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In Memoriam: Mathew O. Tobriner

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Two years ago, when our daughter Sharon was in her first year of law school back in Philadelphia, she called in a state of great excitement. She had known Justice Tobriner all her life. "I never realized," she said, "Justice Tobriner is a great judge." She went on to explain that Tobriner opinions permeated her first year casebooks, and that when her professors made reference to the "better rule," as law professors are wont to do, the "better rule" quite frequently turned out to be one proclaimed in a Tobriner-authored opinion.

Sharon's view was echoed recently by Professor Alan Dershowitz of Harvard law school, who in a review called Tobriner "one of the great state court judges of this century."

I have no intention of reviewing his jurisprudence here. Even to list the important opinions he has authored in the twenty-odd years he has been on the Supreme Court would take more space than I am allotted. Instead, I would like to try, in very summary form, to inquire what it is that we mean when we refer to him as a great judge.

Is it because of his scholarship? Certainly, it is characteristic of Tobriner opinions to trace each rule of law back to its doctrinal roots, and to take due account of all scholarly comment, all relevant views. I have a fantasy that someone will come along and publish the collected footnotes of Justice Tobriner, and that they will form a best-selling compendium of the law.

But there are other scholarly judges. Is it his opinion-writing style that makes him outstanding? Is it that quality of thoroughness which leaves the reader with assurance that there is no sleight-of-hand—that all arguments have been considered, appreciated, responded to? That ability to defend his conclusion with such elegance of argument that a reader is left to wonder how it was ever possible to have any different view of the matter? Certainly those are important qualities, but to be objective, there are other judges who write good opinions.

Is it because of his bold and creative approach to the law? Chief Justice Traynor has written, "It takes boldness to turn a flashlight upon an aura and call out what one has seen, at the risk of violating quiet for the benefit of those who have retired from active thought. It is easier for a court to rationalize that less shock will result if it bides its time,
and bides it and bides it, while it awaits legislative action to transfer an unfortunate precedent unceremoniously to the dump from the fading glory in which it has been basking. Such judicial passivity sets in train real dangers to the stability of the law.”

Whatever else one can say about Justice Tobriner, no one can accuse him of judicial passivity. His opinions have constantly been in the forefront of legal change, reflecting, in his own words, the “demands and challenges of a changing society.” No rationalizer or bidder of time he; whether in the area of doctrinal change or constitutional principles, the judiciary is, in Tobriner’s eyes, a full and independent participant in the governance of society.

But there are other judges who are bold and creative, and not all of them deserve to be called great. We cannot make that judgment without referring to the substance of the judge’s opinions, and here we are on difficult ground. It is difficult because it is necessarily and to a considerable degree subjective. Indeed, some will say that the matter is simply one of taste; either you like the flavor of his opinions or you don’t.

I believe there is something more to be said on the subject, however, at least in terms of the qualities that characterized Mathew Tobriner.

It is the quality of justice tempered with humanity.

It is the ability to see the human being behind the rule of law.

It is a sensitivity to the needs of individuals in a society dominated by big government and big institutions.

It is a commitment to fairness of procedures, whether the claimants be criminal defendants, welfare recipients, public employees, or business licensees.

It is a clear-eyed perception of the reality of relationships, stripped of labels.

It is the ability to identify with others, despite differences in age, race, social position, or lifestyle.

It is the ability to understand and have compassion for the frailties common to all humanity.

It is 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 is the ability to continue to care, when others have given up caring.
It is the maintenance of his own balance, and sense of conviction, in the face of pressures and distortion.

It is the ability to translate ultimate human values such as love and respect and responsibility into legal doctrine.

It is the persistence of integrity in a world where that commodity is in short supply.

In short, Mathew Tobriner was an outstanding judge not only because of his scholarship, his style, his boldness, and his creativity, but because his opinions reflect the image of an outstanding human being.*

* Excerpts from commencement address delivered to the class of 1982, Hastings College of the Law, May 23, 1982.

† Presiding Justice, California Court of Appeal, Division Two.