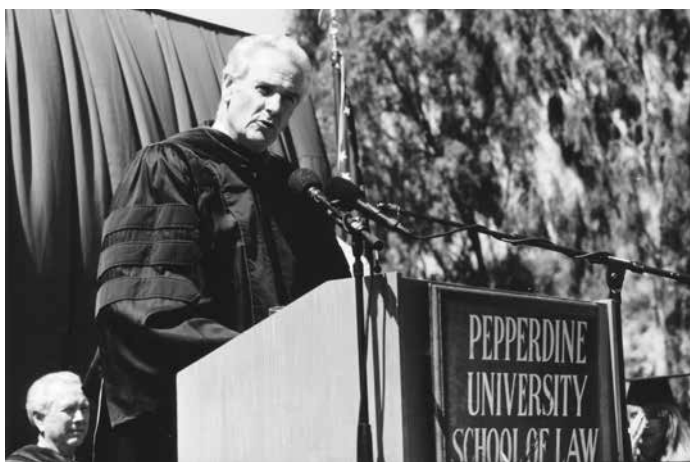


AN ORAL HISTORY BY LAURA MCCREERY,*
WITH AN INTRODUCTION BY RYAN CARTER**

Chief Justice Malcolm Lucas

How “Collegiality” and a “Steady Hand” Reset a Court in Crisis



Malcolm Lucas speaks at the Pepperdine University Commencement in 1991. Credit: University Archives Photograph Collection [digital resource], Pepperdine University Special Collections and and University Archives. Permission granted to publish.

* McCreery conceived of the California Supreme Court Oral History Project, initially, with but four justices in mind, who by 2005–2006 had retired from the bench: Chief Justice Malcolm Lucas, John Arguelles, Armand Arabian, and Edward Panelli. The idea, she noted, was to produce interviews with justices who served overlapping time periods with a goal of offering a richer historical account of the lives and careers of justices who were pivotal at a historic time for the court in the mid to late 1980s. Her work would go on to span her oral histories for nine justices. For more, see, https://www.worldcat.org/search?q=au%3ACalifornia+Supreme+Court+Oral+History+Project.&qt=hot_author and *California Leads in Oral Histories of State Supreme Court Justices*, CAL. SUP. CT. HIST. SOC. REV., Spring/Summer 2020, <https://www.cschs.org/wp-content/uploads/2020/06/2020-CSCHS-Review-Spring-Oral-Histories.pdf>; see *Oral Histories Explore Supreme Court in Changing Times*, <https://www.cschs.org/wp-content/uploads/2014/08/2008-Newsletter-Fall-Oral-Histories-Explore-Supreme-Court.pdf>.

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An Introduction

The year was 1984, and Federal District Court Judge Malcolm Lucas was in a good place. As a federal jurist, he enjoyed lifetime tenure, insulated from the changing political shifts of the era.

The mix of civil and criminal cases struck a satisfying balance. His knowledge of criminal procedure expanded.

And his already well-known collegiality and penchant for fixing the holes in the judiciary and for court administrative reform were shining brightly.

Then, after a robust thirteen years on the federal bench, came a call from his longtime friend, George Deukmejian.¹

Deukmejian had just been elected governor, buoyed by voters' embrace of the tough-on-crime platform that fueled his campaign. He had his eye on the state's liberal highest court, which was packed with appointees of former Governor Edmund G. "Jerry" Brown² and his father Edmond G. "Pat" Brown.³

Deukmejian felt it had become too lenient. And with the Supreme Court's lone conservative associate justice, Frank Richardson⁴ retiring, Deukmejian wanted Lucas, his old friend and law partner from Long Beach, to parachute in.

Suddenly, there was Lucas—whose already robust career had included

¹ George Deukmejian was governor of California from 1983 to 1991. A friend to Lucas from their early legal career days in Long Beach, Deukmejian was elected on a tough-on-crime platform, with overhauling the judiciary a major part of it. THE GOVERNORS' GALLERY, <https://governors.library.ca.gov/35-Deukmejian.html>.

² Jerry Brown was twice the Democratic governor of California, from 1975 to 1983 and again from 2011 to 2019. He would appoint Chief Justice Rose Bird in 1977. THE GOVERNORS' GALLERY, <https://governors.library.ca.gov/34-Jbrown.html>.

³ Pat Brown was Jerry Brown's father. The Democrat served as governor from 1959 to 1967.

⁴ Frank Richardson was appointed to the California Supreme Court in 1974, by then Governor Ronald Reagan. He retired from the court on December 2, 1983. Upon leaving the court, he served as a distinguished visiting professor of law at Pepperdine University School of Law in the spring of 1984. President Ronald Reagan appointed Richardson as solicitor of the U.S. Department of the Interior, headed at the time by Secretary of the Interior William P. Clark, Richardson's former colleague on the California Supreme Court. Richardson left his Interior post in 1985 to become a Nixon Fellow at the Whittier Law School. For more on Richardson, go to <https://www.cschs.org/history/california-supreme-court-justices/frank-k-richardson>. Clark was previously appointed to the California Supreme Court by then Governor Reagan in 1973, and left the court when President Reagan named him to be undersecretary of state, U.S. Department of State, second only to Secretary of State Alexander Haig, in 1981; National Security Advisor in the White House in 1982; and Secretary of the Interior in 1983. In the next two years, Secretary Clark and Solicitor Richardson cleared a huge backlog of litigation the department had let drag on far too long. For more on Clark, see PAUL KENGOR, *THE JUDGE: WILLIAM P. CLARK, RONALD REAGAN'S TOP HAND* (2007).

removing unruly defendant Charles Manson⁵ from his Los Angeles Superior Court courtroom and developing the nickname “Maximum Malcolm” by defense lawyers for his tough sentencing practices⁶—facing questions from his own children.

“My sister and I were sitting around a table at home, and he told us he’d been asked to go serve on the court. I said don’t do it,” Lucas’s son Greg said,⁷ reflecting on his father’s “old-fashioned, Cicero kind of ethic.”⁸

“Why would you give up this cushy gig?” Greg asked, reflecting on the turbulence that state court justices would face, from facing voters to picking up the pieces of a court that was under siege.

The answer was right out of a Roman statesman’s playbook, with some Winston Churchill mixed in: “He said, ‘When you’re asked to serve, you have to step up,’” his son said.

This year marks forty years since Malcolm Lucas was sworn in to the California Supreme Court, a historical marker made all the more poignant by the fact that he helped establish the California Supreme Court Historical Society, which publishes this journal.⁹

When he took the job as an associate justice, he humbly embraced it as a “lone dissenter” on a court friendly to labor, to consumers and criminal defendants, and which was overturning death penalty convictions at a record pace.

But in Lucas, the seeds of what has been called a conservative “counterrevolution” had been planted on a court that for decades had swung left.

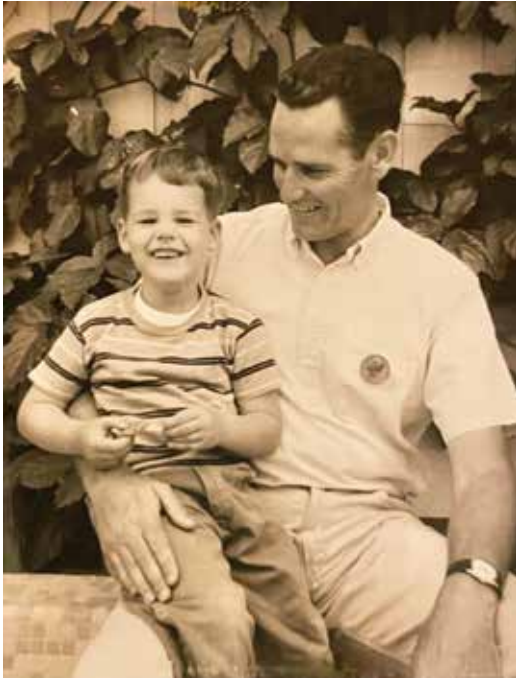
⁵ During a hearing in L.A. Superior Court, Manson, on trial for murder with three women codefendants, continued to physically turn his back to the bench as a show of displeasure. Lucas, who supervised the court’s criminal division at the time, was presiding over law-and-motions matters in the high-publicity trial. As Manson’s lawyer, Irving A. Kanarek, argued for a change of venue, Lucas chimed in: “You are to face the court, Mr. Manson, or you are going to be removed from this court.” After a recess in which Kanarek talked to Manson, Manson continued turning his back to the bench. “He just kept spinning around, so I had him removed from the courtroom,” Malcolm told McCreery. John Kendall, *Manson Turns His Back on Judge, Is Taken from Court*, L.A. TIMES, June 10, 1970. Lucas ultimately assigned the case to Judge Chuck Older. <https://www.newspapers.com/article/the-los-angeles-times-hinman-manson-tu/30772061>.

⁶ Jeremy B. White and Christopher Cadelago, *Former California Chief Justice Malcolm Lucas dies at 89*, SAC. BEE, <https://www.sacbee.com/news/politics-government/capitol-alert/article104792956.html>.

⁷ Telephone interview with Greg Lucas, Malcolm Lucas’s son (Aug. 1, 2024).

⁸ Greg Lucas is the California State Librarian, <https://www.library.ca.gov/about/senior-staff/>. Greg Lucas also paid tribute to his father during an honorary Court session following Malcolm Lucas’s death: See video: *Supreme Court Oral Arguments, December 16, 2016: Remembering Hon. Malcolm Lucas*, at 48:14, https://www.youtube.com/watch?v=-mPagAxWN_I&t=22s.

⁹ McCreery’s oral history Q&A with Lucas is published here under a licensing agreement with the Regents of the University of California. <https://www.lib.berkeley.edu/find/digital-collections>. The longform oral history citation: *Malcolm M. Lucas: Chief Justice: Reforming the California Supreme Court and the California Court System in Extraordinary Times, and a Career in the State and Federal Judiciary, 1967–1996; with an Introduction by George Deukmejian*. Interviews conducted by Laura McCreery in 2007–2008, BANC MSS 2014/183, © The Regents of the University of California, The Bancroft Library, University of California, Berkeley.



Malcolm Lucas and his son Greg, circa early 1960s. Permission to publish from the Lucas Family.

Two years later, the seeds sprouted.

In 1986, voters in a judicial retention election removed Chief Justice Rose Bird,¹⁰ along with two associate justices, Cruz Reynoso¹¹ and Joseph Grodin.¹²

It was the court's most seismic crisis in its 174 years, leaving it down three justices, including its chief, and a judiciary of which voters had grown wary.¹³

¹⁰ Chief Justice Rose Bird was the first woman appointed as a justice of the California Supreme Court and the first woman to serve as Chief Justice of California, and chair of the Judicial Council. Appointed by Governor Edmund G. (Jerry) Brown Jr., she led the court from 1977 to 1987. She died in 1999, after a battle with breast cancer, <https://www.cschs.org/history/california-supreme-court-justices/rose-elizabeth-bird>.

¹¹ Cruz Reynoso was the first Latino state Supreme Court justice in California history. On the court, he is perhaps most known for authoring a landmark opinion, *People v. Aguilar*, 35 Cal. 3d 785 (1984), where the court found non-English speaking people accused of a crime have the right to an interpreter during their entire court proceeding.

¹² Governor Jerry Brown tapped Joseph Grodin as an associate justice for the California Supreme Court in 1982. He had been sitting on the court of appeal, where he authored the decision in *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 312 (1981), a landmark opinion affecting workers' rights. But his tenure on the Supreme Court would meet the same fate as Bird's in 1986. Faculty, UC Law San Francisco, *UC Law SF Celebrates Joseph R. Grodin's Legacy on 90th Birthday* (Aug. 28, 2020), <https://uclawsf.edu/2020/08/28/joseph-grodin-legacy>.

¹³ Note that the three other justices on the court who were on the ballot did not face organized opposition, and retained their seats easily: Justices Stanley Mosk, Lucas, and Edward A. Panelli. Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, <https://www.latimes.com/archives/la-xpm-1986-11-05-mn-15232-story.html>.

When the dust settled, Deukmejian would again call on Lucas. This time it wasn't just to be the "loyal opposition."

This time, in a stunning moment, it was to lead the court.

On February 5, 1987, Deukmejian swore in Lucas as chief justice. And Lucas took the governor's oath of office for his second term.

By the time he retired in 1996, Lucas left behind what Deukmejian called "an extraordinary legacy that others will find hard to emulate."¹⁴

"Make that three legacies," said Clark Kelso, professor of law at the University of the Pacific, and an expert in the state's judicial administration.¹⁵

"The first legacy was that he restored a sense of collegiality and calm to the California Supreme Court," Kelso said. "It had gone through a rather difficult six to eight years."

Kelso said the death penalty rulings, coupled with rulings over state reapportionment, had for years chipped away at public confidence in the court. "It was restored in great part because of his leadership," Kelso said.

Second, the court suddenly went from one of the most liberal courts in the nation to solidly conservative, as a now Republican governor was able to appoint three new associate justices.¹⁶

"That began with Lucas," said Kelso, noting that it brought the court into the "mainstream" of the nation.^{17,18}

And third, Lucas, already with a penchant for identifying gaps in court efficiency and administration, realized early on that the state's court system, from trial to appeals, needed revamped long-term planning and streamlining.

"He got the ball rolling," Kelso said.

¹⁴ McCreery, *supra* note 9, introduction by George Deukmejian.

¹⁵ Ryan Carter interview with Clark Kelso, July 31, 2024. Kelso's *A Report on the California Appellate System*, 45 HASTINGS L.J. 433 (1994), https://repository.uclawsf.edu/hastings_law_journal/vol45/iss3/2, argued that California's Court of Appeal and Supreme Court "should set a model of leadership for the administration of justice" and must strive to meet the "broader goals of the entire judicial system."

¹⁶ Incoming justices John A. Arguelles, Marcus Kaufman, and David Eagleson left after two, three, and four years, respectively.

¹⁷ There has been considerable discussion on this, however. Former Chief Justice Cruz Reynoso said in a 2016 panel on judicial elections that after the 1986 retention election, the "whole tenor of the court changed," saying that its tilt to the right was a reason the court's reputation evaporated. *Thirty Years After a Hundred-Year Flood: Judicial Elections and the Administration of Justice*, CALIF. SUP. CT. HIST. SOC. (Oct. 2, 2016), <https://www.youtube.com/watch?v=uMZcKJ0PvN0>.

¹⁸ Note, too, that despite her ouster and the intense criticism of her jurisprudence and approach as chief justice, Bird was also praised as a jurist for what many saw as voting her conscience. That gained accolades for advancing the law toward protection of the rights of workers, criminal defendants, the poor, and minorities. Maura Dolan, *Ex-Chief Justice Rose Bird Dies of Cancer at 63*, L.A. TIMES, Dec. 5, 1999, <https://www.latimes.com/local/obituaries/archives/la-me-rose-bird-19991205-story.html>.

The state's Judicial Council, with Lucas as presiding judge, became a platform for major reform, short-term and long-term. Lucas was credited for his push on administrative reforms within the high court but also in the court system generally.

He embraced the reforms of the Trial Court Delay Reduction Act, codifying the court system to speed up the processing and disposition of civil and criminal cases. Indeed, he is credited with conceiving, creating, and staffing a Commission on the Future of the California Courts, and accepting its final report in 1993.

The *Report of the Commission on the Future of the California Courts: Justice in the Balance 2020*¹⁹ established goals for a Court operating in an increasingly diverse state, one where the court's own ability to reflect the state it serves had to improve, and one where its own budget and number of judges had to grow in alignment.

Kelso said once those planning goals were established, it paved the way for smoother and fairer operation of the courts in the twenty-first century.

“He took this very seriously,” Kelso said.

When Lucas died in 2016, then Chief Justice Tani G. Cantil-Sakauye praised Lucas's ability to bring “stability, peace and leadership” to a Court in the midst of an upheaval.²⁰

And even Reynoso, then nearly thirty years removed from the very retention election that ousted him and his colleagues and that elevated Lucas, said Lucas “was an honorable man who did a good job of running the court and making sure everybody was heard,” he said. “I ended my tenure on the Supreme Court with great admiration for the work he had done.”²¹

While today's California Supreme Court has tilted toward a moderately more liberal bent, “they have maintained that collegiality,” Kelso said.

Flashback to Jerry Brown's pick of Rose Bird for chief justice. Lucas thought

¹⁹ REPORT OF THE COMMISSION ON THE FUTURE OF THE CALIFORNIA COURTS, JUSTICE IN THE BALANCE 2020 (1993), <https://www.courts.ca.gov/documents/2020.pdf>.

²⁰ Maura Dolan, *Former Chief Justice Malcolm Lucas, Who Steered State's Top Court to the Right, Dies at 89*, L.A. TIMES, Sept. 29, 2016, <https://www.latimes.com/local/obituaries/la-me-ln-malcolm-lucas-obit-20160929-snap-story.html>.

²¹ Jeremy B. White & Christopher Cadelago, *Former California Chief Justice Malcolm Lucas dies at 89*, SAC. BEE, <https://www.sacbee.com/news/politics-government/capitol-alert/article104792956.html>.

it instead should have been Associate Justice Stanley Mosk.^{22,23} And indeed, by the time voters ousted Bird, Associate Justice Edward A. Panelli’s name was in the mix as a possible replacement. But as headlines splashed across newspapers at the time in the walk up to the 1986 retention election—in which Lucas himself was also on the ballot—he was known as a kind of “Great Hope” among conservatives.²⁴

Thankfully, Lucas left a rich path in which to explore his journey.

Exhibit A is Laura McCreery’s sprawling 2007 oral history interview with Lucas,²⁵ excerpted below.

McCreery’s queries, over eleven interviews from late 2007 into mid-2008, prompted Lucas—by now nearly twelve years into retirement—to share his path, sometimes candidly, sometimes kiddingly, sometimes with rich digressions along the way.

What we get is a story of how a Long Beach kid with a penchant for travel found his way from USC Law School to a modest private practice and ultimately to the state’s highest court.

No doubt, not all will agree with his rightward jurisprudence, which aligned with the law-and-order governor who appointed him.

But there’s a sense here that themes in Lucas’s career transcend efforts to define Lucas solely by his death penalty or pro-business legal thinking.

There’s the Rose Bird-era Malcolm Lucas, where his dissents on the death penalty defined his “loyal opposition” as much as they amplified his sharp contrast to the liberalized high court that he was appointed into as an associate justice. Those dissents would, of course, foreshadow the rightward shift that he would lead, not just on capital crimes but on cases involving business and industry.

²² Appointed by then Governor Pat Brown, Stanley Mosk served as an associate justice of the California Supreme Court from Sept. 1, 1964, until his death on June 19, 2001. It was the longest tenure in the court’s history. He had previously served as an L.A. Superior Court judge and had also served as attorney general of the state of California. Mosk authored some of the most consequential liberal rulings on the court. And yet, he and Lucas often sided with each other on their opinions. This often came with capital punishment cases. By 1986, Mosk had sided with Lucas to uphold twelve of thirteen cases issued by the court. For a transcript of a tribute to Mosk, see *Stanley Mosk: In Memoriam*, CALIF. SUP. CT. HIST. SOC., <https://www.cschs.org/history/california-supreme-court-justices/stanley-mosk>; also see Dan Morain, *Malcolm Lucas: The Great Hope Among Court Conservatives*, L.A. TIMES, Oct. 13, 1986, <https://www.latimes.com/archives/la-xpm-1986-10-13-mn-3048-story.html>.

²³ The Los Angeles County Courthouse was renamed in 2002 in honor of Mosk, <https://www.dailyjournal.com/articles/349964-happy-60th-birthday-to-stanley-mosk-courthouse>.

²⁴ Morain, note 22, *supra*, laying out how Lucas emerged as likely the governor’s pick for chief justice. It didn’t hurt that he and Deukmejian were friends. But Morain also notes Lucas was the conservative reply to Bird. This was apparent in his actions on issues such as Medi-Cal abortions, his high volume of dissents (in one of every three cases), the anticompetitive aspects of rent control, and of course his dissents on death penalty cases.

²⁵ McCreery, *supra*, note 9.

Here, in Lucas's own words, we get a glimpse not just of his own space as an early associate justice in the shadow of Bird, but also of his perspective on Bird and a sense of simmering tensions brewing on the court in the lead-up to the retention vote.

But in addition, there's the post-Rose Bird Malcolm Lucas, tasked with the epic job of restoring some form of balance on a court that had been defined by its fractiousness, and in which the state's electorate had lost faith.

There's Malcolm Lucas, the reformer. The man had a penchant for administrative change, learning from his elders and contemporaries about the need to educate the public about the courts, to make the system more fair and more efficient.

McCreery's oral history also offers a taste of the stunning legal and political landscapes of the era in which Lucas navigated as a trial court judge all the way to chief justice. We find Lucas as an early lawyer, relatively ignorant of criminal law in his early days at his and his brother Campbell's Long Beach firm. But we also get a sense of his growth within the law as consequential and burgeoning U.S. Supreme Court and California Supreme Court doctrine paralleled his career. Major state and federal court rulings on privacy and the death penalty would very much set a stage for his own work as a justice.

The story unfolds in every answer of McCreery's sprawling interview with Lucas but is punctuated by that crisis moment in 1986.

With one epic judicial retention election in November of that year, California voters removed Bird, Grodin, and Reynoso—a resounding repudiation at the time of a court that many in the state said had swayed too far to the left.

Out of the crisis emerged Lucas, long known as cut from central casting—a USC law school grad, tall, with a full and wavy grey mane and chiseled chin, no-nonsense, but collegial. A futurist and reformer. A leader. A world traveler. Conservative—just the way Deukmejian wanted it when he nominated his distinguished former law partner to serve.

McCreery tackles it all, from the fate of the Bird court to the rise of the Lucas court. In the coming pages, edited for brevity, the richness of Lucas's experience emerges.

But to get there, the table must be set. One must know something about his roots and the early underpinnings of his career in the law.

McCreery helps us here, too, as we get to know a justice whose familial roots go back to the founding years of the nation.

In its original form, the robust Q&A span hundreds of pages, many of which are devoted to Lucas's early life. In the spirit of brevity, we've tried to condense that narrative of his early life here, in the hope of walking the reader up to the moment when the Supreme Court came calling.

There are also people to meet along the way, so we've tried to offer a robust sprinkling of footnotes as names of people, cases, and more enter the narrative.

Beginnings

When folks note that Lucas was a judge cut from central casting, metaphorically, it's right on. There was his physically towering height, his chiseled jawline, the neatly coiffed, wavy gray hair, and the baritone voice. Put on a judge's robe, and he gets the part.

But there was also his ancestry, which on some level hinted at a life in the judiciary. His great-great grandfather, Robert Lucas, was the twelfth governor of Ohio in 1832, after years of ascending in the state's Democratic machinery. Going even further back to the 1600s, the first Robert Lucas on the continent was a probate judge in the colonies.

So as McCreery noted: "There is judging in the blood," of Lucas's family line. Lucas's father, whom he described as a good and adventurous man, was a successful Nebraska cattle rancher.

William Jennings Bryan, the Democratic presidential candidate three times over, would stay at the Lucas ranch on his lecture tours and political campaigns, Lucas told McCreery, drawing a connection between Bryan's populist politics and Robert Lucas's own lament over the railroad monopolies of the era.

There was a rugged, adventurous, and pioneering spirit that ran through the family, from early morning cattle drives in Jackson Hole to Malcolm Lucas's aunt, Robert Lucas's sister, Geraldine, whose ashes were ultimately buried at the base of the Tetons after a life devoted to the land.

They were ancestors who "had astonishing lives," Lucas would tell McCreery. Robert ultimately sold his ranch, traveled to Australia, and went on a safari in Africa. His travels would lead to Europe, where he would meet the woman who would become Malcolm's mother, Georgina MacGregor Campbell.

They married in Scotland, ultimately finding their way back to the United States. Lucas was born in Berkeley on April 19, 1927, two years before the Great Depression.

After his father died suddenly in 1937, his mother would take her three boys—Malcolm, older brother Campbell, and younger brother Eric—to her

ancestral home in Scotland briefly. But with war brewing, they would settle back in Long Beach, California.

Lucas's widowed mother made a home in Long Beach with her boys. And despite the absence of a father, whose sudden death came from a heart attack, it was a happy childhood. Thanks to a mother who "devoted her life to her three boys," and some wealth brought by the sale of his father's ranch and grasslands, life was relatively insulated from the financial ravages of the Great Depression.

Here, we already see early contrasts with another of McCreery's subjects, former Justice John A. Arguelles,²⁶ a Lucas contemporary on the court. Arguelles's reflections on his own early life centered on Depression-era East Los Angeles, where his working-class origins offer insight into a Latino's life journey to the Supreme Court.

While they took very different paths, they converged with those of millions of their generation because of World War II. And they also found common ground in an exploration of the cities they grew up in and began their early careers—cities that were experiencing their own versions of pre- and postwar America.

Where Arguelles's career was grounded in 1950s working-class Montebello, California, after his late-war enlistment in the U.S. Navy, Lucas would find his own local turf as he found his way also to the Navy, where he enlisted at age seventeen. By then, he was somewhat acclimated to the sea, growing up in what was then the "sleepy," bucolic and white Long Beach.

It's here where at age sixteen, the war raging abroad, he was working for the summer at Douglas Aircraft, riveting together the aluminum of C-47s, joining the growing numbers of *Rosie the Riveters* at the plant as the war unfolded and the adult men were sent to fight.

Still, it was a happy early life: There was Woodrow Wilson High School, where playing on the golf team kept him out of trouble. There was the time he, his brother Campbell, and neighborhood friend Eddie, built a sailboat and sailed to Catalina.

"It was a nice little adventure," he tells McCreery, foreshadowing his own legal adventures to come.

²⁶ For more on Arguelles, see *From the "People's Court" to the Supreme Court: Remembering the Legacy of John A. Arguelles*, Oral History by Laura McCreery and Introduction and Conclusion by Ryan Carter, 18 CALIF. LEGAL HIST. (2023), <https://www.cschs.org/wp-content/uploads/2023/12/Legal-Hist.-v.18-Oral-Hist.-Justice-Arguelles.pdf>.

Road to the Law

Like Arguelles, a life in the law was not necessarily predestined for Lucas. But where Arguelles nearly found his way into a completely different profession and had few mentors, Lucas at least had hints early on about his career path.

McCreery prompted a telling quote from the judge about that path. Again, it was his mother's voice.

"You're never going to earn your living by hard labor," he remembered her saying. "You're going to earn your living with your mind."

"She didn't go so far as to say I'd be in law and all the rest of it," he tells McCreery. "That would be asking too much, or that would make me very suspicious, but she went on about: 'It's going to be intellectual pursuits that you follow,' which is something they could probably read from the atmosphere there and all the rest of it. It was unlikely that I would be a coal miner."

By 1947, when he was filling out his Navy discharge papers, even though specifics were thin, when asked about "plans for discharge," he wrote: "law school."

"So I must have had this in mind a long, long time ago," he said, reflecting on his young self. Indeed—the shy but studious Lucas would follow in his brother Campbell's footsteps. Campbell went to UCLA in pre-law and then to USC Law. Malcolm, thanks to the GI Bill that supported veterans, would earn his way into USC Law, a year behind his brother.

Lucas's education in itself, much like that of Arguelles, offers a glimpse into the early generations of the legal education landscape in their generation's Southern California.

By 1953, USC Law School—the first in California—was more than fifty years old. UCLA Law was still newly christened, having opened in temporary barracks behind the campus's Royce Hall in 1949.

There were only two women in this early academic cohort, which attracted among their entrants many military veterans such as Lucas.²⁷

²⁷ Times would change, of course. The school would ultimately go on to boast that its graduates included "arguably the most renowned American female lawyer from the 1920s through the 1940s, Mabel Walker Willebrandt, J.D. 1916, LLM 1917," who served as assistant U.S. attorney general during U.S. President Warren G. Harding's administration. Other distinguished alumnae from the school's early years, among others, include the first female Asian-American justice, Joyce Kennard, on the California Supreme Court, <https://www.courts.ca.gov/5760.htm>; and the first African American woman, Yvonne Brathwaite Burke, elected to Congress from California, who was also the first woman to serve on the Los Angeles County Board of Supervisors, <https://cablackcaucus.org/hon-yvonne-brathwaite-burke>. USC was the first top-tier law school to appoint a female dean, Dorothy W. Nelson, LLM 1956, who served from 1968 until 1980. She was appointed to the U.S. Court of Appeals for the Ninth Circuit. *History of Innovation in Legal Education*, USC GOULD SCHOOL OF LAW, <https://gould.usc.edu/about/history>.

Prompted by McCreery, Lucas reflected on “teachers fearsome to behold,” such as corporate law professor John Paul Jones.

“You’re seated there, and he’s got a seating chart, and you know that you’re going to have to recite if he calls on you. He’ll run his finger up and down the seating chart, and then he’ll say in this stentorian voice, “Smith. What’s true about the case of x versus y ?” which is one of the cases that we would study. “What’s true about this case?”

Any sign of the judge Lucas would become is not easy to find in these early years. Good student? Yes. (And he worked on the side in the legal department at Southern California Edison, he tells McCreery.)

But destined for the pinnacle of the state judiciary? Political aspirations? Other than studying political science, any big precursors to “chief justice” were not on the radar screen quite yet. What was clear was a continued robust sense of adventure, and perhaps even a hint of a maverick spirit. There was the drive with a classmate to Mexico City at the end of his law school career. He would spend three months there, away from “noxious law school.”

There was the year off after the bar exam to travel Europe. “We had purchased a Volkswagen when we got to Paris, so then we decided we will follow the sun, keeping going to the south to avoid the dreaded cold—not as easy as it sounds. We went through France and then Spain, and then at Christmastime we left the car in Barcelona, garaged it, and took a boat to Mallorca . . .” Denmark, Sweden, Berlin would follow.

It was the summer of 1954, and the trek “made names come alive,” Lucas told McCreery. But a professional life beckoned. Lucas and brother Campbell²⁸ had long envisioned starting a law firm back in Long Beach, and that they did when Malcolm returned from Europe. It would start them on a path to the courtroom, and to major lifelong connections.

It was the mid-1950s. A booming postwar America. A growing Long Beach, trying to become a big Southern California city. And Lucas, Pino & Lucas was making a name for itself mostly in commercial and business law.

What wasn’t part of the firm’s portfolio early on was criminal law and procedure, which would become foundational legal landscapes Lucas would face, and come to embrace, through much of his career.

²⁸ Campbell Lucas carved out a distinguished judicial career in his own right. He served as an associate justice in the California Court of Appeal, Second Appellate District, Division 5 from Sept. 17, 1984, to May 2, 1988. He was then promoted to presiding justice of the same court, a position he held from May 2, 1988, to Jan. 6, 1991. Prior to these roles, he was a judge at the Los Angeles Superior Court from Nov. 13, 1970, to Sept. 17, 1984, having been appointed by then Governor Ronald Reagan. CALIFORNIA COURTS: COURTS OF APPEAL, <https://appellate.courts.ca.gov/district-courts/2dca/bio/campbell-m-lucas>.



Malcolm Lucas, William Barr, and an unknown party. Pepperdine University Archives Individual Files. Special Collections and University Archives, University Libraries, Pepperdine University. Used with permission.

It wouldn't be long before all of that, including the course of Lucas's career journey, changed: enter George Deukmejian, the future governor of California.

Deukmejian was also rooted in Long Beach, a lawyer and ambitious. As Lucas described the time, lawyers ran in the same circles. They, including Lucas and Deukmejian, often gathered at Charlie Savitz restaurant in the city.

Deukmejian had just been elected to the California State Assembly in 1963 for a seat representing Long Beach. That same year, he went to the Lucases and asked to form a partnership, and did.

It was a good fit. "George was singularly prudent and almost miraculously honest," Lucas tells McCreery. "He makes Abe Lincoln look like kind of a neighborhood delinquent."

But the Lucas-Deukmejian association was just getting started.

Political power was shifting anew in California. The more left-leaning years of Governor Edmund G. "Pat" Brown would give way to Ronald Reagan,²⁹

²⁹ Ronald Reagan was governor of California from 1967 to 1975. He served as president of the United States from 1981 to 1989. GOVERNORS' GALLERY, <https://governors.library.ca.gov/33-Reagan.html>.

the famous actor turned politician, who with his now conservative credentials was elected to the state's highest office and Deukmejian was elected to the California State Senate, both in 1966.

As Reagan's policies steered the state rightward, he needed judges to do the same. Deukmejian, too, was rising in the state's now conservative power dynamics. He put Lucas's name forward as a judge in the L.A. Superior Court.

Reagan obliged.

Long Beach attorney Malcolm Lucas, the kid who made a sailboat that sailed to Catalina, and the world traveler who spent three months in Mexico City to get away from "noxious law school," was now a judge for the Los Angeles Superior Court.

A theme that cuts through Lucas's early judicial years is his evolving embrace of criminal law. That embrace started in Los Angeles, where he went from little exposure to criminal law and procedure as a lawyer to facing it every day as a judge.

"From the very first day in the Superior Court I realized how abysmally ignorant I was of criminal law," he tells McCreery. "I told you about telling Don Wright,³⁰ 'Don, you can't on a Monday send me down on Thursday to try, to start a murder trial. The only Miranda I know is Carmen.'" But he would grow.

"I began to like the criminal law," he tells McCreery. "I'd never had it. You start it off with the initial proceedings and the *voir dire* and all of that, and then there's this oftentimes dramatic tableau that is created before you. You're steering in a certain direction with your rulings, but you're watching what's happening, and some of these cases are just absolutely fascinating."

Shifting Constitutional Doctrine

It was also a time when big rulings in criminal procedure and civil rights were being handed down by the U.S. Supreme Court.

The court ruled in 1966 in *Miranda v. Arizona*³¹ that police must inform criminal suspects of their constitutional rights before questioning them.

The decision would ripple all the way to the L.A. Superior Court, where

³⁰ Donald R. Wright was chief justice of the California Supreme Court from 1970 to 1977. He was appointed by then Governor Ronald Reagan. He was a Los Angeles Superior Court judge from 1961 to 1968 before Reagan appointed him to the California Court of Appeal, Second Appellate District. See <https://www.courts.ca.gov/documents/WrightD.pdf>. Ultimately, as chief justice of the state's high court, in 1972, he wrote the landmark majority opinion striking down California's death penalty, *People v. Anderson*, 6 Cal. 3d 628 (1972). After the penalty was reinstated in 1976 by an initiative, he wrote another opinion striking it down again, in *Rockwell v. Superior Court*, 18 Cal. 3d 420 (1976).

³¹ 384 U.S. 436 (1966).

judges, including a young Lucas, were faced with presiding in the context of new doctrine.

There was *Gilbert v. California*³² and *U.S. v. Wade*,³³ declaring the constitutional right to counsel during a police lineup.

“At the time I thought it was really quite an intrusion into state-court criminal proceedings,” Lucas said, reflecting on *Miranda*. “I don’t feel that way now. I think it’s very beneficial that we have it. So, as I grew to understand it and use it, I endorsed it.”

It’s notable here that in this period—the late 1960s to early 1970s—there was major change in death penalty doctrine. In time, it would become consequential in the evolution of the death penalty in California and in how the Bird and Lucas Courts would rule on it.³⁴

In the meantime, Lucas became head of the L.A. County Superior Court criminal division after working in it for three years. He was named to the post by then Presiding Judge Joe Wapner.³⁵

By now, there were glimpses of the jurist Lucas would become. Wapner saw “that I could ensure that the progress of the court continued,” Lucas tells McCreery.

At the time, there were mounting backlogs in cases. And there was little emphasis on settling them. It was a time before the Trial Court Delay Reduction Act of 1986, legislation that codified standards of timely disposition of civil and criminal actions. Lucas himself would later be a force in establishing the law as the state’s chief justice.

But even at the Superior Court level, Lucas was pushing the court to be better. There was the streamlining of the Superior Court case calendar via the Special Committee on Judicial Reforms in 1971. There was the reclassification of possession of marijuana and dangerous drugs.

³² 388 U.S. 263 (1967).

³³ 388 U.S. 218 (1967).

³⁴ In 1972, the California Supreme Court’s landmark decision in *People v. Anderson* (see note 30, *supra*) finding the death penalty is cruel or unusual punishment under the state’s constitution, would shift the direction of death penalty doctrine for the next nearly twenty years. As a Superior Court judge at the time, Lucas would abide by *Anderson*. But in time, he would be on the leading edge of shifting it anew.

³⁵ Wapner was a key leader in Lucas’s experience, who also recognized Lucas’s leadership talent. Wapner himself is an interesting story. Many knew him as the pioneering, level-headed, but no-nonsense superstar judge on the television show “The People’s Court.” Born in Los Angeles, he too attended USC Law, rising from L.A. municipal courts to L.A. Superior Court, where he was elected presiding judge several times over. Adam Bernstein, *Joseph Wapner, Judge on “The People’s Court,” Dies at 97*, WASH. POST, Feb. 26, 2017, https://www.washingtonpost.com/entertainment/tv/joseph-wapner-judge-on-the-peoples-court-dies-at-97/2017/02/26/2664b1e0-fc58-11e6-8ebe-6e0dbe4f2bca_story.html.

Lucas found himself joining Wapner in lobbying the state Legislature for such reforms. He'd discovered his aptitude for improving the courts, and following Wapner's lead his interest in administration was reinforced.

"I think, although I had it myself, I think I had reinforced my feeling of institutional loyalty and a desire to improve the institution, not necessarily our own individual betterment," he told McCreery.

All the while, his efforts were being noticed. By 1971, the political winds had also shifted at the national level. Richard Nixon was three years into his presidency.

Lucas himself, a conservative judge emerging at a time when conservatives held the White House and the governor's mansion in Sacramento, had little outward interest in the federal bench until he was asked if he'd consider a seat.

"If I was happy with what I was doing, well, I'm just going to do that, do the best I can, and sometimes different things happen, sometimes they don't," he tells McCreery as she queries Lucas on his ascendency to the district court. "But I was never in an avenue of seeking advancement, which made me feel very comfortable, and I never thought about it. It seemed to me to be the best course."

Indeed, Lucas was rather enjoying the state courts and making a difference when it came to reforming them. But he did appreciate the formality of the federal bench.

And so, on July 8, 1971, he was appointed for a life term to the U.S. District Court and was formally inducted the following year.

But other winds were shifting.

Justice Donald Wright's majority opinion in *Anderson*³⁶ would alter the trajectory of cases for years to come, setting the stage for a major moment in Lucas's own jurisprudence and career.

In the case, the majority outlawed capital punishment, finding that it violated the California Constitution's "cruel and unusual punishment clause."

By then, the death penalty as a form of punishment was evolving, and by the time of Wright's opinion, becoming increasingly rare in the state.³⁷

³⁶ 6 Cal. 3d 628 (1972).

³⁷ Again, the evolution of the death penalty in this state is worth noting in the context of *People v. Anderson*. Beginning in 1967, as a result of various state and United States Supreme Court decisions, there were no executions in California for twenty-five years. On Aug. 27, 1937, the Legislature replaced hanging as the method of capital punishment with lethal gas. The law did not affect the execution method for those already sentenced. As a result, the last execution by hanging at Folsom Prison was conducted on Dec. 3, 1937. The last execution by hanging at San Quentin State Prison was held May 1, 1942; the defendant had been convicted of murder in 1936. A total of 215 inmates were hanged at San Quentin and 92 were hanged at Folsom. The gas chamber was installed at San Quentin in 1938. On Dec. 2, 1938, the first execution by lethal gas was conducted. From that date through 1967, 194 people—including four women—were executed by gas, all at San Quentin. *History of Capital Punishment in California*, CALIFORNIA DEP'T CORR. & REHAB., <https://www.cdcr.ca.gov/capital-punishment/history>.

In his opinion, Wright leaned heavily on an evolved standard of what constituted cruel punishment, while also finding that the framers of the state's constitution sought to "restrict their fellow Californians' zeal for devising novel and torturous punishments."^{38,39}

"Well over a century has now passed since the day when vigilante justice and public hangings made executions an accepted practice of California life," Wright wrote. "We cannot today assume, as it was assumed in early opinions of this court, that capital punishment is not so cruel as to offend contemporary standards of decency."⁴⁰

In his dissent in the case,⁴¹ Associate Justice Marshall McComb⁴² argued that the death penalty is constitutional, based on a long line of cases, and that it deters crimes that result in the deaths of innocent victims. He added that it is up to the Legislature or the electorate—not the courts—"to decide whether it is sound public policy to empower the imposing of the death penalty."

That dissent, while in the minority at the time, would resonate in the Lucas era, on a court where Lucas made a point of amplifying the people's will through the vote or through the legislative branch.

It wouldn't be long before McComb's reasoning would win the day, at least in the short term.

In November 1972, the California electorate passed Proposition 17,⁴³ which amended the state constitution, and in 1973, legislation was enacted making the death penalty mandatory in specified criminal cases.

³⁸ *Anderson*, 6 Cal. 3d at 646.

³⁹ As noted by Edward J. Erler, professor of political science emeritus at Cal State San Bernardino, an underlying element of *Anderson* was the doctrine of independent state grounds, which "allows the California Court to make more liberal or expansive interpretations of provisions in the California Constitution which are similar to those in the U.S. Constitution." Edward J. Erler, *The Death Knell of the Bird Court*, CLAREMONT REV. BOOKS, July 16, 2014.

⁴⁰ *Anderson*, 6 Cal. 3d at 645.

⁴¹ *Id.* at 657.

⁴² Marshall F. McComb served as an associate justice on the California Supreme Court from 1956 to 1977, <https://appellate.courts.ca.gov/district-courts/2dca/bio/marshall-f-mccomb>.

⁴³ A "yes" vote for the measure effectively prohibited "the death penalty from being deemed unconstitutional under any provision of the California Constitution." It was a direct refutation of Wright's opinion in *People v. Anderson* that "every statutory law of California relating to the death penalty that was rendered ineffective by the decision of the California Supreme Court would be reinstated (subject to amendment or repeal) insofar as their validity under the United States Constitution is concerned." The analysis of the measure did stop short of saying such provisions were unconstitutional under the U.S. Constitution: "Their validity under the United States Constitution, however, is a separate issue." The analysis goes on, noting that Proposition 17 would "make effective" the death penalty statutes "to the extent permitted under the U.S. Constitution." UC Hastings College of Law, *Voter Information Guide for 1972, General Election*, UC HASTINGS SCHOLARSHIP REPOSITORY, http://repository.uchastings.edu/ca_ballot_props/774.

But the force of the U.S. Supreme Court’s opinion in *Furman v. Georgia*,⁴⁴ declaring capital punishment unconstitutional, would become the backbone of reversals⁴⁵ throughout the Bird court for years to come.⁴⁶

The legal and constitutional tug of war over capital punishment would remain, setting the stage not just for Bird’s tenure, but for the shift that Lucas led.

In the meantime, he was busy in federal court.

Defense lawyers gave him the nickname “Maximum Malcolm” for his tough sentencing protocol.

It was his time on the federal bench, from 1971 to 1984, that Lucas told McCreery was the best experience in his judicial career. “There was always a sense of, in a sense, adventure,” he said, adding that the mix of civil and criminal law on the federal bench was unmatched.

⁴⁴ *Furman v. Ga.*, 408 U.S. 238 (1972).

⁴⁵ At issue in *Furman* was whether carrying out the death penalty constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. In a sprawling opinion, only Justices William Brennan and Thurgood Marshall believed the death penalty to be unconstitutional in all instances.

⁴⁶ The case law in this period was very much evolving. A quick timeline for context:

- February 17, 1972: *People v. Anderson*, the California Supreme Court invalidated the death penalty law as a violation of the California Constitution’s prohibition against “cruel or unusual punishment.”
- June 29, 1972: *Furman v. Ga.*, the U.S. Supreme Court ruled the imposition of the death penalty in these cases constituted cruel and unusual punishment and violated the Constitution.
- November 1972: Proposition 17 passes, reinstating death penalty statutes, and that capital punishment is not “cruel or unusual punishment.”
- 1973: The California legislature passes another death penalty statute. In an attempt to satisfy the requirements of *Furman*, the new statute left no discretion to juries.
- July 2, 1976: *Gregg v. Ga.*, 428 U.S. 153. In a 7-to-2 decision, the U.S. Supreme Court held that a punishment of death did not violate the Eighth and Fourteenth Amendments under all circumstances. In extreme criminal cases, such as when a defendant has been convicted of deliberately killing another, the careful and judicious use of the death penalty may be appropriate if carefully employed. The court did invalidate the use of mandatory death sentences, which disallowed the consideration of mitigating circumstances.
- 1976: *Rockwell v. Superior Ct.*, 18 Cal. 3d 420, strikes down California’s mandatory death penalty statute, citing *Gregg*’s rationale.
- 1977: Legislature passes new death penalty over veto of then Governor Jerry Brown. State Legislature overrides Governor Jerry Brown’s veto and reinstates the death penalty, allowing for capital punishment in first-degree murders with any of twelve special circumstances.
- 1978: California voters pass the Briggs Initiative, which creates California’s current death penalty statute, adding sixteen more special circumstances, for a total of twenty-eight death-eligible crimes, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/california>.



The Bird Court: The California Supreme Court in 1986 in the Chief Justice's chambers. Left to right: Associate Justice Stanley Mosk, Associate Justice Malcolm M. Lucas, Associate Justice Cruz Reynoso, Chief Justice Rose Elizabeth Bird, Associate Justice Joseph R. Grodin, Associate Justice Edward A. Panelli (standing), and Associate Justice Allen E. Broussard (seated). Published courtesy of the Supreme Court of California.

He was appointed justice pro tem on the U.S. Court of Appeal, giving him early appellate experience. He developed early views on the importance of oral argument. “It’s important that it be done, if for nothing more than the appearance of justice,” he tells McCreery. “And it does aid justice, so it should be continued.”

He was contrasting what he’d seen at the state level with the federal judiciary and was not a fan of the “seniority system” of chief justices at the federal level. And he was continuing to develop his own courtroom approach and administrative chops.

A year in, he was already critical of certain court processes and norms and their impact on the court calendar and the efficiency of the system.

Lucas was in a good position. Lifetime appointment. He enjoyed the job. Thirteen years on the federal bench, and he was fascinated by it. But the political winds in California were changing anew.

An old and very good friend had reached the pinnacle of the state’s elected office. Governor George Deukmejian took office in 1983⁴⁷ on a tough-on-crime platform, critical of outgoing Governor Jerry Brown’s policies. In particular, he panned Brown’s pick of Rose Bird as chief justice in 1977. The state’s judiciary was way too lenient, he believed.

“Attorneys general don’t appoint judges, but governors do,” he told the *New York Times* in 2012. “And we were very troubled in those days by a lot of the appointments Jerry Brown had made.”

Indeed, fueled by the doctrine of “reversible error,” the Bird Court had overturned nearly every death penalty sentence that came before it.^{48,49}

For Deukmejian, who put Lucas’s name in Reagan’s hat for the federal bench, it was time to turn the court’s ideological tide—and quickly.

It was 1983. Lucas’s phone rang. It was the governor calling. Even after a robust career on the state and federal benches, the journey was just getting going.

From here, the stage was set for Lucas’s transition from federal bench to the state’s high court in 1984. And it’s here where we pick up with McCreery’s interview, part of the California Supreme Court Oral History Project.

We present an abridged version here, amplifying key Lucas themes—from the Bird era to the retention election, to his leadership and collegiality, and to the cases.

Associate Justice Lucas: In the Shadow of Rose Bird

McCreery:

Mr. Chief Justice, you had been a federal judge for thirteen years by the time 1984 rolled around; I wonder, what was the first event that led to your eventually being seated on the California Supreme Court? How did it all begin, as you recollect it?

⁴⁷ Deukmejian defeated Los Angeles Mayor Tom Bradley by about 90,000 votes out of nearly 8 million cast. Katie Hafner, *George Deukmejian, 2-Term California Governor in the '80s, Dies at 89*, N.Y. TIMES, May 8, 2018, <https://www.nytimes.com/2018/05/08/obituaries/george-deukmejian-dead-california-governor.html>.

⁴⁸ During her time as chief justice, Bird voted to vacate on more than five dozen death sentences. An example of a case that was overturned by the Bird court was that of Theodore Frank, who was convicted of kidnapping, raping and murdering a two-year-old girl, in *People v. Frank*, 38 Cal. 3d 711 (1985). His death sentence was overturned when the court ruled that evidence used in his trial was seized as a result of an overbroad search warrant. But Bird went further in her concurrence and dissent. The girl’s grandmother, cochair of Crime Victims for Court Reform, blamed the court and specifically, Rose Bird. See Patrick K. Brown’s *The Rise and Fall of Rose Bird: A Career Killed by the Death Penalty* (2014), https://www.cschs.org/wp-content/uploads/2014/03/CSCSHS_2007-Brown.pdf.

⁴⁹ See also Chief Justice Bird’s dissent in *People v. Jackson*, 28 Cal. 3d 264, 278 (1980). In part: “Today, this court sends to his death an impoverished, illiterate and possibly retarded 19-year-old black youth by affirming a judgment that this court would not hesitate to reverse if any other offense were involved. I respectfully submit that it is unconscionable to affirm The majority dismiss counsel’s failings as nonprejudicial. I cannot agree. Counsel’s ineptness in preparing for and handling the guilt and penalty phases of this trial was so egregious as to amount to a denial of due process. A young man’s life will be taken by the state as a direct result of these errors.”

Lucas:

What monstrous misfortune caused me to leave a safe lifetime haven on the U.S. District Court to go to the California Supreme Court, a little more hurly-burly than the federal court?

The direct answer is, I got a telephone call from Governor Deukmejian, telling me, of course, which I had already known, that Frank Richardson,⁵⁰ a member of the California Supreme Court, was retiring, and would I be willing to have my name considered, along with others, to fill that position? I said, “I really don’t know, George. I’ll have to take a day or two and think about this, and I’ll call you back.” He said that was fine.

I spoke with friends in the judiciary who were knowledgeable about this. I spoke, I remember, with Otto Kaus,⁵¹ and I expressed to him that the amount of writing that goes on there is considerable. I said, “Do you find it oppressive, Otto?”

He said not oppressive because, he explained to me, “Each justice has a staff of four law clerks,” I believe it was. It may have been either three or four, because I know we added one when I was chief. “Then we have central staffs. We have a criminal central staff.” I added a civil central staff when I became chief.

But he said, “You’re primarily an editor. You assign these cases to each one of the individual staff attorneys, discuss it with the staff attorney, describe how the case in your view, so far at least, should turn out, and then they will return with a rough draft, perhaps of the opinion.”

This isn’t the case in all opinions, but most of them, particularly the more mundane ones. “So,” he said, “you don’t have to sit down with a yellow pad and start from square zero on the great, great, great majority of the cases. They’re done.”

I felt I could be a loyal opposition and that it would be a worthy task, and when I took the position, I had no thoughts of becoming chief justice. We had a chief justice, Rose Elizabeth Bird, and I accepted that.

So I told Deukmejian that, yes, I’m perfectly willing to be considered.

McCreery:

May I ask, at the time that Governor Deukmejian called and informed

⁵⁰ See note 4, *supra*.

⁵¹ Otto Kaus was appointed as an associate justice of the California Supreme Court, a position he held from July 21, 1981, to 1985. JUDICIAL BRANCH OF CALIFORNIA, CALIFORNIA COURTS OF APPEAL, <https://appellate.courts.ca.gov/district-courts/2dca/bio/otto-m-kaus>.

you of Justice Richardson's retirement and asked to consider you for this, had there been any talk between you and the governor before that time about this possibility? Had you had any reason to even think about the California court system again?

Lucas:

Not really. I'd done thirteen, I must say, happy years in the federal bench, where you're pretty well your own boss.

You get individual calendars put in a routine manner into a wheel, as they call it. Your name is pulled up and that's your case. You work on your cases, and you help other people in other jurisdictions, but you're pretty well your own boss, and the Ninth Circuit is really a very lengthy distance from you, and not at all menacing.

Let's see. I think I tried about 5,000 cases in the federal bench, and 132 of those were appealed, and something like 28 of them were reversed. This is over a thirteen-year period and 5,000 cases, which is one of the lowest reversal rates in the whole circuit. I was enjoying myself and doing well, and getting interesting cases.

You get the mix of criminal and civil, and then you get the appellate work when you do go on the Ninth Circuit to sit, so no, a less longwinded answer would be that, no, we hadn't talked about it before this.

McCreery:

Just in your own mind, did you foresee any change at all for yourself from your federal position?

Lucas:

No. I mean, I was quite happy there. Perhaps I should have been more ambitious and been casting my summary of qualifications out over the city from a helicopter, but I saw no need to do that, and I am not one to promote myself, as I explained about coming on the superior court.

McCreery:

Did you find that in terms of actual legal questions, was there much crossover between the two systems—the federal system and the state system?

Lucas:

Sometimes, sure. Sometimes you'd look to get the reasoning as to what the Supreme Court would have done on that particular issue. You weren't bound

to accept it, of course, but if it had wisdom and persuasive impact, then you might well adopt it, or at least its reasoning.

McCreery:

The record shows that you were confirmed by the Commission on Judicial Appointments on April 6, 1984, and that, as you indicated earlier, was Chief Justice Bird, Court of Appeal Justice Lester Roth, and the attorney general at that time, John Van de Kamp, and that you took the oath the same day.

You were just shy of your fifty-seventh birthday, I noticed by that date. Then, I gather, there was a formal investiture ceremony about a month later down here in Los Angeles, presided over by Governor Deukmejian. That's just a list of those who spoke and participated on that occasion.

Lucas:

Yes. [Looking at list] I think this was conducted by the Supreme Court after I had been sworn in. I'm not sure what you would call it, welcoming remarks and introduction. Yes, I remember this. It all seems so long ago, twenty-four years ago.

McCreery:

It is quite a while ago. Do you remember how you felt upon embarking on this new phase of your life?

Lucas:

I was picked up the first day, I went up there, by another member of the state police who were assigned to the court. I noticed that he had a raincoat in the back seat. It was a very nice, perhaps unusual San Francisco day. I said, "Do you think we're going to need the raincoat?"

He said, "At some time during every day you need a raincoat. It's either so cold or so foggy, or maybe raining. The weather up here," he was from someplace else, "is not all that great."

That's kind of the, "Oh, really?" You'd been to San Francisco and you know it's in an area where the weather can be changeable.

McCreery:

But you were looking at it through new eyes all of a sudden.

Lucas:

Yes. I was looking at it like, this weather may be changeable on *me*. In June you would see tourists standing on the corner in shorts—who'd come from the

East where it was very hot—and just shivering. Then maybe you’d happen to see them the next day, and they’d be wearing, oh, a San Francisco coat that they’d bought, and San Francisco pants, the cheapest and warmest thing. So it was fickle, the weather. But it’s a beautiful place, so I adapted to it. It was mostly work. You’d get up in the morning, and where do you go? You go right to work.

McCreery:

Just to set the stage for what the situation was when you joined the court, let’s back up. While you were on the federal court, of course, Chief Justice Don Wright⁵² decided to retire in 1977. I wonder if you can talk about how you first learned and reacted to Governor Jerry Brown’s choice to replace him.

Lucas:

I suppose somebody called me, and/or I read it in the newspaper. I wasn’t following it personally.

The more I learned about it, the more of a mistake I thought it was. Jerry Brown had appointed—when Frank Richardson was on, he was appointed by Reagan, and Mosk was appointed by Pat Brown, Sr.—everyone else on the court.

What I was told and what I’ve read is that she [Chief Justice Rose Bird] was a member of the public defender’s office in Santa Clara County⁵³ and had been there for eight years, and she had volunteered to drive Jerry Brown around, I guess in his 1956 Plymouth or whatever he was probably driving in, when he was down in San Mateo.⁵⁴

McCreery:

This is when he was running for governor?

⁵² See note 30, *supra*.

⁵³ While she had never been a judge, what Brown did like was Bird’s reputation as an innovator as he sought a successor to Wright. Earning her law degree from Boalt Hall at UC Berkeley in 1965, she became the first woman in the Santa Clara County Public Defender’s Office. She had also clerked at the Nevada Supreme Court. By the time she was in the Brown administration, she had her critics who knew her as a tough bargainer. While she was serving in the public defender’s office in Santa Clara, she prepared a brief that persuaded the U.S. Supreme Court to refuse to hear a case that had been appealed by the attorney general of California. The case, *People vs. Kriwda*, involving a search of a garbage can, developed the concept of independent state grounds. While at the public defender’s office, she founded the public defender’s appellate branch. Robert P. Studer, *Rose Bird Immersed in Controversy*, SAN DIEGO UNION-TRIBUNE, Mar. 1, 1977, <https://www.sandiegouniontribune.com/news/local-history/story/2020-03-01/rose-bird-immersed-in-controversy>; *but see California v. Greenwood*, 486 U.S. 35, 38, 43 (1988).

⁵⁴ Bird was known as one of Brown’s most trusted advisors. She was the first woman to serve on the California Supreme Court and only the second woman in the nation to lead a state court, following Susie M. Sharp, chief justice of North Carolina. In 1975, before her elevation to the court, Brown appointed her Secretary of Agriculture, an agency of state government that employed 18,000 persons in 11 departments. It was known as a demanding job. She became one of two women to be named to a cabinet-level rank in the Brown administration, the first in California history. Studer, *Rose Bird Immersed in Controversy*, note 53, *supra*.

Lucas:

When he was running for governor. So he got to observe her So she, again apparently, and understandably I suppose, became a *bête noire* with the agricultural interests in California.

McCreery:

I was asking how you first learned that she was to be chief justice.

Lucas:

Yes, that's how I learned. A state senator, I never met this guy, H.L. Richardson,^{55,56} apparently a very right-wing senator with little or no money for a campaign, began campaigning against her selection for this position.

When she appeared before the Commission on Judicial Appointments, she received the vote of Mathew Tobriner [as acting chief justice].

Parker Woods voted against her, saying, "On the grounds of experience." She'd had absolutely no judicial experience.

Finally, after much agonizing, Evelle Younger, who was the attorney general at that time, voted for her.⁵⁷

I was told later by someone who talked to Evelle Younger that he said, "I'm going to be running for governor, and I don't want to lose the women's vote."

I hope that's not true, but at any rate it was kind of a tempestuous route to the position of chief justice for her.

⁵⁵ H.L. "Bill" Richardson arrived in the California State Senate with the freshman class of 1966, part of the Reagan landslide that year, according to a tribute by Rep. Tom McClintock, R-Modesto. Richardson founded the Law and Order Campaign Committee, which became the driving force behind the early attempts to recall Bird, Reynoso, and Grodin. *Senator H.L. Richardson, RIP*, Feb. 11, 2020. Speech from the House floor, <https://mcclintock.house.gov/newsroom/speeches/senator-hl-richardson-rip>.

⁵⁶ Richardson was a pioneer in the use of direct mail lists to raise money for political causes and in particular for conservative causes. He also established one of the earliest, if not the first computer mailing company in the nation. Brown, *The Rise and Fall of Rose Bird*, *supra* note 48.

⁵⁷ Editor's Note: Once Bird's gubernatorial nomination to the high court was announced, Herbert Ellingwood, special assistant attorney general, California Department of Justice, called George Nicholson who was then executive director of the California District Attorneys Association (CDAA). He asked whether the association would oppose Bird's nomination. He said Attorney General Evelle Younger was a "no" vote if CDAA opposed Bird, but a "yes" vote if the association failed to oppose. Nicholson said he would call the president of CDAA, District Attorney Byron Morton, Riverside County. Morton said to go ahead, oppose, and call to reserve a testimonial slot before the California Commission on Judicial Appointments. Before doing so, Nicholson reflected for a short while and called Morton back to suggest CDAA's board of directors should be polled. Morton agreed. Nicholson polled the board by telephone and, by majority vote, 11–5, the board directed Nicholson to reserve the slot to oppose. District Attorney John Van de Kamp, Los Angeles County, immediately called Nicholson demanding an emergency full board meeting in Sacramento. The next day or so, the board met in Sacramento and evenly split by a vote of those in attendance, 6–6. CDAA thus took no position on the nomination. Late in the day before the confirmation hearing on Rose Bird's nomination as chief justice was to be heard by the Commission, Ellingwood again called Nicholson and asked, "Will CDAA be at tomorrow's hearing? If not, the attorney general will be a 'no' vote." Nicholson reiterated, "CDAA will not be there." Younger voted to confirm.

But at any rate, that's what I learned.

McCreery:

Just thinking for a moment about Governor Jerry Brown. He was said at that time to consider some other candidates for the position.

I don't know how many total, but the ones I read about were two other women, Dorothy Nelson,⁵⁸ who was then dean of USC Law School, and Shirley Hufstедler⁵⁹ of the Ninth Circuit. So that would seem to indicate he was in great hopes of having a woman seated in that position.

I just wonder, up to that point, what you might have thought about what he was generally doing, judicially speaking. He was clearly trying to make some changes in the face of the judiciary in the whole state, shall we say.

Lucas:

He wanted to poke his finger in the eye of the judiciary, is what it amounted to. That's my own view.

When you consider Dorothy Nelson and Shirley Hufstедler and Rose Elizabeth Bird in the same mouthful—Dorothy Nelson, dean of USC Law School, and even now a member of the Ninth Circuit Court of Appeal, and Shirley Hufstедler, who had been on our state Court of Appeal, and then went to the Ninth Circuit Court of Appeal, distinguished lawyer and all the rest.

If he'd wanted a woman, he would have gotten great huzzahs for either Dorothy or Shirley, because they were very able, and as has been proven by the test of actual experience, very able people. But he didn't.

Many people thought that he had difficulties with the judiciary. I don't know whether the thought that we had too much power because we weren't elected, yet we could declare unconstitutional a lot of the things that he did.

But no, he did no favor, either, to her when he appointed her to the Supreme Court.⁶⁰

⁵⁸ Nelson, a graduate with multiple degrees from UCLA and USC law schools, would carve out her own distinguished career on the U.S. Court of Appeals for the Ninth Circuit, after being nominated by President Jimmy Carter. News release: *Ninth Circuit Judge Dorothy Nelson Receives Lifetime Achievement Award*, Sept. 22, 2022, UNITED STATES COURTS FOR THE NINTH CIRCUIT, <https://cdn.ca9.uscourts.gov/datastore/cc9/2022/Nelson-Award-July-2022.pdf>.

⁵⁹ A graduate of Stanford Law School, Hufstедler was appointed associate justice of the California Court of Appeal, and then, just two years later, President Lyndon B. Johnson appointed her to the U.S. Court of Appeals for the Ninth Circuit. Eleven years later, President Jimmy Carter appointed her United States Secretary of Education.

⁶⁰ Friends said Bird ultimately acknowledged that she wished Brown had made her an associate justice instead of chief. See Dolan, note 20, *supra*.

McCreery:

I'd like you to say a few words about Stanley Mosk⁶¹ and perhaps reflect on this idea voiced by so many that he, quote, "should have been chief justice."

Lucas:

Oh, absolutely he should have been chief justice. I expected him to be—from my outside position.

Here was a man of great standing and great recognition, and long-term experience on the court, and an innovative person who came up with good administrative ideas, and was just a standout person that should have been appointed and was never considered.

Maybe if Pat [Brown] had been governor, Pat might have considered him, but Jerry would not.

There was some word that spread around, "No, he's not going to have Stanley Mosk." He looked around until he found Rose, passing over Shirley Hufstедler and Dorothy Nelson.

It would have been a nice, tranquil court, well operated, with no interruptions.

Now, [Mosk] expected it [the promotion to chief]. He expected it, and he should have received it.

A Q&A Pause: The *People v. Tanner* Episode

Speaking of Stanley Mosk, Lucas shared with McCreery that "there was no love lost" between Mosk and Bird, not just after Brown passed over him to appoint Bird as chief justice, but also after allegations arose that the Bird court delayed the release of a decision in a case, *People v. Tanner*, to avoid public scrutiny.

From Lucas's perspective, the *People v. Tanner*⁶² episode created "self-inflicted" wounds on the court and set a tone for what was to come under Bird.

We offer a summarized version here, with the hope of laying down some context as Lucas answers McCreery's queries about Bird.

⁶¹ Mosk was not an ally of Bird's. While his views were liberal, his dissents on death penalty matters set him apart. See his articulation in *In re Anderson*, 69 Cal. 2d 613 (1968). That said, he spoke highly of her upon her death, noting that Bird worked hard at the court, and her legal rulings were solidly researched and thorough, scholars said. "They were first rate. Even if you disagreed with the result, you would have to concede they were well-prepared and well-reasoned from her point of view." Maura Dolan, *Ex-Chief Justice Rose Bird Dies of Cancer at 63*, L.A. TIMES, Dec. 5, 1999, <https://www.latimes.com/local/obituaries/archives/la-me-rose-bird-19991205-story.html>.

⁶² In *People v. Tanner*, 23 Cal. 3d 16 (1978) (*Tanner I*), the "Use a gun, go to prison" law, by a 4–3 vote, was found to intrude upon judicial discretion and voided. *Tanner I* was superseded when rehearing was granted, 23 Cal. 3d 55 (1978). Following reargument, the court reversed itself, by a 4–3 vote, and upheld the law in *People v. Tanner*, 24 Cal. 3d 514 (1979) (*Tanner II*).

Rewind to 1975, before Bird or Lucas were on the court. With the electorate's ire over crime building, Governor Jerry Brown signed a tough-on-crime bill, authored by Senator George Deukmejian, the "Use a Gun, Go to Prison" bill, stating: "By signing this bill, I want to send a clear message to every person in this state that using a gun in the commission of a serious crime means a stiff prison sentence. Whatever the circumstances, however eloquent the lawyer, judges will no longer have discretion to grant probation even to first offenders."

Two years later, Brown appointed Bird as chief justice, and her first retention election would come up the next year, November 1978.

In February of that year, the court heard arguments in *Tanner*, an early test of the "Use a Gun Go to Prison" law Brown had signed back in 1975.

The trial court found that Tanner—who had no prior criminal record and who had used an unloaded handgun in the commission of a robbery of a store clerk for \$40—was not a suitable candidate for prison, striking the gun allegation in order to sentence Tanner to probation.

On appeal, the California Supreme Court initially agreed 4 to 3, in essence striking down the 1975 law requiring a prison term for use of a gun in a crime. But it would not release its decision until after election day.⁶³

The *Los Angeles Times* reported on election day that the Bird court had delayed releasing the politically sensitive criminal case until after the election, in which voters were asked whether they wanted to retain four of the seven justices, including Bird.

The underlying allegation in the article was that the decision was withheld because it might impact voting.⁶⁴

Bird denied the charge and asked the Commission on Judicial Performance to investigate. The public probe proved a public relations disaster for the Bird court. There were televised hearings, where members of the court were questioned on their handling of cases, questioned over the timing of the release of decisions, and whether members leaked information to outside sources.

⁶³ Attorney General Deukmejian, as noted, wrote the "Use a gun, go to prison" law and stewarded it to passage while he was a state senator. By then, attorney general Deukmejian filed a petition for rehearing. The California District Attorneys Association arranged for the drafting and submission of a bipartisan petition for rehearing on the attorney general's side on behalf of more than one hundred state senators and assemblymen. Deukmejian argued *Tanner II* personally while the Supreme Court was sitting in Sacramento. Justice Mosk was the high court justice who made the difference when, without explanation, he reversed his *Tanner I* vote, and *Tanner II* was born. Adding to the consternation about the Court, *Tanner II* was filed late on the eve of the Christmas break in 1979. The very late filing insured the controversial case would continue as an immense distraction for the high court.

⁶⁴ Despite the adverse press, Bird kept her job, but just barely. She was confirmed with the lowest affirmative vote ever given a justice on the court, 52 percent to 48 percent. Wallace Turner, *Televised Hearings Are Planned in Inquiry on California's Justices*, N.Y. TIMES, Apr. 26, 1979, <https://www.nytimes.com/1979/04/26/archives/televised-hearings-are-planned-in-inquiry-on-californias-justices.html>.

When his turn came to testify before the commission, Justice Mosk sought to quash the subpoena. He successfully sought judicial intervention and won a decision by a reconstituted California Supreme Court concluding that Justice Mosk could not be compelled to testify in public commission proceedings.⁶⁵ Ultimately, he testified before closed commission proceedings.

The investigation failed to produce charges against any justice, but exposed the acrimony, pettiness, and divisions that wracked the court under Bird.

Conservatives used the court's initial ruling as evidence there was a liberal majority on the court that was soft on crime and that its ringleader was Rose Bird. Indeed, funds began to pour in from conservative interests in the effort to oppose her reconfirmation. Eight years later, in November 1986, she and Justices Joseph Grodin and Cruz Reynoso were removed from the bench by voters.

For Lucas, who was on the federal bench at the time but who came to learn about it through Mosk,⁶⁶ it was a moment that exemplified the acrimony on the court under Bird.

“It caused me a great concern also, but Rose—this is what Stanley tells me, and other members of the court told me—Rose immediately, without having a meeting of the court, without talking to the members of the court, because this would—to determine whether individual members of the court were holding this opinion would require investigating every member of the court,” he tells McCreery. “Without any discussion, without asking them for their thoughts and their suggestions, or ‘Should we do this?’ or ‘It’s just stupid, it’s untrue, and why glorify it?’” She asked for a hearing on this question. Stanley was furious about that, too, as were many other members of the court. Can you remember that hearing?

Back to the Q&A: “Self-Inflicted Wounds”

McCreery:

The whole aspect of going public with the inner workings of the court was quite unusual, it seems to me.

Lucas:

Exactly. It certainly was.

⁶⁵ Mosk v. Superior Court, 25 Cal. 3d 474 (1979).

⁶⁶ Bird and Mosk were on the same side in the court's initial vote in favor of Tanner, and which struck down the law. But after the investigation had begun, Mosk joined the three who had initially opposed the decision, thus upholding the law. Turner, note 64, *supra*.

McCreery:

Then also that, as exhibits presented they released calendar memos and draft opinions, things that normally are never seen outside the court itself.

Lucas:

Exactly. Yes. This, of course, created additional problems. These were self-inflicted wounds, as I say.

She could have made a different administrative or executive decision, and only after consulting with the whole court, who were going to be as much impacted as she, maybe more.

So, this type of thing is not easily forgotten—is *not* forgotten. The collegiality as a result was—of the court, and the rapport I’m told, I wasn’t on the court at that time, was very bad.

McCreery:

Any time you’re trying to accomplish something, there’s more than one way to get there.

Lucas:

Sure.

McCreery:

Of course, we know only in hindsight that there was no need to bring any charges against any of the justices, but the route to reaching that result was astounding in its effects, really.

Lucas:

Yes, yes. Just the lack of judgment to have immediately, just like that, ordered such a hearing, again without consulting the court—even doing it, and then doing it without consulting the court is just incredible.

McCreery:

You’re not the first to use the word paranoia in conjunction with Chief Justice Bird. Do you have any knowledge of anything that might have caused her to be that way? I mean, had she any reason to fear?

Lucas:

Here are various things that have been suggested that might have application. Number one, she came on as a completely inexperienced person.

McCreery:

The first time, she won by a clearly narrow margin.

Lucas:

But anyway, shortly after she came on, Richardson started this campaign, his own personal campaign, and gathered aboard people, and that, from kind of the first day, she was apprehensive about the election process.⁶⁷

Then, of course, when she'd gone before the Commission on Judicial Appointments she hadn't received a unanimous vote, which is not a good way to start.

She had one, a very distinguished, experienced, Parker Woods, a member of the court of appeal who said, "I wouldn't vote for you. You have insufficient experience, and you shouldn't be chief justice."

From then on it was kind of a, "Well, she'll learn," or "That doesn't count. We're only determining whether she has the smarts to be able to do it," and all the rest.

I'm not saying that a governor doesn't have the right to appoint somebody that hadn't had any judicial experience. But she [Chief Justice Bird] was more or less under constant attack.⁶⁸

McCreery:

In talking to her about the matter of death cases, were you able to discern, was she considering the individual situations of each one, or was there a more blanket approach to the whole matter? Did she indicate to you personally in any way?

⁶⁷ Indeed, Bird was essentially under relentless attack from the beginning. As noted earlier, she would later confide that it would have been better if Brown had made her associate justice, just over two years after she'd become a cabinet secretary. But it should also be noted that there weren't many opportunities for women to gain experience in the law at this time. Many private firms refused to hire women. And she was among few women with legal prominence in Sacramento at the time. See Dolan, *Ex-Chief Justice Rose Bird Dies of Cancer*, note 61, *supra*. She set a different tone, and it rubbed many the wrong way. Even as women's participation in the legal profession increased substantially by the end of the twentieth century, during the 1950s and 1960s male college graduates were ten times more likely to enroll in law school than female college graduates. Elizabeth D. Katz, Kyle Rozema, & Sarath Sanga, *Women in U.S. Law Schools, 1948–2021*, 15 J. LEGAL ANALYSIS, 48–78 (2023), <https://doi.org/10.1093/jla/laad005>.

⁶⁸ Given her lack of experience, even Cardinal Roger M. Mahony, then a bishop and chair of Brown's farm relations panel, penned a letter to Associate Justice Mathew Tobriner, which questioned Bird's "emotional stability" and criticized her as "vindictive." Robert C. Vanderet, *A Glimpse into the Private Life of the Late Chief Justice Rose Bird*, CALIF. SUP. CT. HIST. SOC. REV., Fall/Winter 2022, <https://www.cschs.org/wp-content/uploads/2022/12/2022-CSCHS-Review-Fall-Chief-Justice-Rose-Bird.pdf>.

Lucas:

Here's the way that it happened with the death penalty cases, much to the relief of many members of the court.

These death penalty cases would come up, with huge, bulging records, come up to us for the first time. They didn't go to the court of appeal. They would have issues on appeal, dozens of issues on appeal.

Rose's way when she would write up her cases, not always, and others on the bench—I never did that, because I was dissenting—they would find what they believed to be one error, and they would say, "We have found this to be a reversible error," whatever it was, "and therefore we need not consider any of the other alleged errors, and we'll simply reverse it for retrial."

So that made the case pretty easy, when you only talked about one of the issues, generally. Sometimes they'd touch the others, as they should have, to assist whatever new trial judge hears this, but most of the time the cases were reduced in complexity by that concept.

Again, I thought that was not doing the duty of what a court should do.

If they're sending them back for retrial and there are clearly issues that are going to come up again, not issues of the way the trial court ruled necessarily, but just issues of law, they should have touched on that.

"The guidance of the trial court, we conclude that—," and then they go on from there.

But that was an acceptable way of disposing of death penalty cases, and the overall workload of the court was reduced substantially as a result of that. And it never made for habeas.

When we started on—I guess they called it the Lucas court—when we started affirming more cases, every affirmance generates first a state habeas and then a federal habeas.

The state habeases come to us and are almost the equivalent of another death penalty case and have to be heard by the trial judge, who takes evidence, and then it comes back up to us.

All of that was avoided by Rose, because they never really had a case—two cases, I think, were affirmed by her court. Robert Alton Harris⁶⁹ was one and

⁶⁹ Robert Alton Harris was executed on Apr. 21, 1992, in the gas chamber at San Quentin State Prison—the first execution in California in twenty-five years. For more, please see *Executed Inmate Summary—Robert Alton Harris*, CALIF. DEP'T CORR. & REHAB., <https://www.cdcr.ca.gov/capital-punishment/inmates-executed-1978-to-present/robert-alton-harris>.

[Lloyd Earl Jackson⁷⁰].

McCreery:

When you say that there was a practice then, shall we call it, of focusing on a single error, which was only a part of the whole picture, can you give me an idea of what that sort of error might be?

Lucas:

It would be something that would garner a majority of the votes. You could always start with Rose, you know you were going to get her vote.

If you were the majority opinion writer and that's the way you were going, you would get that vote. You only needed two more, and then it was all over with.

McCreery:

I'm wondering, because I'm partly just trying to sort out the status of things at that time, because the death penalty had been suspended in the early seventies, then the statute rewritten for California and reinstated.

Lucas:

It had been declared unconstitutional in *People v. Anderson*.⁷¹

McCreery:

Right, yes. But then the new statute presumably had things that needed to be worked out in it that would have to come up in the form of cases. Was that work more or less done by the time you arrived, do you know? Were there still bugs in the legislation itself that were—

Lucas:

No, there were still some. The *Carlos* decision,⁷² the court had held that in a

⁷⁰ In 1979, Earl Lloyd Jackson was convicted of bludgeoning two elderly Long Beach women to death. He was nineteen at the time. The death sentence put into motion a series of appeals that in 2008 culminated in the U.S. Court of Appeals for the Ninth Circuit throwing out special circumstance and death penalty rulings. Note that when the California Supreme Court heard the appeal and affirmed, Bird and Mosk dissented. Jackson was retried in 2010, with the special circumstance charge reinstated. Jurors delivered a verdict of death. He remains on death row. Victoria Kim, *Jurors Order Killer Sentenced to Death in 1977 Murders*, L.A. TIMES, April 2, 2010, <https://www.latimes.com/archives/la-xpm-2010-apr-02-la-me-death-penalty2-2010apr02-story.html>.

⁷¹ See notes 36 and 37, *supra*.

⁷² *Carlos v. Superior Court*, 28 Cal. 3d 282 (1983). The court was faced with the question of whether a defendant can be charged or convicted of murder with the special circumstance of felony murder under the state's 1978 death penalty initiative if he did not intend to kill or to aid in the commission of a killing. The court, with Bird in the majority, said no.

felony murder there must be proof of intent before you can convict of murder, despite the fact that the man went into the bank with a gun and fired it, and hit somebody, which is enough for a felony.

But nevertheless, you'd have to prove, not on those facts, but you'd have to prove intent, and these cases were not tried with a question to the jury, "In committing this felony, did the defendant act with intent to commit the felony?" It just wasn't done. It wasn't necessary. And yet a case called *Carlos*—I think that was before I came on the court—was adopted by the court, and thirty-nine cases were swept away with that.

So when I came on and examined it, and my staff, we said, "This is ridiculous. It just can't hold water." So, the next *Carlos*-type case came back, and we reversed the *Carlos* opinion.

Lucas:

We were talking about something to the effect about death appeals and their impact on the court. Is that what we were talking about?

McCreery:

That's right, yes. Yes, you wanted to retrieve the article by Justice Richardson.

Lucas:

Yes. This is actually an article by myself, which quotes Justice Richardson,⁷³ under the category, "What can be done?" that is, about death penalty cases. A variety of suggestions have been made over the years.

First of all, send them to the court of appeal for reviewing there first, as the Constitution guarantees, an automatic right of review before the California Supreme Court.

[reads] "Critics and scholars both suggest that a constant stream of reverse judgments in these cases carries in its wake great social and economic costs, including a loss of public confidence in the ability or objectivity of the state's highest court, increased frustration by the growing number of death penalty proponents, prolonged uncertainty as to the fate of death-row inmates, and an alarming, ever-increasing drain upon judicial resources at both the trial and appellate levels."

Then I say, "At one end of the scale as to the death penalty is the abolitionist."

⁷³ See note 72, *supra*.

And then, “Close to the other end of the scale another view has been expressed by my predecessor, retired Justice Frank Richardson. He expressed some discomfort with the record of his colleagues in these cases.”

In his 1983 dissent in *People v. Easley*,⁷⁴ he observed that “Although California has had a valid constitutional death penalty since 1977, and approximately 145 judgments of death have been filed with us since then, we have thus far decided fewer than twenty such appeals. Of those decided, we have reversed the penalty in sixteen cases and have affirmed the judgment of death in only two.” Those two cases being Harris and Jackson. “The judgments in those two cases are presently subject to pending habeas corpus proceedings, either in this court or in the federal court. As reflected in the majority’s ruling in the present case,” that’s *Easley*, “it is apparent that the majority is willing to reverse a judgment of death for the slightest procedural defect or omission.”

This is how Frank felt about it in 1983, and he put it in writing:

He continued in his dissent in *Easley*, “A personal aversion toward the death penalty is both understandable and widely shared, but the sovereign people have placed the law on the books. It is our responsibility to enforce it in the absence of reversible error.

“I am fully sensitive to the awesome implications of our resolution of the issues in a death penalty case and the great care with which we must examine these issues. Nevertheless, our role is to review the claims of procedural error with an eye toward identifying and resolving only those which reasonably can be said to have affected the verdict adversely.”

He finishes with this phrase: “We should not transform the slightest procedural irregularity into reversible error merely because the death penalty is invoked.” So that’s the other side of the coin.

McCreery:

That very much gets at the question of what sorts of things were causing these reversals?

Lucas:

Yes. This was the year before I went on the court, 1983, and that’s how he felt.

He’d been on the court for thirty years, and he felt strongly enough about it to set it forth in a published opinion. Whether he’s right or not I suppose is just subject to your own opinion.

⁷⁴ *People v. Easley*, 671 P.2d 813 (Cal. 1983).

But reversing sixty-two cases out of sixty-two gives you very little wiggle room to say, “Oh, no, these were all reversible errors. All sixty-two cases had reversible errors in them.”

McCreery:

I think I read that when you arrived and began dealing with these matters yourself—I’m talking about the very early months on the court—you voted with your colleagues to reverse some death cases.⁷⁵

Lucas:

Under the compulsion of the previous precedent that they had created. I hadn’t sat on the cases, but they had precedent along this line, and it seemed folly to start dissenting about precedent that I hadn’t sat on before, so initially I agreed.

McCreery:

Is it correct that you came to some point and decided you weren’t going to do that anymore? I thought I saw some reference to your announcing a change of some sort. What do you recall about that?

Lucas:

Yes, that’s right. I thought about it and determined that it was not my duty in form of *stare decisis* to automatically, Pavlovianly follow these cases, thirty-nine of which were corrected by *People v. Carlos*. Some of the cases were just patently wrong, so you had to reverse them.

McCreery:

Do you recall what prompted you to arrive at that change at the time you did? Was there a particular thing?

Lucas:

It perhaps could have been the magnitude of the problem. Each case that they reversed wasn’t necessarily a *stare decisis* for large areas, because not all of the issues that were raised would be decided and reversed.

But still, with so many cases that had been reversed, you just had to sit down and consider whether this was so significant that you couldn’t follow the precedent of the previous cases.

⁷⁵ In his early months on the court, Lucas voted with the rest of the court to reverse half a dozen death penalty cases. In each case, he wrote, he was casting his vote reluctantly and was merely following the common judicial practice of adhering to precedent. See Morain, *Malcolm Lucas*, note 22, *supra*.

Most of the time the new cases that came to us, it was a question of harmless error, and most of the cases that they decided had been based on harmless error, harmless error being something that, “Surely you jest. This can’t be that important that you would reverse the whole case.”

McCreery:

That is the test, is it not? Would the outcome be different were it not for the error?

Lucas:

Exactly. Yes.

McCreery:

I wonder how your own experience as a trial judge informed your view of these death cases, your knowledge of the trial process?

Lucas:

I think it was very helpful, because you’ve done the *voir dire*—if you’re a federal judge, you’ve even done the *voir dire*; many complaints about the *voir dire* and the use of the *voir dire*.

Most of the concerns were just the question of, “Was there a fair trial?” I emphasize again, not a perfect trial but a fair trial.

McCreery:

Thinking about your early years on the court as associate justice, when you were first becoming fully involved with all this, I wonder, how did you and your colleagues think about the penalty itself in a death case, and the fact that the penalty is so severe compared to other kinds of criminal penalties?

Lucas:

Yes, which is every justification for a very careful examination of the whole process. But then again, the Constitution doesn’t say in death penalty cases, there shall be a perfect trial.

It just says the death penalty is constitutional.⁷⁶ You remember all the hoops we jumped through until it’s been clearly established that it is constitutional.

⁷⁶ Death Penalty, Cal. Const. Art. I § 27 (*Deering’s California Codes* are current through the 2024 Regular Session Ch. 210), <https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JBS-0VX1-DXC8-202G-00000-00&context=1519360>.

When you take your oath you say, “I pledge to support the Constitution of the State of California and the Constitution of the United States against all enemies, foreign and domestic,” et cetera.

It’s constitutional, so you say, “Let’s be very careful about this.” Harmless error becomes a lot narrower, but the harmless error, you look at it and you say, “If they had not transcribed the sidebar where the judge said, ‘Let’s take twenty minutes for a recess.’ That’s not even harmless error, but it’s not reported. What else was said?”

McCreery:

I wonder, how did your own views of the matter change, if at all, once you were in the inner sanctum working on these matters?

Lucas:

I’ve often said I don’t care if tomorrow the death penalty was taken off the books. If the people of the State of California, for example, said, “We no longer want to have death penalty in our California Constitution or laws,” that would be fine with me.

It probably costs more to put through a death penalty—you shouldn’t look at the first thing of cost, but I will speak about that first.

It probably costs more to try the death penalty case than to house the defendant for the rest of his life, because it takes years and years and years, and the productive time of many lawyers and many judges, and it’s not really being enforced is what it amounts to.

Those who are opposing the death penalty are winning, is what it amounts to, if there is a war between those who are opposing and those who are supporting it.

But I never allowed myself to get into an ideological mindset, which I think Rose Bird got herself into, and I just say “sixty-two” to prove my case, and many other things she told me.

I never allowed myself to get—this is the law, and it’s been tested, and the United States Constitution spoke of death as a punishment when they put together the Constitution.

I think it was for treason or for whatever, but the United States Constitution talked about it more than 200 years ago. Far be it from me to say, “I don’t like the death penalty because it seems cruel and unusual and inhumane, et cetera.”

If you're a judge, you have to enforce the law. That doesn't mean you get on the side of the prosecutor, but you have to say, if it's a fairly done trial without any reversible error—what are you going to say? “I don't like that anyway, because I don't like the death penalty, and I'll find some reason to reverse it”?

You shouldn't be a judge if you're impelled by thoughts like that.

McCreery:

A moment ago, you mentioned that Chief Justice Bird told you many other things about her views on this matter. What do you recall?

Lucas:

Oh, mostly things about the importance of reversible error, that if there was just the slightest question about it, well then she was going to reverse.⁷⁷

That's obvious, as I say. Sixty-two times. That was her ideological mindset, there's no question about it, because she would be the only one voting to reverse on some of these cases.

We were talking about her being paranoid, and I think unfortunately it's an apt phrase, and I say that knowing full well what I'm saying. She was defeated in November of 1986.

McCreery:

The very same election.

Lucas:

Yes, in the same election.

So, it was a bad chapter in the life of the court. That's why I had the temerity to say, when I was appointed, that there's been some difficult times in the recent past, but that I hoped to be able to cure the wounds of the court and have us look forward and return to being the great court that we are.

McCreery:

While we're still talking of the period when she was chief, I wonder if I could ask you to just speak a little bit about how she operated in that capacity, before the election itself and everything changed. In other words, the rest of

⁷⁷ Bird: “You don't execute somebody unless you're sure that the trial's been fair and that they have been tried under constitutional law. I think the people of the state of California have a right to be sure that when a person goes to his death here, he will go under constitutional law after a fair and impartial trial.” Erler, *The Death Knell of the Bird Court*, note 39, *supra*.

you justices, when and how would you typically interact with her in the course of a week?

Lucas:

Speaking for myself, and also for Stanley Mosk, and probably all the rest of them, we never interacted except on Wednesday morning at 9:15, when we had our weekly conference to determine which cases we were going to grant and all the rest. I sat immediately to her right, because I was the most junior member, so I know pretty well what she was doing and how she was doing it.

McCreery:

I wonder, before Justice Panelli⁷⁸ arrived and you were the new member, and in some cases I presume the sole voice on certain matters, which of your colleagues could you talk to?

Lucas:

Really, not too many. Now and then Stanley. But you could go down and talk to Reynoso. He'd always be jovial and pleasant, but his mind was with the majority. After a while you determined, maybe incorrectly, that it was a useless exercise.

Certainly it was useless with Rose, because she wanted to have somebody write down every word she said. But it was not time-effective to do that with the others. They just wouldn't budge on these things. "No, this is all harmless error," or whatever I was down there talking to them about. It was mostly working with your staff, and as I told Panelli, "Press on regardless, as the English say."

McCreery:

This is an interesting matter about just the fact that now that you're on an appellate court rather than a trial court, you need other justices with you in order to prevail if you're in the majority, and you need to have some avenue for finding common ground, or perhaps you're at least seeking such avenues.

Lucas:

Not if it's 6 to 1. If it's 6 to 1, then, "Why should we waste our time talking to this outrageous semiconservative guy who doesn't agree with us Pavlovianly? It doesn't matter what he does. We'll do what we want to do."

⁷⁸ Justice Panelli served on the California Supreme Court from 1985 to 1994. For a comprehensive Oral History by McCreery, see: *Oral History: Justice Edward A. Panelli*, 17 CALIF. LEGAL HIST. (2022), <https://www.cschs.org/wp-content/uploads/2022/09/Legal-Hist.-v.-17-Oral-Hist.-Justice-Panelli-pdf>.

McCreery:

So the atmosphere really was such that your attempts to either avoid a dissent, or avoid a very strong dissent, were not really welcome?

Lucas:

Were not accepted, at any rate.

McCreery:

You did dissent rather often in those early years, and now you've just explained that you evolved a method of doing that, perhaps drafting something stronger as a starting point?

Lucas:

Then sometimes I had the satisfaction years later of seeing, "Here's Lucas's dissent, now in new clothes, and it's a majority opinion," not with them but with a different court. It wasn't unexpected, but it was one of those, life's little pleasures.

"At last I won that one." It wasn't "I won it." It's the law is—I think it should have been, and as I espoused it. "The law has prevailed," is what I would say. It wasn't, "I won." You don't win or lose.

McCreery:

May I ask how Chief Justice Bird used her power to assign opinions?

Lucas:

Thank you. You've put me back on track. She never told us how she did it, at least she never told me.

I gather that she did it in a more or less rotational way. I'm sure that some people came in and said from time to time, "I'd like to have that case," and maybe they got it, and maybe they didn't. Then she had to make some judgment. Any good administrator would have to make such judgment. I'm going to give her credit for at least thinking about this. If one judge was in the condition that he had a number of cases under submission with no opinions flowing, why give him another one to go into this black hole?

McCreery:

I can certainly guess, but who else on the court was she close to, as you personally observed it?

Lucas:

Of course, Tobriner.⁷⁹ I wasn't on then, but she was very close to Tobriner. He was her mentor. Of course, he left. Other than that, I think she was playing things pretty close to her vest.

McCreery:

Address, if you would, the collegiality of this court.

Lucas:

Maybe this is a backdoor way of saying—when I became chief, having seen what I had seen, I sent out a memo, “You know where my chambers are, and I’ll have a completely open door for each and every one of you. Come down any time you want. I’ll be glad to see you, and it won’t interrupt anything that’s important. We’ll discuss these things, anything that’s bothering you. My door will be open. It will not be locked and closed. The door to my chambers will be open out into the corridor,” which it was.

Little symbolic things.

McCreery:

Did they take you up on it?

Lucas:

Yes, yes. Of course, it was different personnel at that time, in part.

McCreery:

Right, right. But I wonder, even for those who had been there beforehand, such as—

Lucas:

Oh, Stanley would stroll by just to shoot the breeze. He didn’t need any help from me.

Then I had some retreats where the whole court and the law clerks went—one was at a yacht club that had a room. Then another one was out in Marin.

We’d just take a day, and we’d have a calendar. I’d ask them, “Put down stuff you want to talk about. Let’s have an agenda.”

⁷⁹ Tobriner served as associate justice from July 1962 to January 1982. In a memorial event in 1983, Bird said “it is the quality of justice tempered with humanity. It is the ability to see the human being behind the rule of law” that made him a great judge. *In Memoriam: The Honorable Matthew O. Tobriner*, CALIF. SUP. CT. HIST. SOC., <https://www.cschs.org/wp-content/uploads/2014/07/CSCHS-Tobriner-Memorial.pdf>.

That was an opportunity to vent a little bit if somehow you thought things weren't going right, or you weren't being treated right.

McCreery:

But you're drawing quite a contrast between those efforts and what you experienced when you first came on as an associate.

Lucas:

Oh, yes.

McCreery:

How do you characterize the atmosphere, just generally? You would go to work in the morning.

Lucas:

Of course, you knew what it was, that there was little communication, and in the chief's room there was a vastly suspicious person sitting in there.⁸⁰

This is what you thought. How else could I come to that conclusion? "I'm going to write down everything you say, and then I'm going to come and shred everything in the court, all the memory of the court" This is somebody that's—I don't think this all happened as a result of being disturbed about not being returned to office, and it just happened in the last couple of months of her administration. I must say you got used to it. You didn't expect anything more.

There were still activities with your staff. You'd go out to lunch with your staff occasionally, but that was on just an individual basis.

So you didn't hope for anything better, actually, and after a while you resolved, that's okay. You respond in your own way to something like that, hopefully not belligerent or excessive, but your dissents will say how you feel.

McCreery:

Quite a set of circumstances. I'd like to talk just a little more about your colleagues when you first came on. You talked about Justice Mosk a few times. He was such a senior member, and I wonder, did he—

Lucas:

But he was from Los Angeles, and he sat in the—not while I was there, but

⁸⁰ Critics said Bird provoked the distance and the suspicion. Described as insecure and defensive, she was said to have changed the locks on her chambers door and isolated herself with a few aides. Associate justices had to make appointments to meet with her, and she kept an aide beside her during those chats. Dolan, note 18, *supra*.

he sat in the Los Angeles Superior Court. We knew a lot of people in common, and we'd run into each other at various functions. There was immediately a much more cordial atmosphere with him, and he was a pleasant enough guy. He liked a good joke and would tell a good joke.

McCreery:

Did he have some special place there, just by being so senior, recognizing that you're all equals?

Lucas:

He spoke first. I'm sitting here, at least the junior is here, and then Stanley is there. He's senior. So, when you start off the discussion on the case, "Let's go to the first case, *X v. Y*. What do you think, Stanley? Should we grant, should we deny? Depublish?" Whatever it was. You'd just say, "What are your thoughts, Stanley?" Then he would start out, and then sometimes this was important, because sometimes it would set the tone for the discussion.

McCreery:

I wonder, when you very first came on and were the junior member, did you have any hesitation to oppose Justice Mosk?

Lucas:

Oh, when you do it in writing, you know—actually it's, what did the mafia say?—it's business, it's only business, and you'd accept it. Sometimes there was pretty florid stuff in there. My staff would come in, "We've got to have this removed."

I'd tell them that, "It's business, it's only business. If they want to publish that and have people see how reactive they are, that's to their detriment. We'll never be ungentlemanly in terms of whatever dissent—strong and forceful, but not strident and ungentlemanly." So this was their own prerogative, what they wanted to write down.

As my sainted mother used to say, "Paper refuses nothing." They could write whatever they want down there, and history will determine its validity.

McCreery:

Then let me ask you about a couple of the other justices, again when you first arrived. Justice Kaus we talked about. You knew him from L.A. Superior. What sort of force was he on the Supreme Court?

Lucas:

Oh, he was well respected, and he had a good, clipped sense of humor, which he would use from time to time. I think he was supportive of the court. We used to go occasionally to a lot of Vietnamese restaurants around the court, I don't know why, but very good food, and we'd go and have some Vietnamese food.

He was somebody you could talk to straight out and there wasn't a problem. Sometimes his dissents joined my dissents, not perhaps as often as I would like, but—

McCreery:

Would you say a few words about Justice Broussard?⁸¹

Lucas:

Allen was at first—let's see, how can I say it?—well, like to Panelli when he said, "You're going to wear out the carpet there." It was not really said in a jesting way. It was said with a little sharp edge to it.

This is Panelli telling me this, a little sharp edge to it. Allen had that as a personality, just a little sharp. He was a good enough person. I got along well with him, but sometimes he could be, oh, a little lacking in generosity in excusing what somebody else said, not me or Panelli, just anyone else.

But basically, he worked hard. I know there had been many times that at 8:30 in the evening—his chambers were right across the hall from me. The whole place is empty. I'm working, and I come steaming out to go to the library or something, and here comes Allen and he says, "What are you doing here?"

McCreery:

You touched on Justice Reynoso a few minutes ago.

Lucas:

Cruz lived in Sacramento and had, as he called it, a farm I guess, with chickens and a horse and cow.

⁸¹ Allen E. Broussard served as an associate justice from 1981 to 1991. He grew up in Louisiana, and later attended Law School at UC Berkeley. As he ascended to the court, he worked with the NAACP, Bay Area African American political leaders, and served on the Oakland Municipal Court, the Alameda County Superior Court where, for a time, he was presiding judge, and ultimately the California Supreme Court. He succeeded Wiley Manuel, the first African American Justice on the high court. Broussard's work on the high court included work with the Advisory Committee on Race and Gender in the California Courts. For a transcript of an oral history with Broussard, see *A California Supreme Court Justice Looks at Law and Society, 1964–1996: Oral History Transcript* (1997), <https://archive.org/details/looksatlawsoci00brouich/page/6/mode/2up>.

It sounded pretty idyllic. He used to come in on Tuesday morning. There was a—it wasn't a bus, it was like an airport transport that you could pick up in Sacramento.

It would eventually drop you off at the airport in San Francisco or points in between. He showed it to me once. It had a nice light and an individual seat you could lean back in.

He used to pick that up by probably 6:30 in the morning on Tuesday, then he would come in. I guess he stayed at a hotel or something like that. I don't think he had an apartment or a house, and then Thursday night he would go back. That was often his—but that doesn't mean he isn't working at home, and he's got all these marvelous devices where you can communicate. But I just remember that about him.

McCreery:

Would you say a few words about Justice Grodin, please?

Lucas:

Joe was very academic.⁸² He was a professor and very academic. Panelli used to say, "He's a very long-speaking man, very long." Rose used to say—this as you're going around the table at 9:15 in the morning or thereafter—come to Joe. "Now, Joe." This would start [gesturing with hand]. That's not a good sign.

"Now in this case . . ." Then Rose would finally say, "What is your vote, Joe?" right in the middle of everything. [Laughter] I mean, that was Rose and you could expect that. "What is your vote, Joe?"

He'd say, "Okay," because he wanted to develop whatever thought he had, but sometimes he would go on for minutes at a time, and time is limited. You've got maybe a hundred cases or whatever, and you've got people who all want to express themselves. But he's learned and articulate, and the professor.

I sense that—and I don't blame him in the least, I would have felt the same way—that the retention election hurt him a great deal. He didn't consider himself—this is my own psychoanalysis—he didn't consider himself in the same category as Rose or for that matter Cruz Reynoso.

He wasn't particularly, at least overtly, political, whereas Rose was very political or ideological.

⁸² For an example of Grodin's scholarly work, see Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969 (1988), http://repository.uchastings.edu/faculty_scholarship/222.

I think he was very distressed at the thought that he could even be, that the voters would even consider rejecting him, because of the good work that he's done all his life, and the opinions he'd written.

The unfortunate thing was, it was a package deal. The advertising apparently wasn't just, "Throw Rose Bird out." It was, "Throw Bird et cetera out." Throw all three of them out. In fact, there was some thought in the beginning that maybe they would include Stanley.

McCreery:

You were certainly glad to have him still, Justice Mosk, at that point. I wonder, in your own mind was there a distinction between Justice Mosk and the others who were the targets in that election? You've described his willingness to sign the [death penalty affirmances].

Lucas:

He did not endorse them for reelection.

McCreery:

He did not?

Lucas:

Yes. This is my recollection. He did not endorse them for reelection⁸³. He wanted to stay completely neutral, or completely away from it, because there was always a chance that somebody would have some write-ins, I suppose, or whether it was the campaign or not would vote no for his retention. So I think he just said, I'm washing my hands of the whole affair. He didn't ever use those words, but he was not active one way or the other.

McCreery:

Governor Deukmejian was running for reelection in that same November 1986 vote, and he took the step of making public his own wish that Chief Justice Bird not be retained. I wonder how you viewed that?

⁸³ Mindful that this publication has an audience well acquainted with the process of judicial elections, it still seemed important, for the record, to recount the judicial appointment and election process in California: Appeals court and state Supreme Court justices in California are selected through a governor's appointment and confirmed by the Commission on Judicial Appointments and confirmed again by the voters in the next general election. Supreme Court and Appellate Court justices also come before the voters at the end of their twelve-year terms. Superior Court or local judges can either be appointed or directly elected to the bench by voters. *Fact Sheet, California Judicial Branch*, JUD. COUNCIL CALIF. (Aug. 2022), https://www.courts.ca.gov/documents/California_Judicial_Branch.pdf.

Lucas:

He never talked to me. We never talked about the—he would know better than to call me and to ask about something that involved—and I would know better than to talk to him, of course. So I don't know really what he was doing then. He did that, expressed his own view? I guess he's entitled to do that as a citizen. "I'm not going to vote for Rose Bird. Take it or leave it." Was that it, or what?

McCreery:

I think he expressed his intention not to vote for her himself. I'm not saying that very well, to vote against her I should say. It just seemed a bit unusual for a sitting governor, and I just wondered your thoughts about that.

Lucas:

I know that he had expressed great concern about her as chief justice for the reasons that I've been telling you about. But it was not just the death penalty. I think there were business groups who felt she was anti-business. You can kind of go down the line. They weren't fronting any of this challenge to her, but well, you can imagine the agribusiness. We talked about that. They probably were irked by her, and would have been just as pleased if she wasn't around, although I don't know how well organized the opposition was to her, do you?

McCreery:

There were a number of groups formed. You mentioned Senator H.L. Richardson, but there were some other groups that were formed and, I think, tried actively to place things in the media and to make it an issue that voters were aware of.

Lucas:

I don't remember, but do you remember what the final vote was? Obviously, she did not get 50 percent, but how much less than 50 percent? Do you happen to remember?

McCreery:

I can look it up. If you want to keep talking, I'll try to see if I can spot that.

Lucas:

Okay. I would have to guess that she got fewer votes, say, than Reynoso and Grodin, for example. I mean, the three of them got less than 50 percent.

McCreery:

I don't know if this is quite the thing I'm seeking. This is by county; let me just see.

This is the statement of the vote for 1986. It was each justice that was up for retention. There were six of you. This suggests—again, it's county by county, but looking at the totals as a percentage, 66 percent voted no on the matter of Chief Justice Bird, 34 percent voted yes.

Lucas:

How would that compare to Grodin and Reynoso, as a matter of curiosity?

McCreery:

Yes. For Justice Reynoso, rounding off to the nearest percent, 40 percent voted yes, to her 34 percent; 60 percent voted no. And Justice Grodin, 43 percent voted yes, and 56 or 57 percent voted no.

Lucas:

Could you look at mine while you're there?

McCreery:

You're at 79.5 percent yes. We'll round off to 80 percent, and 20 percent no. So that's quite a difference there.

Lucas:

That's not bad.

McCreery:

Then for Justice Mosk, since we were speaking of him, he got 74 percent yes vote, 26 percent. So it is very interesting, isn't it?

Lucas:

That's a very substantial difference for Stanley and, say, Rose.

McCreery:

Yes. So again, it's hard in a way to reconstruct the effects of the different groups that were formed, those who were overtly trying to unseat the justices. It's hard to deconstruct the effects of Governor Deukmejian's voice on this, because it was such an unusual situation in so many ways, wasn't it?

Lucas:

It certainly was. I remember reading about or being told about certain law firms gave a significant amount of money to Rose, and they were scheduled to appear before us in two or three months, before the election, and they did appear. Yet they'd given—one law firm gave \$50,000 as I recall. They do this in Texas and it doesn't seem to bother them, but it bothered me.

McCreery:

Then there's this whole larger question, in a way, of having voters retain judges periodically. I think we touched on this before.

Lucas:

It's so much different than Texas, say. Texas, you're a Republican judge or you're a Democrat judge. You may have Bill Jones, who has a one-man office in Austin, Texas, run against you, and so it's Justice Smith versus Bill Jones, whereas we have—nobody can run against you. It's not Democrat or a Republican, it's nonpartisan, as it should be.

Nobody can run against you. It's just you're running against your own self, your own record. So there are many protections built in, and that's why I think since 1934 it's never been used except for this one election.

McCreery:

In general, how well do you find that works for California?

Lucas:

I think it works fine. That doesn't sound like high praise when you say, we have this mechanism but we never used it. There must be somebody, some rascal that should have been thrown out. But at any rate, we've never used it except in this one election, so it's been saved, I guess, for what the public thought were perhaps extreme examples of the use.

It was thought after '86, well, this will be happening with some regularity. Now here twenty-two years have gone by, and I don't know whether it's been even thought about in that time. It may have been, but nobody has been denied office that I know of.⁸⁴

⁸⁴ The discussion and debate have continued. The 2016 California State Bar Program examined the California Constitution's system for electing justices and judges, and how the elections can influence the administration of justice. Then UC Irvine School of Law Dean Erwin Chemerinsky and former California Supreme Court Justices Joseph Grodin and Cruz Reynoso offered their thoughts on the matter of retention and term limits for judges. See the California Supreme Court Historical Society's *Thirty Years After a Hundred-Year Flood*, note 17, *supra*.

McCreery:

May I ask if you recall how Chief Justice Bird viewed state constitutionalism, in principle?

Lucas:

She was very much in favor of it. She was not perhaps as—because it was at that time a somewhat controversial concept, particularly when the phrases were identical. I don't think she publicly expressed herself on that. I shouldn't say that; she might have given a dozen speeches on it. But she was not as vocal about it as, say, Stanley, or for that matter Joe Grodin.

But I think she thought that any red-blooded member of a supreme court of last resort, other than the U.S. Supreme Court, would welcome an opportunity to not have them mess with our work type of thing.

I was much less militant in that, thinking that the work of the U.S. Supreme Court was worth considering before we went into the field, if there was a possibility to wait a brief period of time.

As I say, there were certainly substantial ideological differences at that time between the California Supreme Court and the U.S. Supreme Court, as we know.

McCreery:

Did you have any particular knowledge of Chief Justice Bird's relationship or interactions with the U.S. Supreme Court? Was there any back and forth?

Lucas:

None that I know of. I mean, this might have been a private thing, but I knew some—I knew Bill Rehnquist, for example. I was on the federal bench after all. I met these people a lot.

McCreery:

Yes, I wanted to ask which members you might have known as well.

Lucas:

I went on a ten-day—Bill Rehnquist called me and said, “Malcolm, we're going to have the first ever Franco-American exchange. Members of the United States Supreme Court, led by Sandra Day O'Connor, are going to Paris to meet with the leadership of the French judiciary. You're chief justice. Would you like to go as a chief justice representing all of the other chief justices?” If I told you this before, stop me. I think I said to Bill, “*Mais oui*, Bill.”

So, I got to know—Scalia was along. Steve Breyer, although he was on the court of appeal, was along. Ruth Bader Ginsburg was along, although she was also on the court of appeal, and, of course, Sandra and a couple of others. You spend ten days with them and you get to know them relatively well, in comparison to never having met them. But it was interesting to hear them and read their decisions later.



Supreme Court Justice Sandra Day O'Connor laughs at a quip by Justice Malcolm M. Lucas, right. Justice Thomas Reavley is at left. The panel was "grilling" Pepperdine Law School students in the university's 11th annual moot court competition on Feb. 2, 1985. Credit: Los Angeles Times Photographic Collection, UCLA Library Special Collections, Photographer: Bob Chamberlin.

McCreery:

How did Mr. Rehnquist make out as chief, in your view?

Lucas:

I thought he was a very good chief, actually. He allowed the court to proceed. I wasn't on the inside and I don't really know, but I did not see him as an overbearing, necessarily institutional-minded court chief who chided the members if they dared to dissent.

“We want to have uniform majority opinions.” I didn’t view him as that. He was a rather nice man, actually.

McCreery:

You mentioned getting to know Justice O’Connor. She certainly had an interesting career as the first woman on that court, a long and distinguished career.

Lucas:

Yes, she has, and she’d had some practical experience as a legislator; that was the interesting thing. Of course, she was on the Court of Appeal in Arizona as well, but she’d been several years in the Arizona legislature, a senator I think, which I think is helpful. I never had that experience, but it’s helpful in terms of understanding how the sausage is made [Laughter], as it were.

McCreery:

As it were. But her experience on that court, of course, was quite different from California’s first woman justice.

Lucas:

Yes, night and day I would say.

McCreery:

Can you contrast your style in presiding over the court with the earlier style of Chief Justice Bird at oral argument?

Lucas:

The presiding is pretty well the same.

You have sitting on your right the most senior member of the court, and on your left the next most senior.

It’s all done by seniority. You call the case and away we go. Sometimes she would interrupt more than I thought was appropriate, and sometimes she was a little more caustic than I thought was appropriate, but we had so much time for oral argument, and then it was all done.

McCreery:

In her time, which other justices would tend to participate more actively?

Lucas:

Joe Grodin would have a variety of questions. It depended. I think some

of the judges had more interest, basically, in civil law than criminal law. But if it was a criminal case that needed examining, then they would have their questions. Then we'd immediately afterwards have a conference of the court as to how we should proceed on the case.

With the ninety-day rule we'd have a tentative opinion, but sometimes—oh, I can remember Otto. He would come to our post-argument conference and say, "I had a religious experience out there," because he heard one counsel say something that made him start thinking, "and so I don't know how I'm going to vote on this. I'll have to do more research," or maybe, "I've changed my mind."

So, oral argument was helpful. It is not dispositive. It's not a question of who has the most silver tongue, because facts are facts and it's very hard to change those facts. Facts are the most important part about the case. You get to state the facts in the way you want to. [Laughter] It's like the polls that come when they poll the public. "Isn't it true that so-and-so is a real idiot? You agree with that, don't you?"

McCreery:

"Yes or no?"

Lucas:

Yes, "Yes or no."

McCreery:

Can you address the quality of the advocacy that you saw on this court, compared to what you'd known in other settings?

Lucas:

Generally, it was good.

In important civil cases the best appellate argument would be given, because there would be money on both sides, and they would hire somebody who was an experienced and exceptional appellate advocate.

You would sometimes notice with criminal cases, well, here's a young assistant U.S. attorney who probably has maybe only argued a couple of cases, if any.

Not the death penalty cases, because those were handled by a death penalty section or unit in the attorney general's office, and they were, of course, very experienced. That's all they did.

Then you would notice also on the other side that the representation of the defendant, even in a death penalty case, would be enthusiastic but spotty sometimes, because they hadn't really had the experience.

It takes, not a lifetime, but to really have a feel for these cases it's important to be steeped in them. We had an organization called CAP, Criminal Appeals Project, where we attempted to have educative processes available to them, but sometimes we had to look at the case independently to make sure there hadn't been any inadequate representation.

McCreery:

How would one go about doing that, if necessary?

Lucas:

If there was a hint of it, such as, "My lawyer took cocaine" or "My lawyer slept," and this, that, and the other, you might before you hear the case ask for some additional briefing on this subject, so that both sides would be alerted, and you will hear, not additional evidence necessarily (because that would happen under habeas), but enough at least to concentrate on it and the law on it. Sleeping in trial, you might get an affidavit under those circumstances from the assistant D.A. who tried it. "I never saw the defense counsel asleep at any time." Cocaine, they couldn't have any comment on, I'm sure. I don't know how the defendant would know that, but I remember one case where that was the assertion.

McCreery:

How common was it to have things like this arise, questions about the advocacy itself?

Lucas:

Only in habeas. In habeas, this is a ripe field. "Can't you think of anything that you disliked or found different or unique about your lawyer during the trial?" "Well, yes. I wanted him to have my mother come up to the stand and testify what a good person I was in my youth, and he said, 'No, that's not important.'" If that's what happened there may be a problem, because when you're given the death penalty, it's nice to know this guy wasn't an animal from the moment he was born but learned that through hard knocks and all the rest. Then the habeas begins. An investigator is appointed by the defense counsel, and then the matter is heard either in the state court or in the federal court, and thus death penalty cases go on and on and on. There really is no end to them, it seems.

McCreery:

We were speaking about oral argument, and you were saying that before this new approach to the ninety-day rule there would sometimes be a very long time elapsed before a decision was forthcoming. You said particularly in some chambers, and I wonder, in the time of Chief Justice Bird when you were a fairly new member, what was the view of pulling your weight of the total workload?

Lucas:

When I was chief it was very important. I ended up cumulatively writing more opinions than anyone else on the court, just because I thought it was my duty, and we were to get these cases out, hopefully very carefully analyzed and all the rest.

Some of the members of the Bird court somehow were—what's the expression?—walking to different drummers, meaning that a case would be assigned to them and it would just go into a black hole.

Even Rose, after a while, she'd be starting the Wednesday conference and she'd say, "Now, Justice X, the case of *X v. Y*. I assigned that case to you," whenever it was, "a year or a year and a half ago. We haven't gotten an opinion on it. How are you doing on this case?"

"I'm working on it. I've got such a big load of other things."

Under those circumstances I would have privately told the person, "I'm not putting you on the wheel for any other new cases. You've got this case and some others that are behind, and I can't burden you with additional ones. So, I'm putting you on notice. Don't worry about it, but I'm putting you on notice that you're not going to get any new cases until you bring your old cases up."

That would generally be curative enough, because I didn't do that very often, and when I did it I went down to the person's chambers and sat and told them that, "This is not good. You could ultimately become subject to some criticism as a result if this became widely known. I don't want this to happen, but I'm taking you off the wheel, and please, tell me every week how you're doing on this particular case." Just some kind of a [notice that] the alarm's going to ring sooner or later.

McCreery:

Of course, the productivity of every member has ultimately some effect on all the other members over time.

Lucas:

Yes, sure. It's not much fun getting an opinion a year and a half later and saying, "What was that case all about again?" That's the beauty of the ninety-day rule. When the cases came up you, of course, remember them exactly, because you'd considered them fully and completely ninety days before.

McCreery:

But I take it these matters would come up in conference at some times, before that change, when there was still a possibility of a long wait?

Lucas:

Yes. I tried not to do it in conference. "Stand up, go to the corner, you're way behind in this particular case." This person is an equal member, and a constitutionally established member of the court, so I didn't—shame was not public shame, public in the sense that the whole court hears it.

The members of the court knew because we got reports on the cases. All you had to do was take a look and you could see that, uh-oh, things are piling up in the corner here.

But I didn't—there was no excoriating. That's not the way to get cooperation. It's the way I explained it to you. I would go down, and I would have just kind of a heart-to-heart talk, and that was generally effective enough, particularly when combined with the cessation of the assignment of additional cases.

McCreery:

But your predecessor took a somewhat different approach, it sounds like, to dealing with these individual situations?

Lucas:

I don't know what she was doing individually, of course, but I know at times she would, at the start of the Wednesday conference, say what I described.

McCreery:

Thinking a little bit more about overall workload and backlogs in cases where those existed, we touched last time on the backlog going to the death penalty appeals. I just wonder, as the first few years went on, aside from the issue of the penalty itself, but just as a purely administrative matter of how do you deal with this volume, what did you think should happen to ameliorate the backlog and perhaps even make some changes in how that whole process was handled?

Lucas:

It was difficult because, of course, the California Constitution says that a trial court verdict of death in a death penalty case shall go—“Do not pass go. Go directly to the California Supreme Court.”

We considered—I believe the court is now considering—the possibility of sending the death penalty cases through the court of appeal. We considered that thoroughly. We had a—perhaps ungrounded—concern that there would be simply a duplicative process. “The court of appeal did this. Now we have to do it all over again, because of the importance of the case,” and the significance, obviously vital significance, of the verdict.

The biggest problem we had was getting counsel to take these cases. The compensation—I remember once we raised it, it doesn’t seem like much then, but this is years ago, from \$75 to \$95 an hour, in the hopes that with a cumulative number of hours that people would be more interested.

Slipping into when I was chief, we also had a requirement that the appellate process include, concurrently, a state habeas or at least a review. “Is there anything that I should be advancing from the standpoint of a habeas, like was the guy using cocaine, or sleeping, or whatever?” That made it even more difficult, because there was some assurance then that there was going to be an extended representation.

Probably about 20 percent of the court’s time overall was taken up by death penalty cases. There’s no way that I could quantify it, but that’s my own belief.

McCreery:

As time went on, what was your own view of having an automatic appeal to the Supreme Court? Did you think that was the way to continue, or did you favor a change to that, if one should be possible?

Lucas:

The only other thing that would be possible would be if you had the Court of Appeal. We thought long and hard about that. I took an informal poll of the court of appeal members, and some of them were very reluctant to take these cases. “My God, we hear you’ve got 10,000-page transcripts.”

It may be a good idea. It may be. I’ve thought about it often when the death penalty question comes up. The problem is you’d have to make substantial changes.

It’s not really possible to say, “Let’s experiment with it,” and send them something. You’ve got to have the Legislature make substantial changes, constitutional changes, and then it’s too late.

But when you take it—here was the daunting part of the death penalty cases. They're never complete. Once they leave your chambers, leave the chambers of the California Supreme Court, all signed, sealed, and delivered on the appeal, as I've said before, you've got the state habeas, and that goes up and back and forth.

With a death penalty case there will be a minimum of three times that the case will have gone to the U.S. Supreme Court before the judgment can be affirmed, and you can imagine how long that takes.

Then, of course, we had the Ninth Circuit, and they would take these cases and were not all that concerned about it. "We'll hear this when we get around to it, but it's not important." Enormous delays. Most of the delays are inherent in the review process of the Ninth Circuit.

Of course, the U.S. Supreme Court, in a number of opinions, reduced the opportunities for game playing.

Final Thoughts on the Bird Era

McCreery:

Chief Justice Lucas, I wanted to give you a chance to reflect a bit more on your experience serving on the Rose Bird court before we go on and spend more time talking about the period when you were chief justice. Given all that we talked about last time, how do you evaluate that whole experience?

Lucas:

It was punctuated by the 1986 election, but it seemed to me that there was a crisis in public confidence in this judicial system, which in my view had been drifting to the left of the law for some time.

The same things that the public were made aware of—sixty-two death penalty opinions, reversing every one.

After a while it's difficult to tell the public that you believe that everyone is being completely ideology-free and completely objective about cases, particularly death penalty cases. I think, of course, that was the primary reason that the opposition to her was created.

There were business groups, I think, which were disgruntled with some of the tort rulings expanding plaintiffs' rights to sue in tort, and there was certainly a strong resentment, apparently, to the approach that in death penalty cases we don't worry about fair trials, we must approach perfect trials, which was fraught with problems when you had that state of mind, particularly when the court

system had given two defense counsel for the trial of the cases, and millions of dollars were expended on investigators, psychiatrists, and all the rest.

I think the public felt there was a crisis in civil justice, too, to some degree, that the Bird court was adrift here as well, that they had disregarded some statutes, and disregarded established common-law principles, although I don't think that was the primary reason why the retention election of 1986 occurred.



The Lucas Court: The California Supreme Court in 1987 at the Chief Justice's conference table. Left to right: Associate Justice Edward A. Panelli, Associate Justice Stanley Mosk, Associate Justice David N. Eagleson, Chief Justice Malcolm M. Lucas, Associate Justice John A. Arguelles, Associate Justice Allen E. Broussard, Associate Justice Marcus M. Kaufman. Published courtesy of the Supreme Court of California.

Becoming “Chief Justice Lucas”: 1986 Retention Election and Beyond

McCreery:

Have you any additional thoughts on the '86 election itself? We'll talk more about the aftermath when you were chief, but anything else that you'd like to add about that?

Lucas:

As I think I've said before, the retention-election process was created in 1934, and up until 1986 there had never been either a Supreme Court justice or a Court of Appeal justice removed from office—not removed from office but denied reappointment.

So at least my own personal expectations were that—without knowing all of the forces that were allied and how much activity was going on, if any—well, this is a big flap and it's intrusive, but I don't think anything is going to happen.

I think I told you that I had met and talked to a political advisor, Stu Spencer,⁸⁵ about this particular election. It was probably six months before the election. I said, "There's an awful lot of confusion going on about this." I asked him, "There's no possibility that she's going to lose her office, is there?"

He had turned out to be—I looked him up after that—a quite experienced political consultant. He said, forcefully, "She's toast," unquote. I said, "What do you mean?" He said, "At the present time we have 25,000 names who have called in and have volunteered to speak against her."

"Speak? What do you mean?" "Go to their Rotary Clubs, their service clubs, their schools, that they want to speak against her." He said, "I've never had that experience in any of the campaigns that I've run. There is a groundswell of opposition to her that I've never detected before. It's very fierce and growing fiercer."

So that's when I began to think, well, isn't that something? If he's right, that will certainly cause some disruption in the court, never thinking that Joe Grodin or Cruz Reynoso would be swept away by the waves. The election came and we know the results.

McCreery:

What chance did you have to talk to Governor Deukmejian about these events before the election, if any?

⁸⁵ Spencer was a political consultant who served as deputy chairman for political organization in the reelection campaign of President Gerald R. Ford. He was also a longtime adviser to Ronald Reagan. He is known to be one of the first professional campaign consultants in American politics. See <https://geraldrfordfoundation.org/centennial/oralhistory/stu-spencer> and https://ballotpedia.org/Stuart_Spencer.

Lucas:

None. No, once I came on the bench my duty was to the court and to the law, and so I thought it reasonable and expected of me not to discuss anything that might have to do with the activities in the court. I'm sure I saw him from time to time, but there was never any discussion about the operation of the court, or personnel, or anything else.

McCreery:

How early did he approach you with even the idea of being chief justice?

Lucas:

That's a good question. He, of course, could have appointed anybody in the world, I suppose, with the qualifications. But he always had great confidence in me.

After all, we were law partners for thirteen years, and he'd expressed great confidence in me, and I suppose showed it by appointing me as associate justice. When he did call about it, it was, "You're probably expecting this call," something like this. He said, "You've been on the court three and a half years. You're experienced. You're the only candidate that I'm thinking about. What about it?" I've forgotten what I said—something like, "In for a penny, in for a pound," or whatever.

McCreery:

What indications might you have had of his intention before that—any whatsoever?

Lucas:

No. As I say, even after I spoke to Stu Spencer, I thought it was not going to happen, so I'm not going to spend a lot of time mulling this over. I don't think it's going to happen. It's just a relatively few disgruntled people that are unhappy with the court, or at least unhappy with her, and she made it through the [1978 election].



Chief Justice Malcolm Lucas and Gov. George Deukmejian in Deukmejian's office after swearing-in, 1987. (Courtesy of the Lucas Family.)

McCreery:

When Governor Deukmejian did call you with this prospect, how did you respond at first? You said, “In for a penny, in for a pound,” but what else went through your mind, do you remember?

Lucas:

I don't know. I wish that I'd said, “Boy, I'm tired of writing dissents. This'll be a real change,” [Laughter] but I didn't. Look. I was already up there. I was living up there.

I was now entrenched in the processes and had seen many things that if I had been in command I would have changed—we've already talked about many of them—and so it just felt like a natural step.

I don't know. I might have said to him, “Look, George. I can't be any worse than Rose, so go ahead.” [Laughter] I didn't say that either.

McCreery:

You mentioned a moment ago that he said you were the only one he was considering.

Lucas:

I believe that's right, yes.

McCreery:

Here we are in February 1987. You've been sworn in and assumed office as chief justice of the State of California. You had a very unusual situation on your hands. You were short by several justices. What do you recall about your first steps? What seemed most urgent to you to attend to?

Lucas:

I'm not sure whether this was *the* first step, because some disturbing things had been brought to my attention before this—that is, that Rose Bird had destroyed all files of the Supreme Court, all the memory of the Supreme Court.

But, I would remember that soon afterwards, I think I called in Stanley and Allen [Broussard] at the same time, and let's see, who was the fourth, and Justice Panelli, okay.

I called them all in, just a very informal meeting in my chambers, and said, "Look. Every day we get petitions seeking review, and there's going to be a big pile of them before we really get three more people on here," and all the rest.

"What do you think are the possibilities that the four of us," because we had a majority, we had a quorum, "that the four of us can pass on most of these cases? If there's a split among us then, of course, it'll have to go over until we have a full complement of people."

They said, in essence, "The great majority of the cases we can handle. The denials are often unanimous, and so we could certainly handle all of the denials where we determine that this is an appropriate denial, and we will keep in mind that this shorthandedness would become the vote on some other cases."

So, we did. Every Wednesday morning it would just be the four of us, drinking coffee and eating—I've forgotten what I served them up. Rose generally had trail grout, which is pretty good, and I'm not sure if she had muffins, or if I was responsible for all that high-caloric stuff.

McCreery:

The court had a huge spotlight on it after that election. Pretty much everybody was aware of what had happened and how unusual it was. What steps could you take to get things back on track, as it were? How did you think about and act upon the perception of the public and the media and all that piece of it?

Lucas:

I gave an interview and/or a press conference. I didn't give many of those, but I can remember they were asking me about this very same thing, and I said, "You know that Otto Kaus used to say, 'We don't really think about elections and that type of thing,' but it's pretty hard to do, because it's like saying, 'I don't see that alligator in the bathtub.'"

I said, "As far as I'm concerned, we're going to change that alligator in the bathtub into alligator shoes, and I'm going to do the best I can—," the words I used were, "to heal the wounds of the court. We've been through some disruptive, difficult times, and we're going to have some tranquility here, get the court back on an even keel, and just put out good opinions that the public will agree with and support, and they will support the court."

I think I said something to the effect, "I believe that there is a groundswell of support by the people of California for this court as an institution, and we'll try to honor the support that the public does give us." It all seemed to work out, happily.

McCreery:

So, you were out there stumping on your own, as it were?

Lucas:

You had invitations to speak. The annual state bar address, for example, in September, you've got the entire bar organization before you. I started giving speeches shortly after, maybe a month or two after I came aboard. I wanted to have at least sixty days under my belt before I started spouting. These speeches then, at least in part, are disseminated by newspapers or trade journals or whatever.

I think that was effective. I think other members of the court, particularly the new members, were asked, "What do you think? How are you doing?" and all the rest, and they would come up with, hopefully, affirmative answers and a rationale for it.

But we weren't squabbling. It wasn't disruptive. I've told you I had an open-door policy, where any justice that wanted to come in at any time could, not exactly guaranteed to give you smooth sailing when you're reading an opinion or a proposed opinion, but it was worth it to have them come in. I've told you about the retreats we had.

Then we used to have just dinners, the seven of us only. So, all these things were helpful and, of course, then the staff would know about these things, particularly because they were at the retreats. Then if the reporters, which they certainly would attempt to do, if the reporters would talk to the staff, "How are things going?" "He seems okay. In fact, we had a retreat where we—" et cetera.

McCreery:

The communication sounds much improved, just in general.

Lucas:

Oh yes, yes.

McCreery:

In all directions, perhaps.

Lucas:

Yes.

McCreery:

I wonder in the early period when you were just getting reconstituted, what sort of guidance or aid did you have from Governor Deukmejian himself?

Lucas:

On what?

McCreery:

Just on kind of what needed to be done, and what resources might be available to you. Was there anything there?

Lucas:

There was nothing like that, and this would be entirely foreign to him, "How many more law clerks do you need for central civil?" He doesn't get involved in that.

McCreery:

Forgive me. I wasn't thinking so much on that level of detail, but I just wondered if he was able to assist you in any way with the liaison with the public, and the whole aspect of the perception of the court, shall we say?

Lucas:

No. I think he would have felt that that would have been intrusive, and maybe it would be felt by the population to be not within his bailiwick, because he apparently was an important force in motivating people to vote against Bird.

So, if he then says the day after she goes, "Now we have a wonderful court doing this," in my view it would ring hollow. He didn't do anything like that that I'm aware of and, of course, I didn't either. The best thing he did was to make, in due course of time, three appointments that made the court whole.

McCreery:

Before making these three appointments, did Governor Deukmejian consult you at all about any of the prospects?

Lucas:

Either he or somebody else on his behalf would ask me, "These are candidates that we're considering," and mostly, "Do you know anything negative about them? Would you oppose them coming on the court?" I had no veto, that's for sure.

But with these three I said, "No, they're all fine." They, of course, had their own vetting processes, and George knew [David] Eagleson⁸⁶ very well, another Long Beach person, and John Arguelles knew him well, because he was sitting in Long Beach. So, there wasn't that much curiosity about—with the exception of [Marcus] Kaufman,⁸⁷ perhaps—I wonder if he will run amok when he gets up there on the court?

These were solid people who'd had long judicial careers and some leadership roles in the court system, solid people, and reliable people.

⁸⁶ David N. Eagleson would serve from March 1987 to 1991. Prior to his appointment to the Supreme Court, he served for three years as an associate justice of the Court of Appeal, Second Appellate District, Division Five from 1984 to 1987, and for fourteen years as a judge of the Los Angeles County Superior Court from 1970 to 1984, including a term as presiding judge in 1981–1982. *History: David N. Eagleson*, CALIF. SUP. CT. HIST. SOC., <https://www.cschs.org/history/california-supreme-court-justices/david-n-eagleson>.

⁸⁷ Marcus N. Kaufman served from March 1987 to January 1990. Before he was appointed associate justice, Kaufman served for seventeen years as an Associate Justice of the California Court of Appeal, Fourth Appellate District, Second Division.

They were all hardworking, and they knew what was expected of them. They had all talked to me before they were sworn in. “What’s the work like?” and “Do you think I ought to do this, or would you advise me not to?”

I, of course, told them that, “It’s a lot of heavy work, but you’ve been doing that all your life. You’re working on the top shelf now. What you say goes, with the possibility of some gray cloud on the horizon called the U.S. Supreme Court, and it’s all very important stuff and will go in the books. You can contribute to some good opinions going into the books.” They were all well motivated. As I say, their work ethic had been long established, and so they were ready to go.

McCreery:

You’ve used the phrase work ethic several times. Had that particularly been a problem before?

Lucas:

When I described to you some of the chambers, under Chief Justice Bird, where cases would go to die, where the black hole, we used to call it—maybe it’s not right to say there was no work ethic there. Maybe it was more proper to say there was so much disorganization that work couldn’t be done.

I don’t know what it was, but work ethic covers a whole lot, papers over a lot of things. One would be if somebody had a real work ethic and a feeling of personal responsibility, or what was expected of him or her, and what the other members of the court were doing, then one would expect that they would at least put out the average amount of output, and not end up holding up a lot of opinions. So that’s what I mean by work ethic.

McCreery:

I can guess, but how did the votes change with this newly reconstituted court?

Lucas:

It was most notable, I guess, in death penalty cases, because we had a different view of harmless error.

Remember, Rose Bird had voted to reverse sixty-two cases out of sixty-two. There’s always an error someplace, and it’s never harmless. This was very frustrating to me, because some of these reversals were just—as I would say in the dissent—unbelievable.

So, there was then a majority for looking rationally and reasonably at death penalty cases, not rapidly and cursorily, but looking at them reasonably.

They all had tried cases, many cases, as I had, and they knew a harmless error from an error that required reversal. It was the experience, I think, that they had in the trial of cases that made the utilization of harmless error easier for them than it would for Rose, who had never tried a case, as a judge at any rate.

I guess it was easier for her to say, “That was error, therefore it’s not harmless. We’ve got to reverse.” So that was a big difference.

McCreery:

That’s a good example of using the talents of a particular justice to apply to a certain problem.

Lucas:

Yes, exactly.

McCreery:

Do you have other examples of how you as chief could employ your staff of justices to look at some of the larger issues of the court?

Lucas:

The Richardson Committee, for example, had as advisory members Stanley Mosk and Ed Panelli.

Ed Panelli has vast experience in trial court, and of course, Stanley Mosk’s experience is well known. I asked them to sit in and when the members of this committee were talking about various things, if they were making a mistake procedurally or factually and they needed some help, please chime in and give them suggestions. Or if you have your own ideas, project them. The court was well represented in this committee by Stanley and Ed Panelli, and I think we got a better rapport and better suggestions as a result of that.

McCreery:

Since we’re on the subject of the conferences, how did you run those?

Lucas:

I ran them with a good deal more humor than Rose ran hers.

The period before it began was intentionally a relaxing experience. Maybe somebody would tell a joke if they’d heard one. It didn’t happen all that often, but the talk was not about the law or the cases that were coming up. It might be about how did the Dodgers or the Giants do, or whatever.

We tried to keep it low key. Then after that it was more or less the same. We had a different complexion of people, of course, and there was no Rose Bird to say to Joe Grodin, “What is your point, Joe? What is your vote?” He’d say, “Okay, I’ll tell you.” This is after about five minutes of speaking.

McCreery:

That returns to this theme of collegiality that we’ve talked about on other days, and the extent to which you tried to foster that. Were there any bumps in that road?

Lucas:

No, not really. Stanley was always a good friend and cooperative. I think Broussard was a little discouraged by the election returns, because he at least ideologically had more in common with Joe Grodin and Cruz Reynoso than he had with me, at any rate. But he was an experienced judge, and he saw this coming. Let’s see, he retired—?

McCreery:

1991.

Lucas:

I think it must have been uncomfortable for him to be outnumbered. He had never experienced that before. I’ve never thought about this, but I think I’d be uncomfortable. I *was* uncomfortable [when I first came on the court]. [Laughter] I could tell him, “Allen, you’re going to wear my shoes for a while.” I never did that. We wouldn’t rub anything in. It wouldn’t be gentlemanly or anything else, certainly wouldn’t be collegial.

Administering the Court

McCreery:

Mr. Chief Justice, we agreed we would talk today about your task of administering the court system for California when you were chief justice. I wonder if you could start off by saying a bit about what you inherited from your predecessor.

Lucas:

The initial—shock is too strong a word, but the initial realization—it was obvious, of course, but the initial realization that I would have to be doing everything that I had been doing in terms of creating opinions as an associate

justice, plus all the administrative work for the court and the state—and that was very elastic.

You could do as little or as much as you wanted, and I found it to be quite demanding, but nevertheless quite interesting.

The condition of the court when I went there as chief justice—Chief Justice Bird had appointed Allen Broussard as acting chief justice, and indeed he sat in as presiding active chief justice on my confirmation hearing.

As I've said before, there were only the four of us, and we were muddling through, as the English would say, and that went on for quite some time, because it took, of course, time—months as a matter of fact—for the court to be fully staffed.

The staff itself was still—this is my word, and perhaps it's too strong a word—reeling from the elections.

It's obvious that the three judges who were not retained or not returned to office had full staffs that were working for them, and what are we going to do about these particular staff people?

McCreery:

What was the situation at that time with regard to the main part of it in San Francisco, and then these regional offices? Was the administrative office of the courts operating as one body? How was it structured in that regard?

Lucas:

It came to be operating in one body, and when we got the new building built, they had really quite splendid chambers, and hearing rooms, and all the rest of it. There was a time that the membership was scattered around, but Bill Vickrey⁸⁸ wanted to, where possible, where they were not needed in the field, have them in a central location, which he thought was a more efficient operation, and I agreed.

McCreery:

The scope of the office then, again, the AOC itself: keeping statistics and certainly performing useful functions like that, but to what extent was there a mission for the office, a support function to the council and indeed to the state? Did you have much sense of that?

⁸⁸ Vickrey served as administrative director of the Judicial Council of California from 1991 to 2011, serving three state Supreme Court chief justices, from Lucas to Chief Justice Ronald M. George to Chief Justice Tani G. Cantil-Sakauye. Vickrey collaborated with them on historic reforms. Merrill Balassone, *In Memoriam: Longtime Judicial Council Administrative Director William C. Vickrey*, CALIF. CTS. NEWSROOM (Feb. 7, 2023), <https://newsroom.courts.ca.gov/news/memoriam-longtime-judicial-council-administrative-director-william-c-vickrey>.

Lucas:

There is a mission statement that sets forth guiding principles, and California Rules of Court, Rule 1001, as a matter of fact, recites it. It worked well with the committees, in the executive and planning committees. There were a variety of committees, and the AOC worked as staff help for them.

All the advisory committee structures it worked with included the appellate committee, civil and small claims committee, criminal committee, court profiles committee, trial court budget commission, trial court presiding judges committee, court administrators committee, and the governing committee for the Center for Judicial Education and Research, and the administrative presiding justices committee. I was chairman of that committee.

One member of each one of the courts of appeal I appointed as administrative presiding justice, and they would meet with me in my chambers once a month to discuss whatever was of moment, and what we were planning.

The AOC also assisted the court technology committee, various task forces on a variety of things. Trial court delay reduction, for example, is one. They had plenty of work to do, and they did a good job.

McCreery:

It is a rather broad scope as it has developed in the meantime. But you're indicating it was a smaller scope when you took it over.

Lucas:

It was relatively—underline “relatively”—dormant when I came in. We eventually got Larry Sipes⁸⁹ from the National Center for State Courts to come in with us, and his wife also, who was excellent.

I, of course, had had some relationships with the national center as a member of the Conference of Chief Justices. But to give some background on perhaps why there wasn't this much activity—and again I seem to be violating my statement that I wouldn't publicly compare what Rose Bird had done and what we were trying to do.

But Rose Bird would not go to meetings of the Conference of Chief Justices. That is, she knew that twice a year the fifty chief justices would meet and consider a variety of important things for the system as a whole and would set policy, and all the rest.

⁸⁹ See Larry L. Snipes, *Committed to Justice: The Rise of Judicial Administration in California*, ADMIN. OFC. CALIF. CTS. (2002), https://www.courts.ca.gov/documents/Committed_to_Justice_LSnipes_Front_Matter.pdf.

I can remember the first time I went there, and they said, “Boy, are we glad to see you. Your predecessor refused to come. She said something about it was an old-boys’ club.” I thought, well, that can’t be, but that’s what it was.

Nor did she attend CJA meetings and that type of thing. She just was not—I don’t know about her interest, but she was unwilling to do that.

That, of course, slows down anything you want to do, if you’re not able to sit with them and project your ideas, your concepts, or help them project theirs. As I say, at the beginning everything was rather dormant, and you had to try the Heimlich maneuver on it and see if it worked.

McCreery:

I can understand. As you indicated before, a great many or perhaps all of your court records that might relate to these matters—

Lucas:

Had been destroyed.

McCreery:

—had been destroyed. So, you were set with a task of really starting over in some sense. Let’s go back to the beginning of the Trial Court Delay Reduction Act,⁹⁰ if we may. Where did that idea first come from, that ultimately was enacted in 1986?

⁹⁰ The act, introduced in the Legislature as Assembly Bill 3300, first added Article 5, Sections 68600 to 68612, to Chapter 2, Title 8 of the Government Code, stating that “Delay in the resolution of both civil and criminal litigation is not in the best interests of the state and public.” *California’s Trial Court Delay Reduction Act: A First Look*, 1 J.F.K. U. L. REV. 87 (1988). Many years later, Beth Jay provides some perspective, “Malcolm M. Lucas, A Personal Remembrance,” CAL. SUP. CT. HIST. SOC. NEWSL. (Fall/Winter 2016), at 8, <https://www.cschs.org/wp-content/uploads/2015/01/2016-Newsletter-Fall-Winter-Malcolm-Lucas.pdf>. It was in Lucas’s nature fruitfully and diplomatically to challenge his colleagues. For example, he suggested, “One of the fundamental principles upheld by a responsive justice system is that the public court system must have adequate resources to perform its constitutional role. By resources, I do not mean only financial support. I include the authority to handle the affairs of the judicial system, to set a course for the future, and to meet needs in an environment where fiscal resources are unlikely to match increases in demand.” It took some time and legislation, but one huge change arose from his observation. That birth of that change is reported in the *Pacific Law Journal*. “I am pleased that the editors of the *Pacific Law Journal* have agreed to publish the Judicial Council’s report entitled, *Trial Court Unification: Proposed Constitutional Amendments and Commentary* as Amended and Adopted by the Judicial Council, in the annual legislative review issue of the *Journal*,” J. Clark Kelso, *Introduction*, 25 Pac. L. J. 237 (1994), <https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1898&context=mlr>; *Trial Court Unification: Proposed Constitutional Amendments and Commentary as Amended and Adopted by the Judicial Council*, *id.* at 239, <https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1899&context=mlr>; and *Justices of the California Court of Appeal, Third Appellate District, Letter from the Justices of the California Court of Appeal, Third Appellate District, to the California Senate and Assembly Judiciary Committees Regarding Trial Court Unification (SCA3)*, *id.* at 299, <https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1900&context=mlr>; also see two negative responses to an editorial supporting court consolidation in the Los Angeles Times by Judge Tully H. Seymour, Superior Court, Orange County, and Judge Donald E. Smallwood, Superior Court, Santa Ana, both at <https://www.latimes.com/archives/la-xpm-1994-08-28-me-32093-story.html>. “In 1998 California voters passed a constitutional amendment that provided for voluntary unification of the superior and municipal courts in each county into a single, countywide trial court system. By January 2001, all 58 California counties had voted to unify their municipal and superior court operations.” *Fact Sheet, Trial Court Unification*, Administrative Office of the Courts (February 2005), <https://www.courts.ca.gov/documents/tcunif.pdf>.

Lucas:

I would say that it came from—I was thirteen years on the federal bench, and we had the Federal Judicial Center that had programs, and a number of the programs were case management.

They didn't quite call it trial court delay reduction, but it was case management, and it had most of the features of what they call trial court delay reduction: Have an early meeting with counsel; don't just have a case filed. Have a requirement that it be served on the other side, so there's a live person on the other side, and then have an early conference meeting with counsel.

At that time you ask how much time, and you tell them beforehand—this is still federal. “I'm going to be asking you what your estimate on this case is, and when you'll be ready for trial. This is something you shouldn't lightly say. You should think about it, because we're going to probably hold you to this.” All counsel are optimistic. “We'll be ready in six months.”

I said, “No, let's make it nine months. That means you'll have all the discovery complete. You don't come in and say, ‘Oh, we have two or three depositions to complete, and we'd like a continuance,’ because we won't give you a continuance. You should be careful in your initial stages with this.”

So that was very much the nature of the federal courts. Some were more stringent on it than others. Each district perhaps had its own rules. But the Federal Judicial Center, under the judge whose building was blown up, Al Murrah, and his predecessors, had that as a very definite and important thing, and it worked.

McCreery:

So, you saw there a model that could be applied in California?

Lucas:

Yes.

McCreery:

We've talked quite a bit about L.A. County, the most populous and the biggest court system. Were there other counties around the state that stood out in terms of implementing the trial court delay reduction?

Lucas:

As you know we had nine central experimental counties, and they each had different rules that they created themselves, which is what we wanted them to do. “Which worked, which didn't?” Then we found—I think it was San

Francisco that said, “We want to volunteer, before you complete all this pilot-project stuff, we want to volunteer to go full time into this.”

One of the districts in Los Angeles, the Pomona court, they said, “We want to implement trial court delay reduction now in our court district,” not the whole L.A. County, but in Pomona. “Go for it.”

You’d find that people were volunteering, courts were volunteering. They were volunteering. They were reading about all these things that were happening, and they were seeing this horde of people there that they couldn’t manage, and said “Let’s try anything.” Pomona had a voluntary, very successful trial court delay reduction. It got down to “File your case. We’re ready to hear it.” This wasn’t overnight. Maybe this took a year and a half, but I can’t remember specifically whether there were any fallen angels, courts that just couldn’t keep up, because we would then start sending retired judges there.

“I’m sending this judge down not to tell you how to do trial court delay reduction, but he’s somebody that’s knowledgeable about it, and he can also help you with your civil cases.” They appreciated that, that they were getting some help, particularly where the judge would say, “Look, I know there’s a few bumps in the road when you start this, but it’s terrific when you really have it going. You’ll dispose of half again of the cases that you’re doing, the way you’re doing it.”

McCreery:

Trial-court delay reduction was quite a feat of your administration though, in California. I wonder, all these years later, how do you reflect on the success of this program?

Lucas:

It worked so well in the federal courts. It was a proven entity, a proven concept at least, so I knew that given determination and the will to make it work by the judge, and the ultimate cooperation of counsel, it had to work and it had to be better. We just couldn’t have a system where cases would float in over the transom with a note attached, “This case is four years old. We’re now ready to try it.” So, I was quite satisfied with it.

I know since I left there have been requests by counsel, “This is too stringent. Let’s give us this, and let’s give us that.” I wouldn’t have done it. I think there has been some leeway given, which in my view detracts from the benefit of it, slightly.

McCreery:

In other words, asking for exceptions?

Lucas:

Yes.

McCreery:

Just thinking, then, overall about managing the state court system and all those complexities, the one we've just been discussing, the trial court delay, seemed to kind of set the stage for the Trial Court Realignment and Efficiency Act coming a few years later in 1991,⁹¹ and of course those efforts to make the court system more efficient and to realign the courts have continued long after you left, and resulted in unification of the lower courts and so on. But what was the earliest work that you did in this area, and what was your thinking about it at that time?

Lucas:

The unification work was completed after I left the court, but the management of the courts was still before us.

Let's take L.A. County, for example. The municipal court judges were going home at noon. They've got these small claims cases and most of them settle. They were going home, and this was a God-given right. "I only work half a day. I generally get all these cases disposed of, or I'll put them over till the next day."

The superior court judges were working long hours. The municipal court judges for all intents and purposes had no lengthy law-and-motion matters to hear, because their cases at that time were \$25,000 or less, and that was their jurisdiction. They could dispose of these cases easily—and I don't want to say easily, some of them I guess were hard—but there was a great disparity in the amount of work that was being done by the judges, the amount of work being turned out by them in the municipal court versus the superior.

I suggested that there be an agreement between the L.A. municipal and superior courts that the superior court would have the municipal courts as overflow courts, with their concurrence.

Then ultimately, of course, this matured into, "Let's just do away with the names, municipal, and everybody will be a superior court judge."

⁹¹ See Elizabeth G. Hill, *Trial Court Funding "Realignment,"* LEGIS. ANALYST'S OFC. (Feb. 1992), https://lao.ca.gov/1992/reports/trial_court_funding_realignment_393_0292.pdf.

McCreery:

This idea to do away with the names, as you put it, and just have them all judges of the superior court, where did that actually spring from as a solution?

Lucas:

Things like this. There was a court clerk in—bless her, where was she? She was the court clerk of the municipal court in a county, let's say. Sheila Gonzalez⁹² was her name, a very well-motivated woman. She was the court clerk for the municipal court, and the superior court was having the darndest time getting a court clerk that knew that they were doing.

They'd come and they'd mess it up. They'd have to try to get another one. So, they came to Sheila and first they said, "Would you be interested in coming to us as our court clerk?" She said, "Only if the municipal court agrees. I'll go and I'll talk to them, and if they agree, then we'll do that." That's what they did. Eventually they were just operating the superior and the municipal court, with one court clerk, one jury panel, one jury room, and everything was centralized with Sheila and her operation.

McCreery:

Speaking of women, perhaps we'll turn to discussion of some of the various advisory committees that were set up in California during your tenure as chief, the first of these being the Advisory Committee on Gender Bias in the Courts. Perhaps you can just talk about that from the beginning, as you remember it.⁹³

Lucas:

This was a committee that was set up by Rose just before she left the court. I'm not sure why she delayed that long, or maybe it was a new idea that had just come along, but she set it up—or maybe she didn't think I would set up such a committee. I don't know what she was thinking. But she set up the committee just as she left the court.

After she left, I expanded the membership of the committee, which I felt would make it more diversified and appointed a cochair. I left everyone on that she appointed, but I added some other members and appointed a cochair.

This committee has done a lot of good studies and has made recommendations to the judicial education system, so that we judges now

⁹² Gonzalez went from filing parking tickets as a clerk in Glendale Municipal Court in the mid-1970s to a highly persuasive and powerful administrator of the Ventura County courthouse. Mack Reed, *She's So Persuasive Judges Carry Her Bags*, L.A. TIMES, May 1, 1990, <https://www.latimes.com/archives/la-xpm-1990-05-01-me-171-story.html>.

⁹³ See again, JUSTICE IN THE BALANCE 2020, note 19, *supra*.

have programs. It's mandated that a new judge have a one-week preliminary mandatory education, and then within six months have a two-week session at the [judges'] college, which is at Berkeley, as you know. It's my recollection that there is now a mandatory program presented on gender bias.

McCreery:

You were facing an enormous new role with many, many challenges. But I wonder, what was your thinking about the committee and that whole topic, shall we say?

Lucas:

My first and initial response, which was perhaps unseemly of me, was “Rose wanted to hand me a hot potato here. But it's not a bad idea.”

I knew from going to the conference of chiefs that similar committees were being set up. It was an idea whose time had come, and within the last six months or a year a couple of other courts had set up these advisory committees and spoke of them as a good thing.

McCreery:

We can say it was an idea whose time had come, but we didn't so frequently see people at that stage making an attempt to really take a look at gender bias issues.

Lucas:

No, you're right.

McCreery:

Indeed, as I understand it, the committee's work revealed that yes, there was significant gender bias in the courts,⁹⁴ as there was just about everywhere else in society at that time. How did you proceed after the initial results were in, and what hand did you have in the committee's work as things went along?

Lucas:

Basically, not a supervising role, a reviewing role. They would make a study, they'd send me a report. If they wanted to do additional things that required assistance from the AOC, some kind of funding—minimal funding but some

⁹⁴ See *Gender and Justice: Implementing Gender Fairness in the Courts: Implementation Report*, JUD. COUNCIL CALIF. ADVISORY COMM. ON ACCESS AND FAIRNESS GENDER FAIRNESS SUBCOMM. (July 1996), https://www.courts.ca.gov/documents/imp_rept.pdf.

kind of funding—then I would approve that. It was an idea that just, as we've said, whose time has come.

It resulted in a general recognition by the judges of the court, sometimes grudgingly, but ultimately a general recognition that this was important, indeed important enough that there will be a class and instruction in this to every new judge that comes on, so they're introduced to this concept the very first thing they do, or within the first six months of what they're doing. They go to the college and they receive this class, as well as, of course, a number of others.

McCreery:

This work did enjoy your full support, it sounds like?

Lucas:

Oh yes, sure.

McCreery:

Since you mentioned CJA, perhaps you could say a word or two about the California Judges Association.

Lucas:

I had, of course, friends who'd been the president of CJA. David Eagleson, for example, was president of CJA, and some others. Of course I was experienced with it, because I was on the superior court and a member of CJA and was quite familiar with what they do.

McCreery:

What do they do, mainly?

Lucas:

They maintain a political representative in the capital. This may not be his full-time job, representing the judges, but maybe half of his work involves representing the judges.

They follow the proposed bills—a couple of thousand bills will be introduced, some by people who haven't been there that long, because of term limits and all, and some of which would be very, very destructive to the court system. Sooner or later you will find them, but they find them—we had a similar unit, by the way, in the AOC. We had a guy who was in Sacramento, and I say a guy because he was a male and would go through all the bills. Some of the bills, if you didn't hop on them at once would really, really be destructive.

So, the CJA did a good job in their monitoring and support. “We have this particular bill which will—.” Let’s jump ahead. This didn’t happen during my administration, “but which will merge the superior court and the municipal court.”

That was a constitutional amendment as I remember, but at any rate it needed some peddling in the legislature and CJA kept [a list of legislators]. After everyone’s name they would ask, “Please tell us if you have a particular special relationship with any member of the senate or of the assembly.” “Oh yes, he’s my brother. He’s my next-door neighbor. I used to be in business with him.” “Okay. Now, will you call him and tell him, ‘We’ve got to have this bill. It’s really important. I don’t call you very often, but—.’” And so CJA would do that, and it was very helpful, because how many judges did we have at that time, 1,500? Something like that, perhaps.

McCreery:

The whole matter of advocacy for judges is a bit delicate. There aren’t too many avenues for this to take place, really.

Lucas:

No. That’s another thing that the CJA does, is to maintain the rules of ethics. They have a judge and a committee that are appointed and available for telephone calls, but they write the rules of ethics for the court system.

Therefore, they know when they can and when they cannot, and what they can and cannot approach a member of the legislature about. This is all vetted out beforehand, so you don’t have somebody stumbling around irritating legislators. It’s the last thing you want to do, and they get a lot of instruction before they start their approaches.

McCreery:

And how effective were they in Sacramento?

Lucas:

I think they were quite effective.

McCreery:

It is a task, isn’t it, to bridge the gap between the judiciary and the public?

Lucas:

Oh, yes.

McCreery:

There's a lack of information flowing back and forth. I wonder, what do you think is most important for the public to know about our system that they may not have any way to know?

Lucas:

In the first place it's a confounding—not confounded, but confounding system. You say, "Let me tell you about the courts. There's the federal, and then there's the Ninth Circuit and the First Circuit and all the rest. The Ninth Circuit from the Rocky Mountains to the Pacific Trust Territories, from the Mexican borders to the Arctic Circle; that's federal law. Then there are district courts of appeal, that's still federal, and that covers a big area from almost San Diego up to San Luis Obispo, say. But that's federal also. Then we have the state courts, and there are fifty-two counties. Each county has a county seat, in this case Los Angeles, and that's where the head of the machinery of the court will be. But then, at least in Los Angeles, we have satellite courts, like Long Beach, Pomona, et cetera."

And then explain, "Each of those are court-wide operated without too much supervision from the central court."

"If you lose your case, what happens?" "Then there's the court of appeal, and there's the Second District Court of Appeal that's here in Los Angeles and covers so many counties."

"What do you do then?" "You petition for—not 'cert,' that's federal court. You petition for 'review.'"

"What does that mean?" "In the first place, it's not mandatory that they take [the case], so you're asking for a little help from the Supreme Court. It has to be a question of law that's important and significant."

Their heads are reeling. So often we would have boards put up, simplified boards. They would always ask about the death penalty cases. It amounted to trying to pass the buck. It was quite true, however.

I can remember explaining to one group about Robert Alton Harris,⁹⁵ who was the first person executed in California since 1966.⁹⁶ The case was tried in 1977 in the San Diego Superior Court. It came to us directly, of course—it

⁹⁵ *People v. Harris*, 28 Cal. 3d 935 (1981).

⁹⁶ The gas chamber was installed at San Quentin State Prison in 1938. On December 2, 1938, the first execution by lethal gas was conducted. From that date through 1967, 194 people—including four women—were executed by gas, all at San Quentin.

doesn't go to the court of appeal, it comes to the Supreme Court directly—in 1980, and in 1982 we issued our verdict, our judgment. Then you would think, well, ladies and gentlemen, that's all there is, isn't it? The answer is no.

You begin with the state habeas. We changed that around, requiring that the state habeas went forward with the state appeal and with the same lawyer, to make it more efficient.

But basically, then you start with that state habeas, which goes up the ladder and can go to the United States Supreme Court, and then the federal habeas, which goes to the Ninth Circuit and is almost universally rejected, and then has to come back—or it has to go, excuse me, to the U.S. Supreme Court, which almost universally reverses the Ninth Circuit.

But are months going by? No, years. I think Robert Alton Harris was executed—I was chief justice—I think it was 1988.

McCreery:

1992.

NOTE: In McCreery's discussion with Lucas on administering the courts, Lucas went into a deeper look at the impact on the court from the execution of Robert Alton Harris. We discuss it here, given the weight of the moment in the court's history and its death penalty jurisprudence.

“Things Were Thundering Down”: The Alton Harris Execution

Lucas:

That, by the way, was a rather traumatic experience.

Nobody on that court had had any experience with the execution of the death penalty, not that we were doing it, but we had a telephone call with the warden's office. But beforehand we were aware that there were going to be significant filings at the last minute, and so I had our court clerk in correspondence with the federal court to see what had been filed in the federal court.

They filed a federal habeas in the federal court, I think a day and a half before the execution. I told the clerk, “Go down and get a full copy of that at once and make copies of each one.” I dictated a memo, “Dear members of the court, please read this as though it had been filed with us. I have every expectation we're going to see this tonight or tomorrow morning, and it'll be very beneficial if we can say we've read it, and it has merit or it doesn't.”

It turned out to be a collection of newspaper clippings on this particular case. It was just a totally nonmeritorious filing. But sure enough in it came, about six o'clock on a Friday night, and so I got the court together at seven o'clock, and I said, "I believe you've all read this. I sent it out to you and requested that you read it. Do you see that we need to make any changes in our denials?"

"Absolutely not. This is just a spurious attempt to cause us to say, 'Gee, this is so thick we can't possibly do it. We'll have to put the whole execution over,'" which was in my view not an appropriate thing for a lawyer to do. But at any rate, so we had to sit up, we did sit up, and there were delays, and I think finally about five in the morning the warden called and said, "Do you have any other delays?"

It was going back and forth to the U.S. Supreme Court, and Bill Rehnquist was saying, finally, to the district judges here, who were continuously signing off on stays, "No further orders in this court for a stay or otherwise may be made in this matter without the prior approval of the United States Supreme Court." That's the only way they could stop the judges, because you could go to any particular judge. They went to a judge who was not too pleased with the death penalty, they went to his house. "Would you sign this?" "Yes, why not." Things were thundering down, and the attorney general's office had an open line to the U.S. Supreme Court building and were shipping these on right away. I can imagine that the Supreme Court was a little irked, too, at these things coming out at the last minute.

Finally, the very, very first time there's ever been such an order in a case like this, to my knowledge, "The district court judges in the Ninth Circuit shall not grant any stays or any other motions in this case without prior approval by the chief justice of the United States Supreme Court." Then finally the execution occurred.⁹⁷

McCreery:

What else do you remember about the atmosphere back here in California that night as you were awaiting these events?

Lucas:

Very tense and very nervous.

⁹⁷ See also *Executed Inmate Summary*—Robert Alton Harris, CALIF. DEP'T CORR. & REHAB., <https://www.cdcr.ca.gov/capital-punishment/inmates-executed-1978-to-present/robert-alton-harris/>.

McCreery:

You mentioned calling the group together, your colleagues, around seven or whatever time it was. Where were you after that?

Lucas:

I remained in my chambers. We would meet in the chambers, in the conference room, of the chief justice. There's a big table and you all sit around it, of course, in order of seniority, and that's where we met. Then we had this open line to the warden.

The execution was set for midnight, 12:01 to be exact. They do this so that there'll really be a whole day that they can fight off stays, because if the execution is at midnight and somebody comes in at 11:59 and grants a stay, then there's no time to go to the Supreme Court of the United States.

But it was very tense. We were ready for it, I must say. We had done a lot of work on this case; the staff and I were very glad in terms of the reputation of the court that we didn't have to say, as I said before, that "We received this big filing, and it's too late now for us to really read and consider it. Therefore, we'll have to grant a stay."

Having gotten it previously and reproduced it, and all having read it before it was even filed, then we were able to give it careful attention. We had hours to read it in, and it turned out, of course, not to be anything that you would need to give any significant study of. It was all about his case, but not relevant.

McCreery:

You and the other members, then, felt you were adequately prepared?

Lucas:

Yes. We felt that we had more than done our duty. This case, particularly because of its significance in terms of being the first case, we wanted to make sure that we did it absolutely correctly, and if we had to grant a stay we would. Fortunately, we didn't have to do that given the spurious nature of the final petition—it was a successive petition, and there's rules against successive habeas petitions, but we just could give a straight denial, not just on successive but on the merits, too, which is helpful.

McCreery:

As the first one in about twenty-five years, what did this represent?

Lucas:

It represented a very turbulent time in the jurisprudence of the death penalty.

Don Wright wrote the opinion *People v. Anderson*,⁹⁸ which declared California's death penalty to be cruel and unusual, and invalidated the death penalties at that time in California. Then the [U.S.] Supreme Court issued *Gregg v. Georgia*⁹⁹; I think they were doing *Furman*,¹⁰⁰ and then the California legislature passed the Briggs Amendment, which reconstituted the law. I think it followed the *Gregg* case fairly accurately as to what was required.

The U.S. Supreme Court had held (if it was *Gregg* or *Furman*, I've forgotten which) that the Georgia procedures gave too much leeway to a jury. "Shall we execute or not?" "What do we think about ordering the execution?" "I don't know. We just flip a coin." So, the court required a graduated consideration of it, and then our death penalty did include that. We modified it since in some other cases, but basically that was it.

But it was the demonstration, I guess, that the death penalty litigation was not complete by any stretch of the imagination, but that the major building blocks of it were in place and were approved by the U.S. Supreme Court. They're the ones who make the final decision, of course. It made it easier, if you can call it easier to handle these terrible death penalty cases, to analyze them, because the law was still in flux. But most of the major things had been considered and determined.

McCreery:

What effect did that have on your thinking about the death penalty as a sentence?

Lucas:

I've always said that if there were no death penalty the court would be a heck of a lot better off, in terms of labor, and the intensity of the work, and the anxieties, and all of that. But the other side of the coin is, the people of the State of California, through their elected representatives or maybe through themselves, through initiatives, have said they want the death penalty, and they want it imposed.

⁹⁸ 493 P.2d 880, 6 Cal. 3d 628 (Cal. 1972).

⁹⁹ July 2, 1976: *Gregg v. Ga.*, 428 US 153 (1976). In a 7-to-2 decision, the U.S. Supreme Court held that a punishment of death did not violate the Eighth and Fourteenth Amendments under all circumstances. In extreme criminal cases, such as when a defendant has been convicted of deliberately killing another, the careful and judicious use of the death penalty may be appropriate if carefully employed.

¹⁰⁰ *Furman v. Ga.*, 408 U.S. 238 (1972).

The United States Supreme Court has looked over all of the death penalty mechanism here in California, and has approved it in a sense, and so little good is gained from saying, “Well, gee, what if we didn’t have it, we wouldn’t have to work so hard.” We have it, and constitutionally we are the only ones that have it in the court system.

I know that Ron George is interested, and I explored it for a while, too, in the concept of sending it to the intermediate courts of appeal, and when I first introduced the idea to them, we were met by, “I don’t think we want to have those kind of cases. Boy, we’ve heard you get 10,000 pages of transcript.” I said, “How about 40,000?”

McCreery:

Yes. These judges hadn’t seen the likes of that, had they?

Lucas:

No, ever.

McCreery:

Yes, it’s a study in contrast, those two sentences—life without the possibility of parole versus the death sentence.

Lucas:

Night and day. It’s a question of finality of life. Without possibility of parole, he has his entire life to live, and through habeas and additional evidence of his innocence it can be presented at any time during his lifetime, assuming he meets the procedural rules of the U.S. Supreme Court and the California Supreme Court.

But Robert Alton Harris is not going to be able to file any more habeas. But then again, his case was confirmed by every court that considered it—the trial court, our court, the United States Supreme Court. I think even the Ninth Circuit affirmed, I’m not sure.

At any rate, it went up to the Supreme Court three times, and nobody said no. That’s my recollection. Yet it took something like thirteen, fourteen years. So, is there such a thing as too much justice? Too many of those cases will make an old man out of you, I’ll tell you that.

I told you about the one week in the first year I was chief, I told the court, “We’re way behind in these death penalty cases, and they’re entitled to as much priority as civil cases. I’m recommending that we take a week of our vacation in July and set down a solid bank of death penalty cases all week. I want to

hear if anybody has any objections to it. I think it's important, but there may be some adversity caused for one or more of you."

They were pretty good about it. They said, "No, you're right. We've got to do something about this." So that's not the most desirable thing in a judge's life, to sit for one week hearing nothing but death penalties, where the abominations that are committed man to man are just horrifying. But again, you took an oath to support and defend the Constitution of the United States and the Constitution of the State of California.

McCreery:

A moment ago, you touched also on the much larger and more ambitious access and fairness advisory committee that you formed in 1994, with all these subcommittees on race, ethnicity, gender, disability, sexual orientation—really a huge range of civil rights issues addressed. This was a major initiative under your watch.

Lucas:

A major undertaking, yes.

McCreery:

I even read that it was set out formally as the number one priority of the Judicial Council at one point in the mid-nineties, as they were developing into more of a strategic planning role and that sort of thing.

Lucas:

Yes. They were moving, slowly but surely, from the fact-gathering aspects to, as you say, the planning.

That was a great expansion of the AOC and their abilities. But as you say: [reads from page 239]¹⁰¹ "The landmark work of the advisory committee in the area of gender bias was accompanied by the work of another Judicial Council group, the Gender Fairness Subcommittee of the Access and Fairness Advisory Committee, charged with implementing the gender fairness proposals. Thanks to the work of this group, it was reported that by 1996 approximately one third of the sixty-eight original proposals submitted to the Judicial Council in 1990 had been substantially implemented. The Judicial Council's Advisory Committee on Racial and Ethnic Bias in the Courts approached its task directly by conducting public hearings. Between November 1991 and June 1992,

¹⁰¹ Snipes, *Committed to Justice*, note 89, *supra*.

thirteen days of public hearings were conducted in twelve cities [throughout California].” This was no small task.

McCreery:

Just returning, then, to the Access and Fairness Committee on the whole, and the subcommittees, I was actually wondering in those areas, given that you were taking on a lot of complicated issues, how was that work received in the judiciary here in California, that tough look at civil rights?

Lucas:

Yes. Some few members of the judiciary, often crusty old timers—I guess I’m a crusty old timer now, but I wasn’t then—viewed it, as they told me off the record: “Let’s not fool around with this folderol. We’re here to try cases and to act as a judge, and all of this is social work.”

You’d have to tell them, “We’ve got a major problem here. Not we, not California, because California’s in the forefront of finding out about it, but the whole United States. If we want to have the respect and support of the population of California, we don’t have an army to enforce our orders. We need to have the public believe that we are honest and ethical and absolutely fair-minded, without bias or prejudice, and if you have a substantial element of the population that doesn’t believe this, we’re going to have major problems in the enforcement of our orders or the acceptance of our opinions.” And they finally came around, particularly as the evidence developed.

McCreery:

Thank you for talking a little bit about that, another area of innovation it seems to me. You touched a moment ago on the fiscal pressures of the early nineties, and as you say, Governor Pete Wilson and the Legislature and all the branches were facing a difficult time. How did that affect your branch in the early nineties?

Lucas:

It had a very negative impact. Interesting, and Larry [Sipes] lays this out well in the books. Proposition 13 was passed in 1978. Do you remember Proposition 13? If you bought your house before 1978 you’ve always loved that. If you bought it afterwards, you’d say this is very unfair. The guy living next door to me is paying a quarter of the taxes that I’m paying. But that was a catalyst for the concept of state funding of trial courts, because what happened was Proposition 13 said that in terms of increasing, the appraised value or assessed value of a house is limited, and therefore the revenues to the counties are limited.

It made it very difficult for the counties to come up with the money to support the courts, which of course at that time was the whole ballgame.

I think the state was paying the superior court judges. Maybe between 5 and 10 percent of the court system was supported by the state. All the rest, the court buildings and all the personnel, were covered by the counties. Of course, it goes without saying that this made for a very ragged and differentiated form of justice in various counties.

Some counties were wealthier than others. If you were a small and poor county someplace, hiring another deputy sheriff was a big thing, and if you couldn't afford it, you'd say "We can't afford it. We can't give you a marshal, because we can't afford to—you tell me what to do." I've read this, or maybe I had a hearing on it. "You tell me who I should fire so I can hire a deputy sheriff to come to your court. Which one of these officers, eight of them in my police department, do you want me to fire so I can—" et cetera.

A very tough, very difficult thing. So at least in theory, the state funding would ensure a more uniform and regular and continuous form of income for the courts.

McCreery:

But it sounds as if, by contrast, many of the legislators may not have taken such an interest in the judicial branch, or viewed it as important.

Lucas:

Yes. Initially, long ago, they viewed the Judicial Council as just another state agency, an arm of the Legislature.

That was another reason why the Judicial Council began planning. "We're going to plan, and we're going to set forth our plans in advance, and we're going to get some approval by some key legislators, and we're going to make sure these plans are rational and will help the courts."

McCreery:

Whose idea was that, to have that in the wings?

Lucas:

It was an idea that I had from conversations with the Conference of Chief Justices. This is an equal branch of government. What if they said, "No, we're not going to fund you at all"? Do we just shrivel up and go away, and say "We've done something to offend them, and now they're not going to fund us at all." They do have that pocketbook, and I guess that's the end of the court

system? The answer is no. We will bring a lawsuit that would require them to fund us.

McCreery:

We thought we might talk a little bit more, as we did last time, about your Commission on the Future of California Courts, the so-called Vision 2020, and the associated conference that you held. I know there are many reports and official documents that came out of this long planning process, but I wonder if I could ask you to reflect on what you were trying to do in this arena?

Lucas:

Okay. By way of background, the Judicial Council began to be a planning [body]. Of course, it was supposed to be a policy-setting organization as well in its initial stages. In its initial many years, it did no planning. But then it became a planning body, making annual plans.

McCreery:

What was your role in that change?

Lucas:

Well, I encouraged it. Part of this time, I was without an administrative officer of the courts, so the inquiries from the AOC were not weekly and were not necessarily daily, but were often hourly on things to do, so I was heavily involved in all of this.

McCreery:

What was your intent behind these efforts?

Lucas:

It was to give a complete overview of what was happening in the state at the time and then look ahead to what it might be in the year 2020. We had scenarios we would discuss.

It may come to this scenario in the judicial system, that because of a variety of things—lack of funding, massive expansion of alternative dispute resolution or whatever—that we're only trying criminal cases, and we're in gray buildings filled with prisoners clanking along in chains, and that's all we're doing. If that is a possible history, what can we do to avoid that?

What can we plan now to ensure that that never happens, and that these things we are talking about—although they're potentials in the future—that we

will meet them, and best them, and change things so that we have the preferred court in the 2020s?

In other words, that we will lead and not follow, that we will to the extent possible make our own future, and that future should be a beneficial and benign future for the judiciary, and one that gives the people of California a fair and balanced consideration of their problems and does it in an equitable period of time.

McCreery:

How big a change was that, to try to take charge of your own fate?

Lucas:

It was quite a big change, because up until then you had the old graybeards that said, “It’s always been this way, it always will be. Things happen. We’ll just see what—don’t dig up trouble. Things will happen, but we’ve always taken care of them. Just let them happen and then we’ll see what we can do.” Totally reactive, that’s the way the judiciary had been.

We were opening a continuing discourse on what can happen to the judicial system in California, requiring you to consider what can happen in California generally. It was very important to know how much of a population increase there will be in 2020. Will it be sixty million? Probably by 2050 we’ll have sixty million, but whenever we have that, every population increase brings—as night follows day—with it an increase in civil and criminal litigation.

It’s just—that’s the way it works. You have to first find out, what are these projections, and then start planning for them. It opens a lot of doors to a lot of thoughtful stuff, and as I say, it’s been a form of gazing into the future that would not ordinarily have been done.

McCreery:

And you wanted to look quite a way into the future, something like thirty years nearly, from the time you started, so that’s really long-range planning, isn’t it?

Lucas:

Oh, yes, sure. Yes it is.

McCreery:

Was there discussion of how far ahead to look, or do you remember setting that up?

Lucas:

Yes. Futurists told us thirty seems to be a pretty good year. You can be much more accurate than if you say a hundred years.

Who can tell what California's going to be like? Will it have 150 million people crammed in from the Sierra to the ocean, or will there have been some growth slowing by some measures? You can't tell; it's too far away.

But thirty years was something that was possible to project with current statistics and projections and all of that. Not necessarily guaranteed, but you know in advance that there's going to be maybe another fifteen million people that'll be coming to the courthouse and expecting the same service as you're providing to the thirty million that are in California now, and you'd better be ready for them. Does it mean new courthouses?

McCreery:

Let's talk just briefly, if we may, about some of the changes that grew out of this process. I was thinking of one example, and that's the specialty courts for families, for drug cases, domestic violence. What kind of innovation was that?

Lucas:

Significant innovations. The 2020 Commission did not necessarily say, "Here is your blueprint on a drug court. You do this and you do that and the other and you have restorative justice, as it were, to those people who come here, and all the rest.

It just opened the door to the consideration of new methods of doing old jobs, and then it was left to another separate group that would be established to look into this, but whose futures were not limited. "Look at the stars and see what you see. We're not going to get there, but maybe you'll get some good ideas if you can look ahead of you and see all the things that could happen. What would be the best way, assuming that those things happen, to handle them, and to have started handling them?" So, it was a very beneficial thing.

McCreery:

Ultimately, those changes were put into place. As you say, implementation came later.

Lucas:

Yes.

McCreery:

I was wondering about your thoughts on the appropriate role of ADR in the whole system.

Lucas:

It's never been intended to be a substitute for the public courts. The volume that the public courts do compared with the volume of alternative dispute resolution experts is minimal. They do quite a bit.

Every single case that JAMS¹⁰² decides is, generally speaking, a significant case and may have time estimates for a jury trial from two weeks to two months. If you settle that case, there's going to be a shortened line in the courthouse for those who are not going to be involved in mediation or arbitration through an ADR provider. So, whatever they do is plus, is gravy, as it were.

We looked into that. How far can this expand by 2020? You make whatever estimates you can, and I'm sure that it will expand slowly, but will expand. But it's never going to be the solution. We're never going to come to the gray-walled courtroom with prisoners shuffling by in chains, and nothing else because it's all being done by ADR. That won't happen.

McCreery:

Is there any danger of going too much in that direction, in your view?

Lucas:

I suppose the primary danger would be, if indeed it is a danger, that if there was a significant amount of civil cases that were resolved by arbitration, where there is no record and there is no precedent established—it's precedent for the two parties, but it is not quotable precedent for anything else—if enough of that happened, maybe you put the court of appeal out of business, for one thing.

At the very least you would diminish the number of quotable, usable precedents in civil cases. But that's not going to happen. There are too many cases that are going through the courts, and the lawyers have enough to read just from the opinions—I think it's about 12 percent now that are published by the courts of appeal. That gives them plenty of work to do.

McCreery:

It certainly does. I was thinking about just a couple of other things that the futures commission looked at. One was more training, not only for judges

¹⁰² Judicial Arbitration and Mediation Services.

themselves but for court staff. They also looked at improving the services of court interpreters and some reforms to the jury system itself. Without needing to go into great detail, I wonder if any of those stand out to you or are of particular interest to you?

Lucas:

The jury reforms. This was discussed by the 2020 Commission, but it had also been discussed by various court people including the AOC. It was very, very irritating to people who were called for jury duty to come down on Monday morning and sit, and then at five o'clock be told, "Come back tomorrow. We haven't had need for you."

You did have a week's service that was required. You could conceivably sit there for five days without being called—a very, very uneconomic situation, but convenient for the courts themselves. We had a whole bunch of people out there. Is it going to hurt them in their jobs? We don't know. Is it going to make them irritated and feel negative toward the entire judicial system? Maybe, but we don't care.

Now we've come around to what I think is a good, workable system. It's one day, period. Sometimes you don't even report on that one day, because you can call beforehand and you've been told what your jury panel's number is, and if you're not called for duty, that's it. Or if you are down there you have one day. Can you be called for a case? If you're on the jury you have to finish that case. Otherwise you go home, and that's your jury duty, all taken care of. They do call you more often as a result, however, I must say. [Laughter]

I got called recently, was sent a summons recently. I wrote back saying, "I'm over eighty years of age now. I do want to serve, and I consider it my duty and a privilege, but can you change the location from downtown Los Angeles," which is difficult to get to in the early morning hours, "change it to Beverly Hills Superior Court, which is close to where I live?" I haven't yet heard back from them, but I know other people who have made such arrangements.

It's such an important thing to have citizens [participate], and it's important grounds or area for support for the courts. There's nothing like a juror who has gone to the courthouse and has been selected, and has gone through a case, and has seen a judge and some lawyers present a well-planned piece of litigation. They have been gifted with the responsibility of finding either guilt or innocence or liability, and they come back and they know all about it, and they're real fans.

“Would you like to give up the juries?” “Oh no, these are good people. We talked about all these points. We resolved all of them.” Many, many good advocates for the court system are created by a properly handled jury selection process and trial.

McCreery:

That’s one of the really direct avenues for a participatory democracy.

Lucas:

Absolutely. This is your chance to be part of the governing mechanism.

McCreery:

So that was very much of interest to you, it sounds like.

Lucas:

Oh, yes, very much so.

McCreery:

I just wonder, thinking back on the whole futures commission, and then seeing things that have continued to happen, of course, since you left the court, what is it, twelve years ago now. I wonder how you mark the report card. How did it go? How did it turn out?

Lucas:

Did we get our million dollars’ worth? First, it wasn’t our million. I don’t want to be crass about it, but did we get our money’s worth out of it? Yes, we did, and we’re still getting it.

It’s the pebble in the pond, and the concentric waves moving out till they reach the shore. These ideas, written down and substantiated by learned people, are being studied by people who had no idea about this, [who] come out of law school or whatever, or think tanks. This will be and is a source document for many of them.

It is also being kept alive in the AOC, because it’s part of the annual planning programs of the AOC. The ideas that seem appropriate—they can’t put them all down to be done in one year, but the ideas that seem appropriate to concentrate on can be and are being selected from the 2020 Commission report and recommendations. We had a lot of excellent people in there. We were dedicated, too.

McCreery:

Standing behind all this as chief, this strikes me as a significant mark you made on the system, one that perhaps few are truly aware of.

Lucas:

I think that's probably true. It's not the same as if you are an architect and you design a building, and you and your engineer build the building, and there it is. My God, a year ago there was nothing in this space; now we have an eighty-story building. That is something that is clear, momentous, and intrudes upon your consciousness.

The 2020 report, although publicized, and public meetings and surveys and all the rest, is now more important in the minds of the Judicial Council and the AOC and those who seek it out, because it's listed every place you look under court reform, but it's not quite as obvious as some things might be to the general public. I can't say that it was meant necessarily for the general public. They would look at this, and some of these things would be not mysterious, but would be a little complicated for them.

McCreery:

Since you're talking about the members themselves, I wonder if I could ask a little bit about the changes in the membership over the years that you were chief. We talked earlier about, of course, the reconstituting of the court after the '86 election and the arrival of Justices Arguelles, Eagleson, and Kaufman, in alphabetical order and seniority, as it turned out. But in fairly quick succession those three also retired and were in turn replaced. Of course, Justice Broussard retired as well in due time. You really saw a great amount of turnover, didn't you?

Lucas:

Yes, and there's no question that that is disruptive. An annual report would say the first year of my administration, when there were just four of us and we were waiting to get the new members, "Why is the production so low?"

You told them, "We only had four people, and we had a lot waiting to be done." There were fifty-five cases or something. The next year we produced about the standard, 125, when we got up to snuff.

But it is disruptive, because each one of the new members that comes on has to be taken care of in terms of an allotment for furniture and changes to their chambers. Everyone is entitled to their own desk and chair and carpet

and all the rest of it. But that had to be done, and they had to select their staff. Maybe, hopefully, they'd take the staff of the departing justice; maybe not, and so it was disruptive. It was more or less a continuous rumble. Was it John Arguelles who went first?

McCreery:

Yes. Then Justice Kaufman.

Lucas:

Kaufman, and then Eagleson. He was on four years, I think, Eagleson. Then Broussard was after that.

McCreery:

Yes, he retired in 1991.

Lucas:

Yes.

McCreery:

Did they give you much notice of their intents to retire, or did you have—I'm only asking, did you have a chance to kind of think ahead and figure out how you were going to cope?

Lucas:

I at one time said in a Wednesday conference early on, "Let's hope we all remain here till death, but sometimes that doesn't happen. So, if you know that you're going to retire at a particular date (which you wouldn't know if you had a sudden illness or anything), give me about six months' notice. It will be quite confidential. You're the one to announce your retirement, but I'll at least be able to think about the staffing and all the rest of it." They were pretty good about that.

McCreery:

I don't know if you thought in these terms, but did the so-called center of the court, or the natural groupings in terms of approaches to opinions, did those shift noticeably?

Lucas:

If you talk in terms of ideology, which perhaps we shouldn't, it was certainly the center of attention when Rose Bird was chief justice. When

Arguelles, Eagleson, and Kaufman left and their replacements came on, there was probably a slight turn from center to the left, as opposed to a slight turn from center to the right, with those [earlier] three. But I don't think it made an appreciable difference.

McCreery:

No, and I don't suggest it. I was just simply wondering about how sometimes natural alliances form, just as with you and Justice Panelli when Chief Justice Bird was still there, a sort of likeminded person shall we say. So, I only wondered if there were observations that you made once these new members came.

Lucas:

You got so that you could pretty well tell what the votes were going to be.

McCreery:

I can imagine.

Other Legal Themes

McCreery:

We said that we might spend some time talking today about various legal themes that took shape while you were chief justice and perhaps touch on some specific cases, but also talk about the broad ideas behind them. I want to invite you to introduce any themes or cases that we haven't talked about ahead of time that you would like to.

One of the broad areas we thought we might speak of today was cases related to insurance. You had mentioned to me last time that one set of cases that stood out for you was *Moradi-Shalal v. Fireman's Fund Insurance Companies*¹⁰³ and the fact that that decision of 1988 reversed an earlier decision by the Bird court in *Royal Globe Insurance Company v. Superior Court*¹⁰⁴ in 1979. What do you remember about the lead-in to *Moradi-Shalal* and how it panned out?

Lucas:

Of course, I wasn't on the court in 1979 when the *Royal Globe* case came down, which, of course, ruled that third-party claimants could sue an insurance

¹⁰³ *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal. 3d 287 (1988).

¹⁰⁴ *Royal Globe Ins. Co. v. Superior Court*, 23 Cal. 3d 880 (1979). Writing for the majority, Lucas wrote: "We have concluded that the Royal Globe court incorrectly evaluated the legislative intent underlying the passage of section 790.03, subdivision (h), and that accordingly *Royal Globe* should be overruled."

carrier in a separate proceeding for violating the Unfair Claims Settlement Practice Act.

It had a difficult life. Not very many courts followed it, and there was much criticism of it. Lawsuits soared, by the way, third parties filing lawsuits against insurance companies.

McCreery:

Thank you. When you say not many courts were following *Royal Globe*, can you expand on that a bit more?

Lucas:

It pushed the limits of the extension of court liability, particularly against insurance companies.

This case seemed to be an interesting example of the overextension of tort rights, creating another cause of action in an insurance case against the insurance company by third parties rather than the insured.

So, it [*Moradi-Shalal*] was very heavily briefed, as I recall, a lot of amicus curae briefs. I wasn't sure when I started this whether we were going to reverse or simply do some acrobatics and still keep *Royal Globe* alive.

It turned out that approach wouldn't work, and besides that there was a current in the court and elsewhere saying that *Royal Globe* is a case whose time never came.

McCreery:

Yes. Can you put this issue, though, in context for me in terms of the whole range of insurance issues that the court might face? How big a deal was it to address this particular issue?

Lucas:

It was probably the first of just a few of the Bird court opinions that we felt were harmful to the citizenry—impractical, difficult, and hard to apply, and that perpetuated confusion.

When that came up for review we thought, we can speak on this now. It turned out that the court, with two exceptions, 5 to 2, wanted to correct what we believed were obvious errors in the *Royal Globe* case.¹⁰⁵

¹⁰⁵ Mosk and Broussard dissented. Mosk: "*Royal Globe* (1979–1988), may it Rest in Peace. During its life it served the people of California well, particularly the victims of unfair and deceptive practices." *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal. 3d 287, 313.

McCreery:

As you pointed out, this was the first of a handful of decisions of the Bird court that your court reversed. I gather most of them were in the criminal area, other than this? Indeed, we've talked already of the ones relating to the death penalty, for example.

Lucas:

Yes, we've covered that.

McCreery:

And some of the criminal procedure. But I'm simply noting my impression from reading that there weren't so many instances in the civil area of outright reversals.

Lucas:

I suppose *Moradi-Shalal* would certainly be a limitation on tort liability for wrongful termination of an employee.

McCreery:

I wonder what other insurance cases—before we go into employment law—what other insurance cases might stand out to you as key developments in the law, if any?

Lucas:

Let's see. There was *Bank of the West*,¹⁰⁶ which gave some basic contours for the interpretation of an insurance contract.

It used to be that if there was anything—I'm speaking very broadly now—if there was anything wrong and/or ambiguous in the insurance policy, then it was all the insurer's fault, and the insurance company will have to pay, or at least there'd be various intendments taken against them.¹⁰⁷

Then *Bank of the West*—I haven't read it for a long time—basically said that it's the expectations of the consumer and whether he or she have expected coverage under these circumstances. Then consider that expectation in light of the language that was there, and that there would not be an automatic assumption that any errors or ambiguities would be decisively levied against

¹⁰⁶ *Bank of the West v. Superior Court*, 2 Cal. 4th 1254 (1992).

¹⁰⁷ At issue in *Bank of the West* was whether an insurer was obligated to provide insurance to petitioner for petitioner's violation of an unfair competition statute arising out of its advertising activities.

the insurer.¹⁰⁸ That seemed to be a little fairer way to do it.

McCreery:

This matter of interpreting insurance policies, insurance contracts—how big was that in the overall insurance landscape? Was that a frequent issue that would come to the courts?

Lucas:

Yes. As soon as we started to have toxic dumps, toxic waste sites, then a lot of complications arose. “How long has this toxic dump site been in existence?” “Twenty years.” “How many different policies have covered it during that time?” “Eighteen.” So how do you allot, if there is to be an allocation, the damages when you have a situation like that? Each one of the insurance companies would claim that they were not liable. They did it for a year, but that was it.

There seemed to be waves of litigation, all having some relationship to each other. I guess that’s natural enough.

McCreery:

I wonder, to what extent were you aware of an expectation that the court would respond in a certain way to these kinds of issues, the court as it was now configured?

Lucas:

That would generally be a matter of irritation to me if it was voiced to me directly. “You’re expecting some Pavlovian response from us, simply because this is what you would like?”

What kind of a damnation would that be? “You get what we think is right. It may be wrong, that’s possible, but you’ll get a considered opinion from the whole court. Don’t go to sleep. You’ll read the case when it comes out, and then you’ll know where the court is going.”

To leave an impression that because we were more conservative than those who were swept from office—and that’s probably true—that the law would automatically be analyzed, and the decisions would automatically be slanted one way or the other? So, no. You try to put on blinders and do the case as the law suggests.

¹⁰⁸ Writing for the Court, Associate Justice Panelli wrote: “advertising injury” must have a causal connection with the insured’s ‘advertising activities’ before there can be coverage.” *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1277.

McCreery:

Perhaps you handed out a few surprises now and then?

Lucas:

Yes, that's right.

McCreery:

Coming along later and reading about all this, there are all kinds of analysts and court watchers saying the Lucas court was friendly to insurance companies or not friendly enough. It seemed that none of them had all their expectations met, no matter what they were.

Lucas:

No, so maybe we did it right. I don't know. It's like a settlement. When both parties leave the settlement conference with tears in their eyes, having settled the case, you know you've made a good settlement. [Laughter]

McCreery:

But the whole area of insurance law is one that seems to me ever more complicated as the decades go by. Do you have general thoughts about how that landscape changed while you were on the court or even looking at it afterwards?

Lucas:

For example, with the toxic waste dumps and the, quote, "proliferation," of them and the huge expense to clean them up and the number of years that the various policies would cover made every one of them a very, very difficult, convoluted problem.

But we went through and made rules as we went along. "That'll cover some of the cases. We'll wait for the next one," not that it's entirely done. I haven't followed it under Justice George, but we went a long way in clarifying what is a difficult topic, a difficult subject.

McCreery:

We had mentioned perhaps talking a little bit as well about an insurance matter related to Proposition 103, passed by the voters in November of 1988, and that was insurance reform, requiring a 20 percent rollback in auto insurance policy rates, for example, and a matter that came up to you on the Court in the course of things. What do you recall about that whole matter?

Lucas:

It was an important case and highly publicized. We are speaking now of *Cal Farm Insurance Company v. Deukmejian*.¹⁰⁹ As I recall, I used my powers as chief justice to take original jurisdiction of the case and not have the public have to wait as it wends its way, ably and all the rest, through a court of appeal. This was an important enough measure that we should have a decision one way or the other.¹¹⁰

Can you remember, the courtroom was packed for oral argument? I think I granted approval for a telecast. We had been doing that in a few of the cases that came down where there was huge interest but not enough room. I wanted this opinion to be unanimous, if possible, because it's an important issue and the public should think that whatever we come up with, that's right. It was unanimous.

I assigned it to Broussard, and this, as I say, was a major objective as far as I was concerned. In my view it negated any possibilities that people would think that this had any political undertones to it.

McCreery:

We've talked a little bit before about these ballot measures that come up to you. I'm just noting with interest your feeling that it was worth expediting, shall we say, the court's work on this measure so that the people would have an answer.

Lucas:

I can't point to anything in writing about it, but I had the sense that our court, with three exceptions that I'll name, was willing to give great deference to the initiative measure.

After all, this was the people who elected our representatives in Sacramento now coming to us directly with this.

Now, oftentimes they were poorly worded and perhaps ambiguous and all the rest. But nevertheless, they represented a semi-pure democratic way of getting something resolved one way or the other in the courts. I think we

¹⁰⁹ *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805

¹¹⁰ At issue were provisions in the 1988 auto insurance law that stemmed from Proposition 103, requiring a rate reduction to 20 percent below 1987 rates, limiting interim first-year insurance rate relief to companies substantially threatened with insolvency, and requiring a mailing to notify insurance customers of the opportunity to join a nonprofit corporation to advocate their interests. The court held the insolvency standard on its face was unconstitutional and that the formation of the consumer advocacy corporation also violated the state's constitution. The opinion was unanimous.

generally were deferential to them, including wanting to have them resolved as speedily as possible.

I got the sense that probably Mosk, Broussard, and Kennard¹¹¹ were—they could take it or leave it, an initiative measure, not that they were openly belligerent against them; they weren't. But there was less of a feeling that the people have spoken and we should listen to them as soon as possible type of thing.

McCreery:

Let me return just briefly to “three strikes,” or at least to related things. You touched early in our discussion just now on the prison population, and this, of course, was a period of time when many new prisons were being built in California and the population was growing. Then as three strikes went into effect evermore, I just wonder how you reflect on that whole picture, that whole change in California’s citizenry? I was only wondering how you saw the entire landscape of the prison population change.

Lucas:

The option to place people in prison is what, exactly? Is it to be four years in an institution of higher learning? I don't know. I doubt it, for many of the prisoners are—it's very unfortunate, but they're raised in a gang atmosphere, and they have gang responses to questions and issues, which may include shooting or knifing or whatever else.

I don't see that there's too much of a chance to do much but give them the opportunity to choose for themselves to take a path to rehabilitation. It's really up to that particular individual. We must have something to offer them, of course. They can come out as a welder and make a good life being a welder, or they can come out being a much more savvy criminal and take their chances with society. Very difficult problems.

McCreery:

Speaking of three strikes, that reminds me of something that you mentioned briefly when we were talking about three strikes a few minutes ago, and that was the cameras in the courtroom. You were saying you allowed there to be remote televising of the proceedings because of the nature of that particular case. Talk a little bit about, in general, cameras in the courtroom and what you feel the appropriate role is and when it should be allowed.

¹¹¹ Associate Justice Joyce L. Kennard was appointed by Governor George Deukmejian in April 1989. She served as chair of the California Judicial Council's Appellate Advisory Committee from 1996 to 2005. Before that, she had served as associate justice on the state Court of Appeal in Los Angeles (Division Five) and judge of the Los Angeles County Superior Court. <https://www.courts.ca.gov/5760.htm>.

Lucas:

Yes. If I had my druthers, and I was a despot—benevolent, of course, but a despot—I would never have a camera in the courtroom.

I'm talking about non-jury matters, of course, before us. It just causes a difference in the way counsel argue the case. "Do I have my sound bite ready, and when should I give it?" and the way that some members of the court—"Shall I ask my perfectly penetrating question now, or should I wait a little bit?" It detracts from the real process, in my view.

It is a learning experience, to some degree, for people to see it who have never been to a court. That I'm sure is a plus. But all in all, I would never have it.

McCreery:

You didn't want a circus in there.

Lucas:

No. Exactly. I daresay if you got the counsel together, someone would definitely vote against it. Some want to have it, a little free publicity, but a lot of them would not want to have it.

McCreery:

Did it work out OK in those few times you allowed it?

Lucas:

Yes, it worked out OK. Nobody turned and argued to the camera if that's what you mean. [Laughter]

McCreery:

We mentioned that we might talk briefly about one other area of the law that came up while you were on the court, and then where a different decision was reached after you left. We have touched on this in earlier meetings, but this is the matter of whether a girl who is a minor in California needs a parent's consent to have an abortion.

McCreery:

Yes, in *American Academy of Pediatrics v. Lungren*.¹¹²

¹¹² *American Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307 (1997).

Lucas:

Stanley Mosk wrote that decision. I joined it, but it was 4 to 3.

McCreery:

Yes. Maybe you can just summarize what that was, and then what happened after you left.

Lucas:

The summary that I would give was from the opinion itself, Stanley's opinion itself, or maybe he told me this in a conference, but something to the extent, "It's absolutely outrageous that we would permit a fourteen-year-old girl to go and get an abortion without having to consult with the parents." And then here's his clinching line. "You have to have a parent's consent to get a tattoo if you're under sixteen, and here we don't consider this as important as getting a tattoo." He said, "It's just mystifying."

The other side of the coin is, you don't know what kind of a house she's coming from, and maybe she's being abused there.¹¹³

These are very delicate things. But as I recall, there was a mechanism where you could go—a little clumsy—but you could go before the court of appeal and get a ruling on whatever was bothering you. But at any rate, that sums it up, was the way Stanley put it a little roughly, perhaps.

McCreery:

Of course, in this case you and Justices Baxter and Arabian voted with him.¹¹⁴

Lucas:

Yes.

McCreery:

On the subject of new developing areas [of the law], I did want to just very quickly touch today upon last week's decision on gay marriage by the

¹¹³ It was the other side of the coin when at a moment of significant turnover on the court in 1996, the justices—now with Lucas retired—agreed to reconsider their ruling upholding a state law that required minors to obtain parental consent for abortions. Lucas and Arabian had just left, this losing two of the four votes needed to uphold the 1987 law. The initial Lucas court's ruling was scheduled to become final not long after the decision, on April 4, 1996. But with the pending turnover, the court extended the deadline to reconsider. And it did, culminating in the reversal. See Maura Dolan, *State High Court to Revisit Ruling on Abortion Consent*, L.A. TIMES, May 23, 1996, <https://www.latimes.com/archives/la-xpm-1996-05-23-mn-7428-story.html>.

¹¹⁴ In the reconsidered decision, Chief Justice Ronald George was joined in the majority by Associate Justices Kathryn Werdegar, Joyce Kennard, and newly joined Ming W. Chin and Janice Rogers Brown. Justices Mosk, Baxter, and Brown dissented.

California Supreme Court¹¹⁵ as perhaps an area that was being newly shaped as time goes on, and just how you viewed that one coming down?

Lucas:

To me this is something on which the public had already spoken. The proposition inherent in this had 4,600,000 people approve it. There's also a Legislature that, if this was necessary, could do it, and for us to push our way to the front, to be the second state to proclaim this, I thought was just unnecessary, and it's not the duty of the court.

McCreery:

Yes, I did want to explore the court's duty vis-à-vis the Legislature's duty. That is a question, isn't it? Where should this matter be handled?

Lucas:

Yes, and particularly when there had been propositions on it. I gather we're having a subsequent initiative. I think the signatures are already obtained on it.¹¹⁶

McCreery:

I believe just recently they were completed.

Lucas:

Does it say more or less what was said in the prior initiative, except it will come after this decision and therefore nullify it?

McCreery:

I don't know the details.

Lucas:

I think it's relatively modest in its length. "A marriage is a union of a man and a woman," something like that.

¹¹⁵ McCreery's interview with Lucas came just a week after the court decided on May 15, 2008, in the landmark *In re Marriage Cases*, 43 Cal. 4th 757, that the right to marry, as embodied in Cal. Const. art. I, §§ 1 and 7, guaranteed same-sex couples the same substantive constitutional rights as opposite-sex couples, including the right to choose one's life partner.

¹¹⁶ Proposition 8, seeking to add the phrase, "Only marriage between a man and a woman is valid or recognized in California," to the California Constitution, would ultimately make the subsequent November's ballot. And voters approved it. It made its way to the federal courts, where in 2009 a U.S. District Court held that Proposition 8 violated the U.S. Constitution's Fourteenth Amendment. Ultimately, a U.S. Ninth Circuit panel affirmed that Proposition 8 violated the U.S. Constitution. On June 26, 2013, the U.S. Supreme Court's majority opinion in *Hollingsworth v. Perry* held that proponents of California's Proposition 8 lacked standing to appeal the lower court ruling invalidating the measure as unconstitutional, restoring marriage equality for same-sex couples throughout California. *San Francisco's Legal Fight for Marriage Equality* (June 26, 2014), S.F. CITY ATT'Y OFC., <https://www.sfcityattorney.org/2014/06/26/san-franciscos-legal-fight-for-marriage-equality-2>. A year later, the U.S. Supreme Court decisively resolved the matter in *Obergefell v. Hodges*, 576 U.S. 644 (2014), a 5–4 decision, with the majority opinion authored by Justice Anthony M. Kennedy.

I didn't write it and I don't know, but it's very brief, and that will be inserted, they hope, in the Constitution, and therefore in their opinion will void the decision that has just come down, that is not final yet, but will be final shortly, unless they stay it.

McCreery:

Thank you. It certainly is a major case with a lot of ramifications, and we all watched with great interest to see how it would go. As you say, it is not over yet.

McCreery:

I actually wonder if I could ask you about one other key case that I neglected to put on our list. I think we may have touched on it very, very briefly, but I came to realize we didn't talk about it that much. The court had a minor role in a much larger drama, and that was *Wilson v. Eu*¹¹⁷ in 1992, the case on deciding the reapportionment plan for the 1990 census.

Lucas:

Wilson v. Eu.

McCreery:

Yes, and just to remind you, the Legislature had tried to come up with a reapportionment plan. Governor Wilson vetoed it, and so the court was asked to appoint a panel of special masters to do a new plan.

Lucas:

Neither the governor nor the Legislature could agree on a redistricting or reapportionment plan, and so there's only a third branch of government, and that's us. They said, "Will you please redistrict or reapportion?"

There was the handwringing and predictions of doom. "This far-right court will mangle all the districts, and we'll all be out on the street. The sky is falling."

Fortunately, unpersuaded that this was going to occur, we did what seemed a perfectly rational thing to do and a fortunate thing to do. We got the guy, I've forgotten his name, a very able guy, who did the reapportionment before. Do you happen to have his name?

McCreery:

The names that I have for the three special masters are George Brown of the Fifth District Court of Appeal, Rafael Galzaran of L.A. Superior, and Thomas Kongsgaard of Napa Superior?

¹¹⁷ *Wilson v. Eu*, 1 Cal. 4th 707 (1992).

Lucas:

Yes. We also had witnesses, expert witnesses on this law, who had done a prior reapportionment or redistricting. We had them come in and we spoke at great length. We gave them a significant amount of instruction, not on how they do their job, but on what to avoid.

We do not want to have umbilical cords straying all over the State of California, with one bulb in one part of the state that has many Republicans and/or many Democrats, connected with another place that has many Republicans or many Democrats, guaranteeing a sure seat, a sure district. It's not only foolish, but it's just got to be—you can't do that and have a rational government.

So, we gave them a series of directions, some of which they solicited from us. "We think it's improper to have," for example, "noncontiguous districts." Sometimes the result of having contiguous districts melded or changed is to no longer have a safe seat. I think that happened to maybe, let's say half a dozen, I don't know. Not very many, not a significant number of people, and it often happens in every reapportionment. But they had gerrymandered the state up so that everyone's got a safe seat.

Generally speaking, we would not really know who was in any one of the districts of the Assembly or the Senate. Some would be names that you would recognize, but generally it was just, "Let's do numbers on this," and we got great census and statistical figures, and matched it up, and then met with the experts again. It was a job well done.

McCreery:

Recognizing that you were not in the trenches with this, do you recall much about the discussion of how to think about so-called minority districts, and give special notice to certain areas for that reason?

Lucas:

I can't remember an emphasis on that. This would be the expertise of the professionals that we had.

Usually a minority district will have a cohesive allegiance to a particular political party, so that bloc of political party members more or less controls—are they red, white, or blue? I don't know, they're all Democrats. I don't know, they're all Republicans. So, you start with that.

I'm sure we would want to avoid, again, an umbilical cord bringing a group of blacks, African Americans from one part of the state in with another, so

there's a nice, solid African American district. It would be completely contrary to what a fair redistricting would have required.

McCreery:

Were you called upon to do any other peacemaking in this redistricting matter?

Lucas:

No. We talked to the whole Court, and they were very happy.

I told them, "We're putting on blinders here. You may have a friend who is a member of the Assembly, but because of some necessary readjustment he or she is going to be out in the street. It's called collateral damage, and there may be some collateral damage." There wasn't enough to be at all concerned about, but I warned them of this as a potential result.

No, it went nicely, and it was a good job. We had the satisfaction of doing a good job and one that helped the people of California.

McCreery:

There was a case asking whether the state privacy laws were violated by mandatory drug testing of college athletes, *Hill v. NCAA*, 1994.¹¹⁸

Lucas:

That was the *Hill* case. I think I wrote that, did I not?

McCreery:

You did.

Lucas:

It's a question of the right to privacy versus the protection of the public's right to know that whatever athletic events they were attending were not rigged and that all the participants were being given a fair shake.

They were not that intrusive. My God, the opposite side had these athletes out in Times Square doing what they had to do to create a sample. The loss of dignity was overwhelming.¹¹⁹

¹¹⁸ *Hill v. National Collegiate Athletic Ass'n*, 7 Cal. 4th 1 (1994).

¹¹⁹ At issue in this landmark case was whether the NCAA's drug testing program violated student athletes' state constitutional rights to privacy. In his opinion for the majority, "a student athlete's already diminished expectation of privacy is outweighed by the NCAA's legitimate regulatory objectives in conducting testing for proscribed drugs."

Most of these people were glad to have something which assured them—it's like the steroids that we're into now, particularly Barry Bonds. It was the same type of thing, except there hadn't been a scandal. I think it came out well, and it's been followed.

McCreery:

And indeed, you did. You were quite effective at handling a number of the cases, setting aside those you couldn't work on. Of course, you did have the new people coming in after that very early time, and then you continued to have a lot of turnover in your colleagues.

Lucas:

We did have a lot of turnover.

McCreery:

As we were just saying last time. What did you say, something like, "Change was the norm"?

Lucas:

Yes, yes.

McCreery:

So, thinking maybe in the middle and later years when you'd had a chance to put through a number of your initiatives on administering the court system, and the Supreme Court itself was a bit more humming along than it had been, I wonder just how you viewed your role, or what was your focus, and how that might have changed?

Lucas:

I was glad to get help on the administrative side—help in the form, say, of Justice Eagleson.

He'd been two terms the presiding judge of the Los Angeles Superior Court, the largest trial court in the world, I'm told—at least he told me that. California's court system is larger than the federal system, so we're talking about lots of things whirling around, lots of bodies and lots of ideas being transmitted.

He was very helpful in the changes that we made internally in the processing of cases by the Supreme Court, and worked out many of the details, and was very helpful in going personally to other members of the court that might have some concern about this. "Let me explain my idea," he'd say, "and I want to hear yours."

But the idea of reinstating the ninety-day rule is fairly obvious. He didn't have to do much arguing about that. I stated it is fairly obvious. "Everyone else in the world is conforming to this except us. We're supposed to be leading and setting the example, and we're just violating it. We're saying three years later, 'We filed our opinion. Now we've submitted the case. Then and only then does the ninety-day rule start.'"

So basically, the ninety-day rule was never effective when I was on the court as an associate justice and before then. Nobody worried about living off their savings because they'd been slothful in coming out with an opinion. The rule was emasculated, eliminated indeed. It didn't take much discussion to reach agreement on that.

McCreery

Recognizing that you were a group of seven independent, strong-willed judges, I wonder what were the thorny patches in being a leader of such a group?

Lucas:

First, I told myself, don't get excited by dissents.

There were a couple of members of the court that liked to shape the dissent like a javelin and hope that it hits within an inch of your heart and no further away.

"This court has descended into the depth of," blah, blah, blah. It is possible and it occasionally happened when—Don Wright used to do this, too.

Go into the chambers, "Look, X. I think you've gone a little bit too far here. I've had some complaints from other members of the court. Why don't we take out this javelin-through-the-heart aspect of it. Put in anything else you want and, of course, your dissent will remain a dissent and will not be changed in any way by eliminating this criticism of the court as a whole, 'descent into the depths of hell, and we only have a few more minutes to live,' blah, blah, blah. We can take that out without really injuring the dissent."

Inevitably, one on one, the judge would say, "There's no pride of authorship in this, and you're right. It doesn't really belong here, and I'm happy to take it out." "Thank you. As always you're gracious, and it's a very helpful thing." So, you just don't get excited by anything.

My brother used to say—he was a great traveler, and after he took the bar he took a trip around the world with another friend of his from USC law school. His motto was, as far as travel, "Don't panic. Don't panic. If you miss an airplane, another one will come along. If this and that happens, don't

panic.” It’s not a bad admonition to give yourself. Is the world coming to an end? Don’t panic.

McCreery:

You were aiming for a steady hand¹²⁰ at the helm?

Lucas:

Exactly, and someone that is fair, hopefully, and understanding of their problems.

McCreery:

But that does really illustrate the theme of some amount of harmony in this group, and collegiality and ability to work together. This to some extent was surely reflected in your decisions. Many of them enjoyed a strong majority as they came out. I got to wondering how highly you valued unanimity by the court?

Lucas:

I thought it was an important aspect of a successful judiciary, obviously not mandatory. The United States Supreme Court puts out separate and concurring and this and that, and when you’re all done, you know, “Who won?”

McCreery:

Why is it important for the court to speak with one voice, or at least some unified voice?

Lucas:

I view the Supreme Court as a separate entity unto itself, not a group of individuals who happen to have dropped by. I have always thought and felt and occasionally expressed that reasonable accommodation should be made toward the ultimate goal of a unanimous opinion.

There’s nothing worse, in my mind, for lawyers and for that matter the public, if a continuous stream of fractured opinions come out of the court, and one side saying, “What are these buffoons doing?” and the others say, “Ah, at last we’ve discovered the holy grail,” and they’re trying to find out what it’s really all about. It’s bad for the property owners, it’s bad for the citizens, and bad for business. It should be something where you can with some clarity go to find out what your rights are.

¹²⁰ Governor Jerry Brown interestingly noted upon Lucas’s death that “Chief Justice Lucas led California’s highest court with a steady hand and a probing mind.” Bob Egelko, *Malcolm Lucas, Former California Chief Justice, Dies at 89*, S.F. CHRONICLE, Sept. 29, 2016, <https://www.sfgate.com/news/article/Malcolm-Lucas-former-California-chief-justice-9406387.php>.

Of course, it always changes. Things happen, and laws and initiatives and referenda are passed that require additional review, but basically I feel that a justice should dissent only on a very important point, only when it's necessary on an important point.

McCreery:

To look at the other side, what is the role of dissent in the process? When is it important? Did you think of it as serving a particular function, as the law is shaped, or how did you look at it?

Lucas:

The dissent? Keep in mind, I went on the court to replace Frank Richardson, who was retiring. He was a conservative and so was I. I was the only conservative on the court. So, did I think that dissents were important? I thought they were vital.

How can this court live without my views and my scolding on what they're doing? I wouldn't have taken the job if I couldn't have dissented.

Why would I want to come up there and drink coffee while they ran the court off a cliff, as it were, in my view? This is when Rose was chief justice, and you must gather that I had some, let's call them differences with her and her conduct of the court.

There are ways to minimize dissent. One thing would be by example. I tried to dissent as seldom as possible, and I would tell the new members coming on, "Look. It's up to you. We're constitutional officers, and we can do pretty well what we want, but I'll give you my philosophical view," and I'd talk to them about just what we're talking about. If you could live without the dissent, it's far better. If you can't, we've got printing machines that'll take care of it, and maybe you'll persuade the majority opinion? Who knows? I have no comparison on how many dissents we had compared to anyone else. That's the next thing that Jake Dear should do, maybe. [Laughter]

Final Thoughts: "Most Lasting Effects"

McCreery:

Maybe so. Just in a summary mode then, I'm wondering, what do you think are the most lasting effects of the Lucas court in any arena that was part of your job?

Lucas:

The election of 1986 was an earthquake for the court. Suddenly we're bereft, lost three members, and we'd been living under a shower of political propaganda in all the newspapers for almost a year.

There was not much in the way of collegiality, I must say, among the court as a whole, and I lay a lot of blame on Rose. I've talked about this before, so I won't talk about it anymore. But I tried to make the court as collegial as possible, to put us back in the mainstream.

For thirty years or more the court had been running the ship of the court up against the left bank, and it had a reputation for that.

The writers on the law, the professors on the law, delighted in this. This was something that fit their philosophies and their ideologies, and they were quite accepting of this and not desiring any type of a change. I felt it was not representative of a court that was open and going to give all sides of a question a fair shot. But I was hoping that I could get some quiet.

I remember a press conference, or maybe it was an interview, where I was asked, "Do you think this kind of an incident is going to ever happen again?" My response—I don't know where it came from, but my response was, "No. This is like a hundred-year flood, and I don't believe it's ever going to happen again to this court. We've had an unusual series of circumstances, but as far as I'm concerned, it's not going to happen again. The court will resume its principal occupation, and we hope to turn out good, well-reasoned opinions that will satisfy the people of this state." That's what I was trying to do.

In fact, I think I said to one reporter, who I had talked to before and who asked me a question, "What's going to be the latest bombshell that drops?" I said, "Look. It's going to be very quiet around here, productive, humming along, but very quiet. You might think about asking for an assignment overseas if you want excitement, but not here in this court, believe me." He laughed a little bit, and I hope it turned out that way.

Between the "Quiet" and the "Counterrevolution": An Epilogue

By 1995, Lucas was taking "a fresh look" at his future. In the immediate rear view, he was fresh off a difficult episode.

Lucas himself asked for an investigation¹²¹ after the *San Francisco Chronicle* reported in late 1993 that he had spent fifty-three weekdays out of state in

¹²¹ *Justice Lucas Seeks Ruling on Trips*, L.A. TIMES, Nov. 20, 1993, <https://www.latimes.com/archives/la-xpm-1993-11-20-mn-58876-story.html>.

1992 to attend an array of legal conferences and events. He was reimbursed for two of the trips from a subsidiary of a corporation that had cases before the court, though Lucas voted against the corporation's interests in two cases that came before the court after the trips.¹²²

Ultimately, the California Commission on Judicial Performance found “no basis” for disciplining Lucas. But it stung.

As Greg Lucas noted, his father “was very, very cognizant of the appearance of impropriety. We can't just not do bad stuff,” and adding that his father believed fervently that public servants “have to be above the fray.”

In McCreery's Q&A with Lucas, he welcomed her queries on the matter—which came late in their interview, as he quipped, so he wouldn't “snap [her] head off.”

“After this came out I was very, very irritated,” he said of the *Chronicle* article. “So, I called in one of my law clerks, and I said to her, ‘I want to have a request to the Commission on Judicial Performance for a complete review of this. Tell them that we're going to file this, and get whatever papers are appropriate and necessary. Get them all out, and all the bills and everything else, and ask them to investigate.’”

Indeed, as Lucas noted with McCreery, he was trying to advance the business of the court by engaging in the conferences, often with other judges.

“I was active in the Conference of Chief Justices. I headed up a couple of committees for the ABA, one a very important study of habeas corpus in the death penalty, where the committee went around holding public meetings, mostly in the South, to see what was happening there. It wasn't a pretty picture, either, and a variety of other things. I was keeping up my cases. That's the first responsibility, and I made sure that was done.”

Ahead of him, he saw a life beyond the bench nearing. Two years prior, he'd remarried, to Fiorenza Courtright, a Beverly Hills socialite.

It was time. After twelve years on the court, nine as chief justice, it was time to let someone else in. More time for his wife. Time for more reading, and collecting books, a favorite pastime. Time for a knee replacement. Time for travel, still a sense of adventure long embedded in his blood.

“I'd pretty well worked my entire life,” he told McCreery, reflecting on his young self, working at Douglas Aircraft, and at Southern California Edison's legal department during law school.

¹²² *State Chief Justice Lucas' Travels Did Not Violate Ethics, Panel Says*, L.A. TIMES, Jan. 29, 1994, <https://www.latimes.com/archives/la-xpm-1994-01-29-mn-16622-story.html>.

Lucas retired in May 1996. By then, the balance of power on the court was shifting back to something more centrist, and the power of Lucas himself appeared waning.

At one point, then USC law professor Erwin Chemrinsky mused out loud on the benefits of a change at the top of the court—a court that while not broken by the simmering resentments of the 1980s may, he said, have needed a chief justice with a higher profile.¹²³

Still, as Lucas sat down with McCreery in 2007, an old friend was about to chime in on the legacy of his former law partner back in Long Beach. “Through his matchless efforts and strong faith in the judicial system, he provided the leadership which restored respect for the court,” George Deukmejian wrote.¹²⁴

Lucas simultaneously led a kind of quiet conservative “counterrevolution” on the court while also achieving a certain kind “humming along”—catalyzed by a knack for collegiality and administrative prowess—that he hoped separated his chapter from his predecessor’s. His rulings were often underpinned by a fidelity to the idea that policy should be made by legislative act and the voters, not the courts.

He would raise the ire of members of the legislature after upholding a voter initiative limiting the terms of legislators and state officials and cutting the legislature’s budget by 38 percent.¹²⁵ He referred to new curbs on an “entrenched, dynastic legislative bureaucracy.” It irked lawmakers so much that they canceled the chief justice’s annual address to the legislature. And it would lead to retaliation from a legislative committee that briefly sought to cut the court’s budget by the same amount.

Lucas would lead the first conservative court in thirty years, backed by an unprecedented retention vote. He would tackle the loads of capital cases, turning Bird’s doctrine of “reversible error” into “harmless error.”

Major Bird-era rulings and doctrines that once swung against insurers, employers, and drug companies and for consumers, labor, and criminal defendants, would be overturned. As court watcher and legal journalist Robert Egelko noted, the Lucas-led “counterrevolution”¹²⁶ would lead to lasting

¹²³ “We may get a chief justice who is more involved, who uses the office much more as a platform,” Chemerinsky told the L.A. Times in 1995, as speculation emerged, just after Lucas announced he’d be retiring that May, as to who might become chief justice. “Lucas wasn’t a terribly visible figure. My guess is most people in the state couldn’t tell you who the chief justice is.” Maura Dolan, *State Chief Justice Lucas to Retire*, L.A. TIMES, Oct. 1, 1995.

¹²⁴ Deukmejian wrote the introduction that preceded McCreery’s longform Q&A.

¹²⁵ Robert Egelko, *The Supreme Court: Right, Left and Center*, DAILY JOURNAL, Sept. 2, 2006, <https://dailyjournal.com/articles/312072-the-state-supreme-court-right-left-and-center>.

¹²⁶ *Id.*

impacts on a range of legal issues, from tort liability to capital punishment.

And yet, he noted that few executions actually took place, and the rightward momentum that Lucas ushered in would eventually ebb, giving way to a more centrist court.¹²⁷

Lucas died on September 28, 2016, thirty years after he became chief justice. He left a court, in his words, “humming along.”

Eight years after his death, his actions to establish a more collegial tone echo in a Court that is simultaneously (1) the most diverse in the nation,¹²⁸ with different backgrounds and viewpoints; (2) obscure to the public (in contrast to the U.S. Supreme Court)¹²⁹; (3) distinctively unpolarizing (again, unlike the U.S. Supreme Court); (4) among the most consequential of the state’s branches of government; and (5) increasingly unanimous in its opinions.

In her foreword to the *Loyola of Los Angeles Law Review* to a symposium¹³⁰ on the California Supreme Court, former Chief Justice Tani G. Cantil-Sakauye offered insight into that unanimity. Reaching consensus, she said, is about the court’s deliberative process. She pointed to several conversations among justices “at different stages of a case’s progression.”

“These conversations are nothing out of the ordinary—in fact, they are essential—at an institution such as ours,” she wrote. “But especially in light of the current state of public discourse, our procedures may deserve a closer look insofar as they demonstrate how people holding diverse views can work through difficult issues in a manner that is both civil and thorough.”

The dialogue among judges starts at petition conferences, moves to a conversation around memorandums, which leads to some back and forth and an exchange of ideas, and ultimately a majority coalescing around a tentative analysis and ruling on a case before it even gets to oral argument.

A momentum is created for resolving differences. Oral argument then becomes a way for justices to “engage” with counsel over issues developed in the dialogue among justices. The “conversation” sounds familiar. It’s what Lucas was after, notwithstanding a justice’s political viewpoint.

¹²⁷ Byrhonda Lyons, *Four Justices Vie to Keep Spots on “Collegial” California Supreme Court*, CAL MATTERS (May 2, 2023), <https://calmatters.org/justice/2022/10/california-supreme-court-ballot-collegial>.

¹²⁸ Janna Adelstein & Alicia Bannon, *State Supreme Court Diversity—April 2021 Update*, BRENNAN CENTER FOR JUSTICE (April 20, 2021), <https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-april-2021-update>.

¹²⁹ Lyons, *Four Justices*, note 127, *supra*.

¹³⁰ Tani G. Cantil-Sakauye, *Foreword*, 53 *LOY. L.A. L. REV.* 369 (2020), <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=3070&context=llr>.

To this day, former Chief Justice Ronald George¹³¹ touts the effort “to work things out”¹³² in the pursuit of a unanimous court. Lucas’s successor remains in admiration of Lucas’s bond with Stanley Mosk, who while ideologically on different sides of the political spectrum found common ground in ways that Bird and Mosk could not. That was despite how, on paper, Bird and Mosk seemed like a stronger match ideologically.

“He was often a dissenter to Lucas but they still got along very well,” George said of Mosk. “They were able to talk about their differences, able to work them out sometimes, and sometimes not.” “That’s a tribute to Lucas,” George said—adding it was an example that resonated as he led the court. “I certainly tried to continue it. And my impression was that my successors certainly did.”¹³³

Lucas’s son, Greg, acknowledged he’s no objective observer of his father’s legacy. But in reflecting on the polarization of the current national moment, he echoed Ronald George. “You can have a nice relationship with your colleagues and still disagree,” he said, reflecting on his father’s relationship with Mosk, “who couldn’t have been more different in their politics.”¹³⁴

It’s about finding “reasons for commonality,” he said. “Just the very act of doing that gives you a better perspective. That’s the thing that has largely died in our politics.”

His father put it another way, pointing back to his childhood days back in Long Beach, and his own mother. “She was a truly magnificent woman,” he told McCreery. “My brothers and I were very fortunate to have her, after my father died, give total dedication and devotion to us and to, in a very quiet way, ensure that we were on the straight and narrow, we got good educations, and we went ahead.”

¹³¹ George was appointed to the Supreme Court by Pete Wilson in 1991. He succeeded Lucas as chief justice in 1996 and served until his retirement in 2011. His story is an Oral History Q&A in itself. And that’s exactly what McCreery did. See RONALD GEORGE & LAURA MCCREERY, CHIEF: THE QUEST FOR JUSTICE IN CALIFORNIA (2013). See also McCreery’s primer on her work on George—*Chief Justice Ronald M. George Records Comprehensive Oral History*, CALIF. SUP. CT. HIST. SOC. NEWSL. (Fall/Winter 2011), <https://www.cschs.org/wp-content/uploads/2014/08/2011-Newsletter-Fall-Ronald-George-Records-Oral-History.pdf>.

¹³² Telephone interview with former Chief Justice Ronald George (Aug. 17, 2024).

¹³³ *Ibid.*

¹³⁴ See notes 7, 22, and 61, *supra*. Mosk’s colleague, William P. Clark, were also close. “Clark viewed Stanley Mosk as a role model of sorts. Although he and Clark were usually on opposing sides in the decisions that divided the Court, Justice Mosk rarely let rancor in the conference room affect his work- ing or personal relationships with his fellow Justices. He welcomed Clark to the Court with warmth and genuine affection, and Justice Clark gratefully reciprocated. Their close friendship continued long after Clark’s departure from the Court.” *The Longest-Serving Justice, Highlights from a New Biography of Justice Stanley Mosk by Jacqueline R. Braitman and Gerald F. Uelman*, CAL. SUP. CT. HIST. SOC. NEWSL. (Spring/Summer 2014), at 10, <https://www.cschs.org/wp-content/uploads/2014/05/2014-Spring-Stanley-Mosk-Biography.pdf>.

He went on: “Her era was an era of—as far as public service goes—of noblesse oblige, not meaning that you were from the lordly classes and it was your duty to assist the serfs, but just, you’re a human being who happens to be well educated, maybe have a little cash, and it’s your duty to spend some time, or maybe dedicate your life to something important for your government. JFK was able to impart that feeling. There hasn’t been much of that around since then, unfortunately.”

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