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Tribute to Justice Stanley Mosk

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DEDICATION

TRIBUTE TO JUSTICE STANLEY MOSK

*Gerald F. Uelmen**

The image of justice flowing like a mighty river has been celebrated in songs and poems and prayers. Today, we celebrate that image in remembering the career of Justice Stanley Mosk. Like the mighty river of justice, the legacy of Justice Mosk flows long, it flows wide, and it flows deep.

The length of this river stretches back through sixty-five years of California history. Stanley Mosk began his career in public service as executive secretary and legal advisor to Governor Culbert Olson in 1939. He handled Governor Olson's pardon of labor activist Tom Mooney, ending a quest for justice that bounced back and forth between the California Supreme Court and the United States Supreme Court for twenty years.¹ When Governor Olson was defeated for reelection by Earl Warren, Governor Olson rewarded Stanley Mosk with a midnight appointment to the bench before Olson left office. At the age of thirty-one, Stanley Mosk was sworn in as a Judge of the Los Angeles County Superior Court.²

Judge Mosk's rulings on the Superior Court bench included several noteworthy cases. Two years before the Supreme Court struck down racially restrictive real estate covenants in *Shelley v.*

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¹ See *Mooney v. Holohan*, 294 U.S. 103, 104–11, *reh'g denied*, *Ex parte Mooney*, 294 U.S. 103 (1935); *In re Mooney*, 10 Cal. 2d 1, 10–15 (1937) (describing Tom Mooney's various efforts—all unsuccessful—to obtain judicial intervention in his plight from 1917 through 1937); see also Press Release, Judicial Council of California, Justice Stanley Mosk Dies After 37 Years on State Supreme Court (June 19, 2001), at <http://www.courtinfo.ca.gov/presscenter/newsreleases/>. For a detailed account of the Tom Mooney story, see generally CURT GENTRY, *FRAME-UP: THE INCREDIBLE CASE OF TOM MOONEY AND WARREN BILLINGS* (1967).

² *Id.*

Kraemer,³ Judge Mosk upheld the transfer of a Hancock Park home to a black man, ruling that a racially restrictive covenant was unconstitutional. That same home, incidentally, was later sold to Mayor Tom Bradley.

In the 1950s, Judge Mosk presided over the high profile trial of a law student accused of murdering the wealthy Bel Aire matron who had hired him as a houseboy.⁴ John Crooker was convicted and sentenced to death by Judge Mosk.⁵ Eight years before *Miranda*,⁶ in *Crooker v. California* the Supreme Court rejected Crooker's argument that his confession should have been suppressed because police did not advise him of his constitutional rights.⁷ In a five-to-four decision, the Court concluded that anyone who made it through the first year at Southwestern Law School *should* know what his constitutional rights are.⁸ Stanley Mosk, incidentally, received his own law degree from Southwestern in 1935, after having completed his first two years at the University of Chicago School of Law.

Crooker's death sentence was the first death sentence commuted by Governor Pat Brown.⁹ In his wonderful book about his struggle with the death penalty, Brown offered some fascinating reflections on the Crooker commutation.¹⁰ Initially, when he heard that Stanley Mosk had imposed the death sentence, Governor Brown resolved to uphold it. He wrote:

I knew Mosk well . . . I also knew he was not only an excellent jurist but one of the most compassionate men I had ever met, a staunch foe of capital punishment . . . If Mosk had reviewed the trial transcript and found the sentence just, there was little room for doubt. "That's good enough for me," I said.¹¹

Governor Brown later changed his mind; and he said that the principal reason he did so was a note from Stanley Mosk, saying he would not object to a commutation of the death sentence to life imprisonment.¹² Crooker was subsequently released on parole and

³ 334 U.S. 1 (1948).

⁴ *People v. Crooker*, 303 P.2d 753, 755 (Cal. 1956).

⁵ *Id.* at 759.

⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁷ *Crooker v. California*, 357 U.S. 433, 434 (1958).

⁸ *Id.* at 440-41.

⁹ EDMUND G. (PAT) BROWN WITH DICK ADLER, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW 14-15 (1989).

¹⁰ *Id.* at 5-19.

¹¹ *Id.* at 5.

¹² *Id.* at 13.

became a model citizen. Justice Mosk took great delight in his annual receipt of a Christmas card from John Crooker.

Stanley Mosk was elected Attorney General of California in 1958.¹³ During his tenure as California Attorney General, Mosk established both constitutional and consumers' rights sections within the Department of Justice; he actively defended civil rights; and he restored the enforcement of the state's antitrust law.¹⁴ Mosk's battle to integrate the Los Angeles Open Golf Tournament and change PGA bylaws to allow black golfers to compete was another milestone.¹⁵ (Thus, it could be said that Tiger Woods is part of Justice Mosk's legacy of justice.)

Stanley also got to argue his first case before the United States Supreme Court as Attorney General. Ironically, the case dealt with the flowing of another mighty river. The issue in *Arizona v. California*¹⁶ involved rights to the flow of water in the Colorado River. It was an extremely complex and important case, as reflected in the Court's allocating initially sixteen hours for argument, then resetting the case for six more hours of reargument. Arizona contended that a statutory formula for allocation applied only to mainstream waters.¹⁷ California argued that the formula governed the entire Colorado River system, so Arizona's diversion of tributary rivers should be deducted from its share.¹⁸ Invoking principles of equity, Stanley Mosk delivered a thundering peroration which concluded, "Are we going to give Colorado River water to people of California to drink or to Arizona for asparagus?"¹⁹ The Court, by a seven-to-one vote, opted for the asparagus.²⁰

In 1964, Governor Pat Brown appointed Attorney General Mosk to the California Supreme Court, beginning the thirty-seven-year

¹³ Celebration Session, *Honoring the Record Service of Justice Stanley Mosk (1964–Present)*, 21 Cal. 4th 1316, 1321 (2000) [hereinafter Celebration Session]. The California Supreme Court convened a special session on January 7, 2000, to commemorate Justice Mosk's service on the high court. The proceeding was scheduled "over the mild dissent of Justice Mosk." *Id.*

¹⁴ *Id.* at 1321.

¹⁵ *Id.* See also Stanley Mosk, *My Shot: The Tour's Fear of Carts is the Same Form of Bigotry that Caused the Caucasian-only Clause*, CNN SPORTS ILLUSTRATED GOLF PLUS, at http://sportsillustrated.cnn.com/golf/news/2001/06/05/my_shot/index.html (June 5, 2001) (discussing Justice Mosk's role in pressuring the PGA to allow an African-American player to compete in PGA Tour events).

¹⁶ 373 U.S. 546 (1963).

¹⁷ *Id.* at 568.

¹⁸ *Id.* at 563, 568.

¹⁹ Celebration Session, *supra* note 13, at 1321.

²⁰ *Arizona*, 373 U.S. at 602. Chief Justice Earl Warren recused himself, and Justice Douglas dissented. *Id.* at 602, 627.

tenure that broke the Court's record for longevity.²¹ At this point, the river of Justice Mosk's legacy flows broad and deep. I am not going to visit all the landmarks, but a couple of years ago I surveyed law school casebooks and teaching materials to identify the "top ten" Mosk opinions—those most frequently assigned for reading.²² What most impressed me was that Mosk opinions were being assigned in nearly every law school course: in Torts, *Ault v. International Harvester Co.*;²³ in Contracts, *Freeman & Mills, Inc. v. Belcher Oil Co.*;²⁴ in Real Property, *City of Berkeley v. Superior Court*;²⁵ in Evidence, *People v. Shirley*;²⁶ in Family Law, *In re Marriage of Carney*;²⁷ in Criminal Procedure, *Pitchess v. Superior Court*;²⁸ in Trial Practice, *People v. Wheeler*;²⁹ and in Constitutional Law, *Molko v. Holy Spirit Ass'n*,³⁰ *Diamond v. Bland*,³¹ and *Bakke v. Regents of the University of California*.³² What all of these cases have in common is the acerbic analysis of competing policy considerations that came to be the hallmark of a Mosk opinion—great grist for classroom discussions.³³

We celebrate many great judges for their impact in one field of law or another, but Stanley Mosk was a master of every field. Many of his opinions—such as *People v. Wheeler*,³⁴ prohibiting the use of peremptory challenges to exclude jurors on the basis of race—anticipated and inspired later rulings by the U.S. Supreme Court. Following *Wheeler*, the Court eventually came to the same conclusion that Justice Mosk had reached almost a decade before.³⁵

Occasionally, Justice Mosk found himself revisiting issues that he had previously decided. On more than one of these occasions, he changed his mind and decided the other way. He always offered a cogent explanation in such cases. One of my favorite cases was one in which Justice Mosk rejected an opinion he had rendered as Attorney General. Justice Mosk, quoting Justice Jackson, himself

²¹ Celebration Session, *supra* note 13, at 1316–24.

²² Gerald F. Uelmen, *Mosk's Top Ten Opinions*, CAL. LAW., Apr. 1999, at 46.

²³ 528 P.2d 1148 (Cal. 1974).

²⁴ 900 P.2d 669 (Cal. 1995).

²⁵ 606 P.2d 362 (Cal. 1980).

²⁶ 723 P.2d 1354 (Cal. 1982).

²⁷ 598 P.2d 36 (Cal. 1979).

²⁸ 522 P.2d 305 (Cal. 1974).

²⁹ 583 P.2d 748 (Cal. 1978).

³⁰ 762 P.2d 46 (Cal. 1988).

³¹ 477 P.2d 733 (Cal. 1970).

³² 553 P.2d 1152 (Cal. 1976).

³³ See Uelmen, *supra* note 22, at 46.

³⁴ 583 P.2d 748 (Cal. 1978).

³⁵ *Batson v. Kentucky*, 476 U.S. 79 (1986).

quoting Lord Westbury, wrote, “I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.”³⁶ Mosk also quoted Justice Rutledge, writing, “Wisdom too often never comes, and so one ought not to reject it merely because it comes late.”³⁷

As the composition of the California Supreme Court changed, Justice Mosk found himself cast in the role of chief dissenter. There is a long and noble tradition of vigorous dissenters on this court, but Justice Mosk broke the record—publishing more dissenting opinions than any Justice who ever sat on the California Supreme Court. Those dissents are an important part of his legacy; but throughout his thirty-seven years on the court, Justice Mosk averaged twenty *majority* opinions per year. In many of those years, including the most recent, Justice Mosk led the court in production of majority opinions. He was a workhorse in full harness right up to the end.

All of Justice Mosk’s opinions are readily identifiable as his handiwork. The late Justice Otto Kaus, with one word laid to rest any notion that the prodigious judicial output of Stanley Mosk was the work of proxies. That word: “Rubbish.”³⁸ Justice Kaus marveled at how “Stanley [could] go to every opera from *La Grand Duchesse* to *Götterdämmerung*, attend every ballet, see every play, participate in panels on and off the air, and speak after dinner to huge, non-captive audiences—all while doing his job on the court.”³⁹ Justice Mosk also found time to write law review articles,⁴⁰ op-ed pieces,⁴¹ and even critique the writings of others. One of the many

³⁶ *Smith v. Anderson*, 433 P.2d 183, 190–91 (Cal. 1967) (Mosk, J., concurring) (quoting *McGrath v. Kristensen*, 340 U.S. 162, 176, 178 (1950) (Jackson, J. concurring); *Wolf v. Colorado*, 338 U.S. 25, 47 (1949) (Rutledge, J., dissenting)). See also *King v. Bank*, 558 P.2d 857, 862 (Cal. 1977).

³⁷ *Smith*, 433 P.2d at 191; *King*, 558 P.2d at 862.

³⁸ Otto M. Kaus, *The Three Faces of Stanley Mosk*, 12 HASTINGS CONST. L.Q. 367, 368 (1985).

³⁹ *Id.*

⁴⁰ See, e.g., Stanley Mosk, *A Giant in the Field*, 78 CAL. L. REV. 1431 (1990); Stanley Mosk, *A Retrospective*, 71 CAL. L. REV. 1045 (1983); Stanley Mosk, *Judicial Rebuttal*, 62 ALB. L. REV. 1225 (1999); Stanley Mosk, *Nothing Succeeds Like Excess*, 26 LOY. L.A. L. REV. 981 (1993); Stanley Mosk, *Phil Gibson—A Remembrance*, 72 CAL. L. REV. 506 (1984); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985); Stanley Mosk, *States’ Rights—and Wrongs*, 72 N.Y.U. L. REV. 552 (1997).

⁴¹ See, e.g., Stanley Mosk, *A Liberal for Rehnquist His Federalism Served the Cause of Individual Rights*, L.A. TIMES, July 30, 1986, at 5, 1986 WL 2175579; Stanley Mosk, *Partisanship Is Wrong Test for Judge Appointments*, SALT LAKE TRIB., Jan. 3, 1993, at A12, 1993 WL 5374809; Stanley Mosk, *Perspective on the Supreme Court*, L.A. TIMES, Dec. 30, 1992, at 7, 1992 WL 2821304; Stanley Mosk, *Pick Federal Judges on Merit*, PLAIN DEALER (Cleveland), Jan. 9, 1993, at 5B, 1993 WL 4266288; Stanley Mosk, *Putting Labels on Justices*, S.F. CHRON., Jan. 2, 1993, at A18, 1993 WL 6388288; Stanley Mosk, *Why Justice Rehnquist Merits Confirmation*, S.F. CHRON., Aug. 2, 1986, at 32, 1986 WL 3752332.

treasured notes I received from Justice Mosk contained his reaction to one of my annual analyses of the output of the California Supreme Court, with a footnote acknowledging that the data "was compiled" by my student research assistant. Justice Mosk wrote, "advise your research assistant that 'data' is plural. Thus it should read that the data *were* compiled by your research assistant."

The legacy of Justice Mosk is a river that flows far beyond the boundaries of the State of California. In dedicating the 1999 volume of the *Albany Law Review State Constitutional Commentary* to Justice Mosk, Professor Vincent Martin Bonventre recited the pantheon of great state court judges: Traynor, Tobriner, Cardozo, Fuld, Holmes, Shaw, Cooley, Vanderbilt, and then concluded, "[N]o one currently sitting on one of America's state benches is more deserving and more likely to be named alongside them than Stanley Mosk."⁴²

Like most mighty rivers, the legacy of Justice Mosk now meets the sea. I am reminded of the words Justice Mosk himself spoke in his tribute to the memory of Justice William Brennan, one of his personal heroes: "There were times," he said, "when it seemed as if he were a romanticist drowning in a sea of pragmatism."⁴³ Like Justice Brennan, however, Justice Mosk always managed to keep his head above the water.

In searching for a suitable conclusion to this tribute, I found the eloquence I was seeking in an especially memorable dissenting opinion of Justice Mosk.⁴⁴ I will paraphrase it only slightly. "The Goddess of Justice is wearing a black arm-band today, as she weeps for the" loss of Stanley Mosk.⁴⁵ But her tears only add force to the flow of the mighty river of justice that marks his legacy. It will refresh us and inspire us for many years to come.

⁴² Vincent Martin Bonventre, *Editor's Foreword*, 62 ALB. L. REV. 1213, 1213 (1999).

⁴³ Justice Stanley Mosk, *Memorial Dedication to Justice William J. Brennan Jr.*, 31 LOY. L.A. L. REV. 769, 769 (1998).

⁴⁴ *Brosnahan v. Brown*, 651 P.2d 274, 312 (Cal. 1982) (Mosk, J., dissenting).

⁴⁵ *Id.* at 313.