The Anatomy of a Mosk Opinion

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Introduction

The purpose of this Article is to distill a conceptual working model of the archetypal Mosk opinion. This examination into Justice Mosk's work is structural in method. The Article develops an underlying structure of interrelated functions that generate diverse Mosk opinions, even though no individual opinion expressly follows the subtextural generating process.[1] I do not contend that Justice Mosk follows the model consciously or consistently; rather, the model conceptualizes his fundamental approach to legal problems, and may be of some assistance to those judges and lawyers who, like myself, have been surprised and persuaded over the years by the procession of insightful Mosk opinions and would like to achieve a measure of his analytic prowess. My thesis is that many Mosk decisions, regardless of area of law, derive from a distinctive analytical approach that programs original contextual interpretation and application into each decision.

In his twenty years on the California Supreme Court, Justice Mosk has authored more than 500 majority opinions. A reading of these opinions together—like a collection of short stories by a master—reveals similarities of form and method that are not apparent from a reading of an individual opinion with attention focused on the resolution of the particular controversy before the court. Reading "The Collected Works of Mosk, J." opens one's eyes to the artificiality of the categories of law under which legal publishers and law professors routinely file precedent. The opinions reveal a basic continuity of style, perception, and method from case to case, regardless of legal category.

In literary criticism, the concept of "le mot juste" signifies the unique word or grouping of words that conveys the most precise expression of a thought. To convey an idea of the judicial art of Justice Mosk, I

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1. This explanation of structural analysis appears in Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 129 (1984).

suggest the term "la balance juste" to signify the true balance between a legal rule and the legitimate interests of the parties subjected to its application in a fact-pattern that the rule-makers did not expressly anticipate.

Many legal opinions reflect the product of legal programming that inputs round, unique facts and outputs square, legal pigeonholes. "La balance juste," on the other hand, requires a custom-made refinement of the law to fit a specific, real situation. It requires an intelligent determination of how conflicting legal principles should meaningfully interact in the actual ecosystem that contains the dispute before the court. Because "la balance juste" is custom-made for the individual case, it represents an outcome that is both legally precise and intuitively fair.

An abstract description of Mosk's method for achieving "la balance juste" appears at first glance indistinguishable from any conventional approach to legal analysis. Indeed, one hallmark of a Mosk opinion is the craft of making the unanticipated result appear inevitable. For these reasons, this Article compares Mosk's analytical method with a conventional mode of legal analysis.

Many appellate judges and law students outside of jurisprudence class still utilize the modified Aristotelian syllogism represented by the mnemonic IRAC:

> *Issue:* A statement of the question presented by the case.
> *Rule:* A brief statement of the rule of law that governs the issue, phrased in terms of the legal effect of certain operative facts.[2]
> *Application:* An analysis of whether the operative facts that produce the specified legal result are present in the case. Explicit policy arguments or implicit judicial bias may determine whether facts are recognized as "operative facts."
> *Conclusion:* A statement of the legal result. If the operative facts are present, the specified legal result follows.

Justice Mosk's analytical approach also involves formulating issues, establishing controlling rules and applying the law to the facts; Mosk, however, interrelates these functions in a subtly different process that often produces results markedly different than those which are produced by the standard IRAC formula. Mosk's method of analysis is as follows:

> *Preliminary question:* What is the issue within the meaning of the rule of law that controls the case?
> *Purpose of the rule:* An original analysis of the legal principle expressed by the governing rule.

2. As Professor Corbin put it, "[w]hen a rule of law has been reduced to words it is a statement of the legal effect of operative facts; i.e., it is a statement that certain facts will normally be followed by certain immediate or remote consequences in the form of action or non-action by the judicial and executive agents of society." Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 164 (1919).

Issue: The legal question in the case stated in terms of the essential purpose of the governing rule as it relates to the fact pattern of the case.

Application: An analysis of the issue in the context of the ecosystem in which the case arises; how the legal principle should function in the actual circumstances of the case to best achieve its purposes.

Conclusion (la balance juste): A description of the properly functioning system in light of the controlling principles and the real-life situation before the court.

I do not maintain that each step in Mosk's analysis is unique and that no other judge subjects legal issues to similar analyses. I do contend, however, that Mosk's methodology, as described herein, attempts to find a true synthesis for each case between legal principles and reality, and that this willingness to hone previous codifications of principles to fit the particular case before the court keeps Mosk at the cutting edge of the law. Of course, there is a danger of overstating any single thesis that purports to embody the judicial method reflected in twenty years of legal opinions. I do not pretend to account for every individual decision, nor claim that the typical Mosk opinion routinely follows the five analytical steps set forth here. Instead, this Article attempts to elucidate Mosk's creative process by modeling the structure of an *archetypal* Mosk opinion.

I have chosen several cases to illustrate Mosk's conceptual method of analysis. They are not necessarily landmark cases, although some are. These cases traverse different areas of the law and have little, if any, substantive connection. But these cases share with each other and with many Mosk opinions a common analytic methodology. When one examines the opinions of Justice Mosk, it is this methodology, rather than any particular judicial predisposition, that best accounts for the results reached in individual cases.

I. Issues and Rules

A conventional legal opinion begins with a statement of the issue, which favors one party or the other, and proceeds to a statement of the legal rule that governs the legal question. Mosk, however, begins his analysis by asking what the issue *should* be in light of the purposes of the legal rule. His first step is thus to determine what the rule was intended to accomplish. Mosk's premise is that one must first understand the intended function of the rule in the rule's original context before one can properly state the legal issue in the case.

Mosk's approach to formulating the issue in a case can be further broken down into several distinct analytical steps. First, Mosk investigates the inception of the rule in the context of the specific problem to which the rule was addressed. If the rule is precedential, this is accomplished by a conceptual re-enactment of the precedent case to determine the actual concerns of the precedent court. Next, Mosk distinguishes the formative intent of the rulemaking body from the particular language it employed in stating the rule in the original factual context. He then transcribes the formative intent of the rule—its functioning purpose—to the new fact pattern in the case before the court. Finally, Mosk formulates the issue in the case in terms of the formative principles of the rule.

For example, in *Molien v. Kaiser Foundation Hospital*,[3] Mosk was faced with the question of how or whether to apply the rule of *Dillon v. Legg*.[4] The *Dillon* Court had permitted the plaintiff to recover damages for the emotional trauma caused by witnessing her child's death under the wheels of defendant's negligently driven automobile.[5] Relying on the *Dillon* precedent, the plaintiff in *Molien* sought damages for the emotional distress and loss of consortium caused by the negligent misdiagnosis of his wife's ailment as syphilis.[6] The defendant, of course, sought to limit the application of the *Dillon* precedent to the original fact pattern.

It is not unusual for the attorneys in a case to advance differing characterizations of the facts; the litigator's skill lies in fitting the facts into the camp of the favoring precedent. The adversaries may thus create a dilemma for the nonideological judge: which of two equally plausible characterizations should he accept?

In *Molien*, Mosk handled this dilemma by obliterating it. Instead of determining whether *Molien* could be pigeonholed into *Dillon*, Mosk analyzed *Dillon* by re-enacting it in light of the larger perspective provided by the addition of the *Molien* fact pattern. Mosk scrutinized the court's opinion, focusing not on the stated legal consequences of the *Dillon* facts, but on the underlying concerns that shaped the court's conclusion.[7] He used the additional perspective of *Molien* to liberate the formative principle of the *Dillon* precedent from its historical roots.[8]

In his re-evaluation of *Dillon*, Mosk distinguished the court's fact-specific holding from the operative principle which produced that holding: that a defendant's liability for negligence is limited to the reasonably

3. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
4. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
5. *Id.* at 747-48, 441 P.2d at 925-26, 69 Cal. Rptr. at 84-85.
6. 27 Cal. 3d at 919-21, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33.
7. *Id.* at 921-23, 616 P.2d at 815-17, 167 Cal. Rptr. at 833-35.
8. *Id.* at 923, 616 P.2d at 816-17, 167 Cal. Rptr. at 834-35.

foreseeable consequences of his actions.[9] Thus, for Mosk, the ultimate issue in *Molien* was the foreseeability of harm to the plaintiff resulting from the negligent misdiagnosis of his wife's condition.[10]

Mosk's methodology can be highlighted by a comparison with a hypothetical judge's "conventional" treatment of the *Dillon* precedent. The *Dillon* court established a rule that permits a nonvictim plaintiff to recover emotional distress damages only when the plaintiff was a percipient witness to an injury inflicted on a close relative. In conventional nomenclature, the *Dillon* court's guidelines would be given definitional status as operative facts, the existence of which trigger the legal consequence of liability. Whenever the operative facts were not present—as in *Molien*, where the plaintiff was not a percipient witness to the negligent act performed on his wife—the conventional court would not impose liability on the defendant for the plaintiff's emotional distress. The analysis would proceed as follows:

> *Issue:* May a nonwitnessing plaintiff recover for negligent infliction of emotional distress?
> *Rule: Dillon v. Legg* limits the class of plaintiffs who may recover for negligent infliction of emotional distress to closely related persons located near the scene of a wrongful act who suffer emotional distress as a result of witnessing the act.
> *Application:* Plaintiff does not meet the requirements established by the court in *Dillon v. Legg*.
> *Conclusion:* Plaintiff is barred from recovery under *Dillon v. Legg*.

In his analysis, however, Justice Mosk was concerned primarily with distinguishing fact from principle *within* the precedent. Rather than mechanically applying the rule of *Dillon* to a different fact pattern, he applied the operative principle of *Dillon*. His analysis proceeded as follows:

> *Preliminary question:* What is the proper issue within the meaning of the *Dillon v. Legg* precedent?
> *Purpose of rule:* The purpose of the *Dillon* rule was to limit a defendant's liability for a plaintiff's injuries to those harms that were a reasonably foreseeable risk of the defendant's negligence.
> *Mosk Issue*: Are plaintiff's injuries a foreseeable result of the negligent misdiagnosis of his wife's ailment?

As *Molien* illustrates, Mosk is abstract in his treatment of precedent and fact-specific in his treatment of the case before the court. He cuts through the factual trappings in which an issue happened to be clothed in the precedent case and extracts the principle on which the case was decided. He formulates the issue in the case before the court by adapting

9. *Id.*
10. *Id.*

his distilled principle to fit the new fact pattern. For Mosk, there is no definitive codification of the law which can be applied mechanically from case to case; there is instead an ongoing process of redefinition.

Mosk is a writer's judge. It is clear from reading his opinions that he composes each decision to articulate his precise thoughts on the individual case with care for the literary quality of his work. This reflective concern with language is integral to Mosk's analytical processes. The writer edits his work by asking, "What am I really trying to say here? How can I express this thought more clearly?" Mosk edits legal rules the same way; he asks, "What was the court or legislature attempting to say here? How can I express the law so that its meaning is clear in the present case?"

Mosk's flexibility with legal thought and language should not be confused with the misconception of an "activist" judge who manipulates a case according to a static ideological bias to the political left or right.

All judges are "active" whether they act like it or not. The simple fact of the matter is that individual cases do require value judgments. The idealized picture of the perfectly neutral judge who applies neutral logic to produce correct legal conclusions is not part of the human condition, let alone the legal system. The conclusion of neutral reasoning is prefigured by the starting assumptions to which the neutral logic is applied. In a legal decision, the definition of the issue often resolves the ideological conflict and determines the outcome purportedly required by subsequent neutral reasoning. The best a "neutral" judge can do is to discuss openly and analyze the underlying and determining "pre-issues": what should be the controlling principle in the case and how should the issue be stated to reflect *that* value judgment? After a case is decided, one can say that the case stands for a particular narrow rule, but often the specific statement of the rule for this particular situation did not exist before the case was decided on the basis of the applicable legal principles.[11]

Most courts apply some form of policy analysis to a controversy and lawyers are facile in manufacturing after-the-fact policy justifications for their clients' actions. Such rationales may range from purportedly self-evident legal assumptions to diverse social, political, and economic ideologies. Outside of the constitutional areas, Justice Mosk does not carry general policies from case to case. Instead, he freshly explores the specific policy underlying the governing rule in the particular case before the court.

11. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 28-31 (1977).

Jusice Mosk's opinion in *Royal Globe Insurance Company v. Superior Court*[12] is an illustration. The plaintiff argued that as a matter of general policy, the legal system should permit an individual who is injured by the alleged negligence of an insured to bring a direct action against the negligent party's insurer for failing to settle the claim in good faith.[13] The result of the case did not turn on this policy question, however. Indeed, three years before *Royal Globe*, a unanimous court, including Justice Mosk, ruled that the insurer's common law duty to settle in good faith did *not* run to the third party claimant.[14] Mosk's analysis in *Royal Globe*, however, concluded that the insurer's *statutory* duty under the Insurance Code to settle claims reasonably *was* directly enforceable by the third party claimant. The difference to Mosk was the purpose of the statute. Whereas the implied duty of an insurance company to settle in good faith is to protect the contractual rights of the *insured* and does not protect a third party claimant,[15] the purpose of the statutory duty to settle in good faith is to regulate trade practices in the insurance industry.[16] The Insurance Code did this by defining unfair and deceptive practices of an insurer against both insureds *and* claimants.[17] Therefore, the claimant may sue the insurer directly—not for a breach of duty to the insured—but for a breach of the statutory duties which the insurer owes to the claimant.[18] The claimant's direct action is consistent with the statute's broad remedial purpose of regulating the claims practices of insurance companies, in part, because the statutory scheme would not

12. 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979).

13. *Id.* at 884, 592 P.2d at 332, 153 Cal. Rptr. at 845. *See also* Murphy v. Allstate Ins. Co., 17 Cal. 3d 937, 943-44, 553 P.2d 584, 587-89, 132 Cal. Rptr. 424, 427-29 (1976). An insurer's good faith duty to settle an appropriate case is implied by law into every insurance contract even if one is not imposed by the express terms of the policy. Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 659, 328 P.2d 198, 201 (1958). The courts impose this duty to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble—on which only the insured might lose. Shapero v. Allstate Ins. Co., 14 Cal. App. 3d 433, 92 Cal. Rptr. 244 (1971). When the insurer breaches its duty to settle, the insured may recover from the insurer the excess of the judgment over the policy limits plus punitive damages. Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974).

14. Murphy v. Allstate Ins. Co., 17 Cal. 3d at 943-44, 553 P.2d at 587-89, 132 Cal. Rptr. at 427-29. Prior to *Royal Globe*, however, the injured third party claimant could not sue the defendant's insurer directly for a breach of the insurer's duty to insure, since the injured third party claimant was not a contracting party nor a third party beneficiary. An insured could assign his contractual cause of action to the successful plaintiff, but the personal tort cause of action, with its emotional distress and punitive damages, was not assignable. People v. Superior Court, 9 Cal. 3d 283, 287, 507 P.2d 1400, 1403, 107 Cal. Rptr. 192, 195 (1973).

15. *Id.* at 889-90, 592 P.2d at 335, 153 Cal. Rptr. at 848.

16. *Id.* at 884, 592 P.2d at 332, 153 Cal. Rptr. at 845.

17. *Id.* at 888, 592 P.2d at 334, 153 Cal. Rptr. at 847.

18. *Id.* at 890, 592 P.2d at 335, 153 Cal. Rptr. at 848.

function if insurers had enforceable duties to insureds only.[19] Mosk's analytical limitation of the policy considerations to the specific statute at issue in the individual case thus freed a divided court to authorize a new direct cause of action for breach of the statutory duty to settle in good faith just three years after the same court had unanimously rejected a direct cause of action for breach of the common law duty to settle in good faith.[20]

Mosk's contextual derivation of meaning is evident especially in adminstrative law cases, where the ultimate question is often the "reasonableness" of an agency's action. The issue of whether an administrative agency acted "reasonably" is inherently nebulous. The imprecise phrasing of the issue tends to favor the governmental agency, and to set judges free to apply their own interpretions of the reasonableness standard. Mosk, however, phrases the issue within the meaning of the relevant enabling legislation; the propriety of the agency's action becomes a question of whether the agency's action reasonably furthered the purposes of its enabling statute.

For example, in *Green v. Obledo*,[21] a group of working welfare parents challenged a California Health and Welfare Agency regulation that limited the amount of work-related transportation expenses deductible from the earnings of working welfare mothers to fifteen cents per mile traveled.[22] The welfare mothers alleged that the actual costs of owning and operating the automobiles they needed to commute to work far exceeded the Agency's limit and should have been fully deductible.[23] The controlling statute required the Agency, when determining a claimant's income for computing the size of the welfare allocation, to take in consideration any "expenses reasonably attributable to the earning" of income.[24]

In considering the welfare mothers' claims, a judge applying the traditional IRAC analysis might proceed as follows:

> *Issue:* Did the Agency abuse its discretion in determining that fifteen cents per mile was the amount of automotive expenses allowable as a deduction?
> *Rule:* The Agency must take into account all expenses reasonably attributable to the earning of income in determining the amount of deductions allowable.

19. *See id.* at 888-90, 592 P.2d at 334-35, 153 Cal. Rptr. at 847-48.
20. *See supra* notes 13-14.
21. 29 Cal. 3d 126, 624 P.2d 256, 172 Cal. Rptr. 206 (1981).
22. *Id.* at 132, 624 P.2d at 259, 172 Cal. Rptr. at 209.
23. *Id.*
24. Social Security Act, § 402(a)(7), 42 U.S.C. § 602(a)(7) (1973) (amended 1981).

Application: The Agency took these expenses into consideration and determined that fifteen cents per mile was the reasonable amount of expenses attributable to commuting to and from work by automobile.
Conclusion: While experts might disagree as to the fifteen cents per mile figure, it is difficult for a court to say that it is unreasonable as a matter of law; the Agency did not, therefore, abuse its discretion.

Justice Mosk, however, derived the issue from the statutory purposes:

Preliminary question: What are the expenses reasonably attributable to the earning of income that should be deductible within the meaning of the Social Security Act?
Purpose of the rule: The rule was intended to remove the disincentive to holding a job represented by the cost of commuting to work.[25]
Mosk issue: Does the Agency's absolute cap of fifteen cents per mile achieve the statutory purpose of removing the transportation cost disincentive to holding a job?[26]

Mosk's phrasing of the issue in *Green* in terms of the statutory mandate was more than a matter of semantics; it afforded a substantive standard for the court's analysis of the reasonableness of the Agency's actions. To the extent that it disallowed the deduction of transportation expenses in excess of fifteen cents per mile, the Agency's regulation failed to eliminate the disincentive to which the controlling statute was addressed.[27] The simple technique of phrasing the reasonableness issue in terms of the statutory purpose revealed the incongruity between the Agency's authority and its actions. It also transformed the usually ineffectual reasonableness standard into a meaningful instrument to ensure governmental accountability.

Mosk's methodology sometimes produces results different than that indicated by an apparent "plain meaning" conventional analysis of the controlling rule. Mosk is less concerned with the meaning of the words of a rule, considered in isolation, than with the intended meaning of those words in the rule's original context.

For example, the language of the statute at issue in *Clean Air Constituency v. California State Air Resources Board*[28] authorized the Board to implement a pollution control program for automobiles[29] and permitted the agency to delay its program only for "extraordinary and compel-

25. *Green*, 29 Cal. 3d at 135, 624 P.2d at 260, 172 Cal. Rptr. at 210.
26. *Id.*
27. *Id.* at 139, 624 P.2d at 263, 172 Cal. Rptr. at 213.
28. 11 Cal. 3d 801, 523 P.2d 617, 114 Cal. Rptr. 577 (1974).
29. CAL. HEALTH & SAFETY CODE § 39107.6 (West 1979) (repealed by Stats. 1975).

ling reasons."[30] Mosk did not, however, interpret this statute to permit the Board to defer its pollution control program whenever something "extraordinary and compelling" happened in the world. He instead analyzed the issue in the context of the agency's limited grant of authority to implement pollution control. Within this context, the only "extraordinary and compelling reasons" were those that justified a delay for reasons that related to pollution control.[31]

Mosk thus rejected the Board's contention that the 1973-74 energy crisis was an "extraordinary and compelling reason" to delay the Board's program for requiring the installation of pollution control devices on automobiles. Although the gasoline crisis was an extraordinary event and a reason to delay installing energy-costly pollution controls, it was not an "extraordinary and compelling reason" within the meaning of the pollution control statute.[32] A decision to *postpone* the pollution control program because of the gasoline shortage was not within the Board's statutory grant of authority to *implement* a pollution control program.[33]

II. Application of Law to Facts

Legal theory is applied at the artificial intersection of two different dimensions: the conceptual and the material. The conceptual dimension—comprised of rules—is the abstract plane of the law.[34] The material dimension—comprised of people, things, and events—is the reality upon which the conceptual legal systemization is imposed.

Legal rules are often expressed in terms of the legal consequences that follow from the reported existence of certain facts deemed legally significant. Thus, if facts "A" and "B" exist, we apply legal conclusion "C"; the rule, " 'A' + 'B' = 'C'," is the statement of the legal effect of operative facts "A" and "B."[35] Because it can accommodate only "relevant" operative facts, the law is an inadequate language that tends, over time, to distort reality by recognizing only a few preordered legal categories.

The Kafkaesque judicial process that evolved from this species of legal analysis is a game in which the court referees the litigants' self-

30. 11 Cal. 3d at 809, 523 P.2d at 621, 114 Cal. Rptr. at 581.

31. *Id.* at 813, 523 P.2d at 624, 114 Cal. Rptr. at 584.

32. *Id.* at 813-16, 523 P.2d at 624-26, 114 Cal. Rptr. at 584-86.

33. *Id.* at 817-18, 523 P.2d at 627-28, 114 Cal. Rptr. at 587-88.

34. The law may pretend to be a mirror that merely reflects societal norms, but it is truly a mirror only in the sense of the mirror through which Alice stepped to enter Wonderland. The law is really an imaginary universe that has its own physics and math, and exists only in the shared books and consciousness of an inner elite of judges, lawyers, and professors.

35. *See supra* note 2 and accompanying text.

serving characterizations of the case. At the end of the game, the facts are adjudged either similar to or different from those of the proffered precedent case. But the court reserves the ultimate discretion to "fudge" the facts to permit an "Alice in Wonderland" statement of its ruling for posterity.[36]

Justice Mosk views legal rules and their application differently. He deals with processes, not formulas. In Mosk's jurisprudence, a legal rule is intended to affect a process in a certain way. This intent is codified by a legislature or court in language that reacts to and anticipates certain specific fact patterns. In real-world cases, however, the issues seldom come packaged in the identical fact pattern anticipated by the rulemaking body. Mosk prepares a rule for applicaton in the unanticipated fact pattern by returning the codified rule to its sources. Instead of mechanically and blindly applying an immutable law to a unique situation, Mosk applies the law with consideration for its intended effect on the process.[37] In computer terminology a program that is easy to access is termed "user friendly." In the same sense, Mosk's formulation of a legal rule is "fact friendly;" it does not program facts in isolation from the underlying process.

Consider, for example, the rule of California Labor Code section 1156.3, subdivision (c): Upon receipt of an employer's objection to the conduct of an employees' representational election, the Agricultural Labor Relations Board [ALRB] "shall conduct a hearing to determine whether the election shall be certified."[38] The statutory language appears straightforward. When the employer tenders its objection, the ALRB *must* hold a hearing. The legal reflex is thus set.

There may be situations, however, in which the legal reflex should not work. For example, a party might seek to manipulate the law by pushing the legal reflex button in a situation where the automatic legal result negates the statutory purpose. Can the law be protected against this type of abuse, or is this the kind of "hard case" that "makes good law"?

In *J.R. Norton Co. v. Agricultural Labor Relations Board*,[39] the

36. *See supra* note 34.

37. In other disciplines, Mosk's method would be referred to as "systems analysis." The basic tenet of this form of analysis is that one cannot meaningfully analyze the effect of a proposed change to a link in an ecosystem from the surrounding ecosystem. For an example of the application of such analysis in environmental law, see Goldman, *Legal Adequacy of Environmental Discussions in Environmental Impact Reports*, 3 UCLA J. ENVTL. L. & POL'Y 1, 20-21 (1982).

38. CAL. LAB. CODE § 1156.3(c) (West 1983).

39. 26 Cal. 3d 1, 603 P.2d 1306, 160 Cal. Rptr. 710 (1979).

ALRB refused to hold a hearing on an employer's objections to the conduct of a certification election won by a particular union.[40] The employer appealed the ALRB's certification of the union as bargaining agent and refused to negotiate with the union on the ground that Labor Code section 1156.3 expressly required a hearing.[41] The ALRB contended that summary rejection was appropriate because the allegations in the employer's petition and supporting affidavits were facially insufficient to justify reversing the union's victory.[42]

Given this fact pattern, an adherent of conventional IRAC analysis would focus on the existence of the legally operative fact, namely, the employer's submission of a petition objecting to the conduct of the election. The analysis would proceed as follows:

> *Rule:* Upon receipt of a petition objecting to the conduct of an election, the ALRB must conduct a hearing.
> *Application:* When the employer submitted its petition objecting to the conduct of the election, the ALRB should have conducted a hearing.
> *Conclusion:* The ALRB erred in rejecting the employer's objections without affording it a hearing.

Instead of applying the mechanical IRAC formula, Mosk placed the statutory language in the context of its statutory purpose: to protect the employee's right to self-determination by assuring fair representation elections.[43] Before applying the legal principle to the case, he examined the facts from a "systems"[44] perspective. In *Norton*, his inquiry into the labor-management ecosystem underlying the dispute unearthed the fact that the employer's objection to the election results and denial of recognition were customary means of breaking up a struggling young union too weak to follow up its election victory with a successful strike.[45] Thus, when Mosk applied the rule in these circumstances, he was understandably reluctant to conclude that the ALRB's summary dismissal of the employer's facially inadequate objection was not a reasonable exercise of the Board's authority to implement the Labor Code.[46]

Instead he looked at the employer's denial of union recognition and the lack of a prima facie showing in the employer's petition and asked: How should the rule function in these circumstances to further its purposes? He concluded that the ALRB should be able to dismiss summa-

40. *Id.* at 9-10, 603 P.2d at 1309, 160 Cal. Rptr. at 713.
41. *Id.* at 10-12, 603 P.2d at 1309-10, 160 Cal. Rptr. at 713-14.
42. *Id.* at 10, 603 P.2d at 1309, 160 Cal. Rptr. at 713.
43. *Id.* at 8, 603 P.2d at 1308, 160 Cal. Rptr. at 712.
44. *See supra* note 37 and accompanying text.
45. 26 Cal. 3d at 15, 603 P.2d at 1312-13, 160 Cal. Rptr. at 716-17.
46. *See id.* at 15-18, 603 P.2d at 1312-13, 160 Cal. Rptr. at 716-19.

rily a frivolous employer objection that could not change the election result without the delay of a full evidentiary hearing.[47] He thus protected the mandatory hearing rule from employer abuse.

In *Sierra Club v. City of Hayward*,[48] the question before the court was whether a city council had properly cancelled a land preservation contract made pursuant to the California Land Conservation Act.[49] The Act permitted a city to extend tax benefits to rural landowners in exchange for long-term commitments to maintain their land as open space.[50] Unless the city or the landowner gave notice of an intent to terminate the agreement, a land preservation contract would renew automatically at the beginning of each year.[51]

The statute also permitted immediate cancellation of a contract if the continued dedication of the land became no longer "necessary [or] desirable for the purpose of [the Act]."[52] The city council had cancelled a contract that it deemed no longer necessary or desirable, having found the subject property ideally suited for development.[53] The Sierra Club disagreed with the city's finding and challenged the cancellation.[54]

An IRAC analysis of the cancellation issue might proceed as follows:

> *Rule:* A city council may cancel a land conservation agreement when the continued dedication of the land is neither necessary nor desirable.
> *Application:* The city council found, and substantial evidence supports, that continued dedication of the subject land is neither necessary nor desirable, and that the land is ideally suited for suburban development.
> *Conclusion:* The land preservation contract was cancelled properly.

Mosk's analysis, however, began with the purpose of the Land Conservation Act: to preserve open space by extending tax benefits to those who voluntarily subject their land to enforceable development restrictions.[55] The land preservation process which the Act created could achieve this purpose only if it operated to ensure that land preservation

47. *Id.* at 17, 603 P.2d at 1314, 160 Cal. Rptr. at 718.

48. 28 Cal. 3d 840, 623 P.2d 180, 171 Cal. Rptr. 619 (1981).

49. California Land Conservation Act of 1965, CAL. GOV'T CODE §§ 51200-51295 (Deering 1974).

50. *Id.*

51. *Id.* §§ 51244-51245.

52. *Id.* § 51280.

53. 28 Cal. 3d at 848, 854, 623 P.2d at 183, 187, 171 Cal. Rptr. at 622, 626.

54. *Id.* at 846-47, 623 P.2d at 182, 171 Cal. Rptr. at 621.

55. *Id.* at 850-852, 623 P.2d at 184-85, 171 Cal. Rptr. at 623-25.

contracts were in fact enforceable.[56]

If cancellation were a simple matter of showing that restricted land had become more valuable for a developed use, long-term land preservation contracts could not be enforced;[57] the Legislature's intent to guarantee a stable tax base in return for long-term binding commitments could not be given effect.[58] If immediate cancellation were permitted on such a showing, a landowner could obtain a tax advantage and still develop whenever development became profitable.[59] Mosk thus concluded that a mere showing that restricted land had become a logical site for development could not sustain a finding that cancellation—as opposed to non-renewal—of a land preservation contract was proper within the meaning of the Act.[60]

The dynamic interplay in Mosk's analysis between the factual context and the purpose of the legal rule is further illustrated by a series of three prison cases that reached the court in 1979. The cases were brought by members of a statewide prisoners' union to challenge several prohibitions imposed by administrators of the Soledad prison. The administrators had barred the inmates from corresponding with parolees, from wearing Prisoner's Union lapel buttons, and from holding union meetings with outside members and guests in attendance. The inmates based their actions in part on California Penal Code section 2600 which provides that a state prison inmate may be deprived of his civil rights only to the extent necessary to safeguard the public and secure the penal institution in which he is confined.[61]

In the first two cases, *In re Reynolds*[62] and *In re Brandt*,[63] the court split predictably along liberal and conservative lines. Justice Mosk concurred in the majority's application of conventional First Amendment analysis in both cases to strike down the prison administration's prohibitions. In the third case, *In re Price*,[64] the court again split along liberal and conservative lines; this time, however, Justice Mosk authored the majority opinion, holding that the prisoners could *not* conduct union meetings in the presence of outsiders.[65]

56. *Id.* at 855, 623 P.2d at 187, 171 Cal. Rptr. at 626-27.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. CAL. PEN. CODE § 2600 (West 1982).
62. 25 Cal. 3d 131, 599 P.2d 86, 157 Cal. Rptr. 892 (1979).
63. 25 Cal. 3d 136, 599 P.2d 89, 157 Cal. Rptr. 894 (1979).
64. 25 Cal. 3d 448, 600 P.2d 1330, 158 Cal. Rptr. 873 (1979).
65. *Id.* at 454-55, 600 P.2d at 1333, 158 Cal. Rptr. at 876.

Neither the dissenting nor the concurring Justices saw any difference between *Price* and the previous two cases. Concurring Justice Clark opined that the *Price* reasoning should have applied also in *Reynolds* and *Brandt*.[66] Justice Newman's analysis in his dissent would have precluded a ban on holding union meetings with non-inmates present, at least in the absence of a demonstrated threat to security.[67]

Mosk's apparent turnaround can be explained by his contextual analysis. For Mosk, the simple issue in *Price* is whether the specific inmate activity could be proscribed for reasons of prison safety.[68] Mosk viewed the subject activity of union meetings between inmates and guests in *Price* as differing fundamentally from the non-contact correspondence between inmates and parolees in *Reynolds*, or the wearing of union buttons in *Brandt*.[69] He explained:

> Prisons differ substantially from a free society. The melancholy fact is that they are populated by an inordinate number of persons who have previously resorted to violence. Any form of concerted activity among that populace, particularly when directed to grievances and complaints and encouraged by outside persons, appears calculated to create potentially explosive situations.[70]

These realistic considerations tipped the scales in favor of upholding the prison administration's prohibitions. The difference in the prisoners' activity in *Price* thus required a different result than was reached in the previous two cases which concerned more symbolic free speech. Mosk's "swing vote" is inconsistent only in the political context of liberal and conservative ideologies. His is the only position rooted in the reality of the situation.

The importance of factual context in Mosk's analysis lends a natural descriptive element of constantly changing variety to his decisions. While most appellate opinions contain only some dry reference to the facts, Mosk's opinions describe a living, vibrant world. *In re Marriage of Carney*[71] presented the question of whether a physical handicap creates a reasonable presumption of parental unfitness in the context of a custody fight. To Mosk, the issue was not an abstract question of law, but a fact-bound question requiring an analysis of the specific parent-child relationship before the court.[72] His inquiry focused on whether the parental

66. *Id.* at 455, 600 P.2d at 1333-34, 158 Cal. Rptr. at 876-77.
67. *Id.* at 463-464, 600 P.2d at 1338-39, 158 Cal. Rptr. at 881-82.
68. *Id.* at 453, 600 P.2d at 1332, 158 Cal. Rptr. at 875.
69. *Id.* at 454, 600 P.2d at 1333, 158 Cal. Rptr. at 876.
70. *Id.*
71. 24 Cal. 3d 725, 598 P.2d 36, 157 Cal. Rptr. 383 (1979).
72. *Id.* at 736-739, 598 P.2d at 42-44, 157 Cal. Rptr. at 389-91.

function would be unduly hindered by the particular disability involved in the case:

> [T]he essence of parenting . . . lies in the ethical, emotional and intellectual guidance the parent gives to the child throughout his formative years, and often beyond. . . . Even if it were true, as the [trial] court herein asserted, that William cannot do 'anything' for his sons except 'talk to them and teach them, be a tutor,' that would not only be 'enough'—contrary to the court's conclusion—it would be the most valuable service a parent can render. Yet his capacity to do so is entirely unrelated to his physical prowess: however limited his bodily strength may be, a handicapped parent is a whole person to the child who needs his affection, sympathy, and wisdom to deal with the problems of growing up. Indeed, in such matters his handicap may well be an asset: few can pass through the crucible of a severe physical disability without learning enduring lessons in patience and tolerance.[73]

Mosk's method of contextual analysis also explains his perhaps most controversial decision, *Bakke v. Regents of the University of California*.[74] The facts in *Bakke* are well known and need be supplied only sketchingly here. Mr. Bakke contended that his constitutional rights were violated when he was denied admission to the medical school of the University of California at Davis. The university's affirmative action program, Bakke alleged, had resulted in the admission of a less qualified minority applicant in Bakke's place.[75] Justice Mosk wrote the majority opinion of the court, which required that the medical school both admit Bakke and base its future admissions decisions on the individual merit of each applicant.[76] The United States Supreme Court, in a plurality opinion by Justice Powell, affirmed in part and reversed in part, striking down the quota-type admissions program at the medical school, but holding that a university's admissions policy could consider race as a factor.[77]

One might reasonably agree or disagree with Mosk's opinion in *Bakke;* the point here is that Mosk's abhorrence of an institutional program of reverse discrimination in the absence of a showing of discrimination by the university was the natural consequence of his contextual methodology. While in Mosk's view it was a proper consideration to provide special tutoring and other support services for disadvantaged

73. *Id.* at 739, 598 P.2d at 44, 157 Cal. Rptr. at 391.

74. 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).

75. *Id.* at 34, 553 P.2d at 1152, 132 Cal. Rptr. at 680.

76. *Id.* at 62-64, 553 P.2d at 1171-72, 132 Cal. Rptr. at 699-700.

77. Regents of the University of California v. Bakke, 438 U.S. 265 (1978). In a later case, Price v. Civil Serv. Comm'n, 26 Cal. 3d 257, 604 P.2d 1365, 161 Cal. Rptr. 475 (1980), the California Supreme Court explicitly approved hiring quotas based on race. Justice Mosk, however, dissented. *Id.* at 286, 604 P.2d at 1383, 161 Cal. Rptr. at 493.

students, the attractive ideal of eliminating the present effects of racial discrimination could not justify refusing access to otherwise qualified nonminority individuals.

Mosk's reasoning in *Bakke* reflects the same purity of analysis that, for example, compelled his conclusion in *Clean Air Constituency v. California Air Resources Board*.[78] In that case, the Board was prohibited from delaying its pollution control program for gasoline-conservation reasons extraneous to its mandate to implement pollution controls. Similarly, the *Bakke* decision required that the state university not be permitted to reject qualified applicants for reasons unrelated to the university's educational purposes. Mosk's methodology protected both cases from outside influences—"good" or "bad." In short, each case was decided on its own merits in much the same way that Mosk believes individuals should be treated.[79]

III. Legal Conclusions

In any legal analysis, the application of the legal standard to the facts yields a conclusion. The IRAC syllogism states a rule as a major premise; thereafter, depending upon the characterization of the facts in the minor premise, the formula spits out the conclusion. Mosk's analysis, however, does not directly produce a "yes" or "no" result. Instead, it produces a dynamic description of the proper working relationship between the parties and the law. His analysis of each controverted point determines what is necessary for the system as a whole to function as the law intended.

Professor Dworkin explained the distinction between the operation of legal principles and legal rules.[80] Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then the answer it supplies must be accepted or the rule reversed. If two rules conflict, then one must be given priority.[81] On the other hand, when legal principles conflict, one does not simply discard one and enforce the other. One resolves the conflict by examining the intersection of principles and taking into account the relative weight of each in the particular circumstances.[82] This is not to say that a judge has unbridled discretion to manipulate a

78. 11 Cal. 3d 801, 523 P.2d 617, 114 Cal. Rptr. 577 (1974); *see supra* notes 28-32 and accompanying text.

79. *See, e.g.*, People v. Ramirez, 25 Cal. 3d 260, 267, 599 P.2d 622, 626, 158 Cal. Rptr. 316, 320 (1979) (quoting Hornsby v. Allen, 326 F.2d 605, 610 (5th Cir. 1964) (" '[t]he public has the right to expect its officers . . . to make adjudications on the basis of merit' ")).

80. R. DWORKIN, *supra* note 11, at 14-45.

81. *Id.* at 24.

82. *Id.* at 26.

result by playing-off different principles, but rather that the meaningful application of intersecting legal standards demands the use of judgment.[83]

The case of *Sanchez v. Unemployment Insurance Appeals Board*,[84] for example, involved an out-of-work waitress' claim for unemployment insurance benefits. The plaintiff, Ms. Sanchez, had refused several waitressing jobs requiring her to work on Saturday and Sunday, citing her need to care for her infant son on those days.[85] Because Ms. Sanchez had previously worked on weekends, the Employment Development Department found that her self-imposed exclusion from weekend employment was without good cause.[86] Ms. Sanchez was deemed not "available for work" within the meaning of the Unemployment Insurance Code, and was denied unemployment benefits.[87]

Mosk's analysis of the case proceeded as follows:

> *Mosk Issue 1:* Does a parent have "good cause" under the Unemployment Insurance Code for refusing to accept work that would conflict with her duties to care for her minor child?[88]
> *Mosk Issue 2:* What is the meaning of the Code's "availability" requirement and is it satisfied by Ms. Sanchez's willingness to take a waitressing job not requiring weekend work?[89]
> *Application:* How should the legal principles work in the particular circumstances?:
> (1) The importance which the law places on the parent-child relationship mandates that "good cause" in the Unemployment Insurance Code be defined so as not to adversely affect that relationship.[90]
> (2) The unemployment system would not work if the Code's "availability" requirement could be satisfied by a mere willingness to accept work for which there is no substantial field of potential employers.[91]
> *Mosk Conclusion* (synthesis): "Good cause" under the Unemployment Code must "not be defined so narrowly as to compel unemployed parents [like Ms. Sanchez,] who remain available to a significant labor market, to fulfill their parental responsibilities only upon pain of losing their unemployment benefits."[92]

83. *Id.* at 31-39.
84. 20 Cal. 3d 55, 569 P.2d 740, 141 Cal. Rptr. 146 (1977).
85. *Id.* at 59, 569 P.2d at 743, 141 Cal. Rptr. at 149.
86. *Id.* at 62, 569 P.2d at 745, 141 Cal. Rptr. at 151.
87. *Id.* at 59, 569 P.2d at 743, 141 Cal. Rptr. at 149.
88. *Id.* at 62, 569 P.2d at 745, 141 Cal. Rptr. at 151.
89. *Id.* at 65-66, 569 P.2d at 746-47, 141 Cal. Rptr. at 152-53.
90. *Id.* at 69-70, 569 P.2d at 749-50, 141 Cal. Rptr. at 155-56.
91. *Id.* at 65, 569 P.2d at 746, 141 Cal. Rptr. at 152.
92. *Id.* at 70, 72, 569 P.2d at 750, 751, 141 Cal. Rptr. at 156, 157.

Mosk's conclusion described the interaction of competing legal principles in a custom-made statement of the law that fit the particular circumstances of Ms. Sanchez's case. His resolution of the case struck what I previously have called "la balance juste"—a true balance between the legitimate interests of the individual and the functional needs of the system. We can all imagine different plausible conclusions to the Sanchez case that another court might have reached, but none has the resonance of the Mosk opinion. This conclusion is the most satisfying because it honestly identifies and confronts the conflicting legal principles at stake and delineates the proper intersection of these principles in an intellectual and practical fashion. Mosk's resolution satisfies on more than one level. His impeccable analysis, tight and rigorous, appeals to our legal intellect. His eloquent articulation of our legal system's humanism strikes a responsive chord in our sense of justice. Mosk's "balance juste" is not merely another opinion.[93] This judge seeks a true synthesis of principle and life.

Conclusion

The gap between what is legal and what is real is a measure of how well our legal system is working. We live in a society permeated by law. When it is rigid and has lost its connection to reality, the meaning of our lives is lessened. The conscious process of making the law fit the case and deciding each case on its individual merits, as exemplified in the opinions of Justice Mosk, is the spirit of a secular and free society. It embodies our belief in due process. It makes the law meaningful.

93. The combination is compelling; *Sanchez* was joined by a unanimous court, liberals and conservatives.