ARTICLES

Stanley Mosk: A Federalist for the 1980's

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Introduction

The era of the Burger Court has been marked by significant erosions of the safeguards set forth in the Bill of Rights.[1] A number of the Court's decisions have overturned or circumscribed important Warren Court opinions, particularly in the area of civil rights and civil liberties.[2] This trend has been criticized sharply by several members of the Court who—contrary to long-standing practice—have "gone public" to air their views.[3]

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1. *See generally* Kamisar, *Gates, "Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551 (1984); Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085 (1982); Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, 43 LAW & CONTEMP. PROBS. 66 (1980); Frank, *The Burger Court—The First Ten Years*, 43 LAW & CONTEMP. PROBS. 101 (1980); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-98 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971).

2. A few examples from just the 1984-85 Term are Nix v. Williams, 104 S. Ct. 2501 (1984); Segura v. United States, 104 S. Ct. 3380 (1984); and New York v. Quarles, 104 S. Ct. 2626 (1984). *See also infra* notes 31-43 and accompanying text.

The Burger Court seems to be following the election returns, which evidence a strong conservative trend throughout the country. *See* Will, *Realignment Is a Fact*, Wash. Post, Nov. 8, 1984, at A27, col. 1; N.Y. Times, Nov. 8, 1984, at A19, col. 5. But the Court's proper role in our system of checks and balances is to resist the ebb and flow of public caprice. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH—THE SUPREME COURT AT THE BAR OF POLITICS (1962); P. FREUND, THE SUPREME COURT OF THE UNITED STATES (1962).

3. *See, e.g., Justices Making Their Frustrations Public*, Wash. Post, Sept. 23, 1984, at A8, col. 1 (citing separate speeches by Justices Blackmun, Marshall, and Stevens decrying the Burger Court's shift away from individual constitutional protections).

The ultimate goal of the rule of law is to assure equal justice for all.[4] A major achievement of the Warren Court was to "no longer permit" constitutional guarantees "to remain an empty promise."[5] The Warren Court instead gave meaning to those guarantees.[6] The Burger Court, however, is reverting more and more to sterile legalism, dry and lifeless dogma, and unfounded assumptions that serve to insulate the Constitution from the real world it was intended to affect.

In the face of the Burger Court's distorted landscape of federal constitutional law,[7] a number of enlightened state court judges are turning to their state constitutions to find protection for individual rights. Justice Stanley Mosk is, I think, the acknowledged leader in the development of state constitutional adjudication. In his opinions, articles, and addresses, he has charted the course for state courts to follow in safeguarding fundamental human rights.[8]

It is a privilege to join in this well-deserved tribute to Justice Mosk. Although I hold him in the highest personal regard, I shall resist the temptation to write about him in personal terms. Instead, I will discuss his important achievements in the area of state constitutionalism.

I. The Federalist Mandate—An Historical Perspective

In the *Federalist Papers*, James Madison set forth the proper distribution of powers between the state and national governments in a federal system. He observed that the powers of the federal government "are few and defined," while "[t]hose which . . . remain in the state governments are numerous and indefinite."[9] In one of the earlier papers, Alexander Hamilton remarked that the "one transcendent advantage belonging to the province of the State governments [is] the ordinary administration of criminal and civil justice."[10] These principles were later embodied in our constitutional scheme of government.

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4. The motto etched over the great doors of the Supreme Court building in Washington, D.C. is "Equal Justice Under Law."

5. *See* A. GOLDBERG, EQUAL JUSTICES: THE WARREN ERA OF THE SUPREME COURT 3-31 (1971).

6. *Id.*

7. *See* Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 171-72 (1984).

8. Two outstanding examples are People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) and People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). *See also* Remarks of Justice Stanley Mosk to the National Conference on State Constitutional Law, Williamsburg, Virginia (March 9, 1984) (unpublished).

9. THE FEDERALIST No. 45, at 319 (J. Madison) (Tudor Pub. Co. ed. 1937).

10. THE FEDERALIST No. 17, at 113 (A. Hamilton) (Tudor Pub. Co. ed. 1937).

Despite the tenets of federalism, however, our country's development as a nation has necessitated more and more federal intrusion into state governance. Each of the great landmarks in our national history has led to the assumption of a greater responsibility by the federal government, including the federal judiciary.[11] From the Civil War through the era of westward migration, industrial growth, and economic expansion abroad, and into this century with its two World Wars, the Great Depression, and the New Deal, there has been a steady centralization of authority in the federal government.[12]

In the calm and relative prosperity following World War II, many of the problems engendered by nation-building, sectional strife, and the economy seemed to dissolve into less pressing issues. Our nation's courts began to address long neglected problems: the extension of civil liberties to blacks and the protection of the individual rights of all.[13]

At this stage in our history the state courts were in a poor position to bring about change. The great flow of authority from the states to the federal courts over the previous 150 years had rendered the state high courts "mere bus stops on the route from trial courts to the United States Supreme Court."[14]

A. Constitutional Law and the Warren Court

Recognizing its unique responsibility, the Warren Court took up the judicial challenge of the latter half of the 20th century. The Warren Court brought about equality in our democratic representative system through the reapportionment cases.[15] The Court revolutionized the administration of criminal justice by scrupulously enforcing the basic guarantees of the Bill of Rights.[16] It also translated "our society's proclaimed belief in racial equality into some measure of legal reality."[17]

As every law student knows, these advances were made at the cost of some overrulings. But although they have been the subject of much

11. *See* A. GOLDBERG, *supra* note 5, at 3-6.

12. *Id.*

13. *Id.* at 4-5.

14. Remarks of Justice Stanley Mosk, *supra* note 8. *See also* Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165, 167-74 (1984).

15. *See* Reynolds v. Simms, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

16. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969); Katz v. United States, 389 U.S. 347 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Griffin v. Illinois, 351 U.S. 12 (1956).

17. A. GOLDBERG, *supra* note 5, at 5. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Cooper v. Aaron, 358 U.S. 1 (1958); Brown v. Board of Educ. 347 U.S. 483 (1954).

controversy,[18] the Warren Court's overrulings were carefully and selectively made. The Warren Court adhered strictly to a principle that I term "constitutional *stare decisis*."[19]

In my view, because the Constitution contains a built-in prejudice in favor of the individual, it requires that the courts afford much greater respect to individual liberties than to the abstract principle of *stare decisis*.[20] Thus, where a court seeks to overrule in order to *cut back* on fundamental constitutional protections, the commands of *stare decisis* must be all but absolute.[21] Where, however, a court overrules to *expand* personal liberties, the doctrine should be much less restrictive.[22] The Warren Court's overrulings reflected this distinction.[23]

B. Constitutional Law and the Burger Court

The Burger Court has demonstrated over the past fifteen years that it disagrees with this view of constitutional *stare decisis*.[24] The California Supreme Court felt the effects of the Court's changed attitude almost immediately after the appointment of Chief Justice Burger.[25]

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18. *See, e.g.*, Noland, *Stare Decisis and the Overruling of Constitutional Decisions in the Warren Years*, 4 VAL. U.L. REV. 101 (1969); Choper, *On the Warren Court and Judicial Review*, 17 CATH. U.L. REV. 20 (1967).

19. *See generally* A. GOLDBERG, *supra* note 5, at 65.

20. *Id.* at 76-85. The doctrine of *stare decisis* has been applied with uneven force in constitutional decisionmaking over the whole course of our history, and especially by the Warren Court.

21. *Id.* at 85-97.

22. The arguments that support this view of *stare decisis* are set forth in my book, EQUAL JUSTICE. Essentially, they are as follows: First, some overruling is necessary to facilitate the expansion of individual liberties that the Constitution was designed to permit. *Id.* at 85. As the Framers anticipated, such expansion is necessary to meet new and unforeseen evils. *Id.* at 85-86. Second, adherence to *stare decisis* when a contraction of rights is sought guards against "the tyranny of the majority." *Id.* at 86-87. Third, "if the Court overrules to contract liberties, it may convict a man *ex post facto*. . . ." *Id.* at 88. Thus, the Court's adherence to *stare decisis* when contraction is sought may protect substantial reliance interests. *Id.* at 89. Fourth, the contraction of individual liberties may have the undesirable symbolic effect of inducing "the belief that the Court is sanctioning repression." *Id.* at 93. Finally, "[o]nce [an] advance in constitutional rights has been made . . . the reasons that counseled inertia evaporate[,] leaving no reason to later move backward." *Id.* at 96.

23. *Id.* at 90-97.

24. Illustrative are the Court's "*Miranda*" and "exclusionary rule" opinions. *See infra* notes 31-43, 45, 68-70, 132-167 and accompanying text; *see also* Florida v. Meyers, 466 U.S. 380, 383-384 (1984) (Stevens, J., dissenting). Justice Stevens points out that "the Court's recent history indicates that . . . it has been primarily concerned with vindicating the will of the majority and less interested in its role as a protector of the individual's constitutional rights." *Id.* at 383. Justice Stevens went on to cite nineteen cases in which the Burger Court had reversed decisions upholding constitutional rights. *Id.* at 383-84 n.3.

25. *Compare* the California Supreme Court's discussion of U.S. Supreme Court decisions involving the Fifth Amendment in the Warren era in Prudhomme v. Superior Ct., 2 Cal. 3d

To cite an early example, one of Justice Mosk's 1969 opinions, *People v. Green*,[26] struck down a California statute allowing prior testimony to be admitted at a later trial.[27] The United States Supreme Court had held previously that the use of such testimony violated the Confrontation Clause of the Sixth Amendment.[28] Although the *Green* opinion followed seemingly settled federal law, the Supreme Court granted certiorari.[29] The early Burger Court subsequently reversed, holding that prior testimony *was* admissible so long as the declarant was present at the later trial and available for full cross-examination.[30]

More recently, the Burger Court decided several Fourth and Fifth Amendment cases in the 1983-84 Term that emphasize its ever-increasing divergence from the Warren Court's jurisprudence.[31] In *Nix v. Williams*,[32] for example, the Court adopted its "inevitable or ultimate discovery" exception to the exclusionary rule.[33] This exception permits the introduction of evidence obtained in violation of a criminal defendant's Fourth Amendment rights when the prosecution can show, by a preponderance of evidence, that the information ultimately would have been discovered through lawful means.[34]

In *Nix*, the defendant had revealed the location of a corpse during an unlawful interrogation—conducted outside the presence of counsel—

320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970) *with* its discussion of Burger Court decisions in *In re* Misener, 38 Cal. 3d 543, 698 P.2d 673, 213 Cal. Rptr. 569 (1985).

26. 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969), *vacated*, 399 U.S. 149 (1970).

27. 70 Cal. 2d at 665, 451 P.2d at 429, 75 Cal. Rptr. at 789. Justice Mosk's opinion relied upon both Supreme Court precedent (*see* Berger v. California, 393 U.S. 314 (1969); Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965)) and a one year old California case in which federal certiorari had been denied (People v. Johnson, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968), *cert. denied*, 393 U.S. 1051 (1969)).

28. Berger v. California, 393 U.S. 314 (1969); Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965).

29. 396 U.S. 1001 (1969).

30. 399 U.S. 149, 160-61 (1970). I chose this example not because it is an especially significant case in and of itself, but rather because it illustrates an early signal of the Burger Court's departure from the Warren Court era. The signal was not a false one. The trend continues today. *See supra* note 1 and *infra* note 31; *see also infra* text accompanying notes 32-43; Illinois v. Gates, 426 U.S. 213 (1983) (lowering the standard of probable cause for obtaining a search warrant); United States v. Ross, 456 U.S. 798 (1982) (holding that containers found in an automobile during a warrantless search may be searched without a warrant); New York v. Belton, 453 U.S. 454 (1981) (holding that the entire passenger compartment of an automobile may be searched without a warrant incident to a lawful arrest).

31. Some important decisions not discussed here include United States v. Leon, 104 S. Ct. 3405 (1984) (adopting the "good faith" exception to the exclusionary rule) and Hudson v. Palmer, 104 S. Ct. 3194 (1984) (holding that the Fourth Amendment's protection against unreasonable searches and seizures does not apply within the confines of a penal institution).

32. 104 S. Ct. 2501 (1984).

33. *Id.* at 2509-10.

34. *Id.*

after the interrogating officer had promised not to discuss the crime with the defendant in his lawyer's absence. The substance of the testimony offered in support of the inevitable discovery claim was that at one point during the investigation searchers had been proceeding toward the general area in which the body was found.[35]

The crime involved in *Nix* was the tragic murder of a small child. Yet, as Justice Stevens pointed out in his separate opinion, the heinous circumstances of a crime do not "permit any court to condone a violation of constitutional rights."[36] Moreover, the future application of the Court's "inevitable or ultimate discovery" exception does not depend upon the presence of facts similar to those in *Nix*. Indeed, one need not strain the imagination to see how—with good intentions—law enforcement officials might routinely avail themselves of such a potentially forgiving exception and engage in unconstitutional interrogation.

In *Segura v. United States*,[37] the Burger Court limited the exclusionary rule further.[38] The Court's opinion condoned the search of an individual's apartment and all of its contents by federal narcotics agents, even though the initial warrantless entry was admittedly unconstitutional.[39] As Justice Stevens pointed out in his forceful dissent,[40] the majority completely ignored the intended purpose of the exclusionary rule in order to restrict the "protection of criminal activity" that—in the majority's view—the rule affords.[41]

It is, in my view, a bleak day for the Constitution when the Supreme Court decides that since a defendant is an unsavory character, the abrogation of his constitutional rights by law enforcement authorities may be excused.[42] The constitutional rights of those whom society blesses with

35. *Id.* at 2512.

36. *Id.* at 2513 (Stevens, J., concurring).

37. 104 S. Ct. 3380 (1984).

38. *Segura* provides an excellent example of the Court's practice of paying lip service to an established principle (here the exclusionary rule) by first listing its historical bases. *See id.* 104 S. Ct. at 3385-86. Having done so, the Court typically goes on to remove another "cog from the wheel" that powers the rule, leaving the reader uncertain of its current extent and force.

39. Although the Court stated that the legality of the original entry and search was not before it, the traditional construction of the exclusionary rule would treat the original illegality as infecting all of the evidence subsequently obtained, making it inadmissible. *See, e.g.*, Chimel v. California, 395 U.S. 752, 766-67 n.12 (1969); Wong Sun v. United States, 371 U.S. 471, 484 (1963); Nardone v. United States, 308 U.S. 338, 341 (1939). Here, I think, the Court artifically divided the case into two supposedly unrelated parts in order to allow it to consider only the post-search warrant conduct.

40. 104 S. Ct. at 3392 (Stevens, J., dissenting). The Court was divided five to four, with Justices Brennan, Marshall, and Blackmun joining in Justice Stevens' dissent.

41. *Id.*

42. *Id.*

its approval are at risk when the rights of those less highly regarded are not protected.[43]

C. State Constitutionalism

In the era of the Burger Court, the responsibility of protecting individual liberties has fallen on state courts. Some enlightened state jurists—such as Justice Mosk—have met the challenge.[44] Others, regretfully, have been slower to respond.

Justices Brennan and Marshall have begun recently to encourage state courts to implement the guarantees found in state constitutions. In his *Michigan v. Mosley* dissent, Justice Brennan wrote:

> In light of today's erosion of *Miranda* standards as a matter of federal constitutional law, it is appropriate to observe that no state is precluded by [this] decision from adhering to higher standards under state law . . . . [S]tate courts and legislatures are, as a matter of state law, increasingly according protections once provided as federal rights but now increasingly depreciated by decisions of this Court.[45]

To its credit, the California Supreme Court has long recognized the validity of Justice Brennan's observations.[46] As a result of Justice Mosk's leadership, California has developed a substantial body of state constitutional law based on the principles enumerated in the state's Dec-

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43. I discussed this point in EQUAL JUSTICE in connection with Escobedo v. Illinois, 378 U.S. 478 (1964). I quoted Winston Churchill, and believe it is appropriate to do so again here:

> The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country. A calm, dispassionate recognition of the rights of the accused, and even of the convicted criminal, against the State—a constant heart-searching by all charged with the duty of punishment—a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment: tireless efforts towards the discovery of curative and regenerative processes: unfailing faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols, which, in the treatment of crime and criminal, mark and measure the stored up strength of a nation, and are sign and proof of the living virtue within it.

A. Goldberg, *supra* note 5, at 12-13 (quoting W. Churchill, Speech to House of Commons (July 20, 1910)).

44. The Supreme Court of Hawaii has also been in the forefront of the movement toward state constitutionalism. *See, e.g.*, State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974); State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971).

45. 423 U.S. 96, 120-21 (1975) (Brennan, J., dissenting).

46. The California Supreme Court's earlier decisions relying on state constitutional provisions to uphold individual liberties were frequently authored by Chief Justice Wright. *See, e.g.*, People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), *cert. denied*, 406 U.S. 958 (holding the death penalty unconstitutional under the California Constitution's Declaration of Rights). After Justice Wright's retirement in 1977, Justice Mosk—the most senior member of the court—became the primary spokesman for state constitutionalism.

laration of Rights.[47] The Supreme Court of California now leads the country in the progressive development of state constitutional law.

In several of his opinions, Justice Mosk has provided a comprehensive explication of the bases for state constitutionalism. The primary basis is the premise that a state high court may interpret its own constitutional provisions as imposing higher standards than are imposed by analogous provisions of the federal Constitution. As Justice Mosk noted in *People v. Brisendine*,[48] the United States Supreme Court has "clearly recognized that state courts are the ultimate arbiters of state law, even [with respect to] textually parallel provisions of state constitutions, unless [their] interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter."[49] Justice Mosk found occasion to reiterate this principle in *People v. Disbrow*:[50] "We . . . reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution. Indeed the United States Supreme Court has recently characterized this proposition as 'good law' . . . ."[51]

Justice Mosk's *Brisendine* opinion disposed of the argument that the states' various bills of rights are simply copies of the federal Bill of Rights:

> [T]he California Constitution is, and always has been, a document of independent force. Any other result would contradict not only the most fundamental principles of federalism but also the historic bases of state charters. 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. . . .
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> . . . Eight of the Revolutionary Constitutions were prefaced by Bills of Rights, while four contained guarantees of many of the most important individual rights in the body of their texts. In-

47. CAL. CONST. art. I.

48. 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).

49. *Id.* at 548, 531 P.2d at 1112, 119 Cal. Rptr. at 328 (citing Cooper v. California, 386 U.S. 58, 62 (1967); Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487, 491-92 (1965)). *See also* Oregon v. Hass, 420 U.S. 714, 719 (1975); Cooper v. California, 386 U.S. 58, 62 (1967).

50. 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

51. *Id.* at 114-15, 545 P.2d at 280-81, 127 Cal. Rptr. at 368-69.

> cluded in these Revolutionary constitutional provisions were *all of the rights that were to be protected in the federal Bill of Rights.* By the time of the Treaty of Paris (1783) . . . the American inventory of individual rights had been virtually completed.' . . . In particular, the Rights of the Colonists (Boston, 1772) declared for the first time 'the right against unreasonable searches and seizures that was to ripen into the Fourth Amendment' . . . . [T]hat protection was embodied in every one of the eight state constitutions adopted prior to 1789 which contained a separate bill of rights . . . .[52]

In his *Diamond v. Bland* dissent,[53] Justice Mosk contrasted the legal milieux in which the California and federal constitutions were drafted.[54] While the federal drafters had to bear in mind the " 'broad, guiding principles' " of a federation of states, the California drafters were more concerned with " 'the exigent details of a [new] sovereign state government.' "[55] Justice Mosk noted that the California "document was drafted by a constitutional convention that was a reflection of the youth, heterogeneity and independence of the state at that time."[56] He concluded that "the guarantees of individual liberties contained in the California Constitution were not founded upon, are not dependent upon, and have a status independent of, the Constitution of the United States."[57]

In this same dissent, Justice Mosk observed that it is inappropriate to attempt to reduce "diverse federal and state premises to a single body of 'constitutional law.' "[58] One reason, already discussed, is that the provisions and historical bases of the federal and state constitutions are not the same. The other is that such reductionism contradicts the hierarchical logic of constitutional doctrine.[59] The proper hierarchy requires that claims raised under a state constitution be disposed of before any Fourteenth Amendment claim is reached.[60]

In *People v. Longwill*,[61] Justice Mosk addressed the argument that a

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52. 13 Cal. 3d at 549-50, 531 P.2d at 1113, 119 Cal. Rptr. at 329 (quoting 1 SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 383, 199, 206 (1971)) (citations omitted) (emphasis in original).

53. 11 Cal. 3d 331, 335, 521 P.2d 460, 463, 113 Cal. Rptr. 468, 471 (1974) (Mosk, J., dissenting).

54. *Id.* at 337-38, 521 P.2d at 465, 113 Cal. Rptr. at 473 (Mosk, J., dissenting).

55. *Id.* at 338, 521 P.2d at 465, 113 Cal. Rptr. at 473 (quoting Palmer & Selvin, *The Development of Law in California*, in 1 CAL. CODES ANNOT., CONSTITUTIONS 14 (West 1954)).

56. 11 Cal. 3d at 338, 521 P.2d at 465, 113 Cal. Rptr. at 473 (Mosk, J., dissenting).

57. *Id.*

58. *Id.* at 336, 521 P.2d at 464, 113 Cal. Rptr. at 472.

59. *Id.*

60. *Id.* at 336-37, 521 P.2d at 464, 113 Cal. Rptr. at 472 (citing Linde, *Without "Due Process": Unconstitutional Law in Oregon,* 49 OR. L. REV. 125, 133-35 (1970)).

61. 14 Cal. 3d 943, 538 P.2d 753, 123 Cal. Rptr. 297 (1975).

state court may rely upon independent state grounds only in certain narrowly defined circumstances.[62] He wrote:

> This argument presupposes that on issues of individual rights we sit as no more than an intermediate appellate tribunal, and that to the presumption of further review there is but a 'limited' exception which must be 'clearly delineated.' On the contrary, in the area of fundamental civil liberties—which includes not only freedom from unlawful search and seizure but all protections of the California Declaration of Rights—we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter. In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental civil rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.[63]

II. Justice Mosk's Application of State Constitutionalism in California Law

In his opinions, Justice Mosk has found an independent state constitutional basis for most, if not all, of what we have come to think of as our "fundamental rights." Although the California Constitution's Declaration of Rights is more specifically inclusive than the federal Bill of Rights,[64] it is convenient to use the common shorthand references to the various federal guarantees. I shall therefore use these designations to facilitate discussion of Justice Mosk's application of the guarantees found in the California Constitution.

Justice Mosk has authored a number of opinions in the area of "Fourth Amendment rights," establishing high standards of conduct for California law enforcement authorities.[65] In *People v. Brisendine*,[66] for

62. The circumstances were not specified in the opinion.

63. 14 Cal. 3d at 951 n.4, 538 P.2d at 758 n.4, 123 Cal. Rptr. at 302 n.4.

64. For example, the California Constitution's Declaration of Rights contains sections dealing with employment discrimination, art. I, § 8, and safeguards in criminal prosecutions, art. I, § 15.

65. *See, e.g., infra* notes 66-73 and accompanying text.

Although the holdings of these opinions may have been abrogated by the passage of the initiative measure known as "Proposition 8" (now art. I, § 28 subd. (d) of the California Constitution) and the recent opinion of the California Supreme Court upholding its so-called "truth in evidence" provision, *see In re* Lance, 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985); *but cf.* People v. Castro, 30 Cal. 3d 301, 211 P.2d 111, 211 Cal. Rptr. 719 (1985), these developments do not detract from the valuable example that Justice Mosk's opinions provide. *See, e.g.,* Ramona R. v. Superior Ct., 37 Cal. 3d 802, 693 P.2d 789, 210 Cal. Rptr.

example, he wrote that a warrantless weapons search, justified in its inception, could not be extended to containers that could not possibly conceal an ordinary weapon, "absent a showing of reasonable suspicion of the presence of an atypical weapon."[67] To get around the Burger Court's contrary decision in *United States v. Robinson*,[68] Justice Mosk expressly based the court's holding upon article I, section 13 of the California Constitution.[69]

Justice Mosk disagreed with the Court's implication in *Robinson* that " 'an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person.' "[70] He likewise rejected the Court's proposition that " '[t]he authority to search . . . does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.' "[71] Instead, Justice Mosk observed that the converse of the *Robinson* conclusion "would seem to be true: having in the course of a lawful *weapons* search come upon a crumpled cigarette package, the officer would have no reasonable ground to inspect it."[72]

The *Brisendine* line of cases [73] illustrates an important advantage of state constitutionalism: despite the confusion generated by federal constitutional decisions in the last fifteen years,[74] under the state constitution

204 (holding that Proposition 8 does not abrogate state constitutional protection against self-incrimination, which requires that statements made by a juvenile to her probation officer at a fitness hearing may not be used against her at a subsequent trial).

66. 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).

67. *Id.* at 547, 531 P.2d at 1111, 119 Cal. Rptr. at 327.

68. 414 U.S. 218 (1973).

69. That section provides, in part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated . . . ."

70. 13 Cal. 3d at 547, 531 P.2d at 1111, 119 Cal. Rptr. at 327 (quoting *Robinson*, 414 U.S. at 237 (Powell, J., concurring)).

71. 13 Cal. 3d at 547, 531 P.2d at 1110-11, 119 Cal. Rptr. at 326-27 (quoting *Robinson*, 414 U.S. at 235).

72. 13 Cal. 3d at 547 n.15, 531 P.2d at 1111 n.15, 119 Cal. Rptr. at 327 n.15.

73. Among the other cases in this line are People v. Laiwa, 34 Cal. 3d 711, 669 P.2d 1278, 195 Cal. Rptr. 503 (1983); People v. Maher, 17 Cal. 3d 196, 550 P.2d 1044, 130 Cal. Rptr. 508 (1976); People v. Longwill, 14 Cal. 3d 943, 538 P.2d 753, 123 Cal. Rptr. 297 (1975); and People v. Simon, 7 Cal. 3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1974).

74. The Burger Court is continually casting doubt upon the approved interpretation of proper police conduct. Justice Mosk acknowledged this recently, in Ramona R. v. Superior Court, 37 Cal. 3d at 808-09, 693 P.2d at 793, 210 Cal. Rptr. at 208:

> In People v. Coleman, . . . 13 Cal. 3d 867, 878-86 [533 P.2d 1024, 120 Cal. Rptr. 384 (1975)], we examined federal law in the area of use immunities. We declined to decide whether such immunities were compelled by the United States Constitution, because '[t]he federal law on the subject is currently in a state of confusion.' (*Id.* at p. 878.) The developments since that time have not changed our opinion. (Compare,

California law enforcement personnel have had consistent guidelines to follow in carrying out investigations and arrests. This consistency tends to prevent confusion and inadvertent errors on the part of peace officers in the state.

In the area of "First Amendment rights"—freedom of speech, assembly, and petition—Justice Mosk recently has persuaded the United States Supreme Court to adopt his view that California law provides a more appropriate measure of protection than that provided by the federal Constitution with respect to expressive activity on private property.[75] The California Supreme Court elaborated this view in a series of cases involving the right of individuals or groups to distribute handbills and circulate petitions in privately owned shopping centers.[76] The first of these cases was *Diamond v. Bland*.[77]

The plaintiffs in *Diamond* had attempted to gather signatures on anti-pollution initiative petitions in an enclosed, privately-owned shopping mall after their request to the mall's managers for permission to circulate the petitions had been denied. Security guards removed them from the mall's premises. When their request for injunctive relief was denied, they appealed to the California Supreme Court.

Writing for the majority, Justice Mosk held that, absent any interference with business operations, the "bare title" of a shopping center's owners did not outweigh the interest of individuals and groups in conducting orderly First Amendment activities on the premises.[78] The *Diamond* plaintiffs subsequently obtained a permanent injunction restraining the shopping center owners from interfering with their activities.[79]

Two years later, the United States Supreme Court decided *Lloyd Corporation v. Tanner*.[80] The Court held that the owners of an Oregon

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e.g., Melson v. Sard (D. C. Cir. 1968) 402 F.2d 653, 655 ['any self-incriminatory statements made in a parole revocation hearing shall not be used affirmatively against the parolee in any subsequent criminal proceeding'] with Ryan v. State of Montana (9th Cir. 1978) 580 F.2d 988, 991 [no immunity against introduction as evidence at trial for statements made by a probationer at a revocation hearing].) Thus, we must base our determination on the state Constitution.

See also supra notes 31-43 and accompanying text and *infra* note 134.

75. Pruneyard Shopping Centers v. Robins, 447 U.S. 74, 85 n.8 (1980). *See infra* notes 85-91 and accompanying text.

76. *See* Robins v. Pruneyard Shopping Centers, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd,* 447 U.S. 74 (1980); Diamond v. Bland (*Diamond II*), 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468, *cert. denied,* 419 U.S. 885 (1974); Diamond v. Bland, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied sub nom.* Homart Dev. Co. v. Diamond, 402 U.S. 988 (1971).

77. 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970).

78. *Id.* at 666, 477 P.2d at 741, 91 Cal. Rptr. at 509.

79. *See Diamond II*, 11 Cal. 3d at 333, 521 P.2d at 461-62, 113 Cal. Rptr. at 469-70.

80. 407 U.S. 551 (1972).

shopping mall could prohibit the distribution of political leaflets unrelated to the business of the shopping center.[81] In light of *Lloyd*, the trial court that had issued the injunction in favor of the *Diamond* plaintiffs dissolved its decree.[82]

On the *Diamond* plaintiffs' second appeal, the California Supreme Court affirmed, finding no ground for distinguishing *Lloyd*.[83] Justice Mosk, however, dissented. In his lengthy and well-reasoned opinion, Justice Mosk argued that the California Constitution provided greater protection of the speech interests at stake, and that the court was not precluded from relying upon independent state constitutional grounds in following its earlier *Diamond* holding.[84]

Although Justice Mosk's views did not prevail in *Diamond II*, they did prevail five years later in *Robins v. Pruneyard Shopping Center*.[85] Justice Newman's majority opinion in *Robins* concluded that *Lloyd* did "not preclude law-making in California which requires that shopping center owners permit expressive activity on their property."[86] Justice Newman went on to hold "that sections 2 and 3 of article I of the California Constitution protect [rights of] speech and petitioning, reasonably exercised, in [privately owned] shopping centers."[87] *Diamond II* was expressly overruled.[88]

The *Pruneyard* case went to the United States Supreme Court, where a substantially unanimous majority approved of Justice Mosk's *Diamond II* rationale.[89] The Court held that the California Declaration of Rights, as interpreted by the California Supreme Court, could provide "individual liberties more expansive than those conferred by the federal Constitution."[90] In a welcome reaffirmation of the principle of federalism, Justice Rehnquist wrote that "the State's asserted interest in promoting more expansive rights of free speech and petition" in no way violated the United States Constitution.[91]

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81. *Id.* at 568-70.

82. *Diamond II*, 11 Cal. 3d at 333, 521 P.2d at 462, 113 Cal. Rptr. at 470.

83. *Id.* at 335, 521 P.2d at 463, 113 Cal. Rptr. at 471.

84. *Id.* at 335, 521 P.2d at 463, 113 Cal. Rptr. at 471 (Mosk, J., dissenting). Justice Mosk's *Diamond* opinion is discussed *supra* in text accompanying notes 77-79.

85. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980).

86. *Id.* at 905, 592 P.2d at 344, 153 Cal. Rptr. at 857.

87. *Id.* at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860.

88. *Id.*

89. Pruneyard Shopping Centers v. Robins, 447 U.S. 74 (1980). As is increasingly common, various Justices joined in only parts of the opinion, and several wrote concurrences. *Id.* at 75-76.

90. *Id.* at 81.

91. *Id.* at 85.

These brief highlights illustrate the extent of Justice Mosk's application of California constitutional law to protect individual rights. While a review of all of Justice Mosk's independent state grounds opinions is beyond the scope of this article, two important subjects warrant more extended consideration. They are the juror exclusion case of *People v. Wheeler*,[92] and the California case law progeny of *Miranda v. Arizona*.[93]

A. The Right to a Fair Trial: *People v. Wheeler*

One of Justice Mosk's most outstanding civil liberties opinions is *People v. Wheeler*.[94] In *Wheeler*, Justice Mosk led his court and the country in refusing to follow the thirteen year-old case of *Swain v. Alabama*,[95] which established a virtually insurmountable presumption of racial neutrality in the use of peremptory juror challenges.[96]

The *Swain* case involved a nineteen year-old black defendant's appeal from a rape conviction. The defendant had been convicted by an all-white jury and sentenced to death. As the primary basis for his appeal, he made a prima facie showing of systematic and total exclusion of black veniremen from Talladega County juries through the state's use of its power to strike jurors.[97]

Despite the defendant's showing, and over my dissent,[98] the majority refused to apply the well-settled rule that *any* state action resulting in the exclusion of blacks from participation in the justice system violated the Equal Protection Clause of the Fourteenth Amendment.[99] Instead, the Court applied its presumption of neutrality, which, it suggested, could be rebutted only by a showing that "the prosecutor . . ., in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes . . . with the result that no Negroes ever serve on petit juries

92. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

93. 384 U.S. 436 (1966).

94. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890.

95. 380 U.S. 202 (1965).

96. *Id.* at 219.

97. The Alabama "power to strike jurors" is that state's equivalent of the California "peremptory challenge," which is defined as "an objection to a juror for which no reason need be given, but upon which the Court must exclude him." CAL. PENAL CODE § 1069 (West 1970). Jurors may also be challenged for cause on the grounds of either actual or implied bias. CAL. PENAL CODE § 1073 (West 1970).

98. *Swain*, 380 U.S. at 228 (Goldberg, J., dissenting).

99. *See id.* at 228-31. Beginning with Strauder v. West Virginia, 100 U.S. 303 (1880) and extending through Arnold v. North Carolina, 376 U.S. 773 (1964), the Court had applied the rule consistently.

. . . ."[100] In effect, the majority chose to elevate the prosecution's statutory right to exercise peremptory challenges above the defendant's constitutional right to a fair trial by an impartial jury. I disagreed with the majority's analysis, and proposed a pragmatic solution that would accommodate the use of peremptory challenges without abrogating fundamental rights.[101]

The ensuing thirteen years produced few cases in which a defendant was able to meet the stringent burden of proof set forth by the *Swain* plurality.[102] During this interim, the Court held that the Sixth Amendment right to trial by jury in significant criminal cases was applicable to the states via the Fourteenth Amendment.[103] The Court also held that the exclusion of all women from jury service violated the Sixth Amendment right of a defendant to a jury selected from a representative cross-section of the community.[104] Despite these advances, the Court steadfastly refused to reconsider *Swain*.[105]

In *People v. Wheeler*,[106] Justice Mosk took the initiative. The defendants in *Wheeler* were two black men who had been convicted by an all white jury of murdering a white grocery store owner in the course of a robbery. While a number of blacks had been in the jury venire, the prosecutor had used his peremptory challenges to strike all of them. The trial court, following *Swain*, ignored the defendants' protestations of unconstitutional discrimination. The resulting convictions were appealed.

The California Supreme Court reversed.[107] In his ground-breaking

100. 380 U.S. at 223. As I pointed out in my dissent, the majority assumed the petitioner had not made a prima facie showing of racially discriminatory state action. *Id.* at 233. In fact, the record contained ample evidence of discrimination. *Id.* at 233-38.

101. I suggested that where, as in *Swain*, a prima facie showing of unlawful juror exclusion was made, "[t]he burden of proof [would shift] to the State to prove, if it could, that [the] exclusion was brought about for some reason other than racial discrimination . . . ." *Id.* at 238.

102. In United States v. Childress, 715 F.2d 1313 (8th Cir. 1983), the court's search revealed only two post-*Swain* cases in which a particular prosecutor was found to have used peremptory challenges unconstitutionally under the *Swain* requirements. *Id.* at 1316. The court noted that "[a]lthough case law repeatedly describes the defendant's burden of proof as "not insurmountable," e.g., United States v. Pollard, 483 F.2d 929, 930 (8th Cir. 1973), *cert. denied*, 414 U.S. 1137 (1974); United States v. Pearson, 448 F.2d 1207, 1217-18 (5th Cir. 1971), defendants in state and federal courts have been overwhelmingly unable to establish a prima facie case of systematic exclusion." *Id. See also* People v. Wheeler, 22 Cal. 3d at 286 & n.35, 583 P.2d at 768 & n.35 , 148 Cal. Rptr. at 909 & n.35.

103. Duncan v. Louisiana, 391 U.S. 145 (1968).

104. Taylor v. Louisiana, 419 U.S. 522 (1975).

105. The Court consistently refused to grant certiorari in cases involving alleged facially discriminatory use of the peremptory challenge. *See, e.g.*, Miller v. Illinois, Perry v. Louisiana, and McCray v. New York, 461 U.S. 961 (1983).

106. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

107. *Id.* at 287, 583 P.2d at 768, 148 Cal. Rptr. at 910.

majority opinion, Justice Mosk set forth precisely what is unconstitutional about the discriminatory use of peremptory challenges. He explained:

> [W]hen a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds . . . and peremptorily strikes all such persons for that reason alone, he not only upsets the demographic balance of the venire but frustrates the primary purpose of the representative cross-section requirement. That purpose . . . is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences. . . . [I]f jurors are struck simply because they may hold those very beliefs, such interaction becomes impossible and the jury will be dominated by the conscious or unconscious prejudices of the majority.[108]

Analyzing the *Swain* opinion, Justice Mosk noted:

> [It] obviously furnishes no protection whatever to the first defendant who suffers . . . discrimination in any given court—or indeed to all his successors, until 'enough' such instances have accumulated to show a pattern of prosecutorial abuse. . . .
>
> Moreover, even if we consider only the defendant who believes himself in a position to invoke the exception suggested in *Swain*, we see that his attempt to comply with the federal standard of proof is bound to fail. The defendant is party to only one criminal proceeding, and has no personal experience of racial discrimination in the other trials held in that court. Nor can he easily obtain such information, for several reasons. First, those defendants who are indigent or of limited means cannot afford to pay investigators to develop the necessary data. Second, even if the funds were available . . . the time is not . . . . Third, even if the funds and time were available, the data is not . . . .[109]

Justice Mosk added that "[i]t demeans the Constitution to declare a fundamental personal right under that charter and at the same time make it virtually impossible for an aggrieved citizen to exercise that right."[110]

Relying upon the independent right to trial by jury embodied in the California Constitution's Declaration of Rights, [111] Justice Mosk set

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108. *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

109. *Id.* at 285-86, 583 P.2d at 767-68, 148 Cal. Rptr. at 908-09.

110. *Id.* at 287, 583 P.2d at 768, 148 Cal. Rptr. at 909-10.

111. CAL. CONST. art. I, § 16. Grounded on provisions of the California Constitution, Justice Mosk's decision was insulated from review. It is perhaps not as easy, however, to insulate a case today. As Justice Mosk has pointed out:

> It appears that the present Supreme Court . . . will reach for cases—particularly when a defendant's rights have received an expansive interpretation—if the state court cites both federal and state authorities. The Montana Supreme Court learned the hard way in Montana v. Jackson, 460 U.S. 1030 (1983); citation in the opinion to

forth a new procedure for the California courts to follow in the *Swain* situation. Simply put, if the defendant believes his opponent is using his peremptory challenges to strike jurors on the ground of "group bias" alone, he must raise the point in a timely fashion.[112] If the defendant makes a prima facie showing, the burden shifts to the prosecutor to show that the challenges were exercised for reasons other than group bias.[113]

Justice Mosk set forth some of the factors a court may consider in determining whether a prima facie showing of group bias has been made,[114] and, if so, whether the prosecution has met its burden of justification.[115] If a court finds that the prosecution's:

> [B]urden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted. Accordingly, the court must then conclude that the jury as constituted fails to comply with the representative cross-section requirement, and it must dismiss the jurors thus far selected. So too it must quash any remaining venire, since the complaining party is entitled to a random draw from an entire venire . . . .[116]

Several other state courts have now rejected *Swain* and adopted the *Wheeler* approach. In fact, virtually every recent opinion on the subject of juror exclusion refers to *Wheeler*. In *Commonwealth v. Soares*,[117] the Massachusetts high court quoted extensively from *Wheeler* and adopted the *Wheeler* remedy verbatim.[118] An Illinois appellate court recently followed *Wheeler*, stating: "We abhor and condemn the practice of the use of the peremptory challenge to strike all blacks from a jury. The injury is not limited to the defendant; there is injury to the jury system, to the community at large, and to the democratic process reflected in our courts."[119]

The Florida Supreme Court and a New York appellate court each

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the state constitution seven times did not insulate the judgment from vacation by the High Court.

Remarks of Justice Stanley Mosk, *supra* note 8.

In Michigan v. Long, 463 U.S. 1032 (1983), the U.S. Supreme Court announced that state court opinions must overcome a "presumption" against independent state grounds. *See also* Welsh, *Whose Federalism?—The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L.Q. 819, 833-56 (1983).

112. 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

113. *Id.* at 280-83, 583 P.2d at 764-66, 148 Cal. Rptr. at 905-07.

114. *See id.* at 280-81, 583 P.2d at 764, 148 Cal. Rptr. at 905-06.

115. *See id.* at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906.

116. *Id.*

117. 377 Mass. 476, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).

118. 377 Mass. 476-91, 387 N.E.2d at 510-18.

119. People v. Smith, 91 Ill. App. 3d 523, 530-32, 414 N.E.2d 1117, 1122-24 (1980).

have adopted slightly modified versions of *Wheeler*.[120] Still other courts have expressed a willingness to adopt *Wheeler* in an appropriate case.[121] Finally, in *State v. Crespin*,[122] a New Mexico appellate court adopted an unusual approach incorporating both *Swain* and *Wheeler*. The court held "that improper, systematic exclusion by use of peremptory challenges can be shown (1) under *Swain* . . . or (2) under the *Wheeler-Soares* rationale . . . where the absolute number of challenges in the one case raises the inference of systematic acts by the prosecutor."[123]

In *United States v. Childress*,[124] the Eighth Circuit joined the long list of critics of *Swain* and pointedly invited the Supreme Court to review it.[125] Justices Marshall and Brennan have sought consistently to effect such review in dissents to denial of certiorari.[126] Although *Swain* is clearly out of step with other decisions of the Court that protect individual rights,[127] the Court's majority has continued to resist these and other urgings. In my view, Justice Mosk's careful explication of the fundamental constitutional rights involved in these cases, coupled with his detailed description of a fair and workable remedy which does no significant violence to the peremptory challenge, makes further delay insupportable.

Whether the Court finally will reconsider its *Swain* criteria may be determined in the 1985-86 Term. A petition for certiorari was filed in March 1985 in *Abrams v. McCray*,[128] which presents a direct challenge to *Swain*. The Court carried over the petition for decision in the upcoming Term,[129] perhaps because of its ambivalence. Yet, regardless of the out-

120. *See* State v. Neil, 457 So. 2d 481, 486-87 (Fla. 1984); People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981).

121. *See, e.g.*, State v. Gilmore, 195 N.J. Super. 163, 478 A.2d 783 (1984); Saunders v. State, 401 A.2d 629, 632 (Del. 1979), *cert. denied*, 449 U.S. 845 (1980). A number of jurists have advocated the adoption of *Wheeler* in dissenting and concurring opinions. *See, e.g.*, Shockley v. State, 282 Ark. 281, 283, 668 S.W.2d 22, 24 (1984) (Hollingsworth, J., dissenting); State v. Eames, 365 So. 2d 1361, 1364-73 (La. 1979) (Dennis, J., concurring); State v. Blanson, 364 So. 2d 1308 (La. 1978) (Dennis, J., dissenting).

122. 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980).

123. *Id.* at 487, 612 P.2d at 718.

124. 715 F.2d 1313 (8th Cir. 1983), *cert. denied*, 464 U.S. 1063 (1984).

125. *Id.* at 1316-17, 1320. For an extensive list of commentators who have criticised the burden of proof required by *Swain*, see *id.* at 1316.

126. Davis v. Illinois, 464 U.S. 867, *reh'g denied*, 104 S. Ct. 1017 (1984); *See, e.g.*, Gilliard v. Mississippi, 464 U.S. 867 (1983) (citing *Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890); McCray v. New York, 461 U.S. 961, 963-66 (1983). Although Justices Stevens, Blackmun and Powell voted to deny certiorari in *McCray*, they recommended that state courts should serve "as laboratories in which the [*Swain*] issue receives further study before it is addressed by this Court." *Id.* at 963.

127. *See* Swain v. Alabama, 380 U.S. at 228-31 (Goldberg, J., dissenting).

128. 750 F.2d 1113 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3761 (U.S. March 4, 1985) (No. 84-1426).

129. 54 U.S.L.W. 3040 (Aug. 6, 1985).

come of *Abrams*, state courts may rely upon their own state constitutions to cure the defects of *Swain*, and the *Wheeler* opinion has shown them the way.[130]

B. Miranda and Its California Progeny

Another example of Justice Mosk's use of state constitutional provisions to protect civil liberties can be found in the line of cases interpreting the California Constitution's parallel to the Fifth Amendment privilege against self-incrimination.[131] What have long been termed "*Miranda* rights"[132] are being eroded steadily by the Burger Court,[133] largely through a process of piecemeal redefinition.[134]

Recent California cases, in contrast, have remained true to *Miranda*

130. The effect of *Wheeler* has been felt beyond the context of exclusion through peremptory challenges of minorities from juries. In State v. Ball, 685 P.2d 1055 (Utah 1984), the Utah Supreme Court held that it is not improper to inquire during voir dire whether a juror holds his opposition to alcohol consumption on religious conviction. The court stated its agreement with *Wheeler* and quoted the opinion extensively. It reasoned that not to allow voir dire to focus on possible sources of actual or implied bias would vitiate the efficacy of the peremptory challenge system and lead to 'group bias' of the kind held unconstitutional in *Wheeler*. *Id.* at 1059.

131. CAL. CONST. art. I, § 15.

132. As enunciated in Miranda v. Arizona, 384 U.S. 436, 479 (1966), a defendant

> must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

133. *See, e.g.*, Michigan v. Mosley, 423 U.S. 96 (1975) (resumption of interrogation of a defendant who has invoked his *Miranda* right to remain silent is not a per se violation of the defendant's *Miranda* rights) (*see infra* notes 149-57 and accompanying text); United States v. Nobles, 422 U.S. 225, 234 (1975) (privilege against self incrimination does not bar the court from ordering the defense to turn over a report prepared by the defense investigation regarding his discussions with a defense witness) (*see infra* text accompanying notes 162-67); Harris v. New York, 401 U.S. 222 (1971) (statement made by a defendant to police may be used to impeach his credibility, even if the statement is inadmissible under *Miranda* as part of the prosecution's direct case) (*see infra* text accompanying notes 139-48).

134. This redefinition is especially clear in a case from the 1983 Term, New York v. Quarles, 104 S. Ct. 2626 (1984). The U.S. Supreme Court created a "public safety" exception to the once clear directives of *Miranda* and reversed a ruling suppressing a statement obtained by police in violation of *Miranda* requirements. The dangerous ambiguity inherent in the Court's "public safety" exception prompted Justice O'Connor to write in her separate opinion:

> Today, the Court concludes that overriding considerations of public safety justify the admission of evidence—oral statements and a gun—secured without the benefit of [*Miranda*] warnings. In so holding, the Court acknowledges that it is departing from prior precedent . . . and that it is 'lessen[ing] the desirable clarity of [the *Miranda*] rule['] . . . . Were the court writing from a clean slate, I could agree with its holding. But *Miranda* is now the law and, in my view, the Court has not provided sufficient justification for departing from it or for blurring its now clear strictures.

104 S. Ct. at 2634 (O'Connor, J., concurring and dissenting).

Justice Marshall, joined by Justices Brennan and Stevens in the dissenting opinion, was more direct:

and its predecessor, *Escobedo v. Illinois*.[135] The underlying principles in those decisions were that custodial interrogation is inherently coercive, and that procedural safeguards, including the presence of counsel, are essential if the constitutional guarantee against self-incrimination is to be anything more than a paper right.[136] California's "*Miranda*" case law has shown remarkable consistency and can be summed up in a single sentence: Custodial interrogation must wholly cease when the suspect indicates in *any* manner that he wishes to exercise his right against self-incrimination, and must not be resumed until counsel has arrived.[137]

In a number of cases, the California Supreme Court has been faced with the option of following the Burger Court's departures from *Miranda*[138] or adhering to *Miranda* and its California progeny. Under Justice Mosk's leadership, the California court has relied consistently on its own constitution to resist the federal erosions. In *People v. Disbrow*,[139] for example, the court refused to follow *Harris v. New York*.[140] In *Harris*, the United States Supreme Court held that a statement obtained in violation of the requirements of *Miranda* could be admitted for impeachment purposes if found to be trustworthy.[141] As Justice Mosk noted in his *Disbrow* opinion, however, adherence to the *Harris* rule "would res-

> [T]he majority abandons the clear guidelines enunciated in Miranda v. Arizona . . ., and condemns the American judiciary to a new era of *post hoc* inquiry into the propriety of custodial interrogations. More significantly, and in direct conflict with this Court's long-standing interpretation of the Fifth Amendment, the majority has endorsed the introduction of coerced self-incriminating statements in criminal prosecutions.

104 S. Ct. at 2641-42 (Marshall, J., dissenting) (citation omitted).

135. 378 U.S. 478 (1964).

136. *See Miranda*, 384 U.S. at 479.

137. The court has adhered to this principle despite persistent challenges in a number of factual contexts. For example, confessions were deemed inadmissible when a defendant's initial invocation of *Miranda* rights was overcome by police assertions that confessions had been obtained from accomplices. People v. Fioritto, 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817 (1968). In another case, a confession was found inadmissible when a detainee's request to talk to his parents was ignored and interrogation resumed. People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969); *see also* People v. Burton, 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971). A confession also was held inadmissible where interrogation was resumed after a suspect had telephoned an attorney but before the attorney arrived. People v. Randall, 1 Cal. 3d 948, 464 P.2d 114, 83 Cal. Rptr. 658 (1970). Finally, a confession was held inadmissible when police continued efforts to extract a waiver of a suspect's right to counsel after the suspect requested an attorney be present during the suspect's interrogation. People v. Enriquez, 19 Cal. 3d 221, 561 P.2d 261, 137 Cal. Rptr. 171 (1977).

138. Concern about the Court's commitment to *Miranda* has heightened during this Term. *See, e.g.*, Justice Marshall's dissent in New York v. Quarles, 104 S. Ct. at 2641-50.

139. 16 Cal. 3d 101, 113, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976).

140. 401 U.S. 222 (1971).

141. *Id.* at 224.

urrect the remains of the earlier voluntariness test,"[142] thereby forcing the trial courts into the very "evidentiary thicket *Miranda* was designed to avoid."[143] He observed also that a rule permitting the use of illegally obtained confessions for impeachment purposes would leave "little or no incentive for police to comply with *Miranda's* requirements."[144]

Justice Mosk's principal objection to the *Harris* rule, however, was that it created a "considerable potential that a jury, even with the benefit of a limiting instruction, [would] view prior inculpatory statements as substantive evidence of guilt rather than as merely reflecting on the declarant's veracity."[145] Faced with the prospect of his illegally obtained confession being revealed to the jury, a defendant would "be under considerable pressure to forego [exercising his] basic right [to testify in his own behalf]."[146]

Justice Mosk avoided the *Harris* result by relying on the California Constitution.[147] He concluded that "the privilege against self-incrimination of article I, section 15, of the California Constitution precludes use by the prosecution of any extrajudicial statement by the defendant, . . . either as affirmative evidence or for purposes of impeachment, obtained during custodial interrogation in violation of the standards declared in *Miranda* and its California progeny."[148]

Justice Mosk again refused to depart from *Miranda* in *People v. Pettingill*.[149] The State argued in *Pettingill* that statements obtained after a defendant had invoked his right to remain silent were admissible under the Burger Court's holding in *Michigan v. Mosley*.[150]

The Court had held in *Mosley* that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.' "[151] Applying a newly crafted test, the Court found admissible a confession which followed a renewal of interrogation by a different police officer, on a separate floor of the police station, and with regard to a different crime. The Court relied heavily on the circum-

142. 16 Cal. 3d at 111, 545 P.2d at 278, 127 Cal. Rptr. at 366.
143. *Id.* at 112, 545 P.2d at 278, 127 Cal. Rptr. at 366.
144. *Id.* at 113, 545 P.2d at 279, 127 Cal. Rptr. at 367.
145. *Id.* at 112, 545 P.2d at 279, 127 Cal. Rptr. at 367.
146. *Id.*
147. *Id.* at 113, 545 P.2d at 280, 127 Cal. Rptr. at 368. He acknowledged that his court was not the first to reject *Harris* on state constitutional grounds. *Id.* at 113-14, 545 P.2d at 280, 127 Cal. Rptr. at 368 (citing State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971)).
148. 16 Cal. 3d at 113, 545 P.2d at 280, 127 Cal. Rptr. at 368.
149. 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861 (1978).
150. 423 U.S. 96 (1975).
151. *Id.* at 104.

stances of the interrogation[152] to avoid the plain mandate of *Miranda* that an invocation of the right to remain silent, once made, must thereafter be respected.[153]

The facts in *Pettingill* were similar to those in *Mosley*. After twice invoking his right to remain silent, the defendant was given a fresh set of *Miranda* warnings by a different officer, and was questioned about a series of crimes unrelated to the first. The defendant's subsequent confession was admitted into evidence at his trial. Writing for the majority, Justice Mosk rejected the contention that his court was bound to follow the *Mosley* decision.[154] He reiterated that the California Constitution is " 'a document of independent force,' " and added that the court could not "abandon settled applications of its terms every time changes [were] announced in the interpretation of the federal charter."[155]

Justice Mosk went on to examine the logical and practical problems inherent in the *Mosley* test. He first noted its inconsistency with the principles underlying *Miranda*:

> [O]n the facts of [*Mosley*] the high court held that a suspect's right to cut off questioning will be deemed 'scrupulously honored' when the second interrogation (1) occurs 'only after the passage of a significant period of time' and (2) is conducted by a different police officer and deals with a different crime. But these are precisely the techniques—lengthy incommunicado detention and the switching of interrogators and charges—which . . . endanger [the] privilege [against self-incrimination] by increasing the pressures on the suspect to confess in order to end his forced isolation. . . .[156]

Justice Mosk also pointed out *Mosley's* potential for creating confusion and doubt:

> [The] *Mosley* test is evidently designed to apply to . . . circumstances [other] than those presented in the case itself. But the opinion does not attempt a compendium of such additional circumstances, and indeed the effort would have been futile. A major element of uncertainty is thus injected into the law: when has a suspect's right to cut off questioning been 'scrupulously honored?' . . .

152. *Id.* at 99-107.

153. *See* Miranda v. Arizona, 384 U.S. at 473-74. The holding in *Mosley* was based on the doubtful premise that the halting of the first interrogation meant the suspect's *Miranda* rights had been respected, and that a fresh rendition of the *Miranda* rights, together with a "change in the circumstances of the interrogation," rendered the subsequent confession voluntary. 423 U.S. at 99-107.

154. 21 Cal. 3d at 247-48, 578 P.2d at 118-19, 145 Cal. Rptr. at 871.

155. *Id.* at 247-48, 578 P.2d at 118, 145 Cal. Rptr. at 871.

156. *Id.* at 249, 578 P.2d at 119, 145 Cal. Rptr. at 872.

> Not only is this obviously a question of degree, but the very elements of the equation remain unidentified. . . .
>
> . . . Given the high stakes involved in the admission of a confession into evidence, both trial and appellate counsel operating under the *Mosley* test would doubtless feel compelled to litigate every conceivable factual aspect. . . .
>
> . . . [D]elays in adjudication would be inevitable [, and] in a certain number of cases [the *Mosley* test] would undoubtedly produce inconsistent results on essentially similar facts. The stability and predictability of the law on this important topic would thereby be impaired, making it more difficult for the police to conform their conduct to constitutional dictates.[157]

The California Supreme Court recently demonstrated again its adherence to *Miranda* protections, despite their erosions during the Burger years. In *In re Misener*,[158] a public defender challenged his contempt of court citation for failure to obey court ordered discovery. Following direct examination of several defense witnesses, the prosecution sought discovery of prior statements made by them to defense counsel. The court held that the California Penal Code statute, which compelled the discovery compliance, was unconstitutional "because it violates that aspect of the defendant's privilege against self-incrimination requiring the prosecution to carry the entire burden of proving the defendant's guilt."[159]

In his opinion, Justice Mosk observed that the drift away from Fifth Amendment protection for the accused began as early as 1970, in a series of decisions allowing broad prosecutorial discovery.[160] That same year the California Supreme Court had reaffirmed the privilege against self-incrimination:

> [The] American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay. . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against the accused out of his own mouth. . . . The People must 'shoulder the entire load' of their burden of proof in their case in chief, with-

157. *Id.* at 249-51, 578 P.2d at 119-20, 145 Cal. Rptr. at 872-73.

158. 38 Cal. 3d 543, 698 P.2d 637, 213 Cal. Rptr. 569 (1985).

159. 38 Cal. 3d at 545, 698 P.2d at 638, 213 Cal. Rptr. at 570 (holding unconstitutional CAL. PENAL CODE § 1102.5).

160. *Id.* at 549, 698 P.2d at 640-41, 213 Cal. Rptr. at 572-73. *See* Williams v. Florida, 399 U.S. 78 (1970) (Court upheld a Florida notice-of-alibi statute requiring a criminal defendant to give notice to the prosecution of an intended alibi claim, including details of the alibi and names and addresses of intended alibi witnesses). *See also* Wardius v. Oregon, 412 U.S. 470 (1973) (similar Oregon statute did not violate the Fifth Amendment privilege against self-incrimination, although it did violate the defendant's due process rights because of the statute's failure to provide reciprocal discovery for the defense).

> out assistance either from the defendant's silences or from his compelled testimony.[161]

The Burger Court's interpretation of the protection afforded by the Fifth Amendment departs from this fundamental principle. In *United States v. Nobles*,[162] the court stated that the privilege against compulsory self-incrimination does not extend to the testimony or statements of third parties called as defense witnesses at trial.[163] The defense counsel proposed to call its investigator to challenge the validity of identification of the defendant by the prosecution's eyewitnesses. The Court held that it was not unconstitutional to compel discovery of the investigator's written report detailing the interviews he had conducted with the witness.[164]

As Mosk emphasized in *Misener*, "the rationale in *Nobles* fail[s] to consider the aspect of the privilege against self-incrimination that requires the prosecution to carry the entire burden of convicting a defendant. The privilege forbids compelled disclosures from the defendant that will aid the prosecution."[165] The Framers of our Bill of Rights sought to limit "the awesome investigative and prosecutorial powers of government" through constitutional safeguards.[166] Where those federally guaranteed safeguards are also provided in state constitutions, the construction of those protections is left to the state courts, " 'informed but untrammelled by the United States Supreme Court's reading of parallel federal provisions. . . .' "[167]

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161. Prudhomme v. Superior Court, 2 Cal. 3d 320, 325, 466 P.2d 673, 676, 85 Cal. Rptr. 129, 132 (1970) (quoting Malloy v. Hogan, 378 U.S. 1, 7-8 (1964) (citations omitted)). The court also observed that from the vantage point of 1970,

> the United States Supreme Court . . . has placed increasing emphasis upon the role played by the Fifth Amendment privilege against self-incrimination in protecting the rights of the accused. The privilege is now an element of due process protected against state action by the Fourteenth Amendment, and federal standards govern in state proceedings (Malloy v. Hogan, 378 U.S. 1 [(1964)] . . .); the prosecution and trial court are now forbidden to comment or instruct upon the accused's silence, or his reliance upon the privilege (Griffin v. California, 380 U.S. 609 [(1965)] . . .); and the application of the privilege to the accusatory stage has been considerably broadened (Miranda v. Arizona, 384 U.S. 436 [(1966)] . . .).

Id. at 323-24, 466 P.2d at 675, 85 Cal. Rptr. at 131. The court noted that "[t]he privilege against self-incrimination appears in various forms in state and federal constitutional and statutory provisions. (See U.S. CONST. 5th Amend.; CAL. CONST. art. I, § 13; [CAL.] PEN. CODE §§ 688, 1323; [CAL.] Evid. Code §§ 930, 940.)" *Id.* at 323 n.4, 466 P.2d at 675 n.4, 85 Cal. Rptr. at 131 n.4.

162. 422 U.S. 225 (1975).

163. *Id.* at 234.

164. *Id.* at 233-35.

165. 38 Cal. 3d at 558, 698 P.2d at 648, 213 Cal. Rptr. at 580.

166. *Id.* at 551-52, 698 P.2d at 642-43, 213 Cal. Rptr. at 574-75.

167. *Id.* at 549, 698 P.2d at 641, 213 Cal. Rptr. at 573 (*quoting* Reynolds v. Superior Court, 12 Cal. 3d 834, 842-43, 528 P.2d 45, 49-50, 117 Cal. Rptr. 437, 441-42 (1974)).

Conclusion

I salute Justice Stanley Mosk because he is an outstanding jurist and a leader in expounding the concept of state constitutional law. It will be said of Justice Mosk, in the perspective of time and history, that he never sought to enlarge the judicial power beyond its proper bounds nor feared to carry it to the fullest extent that duty requires.