

RETROSPECT

Oral History: Justice Joseph R. Grodin

Preface

This transcript from a videotaped interview with Justice Joseph R. Grodin was prepared by the Committee on History of Law in California, a standing committee of the State Bar of California.¹ It is the third 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 second interview, with Justice Otto Kaus, appeared in Volume 15 of the *Quarterly*.³ The Committee's fourth interview, with Shirley M. Hufstedler, will appear in Volume 17 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.

1. The interview was videotaped on September 28, 1987, at Hastings College of the Law. The interview was conducted by four members of the Committee: John Hanft, a project editor in the Witkin Department at Bancroft Whitney Company in San Francisco; 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; and Kirk McAllister, a sole practitioner and certified criminal law specialist practicing in Modesto.

The videotape, on VHS cassettes, was transcribed with the cooperation of Hastings' then Dean Daniel Lathrope, Hastings' Academic Dean Mary Kay Kane, and the Hastings faculty support staff. John Hanft, then chairman of the Committee, edited the transcript and submitted it to Justice Grodin for his comments and clarifications. Parts of the transcript have been rearranged to keep the discussion of topics together.

Preparing this project—from original interview to final production—required the energies of Committee members under three chairpersons. The project also required generous support from Hastings College of the Law. The Committee thanks the Hastings deans and faculty and the technical services personnel who operated the camera and prepared the tape. We also 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 Grodin for consenting to be interviewed and working with us to preserve his important perspectives on California law.

THE COMMITTEE ON HISTORY OF LAW IN CALIFORNIA

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2. 14 *Hastings Const. L.Q.* 225 (1987).

3. 15 *Hastings Const. L.Q.* 193 (1988).

The Committee accordingly desires to make the tapes and transcripts in the oral history series available to interested scholars and students. The Grodin transcript and videotape are available for research and other permitted uses. Copies have been deposited with the library of Hastings College of the Law and the Archives of the State Bar of California, at its San Francisco office.⁴

Biographical Sketch

Justice Joseph R. Grodin was born in 1930 in Oakland, California, and grew up in the neighboring community of Piedmont. He attended local schools and entered the University of California at Berkeley in 1948, where he took a bachelor's degree in political science with honors after three years. Inspired by friends, including future California Supreme Court Justice Mathew Tobriner, Grodin entered Yale University Law School, where he received a J.D. *cum laude* in 1954. Grodin returned to California briefly to take the bar examination, then went on the London School of Economics, on a Fulbright grant, for a doctorate.

He returned to California in 1955 and joined the San Francisco labor law firm of Tobriner & Lazarus. He practiced labor law with Tobriner until 1959, when Tobriner was appointed to the bench, and Grodin continued with the firm under the name Brundage, Neyhart, Grodin & Beeson until 1972. He has written extensively in the field of labor law.

Grodin taught at Hastings College of the Law part-time while in private practice and was a visiting professor at the University of Oregon School of Law for a year. He became a full-time faculty member at Hastings in 1972 and remained until 1979. His tenure there was interrupted for a year in 1975-76, while he served as one of the original members of the California State Agricultural Labor Relations Board, and for a semester the following year while he taught as a visiting professor at Stanford Law School.

Grodin was appointed to Division One of the First Appellate District of the California Court of Appeal by Governor Edmund G. Brown, Jr., in June, 1979, and was named presiding judge of Division Two in March, 1982. He was confirmed by the electorate in November, 1983,

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and was elevated to the California Supreme Court by Governor Brown in December of that year. Grodin was defeated, along with Chief Justice Rose Bird and Justice Cruz Reynoso, in a widely publicized and politicized retention election in November, 1986. While on the bench, Grodin wrote over two hundred opinions, including significant decisions in wrongful termination of employment, sex discrimination, and criminal procedure.

After leaving the court, Grodin resumed his teaching post at Hastings. He has written a book,⁵ to be published next year by University of California Press, based partly on his experiences as a judge.

I. The Early Years

A. Family Background and Upbringing

Hanft: Justice Grodin, welcome. I'd like to begin with some questions about your family. Could you describe your immediate family and your personal, nonacademic interests?

Grodin: I'm married. My wife is Janet. We have two daughters, Sharon and Lisa. Sharon is thirty, and she's a lawyer. Lisa is twenty-five, and she's a violinist. My nonworking time and interests have changed a bit since I got off the court, in large measure because I have more time now. We just spent a weekend together up in the mountains around Silver Lake. I enjoy backpacking. I play tennis and read a good deal.

Hanft: I believe that you and your daughter [Sharon] have written a guide to backpacking at Silver Lake.⁶ Is that right?

Grodin: We have, and we just checked out one of the revised trails this weekend.

Hanft: How about some discussion of your childhood—your ancestry and upbringing?

Grodin: My father came to this country from Lithuania. His father was a rabbi. His father's father was a rabbi—both of them very orthodox, rather strict. He came to this country as much to get away from *that* repression as the czar. He came to California and went into business with his uncle, who was in the clothing business, and they started a retail men's store in downtown Oakland, which grew, after my father's death, into a large chain.

My mother's family came here from Russia. She's a bit vague about her family history, but she says Kiev, and I guess that's right. They

5. J. GRODIN, IN PURSUIT OF JUSTICE (due to be published May, 1989).

6. J. GRODIN & S. GRODIN, SILVER LAKE: A BACKPACKING GUIDE (1973).

came to New York, then to Sumter, Oregon, which was, and is, in a *very* remote part of eastern Oregon. It was a small mining town; I have no idea how they got there, or why, but my mother's father started a clothing store there, and they eventually moved down to Napa, and then to Oakland, and it turned out that my mother's aunt was married to my father's uncle, and that's how they got to know one another.

I grew up in Piedmont, went to school at Wildwood Grammar School, and then to Piedmont Junior High School and High School. This was during the '30s and '40s. I graduated from high school in 1948. Piedmont was a rather precious place then. I don't think there was a single black person in our school. For that matter, my family and my wife's family were among the very few Democrats in Piedmont at the time. We had a civics teacher by the name of Miss Guest, who was a Texas Democrat, and she was a wonderful teacher. She liked to put on mock conventions, and she had great difficulty getting anyone to nominate Franklin Roosevelt. I agreed to do that. It was a bit [of a] sheltered environment. But I went on to U.C. Berkeley after graduation; that broke [me] out of the shelter.

B. University of California

Hanft: Any particular role models or exposure to the law that started you on the path to the Supreme Court?

Grodin: When I got to Cal, my eyes began to open more, and I had some marvelous teachers. I suppose the most influential was Jacobus TenBroek, who was a lawyer—[he] had a law degree—but was teaching in what was then called the Speech Department at Cal. He had undergraduate courses called Speech 1A and Speech 1B, which were really courses in the First Amendment and the Equal Protection Clause, or, more broadly, the concepts of liberty and equality. And he was a brilliant man and a marvelous teacher; he was blind, [but] able to run a class with Socratic techniques such as I've never seen before or since. [He] had a gift for guiding students in the analytical process, forcing them to think carefully about things. And it was very exciting and probably the most influential course and individual in my undergraduate career.

[There was also] the sponsor of the debate team, so-called. Because the Associated Students did allocate a certain amount of funds for travel, and we weren't going to lose out on it, we did debate occasionally. I took a trip around the Midwest in midwinter, debating the affirmative proposition that resolved that democratic socialism is the answer to communism. I could give that debate today, as well as the other side. But the rest of the time the debate team spent in weekly seminars, and they were

sort of loosely guided by our debate instructor, who was a man by the name of Dick Wilson. We chose our own topics, and we put on the seminars ourselves, and we had a most interesting and diverse group of people. Allen Broussard, who is now on the Supreme Court, was a member of that group, for example. Some of my closest friends, my friends throughout life, [I met] when I was at that group. It was a format which allowed us to bring to bear in these weekly sessions what we were otherwise studying in our distinct undergraduate majors, and it was very exciting.

I had a very fine professor in political science, Charles Aiken, who taught a course in Public Regulation to undergraduates. He was a graduate of the University of Chicago Law School and just a very, very interesting person.

Actually I wasn't going to go to law school; I was, for a long while, what was then called a general curriculum major. You didn't have to select a major if you wanted to be general curriculum, and for a long while I wanted to be general curriculum because that enabled me to take a whole lot of courses around various subjects. But then I got very tired and embarrassed responding to people who asked me what my major was. So I became a political science major, mainly because, at that time at least, political science only required eighteen units in the subject for a major, whereas everything else, every other major that I could think of, required twenty-four. I could take eighteen units of political science and six units in related courses, and *everything* is related to political science.

So I became a political science major, and I had as a teaching assistant (I forget in what course) a then-young man by the name of Victor Rosenblum, who is now a professor at Northwestern University and has been president of Reed College. He had just finished getting a law degree at Columbia, and was doing a Ph.D. in political science. I was enrolled in a graduate program in political economy at Harvard, to get a Ph.D. I mean I had already applied and been accepted, and that's where I planned to go—this was my senior year. I became friends with Vic and told him that I was interested in teaching. He knew some of my other interests, and he persuaded me that I should go to law school, at least go to law school first, and that would give me a solid base. Then I could go on and get a Ph.D., if that's what I wanted to do.

I talked to some people about doing that; among the people I talked to was Mathew Tobriner, who was a friend of a friend. Tobriner was in labor law practice at the time; he had been active in Democratic politics, and that's how this friend of the family knew him. And I went over to

see him, and we hit it off very quickly. I was interested in unions. I thought that if I went into law, I would want to go into labor law.

He was a dynamic personality who had a way of encouraging people and bringing out the best in them. And he was *very* enthusiastic about my going to law school and about my going into labor law, and he offered me a job in his office after my first year, during the first summer of law [school]. And so I switched, and I applied to Yale Law School, where Vic Rosenblum said I should go, because it was more like a graduate school in political science than most graduate schools in political science. And I was accepted. I don't remember whether they had LSAT's [Law School Admission Tests] at the time or not, but it all seemed very fast. But, at any rate, that's where I went, and I never regretted it.

C. Yale Law School

Grodin: I began [law school] in 1951, and I found Yale a very exciting place. I mean, I just thoroughly enjoyed law school, and particularly the first year of law school. It managed to relate all of the things that I was interested in, in terms of the social sciences and philosophy and political science, political theory and law, and governance of society, and was a very stimulating place with very exciting teachers [and] even more exciting students.

Hanft: Do you recall any of them, particularly? Professors or students?

Grodin: Yes. Many of the students I've been very close to through the years. Herbert Morris was a classmate of mine, and we went on after law school to England on Fulbright grants, he to Oxford and I to the London School of Economics. And then we've stayed together through the years; he's now Dean of Humanities at U.C.L.A. Allard Lowenstein, who went on to become a one-man revolutionary, really almost single-handedly responsible for the "Dump Johnson" movement during the Vietnam period. Jerry Carlin, who practiced and went on to get a Ph.D. in sociology, and headed the San Francisco Legal Aid [Society] for a while, and then quit the law to become an artist. Leonard Sperry, who was in the Attorney General's Office in California, quit the law to become a timpanist. A lot of my classmates went on to do other things. Steve Reinhardt, who is on the Ninth Circuit. [Ellen Peters, who is the Chief Justice of the Connecticut Supreme Court.] We had a very, very interesting class.

The professors were also, some of them, quite good. Friedrich Kessler, who is at Boalt [U.C. Berkeley School of Law]—now, I guess emeritus, but still teaching occasionally—was a marvelous Contracts

professor. He had this very open, analytical, but creative, mind. If a student said that he wasn't prepared, if he hadn't read the assignment, Kessler would say, "Dat's wonderful, you can speak with an open mind." I had Fowler Harper for Torts, John Frank for Constitutional Law, and Charles Clark, who was on the Second Circuit at the time, for Code Pleading. Later on, I had Myres McDougal for Property, and Jerome Frank, who was also on the Second Circuit (one of the really great minds of the legal realists) for a course in Equity. [Other professors were] Wesley Sturges for a course in Arbitration; Ashbel Green Gulliver for a course in Future Interests; F. S. C. Northrop for a course in Recent Sociology and Philosophy of the Law; and Felix Cohen, for Jurisprudence. I had a very broad exposure at Yale, for which I'm very grateful.

Hanft: What about women and minorities when you were in law school? How were they represented?

Grodin: We were not big on minorities, as I recall. There were perhaps a half dozen women in a class of 140, or thereabouts, maybe as many as ten or twelve, I don't know. That doesn't sound very good now, but for that time, it was pretty good. Yale was sort of in the lead in encouraging that. It was long before the movement to attract minorities.

Hanft: What about your activities in law school? It sounds like pretty heavy course work. Did you participate in a moot court competition or the law review?

Grodin: Oh, there was a moot court competition, and there was law review. I did law review for a year, and then I had to make a choice between going on law review and, my third year, teaching legal writing and research to first-year students. Since I had in mind becoming a teacher, that sounded like a better alternative for me, and that's what I did. It was a lot of fun. The supervisor of our group of third-year teachers was Nick Katzenbach, who later became Attorney General. And I got to know him through that.

Yale didn't have all that good a record on the bar exams. They were a little light on bar courses, and particularly things that were on the California bar. I was determined to take Community Property, and they offered it in the catalog, so I inquired about it, and they said, "Well, you go see Professor [David] Haber and make arrangements," because there were not that many people taking Community Property at Yale. And so Haber said, "What you do, is you go to the library, and you see what books there are in the area of community property, and you select what you consider to be the best one or two books, and you read them." So

that's what I did. I read this book by de Funiak that I found,⁷ and I read that and studied it, and a couple of other things, and read some cases, and then came exam time. The examinations were posted, listed exams with places and times, and the time for community property was in Haber's office at such-and-such time, so I reported at that time, not having had any communication with that very important professor. And he said, "What you do, is you go to the library, and you compose three questions, and you answer them." So I did that; they were very tough questions, I want you to know. I mean, I wasn't easy on myself, but apparently I answered pretty well, because I got a good grade.

D. Bar Examination

Hanft: Then, after Yale, you came back to California?

Grodin: I came back [briefly] and took the bar exam and had Bernie Witkin as my instructor for the bar exam preparation.

Hanft: What was that like?

Grodin: Well, he was marvelous. You know, he's an excellent lecturer, and he just took us through. We had *Witkin*; it was one volume at the time. We studied the bar course from Witkin's *Summary of California Law* and excellent lectures. He made it easy.

E. London School of Economics

Grodin: After Yale, I applied for a Fulbright grant to go to England and do something in the area of labor law. I had worked for Tobriner both summers; he encouraged me to do that. And to the enormous surprise of my labor law professor at Yale, A. Harry Schulman, I got a Fulbright grant to do that. I [had been] married after my first year [of law school]. I came back, I took the bar exam, and immediately after the bar exam—I mean, if it ended at four o'clock, at five o'clock—we were picked up by Janet's parents and taken to the airport and flew to London, because I was already late for the beginning of the semester at the London School.

There I embarked on a project, a comparative law project of American and British law relating to the internal affairs of unions—questions of union democracy, discipline of members, freedom of speech within unions, and such like.⁸ It was a subject that had been suggested to me by Tobriner, and it turned out to be a very hot topic. This was still before

7. W. A. DE FUNIAK, *PRINCIPLES OF COMMUNITY PROPERTY* (1943).

8. J. GRODIN, *UNION GOVERNMENT AND THE LAW: BRITISH AND AMERICAN EXPERIENCES COMPARED* (U.C.L.A. Inst. for Indus. Rel., Monograph Series No. 8, 1961).

the Landrum-Griffin Act of 1959,⁹ which regulated that whole subject by statute in this country. So it was still common law that I was comparing, and I had a marvelous tutor by the name of Otto Kahn-Freund who had come to England from Germany, and was one of the few people in England at the time who were interested in labor law. He turned me on to some English sources, and I began research, and then I applied for an extension of my Fulbright grant—for mixed motives. One was that I had decided that I'd go on and get a degree, a Ph.D. The other was that the Fulbright statute carried with it an automatic draft exemption at the time; the Korean War was on. So I enrolled in the Ph.D. program, and I ended up writing a thesis. Janet became pregnant after we'd been there a little over a year, and we decided to come back and have the baby here and work on my thesis, and then eventually go back to England.

F. Private Practice

Grodin: We came back in 1955, and I took a part-time job at U.C. Berkeley teaching in the Speech Department; I taught the Speech 1A course that TenBroek had been teaching.¹⁰ TenBroek was, by then, the chairman of the department. I worked on my thesis, and it became apparent that I was going to have to do more than that, if we were expecting a baby. I had decided that, although I still wanted to teach, I wanted to practice for a while before I taught. So I went back to Tobriner and said, "Here I am." And he said, "Well, that's wonderful, good to see you, and we'd certainly love to have you around here, but we don't have any more room. We just recently hired somebody, and our practice won't support another person right now." So that was something of a disappointment, but I looked around, and I got a job offer from Tobriner's principal competitor, Charlie Scully, who was the lawyer for the state AFL-CIO, and who also represented the butchers' union, the Amalgamated Meat Cutters' Union, statewide. The offer was that I would do half-time legal work for Scully, and the other half-time I would work for the butchers' union, putting out their monthly newspaper, helping them with negotiations and doing economic research for them. (Scully thought that since I went to the London School of Economics I must know something about economics.) That sounded like fun, and I accepted, and I called Tobriner to tell him, and he was *outraged*, and said, "You can't do that." I said, "What do you mean, I can't do that?" And he said, "Well, Scully is my principal competitor." I said, "Well, that's very interesting, but we just had a baby, and chances are that she's going

9. Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 et seq. (1982).

10. *See supra* Part I, B.

to want to be fed and clothed.” And he said, “I’ll call you back.” So in a short while, he called me back, and he made me an offer to go with him at \$300 a month (which was \$50 a month less than his secretary was getting, I learned a month later). I accepted, and I called Scully back, and I told him that I had had this offer from Tobriner that I really wanted to accept. He understood and said that was okay. And so I went with Tobriner, and that began a friendship and collaboration that became a very important part of my life. I was with him only four years before he went on the bench.¹¹ I was working on my thesis part of the time, at nights. I don’t know how I did it now, but somehow I found time for it, because it was a very busy practice.

Hanft: What was it like?

Grodin: Well, he would assign me cases or matters to research and write about, and we would talk about them and meet with the clients, or I would be in with the clients when he would talk to them, and I learned a lot about that. Then he turned me over to various projects. The firm represented the plumbers’ union in San Francisco, and also an organization called the San Francisco Joint Board of the Plumbing and Pipefitting Industry, which was a collaboration between the unions and the contractors, to engage in promotion of the industry in a variety of projects, which bordered, I think, on the right side of the line between permissible and antitrust. But my project was to write a plumbing code for the City and County of San Francisco. What I knew about plumbing, and I still know about plumbing, I could tell you in three minutes. But they brought me plumbing codes from Detroit and from various places, and sat with me and explained what a soil pipe is and a waste pipe, and various things. But the principal goals seemed to be to require at least one toilet fixture in every room in San Francisco, to make sure that plumbers and their employers would be employed to the fullest extent possible. That project took quite a while.

We had some cases together; we represented some gardeners in Golden Gate Park. There was, at that time, a [charter provision] in San Francisco which required that city employees who were doing work comparable to crafts that were getting rates of pay under collective bargaining agreements should get the same rates of pay. It was our contention that the gardeners should at least get the laborers’ rate, and that they did much the same work. In fact, there were landscaping contractors out in Golden Gate Park who would be preparing the soil, and then the garden-

11. Tobriner was appointed to the California Court of Appeal in 1959 and to the California Supreme Court in 1962.

ers would come in and do the planting and the cultivation and get a whole lot less than the laborers were getting. So that was our theory.

We had a judge by the name of Theresa Meikle who was, I guess, the only woman judge on the San Francisco bench at the time. San Francisco city government was very closely knit at that time, so that everybody knew everybody else quite well, and the head of the Civil Service Commission, who was a man by the name of Jim Henderson, was in the courtroom during most of the proceedings. We had some wonderful witnesses, including a fellow by the name of James Irwin, who worked in the arboretum, and it was his job to show visiting horticulturists around, and he knew everything about every plant and its identification and habitat, and whatnot. He was just marvelous. I questioned him and he explained what they did, and how they did it, and I asked what wage he was getting, and it was substantially *less* than the laborers who were digging ditches. At that point, Judge Meikle turned to Mr. Henderson and said, "Jim! How can you do that to these people?" Whereupon the deputy city attorney asked for a recess, and we settled the case in the corridor.

I learned a lot from Tobriner. I remember the case resulted in a stipulated judgment of back pay, which amounted to something like \$150,000, maybe more than that, which was quite big money at the time. I asked Tobriner how we should bill on the case (he had no contingent fee), and he said, "We'll bill them at our regular hourly rate," which was \$15 [an] hour, I think. I think our total fee was \$3,000.

[Tobriner] was appointed to the Court of Appeal in 1959 by [Governor] Pat Brown, and at the same time Governor Brown appointed Leland Lazarus, who had been his partner at the firm of Tobriner & Lazarus, to the Municipal Court. One of the principal people in the firm, Al Brundage, had been off in Los Angeles establishing a kind of a branch office, and upon Tobriner's departure, he left the firm and established his own practice with a base in Los Angeles. So the upshot was that I found myself at age twenty-nine a partner in what was still the largest and best labor law firm west of the Mississippi, or certainly one of the best, anyway, and [that] was very heady stuff; it was responsible; it was exciting.

We represented a wide variety of unions, including the garment workers' union. I remember when we first came to represent the garment workers' union while Tobriner was still there. They were having an intra-union battle of some sort, and the union had taken action to, I think, suspend from membership and from the holding of office a couple of union leaders, or would-be leaders, who had said some things very critical about the union leadership, and who were suspected of being a bit

“leftish.” Tobriner and I decided that under California law, as it was developing, even as a matter of common law, that the courts would frown upon discipline of these people and removal from office for what amounted to First Amendment kind of activity. And Tobriner undertook to explain that position to David Dubinsky, who was the head of the garment workers’ union at the time.

Dubinsky was an old-fashioned type who was very zealous and very committed, but who ran the union a bit like the Catholic Church. He thought that the principal duty of everybody who was employed by the union was obedience to him, and the garment workers later became one of the first unions to be found guilty of an unfair labor practice by the National Labor Relations Board when he fired some union organizers who were themselves organizing to bargain within the union over their wage rates.¹² At any rate, he did not take kindly to the idea that there should be any limitations of a legal sort upon the union’s ability to do whatever it damned pleased with dissidents. I was in Tobriner’s office when he had this conversation with Dubinsky. “Dave,” he said, “that’s just the way it is in California. The courts don’t regard unions as private clubs any more; they regard them as organizations that have some kind of public utility status.” Dubinsky obviously would have none of that; it was a rather heated conversation, and I thought we were probably going to lose the client as a result, but we didn’t. At any rate, they were one of our clients, [and] the musicians’ union, the typographers’ union, [and] a whole bunch of teamsters’ locals.

I was representing some unions up in northern Nevada, which was a lot of fun, because Northern Nevada was still pretty much a frontier when it came to labor law. They had recently adopted a right-to-work law, and they had a lawyer by the name of Ernie Brown whose mission in life was the right-to-work law. He viewed the right-to-work law not only as doing away with the arrangements for requiring union membership as a condition of employment, but as an indication that the people of the State of Nevada wanted the courts to do whatever they could to limit unions in any way that we could think of. He would invoke the right-to-work law for *everything*, and he would go into court seeking injunctions. He was actually a very pleasant and delightful man (we got along very well) and he kept me going to Nevada quite a bit.

That was a different legal world. I remember once negotiating in the El Cortez Hotel on behalf of the building trades council up there with some large contractor who had once signed an agreement which simply

12. *Federation of Union Representatives v. N.L.R.B.*, 339 F.2d 126 (2d Cir. 1964).

said that he would be bound by the existing agreement between the union and the associated general contractors and by any successor agreement. At the time that he signed, he was on a fairly small project, but then he got a big project involving atomic testing, and he wasn't at all sure that he wanted to abide by that agreement. And so there was a strike and picketing, and that led to intervention by the Federal Mediation [and Conciliation] Service, and we had this negotiating session in which he and his entourage were in the bar of this old hotel, and I and the union people were in the restaurant, both rooms being unused during daylight hours, and the federal mediator was going back and forth. We kept making proposals and counterproposals, and we reached the point where the contractor would be willing to abide by the agreement for the future, but was unwilling to pay any back fringe benefits. Our union people said they couldn't accept that; they had to insist on the fringe benefits. Finally the mediator came in and said, "Well, I have an unusual proposal for you, but I feel it's my obligation to present it. He says he'll shake you for it, double or nothing." Only in Nevada can that happen.

I also remember being in a state court in Carson City, representing a building trades council there that had been picketing some construction site. Ernie Brown was representing a contractor and seeking an injunction, and we were in court on an order to show cause for preliminary injunction, and this was shortly after the United States Supreme Court had decided *San Diego Building Trades Council v. Garmon*,¹³ which held that state courts are preempted from regulating union picketing and other economic activity on the basis of state law, with exceptions for safety and things like that. And so I stood up in front of this judge, and said, "Your honor, I've been in labor law practice for five years. There are many things that are unclear in labor law, but one thing is crystal clear, and that is the state court has no jurisdiction to entertain this kind of lawsuit." And the judge leaned over, and said, "Young man, I want to tell you that before I became a judge, I was a lawyer for a mining company, and I'm familiar with crystal, and even crystal isn't all that clear." Well, it was a colorful lesson I learned.

He decided that the injunction should issue and then I said, "Well, your honor, you will want findings of fact." And he said, "Yes, that's right." And I said, "Would you want Mr. Brown and [me] to prepare proposals for findings of fact?" And he says, "Yes, that's correct." And I said, "May we have the transcript in order to do that?" And he said, "I don't see why not," and he turned to the court reporter and said, "When

13. See *San Diego Building Trades Council v. Garmon*, 353 U.S. 26 (1957); *San Diego Building Trades Council v. Garmon* 359 U.S. 236 (1959).

will the transcript be ready?" She said she thought she could have it ready by Christmas, this being early October. And he said, "Very well. The matter will be submitted, pending receipt of the reporter's transcript, and then each side will have fifteen days to prepare proposals for findings"—meanwhile, no injunction. Ernie Brown said, "Thank you very much," and we shook hands, and he went out of court believing that he had a victory, and I went out of court with my clients free to continue picketing for two months.

G. Teaching

Grodin: As time went on, I began to look about for teaching prospects because I still wanted to do that. And I had been teaching at Hastings [College of the Law] with Tobriner. Tobriner took on the Labor Law core course back in 1956, I guess it was, as a kind of firm project, and he had me and Stanley Neyhart help him teach the course. When he left, Neyhart and I did it for a bit, and then I did it for a few years until they finally got someone over sixty-five who could teach labor law, that being a period in which Hastings specialized in the over-sixty-five group, and the rule was that if there was an over-sixty-five person to teach, then that's tough.

I continued to do some writing. I'd written something with Tobriner; I wrote something with one of my partners, Duane Beeson; I wrote various things,¹⁴ and I still had an eye for teaching. I had been proposing to my partners that we have some kind of sabbatical or leave of absence program which would permit us to go off and do something else for a while. My proposal was that we not be supported by the firm during that period, that we be responsible for our own financial situations, and I thought I would go off and teach. Duane Beeson, who came to us from the National Labor Relations Board, could probably go back to the board, if he wanted to, and argue cases to the Supreme Court. Each of us had things that he could do. My partners, all being rational souls, couldn't find any reason in principle to disagree with the proposal, but I could never get them to commit to it. Finally [in 1970], I got them all together in a meeting in Duane Beeson's office for the purpose of discussing the idea, and we were about five minutes into that meeting when the phone rang, and it was a long distance call; I went into my office to take

14. See Tobriner and Grodin, *Taft-Hartley Pre-emption in the Area of NLRB Inaction*, 44 CALIF. L. REV. 663 (1956); Grodin and Beeson, *State Right-to-Work Laws and Federal Labor Policy*, 52 CALIF. L. REV. 95 (1964); Grodin, *The Kennedy Labor Board*, 3 INDUS. REL. L.Q. 33 (1964); Tobriner and Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247 (1967).

it and on the other end of the line was Gene Scoles, who was then Dean of the University of Oregon Law School, and whom I had met in San Francisco at an American Association of Law Schools meeting that I attended to see my old friend, Hans Linde, who was teaching at Oregon.¹⁵ And Scoles said, "How would you like to come to Oregon next year and teach Constitutional Law and Administrative Law and Labor Law?" And I said, "I'll be there." And he said, "Don't you want to know how much we're going to pay you?" And I said, "Whatever it is, I'll be there." I went back into Beeson's office, and I informed my colleagues that I was about to leave for the first leave of absence the following fall.

I was away for a year [and] the firm didn't suffer. Two young lawyers took over my clients; one of them was a woman, one of the first women in labor law practice, by the name of Nancy Keene. The worldly wisdom at the time was that women may be perfectly competent lawyers—certainly no reason to believe that they weren't as intelligent as men—but in the area of labor law, and particularly representing unions, they just wouldn't be able to get along with the clients. I mean, they wouldn't be able to sit at a bar and drink beer and tell dirty jokes, or whatever it took to make the clients happy. That turned out to be absolutely false. Nancy did a wonderful job, and with one of my more difficult clients, who I fully expected might have left the firm while I was gone. Not only was [the union] still with the firm when I came back, but the head of the union had become very close friends with Nancy and her husband. I'd tell a story about this fellow, but I'm [not] sure whether he's still alive. But everything worked out fine.

I enjoyed that year immensely and decided that really what I wanted to do was to teach full-time. And so when I came back, I made contact with Marvin Anderson, who was the dean at Hastings at the time, and told him that I was ready to teach full-time whenever they could find a spot for me. Clarence Updegraff, the fellow who had come in to take over my labor law courses, was still teaching, but Marvin called me (I guess it was in mid-August, 1971; I had just been back from Eugene since the spring) and said that they had oversubscribed the first-year class, and they had to add a section, and would I teach Property law. I said there was only one problem with that; I didn't know anything about Property Law. "But Contracts I could do." And he said, "Okay, Contracts." So I taught Contracts. Now that was four hours a week, and I was still supposedly trying to keep up a practice, and it was a tough schedule, but I enjoyed it very much. And, then, in the early spring,

15. Hans A. Linde is now an associate justice of the Oregon Supreme Court.

Clarence Updergraff had a stroke and was unable to teach, and Marvin called and asked whether I would take over his Labor Law class for the balance of the semester, which I did, and about that time I was invited to join the Hastings faculty as one of the first non-sixty-five people to come onto the faculty full-time. The rule had been that you couldn't teach full-time unless you were in the sixty-five club. They had found ways of getting around this rule by hiring younger people and giving them non-academic titles, but putting them in the classroom the equivalent of full-time. But they never actually hired somebody through a faculty appointments committee. For the first time that year they had a faculty appointments committee, and I was interviewed by them and hired and began to teach Labor Law and related courses. I developed an empire. I developed more labor law courses at Hastings than any law school, I think, in the country outside of Georgetown. We had labor law courses coming out of our ears. So I did that for several years.

H. Agricultural Labor Relations Board

Grodin: In 1975, the Agricultural Labor Relations Act¹⁶ was passed, and it was something that I was very interested in; it was the first farm labor law in the country, but it was not something that I had spent any time with; I did not participate in the drafting of the statute or in its negotiation through the Legislature. I was sort of dimly aware of it in the background. The idea crossed my mind that it would be fun to be a member of the Agricultural Labor Relations Board, but the appointments were for one, three, or five years, and there was a professor from Santa Clara who had been working actively in the drafting of the statute who I had assumed would be appointed to the one-year slot, and I had no interest in getting a longer appointment than that. I thought nothing about it, and I made no overtures about it, nor were any overtures made to me.

My wife and I went off to the Northwest in the summer of '75; we went to visit her cousins in Eugene; then I went on a backpacking trip in the Olympics with a friend from Seattle; then Janet and I went up to British Columbia and went off backpacking in an area called Garibaldi Provincial Park above Vancouver. I later learned that Governor [Jerry] Brown had been trying to reach me. [He] tracked me down through Janet's cousins in Oregon, then through my friend in Seattle, who reported that we had headed for British Columbia, and [then] through the Royal Canadian Mounted Police. And later I told people a story about

16. Added by Cal. Stats. 3d Ex. Sess. 1975 Chs. 1 & 2 (codified at Cal. Lab. Code § 1140 et. seq. (Deering 1976)).

how the Mounty came riding up on horseback in full regalia singing "I am calling you" (or whatever it is that Nelson Eddy sang), looking for me, but that's not exactly the way it happened. We came out of the mountains, and I called home, and my mother said that the Governor had been looking for me, and had left various numbers for me to call. So I made contact first with Walter Kinz, who had come out of the National Labor Relations Board, was hired as a consultant, and was doing some work in Sacramento in preparation for the A.L.R.B. coming into existence. He talked to me about how important it was for me to come on the board. I called my old friend Don Vial, who was the head of the [Department of] Industrial Relations for the state. I talked with Tobriner, and I talked with some other people, and I decided if I could get the one-year appointment, I would do it. And so I talked to the Governor, and he said that was fine.

That was a very exciting period. It had been a negotiated statute between one of the growers and the farmworkers and the teamsters. They had managed to agree upon compromises for statutory language, but they had somewhat different ideas as to what the statutory language was supposed to mean. In particular, there was considerable disagreement about how, whether, and to what extent the precedents under the National Labor Relations Act¹⁷ would apply, because the statute said that decisions under the NLRA would govern *when applicable*,¹⁸ and the question was what's applicable. There were certain statutory differences, but also there were differences in context. Agricultural labor had been exempt from the National Labor Relations Act¹⁹ and had certain characteristics, principally mobility and casualness and almost an infinite number of hiring patterns and employment relationships that were quite unusual and had no clear analogues under the National Labor Relations Act. And, in any event, rules that had been adopted under the National Labor Relations Act had been adopted primarily with other kinds of industries in mind. So we were confronted with the need for developing rules that would make sense in the context of farm labor, and doing that against a background of enormous time pressure because the statute went into effect, I believe, in late August of '75.²⁰ The understanding, which we on the board accepted, was that we should have our doors open and

17. 29 U.S.C. § 151 et seq. (1982).

18. CAL. LAB. CODE § 1148 (Deering 1976) reads: "The board shall follow applicable precedents of the National Labor Relations Act, as amended."

19. 29 U.S.C. § 152(3) (1982) provides: "The term 'employee' shall . . . not include any individual engaged as an agricultural laborer. . ."

20. The Agricultural Labor Relations Act became effective August 28, 1975. It was later codified at CAL. LAB. CODE § 1140 et seq. (Deering 1976).

ready to receive petitions for election immediately, particularly since the lettuce-growing season in Salinas was then in peak. We did that, somehow, but against the background of [a] good deal of constant strife and sniping at the board and our general counsel from all quarters. It was interesting; I learned a lot.

II. Court of Appeal Years

A. Appointment to the Court of Appeal

Seitas: I'd like to start off with the background of your appointment. Can you tell me a little bit about how you were appointed?

Grodin: I think I can, insofar as I know how I was appointed. I had come back from Sacramento after my year there with the Farm Labor Board. I returned to Hastings, and I was teaching. I was off for a semester as a visitor at Stanford [Law School]. Sometime in 1978, I guess it was, Justice Tobriner, with whom I met very frequently (we had lunch together almost every Monday for about twenty years or so) talked to me about the possibility of my going on the Court of Appeal, which is not something that I seriously thought about. I had never seriously thought about being a judge; my goal was to be a law professor. But he said that there would be openings on the First District Court of Appeal as a result of the Legislature having created [an] additional fourth judge for each division.²¹ [Tobriner said] that he was going to suggest to Governor Brown, whom he knew well ([Brown] had been his law clerk on the court), that I be appointed, and would I be interested? And I said, "Why not?" So I filled out some sort of application, as I recall, and sent it off to Tony Kline, who was then the Governor's legal affairs secretary.²² In due course, my name was submitted to the State Bar, along with a number of other names, for possible appointment. I was interviewed by the State Bar and went through that process.

Along about that time, I began getting calls from Sacramento—first from Don Vial, who was the Director of Industrial Relations, and then from Howard Berman, who was the Democratic Senate majority leader, and then from Governor Brown, asking me whether I would return to Sacramento to be general counsel for the A.L.R.B. That had been a very controversial position. The first holder of it, Walter Kintz, got chewed up by everybody, and his successors had been in the heat of controversy. Apparently, I was somebody that the farmworkers and the growers could

21. CAL. GOV. CODE § 69101 (Deering 1985) (as amended by 1975 Cal. Stat. ch. 1054 (1)).

22. J. Anthony Kline is now the presiding justice of Division Two of the First Appellate District.

both accept. The only problem was that I didn't want to go back to Sacramento, and I certainly didn't want to go back to be general counsel of the Farm Labor Board, which was a position that nobody could hold and survive. So as politely but as firmly as I could, I declined that appointment, and the Governor said he understood, but, at the same time, when openings became available on the First District, I was not among those who were initially appointed.

Finally, I had a call (I guess it was in April of 1979, or thereabouts) from Tony Kline, saying that they felt they would appoint me, but I'd had no discussion with the Governor about it. I know that Tobriner was trying very hard, and kept calling the Governor, and *insisting* that I should be appointed to the Court of Appeal.

Formal news of the appointment came just after my wife and I had come out of the Colorado River on an eight-day raft trip. We had reservations at a hotel in Grand Canyon National Park. We went to check in, and at the desk, the clerk said that I had a call from a Jerry Brown in Sacramento, and that if I couldn't reach him, I was to call Tony Kline. So I put in a call to the Governor. He wasn't in Sacramento by then; he was in Los Angeles. I reached him there, and he told me that he wanted to appoint me to the Court of Appeal, and we had a very nice conversation, at the conclusion of which I went out and bought a pint of scotch, and my wife and I had a drink or two. The following morning we took off for the rest of our trip, from the Grand Canyon to the Hopi Reservation. Meanwhile, Tony Kline, who was unaware that I had made contact with the Governor, and who was anxious to get a confirmation from me of my acceptance because they wanted to announce it the following day, called my home and spoke to our daughter Lisa, who was then seventeen, and told her what he was calling for, and said that it was *very* important that they make sure that I was willing to accept the appointment. And Lisa said, "Oh, yes, he will!" And Tony, who had met her in Sacramento, said, "Are you sure, Lisa?" And Lisa said, "Oh, yes, I'm sure." So that was it; she accepted for me.

When we came back, I reported for duty. I had to go through a confirmation process. That consisted of the Commission on Judicial Appointments—the Chief Justice [Rose Bird]; the senior justice of the First District, who was then Justice [Thomas] Caldecott; and then-Attorney General [George] Deukmejian. Tobriner came and testified for me, and all manner of other good people, and the only opposition I had was from an organization called the Committee on Law and Order, which presented to the commission a list of things which they obviously considered to be disqualifying, but which I considered to be the things that I

was most proud of in my career, such as going down to Mississippi with some lawyers on a challenge to the exclusion of blacks from voting in the 1964 election, and so forth. So they testified against my appointment, but I was confirmed by all three members of the commission.²³ And I reported for duty; John Racanelli was the presiding justice in Division One. I was very pleased to be appointed to Division One because Division One had a history that was quite outstanding, and also because To-briner, who was my close friend and sponsor, had come out of Division One.

B. Role of Appellate Judges

Seitas: Did you find the transition easy to make?

Grodin: Well, in some respects it was easy because an appellate judge is dealing with legal issues at a level that is not all that dissimilar from a level that a professor deals with them, but the diversity of subject matter was quite astonishing to someone like me whose career had been mainly in the fields of labor law and related areas.

I will never forget the first writ conference that we had. Each week there was a conference with the writ attorney for the division, who would report to us about all of the petitions for prohibition and mandamus and habeas corpus and whatnot that were on tap, and we would vote. At that time, there was no accompanying memorandum. Later I insisted on a memorandum so I could have a chance to study and prepare, but at that time, it was based on oral presentation. We had a very fine writ clerk, and I remember I was sitting in there with Justice [John] Racanelli and Justice [Norman] Elkington and Justice [William] Newsom, who were the other three members of the Division, and the writ clerk was explaining that this was a writ of prohibition or mandate after the trial court's denial of the defendant's 1538.5 motion. I said, "What?" And everybody looked at me, and the truth of the matter was that, although I had a passing knowledge of Fourth Amendment law, I had never practiced criminal law, and the procedure established by section 1538.5 of the Penal Code for addressing questions about exclusion of wrongfully seized evidence is not something I was familiar with. Everybody looked at me as if I had come from another planet. After the meeting (they [had] patiently explained to me what it was all about) Justice Racanelli suggested that I might pick up some materials on criminal procedure and do a little homework, which I proceeded to do. I was a bit shaken by that at first, but I learned, I think, fairly quickly to adapt to that diversity. It's

23. Appointed May 29, 1979; confirmed June 8, 1979; oath July 20, 1979.

one of the things that made the job different from teaching and one of the things that was very exciting about it.

I think that there's a lot of merit in our common law tradition of having judges who are not specialists; or who may have been specialists in something, but when they get to the bench are expected to be generalists. I was a labor law specialist, and one of the first cases that I was assigned was a case involving labor arbitration in the public sector.²⁴ Now that was the one subject that I considered myself to be a real expert on. I had just finished writing a chapter for a book on the response of courts to public sector labor arbitration.²⁵ In preparation for that chapter I read, I think, *every* opinion that had been decided around the United States by any court of the preceding ten years. So it just so happened that I was hot on that topic, and I proceeded to write an opinion explaining why the trial court erred in not ordering arbitration of the union's grievance even though the grievance didn't seem to have a whole lot of merit. And I then proceeded to circulate this opinion to my colleagues, who were, on that case, Elkington and Newsom, and my opinion went first to Justice Elkington and back came a *dissent*. Justice Elkington found my majority opinion unpersuasive, even though I had cited my chapter, and then back came a copy of the dissent with Justice Newsom's signature on it, and so the case was reassigned to Justice Elkington, and my beautiful majority opinion was relegated to a dissent and, to top it all off, the Supreme Court denied review in the case. That was a lesson to me—both in humility and in [the] meaning of the notion that we expected judges to be generalists and not specialists. In terms of the greater scheme of things they may have been right, although I think I was *technically* right in the technicalities of labor law.

I became interested then in a lot of areas of law that I had only dimly known about before. Family law matters involving child custody [were] not something that I had spent any time on, and I became deeply fascinated with the whole system for deciding such matters. Of course, we had a lot of criminal cases. They were marvelous colleagues, and each of us brought to bear different backgrounds and different experiences. All three of them had been trial court judges, and that's terribly important to have on an appellate court. I relied upon them for that perspective, and they relied on me for other perspectives. Each of us brought to bear our own experiences, and I think that that is something

24. *Service Employees International Union v. County of Napa*, 99 Cal. App. 3d 946, 160 Cal. Rptr. 810 (1979).

25. Grodin, *Judicial Response to Public-Sector Arbitration*, in B. AARON, J. STERN & J. GRODIN, *PUBLIC SECTOR BARGAINING* (1979).

that is very valuable for an appellate court; it would be unfortunate to have an appellate court made up of people with identical backgrounds and experiences.

C. Working Methods

Seitas: I'd like to talk a little bit about your working method—how you approached cases and how helpful or not helpful you found the briefs, and how you used your staff—for example, whether you directed your staff to write a certain way.

Grodin: When you say “staff,” at that time, we had one law clerk. Later the Court of Appeal got two for each judge. [I] had one law clerk, plus a writ clerk for the division. And, in addition, I would get one or two student externs to help. We would be assigned cases in rotation; cases would come out of the clerk's office and be assigned to each of the judges for the preparation of a conference memo in preparation for oral argument. That meant that it was our case as long as we had a majority. The custom on the Court of Appeal had been for the conference memo to be very objective (almost like a law review memo), setting out both sides, and not written as an opinion, in contrast to the conference memos of the Supreme Court, which are typically written in an opinion format. We would confer on the case prior to oral argument. I would turn the case over to my research attorney, and ask him or her to start work on a conference memo, but to report back to me as soon as he said where he thought he was going with it, so that we could talk about it. Ultimately [he] would produce a draft, which I might then modify or ask for modifications and then we would circulate it. There was no attempt made to have the conference memo be a perfectly edited document. The Court of Appeal workload is enormous. My research attorney was doing—I don't know—six or seven of these a month, and he would incorporate by reference materials—patch them onto the back, [photocopy] a portion of the brief to lay out the appellant's argument, and so forth. [It] was not the kind of product that I would spend a lot of time trying to edit. Then, after oral argument, if the case remained with me for the writing of an opinion, I might, and typically would, convert the memo into an opinion myself. Sometimes I would ask the research attorney to do that, but more often I would do it myself. And that was gratifying; [it] was one of the things that I missed when I got to the Supreme Court. [I] didn't have time to do that.

D. Role of Appellate Lawyers

Grodin: The quality of the briefs varied enormously. In the criminal cases, generally we got good quality briefs out of the public defender's office and the Attorney General's office. In the other cases, lawyers often had had no appellate experience [and were] appealing a case for the first time. Often [they] acted as trial counsel, which I think is a very dubious thing to do. I mean, if you've been trial counsel, it requires a lot of determined effort to acquire the degree of objectivity that is necessary for presentation of the case on appeal. The tendency of many inexperienced appellate lawyers was to re-argue the cases as if they were arguing to the jury and to talk about the facts as if the appellate court could substitute its decision for the jury on fact-finding. And so I suppose if there's one major failing of the neophyte appellate lawyer, it's the failure to recognize the limited scope of appellate review.

The other failing which I have talked about to various audiences, including my students, is the failure to identify with the court from its perspective, failure to realize that the court has not simply to decide the case but to write an opinion which explains why it decided it, and in the process of doing that, has got to take into account the arguments of opposing counsel, and to do it on the basis of principles that will provide a foundation for the decision of future cases. The best appellate attorneys realize that and assume responsibility for presenting to the court a way of deciding that will provide that kind of foundation. The less good appellate attorneys tend to say to the court, in effect, "I don't care *how* you decide this case, as long as you decide it for my client," and present just a barrage of arguments, some of which they know have no merit, but, who knows? Maybe the court will be dumb enough to buy it. But we had some very excellent briefs. In tort cases, we would often get briefs or amicus briefs from [the] California Trial Lawyers' Association, on one hand, or the insurance organizations, on the other.

Very often, in appellate litigation the lawyers are likely to know a great deal more than the judges, not only about the facts of the particular case, but about the law. And that is something that, I think, is difficult for some lawyers to accept. I remember when I stood up in front of a court as a lawyer, I think I had the notion that the court—the judges—knew everything. I mean, they knew *every* case that had ever been decided, they knew every article that had ever been written, and my function was sort of like a computer to call up to their memory that which they may not have currently in mind. That's simply not correct. In our system, judges are generalists, except in cases like criminal cases where, over time, the appellate judge acquires a great deal of experience. When

you get into planning cases or any kind of case in which there's an area of specialization for lawyers—family law cases or whatever—chances are that the lawyer is going to know more about the subject matter than most of the judges on the panel, and he can perform a very important service by acting as an officer of the court and helping to educate the court, and not assuming just the role of the contentious advocate.

Seitas: What did you think about oral argument as far as being helpful?

Grodin: Well, I was an oral argument “nut.” I loved oral argument. Not all of my colleagues were of that view, either in Division One or, later, Division Two, where I moved to. Some judges I guess find it easier than I found it to make up their minds on the basis of the briefs and their own research and didn't regard oral argument as all that helpful. I found it almost invariably helpful, although I can't say that it changed my views as to the result in very many cases. But the opportunity to engage in dialogue with a live human being who knows something about the case and to sharpen your focus on the case in that manner—if a judge uses oral argument in that way, and not for the purpose of putting a lawyer down or something, but for the purpose of sharpening his own focus, it can be very valuable. It's a matter of style, but I just found it easier to think about the fine points of cases in the context of an oral argument where I could get response to the questions, rather than sitting in my chambers and burrowing into the briefs and thinking deeply about them. I liked oral arguments, and some of my colleagues at times were not as enthusiastic about them, or perhaps also not so enthusiastic about what they perceived as my tending to monopolize them. When I became the presiding justice in Division Two, we had our first oral argument, and Justice Allison Rouse (who's just a wonderful judge and a great person) came to see me, obviously on behalf of his colleagues, to tell me that it had been the tradition in Division Two that the judge to whom the case was assigned would ask the first questions. And since I was presiding justice, if I wanted to change that tradition, it was entirely within my authority to do that, and they would understand, but they thought I ought to know about it.

E. Activities as Presiding Justice

Seitas: I want to talk a little bit now about going to Division Two and becoming presiding justice and some of the background of that—how that occurred and so forth.

Grodin: There was to be a vacancy in Division Two as a result of the announced retirement of Justice Wakefield Taylor. I don't remember

who it was who contacted me first; I think by that time Tony Kline had left the Governor's Office and was [a] superior court judge in San Francisco. The Governor's legal affairs secretary was Byron Giorgio, whom I had known from the Farm Labor Board days because he was in the general counsel's office of the Farm Labor Board. I believe it was he who called to ask whether I was interested in that, and I had very mixed feelings about it because, to tell you the truth, being presiding justice is no great thing.

First of all, you don't get any more pay; what you get is more work. You get a lot of administrative work. And if, with that, you had a significant amount of greater authority and ability to affect the outcome of cases, that would be an offset, but the fact of the matter is you don't. You can have some impact in the way you structure the writ procedure, the way you relate to the writ clerk, the way you structure oral argument, and in the way you decide upon the assignment of cases. But a presiding judge is out of his mind if he tries to assign cases in the Court of Appeal in any manner other than strict rotation, because there's just trouble if you do that. There's trouble with your colleagues, there's trouble with the bar, because they begin to wonder how you're assigning cases, and it's just a whole lot easier to do it by the book. So being a presiding justice means you sit in the middle at oral argument, and you bang the gavel, if you have one, and when it's time to leave, you say, "We're ready to go." And that's about it. It's no great position of authority. And, although I knew people in Division Two and liked them and thought highly of them, I was very fond of the people I was with in Division One, and was not eager to leave them. [I] would not have left them had it not been explained to me by Byron Giorgio that the Governor's Office regarded this move as a possible step toward appointment to the Supreme Court. Now that was put rather vaguely. I mean, it was certainly a long way from saying "If you take this, we're going to appoint you to the Supreme Court." That was not the flavor of it at all, but it was a motion that it would facilitate my appointment to the Supreme Court if that should be considered and if it should come about.

And so I went to a second hearing before the Commission on Judicial Appointments which went pretty much like the first. Attorney General Deukmejian was part of that, as was the Chief Justice and Justice Caldecott, and again I was confirmed unanimously.²⁶ And so I took over as presiding justice.

26. Appointed February 4, 1982; confirmed March 8, 1982; oath March 8, 1982; confirmed by electorate November 2, 1982.

The responsibility for coordinating the work of the court with respect to application for writs, which is pretty much the responsibility of the presiding justice, I found very interesting. I learned a great deal about writ practice in the process, and it was challenging in terms of just how to administer a system like that. And we set about collectively to try to improve the efficiency of the division. All divisions had a backlog, but Division Two had, I think, the largest backlog of any division at the time. Justice Jerry Smith, who was in Division Two, had been with me in New York at an Institute for Appellate Judges at N.Y.U. [New York University]. Judges came there from around the country from appellate courts, and we heard various systems discussed [on] how to expedite the decisions of cases. We came back believing that there were ways that might be better than what we were doing.

In particular, the most important thing seemed to be to try to make distinctions among cases, rather than to treat them all the same for purposes of the process that they went through. Some cases—many cases—which come to the Court of Appeal are quite simple—simple in the sense that they pose a single issue, simple in the sense that they have a short record, possibly simple in the sense that the answer is pretty clear. And then there are varying gradations of complexity, obviously, going up to the case which may be extraordinarily complex. To process each of these cases in exactly the same way, to treat them as fungible for purposes of oral argument, for purposes of the process by which conference memos are written, and so forth, it seemed, when we thought about it, not to be the right way of doing things. So what we did was, for one thing, to identify what I call “beep cases” (I no longer remember what that was an acronym for) but these are the relatively simple cases. By then we had a computer, and we had a research attorney by the name of Dick Mansfield who was very adept at going through the cases and assigning them numbers from one to four, I think it was, in degrees of complexity. Also a principal staff attorney by the name of Lee Johns was very good at that in the criminal area. And we took the simpler cases—the one and two cases, let’s say—and we called them “beep cases”. Instead of assigning any particular quota of them to a judge and staff for purposes of oral argument, we just heaped them on each judge to the extent that he was willing to take them, with the idea that we would have separate conferences on these beep cases, without benefit of staff memos. Instead, we would take the briefs home and read the briefs ourselves—not give them to any law clerk—but read them ourselves, come to the conference ready to talk about them, ready to say where we stood on the case, and then go ahead and write a draft opinion, and after the draft opinion was written,

schedule an oral argument. In that process, we expedited the decision of these relatively simple cases and diminished the backload considerably.

F. Court of Appeal Opinions

Seitas: I'd like to touch on some of the cases that you wrote when you were on the court, for example, *Prisoners Union v. Department of Corrections*.²⁷

Grodin: This is the first amendment activity in the parking lot [case], an interesting case. The Prisoners' Union, as I recall, wanted to distribute literature or handbills to people visiting the prison pertaining to prison conditions. I don't remember what the thrust of them was. The prison officials said "No, [we] can't have any such activity going on in the prison or in the prison area." But they didn't point to any solid reason for not wanting it to go on. They just said that this is prison property, and it's not a public forum. The debate tended to line up on those extreme views: either it was a public forum—in which case, it was like Hyde Park Corner, and anybody could come for any purpose and do anything they wanted, so long as they were nonviolent—either it was public forum, or it was not, in which case, nobody could do anything.

And it seemed to me and to my colleagues that that was not the way it had to be, that there were gradations. It didn't seem that way to us out of the blue; there was case support, and there was support in the law reviews for the proposition that there are gradations of public forums, and that certain locations may be suitable for wide-open Hyde Park activity, but other locations may be appropriate for some more restricted activity. And here we had activity that was location-specific. That is, it was activity directed to the conditions in the prison, and it was directed at an audience (namely, relatives and friends who were coming to visit the prisoners) that was relevant to that location, and it would have been about the only place, if they were going to hand out handbills anyway, that they could probably get names and addresses and write to the relatives.

Seitas: They had tried stopping cars outside the gate, but that stopped because they were creating a traffic hazard.

Grodin: As I recall, we held in that posture of the case, that is, absent some evidence adduced by the prison officials as to why it would be an interference with the legitimate operations of the prison, [that] the balance fell in favor of the First Amendment. So far as I know, they're still doing it.

27. 135 Cal. App. 3d 930, 185 Cal. Rptr. 634 (1982).

Seitas: Another case which you wrote which dealt with the First Amendment, but in a different context, was *Bill v. Superior Court*,²⁸ which dealt with the showing of a movie.

Grodin: It was an unfortunate situation in which someone who happened to be in the vicinity of this movie theater was shot on the street. She hadn't been to see the movie—the person who was shot hadn't been to see the movie; I guess she didn't know who shot her. But, at any rate, she sued the movie theater and the producers of the movie, and her theory was that they knew or should have known that the showing of the movie would attract a violence-prone audience, and, given that, should have taken steps to warn people away from the vicinity. That seemed to me, particularly as regards the producer, to be a position that ran afoul of the principles in the First Amendment. It would certainly have a chilling effect on activity protected by the First Amendment—which the movie undoubtedly certainly was—to say if you are going to show the movie, you have to accompany it by [a] marquee [that] warns people away from the theater. Either that, or you have to make the movie differently. And it wasn't that the movie itself was alleged to contain violence or to inspire violence in others; it was that it was a controversial movie about gangs, which, when shown in some other community, attracted people who were violence-prone. We held that that tort action was barred by the First Amendment, which is not a typical application of the First Amendment, but there is background for that. And there was an opinion, as I recall, by Justice Winslow Christian involving a suit by someone who was injured, perhaps sexually attacked, she claimed, as a result of her attackers having watched a certain movie, and the court held that the suit was barred by the First Amendment.²⁹

Seitas: Another opinion you wrote was *In Re Marriage of Wellman*,³⁰ which dealt with overnight visitation.

Grodin: Yes, that was a case in which a man and a woman had separated (I guess the marriage had been dissolved) and the question was who was to get custody of the child. Meanwhile, the woman was living by herself and had formed a close attachment to a male friend who occasionally visited the house and occasionally stayed over. That evidence was brought out in the custody proceeding, and the judge took it upon himself to inquire into the details of her relationship with this individual and with what went on during his visitations, and, in effect, conditioned

28. 137 Cal. App. 3d 1002, 187 Cal. Rptr. 625 (1982).

29. *Olivia N. v. National Broadcasting Company*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981).

30. 104 Cal. App. 3d 992, 164 Cal. Rptr. 148 (1980).

the grant of custody of the minor children to her upon her agreement not to have him over to the house any more. She challenged that condition, and that was one of the first cases in which I became fascinated with custody questions and the role of courts in custody questions, because it seemed to me that that was a rather significant intrusion, given that there was absolutely no evidence in the case that the presence of this man occasionally in the house was having any adverse impact upon the children at all—just zero evidence to support any such conclusion. So we knocked that condition out.

Seitas: There was a concurrence noting that one didn't have to go into the murky waters of morality and could have based the decision solely on the lack of evidence.

Grodin: It's true that our decision went beyond the lack of evidence to raise a question as to the propriety of the trial court's ruling in such a matter, given that, if it were discovered, for example, that a woman, or a man if he had custody, were having a relationship with someone, and that that person was living over in the house, I can't imagine that that would be a ground for revoking custody. So, yes, we raised some questions about how far it is permissible for a custody court to go in these matters, although that was dicta.

Seitas: Another case, *Payton v. Weaver*,³¹ dealt with a woman receiving dialysis.

Grodin: That was probably the toughest case I had to decide on the Court of Appeal, and it was tough mainly because the decision could not be premised upon any clearly applicable principles. I mean, it was a problem that just went beyond any legal principles. This poor woman was suffering not only from kidney disease, but from obesity and alcohol abuse and drug abuse, and yet the county felt it could not commit her involuntarily because she was able to take care of herself. She lived alone and was insistent upon her independence, but she was unable to control her behavior, and she needed dialysis frequently and routinely, and she (fortunately, for her) came into contact with the doctor, whom she described in the course of the trial as a saint, who took her under his protection and gave her treatment in the dialysis unit that he ran, until he began to experience with her very serious problems. Not only did she never do anything that he directed her to do, but she behaved in a manner that disrupted the dialysis unit. She behaved in such a manner that intruded upon the rights of other patients with respect to the dialysis unit; she would show up drunk, she would take the needle out, she would

31. 131 Cal. App. 3d 38, 182 Cal. Rptr. 225 (1982).

utter obscenities, she would splat blood all over. She arrived once in an ambulance eating a hamburger and french fries. She declined to seek help for any of her problems, and he finally got to the point where he said, "I'm going to withdraw. I'm going to kick you out of the dialysis unit; you're going to have to go somewhere else." Well, there wasn't anywhere else she could go. And she brought suit in trial court to enjoin him from kicking her out, and the trial court initially granted the woman an injunction. Then it heard the case at great length and decided that, under the circumstances, the doctor simply had no legal obligation to continue putting himself and his other patients to the torture of trying to cope with this woman's problems. She was going to have to do something about the situation. But, meanwhile, it continued the injunction in effect.

We took the case on and, although it was a heart-rending case, came to the same conclusion as the trial judge. [I] wrote an opinion suggesting other alternatives, including the possibility that there might be a basis for custody, and including the suggestion that there might be a basis for obtaining treatment from one of the other hospitals in the area, but basically concluding that this doctor could not be required by the law to continue to perform services which he had rather good justification for not being willing to perform. It was a sad case; shortly after the case, she died.

Seitas: One other case is *People v. Superior Court (Corona)*.³² Would you like to tell us a little bit about that case?

Grodin: That's the Juan Corona case in which he was ultimately found guilty for mass murder of farm workers. But this was a preliminary step involving an attempt by the defendants to exclude a whole lot of evidence that had been obtained pursuant to search warrants that permitted searches of the ranch house and other areas in which all manner of highly relevant evidence had been discovered, including some bloody weapons. The question was whether the affidavits in support of these warrants were sufficient to establish probable cause to believe that a violation of the law had occurred, and that Corona was responsible for it. It was a huge case; I mean the transcript was huge, the briefs were huge. The special prosecutor had been appointed to pursue the case, and he was pursuing it extensively and with vigor. The way the case was presented to us the first time around, we—all three of us unanimously (Justices Racanelli and Newsom were on the case with me)—concluded that the defendant was right, and that, while it was a borderline case, the

32. 113 Cal. App. 3d 846, 170 Cal. Rptr. 667 (1981), superseded by *People v. Superior Court (Corona)*, 30 Cal. 3d 193, 636 P.2d 23, 178 Cal. Rptr. 334 (1982).

affidavits in support of the warrants were not sufficient to establish a connection between Corona and these ranch houses in order to support the issuance of the warrants. There then came a petition for rehearing. Ninety percent, or more, of the cases in which petitions for rehearing are filed are denied, but this petition for rehearing presented a view of the case that had not been presented in that manner the first time around, and we were persuaded that there might be merit in that view of the matter. We scheduled the reargument in the case and eventually reversed ourselves, again unanimously, and upheld the introduction of certain evidence and excluded other. It went up to the California Supreme Court, and they rendered an opinion upholding that part of our decision which admitted the evidence over the fourth amendment objection. As I recall, the Chief Justice wrote a separate concurrence in which she said that she was concurring only because this was such an unusual case, and I suppose that there is merit to that point of view.

[There was] one other case on the Court of Appeal (I don't remember the name of it) in which I wrote the initial opinion one way, and then a petition for rehearing came in, and I became convinced that there was merit in the petition. We scheduled the case for reargument, and it came out the other way. That will happen, and it ought to happen; that's what petitions for rehearing are for, and judges have to be willing to keep an open mind.

III. Supreme Court Years

A. Appointment to the Supreme Court

McAllister: Justice Grodin, tell us how you came to be on the Supreme Court.

Grodin: Well, that remains something of a mystery to me. I'm not sure exactly how, but from what I know, the following occurred: There were several vacancies on the court occurring within a very short period of time. Justices [Otto] Kaus and [Allen] Broussard were appointed to the first two of those vacancies. Then, later on, a vacancy occurred. There was a vacancy left by the departure of Justice Tobriner—by the death of Justice Tobriner. The Governor put my name in along with a bunch of other names, but I'd had no further communication, and Justice [Cruz] Reynoso was appointed to that vacancy.

And then Justice [Frank] Newman decided that he had had enough of the Supreme Court and wanted to return to the groves of academe and announced that he would leave, but didn't say when. So that had everybody nervous because the Governor's term was coming to a close. Finally [Newman] announced his departure in, I guess, the summer of '82.

The three names that had been submitted to the State Bar were mine, Justice Howard Wiener,³³ and Tony Kline, who was then on the [superior] court in San Francisco. I had no reason to believe that I would be appointed to the position. I had no further communication with the Governor. I had no further communication with his legal affairs secretary, Byron Giorgio, and down to the wire the Governor was in his office in San Francisco talking to people about that appointment and a number of other appointments to the bench.

I got very indirect feedback that my name was being seriously considered, but actually I had no communication up until the day preceding the appointment. On that day (and then it was not an official communication) I got a call from Connie Kang, the reporter for the San Francisco Examiner, at about one o'clock in the afternoon, and she said, "Well, congratulations!" And I said, "What for?" And she said, "Come on, now, don't be coy. You're moving down the hall"—the hall being the hall on the fourth floor of the State Building in San Francisco. I said, "Connie, if that's true, you know more than I do." She said, "Are you serious?" I said, "Yes." She said, "You've had no conversations with the Governor's office about it?" I said, "No." She said, "And you don't have an appointment to see the Governor this evening?" I said, "No." She obviously didn't believe me, or she was putting on a very good show, but, in any event, she called back later [about] five o'clock. She said, "You still haven't heard?" I said, "I haven't heard anything." My wife and I went [out] that evening and had dinner with Justice [John] Racanelli and his wife. We got home about nine o'clock. I expected maybe the phone would ring; nothing happened. I later learned that the Governor and Byron Giorgio had planned to stop by my house on the way back to Sacramento, but I wasn't home; so they didn't do that. The next morning, I get to the office, and there's a call from Byron Giorgio saying, "Can you come up here this morning? The Governor would like to talk to you." And I said, "Well, if I came up, if I left right now, I would have time enough to drive to Sacramento, and then turn around and drive back, because at one o'clock we have this specially set matter." And I said, "What's it about?" And Byron said, "Well, I'm not supposed to tell you, but the Governor wants to appoint you to the Supreme Court and he needs to talk to you. Are you going to be around there?" So I said I'd stay around by the phone, and about three hours later, I still hadn't heard, and I was about to go into this oral argument, and I called Byron and said, "If the Governor wants to talk to me today, this would be a

33. Howard B. Wiener is now an associate justice on Division One of the Fourth Appellate District.

good time.” So finally we did [talk] and that was it. I honestly don’t know what went into the Governor’s decision; it may be that—and I suspect it is the case that—Justice Tobriner’s earlier intercessions on my behalf had resulted in a state of mind, which the Governor had decided to appoint me. But I think that he was genuinely undecided coming down to the wire, and I’ve never talked to him about it.

McAllister: Could you tell us what the atmosphere was on the court when you arrived?

Grodin: Apart from being hectic when I arrived, I had my confirmation hearing; I was confirmed by the Commission on Judicial Appointments,³⁴ which then consisted of the Chief Justice and Lester Roth, the senior justice of the Court of Appeal, and Attorney General Deukmejian. [Chief Justice Bird] swore me in, and then she said, (this was in late December) “Are you willing to serve on the January calendar?” And I said, “That’s what I’m here for. Why not?” I returned to my chambers in San Francisco, and I saw the desk *completely* covered, one half with briefs and memoranda pertaining to the cases that were to be argued in Los Angeles during that argument week, the second week in January, and the other half [with] petitions for a hearing and memoranda relating to petitions for a hearing, and all of the cases that would be taken up at the Wednesday conference in Los Angeles. It was still the practice of the court (later changed) to have their regular Wednesday conference even during oral argument weeks. So the immediate atmosphere that I was injected into was one of pressure, but, apart from that, the atmosphere was collegial; we met on Wednesdays to go over the petitions for review and other matters on the Wednesday agenda. Cases were assigned and discussed; there were disagreements; Justice Richardson was frequently in the dissent in criminal cases and some other cases. But never at that time nor at any other time on the court did disagreement take a personal tone; it was always in terms of the issues and, after the conference was over, people would go out to lunch, and that was it.

B. Working Methods

McAllister: What changes did going to the Supreme Court effect in your working style?

Grodin: Well, just before I went on the court, I attended an appellate courts institute in Monterey for Court of Appeal judges around the state, and Otto Kaus, who had recently been appointed to the court, was there, and he was telling us what life was like on the Supreme Court. He

34. Appointed December 2, 1982; confirmed December 27, 1982; oath December 27, 1982.

said, “Well, the major difference is that, whereas we had time to work on our own opinions at the Court of Appeal, you don’t have time to do that on the Supreme Court.” And I was sure that he was exaggerating; I thought that he was trying to make us all feel better because we weren’t on the Supreme Court, and I couldn’t believe [what he said] because I had imagined the Supreme Court as a place where people had, if anything, more time to devote to the process of opinion writing. It turned out that Kaus was right, and that was the major change—the amount of time that is devoted around the Wednesday conference, preparing the memos for the Wednesday conference, reviewing the memos written by the judges’ staffs for the Wednesday conference, meeting with your own staff to make up your mind what you’re going to do about the petitions. And the number of petitions kept growing—doubled during the period that I was on the court, or nearly doubled. So gradually I learned how to become more efficient at that process. When you’re on the court for a while, your ideas, although they don’t become fixed, at least become a bit crystallized in areas that you may not have thought a whole lot about before, so that when a petition for a hearing comes up, it isn’t all that new; you’ve thought about the subject before, and you may be able to act on it quicker. Even so, after several years on the court, I found I was spending at least a quarter of my time, and up to a third, perhaps, on the petitions for a hearing, and that takes a lot of time away from the opinion process.

I found that, on the Supreme Court, it was just impossible for me to try to write the first draft of an opinion, and during my entire time on the court, I did that only once, in a labor case that was esoteric, and nobody else was the least bit interested in it. I did it myself [and it] got sent back by the United States Supreme Court. I would have to rely upon my law clerks to come up with the first draft, and then I would work on it and redraft, and we would talk about it in the process of coming up with that draft, so that it would bear some resemblance to my own thinking about the matter. That’s a major difference—and not only the time, but the process of deciding which cases you’re going to decide. On the Court of Appeal, everything goes; if a guy has enough money to file his appeal, you’ll hear it [and] decide it. And so, as a consequence, what is left on the table tends to be the more significant, challenging issues, and ones with broader impact, and that’s a difference.

[I did have marvelous law clerks. I inherited Hal Cohen from Justice Kaus—he had worked for Justice Tobriner before that—and I stole Jane Brady from Central Staff—She had worked for Chief Justices Tray-

nor and Wright in the past. And I had other excellent people, such as Joyce Dear and Richard Seitz.]

Then [there is] the difference in perspective between an appellate court judge who is bound by decisions of the Supreme Court, and being on the Supreme Court, where you're bound only by (as far as state law is concerned) your deference to precedent and whatever appears to you to be the applicable legal principles, but with a whole lot more leeway than on the Court of Appeal and, consequently, with a lot more responsibility for the decision. There was a certain attractiveness, at times, to being on the Court of Appeal, to be able to write an opinion, as I did on occasion, which would mildly criticize a Supreme Court opinion and say, "Well, we're bound to follow it," cite *Auto Equity Sales*,³⁵ "but really the underpinnings of this decision are a bit weak, and maybe it's about time for it to be reconsidered."³⁶ That's kind [of] a fun thing to do as a Court of Appeal judge. When you're on the Supreme Court and you have a responsibility for deciding the damn thing, it looks a bit different; you're not quite so anxious to stir things up, perhaps.

McAllister: When you came onto the Supreme Court, did you have any agenda or areas of law that you would like to have changed?

Grodin: I can't recall that I did. There was nothing in particular that I had in mind. I had a special interest, I suppose, in the law of wrongful termination from employment because I had written some things on that in the Court of Appeal.³⁷ As it happened, I didn't get a crack at that on the Supreme Court, anyway.

C. Comparison with Lower Courts

McAllister: Can you make any comparison of the Supreme Court while you were on it, Justice Grodin, with some of the prior courts—Justices [Roger] Traynor, [Donald] Wright, and [Phil] Gibson?

Grodin: Well, any comparison I would make I would have to make as an outsider to those earlier courts; I didn't participate in them, so I don't know what they were like internally. The question arose frequently during my last year on the court, during the election process, as to whether the California Supreme Court had ceased to be a great court, as compared to the time that the giants trod the earth. An ironic criticism

35. *Auto Equity Sales v. Superior Court*, 57 Cal. 2d 450, 369 P.2d 937, 20 Cal. Rptr. 321 (1962) (trial courts and lower appellate courts are bound to follow the decisions of higher appellate courts).

36. *See, e.g., Kiick v. Levias*, 113 Cal. App. 3d 399, 405-06, 169 Cal. Rptr. 859, 861 (1980); *People v. Chambers*, 136 Cal. App. 3d 444, 452, 186 Cal. Rptr. 306, 311 (1982).

37. *See infra* Part IV, B.

[was] implied in the question. The irony lay in the fact that the greatness of the prior courts from popular perception, and the perception of the bar, lay mainly in their creativity.

What do we think of when we think of Roger Traynor as a great judge? Well, he was the mastermind of strict products liability.³⁸ Why do we think of Donald Wright as a great judge? Well, among other things, he *found* the state constitution as a basis for opposing the death penalty and held the death penalty unconstitutional under circumstances in which there was considerable political risk to the institution in doing so.³⁹ Why do we regard Tobriner as a great judge? Well, because he branched out into new areas; he led the court in the development of liability for negligent infliction of emotional injury in *Dillon v. Legg*,⁴⁰ for example. He led the court in the direction of imposing liability on insurance carriers for the breach of their covenant of good faith and fair dealing with the policyholders.⁴¹

In short, judges tend to become memorable through what might be called judicial activism. It's rare, although there are examples—possibly Learned Hand is an example; possibly Oliver Wendell Holmes is an example—[but] occasionally, judges become [noted] for their reticence. But mainly, throughout history, judges have become famous ([Benjamin] Cardozo certainly) for their great decisions, which mean decisions that break new ground. And at the same time that the court was being accused of not being great, they were also accused of being overly activist. The truth is, I think that—by the time I came to the court at any rate—there was a sense (not uniformly shared, but shared by what turned out to be a working majority of the court) that it was desirable to go slow in certain areas and not bite off more than the court could chew. And so, for example, the court was roundly criticized in some circles for *not* leaping over procedural obstacles and deciding whether or not strict liability should attach to pharmaceutical products,⁴² and in another case for not having decided broadly, as many of the litigants would like, whether and under what circumstances tort damages are available for violation of the covenant of good faith and fair dealing.⁴³ In both those cases, the court

38. See *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

39. See *People v. Andersen*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

40. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

41. See *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau*, 15 Cal. 3d 9, 538 P.2d 744, 123 Cal. Rptr. 288 (1975).

42. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

43. See *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

opted for caution. Now, I suppose, the public doesn't really focus its attention on cautious judges.

D. Supreme Court Opinions

McAllister: Justice Grodin, let's turn now to some of the cases that you had before you on the Supreme Court. You had some difficult cases, one of which was the *Conservatorship of Valerie N.*⁴⁴ Could you tell us about that case?

Grodin: Well, here we had an incompetent woman with Down's Syndrome who was—I forget how old. Twenty-nine? And her parents were her conservators, and they applied to the trial court as conservators for permission to have her sterilized, contending that there was no other effective way of preventing her from becoming pregnant, short of restraining her, which they didn't want to do. And sterilization is the one thing, the one medical procedure, that is not authorized by statute for conservators in the case of a person who is not capable of giving consent.⁴⁵ If the woman had been capable of giving consent, there would have been no problem. So the question was whether this statutory ban on sterilization (historically a response to earlier attempts at eugenics) deprived the woman of any *constitutional* right. A majority of us concluded that it did, although it was a very difficult case, and my opinion for the court provoked dissents from both Chief Justice Bird and now-Chief Justice [Malcolm] Lucas, which demonstrates that the cases don't always have a political or liberal/conservative cast, and the people can disagree for a variety of reasons. I respect their disagreement, but it did seem to me that if we're going to make sterilization available to somebody who consents, and if it could be determined that sterilization would be in that person's long-run, lifetime best interests, then to deprive her of that benefit because of her inability to consent was a violation of constitutional right. The risk was, and is, that conservators might seek sterilization, and courts might be led to authorize it for the benefit not of the person under conservatorship, but for the benefit of the conservators, to make life easier for them. And one can readily understand that. So the challenge is to devise procedures for such authorization that, so far as possible, preclude that kind of motivation. We attempted to do that in the opinion by drawing upon some procedures that had been adopted up

44. 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387 (1985).

45. CAL. PROB. CODE § 2356(d) (Deering 1981), as enacted in 1979, provided: "No ward or conservatee may be sterilized under the provisions of this division." As amended in 1986 (Deering 1988 Supp.), subdivision (d) provides: "No minor may be sterilized under this division."

in the state of Washington, but invited the Legislature to move in. I gather they now have.⁴⁶

McAllister: [In] a number of your cases we see you entreating the Legislature to step in and take action. I take it this was one of those instances?

Grodin: This was. Once we decided to declare it unconstitutional, it was a clear case for requiring legislative action. We provided a temporary solution by adopting the Washington court's formula, but clearly it's [a] more appropriate arena for legislative action.

McAllister: One other case in which you dealt with rights of association, among other things, was *Isbister v. Boys' Club of Santa Cruz*.⁴⁷ Do you want to tell us about that case?

Grodin: That was a boys' club that wanted to keep girls out. It had a facility with a swimming pool and a gymnasium, which was alleged to be the only such facility available in the area, and the plaintiffs were young women, or their legal guardians, who were seeking access to those facilities, and the question was whether the club was a business establishment within the meaning of the Unruh Civil Rights Act⁴⁸ and, if so, whether the exclusion of girls was a violation of that statute. I think that if this had been along racial lines, rather than along gender lines, there would have been little argument over the proposition—to say that there could be a facility generally open, let us say, to whites in Santa Cruz, but no blacks allowed, and that the only requirement for membership was being white. (It was not a social club, where members were selected on the basis of their compatibility, or any other criteria.) I doubt that there would have been much argument on the court. I think that the problem arose from the fact that this was sex discrimination, rather than race discrimination, and it was troubling because it challenged some historic notions about "boys will be boys." Unfortunately, I think, from the standpoint of sharpening the issue, the boys' club in that case did not do very much in the way of putting on evidence to show that a separate club for boys, which excluded girls, was desirable in terms of providing an atmosphere in which these boys could learn better or grow healthier, or whatever. I don't know whether such evidence might be available, but

46. See CAL. PROB. CODE § 1950 et seq. (Deering 1988 Supp.).

47. 40 Cal. 3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985). For the views of Justice Kaus on *Ibister*, see *Oral History: Justice Otto Kaus*, 15 HASTINGS CONST. L.Q. 193, 234 (1988).

48. CAL. CIV. CODE § 51 (Deering 1988 Supp.) 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 every kind whatsoever.

that would be the only basis, and that was really the basis for the dissents, I think, except, I think, that the dissents were without foundation in fact. On the basis of the record in that case, I came to the conclusion that whatever defense might be made for such a practice had not been made on that record. I gather that that boys' club is now coeducational and the world has not come to an end.

McAllister: You had a few cases while you were on the Supreme Court relating to arbitration and generally, as I understand it, upheld the court's position of favoring arbitration, such as *Ericksen v. 100 Oak Street*.⁴⁹

Grodin: Yes. The one exception is a case that I wrote for the court while sitting (is that the right word?) *pro tem.*, and we held that arbitration of certain issues should not be held because of [a] violation of California law, and I got overturned by the United States Supreme Court.⁵⁰ But *100 Oak Street* involved a problem that other states have had a lot of experience with. A party enters into an agreement containing an arbitration clause, and then—it's an end run around the arbitration clause—alleges that the contract was induced by fraud. "Not only did they breach the contract," the plaintiff says, "but they never intended to perform it in the first place; therefore, there was fraud in the inducement, and that's not an issue for arbitration, but rather an issue which goes to the formation of the contract, [so] we ought to have a chance to litigate that before a jury." And all other states which had considered that question came to the conclusion that plaintiffs should not be able to make that end run, and we reached the same conclusion. It was not a startling innovation.

McAllister: In the area—your home field—of labor law, what do you see as the landmark cases during your term on the Supreme Court?

Grodin: I suppose the more important cases I wrote in the field of labor and employment law I wrote on the Court of Appeal; they involved wrongful termination principles—*Pugh v. See's Candies*⁵¹ and *Hentzel v. Singer Company*.⁵² On the Supreme Court (you may have to refresh my recollection) I suppose one of the significant cases was *Sanchez v. Unemployment Insurance Appeals Board*,⁵³ in which the plaintiffs left their employment under circumstances in which they'd been harassed by the employer, in large measure for their activities on behalf of a union, and

49. 35 Cal. 3d 312, 673 P.2d 251, 197 Cal. Rptr. 581 (1983).

50. *Keating v. Superior Court*, 31 Cal. 3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (1982), *appeal dismissed in part, rev'd in part sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984).

51. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *see infra* Part IV, B.

52. 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982); *see infra* Part IV, B.

53. 36 Cal. 3d 575, 685 P.2d 61, 205 Cal. Rptr. 501 (1984).

for their whistle-blowing activities [in] complaining to appropriate government authorities about what they perceived to be (and turned out to be) wrongdoing on the part of the persons who controlled the enterprise, a publicly-funded enterprise. And so the question was whether they were eligible for unemployment insurance, and the employer said they weren't eligible because they had quit. We held that [leaving the job] was tantamount to a constructive discharge under the circumstances.

McAllister: You had a somewhat similar situation in the case of *Amador v. Unemployment Insurance Appeals Board*,⁵⁴ where a worker was discharged for refusing to perform work which she believed would jeopardize the health of other persons.

Grodin: She was performing a dissection of tissue, as I recall. Her background was excellent, and her competence was unquestioned. She had been taught that that particular work (the cutting of live tissue) should only be done by a doctor, and that there was a risk to the patient in having anyone else do it, and she refused to do it on that ground, and she was fired. And we said that the employer, of course, has the right to fire an employee who doesn't do what he wants him to do, and there wasn't anything illegal in requiring her to do that, but that an employee may refuse to do certain work which he reasonably believes to be dangerous to himself and draw unemployment benefits, even though the employer fires him for that reason. So an employee who reasonably believes that what he's being asked to do poses a safety threat to others should be entitled to that same protection.

McAllister: Let's turn to criminal law. Probably the most significant event in criminal law during your tenure was the passage of Proposition 8 in the 1982 primary election.⁵⁵ You were presented with a number of cases dealing with the effect of Proposition 8, for example, *In re Lance W.*,⁵⁶ [which] related to the effect on search and seizure law in California. Could you tell us about that decision?

Grodin: Preliminarily, I might say that I didn't vote for Proposition 8, and if I'd been on the Supreme Court at the time that the court considered its constitutionality against the claim that it had violated the single-subject rule,⁵⁷ I might have agreed with the position of the dissenters who said that it did. But, that aside, assuming Proposition 8 to be consti-

54. 35 Cal.3d 671, 677 P.2d 224, 200 Cal. Rptr. 298 (1984).

55. Proposition 8, an initiative called "The Victims' Bill of Rights," was approved by the electorate June 8, 1982.

56. 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985).

57. See *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982). "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." CAL. CONST. art. II, § 8(d).

tutionally valid, it seemed to be quite clear and almost beyond reasonable dispute (although I realize that some of my colleagues had a different view of the matter) that if Proposition 8 was intended to do anything at all, it was intended to do away with the state exclusionary rule. And that intent was discernable not only in the background of the initiative, but also in the language of the relevant section, which said, as I recall, that all the relevant evidence shall not be excluded, with certain exceptions, including Evidence Code section 352 and some others.⁵⁸ And no one at any point in the litigation under that section of Proposition 8 ever proposed a plausible interpretation of that language that did not entail abolition of the state exclusionary rule. I thought that that was an unwise judgment on the part of the California voters, but one which they had the right to make. It was a difficult case for me, but I thought that that's what Proposition 8 did; I still do.

McAllister: You again encountered Proposition 8 in *People v. Castro*.⁵⁹ Justice Kaus wrote the majority opinion, and you wrote a concurring opinion. [The case] related to Proposition 8's effect on the use of prior convictions in this case for the purpose of impeachment.

Grodin: Yes. Actually, my opinion was a concurring and dissenting opinion. I just couldn't buy the majority's position, given the background of that provision of Proposition 8,⁶⁰ that it really left intact the trial court's discretion to exclude certain priors. It seemed to me that the whole thrust of that provision and its background and its language revealed a purpose to do away with the *Beagle* case⁶¹ and put California in the position of certain other jurisdictions that mandate the admission of prior offenses for purposes of impeachment. I thought that was a highly undesirable result, but it was a result which I found difficult to avoid,

58. CAL. CONST. art. I, § 28, added by Proposition 8, provides in part:

(d) Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

59. 38 Cal. 3d 301, 696 P.2d 111, 211 Cal. Rptr. 719 (1985). For the views of Justice Kaus on *Castro*, see *Oral History: Justice Otto Kaus*, 15 HASTINGS CONST. L.Q. 193, 248 (1988).

60. CAL. CONST. art I, § 28, added by Proposition 8, provides in part:

(f) Use of Prior Convictions. 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.

61. *People v. Beagle*, 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972).

although I disagreed with my colleagues. A majority of my colleagues disagreed with me on that. Having concluded that Proposition 8 did not do away with the trial courts' discretion, the majority concluded also that the purpose of that provision of Proposition 8, though preserving *Beagle*, was intended to eliminate the inundations of *Beagle* which came afterward in the form of Supreme Court opinions which limited the discretion of the trial court. It then became necessary to grapple with the question whether there were any limitations upon the discretion of the trial court, and so in the second part of my opinion I had to deal with the premise of the majority, and participate in the decision on that premise—otherwise, it would not have been a majority for the conclusion as to what we do now. So I went along with the Kaus formula for excluding priors that do not involve moral turpitude, although I sympathized with the Chief Justice's argument and dissent that that was going to be a very difficult standard to apply; I didn't know of a better one. I suggested that the Legislature might, in a manner compatible with the majority's interpretation of Proposition 8, establish some criteria which the court could accept as constitutionally acceptable, and that would [be] more clearly identified. I had in mind, for example, establishing time limits for certain categories of priors so (as they've done for the District of Columbia, for example) you can't go back more than x number of years. It seemed to me very sensible.

McAllister: Another case dealing with Proposition 8 was *People v. Skinner*,⁶² in which you had to deal with the effect of Proposition 8 on the insanity test [the M'Naghten Rule]. One question may be: [what] are [the] limits to that which the majority can do by way of initiative or statute? In the *Skinner* case, you were dealing with an attempt, I think, to redraft *People v. Drew*.⁶³

Grodin: I would say [that Proposition 8 was] rather clearly an attempt to overrule *Drew* and get back to M'Naghten, and the problem was that the language of the initiative,⁶⁴ if read literally, not only put us back to M'Naghten, but to some pre-M'Naghten primitive test, characterized as the "mad dog" test of sanity and insanity. [The] question is: are there any due process limitations on modifying the insanity defense? Could

62. 39 Cal. 3d 765, 704 P.2d 752, 217 Cal. Rptr. 685 (1985).

63. 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978).

64. CAL. PENAL CODE § 25(b) (Deering 1985), added by Proposition 8, 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.

the Legislature do away with the insanity defense altogether? My opinion in *Skinner* suggested that there might be constitutional problems with doing that. There isn't any solid authority for saying that; in fact, the United States Supreme Court opinion seemed to run in the opposite direction,⁶⁵ but then there is the California Constitution, which has independent force, and I would think that there should be, that there are, due process limitations on doing away with the insanity defense. We have some notion of culpability that is so much a part of our traditions and our culture, that to say we don't care whether a person is capable of knowing right from wrong, or judging the quality of his act, or anything else, if he did *x* then he gets punishment *y*—there's something in that, I think, that offends our whole civilization.

McAllister: That same opinion on your part prompted a concurring and dissenting opinion in *People v. Olsen*,⁶⁶ a case in which the defendant was charged with lewd and lascivious conduct on a child under fourteen, and the defense had posited a good faith belief in the age of the victim being more than fourteen. I think you there talked about whether we are going to have strict liability types of offenses in other than regulatory situations.

Grodin: That's a question that bothers me. In that case it was quite clear, as the majority held, that the legislature viewed lewd and lascivious conduct with a girl under fourteen as a strict liability offense, without regard to the defendant's belief or the merits of his belief in the woman's age. That was clear from the way the statute was phrased,⁶⁷ because it gave the trial court discretion to grant probation if the defendant was found to have good faith and reasonable belief that the girl was over fourteen, and so it became clear that the Legislature contemplated that the offense could be committed, even with that belief. Well, I have a problem with the notion of imposing liability, and particularly I'm talking about criminal liability with criminal sanction, particularly with prison sentences, on people whose behavior objectively conforms to all that is expected of them in society. I conceded in my opinion that the Legislature could adopt a standard of recklessness, or even criminal negligence. The Legislature could say that he who has any sort of sexual contact with the young woman has the burden of inquiring as to her age; but I asked the attorney general in that case, "Suppose that the defendant had asked for proof of age, and the girl gave him a driver's license [that] showed she was sixteen, which was what he believed and everybody else

65. See *Leland v. Oregon*, 343 U.S. 790 (1952).

66. 36 Cal. 3d 638, 685 P.2d 52, 205 Cal. Rptr. 492 (1984).

67. See CAL. PENAL CODE § 1203.066(a)(3) (Deering 1988 Supp.).

believed, and she had forged the document.” Would the deputy attorney general be standing there saying that there was nothing wrong with that? Still pack him off to prison? And the deputy said, “Yes, that’s right.” Now there’s something in that that offends me, and I realize that the history of sex crimes has given way to strict liability in many cases. [The] California Supreme Court did soften that in the arena of statutory rape, but there the statutory language permitted it to be done—here it did not.⁶⁸ [There is] something deeply offensive, I think, about the notion that we’re going to treat someone as a criminal who has not departed in any way from the kind of conduct that we expect of people in a civilized society. Now I’m not saying that that characterization holds if [the] jury could have found otherwise. But so far as we knew from the posture of the case, it held. And I think that’s a serious problem.

McAllister: *People v. Geiger*⁶⁹ is a case in which you broke some new ground relating to lesser related offenses.

Grodin: Our law had for many years contained the proposition that a judge should instruct the jury not only with respect to the elements of the offense charged, but with respect to the elements of any lesser included offenses—that is to say, lesser offenses which were considered to be necessarily included within the offense charged. That was considered a due process kind of requirement, stemming from the proposition that a jury should be given the opportunity to find the defendant guilty of something less than what the prosecutor has charged him [with], where the defendant asks for such an instruction. And in *Geiger*, we dealt with offenses which were not technically *included* offenses, but which were *related* offenses. If the defendant’s story were believed by the jury, the jury might well conclude that he committed a crime, but not the crime bearing with it the greater penalties that the prosecutor has charged. And we said that that was not a *sua sponte* instruction, that it need only be given when the defendant asks for it, and we provided some guidelines as to what constituted the sort of offenses to which that requirement would apply. And it seemed to me, and it seems to me now, that that’s perfectly reasonable and doesn’t take anything legitimate away from the prosecutorial interest.

McAllister: In the area of torts you had *Lopez v. Southern California Rapid Transit District*.⁷⁰

Grodin: [The issue was] whether there was enough affirmative obligation on the part of the transit district to take any steps to protect a

68. See *People v. Hernandez*, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964).

69. 35 Cal. 3d 510, 674 P.2d 1303, 199 Cal. Rptr. 45 (1984).

70. 40 Cal. 3d 780, 710 P.2d 907, 221 Cal. Rptr. 840 (1985).

passenger against the evil deeds of third parties. The transit district was saying that they had absolutely no such obligation. And on the basis partly of statutory interpretation and partly common law development, we said that a common carrier has historically been recounted as having that kind of obligation. Now what is reasonable is something else again, and there was a statute which immunizes government entities from suits based upon the failure to provide adequate police protection—things of that sort.⁷¹ So probably such a suit could not be maintained on the basis of a failure to pay armed guards to guard all the buses, but there were other steps that the plaintiff alleged might have been taken to prevent his injury, and we thought it reasonable to allow him to present that to the jury.

McAllister: [Your concurring opinion] in *Ochoa v. Superior Court*⁷² dealt with the extensions of the *Dillon v. Legg*⁷³ line of cases.

Grodin: Yes, we're in a box on *Dillon v. Legg*. The court has cases pending before it now, and I don't want to talk too much in that area because I participated in the earlier argument on those cases. But the question is: How far should the principle of *Dillon v. Legg* be extended? Should it be extended to allow recovery whenever the jury finds that it is foreseeable that the defendant's negligence would have caused emotional injury to the plaintiff or the category of persons in which the plaintiff is a member, regardless of whether or not they are related by familial relationship, regardless of whether or not the plaintiff was present when the accident occurred, regardless of whether or not the injury was something instantaneous, as distinguished from prolonged? [These were all] criteria which Justice Tobriner had articulated in *Dillon v. Legg*. The commentators have pointed out, and quite correctly, that all of those criteria are somewhat arbitrary if the question is foreseeability and that [it is] just as foreseeable, for example, that [if] two people are living together, one would suffer emotional injury upon a physical injury to the other, whether or not they're husband and wife. So the question is whether we need to maintain arbitrary limits upon liability as a means of not overloading the system; if so, [the question is] what those criteria are, or whether there are other nonarbitrary criteria, such as one of my colleagues has suggested, which would allow recovery but change the items of recovery. All I was saying in *Ochoa* [was that] sooner or later the court is going to have to come to grips with this question and can't keep

71. CAL. GOV'T CODE § 845 (Deering 1985).

72. 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985).

73. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (imposing liability for negligent infliction of emotional injury).

deciding it on an ad hoc basis, because that really is a slippery slope since there's no principled basis for drawing the line at one place rather than another. I listed in my concurring opinion a number of possibilities which have been suggested by the academic commentators and by the courts, and I suggested that in this area, as well as in a lot of others, the courts need empirical data. They need some suggestions from lawyers and some studies, if they exist, as to what the consequences will be of one choice over another. People tend to assume that courts are somehow omniscient in these matters, [but] getting the black robes does not bring with it a particular degree of knowledge about the world.

McAllister: Let's talk for a moment about *Unger v. Superior Court*,⁷⁴ a case involving a petition to restrain a political party and its central committee from endorsing or supporting a campaign not to confirm justices.

Grodin: Yes, that was not an easy case for me. I sat on that case knowing that I might well be on the ballot, knowing I would be on the ballot, knowing that it might well be a contested election. I considered disqualifying myself on that account, but my other colleagues who had been involved in the very election that was under challenge had already disqualified themselves and, in principle, that theory of disqualification would result in disqualification of all judges, because all judges have to be on the ballot. And so I decided to stay on the case, but, as I say, it was very difficult because I certainly was not happy about the idea of having a political party come out against me, which would be more formidable than having a political party come out for me. I was not thrilled with the idea of establishing a principle that a political party could take a position on a judicial election, not only because such a principle was likely to affect me adversely but because I don't like the whole idea of politicizing judicial campaigns. But it seemed to me that under first amendment principles I couldn't think, at any rate, of a way of saying that a political party could not speak to the subject, or that members of the political party could not have benefited the party's views on the subject. To some extent, the problem presented a thin and a somewhat artificial line because, of course, the leaders of the parties would take a position, and, in any event, had [done so]. So the real significance of the party itself was the commitment of the party's money and machinery to the project. If you're going to have elections for judges—which I think is not such a great idea,⁷⁵ but if you're going to do it—it seemed to me the First Amendment did not permit that result.

74. 37 Cal. 3d 612, 692 P.2d 238, 209 Cal. Rptr. 474 (1984).

75. See *infra* Part V, F.

IV. Labor Law

A. Origin and Scope of Labor Law Interest

Pierce: Justice Grodin, your interest in labor law goes back to your relationship with Justice Tobriner, is that correct?

Grodin: Yes, it goes back actually to law school, but my relationship with Justice Tobriner had already begun. Through law school I had in mind that that's the area that I wanted to practice in, and I had a labor law professor who said, "That's nice; everybody says that; nobody ever does it." I decided I was going to do it.

Pierce: I'd like to touch on several areas [of labor law]. You were quite involved in the California Agricultural Labor Relations Board,⁷⁶ and you've been involved as an arbitrator with the American Arbitration Association and the [California] State Conciliation Service. Now that you're retired [from the court], do you have an interest in continuing in that area of the law?

Grodin: Yes, I'm teaching a basic labor law class at Hastings, and I intend to do some writing in that area, and some arbitrating as well.

Pierce: The arbitrating that you're doing, is it through the auspices of those particular organizations, or is it private arbitration?

Grodin: Well, actually I've been doing a little commercial arbitration, but I will expect to be doing some labor arbitration under the auspices of those organizations. What that means simply is that if the parties have agreed to use the American Arbitration Association, they call them up and say, "Send us a list of arbitrators, and we choose from that list." Or if they're going to use the State Conciliation Service, they call the State Conciliation Service, and they get pretty much the same list.

B. Wrongful Employment Termination Cases

Pierce: You've taken a strong interest, I believe, in the field of employment. One of the seminal decisions in the field, *Pugh v. See's Candies*,⁷⁷ you wrote while you were a member of the Court of Appeal. At the time you wrote that decision, did you have any idea of the significance or the effect that it would have on our practice of law in California?

Grodin: Well, I had in mind that it was a significant decision. I didn't quite anticipate that it was going to give rise to whole law firms and keep them occupied and living in the style that they had become

76. See *supra* Part I, H.

77. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

accustomed to. But I think that you need to put it into context. When those of us who grew up in the labor law field used the word "labor law," we tend to mean old-fashioned labor law under the National Labor Relations Act⁷⁸ and collective bargaining between unions and employers. Using the term "labor law," or more frequently "employment law," to talk about the relationship of employers and unions, in the absence of, or irrespective of, the collective bargaining agreement is a fairly recent phenomenon, and it's grown up only over the last twenty years or so. It had its primary impetus with the Civil Rights Act of 1964⁷⁹ and the very significant intrusion upon the employment relationship, including the collective bargaining relationship, that Title VII had. Then [we] began to develop other statutes, Occupational Safety and Health Act [OSHA],⁸⁰ and [Employee Retirement Income Security Act] ERISA,⁸¹ and other statutes which impinged upon the employment relationship in such a way that, to some extent, the focus of labor law has shifted away from an exclusive emphasis on the collective bargaining relationship to these other ways in which the employment relationship is affected. To me, *Pugh v. See's Candies* was a kind of logical or natural development out of what had gone on before, both in the labor law area and outside the labor law area. Within the labor law area, it had become apparent that unions were a long way from achieving the goals that a lot of people thought that they were going to achieve back in the '30s and '40s. In fact, the percentage of the work force was declining, so that you had the great bulk of employees (75 or 80 percent, maybe more) unrepresented by the union, and so the field in which these non-collective-bargaining-premised rules could have effect was obviously very large and likely to be larger.

Pierce: So was *Pugh* more or less an evolution, then, in your mind, of the failures of active union representation?

Grodin: It's against that background, but it isn't just a failure of unionization. I really wouldn't use that term, but [rather] the slowdown in organization, combined with the intrusions upon employer prerogatives, if you like, that were already in existence. The notion that an employer could do what he liked vis-à-vis his employees is simply [no] longer a realistic notion in light of modern legal principles. Title VII of the Civil Rights Act had, for example, an enormous impact upon employer personnel practices, not simply upon employers who engaged in

78. *See supra* note 16.

79. 42 U.S.C. § 2000a et seq. (1982 and Supp. IV 1986).

80. 29 U.S.C. § 651 et seq. (1982).

81. 29 U.S.C. § 1001 et seq. (1982 and Supp. IV 1986).

discrimination in the traditional sense, but employers who had maintained tests, standards for employment or for promotion that were adopted quite without discriminatory intent but were found to have an adverse impact upon protected groups. As a result, employers, if they wanted to avoid violating the statute, had to change their whole employment practices very substantially.

Another part of the background was what had developed in common law developments in other cognate areas—for example, the law bringing to bear upon unions, in relation to their members, principles of due process when it came to disciplinary action and a requirement of good faith and fair dealing, so it was clear that unions had certain responsibilities in dealing with workers and did not have a free and autonomous hand. And then you had principles that had been developed in other areas of the law—landlord and tenant, for example: a development that landlords could not get rid of the tenants in retaliation for the tenants' exercise of rights which the law otherwise protected. You had the concept that people dealing with one another in a contractual arrangement had duties of good faith and fair dealing toward one another. Independent consideration would fall in there, in the sense that the employment contract had become an anomaly. What had happened was that, for historical reasons, courts were simply not applying to employment relationships the principles that had developed and were very much a part of modern law with respect to other relationships. What *Pugh v. See's Candies* did was simply to correct that anomaly and to treat the employment contract in the same way as we treat other kinds of relationships, with respect to not requiring independent consideration, with respect to allowing for the implication of terms, and so forth.

Pierce: The *Pugh* case then was followed by *Hentzel v. Singer Company*.⁸² What was the significance of the *Hentzel* case as follow-up to *Pugh*?

Grodin: I didn't view it then, and I don't view [it] now, as a kind of intentional supplementary follow-up. The *Hentzel* case came along, and it fell into my lap as a case to be decided. *Hentzel* involves an elaboration of the principle that Justice Tobriner established in *Tameny v. Atlantic Ritchfield Company*,⁸³ to the effect that an employee may have an action for wrongful termination when his employer has terminated him for reasons which offend public policy. In *that* case, the public policy was well-defined by statute, and it was a policy that was extrinsic to the employment relationship. It was a policy against conspiracy to restrain trade,

82. 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982).

83. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

and the court said that an employee could not be fired for refusing to participate in an illegal act, and that that principle was necessary in order to implement the deeper principle that we don't want people committing crimes.

Hentzel alleged that he was fired because he had complained to his employer that his employer wasn't taking adequate steps to protect him and other non-smokers against smoking in the environment, in the workplace. And there is, or at least there was at the time, no federal or state OSHA regulation which prohibited the employer from allowing smoking in the workplace, or required him to take any steps in that direction, so, unlike *Tameny*, it was not a situation in which the employee was declining to participate in a pattern of illegal conduct; rather, he was simply complaining to the employer about the failure of the employer to take steps which he believed to be necessary for his health, and perhaps the health of others. We held that there were policies of the state which had been expressed by the Legislature—and made subsequently quite specific by OSHA, the Occupational Safety and Health Act,⁸⁴ policies protective of the safety of employees in the workplace, and combined with the policy that had been articulated in prior decisions, supportive of the right of employees to protest to their employer regarding working conditions. Putting those two policies together, we said that, based upon his allegations, Hentzel would have a cause of action, by extension of the *Tameny* theory. So it was a different theory. Also, it asserted a contract theory, which we found was insufficiently supported by his allegations.

V. Retention Election

A. Background

Pierce: When you were first appointed to the Supreme Court, in 1982, your appointment was sort of an eleventh-hour appointment by Governor Brown, was it not?

Grodin: 10:30, anyway.⁸⁵

Pierce: You subsequently were required to undergo a confirmation election.

Grodin: I was confirmed by the Commission on Judicial Appointments in December of 1982.⁸⁶ Under our constitution, an appointed judge appears on the ballot at the first gubernatorial election following

84. *See supra* note 79.

85. *See supra* Part III, A.

86. *See supra* note 33.

the appointment.⁸⁷ So the first election for me on the Supreme Court [was 1986].

Pierce: [When] was it that you first became aware that there might be a contest [of] your confirmation, that you first became aware that there would be a problem there?

Grodin: Well, of course, I knew that I'd be on the ballot. I don't remember when it became apparent that there was going to be a live campaign against the chief. A bit later it became apparent that that would extend to me and Justice Reynoso and, for a while, Justice [Stanley] Mosk. By mid-1985, in any event, it became pretty clear what was shaping up.

B. Death Penalty Issue

Pierce: Certainly one of the major issues had to [be] the death penalty. What was it about the death penalty, in retrospect perhaps, that was such a compelling reason for the people to find it so important?

Grodin: Well, the people had passed an initiative⁸⁸ after the Supreme Court, in an opinion by Justice Donald Wright, held that the death penalty was unconstitutional under the California Constitution.⁸⁹ [This was] an initiative that amended the California Constitution to say that [the death penalty] was not cruel or unusual punishment for purposes of the California Constitution. And then when the [United States] Supreme Court, in *Furman v. Georgia*,⁹⁰ held standardless death penalty statutes to be unconstitutional, the Legislature reacted by adopting a death penalty statute,⁹¹ and that was followed by [a] 1978 initiative,⁹² which was adopted by an overwhelming percentage of the population. The statistics had shown that the percentage of the population supportive of the death penalty had actually *increased* since then, to the point where (I don't remember the figures) 85 percent or so of the population favored the death penalty.

So a degree of impatience and frustration had developed, I think, fed by [a] perceived increase in crime rates. Actually, crime rates had begun to turn down, but it takes a while for public perception to absorb that sort of change. [There was also] fear of violent crime fueled by the kinds of propaganda that came out from the crime victims for law reform. So

87. CAL. CONST. art. VI, § 16(a).

88. CAL. CONST. art. I, § 27, adopted November 7, 1972.

89. *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

90. 408 U.S. 238 (1972).

91. Former CAL. PENAL CODE § 190 et seq.

92. CAL. PENAL CODE § 190 et seq. (Deering 1985), added by initiative, November 7, 1978.

it was kind of a natural issue for the opponents to use, and it was one in which a high degree of emotional charge existed, not only because of support for the death penalty in general, or as an abstract matter, but because of the horror that anyone experiences in being told about or witnessing the details of any one of these crimes that give rise to the death penalty. So it was very easy to create an environment in which a thirty-second television spot could depict the horrors of a murder and have some member of the family of the victim suggest that the California Supreme Court had overturned the conviction or the death penalty on the basis of some technicality and handed the defendant back his gun or his knife, or whatever it was, and turned him loose. And that kind of emotional reaction is very easy to generate and very difficult to defend against.

C. Other Issues

Pierce: Certainly the alleged liberalness of the Bird court was another issue in the election campaign?

Grodin: It was another issue in some quarters; how much of a part it played in the minds of voters I doubt. I think it may have been a factor in some people, in some interests, becoming active in the campaign against the judges and giving money to it, but in terms of the voters, there's no doubt in my mind that it's the death penalty that did it, and there were exit polls out from the election which showed that quite clearly.

Pierce: [Were] any other issues really a factor, other than the death penalty?

Grodin: I think nothing that reached the level of public consciousness. There was a so-called white paper that emanated from some lawyers in a firm in Los Angeles that took the court on in some non-criminal cases. Governor Deukmejian had made a statement in a press conference about the court being bad for business in California; I don't think that captured the public imagination.

D. Opposition and Support

Pierce: Who were the people that you feel led the opposition to your confirmation? Certainly right-wing organizations, law-and-order organizations were active. Do you feel that the Governor's role was significant?

Grodin: I think it probably was, although one of the problems with the election was that I had no particular qualifications as a politician, and so I have no insight in these matters that is superior to yours or anybody else's. But I'm inclined to think that the Governor's role in it was signifi-

cant, because he had already come out against the Chief Justice early on, and when asked his views about Justice Reynoso and myself, said that he would make up his mind about us as opinions came out, and that he would be looking largely in the death penalty arena, and then before the election he was asked again, and he said, yes, he had made up his mind, and his mind was that we should be opposed. And he stayed with that position, in a rather public manner, and I think that when a governor of a state does that, and particularly a governor that is so widely supported as Deukmejian, that that's bound to have an effect.

Pierce: How about the business and manufacturing groups, insurance lobbies, and so on? Do you think that they played any [part]?

Grodin: I don't really know what part they played; I've read things which say that there was some money for the opposition campaign that came from those quarters. I don't know how much, and I don't know the identity of the contributors, and I don't care to know either.

Pierce: How do you feel about the bar's impact, or lack of impact, in the election?

Grodin: Well, I frankly thought that the organized bar would muster itself to play a more active and supportive [role] than it did. I realize that the State Bar as an organization is under constraint in that regard, but I'm talking about the voluntary bar associations. It seemed to me that there were issues involved in this campaign that were terribly important, and I expected more people, whether through organizations or otherwise, to stand up and say something.

Pierce: And you felt that [participation by the bar] was not adequate?

Grodin: It wasn't adequate in the sense that it wasn't all that could have been done, or anywhere near that. Whether it would have made any difference is something else again. What bar associations have to say about judges or anybody else has perhaps the same weight with public opinion as what the used car dealers' association has to say, but there are lawyers who are going to be effective with clients who have confidence in them.

Pierce: [Were] you concerned about conflicts of interests in accepting money from private organizations such as the California Trial Lawyers' [Association]?

Grodin: I accepted money from them and it gave me no more of a problem than in accepting money, say, from labor unions or from lawyers who litigate before the court. But it's a problem, nevertheless, and I think it's a very serious problem. I'll tell you one incident that occurred in the course of the campaign; I haven't said this publicly before. I was

having a beer with a lawyer in Los Angeles, who told me that he had been approached by [a fundraiser] to contribute money to my campaign and that of Justice Reynoso and was told that if he failed to do that, Justices Grodin and Reynoso would surely have that in mind once we were reelected to the court. I urged this fellow to tell me who it was that said that to him, and he declined. I told my professional fundraiser of the conversation, and said I wanted him to find out who did that and to put a stop to it, [and that] if that was being done and I found out who did it, I'd file charges against him with the State Bar. Well, if that incident came to my attention through a rather casual conversation at a bar, I dread to think of what else might have occurred along those lines that I don't [know] about. And that means to me that to create a system in which such a thing may occur is so undermining of everything that I hold of value in terms of the judiciary that it just appalls me. It appalls me to know that in Texas, when Texaco and Pennzoil stood before the Texas Supreme Court, law firms for both firms had given thousands and thousands of dollars to the campaigns of the incumbent judges, and Pennzoil had exceeded Texaco by (I don't know) three or four times, or something like that. That is unseemly in the extreme, and somebody from Texas commented, saying, "Well, it's just like other political situations. If the legislator doesn't vote your way, you don't support him; if he does, you give him money." I never viewed the judicial process that way, and I don't want to view it that way; I don't think it should be viewed that way.

Pierce: Do you foresee the possibility of any financial limitations on contributions or the amount that can be raised for a campaign?

Grodin: I think that would be desirable, subject to first amendment problems, which are substantial. But undoubtedly ways can be found. The most desirable, assuming that we're going to have these elections, would be some kind of public funding. I suppose if we're going to have these elections, we ought think in terms of those alternatives.

E. Campaign Activities

Pierce: As you've indicated, you have no experience as a politician, is that right?

Grodin: That's correct. I did run for City Council once in Berkeley, where I was regarded as part of the far right at the time, back in 1969, and I lost. That was my only experience running for public office.

Pierce: And you had a campaign organization ultimately set up?

Grodin: I did. Actually, I decided to have a campaign organization early on, as soon as it became apparent that I was a target of the opposi-

tion groups. I wasn't sure that I would be, but it had turned out that I was.

Pierce: You had constraints, however, in running a campaign for confirmation that another political candidate might not have, isn't that right?

Grodin: That's true, and it's puzzling. I couldn't make campaign promises; I didn't feel free to talk about what I would do on particular issues coming before the court; I didn't feel free to talk about cases that might be in the pipeline, not yet decided; [I felt] under some constraint about talking about cases in the past. I could talk about my own views, but I couldn't talk about what other judges' views were, or how a decision came about. So that was difficult.

Talking about what turned out to be the main issue, which is the death penalty, was something that was *exceedingly* difficult to do within the framework of television and the time that is allowed for such things. I found I did a lot of speaking to Rotary groups, community groups, sheriffs' association, and whatnot, and I found that when I had the time to get into specific cases and specific issues and to explain what it was that the court was doing in a death penalty case and the limited nature of the decision that it had to make, I would often get people who thought that they were opposed to me come up and tell me that they were wrong. But that sort of thing is exceedingly difficult to do in a thirty-second time slot—I mean, really impossible. Thirty-second time spots are given to emotional impacts. So I don't know whether what we went through is something that will be replicated, but I fear for our body politic if it is.

Pierce: With regard to the campaign and your relationship to the other justices, what effect do you think your relationship with the Chief Justice, Rose Bird, and Justice Reynoso had on your campaign and your confirmation election?

Grodin: Well, people told me throughout the campaign that it was fairly obvious from the outset that I should distance myself from the Chief Justice, that she was going down, and the only risk was that I would be identified with her. I knew of no way to distance myself from her without doing things that I thought would be wrong and unprincipled. I couldn't say that I opposed her, because I intended to vote for her confirmation. I disagreed with her in some cases, and from time to time I would talk about our different records, but I wasn't about to go around the state saying negative things about her. So I don't know whether anything of that sort would have helped, but I have no regrets about not having done it.

Pierce: And your relationship with Justice Reynoso?

Grodin: Well, I think we were pretty much in the same boat. His boat had a little more water in it than mine, partly because of his Hispanic name and partly because [of] the death penalty issue and the concern over box scores. From the standpoint of those who favor the death penalty, my box score was better than his, but basically we were in the same position.

Pierce: I don't believe [you] aligned yourself with the other justices; in other words, you represented yourself as not in a group seeking confirmation. Do you think that that made any difference in the election?

Grodin: I said I was going to vote for all of my colleagues who were on the ballot. I don't know of any principled way that I could have effectively disassociated myself from the Chief Justice or from Justice Reynoso, assuming that that would have been politically desirable. That I didn't do. I talked about the fact, and people who were commenting on the election talked about the fact, that our voting patterns were, to some extent, unpredictable, that I voted as often with Justice Lucas, or more often with Justice Lucas than with the Chief Justice, in certain categories of cases, and so forth. I just don't think much of that had any impact. When it really came down to it, it was the television spots. Going into the television spots, the polls showed me ahead. And as the television spots hit and as people were told that if they wanted to have the death penalty, they had to vote against not only the Chief Justice, but against Justice Reynoso and myself as well, [they] had their effect.

Pierce: Do you think that voters were aware that you had, in fact, upheld the death penalty in several cases?

Grodin: I had ads which said that. I'm not particularly proud of them, but I had ads which declared that I'd voted to affirm the death penalty in certain cases, and that I'd voted to uphold Proposition 8, and whatnot. I had an ad with [a] Los Angeles Superior Court judge advocating support for me along those lines; I had an ad carrying the endorsement of the California Peace Officers' Association, with two leaders of that group walking along, talking about what a fine fellow Grodin is for law-and-order, and some such thing. But it was no match for the counter-ads.

Pierce: Do you think that the election itself, for example, the people on the ballot and the issues on the ballot and that sort of thing, had an effect that, for example, pulled [a] certain group of people into the election as voters that might not otherwise have been there, or affected the outcome of the election?

Grodin: Well, I think that [the] Chief Justice being on the ballot and being under intensive attack undoubtedly brought some people out to vote on judges who might otherwise have skipped that category.

Pierce: I understand that you are writing a book. Will there be recollections of the campaign itself?

Grodin: I do intend a chapter on the campaign, and I do intend to make some comments in that regard, as we have been talking about, in terms of my reflections on the kinds of criteria that are appropriate to such campaigns and the problems that are posed by such campaigns, and, again, to do that in fairly personal terms. I've spoken and written elsewhere about the problems that I see, and one of the very serious problem areas is the fundraising arena, and the necessity for judges who are under attack to go out and raise money from people who inevitably have some stake in the process—lawyers and others, which is not a very healthy thing.

Pierce: Is there anything that you would have done differently had you to do it over again?

Grodin: No, I can honestly say I can't think of anything that I would have done differently.

F. Election Reform

Pierce: You're in favor of some sort of reform of the system for confirmation of Supreme Court justices.

Grodin: Yes, I am, although I'm under no illusions as to how likely it is that we're going to be able to change the present system in any substantial way. But I think that change is desirable.

Pierce: What [is] the main problem with the present system, [that] it's a political system of confirmation for a judicial office?

Grodin: The main problem is that whatever we say the appropriate criteria for evaluating a judge on the ballot might be, it is exceedingly difficult to establish public awareness and public dialogue around those criteria. And that in a campaign of this sort, at least, the campaign tends to boil down to people's reaction to the results of decisions in some category or categories of cases—so that, for example, neither the Governor nor anyone else who is talking about my votes in the death penalty cases assumes the burden of demonstrating that the cases in which I participated in reversing the death penalty, or reversing special circumstances, were wrongly decided. All they pointed to was the fact that the results in those cases were to reverse the death penalty and to require another trial, and they accumulated by box scores. And that, it seems to me, is the inevitable focus of the judicial campaign, that there is [an] almost una-

voidable tendency for the body politic to bring to bear the same kind of criteria that it brings to bear in the case of candidates for legislative or executive office—namely, do we like what they do, or don't we? That sort of campaign that pays no attention to the principles that are involved or to the reasons that are given for decisions, tends to undermine some values that, I think, are terribly important in the institution of the judiciary. Now, where the balance should be drawn is a matter on which people can reasonably disagree, but I think that there is real danger there.

Pierce: Former Justice Kaus has written and spoken about the politicization of the elections,⁹³ and so on, and he pointed out something very interesting; I'd like your comment on it. He was pointing out that perhaps five, or even six, justices may be up for confirmation in 1990. He hypothesized that perhaps a very strong [gubernatorial] candidate from the Democratic Party, for example, might be in a position to sweep the court for his own appointments. Do you see that as a possibility or problem?

Grodin: I agree with Kaus; I think that problem exists. And also Kaus has said, and I agree with this also, that he can't be sure that a particular decision that he participated in back in 1982, a very important decision involving the constitutionality of Proposition 8, that he can't be sure that his vote was not affected by his awareness that he was going to be on the ballot in November of that year. And that is a very candid, and I think truthful, observation, and I would have to say the same thing about myself. I mean, it was very difficult for one to know one's self that well. That's the real danger that I see in this sort of matter—that we create an atmosphere which, in a way, is polluted, and in which judges are made to feel that ultimately the votes are going to be based upon the outcomes in cases, and not upon the legitimacy of their legal reasoning or the legitimacy of the principles that they rely upon. And I think that that's very unfortunate.

Pierce: There have been some proposals for reform. Perhaps we could discuss those briefly. You yourself have some suggestions for reform, do you not?

Grodin: Well, I have talked with reserved admiration of the New York system, in which judges hold office for some twelve or fourteen years in the court of appeal, without elections, and then they're out.⁹⁴

93. See, e.g., Hager, *Cities Fight over Bird, Kaus Urges Dropping of Judicial Elections*, L.A. Times, Aug. 13, 1987, § I, at 3, col. 5; *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.

94. NEW YORK CONST. art. VI, § 2.

That, I think, is preferable to our present system; I would support lifetime tenure, but I don't think that that's politically feasible. There are more modest proposals which would be an improvement over the present system, although they still carry with them the same kinds of evils that are inherent in using the election process for judges. But, for example, under the current law, as it's been interpreted over the years, judges [have] to stand for election twice before they get finally confirmed to a twelve-year term—once at the gubernatorial election following their appointment, once at the end of the term to which they were appointed, and only then do they get their twelve-year term. And the proposal has been made, for example, instead of waiting for the first gubernatorial election, they should be on the first ballot, the first election after their appointment, and then again in twelve years. Well, okay, that's better than now. I would say it would be even better to have them stand at the first election after their appointment and give them lifetime tenure on that basis.

Pierce: I wonder what a voter is going to be voting for at that point, [if he hasn't] had an opportunity to judge the candidate's ability as a justice.

Grodin: If you're going to have an election then, and I'm certainly not advocating them, but it's better then than later, the function of the election would be to take the place of what the U.S. Senate does in the case of an appointment to the federal bench. Instead of having the Senate confirm, to have the entire people confirm. And that confirmation is typically done at a time before the candidate has served as a judge, by definition, before he's served as a judge in the position to which he's being appointed. And so the evaluation is on some other basis, on another basis, once again.

Pierce: Dean [Gerald] Uelmen from the University of Santa Clara has prepared a paper for a symposium at the University of Santa Clara.⁹⁵ Have you had an opportunity to see that, or do you know what he's proposing?

Grodin: He's proposing the alternative, which I mentioned, that we modify the present system to have an election, but have it the first general election following appointment, rather than the first gubernatorial election. I forget what happens down the line. I accept that as preferable to our present system, and I am no expert on what is politically obtainable in this arena. He's advancing that as something which might be polit-

95. See Uelmen, *Essay—Supreme Court Retention Elections in California*, 28 SANTA CLARA L. REV. 333 (1988).

ically obtainable, and if that's the best that can be politically obtained, then okay.

Pierce: [What] about [State] Senator [Gary] Hart's proposal? I believe you testified at the hearing on that proposal, [which] as I understand it, included confirmation by the Senate.

Grodin: I'm not wild about that—the idea of Senate confirmation at the state level. [It's difficult to imagine our senate bringing to bear a non-partisan and dispassionate judgment on judicial appointment. But if that were the price of obtaining a federal-type system of judicial tenure I'd be willing to pay it.]

Pierce: Would [it] be preferable to have [confirmation by] the members of the Senate who theoretically are aware of and can evaluate a person's credentials better than [the] electorate?

Grodin: If you gave me the Senate in exchange for the electorate, I would take the Senate, not simply because they are more capable of evaluating, but because their evaluation is more likely to occur in a context in which evaluation can be made. They can hold hearings; they can deliberate on it and probe the merits of whatever contentions exist. That simply can't be done in a general election.

Pierce: Chief Justice Lucas has [proposed] that the Court of Appeal review some of the death penalty cases.⁹⁶ The law now is that all death penalty cases are reviewed by the Supreme Court.⁹⁷ Do you feel that that review has caused problems and made the decisions [of the Supreme Court] disproportionate in their effect?

Grodin: Well, I think the death penalty cases are threatening to swallow the court. I am inclined to agree with Justice Lucas that it would be better to have those cases go to the Court of Appeal in the first instance, and I realize there are problems with that. There are a number of variations on that proposal but the general principle of having the death penalty cases go to the Court of Appeal in the first instance would be preferable to the present system in my opinion.

VI. Present and Future Activities

Pierce: Tell us what is in store for you in the future professionally.

96. In June, 1987, Chief Justice Lucas named a Select Committee on Supreme Court Procedures, headed by former Justice Richardson, to study ways to remedy the court's backlog, including a proposal that death penalty appeals be heard initially by the Court of Appeal. See *The Recorder*, June 17, 1987, at 1, col. 6; *The Los Angeles Daily Journal*, June 17, 1987, at 1, col. 2.

97. CAL. CONST. art. VI, § 11.

Grodin: I'm teaching at Hastings and enjoying it enormously. I'm teaching a class in basic Labor Law, and I have a seminar in Judicial Process, which talks about some of the things that we've been talking about and exposes the students to some fairly general and somewhat philosophical reflections that they might not otherwise get in the course of their law school curriculum. I will be teaching next semester in addition to my judicial process seminar a seminar in the law of Employment Relationship, which will be the first time I've taught that. There's a casebook out now for the first time that's sort of a growing area of the law, and sooner or later I'll probably convert that to a class. I have plans for all manner of things that I would like to teach. I would prefer not to teach the same thing over and over, but to teach different things. And I expect to be doing some arbitrating⁹⁸ and some writing and some speaking and a whole lot of backpacking.

Pierce: I understand that you are writing a book.

Grodin: Originally I thought of writing a very serious textbook sort of thing, and I started to write that, and it became terribly boring to write, so I suspected it would be terribly boring to read. What I am now in the process of doing is [talking] about what it is like to be a state appellate judge in more personal terms, and [talking] about serious issues of a jurisprudential nature, like what does judicial activism mean, and is it meaningful to talk about activism versus restraint, and how do courts interpret statutes and what are the special problems that are posed by initiative measures, and what can the courts do with the concept of original intent, and all of that—but to do that in the context of cases that I have participated in, rather than in the abstract. So that's what I am presently embarked on.

Pierce: When might we expect this book to be forthcoming?

Grodin: [It's being published by University of California Press, and it should be out some time in the Spring of 1989.]

Pierce: Do you expect there will be any surprises in your book? It sounds like it's going to be more than a scholarly text.

Grodin: It's not an exposé. It is not intended to be an exposé, and so I don't have in mind any surprises, but it's possible that some of the things I have to say will be surprising to some people.

Pierce: Do you see yourself going back into the practice of law?

Grodin: Certainly not in the short run, except that I have been and will probably continue to consult on individual cases, on appeal or otherwise. But I doubt that I will get back into the active practice of law.

98. Justice Grodin is now associated with Dispute Mediation Service, Inc.

Pierce: Any desire to get into politics?

Grodin: If someone can think of an office that would be interesting to hold that you don't have to be elected to, I think I might consider that. I have no interest in getting back into politics—I don't regard it as getting back into politics; I thought I was out of politics, and I would like to stay out.

Pierce: That concludes our oral video history. I'd like to thank you very much for joining us.