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 meanspiritedness. 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.

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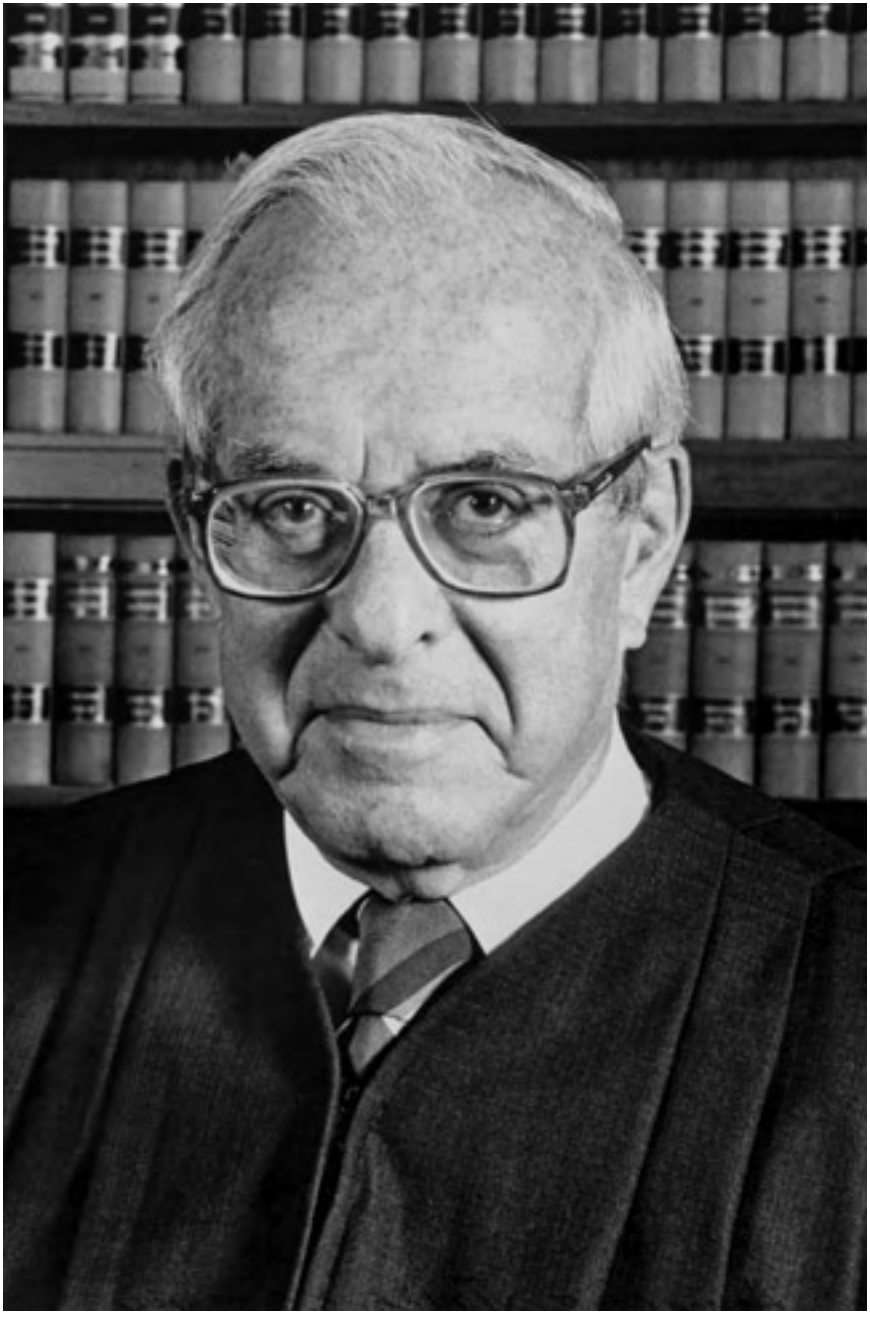

JUSTICE STANLEY MOSK.
Courtesy California Judicial Center Library.

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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

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.

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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.

a book entitled *The Law and the Profits*.[3] A superior court judge in Los Angeles, Frank Swain, compiled his poems in *Judicial Jingles*.[4] A Harvard professor wrote a volume on humorous cases. And more recently Dean Gerald Uelmen of Santa Clara University [and] attorneys Rodney Jones and Charles Sevilla published *Disorderly Conduct*, a collection of courtroom tales that tickle the ribs.[5]

I have my favorite incidents, both at the trial and appellate level. These are not apocryphal, they are genuine.

Most judges appreciate lawyers who are quick on their feet and respond intelligently to difficult questions.

Years ago there was a brilliant, but crusty, justice on the California Supreme Court: Raymond Peters. He often exhibited not only limited patience with oral argument, but his questions frequently telegraphed his views on the pending matter.

In one case, the opening argument had been concluded, and the opposing counsel was collecting his papers to bring to the podium. Before he could arrive there, Justice Peters growled, "Counsel, how can you possibly distinguish the controlling case of Smith versus Jones?" The attorney walked slowly to the rostrum, carefully arranged his notes, cleared his throat, took a drink of water, and replied, "Would Your Honor mind if I said 'good morning' first?" That was poise![6]

Another member of that Court had a delightful sense of humor: Justice Paul Peek. One day a lawyer was well into his presentation when a justice asked him a particularly penetrating question. "That is a remarkable coincidence, Your Honor," said the lawyer. "As I was rehearsing my talk at home last night, my wife asked me the same question and suggested an answer." He recited it. The discussion went on awhile longer,

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[3] C. Northcote Parkinson, *The Law and the Profits* (Boston: Houghton Mifflin, 1960).

[4] Frank G. Swain, *Judicial Jingles: A reliable collection of misinformation by the judge himself* (New York: Pageant, 1955).

[5] Rodney R. Jones, et al., *Disorderly Conduct: Verbatim excerpts from actual cases* (New York: Norton, 1987).

[6] This anecdote and the following one were published in: Stanley Mosk, "Ex Ante: Courtroom Humor," *The Green Bag: An Entertaining Journal of Law* 2:1 (Fall 1998), 2.

when another difficult query came from a member of the Court. Before counsel could reply, Justice Peek asked, "What did your wife have to say about that one?"

Shortly after George Deukmejian was elected Attorney General of California, a young deputy, Asher Rubin, was sent to federal court to obtain a continuance in a pending case. He made his request of the federal judge, and it was denied out of hand. Rubin thought of another reason for a continuance and offered it to the judge. He was refused again. A third time he came up with still another rationale for putting the matter over to a later date. Again the judge rebuffed him. Finally, in exasperation the judge demanded, "Why are you not prepared to proceed? What on earth are you people doing over there in the attorney general's office?" Rubin thought quickly and came up with this response: "Frankly, Your Honor, we have been spending all our time learning how to spell Deukmejian." When the laughter subsided, he won his continuance.

The late Chief Justice Donald Wright of California was a learned man, able to quote literary passages with ease. In a case being argued before the state Supreme Court, an attorney was earnestly contending that the text of a law did not comport precisely with what the legislature clearly intended to accomplish. Wright interrupted to observe: "In a comparable situation an English philosopher once declared, 'If Parliament didn't mean what it said, why didn't it say so?'"[7]

English judges have a particularly dry sense of humor, and often they resort to serious self-deprecation. I was fortunate to be selected as a member of a seven-man team designated by the Institute of Judicial Administration to make a comparative study of British and American judicial procedures. On it I was associated with some brilliant legal minds: Justice Brennan of the United States Supreme Court, . . . Justice Walter Schaefer of the Illinois Supreme Court, Solicitor General Archibald Cox, Judge [J. Edward] Lumbard of the Second Circuit, Chief . . . [Judge Charles S.] Desmond of the New York Court of Appeals.

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[7] This saying appears in Mosk's concurring opinion in *People v. Overstreet*, 42 Cal.3d 891, 901 (1986): "I am reminded of Chief Justice Wright's quotation attributed to a renowned English jurist: 'If Parliament didn't mean what it said, why didn't it say so?' If the Legislature didn't mean 'trial,' why didn't it say so?"

In England the judges do not take cases under submission. No matter how complicated the litigation, they announce their decision immediately from the bench. Our group was tremendously impressed with that ability of jurists to decide matters with such dispatch, and we so expressed ourselves to our British host, Lord Denning. He appreciated our compliments, but suggested undue haste occasionally creates problems.

"A distinguished colleague of mine had tried a long case," he related. "The testimony went on for weeks, the unlimited argument of the barristers went on for days. At the conclusion, my colleague announced his decision.

"Then," continued Lord Denning," my colleague returned to his chambers. His clerk (pronounced clark) helped him off with his wig and his robe. Suddenly, my colleague stopped short. He paused. He thought pensively. He shook his head. He slapped his side. 'There I go again,' he said. 'I said plaintiff when I meant defendant.'"

Our group decided then and there that perhaps our more deliberative method in the United States, though it may take longer, has much to commend it.

British humor is delightful, and has been so from earliest days. Richard Brinsley Sheridan, poking fun at two barristers, said to be Henry Dundas and William Pitt, penned this epigram of their appearance in court in a thoroughly inebriated condition:

"I can't see the judge,
Pray, Hal, do you?"

"Not see the judge, Bill!
Why, I see two."

Of a prominent judge who went to watch a production of Sheridan's play *Pizarro*, and then slept through much of the performance, Sheridan had this pithy comment, "Poor fellow, I suppose he fancied he was on the bench."

The French, too, have their brand of biting humor. The story is told of Clemenceau who was being opposed by one Dubost. The latter complained in court that "they are saying everywhere that I am stupid, an imbecile. But I am no more stupid than another." Whereupon, Clemenceau interrupted to ask, "Which other?"

Along that line there is humorist Art Buchwald on former Attorney General Edwin Meese, III: "He doesn't look like someone who has read the Constitution, but like someone who ate it."

On occasion some rich humor appears in published opinions. For example, here is the complete rule expressed back in 1855 by Justice Heydenfeldt of the California Supreme Court: "The Court below erred . . . . If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street as a sober one, and much more in need of it."[8] That was pragmatic frontier justice.

In 1950 Justice Robert H. Jackson of the United States Supreme Court found himself in agreement with his colleagues on a judgment. The problem was, however, that this was contrary to an opinion he had rendered ten years previously as attorney general of the United States. Jackson felt required to explain his change of position:

> I concur in the judgment and opinion of the Court. But since it is contrary to an opinion which, as Attorney General, I rendered in 1940, I owe some word of explanation. . . . I am entitled to say of that opinion what any discriminating reader must think of it — that it was as foggy as the statuteΔ the Attorney General was asked to interpret.
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> Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. [Inserted by Justice Mosk: Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, "The matter does not appear to me now as it appears to have appeared to me then." And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: "My own error, however, can furnish no ground for its being adopted by this Court . . . ."] Perhaps Dr. Johnson really went to the heart of the matter when he explained a blunder in his

[8] *Robinson v. Pioche, Bayerque & Co.*, 5 Cal. 460, 461.

> dictionary — "Ignorance, sir, ignorance." But an escape less self-depreciating was taken by Lord Westbury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." If there are other ways of gracefully and good naturedly surrendering former views to a better considered position, I invoke them all.[9]

On an occasion I found myself in the identical predicament of Jackson: an opinion of our Court in conflict with an opinion I had rendered some years earlier as the state's attorney general. I invoked Jackson's rationale,[10] and added that of Supreme Court Justice Rutledge [quoting Justice Felix Frankfurter] who wrote in 1949: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."[11]

There are some examples of grim, almost macabre, humor. Anatole France, ever critical, wrote that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

When I was a student at the University of Chicago, a classmate, Jim Zacharias, and I called on Clarence Darrow, who lived near the campus, to wish him a happy birthday. He was most gracious to a couple of young students, showed us around his library, and told us a story of having just come from meeting a doctor friend. "If you had listened to me," said his friend, "You, too, would have been a doctor." Darrow opined that there was nothing wrong with being a lawyer. "I don't say that all lawyers are crooks," responded the doctor, "but even you will have to admit that your profession doesn't exactly make angels of men." Darrow said he replied, "No, you doctors have the better of us there."

For self-depreciation, Justice Jackson deserves high marks for his classic statement in an opinion: "There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state

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9 *McGrath v. Kristensen*, 340 U.S. 162, 176.

10 *King v. Central Bank*, 18 Cal.3d 840, 850 (1977).

11 This statement was quoted by Rutledge, without attribution, in *Wolf v. Colorado*. 338 U.S. 25, 47, from Frankfurter's dissent in *Henslee v. Union Planters Nat. Bank & Trust Co*., 335 U.S. 595, 600 (1949).

courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final."[12]

Judge Jacob Braude wrote of a judge who questioned jurors at the conclusion of a trial: "What possible excuse did you jurors have for acquitting that murderer?" The foreman responded simply, "Insanity." Said the judge, "Really? All twelve of you?"

I heard a veteran lawyer discussing his career with students at a law school. I suspect his remarks were substantially hyperbole, but there may have been a germ of truth in them: "When I was a young inexperienced lawyer, I undoubtedly lost cases I should have won. Now that I have years of experience under my belt, I undoubtedly win cases I should lose. I guess in the long run justice has been done."

I left the trial bench to run for, and was elected attorney general of California. I must confess that one reason I appreciated the office was the title: the incumbent is always referred to as "General." I would come in early in the morning and be greeted by "Good morning, General." In leaving in the evening, it would be "Good evening, General."

Having been a lowly private in World War II, becoming a general was pretty heady stuff. That is, until one evening when I was a dinner guest of Alfred Hart, a banker friend in Los Angeles. Upon my arrival he took me around the room to introduce me to his other guests. "General Mosk, meet Bob Smith." And "General Mosk, meet Bill Jones." This went on for several minutes until he came to a very imposing appearing man, and said, "General Mosk, meet Omar Bradley." Yes, it was the real live general.

I might have taken this casually, but General Bradley inquired politely, "What outfit were you in, General?" My recollection is that I mumbled something about serving in the Transportation Corps, and then beat a hasty retreat.

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12 *Brown v. Allen*, 344 U.S. 443, 540 (1953).

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]

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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).

Senate of the United States: "What do we want with this vast worthless area, this region of savages and wild beasts, of shifting sands and whirlpools of dust, of cactus and prairie dogs? To what use could we ever hope to put these great deserts or those mountain ranges, impenetrable and covered to their base with eternal snow? Mr. President, I will never vote one cent from the public treasury to place the Pacific Coast one inch nearer Boston than it is now."[18]

Speaking of that great senator, I am reminded of a true story. Some years ago when I was attorney general of California, I dictated a letter to the Senate office of the Honorable Daniel Inouye, senator from Hawaii. My secretary, obviously daydreaming, addressed the envelope to the Hon. Daniel Webster, care of United States Senate, Washington. The letter was returned to me with the postal notation: "United States Senate — unknown at this address." Such is fleeting fame.

There are many facets to the fundamentals of federalism. I cannot suggest the issues have always been crystal clear. I do not have the assurance of a Henry Kissinger. This incident comes to mind. As Secretary of State Henry Kissinger was leaving office, a news reporter interviewed him and asked this question: "Mr. Secretary, as you conclude your term of office and reflect on the past years, what do you consider your most notable success and what do you consider your most notable failure?" "Sorry," responded Kissinger, "I don't understand the second part of that question."

One who advocates states' rights may sound like an unreconstructed rebel from the days of the Confederacy. True, I was born in Texas. But I was precocious, and left there at the age of three. So, as I discuss state constitutionalism, I must deny being a nineteenth-century reactionary in this field of law.

There is a growing interest throughout the country in the state use of the states' own constitutions when more individual rights are protected thereunder than pursuant to the federal Constitution as interpreted by the United States Supreme Court. Many conferences on the subject

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[18] This apocryphal quotation may be traced to Edmond J. Carpenter, *The American Advance: a study in territorial expansion* (London and New York: John Lane, 1903), 216.

have been held throughout the country: in Williamsburg, Virginia; at the University of Texas;[19] in Montana,[20] and in Washington, sponsored by the National Association of Attorneys General.[21] The revival suggests renewed interest in true federalism.

That is, everywhere but California, where by initiative and election returns, the state has with flawless imperfection turned the clock back and appears to have insisted on rigid adherence to federal control of the state judicial process.

For 173 of the first 200 years of this republic a relentless tide of judicial authority flowed from the states to the federal government. From John Marshall's opinion in *Marbury v. Madison* in 1803 to comparatively recent days, the highest courts in the several states were often reduced to the status of intermediate appellate tribunals, mere bus stops on the route from trial courts to the Supreme Court.

I do not say this in criticism. Indeed, before 1953, state courts were guilty of a dismal performance in enforcing provisions of their own constitutions. At the same time the federal judiciary tolerated an era that was characterized by a benign acceptance of racism, political rotten boroughs, disability of the poor, an Anthony Comstock approach to sexual matters, denial of universal suffrage, and egregious imposition on the rights of the criminally accused. Under Chief Justice Warren and his merry men, perhaps encouraged by the civil rights movement of the 1950s, the Supreme Court abandoned an apathetic approach to overt injustice in society and elected to employ the federal Constitution to achieve a liberating and egalitarian impact in the areas of political opportunity, criminal justice, and racial equality.

The states were compelled to fall in line. Some of them were dragged, kicking and screaming. Despite protests over many of the decisions, notably in the areas of reapportionment and protection of the rights of criminal defendants, state courts swallowed their provincial prejudices

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19 At which Justice Mosk spoke; see note 2.

20 Justice Mosk delivered a version of the present paper at the Montana Judicial Conference, Big Sky, Montana, July 17, 1985.

21 Justice Mosk delivered a later version of the present paper at the annual seminar of the National Association of Attorneys General, D.C., March 9, 1989.

and obediently embarked upon the designated new course. The nation and the states truly experienced a legal revolution.

The states ultimately adapted their criminal law techniques to the High Court's requirements and in general a satisfactory accommodation was achieved, sort of a judicial détente. Police officers were taught how to lawfully enforce the law; trial judges became reconciled to admitting only legally obtained evidence. Only the press spoke about reversals on technicalities — as if constitutional guarantees are a mere technicality.

Just as an era of peaceful coexistence seemed imminent, the post-Warren counterrevolution began. Few will gainsay the view of Prof. Wilkes, the distinguished University of Georgia observer, that the current Supreme Court "has abandoned, for the moment at least, the role of keeper of the nation's conscience."[22] Without better perspective, I shall not venture a judgment on the current course; perhaps it is inevitable that a period of hypertension will be followed by some years of lowered expectations.

The dilemma is what can reasonably be expected of state courts. Are they to create doctrines of state authority one year and then abandon them the next year as the tides on the Potomac ebb and flow? I think not. Such inconsistency is confusing to the public and the bench and bar, counterproductive to law enforcement, and demeaning to the judicial process.

A few cursory illustrations come to mind. Consider the simple requirement that counsel be present at police lineups. This rule was adopted by the United States Supreme Court in 1967 under the frequently articulated theory that adversary criminal proceedings begin not in the courtroom but at the police station.

Justice Brennan, writing for the Court, emphasized the importance of the presence of counsel at "critical confrontations" and firmly declared that "we scrutinize *any* pretrial confrontation of the accused" (*any* was italicized in his opinion).[23] And later the court added unequivocally that "counsel is required at *all* confrontations" for identification.[24]

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22 Donald E. Wilkes, Jr., "The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court," 62 Kentucky L. J. 421 (1973-74).

23 *United States v. Wade*, 388 U.S. 218, 227.

24 *Stovall v. Denno*, 388 U.S. 293, 298 (1967).

That sounded clear and emphatic. State courts obediently followed directions from above. Manifestly, it seemed to most states, "any" pretrial confrontation and "all" confrontations for identification implied no limitation.

But after a change in Court personnel, along came a 1972 case and the High Court found it to be "firmly established" that the right to counsel attaches only at the time judicial proceedings have been initiated.[25] "Any" and "all" lost something in the translation; they now mean "very few," for post-indictment lineups are rarely held, and when they are, it is merely for the purpose of refreshing identifications previously made. Now the lineup right to counsel is afforded the defendant when he least needs it.

Take the murky field of obscenity. What test should apply?

For years federal and state courts grappled with the *Roth* rule.[26] To some the problem was simple. An Ohio judge adopted this pragmatic test in a Cincinnati case: "That the material acts as an aphrodisiac can almost be determined physically . . . a judge or juror should be able to estimate that rather closely by the reaction he himself has to the material."[27] I can hear his jury instruction now: "Ladies and gentlemen of the jury: in the final analysis what is obscene is whatever turns you on."

Just as the states, one way or another, were adjusting to *Roth*, in 1973 the rules of the game were abruptly changed, in the *Miller* case.[28] Whereas previously, the High Court declared in *Roth* and reaffirmed later that "the constitutional status of an allegedly obscene work must be determined on the basis of a . . . *national* Constitution we are expounding,"[29] in the *Miller* test, courts are to apply "*contemporary* community standards" [emphasis added]. Apparently, the towns of New England and the Bible Belt are to be judged by different standards than New Orleans Bourbon Street and the Strip of Las Vegas. Sodom and Gomorrah are now viewed in the eyes of the beholder.

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25 *Kirby v. Illinois*, 406 U.S. 682, 688.

26 *Roth v. United States*, 354 U.S. 476 (1957).

27 *City of Cincinnati v. Walton*, 3 Ohio Ops.2d 252 (1957).

28 *Miller v. California*, 413 U.S. 15 (1973).

29 *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964).

When the Supreme Court truck careens from one side of the constitutional road to the other, state courts have one of two alternatives. They can shift gears and once again change directions, thus resuming the course upon which they were originally embarked pre-Warren. Or they can retain existing individual rights by reliance on the independent nonfederal grounds found in the several state constitutions. A growing number of states have adopted the latter course. They have accepted Justice Brennan's cordial reminder that each "State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution."[30]

In California, our Court took the lead in this movement. I had the pleasure of writing the Court's opinion in *People v. Brisendine*, a 1975 case, in which we pointed out:

> It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse. "By the end of the Revolutionary period, the concept of a Bill of Rights had been fully developed in the American system. Eleven of the 13 states . . . had enacted Constitutions to fill in the political gap caused by the overthrow of British authority . . . ."[31]

Let me offer a few cursory examples of how state constitutions have been employed to differ with federal constitutional interpretations.

If a person is stopped by a police officer for a simple traffic violation, the motorist may be subjected to a full body search and his vehicle searched. No constitutional violation, says the United States Supreme Court.[32] But a number of states found such police conduct offended state constitutional provisions unless the officer had articulable reasons to suspect other illegal conduct.

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30 *Michigan v. Mosley*, 423 U.S. 96, 120 (1975).

31 13 Cal.3d 528, 550; quoting from Bernard Schwartz, *The Bill of Rights: A Documentary History* (New York: Chelsea House Publishers, 1971), 383.

32 *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973).

I must add that courts still have difficulty in ascertaining the limits, if any, of automobile searches in light of more recent federal opinions. If a vehicle is stopped on a mere suspicion, may the car be searched without a warrant? The glove compartment? The trunk? A closed container in the trunk? And if the vehicle is a van with a bed, kitchen, closet, curtained windows, etc., does it have the qualities of an automobile because it is mobile, or is it entitled to the protections of a home because one lives in it.

A police officer or a public prosecutor may walk into a bank and, with no authority of process, demand to examine the bank records of a named individual or corporation. No constitutional violation, says the United States Supreme Court.[33] But in California we observed that one's cancelled checks, loan applications, etc., are a mini-biography, that one expects his bank records to be used only for internal bank processes and therefore an examination of them violates the state constitutional right of privacy, unless the records are obtained by a warrant or subpoena.[34]

The U.S. Supreme Court originally declared there can be no restrictions whatever on the use by attorneys of peremptory challenges of prospective jurors being chosen for a trial.[35] California and Massachusetts subsequently declared an exception under state constitution principles: no challenges may be used for a racially discriminatory purpose.[36] Ultimately the Supreme Court reversed its previous decision and agreed with the position taken by the state courts.

As a final example, let me trace the convoluted legal history of a commonly recurring factual situation. A small, orderly group of citizens undertakes to pass out leaflets, or to solicit signatures on petitions, in a privately owned shopping center. The shopping center owners seek to prohibit that activity.

Obviously there is a built-in tension between two constitutional guarantees. On the one hand the citizens assert their right of freedom of speech, and the right to petition their government for a redress of grievances, perhaps to get us out of Central America or wherever our resources

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33 *United States v. Miller*, 425 U.S. 435 (1976).

34 *Burrows v. Superior Court*, 13 Cal.3d 238 (1974).

35 *Swain v. Alabama*, 380 U.S. 202 (1965).

36 *People v. Wheeler*, 22 Cal.3d 258 (1978).

happen to be. On the other hand, the shopping center owner asserts his right to possess and control his private property and to exclude all non-business related activity. In that conflict which right is to prevail?

The Supreme Court of California held in 1970 that unless there is obstruction or undue interference with normal business operations, the bare title of the property owners does not outweigh the substantial interest of individuals and groups to engage in peaceful and orderly free speech activities on the premises of shopping centers open to the public.[37]

On four occasions the shopping center owner sought review in the United States Supreme Court, but in each instance he was rebuffed, with no votes noted to grant. We had every reason to believe our opinion was the prevailing law.

Two years later, however, the Supreme Court took over an identical case from Oregon, and held that the owners had the right to prohibit distribution of political handbills unrelated to the operation of the shopping center.[38]

Then, in 1979 our Court decided in another petition-circulating case that the free speech provisions of the state Constitution offer "greater protection than the First Amendment now seems to provide."[39] We flatly refused to follow the decision in the Oregon case.

The United States Supreme Court granted a hearing in that case and I must confess we sensed doom to our theory of state constitutionalism. But, to our delight, the Supreme Court agreed with us, 9-0. Justice Rehnquist wrote the opinion that declared the reasoning in their previous decision "does not . . . limit a State's authority to exercise its police power or its sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution."[40]

Justice Rehnquist was absolutely correct. We are all in good company, because James Madison also agrees with us. He wrote in *The Federalist Papers:*

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37 *Diamond v. Bland*, 3 Cal.3d 653.

38 *Lloyd v. Tanner*, 407 U.S. 551 (1972).

39 *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 905-906.

40 *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 75 (1980).

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part, be connected. The power reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the State."[41]

State courts must be precise in making it abundantly clear when they rely on state authority. Justice Hans Linde of the Oregon Supreme Court did so in 1983 in his state: "Lest there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines."[42] We also did so in the *Brisendine* case: "[O]ur decisions have often comported with federal law, yet there has never been any question that this similarity was a matter of choice and not compulsion."[43]

We must be alert to assure that federalism does not become an anachronism. Many, if not most, states have an independent historical source for their constitutions. Louisiana looked to French civil law. California's original charter adopted in 1849, a year after the Treaty of Guadalupe Hidalgo, was handwritten in Spanish as well as in English. The bills of rights of many state constitutions contain more individual guarantees than those enumerated in the federal Constitution's first ten, plus the fourteenth, amendments.

The use of state constitutions is no sport designed to thwart federal review, although much can be said for hastening the finality of court decisions. Nor is there anything inappropriate in state courts deliberately seeking adequate nonfederal grounds upon which to base opinions.

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41 The Federalist No. 45, at 292-283 (James Madison) (Clinton Rossiter ed., 1961).

42 *State of Oregon* v. *Kennedy*, 295 Or 260, 267.

43 *Brisendine*, 13 Cal.3d at 548.

There is no impropriety when an appellate court of a state evaluates state legislation, state administrative action, or the conviction of a defendant in a state prosecution, pursuant to the provisions of the state constitution. Indeed logic would seem to compel that course. If the result is fragmentation of a national consciousness, it is justified in furtherance of an expanded liberty.

The bottom line is that federal institutions do not have all the solutions. If the fifty states are encouraged to experiment, to retain their historic individuality, to seek innovative responses to problems of protecting individual liberty, ultimately some worthwhile results will be produced. While the U.S. Constitution and the U.S. Supreme Court establish the floor for individual rights, the states may determine the height of the ceiling.

I am hopeful that the perspective of history will look back on these years of some despondency on the national legal scene, and liken state courts to those monks who kept classical learning alive in the Dark Ages so that it might be rediscovered in the Renaissance.

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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.

past life of the woman. Her true name was used in the film, thus, as she alleged in her complaint, exposing her to "obloquy, contempt and ridicule, causing her grievous mental and physical suffering."

The court held that the right of privacy, although unknown at common law, was a viable concept, subject only to some restrictions. The court noted that the state Constitution guaranteed the right to pursue and obtain safety and happiness. This right, wrote the court, "by its very nature includes the right to live free from the unwarranted attack of others upon one's liberty, property and reputation. Any person living a life of rectitude has that right to happiness which includes a freedom from unnecessary attacks on his character, social standing or reputation."[50]

The California court declared certain exceptions to one's right to privacy. There can be no insulation for one involved in a current news event, or for a person in whom the public has a legitimate interest, as, for example, a candidate for political office. The Red Kimono film would have created no problem, held the court, had it limited revelations to events that transpired in the courtroom, but the use of the woman's name did invade her privacy.

Parenthetically, I find the court's conclusion in that respect to be confusing. If events that transpired in the courtroom were permissible, then the woman's true name would have been revealed, for certainly her name was used in court. However, the bottom line is that a right of privacy was formally recognized in the court's decision.

Forty years later the matter was cleared up when, in 1971, another privacy case reached the Supreme Court of California. Marvin Briscoe had hijacked a truck in Danville, Kentucky, in 1956. It was a botched affair: the truck appeared to contain valuable cargo, but only four bowling pin spotters were on board. A gun battle with police ensued; Briscoe was captured, tried, convicted, and sentenced to prison. After completing his sentence, as described by the Court, he "abandoned his life of shame and became entirely rehabilitated, and has thereafter at all times lived an exemplary, virtuous and honorable life. He has assumed a place in respectable society and made many friends who were not aware of the

50 *Id.* at 291.

incident in his earlier life."[51] He had an eleven-year-old daughter who had no knowledge of his unsavory past.

Eleven years later, *Reader's Digest* published an article entitled "The Big Business of Hijacking," and in it mentioned Marvin Briscoe by name.[52] The article did not reveal the date of the Briscoe offense; conceivably a reader could conclude it was a recent transgression. As a result of the revelation, Briscoe alleged his friends "scorned and abandoned" him. He sued *Reader's Digest*.

Obviously, there could be no cause of action for libel. Truth is a defense to libel, and the article was truthful. The issue was whether Briscoe, by the passage of time and the completion of rehabilitation, had earned a right of privacy. Justice Raymond Peters, writing the opinion for the California Supreme Court, was concerned with protecting the individual while at the same time respecting the freedom of the press to disseminate information.

There is no question that the press may publish truthful reports of current crimes and identify offenders or suspects. There is also no doubt that the press may relate past crimes for their educational or entertainment value. The problem arises when the resuscitation of past events includes identification of the actors who, with the passage of time, may have substantially changed their lifestyles and associations. In that circumstance a balancing of interests is essential. A court must weigh the public's interest in the dissemination of news, information, education and possible entertainment versus the individual's interest in anonymity, peace of mind and prevention of emotional disturbance.

The weighing process is not always easy. There are times when even old tales may be revived in the public interest. Names may be significant in cases involving treason, gangster mass murders, political assassinations, tanker oil spills, and such bizarre events as the Jonestown mass suicide. In such instances, the cast of characters, by the accident of history, may have lost their privacy for all time. Those occasions are undoubtedly rare.

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51 *Briscoe v. Reader's Digest Association, Inc.*, 4 Cal.3d 529, 532 (1971).

52 "The Big Business of Hijacking," *Reader's Digest*, Jan. 1968, 118.

Briscoe was not in that predicament. The California Court held that the deleterious consequences of media revelation of his past crime — ostracism, isolation, and alienation of family and friends — and the frustration of the benefits to society of rehabilitation, all combined to outweigh any potential benefits the media might have in identifying him by name. The story of hijacking trucks, the methods used, the apprehension of the perpetrators, could be related without revealing the names of those who committed the crimes years ago. Briscoe was permitted to pursue his lawsuit, not for libel because the article was essentially true, but for invasion of his right of privacy.

The value of privacy to the rehabilitation process cannot be overestimated. One of the premises of that process is the encouragement to the criminal to change his course of life, that if he foregoes criminality and follows a path of rectitude he will be permitted to rejoin the bulk of law-abiding members of the community, those by whom he had been ostracized for his antisocial acts. In return for turning over a new leaf, he should be allowed to melt into the shadows of obscurity.

In a perfect world, one's neighbors and friends would evaluate a person by his present worth, not by the errors of his past. Unfortunately, there is prurient interest in the lurid past of anyone in the public eye, whether there by design or involuntarily. To avoid a canyon of echoes, the right of privacy has developed in the law.

I must concede a certain irony in this development. Actually, one probably had less privacy in the small communities of a century ago than he has in the modern metropolis. And this was without any enforceable right. In small-town America most people knew, and perhaps still know, what their neighbors are doing, due primarily to extended family networks, group relationships and rigid community mores. Any deviation from what has been deemed the norm is likely to be the subject of backyard gossip.

However, exposure of the past of one living in a metropolitan area has serious consequences — to his family and friends and to his economic wellbeing. As a result, the right to privacy has grown with the increased capability of the mass media to destroy an individual's anonymity, to

intrude upon his most intimate activities and relationships, and to expose to public scrutiny his most personal characteristics.

The right of privacy has been extended to the economic field in a case in which I wrote the opinion for the California Supreme Court.[53] Wesley Burrows was a lawyer in San Bernardino. A deputy sheriff contacted banks in which Burrows had accounts and received from them photocopies of his bank statements. On the strength of that information, criminal charges were instituted against the lawyer. Under United States Supreme Court opinions that obtaining of that information from banks would not be improper because it was voluntarily divulged by the banks, Burrows could not have prevailed. But the California Supreme Court held that the customer of a bank expects that documents such as checks, that he transmits to the bank in the course of his business operations, will remain private, and that such an expectation is reasonable.

We pointed out that for all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a bank customer reveals many aspects of his personal affairs, opinions, habits and associations. The totality of bank records are a mini-biography. As a result, it was held that the bank cannot waive the customer's right of privacy, but, of course, the records can be obtained by legal process — a subpoena or search warrant issued by a magistrate upon a proper showing.

In my opinion for the Court, I observed that the "development of photocopying machines, electronic computers and other sophisticated instruments have accelerated the ability of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently, judicial interpretations of the constitutional protection of individual privacy must keep pace with the perils created by these new devices."[54] Otherwise, I feared that the apprehension of [future] Justice Brandeis, expressed in an 1890 law review article,

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53 *Burrows v. Superior Court*, 13 Cal.3d 238 (1974).

54 *Id.* at 248.

might come to pass: "What is whispered in the closet shall be proclaimed from the house-tops."[55]

The Burrows case illustrated another important aspect of law: the ability of states to follow a different course than that charted by federal authorities. Under the doctrine of federalism and states' rights, the fifty states are not compelled to abandon state principles and blindly adapt their law to federal pronouncements. Chief Justice Rehnquist conceded in a 1980 case that a state may "exercise its police power or its sovereign right to adopt in its constitution individual liberties more expansive than those conferred by the Federal Constitution."[56]

Privacy enters the scene in a variety of situations. Routine testing for drug use by employees of the Customs Service was upheld in 1989 by the United States Supreme Court. Finding that the testing was a mere administrative rather than criminal search, the Court declared, "The Government's need to discover latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion."[57] The conclusion was that customs employees "have a diminished expectation of privacy."[58] I suggest that could not be ascertained from the employees' opposition to the program of compulsory testing.

Back in 1975, intelligence units of the local police department assigned officers to pose as students and to gather information about college professors and students who might express unorthodox views. The California Supreme Court found such covert activity inhibited free speech and also constituted an invasion of the right of privacy.[59] The Court relied on a state constitutional provision which specifically guarantees privacy, and it noted the arguments made when the measure was proposed to the electorate and passed:

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55 Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193, 193 (Dec. 15, 1890).

56 *Pruneyard Shopping Center, Inc., v. Robins*, 447 U.S. 74, 75.

57 *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989).

58 *Id*. at 657.

59 *White v. Davis*, 13 Cal.3d 757, 774 (1975).

> The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with whom we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes . . . .
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> . . . The proliferation of government and business records over which we have no control limits our ability to control our personal lives.[60]

Using public funds to place police officers in college classes seems futile and a waste of resources. Fortunately, it was stopped in its tracks by adaptation of the right of privacy of professors and students.

Airport security checks are clearly an invasion of one's personal privacy in his person and in his luggage and other effects. However, we are willing to permit that limited intrusion because it is not for criminal purposes, but is deemed an administrative search to assure the physical safety of the aircraft on which we intend to travel.

The stopping of motor vehicles at sobriety checkpoints also treads upon individual privacy. A majority of courts uphold these roadblocks as so-called administrative searches. I have my doubts. When uniformed law enforcement officers stop motorists to check them for intoxication, shine a light in the car to observe any open containers of alcohol or other evidence of intoxication, with special officers ready to administer blood-alcohol tests and booking officers and police vans available to take potential offenders to jail, it is not a mere administrative inspection but an ordinary police detention. And police detentions are permitted only in accordance with well-established rules. Roadblocks would not appear to comply with those law enforcement rules.

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60 Kenneth Cory and George Moscone, "Argument in Favor of Proposition 11," in *Proposed Amendments to Constitution — Propositions and Proposed Laws Together with Arguments — General Election, Tuesday, November 7, 1972* (1972), 27.

Drunk driving, like the use of dangerous drugs, unquestionably endangers innocent victims and society as a whole. Thus, courts are often inclined to bend constitutional guarantees in order to apprehend and convict malefactors.

We must not encourage invasions of the right of privacy. It is a bulwark of freedom and democracy. As Justice Douglas wrote, privacy "is a powerful deterrent to anyone who would control men's minds."

And, he added, "Once privacy is invaded, privacy is gone."[61]

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II. STATES AND THE RIGHT TO PRIVACY[62]

In extolling the right to privacy in marital affairs, Justice Douglas asserted that the right is "older than the Bill of Rights — older than our political parties, older than our school system."[63] And in *Eisenstadt v. Baird*, he [sic; Justice Brennan] emphasized that, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion . . . ."[64]

As we well know, the right of privacy was first articulated in a case by Justice Brandeis in his dissenting opinion in *Olmstead v. United States*; it is, he said simply, "the right to be let alone."[65]

The intrusion of government, through broadcasts on municipal streetcars and buses, aroused the concern of Justice Douglas in his dissent in *Public Utilities Commission v. Pollack*. The right of privacy, he asserted, "is a powerful deterrent to any one who would control men's minds." And, he warned, "once privacy is invaded, privacy is gone."[66]

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61 *Public Utilities Commission v. Pollack*, 343 U.S. 452, 469 (1952) (Douglas, J. dissenting).

62 *Privacy Journal* 15:10 (Aug. 1989), 1-3, 6. The published version has been edited for publication. All footnotes are provided by the editor.

63 *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

64 405 U.S. 438, 453 (1972) (Brennen, J., concurring with Douglas, J., for the Court).

65 277 U.S. 438, 478 (1928).

66 343 U.S. 452, 469 (1952).

For all the pious declarations on preserving privacy, the right is not guaranteed in the federal Constitution. Its protection rests not upon the sanctity of a charter provision, but upon judicial interpretation of what constitutes a "penumbral" right. Exercising prerogatives under our system of federalism, however, a number of states have specifically guaranteed a right of privacy in their state constitutions. For example, in 1974, California amended its Bill of Rights to assure that people may pursue and obtain "safety, happiness, and privacy." While happiness and privacy may often be redundant, the people of the state desired to make certain both were protected.

Privacy was judicially recognized in California nearly six decades ago in *Melvin v. Reid*, known as "The Red Kimono" case.[67] The suit 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 of her earlier life; . . . ."[68] A motion picture company produced a film entitled "The Red Kimono" and exploited it in advertising as being the true story of the unsavory incidents in the life of the plaintiff. Her name was used and this, of course, revealed to her current friends the details of past events. The court held that the right of privacy, though unknown at common law, was a viable concept, subject to enumerable exceptions. There is no privacy, held the court, "in the dissemination of news and news events, nor in the discussion of events of the life of a person in whom the public has a rightful interest, nor where the information would be of public benefit as in the case of a candidate for public office."[69] The *Melvin v. Reid* court found that there would have been no problem had the film producers limited their revelations to events that had transpired in the public courtroom trial for murder, but the use of the plaintiff's true name did invade her privacy. This is somewhat difficult to comprehend, since undoubtedly her true name was used in the trial. Nevertheless, a right of privacy was specifically recognized.

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67 112 Cal.App. 285 (1931).

68 *Id.* at 286-7.

69 *Id.* at 290.

It took a 1971 case to clear up the matter in California. Marvin Briscoe had hijacked a truck, was caught, tried and served his sentence. Thereafter he "abandoned his life of shame and became entirely rehabilitated."[70] He married, had a daughter; neither she nor his friends knew about the past offense. That is, until *Reader's Digest* published an article on hijacking generally, and discussed Briscoe's case as "typical."[71]

In *Briscoe v. Reader's Digest Association, Inc.*, the plaintiff conceded the truth of the article, admitted the subject of the article qualified as being newsworthy, but contended the use of his name invaded a right to privacy that he had earned by the passage of time — eleven years — and by his rehabilitation.

Justice Peters, writing for a unanimous California Supreme Court, discussed the problem of obtaining privacy in modern times. Perhaps, he suggested:

> [I]n many respects a person had less privacy in the small community of the 18th century than he did in the urbanizing late 19th century or he does today in the modern metropolis. Extended family networks, primary group relationships, and rigid communal mores served to expose an individual's every deviation from the norm and to straightjacket him in a vise of backyard gossip. Yet . . . [Justice] Brandeis perceived that it was mass exposure to public gaze, as opposed to backyard gossip, which threatened to deprive men of the right of "scratching wherever one itches."[72]

There is no question that appreciation of the right to privacy has grown with the increasing capability of the mass media to destroy an individual's anonymity, intrude upon his most intimate activities, and expose his most personal characteristics to public gaze. It was clear to the *Briscoe* court that the right to keep information private inevitably would clash with the right of the media to disseminate information to the public. Thus a balancing of interests becomes necessary: the public interest in the dissemination of news, information and education, versus

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70 4 Cal.3d 529, 532 (1971).

71 "The Big Business of Hijacking," *Reader's Digest*, Jan. 1968, 118.

72 *Briscoe,* 4 Cal.3d at 533.

the individual's interest in anonymity, peace of mind and freedom from emotional disturbance. There is an obvious distinction between current news, which would appear to justify complete reporting, and stories about past events, which would suggest the need for editing in order to prevent unnecessary damage to reputations. There may be times when the public interest would be served by reviving old tales — cases involving treason, a political assassination, gangster mass murders, the Jonestown mass suicide, tanker oil spills — and in such instances the persons involved may by the accident of history lose their privacy for all time. But those occasions will be rare.

The *Briscoe* court held that the deleterious consequences of media revelation of his past — ostracism, isolation, and alienation of family and friends — coupled with frustration of the benefits of rehabilitation combined to outweigh any potential benefits the media might have in identifying him by name. Briscoe was allowed to continue his lawsuit, not for libel because the story was essentially accurate, but for invasion of his right to privacy.

How the California court, if it adheres to precedent, would react to the recent Supreme Court cases on privacy remains to be seen. In *National Treasury Employees Union v. Von Raab*,[73] the High Court majority upheld routine testing for drug use for employees of the Customs Service. Said the Court: "[T]he traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions," and "The Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion."[74] The conclusion was that customs employees "have a diminished expectation of privacy."[75]

Under the doctrine of federalism and states' rights, the fifty states are not compelled to follow the drug testing case. As Justice Rehnquist wrote in *Pruneyard Shopping Center v. Robins*, a state may "exercise its police power or its sovereign right to adopt in its constitution individual

[73] 489 U.S. 656, (1989).

[74] *Id.* at 688

[75] *Id.* at 657

liberties more expansive than those conferred by the Federal Constitution . . . ."[76]

California has accepted that invitation on a number of occasions. For a scenario on this subject, take a situation in which a police officer or public prosecutor walks into a bank and, with no authority of process, demands to examine the bank records of a named individual or corporation. No constitutional violation, contends the U.S. Supreme Court in *United States v. Miller*.[77] But the California Supreme Court pointed out that one's cancelled checks, loan applications, and other banking transactions are a mini-biography and that one reasonably expects his bank records to be used only for internal bank processes; therefore, an examination of them violates the state constitutional right of privacy, unless the records are obtained by a warrant or subpoena.[78] In *White v. Davis*,[79] the California Court found covert police surveillance and intelligence gathering in university classes not only inhibited free speech but also constituted an invasion of the state constitutional guarantee of privacy. The Court cited the ballot arguments when privacy was added to the Constitution:

> The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with whom we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or embarrass us . . . . The proliferation of government and business records over which we have no control limits our ability to control our personal lives.[80]

On the other hand, the current California Court has given some indication that it would tolerate administrative searches and generously defines what they are. It did so with regard to airport security screening

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76 447 U.S. 74, 75 (1980).

77 425 U.S. 435 (1976).

78 *Burrows v. Superior Court*, 13 Cal.3d 238 (1974).

79 13 Cal.3d 757 (1975).

80 *Id*. at 774.

searches[81] and sobriety checkpoints.[82] The latter was decided by a mere four-to-three vote. The dissent argued that roadblocks cannot be deemed mere administrative searches. Said the opinion of the three justices [paraphrasing]:

> When uniformed law enforcement officers stop motorists to check them for intoxication, shine a light in the car to look for open containers of alcohol or other evidence of intoxication, with special officers ready to administer blood-alcohol tests and booking officers and police vans ready to take offenders to jail, it is not an administrative inspection but an ordinary police detention, which must be justified on the same ground as any other detention for the purposes of law enforcement.[83]

Therefore, I reluctantly conclude that, with some dissent it is likely that California and most states will yield to the apparent public demand that something, indeed anything, be done to stem the tidal wave of drugs. That random testing is generally ineffective will probably not deter acceptance of the recent Supreme Court rulings.

In short, defense of the right of individual privacy is certain to be a continuous and difficult task. But it is a task that cannot be abandoned.

* * *

III. PRESERVING PRIVACY[84]

I am delighted to be here at the Fiji Law Convention, under the able direction of the distinguished solicitor, Mr. G. P. Lala.

At first I thought I would entertain you with some superficial tips on how barristers can win or lose cases. I particularly had in mind some stories

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81 People v. Hyde, 12 Cal.3d 158 (1974).

82 *Ingersoll v. Palmer*, 43 Cal.3d 1321 (1987).

83 *Id.* at 1352 (Broussard, J., dissenting; Mosk and Arguelles, JJ., concurring).

84 This paper was delivered as a speech by Justice Mosk at the Fiji Law Convention, Warwick Hotel, Sigatoka, Fiji, July 31, 1993. It has been edited for publication. All footnotes are provided by the editor.

about cases in which barristers — or lawyers, as we prefer to call them — made good impressions on judges or faltered badly in their presentations.

One thing that judges respect is the ability of counsel to respond appropriately to questions from the bench, often questions that are deliberately hostile. A riposte, if not insulting, is genuinely appreciated.

For example, a recent colloquy between our bench and counsel occurred in connection with a suit to challenge the validity of a municipal ordinance that prohibited fortunetelling.[85] It did not license fortunetellers or regulate their operation, but totally prohibited the act of fortunetelling. A woman fortuneteller brought suit to enjoin enforcement of the prohibition and the case ultimately came to our Court. As the attorney for the fortuneteller rose to argue, our chief justice declared, "Counsel, you have us at a disadvantage." The attorney, taken aback, asked, "Why, Your Honor?" "Well," responded the chief justice, "Hasn't your client told you how this case will come out?"[86]

That would stop short most attorneys. But not this counselor. He replied, "Your Honor must realize that I did not consult my client, she consulted me."

I hasten to add that generally, I do not condone the use of humor in a courtroom. The proceedings are much too serious to the participants to justify ridiculing them or their counsel. However, a lighter moment that does not injure feelings may, on rare occasions, be justified to lessen the normal tensions of judicial proceedings.

On reflection, I realized that through your personal experiences you probably know the subject of winning and losing cases better than I. So I have chosen to speak about the effects of modern technology on individual rights.

That seems entirely foreign to me, since in many respects I am quite old-fashioned. I still peck away at a typewriter for opinions and correspondence rather than to use any modern processing device. My wife

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85 *Spiritual Psychic Church of Truth, Inc. v. City of Azusa*, 39 Cal.3d 501 (1985) (opinion by Mosk, J.)

86 Justice Mosk included this anecdote in several papers, including: "In Defense of Oral Argument," *Journal of Appellate Practice and Process* 1:1 (Winter 1999), 25; and "Ex Ante: Courtroom Humor," *The Green Bag: An Entertaining Journal of Law* 2:1 (Fall 1998), 1-2.

often tells me that I must enter the twentieth century. My response is that I will wait for the upcoming twenty-first century and just skip the twentieth.

Perhaps that may explain why I have been interested in the effects of modern technology on individual rights. Trying to synthesize individual rights and modern technology is comparable to looking down a railroad track for the place at which the two rails will converge. The more we advance, the farther away that point appears. I suggest that we may well be undertaking an exercise in futility, that technology will inevitably remain an implacable foe of individual rights. The best we can hope is to limit the conflict. I doubt that we can end it or totally win it.

I do not mean to sound as pessimistic as a prominent comedian-philosopher. In a recent college graduation address he observed: "Now more than any other time in history mankind faces a crossroads: one path leads to despair and utter hopelessness, the other to total extinction. Let us pray, he said, we have the intelligence to choose wisely."[87]

When we speak of civil rights in the United States, we envelope a wide spectrum. We insist upon freedom of speech, freedom of press, freedom against discrimination, the right of assembly, the right to contract, the right to petition the government, the right to a speedy trial, the right to acquire and retain property, the right to an education, the right to habeas corpus, the right to due process of law, the right to equality before the law. Indeed, I could go on for several more minutes enumerating rights that individuals claim in modern American society.

Many of the foregoing are contained within the constitutions of the United States and of the fifty American states. However, I am inclined to agree with a distinguished jurist, Learned Hand, who wrote four decades ago: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; . . . ."[88] I would not suggest for one moment that constitutions are unnecessary, although the British seem to have managed reasonably well without one. You have had one for

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87 Woody Allen, "My Speech to the Graduates," *Side Effects* (New York: Random House, 1980), 75.

88 Learned Hand, in I. Dillard, ed., *The Spirit of Liberty: Papers and addresses of Learned Hand* (New York: Alfred A. Knopf, 1952), 190.

three years. I do suggest that with or without a written constitution, men and women must be firm in their resolve to preserve liberty; it cannot be done for them.

There is one right that I have chosen to emphasize today, because I believe it assumes great significance in this age of technology: the right of privacy. Though not mentioned in many constitutions, it has been generally recognized as common law.

A distinguished professor has pointed out that "the increased sophistication and miniaturization of snooping devices create a serious fear that the sense of privacy so essential to membership in a liberal society may be systematically obliterated by the listening ear."[89]

On the one hand, law enforcement officers claim, with considerable justification, that the new technical devices make their task more efficient in the detection and apprehension of predatory criminals. On the other hand, surveillance by machine sometimes constitutes a clear invasion of the privacy not only of the potentially guilty but also of the innocent.

In 1928, the United States Supreme Court was faced with its first case involving evidence obtained by electronic devices. It held that wiretapping was not a "search" and that words cannot be "seized" within the meaning of the search and seizure provision of the Fourth Amendment to the United States Constitution.[90] To that holding, Justice Brandeis wrote a classic dissent. He said:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred . . . the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.[91]

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89 Kent Greenawalt, "The Right to Privacy," in Norman Dorsen, ed., *The Rights of Americans: What They Are — What They Should Be* (New York: Pantheon, 1971), 390.

90 *Olmstead v. United States*, 277 U.S. 438 (1928).

91 *Id.*, at 478.

The right to be let alone has become a part of our legal lore.

Let me illustrate the conflict between privacy and technology with an example, not entirely hypothetical because it is occurring with some frequency.[92] Law enforcement officers, frustrated in their effort to confirm from any land-based vantage point information that marijuana is being cultivated on a certain farm, survey the area from aircraft without obtaining a search warrant. Marijuana is spotted in the backyard; on the strength of that knowledge a search and arrest warrant are obtained. The issue then is whether the occupant of a home has a reasonable expectation that he may conduct affairs in his enclosed backyard in privacy. Certainly the occupant anticipated that what took place in his backyard would remain secluded from the view of outsiders. Thus, the principal focus is whether, as an objective matter, he should have been entitled to demand the privacy he sought — even from airborne observation by law enforcement officials.

The reasonable expectation of privacy test, by its nature, requires reconciliation of competing social interests, rather than rigid application of formalistic, judicially created rules. This is all the more true where the alleged challenge to individual security comes from a rather novel form of police investigation. Still, there is relevant precedent. The United States Supreme Court has held that, as with the home itself, those activities taking place within the dwelling's curtilage — "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life'" — may reasonably be expected to remain private.[93] An enclosed backyard whose outer boundary was within close proximity to appellant's dwelling would arguably satisfy this definition.

Prosecutors, however, point out that even with respect to those activities which occur in a living room, one is not entitled to demand privacy from peering officers of the state if the activities are plainly visible to officers. For example, the shades are up and the lights are on. Given that airspace occupied by the police is a lawful public location, prosecutors argue, the police observation of a backyard is well within the plain view doctrine, and therefore no violation of expected privacy.

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92 *See*, e.g., *People v. Cook*, 41 Cal.3d 373.

93 *Oliver v. United States*, 466 U.S. 170, 180 (1984), quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886).

This contention holds superficial appeal. Law enforcement people imply that they are entitled to use a technological advance — mechanical flight — which has merely given the public at large a vantage point it did not previously enjoy. But the prevalence of air travel does not excuse the delicate balancing of societal and privacy interests which underlie protections against unreasonable searches and seizures. Striking that balance, one must conclude that an individual has a reasonable expectation of privacy from purposeful surveillance from the air of his curtilage, i.e., a backyard adjacent to his house. Beyond the curtilage, of course, is another matter.

Obviously, one has no reasonable expectation of privacy in the conduct of criminal affairs per se. it is also clear that eavesdropping or surveillance conducted for a legitimate purpose will generally be upheld, e.g., gathering information by a credit reporting agency, or investigation by a government workers' compensation agency. Hence, there is theoretical appeal to the notion that warrantless surveillance is not an unreasonable search if it is narrowly tailored to discover crime while leaving all legitimate private activity undisturbed.

However, a United States Supreme Court case illustrates the problem with that approach. In *United States v. Karo*,[94] federal agents placed a "beeper" in a can of ether sold to suspected drug manufacturers. The agents could track the location of the can by monitoring the radio signals from the beeper. They later obtained a search warrant for a residence, on grounds that beeper signals from within the house indicated the can was there. The court suppressed the evidence yielded by the warrant.

The government argued that monitoring of the beeper within the house was permissible because it could only disclose the location of illegal drug ingredients, exposing nothing else about the activities inside. The Supreme Court rejected this contention. It reiterated that the police may learn by electronic means what legitimate personal surveillance would have disclosed. However, the Court declared, government agents may not use such devices to intrude where they themselves have no right to be. "The monitoring of an electronic device such as a beeper," said the majority:

94 468 U.S. 705 (1984).

> is, of course, less intrusive than a full-scale search, but it does reveal a critical fact about the interior of the [residence] that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant. . . .
>
> . . . Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of [constitutional] oversight.[95]

Dogs are hardly an object of the new technology. But law enforcement people point to the use of dogs to "sniff" airport luggage for contraband drugs as an indication that new techniques can be employed to disclose only evidence of crime without interfering with the reasonable expectations of ordinary travelers. However, the dog cases are easily distinguishable. While persons have a right to expect privacy free from governmental intrusion in their homes, they have no equivalent right to expect that odors emanating from luggage in a public airport will go unnoticed by authorities.[96]

The monitoring of conversations by hidden electronic devices has been used for some time, and generally with acceptance by American courts. When the recording is done by a participant in the conversation, the traditional principle has been that the unwitting party takes his chance by talking with someone who may subsequently betray his confidence. In *Lee v. United States*,[97] the Supreme Court upheld the introduction of evidence transmitted by an electronic device carried by a friend of the defendant who intentionally induced incriminating statements. And in *Lopez v. United States,*[98] the Court accepted evidence obtained by a miniature recorder carried by an Internal Revenue agent who anticipated that he was about to be bribed, and he was.

However, a court in our state of New Hampshire, put it this way:

> If the peeping Tom, the big ear and electronic eavesdropper have a place in the hierarchy of social values, it ought not to be at the

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95 *Id.*, at 715-716.

96 *United States v. Place* (1983) 462 U.S. 696; *People v. Mayberry*, 31 Cal.3d 335.

97 343 U.S. 747 (1952).

98 373 U.S. 427 (1963).

> expense of a married couple minding their own business in the seclusion of their bedroom. The use of parabolic microphones and sonic wave devices designed to pick up conversations in a room without entering it and at a considerable distance away makes the problem far from fanciful.[99]

How about concealed cameras in stores, to detect shoplifting by customers or embezzlement by employees? Generally, this has been helpful to law enforcement and has been upheld, even though the cameras do intrude on the legitimate activities of customers and employees. Many an armed robber of a small shop has later been identified by the photographs taken during the actual robbery.

Some large department stores at one time installed hidden cameras in dressing rooms in which customers tried on clothes for possible purchase. Their purpose was to detect shoplifting. A number of courts have frowned on this invasion of the customers' privacy in that it exposed to view their unclothed bodies.

At every airport in the world today, there are metal detection devices, and all of us submit to passage through the device in order to board an airplane. These have been universally upheld as being administrative searches — i.e., not for the purpose of detecting crime but merely inspections to assure safety of aircraft.[100] As stated in the leading case on the subject of administrative searches, "because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy."[101] However, if one tried to carry a lethal weapon or illegal narcotics through the detection device, I suspect he might be arrested, not merely prevented from boarding the aircraft.

Two other schemes are on the fringes of legal acceptance: polygraphs, a machine, and hypnosis, a quasi-medical technique. Polygraphs, or lie detectors, are being used by prospective employers to ascertain the truth of representations being made by persons seeking employment. Many labor

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99 *Hamberger v. Eastman*, 206 A.2d 239 (NH 1964).

100 *United States v. Bell*, 464 F.2d 667 (2d Cir. 1972); *United States v. Epperson*, 454 F.2d 769 (4th Cir. 1972).

101 *Camara v. Municipal Court,* 387 U.S. 523, 537 (1967).

unions fight the use of the machine for the interrogation of hired employees, and generally, they are successful.[102]

The results of lie detector machines are not admissible in American courts of law since their conclusive reliability has never been established. I had a psychiatrist friend who once told me that lie detectors are correct fifty percent of the time. "You can get the same result by tossing a coin," he advised me.

Hypnosis was being used by law enforcement officers to fortify fragmentary information given to them by crime victims or witnesses. Based upon the almost unanimous literature questioning the validity of hypnotized testimony, most courts have rejected it.[103] Experts in the field have reached four basic conclusions:

1. Hypnosis is by its nature a process of suggestion, and one of its primary effects is that the person hypnotized becomes extremely receptive to suggestions that he perceives as emanating from the hypnotist. The suggestions can be entirely unintended — indeed, unperceived — by the hypnotist himself.

2. The person under hypnosis experiences a compelling desire to please the hypnotist by reacting positively to these suggestions, and hence to produce the particular responses he believes are expected of him.

3. During the hypnotic session, neither the subject nor the hypnotist can distinguish between true memories and pseudo-memories of various kinds in the reported recall; and when the subject repeats that recall in the waking state (e.g., in a subsequent trial), neither an expert witness nor the judge can make a similar distinction. No one can reliably tell whether it is an accurate recollection or mere confabulation.

4. A witness who is uncertain of his recollections before being hypnotized will become convinced by that process that the story he told under hypnosis is true and correct in every respect. This effect is enhanced by two techniques commonly used by lay hypnotists: before being hypnotized the subject is told that hypnosis will help him to "remember very clearly everything that happened" in the prior event, and/or during the

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102 *See*, e.g., *Long Beach City Employees Assn. v. City of Long Beach*, 41 Cal.3d 937 (1986).

103 *See*, e.g., *People v. Shirley*, 31 Cal.3d 37 (1982).

trance he is given the suggestion that after he awakes he will "be able to remember" that event equally clearly and comprehensively. Further enhancement of this effect often occurs when, after he returns to the waking state, the subject remembers the content of his new "memory" but forgets its source, i.e., forgets that he acquired it during the hypnotic session.

An interesting case was argued before our Court just last month. A prisoner in a state prison jumped or fell from a wall, fractured cervical vertebrae and became a quadriplegic. As a result, medical personnel must assist him in the performance of all bodily functions.

Sometime thereafter, he refused to be fed, causing severe weight loss and inevitable death. While the prisoner did not specifically declare he was in effect committing suicide, it was plain that such was his intention. The medical doctor at the prison brought a lawsuit to ascertain what his duties were, i.e., whether he should feed the prisoner by force if necessary.

Back in 1972, I wrote an opinion for our Court in which we said, "A person of adult years and in sound mind has the right, in the exercise of control over his body, to determine whether or not to submit to lawful medical treatment."[104]

Two questions arose: does that right to refuse medical treatment apply even if the inevitable result is death, and does the right apply to one confined in a prison where his rights are necessarily curtailed? Our court is answering both questions in the affirmative.

Now we come to computers, perhaps the most visible contemporary threat to individuality. Yet because computer technology is so varied in design and concept, it is extremely difficult for individuals or for society to control dissemination of collected data.

This is not all bad, I hasten to add. Computer technology has allowed our Secret Service to compile dossiers on more than 50,000 persons who are potentially threatening to the President of the United States. Such comprehensiveness and accessibility enables the Secret Service to know whom to watch wherever the President goes.[105] This, I think, is worthwhile,

104 *Cobbs v. Grant*, 8 Cal.3d 229, 242 (1972).

105 Dorsen, *The Rights of Americans*, 319.

though there is always the danger that in the vast list may be persons who are not truly dangerous, but merely nonconformist in political beliefs and activities.

I wonder about a decision of the United States Supreme Court that upheld a New York law that established a centralized computer file to contain the names of every person who obtained, pursuant to a physician's prescription, certain drugs for which there is both a lawful and unlawful market.[106] The Court declared that

> disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosures to representatives of the State having responsibility for the health of the community does not automatically amount to an impermissible invasion of privacy.[107]

Frankly, I am not so sure of that. Is not the prescription an element of the patient-doctor privilege?

There are several remedies for invasion of privacy: compensatory damages, punitive damages, injunctive relief, and in some instances, criminal penalties.

I am apprehensive that in the days ahead one of the great obstacles to both privacy and the endless search for truth will be our modern phenomenon: the mechanized society. Data processing machines are now used for every conceivable person-saving purpose. Eight-year-old children use computers instead of learning mathematics, and reading the classics loses out to zapping invaders from another planet on a video screen. Business firms use computers to select employees and to devise programs. Law firms are now using machines in place of solid library research.

Every person who enters the work force and obtains appropriate identification, becomes a mere number in a machine. His number is used in our country for filing purposes by — to mention just a few — the federal taxing agency, retirement funds, law enforcement agencies, welfare departments

106 *Whalen v. Roe*, 429 U.S. 589 (1977).

107 *Id*., at 602.

and other social service agencies, civil service commissions, veterans administration, schools, libraries, banks, stock brokerages, insurance companies, departments of motor vehicles and credit card companies. In short, one must have a number to exist, and when he exists he is reduced to a number. The dignity of individuality is constantly demeaned.

While there no longer appears any alternative other than to do everything necessary to live with automation and to govern it, we must never allow our minds to become automated, to think merely when programmed, to operate only on selected inputs of information. We must always bear in mind that we are free men and women first, and members of an automated society only thereafter. We can do what machines can never do — we can think majestically and dream great dreams.

Thomas Edison was once reproved for trying out unsuccessfully some 1,200 different materials for the filament of his great dream, the incandescent electric light globe. "You have failed 1,200 times," a regimented thinker of that day chided him. "I have not failed," replied Edison, "I have discovered 1200 materials that won't work."

As I have indicated, a computerized society is a menace not only because it discourages innovative thought, but because it threatens one of our most important liberties: the right to privacy.

The concept of a common law right of privacy remains largely undefined, but at least three facets have been revealed. The first is the right of the individual to be free in his private affairs from surveillance and intrusion.

The second is the right of an individual not to have his private affairs made public. The third is the right of an individual to be free in action, thought, experience, and belief from external compulsion. Obviously, none of these rights as so stated is absolute.

The question, then, is to what extent officials may properly intrude upon these rights. That they do so is obvious. How much intrusion is necessary, how much desirable, and how much permissible will be the concern of all of us more and more in the years ahead.

Let me give one additional illustration. As a general proposition, we agree one should be able to ply his trade with a minimum of official interference. There is no question about restrictions on the practice of law and medicine. But in many parts of our country, official approval is required

for persons to seek public patronage as beekeepers, embalmers, lightning rod salesmen, septic tank cleaners, taxidermists and tree surgeons. My state of California is the most restrictive of any: we have 178 licensed occupations. A cynic might conclude that virtually the only people who remain unlicensed are clergymen and university professors, presumably because neither of them are taken very seriously.

Of course, I accept the view that some occupations require quality control to protect the uninformed against blatant incompetents and wily charlatans. But everything is a matter of degree. While it is comforting to know that lawyers and surgeons and structural engineers must pass scrutiny by experienced persons knowledgeable in their discipline, it is absurd that elaborate mechanisms are set up as precautions against one being dissatisfied with the way his or her hair has been cut, toenails trimmed, muscles toughened, hearing aid fitted or drains unclogged. Only the credulous can conclude that licensure in many fields is designed to protect the public rather than to benefit those who have been licensed or who do the licensing.

As I understand it, England has not as yet formally recognized a right of privacy. Government agencies controlling radio and television are careful not to use names or photographs without permission of the party involved. And where there is a violation of what we would call privacy, solicitors will frame their complaints in terms of libel. I hope I have an accurate understanding.

To conclude: the right of privacy still remains generally undefined probably because it is indefinable. Indeed, it may be only another expression of the freedom of the individual. And it probably extends beyond the individual to the household. The American founder, Thomas Jefferson, declared that happiness lies outside the public realm, "in the lap and love of my family, in the society of my neighbors and my books, in the wholesome occupation of my farms, and my affairs," in short, in the privacy of an enclave upon the existence of which the public has no claim. According to the election pamphlet when, by popular vote, the state of California adopted a constitutional privacy amendment, that private island includes protection for "our homes, our families, our thoughts, our emotions, our

expressions, our personalities, our freedom of communication and our freedom to associate with the people we choose."

Privacy is a factor of decency and civility. Unfortunately, decency and civility are waning elements in a society where sadism and violence often constitute our primary form of entertainment; where courtesy is regarded as an expendable commodity; where learning is deemed valueless if it is not "practical"; where reason is suspect and emotion is king. In such a tortured society, I suppose it is inevitable that the right of privacy would be on the list of endangered species.

Our ideal must be the kind of contemplative and peaceful marketplace of ideas for which Socrates sipped hemlock and Cicero debated in the Forum. It was for this principle that the free men of England met at Runnymede more than seven and a half centuries ago to wrest the Magna Carta from King John. We in America and you here in Fiji have also sought the right for peaceful self-determination.

I wish you well, I wish all of us well, in preserving the right of privacy.

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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.

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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.

Asians in the early days of California statehood. But on the whole, the record has been quite satisfactory.

For example, my favorite of pioneer days was the fifth justice of the California Supreme Court, Solomon Heydenfeldt, perhaps because of his wry sense of humor. He was most famous for the case of *Robinson v. Pioche* decided in 1855, an action for injuries received by a plaintiff who fell into an uncovered hole dug in the sidewalk in front of the defendant's premises. The trial court instructed the jury that if the plaintiff was intoxicated at the time of the accident he could not recover. Justice Heydenfeldt disagreed and reversed the judgment on the ground that "[a] drunken man is as much entitled to a safe street as a sober one and much more in need of it."[109]

A discussion of employment and education discrimination is no easy task. It is an assignment in which emotion generally prevails and in which rationality is as rare as a modest politician. Almost every business, labor and other association in this country currently discusses discrimination and what to do about it. One hopes all this frantic and repetitive activity will ultimately produce solutions constructive and constitutional.

Constitutional guarantees are our most precious American commodities. Put in that manner, everyone would quickly assent. Yes sir, absolutely, no doubt, right on.[110]

But if the man or woman on the street were to be asked if the religious freedom of some obscure, offbeat religious group — not theirs — was entitled to the same protections as those given to Protestants, Catholics and Jews, a significant number of responses would be hedged with numerous qualifications. Not long ago the Sheriff of Marshall County, West Virginia, upon seeing a Hare Krishna group, declared: "When the founding fathers wrote about freedom of religion, they didn't have people like these in mind."[111]

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109 *Robinson v. Pioche, Bayerque & Co.*, 5 Cal. 460, 461.

110 This paragraph and the following three paragraphs also appear in Justice Mosk's articles: "Judges Have First Amendment Rights," *California Lawyer* 2:9 (Oct. 1982), 30, 76; and "Should Judges Speak Out? Yes . . . " 24 Judges' Journal 42, 44 (Summer 1985).

111 Justice Mosk refers here to controversies involving the New Vrindaban Community near Moundsville, Marshall County, W.Va.

And if the man or woman on the street were to be asked if freedom of speech applies not merely to Republicans and Democrats, but also to socialists, Nazis, communists, Black Muslims, white supremacists, Ku Klux Klansmen, anti-Semites and members of assorted other unpopular splinter organizations, there would be a sizeable number of negative answers.

All of which suggests that there are many otherwise good and devoted American citizens who do not fully appreciate our democratic heritage, the traditions of true freedom that have distinguished our nation from the vast majority of state-controlled societies in this tortured world of ours.

I suggest, however, the greatest number of blank looks would result if the average citizen were asked to explain his understanding of the equal protection clause of the Fourteenth Amendment, and the comparable sections of the several state constitutions. Everyone wants equality of treatment for himself and for others in his particular species. But the other guys and their category can look out for themselves.

I said that everyone wants equality. If that were wholly accurate, many of our problems would vanish. Unfortunately, however, all too many good people want more than equality, they demand preferential treatment. This was true of the white Protestant majority in our population for most of the two centuries of this republic. We finally got around to determining that such preferences in public and private employment, and in admission to educational institutions, were dead wrong. Minorities in our society were entitled to the same benefits as the majority. And then, to the consternation of those of us who have devoted most of our lives to urging equal rights, we have learned that many minorities now seek unequal, that is preferential, treatment. They seek a return to treating races separately in the name of equality.

Before I get further into that subject, let me briefly recite the background of the Court that gave the original celebrated *Bakke* decision to the country. More than three decades ago, long before it became politically or socially expedient to advocate racial equality, the Supreme Court of California spoke out forcefully on the subject. Justice Roger Traynor in a [1948] case invalidated the state's longstanding miscegenation statute.[112] Chief Justice Phil Gibson in a 1944 labor case declared that a union which

[112] *Perez v. Sharp*, 32 Cal.2d 711.

had a closed shop contract could not bar black members.[113] Again, in 1952, Chief Justice Gibson struck down the state's last vestige of official antipathy to Asians by declaring a longstanding alien land law void.[114] These were courageous decisions in a day when no other courts were venturing into the racial equality minefield.

There are lessons we can learn today from the enlightened text of those prescient opinions. Here was the Court in the miscegenation case:

> The right to marry is the right of the individuals, not of racial groups. The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals. . . . [T]he constitutionality of state action must be tested according to whether the rights of an individual are restricted because of his race.[115]

To the contention that racial characteristics may be a factor in measuring rights, Justice Traynor wryly observed that "[h]uman beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains."[116]

And Justice B. Rey Schauer of the same Court in a 1948 case:

> [B]ecause race and color are inherent qualities which no degree of striving . . . could meet, those persons who are born with such qualities constitute, among themselves, a closed union which others cannot join. It was just such a situation — an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely upon individual qualification for the work to be done — which we condemned in the . . . [union] case.[117]

Chief Justice Gibson in the alien land law case: " . . . the Constitution could not permit 'a classification which operates to withhold property rights from some aliens, not because of anything they have done or any beliefs they

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113 *James v. Marinship*, 25 Cal.2d 721.

114 *Sei Fujii v. State of California*, 38 Cal.2d 718.

115 *Perez*, 32 Cal.2d at 716.

116 *Id.* at 725.

117 *Hughes v. Superior Court*, 32 Cal.2d 850, 856

hold, but solely because they are Japanese and not French or Italian.'"[118]

Thus, it is abundantly clear that Californians and westerners generally have traditionally favored equality of treatment, and have resented any overt discrimination, whether in employment or in school admissions.

Unfortunately, a revolutionary theory, discarded a generation or two ago, has stealthily crept back into the pattern of industrial and academic life — the racial quota. I say "stealthily" because for some years its advocates feared the use of the term "quota" and employed such semantic devices as "numerical goals" and "race conscious remedies" and "race hiring ratios." But a quota by any other name still smells like a quota.

Certainly quotas were not contemplated in the Civil Rights Act of 1964. Indeed, when, during debates, some senators expressed a fear that the measure might lead to that result, an exasperated Senator Hubert Humphrey declared, "If the Senator can find . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color, I will start eating the pages one after another… ."

Senator Humphrey never ate those pages, but eighteen years after passage of the Civil Rights Act, designed to promote racial equality, many lesser politicians, in their eagerness to please various pressure groups, are advocating racial quotas. This is, if not commendable, somewhat understandable. But I confess shock and amazement when a number of courts have tolerated and upheld quotas against constitutional challenges.

Thus encouraged, pressure groups have equated all opposition to racial quotas as being the equivalent of opposition to affirmative action. And unfortunately, the media to a large extent have bought that line. But those who take that approach lack an appreciation of the equal protection clause of the United States Constitution, and similar clauses in every state constitution.

In my opinion, one can resist imposition of ethnic quotas because of their palpably undemocratic aspect, and still be a firm believer in affirmative action. I am in that category.

The problem arises in defining affirmative action. Some time ago I read a report of the United States Commission on Civil Rights, which sought what it described as "consultations" on a proposed affirmative

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[118] *Sei Fujii*, 38 Cal.2d at 627. This paragraph does not appear in the published version.

action statement.[119] Many correspondents to the commission defended racial quotas as an integral part of affirmative action. Here are a few direct quotes:

The general counsel of the NAACP: "[N]o apology should be given for the affirmative use of quotas simply because they were abused in the past. The doctrinaire opposition to quotas is not only misplaced, but has come to be a tactic in the hands of those whose real game is to oppose the elimination of discriminatory barriers."[120]

The executive director of the Women's Legal Defense Fund: "The question asked should not be whether or not preferential treatment is legal, ethical or moral, but *who* should a particular preferential scheme benefit."[121]

And the senior attorney for the Asian American Defense and Education Fund: "We believe the Commission should explicitly state its strong and unequivocal support for goals and quotas, whether legally imposed or voluntarily implemented... ."[122]

I do not mean to give an impression that only those types of comments were published by the Commission on Civil Rights. There were some forthright criticisms of the proposed report and some stern denunciations of racial quotas by such distinguished civil libertarians as Dr. John Bunzel, former president of San Jose State University; Morris B. Abram, former U.S. representative to the United Nations Commission on Civil Rights; Attorney Lawrence Lorber and others.

While opposing racial quotas, Lorber took pains to associate himself with affirmative action. He wrote: "Affirmative action is an expression of the highest ideals of our society. It bespeaks a commitment to open up opportunities for persons who, for whatever reason, do not participate in every aspect of our work force."[123] Let me emphasize those words: *for whatever reason*. Therein lies the true basis for affirmative action.

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119 United States Commission on Civil Rights, *Consultations on the affirmative action statement of the U.S. Commission on Civil Rights* (DC: 1982), vol. I.

120 *Id.*, 5. The words "the elimination of" were omitted, apparently inadvertently, from both the original manuscript and the published version.

121 *Id.*, 10.

122 *Id.*, 13.

123 *Id.*, 72.

I maintain that in the early years of schooling affirmative action is justified for all disadvantaged persons in our society.[124] One may be disadvantaged by color, by race, by national origin, by sex, by sexual preference, by inferior educational opportunity, by poverty, by language barrier, by religion, by physical handicap, by age, by family discord, and perhaps by other factors.

To all of those disadvantaged, for whatever reason they suffer the disadvantage, society must make available affirmative action in the form of aid, assistance, special training, necessary tools, anything required to equip them to compete on a basis of reasonable equality for the benefits society has to offer. Those benefits include college admission and employment opportunity, both public and private.

But once affirmative action has equipped the disadvantaged for the competition, the actual competition for college admission and public and private employment must be on a basis of equality. No favoritism, no preferences, no quotas. And by the same token, no bias, no prejudice, no exclusions. Objective standards should be employed in the selection process.

There are those who decry objective standards. I recall in the celebrated *Bakke* case, Allan Bakke had done well in his medical school entrance examination and was rejected, whereas many minority applicants who were admitted had been graded much lower. The minority groups argued to our Court that the entrance examination was "culturally biased." I looked into that exam, and found that it was substantially a factual, objective test of science and mathematics. It is difficult to conclude that there is a white answer to 2 plus 2 and a black answer to 2 plus 2, or different ethnic definitions of H_2O.

Speaking of Bakke, I must confess that after our Court[125] and the United States Supreme Court[126] ordered him admitted to the medical school at UC Davis, for four years I lived in fear that he would give up the pursuit of medicine, or flunk out. I was delighted when Mr. Bakke graduated, became Dr. Bakke, and then won a coveted internship at the Mayo

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124 The words "in the early years of schooling" do not appear in the published version and were added in handwriting by Justice Mosk to his typed manuscript.

125 *Bakke v. Regents of University of California*, 18 Cal.3d 34 (1976).

126 *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

Clinic. All of this with no thanks to the University of California and to those organizations which struggled mightily to keep him out of medical school because of a quota system of admission.

Once again, I emphasize what is really meant by affirmative action. It is increasing opportunities by expanded training for those who are handicapped, for any reason, for the competition that is inevitable in modern society. It should begin with rescuing good minds at the elementary and high school level before they become dulled and ill-equipped to go on to college.[127] It should continue with those who have an inadequate education but who have the desire to learn a trade or occupation. What we require is a never-ending education program that would give the handicapped on a nondiscriminatory basis an opportunity to overcome their handicap, whatever it may be.

In short, what we must do is to upgrade people, not downgrade standards.

As one who believes in equality of the sexes, too, I take considerable comfort in an opinion of Justice Sandra O'Connor, decided in 1982 holding that the Mississippi University for Women could not exclude a man who desired to study nursing. The discriminatory admission policy of the school, she wrote, "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. . . . [The] admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy."[128]

This opinion is a major step in destroying the festering myth of innate inequality of the sexes. It comes more than a decade after the California Supreme Court did precisely the same, but in reverse. In 1971, we invalidated a state law permitting only men to be bartenders. The statute was based on a paternalistic concern for protection of what was believed to be the weaker sex, but Justice Peters rather graphically demolished the concept by declaring, "The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage."[129]

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127 The words "elementary and" do not appear in the published version and were added in handwriting by Justice Mosk to his typed manuscript.

128 *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730.

129 *Sail'er Inn v. Kirby*, 5 Cal.3d 1, 20.

With or without the ERA in the federal Constitution, most states prohibit discrimination on the basis of sex, and despite lingering pockets of resistance, noteworthy progress towards genuine equality has been made in recent years. We have only to look to the profession of law to observe significant advances made by women. The all-male law firm, and the all-male judiciary have become relics of the past.

Women have won their gains, and will win more gains in the future on the basis of perseverance and merit. Seldom have they sought quotas or preferences, unlike some racial groups.

Since the Reconstruction Era, the Constitution has assured all persons that they would receive equal protection. The concept of preferential treatment is contrary to those fundamentals that inspired the unique greatness of the United States. Even more devastating, any scheme involving preference to some races contains the clear message that members of those races are inferior and unable to compete on a basis of equality. The implication in the rationale that whites are inherently superior, other races inherently inferior — and that unless special benefits are given to minority races, institutions and industries will inevitably become all-white — brings back haunting memories of the "master race" that most Americans hoped had been forever eliminated by the Second World War.

Theories of master racism are inherently evil, whether evidenced by Nazi Germany's genocide of a religious minority, former white-controlled South Africa's apartheid program aimed at a racial majority,[130] or black-controlled Uganda's expulsion of an Indian minority. In the final decade of the twentieth century it is incongruous for racism in any guise to creep by stealth into American life, and to be not only abjectly accepted, but stoutly defended.

One of the tragedies of history is that some courts of law have placed their stamp of approval on racism. In *People v. Hall*, an 1854 case, the first justices on the California Supreme Court upheld a statute that prohibited "black, yellow and all other colors" of persons whom "nature has marked as inferior," from testifying against whites.[131] An outrageous opinion.

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130 The word "former" does not appear in the published version and was added in handwriting by Justice Mosk to his typed manuscript.

131 *People v. George W. Hall* , 4 Cal. 399, 404, 405.

But the cases that will endure, that will pass the test of time, are not those that emphasize race as a benefit or detriment, but those that totally exclude race as a consideration in determining rights. One may ask, rhetorically, which opinion will enjoy the plaudits of posterity, the Warren Court's *Brown v. Board of Education* — which took racial factors out of the public schools — or the majority opinion in post-Civil War *Plessy v. Ferguson* — which permitted separation on a basis of race? It seems inevitable that the perspective of time will relegate cases which approved a mathematical racial quota in education and employment to the historical ash heap.

A democratic society cannot accept the proposed new rule of preference: that what you get depends upon what you are. It is a return to the medieval notion of government by status — and race is a status over which no one has any control. Race cannot be a plus among qualifications, for if it is a plus for some in our society it is necessarily a minus for others. It is arithmetically impossible for race as a factor to be neutral. Its inclusion as a benefit to some constitutes a detriment to those unable, merely by the accident of birth, to enjoy the same advantage. For every one quota-ed in, one is quota-ed out. In short, the use of race in the distribution of society's benefits is a form of racism, the anachronistic concept that brains and the ability to use them are related to race.

In a society in which men and women expect to succeed by bettering themselves through individual industry — the traditional work ethic — it is no trivial moral wrong to systematically defeat this expectation by subjecting them to group scrutiny. Any system guilty of rejecting an applicant for employment or public school admission when he or she excels in meeting established objective requirements, in favor of others who are less qualified by the same standards, is immoral; it is also self-defeating in the long run because of its perpetuation of mediocrity. One can only hope that ultimately this new egalitarianism will be rejected because, as Barbara Tuchman wrote, "[T]he urge for the best is an element of humankind as inherent as the heartbeat."[132]

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132 Barbara W. Tuchman, "The Decline of Quality," *The New York Times Sunday Magazine*, Nov. 2, 1980.

Years ago medical doctors attempted to cure morphine addiction with doses of heroin. Such efforts were doomed to failure, and worse. Today there are those who are attempting to cure the remnants of discrimination against minorities with programmed discrimination against the majority. The failure of this misguided social homeopathy is equally predictable. Discrimination — for or against any group — is addictive; the belief that it can be temporary, limited, or controlled is naïve and self-deluding.

Professor Van Alstyne put it in a nutshell in 1979 when he wrote:

> [O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one's own life — or in the life or practices of one's government — the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.[133]

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II. RACISM IN COURTS[134]

Those of us who live north of the Mason-Dixon Line have rather smugly assumed that overt racism was endemic only to the South. Civil rights movements, we have believed, were aimed exclusively at segregation and official bigotry in those states that comprised the Confederacy.

The history of other parts of the country is not unblemished. In the West, discrimination was rife in the early days, particularly against Asians. While many of the acts were of a private nature, there are some

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133 William Van Alstyne, "Rites of Passage: Race, the Supreme Court, and the Constitution," 46 U. Chi. L. Rev. 775, 809-810 (1979).

134 This paper is based on a typed manuscript prepared by Justice Mosk. It has been edited for publication. All footnotes are provided by the editor.

gross examples of official sanction for racial prejudice and remarkable efforts at rationalization.

A paradigm illustration was the 1854 California case of *People v. George W. Hall*,[135] described as "a free white citizen of this State, . . . convicted of murder upon the testimony of Chinese witnesses."

At that time the laws of California, adopted in 1850 shortly after statehood was achieved, provided that "[n]o Black, or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man." The question considered by the state Supreme Court was whether those restrictions also applied to Chinese witnesses. By a process of intricate ratiocination, Chief Justice Murray declared that since the Chinese originated in Asia, and Indian was a term applied not only to those on this continent but also to those living in Asia, and since blacks were also mentioned in the law, the intent of the legislature must have been to exclude from the witness box all "not of white blood" in order "to protect the White person from the influence of all testimony other than of persons of the same caste."[136]

The Court concluded its opinion with one of the most strident racist contentions ever adopted by an American judicial tribunal:

> We have carefully considered all the consequences resulting from a different rule of construction, and are satisfied that even in a doubtful case we would be impelled to this decision on grounds of public policy.
>
> The same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls.
>
> This is not a speculation which exists in the excited and overheated imagination of the patriot and statesman, but it is an actual and present danger.
>
> The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices and national feuds, in

135 *People v. George W. Hall* , 4 Cal. 399.

136 *Id.* at 403.

> which they indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.[137]

At that time the California Supreme Court consisted of three justices. One of them, Justice Alexander Wells, dissented, but did not elaborate on his views.

It was well into the twentieth century before all vestiges of official anti-Asian discrimination would be removed from the western states. Alien land laws were in effect as recently as 1945; they provided that aliens ineligible to citizenship could not acquire or occupy real property or any interest in property. And Asians were excluded from citizenship. Such discriminatory laws were upheld by the United States Supreme Court in 1923.[138]

In 1952 a Japanese farmer, Sei Fujii, had his Central Valley land taken from him by the State of California — escheat is the legal term — because he was in violation of the state's alien land law. He pursued the case to the state Supreme Court. A majority of the court, in an opinion written by Chief Justice Phil Gibson, held the statute unconstitutional. It was, the Court declared, a law

> obviously designed and administered as an instrument for effectuating racial discrimination, and the most searching examination discloses no circumstances justifying classification on that basis. There is nothing to indicate that those alien residents who are racially ineligible for citizenship possess characteristics which are dangerous to the legitimate interests of the state, or that they, as a class, might use the land for purposes injurious to public morals, safety or welfare.[139]

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137 *Id.* at 404-405.

138 *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923).

139 *Sei Fujii v. State of California*, 38 Cal. 2d 718, 725 (1952).

Justice Stephen J. Field was the first Californian to be appointed to the United States Supreme Court, selected by President Lincoln. Fortunately, he did not take any existing anti-Chinese feeling with him to Washington. In 1879 he wrote an opinion invalidating a curious San Francisco ordinance which required, purportedly for sanitary reasons, that every county jail prisoner's hair be cut short.[140] This was aimed at depriving Chinese prisoners of their queue, and without a queue they would have been unable to ever return to their homeland. Cruel and unusual punishment, Justice Field declared.

In 1947, as a trial judge I had the satisfaction of rendering one of the first judgments holding race-restrictive covenants unconstitutional. It had been common for many deeds of real property to provide for the exclusion of persons of some races, usually blacks. Such a restrictive deed was challenged in my court, and I ruled it to be void. Two years later, in the celebrated case of *Shelley v. Kraemer*, the United States Supreme Court reached an identical conclusion.[141]

Until recent years, discrimination in the form of racial segregation was practiced in the public schools. The final elimination of this bigotry is generally attributed to the classic opinion of Chief Justice Earl Warren for the Supreme Court in the *Brown v. Board of Education* case. However, in 1962 the California Supreme Court, again led by its chief justice, Phil Gibson, refused to accept as the basis for segregated schools in Pasadena the excuse of racial housing patterns. He recognized that housing inevitably affects neighborhood school patterns, but that did not justify perpetuation of school segregation. He wrote, for a unanimous court:

> Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior. Where such segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity for education and the harmful consequences of

140 *Ho Ah Kow v. Nuner*, 12 Fed. Cas. 252 (1879).

141 334 U.S. 1 (1948).

> segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause.[142]

I do not mean to suggest that all courts and all judges, as we approach the twenty-first century, are free of bias. Recently there was a federal judge who attempted to censor library books. In California the Supreme Court publicly censured a trial judge who repeatedly used racial epithets, even though they were uttered off the bench. Unfortunately, these types still exist in modern society. But matters are getting better.

As a postscript to the *Hall* case, the "fears" of the 1854 court that one day Asians would become citizens, be at the voting polls and hold public office, have been fully realized. Today, in California, there are a number of distinguished judges of Asian origin, many local supervisors and councilmen, and a talented woman named March Fong Eu has been elected and reelected to the statewide office of secretary of state.

As another postscript to that era, it is somewhat paradoxical that the prejudice aimed at Asians did not affect other minorities that are often the target for discrimination. Hispanics and Jews played prominent roles in the pioneer days in California. Indeed, at one time two of three early justices on the state Supreme Court were of Jewish origin. The second justice chosen was Henry A. Lyons, of French-Jewish extraction. The fifth justice — and one of the most able of that day — was Solomon Heydenfeldt, whose Jewish parents migrated from Silesia.[143]

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142 *Jackson v. Pasadena School District*, 59 Cal.2d 876, 881.

143 See: Stanley Mosk, "A Majority of the California Supreme Court," *Western States Jewish Historical Quarterly* 8:3 (April 1976), 224-231.

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.

death is to be imposed, and at the cornerstone, the moral justification for society deliberately taking human lives.

At the risk of appearing immodest, I claim to be peculiarly equipped to enter into this discussion because I have been on all sides of the issue — not, I hasten to explain, because of unconcern or ambivalence. First, as an idealistic young man, I debated for abolition of the death penalty. Then, as executive secretary to the governor of California, I had the duty of actually interviewing, in prison, men — and one woman — under sentence of death and making a report to the governor. He in turn had the responsibility of commuting some sentences to life and allowing others to go to their death.

Next, I became a trial judge and had the tragic duty of sentencing a murderer to die.[146] (The then governor later commuted the sentence to life; the man is now out on parole and apparently making good in society.)

My next public office was as attorney general of California. In that capacity I was the chief law enforcement officer of the state and resisted the appeals of convicted defendants. Nevertheless, I testified on three occasions before our state Legislature, urging repeal of capital punishment, to no avail.

Finally, as a justice of the Supreme Court of California, I took an oath of office to support the Constitution and laws of the state as they are, and not as I might prefer them to be. Thus, on occasion I have concurred in opinions upholding convictions of murder and death sentences.

As you can see, my perceptions have varied with my responsibilities. When called upon to enforce the laws as they are, I have done so. When permitted the indulgence of personal opinion, I have expressed a clear preference for elimination of capital punishment. Therefore, I claim a certain objectivity on the subject.

Let me give a brief profile of homicide in the area with which I am most familiar. The State of California is roughly one-tenth of the United States in population, so these figures may be multiplied by ten for national statistics. In this one state, with a population of 27 million, we have slightly more than 3,000 willful homicides each year. In addition, there

146 See Justice Mosk's "From the Shadow of Death to Pen Pal" in this issue.

are some 300 homicides committed by juveniles annually. This measures out to 11 homicides per every 100,000 persons.

How many murderers are apprehended? Of the 3,000 killings, more than 2,700 persons are arrested — 2,400 males and 300 females. As to age, between 18 and 25, the numbers are almost identical for each year: 161 eighteen-year-olds were charged with homicide, 155 twenty-year-olds, 155 twenty-three-year-olds. The greatest number was in the 25 to 29 group — 600. Over 60, only 38 murderers were arrested.

In 1986, 21 persons were sentenced to death in my state. Of these, 10 were black, 3 were Hispanic and 8 were white. All were male. None were under 20 years of age, 12 were in their 20's, 5 were over 40.

What are the current social trends in murder? According to the state attorney general, willful homicides increased marginally over the past few years. More than half the victims were the friend or acquaintance of the offender. This suggests that a personal quarrel or feud resulted in a killing. If the victim was female, it was four times more likely that she was a family member than if the victim were male. More victims were killed at their place of residence than at any other location. More victims were killed by firearms than by any other type of weapons or other means, 56 percent compared with 23 percent from the use of knives. The rate of black homicide victims was more than eight times that of white victims, thus indicating that race is a significant social factor. More homicides occur on Saturday and Sunday than any other days of the week.

Let me briefly review the chronology of United States Supreme Court decisions on capital punishment. Most observers agree that the High Court opinions have not been a model of clarity.

Historically, executions for a variety of crimes were common in America. Our country generally followed the English example: in Great Britain in 1800 there were over 200 offenses punishable by death. One might forfeit his life for stealing five shillings, fishing in a private stream or for theft of a rabbit warren.[147]

During the 1950s in the United States there were 717 executions, but soon thereafter an informal moratorium was observed. Then, in 1972,

147 Trevor Thomas, *This Life We Take: The Case Against the Death Penalty* (D.C.: Friends Committee on Legislation, 1959), 3rd unnumbered page.

in the case of *Furman v. Georgia*,[148] the Supreme Court held that the administration of the death penalty had become whimsical, arbitrary and capricious, and found that as applied it violated the constitutional prohibition against cruel and unusual punishment.

The several states then revised their capital punishment statutes, and in 1976 the High Court found in *Gregg v. Georgia*,[149] that if there was guided discretion in the trier of fact — judge or jury — the death penalty would be constitutionally acceptable. They key word was *guided*. The guidance, in most instances, was provided by the states in enumerating the aggravating and mitigating circumstances that could be considered by the trier of fact in determining whether to impose death or some lesser penalty.

In 1977, in *Coker v. Georgia*,[150] the Supreme Court banned the use of the death penalty for rape. The practical effect was to limit the extreme penalty to murder, although in my state the listed offenses for which death is permitted include such esoteric crimes as train wrecking and committing perjury in a trial that results in the death of an innocent person.

The following year, 1978, the Supreme Court held in *Lockett v. Ohio*,[151] that a capital punishment procedure was invalid if it limited in any way the consideration that may be given to a defendant's character and record. This had the practical effect of allowing the jury to consider sympathy for a murderer who, despite a heinous offense, had either a constructive or a deprived background.

In *Enmund v. Florida*,[152] in 1982, the Supreme Court struck down the death penalty for a criminal who did not commit the actual killing and did not intend that a killing take place, even though his crimes resulted in a homicide. Presumably, this would eliminate capital punishment for the driver of the get-away car who sits outside while the confederate enters premises and kills. It would also eliminate the unarmed thief whose victim dies of a heart attack induced by anxiety or fright.

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148 408 U.S. 238.
149 428 U.S. 153.
150 433 U.S. 586.
151 438 U.S. 586.
152 458 U.S. 782.

Many defendants in capital cases argue for proportionality review. In effect they maintain that their offense was no more egregious than comparable offenses for which only imprisonment was ordered. The United States Supreme Court in *Pulley v. Harris*,[153] in 1984, held that proportionality review is not required.

In my opinion, the High Court made an indefensible decision in *Spaziano v. Florida*,[154] in 1984. That state has a strange law that permits a trial judge to order death despite a jury verdict recommending life in prison. And I understand that it is not uncommon for some judges in that state to do so. The High Court held this is permissible.

The selection of jurors in capital cases always presents problems. If a prospective juror, in voir dire examination, declares his opposition to the death penalty, may he be excused for cause? Yes, held the High Court in *Lockhart v. McCree*,[155] in 1986. This, of course, assures that only jurors who favor capital punishment will sit on cases in which that result is a possibility.

That same year, the High Court held in *Ford v. Wainwright*[156] that states may not execute killers who lack the mental competence to understand why they are being put to death, thus barring executions for murderers who become insane while on death row.

In another incomprehensible opinion, the Supreme Court held in *Tison v. Arizona*[157] last year that murder accomplices may be sentenced to death if they merely displayed "reckless indifference" for a human life, even if they did not kill anyone or anticipate that a killing would occur. This seems to undermine the earlier *Enmund* case that held one could not be executed if he did not kill or intend that a killing result. I do not believe many of our states will follow the *Tison* rule.

And finally, in its most recent holding, *McCleskey v. Kemp*,[158] the High Court ruled that discriminatory imposition of the death penalty, established by statistics, does not necessarily invalidate the penalty. Statistics

153 465 U.S. 37 (1984).
154 468 U.S. 447.
155 476 U.S. 162.
156 477 U.S. 399.
157 481 U.S. 137 (1987).
158 481 U.S. 279 (1987).

for the State of Georgia revealed that when a black person kills a white person, he is much more likely to receive the death penalty than when a white kills a white, or a white kills a black. There has long been a suspicion that the racial factor is an element in the choice of punishments, but the High Court was not impressed with the statistical verification offered in that case.[159]

Finally, the United States Supreme Court settled one long-standing issue this past year. Should the court, or the jury, be told in a capital case of the effect upon the victim's surviving family? Is a murderer any more deserving or susceptible of being executed because his victim left a grieving widow, or parents, or children, or friends? It had been common for prosecutors to stress the burden of the homicide on those left behind. The effect on the family of the deceased will inevitably and understandably have a devastating impact on a jury considering the defendant's fate. However, Justice Powell wrote for the Supreme Court in *Booth v. Maryland*, "While the full range of foreseeable consequences of a defendant's actions may be relevant in other criminal and civil contexts, we cannot agree that it is relevant in the unique circumstance of a capital sentencing hearing."[160] In reversing a conviction in a case in which a victim impact statement was given pursuant to state law, he concluded that "we thus reject the contention that the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics, are proper sentencing considerations in a capital case."[161] Of course, noted Justice Powell, one "can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors generally are aware of these feelings. But the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant."[162]

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159 A paragraph that appeared in the published version, between this and the following paragraph, was blanked out by Justice Mosk in his typed manuscript. The omitted paragraph dealt with racial discrimination in the use of peremptory challenges to prospective jurors.

160 482 U.S. 496, 504 (1987).

161 *Id.* at 507.

162 *Id.* at 508.

Three years earlier the California Court of Appeal reached a similar conclusion in *People v. Levitt*.[163] In commenting on the bereavement of the victim's family the court declared:

> The purpose of sentencing is to punish defendants in accordance with their level of culpability. We think it obvious that a defendant's level of culpability depends not on fortuitous circumstances such as the composition of his victim's family, but on circumstances over which he has control. . . . [T]he fact that a victim's family is irredeemably bereaved can be attributable to no act of will of the defendant other than his commission of homicide in the first place. Such bereavement is relevant to damages in a civil action, but it has no relationship to the proper purposes of sentencing in a criminal case.[164]

A serious issue with which courts are currently wrestling is the minimum age at which a murderer may be given the death penalty. The increasing number of homicides committed by teenagers — 18, 17, 16, even 15 years of age — and the tendency to try them as adults, causes concern over the morality involved in putting a youngster to death.

The issue has been before the United States Supreme Court several times, most recently in a case out of Oklahoma.[165] The Court gave no definitive response; it did reverse the penalty on the ground that Oklahoma provided no minimum age, not on the basis of the killer being given the death penalty at age 15.[166]

In an earlier case, the *Eddings* case,[167] also from Oklahoma, the Court avoided the larger constitutional issue by finding that the trial court failed to consider the defendant's family history and emotional disturbance as mitigating circumstances at the death penalty hearing.

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163 156 Cal.App.3d 500 (1984).

164 *Id.* at 516-517.

165 *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

166 This and the following two paragraphs differ from the published version, in which Justice Mosk had described the *Thompson* case as still pending before the Supreme Court.

167 *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

There will undoubtedly be a case in the foreseeable future in which the issue will be an age factor and it will be in a posture in which an answer must be forthcoming. My guess is that the Court is pausing to give each state an opportunity to prescribe its own minimum age for capital punishment, and unless the age is demonstrably low in some instances, it will defer to the states. In a majority of jurisdictions, the death penalty cannot be imposed on one under 18.

Supporters of the death penalty for juveniles argue that there are circumstances in which execution is the only appropriate sentence for an offender even if he committed the crime as a juvenile. They also contend that setting a minimum age for capital punishment would impinge on state prerogatives and would inhibit the U.S. Supreme Court's flexibility in reviewing death sentences according to a broad range of legal concerns, without allowing any single factor, such as age, to determine lawfulness.

Opponents of executing minors note that juveniles are afforded special treatment throughout the American judicial system and contend that to punish them as adults in capital cases would threaten that well-established tradition. They point out that laws and policies reflect an almost universal judgment that adolescents ought to be treated differently than adults. There generally are no exceptions to that judgment. Public officials do not consider requests by especially mature adolescents to allow them to vote, serve as jurors, or drink alcoholic beverages. As a society, we treat those under age 18 as categorically different from adults. These lines reflect clear distinctions between children and adults, distinctions that should require courts to draw the line at age 18 for the imposition of the death penalty.

I should point out that imposing death sentences on juvenile offenders is barred by the International Covenant on Civil and Political Rights, and also by the American Convention on Human Rights, both signed by the United States in 1977. Despite that covenant, two prisoners who were juvenile offenders were executed in the United States in 1986, and another 37 were on death row at the end of last year — including four who were age 15 when their crimes were committed.

In addition, the execution of mentally ill prisoners contravenes guidelines set by the United Nations in 1984, but in 1985 a black farmworker in Virginia was executed for murder after he had been diagnosed as a paranoid schizophrenia with a mental age of eight.

There is an interesting movement in American legal circles these days calling for "original intent." Generally deemed to be reactionary because of the political predilections of its advocates, the original intent doctrine proposes the decisions of courts today must be circumscribed by the expressed or implied limitations declared by the drafters of our federal Constitution two centuries ago.

I do not propose to discuss that controversial concept except to observe that there are some scholars of our constitutional period who believe that the framers of our national charter anticipated abolition of the death penalty. They contend that when the Eighth Amendment prohibition against cruel and unusual punishment was proposed and adopted the framers had in mind the elimination of death as a punishment.

There is some merit to the contention that the framers of our Constitution, who had just thrown off the yoke of British colonialism, felt antipathy toward punitive or military justice. An entire generation had lived under the shadow of the gallows. The revolutionaries were constantly aware that if captured, or if the revolution failed, they would be subject to hanging. Indeed, British General Gage, on June 12, 1775, issued a proclamation offering to pardon all the American rebels who laid down their arms, but that those who did not would face the gallows. Thus, to many of the early Americans, the gallows and hanging represented barbarity.

From that subjective analysis, some advocates of original intent maintain that the Eighth Amendment prohibition against "cruel and unusual punishment" was meant to eliminate the death penalty. It is difficult, if not impossible, to divine original intent in this regard. Indeed, there is somewhat of a contradiction found in the Fifth Amendment which prohibits one being twice in jeopardy of "life or limb," suggesting that life may be placed once in jeopardy.

I believe we are long past returning to original intent, that if abolition of the death penalty is to occur it must be by virtue of a current

movement based on current ideals. As to the Eighth Amendment, it does not specifically refer to capital punishment.

It may surprise you to recall that George Bernard Shaw was, after a fashion, an advocate of capital punishment — although it is often impossible to determine when Shaw was speaking with tongue in cheek. His little book, published nearly a half-century ago and entitled *The Crime of Punishment* (sic) *[Imprisonment]* takes the position that death is preferable to imprisonment; or, to put it another way, imprisonment is itself a form of death. He wrote, regarding serious felons:

> Nothing is gained by punishing people who cannot help themselves, and on whom deterrence is thrown away. Releasing them is like releasing the tigers from the Zoo . . . . The most obvious course is to kill them. Some of the popular objections to this may be considered for a moment. Death, it is said, is irrevocable; and after all, they may turn out to be innocent. But really you cannot handle criminals on the assumption that they may be innocent. You are not supposed to handle them at all until you have convinced yourself by an elaborate trial that they are guilty. Besides, imprisonment is as irrevocable as hanging. Each is a method of taking a criminal's life . . . .
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> . . . .
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> Then comes the plea for the sacredness of human life. The State should not set the example of killing, or clubbing a rioter with a policeman's baton, or of dropping bombs on a sleeping city, or of doing many things that States nevertheless have to do. But let us take the plea on its own ground, which is, fundamentally, that life is the most precious of all things, and its waste the worst of crimes. We have already seen that imprisonment does not spare the life of the criminal: it takes it and wastes it in the most cruel way. But there are others to be considered besides the criminal and the citizens who fear him so much that they cannot sleep in peace unless he is locked up. There are the people who have to lock him up, and fetch him his food, and watch him. Why are their lives to be wasted?

. . . .

> . . . If people are fit to live, let them live under decent human conditions. If they are not fit to live, kill them in a decent human way. When I force humane people to face their political powers of life and death apart from punishment as I am doing now, I produce a terrified impression that I want to hang everybody. In vain I protest that I am dealing with a small class of human monsters . . . .
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> . . . .
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> . . . Such responsibilities must be taken, whether we are fit for them or not, if civilized society is to be organized.[168]

George Bernard Shaw notwithstanding, the deterrent effect of the death penalty has been a source of frequent debate. Thirteen of our fifty American states do not have the death penalty; thus a comparison of their homicide rate with that of their neighbors can be made. The result is inconclusive.

Rhode Island, which has abolished capital punishment, has an almost identical rate per thousand population with adjacent Connecticut which has the death penalty. But Illinois, with the death penalty, has five times the homicide rate of neighboring Wisconsin, which has not had capital punishment since 1853. On the other hand, Michigan, an abolition state since 1847, has more murders per capita than neighboring Indiana, with its death penalty.

The answer seems to be that the law, one way or the other, provides no firm answer. The number of killings reflects cultural and economic conditions in the respective areas.

It can be argued therefore that the mere passage of a law does not necessarily serve as a deterrent. Few killers stop and thoughtfully contemplate the consequences before they act, and many, even if they did,

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168 George Bernard Shaw, "Preface," in Sidney Webb and Beatrice Potter Webb, *English Local Government from the Revolution to the Municipal Corporations Act*, vol. 6, English Prisons Under Local Government (London: Longman, Green, 1906), xxix-xxxiv. Republished separately by Shaw as *Imprisonment* (1925) and *The Crime of Imprisonment* (1946).

would find little personal difference between death and a lifetime behind bars. Yet there are many instances of robbers who use toy guns, or unloaded guns, because they fear the death penalty in the event their escapade turns tragically violent.

There is one argument of those who favor capital punishment that is irrefutable. The murderer who is executed cannot kill again. Society is permanently safe from him.

Since enactment of the death penalty is a legislative function, we must of necessity take heed of public opinion. After all, the public elects legislators. The British Parliament, despite the endorsement of Prime Minister Margaret Thatcher, recently voted down a proposal for the restoration of capital punishment. The Canadian Parliament acted similarly last year.

The Canadian experience was interesting. Canada abolished the death penalty in 1976 and has not had an execution since 1962. But, despite declining levels of violence, proponents of capital punishment continued to have strong backing; public-opinion polls consistently showed that roughly 7 out of 10 Canadians favored the death penalty. Although himself an outspoken opponent of capital punishment, Prime Minster Brian Mulroney kept an election promise for an open debate on the issue by having his government introduce in the House of Commons a resolution that would, in principle, have restored the death penalty.

In discussion on the bill, it became evident that the abolitionists appeared more persuasive than the restorationists. Whether due to stricter gun-control laws, more comprehensive social programs, less disparity between wealth and poverty or between black and white, historical absence of a Western frontier mentality or the kind of devastation plaguing American inner cities, Canada has had far less violence than the United States.

The argument in Parliament at one time took a moral quality. A conservative MP who had at one time favored the death penalty argued that "the execution of an individual is an act of violence, and as such it can never be moral in a society which supposedly abhors violence. It has been demonstrated repeatedly that violence tends to provoke further violence." Members of Parliament were asked whether they wished Canada to be identified in its judicial practices with Iran, South Africa, Saudi

Arabia or the Soviet Union, all of which practice capital punishment, or with Western European democracies, which don't.

Major churches and groups forming the Coalition Against the Return of the Death Penalty staged an effective lobbying campaign and distributed a book entitled, "Why kill people who kill people to show that killing people is wrong?" In the end, votes went against capital punishment, 148 to 127.[169]

What about public opinion in the United States? While it varies with revelations of a particularly heinous murder — the Manson or Sirhan types — it has been fairly consistent in recent years. Let me get to that subject in a rather circuitous route by discussing a case in my jurisdiction.

In 1972 the case of Robert Page Anderson came before the Supreme Court of California. He had murdered one man, attempted the murder of three others and was given the death penalty. It may seem like a thin reed on which to construct an opinion, but Chief Justice Donald Wright observed that, while the United States Constitution's Eighth Amendment prohibits "cruel *and* unusual" punishment, the state Constitution prohibits "cruel *or* unusual" punishment. Thus, both elements need not be found under the state charter, but only one or the other.

Chief Justice Wright's moving opinion in the *Anderson* case is a masterpiece of judicial writing.[170] He took his forthright stand even though it was contrary to the public expressions of then Governor Ronald Reagan who had appointed him.[171]

He first observed that in assessing the cruelty of capital punishment, we are not concerned with the mere extinguishment of life, but in its total impact on the individual and on society. While he found that the framers of our Constitution recognized the existence of capital punishment in their day, that is not controlling, for we must be concerned, as

169 Ronald Sklar, "Canada Trusts Parliament, Not Polls on Death Penalty," *Los Angeles Times*, October 20, 1987.

170 *People v. Anderson*, 6 Cal.3d 628 (1972).

171 In the published version, this paragraph reads in its entirety, "I highly recommend a reading of Chief Justice Wright's moving opinion in *People v. Anderson*. It is a masterpiece of judicial writing; I considered it a privilege to sign it."

Chief Justice Warren put it, in "the evolving standards of decency that mark the progress of a maturing society."[172]

Wrote Justice Wright:

> Were the standards of another age the constitutional measure of "cruelty" today, whipping, branding, pillorying, severing or nailing ears, and boring of the tongue, all of which were once practiced as forms of punishment in this country, might escape constitutional proscription, but none today would argue that they are not "cruel" punishments. . . . The framers of our Constitution, like those who drafted the Bill of Rights, anticipated that interpretation of the cruel or unusual punishments clause would not be static but that the clause would be applied consistently with the standards of the age in which the questioned punishment was sought to be inflicted.[173]

He continued:

> The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture. Respondent concedes the fact of lengthy delays between the pronouncement of the judgment of death and the actual execution, but suggests that these delays are acceptable because they often occur at the insistence of the condemned prisoner. We reject this suggestion. An appellant's insistence on receiving the benefits of appellate review of the judgment condemning him to death does not render the lengthy period of impending execution any less torturous or exempt such cruelty from constitutional proscription.[174]

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172 *Trop v. Dulles*, 356 U.S. 86, 101 (1957).

173 6 Cal.3d at 647-648.

174 *Id*. at 649-50.

. . . .

A punishment as extreme and as irrevocable as death cannot be predicated upon speculation as to what the deterrent effect might be if it were actually applied swiftly and with certainty upon all who were potentially subject to it. As stated previously, in reality today it is neither swift nor certain. Respondent offers us no basis upon which to conclude that, as presently administered, capital punishment is any greater deterrent to crime than are other available forms of punishment.[175]

. . . .

The brutalizing psychological effects of impending execution are a relevant consideration in our assessment of the cruelty of capital punishment. The United States Supreme Court recognized in Weems v. United States, supra, 217 U.S. 349 at page 372, that "it must have come to [the framers of the Eighth Amendment] that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation." In Trop v. Dulles, supra, 356 U.S. 86, in which the United States Supreme Court squarely held . . . the psychological impact of the punishment was dispositive. The court there held that …: "There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture. . . ."[176]

After discussing what he saw as a world-wide trend toward abolition of the death penalty, Chief Justice Wright closed with these words:

We have concluded that capital punishment is impermissibly cruel. It degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process. Our conclusion that the death penalty may no longer be exacted in California consistently with article I, section 6, of our Constitution is not grounded in sympathy for those who would commit

175 *Id.* at 653.
176 *Id.* at 650.

> crimes of violence, but in concern with the society that diminishes itself whenever it takes the life of one of its members. Lord Chancellor Gardiner reminded the House of Lords, debating abolition of capital punishment in England: "When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disemboweled while still alive, and then quartered, we did not abolish that punishment because we sympathised with traitors, but because we took the view that it was a punishment no longer consistent with our self respect." (268 Hansard, Parliamentary Debates (5th Series) Lords, 43d Parl., First Sess., 1964-1965 (1965) p. 703.)[177]

Since the Wright Court had found capital punishment offended the state Constitution, the state Legislature could not merely reenact a capital punishment statute. But public opinion was loud and clear. By an initiative measure, the voters at the very next election amended the state Constitution to provide, with unmistakable clarity: "The death penalty provided for under . . . [previous] statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of the constitution." Ironically, that provision was added to the section on individual rights.[178]

As indicated previously, my purpose in relating this detail is to underscore the popular feeling in the United States in favor of the death penalty. Public opinion polls consistently reveal two-to-one, or even larger majorities, in favor of the extreme punishment, and the margin grows even wider after heinous offenses are reported in the public press. Opponents are unpersuasive when they argue that the principal nations adhering to the death penalty are the communist bloc and military dictatorships, that most western democracies have now abolished that punishment. The voting public sees the extreme penalty as a means of protecting society, particularly in light of the statistical increases in urban violent crime.

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177 *Id.* at 656.

178 California Constitution, article I, section 27.

Finally, we must be cognizant of the effect of capital punishment on the judiciary and the judicial process. It requires an inordinate amount of time, resources and concern.

Barrett Prettyman, Jr., a distinguished court observer, published a book a number of years ago entitled *Death and the Supreme Court*. While his purpose was to discuss a number of dramatically interesting cases, he did reach some conclusions and offered a number of quotations from justices.[179] He wrote:

> Those who have watched the Court at work know the burden that each Justice carries in a death case. It is the one case in which he feels the full impact of both his responsibility and his fallibility. It is the case he takes to meals and to bed; it is the case that lingers on his mind long after it is decided. It finally drops away only because another death case, equally troublesome, has taken its place.
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> Because the Justices generally write in restrained, unemotional terms, it is difficult to document their concern. Nevertheless, there is an undercurrent running through their majority, concurring and dissenting opinions over the years, no less discernible because guarded and judicial in tone. Statements such as these:
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> Mr. Justice Miller (1890): "Nor can we withhold our conviction of the proposition that when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place."[180]
>
> Mr. Justice Black (1940): "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death."[181]

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179 Barrett Prettyman, Jr., *Death and the Supreme Court* (New York: Harcourt, Brace & World, 1961), 309-311. The citations shown here for the various quotations do not appear in Prettyman's book.

180 *In re Medley*, 134 U.S. 160, 172.

181 *Chambers et al. v. State of Florida*, 309 U.S. 227, 241.

Mr. Justice Frankfurter (1948): "The statute reflects the movement, active during the nineteenth century, against the death sentence. The movement was impelled both by ethical and humanitarian arguments against capital punishment, as well as by the practical consideration that jurors were reluctant to bring in verdicts which inevitably called for its infliction."[182]

Mr. Justice Reed (1948): "In death cases doubts such as those presented here should be resolved in favor of the accused."[183]

Mr. Justice Frankfurter (1952): "Even though a person be the immediate occasion of another's death, he is not a deodand to be forfeited like a thing in medieval law."[184]

Mr. Justice Clark (1953): "Human lives are at stake; we need not turn this decision on fine points of procedure or a party's technical standing to claim relief."[185]

Mr. Justice Black (1953): "This would be a strange argument in any case but it seems still stranger to me in a case which involves matters of life and death. . . . I cannot believe . . . that if the sentence of a citizen to death is plainly illegal, this Court would allow that citizen to be executed on the grounds that his lawyers had 'waived' plain error. . . . I have long thought that the practice of some of the states to require an automatic review by the highest court of the state in cases which involve the death penalty was a good practice."[186]

Mr. Justice Douglas (1953): "It is also important that before we allow human lives to be snuffed out we are sure — emphatically sure — that we act within the law. If we are not sure, there will be lingering doubts to plague the conscience after the event."[187]

These are voices of deep concern. . . .

Today, when state courts refuse to act, the Supreme Court of the United States stands as a last bulwark against many such

182 *Andres v. United States*, 333 U.S. 740, 753 (Frankfurter, J. dissenting).
183 *Id.* at 752.
184 *Leland v. State of Oregon*, 343 U.S. 790, 803 (Frankfurter, J., dissenting).
185 *Rosenberg v. United States*, 346 U.S. 273, 294 (Clark, J., concurring).
186 *Id.* at 299-301 (Black, J., dissenting).
187 *Id.* at 321 (Douglas, J., dissenting; appendix: Application for a Stay).

> outrages. And its task in due process cases is exceedingly complex; it cannot simply apply rigid standards and mechanical rules. As extraordinary as it may seem in this age of centralization and collectivism, of wars and threats of wars, of population explosions, breakaway science, and the emphasis on social utility — in this frightening time of cheap life — the fact is that an active ingredient in the workings of one branch of the most powerful government on earth is compassion. Compassion for the fate of solitary people, of desperate, lonely, untutored, and disturbed people. Compassion for human life regardless of its extrinsic worth.

Is this feeling shared in varying degrees by all judges and all courts, or merely by those affected by some fastidious squeamishness or private sentimentalism? I hope it is, I hope we are ever alert to enhance human dignity through the protection of human life.[188]

What conclusion can be drawn from all this discussion? The dismaying possibility is that we can draw no firm conclusion. This may be inferred from the candid admission of Chief Justice Burger in *Lockett v. Ohio* that "[t]here is no perfect procedure for deciding in which cases governmental authority should be used to impose death."[189] That raises a serious moral query: whether a civilized society should proceed with executions when it has only *imperfect* procedures for determining which of its members it will deliberately put to death. The people, according to all available indicia, answer that question affirmatively. The courts merely seem to say, perhaps.

I recall the concluding paragraph of a small book on capital punishment by Professor Thorsten Sellin in 1967:

> If an intelligent visitor from some other planet were to stray to North America, he would observe, here and there and very rarely, a small group of persons assembled in a secluded room who, as representatives of an all-powerful sovereign state, were solemnly participating in deliberately and artfully taking the life a human

188 In this paragraph, Justice Mosk paraphrases Prettyman's two final remaining paragraphs.

189 438 U.S. at 605.

being. Ignorant of our customs, he might conclude that he was witnessing a sacred rite somehow suggesting a human sacrifice. And seeing our great universities and scientific laboratories, our mental hospitals and clinics, our many charitable institutions, and the multitude of churches dedicated to the worship of an executed Saviour, he might well wonder about the strange and paradoxical workings of the human mind.[190]

* * *

II. MYTH: ONLY KILLERS ARE EXECUTED[191]

Until recently no case in modern jurisprudential history received the extravagant expenditure of ink and public attention that was given to Caryl Chessman five decades ago. His conviction and impending execution became a cause célèbre from the courtrooms of California to the chambers of the Vatican. Petitions were circulated and demonstrations were held in countless cities and in most of the capitals of the Free World.

Though the case originated in the administrations of two of my predecessors, ultimately it fell to my lot as attorney general of California to resist all of Chessman's numerous appeals and to assure that the trial court judgment of death be carried out. That I was successful brings no glow of satisfaction to me today.

It was Chessman's misfortune to be convicted in 1948 and not in 1969. For, ironically, I was the author of an opinion as a justice of the California Supreme Court in that latter year that would have made the Chessman execution impossible. But by then he was very dead, the judgment having been irrevocably carried out by the sovereign State of California.[192]

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190 Thorsten Sellin, "The Inevitable End of Capital Punishment," in Thorsten Sellin, ed., *Capital Punishment* (New York: Harper and Row, 1967), 253.

191 This paper is based on a typed manuscript prepared by Justice Mosk. It has been edited for publication. All footnotes are provided by the editor.

192 *People v. Daniels*, 71 Cal.2d 1119.

Mention the name Chessman today and inevitably the reply will be something like this: "Well, perhaps he should not have been executed because of technicalities. But, after all, he was a cold-blooded murderer . . . ." What few people recall is that Chessman was not a murderer. While he committed many heinous offenses, he took no lives. Yes, California executed a man for offenses other than murder.

Chessman's technique was to place red cellophane over the spotlight on his automobile, thus simulating a police vehicle. In that manner he gained the attention of young couples romancing in isolated locales, after which at gunpoint he would rob the male and remove the female to another site for purposes of rape and robbery. He became known as the "red-light bandit." While convicted of seventeen counts of robbery and kidnapping, only two of the charges resulted in a sentence of death. Under the then existing law, one who kidnapped for robbery, with infliction of bodily harm, was subject to the extreme penalty.

To most people kidnapping has a different connotation. Indeed, the California penal code defines kidnapping as the forcible taking of a person out of the country, the state, the county or into another part of the same county, and refers to ransom, extortion or robbery. Reading the law narrowly, many prosecutors would charge ordinary holdup men with kidnapping, in addition to robbery, if they compelled a grocery clerk to move from the counter to the cash register. That, they contended, was involuntary movement from one part of the county to another. The Supreme Court of California invoked in one Chessman appeal the apothegm that it "is the fact, not the distance, of forcible removal which constitutes kidnapping in this state."[193]

The state high court cited cases which upheld kidnapping convictions for forcing a victim to cross the street to enter an automobile, to be dragged from the sidewalk to the adjacent house, to be taken from the front of the house to the roof of the same house, to be taken from the living room to the bedroom of the same house. The Court maintained that "[w]here asportation is charged, the distance removed is not material. . . ."

193 *People v. Chessman*, 38 Cal.2d 166, 192 (1952).

In 1969 I was on the Supreme Court of California, and up to us came the case of Gene Daniels and Archie Simmons. They had been convicted of a series of rapes, robberies and kidnappings on and near the campus of the University of Southern California. In the course of their depredations, they had moved three young women about their rooms for distances of eighteen feet, five or six feet, and thirty feet, respectively. On *Chessman* case authority, they were given the death penalty.

For the Court, I reexamined the whole concept of distance in relation to the statutory requirement of movement from one part of the county to another. Conceding that any definition in terms of inches, feet or miles would be arbitrary, I concluded that reasonableness had to be an element of the definition of movement.

Is reasonableness an uncertain requirement? Not so, we pointed out: the law is replete with instances in which a person must, at his peril, govern his conduct by such nonmathematical standards as "reasonable," "prudent," "necessary and proper," "substantial."

Indeed, a wide spectrum of human activities is regulated by such terms: thus, one man may be given a speeding ticket if he overestimates the "reasonable or prudent" speed to drive his car in the circumstances, while another may be incarcerated in state prison on a conviction of willful homicide if he misjudges the "reasonable" amount of force he may use in repelling an assault. While there is no formula for the determination of reasonableness, standards of this kind are not impermissively vague, provided their meaning can be objectively ascertained by reference to common experiences of mankind.

After analyzing authorities from various parts of the country, I concluded on behalf of our Court that kidnapping may not be charged against a defendant if the movements of the victim are merely incidental to the commission of the underlying robbery and do not substantially increase the risk of harm over and above that necessarily inherent in the crime of robbery itself. Thus, if a robber or rapist does no more than move his victim around the inside of the premises in which he finds him — whether a residence, a place of business, or other enclosure — or even if outside of the premises, moves one only a short distance in

consummation of the underlying offense, his crime will be robbery, or rape, or both, but not kidnapping.

It was the kidnapping for robbery, with bodily harm, that resulted in a death penalty being imposed on Caryl Chessman. Under the *Daniels* doctrine, unless the movement had been substantially more than required for commission of the underlying offense, Chessman would not have been given the death sentence. Indeed, subsequent to the *Daniels* decision, the California Legislature repealed the death provision for the crime of kidnapping altogether.

All of the foregoing was too late for Chessman. He had gone to his uncertain reward. This was a melancholy chapter in the country's legal history for still other reasons.

When Caryl Chessman committed his crimes, mostly against women, and when he was apprehended and originally tried in court, he was an ignorant, arrogant, abusive, intolerable person with few, if any, redeeming qualities. During his years in confinement he educated himself, studied law and literature, became literate and articulate. He wrote many of his own appellate briefs — they were intelligible and rational — and wrote and had published four books. In short, if the purpose of penal confinement is rehabilitation — a concept with which some people quarrel these days — Caryl Chessman had achieved a remarkable degree of rehabilitation. Even if confined for the rest of his natural life, he might well have contributed more to American letters.

Chessman's fourth book was a novel about the violence of boxing, entitled, *The Kid Was a Killer*. In a foreword a distinguished psychiatrist declared that it was remarkable a man on death row, facing death momentarily, could write so forcefully and dispassionately about the violence that lurks in the heart of every person. In his epilogue to the novel, Chessman wrote:

> Remember: The protagonist of the story, the kid, *was* a killer. That was and is the simple, stark fact; that was and remains my point in authoring the type of novel I did. I wanted to examine violence — its meaning, its psychological roots, its social implications — in dramatic terms. If I succeeded to any degree, the thrust and power of the story derives from its rawness, its unprettied crudities. The

> title squares with the unfortunate tendency of the public to oversimplify both the genesis and motivation of the disturbed, antisocial personality which, whether with a gun or boxing gloves, violently expresses its rebellion, its sickness.[194]

It seems apparent that the Caryl Chessman who committed violent robberies and rapes was not the same Caryl Chessman who was a thoughtful, provocative literary figure. Unfortunately, not merely the former, but the latter as well, have been executed.

* * *

III. FROM THE SHADOW OF DEATH TO PEN PAL[195]

Standing before me one day in the 1950s — I was then a trial judge in the Superior Court of Los Angeles County — was a tall, thin, well-groomed young man in his late twenties, charged with a brutal murder. If there is such a thing as a typical murderer, it was obviously not this defendant. He could have been an upwardly mobile professional — a yuppie of the 1980s — for he was serious in mien, rather handsome in an antiseptic way, although his coloring was the drab grey that is an inevitable by-product of jail confinement during the several months prior to trial. He faced a potential death penalty.

I was acutely aware of the most awesome responsibility imposed on a judge who must sentence a defendant to death. If we truly believe that only God renders such irrevocable decisions as life and death, then the judge who makes the pronouncement of the ultimate penalty is in fact playing God. He is ordering the elimination of a human being.

During the selection of a jury to try a defendant on a capital charge, the probing by the competing attorneys into the inner recesses of the

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194 Caryl Chessman, *The Kid was a Killer* (Greenwich, Conn.: Fawcett Publications, 1960), back cover.

195 This paper is based on a typed manuscript prepared by Justice Mosk and to which he gave the alternate title, "Myth: Rehabilitation of Criminals Never Succeeds." It has been edited for publication.

minds of the prospective jurors is itself a fascinating exercise. A venireman who tells the attorneys that he does not believe he can impose the death penalty is frequently asked, "What if you had Adolf Hitler before you as a defendant, or Charles Manson, could you bring yourself to join your fellow jurors to vote for death?" Some judges will not permit hypothetical questions of that kind, but many will allow them. Rare indeed is the prospective juror who will respond that, because of his philosophical opposition to the penalty of death, he would be compelled to spare Hitler and Manson. It suggests that there are few purists is this society of ours, that perhaps everyone has his price.

The first degree murder case of the clean-cut young man proved to be one of the most dramatic cases I heard as a trial judge, and ultimately I had the duty of imposing a sentence of death on the defendant whom the jury had found guilty as charged. The case had all the overtones of intrigue, love, sex, hate, rejection, frustration and finally violence.

John Crooker had graduated from a comparatively small liberal arts college on the West Coast and enrolled in law school in the Los Angeles area. To finance his schooling, he took a job as a butler-handyman for Norma McCauley, an attractive and wealthy young divorcee. The job provided him with living accommodations and sufficient compensation to pay for his tuition, books and personal needs. It was a fortunate arrangement for a law student.

Fate and cupid intervened: a romance developed between the student and the divorcee. The two frequently slipped out to obscure little bars where they were unlikely to be seen, a necessity, since she was part of an affluent social set. It would not do for a socialite to be observed out on the town with the help.

This conduct continued for some months, until Norma finally tired of the surreptitious romance and determined to break it off completely. Not only did the romance come to an end, but the employment and living arrangement terminated as well. Crooker was unceremoniously ordered out of the house. He left, despondent as he felt his secure world crumbling, his opportunity for an education and to become a lawyer endangered.

He brooded about his fate for a week or so. Then one night he determined to make one last effort to persuade Norma to resume their relationship. He took a taxi to her home, observed that she was not at home and let himself in with a key which he had retained. Some hours later Norma returned home with a date; the two came inside and had a few nightcaps. Meanwhile Crooker hid in a closet.

When the date left, Crooker came out and confronted Norma. They talked. She then committed an unpardonable sin: it was late, she was tired and fell asleep while he was professing his undying love. Enraged, he went into the kitchen, seized a large butcher knife and stabbed her to death. He walked home, throwing the knife into some impenetrable brush. It was never found.

Since there was no evidence of a forced entry into Norma's home, suspicion focused on Crooker almost immediately. The tell-tale evidence was unusual. It seems that during the hour or more that he hid in the closet, while waiting for the date to leave, he had to relieve himself. He did so in a jar which was left on the closet shelf. The jar, later discovered containing urine and his fingerprints on the glass, was difficult to explain away.

Nevertheless, at trial Crooker denied his guilt. A confession made to the police, he asserted, had been compelled by police brutality. This was unconvincing both to me and to the jury, although the police did employ some persuasive tactics that have been disapproved in United States Supreme Court opinions rendered subsequently. I believed the confession was essentially voluntary, for the investigating officers did not obtain it by mere interrogation, with a stenographer writing down questions and answers. The police gave Crooker a pad and pencil, and told him to describe in his own words and in his own hand what happened. Thus, there was a full and complete confession in handwriting by a defendant who was above average in intelligence and who fully appreciated the consequences.

Crooker employed a bright and able young attorney to defend him. His tactic was to enter a complete denial, and his counsel insisted to the jury that his client was innocent, but if the jury disbelieved him, the jurors were to order him to be put to death rather than to impose a life sentence.

Crooker assertedly preferred to forfeit his life rather than to spend countless years in confinement. The jury accepted the challenge and returned a sentence of death, which I thereafter ordered to be imposed.

By the time all the appeals were completed and the conviction affirmed — the case ultimately went to the United States Supreme Court — I had been elected attorney general of California and Edmund G. (Pat) Brown had been elected governor. Whether or not his trial declarations were a tactic, or he changed his mind, Crooker finally made a plea for executive clemency, and Pat Brown commuted the death sentence to life imprisonment. I expressed no objection, for I believed this crime, although heinous, was an act of blind passion that was out of character and unlikely to ever be repeated. I had also learned that he was undergoing psychiatric assistance in prison and was apparently responding well.

Now — a long passage of time, more than dozen years. Opening my mail one day, I found a formal announcement of an impending ceremony. I was invited to the marriage of Valerie to Mr. John Crooker at a named time and place. That was my first knowledge that Crooker was apparently out of prison and on parole. I declined the wedding invitation, but dropped the newlyweds a brief note wishing them well.

The following Christmas my wife opened the holiday greeting cards we had received and there was one from Mr. and Mrs. John Crooker. Thoughtful perhaps, but my wife was particularly concerned about the Hallmark-type message: "You are always in my thoughts." As the judge who once formally sentenced the man to die in the San Quentin gas chamber, I was not particularly elated at always being in his thoughts.

Nothing untoward ever occurred. Indeed, every Christmas thereafter, right up to the present, I have received a holiday greeting from John Crooker and his wife.

The handwritten message on the greeting card one year was particularly poignant. It read something like this: "I thought you would be pleased to know that Valerie and I have bought a house. It is the first home I have ever owned. I have been promoted by my employer in the Bay Area of California and am now earning a guarantee of $25,000 per year. Things are really going well for us. I wish you continued success in your career."

Thus, the saga of John Crooker, murderer, one-time occupant of death row at San Quentin: apparently he has made good as a law-abiding member of society. It can be argued that the purpose of our criminal laws — rehabilitation of a criminal — was fulfilled in this case. Obviously, that would not have been possible if the lethal pellets had been dropped while this defendant was strapped to the chair in San Quentin's green gas chamber. And it would not have been possible were it not for the compassion of a governor. Pat Brown — the original Governor Brown — was that type of human being.

* * *

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.

My conclusion was that the answer depends largely on geography. If one's feet are firmly planted in the soil of the United States, the United Kingdom, Canada, Australia, New Zealand, Scandinavia, most of Western Europe, Israel, or Costa Rica, he may feel confident that his rights under constitutional government or its equivalent will be protected.

But if one lives under a military regime, so many of which have proliferated in other parts of the world, political activity and exercise of free speech will undoubtedly jeopardize his freedom, his future security and perhaps his very life. Even a lawyer who undertakes to represent one accused of opposing a repressive regime is himself subject to discipline.

Thus, from a broad worldwide perspective, we cannot be sanguine about the status of the Rule of Law in these forthcoming years of the twenty-first century.[197] John Milton, in the seventeenth century, said that "[n]one can love freedom heartily but good men; the rest love not freedom, but license." The basic conflict today is not between freedom and anarchy, but between freedom and tyranny. To me, freedom depends on maintenance of a Rule of Law.

Perhaps at the outset I should define my concept of the Rule of Law. Each of us may see that Utopian goal in a different light: to some extent its boundaries are in the eye of the beholder.

As said by a distinguished British scholar, Dean Ronald Graveson of King's College [London], "The house of law is the home of all mankind. . . . It has sheltered society since the human race began and still performs its ancient task. . . . Law deals with men and women. It governs their behaviour, their relations, their acquisition and use of things."[198]

Law is not a primary science; it does not exist for an independent, self-sufficient purpose, but only as a means of achieving purposes secondary to itself. It is designed to insure the existence of an organized society and, indeed, the survival of that society.

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197 Justice Mosk revised his typed manuscript in handwriting to read, "in these forthcoming years of the twenty-first century," instead of the original typewritten phrase, "in these concluding years of the twentieth century," whereas the published version of the speech reads only, "circa 1983."

198 Ronald Harry Graveson, "The House of Law," in Roscoe Pound et al., eds., *Perspectives of Law: Essays for Austin Wakeman Scott* (Boston: Brown Little, 1964), 131.

It has been said that law and justice are not necessarily synonymous, and to some extent that is true. Unfortunately, there are occasional incidents in which the application of law without the exercise of compassion results in a tragic injustice. Yet, over the long run, employment of the law fairly and impartially brings about a just and peaceable termination of controversies.

It has also been argued that law and morality are not coextensive, and again, to some extent, this is true. In the creation of a legal society, morals probably play no conscious role. Yet we must recall that law is man-made and man is basically a moral creature, so inevitably, morals affect law through the processes of the human intellect, whether creating law in the legislative arena, executing law in the executive branch of government or interpreting the law in the judiciary.

Basically, there are three external forces that are employed to govern human conduct: religion, custom and law.

Religion posits a divine scheme to which man must conform. While it is largely subjective, its orderliness manifests itself objectively in a duty to obey.

Custom is somewhat ethereal and often difficult to define or rationalize. Yet conformity with accepted custom is consistent with an orderly society, and with man's innate desire for the approval of his fellow man. The sanction of community disapproval is strong.

Law is the most effective tool of society's need for order and orderly processes. There are essentially four elements of law. First, there must be an authority competent to formulate rules of general application. Second, there must be an effective means of promulgating the rules so that they are universally recognized and generally understood. Third, there must be an established means of applying law. And fourth, there generally must be some sanction to induce obedience and to deter disobedience.

The Rule of Law is obviously closely related to liberty. It involves the notion of a legal system, which is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just, they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their

expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of [a] person's liberties.

A system of rules addressed to rational persons to organize their conduct concerns itself with what they can and cannot do. It must not impose a duty to do that which cannot be done. Laws and commands are accepted as laws and commands only if it is generally believed that they are capable of being obeyed and executed. This precept expresses the requirement that a legal system should recognize impossibility of performance as a defense, or at least as a mitigating circumstance. It would be an intolerable burden on liberty if the liability to penalties was not normally limited to actions within our power to do or not to do.

The Rule of Law also implies the precept that similar cases be treated similarly. Men could not regulate their actions by means of rules if this were not followed. The theory that like decisions be given in like cases significantly limits the discretion of judges, administrators and others in authority.[199]

The concept that there is no offense without a law, and the requirements the law implies, also follow from the idea of a legal system. This theory demands that laws be known and expressly promulgated, that their meaning be clearly defined, that statutes be general both in statement and intent and not be used as a way of harming particular individuals, that at least the more severe offenses be strictly construed, and that penal laws should not be retroactive to the disadvantage of those to whom they apply. These requirements are implicit in the notion of regulating behavior by public rules. For if statutes are not clear in what they enjoin and forbid, the citizen does not know how he or she is expected to behave.

Under a Rule of Law, a person charged with a criminal offense is entitled to know in advance the nature of the charges and to have adequate time in which to prepare his defense. He is entitled to have his cause heard before an impartial tribunal — whether judge or jury — and to confront his accusers and adverse witnesses for purposes of cross-examination. He is entitled to be represented by competent counsel, and today a new right has emerged: if one is indigent in a criminal case, he is to have counsel

199 The word "administrators" was added in handwriting by Justice Mosk to his typed manuscript.

appointed by the court at [the] expense of the state.[200] Finally, any decision by the impartial tribunal must be based on competent evidence.

I do not intend to be chauvinistic, but to me the Rule of Law is virtually synonymous with the provisions of our American Bill of Rights. Any country that faithfully adheres to the simple but eloquent guarantees stated in our remarkable eighteenth-century document is a country that respects the Rule of Law.

A Rule of Law is one that imposes restrictions on the powers of government and assures the maximum liberty for individuals. Thus, our Bill of Rights guarantees a speedy and public trial for an accused, representation by counsel, process for obtaining witnesses, a trial by jury, no excessive bail or fines. Our Bill of Rights prohibits the seizure of private property without due process of law, forbids unreasonable searches and seizures, prevents double jeopardy, and denies the government to compel one to be a witness against himself (self-incrimination).

Undoubtedly the greatest guarantee in a Rule of Law is the assurance that each individual may speak and write freely, may practice his religion and the beliefs of his conscience without interference, and that he may assemble freely with his fellow citizens for any peaceable purpose and to petition his government for a redress of grievances.

These are all rights provided without the benefit of a written constitution in common law countries, but they are specifically defined in our American national charter and repeated in charters of the fifty states that comprise the United States.

In this day of mass production, international business operations and cartels, I believe the Rule of Law also embraces protection for the individual entrepreneur against giant predatory competitors. In our country and most of the states,[201] this means effective antitrust laws to prevent overt actions designed to destroy competition and to create monopoly control of products or services. Restraints of trade are deemed as offensive as the common law restraints upon alienation.

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200 The words "in a criminal case" were added in handwriting by Justice Mosk to his typed manuscript.

201 The words "most of the states" were added in handwriting by Justice Mosk to replace the words "a number of others" in his typed manuscript.

The Rule of Law, which frowns on contracts of adhesion, must also prevent rule by economic buccaneers over business enterprises that suffer unequal bargaining power. I suggest such protection is an essential element in preserving an economic system that serves the welfare of society.

In addition to all the foregoing, a new aspect to a Rule of Law is developing. This is based on the obvious theory that all of us are consumers — consumers of products and services — and that we have a fundamental right to be treated fairly and with respect for our health and wellbeing. This is an area that applies both nationally and internationally, for the avarice and deception practiced by some producers and distributors, and the gullibility of users of products, do not pause at national boundaries.[202]

Consumer frauds are particularly evident in three fields: food, infant health and nutrition, and pharmaceutical products. These problems can be attacked if the will to do so exists. Some years ago when I was the state attorney general for California, I created divisions in my office to deal with these problems by using our fraud statutes and our state antitrust laws. We took on some industrial and commercial giants, and justice ultimately prevailed.

In 1969, the International Co-operative Alliance adopted an International Declaration of Consumer Rights which covers matters of special concern to consumers in developing countries. These rights are the assurance of:

(a) A reasonable standard of nutrition, clothing and housing;
(b) Adequate standards of safety and a healthy environment, free from pollution;
(c) Access to unadulterated merchandise at fair prices and with reasonable variety and choice;
(d) Access to relevant information on goods and services and to education on consumer topics; and
(e) Influence in economic life and democratic participation in its control.

Finally, the Rule of Law depends on an independent judiciary. A committee of experts organized by the International Association of Penal Law

202 Justice Mosk revised his typed manuscript in handwriting to read, "applies both nationally and internationally," instead of, "applies to both the have and have-not nations."

and the International Commission of Jurists met in Siracusa, Sicily, in 1981, to formulate draft principles on the independence of the judiciary.[203] The participants comprised distinguished judges and other jurists representing different regions and legal systems. They came from Africa, Asia, America, and Eastern and Western Europe.

The result of their work was a draft of principles on independence of the judiciary. The preamble of the draft noted:

> The Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Rights (Art. 14 (1)) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent judiciary is indispensable for the implementation of this right.

They then proceeded to define independence of the judiciary. It means, they declared:

> (1) That every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and
>
> (2) That the judiciary is independent of the executive and legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature.

If, as indicated earlier, the Rule of Law is in jeopardy in many parts of the world, what do we do about it? This leads to my conclusion: that those of us with a heritage of respect for the dignity of man have a continuing responsibility to protect and perpetuate the Rule of Law in every part of the globe where our voices can be heard.

The Anglo-American common law has been one of the major forces of modern civilization and has kindled the Rule of Law.[204] Some years ago, in an address to New York lawyers, [future] Justice Cardozo said:

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[203] Draft Principles on the Independence of the Judiciary ("Siracusa Principles"), Syracuse, Sicily, May 25-29, 1981.

[204] This sentence was added in handwriting by Justice Mosk to his typed manuscript to generalize a (deleted) quotation from Sir Arthur Gilbert on Jewish

> The tradition, the ennobling tradition, though it be myth as well as verity, that surrounds as with an aura the profession of the law, is the bond between its members and one of the great concerns of man, the cause of justice upon earth. Like the old charter extorted by the barons, the body of our law when we read it line upon line may smack of mere antiquities, the customs of a vanished past. The myth, however, is still there, the myth of a great bible, the myth of mighty tablets hewn and hammered out by successive generations of advocates and judges under the imperious drive of a passion to shape the forms of justice.[205]

This passion to shape the forms of justice must remain one of the dominant forces in the life of those who cherish the Rule of Law.[206]

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II. THE ANATOMY OF AN OPINION[207]

The media announce that a state Supreme Court opinion was rendered on a subject of considerable public interest. The prevailing, or majority, view was expressed by one justice, a contrary, or dissenting, conclusion was declared by another justice. Of the seven members of the state high court, why did those two — and not the other five — write the opinions?

The internal processes of appellate courts have been somewhat of a mystery not only to the public but generally to members of the bar. That is partly due to the fact that the judicial function, particularly at the higher

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contributions to common law (see note 1).

205 Benjamin Nathan Cardozo, "Faith in a Doubting World," address to the New York County Lawyers Association at a dinner in honor of then Chief Judge Cardozo, Dec. 17, 1931, in Margaret E. Hall, ed., *Selected Writings of Benjamin Nathan Cardozo* (New York: Fallon Publications, 1947), 105.

206 This sentence originated as the concluding statement quoted from Sir Arthur Goodhart (see note 1), but was rephrased by Justice Mosk with handwritten revisions into his own concluding statement.

207 This paper is based on a typed manuscript prepared by Justice Mosk, to which he gave the alternate title, "Myth: Court Opinions are Impulsively Reached." It has been edited for publication. All footnotes are provided by the editor.

levels, has always been regarded with a measure of awe. As conceived in the days of emperor Justinian in ancient Rome, and perpetuated in the Anglo-American tradition, the judiciary has been deemed one of the vital elements of organized society and of government under law, but shrouded in secrecy as to internal operations.

The judiciary is divided into two basic components. The first is the trial court. That is the arena in which the opposing litigants clash before a judge or jury and present by means of personal testimony and witnesses their respective versions of the facts in dispute. The second is the appellate court to which an appeal may be taken by the losing party in the trial. Most states have two levels of appellate courts: an intermediate tribunal, in which a hearing is a matter of right, and a supreme court to which one must petition for review.

The appellate process has two distinct functions. The first is to review for correctness the judgment of the trial court. While deference is given to the judge or jury in determination of facts in dispute, an examination is made of rulings on the law to assure that they were correct and not victim of the whims or shortcomings of the judge who presided. The second aspect of appellate review is deemed institutional, that is, an effort to achieve uniformity in decisions among all the judges in the jurisdiction. The purpose is to assure, as effectively as possible, that ours is a government of laws and not of men. Creativity among judges is not totally discouraged, but it must be circumscribed by the laws adopted by legislative bodies and precedent established by higher courts.

In short, the appellate system is concerned with achieving justice for the parties involved in a lawsuit, but also with the effect a decision might have on countless other courts and litigants in the future. A certain symmetry of authority and predictability are healthy in a democratic society.

A frequent debate among judges and legal scholars is over whether an appellate tribunal is a court of justice or a court of law. Actually, it has the elements of both, but in the event of conflict, it must be a court of law. A simple illustration:

Jones and Smith have a contract. Jones breaches the contract. Smith files a lawsuit. In a court of justice he should prevail and obtain money damages. But if he fails to file his suit within four years — the period of

the statue of limitations — he would lose in a court of law. The legislature in its wisdom has determined that litigation must be pursued within a reasonable time, and adopted a law declaring four years on a written contract to be reasonable. The purpose is to discourage lawsuits over claims, even though meritorious, that have been rendered stale by the passage of time. The reason is that documents may have been lost, witnesses disappeared and memories faded. In such an instance, the law prevails over justice.

To illustrate the functioning of the judicial process, let me relate an actual case decided by the Supreme Court of California in 1986.[208]

George Lloyd Pool was arrested at a Safeway supermarket after tendering a $100 bill that did not bear the phrase "In God We Trust." The Safeway employee, believing the bill might be counterfeit, summoned the Oakland Police Department. The police eventually arrested Pool and held him in jail overnight. The bill was not counterfeit.

In the week preceding the incident, Pool had cashed a paycheck at a local bank which issued him a few small bills and fifteen $100 bills. At least one of these $100 bills was from series 1950A — a series upon which the motto "In God We Trust" does not appear.

At the market, Pool tendered that bill to pay for approximately $7 worth of groceries. The checker told him to wait in line while she got his change. Instead, she called the assistant manager. He summoned the police because Safeway was on the alert for counterfeit $100 bills. Apparently, stores in the area had been receiving an inordinate number of counterfeit $100 bills. All employees had also been instructed to look for the motto "In God We Trust" on $100 bills because management believed that bills lacking that motto might be counterfeit. No basis for this belief appears in the record. Indeed, the lack of "In God We Trust" on $100 is *not* an indicium of counterfeit status.

Nevertheless when the assistant manager saw that "In God We Trust" was missing from Pool's bill, he treated the bill as a possible counterfeit. He reported his suspicions to the police. When the police arrived, he showed them Pool's "suspicious" bill next to a "legitimate" bill — i.e., one of more recent vintage — to illustrate where the "missing" motto should be.

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208 *Pool v. City of Oakland*, 42 Cal.3d 1051.

Mr. Pool, waiting in the checkout line, knew none of this. When the officers approached him, he protested that he had done nothing wrong and that he merely wanted to pay for his groceries or get his money back. The officers ignored his pleas.

One officer held Pool's wrist behind his back and threatened to break his arm. The officers asked him for identification, which he produced. They also asked him where he obtained the bill. At no time did they explain the nature of the problem. Pool continued to insist that he had done nothing wrong.

The officers escorted Pool from the store with his arms behind his back and an officer holding each arm. In the parking lot the officers frisked him in public view, then pushed him into the back of a patrol car and took him to the police station. At no time did they advise him of his rights.

At the station, Pool was fingerprinted, photographed and subjected to a strip search, which included a visual inspection of his rectum. It was not until this point that he learned he was suspected of passing counterfeit currency.

Within minutes after arriving at the police station, the officers determined that Pool's $100 bill was valid. The verification procedure consisted of calling a telephone service instituted by the Department of the Treasury for this purpose. The entire process took less than six minutes. Nevertheless, the police held Pool overnight on charges of interfering with a police investigation. He was released the following afternoon.

Pool brought an action against Safeway for negligent and intentional infliction of emotional distress, false arrest, and false imprisonment, and he sued Oakland for false arrest, false imprisonment, assault and battery (i.e., using excessive force to effectuate the arrest), intentional infliction of emotional distress and violation of his civil rights.

The jury returned a general verdict against each defendant and assessed damages of $45,000. An appeal followed.

The first step was an appeal to the intermediate appellate court. Attorneys for the competing sides prepared briefs — that is, written arguments on the facts and the applicable law — and then on an appointed day, made an oral argument before a three-person appellate tribunal. No testimony

from witnesses is taken in that court, only presentation by attorneys, often with intense questioning from the justices on points of law.

Within a few months, sometimes sooner, the intermediate appellate court will render its decision, either affirming or reversing the trial court judgment. In the *Pool* case the court reversed the trial judgment, which meant a ruling in favor of Safeway and Oakland. Pool thereupon petitioned the state Supreme Court for further review, and his petition was granted.

Again written briefs were submitted to the higher tribunal, and again oral argument was heard, this time before the seven-person Court. Here the attorneys were allowed thirty minutes to present their version of the facts and the law, and again they were subjected to sharp questions from the justices.

There is a distinction between "cold" courts and "hot" courts. Justice Felix Frankfurter insisted on knowing absolutely nothing about a case until he ascended the bench and in public heard from the attorneys. He felt that any predisposition was improper. Thus to him a "cold" court was preferable. On the other hand, most high court justices today believe they must be prepared by having read the briefs and studied the applicable law in advance of oral argument, in order to better understand the presentation and to make intelligent inquiry on some of the points at issue. Many of them have memoranda prepared by themselves or by their law clerks. Thus, most appellate tribunals are known as "hot" courts. My colleagues and I are thoroughly prepared before oral argument; in some instances we believe we know as much about the case as the attorneys appearing before us.

Immediately after oral argument a conference is held by the seven justices. The case is discussed, various contentions are presented, sometimes debated, possible options for conclusion are explored, and a tentative vote is taken. While that vote is never deemed conclusive — minds may be changed after further reflection — it does give an indication of the probable ultimate result of the case. In this instance Pool prevailed on his appeal.

It is the chief justice who then designates the author of the majority opinion. Generally he will select the member of the Court who indicated the greatest interest in the matter at hand, or who may have had a certain expertise in the subject matter from previous cases. That is not invariably so, for he will retain some cases for himself, and will also try to fairly equalize the imposition of work.

The designated justice will prepare a draft of an opinion and circulate it to the others on the Court. Those who agree with the proposed result will frequently offer suggestions or additions, deletions or corrections to be made. And to obtain a majority, the author will try to accommodate his colleagues. In the meantime a justice who disagrees with the proposed result will prepare a dissenting opinion. He may find fault with the interpretation of facts, analysis of the law, or with the effect of the result.

The proposed majority opinion, and the proposed dissent, will circulate among the members of the Court. The justices in turn will decide which to sign, and when all seven have placed their signatures on one or the other of the opinions, the final drafts are released to the attorneys and to the public through the media.

There are some rare occasions when the proposed dissent will garner four or more of the seven justices' signatures. In that event, the chief justice will reassign the case to the dissenter, who in turn will write a new majority opinion. On occasion also, there may be a separate concurring opinion. That means, simply, that the concurring justice agrees with the result or disposition of the case but disagrees with some of the rationale employed.

Why does a justice write a dissenting opinion? It takes time and effort to prepare and has no appreciable effect on the final result of the case. And, as Justice Douglas once wrote, "Judges are not perverse; they look for unanimity, not disagreement."[209] On the other hand Justice Sutherland pointed out that the "oath which he takes as a judge is not a composite oath, but an individual one. . . . He cannot subordinate his convictions to that extent and keep faith with his oath or retain his judicial and moral independence."[210] Indeed, said Justice Frankfurter, dissents "record prophecy and shape history."[211]

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209 Similar concepts, differently worded, are found in: William O. Douglas, *We the Judges: Studies in American and Indian constitutional law from Marshall to Mukherjea* (Garden City, N.J.: Doubleday and Company, Inc., 1956), 233, 389.

210 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 401 (1937) (Sutherland, J., dissenting).

211 Felix Frankfurter, "Mr. Justice Holmes and the Constitution: A review of his twenty-five years on the Supreme Court," 41 Harv. L. Rev. 121, 162 (Dec. 1927).

No justice can be deliriously happy at having his views on a case abused by his colleagues, however collegial may be the atmosphere in the Court. He can, therefore, give vent to his beliefs in a sharp dissenting opinion. The writer of a majority opinion must cater to his colleagues, make revisions and changes to obtain their acquiescence. The final draft is often a watered down consensus. The writer of a dissent has no one to please but his own conscience. He may wax eloquent, resort to hyperbole, predict dire results when the majority view prevails, and at the same time try to affect the future of the law. I must confess it is often much more personally rewarding to write a dissent than a consensus majority opinion.

The ultimate in inner-satisfying reward occurs when a minority viewpoint is later adopted by the United States Supreme Court. I have one memorable example in mind.

When a jury is being selected, the opposing attorneys are entitled to challenge prospective jurors. The challenge may be "for cause," that is, the juror may be a friend of one of the parties involved, be related to a witness, or have publicly expressed an opinion on the merits of the case. A limited number of challenges may also be "peremptory," that is, for no explained reason, merely because of some mental reservation a lawyer may have concerning the predilections of the prospective juror.

The United States Supreme Court many years ago held that there can be no limitations on the exercise of peremptory challenges, and no explanation may be required of the attorney using such a challenge. In many instances this resulted in blacks being excluded from juries in which a black defendant was being tried on a criminal charge.

I recall as a trial judge presiding over criminal cases in which there was a black defendant, a white victim, a white prosecutor. The prosecutor would peremptorily challenge every potential black juror, without regard to their qualifications to serve. This would annoy me, but my hands were tied by the Supreme Court decision. It bothered me because, while I would make certain that the black defendant would receive a fair trial, understandably he would not believe he was getting a fair trial. The perception of justice is often as important as justice itself.

On the Supreme Court of California, I had an opportunity to do something about the problem. A case known as *People v. Wheeler* came up on appeal, and on behalf of a majority of the Court I wrote an opinion reaffirming the unbridled right of counsel to exercise peremptory challenges but with a significant proviso: that they were not being used for a racially discriminatory purpose.[212] We prescribed in detail the procedures to be employed by a trial judge in the event all or most of a cognizable group were being excluded from a jury. The *Wheeler* opinion did not limit its scope to blacks; it applied to women, Hispanics, Asians, any cognizable group in our society. We indicated our awareness of the United States Supreme Court opinion to the contrary but deliberately refused to follow it by relying not on federal law but on our state Constitution. Our purpose, we made clear, was to obtain juries that were a representative cross-section of the community, insofar as that could be achieved by a random draw from the jury panel.

The Supreme Court of Massachusetts immediately followed our opinion, as did a number of other states.[213] There the matter rested for several years.

Finally, in 1987, the United States Supreme Court in a case originating in Kentucky reconsidered the issue, and held as we did that the use of peremptory challenges for the purpose of excluding blacks from a jury was impermissible.[214] The high court appeared to limit its decision to blacks, whereas we had included all cognizable groups, but I suspect that a further extension of its views can be anticipated.

That is what I mean by inward satisfaction. To have refused to follow a High Court opinion we deemed improper, to have rendered a directly contrary opinion, and then to have the High Court recant some years later and adopt our view, is truly gratifying.

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212 22 Cal.3d 258 (1978).

213 *Commonwealth v. Soares*, 377 Mass. 461 (1979).

214 *Griffith v. Kentucky*, 479 U.S. 314 (1987).

III. ACCOUNTABILITY OF JUDGES[215]

Seldom does a well-publicized case come before our Court, or any court, without an avalanche of letters being received from citizens expressing their views on the course that should be taken by the judges. There is the unspoken belief that judges should be subject to influence by their constituents. After all, legislators and the chief executive hearken to public opinion; why should judges, who are also public servants, be any different?

The simple answer is that judges *are* different. They are expected to decide cases on the basis of the constitution, the laws and precedent, not in concert with a majority of the populace that tilts in one direction or another. Indeed more often than not courts must thwart public opinion by reaching a result that is manifestly unpopular, simply because individual protections of the constitution or laws so dictate.

Are judges entirely unaware of public interest and concern? Certainly they should be, but on the other hand I cannot overlook the remarks of my late former colleague, Justice Otto Kaus,[216] who, when asked if he paid attention to public opinion, replied, "Of course not. I never look over my shoulder when making a decision. However, one cannot be totally oblivious to the crocodile in the bathtub."

Justice William O. Douglas gave much the same answer in his book, *We the Judges*: "Large and important issues which divide people and heavily implicate their emotions also affect the bench and bar. For judges, lawyers, and jurors are also human."[217] Justice Oliver Wendell Holmes took a comparable position: "[T]he taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be

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215 This paper is based on a typed manuscript prepared by Justice Mosk, to which he gave the alternate title, "Myth: Judges are Above the Law." It has been edited for publication. All footnotes are provided by the editor.

216 The word "late" was added in handwriting by Justice Mosk to his typed manuscript, indicating that the manuscript was first prepared after Justice Kaus's retirement in 1985 and revised after his death in 1996.

217 Similar concepts, differently worded, are found in: William O. Douglas, *We the Judges: Studies in American and Indian constitutional law from Marshall to Mukherjea* (Garden City, N.J.: Doubleday and Company, Inc., 1956), 233, 389.

our hopes for a change."[218] On the other hand, Justice Louis D. Brandeis warned that "[m]ost of the world is in more or less a hypnotic state, and it is comparatively easy to make people believe anything."[219]

No one placed the problem in perspective better than one of the early justices, Joseph Story: "We need not be told how often the popular delusions of the day are seized upon to deprive the best patriots of their just reward, and to secure the triumph of the selfish, the cunning, and the timeserving."[220]

American justice is the better for its insistence upon objectivity, regardless of the consequential effect on the public psyche. "[T]he law," Dean Roscoe Pound of Harvard once said, "enforces the reasonable expectations arising out of conduct, relations and situations."[221] Public opinion cannot be a factor in that equation. If courts were expected to weigh public opinion in deciding the innocence or guilt of a criminal defendant, or the rights of parties in a contentious civil lawsuit, then perhaps we should have George Gallup on the court so that public opinion could be gauged with reasonable accuracy.

Fortunately, courts, and juries composed of average citizens, are able to reach objective conclusions based solely on admissible evidence even when the result strikes a discordant note in the public arena. Were it not so, the accused murderer, rapist, terrorist, armed robber would not have his constitutional rights protected, or the bizarre political group would not have its First Amendment free speech rights assured, or the religious minority would not be guaranteed the right to practice and preach its version of salvation.

A great justice, Benjamin Cardozo, discussed this among many other thoughts on jurisprudence in *[The] Paradoxes of Legal Science*:

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218 *Bleistein v. Donaldson Lithographing Company*, 188 U.S. 239, 252 (1903).

219 Louis D. Brandeis to his fiancée, Alice Goldmark, Dec. 28, 1890, in Melvin I. Urofsky and David W. Levy, eds., *Letters of Louis Dembitz Brandeis, vol. I (1870–1907): Urban Reformer* (Albany: State University of New York Press, 1971), 95.

220 William W. Story, ed., *The Miscellaneous Writings of Joseph Story* (Boston: Charles C. Little and James Brown, 1852), 627.

221 Roscoe Pound, *An Introduction to the Philosophy of the Law* (New Haven: Yale University Press, rev. ed., 1954), 189.

> I know the common answer to these and like laments. The law is not an exact science, we are told, and there the matter ends, if we are willing there to end it. One does not appease the rebellion of the intellect by the reaffirmance of the evil against which intellect rebels. Exactness may be impossible, but this is not enough to cause the mind to acquiesce in a predestined incoherence. Jurisprudence will be the gainer in the long run by fanning the fires of mental insurrection instead of smothering them with platitudes.[222]

It is, of course, public opinion that generally reacts with thoughtless platitudes.

Two recent examples of the independence of the judicial process come to mind. The automobile manufacturer, John DeLorean, was accused of trafficking in drugs. The public was saturated with accounts of the prosecution's case, including surreptitiously taken films of a purported drug transaction. I daresay that if a vote were taken of the public perception of DeLorean's innocence or guilt, ninety percent would have declared belief in his guilt. Yet when the evidence was produced in court and the jury gave consideration to the facts and law, DeLorean was found not guilty.[223] Public opinion had no effect on the result.

A prominent mayor of a large city in California was indicted on a charge of violating election laws. While his trial was pending, an election was held in that city, and the mayor was reelected. Obviously the public had confidence in his integrity and believed him innocent of the charges. Yet when the case came to trial, the mayor was convicted by a jury and as a result he resigned his office. Again, public opinion did not control the result of a well-publicized trial.

To deny the probative effect of public opinion on judges in individual cases does not translate into the denial of any accountability to society by judges. There is genuine accountability for judicial conduct in a number of contexts.

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222 Benjamin Cardozo, *The Paradoxes of Legal Science* (New York: Columbia University Press, 1928), 2-3.

223 *United States v. John DeLorean*, United States District Court, Central District of California, Los Angeles, Aug. 16, 1984.

First of all, a trial judge is accountable to higher courts. If an opinion he renders on the law is quixotic, irrational, unprecedented, or just plain wrong, he will be reversed on appeal. While reversal does not necessarily reflect on the ability or integrity of a trial judge, no member of the bench enjoys being told — in public print — that he grievously erred. If there is frequent repetition by appellate courts, the reputation of the trial judge is damaged in the eyes of his colleagues and the entire legal community.

Second, there is accountability to commissions on judicial performance which many states have created in recent years. These commissions have the power to review conduct of judges who have become imperious on the bench, arbitrary in their handling of lawyers and litigants, tyrannical in conducting courtroom proceedings or prejudicial in their assessment of the rights of cognizable groups in society. There is no room for the bigot in a black robe, and if a judge discriminates in his treatment of women, Blacks, Hispanics, Asians, Jews or any other identifiable segment of the public, he will be called upon to answer to a commission generally composed of other judges and some public members.

These commissions sift out frivolous complaints. It is not uncommon for a losing litigant to file charges against the judge: "He must have been corrupt to decide against me." Only if there appears to be demonstrable merit in the charges will the commission conduct hearings and make a recommendation to the state's highest court.

The court then has several options. It may send a private reproval to the offending judge. In effect, it indicates what conduct was improper and cautions the judge to mend his ways. It may issue a public reproval. This tells the world about the inadequacies of the judge, and subjects him to additional public scrutiny in the future. In [the] most egregious cases the high court may suspend the judge for a fixed period, or remove him entirely from the bench.

This type of accountability has had a salutary effect on the judiciary generally. Judges now are well aware that they are servants of the public, not martinets with a personal duchy subject to their whims.

Finally, judges in most jurisdictions are required to stand for periodic election. Their conduct on the bench in terms of court attendance, industry, competence, courtesy and dispatch in the disposition of pending

cases are all exposed for voter appraisal. While on occasion there has been disingenuous criticism of an incumbent judge by an ambitious opponent, usually an honest appraisal of a judicial candidate is made by local bar associations and by the press. The voters, most of whom are inexperienced in legal lore, have the benefit of such objective analyses. As a matter of practice, incumbent judges are generally returned to office, absent some serious reservations based on questionable conduct on the bench.

It is true that an unpopular decision — even though correct on the controlling law — may result in voter fallout at the ensuing election. The organized bar will generally rally to the defense of a judge under such circumstances, and as a result few jurists are repudiated because of a single opinion that may have offended public sensibilities, if the opinion was rendered in good faith and solidly based on prevailing law on the subject.

There is a growing movement to eliminate elections for judges. Critics point to the federal judiciary, in which the judges are appointed for life and as a result have a comfortable independence. Whether state judges should have life tenure is open to debate, but they should have terms that are long enough to assure experience and freedom from partisan political influences that inevitably invade the electoral process.

The so-called Missouri Plan provides a reasonable compromise between systems in a number of states, in which judges run for office on partisan tickets for limited terms, and the federal system of lifetime tenure. Under that plan judges are originally appointed by a governor pursuant to a merit plan, subject to confirmation by the electorate on a yes-or-no vote, with no named opponent, for a substantial number of years. In my view, that system works reasonably well.

The country followed, with considerable interest, the election campaign of Chief Justice Rose Bird in California in 1986. She was up for confirmation, and was ultimately rejected, along with two colleagues. Much has been written about that election, and the pros and cons depend largely on one's conception of the controversies surrounding Chief Justice Bird's service on the state's highest court. I regretted the defeat of my three colleagues, but since this was the first time since the adoption of the confirmation method that any justice had been defeated, I appraise the results as an aberration.

In the final analysis, accountability of judges must be primarily to their individual conscience and to their sense of devotion to public service. Presidents and governors select appointees whom they believe will further their concepts of justice. As often as not, they are disappointed. But that disappointment is mere confirmation of the independence of the judiciary. I am convinced that independence is essential to a democratic society.

* * *

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.

President Franklin D. Roosevelt contemplated naming a layman to the court he was roundly criticized.

Often my response to a general inquiry seems somewhat flippant, but nevertheless it is pragmatically accurate: "A judge is a lawyer who knew a governor." Approximately ninety percent of all California judges are appointed by the governor; only about ten percent achieve the goal by election in the first instance. I suspect the same proportion applies to the other states. Once appointed, the incumbent judges have an overwhelming likelihood of retention by the voters at election time.

I was a lawyer who knew a governor intimately. When Culbert L. Olson was elected governor and assumed office in January, 1939, he asked me to come to Sacramento as his executive secretary. I was twenty-six years old at the time and a young Los Angeles lawyer struggling to make a living in the depths of the Great Depression. I use a bit of hyperbole to relate that it took me fifteen seconds to accept the offer, and fifteen minutes thereafter to wind up my law practice and to move north to the state capital. There I received the munificent salary of $5,000 a year. But in those Depression days the dollar went much farther; my wife and newborn son were able to live comfortably on that sum, and even to purchase a tract home in Sacramento.

Governor Olson was one of the most highly principled men I have ever known. That, unfortunately, was his downfall. He could not compromise, and in the political world some give-and-take is often necessary to reach ultimate goals. To Olson, however, if a legislator were with him ninety percent of the time, he was deemed a renegade because of his defection the other ten percent.

The result was Olson's defeat in a bid for reelection. His opponent was the then attorney general, Earl Warren, who was starting up the ladder that would take him to four [sic; three] gubernatorial victories, a vice-presidential nomination, and ultimately to chief justice of the Supreme Court. My loyalty to Olson caused me to vigorously oppose Warren. Years later, as Warren developed into a great chief justice, we became good friends and our families became close, and I had an opportunity to apologize for every vote I cast against him. Warren not only understood, but when I became attorney general of California, he recommended me to the

Institute of Judicial Administration for membership on a distinguished seven-man team — chaired by Justice William Brennan of the Supreme Court — to undertake a comparative study of American and British appellate procedures.

I am ahead of my story about the creation of a judge. Mine is a paradigm tale of the influence of luck over brains in the judicial selection process.

In the closing days of the moribund Olson state administration there were three vacancies to be filled on the superior court of Los Angeles and two on the municipal court. On one of those final days Olson called me into his office and directed me to prepare appointment commissions for Judge [sic; Commissioner] Harold Jeffrey, Judge Harold Landreth and Dwight Stephenson for the superior court, and Eugene Fay and me for the municipal court. I thanked the governor profusely, for at age thirty that was my loftiest expectation.

I prepared the appropriate commissions, brought them to the governor for signature, and then intended to have the state seal placed on them by the secretary of state and formally filed in that office. By the time I was able to get to the secretary of state, however, it was after five o'clock and his office was closed. I locked the commissions in my desk for the night and went home. They could be filed the next day.

In the middle of the night Governor Olson telephoned me at home. Had I filed the appointment commissions yet? I apologized for not having reached the secretary of state before his closing hour. "Good," Olson said with apparent relief. "I cannot leave Bob Clifton off. Put him in your place on the municipal court, and you take Dwight Stephenson's place on the superior court."

Thus, for the fortuitous circumstance of my arriving at the secretary of state's office late, I was promoted overnight from municipal court to the superior court — without ever trying a municipal court case as a judge. At age thirty I was the youngest superior court judge in the state, and there can never be one younger. A subsequent law requires ten years of law practice before such an appointment can be made; I had been a member of the bar for only seven years at that time.

Was Dwight Stephenson disappointed? He probably was at the time, but he returned to Los Angeles and became a partner in one of the city's most prestigious law firms. He has since passed away.

Judge Robert Clifton was elevated to the superior court in subsequent years, and became nationally known for his expertise and compassion in the handling of alcoholics.

My youthful appointment to the superior court was not greeted with elation by the elderly members of the Los Angeles court. I was assigned to the Long Beach branch of the court, probably to remove me as far away from the Civic Center as possible. In Long Beach I came under the experienced wing of a splendid jurist, Judge Alfred Paonessa. Under his tutelage I became readily accepted by the Long Beach bar; indeed, when I left there after a year's assignment, the local bar association adopted a resolution of commendation.

New problems arose as my first election approached. Two well-known municipal court judges filed to run against me: Leroy Dawson, a popular decorated World War I veteran who had a weekly radio program, and Ida May Adams, a frequent candidate for elevation. They were formidable opponents — Adams referred to me from platforms as "the child judge" — but in a nearly year-long campaign I prevailed comfortably.

By then World War II was well underway. I must confess a certain feeling of guilt at enjoying exemption from the draft merely for being in a judicial office. So I waived my legal exemption and voluntarily enlisted as a private in the army. But I had another problem: my 20/800 vision rated me 4-F, that is, physically unfit.

I contacted the California director of Selective Service, Col. Kenneth Leitch, and expressed my eagerness to enlist in the army. That unusual request must have impressed him, for on an agreed-upon day he picked me up in his official military vehicle, took me to the induction center at Fort MacArthur, sat me down in the medical office, and called the medical doctor into the adjacent hallway. No one told me what was expected, but it seemed apparent: I was to memorize the eye chart.

The medical officer returned, told me to remove my glasses and to read the chart. I was pointed in the right direction, and rattled off the letters in amazing speed, down to the tiniest bottom line. "Well," said the

M.D., "we must have made a mistake in the previous examination." I was in the army.

When I occasionally relate the story now, many good friends are incredulous. They knew so many men who went to great lengths to get out of military service; they find it difficult to understand one going to great lengths to get into the army. I suspect they consider me just plain perverse.

I wish I could claim to be a war hero. My military service at places like Fort Leonard Wood, Missouri, with the [Corps of] Engineers, and Camp Plauche, Louisiana, with the Transportation Corps, was singularly undistinguished. I remained in the army until hostilities were concluded, and then was honorably discharged.

I had resigned from the superior court when I entered the service, but Governor Warren never filled my office. As a result, when I left the military I was able to resume my judicial career.

Thus was a judge made — and remade.

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ADDRESS DELIVERED BY JUSTICE JESSE W. CARTER OF THE SUPREME COURT OF CALIFORNIA AT THE TESTIMONIAL DINNER IN HONOR OF JUDGE STANLEY MOSK AT THE STATLER HOTEL IN LOS ANGELES ON AUGUST 19TH, 1958,[226] ENTITLED, "THE ADMINISTRATION OF JUSTICE"

Ladies and Gentlemen:

It is a great privilege and honor for me to be here tonight and pay my respects to my good friend Judge Stanley Mosk whom I have known for over twenty years. I had the privilege of administering the oath of office to him when he was appointed a superior judge of Los Angeles County in 1942.[227] He has made an enviable record on the bench and has won the respect and admiration of the bench, the bar and the lay public alike. So, I am indeed happy to join with this group of his many friends and admirers tonight in extending to him our felicitations and best wishes for the continuation of his successful career in the administration of justice.[228]

FROM THE ORAL HISTORY OF OLIVER JESSE CARTER, CHIEF JUDGE, U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA (SON OF JUSTICE JESSE W. CARTER):

"I think [Governor] Olson's most effective man was Stanley Mosk. . . . He was extremely able, and very well respected. But he was quite young; he was only twenty-six when he was the governor's executive secretary. That's how young he was. He was a bright young man and very, very circumspect and very able and knew what he was doing."[229]

226 This event was part of Judge Mosk's successful election campaign for California attorney general and occurred during the 1958 ABA Annual Meeting, held in Los Angeles.

227 The oath was administered on Jan. 7, 1943.

228 The complete address is available in the Jesse W. Carter collection at the Law Library of Golden Gate Law School, San Francisco.

229 "Oliver J. Carter: A Leader in the California Senate and the Democratic Party, 1940-1950." Interview in 1971 and 1972 by Amelia R. Fry and Malca Chall, Regional Oral History Office, The Bancroft Library, UC Berkeley (1979), 67.

II. A LOVE AFFAIR WITH SPORTS[230]

From my early childhood days, as a collector of baseball cards, to this very day, I have been a hero worshipper of athletes and a fanatical fan of sports events. Knowing Gene Washington, Sandy Koufax, Hank Greenberg, Archie Moore, Willie Mays has been more important than knowing most public officials. I am not sure I can explain this phenomenon, for at least superficially I consider myself more cerebral than macho.

Even owners of athletic teams have been appealing to me. I considered the late Walter O'Malley, owner of the Los Angeles Dodgers, to be one of the most fascinating men I ever knew, and his son, Peter, is a fine public-spirited citizen. To be able to perform the marriage ceremony for Roy Eisenhardt and Betsy Haas — their families owned the Oakland Athletics baseball club — was a thrill. Other good friends are Bob Lurie, former owner of the San Francisco Giants, the late Gene Klein who owned the San Diego Chargers, and Sam Schulman, who owned the Seattle basketball franchise.[231]

One of the saddest days I can recall is when my alma mater gave up collegiate football. Robert Maynard Hutchins, then president of the University of Chicago, was a consistent foe of organized sports. Indeed, he was the asserted author of the statement that whenever he had the impulse to undertake any exercise, he would lie down until it passed.

The University of Chicago Maroons had an impressive history in Big Ten sports. The forward pass had originated in the fertile mind of Coach Amos Alonzo Stagg, whose teams won the Conference championship in 1899, 1905, 1907, 1908, 1913, 1922, and 1924.[232] However, as Chicago's

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230 This paper is based on a typed manuscript prepared by Justice Mosk. It has been edited for publication. All footnotes are provided by the editor.

231 Justice Mosk added handwritten revisions to his original typewritten manuscript which help to date both the original and the revisions. Preceding "Walter O'Malley," he added "the late" (O'Malley died in 1979); preceding "the Oakland Athletics," he changed "owns" to "owned" (Haas sold the team in 1995); following "Bob Lurie," he added "former" to "owner" (Lurie sold the Giants in 1992); and preceding "Gene Klein," he added "the late" (Klein died in 1990). Five paragraphs later, describing Sam Horwitz, he changed "Today, he is…" to "Later, he was…" (Horwitz died in 1993).

232 Justice Mosk's final manuscript reads, "in _____ and 1924." The additional dates have been added from the University of Chicago's current publicity information.

academic requirements rose, its football fortunes declined. After Michigan defeated Chicago one year by something like 64 to 0, Stagg was compelled to explain that he was not building football players, but gentlemen. This was of little consolation to frustrated alumni.

The one bright spot in Chicago's athletic fortunes during my years at the university was the performance of the greatest football player I ever saw: Jay Berwanger, the first Heisman Trophy winner. Berwanger was probably the last of the full dimensional players: he was outstanding on offense, defense, passing, running, punting and place kicking. He could do it all, and for three years single-handedly made Chicago's mediocre teams somewhat competitive.

Chicago had some fine basketball teams in its Big Ten days, though championships were few. On its last teams were players like Keith Parsons, now a distinguished attorney, and Sidney Yates, for many years an outstanding and productive member of Congress from the north side of the city of Chicago.

One of my fraternity brothers had the distinction of captaining one of the last football teams. Sam Horwitz was a tiger in the line at 165 pounds dripping wet. Later, he was a fine commercial lawyer in Chicago.

Perhaps my greatest satisfaction in the sports area came when I was attorney general of California. The Junior Chamber of Commerce of Los Angeles sponsored a major golf tournament each year, one of the major events on the Professional Golfers Association (PGA) Tour. In 1960 the tournament was to be held on the Rancho [Park Golf] Course in Los Angeles, a publicly owned facility.

I received a plaintive letter from one Charlie Sifford, who informed me that he had been denied admittance to compete in the tournament because, while he met all the objective qualifications, there was one he could not meet. It seems the bylaws of the PGA limited membership to "Caucasians only." Sifford is black.

In a day when baseball and football had long since abandoned their race restrictive roles, it seemed anachronistic for the sport of golf to remain a bastion of racism. With the help of Franklin Williams, who headed my Civil Rights Section of the attorney general's office, we went into action.

I first communicated with the Junior Chamber of Commerce. That group, I must say, was cooperative but felt frustrated because of the PGA bylaws. I then informed the PGA that it could not discriminate on the basis of race in the forthcoming tournament because it was being held on a publicly owned facility. The PGA declared it was bound by its rules. In that event, I responded, I would go to court if necessary to restrain the organization from using a public park in a racially discriminatory manner. The PGA response was that it would move the tournament out of California.

At that point I communicated with my fellow attorneys general in the major states which might possibly host a major golf event. Attorneys General Ed McCormack of Massachusetts, Walter Mondale of Minnesota, Frank Kelley of Michigan, Louis Lefkowitz of New York, Bob Thornton of Oregon, John O'Connell of Washington, Duke Dunbar of Colorado, and Allan Shepard of Idaho all assured me they would take action similar to mine if the PGA moved into their jurisdictions. It was a proud moment for the office of state attorney general, and demonstrated what can be done to further racial equality and opportunity when the will, and good-willed people, are involved.

The bottom line is that the PGA finally removed the "Caucasians only" clause from its bylaws, and Charlie Sifford became a regular on the Professional Tour. He later wrote me a touching letter, thanking me for making opportunity available for "the Charlie Siffords of the world." It was somewhat sad that the chance to compete came fairly late in his career, and as a result Sifford never made it big. But there are other first-rate black golfers on the tour these days. And golf, like baseball and football, looks at the score rather than skin pigment.[233]

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[233] Mosk recounted the Sifford story again in: Stanley Mosk, "My Shot: The Tour's fear of carts is the same form of bigotry that caused the Caucasian-only clause," *Sports Illustrated* 94:24, June 11, 2001, G46. This was the last work published by Justice Mosk before his death on June 19, 2001.