# Justice Was More Than His Title

David M. Balabanian†

California lawyers have long played in a colorful local rite: Explaining the Law of California to the World. Regularly we have been called upon to describe—often with difficulty—to wondering clients and counterparts elsewhere how poorly their cherished practices and contractual provisions might fare if tested in our courts.

Lately, the frequency of such conversations has seemed to diminish. Perhaps non-Californians have simply gotten used to the notion that our state is somehow always "different". More likely, however, it is because the California rule has increasingly become the rule of other states—even the federal rule—as judges elsewhere find workable and durable the accommodations of interests struck here.

Many of the ideas identified with our courts which seemed remarkable, even visionary, twenty, ten or five years ago, now seem commonplace, even essential. Whether this confirms the hopes of those who welcomed them, or the fears of those who decried them is a moot point—probably both. What is important is that few Californians can remember or imagine life without them. If the standard for evaluating our courts is the speed with which their innovations become traditions, the courts of California are justly praised.

More of California's contributions to the national jurisprudence than is generally realized (even in well-informed legal circles) came from a quiet, humble man who spent much of his long judicial career in relative public obscurity. Without great difficulty, one could demonstrate that his work affected the lives of more Californians more extensively—for good or ill depending on one's biases—than any other jurist (or anyone else for that matter). Yet he was known to few of those whose lives he so touched and, to many of them, only as a figure of controversy.

The scope of his work defies quick summarization. His convictions supplied him answers to vexing questions in nearly every field of human activity. Whole law review articles can be written about his impact on the law of contracts, of real property, of torts, of crimes, of the rights of the individual and of the arts.[1]

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† Member, California Bar.

1. A sampling: Adler and Mosk, *Justice Tobriner and Real Property*, 29 HASTINGS L.J. 127 (1977); Grodin, *Jusice Trobiner: Portrait of the Judge as an Artist*, 29 HASTINGS L.J. 7 (1977); Horvitz, *Justice Tobriner's Tort Decisions: A Reaffirmation of the Common Law Process*, 29 HAS-

Though time alone can adjudicate the durability and worth of his many ideas, two themes stand out:

—The importance of individuality and the need to defend it against the organizational imperatives of both government and private institutions. People everywhere are "free", he regularly reminded us, to agree with the majority and conform their conduct to the wishes of their governments. Real freedom is the latitude accorded to eccentrics, to deviants, to the profane, to the incorrigible—the caryatids of the Republic who carry on their shoulders the rights of us all.

—The substitution of reasonable expectation for fictitious agreement. The idea that one does not engage in arm's length negotiations with the vending machine from which one buys a policy of travel insurance[2] scarcely seems remarkable today. In its time (1962), it was thought near scandalous. Whether the same wide acceptance will befall the notion that the whispered endearments of unmarried cohabitors *do* constitute arm's length bargains[3] remains to be seen.

The form of his opinions was as characteristic as their content. Nearly all begin with a clear statement of their holding. Not just a boon to the lazy reader or headnote writer, this practice bespoke a courage to acknowledge the principle announced rather than letting it shelter in a maze of fact and precedent.

Another Tobriner hallmark was the absence of the passive voice. He saw it as the means by which lawyers and judges suggest that things have somehow just happened without their complicity—and would have none of it. Clerks quickly learned that only active, responsible prose would do. Even being verbs were risky.

He liked good metaphors. Favored ones saw heavy use. (Six times, LEXIS tells us, he kept valuable interests from being sacrificed on "false altars.")

Though earnest in defense of the values he held dear, he shunned the self-righteous moralizing which disfigures much liberal advocacy. A heavy dose of realism, and sometimes humor, tempered his announcement of high principle.

His great output required great industry. The working habits of generations of law clerks were shaped by his tacit assumption that if one day off a week was good enough for the Almighty, it should suffice

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TINGS L.J. 167 (1977): Kamarck, *Opening the Gate: The Steven Case and the Doctrine of Reasonable Expectations*, 29 HASTINGS L.J. 153 (1977); Pearlman, *Welfare Administration and the Rights of Welfare Recipients*, 29 HASTINGS L.J. 19 (1977); Sloss & Becker, *The Organization Affected with a Public Interest and its Members—Justice Tobriner's Contribution to Evolving Common Law Doctrine*, 29 HASTINGS L.J. 99 (1977); Willemsen, *Justice Tobriner and the Tolerance of Evolving Life Styles: Adopting the Law to Social Change*, 29 HASTINGS L.J. 73 (1977).

2. Steven v. Fidelity & Casualty Co., 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).

3. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

for the court. That this principle was simply observed, rather than advocated or imposed, made it the more powerful.

Ever gracious and self-effacing, he resisted all temptation to adopt the eccentricities of manner or displays of choler sometimes mistaken for judicial greatness. He gave no hint of believing the voices raised in his praise. Once, at a meeting of the membership of the San Francisco Barristers Club, an earnest young man asked him how he should conduct himself to have the best chance of securing a seat on the California Supreme Court. Justice Tobriner kindly replied that the only rule he could distill from his own experiences was that one should take care to go to high school with someone who planned to become governor.

There are, of course, many sincere people who heartily deplore his work. Even some who welcome the rules he announced would have preferred to see them emerge from the political process through popular consensus, legislatively expressed.

Whether, given the stasis of our legislative institutions, they ultimately could or would have struck balances more durable or popular than the courts' is unclear.

What is clear is that conflicts unresolved by the legislature have been settled by our judges in ways which once appeared remarkable and now seem commonplace, and that one of these judges was a quiet, gentle man who sought neither controversy nor glory, got more of the former and less of the latter than he deserved, and profoundly changed the lives of us all.