FIFTEEN PAPERS BY JUSTICE STANLEY MOSK

EDITOR'S NOTE

In the years 1985 to 1988, Justice Stanley Mosk assembled a collection of his ideas on various legal and personal topics with the ultimate intention of publishing a book to be titled *Myths and Realities in the Law.* He did publish versions of some of these pieces individually at various times, and to the extent possible, a note has been added to each piece regarding its provenance and publishing history. They are printed here by kind permission of his son, Associate Justice Richard M. Mosk of the California Court of Appeal, Second Appellate District.

All of the original manuscripts of the pieces, including a few omitted here for reasons of space, may be found in The Stanley Mosk Papers at the Special Collections and Archives of the California Judicial Center Library in San Francisco. Special thanks are due Frances M. Jones, director of library services, and Martha Noble, assistant to the director, Special Collections and Archives, for their generous efforts in locating and providing requested materials.

—SELMA MOIDEL SMITH

TABLE OF CONTENTS

JUDICIAL HUMOR[1]

Most of the anecdotes included here by Justice Mosk were gathered from his speeches, articles, and opinions.

He had also prepared a talk specifically on humor in the courtroom. As he said in an oral history: "I developed a little talk on humor, just to keep things a little light. I found that there is humor in which the judges have a little fun with lawyers appearing before them, and the lawyers, of course, must laugh at the jokes from the bench. (Laughter) And then there's a second kind where the lawyers somehow manage to get the last word without antagonizing the judges. And then there's another category I developed where the judges try to help a struggling lawyer who's trying to explain his position, and the lawyer just can't understand it and doesn't accept the help from the court. I found examples of all of them."[2]

In the spirit of Justice Mosk's speeches, most of which began with these or other anecdotes, this paper is placed first among those presented here.

* * *

To most parties involved, the proceedings in a courtroom are deadly serious. Attempts at humor, particularly by judges who believe they have a captive audience, usually fall flat — although the parties may feel they must politely laugh.

However, from time to time there are truly humorous incidents, some inadvertent, some deliberate, to ease inevitable courtroom tensions. Efforts to collect courtroom humor have been made over the years. Professor C. Northcote Parkinson — famous for Parkinson's Law — wrote

[1] This paper is based on a typed manuscript prepared by Justice Mosk, to which he gave the alternate titles, "Myth: Judicial Humor is Always Inappropriate" and "Myth: Cases are too Serious to Permit any Humor in the Courtroom." It has been edited for publication. All footnotes are provided by the editor.

[2] *Honorable Stanley Mosk Oral History Interview*, conducted 1998 by Germaine LaBerge, Regional Oral History Office, UC Berkeley, for the California State Archives State Government Oral History Program, 19-20.

REVIVAL OF STATES' RIGHTS

The topic on which Justice Mosk was invited to speak and write most extensively was that of "adequate and independent state grounds." As described in this paper, he and his colleagues on the California Supreme Court became early advocates of the "The New Federalism" during the 1970s. Justice Mosk developed this paper as the "informal" version of his thoughts, delivered as a speech to law review students in 1985.[13] Simultaneously, he published an expanded academic version based on an address at a constitutional law conference, which was reprinted in this journal in 2006.[14]

A novel aspect of Justice Mosk's writing on state constitutionalism is that he discusses not only its theoretical justifications and various applications, but also the historical "ebb and flow" of federal judicial power that at first inhibited, and then inspired, independent state interpretation. One may observe the constituent elements of the present paper — including the structure of the historical argument, choice of illustrative cases, and growth of distinctive phrases — as they emerge in his speeches and articles of the preceding decade.[15] In a similar manner, this

---

13 Justice Mosk delivered a version of this paper as a speech at the annual banquet of the *Whittier Law Review*, April 12, 1985. It was published as, "Whither Thou Goest — The State Constitution and Election Returns," 7 Whittier L. Rev. 7, 753-763. The version presented here is that of a typed manuscript prepared by Justice Mosk, to which he gave the alternative title, "Myth: All Law is Made in Washington." The typed manuscript differs from the published version in its introduction, the phrasing of various passages, and a few of the cases chosen for discussion, as well as the generalizing of time and place. It has been edited for publication. All footnotes are provided by the editor.

14 Address to the Conference on State Constitutional Law, University of Texas, Jan. 23, 1985, published as: Stanley Mosk, "State Constitutionalism: Both Liberal and Conservative," 63 Tex. L. Rev. 1081-1093 (March/April 1985); reprinted: 1 *California Legal History* (2006), 155-167.

15 See, for example: "The State Courts," in Bernard Schwartz, ed., *American Law: The Third Century: The Law Bicentennial Volume* (South Hackensack, N.J.: Fred B. Rothman and Co., 1976), 213-228 (address, Bicentennial Conference, NYU School of Law, April 28, 1976); "Contemporary Federalism," 9 Pac. L. J. 711-721 (July 1978; address, Lou Ashe Symposium, McGeorge School of Law, March 18, 1978);

paper presages his works of subsequent years, during which he received continuing invitations to speak and write on this favored topic.[16] The culmination was his Brennan Lecture in 1997."[17]

* * *

If one moves about this country of ours, he is struck by our general homogeneity. We all travel by the same type of vehicles; most automobiles and airplanes now look pretty much alike. We generally eat the same food, some a little better, some worse. If a person has stayed in one Holiday Inn, he has seen them all. We watch the same television shows, see the same motion pictures, read the same news reports and try to sort out the misinformation.

All in all, this is indeed one nation, indivisible.

But does that mean that every one of our fifty states must march to the same drummer? Are all distinctions among the states to be obliterated? I think not.

Each state has a right to be considered unique. Certainly size is one factor. And history. Individual backgrounds and traditions vary markedly from states in the West, the East, the Midwest and the South. Thus, the basic theory of federalism requires that recognition be given to the legal traditions of our individual states.

In our early days some great statesmen had a blind spot concerning the West. Take Daniel Webster for example. He once thundered in the

---

"Rediscovering the Tenth Amendment," 20 Judges Journal 16-19, 44 (July 20, 1981; address, Judicial Administration Division's Conference on the Role of the Judge in the 1980s, D.C., June 19, 1981).

16 See, for example: "The Emerging Agenda in State Constitutional Law," *Intergovernmental Perspective* (Spring 1987), 19-22 (address, conference on "State Constitutional Law in the Third Century of American Federalism," Philadelphia, March 15, 1987); "The Power of the State Constitutions in Protecting Individual Rights," 8 N. Ill. U. L. Rev. 651-663 (Summer 1988; address, joint meeting of Illinois State Bar Association and Illinois Judges Association, Chicago, Nov. 12, 1987); "The Role of State Constitutions in an Era of Big Government," 27 U. Rich. L. Rev. 1-20 (Fall 1992; Eighth Annual Emroch Lecture, Richmond, April 13, 1992).

17 Stanley Mosk, "States' Rights — and Wrongs," 72 NYU L. Rev. 552-556 (June 1997; Third Annual Brennan Lecture on State Courts and Social Justice, New York, Feb. 25, 1997).

ON PRIVACY

Of the papers presented here, Justice Mosk substantially revised one for separate publication in 1989, but he also preserved the original version of the paper among those to be published as a group. The subject of both is the right of privacy. In the original version, he provides a general discussion of the evolving right of privacy, demonstrated with relevant federal and California decisions. Toward the end he introduces the sub-theme of independent state interpretation as "another important aspect of law." In the published version, by contrast, he transforms the primary theme from privacy *per se* to the emerging right of states to provide greater privacy protections than are afforded by the federal Constitution. He promotes the theme of states' rights to page one, abbreviates the details of the earlier cases, and reorganizes the discussion of later cases to emphasize the divergence of federal and state opinions. Both themes — the right of privacy and states' rights — are themes that recur in Justice Mosk's works.

Together, the two versions illustrate Justice Mosk's characteristic modes of thought and presentation: the application of one core principle to another, the drawing of multiple themes from common sources, and the restructuring of his speeches and articles into new arguments. Therefore, both versions of the paper appropriately find their place here.

Four years after the published version of this paper appeared, Justice Mosk again turned to the subject of privacy — in an address to a law convention in a developing nation. Here, he provides a third perspective on the subject of privacy that deals with neither the evolution of the American right of privacy nor with states' rights. Instead, from the perspective of a developed nation's legal experience, he calls for the preservation of privacy from government intrusion in an age of technological innovation. As a view into Justice Mosk's continuing ability to recast a topic in new directions, it is presented here as Justice Mosk's third statement on privacy.

* * *

OPPOSING RACIAL DISCRIMINATION

As a young superior court judge, Stanley Mosk was already an egalitarian in the field of race relations. He achieved early renown for his 1947 decision voiding race-restrictive deed covenants, a year before a similar ruling by the U.S. Supreme Court. His view that progress toward a color-blind society was threatened by any form of racial discrimination led to his well-known decision in the 1976 *Bakke* case.

The first of the following papers is a speech delivered by Justice Mosk to two legal rights audiences in 1982, explaining his prohibition of racial quotas in the *Bakke* case — even in the cause of affirmative action, which he had otherwise long supported. In the second paper, Justice Mosk recounts a few of the instances in which institutionalized racism was first supported, and then overturned, by the California Supreme Court.

* * *

I. RACIAL EQUALITY VERSUS RACIAL PREFERENCES[108]

There is something about the wide-open expanse of the West that has generally induced a tolerant approach to the disadvantaged of society. There were some aberrational exceptions, of course, notably against

[108] Justice Mosk delivered this paper as a speech at the Labor and Employment Law Section of the American Bar Association, ABA Annual Meeting, Aug. 11, 1982, San Francisco, and again at the Second Annual Employee Relations Law Institute of the *Employee Relations Law Journal*, Dec. 7, 1982, Burlingame, Calif., which then published the paper as: "Affirmative Action, Sí — Quotas, No," 9 Employee Relations Law J. 126-135 (Summer 1983). The version presented here is that of a typed manuscript prepared by Justice Mosk, to which he gave the alternate title, "Myth: Racial Preferences are Necessary to Achieve Racial Equality." It has been edited for publication. All footnotes are provided by the editor. The typed manuscript and the published version are nearly identical in content and wording, except for their introductions. Justice Mosk also wrote a more detailed explanation of the *Bakke* decision for a general audience: Stanley Mosk, "Why the California Court Ruled for Allan Bakke," *Baltimore Sun*, May 22, 1977.

THE DEATH PENALTY

Justice Mosk's opposition to the death penalty was well known, as was his principled stand that as a judge, or state attorney general, or Supreme Court justice, his duty was to enforce the law as it was, not as he might wish it to be. Nevertheless, he found occasions to present his views against capital punishment. One of these, the first paper below, is a speech he delivered at an international conference in 1988 in which he weighs the arguments and trends for and against capital punishment, concluding with a plea for its abolition.

Following this is a paper in which he discusses his own role in limiting the applicability of the death penalty — and the famous criminal whose execution it would have prevented. In the third paper below, Justice Mosk recounts the only instance in which he sentenced a killer to death — and the unexpected outcome.

* * *

I. MYTH: EXECUTIONS ARE THE ANSWER[144]

In a way, I suppose, everything has been said about the death penalty that can be said.[145] Yet we continue to discuss the penalty, the legal processes involved, the actual means of execution, the crimes for which

[144] Justice Mosk delivered a version of this paper as a speech at the International Conference on Justice in Punishment, Hebrew University, Jerusalem, March 30, 1988. It was published as, "The Current Profile of Capital Punishment," 25 Isr. L. Rev. 488 (Summer-Autumn 1991). The version presented here is that of a typed manuscript prepared by Justice Mosk. The typed manuscript and the published version are nearly identical in content and wording. Substantive differences are noted here individually. The paper has been edited for publication. All footnotes are provided by the editor.

[145] This paper serves as a sequel to Justice Mosk's address at the Fourth International Congress of Jewish Lawyers and Jurists, Jerusalem, December 28, 1978, published as "The Death Penalty Today," *Bulletin of the International Association of Jewish Lawyers and Jurists* (Summer 1979), 13-23; and as "The Death Penalty," W. Indian L. J. (May 1979), 32-40.

EXPLAINING THE LEGAL SYSTEM

Justice Mosk was a partisan for the American tradition of justice — commencing with the Bill of Rights and extending to each level of the legal system. The liberties assured by that tradition are the theme underlying virtually all of his speeches and articles. He found in his various official roles, over the course of fifty years, the obligation and the opportunity to explain the American tradition of justice to hundreds of audiences. On specific occasions, he addressed that theme directly.

The first paper that follows is a speech to an international legal organization in which Justice Mosk discusses the Rule of Law as an ideal that is realized by the American Bill of Rights. The two subsequent papers exemplify his many speeches to lay audiences in civic, religious, and service organizations on the operation of the American legal system.

* * *

I. HOW SAFE IS THE RULE OF LAW?[196]

In 1983 I was invited to address an international group of lawyers and judges at Belgian House, Hebrew University, Jerusalem, on the subject of the Rule of Law, and how secure it is today on this planet of ours.

[196] Justice Mosk delivered a version of this paper as a speech at the International Council Meeting of the Association of Jewish Lawyers and Jurists, Jerusalem, Oct. 3, 1983. It was published as, "Address by Justice Stanley Mosk of the Supreme Court of California …" in *Bulletin of the International Association of Jewish Lawyers and Jurists* 32 (Winter 1983-84), 7-10. The version presented here is that of a typed manuscript prepared by Justice Mosk, to which he gave the alternate titles, "Myth: The Rule of Law is Inviolate" and "Myth: The Rule of Law is Safe in the World." It has been edited for publication. All footnotes are provided by the editor.

The typed manuscript differs from the published version in its introduction and occasional stylistic revisions. Justice Mosk also added a number of handwritten revisions to the typed manuscript that serve to: clarify the intent of a few passages; render gender-neutral most of his masculine usages; and deemphasize the Jewish aspects of the speech by deleting sections at the end quoted from Sir Arthur Goodhart's 1947 Lucien Wolf Memorial Lecture, "Five Jewish Lawyers of the Common Law." Substantive changes are noted individually.

JUSTICE MOSK HIMSELF

Justice Mosk was also a storyteller, and this collection of thoughts concludes with two of his more personal accounts. One of his favorite stories concerned the circumstances of his own first appointment to the bench. Although a brief account appears in his 1998 oral history,[224] he recounts it here in fuller detail as, "The Making of a Judge."

In the final paper presented here, Justice Mosk's second great love — the world of sports — gives him the opportunity to "drop" a few favorite names and to discuss his service to Charlie Sifford and the desegregation of professional golf.

I. THE MAKING OF A JUDGE[225]

In interviewing prospective research assistants each year — senior law school students — I am continually surprised at how many of the applicants have as their ultimate goal either teaching law or becoming a judge. Since it is well publicized that lawyers in large firms are handsomely rewarded these days, it appears that the accumulation of wealth is not the students' primary motivation. I perceive that as a commendable oasis in a modern materialistic environment.

Occasionally a student applicant will ask me how one becomes a judge, and an unusually courageous person will inquire into how I became a judge. What does one do to ascend the judicial bench?

In many countries of the world, a person trains specially to become a jurist, just as he would study and program to become a barrister or solicitor. In some nations a law degree is required for any type of public service, from a mere clerk to the highest tribunal in the land. Curiously, one need not be a lawyer to sit on the United States Supreme Court, although when

224 *Honorable Stanley Mosk Oral History Interview*, conducted 1998 by Germaine LaBerge, Regional Oral History Office, UC Berkeley, for the California State Archives State Government Oral History Program, 17-18.

225 This paper is based on a typed manuscript prepared by Justice Mosk, to which he gave the alternate title, "Myth: Judges Are Ill Prepared to Serve." It has been edited for publication.