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## A Tribute to Retiring Chief Justice Malcolm M. Lucas

J. Clark Kelso\*

Chief Justice Malcolm M. Lucas's opinion for the court in *Freeman & Mills, Inc. v. Belcher Oil Co.*,<sup>1</sup> which is the subject of Robert Rancourt's note,<sup>2</sup> demonstrates why Chief Justice Lucas will long be remembered for guiding the Supreme Court of California through some of its most turbulent times and for restoring the court to national prominence. The opinion is a window into the Chief's thorough decision-making process and philosophy of judicial restraint, characteristics that go far to explain the success of the Chief's tenure.<sup>3</sup>

Malcolm Lucas was appointed Chief Justice in the aftermath of the 1986 confirmation debacle in which three members of the Supreme Court, including Chief Justice Rose Bird, were voted out of office.<sup>4</sup> The public campaign against the court leading up to the 1986 confirmation election was focused primarily upon the court's performance in criminal cases, and most particularly, in capital appeals.<sup>5</sup> With three new appointments on the bench, the court's death penalty jurisprudence changed virtually overnight.

One of the more interesting aspects of the change in death penalty jurisprudence is that it was accomplished without overruling significant numbers of Bird court precedents. Instead, it appears that the court simply modified its application of the "harmless error" doctrine so that a much greater percentage of judgments could be affirmed notwithstanding trial court errors.<sup>6</sup> Modification of the application of the harmless error standard could be achieved on a case-by-case basis without requiring the court to overrule prior decisions. Thus, the court maintained the appearance of continuity in the law and respect for precedent while, nevertheless, significantly changing the results in individual cases.

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1. 11 Cal. 4th 85, 900 P.2d 669, 44 Cal. Rptr. 2d 420 (1995).

2. See Robert L. Rancourt, Jr., Casenote, *Freeman & Mills, Inc. v. Belcher Oil Co.*, *Yes, The Seaman's Tort is Dead*, 27 PAC. L.J. 1399 (1996).

3. As of this writing, California has a new Chief Justice, Ronald M. George. For purposes of this article, however, references to the "Chief" are to Chief Justice Malcolm M. Lucas.

4. See Anthony Paonita, *Voters in 3 States Reject Chief Justices*, THE NAT'L L.J., Nov. 17, 1986, at 3.

5. See J. Clark Kelso & Brigitte A. Bass, *The Victims' Bill of Rights: Where Did It Come From and How Much Did It Do?*, 23 PAC. L.J. 843, 859-61 (1992).

6. See Gerald F. Uelman, *The Lucas Legacy*, CAL. LAW., May 1996, at 29 (explaining that "[u]nder Lucas, 'harmless error' became a mantra, as the court dramatically lowered the level of judicial, prosecutorial, and defender competence demanded in capital cases").

Respect for precedent and for thoughtful analysis was one of the hallmarks of the Lucas court. The court was careful to tread lightly upon existing opinions, wielding the power to overrule only after an exhaustive analysis that revealed analytic flaws in the prior opinion, negative social or economic consequences, and sustained criticism from scholars and courts. Robert Rancourt's note explains in detail how that cautious process was employed in *Freeman & Mills* to overrule *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*<sup>7</sup>

The Chief employed a similar approach—canvassing the law in other jurisdictions, considering the views of commentators, and exploring in depth the consequences of decisions—in many other important civil cases. The list of Lucas opinions includes most of the leading civil cases over the last decade: *Moradi-Shalal v. Fireman's Fund Insurance Cos.* (third party "bad faith" actions);<sup>8</sup> *Nally v. Grace Community Church of the Valley* (limited duty of nontherapist counselors);<sup>9</sup> *Foley v. Interactive Data Corp.* (wrongful termination);<sup>10</sup> *Mitchell v. Gonzales* (proximate cause instruction);<sup>11</sup> *Mexicali Rose v. Superior Court* (chicken bone in enchilada case);<sup>12</sup> *Moncharsh v. Heily & Blase* (review of arbitration decisions);<sup>13</sup> *Hill v. National Collegiate Athletic Association* (privacy);<sup>14</sup> *Waller v. Truck Insurance Exchange, Inc.* (insurer's duty to defend third party action seeking incidental emotional distress damages caused by insured's non-covered economic or business torts).<sup>15</sup> These cases are a model of legal analysis and judicious opinion-writing.

The Chief's modus operandi extended to his leadership of the California Judicial Council, the policy-making body for California's courts. He was always careful to seek complete information and a diversity of perspectives. In 1991, the Chief convened the Commission on the Future of the California Courts, which brought together hundreds of California's leading judges, lawyers, academics and policy-makers to consider the future of the California judiciary.<sup>16</sup> The Chief appointed Mr. William Vickrey, one of the country's most visionary court administrators, to serve as Director of the Administrative Office of the Courts. The Chief revitalized and restructured the operations of the Judicial Council and the Administrative Office of the Courts. These and countless other judicial

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7. 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

8. 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988) (overruling *Royal Globe Ins. Co. v. Superior Court*, 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979)).

9. 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988).

10. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

11. 54 Cal. 3d 1041, 819 P.2d 872, 1 Cal. Rptr. 2d 913 (1991).

12. 1 Cal. 4th 617, 822 P.2d 1292, 4 Cal. Rptr. 2d 145 (1992).

13. 3 Cal. 4th 1, 832 P.2d 899, 10 Cal. Rptr. 2d 183 (1992).

14. 7 Cal. 4th 1, 865 P.2d 633, 26 Cal. Rptr. 2d 834 (1994).

15. 11 Cal. 4th 1, 900 P.2d 619, 44 Cal. Rptr. 2d 370 (1995).

16. See *Commission on the Future of the California Courts*, in *JUSTICE IN THE BALANCE: 2020* (1993); *Symposium, 2020 Vision: A Plan for the Future of California Courts*, 66 S. CAL. L. REV. 1751 (1993).

administration initiatives have restored the Judicial Branch to a role of prominence in forging court policies collaboratively with the Legislature and Governor.

It has been my privilege and pleasure over the course of the last half-decade to participate in some of these judicial reform efforts and to see first-hand how Chief Justice Lucas approaches problem-solving and interpersonal relations. He is a man of good humor, practical wisdom, and great patience. These attributes have plainly served him well in the collegial context of an appellate tribunal and as Chairperson of the Judicial Council. The California Judiciary and the People of California owe the Chief a great debt of gratitude for his distinguished service on the Supreme Court of California.

