

# The Quotable Stanley Mosk

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During most of Stanley Mosk's twenty years on the California Supreme Court, I was a California trial judge. Like all diligent trial judges, I reviewed the decisions of the California Supreme Court in order to keep abreast of the law. Accordingly, I had frequent exposure to Justice Mosk's erudite majority opinions. But I also took the time to read many of his dissenting and concurring opinions.

I have chosen a sampling of excerpts from Justice Mosk's dissenting and concurring opinions<sup>1</sup> to demonstrate what otherwise might be overlooked: his wit, good humor, compassion, sense of fairness, and willingness to innovate. It is not my intention to discuss Justice Mosk's notable contributions to various fields of law; rather, I wish to show the qualities of the man as evidenced by his own words.

It has been said that dissenting opinions reveal more about a justice than do his majority opinions. Justice Douglas once wrote that dissident views often deal with problems on which society itself is divided. In writing dissents, he declared, judges "prove their worth by showing their independence and fortitude. Their dissents or concurring opinions may salvage for tomorrow the principle that was sacrificed or forgotten today."<sup>2</sup>

In his dissents, Justice Mosk has often called for innovation. For example, in *Borer v. American Airlines*,<sup>3</sup> the majority refused to recognize a cause of action for loss of parental consortium, pointing out that other states had acted similarly.<sup>4</sup> Justice Mosk asserted that California courts

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1. As these passages show, Justice Mosk cannot be pigeonholed as a "liberal" or "conservative" judge. His opinions show an effort in each case to arrive at a decision based on principle and common sense. For an elaboration of Mosk's analytical method, see Goldman, *The Anatomy of a Mosk Opinion*, 12 HASTINGS CONST. L.Q. 443 (1985).

2. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC'Y 104, 106-07 (1948). In his article, Douglas quoted Chief Justice Hughes: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." *Id.* at 106.

3. 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977).

4. *Id.* at 449 n.2, 563 P.2d at 864 n.2, 138 Cal. Rptr. at 308 n.2.

should not blindly follow the crowd, stating, “[w]hen [the] crowd is marching in the wrong direction, we have not heretofore hesitated to break ranks and strike out on our own.”<sup>5</sup>

In *Hawkins v. Superior Court*,<sup>6</sup> Mosk took the unusual step of writing a concurrence to his own majority opinion.<sup>7</sup> He wrote first for the court, applying the well-known, two-tiered equal protection analysis. Writing for himself, he added that there should be an intermediate test, as advocated by Justice Marshall of the United States Supreme Court:

I am taking the liberty of explaining why, if ours were not a collegial body and mine was the responsibility alone, I would apply a new and refined test. My diagnosis of the theoretic and pragmatic fallacies in the traditional two-tier test of equal protection suggests the need for adoption of a third, or intermediate, test. . . . [I]n my view the ultimate acceptance of an intermediate test is foreordained in Supreme Court opinions: the question is not whether, but when, the third test will become standard. I regret that our court has failed to forthrightly assume leadership among the states on this important question of constitutional law.<sup>8</sup>

Justice Mosk also has been alert to point out where the majority has withdrawn from earlier innovations in the law. In *Daly v. General Motors Corp.*,<sup>9</sup> he deplored what he considered to be the majority’s retreat from fundamental products liability principles. He wrote:

This will be remembered as the dark day when this court, which heroically took the lead in originating the doctrine of products liability and steadfastly resisted efforts to inject concepts of negligence into the newly designed tort, inexplicably turned 180 degrees and beat a hasty retreat almost back to square one. The pure concept of products liability so pridefully fashioned and nurtured by this court for the past decade and a half is reduced to a shambles.<sup>10</sup>

Although he advocates strict liability in the consumer products context, Justice Mosk has called for a more limited concept of liability in other areas of the law. He wrote a separate concurring opinion to express his views in *Lugosi v. Universal Pictures*,<sup>11</sup> where the court declined

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5. *Id.* at 458, 563 P.2d at 869, 138 Cal. Rptr. at 313 (Mosk, J., dissenting).

6. 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978).

7. Mosk noted that it was “not unprecedented for a justice to write a separate concurrence to an opinion of which he was the author for the court.” *Id.* at 595, 586 P.2d at 923, 150 Cal. Rptr. at 442 (Mosk, J., concurring) (citing *Abbate v. United States*, 359 U.S. 187, 196 (1959) (Brennan, J., concurring), and *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 574 (1949) (Jackson, J., concurring)).

8. 22 Cal. 3d at 595, 586 P.2d at 923, 150 Cal. Rptr. at 442 (Mosk, J., concurring).

9. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

10. *Id.* at 755, 575 P.2d at 1181, 144 Cal. Rptr. at 399 (Mosk, J., dissenting) (citations omitted).

11. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

to recognize a property right in Bela Lugosi's motion picture personification of Count Dracula.

In *Lugosi*, the actor's heirs had sought compensation from a motion picture studio that produced dolls and other likenesses of Count Dracula. Characterizing the facts, Mosk stated: "[As in] the horror films that brought him fame, Bela Lugosi rises from the grave 20 years after death to haunt his former employer. . . . [H]is vehicle is a strained adaptation of a common law cause of action heretofore unknown either in a statute or case law in California."<sup>12</sup> Addressing the merits, Mosk inquired rhetorically whether "the descendants of George Washington [could] sue the Secretary of the Treasury for placing his likeness on the dollar bill."<sup>13</sup> He noted that

Bela Lugosi did not . . . create Dracula, [but] merely acted out a popular role that had been garnished with the patina of age, as had innumerable other thespians over the decades. His performance gave him no more claim on Dracula than that of countless actors on Hamlet who have portrayed the Dane in a unique manner.<sup>14</sup>

Dissenting in another property rights case, *In re Wilson*,<sup>15</sup> Mosk asserted that real property boundaries have little to do with Indian hunting and fishing rights.<sup>16</sup> The *Wilson* majority had denied habeas corpus relief to an Indian convicted of hunting on former Indian territory during the off season.<sup>17</sup> The theory behind the majority opinion was that the Indians' hunting rights had been extinguished along with their title when the government "purchased" the land years before.<sup>18</sup> Contrary to the majority's holding, Mosk would have held that such rights can exist apart from the right of occupancy.<sup>19</sup> Recognizing the plight of some modern-day Indian tribes, he observed that "[v]enison on the hoof and peripatetic trout are unlikely to feel circumscribed by metes and bounds."<sup>20</sup>

Justice Mosk often has used his dissenting opinions to express his distaste for the majority's treatment of the weak and disadvantaged. For example, in *Perez v. City of San Bruno*,<sup>21</sup> the majority approved a municipality's decision to cut off the water supply of a resident who refused to

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12. *Id.* at 824, 603 P.2d at 431-32, 160 Cal. Rptr. at 329-30 (Mosk, J., concurring).

13. *Id.* at 827, 603 P.2d at 433, 160 Cal. Rptr. at 331.

14. *Id.* at 826, 603 P.2d at 432, 160 Cal. Rptr. at 330.

15. 30 Cal. 3d 21, 634 P.2d 363, 177 Cal. Rptr. 336 (1981).

16. *Id.* at 37, 634 P.2d at 373, 177 Cal. Rptr. at 346 (Mosk, J., dissenting).

17. *Id.* at 36, 634 P.2d at 373, 177 Cal. Rptr. at 346.

18. *Id.* at 36, 634 P.2d at 372, 177 Cal. Rptr. at 345.

19. *Id.* at 38, 634 P.2d at 374, 177 Cal. Rptr. at 347.

20. *Id.* at 37, 634 P.2d at 373, 177 Cal. Rptr. at 346.

21. 27 Cal. 3d 875, 616 P.2d 1287, 168 Cal. Rptr. 114 (1980).

pay the city's garbage collection fees.<sup>22</sup> The woman had refused to pay because she had no refuse for the city to collect. Justice Mosk's dissent concluded as follows:

Mrs. Perez, who has acted in propria persona throughout these proceedings, has undoubtedly annoyed city officials by insisting that one should not pay for municipal services unneeded and unused. Of such quiet heroics are martyrs born. Two and a half decades ago Mrs. Rosa Parks annoyed the officials of Montgomery, Alabama, simply by insisting that she should not be required to sit in the back of the bus. Just as Mrs. Parks resisted bureaucracy for a principle—and ultimately brought about the end of compulsory segregation in the south—so Mrs. Perez in apparent splendid solitude is resisting a municipal bureaucracy for a principle. Although the majority fail to see it, I believe due process and justice are her companions.<sup>23</sup>

In another instance, the majority refused compensation to a former prison inmate who had been injured serving as a fireman during his prison term. Justice Mosk dissented. He wrote:

This petitioner is no longer confined to prison but remains a paraplegic as a result of [his] injuries . . . . I cannot agree that . . . he is now and for the remainder of his life will be entitled to only a fraction of the benefits afforded to a firefighter who suffered the same disability but who was not a prisoner at the time of injury. . . . [T]here is no rational basis for treating him differently from others who have suffered the same disability while engaged in the same activity. To do so is to impose punitive treatment upon this petitioner not merely for the penal term provided by law but for life.<sup>24</sup>

Justice Mosk has dissented vigorously when he has perceived the majority as affording inadequate protection to civil rights and liberties, or as giving undue weight to competing concerns. In *Hildebrand v. Unemployment Insurance Appeals Board*,<sup>25</sup> for example, a majority of the court upheld the Board's denial of benefits to a woman who refused to work on a day of religious significance.<sup>26</sup> In his dissent, Mosk stressed the overriding importance of religious freedom:

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22. *Id.* at 895, 616 P.2d at 1298, 168 Cal. Rptr. at 125.

23. *Id.* at 898-99, 616 P.2d at 1300, 168 Cal. Rptr. at 127 (Mosk, J., dissenting). In a footnote, Mosk added that "history has demonstrated over and again that principled zealots frequently achieve an ultimate transition from obloquy to apotheosis." *Id.* at 898 n.1, 616 P.2d at 1300 n.1, 168 Cal. Rptr. at 127 n.1.

24. *Meredith v. Workers' Compensation Appeals Bd.*, 19 Cal. 3d 777, 783, 567 P.2d 746, 749, 140 Cal. Rptr. 314, 317 (1977) (Mosk, J., dissenting).

25. 19 Cal. 3d 765, 566 P.2d 1297, 140 Cal. Rptr. 151 (1977).

26. *Id.* at 768, 566 P.2d at 1298, 140 Cal. Rptr. at 152. The group was the Worldwide Church of God.

The United States has been unique among nations of the world in its vindication of the right of individuality in religion. The practices of religion, under our Constitution, are attributes of individual men and women, acting alone or in concert, not of the state or by the leave of the state. To preserve that principle not only should we tolerate no alliance between church and state, we must also be vigilant to prevent overt hostility between church and state. The only acceptable role of the state is to be totally benign in its attitude toward religion . . . .<sup>27</sup>

In another case involving First Amendment issues, Mosk observed that, “[a]s the melancholy lessons of history teach us, the road to censorship is paved with good intentions.”<sup>28</sup> Yet Mosk is willing to draw lines, so that only what he perceives to be actual First Amendment freedoms are protected. Thus, in his *Weaver v. Jordan*<sup>29</sup> dissent, he asserted that while the First Amendment guarantees freedom of expression, “it does not guarantee the right to be paid for the exercise of that freedom.”<sup>30</sup>

What are perhaps Justice Mosk’s most controversial views were expressed in the racial quota cases.<sup>31</sup> He concluded his dissent in one of them—*DeRonde v. Regents of the University of California*<sup>32</sup>—as follows:

Years ago medical doctors attempted to cure morphine addiction with doses of heroin. Such efforts were doomed to failure, and worse. Today the university is 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 naive and self-deluding.<sup>33</sup>

Mosk invoked the aid of George Orwell in another quota case, calling the majority’s refusal to defend a quota by its name an exercise in “doublethink” and “newspeak.”<sup>34</sup> He concluded: “George Orwell is nodding complacently in his grave, as he wins vindication even before

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27. *Id.* at 775-76, 566 P.2d at 1303, 140 Cal. Rptr. at 157 (Mosk, J., dissenting).

28. *People v. Superior Court*, 13 Cal. 3d 430, 443, 531 P.2d 761, 769, 119 Cal. Rptr. 193, 201 (1975) (Mosk, J., dissenting).

29. 64 Cal. 2d 235, 411 P.2d 289, 49 Cal. Rptr. 537 (1966).

30. *Id.* at 250, 411 P.2d at 300, 49 Cal. Rptr. at 548 (Mosk, J., dissenting) (emphasis omitted).

31. *DeRonde v. Regents of the Univ. of Cal.*, 28 Cal. 3d 875, 625 P.2d 220, 172 Cal. Rptr. 677, *cert. denied*, 454 U.S. 832 (1981); *Price v. Civil Serv. Comm’n*, 26 Cal. 3d 257, 604 P.2d 1365, 161 Cal. Rptr. 475, *cert. dismissed*, 449 U.S. 811 (1980); *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *modified*, 438 U.S. 265 (1978).

32. 28 Cal. 3d 875, 625 P.2d 220, 172 Cal. Rptr. 677 (1981).

33. *Id.* at 906-07, 625 P.2d at 239, 172 Cal. Rptr. at 696 (Mosk, J., dissenting).

34. *Price v. Civil Serv. Comm’n*, 26 Cal. 3d 257, 286-87, 604 P.2d 1365, 1383, 161 Cal. Rptr. 475, 493-94 (1980) (Mosk, J., dissenting).

1984 for his dire apprehensions about the misdirection of society."<sup>35</sup>

In the area of criminal procedure, Mosk's opinions reflect his desire to fashion procedures that are both sensible and fair, as well as constitutionally sound. *In re Deborah C.*<sup>36</sup> involved the question of whether a private security guard should be required to provide *Miranda* warnings when carrying out an arrest. Justice Mosk declared in his separate opinion:

I would invoke the folk wisdom that if an object looks like a duck, walks like a duck and quacks like a duck, it is likely to be a duck. If a security officer in an establishment open to the public dresses like a peace officer, carries a gun and a . . . badge . . . and conducts himself in the authoritative manner of a peace officer, he surely will be deemed in the eyes of the public and detained suspects to be the equivalent of a peace officer. He should be held to the obligations imposed by law upon a peace officer.<sup>37</sup>

In *People v. Superior Court (Meyers)*,<sup>38</sup> the majority approved a procedure by which the police, armed with a warrant, brought the victim of a crime into the defendant's home to identify stolen property. Justice Mosk protested in dissent:

The police practice here in issue . . . is not only unlawful, it is also dangerous. . . . We ignore at our peril, I submit, the sad lessons that history teaches as to the high price of vigilante justice: when private citizens are encouraged to act as "police agents," official lawlessness thrives and the liberties of all are put in jeopardy. Surely we should not now repeat the mistakes of a discredited era of our frontier past.<sup>39</sup>

Mosk has called for a similar common sense approach in connection with other criminal law issues. In *Taylor v. Superior Court*,<sup>40</sup> the court had to decide whether the utterance of explicit threats by the defendant during an armed robbery should make the crime a more serious one for sentencing purposes. The majority's answer was yes,<sup>41</sup> but Justice Mosk thought otherwise. He wrote:

In every robbery in which the criminal aims a gun at his victim as he demands his money or property, [there] is an implied but unmistakable . . . threat that [the gun] will be used if the demands

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35. *Id.* at 287, 604 P.2d at 1383, 161 Cal. Rptr. at 494.

36. 30 Cal. 3d 125, 635 P.2d 446, 177 Cal. Rptr. 852 (1981).

37. *Id.* at 141, 635 P.2d at 455, 177 Cal. Rptr. at 861 (Mosk, J., concurring).

38. 25 Cal. 3d 67, 598 P.2d 877, 157 Cal. Rptr. 716 (1979).

39. *Id.* at 87, 598 P.2d at 889-90, 157 Cal. Rptr. at 729-30 (Mosk, J., dissenting).

40. 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970), *overruled on other grounds*, *People v. Antick*, 15 Cal. 3d 79, 92 n.12, 539 P.2d 43, 51 n.12, 123 Cal. Rptr. 475, 483, n.12 (1975).

41. 3 Cal. 3d at 584-85, 477 P.2d at 135, 91 Cal. Rptr. at 279.

are not promptly met. Under the circumstances, such a deliberate gesture can have no other meaning. Nothing is added, therefore, when the robber makes the threat explicit by concluding his demands with the qualifying phrase, "or I'll shoot"—or any variation on that theme, [such as] "or I'll kill you," "or I'll blow your head off," "or we'll have an execution right here." The latter two formulations were used in the case at bar; dispassionately viewed, however, they are merely vigorous semantic descendants of the classic highwayman's command, "Your money or your life!"<sup>42</sup>

In other contexts, Mosk has never hesitated to point out the unfairness of majority decisions that uphold a litigant's position, but deny the relief sought. In *Westbrook v. Mihaly*,<sup>43</sup> for example, a group of San Francisco voters challenged a state constitutional provision that required local general obligation bond proposals to be approved by a two-thirds vote rather than by a simple majority vote. The voters sought implementation of certain bond proposals that had received a majority vote, but not a two-thirds vote. While the court agreed that the two-thirds vote requirement denied the voters equal protection of the laws, it declined to order the city to proceed with the defeated bond offers. Mosk's separate opinion included the following discourse:

The majority tell the parties who initiated these proceedings, who used their talents and resources to seek and obtain a hearing in this court, and who invoked the constitutional principles on which we here rely, that they are undeniably right, their concept of the law is totally vindicated—but they lose, their petition for a preemptory writ denied. This is indeed a Pyrrhic victory . . . .

. . . .  
. . . [These] aggrieved parties who knocked on our door are turned away with approbation but without assistance.<sup>44</sup>

Mosk also objected to unfairness in *White v. County of San Diego*.<sup>45</sup> In *White*, a public entity had acquired through condemnation the land needed for a road-widening project. It had recouped the compensation paid, however, by levying corresponding assessments on the landowners' adjacent parcels. Justice Mosk could not subscribe to the majority's approval of the county's actions. He explained:

The county's scheme is a cynical method of . . . shifting the cost of an improvement benefitting the public onto the backs of a few landowners because of the fortuity of their location. Not only do the landowners lose a portion of their property, but they are

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42. *Id.* at 592-93, 477 P.2d at 141, 91 Cal. Rptr. at 285 (Mosk, J., dissenting).

43. 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970).

44. *Id.* at 802-04, 471 P.2d at 513-15, 87 Cal. Rptr. at 865-67 (Mosk, J., concurring and dissenting).

45. 26 Cal. 3d 897, 608 P.2d 728, 163 Cal. Rptr. 640 (1980).

then deprived of the constitutionally required compensation. . . . I strongly disapprove of this acquisitive device by which a public entity, in order to obtain private property, puts funds therefor in a landowner's pocket—and then proceeds to pick the pocket.<sup>46</sup>

That Justice Mosk has the flexibility to change his views is demonstrated by *Smith v. Anderson*,<sup>47</sup> where Mosk found himself in agreement with a majority of his colleagues, but in disagreement with an opinion he had rendered previously as Attorney General of California. He discovered that Justice Jackson, a former Attorney General of the United States, had faced the same predicament in an earlier case. He adopted a portion of the Jackson opinion as his own:

'I am entitled to say of [my former] opinion what any discriminating reader must think of it—that it was as foggy as the statute the Attorney General was asked to interpret. . . . 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. . . . 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."<sup>48</sup>

The same problem arose ten years later, in *King v. Central Bank*,<sup>49</sup> and the quotations were employed again.<sup>50</sup>

Others will no doubt point out the great contribution Justice Mosk has made to our jurisprudence—and with that praise I heartily agree. Those of us who have been trial judges have looked for and found guidance and wisdom in Justice Mosk's opinions. Through his pen, he has demonstrated the personal qualities of fair play, prescience, openness, and understanding—as well as a superior intellect. These qualities make him one of California's outstanding public servants.

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46. *Id.* at 911, 608 P.2d at 736, 163 Cal. Rptr. at 648 (Mosk, J., dissenting).

47. 67 Cal. 2d 635, 433 P.2d 183, 63 Cal. Rptr. 391 (1967).

48. *Id.* at 646, 433 P.2d at 190, 63 Cal. Rptr. at 398 (Mosk, J., concurring) (quoting *McGrath v. Kristensen*, 340 U.S. 162, 176 (1950) (Jackson, J., concurring)).

49. 18 Cal. 3d 840, 558 P.2d 857, 135 Cal. Rptr. 771 (1977).

50. *Id.* at 850, 558 P.2d at 862, 135 Cal. Rptr. at 776 (Mosk, J., concurring).