Betty Richli: By way of information, the disembodied voice you’re hearing is coming from Betty Richli. I’m a retired associate justice from the Fourth District Court of Appeal, Division Two, and we are at that court now in the robing room in Riverside. It’s June 13, 2021, and this is part of an ongoing Appellate Court Legacy Project where we interview those justices who are nearing retirement or who are never going to retire, but are of an age.

Art McKinster: A certain age.

Betty Richli: It’s delightful to be here. I also want to make a modest disclosure that the interview today is with Justice McKinster, and the modest disclosure is that I have known Justice Art McKinster for well over 40 years. We were colleagues together in the District Attorney’s office. He became a municipal court judge, I followed him. He became a superior court judge, I followed him. He became an appellate court judge, and once again, I followed him.

He’s been a dear friend. His family, I consider part of my family. In fact, I performed the marriage ceremony for his eldest daughter. And we have been great colleagues for well over 40 years.

Art McKinster: Yeah.

Betty Richli: So it’s a delight to be here to interview you today.

Art McKinster: And I’m so pleased that you agreed to do this. I can’t think of anyone else that I would rather have do this because our career paths have been so similar, and we have been good friends, and I guess that leads to the collegiality, the importance of collegiality, and how well we have gotten along. So I want to thank you for doing this for me.

Betty Richli: Well, it’s been fun and it’s a pleasure. Well, we’re going to start, as I mentioned with Justice Ramirez earlier today, we’re going to do a Dickens approach and we’re going to go back to your beginning, as in David Copperfield.

Art McKinster: Okay.

Betty Richli: And if you could give us, I know that you’re not a native Californian. Many of the judges and justices in this state were born here, but you come from Oklahoma, and if you could give us a little bit of a biographical sketch.

Art McKinster: All right. Well, you are the sum total of your life experience. And my mom used to have a saying that the hand that rocks the cradle rules the world. So your family is really important in your formative years and help create your values and your views on life. I was born in Okmulgee, Oklahoma, which is near Muskogee. If you’ll recall, Ray Craig from our public defender days was from Muskogee, and it’s reminiscent of that song. And so it’s kind of unusual to have someone coming really from the heartland.

My mother was the seventh of 10 children. My dad was—I’m not sure where he was in the lineup—but he was one of 12 and when his mother passed, there were four more. So your parents like mine were of that greatest generation that Tom Brokaw wrote about. And they lived through a depression. And then they went off to fight Nazis. And they had a tough time, but no one ever really complained. If you asked what were the times like? All they would ever say is “tough times.”

And so my dad had wanted to be an electrical engineer, but he had to drop out of the University of Colorado for the want of 100 bucks. And so I think part of the formative years, it was never if you go to college, it’s when you go to college.

My mother was a housewife, a homemaker, I guess we call them now. I had two older brothers who have passed now. My older brother was the first to go to college, and he was sort of leader by example. We talked about mentors, and I really think that the best mentors are just people who inspire you and lead by example. So it was just natural as the little brother, my brother was 12 almost 13 years older than I was, that he got married when he was 19, went to the University of Redlands but he had to go to San Bernardino Valley College. And then he went to Johns Hopkins for a year for his dental school after he graduated from the University of Redlands, came back to Loma Linda to finish there.

I offer that in part because you have an older brother who is also a dentist and very similar backgrounds.

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They both loved to hunt and fish: I did not get that gene. I enjoyed fishing, but I didn’t do that.

So I grew up in San Bernardino. My folks after the war, my dad came home from the war. That was 1945. I was born in the summer of 46 at the leading edge of the baby boom. But my formative years were all here in the Inland Empire. Our court services three counties: Inyo, San Bernardino, and Riverside Counties.

I started kindergarten all the way through high school. I went to Pacific High School. One of the things that our presiding justice innovated was taking the court to high school. And I know that a number of our colleagues claimed that they were the first, but that is not correct. Manuel Ramirez decided that we would hold court at various high schools both in Riverside County and others. And then one day, he picked Pacific High, which is where I graduated from, and both my daughters graduated from.

It was sort of interesting to go back. And you see that the demographics have changed a lot since I was there. And so, we see a lot of Hispanic kids, minority kids, and it was kind of fun going back. Manuel sprung something on me where “he would like to say a few things to you.” And I was like, what am I going to say? And I looked at the kids. I said I was a working class kid who was able to do something, and I sort of offered that. And my wife went to Pacific High School. She was two years behind, but I did not know her. It was one of those … in California we had the largest graduating class for three years running in the whole state. So even in your own class there were 1,000 people, you didn’t know everyone. So we’ve done that, and I’m still very much a product of the Inland Empire. And that’s part of my DNA.

Betty Richli: What led you to college? Where did you go to college? And then finally, to law school? And your wife, Della, is one of the most refined, elegant, talented ladies I have ever met. And tell us in that context of high school and college and law school, when you and Della met and got married.

Art McKinster: My dad was a self-employed electrician and my big brother, who became the dentist, went to Valley College. We called them junior colleges; we call them community colleges now. And I was told very early on that I needed to do that, that the help would come for the final two years. And so I spent two years at Valley College, which was the only college in the area. Chaffey was here, and the college in Redlands was not there then. So, it was the only show in town.

I felt a little cheated, I’ll be honest, because a lot of my friends were going off to four-year schools and doing that, and I did have buddies that that were in the same boat I was. They were blue collar kids and we were at Valley College together. And then a couple of us for the final two years went to Los Angeles. I was going to go to UCLA, and I switched at the last minute because this was the Vietnam War time.

Betty Richli: And where did you end up going?

Art McKinster: I went to USC.

Betty Richli: Yeah, so.

Art McKinster: Gone to major in business administration. I always admire all these kids that say I knew from six years old I wanted to be a doctor or I wanted to be an architect, I wanted to be a veterinarian. I never knew what I wanted to be. All I knew was that there were times that sometimes it was hard. My dad and the business, the money would come in sometimes and it wouldn’t others, and I thought that I wanted some stability, and I think every generation wants their kids to do better than they did. And so I thought, well, I’ll major in business administration and I switched to USC because during the Vietnam War the academic senate voted and they said that business administration was not worthy of the University of California and they terminated it, and it was going to terminate when I was supposed to graduate. And I was naïve, I thought, what if I got behind, how would I ever do this? So I scrambled and I said, well, what else? So, there was USC, which has a good business school and a good graduate business school, and so I switched to that.

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But I had to tell my parents something, very bad news, that USC had changed its tuition. It had raised it.

Betty Richli: Of course, USC is private and UCLA is a public institution.

Art McKinster: Yes, and the tuition was going to go on semester basis from $500 to $600, which was actually a pretty huge issue. So, I wound up going to USC, graduating. I applied to the UCLA School of Business, Anderson School of Business, and was accepted. And as a lark, I decided that I would apply to law school. My brother who was a man about town, the dentist, I asked him, “What’s a good law school?” So, he conferred with some of his drinking buddies at Porter’s, and you know where Porter’s is.

Betty Richli: Yeah.

Art McKinster: It was across the street from …

Betty Richli: The courthouse in San Bernardino.

Art McKinster: The courthouse. Kind of an infamous place in many ways. So, a lot of attorneys, when they’re waiting for jury verdicts, would go there. When the jury was out, they would have to call them at the bar to bring them back. I avoided the place like the plague. He said, “Well, some of the folks that I know all went to Hastings. It’s a good school.” So I applied to Hastings strictly on a lark and was accepted and then I had to make a decision. I think life is filled with Ys in the road and sometimes you don’t recognize them, and it makes a fundamental difference. I think I could’ve been very happy in business with an MBA, but I thought in many ways my personality was better suited to being a lawyer, and so I went to Hastings.

Betty Richli: Of course, when you went to Hastings, that was the golden era of Hastings. It was one of the top law schools in the nation.

Art McKinster: Yes.

Betty Richli: And in fact, one of your to-be colleagues, Tom Hollenhorst, was one of your classmates. Is that correct?

Art McKinster: Yes, he was. And Tom—we’ll get that as we go to other questions that they want to put to us—but yeah, Tom and I were classmates. He was married at the time, so we weren’t real close but we had classes together. I think the single students had a different lifestyle then. We all had our nose to the grindstone, but I think that the married students in particular were going a different way.

Betty Richli: Do you remember when you were at Hastings, were there any of the professors there, because that was when Prosser was teaching there, that influenced you or you felt sort of embedded in you a grain of legal or judicial philosophy in retrospect as you look back on it?

Art McKinster: Well, they were all characters. At that time, there was something called the 65 Club, and it was from a time when there were mandatory retirement ages. And a lot of these folks were required to retire at 65, and it’s only a number. Age is only a number. You can be old at 65, you can be young at 65. And yes, Bill Prosser, who was a luminary and still is, a well-known name in torts; Professor Powell in real property; Rollin Perkins, a giant in criminal law; and Roger Traynor who was forced to retire as a Supreme Court Justice. Our colleague, Doug McDaniel, was forced to retire, stayed on as an assigned judge, and I got his seat because of his forced retirement. But the school benefited from these brilliant minds that were forced to retire.

Betty Richli: And went to teach at Hastings.

Art McKinster: And they went to teach and that really was the golden age of Hastings. I don’t think its reputation is as good as it used to be. But I’d tell people when I was in DA, I was taught criminal procedure by Roger Traynor. And he was a genius because he was a forerunner of many of the landmark criminal justice cases in front of the Supreme Court. And he was little miffed by that, because he would say “they said I anticipated them,” and big egos on all of these people, justifiably so.

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And it’s just a wonderful education, and a great city but a terrible city to be poor in. It is terrible to be a poor student in San Francisco. It’s such a great city.

Betty Richli: Did you feel that any of these people had a lasting influence on your legal career?

Art McKinster: Well, they were pragmatic types and that’s one of the things that I learned. One of the things, “Yeah, I’ll go to law school. It’s great because there are clear cut answers to everything. Everything is black and white.”

Betty Richli: You were naïve, weren’t you?

Art McKinster: It’s one of those a priori kinds of things. The people think one thing and you’re smart and you think you got it figured out. And then when you have the experience, it’s all a posteriori, and the law is about 10 percent black, 10 percent white, and there’s just this huge gray area. The margins were probably better than that, but if you think you’re going into law because there are solid answers, you got another thing coming.

Betty Richli: Of all of those names that you’ve mentioned, does anyone of them particularly stick out in your mind as more memorable than the others?

Art McKinster: Bill Prosser.

Betty Richli: Why was that?

Art McKinster: He was a wild man.

Betty Richli: In what respect that you can tell us on tape?

Art McKinster: He was something of misogynist. When I went to law school, there were hardly any women in that class. That was 1968. The war in Vietnam was full blown, and we had all the other horrible things that had happened. Assassinations of presidents, of Martin Luther King. Two months later, Bobby Kennedy. And even on the other side of the spectrum, George Wallace was put in a wheelchair by being shot. They were just really terrible times of war protest and all of these things that were there. But Wild Bill was his nickname.

Betty Richli: Was he referred to by the students as Wild Bill?

Art McKinster: Yes. And he resented women being there, and he was not the only one. The attitude was that you’re taking the place of a man who will have to support a family, and that the women somehow were dilatants. And as soon as the babies came, they would not be doing that. And it’s just so anathema to how we think today, but they were gentlemen of their time, and that’s simply the way it was. And we always were trying to rip things out of context. And as awful as that sounds, it was a pragmatic kind of thing.

Betty Richli: So, even the icon of torts had his flaws?

Art McKinster: Oh gosh. I have a story, but I can’t repeat it.

Betty Richli: Okay. We won’t, Art.

Art McKinster: Where he called out some young lady and it was the kind of thing that would get you fired today. But a brilliant guy who would not suffer fools lightly. The Socratic method in their hands. Rollin Perkins was an absolute sweetheart teddy bear. If you answered something wrong, he would laugh and correct you. But if you did it in front of Prosser, it was like having someone in front of the company and having your sword broken or your epaulets ripped off, and you were just to be reduced to nothing. And I had problems learning from him partly because of that. He was kind of a mean-spirited guy, but brilliant. Mean-spirited but brilliant. Rollin Perkins was the complete polar opposite.

Betty Richli: Yeah. When you graduated from law school, did you go directly into the district attorney’s office?

Art McKinster: No, I did not, because I thought no. I always say I was an accidental lawyer, and I was an accidental judge. I thought, well, I would use my business degree, which was really kind of a silly thought and that I would want to do business law. So, probably related, I did not intern with anyone, I did not clerk with anyone, and I did not look for a job while I was in law school. And the reason for it was I alluded that the Vietnam War was in progress.

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And for the time that I was in college, the first four years, I had a deferment. Once you were in graduate school, you did not have a deferment. And so towards the end of my first year, my brother came up to San Francisco with a lady friend of the moment and told me he had a patient who was on the draft board. And he says, “You’re going to get drafted in the next couple of months.” Oh God, everyone hated the war, it was such a terrible war. It really had no support at all. And I thought I really want to stay in school, how can I stay in school and I’ll defer this because I was terrified that if I got out, I would never come back. And I hit on joining ROTC at Berkeley, and so I joined ROTC at Berkeley.

Betty Richli: An oxymoron.

Art McKinster: Well, we can go on and on. Anyway, I joined and I looked at the air force, I looked the navy, and I looked at the army. And the air force wanted me for four years, the navy wanted me for three, and the army wanted me for two after I graduated. And so, sign me up for two. So I would go twice a week on Tuesdays and Thursdays. I would have to ride across the bridge, while I’m doing all this other stuff, and take military science classes.

Betty Richli: So after you graduated then you were in the army for two years?

Art McKinster: Well, that’s what I thought. And that’s why you asked what did I do?

Betty Richli: Yeah, what did you do?

Art McKinster: Well, it’s long way around to get there as I am wont to do because when everyone else was working at a law firm and trying to get attention so they can get jobs and stuff, that was not open to me because they were not interested in hiring someone to work at a law firm when you were going to be gone for two years. They did not want to expend that time or effort. So I did not do that and that was not a path open for me.

In about six weeks before I graduated, we had so many second lieutenants coming out that the Army couldn’t use them all. And so I was given an option of, you can go in for two years if you want, and I was in field artillery, that was my branch. The life expectancy of field artillery officers, if you were a forward observer, is not very good because you’re going out and calling in artillery to fire on other people. However, they’re listening to radio signals and if they triangulate on you, they can pinpoint you. So if you’re doing this, a fire mission, you’re calling it. If you called in, you’ve got a book. You’ve got to get the hell out of there because while you’re calling in fire, someone could be calling in fire on you.

So, it’s a dangerous job and I thought okay, I’ve got to go and take the six-year option. That was door number three that if I wanted to go in the army reserve, I could do that, and it was a six-year commitment, and two weeks during the summer. That’s how we got there.

Your original question was did I go in the DA’s office directly, and I did not. What I did is I took the bar in August, it was a late bar then. I was the last group that did not do a multistate. That would be the following year. And then I had to go do my officer basic in Fort Sill, Oklahoma—returned to my roots. Actually, the bar results came out while I was back there, which is another fun story. But when I was done with all that and came back home, I had to go from scratch. I didn’t stay in San Francisco. I came home, and basically I was just putting out cold feelers.

Betty Richli: With law firms?

Art McKinster: Yes. I went to work for a law firm in San Bernardino, which is a very good business firm, very well-known. It later merged and became … it still exists in name. It became Reid & Hellyer but it was Surr and Hellyer when I joined it, and it was the most miserable experience of my life.

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I absolutely hated it. I told my mom that I didn’t like the people that I worked with, I did not like the clients, and I thought I had made a huge mistake. I told my mom that and I felt really down. And so, I said, well, what am I going to do with myself? Should I go back to the business school or should I use my law degree in that way and, on a lark, the DA was wanting to hire some people. And I thought, I was the kid in class that hated to get up and recite, and I still don’t like doing speeches. I could do a lot of things, I’m good extemporaneously, but I hate giving speeches. I don’t like the time put into it. I don’t like teaching because I find it stressful. You have to put so … you’re a teacher! All the time that you put in outside, and is this still going to be good enough?

So I thought, okay, I will do this. I went over and I was interviewed by Lowell Lathrop. I don’t know whether you were around for Lowell or not. You’re probably Jim Cramer, right?

Betty Richli: I was, yeah.

Art McKinster: Yeah, who succeeded Lowell Lathrop who had been in office for years, and Katie Pike and Clark Hansen went through an interview and that was on … I think I did that on a Wednesday, I quit on a Friday, and I was hired the following Tuesday.

You mentioned my wife, and I always circle back, I remember the question. So, my wife and I, so I was hired but they would not bring me onboard for almost six weeks. Part of it was because I had my two-week summer military requirement, the annual training. So, they didn’t want to bring me on because they would have to pay for me. And so, one of my best friends from, well, actually, he’s still my best friend, but I had so many friends, had married my wife’s best friend. But when they got married, I didn’t know Cindy. I was studying for the bar, and I could not fly down to San Diego where they got married.

So I went to see my buddy Bill after I got home from officer basic and met his wife for the first time. I apologized that I literally didn’t have two nickels to rub together for the flight, and it was in the middle of studying for the bar. She was asking me different things and if I had a girlfriend. I said no, but if you know anybody that you think … well, being the good friend that she is, she set me up with her best friend.

Betty Richli: And the rest is history.

Art McKinster: The rest is history. Well, the weird part is Bill was absolutely against it. He said no, this is terrible. They have nothing in common among other things. And we went to the drive-in movies and we saw The Godfather, the original Godfather. And I thought, when I finally saw her, man, she’s really pretty. And you know our colleagues here, Mark Gott, Jim Ward, and all this, we always made jokes. We were always so collegial and we did things as a group. We had so many … we went to dinners, had fun times together. We all decided that we had all married up and that’s the way I feel about that. I married up.

And the terrible part was the two people in the back, they’re looking. And so you’re not really in a position to talk or do a lot of things. So we got done, Della was teaching in Long Beach. She’s a special ed teacher. They got Bill the following week and she was coming back, and Bill called me and says, “Bebop (which is my nickname that he gave me), do you want to mess around?” I thought, what? This is like we’re in seventh grade. It’s what we would say. I said, “Sure. What do you want to do?” “Well, come over the house. We’re going to do such and such.” And they arranged to have Della, just happened to drop by and all this stuff. So, I asked her out and a year later we were married.

Betty Richli: So by then you were well ensconced in the district attorney’s office. What were some of the positions you held there?

Art McKinster: You always start out in the misdemeanors and the municipal court, which doesn’t exist. Again, I will probably circle back to that. And a lot of it sounds kind of mundane. It’s a lot of a drunk driving cases, but you remember Clark Hansen. Clark was an unusual kind of guy. We were not totally sympatico, but he was a mentor type in that I learned a lot from him.

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And one of the things that he always talked about, drunk driving, which in those days was kind of a “boys will be boys and girls will be girls.” You might remember that it was not treated as seriously, we didn’t even ask for jail time until the third drunk driving and if you tried that there would such a push back, no one would’ve done that but Clark taught me. He said, you know, try as many duces drunk driving as you can because it’s going to be a great tune-up for going to superior court when you try felonies, because you try, with every drunk driving case there’s every kind of evidence you could possibly want: direct evidence, circumstantial evidence, expert opinion testimony, and tactical testimony with analysts, and everyone says you can do this in about two days, and he was absolutely right. That kind of a training is a great way to get you ready to go on to bigger things.

Betty Richli: You became an administrator in the DA’s office.

Art McKinster: Yeah, you do misdemeanors, and then you do felonies, and everything that the cat can drag in. I mean, just from homicides to commercial burglaries and yes, and that I think about … can’t remember, they made me a supervising DA, and they put me in charge of the central courts, the municipal courts, and I also had four or five justice courts, which don’t even exist today.

Betty Richli: That’s right.

Art McKinster: That’s another thing we can come back to, what have we seen and how things have changed, but a huge county, San Bernardino’s absolutely a huge county. You can drop three or four states, the smaller states, into the county.

Betty Richli: Yeah, I was told when I joined the office it was the largest county in the world.

Art McKinster: Yeah, certainly in the United States.

Betty Richli: And certainly in the United States.

Art McKinster: Yeah, and I thought that Alaska would be different but no. We were in … there are funny stories just dealing with how you would staff a county that went all the way from 30 miles from LA.

Betty Richli: To Needles.

Art McKinster: To Needles or on the border and all the way to Nevada and it’s just a huge, huge county and trying to … all these outlying courts especially justice courts and that’s it. A funny story all into itself, but I did that and I think from there, I went, they created a new chief deputy spot and there were three and the way the county was set up, it was divided geographically into thirds, and the central was San Bernardino and surroundings, there’s the high desert which really is probably 70 percent of the county and then there was the west end as we called it, which is Ontario, Rancho Cucamonga, and it is the western part of the county that abuts Los Angeles, Orange County, and Riverside, and they were having a problem with the chief deputy was there, and he was very close to the DA at that time, and they had to effectively find a place for him because there were some problems, and I’ve always said most problems aren’t competency problems, they are people problems. And so, they created a chief deputy spot and it’s supposed to be open and promotional. Everyone can apply. But the district attorney came in and I was working on something and he told me, “You know, we’re opening up the spot.” And he said, “You will apply.” I said okay, and I think they went through some motions, but I got that position. A mutual friend, this assistant DA, which was Rex Victor, also a mentor type of person. I think you would probably say that also, not so much because he took us under his wing but he led by example, which is the best kind of mentoring, I think. And I was then plunging into the deep end of the pool because I had never been in Ontario, which was where the court was located, and we were in trailers, you remember that? They’d outgrown the courthouse and we were in trailers, and they just kept expanding the trailers. We had nine trailers that were all interconnected in the parking lot, and I’d never served there, and it was like kind of an unknown entity for everybody.

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Betty Richli: How long were you there?

Art McKinster: I was there five years when I was tapped to go on the bench.

Betty Richli: Yeah, and our next segue is, so you spent how many years in the district attorney’s office, total?

Art McKinster: 11and a half.

Betty Richli: Okay, and in 1984, did you join the bench or was it 1983, city court?

Art McKinster: I think it was March of ’84.

Betty Richli: Okay.

Art McKinster: I think I just becoming 37, or 37 going on 38.

Betty Richli: Okay.

Art McKinster: But I had a four-year old and a 2 and a half year old.

Betty Richli: And you sat in the municipal court how many years?

Art McKinster: It’s embarrassing.

Betty Richli: Three?

Art McKinster: Oh no, it was, I sat I think 16 months.

Betty Richli: And then you were elevated to the superior court? And back then, there was no grandfathering in from municipal court to superior court like there is now, if any of those judges left.

Art McKinster: Yeah.

Betty Richli: You were appointed for each specific position.

Art McKinster: Yes.

Betty Richli: So, you were appointed for a municipal court by Governor Deukmejian and then appointed, elevated by him to the superior court.

Art McKinster: Yes.

Betty Richli: And how long were you in the superior court?

Art McKinster: Superior court, just about five, maybe five and a half years. I was 42 when I came there.

Betty Richli: All right. And then, Governor Deukmejian, again, then elevated you to the appellate court?

Art McKinster: Yes.

Betty Richli: Now, you have been on the appellate court 31 years.

Art McKinster: Almost.

Betty Richli: And like so many of us of that same vintage, you had 10 years or so on the lower courts, so you have almost four decades. I hate to … but almost four decades.

Art McKinster: But who’s counting?

Betty Richli: Of court experience and do you believe that now as you’ve spent the majority of that four decades on the appellate court, 31 years on the appellate court, do you believe that the trial court experience was beneficial to you in terms of sitting on the appellate court and in making some of the decisions that you’ve had to make on the appellate court?

Art McKinster: Oh, sure. One of the, and then we come back to a priori and a posteriori, what you think about something beforehand and something after you’ve had your experience, and I just think that it would … intellectually you can do anything. If you’re bright enough intellectually, you can do anything.

Betty Richli: So the academicians tell us.

Art McKinster: Yes. But frequently, it’s good to have walked in someone else’s shoes and I think when we get the *Daily Journal* articles that come out periodically, they do a profile of you and they’ll make some sort of a comment and once they’ve done in the past, I would say that the court in my experience shows and that I’m always asking questions. If we’re proposing a new rule or something, what’s the effect going to be on the lawyers, what’s the effect going to be on the judges? And I just think, intellectually, anyone can think about jury selection and all these things. But if you haven’t done it, you don’t see it in the same light that someone who has done that. And I think it’s important to have done it both as a trial lawyer, as you and I did, and then again as a judge. It just gives you a different perspective. It’s not just an academic, hypothetical kind of thing, it brings it really home, and I think it’s a blind spot. I know that some of our Supreme Court justices have never really tried a case, and we get sent to the Supreme Court periodically, and I’ve done that three times now and its always kind of fun. But they just have a different outlook, and a lot of those just left the Jerry Brown era where these are all Yale graduates and a highly qualified academic group of people; there’s a different approach I think. I think there’s something to be said for a blue collar kid who worked hard and is fairly smart, and has had some experiences with other people.

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Art McKinster: You can learn from those people.

Betty Richli: So, the trial court gives you a different perspective, but it also to some degree influences you in your decisionmaking?

Art McKinster: Oh, sure. No, I’m always thinking if we’re coming up with a rule, how is a judge going to handle this, what’s the effect on the lawyers and others, I think if it’s from an academic, so be it, so let it be done. They wave the magic wand.

Betty Richli: Of the three courts that you have participated in as a bench officer, which has been the most pleasurable experience?

Art McKinster: They’ve all been fun but for different reasons. Our good friend, Rex Victor, who is very outspoken, he doesn’t care. He’ll always speak his mind. He said, “I don’t care what I say.” And he’s a wonderful, revered judge because you can’t give me a job that I won’t like. So if the PJ says, “I don’t have time for you because I don’t like whatever. I’ll send you here.” He will make a (00:41:15) eliminate our limits and I feel kind of like that. You can’t give me a job that I don’t like. I may be terrified because I’ve never had the experience. When I went to juvenile court, I had skipped … they usually try to rotate you to juvenile at least for the delinquency side before they move you up to superior court, and I was moved up really quickly, and he said, “We’re not going to have that luxury, we need you now.” So, when I was first sent to dependency courts, oh God, I wish I’d had that opportunity because the nomenclature is really different but some of the fundamentals are the same, but we call them different things. It’s a challenge and you come up to the challenge but you’re terrified when you’re doing it. I think we had a conversation about we were both kind of nervous about doing this, and I never went to trial without really having terrible butterflies. You prepare, and you prepare, and you prepare but you and I know when we were doing cases, there was no right to discovery in the DA; there are now. And so it was trial by ambush. In order to try your case. Well, how are they going to defend this? What are you thinking? It made you a better lawyer because you started becoming a savant, and it was rare when you couldn’t figure what the defense is going to be. And so, we have all these wonderful experiences, and you can’t give me one that I just wouldn’t like.

Betty Richli: Do you feel that there are more challenges in terms of legal acumen, decisionmaking? Are you more aware of the impact of your decisions at the appellate level versus at the … not to demean in any way the trial court level from the appellate court?

Art McKinster: Yeah, but it’s a fundamentally different thing. People ask me, what do you do? They don’t know how does a justice vary from a judge: “Well, it’s just a fancier term.”

Betty Richli: But it’s not. There are distinct differences.

Art McKinster: No, it is not. Because on the trial bench, you’re primarily doing jury trials and you’re basically seeing a rough array and trying to keep a lid on everything, keep everyone aligned because everyone is sort of jockeying to see what they can get away with, and you are making calls on evidence. It was rare to have a bench trial, certainly in adult court, not in delinquency. There are no juries and so you’re making those decisions yourself. So, you’re not really a decisionmaker on the trial court, you’re more or less a traffic cop cum referee. You see all the stuff but when we get to this level, and I always tell people, what do you do? I said, “Well we don’t do juries now.” They seemed surprised and I said I’m only actually on the bench a couple of times a month, and they seem … [are you] lazy? What are you doing? And I always tell them, you’ve been to jury service, you see what’s going on there and when you get to where we are, we are doing autopsies on everything that occurred down there. When someone is unhappy, criminals could appeal as a matter of right, civil suits, it’s their choice to decide if they want to pursue all of this stuff.

00:45:08

And there’s a feeling that somehow, we can do whatever we want to do, it’s de novo. We start anew, everything gets pushed to the side and we can do whatever we want to do and obviously unless the issue is purely legal, it’s not de novo and so we have to use these various standards of review and how we approach something. And frequently, you’ll look at a case and I’ll see a criminal case, my god, how did the DA ever get a conviction in this case? And it may not have been a decision and of course you don’t get to see the … you’re looking at cold records. You’re not looking at the witnesses that have testified, you don’t get all the benefit, all the little things that tend to tell you this seems true, this doesn’t seem true or they’re giant whoppers, it doesn’t come through in black and white. Sometimes it does. You can tell they’re just lying but because of the standards of review, substantial evidence, and those things, if there’s evidence going both ways, we’re required to accept the facts as a trier of fact found them and that’s the jury. So, in that sense, it’s totally different. It’s we’re looking for error, or as Tom Hollenhorst, another great mentor, said, “We are an error correcting court. We are not writing for the ages, we’re not going to have a *Roe v. Wade* or a *Plessy v. Ferguson*, or some blockbuster case that everyone would know.” We’re primarily here to correct errors and that’s essentially what we do but it’s fundamentally different. But the experience both as a trial attorney and as a judge makes the job easier.

Betty Richli: Do you feel when we touched on this briefly, when you were in the district attorney’s office, you’re working on a team, there’s an esprit de corps. Do you feel and when you’re on the muni court bench and when you’re on the trial bench, the superior court bench, you’re more like an independent contractor. You talk to your colleagues but you’re there in the courtroom, you’re the one who’s making the calls on all of the issues that come in front of you. You don’t get to talk to somebody else about what to do but at the Court of Appeal, it requires three people on each case. How does collegiality affect that issue?

Art McKinster: Oh, it’s critical. It’s really critical. If we were on the bench, you’re the king of your domain. You get to make your own …

Betty Richli: You’re talking about the trial courts?

Art McKinster: Yeah. In muni court, the superior court, I’m reminded of a colleague, we both love him, former accountant, (00:47:52), we won’t mention the name, wonderful person but a terrible handwringer. You know who I’m referring to. Wonderful guy and it’s like dammit just pull the trigger, and one of the things you could do at a court if you had a tough decision, it’s not against the canons to sort of say, well, I’m working on this, I’m working on that. You can bounce ideas off and get some other ideas but how would you skin this cat or do it … but ultimately, it’s you. You make that decision, and you own it because someone can appeal it. But here, you’ve got to work in panels of three. And you always want to get three votes if you can get three votes, and I always look back to our time together and the folks that we worked with, and it’s really a golden age. The collegiality. We would dissent from time to time and most dissents are normally takeovers. I’m trying to … in preparing this, when do you dissent? I said, well, usually it’s when somebody took my case from me because we could not agree and I think it is so important, you know, you have natural rapports with people. You and I are like that. Manuel and I, the PJ, are like that. We’ve had just some really terrific colleagues like Bart, who came from private practice from Best, Best and Krieger, just a really great mind, the Order of the Coif at Stanford, but just had the common touch and just a great person to work with. Jim Ward, we all enjoyed each other so much. We did things, we went to … oh, heavens yes. And all of that.

Betty Richli: We were talking about collegiality, and you were mentioning the icon of collegiality, of course Jim Ward.

Art McKinster: Jim Ward, yes. And I mentioned that was sort of a golden age for us. And I think … things that we did.

00:50:01

Betty Richli: Off the bench?

Art McKinster: Yeah, oh gosh, the wives, the spouses were terrific people. We all got along. We enjoyed each other’s company, trips to the Getty. Manuel would arrange all these field trips. And the most fun one of all. One of the funnest things I’ve ever done is our trip for we got to go on the distinguished visitors program, where we got to fly in and land on the Carl Vinson, and we spent two days on that, and we had the best time.

Betty Richli: As I recall, this was right before 9/11 and we, the USS Carl Vinson was a nuclear-powered aircraft carrier.

Art McKinster: Yes.

Betty Richli: And it had 5,000 people on board.

Art McKinster: It’s a city.

Betty Richli: We slept overnight in the –

Art McKinster: I bunked with …

Betty Richli: I bunked away from you guys in the women’s section.

Art McKinster: Well, you were the only female. It was really funny, all the guys showed up in Levi’s and tennis shoes. You, the elegant person, the icon of fashion and good taste. I don’t know anyone who has better taste than Betty Richli. And I recall, I don’t know whether it was from Saks or somewhere but you’d gotten a quasi-military look.

(00:51:33)

Betty Richli: I was color coordinated.

Art McKinster: It was kind of a jumpsuit kind of thing, looking vaguely military, but I think it was olive green if I remember correctly. Do you remember this? Well, we had to go to places. I remember one place. Remember the night, they were doing …

Betty Richli: Night landings.

Art McKinster: Night landings and they had the very attractive female major who was sharp as a tack, gosh, she was a sharp troop and she had the ball, which was there as …

Betty Richli: They call it calling the ball when flights come in at night to land.

Art McKinster: And come in. We had if you remember, we were off to the edge, you look down, and we were like 14 feet. You can see water …

(00:52:19)

Betty Richli: Well, we were 50 to 100 feet above the ocean because it was 10 stories.

Art McKinster: It was, but they had to move us, but we had to climb over some stuff, you recall that?

Betty Richli: Yes, you rolled me onto the tarmac.

Art McKinster: I did, it was like, it was so funny. But when you got up because I said, “Betty I’m just going to have to give you a shove.” And I just gave you a shove, and you were kind of rolling around and you got up in this beautiful outfit.

Betty Richli: Covered in tar.

Art McKinster: Was covered in tar. Absolutely covered in tar. I never asked you whether you tried to have that dry cleaned.

Betty Richli: Oh no, it went in the garbage.

Art McKinster: I was going to say I always told everyone she had to burn that because it was utterly hopeless. But that was the kind of group that we had, and it made, I think, we could work out most of our differences.

Betty Richli: But we still had dissents and there was.

Art McKinster: Yes, there were. In fact, I just had a case.

Betty Richli: About that.

(00:53:24)

Art McKinster: Had a Franklin issue and it was actually the prior opinion. It was a takeover from me. You and Manuel took it over from me on a Franklin issue. Happily, you guys got reversed by the Supreme Court. So, it went on a very picky little, it was when you gotthe juvenile got his hearing, does he get it immediately, or does he give it more towards his parole period? And these were people that were youngsters that were sentenced to effectively life imprisonment for horrible crimes. And I took the position, though, that it should happen now while it’s fresh. You guys took a different view, perfectly reasonable and someone has to resolve it, and that’s what the Supreme Court is there to do. But it makes those kinds of decisions easier because we don’t take it personally. It provides the lubricant.

Betty Richli: Yeah, it’s never gotten in the way of the friendships.

Art McKinster: Right and it was never taken personally.

Betty Richli: And the collegiality.

Art McKinster: And that’s not always the case. That’s not always the case, sometimes it can be done in ways that harm relationships or impede establishing a relationship. And I think that to the extent people get along just on a friendly level, even if you’re totally different people, there are ways. I remember a colleague who left that was sort of a challenge. But we could connect on other ways and for him it was sports.

00:55:00

We would always talk sports, and that would sort of smooth things over where we were like this on different issues. But it’s absolutely critical. I don’t understand why people would not want to establish a working relationship like that.

Betty Richli: Yeah, it seems as though collegiality really is the linchpin of so many good things that can come out of the justice system and particularly at the Courts of Appeal where you have to work by consensus.

Art McKinster: Yes, and you really do want to get three, if you can. And you can wound with the word far more than you can with a cudgel.

Betty Richli: That’s right.

Art McKinster: And the manner in which you disagree is very important. And we never had that problem. And typically when there are problems, it’s because of issues like that. I think it’s just a critical mistake for people not to develop a really good working relationship. You have natural rapport with some people, and you can always find some point of rapport with people that are much different that you would not normally have a natural rapport with. This thing if I’m going to sit in my ivory tower and I just want to communicate in writing, that’s not a good way to proceed. It’s just not.

Betty Richli: In the number of years you spent on the Court of Appeal, 30 years, you’ve had worked with a number of great staff. Have you found that to be rewarding? Challenging? What impact does that have on you in terms of how you make the decision? Because you are making the decisions on the cases but yet you have to work with staff in terms of what they’re doing, some of the research on the cases. And do you talk to your staff? Do you get their opinions on issues? Particularly if it’s an gnarly issue. How do you deal with the vicissitudes of working with staff?

Art McKinster: Yeah, that kind of gets into how the process and every chamber has a little bit different process. I feel like I have been blessed. I’ve had good JAs. My first one was a little unusual.

Betty Richli: The JA, judicial assistant.

Art McKinster: Yes.

Betty Richli: Years ago, they were legal secretaries.

Art McKinster: They were secretaries, yeah. Now everyone’s an assistant, and they all have different personalities, but all of them really good. Janice is with me now. I’ve only had three. I had Sandy and then Christie, who went down to San Diego and basically was working for Justice Benke, who I understand has just announced her retirement, which is really, talk about longevity. She’s been there just forever. Anyway, the relationship is just really critical, because you are a team, and you know I’m not a hard task master. If anything, I’m a sweetheart and it’s all very collaborative. I’ve been blessed with some really good chambers attorneys. Some of them have been kind of challenging, Craig Gramer was …

Betty Richli: Or without mentioning names.

Art McKinster: Well, no, no, I’m not saying it was difficult. Craig … some of them have gone on to the bench. Craig Gramer left and I’ve not had a lot of turnover of staff.

Betty Richli: No, you have not.

Art McKinster: If I keep people, I keep them for a long time. So, Craig left and I’ve always hired from inside rather than outside, because if we’ve had staff attorneys or Central Staff, they’re not, for the benefit of the folks listening to this, every judge gets two attorneys and a judicial assistant. There are Central Staff people that work nominally under the direction of the PJ, but they tend to be, the way that we use them, they tend to be assigned out to chambers to write for individual folks. So, I’ve had a lot of Central Staff people, and I’ve tended to … I have had vacancies to bring them in from Central Staff, and that’s when I’ve taken a number from Central Staff. The shortest was Gramer and he went back to Ohio and then I brought Jill Bojarsky and she was with me forever. Jodi Eisenberg wrote for me for 25 years. She was there when I got there, my staff was hired, we’ve had a sort of unwritten policy that if you come in, that you keep your staff.

01:00:04

And if you can work with them, that’s great and if you can’t, that’s fine. You can hire other people. And until very recently, for over 30 years, that’s always been the case, and you develop this wonderful working relationship, especially when you’re long tenured.

I always made a joke with Jill Bojarski and Jodi that we were like an old married couple, that we can finish each other’s sentences. They will know pretty much what I will do in a situation, but we have a pretty good idea. When the carts roll, when they physically rolled, we don’t do that anymore.

When we got bankers boxes with the records and all this stuff, I would look at stuff and then sign them out to various … to the attorneys who are going to do them and give them sort of a view of what I thought the outcome most likely was. But they would have to get in the record, and we would go back and forth.

Betty Richli: Do you believe that tension between or amongst staff attorneys and the justice and the chamber is a good thing? Tension, I mean, about the issues, legal issues?

Art McKinster: No, they all realized that when I tell them something, it’s tentative and we’re able to discuss something if my view varies from theirs; it doesn’t happen very often. It gets written up the way I wanted, because I’mstill, it’s my opinion. They’re assisting. We don’t have the ability. We can’t write every case. It’s utterly impossible with every … to do all of it.

You have to have the attorneys so that they’re working on drafts and you’re editing and doing all of this stuff. Sometimes, they will simply come to you and say, “Well, it’s your call.” They’ll point to the reporter’s transcript. How do you read this? I will take a look at it. So this is how I read it and she says fine, there’s some ambivalence. You look at the entire conundrum and you have to make a decision, and it’s ultimately your decision to make. And that frankly doesn’t happen very often.

I’ve always said that conservatively 80% of the cases that we see will come out the same way regardless of which judge hears it, which chambers it goes to, which attorney may be working on a case because we are an error-correcting court, and there are very few things that are new, unique, and novel, and when we get something unique and novel, that’s when we start publishing.

And even then, if you write something that’s law for a while, it may be ephemeral because the Supreme Court may take it or a competing line of cases, or sometimes another court will go a totally different way, and they’ll resolve that, and you get your cases back to resolve again. It’s easy now because they’ve given you the guidance.

Betty Richli: Having spent 30 years on the Court of Appeal, do you think you are at your peak in terms of the work that you do, analyzing cases, the experiences that you’ve had? I guess what I’m getting at is do you feel you get better with age on the Court of Appeal?

Art McKinster: I think it’s just experience. How long does it take to have the wisdom of a judge with 40 years–worth of experience? Well, it takes 40 years, and you’re always growing. If you cease growing and you can’t be stationary in this, because these things are changing constantly since you have left. I mean I could tell you stuff that comes in and makes your eyes curl.

Betty Richli: By changing, you’re talking about the legally, the statutes change, the legislation changes, the law changes.

Art McKinster: Sure, sure. Case law sometimes at the Supreme Court level, both federal, and then sometimes it gets bounced back and then California Supreme Court precedent change because of federal precedent. So this is not a place to come where everything is clear cut, it’s changing constantly, and so that keeps you mentally alert. I recognize the number on my odometer, and I will stay as long as maybe I can do the job, I think, depending on my health and my wife’s health, because she has a few problems.

Betty Richli: Do you feel that the COVID period of time and the changes that have allowed the court to continue to work because of the technological changes, that that’s been a positive thing, or do you think there should be a return to normalcy and people need to get back into the court and we need to have oral arguments, the lawyers need to come in and argue their cases in front of the court, the public needs to have a place to come in to see that argument?

How do you see what has happened with COVID and the technology affecting the future of the appellate courts for brick and mortar buildings?

01:05:19

Art McKinster: Yeah, that’s an excellent question, because in this long time I’ve been here, there have been all kinds of changes. The actual structure of the courts have changed. We’ve alluded to the fact that there were justice courts and there were municipal courts, and there were superior courts, and DCAs, and the Supreme Court, and two of those courts have just totally evaporated.

The technology, when I came onboard, I did not own a computer. The first time I ever touched a computer and they were new was when I walked into our court when we were in San Bernardino and there was the…

Betty Richli: With the cockroaches in the alley.

Art McKinster: Oh, it was terrible. There was this huge monitor with “Wang” written on it and, of course, Wang was the bees knees and it no longer even exists. So, yeah, all things change. I looked at it and I said, “Well, it’s it or me.” And I knew I was going to have to do this. I sound like a fossil. I don’t know who will be the audience for this, but we span an age where we had landlines.

Betty Richli: That’s right.

Art McKinster: It was even kind of unusual to have mobile phones.

Betty Richli: We remember phone booths with working phones.

Art McKinster: Oh yeah, no, it’s always fun to watch old movies. But the technology has just changed things so much. We are in COVID, whoever is watching this. In fact, tomorrow, this is the first day I’ve been in this courthouse in 15 months.

Betty Richli: That’s amazing.

Art McKinster: And when we worked on paper, I mentioned about we do autopsies. But when a case is over, civil or criminal, the clerk’s office has to get the record together. The reporter’s transcripts, the clerk’s transcripts, all the stuff and it comes in large boxes. Bankers boxes, if it’s a big case. And when we’d work on cases, we call it the carts rolling and you would get your load of cases for the month, and it would literally come on a big cart and there’s banker’s boxes, and that’s the way it was done and if you wanted to work on a case, you’d lock your bankers boxes into your car and you took it home.

And it’s a godsend, given this pandemic that we’ve had to work through, that a few years back, everything went to electronic documents. But for that, we would have come to an absolute screeching halt. The records are available digitally. The briefs are available digitally. I’ve always liked hard copies because I like to write on them, and I would assign cases, even after ...

Betty Richli: So, what do you do now? You don’t get hard copy briefs?

Art McKinster: I don’t and I like hard copies. I like to mark them up.

Betty Richli: So do you make a hard copy of the digital record?

Art McKinster: Before the pandemic, I always did that and I would look at briefs, I would assign cases out, and I would give them the briefs that I’d marked up, and I will make, I call it the stream of consciousness. I’m sure my staff … everyone has foibles and pecadillos. Mine’s got to be the boss’s stream of consciousness notes along the side, and I used to squib every case religiously and I thought I wasn’t using them and I started using Post-Its on the front.

Here are the problems that I see. I think this is the way it’s going to come out, and sometimes I’ve read the briefs on both sides. They’re talking two fundamentally different cases. Someone is running a Nolan Ryan fastball past us. Once we figure out what the facts are: if it’s this, I think it goes this way. If it’s something different, it goes a different way. You get back to me when you get in the record, and they will do that. We’ll sit down and we’ll talk these things. We don’t have the power to do that and they like having my marked up …

Betty Richli: So how do you communicate your thoughts now without?

Art McKinster: It’s different. Everyone adapts. Thank God for email and the phone and so typically, like, I’ve gotten some cases …

Betty Richli: So, it doesn’t save more time actually because you could read the hard copy brief, put the Post-It notes on it, and give it to your attorney. Now you’ve got to write an email?

01:10:05

Art McKinster: Yes. And I find it. Remember the pink sheets?

Betty Richli: Yes.

Art McKinster: That cover? And my handwriting is terrible. Because there wasn’t a lot of space, and you couldn’t write a lot.

Betty Richli: Yeah.

Art McKinster: And my handwriting is terrible because I have some pain in my hand, and I write down the margins. I would apologize for all that. But that pink comes in a format that you can modify. Some come through read-only, you can’t change them because obviously in a law office, there are documents that you never want to be changed because you don’t want to have the ability to have them altered in any way like on the signature pages of things, but they all come through so you can write on them. And I find that I write more because I have the ability to sit at the keyboard and do that. And so, the pink comments will sometimes …

Betty Richli: But that’s on the pinks. I’m talking about the briefs when you read your briefs and then turn it over to an attorney. How do you now communicate? You said by email, so …

Art McKinster: What I will do, Jana will send me the AOB.

Betty Richli: And you read it off your screen?

Art McKinster: Yes, or I can print it out. But I’ve kind of gotten away from that. If there’s prior opinions in the case, I will have all of those when we get a lot of those, because a lot of the new law is ameliorative.

Betty Richli: Yeah.

Art McKinster: We went through a period where it was hard on crime and now the pendulum is kind of swinging the other way, and there are people who are serving really long terms that instead of just changing the statutes, they’re allowing people to petition the court to throw out a five-year prior. You can actually, we’re circulating now a getaway driver who will not be convicted of murder anymore, but he still will be convicted of a third strike robbery and some other kinds of things.

And so, we’re getting a lot of those kinds of cases coming through, but it can all be done. So, we have all of that package there and then what I will do is I’ll hit the forward button and I’ll say, “Lisa, I’m assigning this case to you and it has all of the PDFs and stuff,” but if she wants hard copy, she can print them out and I will give my impressions on the case. I think this is a slam dunk case. A lot of …

Betty Richli: So, that’s via email?

Art McKinster: Yes, and then frequently, and I won’t say frequently, often we will call Steve McElroy, who is a Central Staffer, is doing a lot of these cases that are changes in law and some will say, well, they’re one-issue cases, these will be easy. They’ve actually slowed Central Staff down because some of the judges are not all in agreement. There are, in some cases, there is dissent and I keep looking at some of these cases. I keep saying I wish the Supreme Court would do these because …

Betty Richli: That would put it an end to that, yeah.

Art McKinster: Well, some of them, it’s been two years. We’re getting cases two years down the road, and I said, “Oh gosh, I know you’re busy, but if you could do this, it would just make life so much easier.”

Betty Richli: So, the technology, there’s the good things that come from it, but there’s also some detrimental aspects of it?

Art McKinster: Well, the detrimental is not being here. I think it’s important. I’ve been with my staff again, Jodi left. I brought Jorge in from Central Staff, and I think it’s important to still be here. I think part of it is the working relationship. Sometimes you’ll just walk out and sometimes you’ll talk a case, sometimes you’ll just talk about a current event or something. It’s just important to be able to do that.

Betty Richli: To connect?

Art McKinster: Sure. How are things going? “Well, my son’s engaged.” Now, how wonderful. All of that is important. It sounds like a waste of time. It is not, it’s what keeps us all working together on the same track and not at cross purposes.

Betty Richli: Do you think that, if you look at what’s going on today, the legal issues that are coming up before the court. If you tie that together with this changes in society, changes in mores, attitudes. Do you think that the court is on a stable foundation? Or do you think that there is the possibility that all of these changes can erode the stability of the courts?

Art McKinster: Again, institutional memory long-time here. I have seen lots and lots of changes.

01:15:01

And it’s like the republic will always stand. The courts will always stand their hard times. I’ve seen this pendulum swing back and forth based on whichever way the social and political winds are blowing. It’s one thing to look in the voting for people. It’s a different thing when legislatures are passing laws that incorporate these kinds of things. But when you and I first started, I joined the DA’s office in ‘72 and in 1973, Jerry Brown in his first iteration.

We went from indeterminate sentencing to determinant sentencing. Determinant sentencing, it’s almost like, your eyes can cross because they got tough on crime. It started off with the determinant sentencing, everything was incredibly, for some crimes, incredibly too low, like attempted murder. When we got this binder, all the DAs were studying and said, “What do you mean attempted murder? The maximum is nine years. The midterm was seven.”

A use of a weapon would only get you one year. If you use a weapon and injure someone now or kill them, it’s 25 to life on top of whatever the other is. So we have all these add-ons and things that everyone got really tough on crime. Now, we’re in a position of the Legislature is trying to undo some of this stuff and some of it, I think, is well-taken. I think for some crimes, you don’t need 25 to life. I think on a petty theft, even if you have done burglaries in the past or robberies, people can disagree with that. But they’re undoing some things that are unduly harsh. I also think the baby’s going out with the bathwater on a few of these. And I think that having seen and going back to the ‘82, the preamble to the determinant sentencing law, it says rehabilitation is no longer the object of the penal system.

And you could have taken issue with that then, but now we’ve gone back, this pendulum is swinging another way where there is a focus on the criminal. Obviously, if you can rehabilitate someone, that’s a great idea. Tom Hollenworth, one of the great lines he had: “The problem with rehabilitation is it presumes that someone was formally habilitated.” And so, there are people who you can rehabilitate and there are others, I think, that are just stone sociopaths you can’t do … they are dangerous and hopefully with age they become less so. But it can’t be one size fits all on either side of the spectrum, and I suspect we’re seeing it in terms of social justice movement and we’ve had one DA’s office, major one taken over in Los Angeles, that is taking a totally different view and I’m going to let it play out. You’ve got a view that the system is broken and it doesn’t work.

Betty Richli: Do you see though the effect of that? How do you see the effect of that on the courts and your role as a justice?

Art McKinster: Oh, it’s my role as a justice. Simply these are the facts, this is the law, this is what I’m going to apply. I’m not a judicial activist and the fact that I would not have written this law, this is not part of my DNA.

Betty Richli: Yeah.

Art McKinster: There are times when we’ve all had times where you just hold your nose and do what you have to do. Because if you start going down that road, there is no law because you become a law into yourself and you’ve got to play by the rules absolutely.

Betty Richli: After all of your years in the court, all of the people who you’ve talked about, I thought it was delightful that your mentors are the people who you lived with that grounded. They were grounded people, they’re not necessarily great icons of inspiration. But there are people who led by example.

Art McKinster: Yes, and that’s …

Betty Richli: You do as I do and do as I say, not … yeah.

Art McKinster: But that’s always been my leadership style. Whether I was a Chief Deputy or a Second Lieutenant.

Betty Richli: Yeah.

Art McKinster: If you have to remind people of your rank, you’ve already lost.

Betty Richli: What?

Art McKinster: And you’ve got to simply, yeah.

Betty Richli: Yeah, but given all of that, taking all of this together, what to you has been as a 31-year participant in the justice system in California at a very high level, what do you feel has been your greatest success and achievement? And I know you hate that question.

01:20:16

Art McKinster: I do, because it’s so self-centered. We’re an error-correcting court. And so, I think anyone who goes on the District Court of Appeal, if they think they’re going to be writing a *Roe v. Wade* kind of a case. You’re not going to do it and even if you do, you have first swing at a bat. There’s always something new. A new statute needs to be interpreted. Someone has to be first. You do it, you publish it. It may stay in print for a long time. It may be ephemeral. I always say we write in sand on the beach. Next wave, it goes right back out.

So you don’t have blockbuster kinds of cases. What you kind of enjoy doing, there are some cases that you write that survive or it survives because the Supreme Court pats you on the head and gives you an “attaboy” or an “attagirl.”

And I’ve had a few of those, when I first came on this court I did a lot of writing of cases. Part of it was I needed to write in some areas where I didn’t have a lot of expertise. So I decided to do a little bit of everything. I forced myself to do a summary judgment case because while I did civil cases, I was predominantly known for criminal law and for delinquency and dependency because you and I were both presiding judges of juvenile court. But very few things really kind of survived. –this is why you doI was thinking about those in preparing for this. And some of the cases that came up that survived, very small. They’re not blockbuster kinds of things, but interesting, some of them drew dissents. Bob Timlin of our court now gone, passed.

Early on, I was working on a case and it was something that should have been really simple. What is the standard of review for the denial of a motion to withdraw a guilty plea? I kind of got in, I was working on it and I said, “This is one-issue case.” I decided I wasn’t going to assign it. I had so much time in it already.

So I wrote this case and Tom was number two, and Bob Timlin was number three. And Bob Timlin was a very scholarly kind of guy but things would go there, and he would have to ponder and think about them before you got them back. And I’d gone through all. It was like following a thread and the law changed at some point after the turn of the last century, and the wording changed and, thereafter, every case followed this wording change.

Anyway, it came back. The standard of review is by clear and convincing evidence. Went to Timlin, he wrote a dissent that was like four or five times, and it went back and forth and back and forth, and I finally went to Tom. I said, “I’m not responding to this anymore. I’m going to gut this case.” Another great bit of advice is that sometimes your best work winds on the cutting room floor. That has survived, and one of the oddities of it is that the Supreme Court has said this is the standard but it wasn’t the issue in the case, and cases aren’t authority for issues not that was Nipsey Dixon. And he took total issue with this, and it was kind of an ivory tower kind of thing. And intellectually, he’s probably having a great time with it, but that case still stands.

Another case that I did that I enjoyed. I got to working on it and I didn’t assign it out was I wrote a case called *Vargas*, and the issue was, can you waive your right to appellate review? And there weren’t any extant cases on that, so I had to go to federal case, all kinds of things and wrote that. And it was on the books. It was never taken. Review was denied but in *PanaZon*, the Supreme Court took it up and no one cites *Vargas* anymore because it was totally subsumed in *PanaZon*. But I guess the rewards when you do it, I’ve done a few of these. You get quoted. They lifted wholesale parts of *Vargas* and just quoted it the way it is. It’s very satisfying to say, yeah, you got this right.

01:25:00

It’s funny, I keep coming back to cases I personally wrote, as opposed to asking help with a draft from someone else. I did another case called *Sammy King*, that was a murder case. I got into it and I got too far into it. And again, we might as well keep it myself.

One of the issues, you remember the old Rose Bird court, there was a rule in *Culbertson*, and the ruling in *Culbertson* was, if you use a gun once, you could only be punished for it once. But they called once is like during the entire transaction. And Sammy King wanted to rob a Thrifty store, and he went up to the man and he killed the manager, shot the manager, and he shot another person on the head and left her for dead but she didn’t die. Terrible person, he blamed all this on his brother.

They arrested his brother first and the issue was I complained that there should be two use allocations. There are two separate victims. They were separately punishable but the rule in *Culbertson* had been there for so long. And I basically wrote a section that said, the cases criticizing *Culbertson* are legion and added my voice too. There’s no rational basis for doing this and they took that case and returned to overturn their precedent, which is unusual. They do not like overturning their own precedent, but they will. And so your reward for all of that. So I get a reversal, but you really win.

Betty Richli: Yes.

Art McKinster: You get the R next to your name, but we’re changing the rule. They did that also in another case called *Aberks*, where they had the guiding rule, you can have lesser-related defenses, not lesser included. And I reversed the case for failure to do that. They took that case. Again, I got reversed, but they did it to overturn their prior precedent. And they threw out the rule in Geiger, so.

Betty Richli: So, basically on the whole, you have found your career to be rewarding, challenging? Has it met all your expectations as our final overview?

Art McKinster: I’m still having fun.

Betty Richli: And that’s why you’re still here.

Art McKinster: Yeah. Well, there have been some challenges now and again. Most problems are people problems, and there are some challenges and happily, I’m not alone. Manuel is still here. Manuel and I came in together. I don’t know if we will leave together.

Betty Richli: That’s right, you were appointed on the same day.

Art McKinster: Yeah, our confirmation hearings were, I think December 27. It was like a late Christmas present. And we went in, Malcolm Lucas was there, the great Dan Kramer, who I think the world of, and John Van De Kamp, and both of my girls were there. John Van De Kamp was a very warm person, and he came down. He looked at my two girls and he said, “Which one of you is going to be the lawyer?” And immediately the oldest pointed to her little sister.

Betty Richli: And she is in fact the lawyer.

Art McKinster: And she is in fact the lawyer. And she’s married to a lawyer. And, oddly, her career was, a lot of it is research and writing. She worked for the Sixth District, she wrote for Conrad Rushing and she no longer does that. Her husband was a DA at the time. He works for a well-known personal injury plaintiff’s firm in the South Bay of San Francisco.

And essentially, it became, with COVID and all these other kinds of things, it became important that she sort of subordinate her career for right now to his because someone’s got to get the babies back and forth to school and the preschool. So, she was the one, I always thought who’s going to be the lawyer? Lisa points to Marisa and boy she is, she’s daddy’s girl.

Betty Richli: Well, it’s been delightful talking to you. We’ve covered a lot of territory. We’re not too terribly long a period of time.

Art McKinster: Yeah, probably too long.

Betty Richli: But I have appreciated the opportunity that you invited me to do this.

Art McKinster: I thank you so much for doing it.

Betty Richli: And to me, it’s just kind of the frosting on the cake of such a long-term friendship and professional relationship.

Art McKinster: Yeah, it’s friends talking to friends and great colleagues. Thank you so much.

Betty Richli: Yeah, and I think it’s been a good conversation.

Art McKinster: Thank you so much for doing this. I look at this, I’m wondering how this is going to be, who’s the audience for this? And I’m likening this to a message in a bottle, that this is going to be thrown into the sea and you don’t know.

Betty Richli: Well, that’s what makes it an adventure.

Art McKinster: You don’t know in 2021, there may be someone plumbing the depths, “I wonder what it was like a 100 years ago on the Court of Appeal?” Or maybe I’ll have a grandchild or great grandchild who might find this interesting. I hope so.

Betty Richli: All right, thank you.

Art McKinster: Thank you so much.

01:30:50

**Total Duration: 91 Minutes**