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Selma Moidel Smith, Esq.
Editor-in-Chief, *California Legal History*
Telephone: (818) 345-9922
Email: smsth@aol.com

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SPECIAL SECTION

JUSTICE STANLEY MOSK

CALIFORNIA SUPREME COURT
(1964–2001)

STANLEY MOSK'S LETTERS TO HIS BROTHER OVERSEAS DURING WORLD WAR II

RICHARD M. MOSK*

Prior to becoming a California Supreme Court justice in 1964, Stanley Mosk played an enormous role in the history of Los Angeles, the State of California, and the United States. Recently, we discovered letters that Stanley Mosk wrote from Los Angeles in 1944 and 1945 to his brother Edward Mosk, who was serving overseas. These letters not only chronicle Stanley Mosk's historic reelection as a young Los Angeles Superior Court judge, but present a penetrating view of what was occurring during that period in Los Angeles, California, and the United States from the perspective of a young, ambitious Los Angeles liberal.

Morey Stanley Mosk was born in 1912 in San Antonio, Texas. He and his brother, Edward, grew up in Rockford, Illinois, and he graduated from the University of Chicago. He was attending the University of Chicago Law School when, in the 1930s, the family ran out of money and came to California. He completed his law school education at Southwestern Law School. He was active in various California political campaigns, including efforts to rid the City of Los Angeles of the notorious

* Associate Justice, California Court of Appeal, Second Appellate District (Los Angeles), and son of Stanley Mosk. Comments [in brackets] are by the author.

FIFTEEN PAPERS BY JUSTICE STANLEY MOSK

PREFACE

DENNIS PETER MAIO*

It would be customary to begin by stating that I am honored to have been asked to prepare a preface for this issue of *California Legal History* collecting a number of pieces written by Stanley Mosk during his almost thirty-seven years of service as an associate justice of the California Supreme Court. I shall not violate custom — I *am* honored. But more important, I take pleasure from a task that has allowed memories of years past to become green once again. As a jurist, Justice Mosk remains as vital today for the bench and the bar as ever he was, as the hundreds and hundreds of opinions he authored continue to be cited in California and indeed throughout the United States. As a man, Justice Mosk remains vital for those of us who knew him — and with the publication of these pieces he will become vital to many others, both now and in the future.

As Justice Mosk often explained, opinions are formal documents and corporate products. They are formal because they are written to be

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* Dennis Peter Maio served as an attorney on Justice Mosk's staff from 1984 until Justice Mosk's death in 2001. [Editor's note: Justice Mosk described Maio as "a graduate of Yale and just a remarkable legal mind," in *Honorable Stanley Mosk Oral History Interview*, conducted 1998 by Germaine LaBerge, Regional Oral History Office, UC Berkeley, 334.].

read. They are corporate because they entail the participation of persons in addition to the author: In a majority opinion, the author must accommodate the views of his or her concurring colleagues; in a separate concurring or dissenting opinion, the author can express his or her own views, but regularly involves staff in crafting the expression.

The pieces by Justice Mosk that are published here are different. Not a one of them, of course, is an opinion. That is obvious at first glance. None of the pieces, however, is a formal document. True, they display such adornments as citations and footnotes added by the editor for publication. But each one of them traces its origin to the spoken word, to a speech delivered to a particular group of people, at a particular time and place, and for a particular occasion. Neither is any of the pieces a corporate product. I was a member of Justice Mosk's staff for seventeen years, and assisted him with hundreds of his opinions. But I never had anything to do with any of his speeches, nor did any other member of his staff. His speeches sounded one voice, and one voice alone, and it was his.

So what is it that we hear Justice Mosk talking about in these pieces? Much about the issues of the day — his day and ours still. There is capital punishment, whose abolition he hoped for but knew he would not live to see. There is civil rights, whose progress over the years buoyed him. And there is federalism. Justice Mosk agreed with Justice Louis D. Brandeis that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[1] To that end, Justice Mosk construed and applied the California Constitution to allow this state to serve as one of the country's "laboratories," and marked a path for others to follow as they turned to construe and apply the constitutions of their own states for the same purpose. But in addition to the issues of the day, in these pieces we hear Justice Mosk talking about other matters that caught and held his interest. Among such matters were words — hardly surprising for a man who authored hundreds and hundred of opinions over almost four decades. But there was also sports, a lifelong passion since his days on his high

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1 *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

school baseball team. And throughout it all, there was humor — specifically, as he put it, "gentle humor . . . not pointed at the vulnerability of the target."

But more interesting than what Justice Mosk talks about in his pieces is what he reveals about himself. He lived a long life from the early twentieth century into the beginning of the twenty-first. In living that life, he engaged himself fully in public affairs, from the Great Depression, through the Second World War, and into the Civil Rights Era and all that accompanied and succeeded those times. And how was it that he engaged himself in public affairs? With principles and pragmatism. He was principled, committed unabashedly to the American liberal tradition and its ideals of a society that is not only open but also caring. He was also pragmatic, choosing to do what he could to make things better now rather than to stake all on a chance to make things perfect sometime in the future. His principled pragmatism filled him with a passionate generosity that left no room for small-mindedness or mean-spiritedness. That is doubtless why, even if I did not always agree with a particular view he expressed, I could never disagree with the man who expressed them.

It is now my pleasure to invite you to meet Justice Mosk the man. All you need do to accept my invitation is to turn the page and begin reading.

* * *

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

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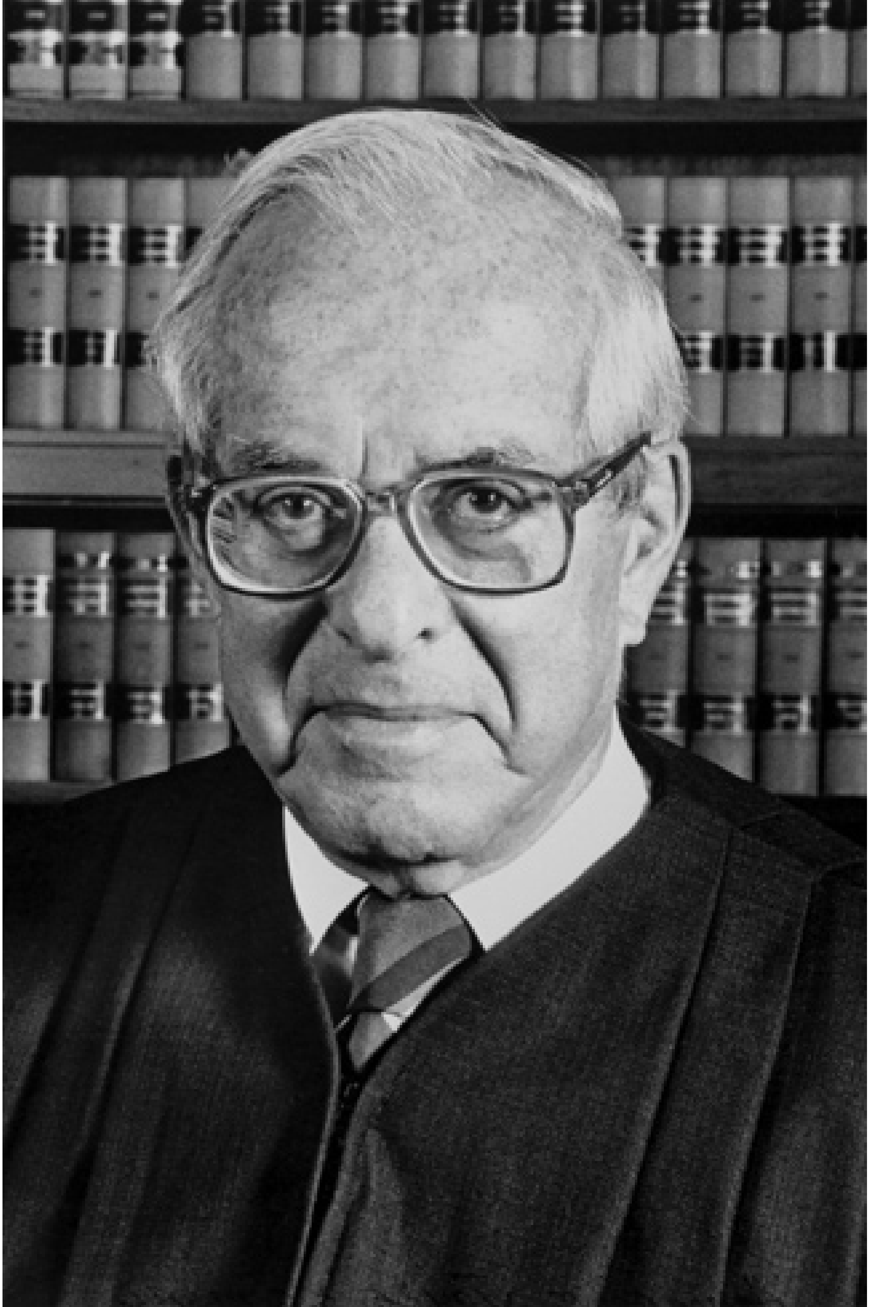

Justice Stanley Mosk.

Courtesy California Judicial Center Library.

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

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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

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"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.

* * *

I. PRIVACY IN A PUBLIC WORLD[44]

The guarantee of privacy has been described as the right to scratch wherever one itches. It is a strange and evolving phenomenon, not assured or recognized specifically in the United States Constitution, yet more and more zealously guarded by state courts.

In a celebrated case involving the right of married persons to acquire contraceptive devices, Justice William O. Douglas asserted that the right to privacy in marital affairs is "older than the Bill of Rights, older than our political parties, older than our school system."[45] He [sic; Justice Brennan] emphasized that "[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion."[46]

The first United States Supreme Court case recognizing privacy was a dissenting opinion of Justice Louis D. Brandeis in 1928. It is, he said simply, "the right to be let alone."[47] Whether it is possible to be let alone in this complicated, computer-governed world of ours will be a serious problem in the years ahead. The answer is far from clear.

California acknowledged existence of privacy in an appellate court case nearly six decades ago. Decided in 1931, privacy was discussed in what was then a celebrated trial known as "The Red Kimono Case."[48] The lawsuit involved a woman who had been a prostitute tried for murder and acquitted. Subsequently, she married, and as described by the court, "lived an exemplary, virtuous, honorable and righteous life; . . . she assumed a place in respectable society and made many friends who were not aware of the incidents in her earlier life; . . . ."[49]

Some years later a motion picture company produced a film entitled "The Red Kimono" and exploited it in advertising as the true story of the

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[44] This paper is based on a typed manuscript prepared by Justice Mosk, to which he gave the alternate title, "Myth: A Right of Privacy is Illusive." It has been edited for publication. All footnotes are provided by the editor.

[45] *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

[46] 405 U.S. 438, 453 (1972) (Brennen, J., concurring).

[47] 277 U.S. 438, 478 (1928).

[48] 112 Cal.App. 285 (1931).

[49] *Id.* at 286-287.

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

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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.

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[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

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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.

THE INFLUENCE OF JUSTICE STANLEY MOSK'S OPINIONS

JAKE DEAR*

Much has been written concerning Justice Stanley Mosk's contributions to the development of the law in his many opinions.[1] In this brief essay, I will attempt to address something a bit different — the comparative *influence* of his opinions.

At the risk of revealing the results of my inquiry before a proper foundation has been laid for the evidence, let me simply announce that Justice Mosk was by far the leading author of "followed" opinions on a

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* Chief Supervising Attorney, California Supreme Court; annual law clerk to Justice Stanley Mosk, 1983-1984; extern to Justice Mosk, Summer 1982.

[1] *See, e.g.*, *Celebration Session Honoring the Record Service of Justice Stanley Mosk, California Supreme Court (1964-present)*, 21 Cal.4th 1316, 1325-1327 (1999) [hereafter *Honoring the Record*] (remarks of Peter J. Belton, referring to and listing some of Justice Mosk's leading decisions in the areas of civil rights and liberties, free speech and free press, equal protection, privacy, state constitutionalism, environmental law, employee rights, consumer protection, taxation, insurance, contracts, and property). *See also* Gerald F. Uelmen, *Justice Stanley Mosk*, 62 Alb. L. Rev. 1221, 1222-1223 (1999) (listing some of Justice Mosk's leading decisions) Christopher David Ruiz Cameron, *Remembering Justice Mosk*, 31 Sw. U. L. Rev. 5, 8-9 (2001) (same); Gerald F. Uelmen, *Tribute to Justice Stanley Mosk*, 65 Alb. L. Rev. 863, 860 (2002) (listing decisions of Justice Mosk that have been included in casebooks).

ORAL HISTORY

JUSTICE JESSE W. CARTER

CALIFORNIA SUPREME COURT
(1939–1959)

Oral History of

JUSTICE JESSE W. CARTER

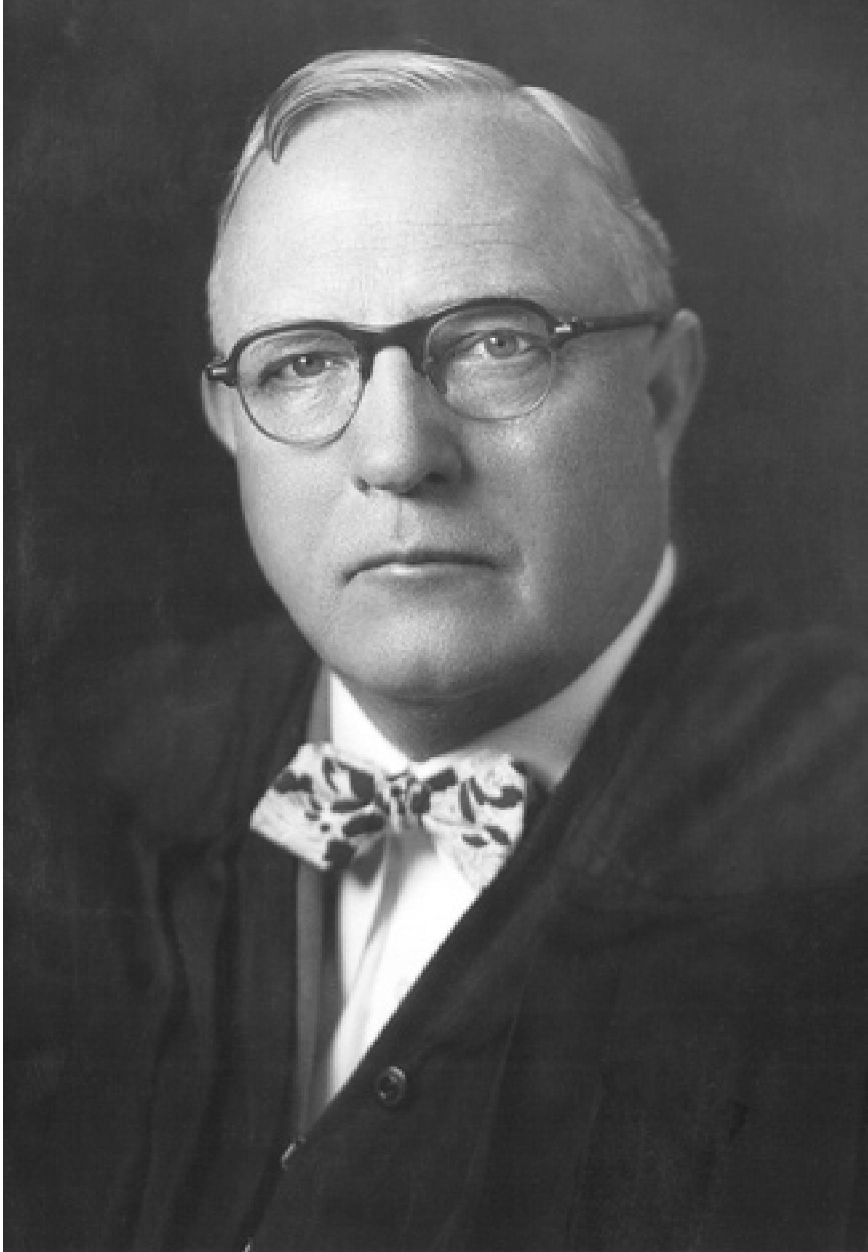
INTRODUCTION

JOSEPH R. GRODIN*

Jesse Carter came to the California Supreme Court by appointment of Governor Culbert Olson in 1939 — at a critical time in the Court's history. Up to that point, the Court had been entirely competent, but not yet as recognized nationally as it later came to be. Carter's appointment was followed in rapid succession by the appointments of Phil Gibson and Roger Traynor, and, in the decades that followed, the California Supreme Court gradually came to be a leader in the development of new approaches in a variety of areas — criminal procedure and consumer protection, among others.

It is Gibson and Traynor, both of whom became chief justice, who typically get the credit for the Court's preeminence, and certainly their reputations as legal giants are well deserved. Carter played an important role, however, and his role has been largely ignored. In large measure that is because Carter authored few majority opinions of prominence. His contribution lay mainly in his frequent dissents (510 of them, if one counts dissents from denial of hearing), sometimes joined by others but

* Associate justice of the California Supreme Court, 1982–1987; professor of law, UC Hastings College of the Law.



Jesse W. Carter,
Associate Justice of the California
Supreme Court, 1939-1959.

Courtesy J. Scott Carter.

often solo, which asserted positions that in a significant number of cases came to be embraced by the majority of the Court, or (where federal law was implicated) by the U.S. Supreme Court. Carter's dissents were often vitriolic[1] — he was taken to task by no less a personage than Roscoe Pound for his lack of collegiality — and were often characterized by expressions of righteous indignation, but if one focuses upon substance rather than style, his position on the frontier of legal change is readily discernible, and quite remarkable.

His dissent in *People v. Gonzales* is an example. The issue was whether illegally obtained evidence should have been rejected in the defendant's criminal trial. The majority opinion, authored by Traynor and joined by all but Carter, held that it should not. Carter's dissent insisted that, whatever the rule might be under the federal Constitution (and at the time the rule was unclear), "the provision in our state Constitution compels the rule that evidence obtained in contravention thereof shall not be competent or admissible." Permitting such evidence to be used, he argued, is "an invitation and encouragement to law enforcing officials to violate the Constitution."[2]

This opinion deserves recognition as a landmark in the development both of the rationale for an exclusionary rule and of the significance of state constitutions as an independent source of rights. Thirteen years later, in *People v. Cahan*,[3] the Court in an opinion by Justice Traynor came to accept Carter's reasoning as to the need for an exclusionary rule, as well as his argument for grounding that requirement in the state Constitution. Justice Traynor's *Cahan* is widely acclaimed both for its prescience in requiring exclusion of illegally obtained evidence before the U.S. Supreme Court's opinion in *Mapp v. Ohio*,[4] and for its impetus

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[1] In a 1953 case in which the majority rejected a finding by the Industrial Accident Commission that the employer was guilty of "serious and willful misconduct," Carter's dissent characterized the majority's view as "the old story of the people and the legislature being defeated by reactionary court decisions." Carter responded to criticism by saying that a conference of appellate judges "is not a prayer meeting where everyone is expected to nod 'Amen.'"

[2] 20 Cal.2d 165, 174-175 (1942).

[3] 44 Cal.2d 434 (1955).

[4] 367 U.S. 643 (1961).

to the later development of independent state constitutional analysis. Meanwhile, Justice Carter's contribution has gone virtually unnoticed.

Equally ignored have been the cases in which a Carter dissent was subsequently "validated" by the U.S. Supreme Court, either through direct reversal or subsequent disapproval. In *Takahashi v. Fish and Game Commission*,[5] Carter authored a dissent, in which Traynor and Gibson joined, disagreeing with the majority's conclusion, reversed by the U.S. Supreme Court,[6] that it was constitutionally permissible for California to exclude aliens from offshore fishing. In *Rochin v. California*,[7] the U.S. Supreme Court held that the due process clause of the Fourteenth Amendment required a state court to exclude evidence obtained by pumping the defendant's stomach, and reversed a California Court of Appeal decision which allowed the evidence,[8] the California Supreme Court had denied hearing, with only Justice Carter voting to grant. In *San Diego Building Trades Council v. Garmon*,[9] the U.S. Supreme Court held that, under federal preemption principles, a state court had no jurisdiction to grant relief against union activity arguably prohibited or protected by the National Labor Relations Act, and reversed a contrary decision by the California Supreme Court, from which Carter, joined by Traynor, had dissented.[10] In *California v. Taylor*,[11] the U.S. Supreme Court in effect disapproved of a prior California Supreme Court decision holding that the Railway Labor Act had no application to a state-owned railway in *California v. Brotherhood of Railroad Trainmen*.[12] In the prior decision, Carter's had been the only dissent. And in *Konigsberg v. State Bar of California*,[13] the U.S. Supreme Court reversed an order of the Supreme Court of California, from which Carter had dissented, denying Konigsberg's admission to the California Bar based upon alleged communist affiliations.

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[5] 30 Cal.2d 719 (1947).

[6] 334 U.S. 410 (1948).

[7] 342 U.S. 165 (1952).

[8] 101 Cal.2d 140 (1950).

[9] 353 U.S. 26 (1957).

[10] 45 Cal.2d 657 (1955).

[11] 353 U.S. 553 (1957).

[12] 37 Cal.2d 412 (1951).

[13] 353 U.S. 252 (1957).

Carter's dissents in these cases, along with others, reflect a strong-willed commitment to a constellation of values that include self-reliance, individual liberty, procedural fairness, distrust of the state, the importance of juries, protection of the underdog, and collective bargaining. It is a constellation which cannot easily be characterized as "liberal" or "conservative," but against the backdrop of Carter's life experiences, reflected in part in this oral history, the constellation takes shape as the expression of a fiercely independent spirit.

From this oral history we learn of Carter's pioneering forebears; of parents who were small farmers and miners in the California northwest; of Carter's birth, the seventh of eight children, in a log cabin on the Trinity River; and of his early education — at home until the age of eight, because the nearest school was seven miles away, but an avid reader and intellectually curious. We learn how he left home at the age of fourteen, and worked in mines and logging camps in order to earn enough money to go to San Francisco and enroll in Wilmerding School; how he went to work for United Railroads, repairing electric motors in the day and taking night classes at YMCA (later Golden Gate) Law School; how he became politically active in the Progressive Movement, and later in the New Deal, but always, it seems, with reservations stemming from his own independent thought. Carter had a colorful career as a plaintiff's lawyer, a defense lawyer, a district attorney, a city attorney, and a state senator before his appointment directly to the Supreme Court.

Not long before his death in 1959, I remember seeing a newspaper story about Carter's involvement in a dispute with Marin County officials and his neighbors over a dam he had constructed on his ranch. The county insisted the dam was unsafe, and demanded it be removed. There was a picture of Carter, standing outside his ranch house, holding a rifle, and quoted as threatening to shoot "the first S.O.B. who sets foot on my property." But after several engineers testified the dam had been made safe and was no longer a hazard to nearby residents, the dam was allowed to stand. Carter's last dissent ultimately prevailed.

Oral History of

JUSTICE JESSE W. CARTER

EDITOR'S NOTE

The oral history of Justice Carter was recorded in five interviews in the spring and summer of 1955 during his tenure as a member of the California Supreme Court. The interviews were conducted by Corinne L. Gilb, PhD (1925-2003), founding director of the Regional Cultural History Project (later, Regional Oral History Office — ROHO) at UC Berkeley. In Gilb's introduction to the original transcription, she indicated that Justice Carter was interviewed in his chambers in San Francisco on April 14 and 27, May 19, and June 6 and 27, 1955. Thereafter, Justice Carter supplied a number of exhibits to document subjects he had discussed, which approximately doubled the length of the transcription. The oral history itself is presented here in its entirety, but for reasons of space, only a few of the most notable exhibits have been included.

The oral history has been reedited for publication. Citations have been verified or provided. A few of the section headings added by the interviewer have been modified. Notations in [square brackets] have been provided by the editor. The oral history and exhibits are reprinted by permission of The Bancroft Library at UC Berkeley. The original transcription may be viewed at the Library or online at http://bancroft.berkeley.edu/ROHO/collections/subjectarea/law/ca_supremecourt.html.

The Table of Contents of the oral history also serves as a concise biography of Justice Carter. For a personal remembrance of Justice Carter, see Daniel S. Carlton, "In Memoriam — Jesse W. Carter: He Died As He Lived — Fighting," *Hastings Law Journal* 10:4 (May 1959) 353-359. In the companion article by Leon Green, "'He Never Declined to Do Battle for His Convictions,'" Ibid., 360-369, the author examines the contribution of Justice Carter's opinions and dissents to the field of tort law. Additional biographical information may be found in the following articles: Corinne Lathrop Gilb, "Justice Jesse W. Carter, An American Individualist," *The Pacific Historical Review* 29:2 (May 1960), 145-157; and J. Edward Johnson, "Jesse W. Carter," in *Justices of California*, *vol. II: 1900-1950* (San Francisco: Bancroft-Whitney Co., 1966), 161-169.

Jesse Carter's advocacy for farmers' water rights, during his earlier legal practice, is the subject of a new article by historian Douglas R. Littlefield for this issue of *California Legal History*, to be found immediately following the oral history.

A significant collection of Justice Carter's papers is available in the Law Library of Golden Gate University in San Francisco. Information about the collection is available at http://www.ggu.edu/lawlibrary/jessecarter.

Photographs credited to "J. Scott Carter" are courtesy of Jesse Scott Carter, son of Harlan Carter, and grandson of Justice Jesse W. Carter. He is a retired instructor of history at Shasta College and former mayor of Redding, California.

Photographs credited to "Scott H. Carter" are courtesy of Scott Henry Carter, Esq., of Napa, California, from the collection of his father, John H. Carter, son of Henry Carter (brother to Jesse W. Carter).

—SELMA MOIDEL SMITH

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THE CARTER FAMILY

CARTER: My father, Asa Manning Carter, was born at Bowling Green, Kentucky, in 1846. His father was born in Virginia and had moved to Kentucky where he was engaged in farming. My father was born on his father's farm there. The family was divided on the slavery question, and at the age of seventeen my father ran away from home and enlisted in the Union Army in Iowa in 1863. He fought in several battles of the Civil War, including Antietam and Vicksburg and some of the lesser battles. I think he referred to Twin Oaks. At the time the war ended, his enlistment had not expired so he was assigned to a regiment which was sent west to suppress the Indians through the Rockies and in northern California and southern Oregon.

GILB: Was he a private all this time?

CARTER: He was a private. I don't think he attained any rank, either commissioned or noncommissioned. He was in the cavalry and he told me, when I was a boy, about some of his experiences coming through the Rocky Mountains, killing buffalo and elk. He finally arrived in southern Oregon and came down into Siskiyou County and was mustered out at Fort Jones in Siskiyou County in 1865. He was allowed a day's pay and a day's ration to return to his place of enlistment, in southern Iowa. He returned there by horseback, overland.

He then organized a caravan consisting of about twenty wagons, oxen and horses and piloted that caravan to California in 1866. He went into the mountains of Trinity and Siskiyou counties and engaged in mining.

He met my mother at Carrville in Trinity County in 1872. She was born in San Francisco in 1852. Her father came from Maine, around the Horn, and arrived in San Francisco by boat about 1849. Her mother came from Ireland and arrived in San Francisco about the same time. They were married in San Francisco in 1850 and my mother was born here in 1852. About two years later they emigrated to Siskiyou County and my mother lived near Callahan in Siskiyou County where she attended the public schools. She was visiting at Carrville in Trinity County when she met my father in 1872.

GILB: Was your father looking for gold up there?

ARTICLES

JESSE W. CARTER AND CALIFORNIA WATER LAW:

Guns, Dynamite, and Farmers, 1918-1939

DOUGLAS R. LITTLEFIELD*

As a practicing attorney before he was appointed to the California Supreme Court in 1939, Jesse W. Carter was known for his impassioned and forceful representation of farming and ranching clients involved in water conflicts with large corporations — particularly hydroelectric power companies. Later, as a state supreme court justice until his death in 1959, Carter gained further attention (as well as the nickname, "The Great Dissenter") for his vigorous opposing judicial opinions.[1] However spirited his courtroom arguments or dissents may have been,

* Ph.D., American history, UCLA; university instructor on history of the American West, California history, and environmental history; currently directs Littlefield Historical Research, a consulting business that provides historical research and expert witness services in relation to water rights, land use, and other environmental issues. The author would like to thank Christine Andersen and Sande DeSalles for their research help and comments on earlier drafts of this article. Thanks are also due to David Kessler and the staff of the Bancroft Library at UC Berkeley; Jeffrey Crawford and the staff at the California State Archives in Sacramento; Lila J. Gestri at the Shasta County Assessor-Recorder's Office in Redding, California; and the staff at the Alameda County Recorder's office in Oakland, California. The author's wife, Christina B. Littlefield, also deserves special thanks for her comments on an earlier draft of this article and for stylistic suggestions.

PUBLIC LAND, PRIVATE SETTLERS,

and The Yosemite Valley Case of 1872

PAUL KENS*

In a 2009 documentary film, Director Ken Burns and writer Dayton Duncan describe the National Parks as "America's Best Idea."[1] Although they may be right, the establishment of the national parks has not been without controversy. This article is about the creation of one of America's first national parks, the Yosemite National Park in California. More specifically, it is about a controversy that arose when plans for the park came into conflict with claims of pioneers who had already settled in the Yosemite Valley. One of those settlers, James Mason Hutchings, persistently resisted California's efforts to have him removed from the land he had claimed. Hutchings's legal battle with the state eventually reached the United States Supreme Court in the 1872 case called *The Yosemite Valley Case*.[2]

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* Professor of Political Science and History, Texas State University, San Marcos.

[1] Web page for the documentary is found at http://www.pbs.org/nationalparks/history/. All Web sites cited in this article were last accessed on October 1, 2009.

[2] *The Yosemite Valley Case*, 82 U.S. 77 (1872), also referred to as *Hutchings v. Low*.

HOW EVOLVING SOCIAL VALUES HAVE SHAPED (AND RESHAPED) CALIFORNIA CRIMINAL LAW

MITCHELL KEITER*

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* As a California Supreme Court Chambers Attorney, the author participated in the determination of *People v. Sanchez*, 26 Cal.4th 834 (2001); *People v. Steele*, 27 Cal.4th 1230 (2002); *People v. Bland*, 28 Cal.4th 313 (2002); *People v. Taylor*, 32 Cal.4th 863; and *People v. Wright*, 35 Cal.4th 964 (2005). The author also briefed and argued *People v. Stone*, 46 Cal.4th 131 (2009).

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INTRODUCTION

A student could learn much about cultural history by studying doctrines of criminal liability. As the United States Supreme Court has observed, the law mirrors evolving societal values. "The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical and medical views of the nature of man."[1]

This adjustment has shifted not only individual doctrines, but their collective rationale as well. The California Supreme Court described this

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1 *Powell v. Texas*, 392 U.S. 514, 536 (1968).

THE FIRST CALIFORNIA STATUTE:

Legal History and the California State Archives

JOHN F. BURNS AND NANCY LENOIL*

INTRODUCTION AND CONTEXT

Nineteenth century statutes rarely appear in California's historical literature. Most have long been superseded, and they are seldom examined unless they deal with contentious contemporary issues such as extending civil rights. The first statute of the first California legislature should be lauded, however, as it required the Secretary of State to "receive . . . all public records, registers, maps, books, papers, rolls, documents, and other writings . . . and the titles to bonds within the territory, or to any other subject which may be interesting, or valuable as references or authorities to the Government, or people of the State . . . and to classify, and safely keep, and preserve the same, in his office."

With that law, the archives of the fledgling state were initiated, the first legislature recognizing the enduring importance of key documents to the state's governance. What was to become the California State

---

* John F. Burns served as California State Archivist from 1981-1997. Nancy Lenoil is the current State Archivist, appointed in 2006. She first joined the Archives' staff in 1986. She is the first woman to serve as State Archivist in the state's history. All illustrations for this article are courtesy California State Archives.

CALIFORNIA'S "LIBERAL MOMENT":

The 1849 Constitution and the Rule of Law

JOSÉ-DANIEL M. PARAMÉS*

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* Member of the California Bar; J.D., Boston College Law School, 2008 (articles editor, *Boston College Law Review*); B.S., Santa Clara University, 2005. I would like to thank Daniel Coquillete (Boston College) for introducing me to legal history and George Fisher (Stanford) for his invaluable comments and advice as this article was being written. In addition, I would like to thank my colleagues Christoffer Lee and Matthew Weyand for their thoughtful comments and suggestions.

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INTRODUCTION

November 13, 1849, was a wet and dreary day in California.[1] But on that day, California voters braved muddy roads and pouring rain to ratify a constitution that had been debated for a month and a half in a convention held at Monterey.[2] In that moment when the proposed constitution was ratified, something momentous though not apparent happened: a liberal society was born. It was California's "liberal moment." Once Spanish, then Mexican, now American, California witnessed more than a changing of the guard with the ratification of the 1849 Constitution. It witnessed the emergence of a society based on the *rule of law.*

The convention that drafted the 1849 California Constitution and the election that ratified it were monumental events given the territory's history and the circumstances that crystallized during that history. Indeed, the 1849 Constitution appears as a climax of events and developments that began before California was known to the Western mind. In particular, when one considers the legal institutions and jurisprudence that developed in the Iberian Peninsula, and which were later imported to the New World and eventually California, then modified by Mexican rule, and eventually adapted by American conquerors, one realizes that

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1 The *Alta California* informed its readers, "The day of the election was very disagreeable. Several showers of rain fell, and the mud, which was unfathomable before, suddenly disclosed a 'lower deep.'" ALTA CALIFORNIA (San Francisco), November 15, 1849.

2 The Constitution was formally adopted by the voters on November 13, 1849 by a margin of 12,061 to 811. KENNETH STARR, CALIFORNIA: A HISTORY 94 (2007); Myra K. Saunders, *California Legal History: The California Constitution of 1849*, 90 L. LIBR. J. 447, 466 (1998).

BOOKS

HOPE'S BOY:
A Memoir

ANDREW BRIDGE

(Hyperion, 2008, 206 pp.)

REVIEW ESSAY BY MYRNA S. RAEDER*

Hope's Boy is the heartrending memoir of Andrew Bridge, called Andy[1] in his youth, who spent eleven years in Los Angeles foster care, ultimately becoming a legal advocate for those who lack his remarkable resiliency, self confidence, intelligence, luck, and belief that his mother truly loved him. The book's cover shows a fair-haired child who would stand out in today's overwhelmingly minority Los Angeles foster care population. He begins his account in the early 1970s when he is only seven years old and taken into foster care on a North Hollywood street because of his mother's neglect, which stemmed from her mental breakdowns that ultimately led to her long-term institutionalization. A social

* Professor of law, Southwestern Law School; currently a member of the Advisory Board of the American Bar Association's Youth at Risk Commission, having formerly served as a commissioner. She is also a member of the ABA Criminal Justice Section's Juvenile Justice Standards Committee that is drafting standards concerning the intersection of juvenile justice with other service providers such as foster care, education, and mental health agencies.

1 I refer to the author as Andy when discussing his memories as a youth, and as Bridge when discussing what he has written or events that occurred when he was an adult.

worker took him to MacLaren Hall, a place that reeks of a Dickens novel, and still haunts generations of foster children who had the misfortune of being housed there until its closure in 2003. During his stay Andy became mute and he suffered from nightmares and nervous habits long after he left. He was finally moved when the staff belatedly noticed that Andy had become totally withdrawn. By that time an untreated bleeding nose had also resulted in an infection that left his nostrils swollen and encrusted with blood. Andy survived this first abject failure of the system designed to keep him safe, but was not sent home.

Instead, his fate, which at first hearing might sound ideal, was to be placed at a foster home with a swimming pool. In reality, he suffered a decade of neglect by a system that left him there in limbo till he aged out at eighteen. Andy was never reunified with Hope, his mother who fought unsuccessfully for his return, or with his grandmother in Chicago. If he had any permanency plan, it did not appear to include adoption. He also had to withstand the intermittent rage and occasional assaultive behavior of a foster mother whose own children also left home on turning eighteen. Indeed, his foster mother's worst emotional abuse may have been her repeated threats that she had already or would call social services to take him back. A "failed placement" could have thrown Andy into a much more dangerous world, and interrupted his schooling, which he early recognized was his path to a better life.

Moreover, the foster home was the only address he knew his mother had during her long absence, and it was her love that sustained him through years of foster care indifference. Ultimately, Andy's remarkable ability to stay calm and comply with his foster mother's unreasonable demands permitted him to obtain the prize that eludes most foster children, an unbroken education that paved the way to his successful graduation from both Wesleyan College and Harvard Law School, as well as to a Fulbright Scholarship. Even his short stint at a large law firm resulted in the firm's arranging for his cost-free health care when he got Hodgkin's disease. With such a compelling narrative, told in a deceptively simple, but powerful manner, it is no wonder that the book appeared on the *Times* best seller list. Even upon rereading, I have not yet made it to the end with dry eyes.

THE MINING LAW OF 1872:
Past, Politics, and Prospects

GORDON MORRIS BAKKEN

(University of New Mexico Press, 2008, 237 pp.)

REVIEW BY STUART BANNER*

Gordon Bakken has written more books than some entire history faculties. It would be an exaggeration, but only a slight one, to say that his output alone accounts for more than half the field of western legal history. He may be just as well known for his other contributions to the field, including a period as editor of this journal, and a longer stretch as editor of the University of Oklahoma Press's series on the Legal History of North America. *The Mining Law of 1872* is a characteristic Gordon Bakken book: no fancy theory, no speculation beyond the evidence, just a straightforward and thoroughly researched account of an interesting topic in western legal history.

The broad outlines of Bakken's narrative will be familiar to many readers. The government's unambiguous goal in the nineteenth century was to encourage mining. Minerals were in remote places, far from white settlements. They were often hard to find and expensive to remove from the ground. So the government in effect subsidized miners, by granting land and mineral rights at extremely low prices, in a series of statutes, the

* Professor of law, UCLA School of Law.

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E-mail: mail@wshein.com ~ Web site: www.wshein.com