

Oral History Center  
The Bancroft Library

University of California  
Berkeley, California

Marshall Krause

*Marshall Krause: ACLU of Northern California Attorney and Civil Liberties Advocate*

Interviews conducted by  
Martin Meeker  
in 2017 and 2018

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Marshall Krause, in his home with one of Ron Boise's *Kama Sutra* sculptures, 2018

Photograph courtesy of Martin Meeker

**Marshall Krause** served as lead attorney for the ACLU of Northern California from 1960 through 1968 and subsequently served as an attorney in private practice where he continued to work civil liberties cases. Krause attended UCLA as an undergraduate and graduated from Boalt Hall, UC Berkeley School of Law after which he clerked for Judge William Denman and Justice Phil Gibson. In this oral history, Mr. Krause discusses: his upbringing and education, including his time at Boalt Hall; clerkships with Denman and Gibson and how those experiences influenced his progressive attitudes; his tenure as ACLU staff attorney, including many of the cases he worked; his experiences arguing several cases before the United States Supreme Court; his perspective of the San Francisco counterculture of the 1960s; and his professional and legal career after leaving ACLU in 1968, which included arguing additional cases before the US Supreme Court.

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## Interview 1: December 4, 2017

01-00:00:11

Meeker:

Today is Monday the fourth of December, 2017. This is Martin Meeker interviewing Marshall Krause for the ACLU / First Amendment Oral History Project, so, thank you very much. This is interview session number one. So, let's get started. The way that we get started with all of these interviews, really, is, you just tell me your name, date, and place of birth.

01-00:00:36

Krause:

I'm Marshall Krause, and I was born May 15, 1933.

01-00:00:42

Meeker:

Okay. Tell me a little bit about where you were born and what kind of family you were born into.

01-00:00:48

Krause:

I was born actually in Los Angeles, and my parents had been living there for about fifteen years or so. I have an older sister who's eight years older than me. When I was about two years old, the family moved to Santa Monica, which is where I grew up, and I enjoyed growing up in Santa Monica. It was a very small town at that time, and just felt a little town by itself not part of Los Angeles, as it is now.

01-00:01:26

Meeker:

So, Santa Monica was removed in the sense that there was like maybe farmland or something, between Santa Monica, and—

01-00:01:32

Krause:

Yes, there was open space between Santa Monica and Westwood, and then more open space between Westwood and Beverly Hills.

01-00:01:41

Meeker:

What kind of work did your parents do, or did your father work and your mother stay at home?

01-00:01:47

Krause:

My father was most of the time a merchant in California, certainly. He actually spent a number of years in the Yukon Territory of Canada, where his father had a trading post for fur trappers, and gold miners, and all that, and so, my father had kind of an adventurous young life. He used to take all of the furs that his father bought and bring them by train to New York City where there was a fur auction. So that was a big job every year.

01-00:02:28

Meeker:

So he grew up in the territories up there.

01-00:02:31

Krause:

Yes.

01-00:02:32

Meeker: Fascinating. You said that your grandfather was the man who had this business.

01-00:02:37

Krause: Yes.

01-00:02:39

Meeker: What's his story? How did he end up in the Yukon Territory?

01-00:02:42

Krause: I really don't know. I never met him. He died before I was born. That's the problem with people having late children, their parents are gone, and so I never really had any connection with any of my grandparents. But my father liked him a lot, so that must mean that he was a pretty fine man.

01-00:03:06

Meeker: So this was kind of an importing-exporting business that your father was involved in?

01-00:03:12

Krause: Well, it was a trading post, it was. They outfitted the fur trappers and the miners who were up there in the Yukon Territory, and he had started the business before the Yukon Gold Rush. So he was outfitting the miners when that gold rush started, and it was a very adventurous time, and they lived in Dawson City, which is part of the Yukon Territory. And later on, I took my son, and we went up there, and we hiked up the Chilkoot Trail, which was the famous trail that the gold miners had to climb up, with all of their provisions, in order to get into Canada where the gold mines were.

01-00:04:03

Meeker: Oh, this was right outside the port in Alaska. Is that—

01-00:04:06

Krause: Yeah.

01-00:04:06

Meeker: —like Sitka or something like—

01-00:04:07

Krause: Sitka is the port, and then the Chilkoot Trail is about three or four miles from Sitka, and it's pretty straight up, and it was an adventure to go up that trail.

01-00:04:20

Meeker: I took the train up to the pass one time when I was on a cruise with the family, so, it's a pretty cool place. And you actually hiked the trail itself.

01-00:04:30

Krause: Yeah, and then we went to Dawson City, and we really retraced the Krause family in that area, and the Dawson City Library had a big collection about the Krause family. It was nice.

01-00:04:44  
Meeker: Your father was doing this kind of work when you were being raised in Southern California in the thirties and forties?

01-00:04:50  
Krause: Yes, he had a men's store on Santa Monica Boulevard called Krause's Menswear.

01-00:04:58  
Meeker: What kind of clientele did that attract?

01-00:05:01  
Krause: Whoever needed men's clothing, I guess.

01-00:05:06  
Meeker: I mean, was it more directed toward the Beverly Hills crowd, or was it more of a—

01-00:05:09  
Krause: Oh no, it was not a swanky place; it was directed toward the everyday person and they had working man's clothing, and as well as suits, and hats was a big thing during that period in the thirties and the forties, so they had hats.

01-00:05:28  
Meeker: What was your father's name?

01-00:05:29  
Krause: Leo.

01-00:05:30  
Meeker: Leo, and your mother?

01-00:05:31  
Krause: Frances.

01-00:05:32  
Meeker: Frances. Did Frances have a job outside the home?

01-00:05:36  
Krause: No, she didn't. She didn't really believe in women working once they were married; that was something that was déclassé.

01-00:05:45  
Meeker: So you were born in '33. Did you have any awareness of the Great Depression, as a young child?

01-00:05:55  
Krause: I think my parents talked about it as the reason why we had to be very careful about money, and how important money was, because they did have their money taken away by the stock crash. They had a lot of investments in the stock market, and investments in real property, and they lost most of that in the Depression.

01-00:06:20

Meeker: Do you recall the beginning of World War II?

01-00:06:24

Krause: Oh yes. I remember sitting in my living room and listening to the radio, as I did every Sunday morning. There were a lot of serials, and things of that sort, and suddenly there was an announcement that Pearl Harbor had been bombed. So I felt very important that I went in and woke up my parents and told them Pearl Harbor had been bombed. I didn't know where Pearl Harbor was, but that's what was on the radio.

01-00:06:58

Meeker: Did the war change your life growing up at all?

01-00:07:04

Krause: I don't think so. I don't think it would've been much different, had there been no war. It gave us a lot to do. We were all busy during the war selling bonds, and buying saving stamps, the kids bought, and we collected aluminum foil and string. I don't know what use they made of the string, but we all collected big balls of string and turned it in somewhere.

01-00:07:32

Meeker: I think offline you had mentioned planting a Victory garden, as well.

01-00:07:38

Krause: Yeah, that was my biggest accomplishment; I was very proud of that. I dug up the backyard—it was a lawn—part of the backyard, and I planted all sorts of vegetables, and I was so happy that they did well, and I felt that I was contributing to the war effort.

01-00:07:59

Meeker: Interesting. Was your family religious at all?

01-00:08:05

Krause: Well, they were Jewish, and they had connection to a liberal synagogue, but I don't really think they were religious. They did go for mainly social purposes, and I went to Sunday school.

01-00:08:25

Meeker: Did you have a bar mitzvah?

01-00:08:27

Krause: No. At my temple, they didn't do bar mitzvahs. It was passé by that time in the liberal part of the Jewish religion, and so I was confirmed at fifteen years old; there was a ceremony.

01-00:08:45

Meeker: Like the Catholic Church would do.

01-00:08:46

Krause: Yes.

- 01-00:08:47  
Meeker: Do you recall the name of the temple?
- 01-00:08:51  
Krause: Yes, it was Beth Sholom Temple, in Santa Monica.
- 01-00:08:55  
Meeker: Which, I believe, is still a pretty major temple down there.
- 01-00:08:58  
Krause: Maybe it is.
- 01-00:08:59  
Meeker: Did your family celebrate the holidays? Did they observe the high holidays?
- 01-00:09:08  
Krause: Not really, no. We celebrated Christmas, because my father had his store, and there were Christmas decorations for his store and all that, so it seemed logical to us to celebrate Christmas. So we didn't celebrate Jewish holidays. I think that maybe I didn't go to school for Yom Kippur; I'm not sure. I don't think I did go to school.
- 01-00:09:35  
Meeker: Do you recall, out of Sunday school or the time that you would have spent in the congregation, getting any sense of what the values important to that community were?
- 01-00:09:47  
Krause: The values of—
- 01-00:09:48  
Meeker: Important to the Jewish community, the liberal Jewish community.
- 01-00:09:52  
Krause: I felt that the values were very poor. I was definitely alienated from that temple, and my parents' idea of religion, which I didn't think was very serious. I was quite interested in philosophical issues of, what is a good life and why are we here, and things of that sort, but I didn't find any answers at the Sunday school I was going to.
- 01-00:10:23  
Meeker: Hmm. Were you actually asking these kinds of questions and seeing if the teachers there could provide some answer?
- 01-00:10:32  
Krause: I don't think I was very good at that. I think I had them in my own head, and I might have talked about them to my friends, but I don't think I asked any of those teachers. I didn't have any confidence in them.
- 01-00:10:45  
Meeker: Were your parents politically active?

01-00:10:49

Krause: No. They always voted for Roosevelt because of his work in getting through the Depression, but then they became Republicans after he died.

01-00:11:04

Meeker: It's kind of such a classic story, isn't it?

01-00:11:07

Krause: Yeah.

01-00:11:08

Meeker: Did you ever get a sense of why that transition happened for them?

01-00:11:16

Krause: They just became more oriented toward the business community, and economic issues were extremely important to them, and paying less taxes was important to them, and they just felt that the Republican Party mirrored their views better.

01-00:11:35

Meeker: Through your time living with them growing up, did you develop any interest in politics, say through high school?

01-00:11:45

Krause: Let's see. I was interested in politics, kind of followed the politics of the time, but I didn't take any active part in any political activities. There weren't any demonstrations, of course, at that time, and politics didn't seem that important to me until I got into maybe the university, yeah.

01-00:12:14

Meeker: Tell me about the schools that you attended—high school for instance.

01-00:12:23

Krause: Yeah, I attended SAMOHI, Santa Monica High School, which I thought was a very good school, and I was kind of active in student government there, and we had a radio station which might be the beginning of my forensic abilities, I don't know. It was KCRW, FM station of the Santa Monica City Schools, and it is still going as it's a PBS affiliate, and I did things like broadcast basketball games, and I was a disc jockey. I had a regular program playing records. It was called *Best Bands in the Land*, and I would play a different band every week for my program. And then we had plays on the radio, and we played around, and we had a really good teacher who I really liked, who told us that he had real experience in radio, and so he let us in on what that experience meant.

01-00:13:30

Meeker: What kind of music were you playing? What kind of bands?

- 01-00:13:32  
Krause: Oh, like Benny Goodman or Tommy Dorsey or Jimmy Dorsey, or Paul Whiteman, yeah, and let's see if I can remember any others. Those are all I can remember right now.
- 01-00:13:49  
Meeker: Did you say that you were part of the founding group of this radio station? Or had it been there already?
- 01-00:13:56  
Krause: Close to it; I don't know whether my class was the first one to participate in it, but it was very close to it. We were feeling our way through it.
- 01-00:14:08  
Meeker: That's interesting. Do you recall what sort of challenges there were in operating this relatively new technology in high school setting?
- 01-00:14:20  
Krause: Oh yeah, we were thrilled with gathering around microphones and knowing that our voices would be heard out in the airwaves. We had no idea whether anyone listened to us or not, but we were sending it out, and it was pretty thrilling. It was probably the best experience of my high school years.
- 01-00:14:42  
Meeker: Do you recall if you were doing news broadcasts, or talking about current events at all?
- 01-00:14:48  
Krause: No, no, the station didn't do that.
- 01-00:14:51  
Meeker: Okay. So there wouldn't have been any First Amendment issues that you would have run across—
- 01-00:14:55  
Krause: No, no, no, no constitutional issues even. We probably did some news about what was happening on campus, the prom, and things of that sort.
- 01-00:15:07  
Meeker: What kind of student were you? Were you engaged in academics?
- 01-00:15:15  
Krause: Yeah, I was a pretty good student, not the best, but I think I had pretty good grades, and I was also interested in athletics and followed our SAMOHI teams. Since I was broadcasting them on the radio station, I followed them pretty closely.
- 01-00:15:35  
Meeker: Where did you hang out, during high school? Where'd the high school kids hang out around Santa Monica?

01-00:15:44

Krause:

Well, when I was sixteen years old, I got a car, and so it gave me and my friends some mobility, and we would go to the beach. Oh, the Santa Monica Pier was a big draw. I loved fishing, and so there were fishing boats out of Santa Monica Pier. But, let's see. And then we would visit each others' houses. That's about what we did.

01-00:16:23

Meeker:

You enroll in UCLA, I believe 1951.

01-00:16:32

Krause:

Yes.

01-00:16:33

Meeker:

Tell me about your decision to go to UCLA for school, for college.

01-00:16:37

Krause:

Well, my best friend, Roy, was going to UCLA, and so that's where I wanted to go too, and I didn't even think about any other places. It was just in the neighborhood and easy to get to, and why not?

01-00:16:57

Meeker:

Did you live at home throughout college?

01-00:16:59

Krause:

No, I lived at my fraternity a lot. I joined a Jewish fraternity called Sigma Alpha Mu, and they had a nice house on Gayley Street, and I lived there quite a bit, and then during vacations, I would live at home.

01-00:17:17

Meeker:

Tell me about your college experience. You joined a Jewish fraternity, so this must have been a meaningful part of your identity at this point, or was it? Was this just the group of friends that you were hanging out with?

01-00:17:32

Krause:

It was, it was a big part of my energy to participate in the fraternity, in the social activities, and the athletic activities, and then, as I look back on it now, or even a few years afterwards, I thought it was a big waste of time. I should've been more involved in student government, and things of that sort would have fit me better. But I did things like bringing weekly faculty lectures to our fraternity lunch once a week, and that was kind of a new innovation that we had faculty members coming and talking to the fraternity members. The fraternity was a pretty light thing. It was very much interested in athletics and social activities and that's it.

01-00:18:29

Meeker:

Sponsoring dances and so forth?

01-00:18:31

Krause:

Yeah, parties.

- 01-00:18:33  
Meeker: So, it was entirely secular; there wasn't much religious element within the fraternity.
- 01-00:18:40  
Krause: No, there was no religious element at all, yeah.
- 01-00:18:44  
Meeker: Interesting. Were you the person who was programming these faculty lectures?
- 01-00:18:51  
Krause: I started that program, yeah.
- 01-00:18:52  
Meeker: Do you recall some of the types of faculty that you'd like to bring? Were these people you were particularly interested in?
- 01-00:19:00  
Krause: People who were well known, who were talked about, or who had an insight into current events. I guess I was interested in current events during my UCLA career.
- 01-00:19:13  
Meeker: How'd you keep up? Were there particular magazines or journals that you're reading, newspapers that you were focused on?
- 01-00:19:20  
Krause: I'm sure I read the newspaper quite often.
- 01-00:19:23  
Meeker: So the *LA Times*?
- 01-00:19:25  
Krause: We had the *Santa Monica Evening Outlook* in Santa Monica, which was a very conservative Republican paper. Even in high school I remember hating it because it was so conservative. But I also read *Time* magazine, and the *Los Angeles Times*, and listened to radio stations, and things of that sort.
- 01-00:19:56  
Meeker: You know, although the 1950s has this reputation as being very stable and kind of harmonious in the United States, there was a lot of tumult, right? I mean, 1951, McCarthyism is raging at that point in time, and there are pretty vociferous trials dealing with perceived subversion at home and all these kinds of issues, vis-à-vis the rise of the Soviet Union, and the threat of nuclear annihilation, I guess. Did that ever come home to UCLA? Did you ever encounter this?
- 01-00:20:36  
Krause: It did. The hearings that the Senate had about McCarthy's accusations against the Army were held I think when I was either a junior or a senior at UCLA,

and they were fascinating, and there was a big television setup in the student union, and I saw practically every minute of those hearings. I was totally wrapped up in them, and there were some real heroes, like Joseph Welch was one of the attorneys who were against McCarthy, and he was a great hero of mine.

01-00:21:21  
Meeker:

He was the one who famously said something about, “Do you have no—

01-00:21:25  
Krause:

“—no shame,” or I don't know, something like that, yeah.

01-00:21:29  
Meeker:

Right. Oh, this is interesting. So you're saying that there was a big TV; did it attract a lot of students?

01-00:21:35  
Krause:

Yes.

01-00:21:35  
Meeker:

Was there a lot of interest in this?

01-00:21:37  
Krause:

Oh yes, yes.

01-00:21:38  
Meeker:

Did you get a sense that students had differing opinions about this, or did there seem to be unanimity among student opinions about these proceedings?

01-00:21:50  
Krause:

I think practically everybody didn't like McCarthy, because he was an ugly man, and he just was so negative. I don't know of anyone who ever defended him in my presence.

01-00:22:04  
Meeker:

Interesting. Did any of the professors talk about this? Did it become a point in any classroom conversation?

01-00:22:14  
Krause:

I majored in political science when I was there, and I took a lot of history classes too. Yeah, I remember there was one class in current United States history in which we talked about such issues, but I don't remember what was said about them exactly.

01-00:22:40  
Meeker:

Were there any professors at UCLA that were particularly influential for you?

01-00:22:47  
Krause:

Not really. I wish I had become closer to the professors. One of the problems at UCLA for me was that it was so big, it was hard to really make contacts and get things started, and I never got started in any UCLA activities. I was so

involved in the fraternity, and the fraternity was a smaller group of people that I felt more at home in. I was shy I guess, and I didn't establish any contacts with professors. I'm sorry I didn't, but I would've liked to have done that. I didn't.

01-00:23:33

Meeker:

You know, it's interesting about this engagement with the fraternity. Had you experienced much in the way of anti-Semitism growing up, or at UCLA, that would have encouraged you to try to find a group of like people?

01-00:23:54

Krause:

Not at UCLA. I was very proud of my fraternity because we were the only fraternity who were willing to accept the black athletes who had been recruited for the UCLA basketball team, and several of them lived at our fraternity house, because they really couldn't find anyplace else to live in the Westwood area. And so they lived at our fraternity house and I was proud of that, and liked knowing them and having some contact with them. I've forgotten who they were, but they were famous at the time.

Anti-Semitism though, getting back to that, that was an extremely important part of my growing up. I was very close to two boys when I was in grammar school, and we hung out together, the three of us, and then, a fourth boy came in who was very conscious of religion. And oh, I think my mother made a big error when I was quite young, and told me never tell anyone I was Jewish. I didn't know why exactly, she didn't explain to me why, but I didn't, so when the other boys asked me what my religion was, I pretended that I didn't really know. And so, after a while they figured out that that must've been a falsehood, and they figured out that I must've been very sensitive about my religion; they figured out I was Jewish. And then, kids that age just find weaknesses in each other to kid and torture, and so I did experience a lot of anti-Semitism, and I had to break off my friendship with these lads who were my friends in grammar school. When I went to junior high school, starting in the seventh grade, I made new friends, some Jewish, some not Jewish.

But being Jewish was important for me. I don't know exactly why. First of all, I was a little concerned about the stereotypes of Jewish people, of, for instance, people like my grandparents on my mother's side, who I knew just a little bit, and they spoke no English. They only spoke Yiddish, which was kind of embarrassing for me. So I was a little ashamed of that, and I didn't know why I had to be Jewish. It was kind of strange. Why do I have to suffer this? And it meant nothing to me to be Jewish. I never was attracted to the religion at all. So, yes, in my early years and in junior high, there was anti-Semitism. By the time I got to high school, it wasn't present anymore. As a matter of fact, I was the only non-Christian ever to be invited to join the major boys' club at Samohi. It was a big thing for the club to accept someone who was Jewish. Huh, I didn't really know that.

01-00:27:40

Meeker:

It's interesting about your friends in elementary school. I imagine that, because they didn't know that you were Jewish, they maybe were saying things, early on, that you were hearing. Did things like that happen, and do you think that had an impact on you?

01-00:28:03

Krause:

That didn't have an impact on me, but what had an impact on me was just the teasing, and being made to feel an outsider, that I was different somehow. Why I was different, I really didn't know.

01-00:28:21

Meeker:

Did you ever present this to your parents, let them know it was happening?

01-00:28:26

Krause:

Not really; I had no real communication with my parents. I was not close to them at all.

01-00:28:36

Meeker:

So was there anyone that you could go to, to talk about what was going on with your friends at the time?

01-00:28:41

Krause:

I finally made a good friend when Roy, the friend of mine that I followed to UCLA, came into my high school. He was raised back in New York, and then he started high school at the same time I did. So, we became best friends, and I would talk to him about stuff like that. He was Jewish, as well.

01-00:29:07

Meeker:

And sounds like, came from a rather different background too.

01-00:29:10

Krause:

Yes, yes. He liked his parents. He got along with his parents, and it was such a revelation to me because I didn't like my parents; I didn't get along with them at all.

01-00:29:23

Meeker:

What was the crux of that, if you don't mind my asking?

01-00:29:29

Krause:

Well, my father was extremely distant, and just not there for me very much. He was away a lot, working a lot, so I really didn't have any closeness with him. He did some nice things for me. He was generous with money, and he would take me places before I had my own car, that was nice. But my mother was a very fearful person. She was very fearful, I think, because of anti-Semitism where she grew up. She grew up in Portland, which had a big German community, and there was a lot of anti-Semitism during the time she was a young lady in the twenties and thirties. So, she wanted to protect me from that, and she chose a way that wasn't very good, because my friends just figured out that this was a weak spot in my being, and had honed in on it. So, I

was not happy with my mother; she was very fearful. She wouldn't let me have a paper route, for instance, which, all my friends had a paper route. I couldn't have one. And she was very fearful, and I just didn't want to follow in her footsteps, at all. All my life I have resisted acting from fear.

01-00:30:52

Meeker:

Studying political science is often seen as sort of a pre-law path at college level. Is that what you had in mind? Did you want to become an attorney?

01-00:31:05

Krause:

No, no, I had never met an attorney, I don't think. I didn't know what attorneys did, had no idea what they did, and this is the way my law school career came about: When I was in college, you had to stay in college and get at least a B average, or else you were drafted for the Korean War, and I didn't want to go into the Korean War. Exactly why, I don't know, but I didn't want to, and then I was graduating UCLA and I had to figure out what I was going to do, and I had to go to some other school. I had no idea what I wanted to do. I would've been much better off if I had been free to travel, or find myself a little bit, but I had to keep staying in school or else I would have been drafted. So I went to vocational aptitude, and took all these tests, and they told me that my likes and dislikes were very much like lawyers, that's the way they compared people. And so they said, "Maybe you should go to law school." So, I went to law school. I applied to Harvard Law School, and I applied to Berkeley. I applied to UCLA; at that time in 1954, it was just starting its law school. And I got admitted to all of those places that I applied to, but I chose to go to Berkeley, because it was someplace that seemed to be closer to me, and it was away from home, and yet not too far away.

01-00:32:53

Meeker:

I've always had the impression, all of those schools, most especially Harvard, are pretty hard to get into, that you would have to have a pretty good idea of why you wanted to go there, but in this case, it sounds a little like—

01-00:33:07

Krause:

No, I had no—I was sure this is kind of juvenile, funny, I think, but I was sure that when I graduated law school, what I was going to do is, when the dean handed me my diploma at graduation ceremony, I was just going to tear it up and say, "This is no good at all," and go on with the rest of my life, because I had been forced to go to law school to stay out of the draft, not because I wanted to. But then it so happened that I liked the challenge of law school. I enjoyed it, and it was interesting to me, and I did well in law school, so, I became a lawyer.

01-00:33:52

Meeker:

So and you enrolled at Boalt Hall I think, in fall of '55, right?

01-00:33:57

Krause:

Fifty-four.

01-00:33:57

Meeker:

Fifty-four, okay. Tell me about your experience there. How do you go from having a pretty cynical attitude about what you were just about to enter into, to participating as an associate editor of the *California Law Review* and really getting involved in your education?

01-00:34:19

Krause:

Well, I didn't want to flunk out, and when you're in the first year of law school, you have no idea whether you're understanding things or not. So much material is thrown at you, and whether you understand it or not, it's hard to figure out, and the law professors are, many times, very insulting about this, abilities of students in their classes to analyze cases and things of that sort. So, everybody gets insulted in the first year of law school, and so I had no idea. And then, I finally got my grades after the first year, and it turned out I was fourth in the class, so I said, "Well, maybe I do know something about this." So, I carried on.

01-00:35:13

Meeker:

Was there anything that was interesting you at this point, anything about the coursework or the case law that you were studying that was drawing you in?

01-00:35:27

Krause:

I think in law school, the course that interested me the most was corporate law. I was really intrigued with all these proxy fights and corporate takeovers, and all the machinations that went on in the business world, and so when I graduated law school, I wanted to be a corporation lawyer. But, the job I took, it was—probably jumping ahead a little bit—was as the law clerk for a judge on the Ninth Circuit, and he was very liberal, very involved with civil liberties issues, and strongly constitutionally oriented, and he impressed me and he influenced me a lot, and I became much more liberal at that point. Another thing he did for me was to make progressive politics and liberal politics something that was acceptable in the mainstream, because his name was William Denman, and he was from an old San Francisco family, and he was the chief judge of the US Court of Appeals for the Ninth Circuit, and a very impressive man, and he was very liberal. And then I said, "Wow, it's not only the Jewish people who are liberal, it's all sorts of people who are liberal." So that kind of freed me to be a more liberal person, which I turned out to be.

Before that, I was afraid I was just being a Jewish stereotype of being a left-wing Jew. So, I hated stereotypes, and I didn't want anything else to determine my choices, so I freely chose to be influenced by Judge Denman and became much more liberal, and that's when I first started my association with the ACLU, because I was following what the then attorney for the ACLU of Northern California was up to, and I saw him argue a few cases. His name was Al Bendich, and I said, "Wow, I really like this." So I called up Al Bendich and had lunch with him, and then he asked me to write some briefs on cases. I couldn't do federal cases because I was a federal judge's clerk, but

I did a few state briefs, and he liked what I did, and so when he left the ACLU, he told me and encouraged me to apply for his position, which I did.

01-00:38:31

Meeker: That's a great overview. Do you mind if we go back and fill in some of the pieces?

01-00:38:35

Krause: Go ahead.

01-00:38:36

Meeker: Well, I'd like to know more about your time at Berkeley. Were there any professors there that were particularly influential?

01-00:38:48

Krause: Yeah, there were two German professors, one Austrian and one German. They were named Stefan Riesenfeld, and I forgot Ehrenzweig's first name [Albert]. The other one was Ehrenzweig, and both of them were very highly regarded professors, and they got me involved in legal history. They liked legal history, and so I had a broader view of the law because of them, and I became Professor Ehrenzweig's research assistant.

01-00:39:26

Meeker: Were they also doing international law?

01-00:39:28

Krause: Oh yeah. Yeah, they were doing international law. I don't think I took an international law course, but I took several courses from them. They were really good professors. Very hard professors, but they were good.

01-00:39:45

Meeker: Did you take any constitutional law courses while there?

01-00:39:51

Krause: Yeah, constitutional law is a required course there. It's a year-long class, and I had it from a professor named Edward Barrett, who was really interested in parts of constitutional law that weren't very interesting to me. He was interested in federalism and state relationships, and he wasn't that interested in criminal law or civil liberties, or constitutional law in general, even though he taught constitutional law. So, I took the course, but I wasn't that drawn to the way he was teaching it.

01-00:40:31

Meeker: You know, '54 to '57 is the time at Berkeley where you're starting to see some transition from the coonskin caps or whatever the fraternity boys were wearing in the 1920s, right, to SLATE and the Free Speech Movement of the late fifties and into the 1960s. Were you aware of the emerging political movements on campus?

01-00:41:07

Krause:

Not at all, I don't think there were any emerging political movements on campus. I can't speak for the undergraduate part of Berkeley; I think I would have noticed it if it had been something big. But the law school was kind of separate, and we didn't mix with the undergraduates that much. We stayed by ourselves as law students, and there was no political activity in the law school, that I knew of. No, so there wasn't any political action—

01-00:41:40

Meeker:

You don't recall any legal issues on campus that law students would have been engaged with?

01-00:41:48

Krause:

Well, McCarthyism, we were engaged in, definitely. Yeah, I think that I was involved in some of the national issues of the day, but it wasn't that there was any protest, or student movement; it was mainly getting involved in what the national issues were.

01-00:42:16

Meeker:

As a student, were you involved with the ACLU?

01-00:42:19

Krause:

No, no. No, I didn't get involved with the ACLU until after I graduated law school.

01-00:42:26

Meeker:

It's a little early for this; I think the "Howl" trial for City Lights was '57, right?

01-00:42:38

Krause:

It was '58 or '59, I think.

01-00:42:40

Meeker:

Oh, was it? Okay. I guess *On the Road* was published in '57, so it was a little bit after that. Were you aware of what was going on in North Beach? Did you have any interest in that literary culture?

01-00:42:55

Krause:

I think I did have an interest in the beatnik culture; that was interesting to me, but I didn't have an entrée into it. I used to listen to Kenneth Rexroth, who was a leading poet of the beatnik movement, and a good friend of Lawrence Ferlinghetti's as well, and he gave a weekly talk on KPFA that I would always listen to, and I was fascinated with him. But I didn't participate myself.

01-00:43:33

Meeker:

So you had mentioned graduating, by the time you graduated, did you have that urge to tear up your diploma?

01-00:43:44

Krause:

No, I didn't; I had a great deal of respect for the law by the time I graduated.

01-00:43:48

Meeker: What was it that changed?

01-00:43:52

Krause: I think it was the intellectual challenge. I liked intellectual challenges. It agreed with me, and I liked the involvement with the real world. That's why I liked the corporation law so much, because it was very real who was going to control Sears Roebuck or General Motors or whatever, and how these very wealthy, powerful people fought their battles, and how lawyers were so important to those battles. So that kind of intrigued me, and as I said, that was my first desire to have a job as a corporate lawyer, but that didn't work out, so I took the job with Judge Denman instead, and I'm so glad that happened. [laughs]

01-00:44:39

Meeker: So you were applying for jobs as legal counsel to corporations?

01-00:44:44

Krause: Not corporations, no; I was applying to law firms, and the large law firms all had corporate sections, so I wanted to be an associate in the corporation division of one of the major law firms. But it so happens, when I graduated, there were very few law firms who were hiring, and I didn't get a job offer from any law firms, so I took the job that I knew about with Judge Denman. [In my senior law school year I was awarded a Ford Foundation Fellowship to study law in Europe for a year but I turned it down because my wife was pregnant and, knowing nothing about either babies or Europe we decided we'd better stay home.]

01-00:45:18

Meeker: Were you looking around the country or just in the Bay Area?

01-00:45:20

Krause: Just in the Bay Area. I immediately, as soon as I got to Berkeley, I knew that I was going to stay in Berkeley and Southern California was out. [laughter] [My wife, Charlotte, was finishing up her undergraduate work at Berkeley and also had a part time job.]

01-00:45:32

Meeker: What were the differences? Why did Berkeley leave that impression on you?

01-00:45:38

Krause: Because it was more settled, and more cultured. It had more culture, and Los Angeles seemed to be kind of vacuous, and focused on celebrity, and focused on money, and focused on speed, and things of that sort that didn't interest me. I was definitely not interested in making money; that was not my interest, because my parents had emphasized how important money was, and at that time, I was totally in reaction to my parents, so I wasn't at all interested in money. I had gotten some scholarships which enabled me to get through law school, and I also worked the entire time I was in law school at various part-time jobs, mainly at the law library. I was some sort of an assistant library or

something, for ten or so hours a week, and made enough money from that and my scholarships, and I think my parents sent me \$100 a month, and that's how I got through.

01-00:46:55

Meeker:

Did you engage in the arts scene, visual arts, performing arts in the Bay Area when you arrived here? Was there anything that was particularly intriguing to you?

01-00:47:05

Krause:

No. I mean, yes, I did; I was interested in show tunes, and show business, and things of that sort, but I didn't personally participate. I went to a lot of events. One of my law school classmates was the head usher at the Opera House, and so he would always let me in to any performance I wanted to go to, opera or symphony, or whatever there was at the Opera House. He just met me at the door and ushered me in, and I was in. So that was nice.

01-00:47:44

Meeker:

That's nice; he would just escort you to an unoccupied seat, and—

01-00:47:47

Krause:

Yeah. So I went to a lot of events at the Opera House, and I got much into the habit of listening to good music, and watching good plays, and things of that sort.

01-00:48:01

Meeker:

Do you recall any particular performances that stick with you?

01-00:48:06

Krause:

No, I was totally taken up by the major symphonies, the Beethoven symphonies and the Brahms symphonies. I loved those and knew them very well. I'd bought all the records, and listened to them. I don't remember them as well now. Now when I hear Beethoven on the radio, I don't even know which symphony it is, but I used to know.

01-00:48:31

Meeker:

During this time, being a consumer, an enjoyer of the arts, were you encountering anything that was pushing the envelope, do you recall?

01-00:48:47

Krause:

I was always attracted to the avant-garde. [I loved jazz music and spent many evenings at the Keystone Korner and other jazz clubs.] I loved the comedians that were available to us in the Bay Area: Mort Sahl, and Lenny Bruce, and all of those people who hung out in the North Beach and appeared at the hungry i or the Purple Onion, or whatever; I liked that very much.

01-00:49:15

Meeker:

So you would go to those venues?

01-00:49:17

Krause: I would go to those venues, and I became interested in the fine arts, too. I went to museums, and galleries, so I had a great interest in that.

01-00:49:30

Meeker: So let's talk about your time with Denman. Was this just a year?

01-00:49:35

Krause: Yes, one year.

01-00:49:37

Meeker: Okay, so that would've been '57 to '58?

01-00:49:39

Krause: Right.

01-00:49:40

Meeker: Roughly? And you had described how you were exposed to somebody who had progressive ideals, and you opened yourself to that. How did that happen? How did he communicate his ideals, his values to you, and what did he communicate those values to be?

01-00:50:02

Krause: Well that's a big question, but I would say that he was the one who let me know that it was okay to be progressive, and I didn't have to apologize about it, because as I say, he was a pillar of the community, and yet was quite liberal and progressive. He was the only one who dissented, for instance, when the Korematsu case came through the Ninth Circuit, and so that was very admirable to me, because he was really out on a limb, the only judge who thought that the Japanese relocation was not right. So, it just ended my feeling that only Jewish people were progressive and liberal, because actually, many of the progressive lawyers at the time were Jewish, so, I connected the two, and finally with Judge Denman I realized that they weren't connected.

01-00:51:18

Meeker: Do you recall having a conversation with him about Korematsu [*Korematsu v. United States*, 1944], for instance?

01-00:51:24

Krause: Yeah, I did, uh-huh, yeah. I don't really remember too much about it except that he was the only one, and that was kind of an isolating thing, and ever since that time, he kind of kept to himself as a judge. He did not go out to lunch with the other judges because he didn't want to be influenced by their points of view. He was a member of the Pacific-Union Club, and he told me a story that I always remember that the Pacific-Union Club. I don't know whether you know it, but it's on Nob Hill and very high level of political and social achievement, old people and rich people are members of the Pacific-Union Club, and it was mainly rich people. Anyway, he was supposed to make a report about some kind of corruption in city government, and he made his report, and many of the richer people of San Francisco were implicated in

this report that was critical of them, and he said, after this report came out, he walked into the Pacific-Union Club, and he heard this squeaking noise. He couldn't figure out what was going on, and he finally figured out, it was the mercury in the thermometers going down. [laughs] I thought that was such a clever thing to say.

01-00:53:07

Meeker: Do you know if he stayed member of it?

01-00:53:11

Krause: Oh yeah, he stayed a member his whole life.

01-00:53:13

Meeker: Eventually, he was forgiven, or accepted?

01-00:53:17

Krause: He just didn't care. He was his own person.

01-00:53:22

Meeker: That's pretty remarkable; it takes the law out of abstract, and it puts it really into personal relations, that humans are the ones who rule on these things, make these decisions, write the grand jury report, or whatever it was.

01-00:53:49

Krause: Yeah, and he was a courageous man. He didn't mind dissenting, and he was admirable. I really liked him.

01-00:54:00

Meeker: That could also be kind of a warning, in some ways that, if you follow this path, there might be people like me who, we can be of similar purpose, but you will also feel some isolation. Did that worry or concern you at this, beginning your career?

01-00:54:27

Krause: Well, when I started off as ACLU attorney, there was definitely some isolation. For instance, my parents were sure that I had become a communist, because I was the ACLU attorney. So they were very upset about it, and they, of course, wanted me to come to Southern California and be a business attorney; that's what they thought I was going to do. So, and there were some people who felt that my clients at the ACLU were bad people, and that they didn't want to be associated with anyone who represented such communists, or criminals, or whatever they thought my clients were. I remember one guy who was a friend of mine who was also my insurance broker for my car insurance and other insurance needs, and when there was a lot of publicity about a controversial case I was involved with, he told me he couldn't work with me anymore because I was too controversial.

01-00:55:43

Meeker: He couldn't sell you insurance anymore?

01-00:55:44

Krause: Yeah, he wouldn't sell me insurance anymore. [laughter] That was his—

01-00:55:48

Meeker: His loss, I guess.

01-00:55:49

Krause: —was his problem, yeah. But mainly, I was very much admired by people who were friends. They thought I was doing great work, and I got a lot of support from friends in the community, and so I never felt isolated in that way. [The most outstanding people I knew were ACLU supporters and Board members.]

01-00:56:10

Meeker: During the Denman year, were there any significant cases that you worked on with him? Anything memorable?

01-00:56:22

Krause: Yeah, there was one case involving some aspect of the peace movement, exactly what it was, I don't know, and there was a famous lawyer involved—I can't remember his name now—who came and argued the case on behalf of whatever issue it was involving peace. And the case was a hopeless one, and they ended up losing it, from my point of view, but that was the law at the time, so that had to be that way. I don't remember the case anymore so I shouldn't really say that. So I can't remember any other cases that I worked on, although they seemed to be important at the time. They were certainly important to people. They involved immigration issues. They involved the criminal law. They involved a lot of money issues. So they were all important.

01-00:57:24

Meeker: What is the nature of being a clerk for an appellate court justice?

01-00:57:31

Krause: Well, it depends on what your judge wants you to do. My judge wanted me to summarize the briefs that the attorneys filed in the case, and kind of give a more neutral argument for each side, and that's what I did. And then he would, many times call me in, and we would discuss the case and which way it ought to go, and I sometimes didn't really know how he was going to vote, and they voted after the oral argument, and sometimes it was a surprise to me. I didn't know how my judge would vote.

01-00:58:15

Meeker: Apropos of Korematsu, was he often in the minority?

01-00:58:27

Krause: Well, no. There weren't that many political cases that came before the court. The courts weren't used so much for political reasons as they were in the twenty-first century, for instance. It was more modest.

01-00:58:48  
Meeker: You, after Denman, I believe you had a second clerkship, right, with Gibson?

01-00:58:56  
Krause: Yes, I worked for Chief Justice Gibson in his capacity as Chairman of the Judicial Council.

01-00:58:59  
Meeker: Of the California Supreme Court.

01-00:59:00  
Krause: Yes.

01-00:59:01  
Meeker: Was that also a year position?

01-00:59:04  
Krause: That was longer; I think I stayed there about a year and a half or so.

01-00:59:09  
Meeker: Can you tell me about how you got that, and how that experience compared to your time with Denman?

01-00:59:19  
Krause: Well, it, once again, involved a man who was extremely impressive. This job was open, and I was finishing up my year with Judge Denman, so I went to visit Chief Justice Gibson, and he impressed me so much as a brilliant and liberal person that I wanted to go to work with him. And so I did.

01-00:59:48  
Meeker: Is that unusual to have two clerkships? Or was this like—

01-00:59:54  
Krause: It's not too usual, no. It is common now. Now, most of the clerks who work for the United States Supreme Court have previously clerked for an appellate court judge. So, now it's very common, but at that point, it wasn't so common.

01-01:00:15  
Meeker: Does this speak to what you hoped your career trajectory would be? Were you hoping, in the course of this, that one day you might be in a position to be nominated a judge? Was that the kind of work that you were really interested in?

01-01:00:29  
Krause: No, I didn't think about that. I really wanted to have a lot of experience as a lawyer and figure out what was most interesting to me. But then, as I say, while I was clerking for Judge Denman, I met Al Bendich and I did a few briefs for the ACLU on state issues, and I realized that was my real attraction. I was very attracted to that, but there wasn't any opening. He was the only attorney for the ACLU of Northern California and far as I knew, he wasn't

leaving, so I couldn't look at that as a career goal. And he didn't tell me he was leaving until while I was working for Chief Justice Gibson.

01-01:01:18

Meeker:

So I came across the announcement in the ACLU news about your hiring. I think that was December of 1960, when that issue came out.

01-01:01:32

Krause:

I started November 1, 1960.

01-01:01:34

Meeker:

Yeah, so this was the next month's newsletter, and it said that you had worked for the California Judicial Council. Was that the clerkship for Gibson?

01-01:01:44

Krause:

That was Gibson, working with Gibson, yeah.

01-01:01:45

Meeker:

Okay, all right, that clarifies things. All right, so that's where you were working for, roughly, two years, or a year and a half.

01-01:01:54

Krause:

Yeah.

01-01:01:55

Meeker:

Where were you living at that point?

01-01:02:00

Krause:

In San Francisco. As soon as I got the job with Judge Denman, my wife and my little daughter, who was born in 1957, moved to San Francisco, and we moved to the Haight-Ashbury district before it was the Haight-Ashbury district. We didn't know it was going to become famous as the grounds for the hippie movement. We just found an apartment on Frederick Street, which was right close to the Haight-Ashbury area, and we moved in there, and then we moved in several other places in San Francisco, and finally we bought a house in San Francisco.

01-01:02:46

Meeker:

Where?

01-01:02:47

Krause:

At Tenth and Lake Street, was our first house.

01-01:02:50

Meeker:

So that's the Richmond, or—

01-01:02:52

Krause:

Yes, that's the inner Richmond.

01-01:02:54

Meeker:

Inner Richmond. What was the neighborhood like then?

01-01:02:58

Krause:

There were families, and playgrounds where we took our daughter to play, and we were very much involved with raising our daughter, and all of our friends had young children as well. And so, that was our activities, and we would switch, do babysitting for each other, and it was a very close group of young parents.

01-01:03:33

Meeker:

What were they like? Were your friends, were they also progressive? Was, sort of what San Francisco's reputation being today, true back then?

01-01:03:49

Krause:

Yes, I think they were mainly progressive, but I don't think we chose them for that reason. We chose them because we had interests in common in raising little children, and we met somehow either at the playground or maybe at the hospital when my daughter was born, or something like that; I don't know. But, yeah, it turned out that they all were very progressive people, but they weren't chosen for that reason.

01-01:04:19

Meeker:

What was your emerging awareness of ACLU? I know that you worked with Al Bendich. Was that your first substantive engagement with the ACLU?

01-01:04:41

Krause:

Yes. I wasn't even a member at the time, and then I joined at that point. Probably somewhere around 1958, I joined the ACLU, and started getting the literature, and became much more aware of what the organization did. I'm sure I'd heard of it before, but I wasn't that clear about what its goals were, what it was doing.

01-01:05:13

Meeker:

What was your emerging awareness of it? What did you think its goals were, and what did you think it was doing at that time?

01-01:05:20

Krause:

I was totally convinced that its goals were to protect the constitutional rights of Americans, and I thought that was a very patriotic thing to do, and I was very much into that. I liked that idea of protecting constitutional rights, and I liked the idea that the ACLU was not concerned with the political views of anyone. They would protect the rights of everyone to have the same constitutional rights. Although, everyone with the ACLU was a progressive person, in the sense of being liberal in their politics, that wasn't the reason that the ACLU existed.

01-01:06:11

Meeker:

At the time, thinking about all that is included in the Constitution, and the amendments, were there particular issues that you thought, areas in which the Constitution was under stress, at that point in time?

- 01-01:06:36  
Krause: Oh yeah, because the House Un-American Activities Committee was still very active at that time, and—
- 01-01:06:42  
Meeker: So, political speech—
- 01-01:06:44  
Krause: Yeah.
- 01-01:06:45  
Meeker: —association—
- 01-01:06:47  
Krause: Yeah, that was a big deal. The—I lost my train of thought there.
- 01-01:06:58  
Meeker: Well, I was just asking you, in what areas was the Constitution under stress when you first got in the ACLU, or in other words, what'd you think the most important work being done by the ACLU was at that point?
- 01-01:07:15  
Krause: I think it was in protecting freedom of speech and freedom of political point of view, because there was a lot of persecution, informal persecution, of people with left-wing views. A lot of teachers were fired for attending left wing meetings, and things of that sort. So, the ACLU was very active in that, and that was the most important thing.
- 01-01:07:46  
Meeker: What about artistic expression and obscenity? Were you aware of all of the work that was being done around those issues, at that point in time?
- 01-01:07:55  
Krause: Yeah, I was aware of the “Howl” trial which had occurred I think '58 or '59, and the issue of obscenity. The ACLU was going through some growing pains about obscenity. We didn't want to say that there was no such thing as obscenity, but we were unsure about how the First Amendment applied. And then eventually, the ACLU came to the view that there is no such thing as obscenity, but it took a long time to get there. So that was important, and I was very attracted to artists and artistic freedom, and loved being involved with artists and writers and poets, and things of that sort.
- 01-01:08:52  
Meeker: So, as a young married father, those issues were pretty cut and dry for you?
- 01-01:09:01  
Krause: No, they were very complicated. They were very, very complicated, and it took a lot of work to come to the right approach in each of these cases.

01-01:09:11

Meeker:

Let me maybe talk about the “Howl” trial. Was this something that you followed?

01-01:09:23

Krause:

I don't think I followed it really closely because there wasn't any way to really follow it. There was some newspaper coverage, and I read the *San Francisco Chronicle* pretty religiously, and I'm sure there was some coverage in there, but not a lot, and I didn't know anyone who was personally involved in it. So, I knew that I was certainly in favor of poets being able to express themselves the way that they wanted to express themselves, and I liked Allen Ginsberg, and I felt that he should be able to express himself any way he wanted to.

01-01:10:13

Meeker:

Were you ever any of the gatherings where he recited this or other poetry?

01-01:10:21

Krause:

Yes. I went to several gatherings where he was present, and I don't remember too much about it, but I know that I was there, and he was one of a group of people who were reading poetry. Kenneth Rexroth was there as well, and maybe Ferlinghetti; I'm not sure. They were kind of scary, because the sexuality, of possible homosexuality, which I was kind of fearful about. I didn't really know what it was, or I had very little contact with homosexuality. I didn't even know there was such a thing as homosexuality until I was in college, I guess. So, that was kind of scary.

01-01:11:24

Meeker:

Scary in what way? I'm curious.

01-01:11:28

Krause:

There was a lot of persecution of homosexuals, and I didn't want to be thought of as perhaps a homosexual and getting persecuted in that way.

01-01:11:45

Meeker:

It's interesting kind of thinking back to what I imagine it could have been like, and that is, *On the Road* comes out I think in '57, “Howl” shortly thereafter, and then you also have the Roth [*Roth v. United States*, 1957] decision in '57, I think. In that next five, six, ten-year period of time, the nation's understanding of free speech and obscenity completely changes, I think. And, the way that you're describing it, it's kind of like you were there with the people who were making this happen when it did happen. Was there a point in time in which you could sense that you were in the midst of a cultural shift?

01-01:12:44

Krause:

I think so. I think that the vast majority of people were not culturally shifting; they remained very narrow minded about literature, and about anything having to do with sex. I just always remembered my mother, who refused to have anything about sex ever mentioned in her presence, and she was totally fearful of any discussion of sexuality. And so, that was the attitude that I knew was wrong, but I wanted to overcome that attitude, and I felt that we should

have more of a discussion about sexuality. And so I was glad that people like Allen Ginsberg were raising these issues of sexuality, and using these words that were forbidden words.

01-01:13:49

Meeker:

Did you read “Howl” when it came out? Did you have an interest in knowing what was being said?

01-01:13:55

Krause:

I don't think I read it when it came out. I think I read it maybe a couple of years afterwards, yeah, then I liked it a lot. I liked being a rebel, maybe that's why I was attracted to the ACLU. I definitely was attracted to being a rebel like Ferlinghetti, because I thought that the mainstream society was absolutely fucked up. They were just so narrow minded, and illiberal, and they didn't know anything about anything. So, I became very attracted to being the opposite.

01-01:14:40

Meeker:

Why don't we wrap up today and talk about the 1960 protest? [side conversation deleted] So, you had been holding hearings. They did kind of a road show around the country, going to various locales, rooting out communists and subversion in small towns and large cities across country. They come to have another set of hearings in May, 1960, at San Francisco City Hall. How did you learn about this? Were you aware that there were going to be protests this particular time? How'd you get involved?

01-01:15:36

Krause:

Well, I guess I really wasn't that involved, up to that point, up until May of 1960, and then HUAC announced that they would be having hearings in San Francisco. I believe it was like May 13 or something. May 13 and 14, and my wife was a graduate student at the time. She was getting her master's in social welfare, and she got involved, and she wanted to go to the demonstration against the committee at the San Francisco city hall. So I was working for Chief Justice Gibson across the street from the city hall at the State Building, so I said, “Well, go to the demonstration. I'll meet you for lunch. We'll have a nice lunch, and then you can go back and demonstrate, and I'll go back to my job.”

So, I went over there, and there were a whole bunch of students kind of just sitting down in front of the board of supervisors' chambers, and my wife was among them, and I asked her and several other people what went on, and they told me that the committee had handed out what they called white cards, which were admission cards to the hearings, and those admission cards were held by American Legion types, and Daughters of the American Revolution types, and very conservative, reactionary people, and they occupied all of the seats in the supervisors' chambers. So no students could get in, and they thought that was pretty horrible. And so, they started sitting down and protesting, and then they had a conference with the sheriff who was in charge

of security, and he promised them that, after lunch, when he came back, there would be no white cards. It would be first come, first served. And his name was Matthew Carberry. And so they agreed to cool it, and that's what these people told me and my wife told me.

So then my wife and I had lunch, and we came back in time for her to get in line to get into the hearing room, and I waited there for her to get into the room, and once again, the doors opened, and only the people with white cards were allowed in, and all the students who were lined up waiting nicely, were denied admission. Later on, it turned out that I found out that Matthew Carberry, the sheriff, never came back from lunch. He was a total alcoholic, and he would be totally drunk at lunchtime and for the rest of the day, and that was our sheriff. So, there was no Matthew Carberry there to keep his promise, so the students got a bit upset about that and they started chanting, and singing, and "We Shall Overcome," and there were a lot of policemen around. They were gathered around; they were holding their clubs, and they were glaring and glowering at the student protestors who, they thought they were communists, or misled by the communists or something.

And all of a sudden, I saw some of the cops start rolling out the fire hoses from the sides of the city hall where they were kept on the second floor, and it looked to me like what they were going to do was turn on those fire hoses on the students who were sitting down and chanting and singing and et cetera. So, I went up to a group of cops and I said, "You can't turn the fire hoses on them. They're not doing anything; they were not even warned to disburse." And so, that was thought, I guess, to be a great insult, so this group of police charged out after me, and I was the first person arrested on May 13, 1960, even though I wasn't participating in the demonstration. And so they started taking me down that big flight of marble steps in the San Francisco City Hall, and not only were they pushing me down these steps, they were actively trying to trip me so I would fall on the steps. And ooh, boy, that was a big eye opener, and that really radicalized me.

That whole experience radicalized me. Up until that point, I thought that everybody could be reformed by just talk and conciliation, and I thought the House Un-American Activities Committee could be reformed by just improving their procedures a little bit. I knew that they were not doing good work—they were doing lousy work—but I thought they could be reformed. After that day, I was sure that they had to be abolished, the committee had to be abolished, and that the police misconduct had to be looked into. So, anyway, I was the first person arrested. I was thrown into a holding cell along with several other people, and I think Charles Garry, who was a left-wing attorney at the time, heard about the students being arrested and came down to city hall. And I had known Charles Garry, and I called out to him, and he was very surprised to see me. I guess he came down to the station house jail and saw me there, and he spoke to a judge and got me out immediately on my own recognizance.

So, I think there were over sixty or seventy people arrested on that day and all the charges were dismissed against everybody except one guy, Robert Meisenbach, was his name, and the charges were dismissed by the presiding judge of the municipal court, on the condition that we waived our right to sue the police for wrongful arrest. So, we all signed the waivers and all the charges were dismissed. And then, Meisenbach had a jury trial, and during that trial, the police testified that Meisenbach jumped over the barricades and charged them, and that's why they had to turn on the fire hoses and engage in all this clubbing of the students which they did. And that was proven to be absolutely false by contemporary photographs at the time which showed Meisenbach way in the back at the time that the students were being hosed down by the police, and so he didn't start anything, and he was acquitted.

So that was quite a lesson for a lot of us of blatant police lawlessness and perjury, and we formed our defense committee. Then the House Un-American Activities Committee made a movie called *Operation Abolition*, in which they showed that the City Hall Riots, as they called them, were led by communists, and they showed a few actual communists hanging around city hall, and they said these were the leaders of the student movement, but the students had never even seen these people, so. Anyway, there was a big defense committee, et cetera, and the ACLU, led by Ernest Besig, who was the executive director, made a film to counter that, which was called *Operation Correction*. And so, that was shown at many events, and it was interesting. And so, anyway, I was hired by—

01-01:25:06

Meeker:

What was the thrust of the *Operation Correction*?

01-01:25:08

Krause:

To show that *Operation Abolition* was totally false, propaganda and HUAC had no regard for truth. I was hired after I had been arrested, but before *Operation Abolition* came out, before the film came out, the films, I should say. And so, people at the ACLU were sort of concerned that I had been arrested, and I had to kind of explain what had happened, and so, they accepted my explanation. And I was very pleased to be hired, because I think there were thirty-two people who applied for that job, and so, that I was hired was quite a feather in my cap. I was really happy about it.

01-01:25:57

Meeker:

Because you hadn't done much litigation up to that point, right?

01-01:25:59

Krause:

None. No, I'd done none.

01-01:26:02

Meeker:

Did you ever get a sense of how it was that you became the leading candidate?

01-01:26:09

Krause: Yeah, I think Ernest Besig, who was the executive director, just said he thought he could work with me; he told me that.

01-01:26:16

Meeker: Well, and for the next eight years, right?

01-01:26:20

Krause: Yeah.

01-01:26:21

Meeker: Did you get to know many of the students or others who were arrested at those protests?

01-01:26:27

Krause: Yeah, I got to know a few of them. We hung out at the same meetings and things of that sort. I helped organize some of those meetings, and they were all very conscientious people who were quite upset about the way the police reacted at that event, and the way the House Committee operated, but they knew in advance that the House Committee would not be fair to anybody. They were very surprised that Sheriff Carberry didn't show up to keep his promise, and they were very surprised that the police just attacked them without giving them any warning, or anything of that sort, which was why I protested, which was why I was arrested.

01-01:27:15

Meeker: You said that this radicalized you, and you described it in a couple senses: one, you now believe that the committee needed to be disbanded, and two, that police misconduct needed to be taken seriously. Did it mean anything else for you? Did it change your thinking, do you think influenced the way that you would have voted in elections, I mean those kinds of—

01-01:27:44

Krause: Well, my picture appeared in the *Chronicle*. I had my suit and tie on in this picture, but I'd obviously been soaking wet, [laughs] because I had been sprayed with water from the fire hoses. And so, the picture appeared in the paper and said that I worked for the Judicial Council and Chief Justice Gibson, and I was very concerned about it. And I went into work the following Monday, and I was sitting in my office, and in comes Chief Justice Gibson—he had never visited my office prior to that time—and knocks on the door and comes in and sits down, and says, "I read about what happened." I said, "Well, yes." And he said, "You know, one time I was driving down home in my limousine with my wife, and I saw, on the side of the road, Highway 101, that the police had somebody that they had stopped in the car, and they were beating him with fists and clubs. And I said to my wife, 'I've got to do something about this. I'm going to stop.' And we did stop, but my wife grabbed me and didn't let me go. So, I think that if I had gone, I would've gotten into the same mess that you got into. So I want you to know

that you should not worry; this is not going to affect your job in any way.” So I was very happy about that.

01-01:29:38

Meeker:

Wow. That’s impressive. I mean, this is 1960. You could’ve easily been fired.

01-01:29:46

Krause:

Gibson was another very, very fine person. He was Pat Brown’s campaign manager when Pat Brown first became governor. So, he was—or was it? No, wait a minute. It was Governor Olson, before Pat Brown, and he was his campaign manager, so, when Olson had a vacancy at the Supreme Court, he appointed Gibson as chief justice, and he was an excellent chief justice. Everybody admired him and respected him. Even though he handed out a lot of work to his clerks, he still was in charge, and you knew he was in charge. Here comes my cat!

[side conversation deleted]

01-01:30:32

Meeker:

I’m curious, sort of the broader politics, I mean, radicalization could mean a loss of faith in the broader political system. Did that happen for you?

01-01:30:53

Krause:

Oh no, I still had faith in the political system, that when the truth came out, the right thing would happen, and that’s why I thought the First Amendment was so important, to get the truth out. And so, yeah, I didn’t lose faith in the system. I lost faith in some of the people in the system. Let’s see. This event with the House Committee occurred on a Friday, Black Friday, it was called, May 13. And then the next day, the committee had a hearing in which they called the police as witnesses. And they said how the students attacked them, and they had to protect themselves, and how horrible it was then, and how that the communists were—[side conversation deleted.] Anyway, they had this hearing, and created a completely false and phony picture of what happened on May 13, and all the city officials cooperated. All the police said that’s what happened, and it was horrible. But anyway, I still didn’t lose faith in the system. I thought when all of this was exposed, it would all come out right.

01-01:32:38

Meeker:

So, come November, 1960, couple months later, were you voting for Kennedy?

01-01:32:46

Krause:

No, I didn’t vote for Kennedy in 1960, because I was very upset that Kennedy approved sending advisors into Vietnam when I thought that was very dangerous, so I voted for Dr. Benjamin Spock, the peace candidate.

01-01:33:11

Meeker:

That's fascinating. Well let's see here. Maybe that's a good spot to stop at for today. This kind of again, brings us right up to you joining ACLU as staff attorney. So, great, yeah, why don't we stop there for today, okay?

01-01:33:38

Krause:

Okay, Martin.

## Interview 2: December 14, 2017

02-00:00:01

Meeker: Today is the fourteenth of December, 2017. This is Martin Meeker interviewing Marshall Krause for the ACLU Oral History Project. We are here at his home in Novato, California, and this is interview session number two. Thank you again for giving your time for this project. As I mentioned, I really enjoyed the research process for this, and looking forward to hearing your perspective on this. You were hired in November, 1960, to be a staff attorney for ACLU. You took over from Al Bendick [sic], or Al Benditch [sic]?

02-00:00:41

Krause: Bendich [pronounces as Bendick].

02-00:00:42

Meeker: —Bendich, and served under Ernie Besig, who was the staff director. I wonder if you can give me a sense of these two individuals. They kind of play an outsized role in looking at the legal history of civil liberties in the Bay Area. So, maybe—

02-00:01:01

Krause: Definitely.

02-00:01:02

Meeker: —tell me about Al Benditch [sic], Al Bendich, sorry. [laughs]

02-00:01:06

Krause: Al was a very deep thinker. He was kind of a philosopher. He talked a lot of philosophy about the Constitution, and about the Bill of Rights, and after he left the ACLU, he ended up teaching at UC Berkeley, and he taught kind of the philosophy of the First Amendment and the philosophy of law. So he was a very deep thinker and a very admirable guy and I liked him a lot, and he was a great role model for me.

02-00:01:41

Meeker: Is it possible to encapsulate what his philosophical approach to the Constitution and First Amendment would have been?

02-00:01:49

Krause: Yeah, I would say that he liked to take things apart and see how they were put together, and become very logical, and clear about what was happening and what position the ACLU should take. So, he wasn't a simple thinker; he was a deep thinker. [He was interested in the political theory of our constitution and applying that to the real problems which come up.]

02-00:02:10

Meeker: Tell me about Ernie Besig. I believe he was involved since the thirties, right?

02-00:02:16

Krause: [Ernie was the third greatest influence in my life, after the two judges.] Ernie Besig, the story is, came to Northern California because there was a famous

tar and feathering, believe it or not, in the middle 1930s of labor organizers, people who were trying to organize workers into labor unions, and there was a lot of opposition to them, and Ernie came up. He had been working for the ACLU in Southern California. He came to handle that problem, and he just stayed for the next whatever, forty years—more than that, maybe fifty years; I've forgotten exactly when he retired. But, he was a total figure in Northern California life. He knew all the politicians. He knew the shakers and movers of San Francisco society, and he was a wonderful guy and everybody respected him for his integrity and feistiness and fearlessness.

At one point, he was the plaintiff in a case to try to get Henry Miller's *Tropic of Cancer* into this country. It had been stopped by the Customs Department as being illegal, and so he put in a claim to get this book, and it came before a famous liberal judge in San Francisco, a federal judge named Louis Goodman, and Louis Goodman put in his opinion, "I have known Ernie Besig for many years and I find him one of the most upright and finest citizens of our land, and I can't imagine why he would want to see this dirty filth." [laughter] And he ended up ruling against us, so, *Tropic of Cancer* remained banned until, I think it was the late fifties or early sixties when it was finally allowed in.

02-00:04:20

Meeker:

Probably as a result of the *Roth* decision?

02-00:04:24

Krause:

Could be, yeah.

02-00:04:26

Meeker:

So Besig was an attorney himself, right?

02-00:04:28

Krause:

He was, but he wasn't admitted to the California bar. So, he never got around to taking the California bar. He was admitted I think in New York, where he went to law school. So, he handled cases that didn't require admission to the California bar, like immigration cases, or loyalty and security cases where there was a loyalty board that heard the issues. So he would handle those administrative proceedings.

02-00:04:58

Meeker:

Did you ever hear from him about why he was so committed to civil liberties work?

02-00:05:05

Krause:

No, I didn't hear from him about that. I know that he was the son of a minister, and he was very straightforward and very honest, and everybody who met him knew he was a man of integrity; it just flowed out of him.

02-00:05:27

Meeker:

Could you tell me what it was like to work for him? He was your boss for the eight years while you were at the ACLU.

02-00:05:33

Krause:

Well, he was the kind of person who didn't come up with much praise. He expected you to do a great job, so, I never got too much praise from him, but after I resigned from the ACLU, he told me that he really respected my work and thought I had done a fantastic job. But that was the only praise I ever got from him. But, he was easy to work with because he let me have my way, and I had a lot of my own discretion.

02-00:06:09

Meeker:

So he didn't manage you really closely, it sounds like.

02-00:06:12

Krause:

No. I had to discuss with him when I wanted to take a case, and then it had to be brought before the board of directors, and so Ernie would usually present the case, sometimes I would, to the board of directors, and we'd get authority to handle it.

02-00:06:29

Meeker:

Can you tell me a little bit about the relationship similarities and differences between the Northern California chapter of the ACLU and ACLU, national?

02-00:06:40

Krause:

Well, Ernie was part of that because he never recognized the authority of the national ACLU to give any orders to the Northern California ACLU. So, when the Northern California ACLU decided to oppose the internment of Japanese during World War II, the national ACLU threatened to expel the Northern California group because the national ACLU supported it as a legitimate war measure. And the attorney general under Franklin Roosevelt was a man named Francis Biddle, who also had been the chairman of the ACLU Advisory Board, and there were a lot of ACLU people working in the Roosevelt administration. So they thought that we should pay attention to them, and Ernie was very independent and didn't go along with the plan, and so, from that point on, Ernie and the national didn't get along too well, and I think, only after Ernie died has that breach healed. Now, the ACLU of Northern California and national get along just fine. [Ernie Besig was a hero of the Japanese community. He visited the camps, gave the residents aid and comfort, and represented Frank Korematsu from the trial through the unfavorable decision of the US Supreme Court.]

02-00:08:08

Meeker:

Were there any other issues that came up, say, during your tenure that you know about, where there was a clear policy divide, for instance?

02-00:08:19

Krause:

I can't think of any but there probably were; they just don't occur to me right at this moment. But, Ernie wanted to be independent, and he was an independent man, and even the ACLU was not going to give him orders. [Ernie was more concerned about working with the Communist Party and

front groups than was the national ACLU. He'd been bummed out by its opportunistic support of civil liberties.]

02-00:08:45

Meeker: The ACLU in Northern California would have been, probably, independently funded, is that correct?

02-00:08:51

Krause: Yes.

02-00:08:51

Meeker: Because I think now, there's a bit more funding coming from the national—

02-00:08:57

Krause: Now the money we raise here in Northern California is split fifty-fifty, between the local group and the national ACLU.

02-00:09:05

Meeker: Oh okay, so there's actually money going to the national—

02-00:09:08

Krause: Oh yeah, oh yeah, and we are the largest ACLU affiliate in Northern California, so, we've always raised the most money.

02-00:09:18

Meeker: Was that true in the sixties when you were there too?

02-00:09:21

Krause: Yes, yes.

02-00:09:21

Meeker: Interesting. So even bigger than the New York chapter.

02-00:09:23

Krause: Yes.

02-00:09:24

Meeker: From what I understand at least, up until recently, chapters had representation on the national ACLU board. Do you know if Besig played a role on the national board in that way?

02-00:09:45

Krause: The board of directors of the ACLU of Northern California nominated a representative to sit on the national board. Ernie was never that representative; it was always an independent member of the board of directors.

02-00:10:01

Meeker: Is that because of his conflict with the national group?

02-00:10:06

Krause: No, I think they just wanted it done on the board level.

02-00:10:10

Meeker:

What can you tell me about the Northern California board, during the sixties? How big was it? What kind of people were involved?

02-00:10:18

Krause:

There were usually between fifteen and twenty people, and there was a strong representative group from religious organizations. The leading rabbi of San Francisco was Alvin Fine, of the Temple Emanu-El, and he was on the board, and the leading Unitarian minister was on the board, and I think the Episcopalian archbishop had been on the board. And then we had a lot of representatives from universities; there were usually several people from Stanford University, several people from UC Berkeley, people from San Francisco State, and then there were kind of like political activists involved, also.

02-00:11:12

Meeker:

For those who came from a religious background, were they primarily concerned with the Establishment Clause, or did they have a broader set of concerns?

02-00:11:20

Krause:

I think they had a broader set of interests, mainly revolving around general freedom of individuals to take whatever political or religious points of view they wanted to.

02-00:11:34

Meeker:

Al Fine was quite different than say the archbishop.

02-00:11:39

Krause:

Yes. Yeah, they were different but they agreed on the importance of civil liberties and the Bill of Rights, yes.

02-00:11:46

Meeker:

So, there would have been some Catholic representation on the ACLU board, do you think?

02-00:11:51

Krause:

I don't remember any official Catholic representative, no. I don't think so. The Catholics are not as strong as the Protestant religions on separation of church and state. I think most Catholics believe that the state should help finance Catholic schools, for instance, and that's always been considered a breach of the Establishment of Religion Clause by the ACLU.

02-00:12:24

Meeker:

I'd like to talk to you a little bit about the context of civil liberties and First Amendment law when you were hired in 1960. There were a number of decisions that were coming down roughly during that period, particularly after 1960, but some before then. I'm thinking like the *Roth* decision in '57; there was, I think it was '58 or '59 where you have *One versus Olesen* [1958] which was about a gay magazine from Los Angeles that went to the Supreme Court.

Both of those were seen as widening the scope of what was, or shrinking the scope rather of what was deemed obscene. Were you aware of this apparent trend at the time?

02-00:13:19

Krause:

The Supreme Court all through the forties had been wrestling—and the fifties, also—had been wrestling with, how do you define obscenity? They kept saying, “Well, obscenity is not protected by the First Amendment,” and the ACLU accepted that too. Part of their policy was that obscenity is not protected by the First Amendment. The trick was, how do you define obscenity? What is obscenity? And as you probably know, during the sixties, Justice Potter Stewart came up with the line that everybody loves to quote, “Well I can’t define obscenity, but I know it when I see it.” And that’s kind of a hard line for lawyers to deal with, because it’s not a line, really. [laughs] How does a person know what would be protected and what wouldn’t be? And that’s what the *Roth* decision was all about, to try to define it, and we’re still trying to define what obscenity is, and right now, I don’t think it has any meaning whatsoever.

02-00:14:37

Meeker:

So, during the time, in 1960, were you aware of these battles and did it seem like things were heading toward a more open direction, or did it seem like there was going to be a big battle over it?

02-00:14:56

Krause:

There always was going to be a big battle because there were lots of organizations, and the Catholic Church, that were always interested in censorship, and they felt that the moral imperative of our civilization was to protect young people, and “impressionable people,” as they put it, from the bad effects of obscenity, whatever that was. Of course, there was a lot of disagreement among the anti-obscenity people about what obscenity was. The leading member of the Citizens for Decent Literature in the sixties was a schoolteacher, and I ended up debating him, several times, about obscenity. And he always would bring a whole bunch of big, blown-up pictures like three feet by four feet, of what he considered to be obscenity, and he would put them all around the hall where we were having this meeting. And so, we would be talking about obscenity, and there would be all these genitalia, and other aspects of sexuality staring down from us all around the room, and I thought that was pretty clear that this man was himself obsessed by sexuality. And it later turned out that he was arrested for some kind of sexual offense himself.

02-00:16:33

Meeker:

I think we’ve heard that story repeated a few times in different contexts, right?

02-00:16:38

Krause:

Mm-hmm, right.

02-00:16:39

Meeker:

What about free speech law around political speech, was there a similar battle or transformation happening at this time?

02-00:16:59

Krause:

Well, I would say both of those things are similar in that people think that obscenity or radical political speech has some kind of harm connected to it, and the question is, how do you eliminate the harm? So, in both of those situations, the Supreme Court was fumbling for some way to figure out what is harmful and what isn't, and the same thing happened with free speech. The famous clear-and-present-danger test was stated in the 1920s, first in a dissent, and finally in the thirties, it was adopted as the rule of First Amendment interpretation. But there have been many tests since then, and we're still working on that one, too.

[side conversation deleted]

02-00:18:04

Meeker:

When you started in 1960 at the ACLU, recognizing this context of freedom of speech and expression in terms of obscenity or politics, was it pretty clear to you that you were going to be on the vanguard here, that there were going to be—even though you're in liberal San Francisco or relatively liberal San Francisco, was it pretty clear to you that there were going to be a lot of battles over these issues?

02-00:18:45

Krause:

[I think there always are, up to the present day. Many times we represented people with very unpopular, even revolting points of view so antagonism was expected, and this was magnified when the cold war was hot.] [paragraph deleted.]

02-00:19:24

Meeker:

What was your skepticism based on?

02-00:19:29

Krause:

My own skepticism is kind of natural; I'm naturally a skeptical person. But to me, it was very clear that freedom was extremely important, and independence was extremely important, and I didn't like the idea of the government telling people what they could read, or what they could see, or what they could believe in the way of religion or politics.

02-00:20:00

Meeker:

So we talked a little bit last time about the hiring process, and I'm wondering if you can just kind of give me an overview of that again. How did you get to be staff attorney for ACLU?

02-00:20:17

Krause:

Oh, they had a general employment application kind of publicity, and so a lot of people applied. Over thirty people applied for this job, but I think I had kind of an inside track because I had done volunteer work for the ACLU

under the tutelage of Al Bendich, and worked on a number of cases, and he thought my work was good. He told me he was going to recommend me for the job, and I don't know how much influence Al Bendich had. I think Ernie Besig really made the decision, and Ernie later told me that he thought that I would be the best person to work with him, and that's probably why he hired me, why he recommended I be hired, and then it was a decision of the board of directors.

02-00:21:16

Meeker: Where were the offices at that time?

02-00:21:20

Krause: It was 503 Market Street, that's the corner of First and Market, and now there's a huge building there, but at that time, it was a little ten-story building called the Executive Tower Building, and we were on, I think, the seventh floor.

02-00:21:38

Meeker: How many staff people were there at that time?

02-00:21:42

Krause: Not many. There was Ernie and myself, at the beginning, and then two secretaries, so there were four people. Ernie used to do a lot of the grunt work himself. Every morning, he would come in and pick up the mail, and deal with the new members, and the old members renewing their memberships, and he was the membership secretary, as well as the executive secretary.

02-00:22:13

Meeker: Oh, interesting. How many volunteers were working, particularly attorneys?

02-00:22:20

Krause: It depended on what was going on, but there would be people coming in every day to help us with the membership information, and to work on meetings and things of that sort. There were a lot of volunteers.

02-00:22:36

Meeker: You know, reading through the newsletter, it appears that you were involved, at least tangentially, on dozens of maybe not cases, but actions, at any time. What were your hours like?

02-00:22:55

Krause: Some days, they were very, very difficult. I would work all day and then come home and have dinner with my family. I had two children at the time, and so, many times I would go back to work in the evening. So I was working pretty hard. I once asked my daughter what was her memory of me during that period, and she said, "My main memory of you was you falling asleep on the couch." [laughs] So, that's what I did sometimes.

02-00:23:31

Meeker: What was motivating you, in order to pull this off?

02-00:23:37

Krause:

I think I had a big ego, and I didn't want to lose any cases, and it would have really ruined me to lose any cases. I did lose a few, but not very many. And, it also seemed extremely important to me that these cases be won, because I always thought of the ACLU as kind of a wall keeping a mountain of water from inundating our freedoms, and the ACLU was always there, and no matter how hard we pushed, how many cases we won, there were always more pressure coming in on that wall.

[side conversation deleted]

02-00:24:33

Meeker:

Well that's an interesting metaphor. How real did that pressure feel? It sounds to me like what you're saying is, it wasn't just an isolated case here and there; it felt like a whole, oops, a whole cultural and political apparatus sort of coming down on it.

02-00:24:58

Krause:

Yeah, we were definitely a minority view. Other people were not as concerned as we were with constitutional rights, and so it became something that was at times, hard to do. However, among the people that I knew, who were mainly college-educated people and a lot of lawyers and professional people, I was kind of a hero. They all thought I was doing fantastic work. So I got a lot of boosts for my own ego there, and it didn't matter to me that some politician or business person thought that I wasn't doing good work. They were wrong and I was right. I was very sure about myself.

02-00:25:55

Meeker:

Can you tell me about the culture of San Francisco in 1960? I think that people tend to hear of 1960 San Francisco and they think more of 1968 San Francisco. What was the culture of the city like?

02-00:26:14

Krause:

Well, in 1960, the beatnik era was just kind of ending, and those, the beatnik culture was considered kind of like bohemians and artists, and they were expected to be a little weird and a little off center, so, they didn't get too much criticism. But then in 1960, the hippie movement started happening, and guys would be walking around the city with long hair, and tie-dyed clothes, and women the same, and there was a lot of hostility and criticism about hippies that they were parasites, and didn't really contribute to society, and were really pushed down. So, San Francisco was always known as a fairly tolerant place, but there was still a lot of racial discrimination, a lot of discrimination against the Chinese, certainly against the blacks, and the blacks were mainly in one area of the city called the Fillmore District, and there were also some black people in the Hunters Point area. But they were a separate community, really, so there wasn't too much integration in San Francisco, and it was still something unusual if a black person moved into a white neighborhood; it was very unusual.

02-00:27:59

Meeker:

Did you have much interaction with like the political leaders of the city? Did they see you and the ACLU as an antagonist or as an ally?

02-00:28:13

Krause:

I think that we were an antagonist, because we caused them a lot of trouble. We exposed a lot of things they were doing. I remember Ernie was very active in trying to help people stay on welfare, and the welfare bureaucrats would be very, very insistent that the rules be followed, and some poor guy would be taken off his benefits because he did this or did that. And Ernie would be on the phone with these welfare administrators, and if they wouldn't do what he felt was fair, he would go to the board of supervisors, and he had friends on the board of supervisors, and he was very effective in influencing the city by moral persuasion. People wanted to do the right thing, and Ernie really allowed them to by exposing the harshness of the system.

02-00:29:18

Meeker:

You know, I think now the ACLU nationwide is having a very successful period, but at the same time, it's going through I think some difficulties. Perhaps people are seeing some conflict between the free speech mission and the social justice mission, apropos of protecting speech of the conservative right. And, the far left now seems to be much more open to squelching free speech for fear of exposing marginalized people to difficult opinions, or something along those lines.

02-00:30:11

Krause:

Yeah. I don't think it's changed a lot. There were always objections to the ACLU defending anti-Semites, or proto-Nazis, or people on the right. There were always objections from people on the left and the same for defending people on the extreme left. So, that's not new that there would be this objection, within the ACLU, but it's never carried the day. Also, now, there seems to be a lot of ferment over whether the ACLU should actually step in to these situations, such as the Charlottesville white supremacist rally and things of that sort. People are saying, "Well, yes, we should defend freedom of speech, but we shouldn't make it a big deal." [laughs] People can't quite understand that if you have free speech for anybody, you have to have free speech for everybody, because I always looked at the government as an encroaching wall, another wall metaphor, that, unless you held back the government all the time, they would encroach on the people's freedoms.

02-00:31:47

Meeker:

And so you didn't see any inherent contradiction in pursuing kind of a social justice as well as a First Amendment frame.

02-00:31:58

Krause:

Well, social justice is a big term. Getting back to Al Bendich, after he left the ACLU, he wrote an influential *Law Review* article which was basically saying that the Fourteenth Amendment's Equal Protection Clause should apply to economic situations, and so, the government should have an obligation,

because of the Equal Protection Clause, to make sure that every person had decent way to live, maybe a guaranteed annual wage or something of that sort. He thought that we were a rich enough country so we could afford to make sure that there wasn't any poverty, which was pretty far out idea and still is a pretty far out idea.

02-00:32:57

Meeker:

This is maybe a bit of a digression, but I know that you just mentioned Al Fine, and I was, a number of years ago, doing some research on the Human Rights Commission in San Francisco, which was established around '64, I think. Al Fine was on that commission, and in the context of talking about human rights rather than civil rights, they were talking about things like that, and sort of the four freedoms, and the Universal Declaration of Human Rights that happened after World War II.

02-00:33:37

Krause:

Well, I think that's one area where the ACLU has changed. It used to be that we were only interested where there was a clear constitutional right at stake, and it was presented on undisputed facts. That is, the ordinary police brutality case seems like it should be a civil liberties issue, because people shouldn't be beaten up by government representatives. However, there's always another side to the story in these police brutality cases. The police will tell you that "oh, this guy attacked me, and I just had to defend myself," so we always took the position that we could not decide those factual issues, that we were against police brutality, but it had to be presented in a way that was undisputed under the facts.

[Side conversation deleted]

02-00:34:58

Krause:

Now, the ACLU is very clear that it is not limited to just constitutional rights. It's more interested in civil, social, and economic rights, so the ACLU is expanding in its idea of what its work is.

02-00:35:29

Meeker:

But you, when you were there in the sixties, that wasn't really the case.

02-00:35:32

Krause:

No, no. Ernie was very clear on that, that there had to be constitutional issue on the undisputed facts. For instance, when the Free Speech Movement came to Berkeley, it was about free speech, but, we really didn't know who started all these fights and disturbances, so, Ernie decided that we had to stay out of the Free Speech Movement.

02-00:35:59

Meeker:

Oh, interesting. I didn't know that, okay. So what was the reason again?

02-00:36:05

Krause:

Because there were disputed facts as to who had started the situation.

02-00:36:10

Meeker:

Well let's talk; I'd like to spend the rest of the time today talking more about freedom of expression, and particularly around the obscenity issues that come up in the 1960s, and there are quite a few really fascinating examples, and notorious too. One thing about obscenity law that's very interesting, and I'd like you to maybe talk about it a bit, is the community standard element, and also is the fact that municipalities, states, are typically where the obscenity laws were passed. There was the Comstock Law in the 1870s, and I'm not sure when that was repealed or overturned, but, that was kind of a nationwide one where you couldn't send material through the mail.

02-00:37:09

Krause:

Yes, Comstock was a real person who was a crusader in that area, and he finally was successful in passing a federal law called the Comstock Act [1873], which supposedly was going to combat obscenity.

02-00:37:26

Meeker:

Particularly through the US Mail system. Well, can you tell me a little bit about the local landscape and the obscenity laws in San Francisco, the Bay Area, and the state? Did you know them to be less stringent, more stringent than other communities around the country? What was the status of the legal landscape?

02-00:37:54

Krause:

Well, the government very well knew that there were different standards in different communities, and so, if the federal government wanted to bring an action against a book or a magazine, they could choose anywhere in the country to bring it. And they would usually choose somewhere out in rural Oklahoma, or something of that sort, where they had never seen a nude person depicted in a magazine, or discussed in a book, or anything of that sort. So the community standard was quite different, and eventually, the *Roth* case said that you had to apply contemporary community standards, but it never said in what community, contemporary community standards in North Beach, San Francisco, or contemporary community standards in Upstate Wisconsin? Finally, they said that it was a national standard, so that changed things quite a bit.

02-00:39:02

Meeker:

Do you know of there being specific laws say in San Francisco, prohibiting obscene publications or speech?

02-00:39:13

Krause:

There was a California obscenity law that applied in San Francisco, of course, so it was a statewide law, but San Francisco, itself, had some very broad and vague laws. For instance, the law against vagrancy said that anytime people seemed to be hanging around without anything to do, they could be arrested for vagrancy, and it obviously left tremendous discretion in the police. They would arrest for vagrancy people who they didn't like; say, interracial couples walking down the street would be arrested for vagrancy. And then there was

the disturbing the peace laws, which was also a very vague statute. So, part of our job at the ACLU was to combat these vague statutes, and make sure that they didn't interfere with constitutional freedom.

02-00:40:22  
Meeker:

Early on, after you get hired, there are a number of cases that deal with obscenity in some ways in San Francisco. In June, 1961, Kenneth Anger, who was a pretty—I don't know about that time, but has since been recognized as a groundbreaking avant-garde filmmaker. His film, *Fireworks*, was shown and then confiscated by the San Francisco Police Department, and I believe you were involved in that.

02-00:40:58  
Krause:

No, I don't think I was involved in that. That happened before I became an ACLU attorney. I know about it, but I wasn't involved in it.

[side conversation deleted]

02-00:41:34  
Meeker:

Well let's talk about, one of the first ones that comes up, chronologically, I think, is the Vorpall Gallery, and Ron Boise, who is a sculptor, his Kama Sutra sculptures. This was 1964. A gentleman by the name of Muldoon Elder was the owner of the gallery and I believe he was the individual who was arrested. Can you tell me a bit about what was involved in this, and why is this something that is well remembered today?

02-00:42:16  
Krause:

Well, I think it's well remembered because it was such an outstanding trial. The Boise sculptures were a group of exquisitely crafted figures made of metal, about eighteen inches high, and I have one here that I could show if you want me to bring it out.

02-00:42:38  
Meeker:

Oh wow, yeah, I'd love to see it.

02-00:42:40  
Krause:

Yeah. And they all depicted various positions of sexual intercourse as described in the famous Indian *Kama Sutra*. And they were displayed, along with a number of other Ron Boise pieces, in a small gallery, right near the City Lights Bookstore in North Beach, called the Vorpall Gallery, and Muldoon was the founder and owner of that gallery. And the police came in, and they said that this obscenity had to be removed, and Muldoon wouldn't remove it so they arrested him, and confiscated all of the Kama Sutra sculptures, and we had a jury trial on the matter of whether the obscenity law of California was breached by this display of the Kama Sutra sculptures.

And the trial was absolutely incredibly interesting, because on one side we had the archbishop, the Catholic archbishop of San Francisco, who testified for the prosecution, and we had the director of the Legion of Art Museum who

testified for the prosecution, and we had a number of other people, and they all were talking about this definition that the *Roth* case established in 1957. Was this material utterly without redeeming social importance? Redeeming social importance was the key. And of course, the archbishop said, “No, this is not socially important. This is socially negative because of the depiction of sexuality.” Sexuality itself was thought by these people to be something that should not be openly discussed, and just the matter of showing sexuality was considered to be, by them, obscene.

On our side, we had Walter Horn, who was the chairman of the UC Berkeley Art Department, and he gave an incredible description of sexuality depicted in fine arts through the generations, starting with the Greeks and the Romans, and we brought in all sorts of Greek and Roman art, and then the Renaissance painters, and we had a complete discussion for a day at least about sex in fine arts. And then we had, on our side, the director of the Museum of Modern Art here in San Francisco, and we had Alan Watts, who philosophically thought that this material was presenting a philosophical message, and he had an incredible line that broke up the whole courtroom. The test for what is obscene was that the material had to appeal to the prurient interest, meaning, an interest in sex. And so, the district attorney asked—or maybe it was me. I asked Alan Watts whether this Kama Sutra sculpture, made out of metal, appealed to his prurient interest, and he leaned back and he said, “Well, I would sooner make love to a bicycle.” [laughter]

So there were all sorts of lines like that, and in the trial, and I was helped in this trial by a very good attorney named Ephraim Margolin, who represented the clerk at the Vorpel Gallery who was also arrested. So there were two defendants, two defense counsel. Between the two of us, we had an incredibly important list of people who were our defense witnesses. And the jury was out a couple of days thinking about this case, and finally they came in with a not guilty verdict.

02-00:47:34

Meeker:

You had mentioned that maybe a curator or the director of the Legion of Honor, an art museum, testified for the prosecution.

02-00:47:43

Krause:

Yes.

02-00:47:44

Meeker:

Do you recall what that person said?

02-00:47:48

Krause:

Oh, and also, the director of the de Young Museum testified for the prosecution, and I really had a good time cross examining him, because he had previously been the assistant director at the Metropolitan Museum in New York. And so, I brought pictures of art from the Metropolitan Museum, which they had displayed, which were very sexual, and I asked him about, “Did this

appeal to the prurient interest? How do you distinguish this art from the art that's on trial in this case today?" And he was very embarrassed and ended up kind of very ineffective, because he was contradicted by his own work as a curator at the Metropolitan Museum. And I'll show you one of these Boise things.

[Side conversation deleted. Krause brings a Kama Sutra sculpture to the room]

02-00:49:42

Meeker: Wow.

02-00:49:42

Krause: Where should I put it?

02-00:49:43

Meeker: Let's see here. Let's put it right here.

[Side conversation deleted]

02-00:50:36

Krause: I remember talking to the jury about this particular sculpture, and showing them how delicate it was, how these two people were in love or lovemaking, but they were doing it in a very loving way, with their arms around each other. And I said, "Ron Boise's delicacy can be seen with this hand right here, touching the back that isn't there, and that is about the most delicate kind of touching you could have." So, I was trying to impress upon the jury how artistic this was, and actually, our expert witnesses had testified to how beautifully, technically this sculpture was made, how the fingers were very unusual, the toes, the body; the shape of the body was so perfect and beautiful that it obviously showed a lot of artistic talent.

02-00:51:45

Meeker: It's interesting you point out the absence in the back, and then also, there's absence it looks like in the back of the head. Just as an art historian approach, do you have an interpretation of why that is?

02-00:52:03

Krause: Yeah, I think he was trying to show how delicate sexuality is, how that it's ethereal, and it's shown by these spaces in the sculpture that you can't show at all because it's impossible to depict it. Three-dimensionally, it's also in your head. And so, I interpret all of these open spaces as to try to recreate the sensitivity of human sexuality.

02-00:52:41

Meeker: How close did the jury get to this piece?

02-00:52:46

Krause: Oh, we had—let me back up a little bit. The *Roth* test said that the material to be assessed, as to whether it was obscene or not, had to be considered as a whole. So we were able to convince the judge that not only these allegedly

obscene sculptures, and there were, I think, ten of them or so, had to be displayed to the jury but, the entire show in the gallery had to be displayed to the jury. So we brought in a number of other Ron Boise sculptures which were not sexual at all, and one of them was a large sculpture of a woman pointing her finger, so we had that pointed right at the jury for the whole trial. So, anyway, the jury was able to wander around among this display of art pieces anytime they wanted, and look very carefully and closely at all these art pieces, and they did.

02-00:53:56  
Meeker:

Well I know it's not the job of the jury to ask questions in the courtroom; they're to listen to testimony. Did the prosecution bring up the phallus in this particular sculpture? Did they focus on any particular element of these sculptures to try to justify their interpretation?

02-00:54:17  
Krause:

Not really. They considered the subject matter showing sexual intercourse between humans as itself, vulgar and obscene, and something that should not be shown in public. So they didn't think that they had to focus on the phallus or the sexual parts of these sculptures, just to show the fact of open sexuality was considered to be obscene.

02-00:54:55  
Meeker:

What court was this in? Was this in Superior Court?

02-00:54:57  
Krause:

No, this was in San Francisco Municipal Court because it was a misdemeanor to exhibit obscene material.

02-00:55:05  
Meeker:

Okay. Was there any appeal by the city to this?

02-00:55:10  
Krause:

No, the prosecution cannot appeal on acquittal. It's finished.

02-00:55:17  
Meeker:

Okay. Interesting. So, were these sculptures then re-exhibited after this?

02-00:55:29  
Krause:

I don't think they were. I think the Vorpall Gallery went on to other shows that they were committed to having. But they were shown around California, certainly. Ron Boise was a very well-known sculptor and his work was shown at museums and et cetera.

02-00:55:56  
Meeker:

How did you end up with this piece?

02-00:55:59

Krause:

Well, he gave it to me. After the trial was over Ron came up and said, “You know, I want to give you this. You talked about it during the trial, and I want you to have it.” So, I was very happy with that.

02-00:56:11

Meeker:

That’s good. Excellent. So, at this time in the city, I don't know if this is the first, but this is one of the—and obviously there was the “Howl” trial before this, but there was now going to be a whole series of First Amendment, freedom of expression cases coming up. There was the SF Mime Troupe in August, '65. There was Michael McClure’s *The Beard* play in August, '66. There was Lenore Kandel’s *Love Book* that was sold by the Psychedelic Shop in November, '66. Did you get a sense that there was kind of like a pitched battle happening, that there were different sides, there was one side really trying to push the envelope, and there was another side trying to shut it down?

02-00:57:11

Krause:

Oh, yes. I don't think you can get away from the truth that the Catholic Church was extremely important in this whole obscenity area. During this period in the 1960s, San Francisco politics was definitely dominated by the Irish Catholics and the Italian Catholics, and they split everything pretty much evenly. And when I first graduated law school, I applied to for a job at the San Francisco Public Defender’s Office, and they said, “No, we don’t have an opening.” And then about a year later, I got a letter from the San Francisco public defender saying, “Oh we now have an opening for a person of your faith.” And what had happened is that the Jewish assistant public defender had died, they then had an opening for one Jewish assistant public defender. But everybody else was Irish Catholic or Italian Catholic, and that was certainly true in the police department. The police department had what was called the vice squad, and they were all very serious Catholics, and they believed in moral authority and moral oppression to get the way they thought that society should be run. So the Catholic influence was very strong, and also, I think politically, you couldn’t be in favor of obscenity and get elected to an office. You had to be against obscenity, and be a crusader against all things evil, to get elected to public office in San Francisco.

02-00:59:04

Meeker:

It’s easy to see how the archbishop and the priests and the Catholic hierarchy would be religiously ideologically opposed to any depictions of sexuality. Did you get a sense that the cops, the politicians, had the same fervor, or was it just a political and adherence to Catholic hierarchy that compelled them to feel like that?

02-00:59:47

Krause:

Well I think these people thought that they were keeping up a moral standard for the community. They really were sure that they were doing the right thing and that people who were against censorship were “bringing filth into the community,” as they called it, and it was very clear to them that they had to

uphold this moral standard. And I should say one more thing, is that for the defense, we also had a Catholic priest. He wasn't the archbishop, but he was a professor, a Catholic priest who was a professor at USF, and he came and testified for the defense. So we were able to show that some Catholics believed in freedom of expression.

02-01:00:38

Meeker:

One of the reasons I'm asking this is, in doing research in about the next thing we'll talk about, which was the Mime Troupe arrest, you look at the historic pictures of that day in August, 1965, and there's a couple pictures you notice where I think it's Ron Davis or the other people who went to go see it—because it was kind of a big deal, because everyone knew arrest was going to happen—and then, the police chief or the cops in the background, and they all seem like they were having a good time, like everyone was smiling. It didn't seem like there was a lot of tension. It seemed like people were performing in a play, almost, and everyone was kind of in on this big joke. But it sounds like what you're saying is that that's not a correct interpretation from how it really played out.

02-01:01:39

Krause:

It was pretty serious for the people involved to be arrested, taken to jail, booked into the jail cell, have to post bail, and to be accused of a criminal offense, which, if they were convicted, would result in a lot of hardship to them. So, it had an air of celebration and fun, but it was really deadly serious for the people involved.

02-01:02:12

Meeker:

Well let's talk about that event then. So, the SF Mime Troupe was, I believe, founded and directed by Ron Davis, and can you just sort of take it from there and—

02-01:02:31

Krause:

Yes. Ron had been trained as a mime under the famous French mime, Marcel Marceau, and he was a very good mime, and he started the San Francisco Mime Troupe, which he called the San Francisco Meme Troupe for some reason, but we won't go into that now, and there was a lot of pantomime in his theater. He was the director, and he chose the plays, and chose the artists as well. He was a very fine director. And he also was interested in having fun, so many of these plays were ridiculing political shortsightedness, as far as Ron was concerned, and they were a lot of fun for people. And he decided that rather than be in a theater, he would do his plays in the parks, and rather than charging for admission, whoever wanted to come would come, and they would be free in the parks, and then they would, afterwards, pass the hat and collect enough money to keep them going. And the Mime Troupe itself had a big warehouse where they kept all their props, and most of the actors and actresses lived there, and also the stage managers and people of that sort, and they all lived almost communally.

So, he was quite adept at keeping things going, but in order to appear in the parks, you had to reserve a space, and to reserve a space, you had to get the permission of the Parks and Recreation Commission, which no one had ever heard of before. We didn't even know there was a Parks and Recreation Commission, but all of a sudden, they got very interested in what was happening with the Mime Troupe, and they found out that there were some salacious jokes, and political ridicule of the leaders of the community, and some sexuality suggested, and they decided that this wasn't appropriate for the San Francisco parks.

So they started denying permission of the Mime Troupe to appear, and that's when the ACLU got involved, because we felt that was censorship, and they could decide who would use the parks on the basis of, has it been booked by somebody else or something of that sort, but they couldn't do viewpoint censorship in granting permits to appear in the park. And I appeared before the Parks and Recreation Commission, and said that was the law and they didn't believe me. They kept denying permits, and so we had to go into court, and we got injunctions against the Park and Recreation Commission requiring them to grant permits, and we had to do that quite a few times. And eventually, the police arrested Ron for appearing in the park in a theatrical production which was not permitted by the Recreation and Parks Department, and he had a criminal trial, but he didn't ask the ACLU to represent him. He had a private attorney, and I'm not exactly sure how that criminal trial came out. But, we were very successful in getting permission of the Parks and Rec after the court issued injunctions to perform.

02-01:06:43

Meeker:

So you were mostly working on the premise that there should not be prior restraint—

02-01:06:49

Krause:

Yes.

02-01:06:50

Meeker:

—of free speech.

02-01:06:51

Krause:

Yes. Right. If there was something that was thought to be obscene, then the proper remedy was to arrest the people who committed the obscenity, and have a jury trial on that issue. But the Parks Department was just preventing it from happening on the basis of their idea of what might happen, and that was called a prior restraint, which was very clear as unconstitutional.

02-01:07:20

Meeker:

Because it really puts the Park and Rec Department in the position of being censors, which they were not. If there was anyone qualified to do it, they certainly weren't.

02-01:07:32

Krause:

Not only that, it provides a chilling effect on anyone who wants to appear in the park to give a speech, or have a political meeting, or something of that sort. If the Parks Department has discretion to grant or deny these permits on any basis they want, it chills the exercise of free speech, because no one wants to be controversial under those conditions.

02-01:08:01

Meeker:

Were you actually there on that day where Ron Davis performed an arrest?

02-01:08:07

Krause:

I think so, yes. I don't remember it too clearly. I was there for most of their performances.

02-01:08:14

Meeker:

You had mentioned Alan Watts and that Berkeley art history professor, was there starting to be like a well-connected contingent of recognized individuals who were advocating for civil liberties and free speech, around the area?

02-01:08:39

Krause:

Well, there were well-recognized expert witnesses who would testify in various obscenity trials, some on the side of the prosecution, some on the side of the defense, and we had a group of people, psychiatrists, art professors, literary professors, who we could call on for that purpose.

02-01:09:02

Meeker:

So you weren't the one that took this through court, correct?

02-01:09:17

Krause:

Ron Davis's criminal trial, no, I didn't handle that, but I handled all of the injunctions which got them permission to perform.

02-01:09:27

Meeker:

And it might be worth noting that, to this day, the Mime Troupe performs in parks in San Francisco.

02-01:09:32

Krause:

Yes, they still perform in the parks, yeah.

02-01:09:35

Meeker:

Let's talk about Michael McClure's play, *The Beard*. This comes a little bit later, in August, 1966, the next summer, actually, almost exactly a year later. Can you tell me who Michael McClure was, and what this play was about?

02-01:09:53

Krause:

Michael McClure is a pretty well-known poet. [Side conversation deleted] He's still alive today. He participated in the de Young Museum celebration of the Summer of Love, recently. He was a poet who was quite different than other poets, and he depended on a lot of sound effects, as well as the words, and he used very unusual words, many words that he, himself invented. But he decided that he wanted to write a play about Billy the Kid and Jean Harlow,

what would happen if Billy the Kid met Jean Harlow, and that was the essence of his play called *The Beard*. I think Billy the Kid was wearing a beard. And they got the use of a theater, I think it was either the Curran or the Geary, in downtown San Francisco, and started putting on *The Beard* as a play. And in the play, there's one part in which Jean Harlow is constantly tempting Billy the Kid, and getting on his nerves, and finally he comes to her and performs what looked like a cunnilingus on the stage. And, the police arrested the actors for that, and the actors, I still remember their names were Richard Bright and Billie something, I can't remember.

02-01:12:06

Meeker:

Dixon.

02-01:12:07

Krause:

Billie Dixon, yes. And, we brought an action in Superior Court to have it declared that this was not an obscene play, and one of the most effective things we did was to bring in Billie Dixon. She wasn't even a witness, she was just there in the courtroom, and she happened to be an extremely beautiful, willowy, British woman, and she had these two darling children who were both blonde towheads. They were about maybe one and a half and three and a half years old, and of course, she brought them to court at my urging. And the judge, whose name was Joseph Karesh, was totally blown away by how beautiful she was, and how wonderful her children were, and I think that was very influential in getting him to rule that this action of the police department was illegal.

02-01:13:22

Meeker:

These were pretty serious charges. I believe there were obscenity, conspiracy, and lewd behavior. Presumably, the lewd behavior charge could have declared these individuals sex perverts under the law.

02-01:13:38

Krause:

Yes, then it would have to register as sexual offenders.

02-01:13:42

Meeker:

Right. Did the actors know what they were getting into, or did it come as a surprise when the arrest happened?

02-01:13:52

Krause:

I don't think so. No, everyone expected there to be arrests on this particular night. I was there; the press was there. The actor Rip Torn was there to support them, and everybody knew that they were going to be arrested. They were arrested not during the play, but after the play was over.

02-01:14:16

Meeker:

Did you have conversations with them in advance about what they might expect?

- 02-01:14:24  
Krause: I think so. They were told that this could result in an arrest and they were very into putting on the play, and they wanted to put it on.
- 02-01:14:37  
Meeker: And so, were they aware that it could've resulted in not just these misdemeanor obscenity charges, but potentially lewdness?
- 02-01:14:48  
Krause: I think so. I think so.
- 02-01:14:51  
Meeker: So did they have a notion that they had a pretty cut-and-dry case? What was the motivation here? Why would actors put themselves at this kind of risk? Do you recall having conversations with them about this?
- 02-01:15:12  
Krause: I think artistic freedom is very important to actors in general, and they were in support of artistic freedom. They felt that Michael McClure had something to say, and they enjoyed being in the play, and they wanted to protect the right of people to see this play. And so they were very much into it.
- 02-01:15:38  
Meeker: How did the trial go? You had mentioned Karesh; I know he presided over a lot of cases that you—
- 02-01:15:45  
Krause: Yes. He was what was called the “law and motion judge,” so he would handle any motions for injunctions, and that’s where injunction motions came before him. Yeah, there wasn’t any trial, because he issued an injunction against criminal prosecution.
- 02-01:16:08  
Meeker: Can you explain that to me? I’m not quite sure I understand what that means, the injunction. What is the injunction, again?
- 02-01:16:16  
Krause: The injunction is a prohibition, and it tells the police department that this particular play is protected by the First Amendment, and they can’t arrest anyone for obscenity because of doing it.
- 02-01:16:32  
Meeker: So the injunction was the outcome—
- 02-01:16:34  
Krause: Yes. Forester.
- 02-01:16:35  
Meeker: —of it. Okay. Can you tell me, what did you know about Judge Karesh, since you presented cases before him, argued cases before him a number of times?

02-01:16:50

Krause:

I knew he was interested in culture and what was going on in the world, and I'd had a number of cases before him. I think the one I remember right now was a case where a probation officer named James Forester went off on vacation, and when he came back to do his job, he had grown a little beard. And he planned on shaving it off pretty soon, but he showed up for work with a beard, and the chief probation officer ordered him to shave it off, and he wouldn't, so he was fired. So, I brought his case before Judge Karesh and said that they had no right to fire him for wearing a beard, and the chief probation officer testified that the kids might think that he was God, since God was always depicted as having a beard, and that's why he fired him, and it was so ridiculous. And during the injunction trial, we went back to Judge Karesh's chambers, and the attorney for the city, who was defending the chief probation officer, asked Judge Karesh, "Who is this man with the beard in the picture hanging up in your chambers?" And Judge Karesh said, "Oh, that's my father." So, I kind of knew that we would win the case. [laughter]

02-01:18:27

Meeker:

Yeah, I remember coming across that. There was this guy, they also accused him of being a beatnik or something like that.

02-01:18:33

Krause:

Yes, that's right. It would tell the kids that being a beatnik or a hippie was okay if their probation officer had a beard. Yes. Some very strange things were done in those days.

02-01:18:48

Meeker:

Well, in a sense, all of these cases, to me, amount to kind of a modernization of law, and a systemization of it as well, whereby individuals and their sometimes strange opinions are no longer going to be part of the political process, or part of the legal process.

02-01:19:24

Krause:

Well, if I can be a little universal about this, I think that happens quite often, that something new comes along that people aren't used to, and their immediate reaction is, this is wrong, this is bad, because we're not used to it; it's new. And this is true with sexuality. There wasn't explicit sexuality very much in art or literature, and it was pretty hidden. Yes, there were a number of painters who painted nude people, and even people in sexual positions, but, it was kept kind of quiet, and the general public didn't know about it. But here we have the Ron Boise sculptures are on public exhibit at a gallery where people walk in and out, and *The Beard* is a public play, so it couldn't be kept hidden. And also with political expression, people weren't as free to express themselves politically until more modern times. So, it's true that anything a little different runs into trouble.

And I think that, getting back to the beard case, you wouldn't think of growing a beard as a matter of constitutional protection. But, as we thought

about it, we did think it was constitutionally protected because it was part of expressing one's self, and if a person wanted to grow a beard, that should be an individual choice, and some city official should not be able to say, "You can't grow a beard," or, "You can't have a moustache," or, "You must cut your hair in this way or that way." Still the military thinks that they can give orders like that, but in the general population now, it seems to be absurd that someone would try to impose their will in a personal decision like that.

So, at the ACLU, we felt that that was part of personal expression, and we have to defend it. We defended kids who were expelled from school because their hair was long. And, I think one of my most famous cases was in the early 1960s after I first started to work for the ACLU. We had a situation where two women were expelled as students from San Francisco City College because they wore slacks to school, and it was thought that women should not wear pants, and it was enough to have them expelled from school. So this individual expression of the way we look, the way we talk, the things we see, all fits into the same mold of protecting individual freedom.

02-01:22:44

Meeker:

And of course, it's so interesting, because you think about the cultural context for this happening. This is not happening at any random place or time; this is happening in San Francisco as the counterculture is becoming a major cultural force, and people are coming there specifically to engage in freedom of expression.

02-01:23:14

Krause:

Yes, it was happening around the country, too. There were obscenity prosecutions all over the country, and the ACLU was busy defending these all over the country. But I think that the greatest freedom was seen to be in the new culture of San Francisco beatniks and hippies.

02-01:23:36

Meeker:

Were you engaging much—I don't know if you went to conferences, or something like that—with other attorneys who were representing individuals in these free expression cases?

02-01:23:47

Krause:

Oh yes, we had an annual meeting of all the ACLU attorneys at the time that I was with the ACLU in the 1960s. There were not very many of us; maybe there were ten or twelve. And now, there're about twenty attorneys who work for the ACLU of Northern California, whereas in the early 1960s, there were maybe twenty all over the country.

02-01:24:14

Meeker:

Where'd you meet?

02-01:24:16

Krause:

All over the place: New York City; Washington, DC; Chicago. We just had different meeting places.

- 02-01:24:24  
Meeker: Do you recall what those meetings were like? Were they mostly just a place to share information and status updates?
- 02-01:24:32  
Krause: Oh, they were thrilling for me because people who were my heroes would show up, people who had been very important in civil liberties for many years, and were the leading authors and representatives of this kind of freedom that I was trying to protect.
- 02-01:24:53  
Meeker: Who were some of those people?
- 02-01:24:55  
Krause: Well, Mel Wulf was the legal director nationally of the ACLU. He was a very good lawyer and a very inspirational guy. And people like Osmond Fraenkel, who had written a lot about First Amendment protections. Those are the only two names I can pick up right now.
- 02-01:25:17  
Meeker: Okay. So eventually, I understand, in *The Beard* case, there was also an arrest in Berkeley. Did that proceed any differently than—
- 02-01:25:36  
Krause: About *The Beard*?
- 02-01:25:37  
Meeker: Yeah.
- 02-01:25:38  
Krause: Oh, I am not familiar with that at all.
- 02-01:25:41  
Meeker: Okay. From what I read, there were months of legal maneuvers before *Karesh*—*Karesh*?
- 02-01:25:50  
Krause: *Karesh*.
- 02-01:25:51  
Meeker: —*Karesh* ordered the charges dropped. Do you recall what eventually convinced him that that was the right course of action?
- 02-01:26:03  
Krause: I think that he was disposed to protect artistic freedom. It was important to him, and if it had come before many of the other judges in San Francisco, we would've lost, because there were, the vast majority of San Francisco judges were Catholic, and once again, the Catholic Church was very influential on people's beliefs, not all Catholics, but some, most of the Catholics, certainly those who were judges. And judges were afraid of rocking the boat too much, as is true of the court system. One of the reasons that the US Supreme Court

seems to hold back and be more conservative is that they are afraid if they do too much that's radical or controversial, that Congress will get mad at them and cut off their funding, or in some way influence the importance of the judiciary. So they don't want to offend people if they can avoid it.

02-01:27:21

Meeker:

Did it seem like, given that there was some diversity within the judiciary in San Francisco—some were more civil libertarian perhaps like Karesh and others were perhaps more conservative—did it seem like the judiciary in San Francisco was ahead of or lagging behind the Supreme Court at the time?

02-01:27:50

Krause:

Oh, I think they were willing to follow the Supreme Court, but they were not ahead of the Supreme Court in the situation of protecting individual liberties, no, they were much more conservative, and that's true of all the lower courts. The Supreme Court is the court that is out front, the avant-garde, in the judicial system.

02-01:28:16

Meeker:

So, it sounds like, based on that, one of your jobs was to kind of, I don't know if mediate is the right word, but to make certain that local judges were abiding by the precedent established by the Supreme Court.

02-01:28:34

Krause:

Oh yes, and that was a very hard job I had. A big part of my activity was trying to get the local courts to conform to what the US Supreme Court required in criminal procedure. The whole *Miranda* warnings, when the Supreme Court said you had to tell people about their right to an attorney and their right to remain silent, many of the local courts refused to apply that rule, and I had to go into court and say, "You are required to apply this *Miranda* rule, and the police are required, and you better order the police to do it," and it took some arm twisting to get the lower courts to follow the US Supreme Court.

02-01:29:25

Meeker:

That's interesting. There was a case down on the Peninsula about a bookstore owner who was arrested or selling what were deemed to be obscene materials.

02-01:29:59

Krause:

Yeah, that was a very interesting lesson in what goes on in obscenity. The police went to some little bookstore—it was kind of like a cigar store or something—and they found a number of little paperback books which involved sadomasochistic sexuality. They had illustrations; they weren't as bad as you might imagine, but they were kind of suggestive illustrations of sadomasochism. And then, they also found a package of pictures of young ladies in their underwear. They were wearing bras and panties, but they were kind of posed in a provocative way, so they arrested the owner of the cigar store—I think his name was Shaver—for violating the obscenity laws, and since—

02-01:31:07

Meeker: I think Conrad Chance, does that sound—

02-01:31:10

Krause: Yes, maybe that was his name. It is familiar, Conrad Chance. I don't know where that name comes from. I'd have to look it up. But in any event, we took on the defense of these people because we were against censorship, even though this particular material might not have had very much literary importance. And, I spent I think three weeks in Redwood City every day going through this jury trial, and arguing about the legal issues, and it ended up that the jury came back with a verdict that there was nothing wrong with these sadomasochistic books, but the little pictures of ladies in their underwear were obscene. [laughter] It was so absurd. I thought it was going to be the other way around, for sure, because these sadomasochistic things were kind of offensive to most people. But anyway, we had to take that case up to the US Supreme Court and we won in the US Supreme Court. The conviction was reversed. So, it was a total waste of time to spend all that effort on these materials that weren't worth anything.

02-01:32:32

Meeker: But again, the reason to do this is why.

02-01:32:36

Krause: Yes, I said it was not a waste of time for me, because we were establishing a principle, but it was a waste of time for the government to spend this time paying a district attorney, and all these expert witnesses, and having the court trial and then going up to the US Supreme Court on this very small stuff.

02-01:33:01

Meeker: One of the things I wanted to ask about was, I believe one of the expert witnesses for the prosecution was a Doctor Rapaport, who worked for the state mental hospitals.

02-01:33:14

Krause: Right.

02-01:33:16

Meeker: And, his argument was that these kinds of materials contribute to the development of sexual psychopathic behavior, and they usually find these materials with sexual psychopaths. How would you respond to those kinds of psychological medical charges?

02-01:33:44

Krause: Well, he established himself as an expert in sexual mental illness issues. He was the head doctor; I think he was also the superintendent at Agnew State Hospital for the Criminally Insane, which has been abolished, thank goodness, but it was kind of a mental hospital torture chamber, of which California had several during that time. And he was a very punitive guy, and he felt that all these sexual offenders were not doing it out of any psychological compulsion, but because they were bad people, and he was very moralistic in his point of

view. So, I tried to point out that his theories were just unsubstantiated in the expert literature, and I hope that I was successful in undermining his theories of what causes sexually criminal behavior. I mean, he was saying that people who look at sex magazines are more likely to commit rape, and I was saying that people who look at sex magazines are less likely to commit rape, because they have an outlet for their sexual feelings.

So, that was where the argument was, and I don't know who got the best of that argument, but as I say, mostly, we got acquittals in our cases. Sometimes we got convictions, like in this case in Redwood City where we had to take it to the United States Supreme Court on these little pictures. And by the way, the US Supreme Court, during this period, had to examine every piece of things, every film, every book, every magazine, every picture thought to be obscene, and that was part of the process. So they had to have a special screening room to see these films. And I got myself into trouble at the ACLU one time because there was a picture of the Supreme Court justices taken while they were posing for their formal portrait, but it was obviously before the actual formal portrait was taken, and everybody was joking around and laughing and pointing, and somebody must have said something funny. So I found that picture and I circulated it among my ACLU buddies, and I said, "Here's a picture of the US Supreme Court watching the latest allegedly pornographic movie." And some of my colleagues loved it—they thought it was so funny—and others said, "Oh, that's disrespectful, and you're going to get the ACLU in trouble with the Supreme Court, and you shouldn't have done that." So, there are differences of opinion even among ACLU attorneys.

02-01:37:04

Meeker:

[laughs] That case in Redwood City, you said it went to the Supreme Court. Did you present the case before them?

02-01:37:19

Krause:

I filed the Petition asking the court to take the case, but it was decided per curiam, on the basis of a number of cases that they decided at the same time. They decided about ten of these cases at the same time, and they said none of them were obscene, and they just were tired of looking at this stuff, I'm sure.

02-01:37:39

Meeker:

Did they use the *Roth* test, or a later—

02-01:37:43

Krause:

No, there was another test called *Redrup versus New York* that was then the most important case—Redrup is R-e-d-r-u-p—and that case put down another test for obscenity. Exactly what it was, I don't remember now.

02-01:38:03

Meeker:

You eventually get to the point where there is no such thing as community standard.

02-01:38:10

Krause:

There is no such thing, and it was an extremely fallacious idea that you could even determine what were community standards, and the definition was that the predominate appeal of the material had to be to the prurient interest, applying contemporary community standards, and considering the material as a whole, and it had to be utterly without redeeming social importance. So all of those terms are subjective, and ridiculously imprecise, so there were all sorts of different opinions. The same thing would be held obscene in New York and would be held not obscene in California. Same all over the country, and the court just got tired of all these cases and just started reversing everything.

02-01:39:12

Meeker:

Which, in essence, plays into what the ACLU's position was.

02-01:39:18

Krause:

Yes, although the ACLU at that time recognized that there was such a thing as obscenity, but even the ACLU couldn't define what it was. And that was for historical reasons, I think, because at the time the Constitution was adopted, many of the states had laws against obscenity, so the logical interpretation was that the First Amendment was not meant to make obscenity covered by the First Amendment.

02-01:39:52

Meeker:

Were there any cases of obscene materials that came to you at the ACLU that was decided to be obscene, and therefore the ACLU wouldn't participate in its defense?

02-01:40:10

Krause:

No, there weren't, not in the ACLU of Northern California. When someone would come in with something and say that "the police are saying this is obscene," I would take it into Ernie Besig, and he would look at it for awhile, and he would say, "Well, that's not so bad," and [laughs] it was very subjective on his part. I never remember him ever saying that something was actually bad; it was "not so bad."

02-01:40:43

Meeker:

Well, what later became called hardcore pornography was certainly being produced, and produced in San Francisco in the early sixties, at the same time that all of these other much less [laughs] cut-and-dry, or much less extreme examples are being adjudicated and run through the legal system. It's surprising to me that the police didn't locate or crack down on these clear examples of, they might be able to get a broader consensus around that these were obscene.

02-01:41:33

Krause:

Many of those people didn't defend themselves. They were kind of fly-by-night operations, and when they were shut down by the police, they just gave

up and went to some other city and did the same thing. So, it was a fly-by-night operation many times, so, they never defended themselves.

02-01:41:54

Meeker:

Well, that's interesting, because what that says is that it took a particular kind of person who, and this is just a speculation, but it took a particular kind of person who had a point to make to take these cases to the ACLU.

02-01:42:14

Krause:

I agree with you. It was always someone who said, "Why shouldn't I be able to produce this? This is good stuff. This is helpful. This is helpful to people with sexual problems." They always came up with some idea of why this should be protected, and those were the people who came to the ACLU.

02-01:42:38

Meeker:

Were there ever any conversations around free market, in the economic sense, not just the free market of ideas, which Holmes talked about, but like this bookstore owner, like, "I should be able to do this because we live in a free market society," like using a capitalistic defense?

02-01:42:58

Krause:

No. I don't think that was a consideration at the ACLU, the free market idea, no.

## Interview 3: January 25, 2018

03-00:01:56

Meeker:

Thursday the twenty-fifth of January, 2018. We are here at Marshall's home in Novato, and this is interview session number three. I will edit that in text so it makes sense. So let's pick up where you left off last time, and we were talking about a series of important freedom of expression, free speech cases in Northern California when you were the attorney for the ACLU of Northern California. The next one I'd like to talk about surrounds the sale of Lenore Kandel's *The Love Book*, which I believe was published around November of 1966, and that case resulted in the arrest of the owner of the store that sold this.

03-00:02:50

Krause:

That was the Psychedelic bookstore on Haight Street, which was kind of the center of the hippie movement, I would say, and that might have been the reason why the police got interested in *The Love Book* to harass in some way the Psychedelic bookstore.

03-00:03:11

Meeker:

Can you put that in a little bit of context? You've been living in the Bay Area since you started at Berkeley in the 1950s. At what point do you start to notice what would be called the counterculture becoming a very visible, clear presence in the San Francisco Bay Area?

03-00:03:33

Krause:

I will tell you the difference between the beatniks who were in the late fifties and the hippie phenomenon. The beats were more intellectual, cosmopolitan and they congregated around poetry readings, jazz and a bohemian attitude toward the surrounding society. [The hippie movement was a total revolt against the status quo, the business as usual.] We started seeing people on the streets with [tie die clothing, long flowery dresses for the women and without bras and the men had long hair, casual and not too clean clothes, and they didn't seem engaged in work or careers. They followed an experimental life with drugs and enjoyment at the center. There was a lot of hostility from the "straight" society; probably coming out of envy. People, including me, didn't understand what was happening to these young people. At one point a long-haired young man came into my office and I asked him what was the point, why was he wearing long hair?] He said, "It feels so good when the wind blows my hair." [It was a revelation for me that instead of conforming to social custom you could do what felt good to you.]

03-00:04:54

Meeker:

Does this emergence of the hippie counterculture, does it feel like it happens overnight, or is it kind of a slow trickle?

03-00:05:03

Krause:

I think it was slow, yes. In various places, it became more and more prevalent in all areas of San Francisco. At the beginning, it was in the Haight-Ashbury area.

03-00:05:22

Meeker:

Other than the presence of long hair, what did you think of it?

03-00:05:27

Krause:

Oh, I was totally jealous. I was a child of the 1950s, and we were very straight laced. I wore a tie every day to my office, and I was jealous of people who had a looser lifestyle, because I didn't have one. I was completely buttoned up. And one time, I was walking down the street behind some gentlemen wearing suits, and ahead of them was a long-haired hippie, and the guy was saying to his friend, "Why do those people have this long hair? I'd like to catch them and shave off their hair." It just—for no reason at all, a lot of antagonism, because these people, the hippie people, were exhibiting a degree of freedom which I think a lot of people were jealous of.

03-00:06:29

Meeker:

Interesting. I mean, there you are, even though you are at the ACLU, fighting for freedom of expression, it sounds like you still felt, personally, you were confined, that your own expression, modes of expression weren't as free.

03-00:06:46

Krause:

Yes, I was definitely influenced by the culture around me, and I didn't have the strength to revolt against it, or the maybe the intelligence to revolt against it and realize that there was something more than work in life. So these people created a path to more pleasure in life.

03-00:07:16

Meeker:

Well I'd like to talk about the example of *The Love Book*, but before we get to that in detail, at the ACLU, were you guys talking about this? Were you anticipating that the hippies that are emerging and expanding, [laughs] before your very eyes are going to perhaps result in some legal issues that need to be addressed?

03-00:07:42

Krause:

Well, we knew that there would be a problem with the police department, because the police department just doesn't like people who look a little different, and there was a lot of harassment on the street of people who were dressed as hippies, and we heard a lot about it. The police department did things like, if they saw someone who they felt was influencing young people, younger people, high school students, to have a looser lifestyle, they would take them to the station and beat them up, and tell them, "Stop this conduct." They were really trying to change, trying to hold the line for conventional society. So, we knew there would be problems.

03-00:08:35

Meeker:

How did the ACLU plug into those kinds of issues?

03-00:08:39

Krause:

Well, when people came to us and complained about the police, we would try to investigate what was going on. We would try to file some sort of complaint with the chief of police, which was generally ignored, and, it was kind of hard for us to be totally active in it, because the ACLU was not in the business of deciding who was right and who was wrong. So if someone came into the office and said, "I was beaten up by the police," and the police said, "No, we didn't do that," we would not take the case because we didn't want to get into the factual matter. We were interested in principal.

03-00:09:28

Meeker:

Well, in that case then, you are presented with a principal in *The Love Book* case. What was *The Love Book*?

03-00:09:39

Krause:

*The Love Book* was a small little book of about five or six poems, written by Lenore Kandel, who was a published poet and a very interesting person in her own right, and it had to do with pleasure and sexuality. One of the poems was entitled "To Fuck with Love," and that was her philosophy, that sex is a pleasure, and we should talk about it and celebrate it, which was kind of an unusual position. Even poets weren't very out there with their talk about sexuality. You know, poets were very careful in their language, and Lenore was just very straight out there. She wanted to be *there*.

03-00:10:38

Meeker:

She wasn't talking about romantic notions of love; she was talking about the physicality of sex.

03-00:10:44

Krause:

She was talking about the physical sexuality of love and how pleasurable it was, and she also talked about love as a serious relationship between people, and how it was influenced by sexuality, and how it deepened sexuality.

03-00:11:04

Meeker:

I imagine you must have gotten to know her a bit over the course of this legal work?

03-00:11:08

Krause:

I did, yes.

03-00:11:09

Meeker:

Where do you think this came from in her life? How did she arrive at the moment of writing this explosive book, or poem?

03-00:11:20

Krause:

Because she was unconventional in her thinking, and very straightforward and truthful. Lenore Kandel would be the last person who would ever try to lie about anything or cover up anything. She was just out there with who she was and what she thought, and didn't mind expressing it.

03-00:11:40

Meeker:

So, you had mentioned the Psychedelic Shop was kind of ground zero for the hippie movement. It wasn't just a bookstore, right? It wasn't even primarily a bookstore. Can you describe what it was like to go into the Psychedelic Shop?

03-00:11:56

Krause:

Well, I think the *Oracle* was edited and published there, and the *Oracle* was the newspaper of the psychedelic, hippie movement; and it had a lot of original art in it, a lot of articles about the free lifestyle. And so that was centered there, and Allen Cohen, who was a well-known poet, was one of the clerks at the bookstore when the police came in and arrested people for selling *The Love Book*, and he got arrested as well as the owner of the bookstore.

03-00:12:36

Meeker:

Who was—

03-00:12:37

Krause:

There were two brothers, Ron and Jay Thelin.

03-00:12:41

Meeker:

Can you tell me about them?

03-00:12:44

Krause:

You know, I didn't really find out too much about them, so I don't know too much about them. All I know is that somehow, they got into the situation of being the center of the hippie movement.

03-00:12:57

Meeker:

What were the bookseller and Ron Thelin arrested for?

03-00:13:03

Krause:

Obscenity. There's a law, there was a law and still is a law in California, making it a criminal offense to offer obscenity for sale.

03-00:13:15

Meeker:

And, at this point in time, 1966, what was the context? Were these kinds of arrests happening regularly? Was there a clear standard coming from the Supreme Court about what could be deemed obscene or not?

03-00:13:34

Krause:

All over the country there were arrests by police for obscenity of all sorts of things—movies, magazines, books, poetry—and it came from the fact that the Supreme Court was very unclear about what obscenity was. They tried to define obscenity in the famous *Roth* case in 1957, but their definition of obscenity was so broad and malleable that nobody knew exactly what it was, and it ended up being whatever the police didn't like was obscenity. And then, there would have to be a trial, and maybe after many months, there would be some sort of a resolution as to that particular piece of art, or work, or whatever it was. But it was very unclear.

03-00:14:33

Meeker:

What was the standard of the *Roth* decision in your words?

03-00:14:37

Krause:

Oh, it's whether it violated contemporary community standards, and was utterly without redeeming social importance, and whether its predominate appeal was to the prurient interest, whatever that is, which means, I think, an unhealthy interest in sex.

03-00:15:04

Meeker:

You know since that time, that was '57—this is nine years later—I think there have been a few other cases that, my understanding is that it appeared that the court was moving toward, I think, a loosening, a freer approach to what could be published, and a more restrictive approach about what would be deemed obscene.

03-00:15:29

Krause:

Well, they were still affirming occasionally some obscenity prosecutions, so people were still going to jail for obscenity. There was a famous guy named Ralph Ginzburg who went to jail for publishing a magazine that had some clear sexual content, and there were other convictions. So, it was in flux.

03-00:15:57

Meeker:

What happened to—the bookseller's name again was Cohen. Is that right?

03-00:16:06

Krause:

Allen Cohen was the clerk, yeah.

03-00:16:08

Meeker:

Okay the clerk and Ron Thelin, who was one of the owners, did they go to jail?

03-00:16:12

Krause:

No, they never went to jail. We lost the trial. We had a very interesting trial which I can tell you about, but, and the jury came in with a verdict of guilty. They just could not fathom that people could use these words like “fuck” and be very frank about what sex was all about in a public way. It was a new concept and the jury couldn't accept that, despite all of our expert testimony, which was very strong about the worth of these poems and their ideas.

03-00:16:49

Meeker:

This was in San Francisco Superior Court?

03-00:16:52

Krause:

Municipal court. It was a misdemeanor to sell obscene material.

03-00:16:58

Meeker:

Okay. Tell me about the trial then. What was the legal strategy?

03-00:17:06

Krause:

The legal strategy was to show that this was not utterly without redeeming social importance; rather, it had good social importance. So we approached it from several points of view. We approached it from a psychological point of view that it was good for the community in general to be frank about expression of sexuality, and literature had a long tradition of being frank about erotic matters. And, we had Professor Thomas Parkinson from UC Berkeley who was a very highly regarded English professor at Berkeley, and he testified that these poems were a great literary value and very helpful to have this feeling expressed in poetic form. And we had psychological testimony from psychiatrists and other people about how this would be helpful in human understanding of sexuality, if we could discuss these things frankly, and *The Love Book* was on the road of discussing them frankly.

So we tried our best to show that it had great value to the society, and was not utterly without redeeming social importance, and we tried our best to show that its predominate appeal was not to a prurient interest, but was to a frank interest in sexuality. And, we tried our best to show that this was not a violation of contemporary community standards, but because the community was changing, and we were lucky enough to be in San Francisco, and we could show all sorts of examples where there was a lot of frankness about sexuality. So, *The Love Book* was not that different.

03-00:19:14

Meeker:

Do you recall who was asked to testify about community standards?

03-00:19:19

Krause:

No, I don't recall right off hand. I could probably research it and find out.

03-00:19:24

Meeker:

I know that Ferlinghetti testified for this. Is that right? I think so.

03-00:19:31

Krause:

I don't remember him testifying.

03-00:19:33

Meeker:

Actually, you know what, maybe that was the Jean Genet case instead. Sorry, I'll strike that, because it's not actually in my notes here.

03-00:19:43

Krause:

But there, I want to tell you about one thing that happened during the trial which was kind of amazing. At the time this trial was taking place, I was the president of the Barristers Club of San Francisco, which was a club of lawyers under thirty-five, and there were several hundred members of the Barristers Club, and it was part of the San Francisco Bar Association. So for the monthly luncheon of the San Francisco Bar Association, I was able to get the program to include Lenore Kandel, and she came up to this monthly meeting which was on the top floor of the Mills Building at the time. And the whole floor was devoted to the bar association, and the whole floor was open for a catered

lunch every month, and usually there were one hundred people or something who came at most.

So when this Lenore Kandel reading was announced for the bar association, the place was utterly jammed. There was standing room only. Everybody was there, all of the leading lawyers of the city, not to speak of all the young lawyers who were also there. And Lenore read *The Love Book* to this assembled group of distinguished lawyers, and there was not anything except utter silence and respect while she was reading, and they were blown away by it, and she was given a big round of applause by all the lawyers, which I think was influential in trying to find out what the contemporary community standards were. If the leading lawyers of the city thought this was a worthwhile thing to listen to, how could it not be within contemporary community standards?

03-00:21:56

Meeker:

Was there ever any concern that she could have been arrested for obscenity in her own right by delivering this?

03-00:22:04

Krause:

I don't think we were concerned about it. The police would've been crazy to do something like that, to arrest her in front of the leading lawyers of the city. No, that would've been clearly persecution.

03-00:22:19

Meeker:

Were you aware of that? Was that part of your legal strategy in doing this?

03-00:22:31

Krause:

No, since I was the president of the Barristers Club, I was interested in getting a popular program for the young lawyers, and I didn't know that all of the older lawyers would also show up.

03-00:22:45

Meeker:

Did folks like Melvin Belli, Alioto, and those folks show up?

03-00:22:49

Krause:

Oh yeah. Those guys were not the leading lawyers of San Francisco in the eyes of lawyers. The leading lawyers were the senior partners in the major law firms, and they were the ones who had the real power in the bar association.

03-00:23:12

Meeker:

Like at Heller Ehrman and those kinds of—

03-00:23:14

Krause:

Yes, and Pillsbury, Madison, and Sutro, and there were, you know, ten or twelve very large, very prosperous law firms.

03-00:23:24

Meeker:

Did you get any negative blowback? Did anyone say, "How can you be doing this"?

03-00:23:29

Krause: No. There wasn't any negative blowback at all.

03-00:23:34

Meeker: So, it seems like the consensus opinion amongst lawyers in San Francisco at the time was certainly in favor of a broad definition of freedom of speech.

03-00:23:45

Krause: Yeah. It was easy for them to recognize that this was valuable, this was not trash, this was valuable.

03-00:23:56

Meeker: In the trial, how did the prosecution go about making their argument?

03-00:24:04

Krause: Oh, generally just repeating all the four-letter words and things. They just tried to take it out of context and say it was only for excitation of sexual interest; it wasn't a literary work. And they had some testimony. I think this might've been the trial where the Catholic archbishop of San Francisco testified for the prosecution, and I think they had a professor from USF, the Catholic school, testifying for the prosecution. So there was a lot of testimony on both sides.

03-00:24:51

Meeker: I believe you were quoted at the time as describing it not as an obscenity trial, but more as a heresy trial.

03-00:24:57

Krause: Yeah, I felt it was a trial of the whole hippie idea that there could be such a thing as freedom, and it wasn't as popular as you might imagine. It was very controversial to be a hippie.

03-00:25:21

Meeker: Did you feel like you were constantly running up against sort of the Catholic hierarchy of San Francisco? Was that organized solidly against this new movement of freedom that you're talking about?

03-00:25:35

Krause: Well, the district attorney of San Francisco who made the decision to prosecute *The Love Book* was Catholic. The mayor of San Francisco, who was Mayor Shelley, was Catholic, and the majority of the Board of Supervisors were Catholic. As a matter of fact, San Francisco at this time was still very segregated by religion. A personal story: When I graduated law school, I applied to the San Francisco public defender, and they told me that they didn't have any vacancy at the time. But I had my application there, and a few years later I got a letter from the public defender, which said, "We now have a vacancy for a person of your background." And what had happened was that the one Jewish public defender had died, so they were looking for a Jewish replacement. And they had a certain quota of Irish; they had a certain quota of Italian; and they had a certain quota of Protestants; and they had one Jewish

public defender. And the district attorney's office was the same way, and the appointees to the bench by the political forces were the same way.

03-00:27:07

Meeker:

Did you get the sense that these elected officials, the district attorney, the mayor, were really onboard with what the archbishop was pronouncing, or was there reluctance amongst lay officials to pursue this more strict Catholic line?

03-00:27:34

Krause:

No, these people were all very good Catholics, and they felt that there should be an enforcement of a moral standard in the community. I'm sure they felt that they were fighting against debasement of morals in the community, and the Catholic Church has always been that way, trying to decide what is morally correct.

03-00:28:03

Meeker:

I mean, goes back to the codes in Hollywood.

03-00:28:10

Krause:

Yes, the Hays Code, right, that was Catholic dominated as well, and the purpose of that Hays Code was to elevate the morals of the motion picture industry.

03-00:28:27

Meeker:

Did Kandel testify?

03-00:28:32

Krause:

Yes she did. Yeah, she was very impressive.

03-00:28:35

Meeker:

What did she have to say, do you recall? What was her approach?

03-00:28:40

Krause:

I think that I asked her why she wrote these poems, and what she intended to accomplish, and she said what she'd tried to do and what she was trying to do, and it all sounded very good to me, but not good enough to the jury.

03-00:28:58

Meeker:

Do you recall if the location of where this was sold, the Psychedelic Shop, played into the prosecution, played into their argument, sort of guilt by association, or—

03-00:29:12

Krause:

No, I don't recall anything like that. I think that was mainly the reason why the arrest was made in the first place, because you know, policemen don't usually go through books of poetry in bookstores to try to find out if there is anything obscene there. They were looking for something.

03-00:29:32

Meeker:

You don't think they were tipped off or anything?

03-00:29:37  
Krause: No. I think that they were looking for something.

03-00:29:40  
Meeker: So tell me about the outcome of this case.

03-00:29:44  
Krause: Well, after the conviction took place, we filed for a habeas corpus in federal court to overturn the conviction, and we were successful, and the federal court said, "This is protected by the First Amendment, and the state cannot punish it as obscene." And so, the conviction was set aside.

03-00:30:09  
Meeker: What federal court made that decision?

03-00:30:12  
Krause: Northern District of California, the trial court. I don't remember the judge.

03-00:30:17  
Meeker: So, it would've been a First, Fourteenth Amendment kind of decision.

03-00:30:21  
Krause: Definitely, yes.

03-00:30:23  
Meeker: So there was no requirement of a trial, or anything like that, I guess.

03-00:30:28  
Krause: In the federal court?

03-00:30:29  
Meeker: Yeah.

03-00:30:30  
Krause: No, the judge just looked at the testimony, and said, "This is indisputably of social importance, and the First Amendment doesn't allow it to be suppressed."

03-00:30:42  
Meeker: Excellent. Is there anything else about that particular case you'd like to—

03-00:30:55  
Krause: No, there's nothing else that I can think of.

03-00:30:57  
Meeker: Okay. Let's talk about the *Un Chant d'Amour* showing of a film by Jean Genet. I think it was on the UC Berkeley campus?

03-00:31:07  
Krause: Yes.

03-00:31:10  
Meeker: Tell me, what is this film and what happened legally?

03-00:31:17

Krause:

Well, Jean Genet was an intellectual and poet in French culture in the forties and in the fifties, and he was also a rebel, and revolutionary, I would say, and he managed to get himself into trouble with the law. And he got put in prison, and while he was in prison, there were many efforts to get him out, and all the French intellectuals joined together, and finally got him out of prison. When he got out of prison, he decided he was going to make a film about the conditions in prisons, so he made this film called *Un Chant d'Amour*, and it was about how prisoners have feelings, and I remember a scene from that film so vividly now. They found some big prison kind of building with bars on all the windows and all that, and one of the prisoners was out in the courtyard, and he picks a bouquet of mainly weeds, but tried to make it into flowers, and tied it on a string or a rope, and he put it out the window of his barred cell and he was swinging the rope in a huge circle. And finally, he got to some other window where a guy put out his hand and caught the bouquet, and that was just an indication that even in prison, there were close feelings between people, and he wanted to celebrate that.

So, another thing that he did was to show about ten seconds of a prisoner masturbating in his cell, which was quite realistic about what happens in prisons, and this was what got the film into trouble. And it was announced that this film would be shown on the Berkeley campus by some group; I've forgotten what group was. And the police chief in Berkeley got wind of this and found out what was in this film, this scene of masturbation, and he said, "Anyone who shows this film on the Berkeley campus is going to be arrested for obscenity." So, when this was reported to me, I decided to bring an injunction action against the police chief. And one of the sponsors of the film was a fellow named Sol Landau, and the case became known as *Landau versus Fording* [1967], and we had a trial as to whether the court should issue an injunction against the chief of police to prevent him from arresting people for showing this film.

And during the trial, we had some incredibly wonderful testimony about prisons, and about how this was a very, very clear, honest depiction of what life was like in prisons, and how valuable it was to let people know what went on in prisons, and then we had a lot of testimony about how well made this film was, and how it had very, very high literary value. And we thought that we had proven pretty clearly that the film had what was called redeeming social importance, and it was not primarily for prurient interests; that the masturbation scene, which was the big problem with the film according to Chief Fording, that was only a tiny part of the film and was very realistic, and wasn't making things up for purposes of sexual titillation. So, we had this trial, and the judge refused to issue an injunction. So we appealed, and we eventually got to the United States Supreme Court.

03-00:35:59

Meeker:

So this wasn't a jury trial, right? This is—

03-00:36:01

Krause: No, this was just a judge trial.

03-00:36:05

Meeker: Who was the judge? Do you recall?

03-00:36:07

Krause: I don't remember who the judge was. It was a Superior Court judge in Alameda County. Actually, the only way the case could go up on appeal is if we lost in the original trial, so it was not unforeseen that we would lose the trial part of the case, so—

03-00:36:34

Meeker: Because you were interested in having it resolved in the Supreme Court to establish precedent.

03-00:36:38

Krause: Yes, we were interested in winning the trial as well, but we knew that it would be better to take the case up on appeal where it would have some precedent value. So, it got to the US Supreme Court after a decision of the intermediate California Court of Appeal, and to get a case heard by the United States Supreme Court, there have to be four justices who indicate that they want to have the case heard, even though that's not a majority of the nine justices. The rule is that if four justices want the case heard, it will be heard. So, when a case is heard, what happens is that it's briefed; there are written arguments submitted and then oral arguments; the record is submitted; and eventually, there will be an opinion of the court deciding the case and giving reasons for the decision.

In this particular case, unfortunately, it was a very rare thing that happened. There were four justices who voted to grant the case review, and immediately the five other justices said that the case should be affirmed, and they didn't allow briefing. They didn't allow oral argument. They just affirmed the lower court against the film. So we lost, but we lost in a very unusual way, that there was no reasoning; there was no opinion. There was just a per curiam statement that "the judgment below is affirmed."

03-00:38:33

Meeker: We don't typically know who those four justices are that grants cert right?

03-00:38:37

Krause: Oh, we do. I have a listing right here: "Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Stewart, and Mr. Justice Fortas would grant the petition and reverse the decision below." But, that was four votes, and there were five votes for affirming, and so it was affirmed.

03-00:39:01

Meeker: Interesting. I mean, this rule still exists in the Supreme Court, and like you said, it's rare, so it's interesting that the five who voted to sustain the lower court decision didn't want it to be heard.

03-00:39:22

Krause:

That's right. I think they knew that there were not good reasons to sustain the decision below, and if they had to hear this case and write an opinion, they wouldn't be able to. So, they just decided to affirm it without an opinion. I think they were offended by the masturbation scene. There's no question about it that it was extremely unusual for such frank sexuality to be shown in a film. Even films that were considered erotic at that time only suggested that there was some sexual activity happening; they didn't actually show it, which this film did.

03-00:40:12

Meeker:

So this crossed a line for—

03-00:40:14

Krause:

Crossed a line for at least one justice, because ordinarily, there were five justices who voted to reverse practically every conviction for obscenity. So, here we only had four justices who were willing to vote to reverse.

03-00:40:33

Meeker:

And your suspicion is that it was Justice White who was the pivotal—

03-00:40:36

Krause:

Yes. He was extremely sensitive to the issue of homosexuality, and masturbation. He was a well-known athlete before he became a lawyer, and I guess he had had a lot of experience with homosexuality when he was an athlete, and was very negative about it.

03-00:41:04

Meeker:

How did you learn this?

03-00:41:06

Krause:

Conversation with people who worked on the court.

03-00:41:11

Meeker:

Huh, that's interesting. So people would talk about what his particular sensitivities were.

03-00:41:17

Krause:

In this particular case—it was so unusual—yes, we did manage to talk with some people.

03-00:41:23

Meeker:

I know that they actually had a—they would screen these films and other materials when they came up. Do you know if White ever actually saw the film?

03-00:41:35

Krause:

No, I don't know. Yes, the Supreme Court had a screening room in which any film that was accused of being obscene that came before the Supreme Court was actually shown, and some of the justices, Justice Black and Douglas, for instance, they didn't think there was such a thing as obscenity. They thought

that obscenity was just a made up statement for something you don't like. So they refused to go to any of the screenings, but the other justices did, or they sent their law clerks or something of that sort.

03-00:42:14  
Meeker:

And of course, Justice Stewart had the famous formulation.

03-00:42:18  
Krause:

Yes.

03-00:42:19  
Meeker:

That wasn't in this case, though.

03-00:42:21  
Krause:

No, that wasn't in this case, but it was very typical of how hard it was to know what was obscene, because Justice Stewart said, "Well, I can't define it, but I know it when I see it!" So how are we supposed to know what Justice Stewart thought was obscene? How is a bookseller supposed to know? And a basic tenet of the law is that people are supposed to be able to know what is legal and what is not legal, and you couldn't do that in the obscenity field.

03-00:42:56  
Meeker:

Well, it's interesting as well, in this case and there are other cases as well, about censorship panels particularly for film, that by definition those are prior restraint, right? Which I guess goes back to Blackstone?

03-00:43:18  
Krause:

No, there wasn't a prior restraint. These were all cases where the material was out in public, and there was an arrest or an attempt to stifle it being shown. I think *Un Chant d'Amour*, you might say it was a prior restraint because the chief said, "If this film is shown, I'm going to arrest whoever's showing it." So that was a threat, which operates as a prior restraint. There's one thing I want to add to the *Un Chant d'Amour* discussion before the US Supreme Court.

03-00:43:56  
Meeker:

Sure.

03-00:43:58  
Krause:

At the same time that *Un Chant d'Amour* was pending before the court, I had another case pending before the court, and that was called *Chance versus California*. And it too was a conviction in California, after a long trial, of some material that wasn't very literarily important or important in any way, but being the attorney for the American Civil Liberties Union, we took the position that there wasn't any such thing as obscenity, so we defended practically everything. So, this particular case, the bookseller was accused of selling obscenity because there were five or six books describing, in novelistic form, sadomasochism, and women getting beaten up, and things of that sort, which was kind of disgusting, and there were also a group of photographs of women in their underwear.

So this was the subject of a long trial in Redwood City, and the jury came in with a verdict of, that the books were not obscene, but these little pictures of women posing in their underwear were obscene. So, that came up before the Supreme Court at the same time as Un Chant d'Amour. So there was that conviction was before the Supreme Court, and the Supreme Court reversed that conviction and said, "No, this is protected by the First Amendment." And it was totally incredible to me that the court could say *Un Chant d'Amour* was obscenity, but this trashy stuff was not.

03-00:46:14  
Meeker:

You know, after working on all of these cases, and seeing, dealing with material such as *The Love Book*—which is challenging, yes, but I think a very good case could and was made for its artistic value, versus trashier stuff or later on, hardcore pornography—did you ever start to develop your own opinion about, if obscenity laws existed, is there a possible test to make? Or did you agree entirely with the ACLU's opinion that there's no such thing as obscenity, that freedom of expression is without limit?

03-00:47:05  
Krause:

Well, I think the area where I would say I would not agree with that would be in the area of child pornography, where children were exploited for pornographic reasons, or where children were exposed to sexual material that they weren't mature enough to see. That would be a problem for me. But basically, yes, I thought the whole search for obscenity was absurd, and I'll give you an example of how absurd it was during this period. There was a shipment of 13,000 nudist magazines that were seized by the United States Customs. They were sent in from where nudism was quite a popular thing: Finland and Sweden and Denmark, and the Scandinavian countries. They had hundreds of nudist magazines and nudist colonies, and there were photographs taken at these places, and magazines made of them, and they were sent into the United States. So 13,000 were found by the Customs Department, and they were going to confiscate them.

So we objected to the confiscation, and I had a conference with the United States Attorney, who was a man named Cecil Poole at the time, and we talked about this, and I told him how absurd it was, that these were just nude people. They weren't even sexual poses or anything; they were just walking around at a nudist colony, and they had their pictures taken. And finally, we reached a compromise, that Cecil Poole said, "Well, if the pictures don't show any pubic hair, I will let them in, and if they do, you have to agree that we will be able to confiscate them." So, I agreed to get rid of the case and get most of these magazines in. So, who had to decide which pictures had pubic hair? Cecil Poole and I went through 13,000 [laughs] nudist magazines looking for pubic hair, and it took us about five days of looking through. After looking at 13,000 nudist magazines, I didn't want to see another nude human being in my whole life. [laughter] So, that's an example of how ridiculous it could be.

- 03-00:49:58  
Meeker: Was it just pubic hair or was it also genitalia?
- 03-00:50:01  
Krause: No, just pubic hair.
- 03-00:50:03  
Meeker: All right. So were they Photoshopping, or not Photoshopping, but airbrushing out the pubic hair, but still leaving full nudes in?
- 03-00:50:12  
Krause: I don't know. No, I think they were not Photoshopped. Photoshopping wasn't even available at that time. So I think if they were full frontal pictures, they would have shown pubic hair.
- 03-00:50:30  
Meeker: Okay. I've seen some of these in my own historical research. I used to be an archivist at an archive that had a lot of these materials, and I know that a lot of the nudist magazines were—they're kind of boring. I mean, it's like people playing volleyball all nude or something like that, and specifically done in a style that I think is trying to prevent prurient interest, but there can be nude children in these magazines. Was that an issue that was brought up?
- 03-00:51:12  
Krause: No. It wasn't an issue that was brought up, because the, as you say, the pictures of nudist colony people are so innocent. They're just people going about everyday business. They're just not wearing clothes, that's all.
- 03-00:51:32  
Meeker: So, ultimately, a number of these magazines were permitted to enter.
- 03-00:51:38  
Krause: Yes, there were a lot of them that didn't show any pubic hair.
- 03-00:51:41  
Meeker: Yeah. [laughs] Okay. Let's see here. So I'd like to actually switch gears a little bit, and spend some time talking about, you know, continue to talk about free speech, but in the context of political speech, and I know that there are a number of very interesting cases that you worked on, including *Lamont*, which you argued before the Supreme Court, in camera, as well. Did you work on the *Brown* case, the *Archie Brown*?
- 03-00:52:20  
Krause: Yes, we filed an amicus curiae brief in that case, which eventually became the reason that the Supreme Court decided the case in favor of Archie Brown. We argued that the law that he was challenging was a bill of attainder, which is punishment of someone by legislation rather than judicial action, and we were the only people who argued that. The parties, the defendant's attorney, and the government didn't discuss bill of attainder at all, and when the opinion came out, they adopted our amicus curiae position and found it a bill of attainder.

03-00:53:09

Meeker:

Interesting. I'd like to go back to some of the earliest cases you worked on though after being hired by the ACLU, just in terms of chronology. One is interesting and I think it brings up a lot of issues, and I'm frankly not sure what the legacy or the outcome of it was. It actually involves a pretty interesting character too, who later reappears on the scene, and that's these young, kind of labor organizers go to a bracero labor camp, and this is about 1961. I think one of the organizers was Jefferson Poland, who later becomes a free speech, free love activist in San Francisco.

03-00:53:56

Krause:

He founded an organization called the Sexual Freedom League. This was after the case that you're talking about.

03-00:54:07

Meeker:

Yeah, and so, it sounds like you recall this case. Can you recall for us what was happening with it? What was the disposition?

03-00:54:19

Krause:

Well, the Bracero Program was a program where Mexicans were brought in by private contractors to harvest the crops in California, and they were housed in bracero labor camps, and there were thousands of them, and they were big, long cabins, and they were housed in kind of dormitories, and Congress had passed some laws protecting these Mexican workers. For instance, they were entitled to have regular breaks for bathroom and meals and things of that sort, and they were entitled to get overtime pay if they worked more than eight hours. And of course, the braceros knew nothing about these rights, and the agriculture union decided that they wanted to tell the braceros that they had certain rights under the law. However, it was impossible to reach the braceros. They were in these private camps which were guarded by armed guards. No one was allowed to talk to the braceros. When they were out in the fields, there were also armed guards making sure that no one talked to them. [The braceros were unable to leave the camps.]

So, the agriculture labor union hired Jeff Poland and another guy named Fred Cage to try to get in to the bracero camps and tell them what their rights were, and they tried, and they were successful some of the time, but they ended up getting arrested and charged with trespassing. So we decided that it was a civil liberties issue since these braceros were entitled to know what their rights were under the law, and Jeff Poland and Fred Cage were just trying to tell them those rights and should not have been arrested for trespassing. So we had a trial in municipal court in Manteca, California, and it was a trial before the judge alone. And it was a very politically sensitive issue in that area with all the power being in the farm owners' hands, and the judge I think almost had to find against us, and convicted these two young men, and we took that case to the US Supreme Court.

And the US Supreme Court, as I've already mentioned, has to decide whether to take a case or not, and they kept this case for I think three years, and didn't decide whether they wanted to take it or not. Finally, they asked for the government to state what the current situation is with regard to the Bracero Program, and the government filed a brief saying that the Bracero Program was going to be phased out and would no longer be in existence in one year. So, on that premise, the court refused to hear the case. That wasn't true. The Bracero Program kept going for a couple of years, but there was nothing we could do about it. So, we lost that case.

03-00:58:05

Meeker:

What about the convictions of the individuals who were trespassing?

03-00:58:11

Krause:

They were convicted. I don't think; they were not sentenced to any jail time. I don't know what the sentence was, was probation or something like that.

03-00:58:20

Meeker:

I believe that the argument that you were making on behalf of speech at this was that it was similar to company towns in Appalachia.

03-00:58:34

Krause:

Yes, we said that people can't be walled off from access to other people. They can't be held prisoners. These braceros were being held prisoners, without any ability to contact outside people, and that, we thought, was illegal.

03-00:58:54

Meeker:

On the cases around obscenity and freedom of speech, you had mentioned there's the *Roth* standard. As difficult as it was to apply, there was kind of an understanding about what might or might not fall on either side of the obscenity definition. All of these political speech cases, was there a similar understanding? Were you operating under the Holmesian definition of imminent threat around what kind of speech around politics was acceptable and what wasn't?

03-00:59:39

Krause:

Well yes, and political considerations of what's protected by the First Amendment. There is some vagueness as to, for instance, the famous clear and present danger standard. There can be differences of opinion as to what is a clear and present danger, and what is not, and there were such differences of opinion. So, yes, even if it was political speech sometimes there had to be a trial. There's another exception in the First Amendment for what are called "fighting words." If you come up to someone and give them a talk or a speech that inflames their passions and immediately results in some sort of violence, you can be punished for uttering those fighting words.

03-01:00:36

Meeker:

Like incitement.

[Side conversation deleted]

03-01:00:59

Meeker:

Okay. So we were talking generally around political speech, and my understanding is that after those Holmes dissents in the 1920s, political speech is—there's an understanding of its First Amendment protections, but there are limitations on it. But the limitations it seems like are often put forth not to deny speech, but are sort of around it. So the *bracero* case, this was about trespassing, right?

03-01:01:44

Krause:

Yes, and the right to communicate.

03-01:01:45

Meeker:

Later on, the *Lamont* case had to do with literature from Communist countries coming in, and there was this postcard system that was devised, and so that aversion of it wasn't about limiting speech; it was just about regulating the kinds of information that comes in, although that is decided on, on a free speech case.

03-01:02:13

Krause:

[The *Lamont* case ruled that requiring people to register at the post office if they wanted to receive mail from behind the Iron Curtain inhibited free communication and was a violation of the First Amendment. We looked at the effect of the law. If the effect was to abridge free speech then the ACLU wanted to be there protecting free speech.]

03-01:02:27

Meeker:

Why don't you tell me about the *Louis Hartman* case? And this was also 1961. I understand this kind of marked the end of some of the rulings in favor of the House Un-American Activities Committee. Who was Louis Hartman and/or also known as Jim Grady, I guess?

03-01:02:57

Krause:

Yeah, Louis Hartman was a very well-known radio personality, and he had some sort of a disc jockey discussion program. It was before the popularity of talk shows, but he was kind of a host during the commute hours on the largest radio station in San Francisco, the CBS affiliate, and he was called before the House Committee on Un-American Activities because they had some word that he was active in Communist causes. And so they asked him whether he was active in this cause or that cause, and he said, "I don't have to answer the government because this is my political right, and I have the right to keep my politics to myself," under the First Amendment, he thought. It turns out that the US Supreme Court has not approved of that protection for free speech, so we attacked the House Committee on Un-American Activities on several other grounds. We felt they were suppressing speech, but we wanted to win the case on whatever grounds we could, so we also argued that the mandate of the

House Committee was too vague, and interfered itself with free speech. In other words, what Congress had—ooh—how Congress had—

[Side conversation deleted]

03-01:05:06

Krause:

We argued to the Supreme Court that the mandate or the way in which Congress had set up the House Un-American Activities Committee was too broad, that it interfered with free speech rights just because it allowed them to investigate so much, which was beyond the capacity of a congressional committee to do. And we eventually won on that basis, and Hartman's conviction for contempt of Congress was overturned, came back to the trial court for further proceedings, and we were able then to win the case. And so, the ACLU felt that the House Un-American Activities Committee was interested in pursuing people, punishing people for their political views. [This vindicated Hartman's view that he had a First Amendment right not to answer their questions. They were not gathering evidence for legislation, which is the proper job of a Congressional committee. They were engaged in punishing left wing activities.] Lou Hartman got fired when it was determined by CBS that he had been active in some Communist political causes. And that's the way they operated.

They were interested in getting people fired from their employment, especially teachers, and the ACLU represented many, many teachers who were called before the House Un-American Activities Committee because someone had said they had gone to some left-wing organization's meetings, or something of that sort. And the teachers usually took the Fifth Amendment. They said, "We don't want to testify because it might tend to incriminate us, or provide information which could be used by the prosecuting authorities to bring criminal charges against us. Therefore, we assert our rights under the Fifth Amendment." And, the school boards, almost uniformly, said that that was conduct unbecoming teachers, because the teachers supposedly should answer all of the questions posed by a congressional committee. And therefore, many teachers were fired, and we protested each one of these, and had to bring it before the school board and then the court, and then there were appeals. And there were many of these cases, and we won every one of them, and many times the teachers got reinstated with back pay.

03-01:08:09

Meeker:

So, one of these cases was the William and Rita Mack case, I believe.

03-01:08:12

Krause:

Yes. That was an interesting case because the government finally had to admit [that its chief witness, a professional anti-Communist named Karl Prussion, had lied about the Macks at their trial. His shtick was to get involved in the left-wing] movements, and then tell the FBI of everyone who was a part of

that organization, and then he would testify at their trials, and it turned out that he was a total liar. If he couldn't make a meeting one night, he would just make it up. And he would say he was there and he saw so and so there, and it turned out that on several occasions, these people couldn't have been at the meeting, because they were somewhere else. So, Karl Prussion was finally exposed as a complete liar, and the government had to admit in the William and Rita Mack cases that they had been relying on a perjuring witness. So we got those firings of the teachers overturned.

03-01:09:29

Meeker:

It's interesting. On the *Louis Hartman* case, it sounds like it was what, contempt of Congress?

03-01:09:37

Krause:

Yes.

03-01:09:38

Meeker:

That, so he was refusing to testify and that's why they charged him on contempt of Congress. You said the basis that he was using was privacy under the First Amendment?

03-01:09:50

Krause:

He was saying that the government has no right to require him to testify as to his political activities, that that's private information, and his privacy is protected by his right of political association under the First Amendment.

03-01:10:11

Meeker:

So it was political association and privacy. I'm curious about privacy law, if there's, of course, I think, a lot of question and debate about where does this come from. Were you starting to develop your own legal perspective on privacy under the Constitution?

03-01:10:29

Krause:

Sure. It's a very interesting question because privacy is not protected in the United States Constitution. It is protected in the California Constitution. Specifically, citizens of California have the right of privacy against any interference by the state government. But the federal constitution does not protect the right of privacy. So, the question of birth control came up in a case called *Griswold versus Connecticut* [1965], and Mrs. Griswold was part of a Connecticut birth control clinic which was advising people of their right to use birth control. But unfortunately for her, the Connecticut law made it a crime to tell people about birth control—this was during the fifties—and she was convicted of this crime.

And it went up before the US Supreme Court, and Justice William O. Douglas wrote the opinion for the court, and he said, "In order to find out whether people are using birth control, the government would have to interfere with the private relationship of their sexual activities and their marital activities," and this was forbidden. There was a right of privacy which he discovered in

the Constitution, even though it wasn't in the words of the Constitution. He said it was in the interstices between the rights of the Constitution that he found a right of privacy, and in any event, that established the right of privacy. It's now one of our constitutional rights.

03-01:12:30

Meeker:

What did you think of that decision when it came out?

03-01:12:35

Krause:

Oh, I thought it was a great decision because I thought the Connecticut law was completely ridiculous to make a criminal offense to tell people about birth control. Connecticut is a very Catholic-influenced state, and that was a religious prohibition, and it should not have been allowed, and I was glad to see it overturned, and the right of privacy is one that the ACLU is very happy to accept and protect, even though it's not in the specific words of the Constitution.

03-01:13:15

Meeker:

Yeah, I wonder what Madison and Jefferson would think of that decision today. Would they say, "Wow, this is a great idea; I wish we had thought of it ourselves"? [laughter]

03-01:13:27

Krause:

Yeah.

03-01:13:30

Meeker:

I'd like to ask you a little bit about what involvement you had, if any, in what was beginning to happen on the Berkeley campus in the 1960s. I think I mentioned to you I'm doing this series of interviews around the campus political, student political organization SLATE, which was formally established in like February, '58, and then starts to elect students to the student government, and a lot of people see this as the necessarily precursor to the free speech movement which happened in the fall of '64. Being that you were a graduate of the University of California, were you paying attention to what was going on in campus? You had already graduated by the time SLATE got started, but were you paying attention to these political movements that were beginning to take root there?

03-01:14:36

Krause:

Well, I graduated law school in 1957, and I can't remember one political thing that ever happened on the campus of the University of California at Berkeley. It was just completely dead as far as anything except football, and sports, and student activities, social activities, but there was no political activity. So, no, I wasn't aware of it, and interestingly enough, I chose to take my first vacation while working for the ACLU during the month of September of 1964. And so, I was in Europe when the Free Speech Movement started, and my wife and I were touring around. We weren't reachable at that time; it was very hard to reach people in Europe from the United States. So, I never found out about the

Free Speech Movement and all of the ferment that was going on in 1964 until after I got back from Europe.

03-01:15:57

Meeker:

So were you aware of SLATE? We had discussed off camera that Michael Tigar, who was involved in SLATE on campus, was a summer intern for you. Did, through engaging with students or anything like that, did you ever learn about what was going on pre-Free Speech Movement?

03-01:16:18

Krause:

Oh yes. By that time, I had been involved with the demonstration against the House Committee on Un-American Activities in May of 1960. So I became very aware that there were active political movements going on in Berkeley, but there weren't any before I graduated law school.

03-01:16:48

Meeker:

I think it was in our first conversation, you talked about actually getting arrested at that event and—

03-01:16:55

Krause:

I was the first person arrested on May 13, 1960. I'm proud of that. [laughs]

03-01:16:58

Meeker:

What were you thinking of the student activity that was starting to emerge, the political student activity on campus?

03-01:17:06

Krause:

I thought it was healthy. This was before I started work for the ACLU, and before I had any real interest in civil liberties as such. However, I always felt that there should be student activity. I like the idea that students were active in politics, and after that time in May of 1960 when I got arrested, I became very interested in student politics.

03-01:17:51

Meeker:

Tell me about your involvement. How did you get to know students? Were you working with the Student Civil Liberties Union on campus? Tell me about that engagement.

03-01:18:03

Krause:

I was not engaged with students on civil liberties issues until after May of 1960. So, I didn't know much about student politics. And, I didn't start working for the ACLU until November of 1960, so, I just didn't know, and I found out a lot.

03-01:18:31

Meeker:

Well tell me about that time after the HUAC protest, after you're hired by the ACLU.

[Side conversation deleted]

03-01:18:52

Meeker:

Yeah, I just kind of want to know, after this HUAC protest, after you get hired by the ACLU, that coincides with really this emerging context of student activism at Berkeley, and leading up to the fall of '64 with the Free Speech Movement, but of course, student activism doesn't end there. I mean really, there's a lot happening after that, that's for sure. And I just would like to know what the nature of your engagement with students on campus was, and vis-à-vis these political issues.

03-01:19:31

Krause:

Well, we had an active civil liberties chapter, or sub-organization going on at UC Berkeley, and we had a very active group of students, and they would come to the Board of Directors meetings of the ACLU, and sometimes talk to the Board of Directors. So we knew what was going on, on campus, and I liked those people and I became interested in befriending them, and finding out what their interests were. So, yes, after I started working for the ACLU, I became much more aware of student activities.

03-01:20:19

Meeker:

Do you recall who some of the key student players were?

03-01:20:22

Krause:

I remember a young man named Peter Franck, who is now a lawyer. He was very active in the student civil liberties movement. And every year, I had a law student as a summer intern, so I had some very good contacts with law students, and I knew a lot about their thinking.

03-01:20:48

Meeker:

And I guess that's where Michael Tigar comes to you—

03-01:20:52

Krause:

Yes.

03-01:20:53

Meeker:

—as well. Did ACLU see what was happening on campus as relevant to ACLU's mission, in terms of free speech rights for students on the campus itself?

03-01:21:16

Krause:

Yes, freedom of expression on university campuses has always been an issue, with administrators trying to punish students for speaking out on various subjects because they are afraid that it would be resulting in less money for them from alumni donations, or from the state government, or something. So there's an attempt to hold down student activities for reasons of financial prosperity of universities. So, yes, that was certainly going on, and I was aware of that.

03-01:21:59

Meeker:

What role did you think the ACLU could play in representing the students, or representing the cause of free speech on campuses?

03-01:22:10

Krause:

Well, I'll tell you about one case involving a young man named Creighton, who was a part of the ROTC program. At that time, it was thought that ROTC was mandatory at the state colleges and universities, so all the male students were enrolled in ROTC, and Creighton was enrolled. In ROTC you had to wear a uniform, so he had his uniform on, and then after his ROTC class, he wanted to go protest the war in Vietnam. There was a big demonstration against the war.

So he went in his uniform, and joined the parade demonstrating, and his instructor, Colonel Somebody-or-other, whose name I don't remember, saw him there, and he said that demonstrating against the government while wearing your uniform was so antithetical to military government, military discipline, rather, that he gave Creighton an F in the class, just for that reason. And that meant that Creighton had to take ROTC again, and couldn't graduate until he passed that class. So, we heard about this, and we wrote to the president of the university and complained, and he didn't want to do anything about it, so, we brought it before the Academic Senate at UC Berkeley, which was the organization representing all the professors.

So, the Academic Senate is composed of all the professors, and I'm sure that very few of them liked the fact that Creighton got an F in a grade because he demonstrated in some activity that had nothing to do with ROTC. Nevertheless, the Academic Senate was very hesitant to change to order the grade be changed. They had the power to do so, but a lot of the professors thought that if Creighton's grade was ordered to be changed, then all sorts of students could object to their grade on the ground of, that it interfered with their constitutional rights or something. There was this kind of irrational fear of too much interference with the grading policy.

And so, Creighton's case came before the Academic Senate, and I was allowed to speak to the Academic Senate. It was very rare that anyone outside of the academic community was allowed to speak, but I was allowed to speak, and made a big case about his First Amendment right to protest. And finally the Academic Senate agreed that they would order the professor to give him a pass grade. So he didn't get the grade he would have earned, but he got passed and he didn't have to take ROTC again.

03-01:25:48

Meeker:

That's interesting. Were you being called to campus often during this period of time?

03-01:25:57

Krause:

No. No, no. The main protest activity was around the war in Vietnam, and around civil rights, and that tended to be elsewhere than on the campus.

03-01:26:14

Meeker:

What kind of involvement did you have as ACLU attorney for those instances, representing people?

03-01:26:22

Krause:

Well, we were very clear that everyone had the right to protest, and the right to march, and to use the streets and parks for public speeches, and to express their opinions, and many, many communities around Northern California tried to prevent this from happening, were accusing people who were demonstrating against the war of disturbing the peace, or some other vague law. And so we had to go in, many times, and defend people who were charged with crimes because they were demonstrating against the war.

03-01:27:06

Meeker:

Were you having to—

03-01:27:07

Krause:

Or in favor of civil rights.

03-01:27:09

Meeker:

Were you having to modify your message at all, the arguments that you were making, the approach that you're taking when you're going outside of San Francisco or Berkeley to the rest of Northern California?

03-01:27:23

Krause:

Well, luckily, we were able to appeal to volunteer attorneys around the state. We had a whole group of volunteer attorneys who would agree to take an ACLU case, and when there was a case in a local area, we tried to get a local volunteer attorney because we wanted to deal with those issues at the local level, and have a local person deal with it, and we were successful in doing that, most of the time. In some areas, we just couldn't find an ACLU-type lawyer, so I had to go to Eureka; I had to go to Manteca; I had to go to Fresno. I traveled to many areas in Northern California to defend civil liberties.

03-01:28:20

Meeker:

What kind of efforts did you make to establish those networks throughout Northern California, you know, Fresno, north, up to the border?

03-01:28:28

Krause:

But we had a system of chapters, and I've already mentioned the student chapter at UC Berkeley. We had a chapter in Oakland. We had a chapter in Marin County. We had a chapter in the Peninsula. We had a chapter in Fresno. So, there were ACLU activists there, and each chapter tried to recruit volunteer lawyers, and they would investigate things that were happening. And of course, civil rights movement was happening everywhere, so the chapters were very useful in being a voice of finding out what's going on in their communities. And when they needed support, the ACLU main office in San Francisco would send people, or send a lawyer, or something of that sort, to help out.

03-01:29:26

Meeker:

What kind of issues were most prominent in the hinterlands in California at this time? I mean, you said there were protest issues and there were civil rights; how did that appear in court? What were people getting arrested for?

03-01:29:44

Krause:

They were getting arrested for what we thought were synthetic charges, like obstructing the sidewalk, or being too loud, or something of that sort, which was obviously an attempt to suppress their right to demonstrate, and had nothing to do with what they were charged with. So, we had to fight many of these cases. There was something called the Civic Center Act in California which said that every school must be opened to civic meetings, and so, many times, groups interested in protesting one thing or another would ask to use the school for a meeting, and they were often turned down if they were controversial groups. So we had to go to court time after time, all over the state, to establish the right of any group to use the school for a civic meeting, including controversial groups.

03-01:30:55

Meeker:

Were you at all surprised about the degree of activism, of activity that was happening beyond the large population centers?

03-01:31:06

Krause:

No, I wasn't, because people are kind of the same everywhere. Everyone believes that they should have a right to a peaceful existence, and without racial discrimination. Most people in California believe that, and the right to protest was generally recognized, but they always tried to find some excuse for not recognizing it, and that was more prevalent in smaller communities.

03-01:31:45

Meeker:

Hmm. You know what? I'd like to move on to *Lamont*, but I think that we don't have a lot of time left, and so, why don't we wait for next time to pick up with *Lamont*, and we'll also talk about the camera case, which is another privacy thing, right?

03-01:32:04

Krause:

Yes.

03-01:32:05

Meeker:

So, we can talk more about that, and then, I think you've seen the agenda, but I'm sort of further refining this as we go along, so.

03-01:32:15

Krause:

Great.

## Interview 4: February 16, 2018

04-00:00:05

Meeker:

This is Martin Meeker interviewing Marshall Krause. Today is Friday, the sixteenth of February, 2018. This is interview session number four, and we are here at Marshall's home in Novato, California. So, in the three interview sessions, we've covered a lot of terrain, and focused, I think, in large part on freedom of expression, and First Amendment kinds of cases, and now we're going to shift over and talk about some key cases around politics, political association, and I guess there's also a privacy case, in the Fourth Amendment case for *Camara*. But let's start out and talk about the *Lamont versus Postmaster General* case. This is a 1965 decision, and this was a case that you engaged in oral arguments before the Supreme Court, so, I would imagine that this case holds a pretty strong place in your memory. I'm wondering if maybe you can just give a brief on what the case was, who the litigants were, and how you at the ACLU got involved in that.

04-00:01:31

Krause:

Well, it's very important to me because it's the first case I argued before the US Supreme Court, and I was kind of a young attorney at the time, and I wasn't quite sure how I would come out. But, eventually, to make a long story short, I won the case. But it was about Congress passing a law saying that if you, any United States person, wanted to get mail from behind the Iron Curtain, which was not first-class mail—first-class mail was not affected by this law, but if you wanted to get second- or third-class mail, which is periodicals mainly, you had to go to the post office and tell them that you desired to have that mail delivered, or else they wouldn't deliver it and they would destroy it.

And so, my client, Leif Heilberg, came to me and said he didn't want to go to the post office and put his name on some list, but he wanted the mail, and we felt that was reasonable because this was at still the height of the McCarthyite period, and if you had your name on a list of sympathizers, people who thought were sympathizers with the Russian and Soviet Union, you would be in trouble. So, we sympathized with him and we said we thought this law was unconstitutional. We had a trial before a three-judge district court, which is the procedure at that time for challenging the constitutionality of a law, and we won the trial, so the government had to appeal, and they were given the right to directly appeal to the US Supreme Court, and they did and the Supreme Court accepted the case. And so, I had to argue it, and it was really interesting. I don't know whether I told you last time about the good luck I had in finding a passage in a book. Okay, well I'll tell you that.

I was preparing very hard for this case. I had read all the transcripts and the legal arguments and the precedent cases, and I thought I was really up on it, and I just got to the point where I couldn't do anything more, and yet I felt I had to continue working on it, because it was so important. And so, I was in the law library. I couldn't look at my stuff anymore so I just started to wander

around, and I picked off a book, randomly, from the shelves of the law library, and it opened up to a page that had something pertinent to our case. It seems, and this book said, that in the period prior to the Civil War, the Southern states or the Southern senators, were very concerned about abolitionist literature coming in to the South, so they wanted to pass a law that if someone wanted abolitionist literature, they could just put their name on a list and only then would it be delivered to them. And when this bill was debated in the Senate, it was defeated on the basis that it would be a violation of the First Amendment. So, that was very interesting to me and I kind of just noted it in my head. I think I made a note in my legal pad about it.

When the case came up for argument, one of the first questions given to the solicitor general, my opponent, Archibald Cox, was, “Mr. General Cox, hasn’t this occurred once before in United States history?” And he looked around at all of his assistants and they all shook their heads, and he said, “No, Justice Black, this has never occurred before in American history.” So, that gave me my entrée when I got up to speak, because I was able to say, “I’m not going to speak about anything that I have prepared here. I’m just going to answer the questions that the other attorneys were not able to answer.” And I started off with that first one, telling the justices about that Civil War precedent that the Senate rejected because it violated the First Amendment. And I could see that they were all writing down this. It was very important to them, and Justice Black was very happy to hear that he was right, that it had happened before in American history. And, it ended up that we won the case, I think by a six to three vote, and it was the first time that an act of Congress had been declared unconstitutional because it violated the First Amendment. So that was a real landmark.

04-00:06:54

Meeker:

That bit of historical knowledge that you came across—I’m trying to remember the decision in the case—was there any reference to that?

04-00:07:04

Krause:

Yes, it was in a footnote. Justice Douglas wrote the opinion, and he was very famous for writing short opinions, so, I was pleased that it made it into the footnote.

04-00:07:17

Meeker:

I believe the name of the original piece of legislation was the Cunningham Act, and that law I think had only been passed in ’62. It was a fairly recent piece of legislation.

04-00:07:29

Krause:

Yes.

04-00:07:30

Meeker:

Right? As part of your preparation for this case, did you spend much time going back and looking at the specific context of the Cunningham Act, trying

to get a sense of what the legislators were intending with this, if it was a suppression of speech, or if they were trying to cloak it in something more benign or even just bureaucratic?

04-00:07:55

Krause:

Yeah, I think they have another motive, which, it just happened that a peripheral consequence of that motive was to suppress free speech. But I'm sure they never thought how devastating it would be to have your name on the list that was of suspects of being interested in Communist political propaganda. They didn't think about that. What they thought of is what their purpose was, which was to try to protect Hungarian refugees who had come to this country as a result of the Hungarian Revolution, which was suppressed by the Soviet Union, and a lot of them who came to this country were bombarded with propaganda from their home country. And so this is the way Congress tried to prevent that from happening.

04-00:08:52

Meeker:

It's interesting, because I mean, I guess perhaps just being skeptical and suspicious, I would have thought that one of Congress's motives in this would have in fact been to dissuade people from wanting to subscribe to publications from Communist countries, but it doesn't sound like that was actually the case.

04-00:09:12

Krause:

I don't know. It might have been in some of their minds. You never know what the purpose of Congress is. Senator A may have this purpose and Senator B may have another purpose, but they both vote for the legislation. So, yes, I think their main purpose was this Hungarian Revolution protection of people, but a peripheral purpose was more important in this country.

04-00:09:39

Meeker:

Can you tell me who Leif Heilberg was?

04-00:09:44

Krause:

Yes. He was a citizen of Denmark, I believe, and he also was concerned about his potential application for United States citizenship, and he felt that if his name was on this kind of a list, wanting to receive Communist political propaganda, that they might hold it against him when he applied for citizenship. So that was another reason he had, and luckily, it never came out that the actual publications he was getting were not political at all, because this whole case was about, well, this is suppressing political expression. But the actual magazines and material he was getting were from countries like Romania and Czechoslovakia, which had big nudist colonies, and he was getting nudist magazines, pictures of people in nudist colonies, and he was an artist and felt that that was important for him. I was hoping and praying that none of the justices would ask me, "Well what was in this mail?" because I'd have to say, "It wasn't politics; it was nudist magazines." But nobody asked me that so I didn't have to fess up to it.

04-00:11:13

Meeker:

I sort of remember seeing a reference to him wanting to learn Esperanto, and he was getting publications from China. Am I mixing up cases here?

04-00:11:24

Krause:

I don't know; perhaps. He would've been a kind of guy who wanted to learn Esperanto, but I don't remember that. I just know that his magazines that were involved in this case were nudist magazines.

04-00:11:37

Meeker:

Well, this brings up a really interesting question around legal strategy. An attorney always has to make a decision strategically, about in contesting the constitutionality of a law for instance. Are you going to contest this on narrow grounds because maybe that's all you think that you can win? Or, are you interested in making this into a hallmark case that might have a broader repercussions in perhaps, you know, in this case, extend the protections of the First Amendment? How do you go about making those decisions, I mean, maybe in a case like this, where you have these publications that aren't political speech, right? Yet in the end, it sounds like you saw an opportunity to have this have implications for freedom of political speech.

04-00:12:41

Krause:

Yeah. Well, you touch on a very interesting ethical point, because every attorney's job is to win the case for his client, and if he wins it on whatever basis he wins it on, he wins it. So, an attorney is ethically obligated to make every argument that'll win the case. But, working for the ACLU, of course, we wanted to establish these broad principles of freedom of speech. So, is that a conflict? Well, I never found it to be a conflict. I always argued whatever I could to win the case, and I also argued all the broad principles to try to win it as broadly as possible. So, that's what I did in this case.

04-00:13:32

Meeker:

It sounds like it's not always an either/or decision. I think the phrase you used was, "use every argument possible to win the case," so it's not like you necessarily have to choose one strategy or another.

04-00:13:46

Krause:

Yes. I wouldn't have neglected an argument that would win the case for Mr. Heilberg, even if it didn't involve some big free-speech principle, but I was very happy to argue both, anything that I could to win the case and also the free-speech principle. And that's the way the case was eventually decided, upholding freedom of speech, and saying that no, you can't require someone to put his name on a list where he could be politically persecuted for that.

04-00:14:25

Meeker:

How did this case come in? Did he just walk in the door?

04-00:14:28

Krause:

Yes. He just walked in the door. Luckily, he had heard about the ACLU, and knew that we protected constitutional rights. Sometimes when there was a big

issue that people were talking about and we didn't have any clients, we would send out our little messages to the community to try to find someone so we could bring a case. In this one, he just walked in the door.

04-00:14:56  
Meeker:

So, I imagine, in 1962, the ACLU was aware of this act that was making its way through Congress.

04-00:15:07  
Krause:

Oh yeah, we opposed it. Our legislative lobbying group opposed it and told the Congress that it would be a violation of free speech, but they passed it anyway.

04-00:15:20  
Meeker:

That's interesting. So, thinking organizationally about the ACLU as kind of a federation, there's a national headquarters, but there are many state chapters. How is it decided which state gets to take on these broad First Amendment issues?

04-00:15:43  
Krause:

Well generally, courts have a territorial jurisdiction, so wherever your client lives or has a business, you're kind of limited to that, and then wherever the defendant can be found, that's another way that you can choose where to bring the case. But actually, there were several other cases challenging this statute. There was one from New York that eventually became the name of the case, *Lamont versus Postmaster General*, and they had lost the case in the trial court, so they got the case up before the Supreme Court quicker than ours. So they became the lead case and we also participated in the case just as much, but we didn't get our name on them as the main name.

04-00:16:38  
Meeker:

What was the name of this particular case, do you recall?

04-00:16:42  
Krause:

This *Heilberg versus Fixa*, Fixa was the Postmaster General.

04-00:16:49  
Meeker:

In California, or—

04-00:16:51  
Krause:

No, for the United States.

04-00:16:54  
Meeker:

Okay. Right. Oh, what was I just going to ask about that? How was it decided then that you would be the attorney representing the defendants?

04-00:17:11  
Krause:

Well at the time, I was the attorney for the ACLU of Northern California, and so, it was my in my bailiwick, so it was pretty natural. But of course, some people were concerned to have such a green attorney arguing the case, but I

felt I had a pretty good experience in the appellate courts. I had been a clerk for the Ninth Circuit. I had also worked for Chief Justice Gibson of the California Supreme Court. I had handled a few other appeals before, and I thought I knew what I was doing. Maybe it was some sort of chutzpah on my part, but I did it.

04-00:17:52

Meeker:

Well, I guess what I was asking was, why wasn't Lamont's attorney the one who represented the case?

04-00:17:59

Krause:

Both of us were. When I saw that they were taking both cases, I suggested that Lamont's attorney go first, and then followed by the solicitor general representing the United States, and then I would be the last person to argue. So that's why all of my argument was kind of rebuttal.

04-00:18:22

Meeker:

Okay, I guess I didn't gather that. I'm curious if you can maybe take us back to that day when you went and argued the case before the Supreme Court. What was it like for you? What were you feeling at that time?

04-00:18:43

Krause:

Well it was a pretty impressive experience. I had to be admitted to the bar of the Supreme Court, so my colleague at the Washington, DC, ACLU—Lawrence Speiser was his name—moved my admission to the bar, and then the next day, I argued the case. And I had a whole group of students I had previously taught at San Francisco State University, and somehow, a whole group of my former students were working in Washington, DC, and they all came to the argument to cheer me on, and my wife was there, and it was quite an event, and I felt that I had to do really well, not only for the Supreme Court, but for all these people who came to see me.

04-00:19:40

Meeker:

What was the nature of the preparation? Did you have particular arguments memorized? Did you have like a goal of what you wanted to accomplish in your allotted time?

04-00:19:52

Krause:

I had an outline of what I was going to say, but as I've told you, I discarded that outline completely, because not only that question about "has this ever happened before in American history," but there were six or eight other questions that either the solicitor general didn't answer well, or that the attorney for Corliss Lamont didn't answer well. So, I just hit on those and I answered all of those in a way that I thought was more satisfactory for winning the case.

04-00:20:24

Meeker:

What did you think of the justices, and the questions that they asked of you? Did you feel like they were fair and on point, or were there any justices or comments that seemed to you bizarre? [laughs]

04-00:20:42

Krause:

You know, thinking about all the cases that I've argued, I argued four cases personally, and each one, I felt the justices were pretty well prepared. They knew what the issues were; they knew what the facts were; and they probed mainly on legal theories, rather than trying to get more facts. And so, I thought they did a very good job, and of course, they each have law clerks who read all the stuff and prepare them. I doubt if the justices actually read all the briefs filed by the attorneys, but they depend on summaries prepared by their law clerks, and they depend on discussion of the case in their chambers with their law clerks, and they each have three or four law clerks, so there could be quite a lively discussion.

So, by the time the case is ready for oral argument, they knew a lot about it. But, oral argument is the first place where the justices actually come together to discuss or to hear about a case. Before the oral argument, they don't meet with each other about that case. So, sometimes in the oral argument you'll see that the justices are not trying to talk to the attorneys; they're trying to talk to the other justices, to convince them to vote in the way they think should be the outcome of the case.

04-00:22:14

Meeker:

When your argument was over, how did you feel about what had just transpired?

04-00:22:20

Krause:

I felt really good about it. I felt that I was able to answer all these questions, and that I didn't get tripped up, so I felt that I had done well.

04-00:22:29

Meeker:

Did people around you give you good reviews?

04-00:22:35

Krause:

Oh yeah, of course, you can't trust your own friends and family ought to be completely objective. [laughter]

04-00:22:44

Meeker:

Was Heilberg there?

04-00:22:47

Krause:

No, he wasn't there.

04-00:22:48

Meeker:

So, I think that a couple months passed, right, between the arguments and the decision coming—

04-00:22:58

Krause: Yes.

04-00:22:58

Meeker: —down. Do you recall where you were when the decision came down? I mean now they just refresh POTUS Blog, right? [laughs] You know as soon as the decision comes out, but I imagine—

04-00:23:14

Krause: Yeah, in those days, the clerk would send out a telegram to the attorneys, and so, I got a telegram, and I knew it was about this case, as I didn't get very many telegrams. So I opened it up, trembling, and there it is: "The decision is affirmed." So, our lower court decision was affirmed.

04-00:23:40

Meeker: And you said that this was unique in the sense that it was overturning an act of Congress.

04-00:23:46

Krause: Yes, on the First Amendment, yeah. They hadn't done that before.

04-00:23:52

Meeker: Interesting. Was that made a fairly big deal out of in the media?

04-00:23:59

Krause: Yeah, I think so. I think the *New York Times* had it on the front page, and it was of course a headline and the front story, front-page story in the *San Francisco Chronicle*, and the *Examiner*, and the *News-Call Bulletin*, which was published at the time. And so yes, it was a big deal and I got a lot of calls about it.

04-00:24:22

Meeker: Calls from the media?

04-00:24:23

Krause: Yeah.

04-00:24:23

Meeker: What was the media interested in? What angle of the story would they have been interested in?

04-00:24:37

Krause: They were interested in who Mr. Heilberg was, and I don't think I told them about the nudist magazines; that would've overshadowed the political element of the story and I didn't want to do that. They were interested in the fact that it looked like something that was sympathetic to Communism won the case and at that time, that was a big deal. So, that got a lot of play, that somebody who wanted to receive Communist literature, the Supreme Court ordered that they should be able to do so without having to put their names on a post office list.

04-00:25:22

Meeker:

How did you engage in that conversation with the media? Because that wasn't the case in this instance.

04-00:25:30

Krause:

At that time, in the early and mid-sixties, there weren't specialized reporters on the Supreme Court. Now, there are some really excellent lawyers, and people trained in the law, who report about the Supreme Court. At that time, there weren't, and so, one of my jobs was to explain what the legal terminology meant, what it meant to win a case on this ground, and what the precedent effect would be, how this case would affect things in the future.

04-00:26:08

Meeker:

What would have been your thoughts at the time? Clearly, it had the immediate impact of overturning the Cunningham Act, that now, people would not have to, in essence, register or proactively seek these publications. Did you see it as having a broader implication?

04-00:26:30

Krause:

Yes, all of the cases at this time that I handled from the point of view of trying to defend radical politics were trying to get away from the very rigid, punitive attitude that had been in effect about left-wing and liberal and Communist ideas, and we wanted to get back to having them considered on a fair playing field.

04-00:27:07

Meeker:

Let's talk about the *US versus Archie Brown* case, and this also was 1965 and so it would've been I guess the same term. It was decided in June, '65. I know that you were not the attorney on this case, but I believe you and the ACLU wrote an amicus brief in support of the Archie Brown. Can you tell me what this case was and what was at stake here?

04-00:27:41

Krause:

Archie Brown was on the board of directors, or whatever it was called, the governing board of the International Longshoremen's and Warehouse Union in Northern California, and he was also a member of the Communist Party, pretty openly. He felt that Communism was his thing, and so he didn't conceal it, but Congress passed a law that said if a member of the Communist Party is on the board of a labor union, that would be a crime. And Archie Brown was charged with the crime and convicted, and he appealed, and there were lots of arguments in his favor on free speech grounds and freedom of association grounds, and the right of union members to elect whoever they wanted to, to be on the board of their union.

But, our brief, my brief for the ACLU raised the issue that this was a bill of attainder, which was forbidden by the Constitution. And, for those who don't know what a bill of attainder is, which is practically everybody because it's very uncommon, it's where the legislature tries to punish somebody by enacting a criminal statute to penalize that person, where it's the province of

the judiciary branch to punish someone for a crime, not the legislature. So, I argued in my amicus curiae brief, friend of the court, that this is a bill of attainder because Archie Brown was punished for being elected to his board of directors position on his union, and Congress punished him for that. It wasn't a judicial act, although, of course, he was convicted in a court, but he was already convicted, because it was obvious that he was a member of the Communist Party and a member of the labor union board. So, the court accepted that argument and said that this law is unconstitutional, because it's a bill of attainder.

04-00:30:21

Meeker:

Right, that was the crux of the decision, was this point about the bill of attainder. Interesting that you came up with that. Do you recall how you—because that's an interesting way of looking at this case, and maybe not the most obvious way of looking at this case. How did you decide to focus on that?

[Side conversation deleted]

04-00:30:51

Krause:

The function of an amicus curiae brief is try to suggest to the court that there are other things to consider in this case besides what the parties are arguing. And so, I was trying to find something that the parties hadn't argued themselves, and I kind of hit upon this. Exactly how I did it, I don't know.

04-00:31:20

Meeker:

Interesting. When you put this together, I guess the attorney representing Brown was—was that Richard Gladstein?

04-00:31:34

Krause:

Richard Gladstein, yes.

04-00:31:37

Meeker:

Did you engage with him about this line of argument? Did he have a thought about—

04-00:31:41

Krause:

Mm, I don't remember talking to him about it, no. I don't think I talked to him about it.

04-00:31:50

Meeker:

Yeah. It's quite unique, and it clearly was effective.

04-00:31:57

Krause:

Well the ACLU has done that in a number of cases. The whole issue, for instance, of using the exclusionary rule to prevent evidence illegally seized in a criminal case, was only raised by the ACLU in the case where it was finally adjudicated that that should be the rule. The parties were arguing other things, and the ACLU said—not in my brief, but some other ACLU attorney said, “Besides, this ought to be within the exclusionary rule.” At that time, the

exclusionary rule applied to federal criminal prosecutions, but not state criminal prosecutions, so the ACLU said it ought to apply both to federal and state, and the court accepted that. So, there is an example of an amicus curiae brief being extremely important.

04-00:32:58

Meeker:

Interesting. And this also, this decision—it's five-four in favor of Archie Brown—comes down, like I said, at the same time that the Lamont decision comes down as well, and both of these are robust, First Amendment decisions opening up a political discourse. I'm curious. Can you bring us back to that time, and what the atmosphere at the Northern California chapter of the ACLU was like when you're winning all these cases?

04-00:33:43

Krause:

I think that we prided ourselves in stirring things up and changing things. We were attacking the way things had been done, because there was the House Committee on Un-American Activities; there was all sorts of very regressive political action during this period, and we didn't like it, and we tried to protect constitutional rights. And so, we liked the fact that it was controversial.

04-00:34:19

Meeker:

Did it seem like, as these decisions were coming down, enough was being achieved, or did it seem like there were still many battles that needed to be fought and won within the purview of what the ACLU was interested in?

04-00:34:39

Krause:

Well no, I think these decisions were really important decisions, and changed the direction of the Congress; the Congress being slapped down for violating First Amendment rights was not something that was easy to take. I'm sure that there was a lot of criticism of the court because of these decisions. But some of my cases I kept having to repeat over and over again. There was one involving what was called the Civic Center Act in California. In California, the law is that public schools are considered open for public forums, on any subject, and that's what the law is. However, many school boards just refused to allow groups that were in any way tarred as possibly Communist influenced from meeting at school in school offices. So, I would bring lawsuits and we would win, and then in some other little town in Northern California there would be the same issue, and I kept winning that over and over again, but it just kept repeating itself. So, sometimes you don't get anywhere on a larger scale.

04-00:36:07

Meeker:

That's interesting. I don't know if it was in your interview or another interview, but I was interviewing some attorneys lately and you know, actually I think it was Michael Tigar was saying, "Hey, I mean, you know, we win *Brown versus Board of Education* in '54 but that doesn't mean the segregationists give up." You know, you can win these big First Amendment

cases, but that doesn't mean that local officials are going to all of a sudden abide by what the court decrees.

04-00:36:40

Krause:

Oh, yeah, most of the Southern states maintained their segregation laws for ten or fifteen years after *Brown versus Board of Education*, and each one of them had to be sued, and threatened with contempt of court, et cetera, because of the politics of the area. You couldn't be elected to a political office unless you were in favor of segregated schools. So, the politicians didn't pay any attention to what the court had to say.

04-00:37:16

Meeker:

In these civic center acts around access to public schools space, the fact that you had to keep going back to court, did you and your colleagues ever sit down and try to come up with alternative strategies, or ways to—you know, it's a lot of work that you guys have to do to go and continue to fight these small battles.

04-00:37:41

Krause:

Yeah, we did try to do that. We tried to contact the Association of School Board attorneys and say, "You people should be aware that this is the law," and the school board would be insistent that they not rent their school facility to some group they didn't like, regardless of the law, because the school board was elected by the community, and they didn't want it said that they were in favor of having controversial groups having meetings at the school. So it didn't matter that their own attorneys advised them that this would be illegal. They still kept doing it.

04-00:38:25

Meeker:

As time goes on, do you start to develop any ideas about how to compensate for the ineffectiveness of law in this case, the fact that law doesn't necessarily move people to act in the way that they should?

04-00:38:46

Krause:

Well I think we tried education as much as we could. We held conferences, public conferences, about certain subjects, and tried to educate the public, and we had a legislative representative in Sacramento who tried to educate the Sacramento, the California politicians, and we had a national lobbying office in Washington, DC, which was very well staffed with intelligent people who got around and knew how to try to get to congressmen and senators, and they tried their best to head off these things before they became court cases.

04-00:39:35

Meeker:

Were you having any direct interaction with elected officials in the Bay Area or around California?

04-00:39:43

Krause:

Yeah, I sometimes did on an informal basis. Sometimes I would go to Sacramento to testify about a law or something of that sort, and I got to know a number of legislators, yes.

04-00:39:57

Meeker:

Did you have a clear idea of those who were supportive of what the ACLU is fighting for?

04-00:40:05

Krause:

Yes, yes, and we would invite those people to come and speak to conferences and things of that sort. Yes, when we would have a big conference about something like loyalty oaths, we knew what members of the legislature were in favor of restricting loyalty oaths, and we would invite them to help us out in the conference.

04-00:40:29

Meeker:

I'm not entirely sure of the history of IRS law, but over time, of course, we have the 501(c)(3) and 501(c)(4) organizations; the (4) organizations are nonprofits but can do lobbying, and, where was ACLU within this mix at the time? I don't know if the law was different then.

04-00:40:57

Krause:

At some point, I don't remember where, the ACLU kind of established a 501(c)(3) division or part, and so we would raise money for that 501(c)(3), which was just to support our litigation. Litigation is not lobbying, so, that was fine. People could donate to the ACLU and get a tax deduction. But if they wanted to donate to an organization that would be doing lobbying, then that was the other ACLU organization.

04-00:41:35

Meeker:

Did you have to deal with this divide when you were a staff attorney?

04-00:41:40

Krause:

No, I didn't. I didn't. I think we had some volunteer attorney who knew tax law pretty well and helped us out.

04-00:41:52

Meeker:

Shall we talk about the *Camara* case? So this is *Camara versus the Municipal Court of San Francisco*, a 1967 Supreme Court, US Supreme Court decision. Who was Camara and what was at stake in this case?

04-00:42:15

Krause:

Roland Camara was a gentleman who lived in the Tenderloin district of San Francisco. He had an apartment there, and he also had a little bookstore right near his apartment. And one day, someone knocked on his door and said they were a San Francisco health inspector, and wanted to come in and inspect his apartment. For one reason or another, he said, "No. Do you have a search warrant?" And they said, "No, we don't. We don't need a search warrant. We're health inspectors." And he said, "Well, you can't come in," and they

said, “Okay, you won’t let us in; you’re going to be charged with a criminal offense,” and he was. He was charged with the crime of failing to allow a health inspector to inspect his apartment.

So we brought what was—when he came into the office, we realized that they should’ve had a warrant to go into his private apartment. The only problem was that in the 1940s, the US Supreme Court had decided a case that said the protection of privacy in your home doesn’t apply as to people who are not trying to convict you of a crime, who are only health inspectors, say. So—

04-00:43:41

Meeker:

Is that the *Frank v. Maryland* case?

04-00:43:43

Krause:

Yes, that’s *Frank versus Maryland*. And so the law was against us on that issue, but we didn’t like that law, so we decided to change it. We thought people should have privacy interests in their own home, whether it was the government acting as a policeman, or the government acting as a health inspector, or a building inspector, or whatever. So, we took his case and we tried to prevent the criminal trial from taking place, and we took that case all the way up to the US Supreme Court. No one else could overrule *Frank versus Maryland*; everybody was bound by the fact that they’d already decided that health inspectors could go into a house without a search warrant. So, we had to argue that that case was wrong, and we were successful in doing that.

04-00:44:40

Meeker:

That’s pretty remarkable to overturn established Supreme Court precedent.

04-00:44:46

Krause:

Yeah, it was. It was, but it was clearly wrong. In my mind, the essential interest that we were talking about was privacy in one’s home, and it doesn’t matter what badge the government is wearing when they go into your home; they’re still the government. They’re still depriving you of privacy. So it didn’t make sense to us that health inspectors and building inspectors should be able to go into a home without a warrant, and we argued that if there was some probable cause, that there was some health problem there, they could go get a search warrant.

Now I don’t know why it was that Roland Camara decided to dispute the health inspector. I think most citizens in those days would’ve said, “Well, okay, you’re the health inspector. Sure, you can come in my place; it’s not a problem,” or whatever. But for some reason, and I think I know why, Roland Camara didn’t want to let the health inspector in, and I think the reason was that he was a little concerned that he had some pictures of men up in his apartment, and that they would think he was gay, or homosexual, and he didn’t want to expose that to the government.

- 04-00:46:24  
Meeker: That's interesting. It's interesting that doesn't get mentioned at all anywhere in the written record about this particular case.
- 04-00:46:31  
Krause: No, it didn't get mentioned in the written record, and he didn't have to give any reason. He just didn't want them in there, period.
- 04-00:46:39  
Meeker: I mean that's actually the point of the case, of the ACLU argument, that there doesn't need to be an argument.
- 04-00:46:47  
Krause: Doesn't have to be a good reason; you just don't want the government to come in and inspect your property unless there's probable cause.
- 04-00:46:55  
Meeker: Well what I wanted to ask was, why the rush? Why did you not want this to go to trial? I guess, what is the legal jeopardy if it goes to trial before the constitutionality of it was decided?
- 04-00:47:10  
Krause: Well, we didn't want him convicted of a crime; then he would have to be sentenced to jail term, and it would be very hard on him. So we decided to bring what was called a writ of prohibition, to prohibit the criminal trial from taking place, and that's what went up to the US Supreme Court.
- 04-00:47:31  
Meeker: How did this case come to you?
- 04-00:47:36  
Krause: I think he walked through the door, again, yeah, and said, "This happened to me," and we decided to take the case.
- 04-00:47:44  
Meeker: What did you know about him at the time that you met him?
- 04-00:47:47  
Krause: Not much. He seemed to be kind of an eccentric guy, but that was okay; we had a lot of eccentric clients.
- 04-00:47:57  
Meeker: And how do you decide—something like this walks in, especially given that there was established precedent in the *Frank* case, to invest considerable resources and move ahead with this, what kinds of questions are you asking of the case, of the litigant, and so forth?
- 04-00:48:20  
Krause: The way we have kind of an arrogant attitude toward the Constitution, we believe that our interpretation is the best one, and we try to interpret the Constitution to give people as much freedom as possible, because we think

that that's the essential underlying theory of our Constitution, and the Bill of Rights, to give people freedom to do their own thing, as long as it doesn't harm anything else significant in society. So, that's the basis that we came at any problem, and if the Supreme Court disagreed with us, we disagreed with the Supreme Court, and that was it.

04-00:49:05

Meeker:

You know, both of these cases move pretty quickly through a process to get to the Supreme Court. How is that, that that happens? I mean, now it can take many, many years.

04-00:49:16

Krause:

Well, because there was no trial; there was just a question of law. Should *Frank versus Maryland*, the old case, be applied here? And all the lower courts were required to apply *Frank versus Maryland*, and required to say that the health inspectors did not need a search warrant or probable cause to come into somebody's apartment. The basic reason why they were at Roland Camara's apartment was that somebody in the block that he lived in was complaining that there were rats somewhere in the block. So they decided they would inspect every apartment in the block to see if there was someone in there hoarding things, and creating an attractive place for rats to be, so that's what it was all about. So, but in any event, I forgot exactly what question I was answering.

04-00:50:16

Meeker:

I think you answered it. So, well, let's talk about the oral arguments. I just listened to it, and they were pretty lively, I thought, really quite interesting, and they spent, the justices spent a lot of time questioning you, and in particular, there was a long exchange with Potter Stewart, who ended up voting with the minority on the case so, against your position. He seemed most concerned about whether the police might use this in violation of the Fourth Amendment, but otherwise didn't seem overly concerned, I think, about, in terms of the *Frank* precedent, right, like the health inspectors. So he was, I think he was trying to say—he was trying to see if there was a meaningful distinction between those two, and I think he was arguing for there yes, being a meaningful distinction between, say, police and health inspectors.

04-00:51:28

Krause:

Yes, that was the thing that I think he fixed on, that he thought it was an entirely different kettle of fish when the police were trying to pin a crime on you, and were coming into your apartment to try to find evidence that you had committed some crime. But where the police were, I mean the government was just generally trying to protect the health and safety of all the citizens, he thought it was entirely different, whereas I and the majority of the court, it turned out, thought it was the same kind of thing; it was an invasion of privacy, and the government was doing it, and regardless of what reason they had to do it, it should not be allowed without a search warrant.

04-00:52:19

Meeker:

There was a particularly interesting moment in the oral arguments, and I think when you kind of stepped out and provided a—you shifted the debate, I think, a little bit, and that was when you offered up alternatives to this kind of search, so, you know, whether it was with warrants or not, and so you talked about trying to get like affirmative certification. So you kind of took the debate out of the way in which it was being discussed in terms of *Frank*, and said, “Hey listen, there are other alternatives the state has in its toolbox.”

04-00:53:06

Krause:

Yes. Well, I have to start with, the interesting event in the oral argument for me in that case was my exchange with Chief Justice Warren. And I had a volunteer attorney named Donald Cahen who was helping me on this case, and he came to Washington with me, and he was sitting at the counsel table, and he had been one of Chief Justice Warren’s law clerks. So the previous day, he took me in and introduced me to Chief Justice Warren, and we sat there and talked for maybe a half an hour. We had a really nice, cordial conversation, and I thought, wow, I am really getting close to the chief justice and he’s going to be very good to me when oral arguments started.

Well, oral arguments started, and he asked me whether I thought that the probable cause requirement for a police officer should be different than that for a health inspector, and I said, “No, I think they should both be the same,” and he did not like that at all. He felt that there should be some lesser degree of probable cause when the government was trying to protect the health and safety of citizens, and actually that’s the way he wrote the opinion. He wrote the majority opinion, and the majority opinion said, “No, you don’t have to show exactly the same kind of probable cause you do for a criminal search warrant, but you have to show some probable cause.” So since the health inspector had not shown any probable cause, we won the case, but we didn’t get the complete victory. So when I argued for that complete victory that it should be the same, he got very upset with me, and I could see his face was getting red. And he asked me a number of difficult questions after that, and I tried to stand my ground; however, he didn’t accept my full position.

04-00:55:37

Meeker:

That is also why it’s so good to listen to the original recordings, because you do get that sense of emergent tension in the conversation, and he does seem to be getting impatient. I think something that—I don’t know the exact quote, but it’s something like, “Do I have to go that far? Do we have to go that far?” And, it was clear by asking that that it was a rhetorical question, that he wasn’t prepared to go that far. But, it also seemed like he was inclined to try to find a way to settle the case in favor of Camara, and so he was sort of like asking you, “I’m not going to go that far. You can argue for that if you want, but, give me something that I can rule on.”

04-00:56:29

Krause:

Yeah, and that's how he got five votes. I think it was not easy for the court to overrule one of its major precedents, so they had to do it as gently as possible.

04-00:56:44

Meeker:

That's super interesting. So, after this, after the arguments, what did you think in this case, in comparison to *Lamont*?

04-00:57:00

Krause:

I was a little concerned about this one. I didn't exactly know what would happen, because of the chief justice's position, and I thought maybe we would not win. I was not sure.

04-00:57:15

Meeker:

In preparation for the *Camara* case, had you revised your preparation strategy in light of your experience the first time around?

04-00:57:30

Krause:

I don't think so. No, my strategy was to know the trial court record very well, to know all the facts of the case extremely well, and to understand all the legal argument and all the legal precedents, and I tried to be as prepared as possible, because you never know what questions are coming up. So you have to be prepared on the whole field, even though the questions might be just on a narrow aspect of it. You don't know what aspect will come up. So, yes, I had a lot of work to be prepared for both cases.

04-00:58:06

Meeker:

It's interesting, kind of going back to that conversation we had about the different strategies, and how far do you push it, that really shows itself in this case. I mean, you, as an attorney, could have conceivably, while making your arguments, taken a very purist case and said, "No, you have to decide the full thing. I'm not going to give you a half route." Was that something that you had to think about in that moment?

04-00:58:46

Krause:

Well, once again, you come to the ethical obligation to your client. I mean, my client did not want to be convicted of a crime, and so, any way I could prevent him from being convicted of a crime, I was willing to accept.

04-00:59:02

Meeker:

Did *Camara* go to the—

04-00:59:05

Krause:

No, he didn't go, and after the case was all over and we won it, his name was on the front page of all the papers, and there was a lot of discussion, and his picture was in the papers, I believe, and he really liked that kind of publicity, and he ended up running for mayor of San Francisco at the next election. He wasn't elected, but he put on a campaign, and he became a celebrity.

- 04-00:59:38  
Meeker: Interesting. You said that he had a bookstore attached to his apartment. What kind of bookstore was it, do you know?
- 04-00:59:44  
Krause: I wasn't in the bookstore, so I don't know. I was just in his apartment. But he did give me a copy of the eleventh edition of the *Encyclopædia Britannica*, which was kind of a rare book at the time, and it was very nice of him to give me that.
- 04-01:00:02  
Meeker: Oh, cool. What did you think when the decision comes down? It was a six-three case, I think.
- 04-01:00:11  
Krause: Something like that.
- 04-01:00:12  
Meeker: Yeah, so it was a bit more than five-four on this overturning precedent. What did you think when you read the decision?
- 04-01:00:22  
Krause: Oh, I was very happy with it. I thought that it would have a lot of ramifications, and it has. The case has been used to resist building inspectors coming into your house, and all sorts of inspections, and any time the government wants to come into your residence, they have to get by the *Camara* case.
- 04-01:00:50  
Meeker: And what does that mean in this context?
- 04-01:00:52  
Krause: They have to get a search warrant, or they have to be confronted with some sort of an emergency.
- 04-01:01:00  
Meeker: There is an exception around public spaces, stairwells and fire escapes and that sort of thing.
- 04-01:01:09  
Krause: Yes, but this is within a private apartment, so it's the most sacred space protected by the Constitution. The Supreme Court has been very clear about that, that the privacy of the home is the most important thing that they want to protect by the Fourth Amendment.
- 04-01:01:30  
Meeker: How critical was it that this was an apartment as opposed to a single-family dwelling?
- 04-01:01:35  
Krause: I don't think that was critical at all, no.

04-01:01:39

Meeker: Not even symbolically?

04-01:01:41

Krause: No. No, I think, no, you have your same privacy interests in an apartment, and a private home, and a hotel room or something of that sort. If you check into a hotel, that is your room for the time that you are renting it, just the same as if it had been your private home.

04-01:02:02

Meeker: Interesting. Has the *Camara* decision been robust? Have you seen any whittling away at it, over time?

04-01:02:15

Krause: No, I haven't seen any whittling away at it.

04-01:02:17

Meeker: Great. Anything else you'd like to say about the *Camara* decision?

04-01:02:29

Krause: No, I can't think of anything else.

04-01:02:30

Meeker: Okay. Well let's move on to some activity at the ACLU I know that you were engaged with that didn't quite reach the level of the Supreme Court. But there were a whole series of laws that were typically directed at policing quality of life issues, as might be called, or sort of street-level criminal activity, like vagrancy laws, and the lewdness—

04-01:03:06

Krause: Disturbing the peace, and all that sort of stuff.

04-01:03:10

Meeker: What was the ACLU's approach to dealing with, to those kinds of issues?

04-01:03:18

Krause: Well, we took as a basic principle that the criminal law has to be clear. It can't give the police a vague opportunity to arrest people, because if it does, then they can arrest anyone who they don't like, who has a minority political position, is a minority race, or a minority anything, they can pick on people with these vague laws. So something like the vagrancy law, of being on the street without visible means of support that could be applied to anybody. Anybody lolling around in a park, in those days, could've been arrested for a vagrant violation, and in fact, was, and that was one of the things that they used to arrest hippies who they didn't like, the police, I'm talking about, and so, they were charged with vagrancy. Sometimes when they were sitting on the sidewalk they were charged with obstructing public passageway, or disturbing the peace. Any law that can be stretched out so you don't know exactly what is forbidden and what isn't, is too vague to be enforced, and gives too much power to the government to stop people and arrest them.

04-01:04:47

Meeker:

So the, I mean these are typically muni-code kinds of laws, or maybe state law, right?

04-01:04:55

Krause:

Some were municipal codes. Most cities have what they call police code, which has some minor regulations about noise on the streets and things of that sort, and then, the vagrancy law was a state law.

04-01:05:14

Meeker:

What was ACLU's perspective on it? Did you guys develop a policy that said, "Vagrancy laws should be overturned; they are unconstitutional"? Was that the approach?

04-01:05:32

Krause:

Yes, it was the approach because we felt that most vagrancy laws had the problem of being too vague, and giving the police too much unrestricted authority to decide what was criminal conduct, and what wasn't. In other words, we didn't like it that somebody dressed respectably could sit in a park on a bench and do nothing, but if you were dressed in a way that the police thought was controversial—you didn't have good clothes or you were a hippie—they could arrest you for doing the same thing.

04-01:06:13

Meeker:

Well so then, what was the ACLU's approach to mitigating these laws?

04-01:06:20

Krause:

There were so many of these arrests, we couldn't handle all of them, but so, we tried to get a couple of key cases, and have these laws declared unconstitutional. So, that took a lot of work, but eventually we were successful to have these laws challenged constitutionally, and they have been changed now so they don't allow such vague language to be part of the criminal statute.

04-01:06:54

Meeker:

Do you recall what some of those key cases were?

04-01:06:58

Krause:

No, I don't, and there were many of them. There were so many of them. They were decided by all sorts of different courts, the superior court, the appellate department of the superior court, the court of appeal, in various cities and counties, and it was a big problem.

04-01:07:18

Meeker:

I believe in the California statute around vagrancy, one of the subsets of that had to do with lewdness and lewd behavior. It was typically used about people having sexual encounters in public bathrooms, and those kinds of things. Did the ACLU have a particular approach to that? Was that treated or seen differently than just sort of general vagrancy?

04-01:07:47

Krause:

No, I don't think so. I think that it suffers from the same problems of having such broad language that it could be abused, and then there was the issue of entrapment also. You mentioned sexual conduct in bathrooms. It was unfortunately the practice of the police to send in people to try to stimulate other people to have some sexual adventures, and then they would arrest them, and we call that entrapment, and we don't think that the police should be able to be the ones who initiate sexual conduct, and then arrest somebody for doing that.

04-01:08:31

Meeker:

It's interesting. The ACLU defending individuals arrested on these, in the fifties and 1960s is pretty well ahead of the curve. There were certainly unethical attorneys who would take advantage of desperate clients, and then there were ethical attorneys who didn't want anything to do with it, and then there's the ACLU, who approached in an ethical way and also helped these folks. But it was also, it was a topic that was, at the time, was not seen as exalted in the same way that political speech was, right?

04-01:09:23

Krause:

If you go back to the sixties, you would be amazed at the attitude toward people who were gay. People just didn't accept it as proper behavior. They were thought to be deviants, and dangerous to the community, and sexual predators, and all sorts of names were given, and therefore, the police often felt that they could do anything they wanted to the homosexual community. At that time, there were a lot of gay bars where gay people hung out, and the police would not hesitate to raid these bars occasionally, and just go in and arrest a whole bunch of people for disturbing the peace, even though they were in a private bar, and so there was a lot of persecution.

04-01:10:21

Meeker:

There were some nascent gay rights organizations in San Francisco in the late fifties and early sixties. Did you or the ACLU engage with those organizations much to try to strategize and come up with a unified defense against these kinds of arrests?

04-01:10:40

Krause:

Yes, but I have to tell you an amusing story. I had come to work for the ACLU in November of 1960 and I was fairly young then. I hadn't done anything really significant in my life, and I didn't know very much about anything. And about three days after I came to work, my boss came in and said, laid a piece of paper on my desk and said, "This is an invitation to be the keynote speaker of the national conference of the Daughters of Bilitis." And then he walked out. I had no idea what the Daughters of Bilitis was. I didn't know it was the leading lesbian defense organization at that time. And so, that gave me about three or four days to prepare for giving this keynote speech, and I gave a speech about civil liberties, and I was very surprised that the

people there, by and large, were pretty normal people. [laughter] So, that was a great surprise to me. I didn't know what to expect.

04-01:11:52

Meeker: Did you know it was a lesbian organization as you were preparing to give the presentation?

04-01:11:56

Krause: I eventually, I asked someone, "What is the Daughters of Bilitis?" and someone told me. But we worked with other groups. We worked with the Tavern Guild, which was the organization of bar owners who catered to gay people, and because of all this police harassment, they felt they had to have an organization, and they did. They had a good, strong organization, and they resisted blackmail attempts on behalf of the police. In many, many cities in the United States the police were getting a rake off from gay bars, for not raiding them, and that was happening in San Francisco too, so the Tavern Guild resisted that, and we helped them on that. The Mattachine Society was active in San Francisco. We helped them; we advised them on various strategies also.

04-01:12:52

Meeker: What is the nature of the advice? Is it just, they have legal questions, and you're there to provide a legal opinion? What was the nature of the engagement?

04-01:13:03

Krause: Well, it basically comes down to, you have the same rights as everybody else, regardless of your sexual preference, and that's what we tried to get across, and we tried to get them to stand up for their rights, and to insist on their rights, and it was dangerous in those days. If you insisted on your rights, that would be cause for an attack by the police.

04-01:13:27

Meeker: Did they seem not reluctant to stand up for their rights, but, I mean, how did they respond to that, I guess? How did they respond—

04-01:13:37

Krause: Well, I think they all saw the truth of that, that if they were going to have rights, they had to stand up for them, but when it came right down to doing it, it depended on who they were as people. Some gay people would be willing to stand up to the police; others would be intimidated.

04-01:14:00

Meeker: Is it kind of just as simple as that, that it came down to perhaps having a history of being intimidated on this, and actually having to stand up and forthrightly claim rights?

04-01:14:14

Krause: Well, it was always a little more complicated, because the police always had some excuse. Their excuse to raid these bars was that there were a lot of drunk

and disorderly people there, and who knew? I mean, we didn't know what kind of people were hanging out there, whether they were drunk or not, or what, and the police said they were and who are we to question them? It was a factual issue many times, and many times it became a factual issue as to whether the gay people attacked the police. Sometimes if gay people stood up for their rights, they were then accused of attacking the police.

So, it was very difficult. I remember preparing some advice to young people, telling them if they're questioned by the police, they don't have to answer this or that. And we were going to publish that advice, and it was looked over by some experienced people, and they said, "You can't tell people, young people that, because if they do that, they're going to get the hell beat out of them! You've got to be a little circumspect about that." So we were very wary of advising people of their rights when it would be dangerous to assert them.

04-01:15:38  
Meeker:

And the context of gay bars is interesting, because there's also the ABC, the Alcohol Beverage Control Commission, that I believe could shut down bars if there were violations of underage drinking, I think also disorderly conduct, so that, I think, originally was dealing with prostitution in bars, but disorderly conduct could be interpreted as a same-sex couple dancing together as well. Here's an interesting moment in history where the ACLU is trying to intervene to disrupt some of those complexities in favor of principles. Is that kind of how you were seeing things? Does that ring true?

04-01:16:37  
Krause:

Well, you know it was hard for us to know in many of these situations, as I said. We don't know whether disorderly drunken conduct was happening or not, and the ABC might say it was. But if they said just that the people who were hanging out there were acting affectionate toward members of the same sex, then we would see very clearly that that was just discrimination against gay people. It wasn't trying to prevent disorderly conduct.

04-01:17:15  
Meeker:

Was that a concept, discrimination against gay people? Was there a concept that gay people were a group, a separate group that could be discriminated against, in terms analogous to discrimination against blacks, for instance?

04-01:17:37  
Krause:

Yeah. Among those of us who weren't really familiar with the gay community, and I include myself in that group, we had a lot to learn about the gay community, and at one point, the police lieutenant who was in charge of police community relations, invited me to come and tour all the gay bars, and it was eye-opening to me. I didn't even know that these places existed, and I didn't know that gay people had such a separate culture, and they did, and I didn't know about that. So it was very eye-opening. We really didn't know. I mean, gay people were accused of being predators against young people; that was kind of the understanding, that if you were gay, you were going to be

trying to get minors to engage in sex with you, and there was a lot of ignorance about gay people.

04-01:18:52

Meeker: That community police relations officer, was that Elliott Blackstone?

04-01:18:59

Krause: No, that was Richard Hongisto, who later became the sheriff, yeah, and later after that, became a board of supervisors member.

04-01:19:09

Meeker: Right, ran for mayor, I think, at one point too.

04-01:19:10

Krause: Yeah, but he was the practically the only policeman who knew anything about the gay community, and he had educated himself by going to these places and finding out what was happening. And he wanted to show me that what was happening was just normal behavior.

04-01:19:28

Meeker: Interesting. Did the ACLU play any role in the—there was this, I guess, kind of police raid at California Hall on January 1, 1965.

04-01:19:40

Krause: Oh yeah, that was a very clear situation of harassment. This group of ministers and reverends and rabbis, and all that—I forgot what they were called, council, Religious Council on Homosexuality [Council on Religion and the Homosexual], or something of that sort—they decided they would put on a Halloween ball for the gay community, and they would supervise it and make sure that there was nothing illegal happening at the Halloween ball. And it was very well publicized, and a lot of gay people went dressed up in costumes; gay people like to celebrate Halloween more than the rest of the community. So, what was really upsetting to me is that at the front door, there were a number of policemen operating movie cameras, and they were taking motion pictures of every person who came into that hall. And at that time, if you were gay, and you were known as gay, you were likely to lose your job. If you were a teacher, you might lose your teaching credential. There were lots of real hardships that were visited on people who were trying to conceal their actual sexual identity. Not too many people were coming out of the closet in the fifties.

And so anyway, we were convinced that that, taking motion pictures of these people, was totally unnecessary. Of course, the police justified it by saying, “Well, in case something illegal happens inside, we wanted to know who was there.” Anyway, three gay attorneys protested this police harassment, and they ended up getting arrested. And so, the ACLU defended them, and I handled their criminal trial, and we got an acquittal.

04-01:21:47

Meeker:

Can you tell me about that criminal trial, what transpired?

04-01:21:53

Krause:

Well, they were charged with inciting a riot or something. I can't remember what they were charged with right now. So we had a trial about what happened there, and the judge who was presiding was a guy named Leo Friedman, who was a fairly liberal judge, and at the end of the prosecution case, he decided that there really wasn't enough evidence even to go to the jury. So, he instructed the jury to bring in a verdict of not guilty, and they did.

04-01:22:33

Meeker:

Hmm. Let's see. I'm thinking about other groups particularly within the San Francisco area who might have received similar unwanted scrutiny, and I think on the phone you had mentioned there were some examples of interracial couples—

04-01:23:01

Krause:

Yes. Interracial couples were quite likely to be arrested for vagrancy if they were walking down the street holding hands, for instance. It was just like some kind of insult to the police. They felt that it was insulting. The police had very few minority members at that point, hardly any. They had Italians, they had Irish, and they had maybe one Latin and one black, in the whole police department. So, they weren't used to mixing races, and, at the time, there were a lot of people who thought it was horrible for races to mix. They thought it would result in some sort of degeneration of the whole human race, not realizing that the whole human race is mixed race to start off with. [laughter] So, anyway, there was a lot of hostility toward interracial couples and there was a lot of hostility toward any minority people who stood up and tried to maintain their rights. They were thought to be reacting against the system that black and Latin people were supposed to be meek and moderate.

04-01:24:31

Meeker:

I'm thinking about this whole constellation of the law, policing, and I guess politicians or those who are presumably the superiors to the cops on the beat. At the ACLU, were you guys thinking about, or strategizing of ways to engage with the police to try to maybe instill a better respect for the Constitution, or to approach their populace in a more colorblind, equanimous—

04-01:25:18

Krause:

Yes.

04-01:25:18

Meeker:

—yeah, fashion? How was that done?

04-01:25:21

Krause:

Well, first of all, I shouldn't have said that police were all Italians or Irish. There were a lot of people of Italian background and Irish background who were policemen, and many of them were children of immigrants, et cetera,

who came from those countries, and, however, I think major influence was the Catholicism of most of the police department, and they were used to people who would obey orders. They were used to people who would want to create what they considered to be a high moral standard in public life. So, that's who they were. And I can remember being invited to address the police department, might have been the graduating class of the police academy or something of that sort, but I came there and talked about civil liberties, but the room was extremely cold. You could just tell that they were sitting there because they were forced to sit there by the chief of police, and they wouldn't have stayed one minute if they had their own choice. So, there was a lot of antagonism. The police thought the ACLU was nothing except an apologist organization for those who were trying to tear down the moral standards of the society and the political standards of society.

04-01:27:01

Meeker:

Was this just one time that you spoke before the cadets or the—

04-01:27:05

Krause:

I only remember one time. There might've been a couple more; I don't know. As I say, I had a good relation with the police community relations division, and I think I spoke to them.

04-01:27:17

Meeker:

Did you think much about trying to come up with a messaging strategy that would address their concerns, maybe try to present the ACLU in a light that was not familiar to them?

04-01:27:38

Krause:

You know, we, I guess we thought—we were pretty arrogant—we thought that we had a lot of answers to a lot of difficult questions, and we thought people who disagreed with us were wrong, and I kind of regret that arrogance, and I don't think we gave people enough leeway to be receptive to our point of view sometimes, because we were so convinced that we were right. So, I think we were mainly trying to convince people that we were right through the logic of our position, not the emotional thing that was more important to many people. So, the ACLU I don't think did a great job in taming our enemies.

04-01:28:37

Meeker:

Winning them over.

04-01:28:38

Krause:

Yeah. We didn't do a great job. Still, there are so many people who believe that the ACLU is a destructive force in society.

04-01:28:49

Meeker:

I keep coming back to this recognition that San Francisco, in that era that you were heading up the legal team at the ACLU, was really the front lines of all of these battles, all of these debates that are happening, and there you are engaging with police community relations and gay bar owners, and hippies

who were getting roused up. It's pretty remarkable. Did you have a conception that this was such a pivotal cultural moment?

04-01:29:42

Krause:

Well, I always thought that the hippie movement was a very liberating movement, an important movement in our society, especially in San Francisco in the Bay Area where the hippie philosophy was so significant, and the same with liberal ideas about race relations. I think we had pretty good ideas about race relations. And so I did think that it was in the forefront of those attitudes, and I was hoping that it would be accepted in more of the country.

04-01:30:23

Meeker:

Let's see here. Where are we on time? I don't want to keep too long time. Well, speaking of race relations, can you tell me about some of the significant engagements that you at the ACLU had on those kinds of issues? I mean, the Unruh Act was passed in 1959; it was a fair housing legislation that was, I think it was challenged, what was it, in 1964?

04-01:30:57

Krause:

Yeah, I told you about *Burks versus Poppy Construction Company* [1962]. We did that case, and we did a number of cases on race relations where people were arrested at demonstrations on racial grounds, I believe. But—

04-01:31:15

Meeker:

Well, I don't think we talked about Burks on tape, so—

04-01:31:19

Krause:

Oh.

04-01:31:19

Meeker:

Yeah. I think that we had just talked about it in preparation, so, can you tell me about the *Burks* case?

04-01:31:28

Krause:

Yeah, the Burks were a couple that were trying to buy one of the new houses that was being built in San Francisco in the sixties, and they were turned down. They were not allowed to buy the house. Of course, they weren't given any reason, but, there were a couple of civil rights groups that sent out testers who were very similar to the Burks in their economic position, and they did get positive response; they were able to buy one of those new houses. So, we were pretty convinced that it was racial discrimination. So, we filed a lawsuit and their defense was that the law providing for antidiscrimination in housing was itself unconstitutional. They believed that the Constitution of the United States protected liberty and property, and it does say "property" in the Constitution, and that meant that people should be able to do with their property whatever they wanted to do with it, and if they didn't want to sell to a black person, or a Chinese person, or a Jewish person, or a Catholic person, they had the right to do whatever they wanted with their property. So that was their defense, and that issue went up before the California Supreme Court, and

the case was *Burks versus Poppy Construction Company*, and the court decided that this was a valid law, that property rights did not trump human rights.

04-01:33:17

Meeker: And you argued this case.

04-01:33:18

Krause: Yes.

04-01:33:19

Meeker: Before Gibson, right, who—

04-01:33:22

Krause: Yeah, Gibson was the chief justice, and I had worked for Gibson and I felt pretty confident that I had some good rapport with him. And you know, their legal arguments were not good. They just didn't hold up, so, I was very confident that we would win the case and we did.

04-01:33:45

Meeker: What was the experience of presenting at the state supreme court versus the US Supreme Court? Is it analogous; is it comparable?

04-01:33:55

Krause: Yes, there are some very good, smart people on the California Supreme Court, and they ask questions, and they are demanding of good lawyering, and so, it's comparable. It's not as important, but it's comparable.

04-01:34:16

Meeker: And this decision then comes down in favor of, well, of the existing law.

04-01:34:23

Krause: Yeah.

04-01:34:24

Meeker: Right. And I believe that that was law that there was then under scrutiny; I think it was Prop 14 a couple of years later.

04-01:34:33

Krause: Yes, I think they tried to amend the Constitution in Prop 14, and there were lots of legal challenges to that, and I can't remember exactly how it came down.

04-01:34:46

Meeker: Do you know if the ACLU got involved in the referendum battle at all?

04-01:34:56

Krause: I don't think we did. I don't think we were set up to really run a political campaign. We might've provided some legal reference materials, or something of that sort, but we didn't run the campaign.

04-01:35:13

Meeker:

Okay. Why don't we stop here for today? I think that we've covered a good amount of ground, and mostly what I wanted to cover today, and I think I want to go back and do a little more review before we continue. Okay?

04-01:35:31

Krause:

Good!

## Interview 5: February 22, 2018

05-00:00:19

Meeker:

Today is Thursday the twenty-second of February, 2018. This is Martin Meeker interviewing Marshall Krause, and this is interview session number five, and we are here at his home in Novato, California. So, we've covered a lot of the First Amendment free speech cases that you worked on while at the ACLU in the 1960s, from obscenity to political speech, and I'd like to ask you about the work that was being done during that period of time, working with individuals who were dealing with immigration issues, coming into the United States and staying here. I came across a handful of cases that were mentioned in the *ACLU News*, and I think that you recently just looked at the *ACLU News* as well, and noticed some of these cases. Were there any cases that particularly stand out in your memory upon looking through the record?

05-00:01:28

Krause:

Yes, there are several that stand out. First of all, let me set the scene. In the San Francisco community, there were lots of Chinese people, and as people know, the United States had excluded Oriental people from immigration for a long time, and the only people who could come into this country from China were children of American citizens. And so, the practice began to send a Chinese person to visit China, and then, while he was there, he would create what's called a slot, so that someone in China could then buy that slot for their child and claim that the father was this US citizen who had visited. So there was a lot of immigration fraud, and the fraud was pretty understandable, because no Chinese were allowed.

But anyway, that's what happened, and one of the people thought to have been a participant in this fraud was a Chinese man who was a seaman aboard the American President Lines, and his name was Eng Let Poy. And he was visited all of a sudden, just before his ship docked in San Francisco, by the immigration authorities, who questioned him, and then told the captain of the ship that he could not get off, because he wasn't really a citizen of the United States. His citizenship had been created by some sort of fraud. So, we heard about this case at the ACLU and we didn't like the fact that Eng Let Poy hadn't been given a chance to explain himself. Maybe there were facts that the Immigration Service didn't know.

So, we started representing him, and it turned out that it was a very, very startling case, because the United States resisted our efforts to bring him back into this country, and said he couldn't come back into this country. And finally I had to go get a writ of habeas corpus from Judge Zirpoli, a federal district court judge, and I still remember it with a lot of awe, because we drafted the writ of habeas corpus to the president of the American President Lines, because they were the ones who were actually holding Eng Let Poy, and didn't let him into this country. So I had a piece of paper that said, "The president of the United States sends greetings to the president of the American President Lines. You are required to produce Eng Let Poy in court." So, I

went to the headquarters of the American President Lines, and got the president, and I served him with this habeas corpus writ, and they did produce him.

05-00:04:56

Meeker:

So the American President Lines had previously been ordered by the Immigration Service to hold this gentleman?

05-00:05:01

Krause:

Yes, yes. So they just, the Immigration Service said, "We won't let him into the country." And then, he was on a cruise that went from San Francisco to Hong Kong, so he got back to Hong Kong on the ship, and the United States had told the British authorities in Hong Kong not to let him off there. So he was kind of going back and forth between Hong Kong and San Francisco, and couldn't get off the ship. So, when the press heard about this, they called him "the man without a country," and it was a big deal, headlines in all the papers. And finally, we came before Judge Zirpoli and he issued this writ of habeas corpus, and we got him produced, and the United States attorney said they wouldn't produce him, even though the judge had ordered him to be produced.

So, finally we got down to it, and the United States attorney said that they suspected that Eng Let Poy was a Communist spy from Communist China, which was a big deal. Anyway, they had no proof of that, and so I said to Judge Zirpoli that "this man is entitled to a trial," and Judge Zirpoli agreed, so he was allowed to come into the country. And finally we had a number of hearings, and we reached a compromise so that Eng Let Poy would be allowed to draw his American social security, which they were trying to deny him, in return for him agreeing to live in Hong Kong. So, that's what happened. America withdrew the objection to him being in Hong Kong. He lived in Hong Kong and he got social security for the rest of his life, but he also got a hearing, finally, which the government was trying to deny him.

05-00:07:09

Meeker:

Where did he originate from in China? Was he from Hong Kong or was he from mainland?

05-00:07:12

Krause:

No, he was from mainland China. I don't know exactly where. I don't know where. So there were many of these Chinese cases. The Chinese community was kind of persecuted by the Immigration Service in the 1960s.

05-00:07:28

Meeker:

Did you see this accusation of Communist spying as kind of a curveball that was thrown into it last minute, or did it seem like the US attorney really had some concerns about that?

05-00:07:43

Krause:

Oh, he definitely had some concerns about it. He told Judge Zirpoli that he couldn't release Eng Let Poy, and then Zirpoli said, "Well, you're going to

release Eng Let Poy,” and he said, “Well, I have to call Washington.” And so he left the courtroom, and had some sort of a conference with somebody in Washington on his own, and then came back and finally agreed to let him come into the country. So, it was sort of a big deal, and I think they really did think he was a Red China spy. That was kind of a big deal. And that was just one of many Chinese cases that the ACLU handled.

Another immigration case which I remember with great personal satisfaction was the Albert Kaspin case. Albert Kaspin had been brought to the Soviet Union as a child, in the 1930s, by his parents, who were members of the Communist Party, and thought that the Soviet Union would be a great thing to expose their child to, and they were living there. And while they were living there, World War II started, and Kaspin was drafted into the Soviet Army, and had to go, because he was living in the Soviet Union, and at the end of World War II, the United States said he had lost his citizenship. He was born in the United States. He had lost his citizenship by serving in the army of the Soviet Union, and the ACLU always took the position that the government should not be allowed to take away citizenship. If someone does something wrong, they can be punished, but don't take away his citizenship, because that's the way people survive in this world, by being a citizen of some country or the other.

So there was a big fight about Albert Kaspin, and I was one night in my office, and I was going through the files that he had given me, and I found this passport from the Soviet Union that Albert Kaspin had, and I was kind of looking through it and I realized, this was kind of like a red-hot thing. It was a red passport, and it was a big deal to have a passport from the Soviet Union in the early 1960s. It just wasn't common.

05-00:10:43

Meeker:

Were you concerned that this would have complicated his case?

05-00:10:47

Krause:

Yes, definitely, because it showed that he was a citizen of the USSR. But anyway, we finally had this hearing, and we won the case on the basis that he had gone into the army when he was under twenty-one, and therefore, he shouldn't be held responsible for that. And Kaspin had his citizenship restored, and went on to become a professor of Slavic languages at the University of Minnesota.

05-00:11:18

Meeker:

Did this passport ever come to light?

05-00:11:25

Krause:

I think they knew about it, yes, yes. It was just, it's an amazing thing to me that since we were in such a big Cold War with the Soviet Union, to have in my hands this passport from the Soviet Union seemed like a big deal. I remember it still.

05-00:11:45  
Meeker: Is that the only one you ever saw in the course of your work?

05-00:11:48  
Krause: Yeah.

05-00:11:49  
Meeker: What court system was this adjudicated through?

05-00:11:56  
Krause: This was decided by the Immigration Appeals Board; I forgot what it was called exactly. They finally ruled that yes, since he was under twenty-one, he wasn't responsible for going into the army.

05-00:12:13  
Meeker: That's, in essence, kind of an administrative court, right—

05-00:12:16  
Krause: Yes.

05-00:12:16  
Meeker: —and it would fall within that category?

05-00:12:18  
Krause: Yes.

05-00:12:18  
Meeker: How much of your work was done in the context of administrative courts as opposed to public courts of law?

05-00:12:26  
Krause: Only a small portion of it. The executive director of the ACLU, a wonderful man named Ernest Besig, was trained as a lawyer, although he wasn't admitted in California, so he didn't do court cases in California. But, he would do most of the immigration cases, the administrative cases, and he was very good at it.

05-00:12:51  
Meeker: When you would do those cases yourself, was there a different standard or a different approach that you would take to preparing for your client?

05-00:13:01  
Krause: There was always a recognition of how important it was to maintain United States citizenship. So I knew that the cases were extremely important to these people. But we never knew what the Immigration Service was going to do. It was hard to predict them. Sometimes they would be more liberal, and sometimes they wouldn't be, and then we had to go into court to challenge them when they appeared to be too authoritarian, and we won a lot of cases in court.

- 05-00:13:37  
Meeker: Interesting. Were these Immigration Board members, were they appointed officials?
- 05-00:13:44  
Krause: Yes, they were appointed by—I don't know whether they're appointed by the president, or by the Department of Justice, or whatever.
- 05-00:13:53  
Meeker: Did those boards seem to change as the political winds shifted over time?
- 05-00:14:00  
Krause: Oh yes, and when someone was suspected of being a Communist in those days, they had practically no chance of winning before the Immigration Service, and we had to bring a challenge in federal district court.
- 05-00:14:19  
Meeker: There was another case; I think this was a bit earlier. I think that you guys won it in 1962, and that was Binetti, and there was, I guess there was a refusal to allow him to enter the country because he had a subscription to *The Nation*, which was seen as—do you recall this case?
- 05-00:14:42  
Krause: No, I don't recall that one and—
- 05-00:14:44  
Meeker: This might not been one of yours. It might just have been one that you reported on, so—
- 05-00:14:47  
Krause: Maybe it was Ernie Besig's case. I don't know.
- 05-00:14:47  
Meeker: All right, well, we can skip that one. In addition to this broad notion that the ACLU had, that in whatever circumstance, the individual should not lose their citizenship, were there other driving principles at the ACLU regarding immigration at this point in time?
- 05-00:15:14  
Krause: Yeah, we were very concerned about racial prejudice. We felt for sure that the Immigration Service was strongly prejudiced against Oriental people, and they had a very hard time getting a fair hearing before the Immigration Service. So there was a lot of racial prejudice. The Immigration Service officers were usually retired policemen or retired military people, all of whom are fairly narrow-minded when it comes to American principles. They think that they know best about what is patriotic and what is good for the country, and they enforce those personal views in their work as immigration officers. So, we were very concerned with that racial prejudice.

- 05-00:16:05  
Meeker: Were you getting many cases from Mexican nationals, or Mexican Americans in San Francisco?
- 05-00:16:15  
Krause: The only one that I can recall is that bracero camp case that I told you about, involving Jefferson Poland and Fred Cage who were arrested for trespassing.
- 05-00:16:28  
Meeker: So you weren't getting a lot of people saying that they weren't able to become naturalized, or through anti-Mexican prejudice?
- 05-00:16:38  
Krause: No. That didn't show up in that period of time.
- 05-00:16:42  
Meeker: Did you get a sense of what was happening in terms of that population in California? Were they able to become naturalized?
- 05-00:16:53  
Krause: I never heard of any problems with the Mexican people, people from Mexico, being eligible to apply for citizenship. They were.
- 05-00:17:05  
Meeker: Okay. In 1965, Congress passes an immigration reform act, and that basically ends those more restrictionary quotas that were passed in the late nineteenth and early part of the twentieth century. Did you have any involvement in that, other than—were you paying attention to that as it was happening?
- 05-00:17:28  
Krause: Only a little bit. It wasn't in my bailiwick as far as national lobbying, no. So, no, I didn't know too much about it.
- 05-00:17:43  
Meeker: Maybe we should wrap up the ACLU and move on to some of your post-ACLU activities, but I want to make sure that we've covered what you think are the most important cases that you worked on, issues that you worked on, and such. Do you have any sort of overview thoughts about the work that you did there during that period of time?
- 05-00:18:10  
Krause: Well, we haven't talked too much about the criminal law, and we were very concerned about proper and fair procedures in the criminal courts. When I first came to the ACLU in 1960, people charged with misdemeanors in California were not even entitled to have an attorney appointed for them, and they frequently were given very short shrift. They were hardly ever advised of their rights, and they were kind of like presumed guilty. Anyone arrested by the police was presumed guilty, especially if they were in a poor economic group of people. The homeless, of course, but poor people in general did not get a due process hearing in criminal law, mostly. So we tried to reform that

as much as we could. We went into court and insisted that certain rights be granted to all persons charged with crimes, and we were generally pretty successful at that.

I remember one case where a judge said that anyone who can afford bail, should not be given an appointed attorney, because they should've spent that money that they paid to the bail bondsman to get free, on an attorney, and it didn't matter that their family had put up the money for the bail, or whatever. He had this rigid rule that no appointment of attorney, if you made bail. So, we challenged that, and took it up to the court of appeal and won there. We won many cases involving the right to appointed counsel in other circumstances. The right to cross examine and confront witnesses was kind of something we had to fight for. So, that criminal procedure area was one that we were quite active in.

05-00:20:36

Meeker:

Isn't this about the time that the *Miranda* case decision comes down?

05-00:20:46

Krause:

Yes, uh-huh.

05-00:20:47

Meeker:

I mean, do you find that the broader legal context is assisting you in these efforts?

05-00:20:54

Krause:

Yes, the trend is definitely in favor of more attention to procedural criminal rights, rights that you have when you're charged with a crime.

05-00:21:05

Meeker:

I'm curious, actually, about the broader legal landscape at this point in time. Certainly there were individual, progressive attorneys when you started out in 1961. I would guess maybe Vincent Hallinan would have been one of those around at the time. But by the time you wrap up in 1968, there's neighborhood legal assistance, there's organizations that are coming out of the war on poverty, and I imagine there's a whole new generation of attorneys who are on the same page with the ACLU.

05-00:21:47

Krause:

Yes. There's no question that as the sixties developed, civil liberties and civil rights became much more prevalent in the society, and much more popular. When I was with the ACLU in the early 1960s, there was no other civil rights or liberties group which employed an attorney. There wasn't a neighborhood legal assistance. There wasn't anything except the public defender, and the public defender was terribly overworked, and generally didn't do anything except appear in court and have the most minimal representation for most people charged with small crimes. Of course, they did a good job on the larger, more important criminal cases that might jeopardize someone's life or

threaten a prison sentence. They were good lawyers, but they just were too overworked.

05-00:22:49

Meeker:

How do you think the expansion of progressive attorneys and other organizations impacted ACLU?

05-00:23:02

Krause:

It didn't take away our work. We were still quite busy, even though those organizations existed, because there was so much to be done, such a long way to go. Reforming the bail system, the ACLU is still working on that here in 2018, trying to make money bail less important, because it obviously discriminates against the poor. The rich can get out on bail, and the poor can't, and it's very hard to win a criminal case when you're sitting in court in a prison uniform, or chained up to the chair, something of that sort. So people on bail have a much greater chance of having a fair trial.

05-00:23:52

Meeker:

Was that an issue that you were concerned with in the sixties?

05-00:23:55

Krause:

Yes, definitely. Yeah, we were trying to encourage more courts to release people on what's called their own recognizance, OR. That is, just because they had a job in the community, they had family in the community, they were unlikely to flee, so why should you require them to pay a bail bondsman thousands of dollars so that they can be free, pending their trial? And we established an OR project for the City of San Francisco that is still in existence and works very well.

05-00:24:34

Meeker:

Interesting. Was there just this kind of process that was happening at the time, that—how should I put this? You said that ACLU didn't run out of work to do; in fact, it seems that the more work that was done, it was discovered more work needed to be done. Is that kind of an accurate description of what was going on in the sixties?

05-00:25:05

Krause:

Yes, because just because you think you've solved a problem by getting a good legal decision at the Supreme Court level, doesn't mean you've solved the problem. For instance, you mentioned Miranda, Miranda rights. Well, it took a long time for the police to understand that they really did have to give arrested people advice as to their ability to get an attorney, and their right not to say anything to incriminate themselves. It didn't sink in for years, and we had to keep pushing that issue, and the judges in the municipal courts didn't know too much about those rules either. So it was an educational process that had to continue, long after the bedrock decision.

05-00:25:58

Meeker:

By the late 1960s, were you meeting frequently with these other organizations and other attorneys who were operating in the same realm? Was there any attempt to develop a unified front and strategy for what the most important issues were in cases that were going to be addressed?

05-00:26:19

Krause:

Well, that raises a very significant issue which is the influence of the Communist Party. Many liberal organizations were attacked as helping the Communists who were our enemies during the Cold War, and, it was important for the ACLU not to be involved with organizations that seemed to be controlled by the Communist Party, even though they had similar goals in some respects. For instance in race relations, the Communist Party had a very good policy. However, they tended to exploit whoever was involved in their political activities, and try to turn them into apologists for the Soviet Union. So, we wanted to steer clear of that. So, yes, we worked with a number of organizations. For instance on the death penalty, we worked closely with the NAACP Defense Fund, which had a death penalty project, and we coordinated our attacks and exchanged memos about strategy, and I think were very successful in slowing down the death penalty.

05-00:27:56

Meeker:

Also thinking contextually, say between '66 and '68, what was left political activism becomes much more violent and radicalized. You see the disintegration of SDS in the emergence of the Weathermen. You see white people being excused from SNCC, and the emergence of the Black Panthers and other militant groups. What did you personally think of that transformation at the time?

05-00:28:37

Krause:

Well, let's take the Black Panthers. They really didn't believe very strongly in the ability to get justice in American courts, and they had a lot of reason to believe that black people were treated unfairly in the court system. However, they seemed to attack it from the point of view, not like the ACLU did by bringing legal cases, but by militantly demonstrating, sometimes threatening violence. So, we didn't think that was the tactic that we wanted to use. So, it was kind of troubling. You know, always in a situation where there's picketing, or demonstration, or a large group of people who are upset about something or angry about something, there is the potential for violence, and that's what some people say is the reason why there shouldn't be demonstrations or picketing, because of the potential for violence. But, we don't think that potential for violence is a sufficient excuse for depriving people of their right to assemble and protest under the First Amendment.

05-00:30:04

Meeker:

Did you have any engagement with individuals who were pushing the envelope, and, I guess, were you speaking with them? Were you talking strategy? Were you trying to engage with them in any way?

05-00:30:25

Krause:

Well yes, I was a member during this period of the National Lawyers Guild, which was the kind of left-wing lawyers' organization, and some people claim that it was directed by the Communist Party, and I think my boss, Ernie Besig, felt that way. But I felt that the people in the National Lawyers Guild had many of the same positions I did about civil rights and civil liberties and social justice, so I joined the National Lawyers Guild and participated, and they wanted me to be president of the local chapter, but I thought that would be too much for the ACLU to accept so I turned that down. But I worked with lots of people who had views that accorded with mine on civil liberties issues. I wasn't as worried about fellow travelers, and Communist influence, as some people were.

05-00:31:30

Meeker:

But were you having conversations in which you were trying to come up with the best approach to addressing these problems, without falling into various pitfalls that existed?

05-00:31:48

Krause:

Yeah, for instance, on the civil rights demonstrations, there were always elements of the Civil Rights Movement that wanted to challenge the police and challenge the authorities, and get arrested on the basis that the more people who were impacted by police activities, the better the chances would be for civil rights to advance, because that was the way to get attention. I didn't go along with that. I felt that the demonstrations should be peaceful, and tried to influence whatever I could in that way, and when I would talk to groups, civil rights groups, I would tell them that I thought they could get their aims by peaceful demonstration.

05-00:32:44

Meeker:

Do you recall the kind of arguments you would use? I'm curious about what those conversations would have looked like, would have sounded like.

05-00:32:53

Krause:

There were just people who didn't trust the system, and they thought that the only way to get anywhere with civil rights or civil liberties was to act in a violent way, and those people had their point of view that couldn't be talked down. But it didn't work as far as I was concerned, and that's what I would say, that this is not going to work. It's going to anger the bulk of people, and it doesn't work to advance civil liberties or civil rights.

05-00:33:39

Meeker:

So, 1968, you had been deep in these legal trenches for many years. Did you trust the system at that point?

05-00:33:48

Krause:

Yes, I did. I really always have had faith that the courts and judges would like to do the right thing, and, most people would like to do the right thing if they're given the opportunity to do it. So, my job was to try to give people the

opportunity to do the right thing, and yes, I felt that the system slowly but surely, was progressing.

05-00:34:18

Meeker:

Let's talk about your decision to leave in 1968. You were still a pretty young man at that point in time. Why give up this really great, exciting job when I'm sure you could've stayed there for many more years?

05-00:34:36

Krause:

Yes, in 1968 when I retired from the ACLU, I was thirty-five years old, and it was quite a remarkable thing that I said that I retired. There was an article in the *San Francisco Chronicle* about me in which they said that I was retiring, and a lot of people really didn't believe it. They thought that I would be doing something else, but I really intended to try to become a hippie, because I was very, very drawn to the hippie lifestyle. The freedom that people had in their behavior and sexuality and all that was very, very attractive to me. So I wanted to become a hippie, but then—

05-00:35:24

Meeker:

Can I pause there? What was your personal experience with hippie culture, if you will, at this point in time? Were you hanging out in Golden Gate Park? Were you going to rock shows? Was it more kind of an art scene for you? What did that mean to you?

05-00:35:40

Krause:

Well, I had a lot of contact with artists and people who were interested in literature through these obscenity cases which we've already talked about. So I got to meet a lot of people, like Lawrence Ferlinghetti, and Michael McClure, and Allen Ginsberg, and leaders of the beatnik community and the hippie community, and I liked them. I liked their lifestyle; I liked their attitude. I was drawn to them. So, it was a big draw for me, so I thought that maybe I could become sort of more interested in art, and I actually became a metal sculptor for awhile. I had a studio at Tenth and Folsom in San Francisco, and I had my welding equipment there, and I would make some metal sculpture, but it just never kind of worked out for me, never really caught on. I was kind of lonely in my studio, so I kind of dropped that when I moved to Marin County.

05-00:37:02

Meeker:

Were you socializing with these folks, and kind of getting to know them on a personal basis, in addition to the professional work you were doing?

05-00:37:10

Krause:

Some, yes, yes. Yeah, I've always been attracted to artists, and my friends are artists. A lot of friends are artists, and that's been attractive to me. So yes, I was socializing with a lot of people in that area.

05-00:37:30

Meeker:

You said hippies and the attraction of the freedom of their lifestyle. Maybe it's folly to try to define freedom in this way, but, what did that mean in terms of actually living your life?

05-00:37:47

Krause:

Well, remember that I came out of the very staid and stiff fifties, where all the men wore white shirts and ties, and hats, and they were very stiff and unreal and unnatural for me, and I was more attracted to people who were more natural and who were exploring human potential at its borders or edges. So, that was one thing that I certainly noticed, that the hippie community and the beatnik community were not stiff and formal and unfriendly. They were the opposite. So, I liked that a lot.

05-00:38:36

Meeker:

Did you get to go down to Esalen and spend time in those kinds of environments as well?

05-00:38:43

Krause:

Yes, really, I had some friends who knew Esalen very well and took me down, and I had some experience with LSD there which I enjoyed a lot, and so Esalen was a wonderful place. It was so beautiful on the edge of the sea, and the building itself was gorgeous, and the people were interesting. So I was very interested in Esalen.

05-00:39:15

Meeker:

If you don't mind my asking, I'd like to hear more about this experience with LSD. Was it kind of administered in a set setting, or—

05-00:39:27

Krause:

Oh no, it was out in the outdoors. It was in Big Sur, and that was my first experience, and it was kind of a mind-blowing experience.

05-00:39:41

Meeker:

Was it just spontaneous? I mean, you didn't have a—

05-00:39:44

Krause:

No—

05-00:39:45

Meeker:

—guide that was kind of walking you through it?

05-00:39:46

Krause:

—I knew someone who had done quite a bit of LSD, and asked them to let me experiment with it, and they brought me into the circle.

05-00:39:59

Meeker:

The reason I'm asking about this is because there's a tendency to think about LSD as just a drug where people want to kind of get out of their heads. But, there's also maybe another side to it where there's kind of a free discipline to it—I don't know how to describe it—or a medicinal aspect, maybe, to it.

05-00:40:25

Krause:

Well, it opens up some windows in your own life and what would be important to you, and that's one thing that I learned with LSD, that I could have a different perspective on my own life, and it was very helpful.

05-00:40:45

Meeker:

Did this precede your departure from the ACLU?

05-00:40:48

Krause:

Just about. I think I'd already decided to leave the ACLU at the time, but it kind of reinforced my idea that more freedom would be good for me, that I would enjoy it, because you know, I had gone from high school to college, and then college immediately to law school, and then law school immediately to work. So I never really had any freedom in my life, never had the opportunity to travel, never had the opportunity just to find out who I was and what I liked. So I needed that time.

05-00:41:26

Meeker:

How did Besig respond to your announcement of retirement?

05-00:41:32

Krause:

Well, he told me that he really thought I was a very excellent lawyer, and had done some incredibly good things for the ACLU. And, I think he tried to talk me out of retiring, and the board of directors of the ACLU tried to talk me out of retiring, but I was determined to sample this more free life.

05-00:42:01

Meeker:

Did you get to do much travel during that period of time?

05-00:42:05

Krause:

Yes. I got to go to Europe, and I enjoyed that very much, and I traveled around the States some, but actually, I was offered a job as a full professor at San Francisco State University on a part-time basis, teaching in the political science department, so I thought I would take that. So I was teaching, I think, one or two days a week, maybe two classes, and then I also got offered the job as a reporter for KQED's newsroom, which was just starting then, because I had complained that most reporters on legal stories got it all wrong; they didn't know what they were talking about, and they missed the point on many of the stories they were writing about the Supreme Court and significant decisions. And so, Mel Wax, who was the leader of *Newsroom*, invited me to come on the program and do legal stories once a week, so I did that. So I had these two commitments already, and I wasn't as free as I thought I was going to be.

05-00:43:31

Meeker:

Yeah, off-camera you said you weren't a very good hippie. [laughs]

05-00:43:35

Krause:

Yes.

05-00:43:37

Meeker: How long did you continue in those two endeavors

05-00:43:42

Krause: Well, I didn't have another real full-time job until 1974, when I started a law firm with two other lawyers here in Marin County, and started practicing law for the purpose of earning a living, but I continued also trying to work for social issues. I took death penalty defense cases. I took some volunteer cases. I tried to continue my reform efforts in the criminal law, and at the same time, tried to run a law firm, which was a lot.

05-00:44:27

Meeker: So were you doing any legal work between '68 and '74?

05-00:44:33

Krause: I think I wrote a book, or I—yeah, I wrote a book during that period. It was called *California Search and Seizure Practice*, and it was published by the University of California, and it kind of went through the whole search and seizure area, and it was written for lawyers so that they could do a better job of raising Fourth Amendment issues in the courts.

05-00:45:10

Meeker: Was this in relation to your faculty work at State?

05-00:45:14

Krause: No, no, at State, I was teaching undergraduates and I taught things like the Bill of Rights, and civil rights, and international human rights, and whatever I wanted to teach, they let me teach. And they were small classes, seminar-type classes, and I enjoyed those classes, but they weren't about practicing law.

05-00:45:40

Meeker: How long were you at State?

05-00:45:43

Krause: I think about four years, or something like that.

05-00:45:48

Meeker: Okay. Well, tell me about the process of establishing, building your own firm out. Who were your colleagues that you decided to join in with?

05-00:46:01

Krause: I met this man named Larry Baskin, who I became partners with in the practice of law here in Marin, and we didn't know it, but it later turned out that we had the same birthdays, May 15. So we thought that was interesting that we were practicing law together, and then we discovered we had the same birthdays, and we did agree on everything. We were partners in the practice of law for about twenty-five years, and during that time, we really never had any arguments or disagreements, and it was a very successful partnership, except that it wasn't terribly successful financially. I don't think I was a very good businessman, and in order to make a law practice work, you have to be a good

businessman, and understand the money side of it. I didn't. I was only understanding the legal side of it.

05-00:47:05

Meeker: Meaning that you were just interested in taking cases that moved you in a way, rather than cases that were going to pay you?

05-00:47:13

Krause: Right. There were many cases I took that ended up with a net loss.

05-00:47:20

Meeker: But yet, that didn't sour the partnership and you remained in this partnership for twenty-five years?

05-00:47:28

Krause: No, but luckily, I had a few big cases too. I had cases referred to me by people who knew my work at the ACLU, and I had a very big employment discrimination case which we eventually won, and we got about a thirteen million dollar judgment which was a big deal in those days, and we got attorney's fees on a generous basis from that. So, I was able to bring in some big attorney fees.

05-00:48:01

Meeker: When you get together with Baskin to draw up this new firm, how do you determine what's going to be within your bailiwick and what isn't?

05-00:48:17

Krause: Well, we had pretty good ideas of what we wanted. We didn't want to work too hard, and both of us said that we should be able to take a month's vacation every year, and, that we shouldn't have to bring work home, and we should do it on a relaxed basis. Well, that proved to be impossible. The only one who ever took a month's vacation was me, and I went to Bali one year for a month, but nobody else could, and we had a number of lawyers working for us. Nobody could take a month off because they were too involved in litigation and other things that kept them too busy. And Larry Baskin never took a month off, because it was kind of difficult to be a relaxed lawyer. If you were going to be a lawyer trying to earn money in law practice, you had to be pretty aggressive, and you had to work hard.

05-00:49:32

Meeker: Yeah, I love the idea of being a relaxed lawyer. I mean really, it's just there's an economics to running your own firm, and you never say no—I suspect that it's hard to say no to a paying client that comes in.

05-00:49:51

Krause: Yes, it is hard to say no, especially when you have a number of clients that aren't paying. You have to find somebody who will pay so you can pay the rent and pay your office staff, et cetera.

05-00:50:04

Meeker:

Was there a particular focus on the area of law that you were going to work in, or—

05-00:50:11

Krause:

I was focusing on appeals because I had handled a lot of appeals. I tried to focus on appeals, but there weren't enough of those, so I had to take some family law cases. I took one child custody case which was difficult, and I took some personal injury cases, and some business litigation, but I was trying to focus on appeals.

05-00:50:38

Meeker:

So this wasn't entirely public interest law?

05-00:50:45

Krause:

No, not at all, no. I handled a number of criminal cases too. I was doing criminal defense work, and that was basically, the people who had money to pay for criminal defense lawyers were usually people involved in the narcotics trafficking world. So that wasn't necessarily a civil liberties or civil rights case.

05-00:51:13

Meeker:

There are narcotics and there's marijuana, and I don't know how you feel about grouping those together. I suspect there's probably a big difference, in particular, with the, you know—

05-00:51:33

Krause:

In the law, you know, marijuana is still considered in the same category as heroin in the federal law, which everyone knows is ridiculous, but nobody can get out from under what we've started. So, that's still the situation. Yeah, in those days, I would much rather defend a marijuana dealer than someone dealing in cocaine or other drugs, but I had both kinds of cases.

05-00:52:13

Meeker:

Well, the next two times you appear before the US Supreme Court, they were more Fourth Amendment cases, but they hinged—the people were arrested for possession or growing of marijuana.

05-00:52:27

Krause:

Yes, yes.

05-00:52:29

Meeker:

Did you have a particular interest in law and defending individuals who had been arrested because of marijuana? Did marijuana seem to you just kind of like a benign thing in the way in which it's rather viewed today?

05-00:52:51

Krause:

Yes, it was pretty benign to me, but it was a very serious offense in those days, especially if you were in federal court, but state court too. But, because I wrote this book, I attracted a lot of cases involving search and seizure. I had

written the definitive book about search and seizure procedures in California, so there were a lot of cases that came to me because of that, and that's how I got both of those cases I argued before the US Supreme Court, because of my experience and expertise in search and seizure Fourth Amendment law.

05-00:53:33

Meeker:

You know, I'm afraid that I didn't fully prepare because I wasn't aware of that book. Is there anything you'd like to talk about in terms of that book, considering that it was a definitive account at the time?

05-00:53:48

Krause:

Well I worked pretty hard on that book. It was not easy to write. It was a complicated area, and I wanted to do a good job. And so, I did it, and it was used quite a bit by practitioners and judges, and I was always pleased if my book would be referred to in some judicial opinion or something of that sort, and I liked the fact that lawyers used the book and were grateful for it. And, I lectured on search and seizure at national conventions of criminal defense lawyers, and things of that sort.

05-00:54:30

Meeker:

Was there like an overarching argument that you were trying to make within the context of this book?

05-00:54:36

Krause:

Well, I was a strong believer in privacy rights, and I felt that the government should be very much limited when it came to going into private homes, and automobiles, and searching people. I felt that they had too much power in that area, especially the police on the street. So, I was trying to ameliorate that problem.

05-00:55:06

Meeker:

Did you propose like a constitutional standard within that book, of what you think would be—

05-00:55:12

Krause:

No, I was trying basically to say what the law is, and to help people to operate within the parameters of that law. And we had pretty good search and seizure protections in that period.

05-00:55:28

Meeker:

When this book is cited in legal decisions, what was the context? Was it in the sense of, here's an authority on this subject, and this is their interpretation of what the law is, or, was it something else?

05-00:55:45

Krause:

It was in the context of discussion of issues such as, when can a policeman stop a person on the street and ask them to identify themselves? Many, many cases come up with that, because there are things that the police find out or get suspicious about when they start talking to people. So, can they stop people? Can they require them to identify themselves, and under what circumstances?

So, my book would discuss that particular issue, and then when that issue came up in an appellate opinion, my discussion of it might be referred to.

05-00:56:32

Meeker:

So, the idea was that in this book, you're spending a lot of time reviewing case law, reviewing legislation to try to get a sense of how those apply in each of these specific situations.

05-00:56:45

Krause:

Definitely, yeah, how they work, and I think I was trying to help defense attorneys assert rights of privacy, but it was also meant to be an accurate depiction of the law so it could be used by judges, it could be used by prosecutors, as to what the law was.

05-00:57:08

Meeker:

So, the book wasn't written with the intention of trying to sort of push the interpretation of law in a certain direction.

05-00:57:14

Krause:

No, it was written to be accurate.

[Side conversation deleted]

05-00:57:45

Meeker:

I mean, now that we're talking about this, these Fourth Amendment issues, why don't we talk about these two cases that get ultimately brought before the Supreme Court, *Robbins* and, oh gosh—

05-00:58:02

Krause:

*Ciraolo*.

05-00:58:02

Meeker:

—*Ciraolo*. I knew I was going to mispronounce that one. So, *Robbins*, 1980, and *Ciraolo* was 1985. So tell me about, who was Robbins, and how did this case come to you?

05-00:58:25

Krause:

Jeffrey Robbins was known to me as the owner of a hot tub place in Fairfax, and I went there sometimes. The hot tubs were quite a popular thing in Marin County, especially, and he had this big hot tub place where people would go and rent the hot tub for awhile. So anyway, he was also a marijuana dealer, and one night he was driving his car somewhere out in the countryside, pretty far from the Bay Area—I don't know exactly where but still in California—and a police car noticed he was driving erratically and pulled him over, and smelled the odor of marijuana when they went up to the car to talk to him, and arrested him for driving under the influence of marijuana. And then, they decided they wanted to search his car, and they went into his car and searched it. They opened the trunk, and in the trunk, there was kind of a black plastic package, wrapped in black plastic, and it was about one foot square, or

something of that sort. So, they opened that package and they found bricks of marijuana, and they charged him with selling marijuana because of that.

And to me, the stop of Mr. Robbins was correct; he was driving dangerously. The arrest was correct because they had probable cause that he was under the influence of marijuana when they smelled it. But, they had plenty of time to get a search warrant if they wanted to open that package, and to me it was kind of the same as opening luggage, or opening a briefcase, and the examples I used when the case got into court were: Suppose I'm a lawyer and for some reason I have my briefcase and it has a lot of confidential papers in it about criminal cases that are pending, and I don't want that confidential information to be seen by the police. But, the police decide they suspect me of drunk driving. Does that mean just because they suspect me of drunk driving that they can go through my briefcase and all my confidential stuff? And, I took the position that they had plenty of time to go to a magistrate and get a search warrant. Mr. Robbins was under arrest. He was being taken to the station. The car was confiscated. So, before opening this package, they could have taken the time to show a magistrate that they had probable cause that there was something illegal in this package. They didn't do that. They just opened it up.

So, that was my argument before the courts. We lost in all the California courts, but the Supreme Court became interested in the case, granted the writ of certiorari, which means they agree to hear the case, and it was heard.

05-01:02:02

Meeker:

So the established law on this was—is that what came out of *Mapp*, I think? The established, you know—

05-01:02:11

Krause:

Oh, *Mapp versus Ohio* ruled that if the police violate the Fourth Amendment, the evidence can't be used in a state court.

05-01:02:21

Meeker:

But this was more determining, did they violate the Fourth Amendment?

05-01:02:24

Krause:

Yes.

05-01:02:25

Meeker:

It's interesting. What was the nature of police education about these things? How fine-grained were police being educated about, you can't do this and you can't do this, and what leverage of interpretation would they have? Or, should it just be, if in doubt, hold it and try to get a warrant?

05-01:02:55

Krause:

Yeah, the police are not trained in the law, and they might have a few hours of instruction in police academy about what the Fourth Amendment means, and when you can search someone and when you can't, and what probable cause means, but it's a very complicated area, and they're not going to be right all

the time. So, they do their best, and many police don't really believe that evidence illegally seized should not be used. After all, the guy's a criminal. He was found with some marijuana, and it should be used against him, and if the police did something wrong, it should be left to the police to discipline their own members, rather than saying that the criminal conviction has to be thrown out. But I don't agree with that; I think that the only effective way to deter illegal police searches is by showing them that it's not going to do them any good, because the evidence that they seize won't be able to be used in evidence. So, I think the exclusionary rule, as it's called, is very effective on getting the police to understand rights of privacy.

05-01:04:22

Meeker: What about mistakes?

05-01:04:26

Krause: Yeah, mistakes are made, and sometimes the court has ruled that mistakes made in good faith do not violate the Fourth Amendment.

05-01:04:40

Meeker: Could that have been applied to this case?

05-01:04:42

Krause: No, they didn't make any mistake in the *Robbins* case. They knew exactly what they were doing. They had this package; they wanted to open it. They wanted to open it right away. Well the police, like most of us, would rather avoid work, and so, getting a search warrant is work, and they could just open it right there on the scene, and most of the time, nobody challenges their searches, so they felt maybe they could get away with it, or maybe they didn't know that a warrant was required.

05-01:05:19

Meeker: It sounds like you already knew Robbins. How did the case come to you?

05-01:05:27

Krause: His attorney. I didn't handle the trial. His trial attorney consulted me about the appeal, and then recommended to Robbins that he hire me for the Supreme Court case.

05-01:05:45

Meeker: So that's when you're brought into this.

05-01:05:47

Krause: Yes.

05-01:05:48

Meeker: How did you feel how the lower courts handled it?

05-01:05:55

Krause: Well, there's such a thing as the automobile exception to the protections of search and seizure, which, way back in the 1920s, the Supreme Court ruled

that since an automobile could be moved away from police custody immediately, that if the police stopped an automobile and had probable cause that there was something illegal going on in the automobile, they could search it without a warrant, because by the time they got a warrant, the car would be driven away. So they crafted an automobile exception to the search and seizure protections, and so, the lower court thought that that automobile exception should allow the police to search without a warrant anything they found in an automobile. And what my point was in *Robbins* and what we succeeded in establishing is that, even though they could search the automobile, they couldn't break into suitcases, briefcases, or packages, when they had plenty of time to get a warrant. If they don't have time, if it's an emergency situation, then they can do it. But here they had plenty of time, so, I argued that they couldn't do it.

05-01:07:25

Meeker:

One of the interesting things about all these cases is this sense, this question of, was the defendant consciously trying to maintain privacy or protection around something? Is that necessary? Is it necessary to establish intention for privacy on behalf of the defendant in these cases?

05-01:07:52

Krause:

No, I think it's kind of assumed that most people would rather have their privacy rather than have the police rummage through their personal papers, or effects, or come into their house. And so, well before the beginning of our country, it was established that there had to be some kind of judicial order for the police to go into a private home and start rummaging around in a private home. That was part of the basic protections of the Englishmen, and there was this famous saying in an English case that, "be it ever so humble, the home is protected against the overwhelming force of the state."

05-01:08:41

Meeker:

Or you know, a man's home is his castle.

05-01:08:44

Krause:

Yes.

05-01:08:46

Meeker:

What was your thought at the time, and has it changed at all, on the automobile exception?

05-01:08:57

Krause:

I thought the automobile exception had some basis in fact, that if you had probable cause that there was something illegal in the car, but you had to let the driver go, he would just drive away and you'd never find out. So, I felt that there was some reason for it, but when they've arrested the defendant, taken him to the police station, and impounded the car, there's no longer any emergency. It's not going to be driven away. So they do have time to get a warrant. So, my argument in the *Robbins* case, which was pretty well accepted

by the majority, was that, if there's time to get a search warrant, the police should go get a search warrant.

05-01:09:50

Meeker:

There was this one thing that was a potential stumbling block for your argument, and that was, I guess, Robbins said to the police, "What you want is in the back."

05-01:10:01

Krause:

Yeah, I think he did say that, but I was able to argue that that was no indication that there was anything illegal there. I don't know how I handled that, but somehow it didn't become an issue in the case.

05-01:10:20

Meeker:

So by 1980, the court has started to look a bit different than it did in the mid-1960s. It's now the Burger court not the Warren court. I think Rehnquist is on it at that point in time, but you don't have the full sweep of Reagan appointees yet. Did it feel like a different entity that you were engaging with in 1980 than it did in—

05-01:10:49

Krause:

Yes, the crown jewels of the liberal establishment, Justice Douglas and Justice Black, were no longer on the Supreme Court, and Justice Brennan was on the court who was quite a liberal guy, and I think Arthur Goldberg was on the court at that time, was also a liberal. So the court was kind of split. You never could tell which way they would go, and one of the interesting things about the *Robbins* case is that about six months later, Justice Stewart, who wrote the *Robbins* opinion, was replaced by another justice, and the court reversed itself and overruled the *Robbins* case. So it's one of the shortest-lived precedents ever in the Supreme Court, that we won that case on the basis that, if there's time to get a warrant, you should get one, and then that was overruled about six months later.

05-01:12:00

Meeker:

I was going to ask you about that, so I think that was the *New York versus Belton* case, right?

05-01:12:05

Krause:

Probably.

05-01:12:06

Meeker:

Yeah, the *New York Times* wrote about these two cases, and I think the *Belton* was also, I think it was also marijuana, wasn't it, or something in like a coat pocket? Is that the one?

05-01:12:19

Krause:

You know, I don't remember that case well enough. I'm sure I wrote about it in my book, and at the time, I knew a lot about it, but I don't know anything about it now.

05-01:12:28

Meeker:

Okay. [laughter] But it's interesting, so you do see it as overturning that—

05-01:12:34

Krause:

It did overrule, specifically overrule *Robbins*. I don't know that it was the *Belton* case, but it was another case about the same time.

05-01:12:42

Meeker:

Okay. The six-three is interesting. I think that the three dissenting included Rehnquist which might've been expected, but also John Paul Stevens. Was that surprising to you when the decision comes down? Or, I don't know what his reputation was like at the time.

05-01:12:59

Krause:

Well, John Paul Stevens, at the time, was kind of an unknown factor. He was pretty new on the court, and we all knew he was a Republican; he had been active in politics before he went on the bench, and so we weren't surprised that he would be more conservative on criminal procedure. And even though he became a more liberal justice as time went on, he was somewhat conservative in criminal procedure cases. Justice Scalia is known as a favorite of the conservatives. He was quite a liberal in search and seizure area. He believed strongly in protecting the right of privacy, and he wrote a number of leading opinions protecting the right of privacy.

05-01:13:54

Meeker:

When you were preparing for this argument, how were you feeling about it? Did you feel like you were going into a friendly environment and that the Supreme Court was going to agree with your side, or was it more up in the air?

05-01:14:14

Krause:

I think I really did not know how this court would react to my argument. I was hoping they would see the logic of it, that it's been pretty well established in American law that search warrants should ordinarily be used when there's going to be some invasion of privacy, on the basis of the need to enforce the criminal law, and it shouldn't be the judgment of the policeman as to when he can go into a home, or into a package or a briefcase. It should be judgment of a magistrate. And, the only exception to that is when there isn't time to get a search warrant, and there's an emergency situation. Okay, that's fine, but if there is time to get a search warrant, I was arguing that they should get one, and that had never been ruled upon before. So, I didn't know how it would come out, and I really was very pleased that we won the case, because I was worried that we would lose it.

05-01:15:29

Meeker:

Hmm. Okay, so it was a bit of a surprise when it comes down to you, and a six-three decision which maybe was less rare than it is today. Well, okay, so then five years later, in *California versus Ciraolo*—

05-01:15:51

Krause: *Ciraolo*.

05-01:15:52

Meeker: —*Ciraolo*, this is also a Fourth Amendment case, somewhat different than kind of a micro search and seizure; this is kind of a macro observation.  
[laughs]

05-01:16:10

Krause: Yeah, the facts were that *Ciraolo* had a big fence around his property which was somewhere in San Jose, and no one knew what was behind this fence, but the police suspected that he was growing marijuana. Why they suspected that, I don't know. But they could not see into his yard, and the police are not entitled to go into a fenced yard and trespass into private property unless they have a search warrant, or unless they're operating in the face of an emergency. So, they decided that they would charter a helicopter, and fly over the property, and they had an expert in identification of marijuana plants in that helicopter, and they flew over the property, and he said, "Yes, it's marijuana," and so they busted down the fence and went in and arrested *Ciraolo* for growing marijuana after they found a whole bunch of marijuana plants.

So they were right in their speculation, but, once again, I was arguing that they had plenty of time to get a search warrant, and why didn't they get a search warrant? How could they invade the privacy of his backyard by flying a helicopter over it, without his permission? And they couldn't use this evidence, and we won in the California courts in this case, and it was the State of California who had took the case up to the US Supreme Court, and the US Supreme Court eventually ruled against *Ciraolo* in an opinion, which has been criticized roundly by everybody who's ever studied it, by Chief Justice Burger who said, "Well, since someone in a commercial airplane might fly over *Ciraolo*'s property, it was in effect open to public view, and the police, by chartering this helicopter and surveilling his property, did not need a search warrant." So we lost the case, and there were some dissents in that, and I think that case has simply been overruled in subsequent cases. So, both of the cases we're talking about now have been overruled, one in favor of the defense position and one in favor of the prosecution.

05-01:19:05

Meeker: Right, I think it was Justice Powell who wrote a pretty firm dissent from it.

05-01:19:13

Krause: Yes, and he was known as a conservative justice, so we had some merit to our case if he would write a dissent taking our position.

05-01:19:24

Meeker: It's interesting. I listened to the arguments, and I can't remember the name of the person representing California in this, Sullivan, maybe. Does that sound familiar?

05-01:19:44

Krause: I don't remember.

05-01:19:45

Meeker: But he basically admitted that the state wouldn't have been able to secure a warrant in this case. I don't know. Does that just mean that the state moves on? And I think what happened was a neighbor had reported that there were marijuana plants growing in the backyard. Is that just hearsay, or like, how does the state deal with something like that?

05-01:20:15

Krause: Well, probable cause means that they have to show some facts tending to prove that there's a violation of law, and just the opinion of a neighbor that there were marijuana plants growing in Ciruolo's backyard would not have been sufficient facts to get a search warrant. And the police, as I say, were not able to see through or over his fence; they couldn't have provided any evidence to get a search warrant. So, I think that was correct that they couldn't have gotten a search warrant, and maybe that was the reason that Ciruolo lost, because a majority of the court felt that marijuana growing should be punished—punished, rather, and they didn't really care about the rationality for it, and they kind of made up this rationality that I think is absurd, because if you were flying in a commercial airplane, you would not have seen any marijuana plants; you're too high up. The helicopter was only a few hundred feet up, and it was much easier to see. But it wasn't open to public view; that's absurd.

05-01:21:30

Meeker: You know, the arguments in it were interesting in the sense that this, of the four cases that you argued, you really got the chance to speak what you had intended to present, I think, including by the end, you're making your final arguments and you're summing up, clearly, what you had intended to say. There were questions, but it almost felt like everything had already been decided prior to the arguments in this particular case, is what I'm getting at.

05-01:22:08

Krause: Well, I don't think that's the case, because the way the cases are handled before the Supreme Court is that the justices don't really talk about them among themselves until after the oral argument. But I think there was substantial force on the court to support law enforcement no matter what they did. There was a lot of feeling that law enforcement had to be supported when they found narcotics, and here this guy was clearly guilty of violation of the law; why should they let him off on a technicality? I think that was really behind many of the votes that constituted the majority to convict Ciruolo.

05-01:23:01

Meeker: Did you have any sense going into it that you were up against that broad sentiment on the court?

05-01:23:08

Krause:

No, in this case, I was very confident that I would win the case, and especially after the oral argument. As you say, they let me give my whole argument, and they paid attention to it, and I got some favorable comments from justices, so I was pretty confident that we would win, and I was very surprised when we lost.

05-01:23:36

Meeker:

Did you ever get a sense of what went wrong?

05-01:23:42

Krause:

I just think they felt that somebody growing marijuana should not be able to get away with it. That's what I think, because I think it was a bad precedent. I mean, we don't consider that we're surrendering our right of privacy in the backyard just because a commercial aircraft might fly over it, and someone might be looking out the window and seeing a couple thousand feet down what's going on in your backyard. That's absurd!

05-01:24:18

Meeker:

It's interesting, and then there's this whole concept around curtilage. Was that the name of the—

05-01:24:23

Krause:

Yes.

05-01:24:24

Meeker:

—the notion of, your castle is not just the four walls of the house, but it extends out some degree beyond that?

05-01:24:36

Krause:

Yes, it extends out to what's called the curtilage, which means the area surrounding the home which is used for ordinary, household purposes, which would include your backyard.

05-01:24:50

Meeker:

It again comes back to this kind of attempt to—it seems that the law sort of hinges on this question of, what was the degree to which the individual attempted to make this private, and did they do enough to protect what maybe others shouldn't see or could get them in trouble to meet a certain standard of the law? In this case, it's like, well, did Ciraolo, was he just not smart enough to realize he should've put a tarp over his pot plants? And, it was his, like it was his failing for not really understanding privacy in this case, that allowed those justices to rule in a particular way. I don't know. I'm just curious about how you deal with those kinds of things when you're preparing a case.

05-01:26:01

Krause:

Well, did he take steps to ensure that the public knew that this was his private land? And I think he did. He built the fence, and he was sending the message that "I want this area kept private," and he could've been doing anything there. He could've been sunbathing in the nude. He could've been having

some activity that wasn't illegal, but he just didn't want to show the general public what was going on. And so, I think he did all he could.

05-01:26:43

Meeker:

How do you deal with the perception that building a fence, or trying to protect through some sort of screen or privacy, shouldn't be interpreted as probable cause for illegal behavior?

05-01:27:03

Krause:

Yes, it isn't, and it shouldn't be probable cause. The fact that someone wants to protect his or her privacy is not probable cause of anything. Most of us, practically all of us, I would say, have some areas of our lives that we want to keep private from the general public. So, no, I don't think that's any kind of a surrender of his rights.

05-01:27:36

Meeker:

There was this interesting moment, and you're in the room, but I don't know if you remember it, when Sullivan is doing his rebuttal to what you had argued. And I don't know if he's talking directly to Thurgood Marshall or not, but he says something like, "The Supreme Court, if they come out and they do this, they're basically giving instructions to pot growers about what they need to do in order to not be arrested, to not have their property searched," and Thurgood Marshall responds very—he seems upset about this. [laughs] Do you recall that happening?

05-01:28:34

Krause:

Yeah. I do recall that, and you know, the exclusionary rule as the remedy for violation of the Fourth Amendment has never really been popular with prosecutors, and even with judges, because it kind of lets people get away with things for irrelevant reasons. I mean, just because someone did something illegal, the police did something illegal, like invading privacy, why should someone else be able to get away with growing marijuana, which, in those days was considered a very serious offense? So, it's kind of an unpopular thing, and so, the prosecution always emphasized that about how bad it is that if Mr. Ciraolo wins this case, he will get away with cultivating all this marijuana in his backyard, and the prosecution tries to use that argument, tries to persuade people. And also, I think Justice Burger, Chief Justice Burger, was kind of hostile to the whole exclusionary rule idea.

05-01:30:00

Meeker:

It wouldn't just be someone like Ciraolo, who would now be able to get away with it, but any pot grower who is paying attention to this could be like, "Okay well, they're going to need a warrant in order to fly over my house, which, they could conceivably get the right circumstance, so I'll just build a big fence, and that should give me the measure of protection that I need." Were you assuming that something like that could happen if the decision had gone the other way? Were you trying to engage in some new jurisprudence on marijuana and cultivation, or is it just kind of broader privacy issues?

05-01:30:55

Krause:

Well, we shouldn't consider that it's just criminals who are interested in privacy. There was a companion case to the *Ciraolo* case, which was argued at the same time. It was called *United States versus Dow Chemical*, and, similar thing happened. The Environmental Protection Agency thought that the Dow Chemical Company had been concealing certain processes that created dangerous chemicals on one of its plants, and they couldn't get permission to go in and inspect that. So, they used either a helicopter or a low-flying airplane to take pictures of the Dow Chemical factory, and found what they thought was a violation of the law, and Dow Chemical used the same argument that *Ciraolo* used, that they had privacy in the area surrounding their plant or whatever it was. And so, they argued that too, and they lost, at the same time that *Ciraolo* lost.

05-01:32:12

Meeker:

It was grouped together, in the—

05-01:32:14

Krause:

Yes.

05-01:32:14

Meeker:

—same—okay. Huh, that's interesting. There was also another case; I don't know if this is on your radar or not, but there was also another case I think that you worked on in the State of California that was a California State Supreme Court case, *People versus Mayoff*, that was almost like the same thing, I think.

05-01:32:40

Krause:

Yes. Unfortunately, I don't remember that case.

05-01:32:44

Meeker:

Okay. I think it was actually also about overhead observation, but I guess these kinds of things just come down to precedence. So if the Supreme Court has a constitutional precedent that lower courts, whether they're state supreme courts or appellate courts, are going to need to abide by those decisions.

05-01:33:06

Krause:

Well, no, not necessarily, because we have, for instance, in California, we have our own state constitution, and if the Supreme Court of California says that our state constitution forbids certain evidence from being used in a trial, that would be the end of the story, because the US Supreme Court doesn't have any jurisdiction to interpret the California Constitution. The same thing is going on right now with gerrymandering where, in the state of Pennsylvania, the Pennsylvania Supreme Court said that political gerrymandering was unconstitutional, even though the US Supreme Court hasn't taken that step yet, and may or may not do so in some of the pending cases that are now before it.

05-01:34:01

Meeker:

Through this period, through the eighties and nineties as you continue to practice law, and the Supreme Court appears to be getting more conservative,

are you trying to steer your cases more into the direction that they would have had to the California State Supreme Court, which was not as conservative?

05-01:34:20

Krause:

Oh yes, yes, that became a tactic to keep cases out of the federal system, once the court was recognized as very conservative. So, here in California we had a liberal supreme court at the same time that the US Supreme Court was rather conservative so, we would much rather have cases decided by the state supreme court.

05-01:34:48

Meeker:

Can you think of any examples of those that ended up in the California State Supreme Court that you worked on that—

05-01:34:53

Krause:

Well, there were some about racial discrimination; maybe it was affirmative action, or something of that sort. I can't quite remember it, but I know that we used that tactic many times to keep cases out of the federal system.

05-01:35:17

Meeker:

Successfully used it?

05-01:35:19

Krause:

Yeah, sometimes. Of course, sometimes you can't keep it out of the federal system.

05-01:35:25

Meeker:

You had referred to this big, I think it was employment discrimination lawsuit that you worked on. I didn't come across a reference to that. Do you want to talk about that one for a moment?

05-01:35:38

Krause:

Well, it's an interesting case. The companies who collected garbage in the Bay Area were generally owned by Italians from one particular area of Italy, Genoa. They were all Genovese, and they tended to keep the companies within their families. But they grew so big that they had to hire other people besides their family members, so they started hiring black people and Mexican people to be workers in the garbage collection industry, but, these people were never given the opportunity to advance in the company. One advance in the company was to be a driver, rather than a collector, and there weren't any black or Spanish-speaking drivers, even though that was kind of the next step up from being a collector, and a lot of collectors who wanted that job were passed up because they were minorities.

So, when the case got to court, the owners of the company said, "Well, all we're doing is protecting our families, and we have the right to give the best job to our families." And so, they won the case on that basis, and that went up to the Ninth Circuit Court of Appeals, and they said, "No, you can't discriminate on the basis of race because you're giving the best jobs to your

family members. You have to treat everyone equally under the law.” So then we went back down to the trial court. We had a trial, and we showed that, who they thought were their family members were actually just acquaintances who happened to be Italian, and they were totally discriminating against blacks and Latin people. And we got, I think we got several million dollars from the San Francisco garbage collection companies, and we got like, eleven million dollars from the Oakland Scavenger Company.

05-01:38:09

Meeker:

Wow. Do you recall the name of this case?

05-01:38:14

Krause:

The defendant was the Oakland Scavenger case, in the Oakland case, and the other defendant was Golden Gate Disposal. Both of those companies have now been taken over by the big conglomerate Waste Management, which owns most of the garbage collection companies in this area.

05-01:38:36

Meeker:

So, we don't have a whole lot of time left, and I think I've pretty much covered what I wanted to cover. I think that maybe what we should do now is wrap up, and then, we'll give you the transcript, and you'll get a chance to review the transcript, make any corrections, and if after going through the transcript you decide there's still some more things that you'd like to talk about, then I can come back and we can cover those issues.

05-01:39:06

Krause:

Okay, that's fine with me, Martin.

05-01:39:08

Meeker:

Okay. If you have any sort of final thoughts on some of these issues, these major issues that you've dealt with that really continue to animate law and politics today—in terms of free speech, we've been given *Citizens United* not too long ago, and maybe another side of free speech, we've had these eruptions of battles around free speech at Berkeley in the last couple of years, whereby violent groups are attempting to suppress speech that they disagree with. And I'm just kind of wondering, from where you sit and are observing these turns in law and public life, how you feel about these issues.

05-01:40:08

Krause:

Well, I'm happy to say that I think our work in protecting free speech was very useful and still is in existence today. Now, the issues are more on the fringe of whether people can be stopped speaking because they're speaking hate speech or some other kind of not valued speech, and I think all of those ideas are subsumed in the general idea that we have freedom of expression, except when there's actual incitement to violence, and most people understand that and accept that, and it's the same with the advances in criminal law. Most people accept the fairness of now of having poor people assigned an attorney when they can't afford to have an attorney, and having people advised of their rights before they're questioned by the police. It's pretty well universally

accepted, and racial discrimination, of course, is getting less and less prevalent in our society.

So, I feel that the work that the ACLU did, and some of it was done by me, but there were a lot of cases done by many other ACLU attorneys, it's profited the whole country. We have a greater sense of freedom in this country because of that tradition, and we have people who are willing to fight for their rights because of that tradition. So I think that that will continue to be important. And I thought that I was so lucky to have been the ACLU attorney in Northern California, just very fortunate, and throughout the rest of my whole life, I've been able to say that, well, at least I accomplished this. Even though I haven't been able to accomplish some of the other things I wanted to accomplish, I'm still very proud of my achievements and I feel that my life is worthwhile because of that.

05-01:42:33

Meeker:

Well that's good, and I'm glad that we were able to document some more of this work here today, and I appreciate the time spent with you doing this.

05-01:42:41

Krause:

Okay, Martin.

05-01:42:42

Meeker:

All right. Thank you, Marshall.

[End of Interview]