

SPECIAL SECTION

JUSTICE
STANLEY MOSK

CALIFORNIA SUPREME COURT
(1964-2001)

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

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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

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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

*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

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

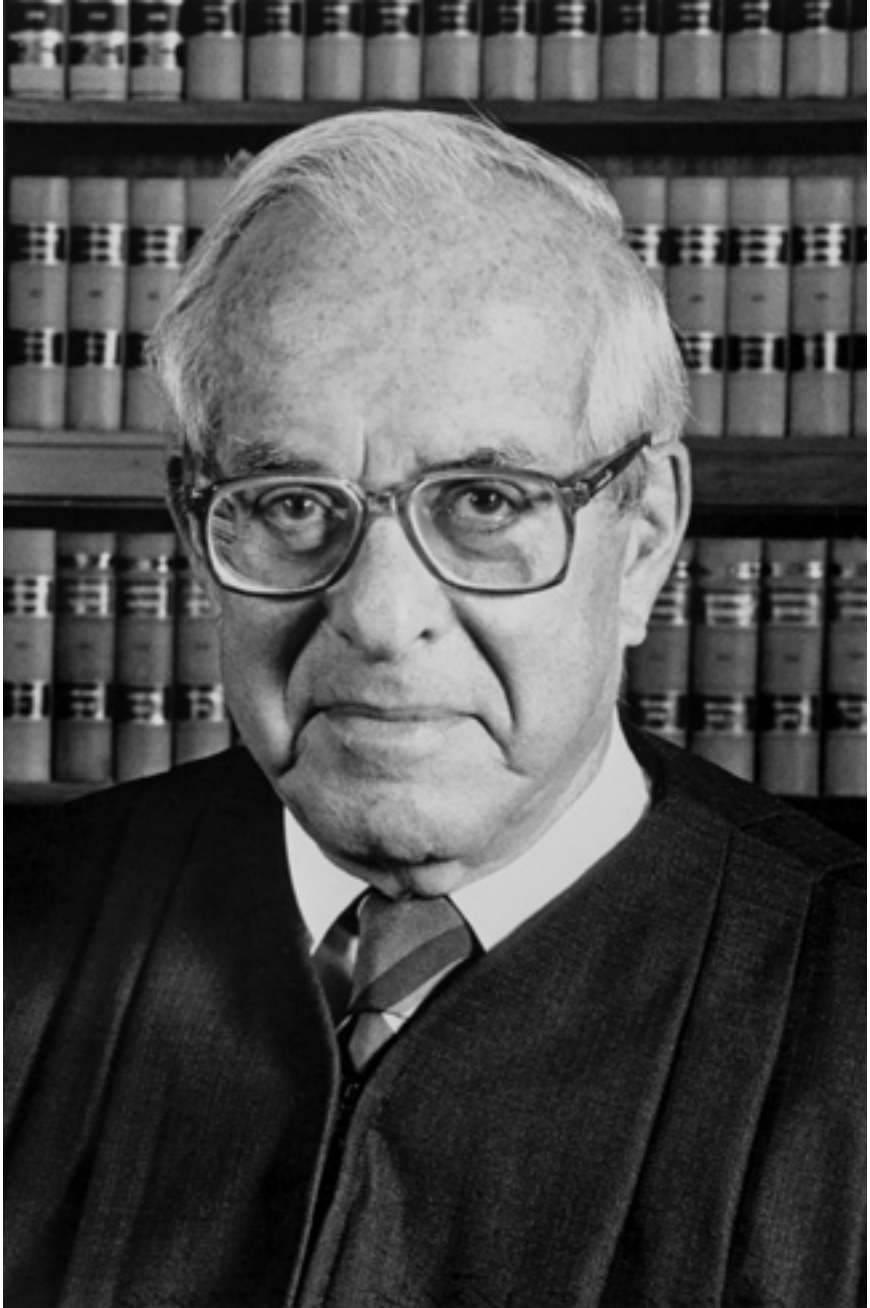
In the years 1985 to 1988, Justice Stanley Mosk assembled a collection of his ideas on various legal and personal topics with the ultimate intention of publishing a book to be titled *Myths and Realities in the Law*. He did publish versions of some of these pieces individually at various times, and to 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 HUMOR¹

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.

I. PRIVACY IN A PUBLIC WORLD⁴⁴

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

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 PREFERENCES¹⁰⁸

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 ANSWER¹⁴⁴

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 Inviolable” 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 JUDGE²²⁵

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.

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

* 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).