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# In Memoriam

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## HONORABLE MATHEW O. TOBRINER

Associate Justice of the Court of Appeal, First Appellate District, Division One,  
1959-1962;

Associate Justice of the Supreme Court of the State of California, 1962-1982.

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The Supreme Court of California met in its courtroom, State Building, San Francisco, California, December 7, 1983.

Present: Chief Justice Bird, presiding, Associate Justices Mosk, Kaus, Broussard, Reynoso and Grodin, and Retired Associate Justices Burke, Sullivan and Richardson. Gill, Clerk; Williams and Rodgers, Bailiffs.

CHIEF JUSTICE BIRD: We meet this morning to pay tribute to the memory of Justice Mathew O. Tobriner, who served with great distinction as an associate justice of this court from July 11, 1962 to January 3, 1982. On behalf of the court, I wish to welcome Justice Tobriner's widow, Rosabelle, his son, Michael, and his daughter-in-law, Stephanie Wildman. We also wish to welcome to our court this morning two very distinguished colleagues, our recently retired Justice Frank K. Richardson and Justice Louis H. Burke who has been sitting in the Superior Court of Marin County.

I had the pleasure of serving with Justice Mathew O. Tobriner for five of his nearly twenty years on this court. It was my privilege to have spoken at the memorial service in his honor shortly after his death, and I would like to spread upon the record, by way of reference, comments that I made at that time.\*

CHIEF JUSTICE BIRD: First on this morning's program is Justice Joseph Grodin, who will speak on behalf of the court.

JUSTICE GRODIN: I'm indebted to you Chief Justice Bird for permitting me the honor of speaking on this occasion. I know that I speak for my other colleagues as well. Chief Justice, to praise famous men after they are gone is a worthy enterprise, but it is more satisfying to those who loved him and a greater tribute to the man and his memory when the praise reflects a recognition accorded during the person's lifetime. It is in that spirit that I beg your leave to borrow from a speech which I gave almost two years ago upon the occasion of Justice Tobriner's retirement.

In that speech I made reference to his vast national reputation and I asked rhetorically what it was that we meant when we referred to him as a great Judge.

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\*Chief Justice Bird's comments at Justice Tobriner's memorial service are contained in an addendum at the end of these minutes.

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, not at all far-fetched, 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 slight of hand, that all arguments have been considered, appreciated and responded to? That ability to defend his conclusion with such elegance of argument that the reader is left to wonder how would it be 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, whom we honor later today, has written, "It takes boldness to turn a flashlight upon an aurora and call out what one has seen at the risk of violating quality 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, Justice Traynor said, "sets in train real dangers to the stability of the law." Whatever else one can say about Justice Tobriner, no one could 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 bider of time he. Whether in the area of doctrinal change or constitutional principle, the judiciary was, 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. You cannot make that judgment without referring to the substance of the judges' 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 the greatness of Justice 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

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identify with others despite differences in age, grace, 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 on 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, Justice 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. They reflect the qualities which made him also a great husband, a great father and a great friend.

I would observe, Chief Justice, that Mathew Tobriner touched the lives, not only of his relatives and friends, and those who came into personal contact with him, but of countless millions of others, including many who have never heard of him, but who are the beneficiaries of his humane and sensitive view of the law. And we are indebted to him not only for the substance of his opinions, but for his contribution to the independence and integrity of the judicial function as well. In the words inscribed on the tomb of Sir Christopher Wren, one of the greatest architects the world has known, inside St. Paul's Cathedral, his greatest creation, "if you would see his monument look around."

**CHIEF JUSTICE BIRD:** Thank you, Justice Grodin. Next we are pleased to have with us another former colleague, retired Justice Raymond L. Sullivan, a long-time colleague of Justice Tobriner at the Court of Appeal and on this court. Justice Sullivan has asked that the comments he made at Justice Tobriner's memorial service be spread upon the record by way of reference, and he would also like to offer some additional remarks this morning.\*

**JUSTICE SULLIVAN:** Chief Justice Bird and Associate Justices of the Supreme Court:

We honor today not merely a colleague of beloved memory, but a distinguished jurist who added luster to this great court. In memorial services at the time of his death, on behalf of all of us who loved him, I spoke of those remarkable achievements and rare qualities of his which made him a great judge and a great human being. My theme, in essence, was that a noble and imperishable spirit pervaded his life and exalted his ceaseless search for justice. Mindful of the wisdom—attributed to the ancient Greeks—that one may say a

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\*Retired Justice Sullivan's comments at Justice Tobriner's memorial service are contained at the end of these minutes following those of Chief Justice Bird.

thing well once, but hardly twice, I will forego any repetition of those remarks. I am grateful to you, Chief Justice, and to the court for incorporating into this record my previous expressions of admiration and affection.

This morning's proceedings, if somewhat removed from death's first profound grief, are no less poignant for they are cast in the setting of his life's great work. In this building, his total dedication to the calling of high office demonstrated, in Holmes' words, that "a man may live greatly in the law." In this courtroom, I see him now on the bench intent upon the memoranda before him, a gentle smile illuminating his whole person, a round of probing questions on his lips, seemingly frail, but with a mind of steel, with fire in his heart and a passion for justice in his soul. Lawyer, scholar, philosopher, gifted writer, eloquent speaker, and jurist—how can we sum it all up? The words of Harold Laski come to mind, written a half century ago in praise of Mr. Justice Holmes; "He has been a great judge because he never ceased to be a philosopher . . . He has proved again the simple secret that a great judge must be a great man."

Justice Mathew Tobriner, a great judge and a great man, will live forever as an example and an inspiration for all those who love the law.

**CHIEF JUSTICE BIRD:** Thank you, Justice Sullivan. Next we are pleased to have a member of our inner family, Mr. Hal Cohen, who is a member of the State Bar of California and who served as Justice Tobriner's law clerk for many years.

**MR. COHEN:** Chief Justice Bird, Justices of the Supreme Court, family and friends of Justice Tobriner.

I am deeply honored and grateful for the opportunity to speak today both for myself and on behalf of the more than 130 women and men who worked with Justice Tobriner as law clerks and externs during his 20 years on the California Supreme Court.

I first met Justice Tobriner in June 1969. I had just graduated from law school, had been married for only a few weeks, and arrived in San Francisco from the East to begin a one-year clerkship with the judge. Twelve and a half years later, when Justice Tobriner retired from the court in January 1982, I was still working with him. I knew early on that I had found the perfect job and was lucky enough to have the judge ask me to stay on beyond my initial year. In those 12 years, I developed a very special relationship with the judge, a relationship as close to a father-son tie as I think any mentor-student relationship could possibly be. And though I was particularly fortunate because the length of my tenure with the judge provided precious time for our friendship to grow and deepen, during my clerkship I witnessed the development of similar close relationships between the judge and many of his clerks and externs, and came to know the devotion and love which all his staff felt for him. The relationship be-

tween judge and law clerk is traditionally a close one, but there was something very special about the bonds that developed within the Tobriner staff. I will try to give you my sense of at least some of the sources of those special feelings.

Several weeks ago, on the 20th anniversary of President Kennedy's death, as I listened to a news program on which a number of men and women, about my age, were reminiscing about their experiences as Peace Corps Volunteers, I was struck by the similarity of the feelings which the Peace Corps evoked in them and the feelings which I continue to carry with me from my clerkship and friendship with Justice Tobriner, feelings that flow directly from his extraordinary ability to impart to others the idealism that was so much a part of his character and philosophy. In working with the judge, one learned very quickly of his deep belief in the need to improve the conditions of society and alleviate the injustices and inequalities of day-to-day life, and of his conviction that an individual committed to such a task can, in fact, make a significant difference. One also learned, from his example, of the importance of this idealistic pursuit—that it is truly a task worth dedicating one's life to. Finally, he shared with us his firm conviction that law and the legal process have a central role to play in the improvement of society, reaffirming at a crucial time for us the hopes that had led many of us to choose a legal career. Justice Tobriner's idealism, so extraordinary because it was untainted by the cynicism that often accompanies experience, provided a beacon that still lights our way.

While the judge's idealism provided us with a philosophical foundation similar to that of the Peace Corps, life at the Supreme Court was, of course, quite a bit different than life in a foreign developing country. Our idealism was not tested by the harsh reality of poverty or by the need to learn and understand the limits imposed by a foreign culture. Yet, in Justice Tobriner's chambers, idealism was by no means unbounded. Our discipline came through the judge's devotion to, and insistence upon, the highest standards of legal scholarship, a commitment to judicial integrity and principled decision-making which both pointed the way for, and set the limits of, the changes that he felt the Court could properly pursue. He taught us the importance of studying the origins and evolution of legal doctrines that now appear outmoded, and of proceeding cautiously in the best common law tradition when changed circumstances warrant an alteration in the law's course. He taught us to broaden our horizons in pursuit of wisdom, to seek guidance from leading jurists in other jurisdictions and from the law reviews and the academic community. And he impressed upon us the importance of fully explaining the basis of any legal conclusion, emphasizing that the cogency of an opinion's reasoning, rather than the force of its authority, would determine its ultimate fate over time. Justice Tobriner's stature as one of the preeminent American jurists, a stature acknowledged even by those who do not share his legal philosophy, is a testament to the importance he placed, and taught us to place, on legal scholarship.

Finally, beyond his idealism and scholarship, we who were privileged to work with Justice Tobriner experienced first-hand the depth of his compassion

and the warmth of his friendship. He counseled us on our most intimate personal problems and helped us choose the paths to take in pursuit of our professional goals. He performed many of our marriage ceremonies and was the godfather to a number of our children. He even generously shared his much-loved chocolate with us. Throughout our clerkships, we saw very clearly how the judge's compassion carried over into his judicial work. His empathy for the underdog animates many of his decisions. By his example we learned how the quality of character can profoundly affect the quality of performance.

For my own part, it would be impossible to overstate what my relationship with Justice Tobriner has meant, and continues to mean, to me. My only hope is that I prove worthy of his friendship and trust.

CHIEF JUSTICE BIRD: Thank you, Mr. Cohen, for those elegant words, and I would also like to thank Justice Sullivan and Justice Grodin for their eloquent remarks today.

In accordance with our custom, it is ordered that this memorial be spread in full upon the minutes of the court and published in the Official Reports and that a copy of these proceedings be sent to Mrs. Tobriner.

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### ADDENDUM

The remarks of the Chief Justice given on the occasion of the memorial service in honor of Associate Justice Mathew O. Tobriner on April 13, 1982, are as follows:

Justice Mathew O. 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. "Often," he wrote, "courts must 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."

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He had a clarity of vision that was, indeed, rare. 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." 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 continue 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 O. 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.

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#### ADDENDUM

The address of Justice Raymond L. Sullivan given on the occasion of the memorial services for Associate Justice Mathew O. Tobriner held on April 13, 1982, at Temple Emanu-el, San Francisco, is as follows:

Mathew Tobriner was the servant of justice, the goal of all civilized law. His quest for justice ennobled his great intellect; it fired his heart; it aroused the profound aspirations of his human spirit. It was of such spirit that Plato spoke when he declared that "justice is the excellence of the soul." It was to this spirit that Judge Learned Hand referred when he stated that "the form of justice will be without content till we fill it with the ardor of life." The revered Justice Benjamin Cardozo found in justice "a concept by far more subtle and indefinite than any that is yielded by mere obedience to a rule . . . the synonym of . . . a yearning for what is fine or high. . . . Perhaps" he said, "we shall even find at times that when talking about justice, the quality we have in mind is charity. . . ." This charity, which is love, and this ardor of life, which is compassion, were a quenchless flame in the heart of Justice Tobriner.

His dedication to the law had no limits. His learning worshipped no false gods. His scholarship, vitalized by a deep-felt philosophy, revealed a keen insight into the core of the issue and an unerring probing for principle beneath the perplexities of the dispute. He spurned the legalistic—the arid axiom, the moribund rule, the mechanical solution, the answer suffering from "delusive exactness," to borrow a phrase of Holmes. A gifted writer, he was in a sense a poet employing a prose style, adorned with jewelled words and the vivid imagery of the crafted phrase. He shunned pretense and abhorred bluster and shallow thought. He wrote, as he spoke, with a modesty that belied the force of his argument but bespoke the warmth of his nature.

All this was his weaponry in the service of justice wielded with skill and vision and fearlessness. Confronted with the inequities of our society, he vindicated the rights of the poor, the disadvantaged and the defenseless. Sensitive to the problems erupting in a world of change and turbulence and social revolution, he identified new values and fashioned new standards grounded in our juristic tradition that the law cannot stand still. A liberal, he led the charge for human rights and aroused the comfortable so as to rescue the dispossessed. A legal realist in a technocratic society dominated by governmental and institutional power, he fought for the protection of the individual against the overreaching of the state. In a sense, we might say in the words of the psalm, that he fought to "defend the poor of the people and save the children of the needy and crush the oppressor." Remarkably, he carried out all this with a youthful fervor; on critical issues, his role was that of a hero. Who can fail to respond to the appealing figure of the youthful knight with his banners of freedom and truth—especially youth itself? And so he won the deep and abiding affection of a corps of men and women law clerks whom he influenced and inspired and an untold audience of the young in the law whom he never met. This was his self-fulfillment and in the stirring word of Holmes "the secret isolated joy of the thinker who knows that a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought—the subtle rapture of postponed power—more real than that which commands an army."

He had by nature a rare quality of sweetness which made him at all times a loving and caring man. His great affection for his family—his wife and his sons and their own families—thwarts any appropriate description. He loved literature and music and art and the world about him. All these are aspects of the same spirit which searched for beauty in the symmetry of the law and pursued the high ideal of justice. Such a transcendent part of man does not follow its alloy into the “tongueless silence of the dreamless dust.” Such a spirit is fashioned by God. The servant of justice is the servant of God.

Across the centuries we hear the ancient words of the prophet Isaiah:

“Here is my servant whom I uphold,  
My chosen one in whom my soul delights,  
I have endowed with him my spirit,  
That he may bring true justice to the nations.”