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Justice Tobriner: Portrait of the Judge
As An Artist

By JOSEPH GRODIN*

No "ineluctable logic", but a composite of the relations seen between legal propositions, of observation of facts and consequences, and of value-judgments about the acceptability of these consequences, is what finally comes to bear upon the alternatives with which "the rule of stare decisis" confronts the courts, and especially appellate courts. And this, it may be supposed, is why finally we cannot assess the product of their work in terms of any less complex quality than that of wisdom.

— Julius Stone¹

And what is wisdom — that gift of God which the great prophets... exalted? I do not know; like you, I know it when I see it, but I cannot tell of what it is composed.

— Learned Hand²

To describe the career, working philosophy, and outlook on the judicial process of any judge is a difficult assignment. In the case of a judge as prolific, creative, and complex as Mathew O. Tobriner, the task is impossible, and I renounce it at the outset. Instead, following the justice's own lead in his extracurricular activity as amateur painter, I resort to an impressionistic style. I essay an impression of his work and judicial personality through the sketching of highlights and hues, leaving more detailed examination to the thoughtful and more precisely focused articles that follow.

Tobriner's legal training at Harvard in the 1920's was doubtless infused with an analytical, deductive approach to the law. In contrast, his subsequent legal practice in representing agricultural coopera-

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1. J. STONE, LEGAL SYSTEMS AND LAWYER'S REASONINGS 284 (1964) (footnote omitted).

tives and labor unions in the 1930's and 1940's could hardly have failed to impress upon him the extent to which a judge's decisions are likely to reflect his background and personal predilections. By experience, if not by education, Tobriner became a legal realist.3

Tobriner is more than a legal realist, however. Legal realism leads the judge to acknowledge that to the extent that he must make policy choices when he applies precedent and interprets statutes and constitutions, he is inevitably a legislator. Judges choose to be more or less deferential to precedent and to the role of the legislature in the development of legal principles, more or less inclined to interpret statutory language in accordance with their own perception of statutory policy, and more or less willing to respect legislative judgment in the application of constitutional doctrine. They choose to be more or less of an "activist," to use a common, though somewhat overextended term.4

From almost any perspective, including those of the other authors in this symposium, Justice Tobriner is a judicial activist. The label "activist" in this context is not synonymous with any particular political or philosophical persuasion. Those common law judges who in the absence of legislation developed remarkably creative theories to enjoin labor union activity, for example, might well be called activists. Both as an advocate and as a judge, Tobriner opposed that type of creativity on the ground, among others, that any limitation on such activity should come from the legislature, not the courts.5 On the other hand, Tobriner the advocate and the judge supported judicial restrictions on labor union admission policies6 despite the long and widely held view that a union, like other associations, should be legally free to exclude whomever it liked. Are these two forms of judicial activism analytically identical manifestations of judicial hubris, differentiated only by


4. Tobriner has suggested that "the common characterization of courts as either 'passive' or 'active' is naively misleading; no matter which way a court rules on a particular issue, its decision inevitably affects the contemporary society." Tobriner, Can Young Lawyers Reform Society Through the Courts?, 47 Cal. St. B.J. 294, 296 (1972). The term "active" is used in this article, however, to describe the relationship between courts and the legislative process rather than to describe the degree or nature of the impact of judicial decisions upon society.

5. Tobriner as advocate argued to this effect in the landmark California labor case, McKay v. Retail Auto. Salesmen's Local 1067, 16 Cal. 2d 311 (1940). He expressed his judicial opinion in Englund v. Chavez, 6 Cal. 3d 572, 584-86; 105 Cal. Rptr. 521, 529-31 (1972) (opinion of the court).

whose ox is being gored or which court is doing the goring, or does there exist a justification more neutral than personal preference for the approval, of one but not the other? The answer is not simple, but Justice Tobriner's particular brand of judicial activism can be analyzed to determine its make-up and the unique qualities that set it apart from the activism of others.

Tobriner's decisions display, first of all, a sensitivity to social change both in the factual context to which legal doctrine is applied and in the social mores that the doctrine reflects. Recognizing, for example, that labor unions had become powerful institutions affecting their members' lives in a manner similar to that of a public utility or government, Tobriner urged in Director's Guild, Inc. v. Superior Court that union membership policies no longer be treated as equivalent to those of private clubs. Similarly, in Marvin v. Marvin he noted that society has begun to experience and accept living relationships between unmarried couples. In both cases, he indicated that the courts should accommodate the new social institutions within traditional legal doctrines.

The reason why accommodation should come at the hands of the courts rather than the legislature, finds no clear-cut answer in Tobriner's opinions. Implicit in their thrust, however, is the view that doctrines initially established by courts should be amenable to judicial modification and, perhaps the view, that although legislatures have the last word, a bit of judicial prodding may be useful, if for no other reason than as a means of getting them to say it.

Tobriner's emphasis on legal accommodation to social change is nonetheless consistent with a second characteristic of Tobriner's opinion, a strong historical motif in which he manifests an appreciation for doctrinal roots. As Horvitz states in his article, Tobriner's writing manifests "a deep respect for precedent and recognition of the need for continuity." Tobriner's use of older doctrine can be characterized as "revolutionary," not in the sense of causing upheaval but in the sense of returning or restoring, "a turning back to its first place."

There is something of that restorative aspect in many of Tobriner's opinions,

but of course the clock cannot and should not be turned back. Older doctrines cannot have the same meaning when applied in dramatically changed factual contexts. They are invoked, therefore, as analogy or metaphor. What is involved is synthesis, not regression.

A third characteristic of Tobriner’s opinions is his tendency toward philosophic perspective. Perhaps more than most judges, he views particular questions as manifestations of more general issues concerning the nature of justice in society. Comfortable with ideas and not afraid of abstractions, he probes constantly toward normative principles and seeks to locate his own ideas within the trend of intellectual thought. The development of consensus around an idea is for him an important stepping-stone to judicial movement. As evidenced by his frequent footnote citations to the work of legal scholars, their opinions are nearly as important to him as the opinions of judges. Tobriner paints with expansive perspective.

He paints, however, always with individual human beings at the center of the picture. Abstractions, doctrines, and rules are but ways of visualizing and grappling with the human dilemma. That dilemma stems mainly from two sources. One is the tension between the need for society to centralize, institutionalize, organize, computerize, and routinize. The other is the need of individuals to be treated with dignity, with respect for their psychological and physical integrity, and with the opportunity for a maximum of self-expression and self-fulfillment.

Tobriner’s is not the self-sustaining individualism of the frontier, but the individualism of a society in which human beings are dependent upon one another and upon institutions for their mutual survival: “We live in an interdependent society; each individual depends for his safety upon the exercise of due care of other individuals. In our crowded cities and on our traffic-jammed highways each of us must necessarily depend upon the carefulness and responsibility of others.”

Tobriner’s writing also manifests his great concern with the persistent and pernicious imbalances in our society based on race, ethnicity, and wealth. He has observed, “The gaunt presence of the unbalanced society stalks the legislative chamber, the court room, and the election booth.” To Tobriner such imbalance should precipitate judicial as well as legislative response. In his opinions economic imbalance has been a factor in the enforceability of ostensible bargains

14. Id.
and the allocation of risks, and political imbalance has tipped the scale toward judicial intervention.

The style of Tobriner's activism is evident in a theme common to several of the articles in this symposium: the return to status concepts in the law.\textsuperscript{15} At one time, the law imposed certain obligations without regard to privity, consent, or fault on any party who undertook to perform a function affecting the general public. With the rise of industrialism and laissez-faire, such principles gave way to narrower doctrines more conducive to economic enterprise and the mobility of both capital and labor. These narrower doctrines imposed the responsibilities of a business "affected with a public interest" only on monopolistic enterprises and channeled the more general concept of liability into the categories of negligence and contract.\textsuperscript{16}

Today society is becoming more complex and interdependent and the factual premises upon which the movement away from status concepts was based no longer hold true. Justice Tobriner has led the judiciary in realizing that status concepts, if adapted to the needs of today, provide useful tools for the analysis of modern relationships and for the imposition of responsibility in modern society. Thus, as discussed in the article by Sloss and Becker, the concept of an enterprise affected with a public interest provides a touchstone for the analysis of problems involving labor unions and professional or business societies. The concept in its modern context was applied initially to labor unions and was extended to professional societies as a means of protecting practitioners of a trade or occupation against exclusion from membership for reasons unrelated to the group's function.\textsuperscript{17} It was then used to require such organizations to afford procedural rights to applicants for membership. In the future, status concepts may provide a challenge to the traditional notion that an employer has an absolute common law right to select and dismiss employees on any basis he chooses, subject only to employment contracts.\textsuperscript{18}


\textsuperscript{18} The common law concept that employment relationships are necessarily ter-
The fixing of obligations in accord with reasonable expectations provides the basic theme for Kamarck’s discussion of Justice Tobriner and the law of contract.\textsuperscript{19} In the area of contract law the role of status concepts is most sensitive because nineteenth century contract doctrine epitomizes the model of the unconstrained individual creating his own obligations by agreement rather than through operation of law. Indeed, some modern relationships match that model, and the premise that in general people should be held to their agreements has great social and moral value. Modernly, many relationships in society are so one sided that they render the model unrealistic and the results of its application unjust. When there is a weaker party, his reasonable expectations, founded on the function of the relationship, may to some extent supersede the language of the “agreement” as the measure of the obligation. In recognizing this supersedure, Justice Tobriner has borrowed a doctrine from older law and refashioned it to fit today’s social imperatives.

As discussed in the article by Horvitz,\textsuperscript{20} status concepts also play a key role in Justice Tobriner’s perspective on the law of torts. In Tobriner’s view, the protection of individuals against risk in a crowded and technological society may require the imposition of liability in the absence of fault and without the limitation of traditional concepts of duty. The doctrinal source of this view is, again, historical and is based on consideration of the conduct reasonably expected and normally rendered under similar circumstances. As in other areas of the law, Justice Tobriner is calling not for ancient doctrine warmed over but for a new recipe which takes account of modern socioeconomic ingredients.

Finally, Adler and Mosk consider Tobriner’s use of status concepts in the law of real property.\textsuperscript{21} Landlord-tenant relationships provide a fertile ground for establishing duty based on reasonable expectations, and Tobriner’s opinion in \textit{Green v. Superior Court},\textsuperscript{22} recognizing an minable at will in the absence of an express agreement as to term has been modified by the Supreme Court of New Hampshire in Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974). As of this writing, there is pending before the California Supreme Court a case involving the question of whether a public utility may arbitrarily reject job applications on the basis of sexual preferences.

implied covenant of habitability, is of course a prime example. Here, Tobriner leads a unanimous court in holding that a tenant's reasonable expectation that his apartment will be habitable may provide a defense to his landlord's action for rent and unlawful detainer, despite precedents to the contrary. Recognizing that in leases the doctrine of independent covenants had evolved separately from contract principles, Tobriner analogized the landlord-tenant relationship to that of the seller and buyer of goods, and applied similar concepts of implied warranty.

Tobriner's analysis in *Green* demonstrates an insight implicit in each of the four articles discussed thus far: that while it is useful for certain purposes to examine the development of legal principles in relation to traditional doctrinal categories of contracts, torts, and property, the dynamics of legal growth are likely to transcend those categories in such a way as to render a broader perspective essential. Clearly, this is the situation with the growth of judicial reliance on status concepts. Traditional categories are of little value in the analysis of modern developments in landlord-tenant law, for example. They also muddy the focus on issues of responsibility between manufacturer and consumer, seller and buyer, insurer and insured. Traditional categories are of no value in explaining such developments as the emerging obligation of associations to provide applicants for membership with fair consideration of their application. What is required in these situations is an understanding of the premises involved in status concepts, and an examination of those concepts in the context of particular relationships. The implications for first year law school curricula, as well as for the courts, are substantial.

Tobriner's doctrinal outlook tends to minimize any distinction between "private" law and "public" law. In his view, it is as important to impose responsibility on the powerful "private" institutions of our society as it is to impose responsibility upon government itself. Some institutions, such as labor unions, exercise authority of such a "governmental" nature as to warrant the imposition by analogy of certain constitutional doctrines, even in the absence of "state action." Others, such as powerful business enterprises, particularly warrant judicial scrutiny in their relationships with parties of lesser economic strength. Even as between parties of relatively equal power, considerations of fairness may require judicial protection. Thus, for Tobriner, all or nearly all legal questions become infused to some degree with elements of public policy; and to that extent all or nearly all law is "public."

Willemsen, in his article, recognizes this ingredient of Tobriner's
outlook by including analysis of *Marvin v. Marvin* with statutory and constitutional decisions involving a common policy theme. The theme itself — governmental tolerance of evolving life styles — is clearly central to Tobriner's philosophy and represents an aspect of his more general commitment to individual freedom. From one point of view *Marvin v. Marvin* might be considered antithetical to that theme on the ground that its practical effect may be to discourage extra-marital living relationships by exposing the participants to unintended liability based upon "implied" agreements for property sharing. Willemsen, however, apparently views the opinion as standing only for the proposition that courts should not withhold enforcement of agreements simply because they involve living relationships between unmarried persons. From that perspective the decision is analytically within the theme addressed.

Another article in this symposium, Pearlman's discussion of Justice Tobriner and the rights of the poor, provides a basis for examination of Tobriner's jurisprudence in the area of statutory and constitutional law. The context is one in which the Justice's views on economic inequality emerge clearly. His use of the technique of attributing these values to the legislature in matters of statutory interpretation comes as neither a surprise nor an offense to the notion of separation of powers; his interpretation of legislative intent may, after all, be correct. In any event, it is the legislature which has the last word, as is demonstrated by the history of welfare legislation discussed by Pearlman.

In the area of California constitutional litigation, Tobriner wrote the dissenting opinion in *Swoap v. Superior Court*, in which the court decided the constitutionality of a state statute requiring adult children of recipients of aid under the Old Age Security Law to reimburse the state. Tobriner argued that the statute was unconstitutional under California's equal protection guarantee. His dissent was based in part on the established precedent of upholding a reimbursement requirement only if there was an independent legal duty to support.

25. Id. at 77.
27. Id. at 44-57.
30. 10 Cal. 3d 490, 512-18, 516 P.2d 840, 855-60, 111 Cal. Rptr. 136, 151-56
Further, Tobriner objected to the majority's use of a "rationality" test to uphold the imposition of a duty to support only on the children of welfare recipients. He felt that this test jeopardized the rights of persons who might be required to assume onerous government costs "rationally" related to them. There is no constitutional principle, however, that precludes the legislature from allocating the burdens of state services, nor is it truly "irrational" for a legislator to conclude that children of parents who receive welfare benefits should reimburse the state for them, even though children of parents who do not receive such benefits are under no legal obligation of support. The more convincing reason advanced by Justice Tobriner is that children of poor people, who are likely to be poor themselves, require special protection against majoritarian power. Tobriner says, in that connection: "Past decisions have implicitly recognized that the potential abuse of majoritarian power is particularly hazardous in this context, because the group singled out to bear a disproportionate share of the public expense will frequently be a small minority, often with no cohesive characteristics that would permit effective political representation." It is this observation concerning the nature of the political process that supports Justice Tobriner's view that, for purposes of equal protection analysis, poverty should be regarded as a suspect class, requiring distinctions based on poverty to be supported by more than a showing of rationality.

It is enlightening to contrast Tobriner's dissent in Swoap with his dissent in Bakke v. Regents of the University of California, which addressed the constitutionality under the equal protection clause of a state medical school's admission policy that as administered accorded preferential treatment to minorities. The majority in Bakke held that, because race is a suspect classification, the strict scrutiny test of equal protection analysis should be applied to the school's admission policies. While assuming arguendo the existence of a compelling state interest, the court held that this interest could be satisfied by less

32. 10 Cal. 3d 490, 518-20, 516 P.2d 840, 859-61, 111 Cal. Rptr. 136, 155-57.
33. Id. at 523, 516 P.2d at 863, 111 Cal. Rptr. at 159.
34. 10 Cal. 3d 490, 518, 516 P.2d 840, 859-60, 111 Cal. Rptr. 136, 155-56.
35. See id. at 522-24, 516 P.2d at 862-64, 111 Cal. Rptr. at 158-60.
37. Id. at 50-51, 553 P.2d at 1163, 132 Cal. Rptr. at 691.
onerous alternatives.\textsuperscript{38} Tobriner's lone dissent took issue with the majority on the question of the applicable test. The dissent argued that because the racial classification was designed to promote integration and to overcome the effects of past discrimination, it was neither "suspect" nor presumptively unconstitutional.\textsuperscript{29} The majority contended that no principled basis exists for distinguishing "benign" from invidious discrimination.\textsuperscript{40} Tobriner met this contention by relying, in part, upon Justice Stone's famous dictum in \textit{United States v. Carolene Products Co.},\textsuperscript{41} to the effect that while there generally exists a presumption in favor of the constitutionality of governmental action, "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."\textsuperscript{42} Tobriner drew this conclusion:

Heightened judicial scrutiny is accordingly appropriate when reviewing laws embodying invidious racial classifications, because the political process affords an inadequate check on discrimination against "discrete and insular minorities." By the same token, however, such stringent judicial review is not appropriate when, as here, racial classifications are utilized remedially to benefit such minorities, for under such circumstances the normal political process can be relied on to protect the majority who may be incidentally injured by the classification scheme.\textsuperscript{43}

The dissents in \textit{Swoap} and \textit{Bakke}, then, share this common premise: a court is not required in the pursuit of neutral principles to blind itself to the realities of the political process. Instead it may consider these realities in assessing the appropriateness of judicial intervention, at least to the extent of recognizing the political imbalance which may exist on the basis of wealth and race. While classifications which operate on the one hand to the detriment of the poor and on the other to the benefit of racial minorities may seem analytically similar, their

\textsuperscript{38} \textit{Id.} at 53-57, 553 P.2d at 1165-67, 132 Cal. Rptr. at 693-95.
\textsuperscript{39} \textit{Id.} at 68-77, 553 P.2d at 1175-83, 132 Cal. Rptr. at 703-11 (Tobriner, J., dissenting).
\textsuperscript{40} \textit{Id.} at 50-51, 553 P.2d at 1163-64, 132 Cal. Rptr. at 691-92.
\textsuperscript{41} 304 U.S. 144 (1937).
\textsuperscript{43} \textit{Bakke v. Regents of the University of California}, 18 Cal. 3d 34, 79-80, 553 P.2d 1152, 1183, 132 Cal. Rptr. 680, 711 (1976), \textit{cert. granted}, 97 S. Ct. 1098 (1977) (Tobriner, J., dissenting) (citations omitted).
meanings in terms of social reality are, in Tobriner’s view, poles apart.\textsuperscript{44} I have spoken of the Justice’s sensitivity to social change, his sense of history, his tendency toward a philosophical perspective, his concern for human values, and his views regarding the political process. I have considered, albeit briefly, how these characteristics are reflected in his jurisprudence. Yet more remains to be said. It is tempting to say that what remains is a consideration of style. However, a judge’s style, like an artist’s is inseparable from substance.

In any judicial opinion, the factors which Justice Tobriner, or any judge, may articulate as grounds for decision do not of themselves account for a given result. An opinion may, and typically does, utilize the language of weighing and balancing, as, for example, in determining whether status principles apply. Such language suggests the possibility of assigning weights in some fashion so that the result is the product of a more or less mathematical process. I submit, on the basis of common experience, that no such mathematical process takes place. We may list all the factors that appear to be relevant to our decision and comprehensively consider their implications, but finally there remains a hard core of choice which is of necessity more existential or intuitive than analytical.\textsuperscript{45} The language of balancing is a metaphor which points toward but does not fully express the basis on which a decision is made.

Intuitive content does not immunize the work of a judge from critical treatment, any more than it does that of an artist. We speak of wise judges and presumably mean something more by the term than that they are learned in the law, that they are adept at taking all relevant factors into account, or even that we agree with their decisions. Appreciation of wisdom, like appreciation of great art, may be a faculty

\textsuperscript{44} The Swoap and Bakke decisions may be further contrasted with the California Supreme Court’s decision in Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973). In Brown, the court, in a unanimous opinion by Justice Tobriner, struck down the California guest statute on the ground that it was irrational and therefore a violation of the equal protection clause for the legislature to deprive injured guests of recovery for the careless driving of their hosts. In the course of the opinion, Tobriner takes note of an observation by Professor Prosser that throughout the country guest statutes came into being as a “result of persistent and effective lobbying on the part of liability insurance companies.” \textit{Id.} at 873, 506 P.2d at 225, 106 Cal. Rptr. at 401.

\textsuperscript{45} “He must gather his wits, pluck up his courage, go forward one way or the other, and pray that he may be walking, not into ambush, morass, and darkness, but into safety, the open spaces, and the light.”\textsuperscript{46} CARDozo, \textit{supra} note 10, at 59. \textit{But see Rawls, A Theory of Justice} 40-45 (1971).
acquired through experience, not amenable to analytical description or comparison.  

To appraise judicial wisdom, we need an example of its products. We should no more speak of the wisdom of a judge who has not made a decision than of the talent of a painter who has produced no paintings. Specifically in the case of the judge, what is required is a communication of the basis on which he arrives at his conclusion. We would not be likely, for example, to ascribe wisdom to a judge simply because he votes for a particular result; it is his opinion which convinces us that the choice is a wise one. Justice Cardozo, comparing judicial to artistic creativity, expressed the thought eloquently:

As new problems arise, equity and justice will direct the mind to solutions which will be found, when they are scrutinized, to be consistent with symmetry and order, or even to be the starting points of a symmetry and order theretofore unknown. Logic and history, the countless analogies suggested by the recorded wisdom of the past, will in turn inspire new expedients for the attainment of equity and justice. We find a kindred phenomenon in literature, alike in poetry and in prose. The search is for the just word, the happy phrase, that will give expression to the thought, but somehow the thought itself is transfigured by the phrase when found. There is emancipation in our very bonds. The restraints of rhyme or metre, the exigencies of period or balance, liberate at times the thought which they confine, and in imprisoning release.

By these standards Justice Tobriner is a judicial artist of the highest calibre.

46. I am grateful to my dear friend, Professor Herbert Morris of UCLA, for this insight into the similarity between judicial and artistic criticism, though I am certain he could express it much better than I have done here.

47. Cardozo, supra note 10, at 88-89.