July 1982

Justice Mathew O. Tobriner--The Heart of a Lion, the Soul of a Dove

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Recommended Citation
Rose Elizabeth Bird, Justice Mathew O. Tobriner--The Heart of a Lion, the Soul of a Dove, 70 Calif. L. Rev. 871 (1982).

Link to publisher version (DOI)
https://doi.org/10.15779/Z386B34

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With the death of Justice Mathew O. Tobriner on April 7, 1982, California's judicial system suffered the loss of a quiet leader who had been on the cutting edge of the law for the last 20 years. The people of California lost an exceptional public servant and his colleagues at the court lost a unique and remarkable friend, as well as one of the finest legal scholars who has ever graced our court.

The author of many of the most important decisions of the California Supreme Court, he has left us a rich legacy in areas such as civil liberties, procedural due process, products liability, and contracts of adhesion. A true scholar, Justice Tobriner made many outstanding contributions to the law and to our justice system.

A few examples will serve to illustrate Justice Tobriner's singular achievements as a juridical scholar. In *People v. Dorado*, he blazed the trail that the United States Supreme Court was later to follow in *Miranda*. His opinion in *Green v. Superior Court* was widely praised and regularly cited for its clarity in delineating the doctrine of an implied covenant of habitability for tenants. His analysis of the concept of duty in *Dillon v. Legg*, his treatment of contracts of adhesion in *Steven v. Fidelity & Casualty Co.*, and his prophetic dissenting opinion in *In re Tucker* on the procedural due process rights of parolees, all

† Chief Justice of the California Supreme Court.
4. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
6. 5 Cal. 3d 171, 184, 486 P.2d 657, 665, 95 Cal. Rptr. 761, 769 (1971).
attend to the breadth and depth of his remarkable skills as a judicial craftsman.

The traits that enabled Justice Tobriner to create such a special niche for himself were summarized recently by Presiding Justice Joseph R. Grodin of the Court of Appeal.

It was the quality of justice tempered with humanity. It was the ability to see the human being behind the rule of law. It was a sensitivity to the needs of individuals in a society dominated by big government and big institutions. It was a commitment to fairness of procedures, whether the claimants be criminal defendants, welfare recipients, public employees, or business licensees. It was a clear-eyed perception of the reality of relationships, stripped of labels. It was the ability to identify with others, despite differences in age, race, social position, or lifestyle. It was the ability to understand and have compassion for the frailties common to all humanity. It was the quality of eternal youth, that freshness of spirit, openness of mind, and tenacious idealism that served to nourish and inspire all those who came into contact with him or read his opinions. It was the ability to continue to care, when others have given up on caring. It was the maintenance of his own balance, and sense of conviction, in the face of pressures and distortion. It was the ability to translate ultimate human values such as love and respect and responsibility into legal doctrine. It was the persistence of integrity in a world where that commodity is in short supply.7

Though much has been written and said about Justice Tobriner’s career, perhaps his own words tell us the most about him as a judge and as an individual. His manner may have been gentle, but his strength and his courage exhibited themselves forcefully when he spoke about subjects such as the duty of the judiciary to safeguard the rights of individuals: “[T]he fundamental value of individualism depends upon the courts for its articulation and enforcement. The courts bear the obligation to serve as the guardians of this principle; they must be the sentinels to keep this country true to itself and to its ideals.”8

During his tenure on the bench, he gave a great deal of thought to the proper function of the courts in our increasingly industrialized and automated society. Some 14 years ago, he wrote about the dynamic tension between the desire for order and the need to preserve individual liberties:

Our society—highly organized, largely computerized and somewhat dehumanized—finds itself caught between a mounting incidence

8. Address by The Honorable Mathew O. Tobriner, Associate Justice of the Supreme Court of California, Meeting of California Attorneys for Criminal Justice, San Francisco (Nov. 15, 1980).
of crime and a deepening sensitivity to the danger of the police state. The first goal prompts the courts to support the state in its effort to get evidence for convictions; the second, to scrutinize the evidence to assure that its use will not violate constitutional protections. A court must attempt the reconciliation of these competing goals and in the process differences of opinion become inevitable.9

He went on to explore the vital role that the courts must play if our personal freedoms are to be maintained:

This nation has been founded on the premise that the rights and dignity of the individual must be preserved; that his opportunity for self-fulfillment and his chance for creativity be saved. The last recourse of the individual against oppression is the courts. . . .

But the judicial task calls for the most delicate balancing of society’s need for continuity and order vis-à-vis the individual’s right of expression and fulfillment. In redefining and reapplying the Constitution to a society of massive organizations, courts must often rule in a night that has no light of precedent and no beacon of scientific proof. They engage in the lonely task of balancing the need for order and stability with the goal of liberty and due process, seeking to preserve a heritage of individualism in a hierarchy of pervasive institutionalism.10

Justice Tobriner was a man of uncommon grace. He was unselfish and forgiving. He believed deeply in the ultimate goodness of everyone. There was a harmony to his life that sprang from his sensitivity to both the abstractions of the law and the needs of people. He saw life as a delicate balancing of order and liberty, mercy and justice, passion and compassion.

He had a clarity of vision that was, indeed, rare. From his office window he viewed a nearby park and in it he saw a pattern of the life around us. His words reflect his artist’s eye.

I walked down the hallway of our court, down the stairway to the entrance of our building. As I opened the door, the winter light, after the comparative darkness of the conference room, momentarily blinded me. Then I saw before me the planned plaza with the neat rows of trees and benches and its rectangular walkways. The shrubs were manicured and the olive trees pruned, the large squares of grass clipped. It was a symbol of orderliness.

Yet it was a Monday morning, and, as is the custom of that plaza, dozens of weekend drunks were lying in various deathlike poses on the grass and across the benches. The presence of these derelicts of an industrial age demonstrated that life itself intrudes on the precise plan. No perfect order and no scheme of law, however wise, can escape the impact of the imperfect human being. We shall always be engaged in reconciling the fixed system with the ever-present surges, demands and

10. Id. at 23.
travail of a struggling humanity. And in that legal process of reconciliation there will always be those who see the beauty of the design and those who see the pathos of the drunks. Mathew Tobriner was unique because he had the capacity both to see the design and to feel the pathos.

Over the years, Justice Tobriner dedicated himself to helping ease humanity’s struggle by ensuring that the law continued to recognize and reflect people’s needs. For as imperfect as human beings may be, Justice Tobriner never lost his faith in the ultimate worth of every individual. That faith is well reflected in these lines by Carl Sandburg, which I once heard him quote:

The people will live on./ The learning and blundering people will live on./ . . . The people so peculiar in renewal and comeback . . .

Yes, the people will live on. And so will the magnificent legacy that Mathew Tobriner—justice, legal scholar, and humanist—has left us.

He lived a life of grace and he truly graced us all with his presence. Through his abiding belief in the inherent worth of each of us, he has left us a great gift. That is both a wonderful memory of him, and an inspiration to us to emulate his example.

May we use his gift to us well.

If I might be allowed a brief personal note, I shall remember Mat Tobriner most for his sweet ways, his dignity, his sensitivity, his compassion, and his wisdom. At his recent retirement luncheon in San Francisco, I had the honor of presenting him with a valentine, in rhyme, from the court to indicate how much his colleagues admired him and how much we all miss him.

I doubt that the court will soon again see, A Justice the likes of our Mathew T.

In discussing the law and its reasons, He was truly a man for all seasons. At conference, his oratorical power Was the cause of many a late lunch hour.

His opinions were all meticulous, So often sublime it’s ridiculous. With scholarly footnotes conspicuous, So long they were typed perpendiculous.

He was truly a sight to see on the bench. His questions could make even strong counsel flinch,

11. Id.
And when it came to arguing his case,
Mat seldom finished in less than first place.

His trademarks include his venerable car,
And an omnipresent chocolate bar.
Had Mathew not met his wonderful wife,
Chocolate would be the great love of his life.

When complimented, he's shy and retiring,
But his example is truly inspiring.
He always can see the positive side,
He remains upbeat when others are snide.
His belief in each person's goodness is strong,
Though some have tried damn hard to show that he's wrong.

A Renaissance man, a tower of strength,
A true friend whose praise I've sung at some length,
That's Mat Tobriner, who leaves with our love—
The heart of a lion, the soul of a dove.

If you'll allow me one personal word,
I'll close not as C.J. but as Rose Bird:
Valentines may be red, but Rose is blue,
Now that Mat Tobriner's tenure is through,
We shared some painful moments, that's hard to ignore,
But there's no one I'd rather have done it with more.