

David Knight: Name, and give me your title, Justice McAdams.

Richard McAdams: It's Richard McAdams, M-C-A-D-A-M-S, Associate Justice of the Sixth District Court of Appeal.

David Knight: And Justice Brauer?

Harry Brauer: Harry Brauer, Associate Justice, Retired, Sixth District.

David Knight: All right, I'm ready anytime.

Richard McAdams: In 2005 we celebrated the Centennial of the California Courts of Appeal; and as a part of this commemoration, the Judicial Council and the Administrative Office of the Courts, under the leadership of the Chief Justice, instituted the California Appellate Court Legacy Project. The purpose of this project is to create an oral history of the appellate courts in our state through the voices and conversations with the retired justices throughout California.

My name is Richard McAdams. I'm an Associate Justice with the Sixth District Court of Appeal situated in San Jose. Today, it is my pleasure to have a conversation with Retired Justice Harry Brauer, retired from the Sixth District Court of Appeal.

Harry Brauer: Obviously you don't have to introduce yourself to me, as we have both served in Santa Cruz.

Richard McAdams: We spent many years together in your courtroom; and then as a colleague, when I was in municipal court, you were in superior court in Santa Cruz, and we have some history together. And today we get a chance to have a great conversation, everything about you: the immigrant experience, to talk about that; your rich educational background; your over 50 years in the legal community; and of course your reputation as an avid hiker and a mountain climber. I hope to touch on all of those things.

But I wanted to start and ask you, rather than just proceeding in a strictly chronological fashion, to talk about the beginning of the Sixth District Court of Appeal. You were among the three original justices appointed to this court when it was created; and just some idea of what that experience was like and what were the challenges you had.

Harry Brauer: Well, a friend, Ed Panelli, who was never one to let the photo-op go by and having been previously confirmed, arrived at the confirmation hearing for Nat and me bearing two big banker's boxes of books, which he ceremoniously handed to us the minute we were confirmed. He made a valid point. Our district was lopped off the First, and they lopped off one-third of their population base for the three of us to handle—they having 19 judges.

In fact, this was one of those usual legislative snafus. It had been contemplated that the three who were created in San Jose would

be taken away from the First District, but politics got in the way and this didn't happen. They kept their 19 judges and they kindly sent down to us one-third of their pending cases.

Richard McAdams: And this would have been . . . the confirmation hearings were in the latter part of 1984?

Harry Brauer: Yes, in November, I think. Well, we set to work. I had had some moments of anxiety about the confirmation process, because in my application to the Governor, I had written that my appellate opinions would be pithy and informed denunciations of the Supreme Court's excesses.

(00:04:57)

And by some error in the Governor's Office that was sent to the Chief. *[laughing]* But she was in a good mood, I think, or generous, and didn't give me any trouble—except after the vote of confirmation, she told me pointedly that she was looking forward to my trenchant and pithy opinions. *[laughing]*

Richard McAdams: And we'll perhaps talk about some of those as we go along. The counties that were carved off from the First District are still the four counties today of Santa Cruz, Monterey, San Benito, and of course Santa Clara County; and one judge from each county was appointed originally.

Harry Brauer: Not San Benito; Santa Clara, Monterey, and Santa Cruz.

Richard McAdams: Was office space already found for you, or did the three of you have to actually . . . how did you start up the office?

Harry Brauer: No. Panelli, who had been confirmed quite some time before the court actually opened, had arranged for office space here on the 12th floor, which was rather primitive, you might say; but we had space when we started working.

Richard McAdams: And we're still in the same office building in downtown San Jose today?

Harry Brauer: Yes.

Richard McAdams: And the staff—did you have to bring in, hire, your own staff at the time?

Harry Brauer: Yes, I brought with me Tom Prosser, who had been working for me down in Santa Cruz. And I hired—god, I can't think of her name now—she didn't stay long. And then I hired Christina, who is still here, and she was an amazing surprise to me. I really didn't expect very much. She came out of the Monterey College of Law and was so self-effacing that she didn't even tell me that she was valedictorian. And not only did she turn out to be a first-rate

lawyer, but also the best writer next to me on the court.
[laughing]

Richard McAdams: And in those days, you wrote a good number of your opinions?

Harry Brauer: Yes.

Richard McAdams: As we go along, we'll talk about some of those and some of the concurring opinions and even maybe a few dissents; but you retired from this court in 1989?

Harry Brauer: Yes.

Richard McAdams: Did you move at that time, or was it shortly thereafter?

Harry Brauer: No. My wife moved in '96 because our only child lived in Arizona and we wanted to spend the remaining years near her, but I didn't move until 2001. And for 10 years I acted as a private judge and also helped in the courts. Those were the days before the Chief issued a fiat that you do one or the other.

Richard McAdams: And now you're living in Arizona?

Harry Brauer: Yes, for my sins. We've just had a week of 110 temperatures.

Richard McAdams: There's about 40 degrees difference today, I would note for the record.

Harry Brauer: Anyway, going back to the initial period, as I said, they sent down one-third of their workload. But we set to work, and the three of us, just in spite of our differing backgrounds, we worked together like three cogs in a latch; and within a year we had brought the backlog down to virtually nothing.

(00:10:06)

And as you pointed out, we wrote quite a few of our own opinions, especially I did. So I think the main thing that Justice Panelli did, as I pointed out at the 20th anniversary, he initiated the conference system, which unfortunately fell by the wayside.

Richard McAdams: Can you describe what that was? How—

Harry Brauer: Yes, it's very simple. A judge was expected to go to the first conference having read the briefs, before turning the case over to any of his research attorneys, so that at the conference, the judges would arrive at a tentative decision and the case would be assigned to one or another of us. And at that time the judge would tell his lawyer, unless you find something inconsistent, some precedent, inconsistent with the tentative decision we've arrived at, I want you to write up a draft consistent with our tentative decision.

This system ensured that the judge himself would be primarily responsible for the final product rather than doing what some irresponsible judges have done—is just simply sign whatever their lawyers put in front of their noses. And I’m not talking just about the Sixth District, I’m talking statewide.

Richard McAdams: Did that conference system continue after Justice Panelli left for the Supreme Court?

Harry Brauer: No. The first conference in which Justice Capaccioli appeared, he had in his hand a memo written by his lawyer; and somehow Justice Agliano, whom I love like a brother, nevertheless was not ornery enough or whatever you call it to enforce it, and it just disappeared.

Richard McAdams: And you went to a system where the cases would be assigned out in advance?

Harry Brauer: The cases are assigned out, and the first time the other two judges see the case is when they get a draft opinion and the briefs. And at that time, depending on the degree of conscientiousness of the judge, he would look into that case. As a practical matter, the judge to whom the case is assigned is the one who is most familiar with it and does most of the work on it.

Richard McAdams: Did you find yourself concurring or dissenting more after the conference system ended, or did it make any difference?

Harry Brauer: I can’t say that it did.

Richard McAdams: We’ll talk about it. I want to go back in time. I’ll come back and we’ll talk a bit more about the appellate court work. I know that you were born in Germany in 1926; and if you could tell us about your experiences in Germany and, of course, coming to America.

(00:14:54)

Harry Brauer: My background is somewhat unusual, I think, for a judge. We, my parents and I—I was an only child—fled Hitler in 1939 and we arrived in the Philippines on my 13th birthday. Why the Philippines? Because the Philippines gave us a visa to come in, it’s as simple as that.

Richard McAdams: Directly from Germany to the Philippines? Or a circuitous route?

Harry Brauer: Yes, directly on a ship by way of the Suez Canal and Singapore, etc. I didn’t speak a word of English, but I had had French and Latin in Germany, and I picked up English like a sponge. Within a month, I participated fully in seventh grade, and at the end of the first year I topped my class in English. I went to Catholic school.

Richard McAdams: In the Philippines?

Harry Brauer: Yes, and I was never more secure in grammar than I was at the end of the seventh grade. I've always been secure in grammar.

Richard McAdams: And this was in the turbulence of World War II that this is occurring?

Harry Brauer: Yes, this was the seventh grade. This was in '39. As a final test in seventh grade, we were required to diagram a sentence from a speech by Hoover which was positively Germanic. It was a paragraph long, and if you could diagram that sentence, there wasn't anything about grammar you didn't know.

Anyway, it turned out to be going from the frying pan into the fire, because in December of '41 or January of '42, the Japanese conquered Manila and then I spent the entire war under the Japanese military dictatorship. The schools were open for part of that time and not towards the end, at which time a few friends and I were tutored by . . . one was a German refugee physicist and some of our former lay teachers.

Richard McAdams: You were living with your parents in the Philippines?

Harry Brauer: Oh, yes, I was still a child. I was a teenager.

Richard McAdams: Were they able to find work there?

Harry Brauer: Well, when we first arrived, we found out that La Salle, which was run by the Christian Brothers, was about the best school there, so my mother took me there. And we couldn't even pay the six dollars a month tuition.

But Brother Xavier, the president, let me in anyway, and it didn't take my father more than two months before I could start paying the six dollars. My people had always been in the liquor business. I am the first person of my family to go to college and to graduate school, just as my wife was the first person from her family to go to college and graduate school.

Richard McAdams: So the name "Brauer" is truly significant.

Harry Brauer: It's "Brewer," right. But actually my family was in the business of making liqueurs, and we opened a little restaurant in Manila.

(00:20:03)

During the war, my father eked out a living by doing what everybody else was doing, what they called buy and sell. He'd find a bottle of good Scotch, for instance, and then go to some of the Japanese businessmen there and sell it to them and make a little profit and that sort of thing; that kept us going.

But after the Americans came back, he turned out to be in hog's heaven because here you had all these soldiers and there was a whole year before liquor was imported.

So he was almost the only game in town, and he made gin and whiskey and sold it, and in one year he accumulated a nest egg of \$50,000, which in those days was a lot of money.

So I came to the States originally; I thought I'd just come to study. I had been admitted to the University of Chicago before I even left the Philippines, and curiously, it was easier for me to get an immigration visa than a student's visa because the German quota was empty right after the war. You know, they didn't let anybody out of Germany.

Richard McAdams: You were recognized as a refugee, having refugee status in Germany?

Harry Brauer: No, it didn't make any difference. What the American quota system was based on is the place where you were born, and I was born in Germany. The only thing that I needed was either to have somebody sponsor me, and we didn't have any relatives or friends, or my father was required to give me \$10,000 when I was 20 years old to get . . . the consul figured that that was what it would take me for the five years until I became eligible to be a citizen.

So my father told me this was all . . . by then he had no livelihood, and this was 20 percent of all he had. And he said, "Look, you can piss it away if you want to, or it can last you for an education"; and it lasted me through college and law school.

And of course it was a great deal more valuable to me than it would be if I had inherited it 20, 30 years later and hadn't had the kind of education that it had brought me; and I had scholarships both at Chicago and Yale.

Richard McAdams: You had applied to other schools besides the University of Chicago?

Harry Brauer: I had applied to Stanford, Chicago, and Harvard. Stanford admitted me, Chicago admitted me, Harvard wanted some more information before they admitted me. But in the circle I was going around in the Philippines, among the teachers and so on, the University of Chicago was very highly regarded—much higher than Stanford, for instance.

Richard McAdams: They weren't trying to channel you into a Catholic university in the States then?

Harry Brauer: No. The Brothers gave me an excellent education, but they didn't convince me on religion.

Richard McAdams: Your interest at that time, were you heading for law at that point?

Harry Brauer: No, my first inclination was journalism, writing, but I soon realized that there were a few top people in that field who could make a living as writers, whereas even mediocrities can make it as a lawyer. *[laughing]*

(00:25:20)

Richard McAdams: You still feel that way now? *[laughing]*

Harry Brauer: When I was elevated to the superior court I had the fond hope that I would have better lawyers, and I was disappointed; and then when I got to the Court of Appeal, I had the same hope and was equally disappointed. You have some good ones and many, many more bad ones. But then my view is that the average judge is no better than the average lawyer either.

Richard McAdams: Well, going back to the University of Chicago, you graduated in 1947.

Harry Brauer: Yes, I graduated with honors.

Richard McAdams: And your degree?

Harry Brauer: I had had a year at the University of the Philippines before I moved over to the States. So it just took me a year. The usual load was four courses and I took six, so I did what was necessary and graduated in '47.

Richard McAdams: You graduated with honors; and the degree that they bestowed?

Harry Brauer: It was a Ph.B., which is like an A.B. At Chicago the difference between the A.B. and the Ph.B. was for the Ph.B., you had more electives as part of your degree. It's meaningless.

Richard McAdams: One publication had you listed as Ph.D.

Harry Brauer: No, that's wrong, it's "B." Also, I'm one of the few old-timers who do not have a doctorate of laws.

Richard McAdams: When did your interest turn to law? When did you decide to apply for law school?

Harry Brauer: Well, obviously it must have been sometime during that year at Chicago. I can't recall just when.

Richard McAdams: Was there a specific major you had at Chicago?

Harry Brauer: No, Chicago did not believe in majors. They believed in turning out well-rounded people, and everybody had to take the surveys in the biological sciences, physical sciences, the humanities, and

the social sciences. They did not, Hutchins did not, believe in majors.

Richard McAdams: Even though you didn't turn to journalism, were there some favorite courses you look back upon now with fondness?

Harry Brauer: In college it was always the social sciences, which were composed of partly history and social anthropology and sociology. You read all sorts of books.

Richard McAdams: Do you think that study helped you with—

Harry Brauer: Yes, it did.

Richard McAdams: I know we've had this discussion before, about that foundation.

Harry Brauer: Well, I think it's the sort of thing that would make you gravitate towards law rather than to be a doctor or engineer. I never was worth a damn in math. I still can't balance my checkbook. If it has a number in it, I'm useless.

Richard McAdams: And then tell me about Yale Law School, selecting Yale.

(00:29:54)

Harry Brauer: Well, actually I started out at the University of Chicago Law School, and there I had a memorable experience of being exposed to Edward H. Levi, who was then just a professor of law but later became dean of the law school, president of the University of Chicago, and then Attorney General under Ford.

Ford was the only president since the memory of man reaches not, who took a completely apolitical person as his Attorney General rather than his private lawyer. And anyway, Ed Levi was a fabulous teacher.

Why did I transfer to Yale? At the end of the first year, I was invited to compete on the law review, and at Chicago, unlike at Yale, the professors had some input into the law review. And I was handed a clip from an advance sheet which a Professor Gregory who was a labor law professor had written, said, "This would make an excellent case note."

So it was assigned to me and I read around in the field of it. I hadn't had labor law yet, didn't know beans about it, but it became clear to me that this case was nothing new.

So, I went to the editor-in-chief and I said, "I don't think this is a subject for a note." And he said, "Well, if Gregory thinks it's a note, when he comes back at the end of the summer, he will tell you why he thinks it is a note. In the meantime, why don't you just read around in the field?"

So I spent the whole bloody summer in a disorganized manner reading in labor law. And then when Gregory came back, I went to see him, and I pointed out to him why I thought it wasn't a note.

He says, "Well if you don't think if it's a note, it's not a note." So by then I was a quarter behind all my fellow competitors, and I was so mad that I applied to Yale and they took me. So that's how I transferred to Yale; and at the end of my first year there, I was also invited to compete on the *Law Journal* and ultimately became an editor of the *Law Journal*.

Richard McAdams: You had two years as a part of the *Law Journal*?

Harry Brauer: Well, you spend a year competing and at the end of that year . . . those were the days when being on the *Law Journal* really meant something, because only the top quarter of the class was invited to compete. This, I think, is no longer the case now. They do things differently. I don't quite know how they do it.

And during that year, you pay very little attention to your classwork; you spend all your time on the *Law Journal*. But historically it was the experience, certainly at Yale, that your grades didn't really suffer, perhaps because of what you did on the *Journal* made you absorb the coursework more easily, I don't know. Anyway, that's how it worked for me.

Richard McAdams: Anything about other aspects of the law school experience that stand out years later now—courses, classmates, professors, Yale in the early '50s?

(00:34:59)

Harry Brauer: Well, of course both at Chicago, I was admitted to a good fraternity, and this was emotionally very important to me as a newcomer, as a refugee, as a foreigner. This was very important to me. And I made a lot of friends, some of whom are still my friends now, and the same is true at Yale, where some of my classmates either were from or moved to San Francisco and we remained friends.

Needless to say, they all made about three times as much money as I did as a judge. We'll get to that, but you and I are among the youngest who have been appointed. I was appointed at 35, and I think you were appointed even earlier. Well, we're not there yet.

Richard McAdams: But the conversation takes us where it leads us. After law school, did you immediately go into practice?

Harry Brauer: No.

Richard McAdams: Or was it the Army first?

Harry Brauer: The minute I got out of law school—I had been deferred; those were the days of the draft and the days of the Korean War—I was immediately drafted, and I was assigned to Camp Roberts, which was sort of a hellhole.

And I had to go through the full infantry basic training, because as a graduate lawyer I was not eligible for any school; but as soon as I was through basic training, I was immediately assigned to the Judge Advocate's office there. And I had some awfully good breaks in my life. The colonel in charge of our office sent me to San Francisco on TDY so I could take Witkin's cram course for the bar.

When I passed the bar, I turned down a commission. I didn't want to apply for a commission because it simply would have extended my service by about 18 months and all I wanted was to get it over with and start my life. But it's interesting; one of my friends in basic training who was the ultimate goof-off ended up being charged with felony malingering, and he wanted me to represent him. Of course I had never represented anybody at all, but he insisted, so I was assigned to TDY in San Francisco to Letterman Army Hospital.

Richard McAdams: TDY is?

Harry Brauer: Temporary Duty, I think. I don't know what the "Y" stands for.

Richard McAdams: Were you still in the Army?

Harry Brauer: Oh, yes, I was a corporal, and I went into the Judge Advocate's office at Letterman. Letterman was a separate command at the procedural, and here was this little law office which called for a captain and a couple of enlisted men, secretaries,

(00:39:55)

But the man who was actually sitting in the chair was a full colonel who had been assigned to the post because he needed medical attention. I went in to see him and I said—by then my parents were living in San Francisco—I went to see him and I said, "Colonel, I'm a lawyer, I'm an enlisted man, can you use me?" And before I knew it, he had me transferred. The large law office at Camp Roberts was headed by a lieutenant colonel; and before I knew it, I was transferred to San Francisco. And he treated me like a son.

So as he was just about the most senior man there next to the commanding general, nobody gave me any bull. I lived at home. And I learned afterwards about something I didn't even know about: he kept me off the Korean roster because in those days the Army had a rule that if you have not been sent to Korea by then you should be sent if you only had three more months to go or something like that. It wasn't very efficient.

So I spent the entire Korean War at Letterman Army Hospital and living at home. So I had a very pleasant legal career, and as soon as I got out of the Army, I got a job as law clerk to a federal judge in San Francisco, Ed Murphy.

Richard McAdams: I would be remiss if I didn't ask you how the felony malingering case went. *[laughing]*

Harry Brauer: *[Laughing]* Well, how do you think a malingering case would come out where you have a man who turns himself in to the hospital with a bad back problem after he had received overseas orders and then he was observed in the rec room lifting one end of a 300-pound settee in front of the TV set? *[laughing]*

Richard McAdams: So your first case didn't go well, I take it? *[laughing]*

Harry Brauer: No, that was a loss leader.

Richard McAdams: From the Army, you were eventually discharged and eventually you clerked with a U.S. district judge.

Harry Brauer: Yes.

Richard McAdams: How did that come about?

Harry Brauer: How did that come about?

Richard McAdams: Yes, when you left. At some point, you finished your Army duty then?

Harry Brauer: Yes, well, even when I had one month to go, I looked around in San Francisco, and really the only entrées I had were either to a clerkship or to the large firms—because I had no connections, but I had a good academic background.

I looked and I asked in the district court whether any of the judges were looking for a law clerk, and Ed Murphy was and he hired me. I stayed with him a year or a little over a year, and I could see that I had to get out of that because it was too easy and too pleasant.

Richard McAdams: This was in San Francisco?

Harry Brauer: Yes.

Richard McAdams: What kind of work were you doing?

Harry Brauer: Well, *de mortuis nil nisi bonum* and all that. Old Ed Murphy was never sober, and he'd put a file on my desk when I hadn't even observed the trial, and he'd say, "Decide who's right and write it up." I was in effect the federal judge.

(00:45:02)

Well, in a way this was good experience. I either got out into the battlefield or I'd stay there forever—because there were some law clerks who were lifetime law clerks, and I didn't want that.

So, as I told you, my only entrée was to the large firms. And my roommate worked for McCutcheon and my best friend worked for Pillsbury, Madison, the two largest firms; and they both told me that the senior partners would pass them in the hall and they wouldn't know whether they were visiting messengers or young lawyers working there.

And I liked the San Francisco climate, but I just didn't want that large firm business. So I talked to my boss and he said, "Well, you know . . ."

Well, go back. That in effect left the Monterey Bay. If you wanted San Francisco, the weather, and didn't want San Francisco, that left the Monterey Bay. So I mentioned that to Judge Murphy, and he said, "Well, you know, there's that little town of Watsonville, and I was there once during the Depression and it was the only place in California that didn't suffer from the Depression."

And he said, "I was there and I saw all the rich Slavonians bidding against each other for the privilege of paying for a new altar for St. Patrick's Church." He said, "I have a friend down there, Hubert Wyckoff; why don't you apply to him?" And I applied to him and they hired me.

Richard McAdams: The Watsonville population at that time was?

Harry Brauer: It was 13,000 or something like that, but that firm had a reach far beyond the area, because the founders, Hubert Wyckoff had been president of the State Bar and John Gardner was a statewide-known lawyer; and the firm had quite a reputation.

So by the time I became a partner it had branches in Hollister, at Monterey, and it had joined with the Santa Cruz firm, which was headed by Steve Wyckoff. So there were 16 partners, which was then more than any firm in San Jose had.

Richard McAdams: I remember hearing that it was considered to be, even though based in Watsonville, it was considered to be the largest or one of the largest law firms between San Francisco and Los Angeles.

Harry Brauer: Yes, that's true.

Richard McAdams: What kind of work did they have you doing at the beginning?

Harry Brauer: I was doing obviously nothing but civil work, and I was doing all their appellate work. And soon came one of the high points of my career. I consider that there were two: I argued a case before the

California Supreme Court and when the court rose and Chief Justice Gibson summoned me into chambers and congratulated me on my argument; and he didn't do that routinely. And six years later, when a vacancy arose at the Watsonville muni court when Judge Franich was elevated. Steve Wyckoff, who had clerked on the Supreme Court, reminded the Chief of that incident, and when Pat Brown summoned me to Sacramento, this was to hand me my commission.

(00:49:58)

Pat Brown was the last Governor who made a practice of that. I think it was a wonderful idea. He told me that I had only one man to thank for my appointment, and that was the Chief Justice, and he said, "Be sure to send a thank-you note." *[laughing]*

So anyway, my law review experience, of course, stood me in good stead in my brief writing; and I did a lot of writing, and writing has really been my greatest skill, if I say so myself.

Richard McAdams: Throughout your educational, legal career?

Harry Brauer: Yes, because actually it only really blossomed when I got on the Court of Appeal, although I had written a few relatively lengthy opinions when I was on the superior court. But I couldn't . . . obviously as a trial judge you can't take the time in a small county, as you well know.

We're going to get to my other high point. But I became close to Justice Jefferson, who was then Judge Jefferson, and in Los Angeles if he wanted to spend a month writing a decision, well, he could do it; but obviously in Santa Cruz, the other judges would have been on my tail. *[laughing]*

Richard McAdams: Going back a bit in your practice experience, did you practice primarily in Santa Cruz County—besides the appellate work, of course?

Harry Brauer: I spelled the Monterey partner once for a month when he went for a vacation, and if somebody had a case in Hollister or in Monterey that they thought would be up my alley, they would ask me to handle it; but most of it was Santa Cruz.

Richard McAdams: Were you doing—

Harry Brauer: And of course I had the experience which no younger lawyer will ever have again, of being under a man like Judge Aldrich. Judge Aldrich was a phenomenon which you simply do not find since the advent of 170.6; and I think he was the only judge in the county.

Richard McAdams: This is Santa Cruz Superior Court, in the mid to late '50s?

Harry Brauer: He was a most irascible person. I heard him once say to a young lawyer that his parents did not perform a public spirit of act when

they conceived him. He was incredible. The worst thing he did, if he wanted to make one of his outrageous remarks, he would say to his court reporter, "Ms. Green, lift your pencil," and then there wouldn't be a record.

The only man I know who ever got the better of that was Steve Wyckoff, who when he told Ms. Green to lift a pencil, he picked up his books, walked out of the courtroom, and when he got to the door, he says, "You find me in contempt and then we'll have a record."

But he made a lawyer out of me, you see, because I would never go before him on the simplest uncontested divorce or demurrer without spending half an hour saying to myself, "What can that son of a bitch ask me that I don't know?" And that made a lawyer out of me. Unlike his successor, he was a good lawyer. He was outrageous.

(00:55:05)

There's one case I remember. Well, he didn't like doctors in general, but there was a small coterie of local doctors whom he respected, and there was a case in which one of the local doctors he liked, I don't whether it was Allegrini or Ascamp, somebody like that, who had testified.

And the other side brought down the top neurosurgeon from San Francisco. And the man got on the stand, he answered a few questions, and then Leo leaned down benignly and said, "Doctor, you don't know what you're talking about, do you?" in front of a jury. *[laughing]* Anyway, that was an important incident in my development.

Richard McAdams: You honed trial skills to some extent?

Harry Brauer: Well, not so much the trial skills as the preparation skills. You just don't enter a courtroom unprepared.

And coming back to that incident before the Supreme Court, that was also a very important lesson to me which stood me in good stead when I got to be a judge myself. I knew that I had half an hour, so I first wrote out my argument, then I rewrote it, then I rewrote it, then I timed it, then I memorized it, then I memorized it so well that it didn't sound memorized. And I got exactly as far as "May it please the court" when the Chief and the other judges lit into me.

And they're perfectly right. They don't want to listen; judges don't want to listen to canned speeches. Half of what you want to say, you don't need to convince them. Some points you may never convince them of, but there is something in between that concerns them and in which they could be swayed.

I always thought that it would be better—and I did that as a judge; I was known for interrupting lawyers, asking them questions—and I always think that it might be better if a lawyer, if he knows that he's before a judge who has done his homework . . . that's a requirement, otherwise it wouldn't work, is to simply say, "Your Honor, I'd be happy to answer whatever questions you have." Of course, if you're before a judge who hasn't done his homework it wouldn't work.

Richard McAdams: Did you have that experience often with an attorney who felt confident enough to just ask you?

Harry Brauer: No, I didn't dare take the chance that the judge might not know. But you know, as a judge, as you may remember, I had the law and motion calendar 8 out of the 12 years when I was on the superior court, and one of my greatest ego trips was when, as you know, we have the calendars between 8:30 and 9:30; and at 9:30, by god, we have to be through because that's when the jury was coming in. So you had to do a lot of pushing.

And I'd have a complex summary judgment or something on the calendar and there would be a lawyer who would be coming up from Los Angeles and you could see from his face, how the hell am I going to get through to this rube in this amount of time that I have?

(00:59:57)

And I'd ask him one question and his eyes would light up because he would realize (a) that I'd read the bloody file, and (b) that I understood it. *[laughing]* And that was always important to me.

Richard McAdams: You did enjoy the law and motion calendar, right?

Harry Brauer: Well, it was challenging.

(Short pause)

Richard McAdams: We were talking about how much you enjoyed the law and motion department, among other aspects of all the years that you were on the bench.

Harry Brauer: Well, you know, I think that the law and motion calendar, especially in a metropolitan court like Santa Clara County, is the most exacting judicial task on any level. It is tougher than anything else, the law and motion and discovery calendars.

As you may know, in Santa Clara County they do discovery once a week, and the judge has about three days before that to prepare for it because he has to plow through the thick files; and law and motion is usually twice a week, Tuesdays and Thursdays.

They have some really excellent judges in Santa Clara County. Many of them were relatively recent appointees, and in Santa Clara County, unlike another county I could mention—not Santa Cruz—they put you where you belong. Well, the other county, I don't mind saying, is Monterey. They go by seniority regardless of what your background is. Well, anyway, where were we?

Richard McAdams: Well, I want to ask you to associate your bench experience with your interest in the law of evidence and if that interest began as an attorney, or through some trial work, or later from bench experience.

Harry Brauer: It's very simple. I had no particular interest in evidence nor any particular competence in evidence; and this brings me to the second high point of my legal and judicial career.

When I was on the Watsonville Municipal Court, I get a phone call out of the blue from then-Judge Bernard Jefferson, who asked me to be his partner teaching evidence at the College of Trial Judges. And I said yes, but this was in February, and I spent literally some time every evening between February and July studying evidence. *[laughing]*

Richard McAdams: This would have been one of the very first, if not the first, judicial college?

Harry Brauer: No, it wasn't the first. What brought this on, evidently, is that two years before that, I had been asked to be a seminar leader at the college. The seminar leaders led groups of their own judges—that is, muni judges were segregated from the superior court judges.

So I was a seminar leader for a group of new muni judges. The function of these seminars was to discuss what the lectures had been about earlier that day; and evidently, there was a technical evidence question that I didn't really know the answer to.

(01:05:00)

So I went to Bernie's room, and Bernie and Betty were there, and I laid the problem out; and he evidently liked the way my mind worked. So that's what started me being his partner at the college for a number of years, and it was a memorable experience for me.

Well, then I was elevated to the superior court. And while I'm very fond of Chick Franich, who was in a lot of ways my mentor and a good friend, he always resented that he had not been asked to teach at the college.

So when I was elevated to the superior court, he was PJ that year, and he told me in direct violation of the edict of the Chief Justice that I would have to take it as a vacation time.

The Chief Justice, who was then Don Wright, had issued an absolute order that neither attendance as a student or as a teacher was to cut against your vacation time. But he told me that I had to, so I told Bernie this would be the last year that I would teach.

But thereafter, as you may know, that he and I and sometimes joined by Ross Bigelow would teach at the annual workshop or some other superior court workshops.

Richard McAdams: You kept your friendship with Bernie Jefferson all the years?

Harry Brauer: Yes absolutely, till the day he died. He was a guest in my home when they came up once to Monterey, and we were very good friends even though there was a considerable ideological distance between us; and in fact, as long as he was on the superior court, he never really showed his true colors.

It was just since he got on the Court of Appeal that he was really on the very left fringe of the appellate justices. But you don't have to agree with somebody ideologically to be a friend. Look at Scalia and what's her name, Greenberg?

Richard McAdams: Ruth Ginsburg, going to the opera together repeatedly?

Harry Brauer: Oh, they're very close friends.

Richard McAdams: Did those differences spill over into your evidence classes?

Harry Brauer: Yes.

Richard McAdams: As sort of a teaching method. And the judicial career, you'd mentioned about your appointment to the municipal court; that would have been in 1962. Did you actually apply for the position, or how did it come about?

Harry Brauer: Yes, I applied for the position.

Richard McAdams: There was an open municipal courts position in Watsonville?

Harry Brauer: Yes, because Pat Brown had picked Chick Franich, a Republican, over Jim Scoppetone for the second superior court when it was authorized by the Legislature in '61, which left a vacancy. There were four applicants: John McCarthy, who though a Republican, was backed by virtually every Democratic power broker in Watsonville because he was part of the old boys club; Nick Drobac, who was a DA; I; and Harry Ferris, who didn't count.

(01:10:17)

John McCarthy had only one thing going against him, and that was he was a classmate of Pat Brown's, and Pat Brown knew him

intimately. He's a lovely guy. He was a very pleasant guy and not a bad lawyer, but he wanted to retire to the bench.

Richard McAdams: You're the youngest applicant, I take it, at 35?

Harry Brauer: Nick and I were the same age. Then Nick beat me out for the superior court, because there were three applicants: Don and I, the two muni judges, both of whom were Democrats; and Nick, who was Reagan's county chairman.

Nick was a good friend of mine, and all the time he was on the superior court, he says, "I am going to resign. I don't like it. I'm not making enough money." And I never paid the slightest attention to him because the idea of resigning from the superior court was so ridiculous to me.

So lo and behold, one day, it was about after he had been on the bench four years or so, he phoned me and says, "Harry, I've just sent in my letter of resignation, and I'll do what I can to help you get the job."

But the person who was most helpful was Don Grunsky. And I as a young lawyer had been a Democratic firebrand in Watsonville. I was president of the Democratic Club; Georgia was president of the Democratic Women's Club. And in fact we'd even tried to run a candidate against him, which was an exercise in futility.

And when Nick got the job the first time, Don, who was a very prominent and competent trial lawyer, insurance defense lawyer—as well as, of course, a very powerful senator—stayed out of it. He says, "If I back one person, I make two enemies for every friend I make," and he also said publicly, "I can live with any judge."

Richard McAdams: He was a state senator at the time?

Harry Brauer: He was not just a state senator; he was chairman of the Judiciary Committee and one of the most powerful Republicans. But evidently Nick did something which really got him upset, so that when Nick resigned, Don decided to take a hand in it. And you know, here I was not only a Democrat, but former chairman—I had been chairman of the ACLU in Watsonville. But Grunsky, with Frank Murphy in tow, was the representative—walked into Ed Meese's office and said, "Brauer or nobody," just as simple as that.

He rammed, literally rammed, me down Reagan's throat; and so that's how I got on the superior court. The first case I had, contested case I had, was a custody fight in which Grunsky represented the father and Hermia Kaplan had her first case representing the wife.

(01:15:07)

And her client wanted her to disqualify me, but she didn't, and she won the case; and Grunsky didn't feel the slightest upset. He knew that he wasn't buying himself a judge when he backed me.

Richard McAdams: People think of Santa Cruz today, as we're doing this interview, and would not think much of the fact that you were active in Democratic Party politics or the ACLU; but things were a bit different in the late '50s and '60s in Santa Cruz County, were they not?

Harry Brauer: Yes, Santa Cruz was an old people's town, conservative, never passed a school bond issue, whereas Watsonville was more liberal. Well, not really liberal, certainly not by today's standards, but passed school bond issues.

If you get right down to it, the Democratic Club had four or five activist members: Henry Mello, and Brauer, and Bob Bennett, and Nancy Kepple. There weren't many of us, but then it certainly was different. The complexion of Santa Cruz has changed.

Richard McAdams: Did your views change over the years?

Harry Brauer: Yes, there's no question about it.

Richard McAdams: Perhaps again, getting a bit ahead of myself, but it comes up at this point.

Harry Brauer: You really aren't. I had led a typical sheltered ideological life: liberal law schools, I was at home with the liberals. Of course, I had had no criminal experience whatever as a lawyer. When I was appointed to the muni court, I sequestered myself in my bedroom for two weeks with Fricke, who was the only authority then. I didn't know what a preliminary hearing was, literally.

If the advance sheet said "People versus," I skipped it while I was practicing law. I knew nothing about it, but it didn't take me long to realize that the criminal defendants by and large were hoods, not Robin Hoods, and gradually I became more conservative. No question about it.

Even when I became conservative, I did not change my registration because I did not want to give the appearance that I was doing that in order to gain advancement from Republican Governors. You were on the court at the time. You know that shortly after I put in my name for the Court of Appeal, I tried that voter fraud case. And Mitchell Page, who represented the liberals, was under a lot of pressure to disqualify me, but he wouldn't. And as you know, we took the testimony oath of 300 UCSC students and I had it in my hands to turn the city of Santa Cruz over to the conservatives.

(01:20:14)

If I had invalidated those votes, all of those votes, the four-to-three balance would have passed the other direction; but I didn't, and I frankly believed that with that decision I had kissed any hope of getting on the Court of Appeal goodbye. And I must say that you've got to give Deukmejian credit for appointing me nevertheless.

One reason was that the lawyer who represented the conservatives, Tim Morgan, was also Deukmejian's county chairman, and he was one of my main backers. So I don't know. You can play it straight and they'll hurt you.

Richard McAdams: Did you feel that when you came to the bench in the municipal court in 1962, did you have a judicial philosophy? And did it change over the years?

Harry Brauer: No. When I first went on the bench, I was asked by the Watsonville Rotary Club to give a talk on my judicial philosophy, and I prepared a little talk, which I then delivered over the years before virtually every service club in the county. And the key sentence in it, to which I really adhere and believe in today, was this. I said that, "Above all I believe in noblesse oblige, the principle that those of us to whom life has been good—the wealthy, the educated, and especially the people in the position of public trust—are held to a higher standard of conduct than the man who sleeps under the bridge. And therefore, when one of the favorite ones violates the law, he should be treated more, rather than less, severely than the man who sleeps under the bridge."

And I believe in that, and I believed in that then. Every once in a while when I was on the superior court an out-of-county lawyer would come with his young client for sentencing and he would start out by saying, "This young man comes from a good family." And I would stop him right there and I would tell him he is just giving me an aggravating circumstance, not an extenuating circumstance. Really, I don't think my judicial philosophy has changed any.

Richard McAdams: I wanted to ask you about another friendship that you had over the years with Bernie Witkin. Can you tell us about that?

Harry Brauer: Well, that arose from the fact that we both taught at the college. And when I was on the Court of Appeal, I'd occasionally send him copies of concurrences or something else that I had written. I don't know that it was friendship. I'd like to think he thought of me as one of the brighter, one of the brethren; that's about all I can say.

Richard McAdams: Are there friendships or acquaintances among other judges, justices, or others in the legal community? I know a good many came to your retirement party, along with Bernie Witkin.

(01:25:03)

Harry Brauer: Yes. These were mostly just professional friends. There were quite a few them, but none other than my immediate group comes to mind.

Richard McAdams: And most of them were teaching colleagues at judicial college, contemporaries?

Harry Brauer: Well, people like Sims and Epstein and some of the ones we'd just exchange opinions. One of my heroes always was Otto Kaus, whom I regard as the finest mind in the judiciary.

Richard McAdams: And that was one of the justices I had in mind. Did you actually have a personal friendship with him, or was it professional? How would you characterize that?

Harry Brauer: Let me put it this way. When I was still a superior court judge, I read one opinion, and it happened to be in the field of evidence, in which he had concurred. He was then on the Court of Appeal and I wrote him a letter saying I just couldn't see how he could possibly concur in that opinion, and I laid it out.

You can do that with some people. You can't do that with a lot of them. I did that once. *[laughing]* This was in a way sort of a stupid thing to do. Now, it's prohibited. It wasn't then prohibited.

The First District reversed me—I think it was Taylor—and I wrote him a letter saying that "that opinion must have been written by one of the central staff people." And he wrote me an angry reply to which I then wrote him a reply, which said, "There's a story told of the late Judge Lucas of our court that once his bailiff came running up to him yelling, 'Hey, Judge, there's a lawyer standing on the courthouse steps calling you every name in the book. Do you want me to haul him in for contempt?' And Judge Lucas is reputed to have replied, 'No, let him be, he's just taking a Nevada appeal.'" And then I added, I said, "I was just taking a Nevada appeal." *[laughing]*

Richard McAdams: This is our Santa Cruz County Judge Lucas, by the way?

Harry Brauer: Yes, the father of the lawyer Lucas.

Richard McAdams: You mentioned a voter case in Santa Cruz. Are there other memorable cases at the superior court level?

Harry Brauer: Oh, I had quite a few, but I can't think of them right now.

Richard McAdams: Any that were a challenge to you in terms of judicial philosophy?

Harry Brauer: No, not judicial philosophy.

Richard McAdams: And the same with the appellate court work, other memorable cases where you were the author?

Harry Brauer: The appellate court, you know, the book you people put together was really an eye opener to me.

Richard McAdams: The Santa Cruz history?

Harry Brauer: No, no.

Richard McAdams: Or the book that we prepared for this interview?

(01:30:00)

Harry Brauer: Yes, because it jogged my memory on a lot of it. And this is a hell of a thing for a guy to say, but I was an extraordinarily good writer. I may not have been the greatest scholar, but I really think that after the retirement of Friedman of Sacramento, I was probably the best legal writer on the Court of Appeal. All the concurrences and all the dissents I have written are entirely written by me; and the concurrences especially, they are just well written. I was just going to . . . cut for a minute.

(brief intermission)

Richard McAdams: And you brought something along or got something from your papers to jog your memory?

Harry Brauer: Yes, for my retirement dinner Christina Floyd prepared placemats which quote from some of my better opinions. And I'll leave a copy with you and you can attach it, because most of the stuff in there is in the book you guys compiled. But one real gem, that *People v. Castro*, did not find its way in there.

The thing that annoyed me, frankly, is that the Supreme Court under Bird and also Lucas depublished a number of opinions because of what I wrote in a concurrence. And that is absolutely improper, because the concurrence carries no precedential value, and nowhere in the rules is there any indication that you should.

It's just censorship. They didn't like some of the things I said in one which they depublished. I said something about appellate judges on their Olympian perch do not know the problems of a cop facing some punks at 4 a.m. So this was a case which we had to reverse, and I joined the reversal because this woman cop could not give any articulable grounds for suspicion that these two people were armed. But they were wearing shirts outside of their pants, so she patted them down and of course found a shiv; but we had to reverse it. And I suggested that the decision of the Supreme Court should be changed. Anyway . . . and of course one of my hobby horses which I rode whenever I could was my absolute disgust at the creation of the so-called separate state ground.

Richard McAdams: I noticed what the placemat includes—mostly nonpublished cases, whether they were originally nonpublished or depublished. But there are still published cases that—

Harry Brauer: Yes, the two cases that are in there that deal with this problem are the *San Jose Peace Officers* case and what is it, *People v. Seliah*?

Richard McAdams: Correct.

Harry Brauer: But the state courts have done—

(01:35:02)

Richard McAdams: I can quote you. In one case you're saying, "I must cry out and protest against the separate state ground doctrine."

Harry Brauer: Right. You read some of the stuff and that was one of my more eloquent moments, and I don't why that one wasn't depublished. It must have fallen through the crack.

Richard McAdams: *[Laughing]* Your disagreement with the doctrine? You mentioned—

Harry Brauer: Well, my disagreement is very simple. What the state courts have done—and I'm under the impression that Stanley Mosk actually invented this first, but I could be wrong—is they take the identical language in the state Constitution and the federal Constitution, specifically the due process clause in most instances, and ascribe a different meaning to it, so as to give certain people in the state additional rights and others corresponding disabilities without the slightest historical basis for believing that the drafters of the state Constitution or the people in voting for it intended the identical language to have a different meaning from the federal Constitution from which it was drawn anyway.

And the U.S. Supreme Court has done nothing about it because the U.S. Supreme Court, being a strict constructionist court, accepts that the state highest court is the ultimate determinant of the meaning of the state's Constitution.

Richard McAdams: In the two cases that you had mentioned, you wrote about the irony of how a generation such as yourself from the early 1950s, you described yourself as a generation of idealistic law students
. . .

Harry Brauer: That's right.

Richard McAdams: . . . and were urging that the Fourteenth Amendment encompass the Bill of Rights.

Harry Brauer: Yes, encompass the first 10.

Richard McAdams: And that a citizen in Massachusetts has the same bundle of rights as the citizen of Mississippi. You felt that that was being eroded by this doctrine.

Harry Brauer: Sure, because the irony is that the California Supreme Court, which invests the California Constitution with different meaning in an area where the California Constitution has a provision which is not found in the U.S. Constitution, namely article VI, section 13, which says categorically in effect that a criminal conviction must not be reversed unless a miscarriage of justice has occurred.

The Bird court wrote that provision out of the Constitution, just simply wrote it out. Justice Broussard took the position publicly that there is no such thing as an inconsequential error in a death penalty case. And of course one of my loftiest sarcasms there, which is found in there and also in the book, is where the Supreme Court has held that if a court reporter rereads testimony, a portion of testimony, in the jury room rather than in open court, the absence of any showing that the court reporter read anything that she shouldn't have read or that she used inflections which were prejudicial, that constitutes reversible error.

(01:40:32)

And I said that people reading that must think that then the country of *Erewan*, which is Samuel Butler's book in which the criminals are hospitalized and the sick are prosecuted . . .
[laughing]

Richard McAdams: Another area that you wrote about in a case is a dependency case where you were concerned . . . you wrote a concurring opinion.

Harry Brauer: With *Micah*?

Richard McAdams: With *Micah S.* This is 1988.

Harry Brauer: Well, that's one I am very proud of, and I understand that my concurrence hung in the offices of a lot of Child Protective Service workers throughout the state.

Richard McAdams: You expressed concern about the protection of parental rights was overshadowing the child's best interests.

Harry Brauer: And terribly harmful to the children. And part of that is the result of my experience, as I say in there, that I don't know of a single case where independent counsel was appointed for the child and counsel recommended that the child be returned to the natural parents.

You know, Child Protective Services are badly overworked, so they can only take cognizance of the most extreme cases of abandonment or mistreatment. And you take a child away from the parents and you put them in a foster home or in prospective

adoptive parents' home, and those people are reluctant to bond with the child because they know that the child may be taken away from them.

And of course when you're dealing with young children, as I say in there, as Goldstein says, "to an adult three months doesn't mean anything; to a young child it's a lifetime."

Richard McAdams:

That was almost 20 years ago. And do you think there was a response to your concerns?

Harry Brauer:

I have no idea, but let me tell you about one case that is in the book, that I am still very unhappy about. What I think is the best crafted and most important decision which came down during my tenure on the Sixth District was a case called *Acuson v. Aloka*. The case dealt with the interrelationship between patent law and trade secret law and the effect of reverse engineering.

This was of enormous importance to the burgeoning high-tech industry in Silicon Valley and all over the country because there had been very little written on it. And one of my lawyers and I slaved over that for months. In fact, it's the only case in which I ever convened both of my lawyers, and that was over the placement of a comma. I called Christina in to get her opinion too.

(01:45:00)

Anyway, review was granted and the case was assigned to Justice Eagleson, who turned it over to a lawyer whose entire experience had been in the criminal field. And he misunderstood one point in the opinion and urged that the case be depublished. And because none of the Supreme Court justices, with the possible exception of Chief Lucas, had any experience in this field, they probably paid more attention to what the lawyer said than what they would otherwise would do.

They depublished the case. A petition to reconsider the depublication was filed, and a very high-powered amici filed briefs urging, but they didn't do anything about it. Well, fortunately, the case didn't die—except in the California state system—because it was picked up and published in *U.S. Patent Reporter* and then it was cited in at least one Court of Appeal decision and a number of district court decisions and a great number of law reviews.

I would like to hope that under Ron George this sort of thing doesn't happen, that he would say to the justices, "Hey, when you get something esoteric like this, don't turn it over to a guy who has no experience in that field." And incidentally, I want to say this because I don't want to get somebody into trouble. The source of my information is not a lawyer who is now working for the Supreme Court, but rather a retired justice who has many good qualities, but keeping his mouth shut isn't one of them.
[laughing]

Richard McAdams: And the case you're talking about is in almost mid-1989 when this is going on.

Harry Brauer: Yes, it was one of my last cases.

Richard McAdams: And that, I trust, didn't lead to your retirement; was there a specific reason behind your decision to retire in June of 1989?

Harry Brauer: Well, you know, by then I had been on the bench 29 years, but there was another reason. I felt enormously grateful to Deukmejian for giving me the opportunity to serve on the Court of Appeal in spite of my being a Democrat and having just funneled his side in a major case; and I wanted to give him the opportunity to name my successor because I wouldn't know who his successor was going to be.

I will tell you that I often regretted my decision to leave the bench, even though I of course was making a great deal more money as a private judge. Because of my background in evidence and civil procedure, which I had been teaching all these years, I was quite in demand as a discovery master. And you know, at \$400 an hour portal to portal every time I drove from Santa Cruz to Palo Alto, I had earned \$800 before I did any work.

(01:49:59)

But being on the bench was far more stimulating. And there is also another reason. I found life much more stimulating when I worked with Panelli and Agliano than thereafter. The three of us just would sit around the table, this little round table that Panelli had in his chambers; I don't know whether Rushing still has it.

Working on a case, I would turn to Panelli and I'd say, "Ed, you're full of shit," and he would just look at me and say, "Yeah, tell me why?" Nobody got mad at anybody else. We could say whatever we wanted to and we'd still be good friends.

Well, you have any more questions?

Richard McAdams: I got you to retirement before asking you if there were other notable cases that you'd want to be certain to mention.

Harry Brauer: Were you asking me whether there were other notable cases?

Richard McAdams: Sure. I want to make sure I didn't skip over some other cases that come to mind.

Harry Brauer: Hand me that.

Richard McAdams: *[Laughing]* Well, while you're looking at the placemat I do remember you handling the case arising from the dismissed professor from Stanford.

Harry Brauer: Oh, yes, *Franklin*, that's another one.

Richard McAdams: You wrote a concurring opinion in that one as well that—

Harry Brauer: Yes, and I was thinking of that when I read about this guy Churchill in Colorado, who as I recall . . . well, I think what he actually said is he urged the soldiers in Iraq to kill their officers and things like that; and it was just way, way out.

The Board of Regents of the University in Colorado evidently didn't have the backbone that the people of Stanford did. They have now finally suspended him with pay, but they haven't fired him; and I thought that my concurrence in *Franklin* should be read by them. Because that's another one I'm very fond of. And some of these little quips like the one in *Kahn v.*—

Richard McAdams: So you do use the word "rubbish" on occasion in some of those, I noticed?

Harry Brauer: Yeah, and frankly there are some people on this bench who think that my style was not sufficiently judicious or whatever it is, but it's my style. *[laughing]*

Richard McAdams: You mentioned *Kyle*?

Harry Brauer: No, *Kahn*.

Richard McAdams: *Kahn*, I'm sorry.

Harry Brauer: Yes. "In times such as these, the pursuit of excellence in our institutions of higher learning has educational and social implications of paramount importance. If we abandon the pursuit we lose the objective. The lowering of standards is the ultimate sacrilege against the ascent of man." And in a footnote I say that with apologies to Adam Bronowski, from whom I stole the phrase "ascent of man."

(01:55:04)

One of the center points of my philosophy is that the pursuit of excellence is at the top of my hierarchy of values; and unfortunately so many of our programs and practices are inconsistent with it. Such as, for instance, when we give a scholarship to a less qualified person because he belongs to a certain race, or what to me is the ultimate, ultimate outrage on the other side of the fence: the so-called athletic scholarship, which to me is the ultimate oxymoron. I mean, resources are limited, and for every seven-foot moron who is adept at fluxing a ball into a net and gets a scholarship, there is some little girl or nerd with a big brain who doesn't. To me, this is terrible, but I'm alone. *[laughing]*

Richard McAdams: Your pursuit of excellence just reminds me of our days together in Santa Cruz, very much so. As we've talked about it, you were never viewed as an archconservative in Santa Cruz County, but much has been made over the years, as we touched on earlier, about your disagreement with the California Supreme Court under Rose Bird. And further comments on that? Did you deliver the pithy opinions that you promised?

Harry Brauer: Well, there's one lovely little opinion—it's only four pages long, I think—which did not find its way into your folder. That's *People v. Castro*. It is on my placemat. Ed Panelli, who was then bucking for the Supreme Court, only joined in the judgment, not signed the opinion, but only on condition that it not be published. It met all the criteria for publication, and that's one where I took issue with this idea, which was part of Rose Bird's philosophy, that nothing must interfere with the right of a person to the appellate courts, however unmeritorious the case may be.

You know as well as I do that most of the criminal appeals are devoid of merit. Not all, by any means, but there are an awful lot of lawyers who make a living being appellate lawyers, and obviously they have to file appeals to get their pay.

In some ways, I had a real grudging respect for Rose Bird. Many of her qualities I really admired, even though she did not value those as highly as others. She was a very clear writer.

(02:00:04)

She was a hard worker and she was very intelligent. Those things I admire, but she was also a very vindictive person. I was literally the only Court of Appeal justice who had never been invited to sit with the Supreme Court. She picked muni judges and all sorts of others, but on key issues like redistricting, she made absolutely sure that the person she brought up would be on her side of the fence.

And as soon as Lucas came in, Panelli pointed out to him that I had never sat with the Supreme Court, and I was immediately invited to sit on a particular case. *[laughing]* Well, it was a great time in one's life.

Richard McAdams: Harry, we earlier touched upon your family and now in Arizona; but going back through the chronology, I want to make sure we discuss where Georgia comes into the picture and you come into her life.

Harry Brauer: Well, I can tell you that. I told you I got myself transferred to Letterman Army Hospital and she was a psychiatric social worker, a civilian at Letterman; and I was assigned primarily to do legal aid to soldiers when I was transferred to Letterman.

There was a soldier who had a problem which was both in the legal sphere and in the sphere of social work, so we were supposed to collaborate on a letter; and my idea of collaboration was to say, "Miss Parsons, take a letter." *[laughing]* That was my first contact with Georgia.

Richard McAdams: *[Laughing]* We're both chuckling, because of course we know Georgia.

Harry Brauer: That's right. She had an older brother who is now dead who used to beat up on her when she was a kid, and she has never taken any crap from any male since, and especially not her husband. We're now married 53 years.

We have one child, Holly, and now we have a lovely grandchild who is 10. And as I said at my retirement party, I've had many events in my life that were pleasant, and I've enjoyed prestige and a good reputation, but when it comes right down, the most important thing is that I married Georgia and we have Holly.

Richard McAdams: And congratulations—53 years, and a wonderful family.

Harry Brauer: As you know, in Santa Cruz County, there are not too many people like you and me who are still with their first wives. *[laughing]*

(02:04:59)

Richard McAdams: Sadly true, including the bench and the bar. Obviously, Georgia was a great influence on your life.

Harry Brauer: Well, you know, for 50 years people have always asked her how she could stand that man; and her answer always was, "He's honest." *[laughing]*

Richard McAdams: One adjective—that's a good one to choose. Other influences from the legal world or the outside of the legal world, heroes other than those we've discussed along the way?

Harry Brauer: I can't really think of any.

Richard McAdams: Of interest to many people, when somebody such as yourself has . . . you've been in the legal, you've had a legal career spanning over 50 years; significant changes other than some of the ones we've discussed that you've seen over these 50 years, including shift of attitudes of the public towards the bar, towards the bench?

Harry Brauer: I think one change that has taken place—well, of course, one big change—was that lawyers are allowed to advertise. And incidentally, I've made a point of looking at the phone book of Santa Cruz County and I think there is a direct inverse

relationship between the capacity of the lawyer and the size of his ad. *[laughing]* Most of the really good firms have nothing there.

But there has of course been a tremendous change, which came from the top—and that is the creation of all these additional rights, which have spawned a great deal more litigation.

Another factor is I think the increased rapacity, if you want to put it that way, of the plaintiff's bar. I can't tell you how many cases that I came across either as a judge or later when I was a private judge where lawyers took dead aim at the deep pocket when that deep pocket simply was not the cause of the accident.

I have had many, many cases where insurance companies will pay a significant sum where there is no exposure or very, very little exposure, because you cannot predict what a jury is going to do.

Of course, on the other side you have an awful lot of very marginal lawyers who will take a soft-issue case on the assumption, well, the insurance company is going to pay us \$5,000, \$8,000, \$10,000 anyway to get rid of the risk because it costs more to defend the case. You see an awful lot of that.

Richard McAdams:

Any changes in the public confidence in the judiciary over your career?

Harry Brauer:

My experience with juries is that they pay a great deal of attention to the judge, and that's why the judge has to be very careful not to indicate by means of gestures or facial expressions whom he favors.

(02:10:17)

Because that sort of thing doesn't get into the record, and it does have bearing on what juries do. And I also found them in general to pay attention to judges and to pay attention to their instructions. Of course in most civil cases, as that is in contract cases, the instructions are so abstruse that the verdicts are all over the lot. A criminal case or a personal injury case, the jury understands and they usually come out with the right decision, O. J. Simpson notwithstanding; but in contract cases my experience . . . When I used to settle cases, if it involved a contract case, I would tell the lawyers that you cannot predict what the jury is going to come up with. At least that's been my experience.

You know the law, it goes through cycles. There was a period when I was on the superior court, when jurors, not just in Santa Cruz, were extremely conservative. I think now the pendulum has swung, but that doesn't necessarily mean it will stay in that direction all the time.

Richard McAdams: May I ask you—if you have advice to give—if an attorney were interested in becoming a judge, what advice you would give?

Harry Brauer: You mean how to attain the position?

Richard McAdams: Well—

Harry Brauer: That's the old story. A judge is a lawyer who knows a governor.

Richard McAdams: But the qualities—speaking of the higher ideal—the qualities of a good judge, advice that you received as a judge that impacted on you, let's say a newly appointed judge?

Harry Brauer: Well, the judges whom I regard as really good ones—and there are many of those in Santa Clara County—they come primarily from law firms where they had to work hard, and they did work hard, and they had to have brains to get to where they are.

But you can't generalize. If you look at the Supreme Court justices, some of the best ones had not been lower-court judges; Brandeis, Frankfurter, Whizzer White, and so on; you just can't tell.

Richard McAdams: Well, did anybody give you advice along the way that is striking to you now?

Harry Brauer: Yes.

Richard McAdams: Good advice.

(02:14:55)

Harry Brauer: When I first went on the bench, like every young, idealistic guy, I just worried the hell . . . I just suffered over every decision. And I discussed that with Jimmy Scoppettone, of all people, who was not the brightest bulb in the chandelier, but he had common sense. And he said, "Harry, if the people wanted you to be Jesus Christ they'd pay you more. Do the best you can. Infallibility is not one of the requirements for being a judge. I have made a lot of mistakes, and so has everybody else, I'm sure. Sometimes even the Court of Appeal was right when it reversed me." *[laughing]*

Richard McAdams: Let me literally take another path. I have to ask you about your reputation as an avid hiker and described also as a mountain climber—memorable exploits?

Harry Brauer: Well, I've climbed quite a few 14,000-foot peaks in the Sierras. I have spent every summer except for one, every vacation, in the high country. At the age of 81, I still do a lot of hiking, although the last year or two, I've slowed down. I'm not the man I used to be, but every Saturday I still hike. We start at six because of the heat at this time of year, and that's where I live.

- Richard McAdams: Other hobbies, interests that you've pursued?
- Harry Brauer: The only other hobby you might think is my love for classical music. I'm a real long-hair, mostly chamber music. My collection is 50 percent Bach, and the rest is mostly Mozart, Beethoven, Brahms, and Schubert, mostly chamber music.
- Richard McAdams: Contemporary music?
- Harry Brauer: No, I don't understand it. It doesn't get me there. I'm afraid the world has passed me by in a lot of ways. I don't get some of the jokes, and I try to do crossword puzzles and they ask all the names of actors and movies and so on, and I don't have the slightest clue.
- Richard McAdams: Well, you've been very active, and everybody marvels when I told them we were going to meet and that you were now 81. You have a much younger image. Even when you left this bench in 1989, you continued in active practice, as you said, either as private judging combined with assignments, and then eventually assignments up until fairly recently.
- Harry Brauer: Well, I still take some assignments. The problem is that Georgia developed a very severe case of shingles in her head. She has now had it for six months and the neurologist said that if she's had it for six months there's at least a 50-50 chance that she'll never get rid of it. So that puts some limitation on me. She's paid her dues.
- Richard McAdams: Well, you're still a welcome addition to the courts and particularly in Santa Clara and Santa Cruz.
- Harry Brauer: Yes, I spend most of my time in San Diego when I do take it, and here in Santa Clara. I used to do the discovery calendar when the regular judge was on vacation, but I haven't done it recently because it takes too much time away from home.
- Richard McAdams: Sure. Before closing, are there any areas that we didn't touch on?
- Harry Brauer: I think you've made me bare my soul.
- Richard McAdams: I sure have enjoyed it. How would you like to be remembered? You're so young and active, I don't like to ask you these questions that sound so terminable or something like that; but how would you like to be remembered in terms of your judicial career?
- Harry Brauer: I would like to be remembered as a good judge, that's all I can think of, and a mean SOB. *[laughing]*
- Richard McAdams: I will agree with you on the first part.
- Harry Brauer: As a closing note, when I retired, I went around to all the chambers and said goodbye and Capaccioli said to me, after

telling me how much he had learned from me, he said, "I'm not going to insult you by calling you a nice guy." And that probably was just right. And on that note shall we end it?

Richard McAdams: On that note, I thank you, and a great interview.

Harry Brauer: Thank you.

*Duration: 142 minutes
July 9, 2007*