RETROSPECT

Oral History: Justice Otto Kaus

Preface

This transcript from a videotaped interview with Justice Otto Kaus was prepared by the Committee on History of Law in California, a standing committee of the State Bar of California.[1] It is the second published interview in "The California Bar Oral History Series." The first interview in the series, with Justice Bernard Jefferson, appeared in Volume 14 of the *Hastings Constitutional Law Quarterly*.[2] The Committee's third interview, with Justice Joseph R. Grodin, will appear in Volume 16 of the *Quarterly*.

A primary objective of the Committee on History of Law in California is to foster the preservation and study of California's legal history.

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1. The videotaping occurred on November 21, 1986, at Loyola of Los Angeles School of Law. The interview was conducted by four members of the Committee: Mark Pierce, a civil litigation attorney practicing with Olsen & Pierce in San Jose; Patricia Seitas, a research attorney with the California Court of Appeal, Fourth District, Division One, in San Diego; Kirk McAllister, a sole practitioner and certified criminal law specialist practicing in Modesto; and Matthew St. George, then deputy city attorney with the City of Los Angeles.

The video tape, on VHS cassettes, was transcribed with the cooperation of Loyola Dean Arthur Frakt, Loyola Director of Faculty Support Services Pamela Buckles, and Neil Gotanda, a member of the Committee and a professor at Western State University. Patricia Seitas, the chair of the oral history subcommittee, compared the transcript to the tapes, edited the final product, and submitted the transcript to Justice Kaus for his comments and clarifications. Parts of the transcript have been rearranged to keep the discussion of topics together and parts have been reserved for future publication.

Preparing this project—from original interview to final publication—required the energies of Committee members under three chairpersons. The project also required generous support from Loyola of Los Angeles School of Law. The Committee thanks the Loyola deans and faculty and the technical services personnel who operated the camera and made the tape. We also thank Neil Gotanda and the support staff at Western State University for their help. We thank the editors of the *Hastings Constitutional Law Quarterly* for working with the Committee to publish "The California Bar Oral History Series." Finally, we thank Justice Kaus for consenting to the interview and patiently working with us to preserve his important perspectives on the evolution of California law.

THE COMMITTEE ON HISTORY OF LAW IN CALIFORNIA
John K. Hanft, Jr., Chair, 1987-1988
Laurene Wu McClain, Chair, 1986-1987
Kenneth D. Crews, Chair, 1985-1986

2. 14 HASTINGS CONST. L.Q. 225 (1987).

The Committee accordingly desires to make the tapes and transcripts in the oral history series available to interested scholars and students. The Kaus transcript and videotape are available for research and other permitted uses. Copies have been deposited with the library of Loyola of Los Angeles School of Law, the library of Hastings College of the Law, and the Archives of the State Bar of California, at its San Francisco office.[3]

Biographical Sketch

From private practice to the California Supreme Court, Otto Kaus' legal career spans nearly forty years. He has been praised for his legal scholarship, sharp intellect, independence of mind, writing ability, and wit.

Born in Vienna, Austria, Kaus was an Italian citizen. Kaus' father elected to become an Italian citizen, rather than to remain an Austrian when his home city of Trieste became part of Italy at the end of World War I. Kaus' parents separated in the mid-1920s, not long after his brother was born. Subsequently, his father died in an Allied air raid on Berlin in the late stages of World War II. His mother remarried a lawyer to whom Kaus became very close.

Kaus was educated in Austria and England. He attended the University of London where he studied first history and then economics. In 1939, he emigrated to the United States with his family, arriving in New York and later moving to Los Angeles, where his mother was a screenwriter and a part of the Hollywood community. Kaus finished his undergraduate degree at the University of California at Los Angeles.

During World War II, Kaus was drafted into the United States Army even though, because of his Italian citizenship, he was technically an "enemy alien." He was naturalized shortly afterwards by a state court judge in San Luis Obispo. Eventually, Kaus became an officer with the amphibian engineers, helping to prepare for landings on islands in the Pacific, including assembling prefabricated barges in Brisbane, Australia for the anticipated invasion of the Philippines and Japan. While in the

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Army, Kaus acted as a presiding officer of the special court martial. He was discharged from the Army as a captain.

In the Fall of 1946, Kaus began law school at Loyola of Los Angeles School of Law. He was graduated *summa cum laude* in 1949. For the next twelve years, Kaus practiced with the law firm of Chase, Rotchford, Downen & Drukker in Los Angeles, primarily engaging in insurance defense. Kaus also handled plagiarism cases for a Lloyds of London syndicate and did appellate work.

In 1961, Governor Edmund G. Brown, Sr. appointed Kaus to the Los Angeles Superior Court. Three years later, the governor elevated Kaus to the Court of Appeal, and the following year appointed Kaus presiding justice of the newly-created Fifth Division of the Second District Court of Appeal in Los Angeles. Kaus held this position for the next fifteen years. While on the Court of Appeal, Kaus authored over 400 published opinions on a wide variety of subjects, including the interrelationship of criminal conspiracy law and the First Amendment[4] and the use of gag orders in criminal trials.[5]

During this period, Kaus also taught Evidence, Legal Method, Appellate Advocacy, Agency, and Sales at Loyola. Earlier, Kaus had been a member of a State Bar committee working on the then Uniform Rules of Evidence, which eventually became the Evidence Code. Kaus also participated in Continuing Education of the Bar seminars[6] and wrote law review articles on evidence and criminal malpractice.[7]

In May 1981, Governor Edmund G. Brown, Jr. appointed Kaus to the California Supreme Court to fill an opening left by the death of Justice Wiley Manuel. Kaus was confirmed in July 1981.

During his tenure on the California Supreme Court, Kaus authored a number of important decisions, including opinions on the validity of the 1975 Medical Injury Compensation Reform Act,[8] the tort of "wrongful life,"[9] adult-only restrictions in condominium complexes,[10] the need to appoint separate counsel initially for indigent criminal co-defend-

4. Castro v. Superior Court, 9 Cal. App. 3d 675, 88 Cal. Rptr. 500 (1970).

5. Younger v. Smith, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973).

6. *See, e.g.*, CURRENT PROBLEMS IN CRIMINAL EVIDENCE, PROGRAM MATERIALS (Cont. Educ. of the Bar 1978).

7. Kaus, *All Power to the Jury—California's Democratic Evidence Code*, 4 LOY. L.A. L. REV. 233 (1971); Kaus & Mallen, *The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice,"* 21 UCLA L. REV. 1191 (1974).

8. Chs. 1, 2, 1975 Cal. Stats. 2d Ex. Sess. 3949 (codified at CAL. CIV. PROC. CODE § 667.7 (West 1987); CAL. CIV. PROC. CODE § § 3333.1-3333.2 (West Supp. 1987)). *See generally* Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 416 (1985).

9. Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

ants,[11] and the admissibility of prior similar acts in criminal proceedings.[12]

Kaus originally intended to remain on the Supreme Court for three years, but stayed an additional year, leaving only because of the strain of commuting between his wife and home in the Los Angeles area and the Court in San Francisco. He is presently in private practice with the law firm of Hufstedler, Miller, Carlson & Beardsley in downtown Los Angeles.

I. The Early Years

A. Family Background and Childhood

Pierce: First off we'd like to start with some of your family background. I'm interested in knowing about your present family.

Kaus: My present family? My present family is my wife, Peggy, to whom I've been married since January of 1943. I've known her much longer than that because it so happened we went to school together in England in the late 1930s. We hardly knew each other at school but we had a nodding acquaintance. We both independently came to Los Angeles. We met again at UCLA [University of California at Los Angeles] in 1940.

I have two sons. Steven is a lawyer. He is practicing in San Francisco. He used to be a public defender in Contra Costa County. He and another [former] public defender formed a firm; they now have about six or seven lawyers. He practices mostly personal injury law and bad faith cases and that kind of thing.

My other son, Mickey, is also a lawyer. He had seven years of Cambridge, four at Harvard College and three in law school. He came here for a year in 1976. He clerked for Justice [Stanley] Mosk on the Supreme Court and had about four more months of earning an honest living by working for the Federal Trade Commission in Washington. He finally decided he didn't like the law and turned to journalism to do general writing for the *Washington Monthly*, for *Harper's*, and for the *New Republic*. At the moment he's writing a book and he is living in Washington, D.C. So that's my family, apart from my cat whose name is Fearless Fosdick.

10. O'Connor v. Village Green Owners Ass'n, 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983).

11. People v. Mroczko, 35 Cal. 3d 86, 672 P.2d 854, 197 Cal. Rptr. 52 (1983).

12. People v. Tassell, 36 Cal. 3d 77, 679 P.2d 1, 201 Cal. Rptr. 567 (1984).

Pierce: Does your wife have any background in law or education in the law?

Kaus: No. My wife graduated as an economist from UCLA at a time when I was overseas in 1944. She went back to UCLA to get a graduate degree in Library Science in the early 1970s after both our sons had left home. But she's never worked as a librarian.

Pierce: I understand that you were born in Austria?

Kaus: I was born in Vienna in January of 1920. At that time—I wasn't aware of it at all—Austria was dead poor. It was after World War I. [Austria had been] on the losing side. They lost the Austrian-Hungarian Empire. [Austria was] a small country with a huge capital city, Vienna, much too big for the country. They were very hard times—you couldn't get milk and so on.

Pierce: The family that you grew up in, did you have any brothers or sisters?

Kaus: I had one younger brother, about four or five years younger. He is a professor of Physics at the University of California, Riverside campus. He's the only scientist in what is otherwise a reasonably intellectual family. My mother was a writer. My father was a writer. My stepfather was a lawyer. At best we could add three and three and multiply four times four. That's as far as we went in the physical sciences. But [my brother] turned into a higher mathematician, physicist. I don't know where he got it from.

Pierce: How would you classify your family's economic class?

Kaus: We lived quite well but I think throughout my childhood in Vienna and later on, too, my mother was always looking forward to the next check. We never had any savings. My mother was a writer, she came from a middle class Jewish family. I think they gravitated to Vienna from Bohemia. I'm not sure because I've never done any research on my family history. Her grandfather was a rabbi.

My father came from Trieste. His native language was Italian. Trieste, of course, at the time was part of the Austrian-Hungarian empire. Austria lost it after World War I and at that time he was living in Vienna. He spoke and wrote in German. I hardly knew him, really. Apparently, he was a very difficult person to get along with. Very brilliant in his way, very intellectual. He made studies of Dostoevsky and dabbled in psychiatry and so on. But, as I said, everybody I have ever known who has known him has told me what a difficult fellow he was to deal with. Certainly my mother found that to be the case. They were divorced—or separated at least—very soon after my brother was born, in 1924, 1925. I haven't seen my father since I was five or six years old. He

moved to Germany. I had really completely lost touch with my father once [Adolf] Hitler took over. I later learned that he had been killed in an Allied air raid on Berlin in the late stages of the war.

Pierce: Your upraising was then primarily by your mother?

Kaus: Oh yes, entirely.

Pierce: Was she a published writer or novelist?

Kaus: She was a novelist. At one point she edited, and, I think, published (in the sense she owned it) a monthly magazine called "The Mother." She was putting her experiences to commercial use after my brother was born. No, no. She started that before my brother was born because there is a story in the family. She had a "Letters to the Editor" column where she, of course, wrote herself letters and then she answered them. Then she went into confinement with my brother. Her assistant didn't know that's what she had been doing and he actually answered two or three letters that came. My mother's style had been rude with these fictitious letter writers. And [the assistant] was just as rude with real letter writers. They nearly got themselves in bad trouble with libel cases.

Pierce: Your upbringing, was it a fairly strict upbringing?

Kaus: Well, it was a very strange one. My mother was a typical intellectual. She slept late in the morning and went to bed late at night. She worked late in the evening. She was a writer, as I said. The first thing in the morning she went downtown to meet her friends in one of the cafe houses in Vienna. That was the way life was then. I was brought up actually by a governess, Anna, who was a very, very strict Catholic. I was baptized a Catholic so that worked out all right. So, I was always between a very lax mother, who was very forgiving, very understanding, and Anna, who was quite unbending. It required a certain amount of diplomacy at an early age.

Pierce: Did you have thoughts at your early stages in life about the law?

Kaus: None. No. My mother and stepfather-to-be, who was a lawyer, started to live together about 1931, 1932. At that time I had sort of assumed I would become a lawyer, to follow in my stepfather's footsteps. I was very close to my stepfather, much closer to my stepfather than I ever had been to my father, because we lived together for many, many years. He was a fine man.

Pierce: What was his name?

Kaus: His name was Edward Frischauer.

At that time I was already going to school in England and my family had moved to France. Eventually we all landed in America. The idea

of being a lawyer in a country where I would always have a certain amount of accent seemed preposterous. At the time, when I was drafted into the Army in early 1942, I really had no particular plan of what to do with my life. I had just graduated from UCLA and the first thing was to get the war over with and get out of the Army and then we'd look around. Then, in the Army, I became a company commander and eventually a battalion commander in the engineers. So I realized that whatever accent I had, whatever language difficulties I had, it was no handicap. When I came back, I again, at my wife's urging, turned to the law and went to Loyola Law School.

B. London

Pierce: When was it that you actually went to London?

Kaus: Let's see, I went to England during the summer—I was a very active Boy Scout—in the summer of 1934. To put this in a historical context, this was one year after Hitler came to power in Germany. That was the summer when [Paul von] Hindenburg died and Hitler became president. Before that, of course, they had the so-called "Night of the Long Knives"[13] when Hitler destroyed the S.A.[14] as a military force because they were under the leadership of [Ernst] Roehm who took the socialism part of national socialism more seriously than Hitler wanted them to. So I spent the summer of 1934 in England on an exchange program with Boy Scouts. I liked it very much.

At the time, in Austria, we realized that we were living on borrowed time, that sooner or later there would be an *Anschluss*[15] with Germany and the Jews would be in jeopardy. Now, going back with it a little bit, I was Catholic but my mother was Jewish. I always lived with my mother so basically my contacts were Jewish, much more than Catholic.

At the same time we were Italian subjects when World War I ended and Trieste became Italian. Austrians who had been born in Trieste had the option of becoming Austrian citizens or remaining Austrian citizens, or becoming Italian subjects together with their home city. My father's theory, I have been told (I was, of course, too young to remember it), was that it was always better to be a foreigner in Europe, so that you do not owe any kind of allegiance to the local tyrant. So, he opted to become an Italian and that saved our lives, because when the *Anschluss* finally came in 1938, well, I was in London but my mother and my brother had Italian passports and they got out of Austria without any trouble. If they

13. June 30, 1934.

14. *Sturmabteilung*, stormtroopers or Brownshirts.

15. The *Anschluss* (union) between Germany and Austria occurred in late March 1938.

had had Austrian passports, who knows what might have happened? Now I'm getting ahead of myself.

In 1935, knowing that the *Anschluss* was coming, my mother sent me to school in England. I loved it. Two years at a boarding school was where I met my wife, starting in the fall of 1935, 1936. In the fall of 1937, I started going to the University of London. I went there for two years. In 1939, we moved to the United States. I finished my education there at UCLA. I guess I had my last class in December of 1941, which was the month of Pearl Harbor. The following month I went in the Army where I spent four years.

Pierce: With regard to your experience in England and at the University of London, what were your goals while you were there?

Kaus: Basically, I guess I was really treading water. I had no particular idea what I wanted to do with my life, we were living hand to mouth at the time. I was still an Italian, living in England, with my family in France. My family had fled Austria and they were living in Paris. So I didn't really know what I was going to do with my life. I started to study history because I liked history as a subject in high school. Then I switched to economics because there was a professor at the University College who felt I had some kind of talent in that direction. I had had one year of economics when I switched from the University College, London, to UCLA. I had two more years at UCLA. So when I went into the Army, I had a degree in economics. I wouldn't have known what to do with it if the war had ended and I had been demobilized all of a sudden. I would have stood there with an economics degree looking for a job as a waiter.

Pierce: Your experiences in London, did you consider yourself at that time to have somewhat of an intellectual bent? Did you enjoy reading more than going out or playing soccer?

Kaus: No, I always, my entire life, kept a particular balance between intellectual and physical pursuits. I'm no great athlete but I've played a lot of tennis all my life. I play tennis every day now at seven o'clock in the morning, from seven to eight. One of the privileges of being a retired Supreme Court Justice is that you can get to your office by 9:30 a.m. instead of 9:00. So, I play tennis from seven to eight, then I shower, dress, and then drive downtown. I've skied a lot. I love to hike and to walk. I don't do nearly enough of it. I was never a bookworm although I was always curious.

C. Immigration to the United States

Pierce: Your education then, after leaving London, was completed at UCLA. How was it that the entire family chose to move to the United States?

Kaus: That's right, it was really rather strange. We went to accompany our mother. She was a writer. She wanted to go to New York—she had some interviews coming up with her publisher—so we went along. Then, while we were on the ocean, on the boat, still in the harbor at Le Havre, the war broke out. While we were on the water with our Italian passports, the return became kind of dicey. At the time, everyone expected that Italy would be immediately involved in the war. As it turned out, the Italians didn't get into the act until about a year and half, about a year later.

Pierce: The time frame you are speaking about?

Kaus: This is September 1939 to 1940. So, I came to the United States as a visitor. We had to leave again to change our visa to permanent residents. One went through Ensenada, Tijuana, Mexico—you had to leave the country to change your status.

Pierce: How is it that you happened to gravitate toward Southern California?

Kaus: As it turned out (I wasn't in on all of this, I was a minor), my mother did some screenwriting in Europe, particularly in Paris. Her agent, whom she had in Europe, had gone to Hollywood and he apparently suggested to her that she come here. She then was a screenwriter for the next twenty years or so. She had been writing books in the 1920s and 1930s [and did not write another book] until she was eighty years old. This was very funny. She was quite senile; at least, we thought she was. She sat at the typewriter all day long, typing away and putting pages on the side. The pile of pages grew and grew and grew. None of us ever read what she wrote but we figured it was good therapy for her as long as she was happy sitting at her typewriter, typing away. Why bother her? Turned out that she was writing her autobiography. She sold it. It was published in German, it never came out in English. By that time she was eighty-four, eighty-five years old.

Pierce: Now, when she came to the United States you say she got into screenwriting here. Was that in German or was that in English?

Kaus: She worked a great deal with a collaborator whose name was Jay Dratler. What they produced together, of course, they did in English. He was an American. She did some original stories on her own. At first she wrote them in German. I earned a little pocket money translating them into what I fondly thought was English and I would make it

more idiomatic, so to speak. I remember a very funny story she wrote after World War II about the father of an American G.I. He was a Swedish American from Minnesota, whose son had been killed in Italy during the war. I forget how he learns that his son may have sired a child while he was there. So this American went to this little Italian village to see whether or not he could find his grandson. According to my mother's manuscript, he had no problem at all because he saw ten, twelve very dark haired children playing with a child who was tow-headed.

Pierce: So he saw the blonde?

Kaus: He saw the blonde.

Pierce: Did your mother get involved with the Hollywood-type community?

Kaus: To some extent. When we came here, the Hollywood-type of community was people who were written up for going to the Mocambo at night, to Ciros, to the Trocadero, and so on. We were never part of that set. There was a set of writers, Austrian, in particular, a subset of Austrian, Hungarian, [and] German writers, mostly refugees, and, basically, she was part of that set. There was a lady, her name was Salka Viertel, she was a writer. She was German, too. She had done several of the screenplays for Greta Garbo. Salka Viertel had a real salon: every Sunday afternoon her home was open to anybody who had been invited to come on a permanent basis.

Pierce: You were able to attend some of those affairs?

Kaus: Yes, I went with my mother. I once nearly ran into Greta Garbo, I missed her by an eyelash. Christopher Isherwood was one of the regulars and Oscar Levant. In fact, Oscar Levant wrote up the salon in one of his books,[16] I forget the name of the book. Mrs. Viertel was a little bit put out because she had never wanted any publicity for it. Her son became a good friend of mine. I've lost touch with him. He's a writer in his own right—Peter Viertel. He's married to Deborah Kerr and lives in Switzerland.

Pierce: Was your stepfather here also?

Kaus: My stepfather eventually joined us. We came together on the boat. He stayed a little bit longer in New York. He was never able to establish himself in any regular profession. He had been a lawyer in Austria. He started to go to law school here at USC [University of Southern California] but he gave it up. He realized he was too old to do anything with it. He was an excellent bridge player, at least, I would say, semi-

16. O. LEVANT, A SMATTERING OF IGNORANCE (1942).

professional. He was world champion in 1938. The first and perhaps last bridge world championship had been held in Budapest that year. He and three other Austrians won the title.

D. University of California at Los Angeles

Pierce: Now I suppose the Los Angeles you lived in while you were attending UCLA was vastly different from what it is today?

Kaus: Oh, absolutely.

Pierce: What was it like attending UCLA at that time?

Kaus: Well, after the University of London, it was really a snap, in this sense, that in London you go to classes for a year and there are no exams, no nothing. At the end of the year you have a tough set of exams. It's all there. You either make it or you don't. At UCLA you are spoon fed, you have a quiz every two weeks, an exam every month or so and you know exactly how you are doing. If you're getting a "C" and you want to wind up with a "B", you know you have to put a little more effort into that particular course. So, they treated you much more like a high school student than a university student which had been the case in England. Of course, here law is a post-graduate subject; in England, law is what you study when you go to college.

This doesn't mean you get admitted to the bar. Getting admitted to the bar in England is a highly complex process involving the eating and drinking of several dinners in one of the Inns, and so on and so forth, if you want to become a barrister. Solicitors go on a different track.

Pierce: The Los Angeles that you lived in, other than just UCLA, where you attended functions with your mother, and so on, did you meet your future wife during this time period?

Kaus: Yes. I met Peggy during my first week at UCLA. We started to go together. We went, as they said, "steady" for a couple of years, then I was drafted and went to Officer Candidate School [OCS] in the fall of 1942. At that time I was stationed in Cape Cod, Massachusetts. That Christmas, Peggy came east and we got married.

Pierce: And that would be the fall of 1942?

Kaus: We got married after Christmas. If I don't get the date right, I'll never live through it. It was January 12, 1943. [Taking off wedding ring.] Would you like to confirm that?

Pierce: I see it's actually engraved on the ring.

Kaus: Yes, that's a reminder. Yes, "Peggy."

Pierce: You graduated from UCLA with a degree in economics?

Kaus: Yes.

E. War and Military Experiences

Pierce: And soon after that you were actually drafted?

Kaus: Well, actually, yes. The actual graduation took place while I was in basic training at Camp Roberts but they mailed me my degree.

Pierce: At that time you were still an alien in effect?

Kaus: I was in the process of becoming a citizen. At that time (I don't know what it is like now) it took five years, if you came in under an immigration visa, to become a citizen. You took out what were called "first papers." But if you were in the Army, the process was speeded up. The Army was extremely conscientious about finding foreigners.

The strange thing was, I was Italian and I was an enemy alien after the war was declared. Until I was drafted, I never thought they would draft me. I went down to Fort MacArthur one day and I was sure I was going to be rejected as an enemy alien. I hadn't been allowed to go out in the evening, I was subject to the curfew. I was not allowed to leave Los Angeles County except with the permission of the District Attorney. I tried in a vague sort of way to get permission to go skiing in San Bernardino. They laughed and I didn't get it. But the Army took enemy aliens. Of course, all the enemy aliens basically were refugees like I was and not "enemies" in any real sense of the word. So I was naturalized while I was in basic training at Camp Roberts on June 4, 1943 in the Superior Court in San Luis Obispo. Bet you didn't know that state judges have the right to naturalize.

Pierce: I'd heard that before.

Kaus: That is a delegation somewhere in the law.[17]

Pierce: I was totally unaware of the fact that there were restrictions on foreigners who had residency.

Kaus: That's right. There were much more severe restrictions on citizens who were of Japanese ancestry. So nothing should shock you after that.

My wife was an enemy alien and she is one hundred percent Jewish. But on paper she was an enemy alien because she was a German national.

My wife has an interesting history. Her mother was born in San Francisco but she was a child prodigy on the piano so she went to Germany before World War I to study the piano. She came back here during World War I. Then she went back again to study some more and to give concerts. She met my father-in-law who was a German businessman and they were married in Germany. So my wife was born in Frankfurt,

17. *See* 8 U.S.C. § 1421(a) (1982).

but actually her first language was English because they spoke English in the home on account of her mother. When my wife fled Germany, she left as a German national and she remained one until the war started here. So, she was an enemy alien, too, and subject to the curfew and all that.

Pierce: In retrospect, how do you feel about those restrictions from a legal standpoint, from a historical perspective?

Kaus: Things were very hectic. I am very, very pro-British. In many ways, England is my spiritual home, much more than Austria, because my intellectually formative years were spent in England, between fifteen and nineteen [years old]. Yet the British were really bloody toward refugees. They were interned, that is, people who obviously were refugees from Nazi Germany. But they took no chances on any of them being possibly a spy subject to being blackmailed in some fashion because there were relatives left in Germany. They were interned. So, what we did with the refugee enemy aliens, like myself and my wife, was very, very mild. There was nothing to it. They had very little personnel to check up. But I do remember once (I guess my wife has told me this) one night while I was already in the service, they sent a couple of detectives—whether they were F.B.I. men, I don't know—to check whether she was at home. She was.

Pierce: How long did those restrictions last?

Kaus: I don't know. I don't even know what my wife's status was after we were married. She was married to an officer in the United States Army. Conceivably, she was still technically an enemy alien, but to tell you the truth we paid no attention to it. We lived on Army posts. She went to the Army posts, went to Army officer's clubs and so on and so forth. I guess we never lived on the post but she had the freedom of the posts, the same as any other Army wife.

Pierce: Tell us a little about your military career.

Kaus: It was odd. I went through infantry basic training at Camp Roberts. I tried to go to infantry Officers Candidate School. I didn't make it, I didn't know why not. You know whether you're doing well as a soldier. I did all right. I knew I was at the top of my class, so to speak. Later on my records caught up with me and I realized why I wasn't sent to OCS, and that was because I had been an enemy alien. The colonel had written: "I do not believe a soldier who was so recently an enemy alien (I had already been naturalized) should be an officer in the Army of the United States." So I never made it into the infantry OCS which was probably a lucky thing.

We got shipped out to Camp Edwards in Massachusetts on Cape Cod, where the Army was then forming the amphibian engineers which were units whose mission was to operate landing craft and transport soldiers, vehicles, and guns, and so forth, from one island to another. The idea at the time was that they visualized the war in the Pacific as being an island-hopping affair from island to island. These small fifty-six foot landing crafts with ramps on them were supposed to pick up troops on one beach and land them on the other beach. The way it eventually happened, actually, [General Douglas] MacArthur leap-frogged most of the way to the Philippines. This type of operation hardly ever took place but we didn't know it at the time. So we started to train as amphibian engineers in 1943.

I again applied to go to Officers Candidate School and this time I was accepted. I went to engineer Officers Candidate School. Why this mission was given to the corps of engineers, I don't know, because it was really sort of a quasi-Navy Seabee operation. We had boat [and shore] battalions. I was always in the boat battalion. [Shore battalions] would install shore installations, roadways across the beach, and latrines and that kind of thing.

Pierce: The necessary functions?

Kaus: Yes, to make things comfortable for the infantry. Then I went to Officers Candidate School at Fort Belvoir in Washington, D.C. in the fall of 1943. I became an officer in December 1943. I had hoped to be assigned to military intelligence. In fact, I was ticketed to go there because I spoke German. It was rather an obvious type of assignment but some order came through that all the officers that had come from amphibian engineers had to go back to amphibian engineers so I was right back at Camp Edwards where I started.

Pierce: You were bilingual at that time. Did you speak any other languages?

Kaus: Latin and Greek. At the time, I spoke French [quite] well because my family had lived in France from the *Anschluss*, which was in April 1938, until the middle of 1939. I went home for vacation and I spoke French. I had French friends.

Pierce: Did languages always come easy to you?

Kaus: I'm not saying it came easy. But, I spoke French.

Pierce: Did you actually speak Latin?

Kaus: No. I laboriously translated from Latin into English or German and even more laboriously from German into English. I had two years of Greek in Vienna but we never spoke Greek, we read Homer.

Pierce: You wouldn't feel comfortable living on some Greek isle with the experience you have?

Kaus: If the natives speak English, I would.

Pierce: It is interesting that the military did not take advantage of your bilingual skills.

Kaus: No, that was the Army's classification system in full cry.

Pierce: Did you actually see some action in the balance of your Army experience?

Kaus: No. I tried several times as an officer to get back into intelligence. I don't want to brag, but I was a good officer. I had a good service record [so] no commanding officer would let me go. If I had screwed up, they would have been delighted. They would have approved my transfer anytime—you know, get rid of this "eight ball." As long as you could do a good job, they didn't want to let you go. I always ran into a brick wall trying to get out of the amphibian engineers.

I was totally unsuited for the amphibian engineers. I had no technical ability whatsoever and I get seasick at the slightest provocation. Martha's Vineyard was our enemy beach. We had these simulated exercises from Cape Cod and we always landed at the south end of Martha's Vineyard. Well, I managed to get seasick during that short crossing. So, I was miscast as an amphibian engineer. Luckily, I was a company commander, more concerned with laundry and food and supplies and so on than running boats—that was a platoon leader's job. So, I survived.

Pierce: Did you ultimately end up in the South Pacific?

Kaus: Well, in a manner of speaking. After intensive training in the amphibian engineers, just before we went overseas to do our fighting in New Guinea, the Army discovered that it had by then maybe fifty, maybe a hundred, I forget how many, prefabricated barges in Brisbane, Australia, which had to be riveted and welded together for the invasion of the Philippines. They held fuel and water and so forth. They had no one to do the job so they took our entire battalion and ran us through the Kaiser shipyards in Richmond [California]. We all became riveters and welders.

We landed in Australia in April of 1944. We had a very nice camp in Brisbane. It was about a five, ten minute walk away from the shipyard. I ran two shifts. We had a day and a swing shift. My men went down there and they knocked these barges together for a year. I was just sort of a housemother. I had to see to it that they got fed before they went down and there was a warm meal waiting for them when they came back, that their laundry was done, that they had a hospital to go to when

they got sick, and so on and so forth. I was a housewife instead of a company commander. I had three hundred twenty men in my company.

We finished the job in March of 1945 and then we had about two or three months before going to the Philippines where we were going to go through training for the invasion of Japan. So, I tried to make a military unit out of my company during those two or three months. We did quite well. We got our boats back and ran on forced hikes to get back into physical shape. [The men] were in lousy shape while they were in the shipyard. They were just workmen. After they got through maybe they ate at my table, maybe they didn't. They went to town. They had girlfriends all over town. They went to the races. They went to the movies. They went to the theater. Brisbane was a very nice town.

Pierce: How would you characterize the way you commanded your unit? Were you a strict disciplinarian in the military style?

Kaus: I thought I was a very nice, comfortable commanding officer, the ideal officer I would have liked if I were a soldier. [Smiling.] Whether my men saw it that way, I don't know. To some extent I did things by the book, but not to excess.

Pierce: Did you take to the military discipline while in the Army?

Kaus: I was very surprised. You come from a Jewish, intellectual, Viennese background and you would think that the Army of the United States is not the place to which you would adapt with any particular ease, but I made up my mind I wasn't going to be a misfit. So I went along with lots of things which I probably thought were foolish at the time, but the manual said do this and do that and I did this and did that. I did all right, I mean, I wound up as battalion commander. By that time, of course, all the real veterans had gone home from Japan in 1946. I was the only one left.

Pierce: What rank did you retire at?

Kaus: That was funny. I was a captain most of the time and they wanted to retire me as a major. On my discharge they called it "terminal promotion" or something but field officers (major was the lowest rank in field officers) did not get mustering out pay while line officers (captain was the highest) captains got $300 mustering out pay. The difference in pay, during your terminal leave, didn't make up for the three hundred bucks, so I declined promotion to major.

Pierce: And took the $300.

Kaus: And took the $300. That was a lot of money in those days. Neither my wife nor I had a source of income.

Pierce: Did your military background—the discipline and experience—help you later on in your years as a law student, in business?

Kaus: I'll tell you, in the amphibian engineers, the Army in Washington, D.C. had promoted straight from civilian life a bunch of people whose only qualification was that they owned boats, yachts. These yachtsmen (I had about six of them in my company) were the most unmilitary people you can imagine. I had sergeants and corporals, teaching them the basic close order drill and how to take a rifle apart and that sort of thing. There was one of them who I remember we had a lot of fun with because we persuaded him that the way to take a rifle apart was to unscrew the screw that held the butt plate to the rifle. After he had unscrewed it, he was at a loss to see where to proceed from there.

He was a municipal court judge in Rennselaer, New York. Naturally, we found a useful job for him. He was the trial judge advocate for the battalion. He prepared and prosecuted all the courts martial. I was the presiding officer of the special court martial. I was not a lawyer at the time but I had a lot of business with Pete (Peter Conlin). I don't know if he wanted to flatter me (he was one of my officers) but he maintained that I had a good legal mind because we had some knotty problems. So, what happened was, I wrote to my wife that I was thinking of going to law school after the war. When I came back, she had practically registered me in law school because she wanted to prevent me from going back to work for my mother as a translator which would have been easy money in a way but that was not what I wanted to do with my life.

F. Loyola Law School

Pierce: Was she the one who helped you choose Loyola?

Kaus: No, I'll tell you what happened there. I first went to USC but I realized I would have to work to earn enough money to live on and USC had a program which was, I think, purposely spread out, where the classes were spread out over the entire day so you couldn't take an afternoon job, while Loyola was a little bit more practical. They had all the classes bunched in the morning and you could take an afternoon job. But they delayed letting me know whether I would be admitted because they had some kind of admission exam that Father [Joseph J.] Donovan had devised. USC had admitted me, so I went to USC for two weeks before finding out that I would be admitted to Loyola. I switched to Loyola and after a little while I took a job as an office boy with a law firm, in which I stayed until I became a judge.

Pierce: During your law school years did you work the entire time?

Kaus: I worked, I think, about half the time. I started to work, if I'm not mistaken, after the first quarter and I worked until about (we

were on the quarter system) I worked until the last quarter when I started to prepare for the Bar. I took a leave of absence from the firm and I started to work again the day after the Bar examination. They had me do a brief.

Pierce: When was it that you actually enrolled at Loyola?

Kaus: I started in the fall of 1946. I worked briefly as a real estate salesman for my uncle. I got out of the Army in early 1946 and I worked as a real estate salesman until the fall, then I started as a lawyer. I foolishly thought at the time (it's sort of coming back to me) that I could maintain, remain active as a real estate salesman and go to law school. It didn't take me long to find out that that wasn't working for me.

Pierce: How did you like law school from an intellectual standpoint?

Kaus: Oh, fine. Loyola at that time was pretty much of a trade school. In other words, the teachers did not teach by the "confusion method." They told you what the law was and you just wrote it down, then took an exam, said on the exam what the law was and the same thing on the Bar exam. Things were pretty easy.

Pierce: More of a practical type of approach to the law?

Kaus: Yes, very practical. The intellectual problems remained fairly well hidden. In other words, you got out of law school thinking this was the law and that's the way it should be and that's the way it's always going to be and why not? Because nobody told you why not.

May I say in defense of my teachers, some of my teachers, of course, were more intellectual than others but several were very much the trade school types. I think it was recognized that the school did not impinge on your timé too much. I had no problem at all working as an office boy five, six hours per day and still keeping up as a student.

Pierce: Were there any particular professors in law school, for example, that guided you towards your future career as a trial lawyer, as a judge, and that sort of thing?

Kaus: No, I wouldn't say that. There were some professors I admired a great deal. One of them was Rex Dibble who later on became the dean of this law school [Loyola] and who died a few years ago. I very much enjoyed several courses I took from Robert Newell, he's still practicing law. Most of our teachers were part-time teachers. Walter Cook taught contracts at the time. He was a real intellectual. The one I enjoyed most, I must say was Dean Macneil, Sayre Macneil. He taught equity. He was dean of the law school in name only. The law school was run by Father Donovan and no one else. But Sayre Macneil had the title of dean. He was a really stimulating teacher.

Pierce: So you enjoyed the intellectual discussions with him more, he brought a little bit more of the intellectual out of you?

Kaus: He was the kind of guy [who] knew after a few hours who would give him the answers he wanted, maybe silly answers, that enabled him to show up what a dolt the student was, but at the same time teach the law. I was one of the "dolts," so his equity classes always were, for me, discussions with the professor.

Pierce: Did he use the Socratic Method?

Kaus: He was the only one who really used the Socratic Method at the time at Loyola. He had taught at Harvard where I guess in those days they kicked you out if you didn't use the Socratic Method. One taboo was to tell a student what the law was.

Pierce: Did you have any favorite subjects in law school that stick out in your mind?

Kaus: No, but I had some unfavorites.

Pierce: What were those?

Kaus: Taxation.

Pierce: You learned in law school that you were not going to be a tax lawyer?

Kaus: Yes. I learned that very quickly.

G. Private Practice

Pierce: You were indicating that you were working as an office boy. Was that at the firm [you joined as a lawyer]?

Kaus: Yes.

Pierce: What was the name of that firm at that time?

Kaus: It was Chase, Rotchford, Downen & Drukker. It's now Chase, Rotchford, Drukker & Bogust, I think. They happen to be in the same building where I'm working at—700 South Flower (in Los Angeles). They started to grow by leaps and bounds after I left in 1961.

Pierce: When you graduated from Loyola you went to work for them?

Kaus: Yes, yes, the next day. About three or four years later I became a partner. It was a small firm, there were just nine, ten of us.

Pierce: What was the emphasis of that firm?

Kaus: Basically, it was an insurance defense firm. We always tried to branch out into other fields and I did, too. But, I learned very soon that it was almost impossible to combine a trial practice with a business practice. If you have a business practice with clients who want you to negotiate contracts, to go into escrow on real estate transactions, that

kind of thing, nothing very big, they want you available. If you're in court from nine to five every day, you're no good to your clients. It's very bad on your stomach to come back after a rough day in court and find twenty-five telephone messages, each one marked urgent.

Pierce: The type of client that you were representing after law school, was that the typical insurance defense-type client?

Kaus: The typical insurance defense-type client is the typical insured which runs the gamut; whoever the Great American Indemnity Company insures is my client. The fun clients, for awhile we had some Lloyds clients, one of the Lloyds syndicates.

Pierce: That would be Lloyds of London?

Kaus: Yes. I think it was a Lloyds syndicate [that] insured either CBS [Columbia Broadcasting System] or ABC [American Broadcasting Corporation] for plagiarism-type liabilities. Oh, I loved those cases, they were fun. I remember defending (it never went to trial) an attack on . . . "The Danny Thomas Show."[18] You're too young to remember that.

Pierce: I do remember that.

Kaus: Somebody claimed that he had the idea first. We had a law suit against Primo Carnera, the former heavyweight champion,[19] who claimed that the movie "The Harder They Fall"[20] was patterned after his life, which it probably was because we had paid $20,000 for the rights. He didn't mention that in his complaint. So those cases were a lot more fun than the who-hit-whom cases.

Pierce: Were you actually trying that type of case?

Kaus: Yes, mostly, like it always is, it was a question of getting ready for trial and settling on the courthouse steps. Most of the cases don't get tried. But the fun is preparing it and getting yourself in the position where you can get the best possible settlement for your client.

Pierce: Did you enjoy being an advocate at that time in your life?

Kaus: I did. I enjoyed it and I dreaded it. That hasn't changed. I have a trial coming up next month, in fact. It will be my first trial. After retiring from the Supreme Court, I made myself one promise, I was not going to be a trial lawyer. I was going to be an appellate lawyer. I was not going to worry about talking to witnesses and making sure they came to the court at the right time or that they wore the right kind of tie and they didn't smell of booze or that kind of thing. Here I am trying a case next week.

18. Television show (1957-1964), previously shown under the name "Make Room for Daddy" (1953-1957).

19. Heavyweight champion, 1933-1934.

20. Columbia Pictures, 1956.

Pierce: The best laid plans?

Kaus: Yes. It's just unavoidable.

Pierce: You were doing the trial work, were you doing any appellate work at that point?

Kaus: Yes, I was doing quite a bit of appellate work and I enjoyed that most.

Pierce: Did you enjoy the writing?

Kaus: Yes, I enjoyed the writing. I enjoyed the research. I enjoyed the fact that you're not tied to a clock. You can do your appellate work on the weekends. You can do it in the evenings. In fact, you usually have to because you are doing other things in the daytime. Later on I felt the same way; I just did not like being a trial judge. I didn't dislike it but I didn't really enjoy it. I loved being an appellate judge from the moment I worked at it.

Pierce: Let me see if I can categorize your idea of what a good time is. It's kind of with the law books surrounding you and searching for . . . ?

Kaus: It's a lot of things. It's trying to find a solution to a knotty problem. First of all, you have to find out if somebody else has found a solution first. And if they have, then that kind of confines you in what you can do. If nobody has and you're satisfied that this is an undiscovered territory, then you're really free to say what you think the law ought to be. If nobody says you're wrong, then you're saying what the law is. Whether a political theory says that you are not supposed to make the law, the fact is, when you're confronted with an unprecedented problem, usually to decide the case you have to make the law. There is no way out of it, that's what you get paid for.

Pierce: In practicing law, we all know there are other things than just getting to practice law, there's office management, running the law practice and those sorts of things. Did you enjoy that sort of thing?

Kaus: I hated it. I still do. I don't like administration at all. If I can practice law and somebody administers those things for me, I'll do whatever he says. I'll buy whatever health insurance he tells me to buy, I'll go into whatever pension plan he tells me is a good one. I don't want to be bothered with that kind of thing at all. When I was presiding justice of a division of the Court of Appeal from 1967 until 1981, fourteen years, I was cursed with a lot more administration than I liked.

Pierce: How about entertaining clients and that sort of thing?

Kaus: I couldn't stand it. Particularly insurance clients. They are yahoos, totally unintellectual. They want to be entertained. They want

to be dined, wined, and boozed. I had nothing in common with them. I did as little of it as I possibly could.

H. Appointment to the Superior Court

Pierce: What year were you appointed to the Superior Court?

Kaus: 1961, late 1961.

Pierce: How was it that you were first appointed to the Superior Court? Was it a political-type appointment?

Kaus: It wasn't. Pat [Edmund G.] Brown never knew where I came from. What happened was this, there was a very fine judge on the Superior Court, Judge John G. Clark, who had known Pat Brown for a long time. He had been chairman of the Adult Authority and so forth. At one point in 1959, Pat [Brown] had several superior court appointments. He asked Judge Clark whether he had any suggestions about people who had appeared in his court. Judge Clark's son was an associate with our firm. I guess he asked his son Stanley and Stanley told him that he thought that I would make a good judge so my name went in to Pat Brown in 1959. Nothing ever happened.

Then out of the blue, two years later in 1961, all of a sudden I got a call (I guess he had a few more appointments then), I got a call to go and see the governor in the State Building and he interviewed me. I had never met him. I had no political clout whatsoever. In 1959, as a result of having been nominated, so to speak, by Judge Clark, somebody asked me would I give some references for the governor's office. I gave as references Father Donovan whom Pat Brown knew very well, Herman Selvin who was a very prominent appellate lawyer, and Joe Ball who had been president of the State Bar and who had put me on this evidence committee when he was president. I guess he's always been my sponsor, so to speak. Of course, he's Pat Brown's partner now. So that isn't political, I don't call that political.

Pat Brown never knew quite why he was appointing me. After he appointed me to the Superior Court, he was persuaded three years later to appoint me to the Court of Appeal. My sponsors then were again there—Joe Ball, Chuck Beardsley who used to be a partner (he's now dead) in the firm that I'm working with. He appointed me to the Court of Appeal and two years later, when Division Five was founded, he appointed me to be Presiding Justice of Division Five. Mainly, I think, because I was young. Governors always like to appoint young people, that way their appointees stick around longer. Governor [Culbert L.] Olsen, for example, was a one-term governor, but he appointed some of

the best and longest serving judges in California—Roger Traynor, Phil Gibson and so on and so forth.

I didn't know Pat Brown socially at all, until after I had been Court of Appeal Presiding Justice for two years. Finally I met him at a dinner party at the home of Jerry Schutzbank. Pat was very gracious; he met my wife Peggy and started to talk to her. He asked her where she met me and how she got ahold of me. After she told him, he started to muse, he said "For that matter can you tell me how I got ahold of him?"

One more story, I have to tell you this. After he [Pat Brown] was no longer governor, Roger Traynor retired and Governor [Ronald] Reagan was [a long time] making up his mind whom to appoint to be his successor. I got this story the next day from four different sources. There was a cocktail party. I wasn't there, but Pat Brown was. Somebody asked him, "If you were still governor whom would you appoint as Chief Justice?" He said, "Well, you know, that Hungarian what's-his-name." By a process of elimination, my friends decided that he must have been talking about me.

Pierce: Even though you weren't actually Hungarian?

Kaus: Yes, that's right. I came closest.

By the way, Pat Brown, I must say, is one of the most complete human beings I have ever met in my life. I just love the guy, I've gotten to know him since, I didn't know him at the time at all, but I've gotten to know him very well after he stopped appointing me. He is a complete *mensch*, if you know what a "*mensch*" is.

Pierce: No, I don't know what a "*mensch*" is.

Kaus: It's a Yiddish expression for a human being with all the advantages and all the virtues and some of the faults of a human being. "*Mensch*" is actually German for human being. But it's a word that was adopted, like so many other German words, into the Yiddish language.

Pierce: Did some things [like] entertaining clients, administration, and so on play a role in your deciding to accept the appointment to the Superior Court?

Kaus: Yes. There really never was any question about accepting it. It did not mean a cut in pay for me. I was making just about the same money then practicing as I would have made as a judge. I felt the partnership I was in wasn't going anywhere. I was dead wrong, of course, because they have really zoomed. They had been very, very nice to me, the partners. I was in no position to tell them how to run the joint but they weren't running it right. I guess the main problem was there wasn't a single person in the partnership, including myself, who was interested in administration. Everybody wanted to be a trial lawyer or an appellate

lawyer, but nobody wanted to worry about the payroll and things like that. [We] never had partnership meetings. We always started on a regular routine of partnership meetings. We had two and then the thing petered out. So, we navigated the ship by the seat of our pants. We made money and we all made a good living, but it wasn't organized well.

Pierce: What was the size of the firm?

Kaus: About ten lawyers.

Pierce: At that time you were appointed to Superior Court?

Kaus: Yes. I think right now they [Chase, Rotchford, Drukker & Bogust] are up to sixty.

Pierce: In joining the bench and being in Superior Court, do you recall any particular cases that stick out in your mind, one case you'll never forget?

Kaus: Well, maybe there are one or two. I remember one case, the parties came in early in the morning. I immediately took the bench and I didn't talk to the lawyers or anything. The plaintiff was the first person to testify. It turned out that he was stone deaf but he could lip read. It took about an hour getting the standard operating procedures straightened out. If you talked to him, you had to position yourself right in front of him and speak to him directly and he would understand what you said. He answered in very good Oxbridge-type English. I don't know whether he was English but he affected that type of accent. I, myself, had to organize this thing. There was no jury. I had to tap him on the back when I wanted to talk to him. He turned to me and I turned to him. We got along fine after about an hour. I was a heavy smoker in those days so there were lots of recesses in my court. About 10:30 a.m., I took the morning recess. As I walked off the bench, he said, "Judge, I've answered a lot of your questions, now would you mind answering one for me?" I said "No, not at all. What is it?" He said "Where did you get your accent?" [Laughing.] It's a shaggy dog story.

One of the reasons, perhaps, why I didn't particularly enjoy being a trial judge was that I did not have too many legally interesting cases. Part of the reason for that was that having been a trial lawyer myself, I was a good settler. I knew the value of a case and the lawyers trusted me up to a point. I settled a lot of cases. In those days we had four or five judges downtown who spent a week every five weeks or so doing nothing but settling cases which meant, in effect, that you couldn't take any case that threatened to go [into] that week, so you called Department One and said I'm open for three days. But what you got for three days was another fender-bender. Oh God, I heard more eminent domain cases than I'd like to remember.

Pierce: How long were you actually on the Superior Court bench?

Kaus: Three years almost to the day. The last case I had was quite interesting. I remember we finished it at 4:40 p.m. on December 31, 1964. I had to be sworn in that day. Presiding Justice Clem Shinn was going to wait until five o'clock so I rushed from the courthouse to his chambers and I was sworn in just before five o'clock on December 31, 1964.

Believe me, the problems I had with that one day. The county of Los Angeles paid me for that one day and so did the state of California. If you've ever tried to repay one day's pay to the county of Los Angeles, you'll know the trouble I had doing that.

I. Teaching Experiences

Pierce: At some point in this spectrum of time you also took on some teaching responsibilities.

Kaus: All the time. I started to teach here at Loyola within a semester after graduating. I was eased into it.

Pierce: What year was that?

Kaus: I graduated in 1949. At the time Father Donovan had about four or five problem students who he felt were going to have problems at the Bar. So he hired me (I forget what he paid me) to give them a special tutorial preparing them for the Bar exam. I did that for about a semester. I think I did that at both day and night school. Eventually, about a year after I graduated, he let me teach a real course called Legal Method. Eventually I also taught Agency and Sales. In 1958, I think it was, I became a member of the State Bar Committee which worked on the then Uniform Rules of Evidence which eventually became the Evidence Code, in loose connection with the Law Revision Commission which did all the hard work. I became interested in Evidence and, naturally, as a trial lawyer you can never have enough of it. Then I finally started to teach Evidence. That became my course until I quit teaching in the early 1970s. I did teach appellate advocacy once and I enjoyed it very much. It was a seminar, in about 1976.

Pierce: I'm interested whether or not when you taught, did you use the Socratic Method?

Kaus: Not much, no. I taught Evidence. Particularly Evidence which is a tool. In other words, you can go into philosophy a great deal if you want to—why are dying declarations admissible, is it really true people don't want to meet their maker with a lie on their lips and what about their capacity to properly perceive when they are about to die (it is a rather exciting moment in one's life and, maybe, the senses aren't oper-

ating properly), but you can't get away from the fact dying declarations are admissible as an exception to the hearsay rule.[21] So, I tell them what the law is and leave it at that.

Pierce: You were indicating that most of the teachers you had at Loyola didn't use the Socratic Method and didn't challenge you so much intellectually as they did give you the basic tools to practice law.

Kaus: Well, I think that different courses . . . . For example, [Evidence] is a tool course and you don't want to teach that by the Socratic Method. I know of one Evidence teacher who told me proudly that he spent two-thirds of the course discussing presumptions.[22] Well, I know the law of presumptions is cock-eyed, it's complicated, it's tied in with all kinds of public policy issues and so on and so forth and you can spend an entire course teaching presumptions but you are trying to get people out into practice and they have to take Evidence, it's a course on the Bar examination. They are about to be certified by the State of California that they can practice law.

Pierce: You went on to be on the Superior Court bench and you also taught for a period in there. Is that right?

Kaus: Yes. The strangest thing was that I never had any conflict teaching when I was a trial lawyer. I always somehow managed to teach my classes from eight to nine o'clock and get to court. When I was on the Superior Court I had to be on the bench at nine o'clock, even earlier because I had default divorces in the morning. In those days we had pretrials, settlement conferences, and I found it incompatible with teaching in the morning. So while I was on the Superior Court I only taught at night. Then on the appellate bench (that's what I particularly liked about being an appellate judge), you're not tied to the clock. So I resumed teaching in the daytime again, as I recall.

Pierce: Would that be usually one class a semester?

Kaus: Yes. Those were the days before we moved into this new campus [Loyola] here where it is now. The number of students grew. In the early 1970s, we switched to having two sections. My very good friend, Bob Henigson, who is senior partner with Lawler, Felix and Hall, taught one section and I taught another.

Pierce: Did you ever teach any classes in trial practice?

Kaus: No.

Pierce: Did they have that class here at that time?

Kaus: I think they did.

21. CAL. EVID. CODE § 1242 (West 1966).

22. *See* CAL. EVID. CODE §§ 660-669.5 (West 1966 & Supp. 1988).

Pierce: Did you ever have any feelings about wanting to teach a class like that, perhaps given the young attorneys who were appearing in front of you?

Kaus: No, because frankly I was too lazy to categorize and classify and so on what you do as a trial lawyer. I don't want to give you the impression that I was the greatest trial lawyer that came down the pike. I was adequate. I had some nice results and some results I'd prefer to forget. I really didn't feel I was qualified to teach a course in trial practice.

II. Court of Appeal Years

A. Elevation to the Court of Appeal

Seitas: Were you expecting to be elevated to the Court of Appeal so soon?

Kaus: No. I can't say I wasn't hoping, but I really wasn't expecting it. I knew there was a vacancy. I'm trying to remember how the vacancy originated. Oh yes. Justice [Louis] Burke, from Division Four went to the Supreme Court. That created a vacancy in Division Four. I guess everybody kind of felt that Justice [Gordon] Files would be transferred from Division Three to Division Four as Presiding Justice. So, the vacancy was really in Division Three. I knew that it was there for maybe four or five weeks before I was actually appointed. I was told by several people that my name was going in to the Governor, but I had no real expectations I would get the nod. I was very much surprised the morning Governor Brown called me. I was sitting on the bench trying my last case. He asked me very graciously. I said "Of course" and then I went back to the courtroom. I couldn't tell them why, but I said, "This case has got to be finished in the next two weeks."

Seitas: Did you find the transition easy to make?

Kaus: Oh yes, the easiest thing in the world. I took to appellate work (I'm not talking about the quality of my work) from the moment I walked in. Maybe I like to write. I discovered that gave me the greatest pleasure.

Seitas: Was there any difficulty in the transition from the Superior Court to the Court of Appeal?

Kaus: No. Only ease. On the Superior Court you're on stage all the time. You've got a jury looking down your throat to see whether you've combed your hair right, whether you've shaved, whether you're wearing the right kind of tie, and that kind of thing. In the appellate court you can go to work in blue jeans. I didn't. I tried to look reason-

ably respectable, but you could if you wanted to and I think some of the appellate justices today do. You can set your own hours, you have to get your work done, of course.

Seitas: How about the transition to being Presiding Justice?

Kaus: That was fairly easy. Division Three, where I was first appointed, was a very strange division. Justice Shinn who was the presiding justice, he was a wonderful man, but he had quirks, one of them was he didn't come to work. He worked out of his home. He came whenever we had oral arguments. If he had to come for any particular reason he would, but basically he liked to work at home. He had a library there. He had a wonderful sense of humor. He was really sprightly and very mischievous. I remember the first time I sat on the bench next to him. Some attorney started out very pompously saying, "We rely for reversal on common sense and the Constitution of the United States as interpreted by the Supreme Court." Shinn said "You have taken two widely divergent approaches, have you not?" He was quite conservative. So the Division was run really by Justice [John] Ford who was senior to me by a good many years, and myself. Justice Ford was a person of infinite tact, so he would make no decisions at all of any importance without consulting me. In a sense, Ford and I had been running the Division to the extent that Clem Shinn didn't want to run it. It was an odd operation.

Becoming Presiding Justice in Division Five (I was in Division Three for two years) with two good friends of mine— Shirley Hufstedler and Clarke Stephens—it was a snap. I tried not to throw my weight around. The only decisions that I made without consulting them were the ones which were routine and burdensome— extensions of time or augmentations of the record. You have to make about ten or fifteen orders a day. They were pretty much foregone conclusions and nobody but the P.J. [Presiding Justice] wants to be bothered with them.

Seitas: Did you find that an interference?

Kaus: Yes, it's a nuisance. Each division has a Deputy Clerk who is assigned to the division. Once a day that deputy comes to you and he invariably comes at the time when you are just going good, dictating a very knotty point and you're just reaching the resolution. He walks in with his pile of papers, extensions of time and that kind of thing, that you have to sign. You have to take care of them then because there's no use putting them off because they won't go away. But it's just one of those things you take into account.

B. Stare Decisis

Seitas: You mentioned, in an article in the Los Angeles Daily Journal[23] stare decisis among the Courts of Appeal.

Kaus: Oh yes, that's the one item on my hidden agenda[24] when I was on the Supreme Court with which I got precisely nowhere. We have a very, very strange philosophy in California. On the one hand, the Supreme Court in the so-called *Auto Equity* case[25] held that following the doctrine of stare decisis is jurisdictional. It happened to involve an appellate department of a Superior Court which defiantly refused to follow the decision of the Court of Appeal in another district. The Supreme Court held that there was no jurisdiction not to follow the doctrine of stare decisis in *any* Court of Appeal in the state of California even if it was the Court of Appeal in another district. So, Courts of Appeal had statewide "lawmaking" powers, for want of a more polite word.

Well, the Courts of Appeal, of course, have been ignoring this decision most freely. In other words, when they don't agree with another Court of Appeal decision, they don't even distinguish it, they don't even say times have changed, it is out of date. They just say we can't agree. Because they don't agree they will reverse the trial judge for doing the only thing he has jurisdiction to do and that is to follow the Court of Appeal decision with which they all disagree. That's a cockamamie system, I think.

Now, I know there is a thin line between saying I don't agree and distinguishing on what some may think are specious grounds but, at least, there is a distinction. There is also another way of getting around a precedent you don't like and that is not to find it, to pretend not to find it. I'm aware of all those things. It puts lawyers, puts trial judges in the wholly untenable position to be faced with totally contradictory Court of Appeal opinions. Now the answer which one gets is, well, that's the kind of thing which is tailor-made for Supreme Court intervention. The trouble is there are so many of these disagreements among the Courts of Appeal that the Supreme Court, burdened as it is with capital cases up to here, cannot grant hearings in all of them. It can horse around a little bit by depublishing if it gets the chance (if it's possible to do so) the one of the two decisions with which it [did] not agree. But that is a tough public relations problem. Every time we've done that, while I was on the Supreme Court, we always heard from some member of the State Bar

23. L.A. Daily Journal, May 7, 1981, § I, at 1, col. 4.

24. *See infra* text accompanying note 68.

25. Auto-Equity Sales, Inc. v. Superior Court, 57 Cal. 2d 450, 369 P.2d 937, 20 Cal. Rptr. 321 (1962).

about making law by depublication which is very frowned upon.[26]

Also, the issues on which courts disagree aren't necessarily important enough for the Supreme Court to handle. The Court of Appeal should follow a decision if it finds no legitimate way around it. It should follow a precedent which is clearly on point. It should say if it thinks the precedent is bad, suggest the Supreme Court intervene and leave it at that. We did that when I was in Division Five.

We had a case involving incest of an uncle with a niece of the half-blood.[27] The statute forbids incest with a niece. As far as blood lines are concerned, the niece of the half-blood would be like the daughter of a niece which is all right; it doesn't bother the incest statute. However, there had been a precedent about five or six years earlier which said that, in effect, a niece is a niece is a niece, a half-blood line doesn't make any difference, affirm.[28] So, Justice Stephens, with whom I was sitting at the time, wrote a very nice opinion giving all kinds of reasons why that opinion was bad, illogical, et cetera, but saying we feel bound to follow it, we hope the Supreme Court will intervene eventually. The Supreme Court did intervene.[29] They wrote an opinion, an incredibly learned opinion, going back into canon law about incest with nieces (I didn't know there had been such a problem over the years) and reversing the conviction. The humorous part is that Justice [Marshall] McComb wrote a dissent[30] saying he would affirm the conviction for the reasons stated by Justice Stephens for the Court of Appeal, which didn't make too much sense in that particular case.

Seitas: So basically you see it as preventing chaos in the trial court?

Kaus: Yes. I think there is a great deal to be said for stability. If the rule is really bad, eventually the Supreme Court can overrule it. This way we have conflicting cases, one of which is bad.

Seitas: You have to figure out which one is bad . . . .

Kaus: Yes. In other words, the necessity for Supreme Court intervention is twice as frequent as it would be if the [Courts of Appeal] followed each other. If the appellate court, albeit reluctantly, followed a decision with which it does not agree, there's at least a fifty-fifty chance that the Supreme Court agrees with the first decision and doesn't have to do anything.

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26. *See infra* text accompanying notes 31, 91 & 101.

27. People v. Baker, 65 Cal. Rptr. 150 (1968) (official opinion ordered depublished by the California Supreme Court), *rev'd*, 69 Cal. 2d 44, 442 P.2d 675, 69 Cal. Rptr. 595 (1968).

28. People v. Womack, 167 Cal. App. 2d 130, 334 P.2d 309 (1959).

29. People v. Baker, 69 Cal. 2d 44, 442 P.2d 675, 69 Cal. Rptr. 595 (1968).

30. *Id.* at 51, 442 P.2d at 679, 69 Cal. Rptr. at 599 (McComb, J., dissenting).

Seitas: Right. Do you think there's any benefit from having a diversity of opinions?

Kaus: No. You can have a diversity of opinion. We got a diversity of opinion in the incest case. Justice Stephens gave very good reasons why he thought that intercourse with a niece of a half- blood was not in violation of the statute. So the diversity of opinion was right there, it's just that we had identity of result.

C. Depublication[31]

Seitas: While you were talking, you brought up depublishing cases and I was wondering if you had any change of attitude about depublishing from when you were on the Court of Appeal, perhaps being depublished, and being on the Supreme Court?

Kaus: Well, naturally when you're on the Court of Appeal and you see one of your brain children depublished, you don't like it. That goes without saying. But they pay the Supreme Court to disagree with you, so what can you do? Obviously, if the decision is depublished, there's something about it that bothers them. Theoretically, in most cases you've reached the right result [but] you've said too much.

Judges have diarrhea of the mouth and I was one of the them. You tend all the time, however hard you try not to do it, to say more than the case demands. Here you've got this beautiful rule of law all ready and you've never had a case in which you could plant it. Well, this case comes closest so you are going to throw this dictum in. Thereby, you may very well louse up a perfectly good opinion that the Supreme Court wouldn't touch but for the dictum.

I know depublication is not the most perfect system in the world, but it's better than any other. The real crunch comes when the Supreme Court depublishes a decision with which it does not agree where it thinks the result is bad but it doesn't want to take it up because it's got too much on its plate. So, in a way, it's an exercise in containing the damage to the parties immediately affected, not hurting anyone else because the decision is no longer precedent. Now that is not the way it should be, but if the only alternative is that you don't grant a hearing and dozens of superior courts, trial courts, follow the decision before they eventually overrule or disapprove the rule of law, it's the better of two evils.

31. *See* also *supra* text accompanying note 26 and *infra* text accompanying notes 91 & 101.

D. Working Methods

Seitas: Getting back to how you approach cases, working on cases do you have any particular . . . ?

Kaus: No, I have no systematic approach at all. Of course, in the Supreme Court it's different. I'm talking about the Court of Appeal where cases come to you totally unprepared. It may be a ding-a-ling case that you can handle in one hour; appeal after a plea of guilty on some specious ground and totally frivolous. It may be a very complicated case that's obviously going to go to the Supreme Court and is going to demand lots of hours of your time.

The way I approached them depended a great deal on whom I had to help me. The law clerk that I had for the longest time was Abby Soven, who is now a Superior Court judge. She's in the appellate department of the Superior Court and she is obviously an A-number-one legal intellect. When she was working for me I just divided up the cases with her: you handle these, I handle these; I give you my draft, you give me your draft.

Seitas: Without directing?

Kaus: No, I never direct a law clerk. Even if I am quite familiar with a case. Well, "never" is too strong a word. I generally like to get the most value out of the law clerk by giving it to him or her and seeing what he or she comes up with. You know, I'm the boss. I can always disagree in the end. Just to use a law clerk simply as a hired gun to say nothing but what I want to say is not getting the benefit of a person who is obviously above average in legal ability or else [he or she] wouldn't be here.

Seitas: So you approached it differently . . . .

Kaus: With different law clerks. Of course, the volume changed so much. When I first came on the Court of Appeal and I introduced myself to Justice Shinn, he said to me, "What we do here is we write one opinion a week and we have a four-week vacation so that means we have forty-eight opinions a year. Then, of course you have to participate in ninety-six from your two colleagues. That's an awful lot of work," says he. Well, he was already behind the times. In my first year, I did sixty-five. I thought I was going great guns. By the time I left, we were up to one-hundred ten, one-hundred twenty [opinions] a year and barely holding our heads above water. I don't know what they are doing now.

Seitas: So, did you towards the end feel . . . ?

Kaus: Well, you know sitting back with a record and reading from A-to-Z and reading the briefs before you give it to the law clerk, is a luxury you simply can't afford. You may want to get an idea of what the

case is all about before giving it to the law clerk to work on or you give it to him cold and say you let me know what this case is all about, let me see a draft.

When I went on the Court of Appeal (for all I know, some of them still do it) they were really doing things in what you would call a "bespoke way." They would have long legal memoranda on each case that went back and forth and discussed the pros and cons and this and that and the other. Then only after they had been studied, and chewed and digested would somebody be assigned the case and [he or she] would turn it into an opinion. That's a luxury we can't afford. We just don't have the time. So, it seemed perfectly obvious to me (I'm not saying that I'm the one who started it, I found out the Supreme Court had been doing something fairly similar in many cases, not in all cases, for a long time) [that] the first memorandum that is circulated by a justice, in many cases, should be pretty close to the opinion that he wants to file if they let him.

Now, in that memorandum you can discuss the pros and cons a lot more. For example, you could discuss the cons in the footnotes and that simply falls by the wayside. You know, dropping footnotes today is a lot easier than it was when I first came on the court. We had no Xerox. We circulated opinions in typewritten form. We still had carbon paper. Remember carbon paper? And only after everybody was signed off in typewritten form a secretary would then use a ditto machine. Oh my God, remember those purple hands we used to have? So, by that time it had to be set in bronze, so to speak, by the time you went to the ditto machine. If you had to ditto twice, God forbid. Today with a word processor you punch a button and the whole darn thing changes.

Seitas: So you think that changes in technology . . . ?

Kaus: I think it changes it a great deal. You would think that today there is more room for discursive memoranda because you can eliminate the chaff so easily by a press of the button. The funny thing is that the volume today in every court is such that without the word processing help that you have you couldn't get along. In the Supreme Court (to anticipate a little) I had one secretary, "one-and-a-half secretaries." I never hired a "half," that was just before I left I got the "half." That one secretary, she worked for eight lawyers—for me, for three or four law clerks and for four externs. All she could do was copy. You couldn't work in the Supreme Court unless you could do your own typing. When I first got there, I said, "Please come in and take dictation." She sat there for about fifteen minutes. After fifteen minutes, she said, "Judge, this isn't going to work. I have seven other people who have drafts they've

put on my desk I have to type up and circulate. If you want to dictate, here's a machine but I don't have the time to sit here looking at you."

E. Written Briefs and Oral Argument

Seitas: Do you find that the briefs are really helpful when you're approaching a case? How helpful did you find the briefs in general?

Kaus: Not too. Of course, there is a tremendous disparity in quality. That doesn't necessarily mean that the guy who has a lousy lawyer is at a disadvantage because he often acquires a new lawyer in the person of the judge who takes pity on him, if he feels like taking on the other lawyer. I'm not saying this is the ideal system at all. Sometimes you can't help wondering whether or not if one side or the other had a better lawyer, had a better brief, there isn't more that could be said for him or her. So you unconsciously or subconsciously tend to become the advocate for that side. Then, of course, you have to scrape these outer layers of advocacy away and become the judge again before you decide the case.

Seitas: What about the helpfulness or the role of oral argument?

Kaus: In the Court of Appeal it's negligible to tell you the truth. We were handling about ten cases a month per judge on the calendar. We were trying to sit only one day a month so we put thirty cases on. If everybody took an hour (a half-hour per side) on each case, obviously, it would be impossible. In the majority of the cases in the Court of Appeal, argument was either waived, counsel came and said, "I'm here to answer questions," or the arguments would be restricted to five or ten minutes. I found out one thing pretty soon after I became Presiding Justice, that if the first guy on the calendar estimates his time for twenty minutes, everyone else will say twenty, fifteen, twenty-five minutes. If the first guy says three minutes, you get two minutes, four minutes estimates. So, I proposed to my colleagues in Division Five that we should hire a shill and have a fictitious case at the head of the calendar and have them estimate the time for oral argument as one minutes and forty seconds. [Laughing.]

F. Court of Appeal Opinions

Seitas: You've mentioned one of the cases that you're most proud of when you were on the Court of Appeal is *Castro v. Superior Court.*[32]

Kaus: Yes, even though nobody agreed with me, I still think we scratched something which one of these days is going to come to the

32. 9 Cal. App. 3d 675, 88 Cal. Rptr. 500 (1970).

surface and that is the relationship between conspiracy law and first amendment rights which were on a collision course in that case.

Seitas: Could you explain a little bit what the case was about?

Kaus: It involved demonstrations and student strikes and so on at various East Los Angeles high schools by Chicano students who felt that they were getting the short end of the stick as far as their education dollar was concerned. Of course, whether or not they were right or wrong had nothing to do with it. The strikes were obviously concerted. They started at several high schools simultaneously. They obviously involved the commission of many, many misdemeanors. Some of them reasonably serious—sitting down on the public street, obstructing traffic, and so on and so forth. But that was not the problem before us. Instead of charging the ones who had committed the misdemeanors with the misdemeanors, the prosecution tried to charge them with felonies on the theory that they had conspired to commit those misdemeanors.

In California, as you know, conspiracy to commit a misdemeanor is a felony.[33] Now you can go along with that, I suppose, with respect to those people who had actually been caught committing misdemeanors. That wasn't the real problem. The problem was how far can you go with that? There were some students, for example, I remember one, he arrived after one of the demonstrations had started but he brought a placard with him. Obviously, he knew it was going to start. From that you can draw an inference that he had been one of the people who had been in on the planning, a "conspirator" for the demonstration, if you will. The only thing that happened as far as this one defendant was concerned (this guy was charged with a felony) is that after he got to the scene, he turned to a priest or an episcopal father who happened to be there and said, "Isn't it wonderful, Father?" That's all. That was the evidence against him.

Logically, if you apply conspiracy theory to the facts, there was evidence that he had been a conspirator who planned the demonstrations and that the conspiracy obviously involved the commission of misdemeanors. Now, he wasn't one of the ones who had committed the misdemeanors, but when a hundred students, as if on command, sit down on the street and block traffic, you can draw the inference that there had been an agreement. So, here we have a man who did nothing but participate in the planning of a first amendment activity, who did not personally commit any crime at all, except conspiracy, being charged with a felony.

33. *See* CAL. PENAL CODE § 182 (West 1970 & Supp. 1988).

I came up with a solution, I don't know whether it is valid. We could not overrule conspiracy law. It was ingrained that conspiracy to commit a misdemeanor is a felony and you don't have to be the one that commits the misdemeanor to be guilty of conspiracy. But we felt that where the conspirator was obviously engaged in a first amendment activity, you shouldn't be able to convict him just on circumstantial evidence. There should be direct evidence that he had really conspired to commit a misdemeanor. Otherwise, it's just too dangerous to plan any demonstration. You plan a demonstration, obviously a first amendment activity, that involves several hundred people, you can bet your bottom dollar that one of them is going to commit some kind of misdemeanor. If that's all it takes to make the planners guilty of a felony (because you can draw an inference that the misdemeanor was planned, whether or not it was) I don't want to do any planning. I don't want to go to jail for five years just because some idiot sits down on the street, so my solution (it didn't ring any bells with either of my colleagues) was that when you have a first amendment activity, you shouldn't be found guilty of, you shouldn't even have to go to trial on a conspiracy theory unless there is direct evidence that you had conspired to violate the law. It's a compromise between two principles, which as I say, are on a collision course. If you can think of a better one, you're welcome to it.

Seitas: Are there any other Court of Appeal opinions that you are particularly proud of?

Kaus: There are some that I'm proud of because I think they are well written. They don't amount to a hill of beans as far as law is concerned. The one that I really like best, because, as I say, it is well written, is a [slander] case called *Friedman v. Knecht*.[34] It was a [slander] case brought by an attorney who was in court to defend a lady who was charged with prostitution, as I recall, against the deputy district attorney who was prosecuting the case, who wanted a continuance because he was not ready to go to trial. The plaintiff was quite dramatic in the way that he insisted on going to trial. The district attorney said something like, "I wonder what his great interest in this case is?" implying, I suppose, that the guy was a customer of the defendant (who had not yet been found guilty, of course). It was an amusing kind of case. It made no waves as far as the law is concerned.

I suppose important cases we had, there were two cases, one was called *Younger v. Smith*[35] and the other one was, if I'm not mistaken,

34. 248 Cal. App. 2d 455, 56 Cal. Rptr. 540 (1967).

35. 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973).

was it *Times Mirror v. Superior Court*?[36] There were two cases in tandem. They both dealt with the same thing and that is so-called "gag orders." By the way, of course, the moment you have called it a "gag order," you have decided the case—you're going to be against it. You call it a "protective order" . . . .

Seitas: You noted in the *Younger* case that the attorney had referred to "muzzling the press."[37]

Kaus: Yes, that's right.

Seitas: That was a mistake from the beginning as far as his position?

Kaus: The *Younger* case involved a twenty-five dollar fine that Judge Smith had levied against the then Attorney General for violating his gag order. We sprung Evelle Younger from the conviction on first amendment grounds. I guess, the tougher case was the other one which involved a protective order which had been issued not just against court personnel and parties and lawyers but also against the media. That was bad from the word go. It was pretty obvious that you cannot do that, except in the most extreme circumstances. I don't think the Supreme Court of the United States has yet found a case that was extreme enough. Then, the question was under what circumstances and by what criteria can you issue protective orders against parties and firms. The big question and I think it was really rather an artificial question, was whether or not the court had to find prejudice beyond a reasonable doubt. If it didn't make the gag order, a fair trial would be in danger. What the criterion was, was it a preponderance of evidence or some other nice new language that was put forwards which we finally bought. After all, you are in the business of predicting what will happen. You can't ask too much of a judge who is trying to preserve the constitutional right to a fair trial for a defendant before you are going to let him order the attorneys and other people involved to try the case in the courtroom rather than in the press. The case has stuck. I know the Supreme Court denied a hearing.

I rather like the *Bozung* case.[38] That was taken over by the Supreme Court, but they used our opinion.[39] That had to do with whether or not

36. (Civ. No. 40879), *consolidated on appeal with* Busch v. Superior Court (Civ. No. 40912) *and* Younger v. Smith (Civ. No. 38590), 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973).

37. *Id.* at 147, 106 Cal. Rptr. at 231.

38. Bozung v. Local Agency Formation Comm'n, 37 Cal. App. 3d 842, 112 Cal. Rptr. 668 (1974) (official opinion ordered depublished), *rev'd*, 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975).

39. Bozung v. Local Agency Formation Comm'n, 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975).

an annexation has to be approved by the Local Agency Formation Commission [LAFCO] in a particular county. We held that it did. No, I'm sorry. I'm misstating the issue. It was whether or not before the LAFCO approves the annexation it has to order an environmental impact report or whether it's a purely political decision.

III. Supreme Court Elevation and Opinions

A. Supreme Court Working Methods

McAllister: This afternoon's topic will be your move and your experiences on the California Supreme Court. First, can you tell us about the transition to the Supreme Court, what that entailed and how you had to change your life and methods of working?

Kaus: It's a completely different proposition. First of all, from the point of view of method of life, I had no intention—and Governor Brown knew this when he appointed me—of staying there. I was sixty-one at the time. I could have stayed for nine years, but I had no intention of staying that long. I knew I'd be there for three or four years. It was totally impractical for us, my wife to move up there. We had a home that we built and we couldn't possibly lease it; it was too full of things. We didn't want to sell it because in three or four years we would want to live in it again. So, we reached a compromise which wasn't a very good one but the best under the circumstances. I had a small apartment in Berkeley which turned out to be very nice. I liked it very much and so did my wife when she came up. It was over a garage in a private residence and separate from everything else. It had its own bathroom, kitchen and so on. I enjoyed it.

I flew to San Francisco either on Sunday night or very early on Monday morning and I flew back on Thursday evening. I worked in the Los Angeles office of the court on Fridays. One routine which became absolutely ironclad was in the Supreme Court you circulate the memoranda for next Wednesday's conference no later than Friday at five o'clock. Friday I was in Los Angeles so my secretary in San Francisco gathered the memoranda and she put them in a Federal Express envelope and she expressed them to Los Angeles, I gather by way of Memphis, Tennessee. On Saturday morning I would go to the Federal Express office in Beverly Hills to pick up the package and spend the rest of the weekend reading the memoranda. Usually I read the last four or five on the plane either on Sunday night or Monday morning. So, I spent three or four nights a week in San Francisco and three or four nights a week in Los Angeles. It was very tiring even though it became a routine like brushing your teeth and shaving, something you just live with.

Transportation from the airport to Beverly Hills became a headache. My wife doesn't like to drive to the airport so I had to go by public transportation, [like] buses, but you have to arrive at the right time for them. Going to the airport was easier because the state police picked me up at home and took me there on Monday morning. So, from that point of view, it was a drag.

But, on the other hand, I enjoyed Berkeley very much. I became great friends with my most senior law clerk, Alice Shore. Her own home was very near to my apartment. Justice Joseph Grodin was close by so we formed a carpool of three which is what you need in order to sail across the bridge instead of lining up for fifteen minutes or so for the privilege of paying seventy-five cents to cross. That was a wonderful ego trip every morning when you went past at fifty miles an hour and you see ten thousand cars to your left lined up to pay the toll. So, from that point of view, it was a total change of life.

It was a job that took far more hours than the Court of Appeal. I had one night a week free, that was Wednesday in San Francisco. That was after the Wednesday conference. I usually had dinner with my son who practices law in San Francisco. That was one small advantage of being up there. I saw a lot more of him then than I do now or I did before.

The work is totally different. Sixty percent of the work centers around the Wednesday conference in one way or another. You always have at least three different things going for the Wednesday conference. The memoranda for the one that is coming up that have been circulated, that you have read, that you've studied. I usually had a meeting with my staff, I assigned them out and then we all met together and went over each case separately and they told me how to vote. Usually I was very obedient.

Then, of course, there was the conference a week down the road. For this one, there were a number of cases assigned to you and you have to get the memoranda out. If you don't know about a week before the conference what you're going to say you'd better ask the Chief Justice to put it over because by that time you ought to know what you're going to put in your memorandum. Then there is the one that is two weeks down the road. On that one, you're working with a law clerk or with an extern. Then there's the one that is three weeks down the road which you're beginning to become acquainted with. So there are these various levels of preparations that you have for the upcoming conferences.

By the way, I said "extern." I want to get something off my chest. On the court we have three or four law clerks. Now, they may even have

five per justice. In addition, you can get as many externs from the law schools—they are law students who come to the court for one semester—as you have chairs to put them on. There's no limit except the physical limit. The court is really hurting for space. It's a lousy system. It started, if my history is correct, maybe in the late 1960s, early 1970s with one or two externs per justice. It was really a sort of a favor the court did for the law schools. It gave certain selected law students an opportunity to work with the court and become acquainted with its inner workings. But today, the system is such that the court relies on externs. It couldn't function without them. Naturally, they don't do very responsible work but they do very essential work. They will go through the records, they may try their hands at memoranda and that kind of thing. Naturally, it frees the regular clerks for the drafting of opinions and dissents and other things.

Ideally, the chain of command is that the extern works for the law clerk and the law clerk works for the judge. It gets broken down quite a bit, at least it did in my case. I don't know how other judges work. Some of the externs were awfully good. I don't mean to run them down as lawyers, we got the cream of the crop, but they only come for one semester. By the time you get to know them, they leave. The major law schools up there—Boalt Hall and Stanford—will not let their third year students come for the Spring semester. So as far as Boalt Hall and Stanford are concerned, you can get third-year students only for the Fall semester. In the Spring semester, you settle for second-year students from Boalt Hall and Stanford or you can go to the other law schools. I had many excellent externs from Golden Gate [University], U.S.F. [University of San Francisco], Hastings College of the Law. It's not a happy system. It seems to me that a court of the importance of the California Supreme Court which is, after all, the court of last resort in the biggest state in the union, a state that is bigger than most countries, shouldn't have to rely on volunteer help, that is not yet even admitted to the Bar from the law schools. I'm not saying we can't use externs on the court. I think we can, but I don't think we should have to depend on them the way the court is now.

B. *O'Connor v. Village Green Owners' Association*[40]

McAllister: We turn now, Justice Kaus, to some of the cases which you were part of, starting with *O'Connor v. Village Green Owners' Association*.

40. 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983).

Kaus: I've taken more flack over that case than any other that I wrote. The case is a sequel to *Marina Point v. Wolfson*.[41] The *Marina Point* case held that you cannot discriminate against the tenant because he or she has minor children. The *Marina Point* case was before my division in the Court of Appeal.[42] We held in favor of the landlord and I signed the majority opinion. I still think we were right. Basically, what had happened is that the Legislature had taken several runs at amending the Unruh Civil Rights Act[43] to specifically provide against discrimination on account of age. They had never managed to pass a law so that it seemed to us a pretty clear indication of what the Legislature didn't want.

Nevertheless, the Supreme Court granted a hearing and went the other way and held in favor of the tenant. Then along came the *O'Connor* case which involved condominiums. Well, if you think about it for a moment, my own reasoning went this way: that many condominium owners rent their condominiums. When they do, they cannot discriminate against parents with minor children. It just doesn't make sense that if half the condominiums are rented out, in the rented units minor children have to be admitted while in the units that are occupied by the owners a rule against minor children can be enforced. So, we held, in effect, that *Marina Point* applied to condominiums. I think given *Marina Point*, *O'Connor* is still correct although it made a lot of people unhappy. It possibly could have been written in a different fashion. I don't know how.

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41. 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496, *cert. denied*, 459 U.S. 858 (1982).

42. Marina Point v. Wolfson, 97 Cal. App. 3d 278, 158 Cal. Rptr. 669 (1979) (official opinion ordered depublished), *rev'd*, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982).

43. CAL. CIV. CODE § 51-51.8 (West 1982 & Supp. 1988). The Act provides in part:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or blindness or other physical disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of any kind whatsoever. This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, or blindness or other physical disability.

Id. § 51. The Act also provides:

> No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, refuse to buy from, sell to, or trade with any person in this state because of the race, creed, religion, color, national origin, sex, or blindness or other physical disability of the person or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers.

Id. § 51.5.

Following the *Marina Point* and *O'Connor* decisions, the Legislature added CAL. CIV. CODE § 51.2 (West Supp. 1987), which prohibits discrimination in housing sales or rentals based on age.

McAllister: Was the opinion criticized?

Kaus: Oh, all over the place, yes.[44]

C. *Isbister v. Boys' Club of Santa Cruz*[45]

McAllister: Then another case following that was *Isbister v. Boys' Club of Santa Cruz*. In this you dissented.

Kaus: I dissented, yes. The question there was whether or not the Boys' Club of Santa Cruz had to admit girls. I will say that the Boys' Club did not make a very good case for itself. There were two basic issues as to whether or not the Unruh Civil Rights Act applied to the Boys' Club in the first place. The Act speaks of business establishments[46] and prima facie a Boys' Club is not a business establishment. However, the legislative history of the last amendment of the Act, in my mind, left no doubt they intended it to apply prima facie to this kind of club, but that doesn't mean that discrimination based upon a rational basis was prohibited.

I thought when you're dealing with adolescents, which are not quite human, they are human beings with an asterisk. They are growing up. I'll never forget one of my sons when he was an adolescent all of a sudden developed breasts, only for a week, they went away. But you have all kinds of juices flowing through you when you are thirteen, fourteen, fifteen, which eventually go away.

What's perhaps mandatory for adults is not necessarily mandatory for adolescents. It's not a question of what I believe, it's a question of whether the Board of Trustees at the Boys' Club could rationally come to the conclusion that during adolescence a valid purpose is served by giving the boys a time that they don't have to show they're macho to the girls and the girls a time that they don't have to exercise their sex appeal for the boys.

Also the purpose of the club was to combat juvenile delinquency. Since the vast majority of juvenile delinquents (at least the ones that are caught) were boys, it made sense to me for the club to spend its anti-juvenile delinquency dollars the way it felt it would do the most good. So, I dissented.

I must say several of my very liberal friends wrote me very nice notes agreeing with me. I think the case is an exercise in, I hate to say this, a kind of a "reactive liberalism," where the court refused to go into

44. *See, e.g.*, Note, *Condominium Age Restrictive Covenants Under the Unruh Civil Rights Act:* O'Connor v. Village Green Owner's Ass'n, 18 U.S.F. L. REV. 371 (1984).

45. 40 Cal. 3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985).

46. *See supra* note 43.

the facts of the particular cases, the particular problem that was presented. I was very sad about the result. Particularly, because my buddy, Joe Grodin, wrote the majority opinion. Everybody's entitled to one mistake.

McAllister: At one point in the dissent you said the majority had a chip on its shoulder.[47]

Kaus: I did? I'm sorry I let that one get away.

D. *Hartman v. Santamarina*[48]

McAllister: *Hartman v. Santamarina* was another of your decisions, relating to the five-year statute.[49]

Kaus: That case was pure fun. You know what the five-year rule is? If the plaintiff doesn't bring his case to trial within five years, the case gets dismissed. The rule was enacted at a time when you really had to be an artist in delay not to bring your case to trial in five years because the judges were just waiting to try cases and they had no business. Nowadays I understand in Department One of our Los Angeles Superior Court they are happy if they can get rid of all the five year cases every morning at least. The situation has changed a great deal. The five-year rule is just something for defendants to harass plaintiffs with.

Some years ago, the Supreme Court by way of dictum said, well, you can get around it very nicely by swearing one witness or empaneling a jury. In [*Hartman*], they empaneled a jury with everybody knowing the case wasn't going to be tried. The attorney for the defendant called that a charade or farce. I happened to be reminded of the various charades in which the common law has engaged over the years in order to give courts jurisdiction they didn't already have, like the King's Bench, the Writ of Middlesex, the Court of Exchecquer, and the Bill of Quominus. Do you know how the Bill of Quominus worked?

McAllister: Tell us.

Kaus: That's nice. The Court of Exchecquer was always supposed to look after the king's purse. But they wanted to have jurisdiction over

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47. Justice Kaus wrote:

> If I may suggest, the basic mistake of the majority opinion is that it views the Club's policies as being pointed toward the exclusion of girls. With that chip on the majority's shoulder, perjoratives come easily. If the court looked at the Club's activities more benignly as providing a service for boys—a service tailored to their needs—it would not find it necessary to reach such a *wonderous* result.

40 Cal. 3d at 101, 707 P.2d at 232, 219 Cal. Rptr. at 170 (Kaus, J., dissenting).

48. 30 Cal. 3d 762, 639 P.2d 979, 180 Cal. Rptr. 337 (1982).

49. *See* CAL. CIV. PROC. CODE § 583.310 (West Supp. 1988) (formerly CAL. CIV. PROC. CODE § 583(b) (West 1970)).

ordinary civil cases. So a proceeding was developed by which you sued the defendant like in any other civil case but then you added at the end "and he owes me so much in damages and he hasn't paid me and therefore, I am the less—'*quominus*'—able to pay the king his taxes." "Aha!" said the Court of Exchecquer. "That interests us a great deal. Here is a guy who cannot pay his taxes because the defendant won't pay his just debt to him, so therefore, we'll have civil jurisdiction." Easy. I think it's a worse charade than anything we ever engaged in in connection with the five-year rule.

McAllister: In the *Hartman* case you upheld the "charade" or "fiction" of that [the five-year rule]?

Kaus: Yes, I felt we had to. After all, the court had announced this charade as being legally valid twenty or thirty years earlier and hundreds and thousands of judges and litigants had relied on it since. To suddenly say it wasn't going to work would have been ridiculous. The Legislature had a million chances to amend the statute and they never did.

McAllister: You probably had at that point a lot of cases in the pipeline of the courtroom that were relying . . . ?

Kaus: Right. Oh, there must have been thousands, particularly in Los Angeles where they were striving to bring five-year cases to trial.

E. Legal History and Litigation Experience

McAllister: This case, Justice Kaus, prompts me to ask a couple of questions. The first one is obviously you are conversant with legal history?

Kaus: That is pure chance. The Legal Method book of materials, which I used as a matter of fact when I was a student at Loyola in 1946 [and] which I later on used when I was teaching Legal Method, had a short history of the English courts in it. That's where I became acquainted with the Bill of Middlesex and the Writ of Quominus. I am no great student of legal history. I'm interested, but never really had the time to sit down and study it at length.

McAllister: My second question is this: a lot of practitioners, particularly trial lawyers, view appellate justices in general as probably not having a lot of trial experience, which may be sour grapes. You obviously have a lot of litigation experience and that seems to show in this *Hartman* case.

Kaus: That type of litigation, civil cases. I had no experience on the criminal side and that's why a person like Justice [Allen] Broussard is so valuable to the Supreme Court, because, frankly, I don't think any of us when I was there were ever in the trenches in criminal cases. He was a

trial judge in Oakland. There wasn't a stunt that anybody could pull that he hadn't heard of. He knew what the pressures were and the motivations in many situations where nobody else on the court was really familiar with what was going on in a city like Oakland. Rose Bird, of course, she was public defender, but in perhaps a different type of legal community in San Jose.

McAllister: Did you feel that your background in civil litigation put you on good footing to know about real life problems like the overloads of the courts?

Kaus: To some extent, yes. But I certainly had no monopoly on that. Several others on the court had the same type of experience that I had.

F. *Turpin v. Sortini*[50]

McAllister: Let's talk about the case where you didn't have a whole lot of precedents to rely on, *Turpin v. Sortini*, a case regarding "wrongful life."

Kaus: The wrongful life case. That's the funny thing, of course, the predicate to a wrongful life case (as distinguished from the wrongful birth case) is that if the parents had had proper eugenic counseling from the defendant doctor they would not have conceived the plaintiff and he would never have been born. Since he was born with some kind of birth defect or disease, he sued the defendant in damages. You're immediately up against a problem. Usually when you award damages, the guy loses a leg. Then you compare a life with two legs with a life with one leg and you assess some kind of monetary label to the difference. But when a guy sues on the basis that he never should have been born, what are you comparing? A life? I'll say that *Turpin* was not an extreme case. The plaintiff was deaf. That's unfortunate, of course, but it's not the worst kind of thing that can happen to you. One of the precedents,[51] the precedent we overruled, involved a poor kid who was born with Tay-Sachs disease. That is a short life but it is full of pain, as I understand it. Then you really feel obviously in that case something to compare it with even though you can't get ahold of it.

The decision wasn't too satisfying to me intellectually when I wrote it and it still isn't, though I think from a practical point of view it is valid.

50. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982). *See also infra* text accompanying notes 71 & 89.

51. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980). *See Oral History: Justice Bernard S. Jefferson*, 14 HASTINGS CONST. L.Q. 225, 249-51 (1987) (discussion of the *Curlender* case).

What we held is you couldn't get general damages for "pain and suffering" or whatever you want to call it, because you were alive. On the other hand, to the extent your disability or what it was, caused some financial outlay, let's say in the case of a deaf child, a hearing aid or whatever else was needed if possible to bring him up to scratch, if possible, to that extent the damages were recoverable.

I think it makes sense in a practical way. Here is a person that's alive, he has to dish out a certain amount of money which a normal person doesn't have to dish out. The defendant should have warned the parents that the plaintiff was not going to be a normal sort of person. So why shouldn't he be responsible for that check, for that particular financial outlay? On the other hand, you're still faced with the same intellectual dilemma that you're faced with in the area of general damages. So, from an intellectual point of view, the solution is not satisfying, although I still think a good practical solution to a legally unsolvable problem which incidentally raises an interesting issue.

If the Legislature passed a statute saying that in an action for wrongful life, general damages are not recoverable but special damages are, we would cheerfully enforce that, I suppose, and not worry so much about the intellectual underpinnings of the legislation—that's what the Legislature said, it's constitutional, why not? On the other hand, when a court has to make up a rule practically out of whole cloth—let's face it, there were no precedents—you do look for an intellectual basis, [a] philosophical basis, a jurisprudential basis, which is satisfying to a discriminating mind. I don't think we found it in that case.

G. Medical Injury Compensation Reform Act (MICRA)[52]

McAllister: Let's turn to one where the Legislature did speak in the area of medical malpractice: *American Bank & Trust Co. v. Community Hospital*[53] which related to the Medical Injury Compensation Reform Act.

Kaus: There are four of them: *American Bank, Barme,*[54] *Roa v. Lodi*[55] and *Fein*.[56] To me that was a series of cases which were watershed cases. A tendency has developed, of course, on the court—we all

52. Chs. 1, 2, 1975 Cal. Stats. 2d Ex. Sess. 3949 (codified at CAL. CIV. PROC. CODE § 667.7 (West 1987); CAL. CIV. CODE § § 3333.1-3333.2 (West Supp. 1988)).

53. American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, Inc., 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984). *See also infra* text accompanying note 93.

54. Barme v. Wood, 37 Cal. 3d 174, 689 P.2d 446, 207 Cal. Rptr. 816 (1984).

55. Roa v. Lodi Medical Group, Inc., 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77, *appeal dismissed*, 474 U.S. 990 (1985).

know it—of constitutionalizing one's theories of how the world should be run. So, if the Legislature passes a statute, or a court comes down with a ruling which runs counter to one's beliefs in the proper sphere of government, we all have a tendency to find there's a violation of due process or equal protection or find some other constitutional basis for holding the statute unconstitutional. Obviously, I think that in these MICRA cases, the four cases, what was wrong with the dissenting opinions was that they constitutionalized what they thought the rule ought to be. I personally didn't think that much about it as to whether or not the MICRA legislation was good law or lousy law. I was satisfied it was well within the legislative sphere and that there was no constitutional prohibition. It probably did affect poor people more than rich people but so does the sales tax, doesn't it?

If you keep in mind at all times what the Legislature was trying to accomplish, that is, to find financially responsible defendants in medical malpractice cases because doctors were threatening to go bare, they were threatening to hide their assets in the Bahamas, mahogany stumpage in Honduras and what have you, I think the Legislature did a fair job.

I think that there is much wrong with some of the statutes. They are not very clear. You can see the obvious traces of legislative compromise in some situations. But to me, it was clear that this is where it was the duty of the court to say it was none of our business, whether or not this is a good statute or whether it is a bad statute, whether it works, whether it doesn't work.

The first case, the *American Bank* case, the first time it came out it went the other way because we had three pro tems on the court at the time.[57] The statute involved was unconstitutional because it didn't work! Now, that had never been a criterion of constitutionality. By the way, it worked. The purpose of the statute was not to bring down medical costs, but it was just to bring down the cost of medical insurance, and it worked beautifully as far as that's concerned.

McAllister: The opponents to the statute seem to have been trying to have the court reweigh the empirical data supporting it.

Kaus: Well, I don't think the court went for that. The argument was made that the Legislature was defrauded into believing that there was an insurance crisis, that it was a phony crisis of the insurance com-

56. Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985). *See also infra* text accompanying note 72.

57. *See* American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, Inc., 33 Cal. 3d 674, 657 P.2d 829, 204 Cal. Rptr. 371 (1983), *vacated*, 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984).

panies' own making. Nobody on the court went for that. Everybody agreed that if the Legislature felt there was an insurance crisis, there was an insurance crisis. Even if somebody put one over on the Legislature, that was the Legislature's deciding, it wasn't our business to say to the Legislature, "Boy, were you fooled." But, from then on we diverged.

H. *Kumar v. Superior Court*[58]

McAllister: *Kumar v. Superior Court* related to a New York divorce which ended up in the California courts.

Kaus: We had a lot of favorable comment on that case. My senior law clerk, Alice Shore, worked on that a great deal. There was a tendency among California judges who had a child custody problem before them to grab ahold of the case, even though the divorce hadn't been granted in this state and even though the connection of this state with the parties or the child was extremely tenuous. All the judges had to do was see a kid and decide that they had a better idea of who should have custody of the kid than the court that had originally decided the custody issue.

That went directly counter to the—I'm afraid I've forgotten the name of the statute—some uniform law concerning interstate custody problems.[59] Basically, what the court held was to enforce the statute which gave, absent certain exceptions of course, the court which originally had granted the divorce and granted the custody primary jurisdiction to decide whether or not to change the custody.[60] As I recall in the *Kumar* case (I hope I have it right), there was a New Jersey or New York divorce, and the mother had grabbed one of the children or two children (I forget how many were involved) and brought them to California. The California judge assumed full jurisdiction over who should have custody of the child. Absent some emergency, the California judge should simply have enforced the out-of-state divorce decree whatever it said.

McAllister: One other aspect of that was I believe the father obtained California counsel and had attempted to get or got a writ of habeas corpus to bring the child into court and the issue was did that give in personam jurisdiction for child support and attorney fees?

Kaus: Well, yes. I totally had forgotten about the attorney's fee angle, but obviously, it seemed to me at least, when a father has to chase his kid across the country and finds the kid in California, he does not waive whatever jurisdiction there is in the eastern courts by trying to get

58. 32 Cal. 3d 689, 652 P.2d 1003, 186 Cal. Rptr. 772 (1982).
59. Uniform Child Custody Jurisdiction Act, CAL. CIV. CODE §§ 5150-5174 (West 1983).
60. CAL. CIV. CODE § 5163 (West 1983).

custody or possession or whatever you want to call it of the child by way of a writ of habeas corpus. It's a desperation measure which is in no sense a waiver of his right to stand on the original decree. Some of the minutiae of that case I have forgotten but you're bringing it back to me.

I. *Bailey v. Loggins*[61]

McAllister: *Bailey v. Loggins* was a case relating to a prison newspaper.

Kaus: Yes, well that was another case of what I would call "knee-jerk liberalism." It was a prison newspaper which had been, in the most heavy-handed way, censored by the prison authorities. There's no doubt about that. They prohibited a couple of pieces which seemed utterly harmless to me. By the time the case came to the Supreme Court, by the way, and I heard it with the others, it had been argued three times because there had been so many changes of personnel and they could never find four judges to agree on a result. So by the time we eventually filed our opinion, the regulations had been changed two or three times, as I recall. The whole thing was more or less moot. After these efforts we felt some guidance to the prison authorities was called for and I didn't dissent from that.

The fun part of it is that the prison doesn't have to run a newspaper, they could shut it down. So what are you going to do here? Are you going to tell them what they can and what they cannot do in regulating a newspaper which they can prohibit altogether at any time? It seemed to me that there was some room for diplomacy in that situation and not the heavy hand of the Supreme Court screaming "First Amendment." Going through the regulations it seemed pretty clear to me that the newspaper was not really established—at least there was a very good argument [that] can be made—that the newspaper was not established so much as a medium of expression [but] as a means for prisoners who were studying how to write English, to write essays on this, that, and the other.

When you look at it that way, the prison authorities are in the position of a professor of English who grades the papers that the students write. Obviously, they have a lot more authority to tell a student that this is no good, rewrite this, or leave out this sentence, you're lousing it up. Whether I was right or not in that case, I don't know. I see a lot in the majority opinion but I do think that my solution was a good practical solution, well grounded in the regulations which reconciled the first amendment problems that the majority saw which I thought would dis-

61. 32 Cal. 3d 907, 654 P.2d 758, 187 Cal. Rptr. 575 (1982).

appear because, if the majority opinion was too strictly interpreted, the paper would be shut down.

What actually happened was really rather amusing. While we had the case, they closed down the newspaper either at one state prison or at all of the state prisons, I don't know. A particular assemblyman, Representative [now Mayor of San Francisco Art] Agnos, made such a fuss about it in the media (he obviously had some clout, I don't know if he was a chairman of some committee or something) that they opened up the newspaper again, they resumed publication. So here we think that it's just between the prison authorities and us, the courts. We tend to ignore in our deliberations the influence the Legislature quite properly has over the way things are run in this state. After all, we are a democracy.

J. Criminal Cases

McAllister: Next, I'd like to turn to some criminal cases. Before we get to that, you've mentioned before that your personal experience in practice had not been in the criminal area. Even given that, you authored some important criminal decisions. How did you get up to speed?

Kaus: Well, frankly, I felt like a fraud. I had no criminal experience at all as a practicing attorney. I never sat on a criminal case as a Superior Court judge except on one short contempt matter. I just had to learn it.

Justice Jack Ford, on the Court of Appeal when I first got there, was unbelievably helpful to me. Later on in Division Five, Justice Stephens, who had quite a bit of experience as a criminal judge [was helpful]. Justice [John F.] Aiso went to enormous lengths to correct my mistakes. In fact he was kind enough, I think he was then Presiding Judge of the appellate department and I was still in Division Three, and I had filed an opinion and he had read it. With his old world Japanese courtesy, he called me up and told me, to be blunt about it, I had pulled an awful booboo. Luckily, it was in time to correct it. It was a very esoteric point of criminal pleading. Well, I won't go into that. I don't remember what the point was now. He was a real student of criminal law. He had the same problem that I had. He had never practiced it at all when he went on the bench. He really sat down and studied it from the ground up as only a very conscientious and very brilliant and very hard working Japanese American can do. He knew it cold, up and down and right and left.

K. *People v. Tassell*[62]

McAllister: One of those decisions was *People v. Tassell*, relating to when evidence of prior acts could come in.

Kaus: You know, I accepted an appointment to the Supreme Court mainly for the chance of writing that opinion.

McAllister: Tell us about that.

Kaus: The background is that under the common law system you cannot use uncharged crimes to show that the defendant is guilty, subject to certain exceptions. I won't go into the exceptions. Whether or not that is a good rule or a bad rule, I'm not concerned, but clearly it is the rule. There are many very fine, very good, civilized jurisdictions, which start in at the trial with the defendant's prior history. You first have to learn about the guy or the gal. You learn all about him, his entire history, his jobs, his education, his family history, and his crimes and only then does the court turn to the particular crime that's under investigation. That's a rational way of deciding cases, it seems to me. That's the way we do it at home. If Johnny has a sweet tooth and Jimmy doesn't and the cookies are stolen, you know Johnny did it. You don't do that. However, there had developed in California a wholly, it seemed to me, irrational basis for letting in prior sex crimes on the theory that they showed a scheme or design of the defendant. I never did learn what the "scheme" or "design" was. Was it to rape every woman in California on the thought [that] every journey begins with a single step?

Do you remember the name of the case, the one we overruled in *Tassell*?[63] Maybe it will come to me. Anyhow, there was a previous Supreme Court case that had been written about two years before I got on the court, which seemed to me totally irrational, but it was signed by seven of them, every single one. When I was still on the Court of Appeal, I wrote a concurring opinion because I'm an obedient C.A. justice, but I explained to the Supreme Court at great length why that opinion was dead wrong.[64] They paid no attention to it, of course. So, after I was on the court for two years, *Tassell* came along, and I had an opportunity to state my case. I managed to persuade five of the seven judges that I was correct.

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62. 36 Cal. 3d 77, 679 P.2d 1, 201 Cal. Rptr. 567 (1984).

63. The Supreme Court precedents questioned or overruled in *Tassell* included: People. v. Thomas, 20 Cal. 3d 457, 573 P.2d 433, 143 Cal. Rptr. 215 (1978); People v. Cramer, 67 Cal. 2d 126, 429 P.2d 582, 60 Cal. Rptr. 230 (1967); People v. Kelley, 66 Cal. 2d 232, 424 P.2d 947, 57 Cal Rptr. 363 (1967); People v. Ing, 65 Cal. 2d 603, 442 P.2d 590, 55 Cal. Rptr. 903 (1967).

64. *See* People v. Wills-Watkins, 99 Cal. App. 3d 451, 457, 160 Cal. Rptr. 289, 292 (1979) (Kaus, J., concurring).

It was a short-lived victory because Proposition 8[65] was in effect and greatly modified the law (how much we don't know yet because the case had not come down yet) including section 1101 of the Evidence Code, which was the embodiment of the common law rule against the admissibility of prior crimes. But it was fun, it was something I wanted to do, and I really enjoyed it. That and *Mroczko*.[66] My hidden agenda consisted of the *Tassell* issue and the *Mroczko* issue.

L. *People v. Mroczko*

McAllister: Okay, let's go into *Mroczko*.

Kaus: There had been a problem in many cases that we had on the Court of Appeal where two defendants were jointly charged with some felony and they were represented by one attorney throughout the trial and then the point was made that there was a conflict. Sometimes you could put your fingers on the conflict and sometimes you could not because one of the problems with having an attorney who is trying a case, but has a potential conflict between his two clients, is that he's in a position to sweep the conflict under the rug.

So in two or three dissents that I wrote on the Court of Appeal,[67] not all of them published as I recall, I advocated that California adopt the rule, which as a matter of judicial administration has been adopted in Washington, D.C., that is this: when you have more than one defendant, at first each defendant has his own attorney appointed for him and then if both lawyers have independently investigated the case and represent to the court that there is no conflict, then the court can relieve one of them. That way you start the investigation into whether or not there is a conflict at the right end, that is to say, with two independent attorneys rather than with one attorney who can sit on and squelch the conflict.

The funny thing in the *Mroczko* case was that the attorney whom both defendants very much wanted—but to what extent he had persuaded them that they should want him, I don't know—but both defendants kept waiving conflict after conflict after conflict. And at one point the district attorney says, "Judge, this just isn't going to work." And the judge nevertheless let one attorney try a capital case against two defendants, and one of them got the chair.

McAllister: Even if the argument is only that my client may not be great, but this guy is really bad . . .?

65. Proposition 8 was adopted by the voters on June 8, 1982.

66. People v. Mroczko, 35 Cal. 3d 86, 672 P.2d 854, 197 Cal. Rptr. 52 (1983).

67. *See, e.g.*, People v. Baker, 268 Cal. App. 2d 254, 256 n.2, 73 Cal. Rptr. 758, 760 n.2 (1968).

Kaus: That's right. In one of the very first cases I ever had on the Court of Appeal there were two guys who robbed somebody on the street. One of them was very active and the other one maybe was just sort of a lookout. One attorney represented both and first made a great pitch for the guy who had been active in his closing argument that he hadn't really done anything and then he said, "Well, even if you say Mr. X is guilty, surely Mr. Y is not." Now X was convicted and Y, as I recall, was acquitted.

McAllister: You mentioned an agenda, were those the only two areas?

Kaus: The other one I struck out on. I had a three-issue agenda, which is really quite modest—the *Tassell* issue, the *Mroczko* issue, and the third one was to get the Supreme Court to say in an appropriate case that Courts of Appeal have to follow each other under the rule of stare decisis instead of [just] saying we don't like that rule.[68] I never could even get a hearing on that issue. Of course, it doesn't come along too often. I know that my views on that would not have commanded the opinions of a majority of the court even if we would have found the case.

M. *People v. Shirley*[69]

McAllister: You were more successful in the criminal end. One case I wanted to comment on just shortly is *People v. Shirley*, which is a case in which the majority, in effect, ruled a hypnotized witness cannot be used with the exception that they apply to the defendant. You dissented in that.

Kaus: Yes. I dissented from the blunderbus, what I thought was a blunderbus, approach of the majority. The majority approach was, of course, coldly logical. You can't deny it. You know, there is hypnosis and there is hypnosis. There is hypnosis that is carried on by an amateur hypnotist in the district attorney's officer with no safeguards whatsoever, and then there is hypnosis that is carried on by professional hypnotists under all kinds of safeguards which have been outlined by many writers in the literature. For the court to treat both types of hypnosis with equal fervor, struck me as wrong, particularly when applied to situations where nobody knew what the rule was going to be.

McAllister: The facts in *Shirley* were terrible for the prosecutor.

Kaus: The facts were very bad. As I recall, it was a rather thin case of rape which was vastly improved by the hypnosis of the victim. If

68. *See supra* text accompanying note 24.

69. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982).

you've read it recently, you have me at a disadvantage. Was it between the preliminary hearing and the trial that she was hypnotized?[70]

McAllister: I don't recall, all I remember is the facts were terrible.

Kaus: The facts were very bad. I may prove wrong, but I did not dissent from the result of *Shirley*. I think I dissented from the general condemnation that the court issued. You see, you get ahold of an issue like hypnosis, let's just speak generally, and it is true, the literature tells you, that even if the hypnosis is carried on under the most rigorous conditions by the best hypnotist in the world, there is always a possibility that a so-called "pseudo-memory" can be created whereby the subject, if later put on the witness stand (of course, no longer under hypnosis), nevertheless most sincerely believes that he remembers things that didn't really happen. They don't even have to be, as I understand it, things that were suggested to him by the hypnotist. Of course, that's unfortunate, but the question is do you really have to eliminate every possible chance of such an error or is it enough that the defendant has the opportunity to bring out the possibility of a pseudo-memory which may be the case only once in ten thousand times. We permit witnesses who have all kinds of defects to testify. They are half-crazy, this, that and the other. We don't demand a great deal of sanity. I mean "sanity" in the broadest sense of the word—ability to perceive, ability to memorize, ability to narrate—before we are willing to hear them. Knowing perfectly well that we are going to permit a lot of people to testify whom we wouldn't believe on a stack of bibles, now why be that rigorous with respect to hypnosis? That's just the way it struck me at the time.

McAllister: Was the *Shirley* case chosen as the most egregious case on its facts?

Kaus: I don't know. The hearing in *Shirley* had been granted before I ever got on the court. I don't know how many other opportunities the court had to grant a hearing in hypnosis cases.

N. Selection of Cases

McAllister: Is that something that does happen? Speaking generally now, on the Supreme Court does the court ever look for a particularly good case or a particularly bad case?

Kaus: Well, I suppose so. Certainly in my own mind, if I want to push something, I prefer to be pushing it in a sympathetic case rather than an unsympathetic case. Now, for example, if I had any precon-

70. The victim was hypnotized between the preliminary hearing and trial. *Id.* at 29, 641 P.2d at 780, 181 Cal. Rptr. at 248.

ceived prejudice (which I didn't) in the *Turpin v. Sortini*[71] type situation, I would have preferred the kind of case I had—a poor deaf kid—rather than a poor kid who had Tay-Sachs disease, where it is much more difficult. Or, for example, one of the MICRA cases, the *Fein* case[72], the one that put the lid of $250,000 on non-economic damages, that validated the legislative plan. *Fein* was not too sympathetic a case. I don't mean he was unsympathetic, but Fein was a lawyer whose heart disease was diagnosed possibly a few hours too late, and as a result of that misdiagnosis (there was expert testimony, not necessarily conclusive at all), that his life expectancy was shortened. He was back at work, he was a lawyer working for the state government, and his chances were that instead of retiring at seventy and dying at seventy-five he would have a heart attack at his desk at sixty. I mean it was that kind of case.

Well, the day before we filed the *Fein* case, there was a trial court decision in Los Angeles where a patient had been wheeled into a hospital operating room to have his right kidney removed and the surgeon made a mistake, removed the left kidney and the guy was left without any kidneys or functioning kidneys. The jury had just awarded him umpteen million dollars. The trial judge, feeling that the legislative limit was constitutional, took it away. That was a much tougher case. I'm not a bit sure that we would have had a five-to-two ruling on that case.

There was one factor when I was on the court which weighed very heavily when granting or denying a hearing. That was this, in those days if we granted a hearing, we had to take over the entire case. There may have been lots of issues in it which were boring and which, if decided in a particular fashion, might not even let you decide the issue you wanted to decide. In the *Fein* case, for example, Fein was a cross-appellant, if I'm not mistaken. We affirmed the judgment on liability but the defendant had several very, very tough points. Only after we had affirmed the appeal on liability did we get to Fein's problem which had to do with the amount of damages.

Now today, under the new system, where review can be granted on single issues, it's much easier to pick that issue regardless of what case it is in, decide the issue, ship the case back to the Court of Appeal and have the Court of Appeal do with the rest of the case whatever needs to be done.

71. *See supra* text accompanying notes 50 & 89.

72. Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985). *See also supra* text accompanying notes 52-57.

O. *People v. Castro*[73]

McAllister: One area that you mentioned earlier, when we began talking about some of the criminal cases, was Proposition 8, the measure which was approved by the populace. You had that in *People v. Castro*, I believe, or at least one aspect of it. Tell us about *People v. Castro*.

Kaus: That is the quintessential camel being a horse put together by a committee. There's a long history to this. California has had many battles between sessions of the Legislature and the Legislature and the courts, and so on and so forth over the question of whether or not a witness can be impeached, should be impeached with his commission of a felony. It so happens that ninety-nine percent of the cases involving witness-impeachment with felonies involve the defendant in a criminal case being the witness. It doesn't have to be that way and there are at least one or two cases by the Supreme Court where it wasn't the defendant, but the defendant's witness who was so impeached. The law before Proposition 8 went into effect, as far as the statute was concerned, was that such impeachment was permissible with respect to any felony.[74] However, the Supreme Court in a series of decisions starting with the *Antick* case,[75] as I recall, and going on to several others, had most severely limited the opportunities for the prosecutor to impeach the defendant. It was pretty difficult to think of a felony conviction with which the defendant could be impeached. Obviously, that didn't please the people who drew Proposition 8 and so they provided in Proposition 8 that

73. 38 Cal. 3d 301, 696 P.2d 111, 211 Cal. Rptr. 719 (1985).

74. CAL. EVID. CODE § 788 (West 1966) provided:

> For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony unless:
>
> (a) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.
>
> (b) A certificate of rehabilitation and pardon has been granted to the witness under the provisions of chapter 3.5 (commencing with § 4852.01) of Title 6 of Part 3 of the Penal Code.
>
> (c) the accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4, but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offense.
>
> (d) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in subdivision (b) or (c).

75. People v. Antick, 15 Cal. 3d 79, 539 P.2d 43, 123 Cal. Rptr. 475 (1975); People v. Rist, 16 Cal. 3d 211, 545 P.2d 833, 127 Cal. Rptr. 457 (1976); People v. Rollo, 20 Cal. 3d 109, 569 P.2d 771, 141 Cal. Rptr. 177 (1977); People v. Woodard, 23 Cal. 3d 329, 590 P.2d 391, 152 Cal. Rptr. 536 (1979); People v. Fries, 24 Cal. 3d 222, 594 P.2d 19, 155 Cal. Rptr. 194 (1979); People v. Spearman, 25 Cal. 3d 107, 599 P.2d 74, 157 Cal. Rptr. 883 (1979); People v. Barrick, 33 Cal. 3d 115, 654 P.2d 1243, 187 Cal. Rptr. 716 (1982). *See also* People v. Beagle, 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972).

felony impeachment shall be permitted, I think the phrase was "without limitation."[76]

However, because of what may have been (but who knows) a typographical error or boo-boo or whatever, that particular provision was still subject to section 352 of the Evidence Code.[77] It was perfectly obvious to me that unless we rewrote Proposition 8, felony impeachment had to be permitted in all cases except at the discretion of the trial court, if the trial court felt it was too prejudicial. It was a pretty straightforward decision and, in my view, what the Evidence Code always meant to say.

I had never thought that Supreme Court cases starting with *Antick* which held that the trial court really had no discretion in certain situations were right. That was my view. The only limitation that I felt was appropriate was where the commission of the felony had no relevance to the defendant's bad character. In that case, I felt the defendant, always the witness, was deprived of due process if you permitted him to be impeached with a felony which does not reveal a trait of character which is incompatible with sincerity, the desire to tell the truth. There aren't too many of those felonies, but it has been well recognized that quite a few felonies do not involve moral turpitude. So I drew the line at moral turpitude and said that obviously if the felony in question doesn't involve moral turpitude then you can't use them for impeachment, like a conspiracy to run a red light. It's a felony in California, like it or not. So I think I got three signatures on that one. [Looks at *Castro* decision.] Somehow there are four votes for everything, but I had to borrow them from here and there.

McAllister: The Chief Justice agreed that section 352 of the Evidence Code was alive and well but thought that . . . ?

Kaus: Somehow or other she came out against any felony impeachment.

McAllister: That's right.

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76. Subdivision (f) of Art. I, § 28, added to the California Constitution by Proposition 8, provides:

> Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used *without limitation* for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.

(emphasis added).

77. CAL. EVID. CODE § 352 (West 1966) provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Kaus: Because I think the Hawaii Supreme Court had held it was unconstitutional and she went along with that.[78]

McAllister: I think you had Justice Lucas saying Proposition 8 abrogated all restrictions on priors.

Kaus: I got Lucas and Grodin to support me on the fact that some felony impeachment was permissible. Then putting together what at least four agreed on I somehow prevailed, but I didn't have [the same] four votes for [more than one] proposition. It was not a famous victory.

By the way, after I left I did read a decision that the court has finally come out with an opinion which lays down in some detail when a *Castro* error is prejudicial and leads to reversal.[79] I understand it's a whole textbook.

McAllister: Was part of the problem there the fact that this was an initiative that wasn't drafted well?

Kaus: I don't know. It wasn't drafted well. They hardly ever are. But compared to the recent Gann initiative,[80] it was a beauty of draftsmanship. Basically, it was drafted better than the death penalty initiative of 1978[81] which has several of these typos in it. The idea that nobody even proofread the death penalty initiative in 1978 is hair-raising.

P. Death Penalty Legislation and Initiatives

McAllister: Did you recall any decisions on the fact that the death penalty legislation was poorly drafted?

Kaus: Well, here is a central problem. I think it is poor draftsmanship. I don't know what the solution to it is. You may recall that in 1977 the Legislature passed a law which said in effect for the death penalty to apply you have to have first of all a conviction for deliberate, premeditated murder in the first degree.[82] Then, if the murder was committed in the course of certain felonies—robbery, burglary, rape, and several others—then it could be punished with the death penalty. Along came the 1978 initiative, took out the words "premeditated," "deliberate," merely required that the murder be in the first degree and added

78. *See* State v. Santiago, 53 Haw. 254, 492 P.2d 657 (1971); *see also* Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1031 n.153 (1984).

79. *People v. Collins*, 42 Cal. 3d 378, 722 P.2d 173, 228 Cal. Rptr. 899 (1986).

80. The Gann initiative was Proposition 61 on the November 4, 1986 ballot. It proposed salary limits on government employees and contractors tied to the governor's salary. *See infra* text accompanying notes 83-84.

81. The Death Penalty initiative was passed by the voters on November 7, 1978. *See also infra* Part IV, section A.

82. *See* 1977 Cal. Stats. 316, § 5.

about ten different felonies to the ones that had been listed in 1977. What they overlooked was that several of the felonies that had been listed in 1977 were the type of felonies which made the murder a murder in the first degree—felony murder, robbery, burglary, and so on. But quite a few of the felonies which were listed in the 1978 statute did not make the killing a first degree murder. So where do you get your first degree from? You see? In effect, the only way you can justify it is to say that, well, when those felonies are involved, as distinguished from robbery and burglary, then you have to find premeditation, deliberation, lying in wait, poison, whatever other facts make a murder first degree murder. But that's only by implication.

I don't think anybody purposely drafts a death penalty statute where that kind of issue is left to implication. I think they just plain goofed and didn't realize that in listing so many felonies they'd forgotten their source of first degree murder which, in the 1977 statute, of course, was the language about deliberation and premeditation. Now, that is quite apart from the fact as to whether or not as a matter of policy—and I say no more about that—you want to send to the gas chamber a guy who commits a common garden variety of burglary where the householder stumbles in the dark when he comes downstairs to see what the hell is going on, hits his head against the mantelpiece and dies accidentally, and whether you really want to let a guy live who with deliberation and premeditation kills his wife or anyone else just because he doesn't happen to have committed any of these other felonies. That's maybe a matter of judgment.

McAllister: In some of your decisions, such as Proposition 8, you were seeing legislation by initiative and we've had some sweeping changes since then. Do you see this as a phenomenon of the 1980s, 1970s, or is this something that's always been around?

Kaus: Well, I haven't been around long enough. I really think we need something. Let me talk about the Gann initiative which has just been defeated. Most judges, of course, saw it as the initiative that would cut their pensions down if it was constitutional.[83] But I don't like it for

83. The Gann initiative proposed to add § 26 to Art. XX of the California Constitution, providing in subdivision (b):

> Notwithstanding Article III section 4 or any other section of this Constitution, but subject to subsection (g) of this Section, no state, city, county, city and county or special district employee, elected or appointed, which shall include individuals working under contract, may receive compensation in excess of eighty percent of the Governor's salary. Under special circumstances the Legislature may appropriate funds for employee services contracted for by agencies in state government in excess of eighty percent of the Governor's salary if the contract or contracts in question do not exceed four years in length and are approved by both houses by a two-thirds roll call

some other reason. I happen to be under consideration to sit as a judge pro tem in litigation where a public entity is one of the litigants. They want to pay me my fee which is more than $75 an hour. I wanted to see to what extent—I'd always heard about the Gann initiative that it limits consultants' fees for public agencies to $75 an hour—I wanted to see whether that could conceivably apply to me.[84] It doesn't. In connection with that I read that particular paragraph. Now, I've read a lot of law. I have a certain amount of imagination as to what the author meant or could have meant, but this one totally escaped me. Now there is just no way I could— maybe if they explained to me very slowly it makes some sense—but this one just lost me. Minimally, I don't see how you can set it up constitutionally, but there should be some way in which a person who has the ability to circulate an initiative, gets six hundred thousand or whatever it takes, of people to sign it and put it before the votes, has to submit it first to a couple of guys who are lawyers and who speak English, who can at least point out, maybe he doesn't have to follow their suggestions, but they can at least point out to him the most glaring deficiencies.

There are two or three references in the 1978 death penalty initiative, [where they simply referred] to the wrong code numbers or to the wrong code, to the wrong section or something, which if a couple of externs had sat down and proofread this really very carefully they would have been caught.[85] They are so obvious. So far, I don't believe that they have caused the court any problem. But you can see what this kind of thing can lead to. Basically, I must say in my heart of hearts, I don't like the initiative process anymore. I've seen too much horsing around. It left

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vote. Insofar as this section may conflict with a city, county, or city and county's power to set salaries pursuant to Article XI sections 3 through 5, this section shall take precedence.

84. The Gann initiative proposed to add section 26(h) to Art. XX of the California Constitution, providing:

> After the date this section becomes effective, the Legislature shall enact no laws authorizing any public official covered by this section to engage the services of private subcontractors wherein the contractual amount of compensation exceeds seventy-five dollars per hour and no contract may exceed two years in duration, and in no event may the total compensation for an individual exceed the amount set forth in subsection (b) of this Section 26. Furthermore, no state official or agency shall employ, hire, contract with, pay or otherwise compensate any attorney or legal firm to act on behalf of the state or any agency thereof where the state or any agency thereof is a plaintiff, defendant, complainant petitioner, respondent or real party in interest unless the California Attorney General has formally noted a conflict in representing the agency.

85. *See, e.g.*, CAL. PENAL CODE § 190.2(a)(17)(viii) (West Supp. 1988), referring to "Arson in violation of [Penal Code] Section 447" although there was no section of the Penal Code so numbered. For a discussion of this particular subdivision, see People v. Oliver, 168 Cal. App. 3d 920, 926, 214 Cal. Rptr. 587, 590-91 (1985).

me indifferent before I went on the Supreme Court, but on the Supreme Court I learned, frankly, to feel that there must be a better way of running the show.

McAllister: I think it was in the *Castro* case you talked about the perceived trend and perceived problem . . . .[86]

Kaus: Well, you understand, in the *Castro* case I had to be very nice to an awful lot of people. I used the word "perceived" in a . . . .

McAllister: A diplomatic way?

Kaus: Yes.

IV. Supreme Court Experiences and Retirement

St. George: I want to talk with you about how you found going to the Supreme Court from the Court of Appeal. First of all, starting with the type of cases you had an opportunity to review.

Kaus: The type of case wasn't so different except, of course, two areas, no, three areas, we can't touch on the Court of Appeal. The first one is obvious: capital cases. The second one is public utility matters where we don't even have to write an opinion. Well, I guess we don't have to write an opinion, we have to grant a certiorari in state bar matters. We don't see any of those on the Court of Appeal either.

A. Death Penalty Cases

St. George: There was a proposal that the death penalty matters, rather than making them mandatory up to the Supreme Court automatically, that there be an opportunity for the Court of Appeal to sort of clean them up and send only the really heavy ones on. How do you feel about that?

Kaus: Well, I don't quite know what you mean by that. What do you mean by sending only the really heavy ones on?

St. George: Well, it was a suggestion that sometimes there are some types of errors that are more procedural and really don't get into the substantive issue. Perhaps, the Court of Appeal could handle those by looking at previous cases rather than having the Supreme Court having to handle every capital case.

86. Justice Kaus wrote in *Castro*: "It was also argued [in the Proposition 8 voter's pamphlet] that the initiative would 'result in more criminal convictions' and thereby reverse the perceived trend that 'our courts and professional politicians in Sacramento have demonstrated more concern with the rights of criminals than with the rights of innocent victims.' " People v. Castro, 38 Cal. 3d at 311, 696 P.2d at 116, 211 Cal. Rptr. at 724.

Kaus: Are you simply saying that death penalty cases should be handled like every other criminal case?

St. George: Right.

Kaus: Something has to be done. There's no doubt in my mind that the death penalty cases are absolutely swamping the Supreme Court. I spent forty percent [or] fifty percent of my time that I spent on cases, as distinguished from conference matters, on death penalty cases, and I think that's much too large a proportion to spend. Not that they aren't important, but you have to make a decision as to what kind of case, what kind of work do you want the highest court to do. We can't do everything.

Whether or not handling them like every other case, that is to say, that the Supreme Court can deny a review and not touch it, is feasible, I don't know. I would feel . . . . Well, I never had, so I don't know how I would feel, but to send a man to his death by denying a hearing, that's a quick vote-casting at conference you know, I'd probably find that fairly hard to do, knowing as little about his case as I can on the brief consideration that you can give a petition for review when you have a hundred others on the menu that particular week.

I had thought of a kind of a compromise position. Let me try that one for size. An enormous amount of the judicial time and clerk's time in the Supreme Court is, of course, spent in summarizing the record, digesting the record, checking up on the facts that are stated in the briefs, and so on and so forth. There's no reason in the world why that work has to be done on the Supreme Court. It can be done by other divisions (How many divisions do we have now? Twenty? Twenty-two? Whatever.) [It can be done] by the clerks and the very able justices in the divisions of the Court of Appeal. If there is no factual error pointed out in the petition for rehearing, we can assume that the statement of facts in the Court of Appeal opinion is correct. Right there you have eliminated fifty, sixty percent of the staff work in the Supreme Court. If we can just read the facts in maybe twenty pages (instead of maybe twenty thousand) in the Court of Appeal opinion, we are already that much better off.

Let's have compulsory review of the Court of Appeal opinion. Now, you can say that there is very little incentive for the Court of Appeal justices to do a good job if they know the Supreme Court is going to take over the case. They will feel that they are nothing but law clerks writing a memorandum for the Supreme Court, which will have the last word. Well, I haven't quite got the answer. But, as a practical matter, the Supreme Court can restore Court of Appeal morale by habitually adopting the Court of Appeal's opinion or a portion of the Court of Ap-

peal opinion if it agrees. That way the Court of Appeal justices will know that chances are very good that they are not just writing something that is designed for oblivion, but that they are writing, probably, for the purpose of being published in the Supreme Court reports which gives them an incentive to do a good job.

That's only one of several possible solutions. I will say right now at the outset, I have never worked under the system of review as distinguished from hearing.[87] I guess I did, but this had been in conferences for a few months after the new system went into effect. At that time, we hadn't learned how to play with the new toy. Even today I think that the Supreme Court has made relatively few orders granting review in which it specified issues. In fact, I'm going to do a little bit of research for a lecture I'm going to give in a couple of weeks to try and find some of these orders. I think they are relatively few and far between. There may be some mechanism in connection with these new rules concerning review, which could be utilized in connection with death penalty cases. I don't know how and I won't even venture to guess.

B. Selective Review of Cases

St. George: Did you play a role in the promulgation of those rules?

Kaus: No, as a matter of fact what happened was the directive to draw up rules was passed by the voters, I think it was Proposition 32 in the 1984 election. The Chief Justice put me on a committee to write the rules but because of my strange way of living, half in San Francisco and half in Los Angeles, the

committee met weekends, Saturday typically. After I missed one meeting in San Francisco because I was in Los Angeles that weekend and had to miss the next meeting in Los Angeles for some reason (I forget what it was), I realized I just couldn't handle it. I asked the Chief Justice to excuse me. She did. So, I didn't have a hand in drawing up the rules at all.

St. George: Do you think that is the way to go to streamline the process?

Kaus: We'll see. I was certainly in favor of it in 1984 and I still am until it proves to be unworkable and I don't think it will.

87. Proposition 32, passed by the voters on November 6, 1986, amended Art. VI, § 12 of the California Constitution to provide for a system of granting "reviews" rather than "hearings." Subdivision (c) provides: "The Judicial Council shall provide, by rules of court, for the time and procedure for transfer and for review, including, among other things, provisions for the time and procedure for transfer with instructions, for review of all or part of a decision, and for remand as improvidently granted." Pursuant to this provision, the Judicial Council amended California Rules of Court, rules 24, 28, and 29, and added rules 27.5 and 29.2-29.9.

C. Staffing and Supreme Court Facilities

St. George: What type of staffing changes would you think could help improve the situation at the Supreme Court?

Kaus: Before we talk staffing I think we have to talk room. The Supreme Court is much too crowded. I think during the early 1970s, during the days of what Jesse Unruh called the "obscene surplus," somebody missed a bet in not grabbing a hold of more state money for the purpose of improving the living conditions of the Supreme Court and its staff. You should go up there and see the utter squalor under which the court operates. One reason for the squalor is death penalty records—one hundred, two hundred jackets per case. We've run out of space to store them. The court was designed for seven justices who had maybe seven, and after awhile, fourteen law clerks. We now have seven justices, we have twenty-eight or maybe even thirty-five law clerks. We have thirty, forty externs. We have a growth in the number of clerk's deputies, secretaries and so on and so forth. The court is just like this; the library [is] a lousy library as law libraries go. I can name you ten better ones in Los Angeles in the big firms. They have a very good librarian but, for example, the California Administrative Code is on microfiche. Have you worked with microfiche?

St. George: Yes.

Kaus: Forget it. The Court of Appeal in San Francisco has a paper California Administrative Code. When I wanted to work with the California Administrative Code, I asked permission to use the C.A. library because I can't work with microfiche. It drives me nuts.

St. George: Did you find in your work on the Supreme Court that you had to take on more or did you have a staff of clerks and attorneys whom you found to be very helpful?

Kaus: I had the most wonderful staff. They use rather silly expressions, but you use them after awhile without feeling self-conscious about it. Every justice has what is called a "chief of staff," that is, a law clerk who is the traffic cop. He or she assigns cases to externs, sees that the cases get on the calendar for the conferences because we operate under time limits. That was Alice Shore. She has been with the Supreme Court, with time out for marriage and four kids, since the late 1940s. She became a very, very good friend of mine. She lived near me in Berkeley, and we were in a car pool, and we're still very great friends.

Then I had Hal Cohen who was a Harvard graduate 1972 or thereabouts. He had worked for Justice Tobriner for nine or ten years before I came on the court. He worked for me, and he was one of the most wonderful human beings I had ever met and an excellent lawyer. He worked

very hard and very successfully on the MICRA cases[88] that I discussed a little bit earlier. He also worked on *Turpin v. Sortini.*[89] He is an intellectual giant, I think. It is very fortunate for the State of California that he likes what he is doing. After I left, he started working with Justice Grodin. I unloaded the rest of my staff on Justice Panelli. So I found them all jobs. He's very happy with them, and they're very happy with him. Hal Cohen had been "reserved," so to speak, by Justice Grodin for a long time in case I left, which was always imminent, and right now he has lost his boss, but I'm sure he'll find someone to work for.

Then I had Barbara Spencer, who is a fine lawyer, a young lady. She took time out to have two kids while I was up there. She was already seven months pregnant when I came there and she took several months off. A couple of years later she had a second kid. She was an enormous help. Then I had an "annual." I had several very, very good ones. Now I think they have one more annual.

As I said earlier today, I think the extern system[90] has gotten out of hand, out of control. I think we're going to have to, unless there is some way of cutting down the work of the court, we're going to have to find some way of relying a lot less on the externs. The only thing I can think of is more law clerks, at least one more.

D. Case Selection

St. George: In terms of choosing cases that you wanted to bring to the attention of your colleagues as they came up from the lower courts, how did you find the best way to make a use of the list that was prepared for review?

Kaus: I'm not quite sure I understand your question. You understand how it works? The secretary [of the court] on a random basis assigns files of petitions for hearing to the various justices. The Chief Justice does not participate in that part although the central staff works—I'm talking about civil cases— the central staff handles criminal cases. If there are thirty cases, then five are assigned to each justice and he or she will prepare a memorandum which is circulated to the others on the Friday before the Wednesday conference. Are you asking me how they select the cases which I would recommend?

St. George: If there was one that you had thought was particularly important among those, would you put that at the top of your list?

88. *See supra* text accompanying notes 52-57.

89. *See supra* text accompanying notes 50 & 71.

90. *See supra* Part III, section A.

Kaus: Not necessarily. First of all, we have the "A" list and the "B" list, you've heard about that?

St. George: Yes. Why don't you explain that?

Kaus: The author of the memorandum decides tentatively whether the case should be discussed in conference or whether it looks like a routine denial. If it looks like a routine denial he will put it on the B list. He'll still circulate the memorandum. If he thinks it should be discussed, he will put it on the A list. That doesn't mean he's going to recommend a grant, he can recommend a denial, but he thinks it ought to be denied after oral discussion. All the memoranda are then read by the other justices and anyone who thinks a case shouldn't be on the B list can put it on the A list and it will come up for discussion a week later. So the first thing you want to do when you want to have a hearing granted, is put the case on the A list. That is *numero uno*.

Otherwise, what you want to do, of course, if you think that a grant is indicated, is write a very strong memorandum explaining why this is the kind of case the Supreme Court ought to take over. Point out that there is a conflict among the C.A.'s [Court of Appeal judges], ideally a conflict that cannot be reconciled by unpublishing something. The Supreme Court has lately found means of making law by censoring which I'm not against. I don't mean to be pejorative about it.[91] When the case comes up for discussion, the author of the memorandum is the first one to speak, so try and get a few tears into your voice when you address your colleagues and learn how to count up to four.

St. George: So you need the four votes to take the case.

Kaus: You need the four votes. We don't have a rule of three.

St. George: In the use of the A and B lists, if you had a case on the A list that was being circulated, would you let the other justices know that this was a case that you were enthusiastic about?

Kaus: No.

St. George: Or would you wait until Wednesday morning?

Kaus: You wait. Once you start lobbying, you loosen the hounds of hell, so to speak. All the time that I was up there, I don't think I was lobbied more than twice on cases. Grodin and I rode to work every day so we discussed a lot of cases when there was no one in the car that wasn't on the court and we tried to convince each other an awful lot. But I don't call that lobbying, that's just war talk. Going into justices' chambers and taking them by the throat, no, there was very, very little of

91. *See supra* text accompanying notes 26, 31 & 101.

that, and it would be terrible if there were more of it. Life wouldn't be worth living.

Now every Wednesday the court meets to discuss the A and B lists at 9:15 a.m.

St. George: What was the role of the Chief at those meetings?

Kaus: The Chief is the last one to speak. You'd go around the table—that's rather formal. You start with the senior justice. When I left it was Mosk, myself, Broussard, Reynoso, Grodin and Lucas. After they've all had their say, the Chief speaks. All votes are tentative, of course. If one side or the other has gathered four votes by the time it gets to her, unless someone changes his or her mind, the die is cast without her having announced her views.

St. George: If a case was agreed to by four justices as one that should be reviewed by the court, did the court then follow the pattern which occurs in the United States Supreme Court that the senior justice of the majority would write the opinion?

Kaus: No. The case is immediately assigned after the grant of the hearing by the Chief Justice. I have never cross-examined her as to what moves her to assign particular cases to particular people. Basically, I think that the only thing she takes into consideration is backlogs. Of the MICRA cases,[92] it was kind of understood that after I had prevailed on the first one after rehearing and had written the majority opinion, that the others would be assigned to me. No, wait a minute, let me correct that. They were all assigned to me when I came on the court. I wrote the memorandum on *American Bank*[93] but I didn't get a majority. So, I don't know whether they were ever taken away from me, but then a rehearing was granted, and I had a majority. So, I retained the others.

I think the Chief Justice was scrupulously fair in her assignments. I really think the only thing that moved her was backlogs. We have a very strange custom that's prevailed on the court for years, ever since anyone can remember; assume after conference, it appears that the case has to be reassigned because whoever wrote the memorandum doesn't get a [majority], and the Chief Justice is on the side of the guy that doesn't have the [majority]. In the United States Supreme Court, of course, the senior justice would then assign the case to somebody new. On our Supreme Court, the Chief Justice still assigns it even though at that moment the Chief Justice would appear to be in the dissent. The funny thing is—it's happened very rarely—but it never gave rise to friction.

92. *See supra* text accompanying notes 52-57, 72.

93. *See supra* text accompanying note 53.

E. Concurring Opinions

St. George: Now the Chief Justice wrote many concurring opinions. Would these signify that she had not been in the majority or does the fact that she sides with the majority in no way reflect . . . ?

Kaus: You just never know. I'm not just saying this of the Chief Justice. It may be anybody. A person will say yes I'm with you, and then when the opinion circulates he or she will feel moved to add his or her two bits worth—I've done it myself many a time. Sometimes, it is just a spur of the moment thing to do. For example, on *Deukmejian v. Assembly*[94] (the 1982 apportionment case) it was four to three. The Chief Justice eventually prevailed. I thought she was dead wrong. Justice Richardson wrote the dissent.[95] Both he and she got awfully shrill. I wanted to say something to sort of cool the tempers. You have to live with each other. So I wrote just an eight line dissent in which I said there's obviously a lot to be said on both sides, and I'm sorry the court didn't follow the 1970 precedent, and I was happy that I won't be around to break the tie in 1990.[96] I wanted to make a little joke and take the tension out of the situation. The die was cast. The strange thing is some law school professors have mentioned this eight line thing as the best concurring opinion I ever wrote, so that tells you how good the others are.

St. George: So you see a concurring opinion as a way for a justice to set forth what he thought should have been in the majority opinion?

Kaus: Yes. A horrible example (I was an accessory) was in the case involving the right of public employees to strike, *Sanitation Workers*[97] or something, where Justice Broussard, I thought, decided far too much in the majority opinion. The only question that I saw in the case was

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94. Assembly v. Deukmejian, 30 Cal. 3d 638, 639 P.2d 939, 180 Cal. Rptr. 297, *cert. denied sub. nom* Republican Nat'l Comm. v. Burton, 456 U.S. 941 (1982). *See also infra* text accompanying note 105.

95. 30 Cal. 3d at 679-94, 639 P.2d at 964-73, 180 Cal. Rptr. at 322-31 (Richardson, J., concurring and dissenting).

96. Justice Kaus wrote:

> Obviously much is to be said on each side of the only issue that divides the majority and Justice Richardson's dissent which I have signed. The two considerations which, in my view, tip the scale in favor of the dissent are these: First, simple adherence to precedent should make us follow *Reinecke I*. Second, it seems clear to me that the course chosen by the majority involves greater judicial intrusion into the legislative process laid out by the California Constitution. Absent compulsion by *Baker v. Carr*—and I see none—we should let that process play itself out without any judicial intervention.

Id. at 696, 639 P.2d at 973-74, 180 Cal. Rptr. at 331 (Kaus, J., concurring and dissenting) (footnote omitted).

97. County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n, 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424, *cert. denied*, 106 S. Ct. 408 (1985).

whether or not, even if a strike by public employees was illegal, it was a tort for which the union had to pay damages, and that's all we had to decide. Well, he decided not only that strikes by public employees were not illegal (of course, he had to make room for exceptions) and said that the Legislature should write a statute but he very much doubted that it could be constitutional. Now that, it seemed to me, went way beyond what the court ought to be doing—telling the Legislature that they are starting to write a statute with two strikes against them. I wrote a concurring opinion agreeing with the result, saying this is not a tort; there are good public policy reasons why a tort remedy is not the correct one and you never should have said that the Legislature probably could not write a constitutional statute.[98] The Chief Justice wrote a concurring opinion which said there was no way that the Legislature could write a constitutional statute providing against strikes involving public employees, and she wrote about Solidarity and Poland and God knows what.[99] So, the concurring opinions pretty much tell you what is down the pike the next time around, depending on who is on the court.

St. George: When an opinion was circulated by a justice would you, could you make notes on it and send it back and say I join you if you'd extend this?

Kaus: There are all kinds of ways of expressing your pleasure or your limited displeasure or your total displeasure. I could say to Hal Cohen, "You know who wrote this for Justice So-and-So?," and he would say "I know who it is," and [I] would say, "Well, why don't you talk to her and see if they are willing to take this out." A million and one ways. There was much publicity given, of course, to the negotiations between the Chief Justice's staff and Bill Clark's staff in 1978. What was the name of the case that created all the furor? You know what I'm talking about.[100]

St. George: Yes, I know.

Kaus: That's the kind of thing I have tried to avoid like the plague. To be stubborn over whether or not a certain case is cited or whether or not something is in a footnote or is in the text, that's the kind of person whom the gods will punish. Life on the court is too important to get hung up on minutiae like that because you're going to have to live with the guy or the gal for the next five, ten years, and there will be lots of opportunities to get repaid if you're really nasty.

98. *Id.* at 592, 699 P.2d at 854, 214 Cal. Rptr. at 443 (Kaus, J., concurring).

99. *Id.* at 593, 699 P.2d at 855, 214 Cal. Rptr. at 444 (Bird, C.J., concurring).

100. People v. Tanner, 24 Cal. 3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979).

St. George: You mentioned depublishing.[101] You mentioned also you think it might be helpful to build the morale of the C.A.'s if they had more role in what was going to the Supreme Court and giving them things the Supreme Court then recognized as good opinions. Could you use depublishing as that sort of recognition?

Kaus: No. Depublishing can only destroy the morale of the C.A. One thing which is good for the morale of the C.A. is that as often as possible the Supreme Court will adopt the C.A.'s opinion as its own after granting a hearing, realizing the C.A. was right. The mechanics of that under the new system of granting review of certain issues, are not terribly clear to me because if the C.A. decides five issues, you grant review on one and you decide that issue, you then ship the case back to the C.A. The C.A.'s opinion is then presumably modified to reflect what the Supreme Court has done. So, they have the last word in their own name anyway.

I had the distinction when I was in the C.A. of having had an opinion that I wrote adopted by the Supreme Court. They changed one word. Where I said "reversed," they said "affirmed."[102] Otherwise, they agreed one hundred percent.

F. Legislation by Initiatives

St. George: Do you feel that the recent initiatives that have passed like Proposition 8, Proposition 13,[103] the death penalty initiative, because they are poorly written they are, in effect, the public legislating, that they are taking up a lot of the court's time with redrafting and rewriting, correcting language, the kind of stuff which normally wouldn't worry the court?

Kaus: Yes, of course. Basically, I recall not only the propositions that passed, I recall the hassles we had over propositions that somehow never got on the ballot. We had the Sebastiani Reapportionment initiative which didn't make it because the court interpreted the constitution to mean that you reapportion only once every ten years.

We had the initiative (I hope I'm getting this right) which was intended to "blackmail" the Legislature into petitioning Congress to call a constitutional convention for the balanced budget amendment.[104] You

101. *See supra* text accompanying notes 26, 31 & 91.

102. *See* Continental Baking Co. v. Katz, 68 Cal. 2d 512, 439 P.2d 889, 67 Cal. Rptr. 761 (1968), *vacating* 61 Cal. Rptr. 794 (1967).

103. Proposition 13 was passed by the voters on June 6, 1978. It added Art. XIIIA, imposing limits on property taxation, to the California Constitution.

104. The "Balanced Federal Budget Statutory Initiative", proposed for the November 6, 1984 ballot, would have compelled the California Legislature, on penalty of loss of salary, to

can shoot me, I don't remember what the basis for not putting that one on the ballot was.

I sort of remember one or two others which gave us fits. There were lots of questions in connection with the referendum which led to the *Deukmejian* decision in 1982, the reapportionment decision because of the way the signatures had been gathered.[105] It was a mess.

The problem is, you take the 1978 death penalty initiative, and it's presented to a lot of lay voters who don't know about the niceties, they just know this is going to send more people to the gas chamber, that's all. You present them with a long megilla on a take-it-or-leave-it basis. Even if a voter recognized that this reference to section 186 should be 185 (I'm making these up), there was nothing he could do about it, though he was one hundred percent in sympathy with the initiative. He had to make up his mind as to whether or not to vote for something which was nonsense or decide not to vote for an initiative with which he agreed one hundred percent because of this one mistake. If he read it in the Legislature, he could draw the attention of the author to the mistake.

St. George: That type of amending by judicial fiat . . . ?

Kaus: We had problems. For example, in Proposition 8, the proposition said that a person shall not be deemed insane and not be given a verdict of insanity unless he or she does not know the difference between right and wrong *and* does not understand the nature and quality of his or her act.[106] Now we became convinced that the Legislature didn't mean "and" because that's the so-called "wild beast" test. I'm not sure we were right. You never can be quite sure about these things. Maybe that's what they meant. The Chief Justice wrote a dissent in which she

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apply to Congress to convene a constitutional convention for the limited purpose of proposing an amendment to the United States Constitution requiring a balanced federal budget. In American Fed'n of Labor v. Eu, 36 Cal. 3d 687, 715-16, 686 P.2d 609, 628-29, 206 Cal. Rptr. 89, 108-09 (1984), the Supreme Court held the initiative exceeded the scope of the initiative power and directed issuance of a writ commanding the Secretary of State "not to take any action, including the expenditure of public funds," to place the initiative on the November 6, 1984 ballot.

105. Assembly v. Deukmejian, 30 Cal. 3d 638, 639 P.2d 939, 180 Cal.Rptr. 297, *cert. denied sub. nom* Republican Nat'l Comm. v. Burton, 456 U.S. 941 (1982). *See supra* text accompanying note 86.

106. Proposition 8 added § 25 to the Penal Code. Section 25(b) provides:

> In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.

CAL. PENAL CODE § 25(b) (West Supp. 1988).

said that's what they meant.[107]

G. Retention Elections

St. George: Do you feel there should be a change to have the Supreme Court at least appointed in a similar manner as the United States Supreme Court?

Kaus: Whatever change is made I think should be made for both the Supreme Court and the Court of Appeal. As far as the appointment goes, did you read the piece I had in the Los Angeles Times last week?[108]

St. George: That's one I missed.

Kaus: Okay, that's one you missed. I'll repeat myself. I am against legislative confirmation. The Senate of the United States has a two hundred year old tradition of self-restraint in connection with appointments to courts where they'll go along with the President as long as there is nothing wrong with the appointee morally or legally and so on, even though the appointee does not agree with them, they don't agree with the appointee philosophically and so on and so forth. We just don't know whether the Senate for the State of California is going to adopt that kind of an attitude. Right now the Senate is in a state of suspended animation because the Governor and the President Pro Tem can't agree on whether or not there should be a prison in Los Angeles County. That's the kind of dog in the manger attitude which . . . . Well, I suppose I'm not being fair. You find in the Senate of the United States, too, filibusters, one-man shows and so on and so forth. But, at least, they have shown self-restraint in the area of judicial appointments.

I think what we have to do is broaden the basis of the present commission.[109] If you looked through the State of California to find three people who should *not* vote on appointments, you couldn't come up with three better nominations than the Attorney General who is a lawyer that has fifty percent of the cases before the court, the senior presiding justice of one of the twenty-two divisions of the Court of Appeal who, under the law of averages, has to be somebody between eighty-five and ninety. You know, you're picking the *senior* one. Right now, we're lucky. Lester Roth, I think, is ninety-two; he's got all his marbles about him. Whether the next guy that's ninety-two is going to have all his marbles, I don't

107. People v. Skinner, 39 Cal. 3d 765, 786, 704 P.2d 752, 765-66, 217 Cal. Rptr. 685, 698-99 (1985) (Bird, C.J., dissenting).

108. *Why Not Drop State Court Elections? Federal System of Judicial Tenure May be Applied Here,* L.A. Times, Nov. 13, 1986, § II, at 7, col. 3. *See also* Hager, *Cites Fight Over Bird, Kaus Urges Dropping of Judicial Elections,* L.A. Times, Aug. 13, 1987, § I, at 3, col. 5.

109. Commission on Judicial Appointments.

know, I wouldn't want to bet. And the third one is the Chief Justice who risks a professional lifetime of unpleasantness if he votes [against the nominee]. Of course, I don't know why Don Wright voted against Bill Clark. That was a stunt. After he knew he didn't have the votes, he should have voted for him. But that's between him and his maker. (By the way, I was a great admirer of Don Wright. I can say that without making him angry, wherever he is.) So, I think we have to broaden the base of that commission if not eliminate its three present occupants, but I don't think I'd throw in the Legislature. I would have a legislative appointee, a member of the Senate, a member of the Assembly and several others. Basically, I would abolish retention elections.

I would retain by all means the Commission on Judicial Performance. I would do whatever is necessary to give it more teeth and more desire to bite than it has at the present time. I've never felt that the independence of the judiciary includes the right to be lazy, the right to be drunk on the job, the right to be rude to the lawyers or litigants. These things can be controlled without thought-control over the judges.

St. George: Do you think that the Commission [on Judicial Appointments] should be empowered only to look at this person's qualifications for the job, then they would not in any way be allowed to look into how they would vote or anything like that?

Kaus: Not how they would vote but whether they *do* vote.[110] The last case I had on the Supreme Court, I had to dissent.[111] It was a disciplinary proceeding against a judge because he didn't decide cases. I think that's entirely proper. The federal judges right now have been sitting on a case for two or three years, right here in this community. There's nothing you can do about it.

H. Retirement from the Supreme Court[112]

St. George: Now your retirement, which occurred back in late 1985, did you have a finger in the wind as part of the consideration that you didn't want to be up there along with Rose Bird?

Kaus: No, not at all. When I went on the court, my wife was very unhappy because I had been a judge for nineteen and a half years. I was six months away from retirement and she had very much looked forward to retirement, to relaxation, to traveling, to this, that, and the other.

110. Justice Kaus is responding in terms of the members of the Commission on Judicial Performance.

111. Mardikian v. Commission on Judicial Performance, 40 Cal. 3d 473, 485-87, 709 P.2d 852, 860-61, 220 Cal. Rptr. 833, 841-42 (1985).

112. *See supra* Part III, section A.

There I went and took another job and not only did I take another job, but I took another job which took me away from home. So to say she was opposed to my being on the Supreme Court is quite an understatement. She understood. She realized I had a career and I was ambitious, but that didn't make it any easier for her. As I think I said earlier today, I promised [Governor] Jerry Brown what I think was a minimum. What I said was three years. Now the assistant of Jerry's, to whom I talked, he remembers five, but it isn't what I remember. My wife remembers two. I stayed four, four-and-a-half. Just between you and me and whoever sees this down the pike, I retired for one reason and for one reason only and that is my wife twisted my arm.

I would've stayed on. I loved it, every minute of it. I was not on the ballot this year. I realize it would have been a tough year, of course, but I loved the work so much. I loved my staff. I was really in love with every single one of them. They were wonderful people, my secretary, my four clerks, and so on. I had no reason in the world to leave except my wife. That's the long and short of it. Nobody believes me. Nobody believes me.

St. George: Well, you've now got it on tape for all to hear.

Kaus: It doesn't make it true. It's true, I swear.

St. George: After you left the court what did you do?

Kaus: I joined the firm of Hufstedler, Miller, Carlson & Beardsley where I started to work as of January 1st of this year, January 2nd, January 1st was bowl games. I'm working there now.

St. George: Did you take any special trips or vacations that have been deferred?

Kaus: Not yet. I'm hoping to get away next June. We had one week in London in May or June of this year, and then I had a week in Zurich on business which was nice. I like to go to Switzerland on other people's money. But it wasn't a complete vacation. The problem is that my wife's mother had two very severe strokes in the middle of 1985. She's still alive. She's been in a coma now for a year and one half, nearly. My wife simply can't get away. We cheated and we got away those two weeks with all kinds of arrangements. But she isn't dying, but nevertheless, when a person is in that kind of shape she could die any minute. She's healthy. She's gained fifteen pounds, lying there, being fed through the nose.

St. George: How is it to be back in the trenches?

Kaus: Well, I'm not really in the trenches. I kind of like it. I promised myself I wouldn't be trying any cases at the trial level. Monday I

have to try a contempt of court matter. I'll let you know. Call me Monday at five p.m., I'll let you know. If I win, it's fun. If I lose, I've lost it.

St. George: Have you been in court since leaving the Supreme Court?

Kaus: Very little. I've filed briefs. I've made one personal appearance where I actually argued a matter in federal court. I've been working on several appellate matters. I had an argument coming up in the Supreme Court last week but, of course, they cancelled.

St. George: Do you anticipate that you'll write a book?

Kaus: No.

St. George: No book?

Kaus: I know I won't write a book.

St. George: Why is that?

Kaus: Because I have no desire to write a book. I have nothing to say. I don't think that anybody is particularly interested in what I've done, so I don't want to write a book.

St. George: Well, not just as an autobiography, but perhaps something about . . . ?

Kaus: No. I have nothing I want to get rid of intellectually.

St. George: You've said it in your opinions over the years?

Kaus: Over the years I have tried not to use my opinions to propagate a particular philosophy. I don't have any. I very much work from case to case like a football coach who takes them one week at a time. What emerges, emerges. If I'm a liberal, I'm a liberal. If I'm a conservative, I'm a conservative. I just have nothing I want to sell.

St. George: Do you have any regrets from your years as a justice, anything you feel you could've done but did not accomplish?

Kaus: Well, I can't read a single opinion that I ever wrote without regretting that I used this word instead of that word. One keeps correcting. No, from my point of view (I don't know what others think), I had a wonderful career on the appellate court. I didn't like it on the trial court, as I said. From the moment I got on the appellate court in 1965 until I retired twenty years later, I enjoyed it every minute. I really did.

St. George: If there was one thing you'd like to be known for in your judicial career, something you would like as an epitaph, what would it be?

Kaus: Oh, I don't know. I don't want to write my own epitaph. Let somebody else figure it out.

The one thing I wanted to do well was to write. I like to write well. I like to polish. I like my opinions to be readable so that people would

read them whether or not they happened to be interested in the subject which was often very, very dull.

St. George: Thank you. I think that's it, the end of the day.

Kaus: Well, thank you very much.