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DEDICATION

Justice Mathew O. Tobriner — A Man of Uncommon Grace

By ROSE ELIZABETH BIRD*

Justice Mathew O. Tobriner was an incomparable judge and an exceptional human being. With his death 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 past twenty years. The people of California lost a dedicated public servant and his colleagues at the Court lost a unique and remarkable friend, as well as one of the finest legal scholars ever to sit on an appellate bench.

In his memory, the Tobriner Lecture was established at Hastings College of the Law, and in October of 1983, Judge J. Skelly Wright delivered the first in what will be a series of annual presentations. The selection of Judge Wright as the initial lecturer was a most fitting choice, for he exemplifies the blend of gentle wisdom and good humor that was so much a part of Mat Tobriner.

The author of many of the most important decisions handed down by the California Supreme Court, Justice Tobriner has left us a rich legacy in many areas — civil liberties, procedural due process, products liability, and contracts of adhesion. A few examples will serve to illustrate his singular achievements as a legal scholar.

In *People v. Dorado*,¹ he blazed the trail that the United States Supreme Court was later to follow in *Miranda*.² His opinion in *Green v. Superior Court*³ was widely praised and regularly cited for its clarity in delineating the doctrine of implied covenants of habitability for ten-

* Chief Justice of California. Parts of this Tribute are from Chief Justice Bird's eulogy at the memorial service for Justice Tobriner. Portions of her testimonial were also published in Bird, *Justice Mathew O. Tobriner — The Heart of a Lion, the Soul of a Dove*, 70 CALIF. L. REV. 871 (1982).

1. 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965).

2. *Miranda v. Arizona*, 384 U.S. 436 (1966).

3. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

ants. His analysis of the concept of duty in *Dillon v. Legg*,⁴ his treatment of contracts of adhesion in *Steven v. Fidelity & Casualty Co.*,⁵ and his prophetic dissenting opinion in *In re Tucker*⁶ on the procedural due process rights of parolees all attest to the breadth and depth of his remarkable skills as a judicial craftsman.

As noteworthy as these achievements are, however, they do not begin to take the full measure of the man. That measure lies in the quality of his spirit, and it is there that Mat Tobriner was unique.

As I remarked at the time of his death, 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.

Justice Tobriner's manner may have been gentle, but his strength and his courage exhibited themselves forcefully when he spoke about the law. "[C]ourts must often rule," he once wrote, "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."⁷

As Judge Wright has aptly observed in his lecture, outstanding state judges like Mathew Tobriner have made enormous contributions "in vindicating our liberties, assuring equality of treatment to all our people, and combatting unfairness."⁸ Justice Tobriner himself was never more resolute than when speaking of the vital role the courts must play if our personal freedoms are to be maintained. "This nation," he asserted, "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."⁹

The forests of the law, to paraphrase Robert Frost, are sometimes dark and deep, but Justice Tobriner was always able to see the paths that led through them. He had a clarity of vision that was, indeed, rare.

4. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

5. 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).

6. 5 Cal. 3d 171, 184, 486 P.2d 657, 665, 95 Cal. Rptr. 761, 769 (1971).

7. Tobriner, *Individual Rights in an Industrialized Society*, 54 A.B.A. J. 21, 23 (1968).

8. Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 5, 5 (1983).

9. Tobriner, *supra* note 7, at 23.

From his office window he viewed the 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 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.¹⁰

Mathew Tobriner was unique because he had the capacity both to see the design and to feel the pathos.

I agree with Judge Wright's conclusion that there are many state judges who have contributed greatly to safeguarding our freedoms. And I know that there is no one who has contributed more toward that end than Justice Tobriner. He combined intellectual vigor and an unwavering sense of fairness with a kind heart and a forgiving nature—qualities that are all too rare in this complex world but that are so essential in our culturally diverse society.

Over the years, Justice Tobriner dedicated himself to helping ease humanity's struggle by ensuring that the law continue to recognize and reflect people's needs. For as imperfect as human beings may be, he 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 Justice Tobriner quote: "The people will live on. The learning and blundering people will live on. . . . The people so peculiar in renewal and comeback"¹¹

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

10. *Id.*

11. C. Sandburg, *The People, Yes*, in *THE PEOPLE, YES* No. 107, at 284 (1936).

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 given 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.