

**HISTORICAL SOCIETY OF THE
NEW YORK COURTS**

ORAL HISTORY PROGRAM

Hon. Sol Wachtler



Found on exterior entrance to New York Court of Appeals

**HISTORICAL SOCIETY
OF THE NEW YORK COURTS**

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ORAL HISTORY

**Subject: Hon. Sol Wachtler
New York State Court of Appeals**

An Interview Conducted by: Nicholas M. Cannella, Esq.

Date of Interview: December 21, 2011

Location of interview: OCA Studio, 25 Beaver Street, New York, NY

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OF THE NEW YORK COURTS**

Oral History Project

INTERVIEWEE: Hon. Sol Wachtler

INTERVIEWER: Nicholas M. Cannella, Esq.

DATES: December 21, 2011

NC: [0:00:00] We are here today as part of the New York Courts Historical Society's Oral History Project. I have been given the distinct honor and privilege of being here today for a conversation with the 35th Chief Judge of the State of New York, the Honorable Sol Wachtler. Judge Wachtler was elected to that Court in 1972, and served as an Associate Judge until 1985, when he was appointed its Chief Judge, by the then Governor, Mario Cuomo.¹ Judge Wachtler left the Court in 1993.

My name is Nick Cannella, and I have had the great, good fortune of serving as Judge Wachtler's law clerk from 1976 to 1977. To this day, that period of time remains the most enlightening and rewarding experience in my professional career. More importantly, I've had the good fortune of having Judge Wachtler as a mentor and friend for some 35 years.

Judge, glad to be with you today.

SW: Right, thank you so much, Nick, and thank you for your kind remarks.

NC: Judge, much has been written and said about your career. What I'd like to do today if we could, is in a more informal fashion, discuss some of your

¹ Mario M. Cuomo, Governor of the State of New York, 1983-1994.

perspectives on Sol Wachtler, the public servant who served the people of this state so well, as we will detail, from the early 1960s, all the way through to the beginning of 1993. I'm a trial lawyer by nature, Judge, and so when I appear before judges, I always do some homework in advance to try to figure who the trier of fact is going to be, who's going to be listening to me. So I have done a little background research. And I noticed that we have something in common.

[0:02:00] We were both born in Brooklyn, New York

SW: That's right. But I was born way before you were, Nick. I was born in 1930, which now makes me 81 years old, so, I can look back on a lot of years. I was raised in the south, actually. Shortly after I was born, we moved down to Georgia, then to Florida. My father was a traveling auctioneer, so I lived in eight different states, and went to almost a dozen different public schools. Whenever I was in the south I was advanced a year. When I went to the north, I was left back a year, because there was no synchronization between the southern schools and the northern schools. This was a great learning experience for me, because I was able to meet people from all over the country. When I went into the Army, I spent a couple years, mostly in Georgia, in the Provost Marshall General School, training military police, and then becoming a military policeman myself.

And then I came north to make my permanent home. Actually I came north to pick up a couple years experience in the practice of law in New York, because this was always the heart of commercial law. I thought I would learn law up in New York, and then go back south and show all the southerners how real law is practiced. But I became part of the New York scene. Married a New York girl,

and [0:04:00] that was in 1952. And then, upon my discharge from the Army, came back to New York. Practiced for a while and then went into politics, because I felt that I could accomplish a great deal by, instead of knowing people in public office, being someone in public office. And so I ran for councilman of the town of North Hempstead, which is a township on Long Island and which has a population of close to 150,000 people. To me, coming from the south, that was a big metropolitan area. Actually, up here, it was just a town. I was elected to that position after a primary, and then went on to become Supervisor of the town, which was like the mayor of the township, and also was elected to and served on the Board of Supervisors of Nassau County, which is a metropolitan county of a million and a half people. I was Chairman of the Committee on Public Safety for the County, which would have under its jurisdiction the police department of the County and the law enforcement agencies.

I then ran, unsuccessfully, for the position of county executive. I ran against a fellow named Eugene Nickerson,² who became a federal judge, was a brilliant jurist and a wonderful county executive. He had won previously by over 90,000 votes, and they couldn't find anyone to run against him. I didn't want to run against him either, except that Nelson Rockefeller,³ who was then the governor, leaned very heavily on me. And so I ran. As it turns out, I only lost by 2,000 votes, so it was a very, very close election. After the election was over, Nelson Rockefeller [0:06:00] asked me what I wanted to do, what office I wanted to seek,

² Eugene H. Nickerson, Nassau County Executive, New York, 1962-1970; Judge of the United States District Court, ED NY, 1977-2002.

³ Nelson A. Rockefeller, Governor of the State of New York, 1959-1974.

or whether I wanted to become part of his administration. I told him that I had always wanted to be a judge. He tried to persuade me not to, because he thought I should stay in politics and in government. But the lure of the judiciary was overpowering to me, and I was very fortunate that the governor did name me to the state Supreme Court. I then had to run the next November, but I was fortunate enough to get bipartisan endorsement, so it was not a contested election. Except for the Conservative Party, which had just been organized, ran a candidate against me. But I had all the other major party lines. And so I was elected to the New York Supreme Court in 1968. And, I served in the Supreme Court as a trial judge, had some wonderful experiences there. I had the opportunity to write a couple of decisions that I thought were noteworthy. *Jones v. Star Credit*,⁴ which became a textbook contract case, and several others. And then, Nelson Rockefeller called me up one day, and asked if I would consider running for the New York Court of Appeals. Now that would be like my coming to you, Nick, and asking you whether you wanted to become Pope.

NC: (laughter)

SW: It was really out of the blue. And the reason I was asked was an interesting one. There were three vacancies on the Court of Appeals, which was most unusual. And Nelson Rockefeller had made a deal with the head of the Democratic [0:08:00] state party, a fellow named Crangle,⁵ and the arrangement was that the Democrats would name two people to the bench, and the Republicans would

⁴ *Jones v Star Credit Corp.*, 59 Misc 2d 189 (Sup Ct, Nassau County 1969).

⁵ Joseph F. Crangle, Chair, New York State Democratic Party, 1971-1974.

name one. The Republicans picked Domenick Gabrielli⁶ and the Democrats picked Bernie Meyer⁷ and someone else whom I don't recall. And then, Crangle said, 'You know, Nixon is running. He's going to be swamped, there's no way he can win.' And he thought that the Democrats would pick up all three seats. In those days, of course, you ran for the Court of Appeals. So, he said, 'No deal. We're going to run three candidates, and we're going to pick up three seats.' And Nelson Rockefeller said, 'Well then, we're going to run three candidates, and we're going to take all three seats.'

So, Nelson Rockefeller nominated, or saw to it that Domenick Gabrielli was nominated. Hugh Jones,⁸ who was president of the State Bar, and although he had no judicial experience became a fantastic jurist, was nominated. And I was nominated. Initially the State Bar thought me too young to run, I was 42 years old. And so they initially said that I was not qualified. And when it was pointed out that the President of the United States, John Kennedy, became president at that age, they said, 'Well, you might be old enough to be president, but you're not old enough to be on the New York Court of Appeals.' It was then that Marcus Christ,⁹ who was then an outstanding jurist, and Presiding Justice of the Appellate

⁶ Domenick L. Gabrielli, Associate Judge of the New York State Court of Appeals, 1972-1982.

⁷ Bernard S. Meyer, Associate Judge of the New York State Court of Appeals, 1979-1986.

⁸ Hugh R. Jones, Associate Judge of the New York State Court of Appeals, 1972-1984.

⁹ Marcus G. Christ, Presiding Justice of the Appellate Division of the Supreme Court, Second Judicial Department, 1970; Associate Justice, 1959-1969, 1971-1976.

[0:10:00] Division, Second Department, interceded on my behalf, and the State Bar changed its mind and found me qualified. And then came my time to run. The candidate placed against me was Lawrence Cooke,¹⁰ who was later to become a judge of the Court, and of course, Chief Judge. But, because the Conservative Party really didn't like me, they decided that they would nominate Larry Cooke. So I had only the Republican line, and Larry Cooke has the Democratic and Conservative lines, which on paper, would have been a winning ticket. Hugh Jones had the Conservative and Republican lines, and Gabrielli also had the Conservative and the Republican lines. So I was alone on the Republican line. But, Kenneth Keating,¹¹ who had been a former judge of the Court, and before that had been United States Senator, and before that had been a Congressman, and then became Ambassador to Israel and Ambassador to India, came to me, and he said he would like to run my campaign. Of course I said, 'I'm honored.' I had known him when he was a senator, and established a good relationship with him. He said, 'The only way you can win is to go on television.' And so, there was a fundraising operation, and I went on television. And I won the election. It was a tremendous turnout on the Republican [0:12:00] line, fortunately, and so I won, and that was in 1972.

¹⁰ Lawrence H. Cooke, Chief Judge of the New York State Court of Appeals, 1979-1984; Associate Judge, 1974-1979.

¹¹ Kenneth B. Keating, Associate Judge of the New York State Court of Appeals, 1965-1969.

I then took the Court of Appeals bench. The Chief Judge was Stanley Fuld,¹² that's how far back it goes, Nick. And, it was a very good bench, and a strong bench, and I learned an enormous amount from the judges with whom I served. Charlie Breitel¹³ was the Senior Associate Judge, and then the next year, Charlie Breitel became the Chief Judge of the Court. And again, Stanley Fuld was a brilliant jurist. Charlie Breitel was exceptional. And just being with those men, and serving with those men, was a great, great learning experience for me.

Now when Stanley Fuld was the Chief Judge, when I first came on the Court, we had what is known as a 'cold bench.' That is, we did not know what the cases were about, until such time as we took the bench and heard the argument. It was not a good system, only because -- well, it was an interesting kind of dynamic. The judge knew, right before the argument began, what case he was going to be assigned to him. I say 'he' because we had no women on the bench at the time. Then that judge would tell his law clerks to come into the courtroom to hear the argument while the judge was learning about the case for the first time. So the lawyer arguing the case, if he was at all astute, and they all were, he would know which judge was going to have his case by which law clerks were in attendance. The other sign was that the other judges on the bench would pay attention to the case being argued [0:14:00] which was assigned to him, but didn't pay too much attention to the cases which were assigned to the other judges. And the only judge

¹² Stanley H. Fuld, Chief Judge of the New York State Court of Appeals, 1967-1973; Associate Judge, 1946-1966.

¹³ Charles D. Breitel, Chief Judge of the New York State Court of Appeals, 1974-1978; Associate Judge, 1967-1973.

who was really attentive, was the judge who was assigned that case. This was the unfortunate part about the cold bench.

NC: Judge, if I can interject this here --

SW: Yes.

NC: -- because I think there's another story, that I've heard told, that the public might find interesting. Shortly after you took the bench, am I correct in my understanding that you had the opportunity to write for the Court in an obscenity case, where you talked about the local standards being applied from one community to the other?

SW: Yes.

NC: Could you tell the story behind that opinion, if you would?

SW: Yes, the name of the case was, *People v. Heller*.¹⁴ It was decided by the Court before I got to the Court, and then went to the United States Supreme Court, and was sent back by the United States Supreme Court for reconsideration, in light of the *United States v. Miller* case,¹⁵ which set the standard for obscenity. The U.S. Supreme Court wanted to see whether we considered this 'obscene,' or not. The three new judges, that is Judge Gabrielli, Judge Jones, and myself, we were asked to come down to the robing room to see this particular movie. And I remember Stanley Fuld came down as well. And, I said to him, 'Chief, you've already seen this.' He said, 'Yes, I want to see it again.' I remember asking him, 'How do you judge whether a case is obscene or not, Chief?' [0:18:00] And he said, 'I usually

¹⁴ *People v Heller*, 33 NY2d 314 (1973).

¹⁵ *Miller v California*, 413 US 15 (1973).

watch it with my law clerks, and while my law clerks are watching the show, I watch them.’ (laughter) But, we saw this film, and it was an Andy Warhol film, I remember. It was called, ‘Blue Movie’, a very suggestive title. But the movie consisted of a couple, sitting, discussing the war in Vietnam. And that discussion lasted one hour, and was totally inane. Then the couple left the table, where they were drinking wine, and walked about 20 feet away from a fixed camera, and they had sex. Today that film might have been rated PG, at the worst, R. But, because of the standards of the time, our Court decided it was obscene. And the split in the Court came with respect to, what are the ‘community standards’? Because the United States Supreme Court put that as part of the criteria, that the material being judged had to be judged by ‘community standards.’ So the question was, ‘What is the community in New York?’ Judge Gabrielli wrote the majority opinion, and he said, ‘The community is the entire State of New York.’ And I concurred in the result, but in my concurrence, I said that, that the entire State should not be ‘the community,’ because, as I wrote in the decision, ‘What is acceptable in New York [0:20:00] City would be considered obscene in Elmira, because of the enormous demographic differences within New York State.’ But Nick, I’ll make a confession now, that’s not the way I originally dictated the opinion.

NC: I’ve heard that rumor.

SW: (laughter) Yes. The way I originally dictated it was, ‘What is acceptable in New York City, would be considered obscene in Watertown.’ And my secretary, in typing the decision said, ‘Why did you pick on Watertown?’ I said, ‘Well, you

know, it's a small, very remote upstate community.' And she said, 'You know, you ran very well in Watertown.' So I asked, 'Well where didn't I run well?' And she said, 'You didn't run well in Elmira.'

NC: (laughter)

SW: So, that's how Elmira was put in the opinion. I remember bumping into Judge Van Voorhis,¹⁶ who was a retired judge of our Court, and who happens to be from Elmira, and he asked, 'I think you were right on target with your concurrence, but why did you pick Elmira?'

NC: (laughter)

SW: So, you know, sometimes you can't win.

NC: Judge, I interrupted your flow, you were --

SW: Yes, I was just saying about the cold --

NC: -- talking about the transition from a cold court to a hot court.

SW: When Charlie Breitel became Chief Judge, he said, 'We're going to have a hot bench. We will read all of the cases in advance, all of the briefs in advance of oral argument. And then when we take the bench, we will be attentive because we won't know which of the cases a particular judge will draw. After we hear oral argument, we're then going to go back into the robing room,' assuming seven cases were being argued, although in those days, we used to argue nine or ten cases, 'I will have an index card with the name of each case on it. And I'll pass out the index card, around [0:22:00] the table. And then, in reverse order of

¹⁶ John Van Voorhis, Associate Judge of the New York State Court of Appeals, 1953-1967.

seniority, the junior judge first will draw a card, and that will be that judge's case. And then each judge will have a case, some two cases.'

The day after oral argument we would attend the decision conference, which began ten in the morning, although we were always in the courthouse at seven or even earlier. We would go around the conference table, starting with reverse order of seniority, the junior judge first, would report on his case. And the report would be something like, 'I would vote to affirm.' And then he would give all his reasons for affirmance. Then the next judge would either say, 'I agree,' or, 'I disagree.' The first one to disagree would be assigned the opposite opinion to write, so that if I reported to affirm as the junior judge, and two judges down the row reported to reverse, I would write the majority opinion, the first one to speak for reversal would write the dissent. Now sometimes that shifted, as the case progressed. But that's generally the pattern that was followed. If of course everyone agreed, then it would be only the majority opinion.

The role of the Chief Judge at that time, at least, the way I perceived my role, was to try to harmonize the views as best as possible, to try to bring about consensus. Because, it was my feeling that when the lawyers read a decision that's unanimous or almost unanimous, that it was given more gravitas. Not that it's any greater precedent, because even if it's a 4-3 decision, it's still [0:24:00] binding precedent. But there is a sense that it's more firm in its resolve, if you can attribute that to a decision.

NC: And as a private practitioner, I can tell you, that is the reaction to an opinion of the Court. The greater the majority, the more comfort you take that that not only

is the law today, but likely will be the law tomorrow. And it's easier to advise your clients.

SW: Now on the other hand, Judge Lippman¹⁷ has a different view which he has expressed, which is also valid. And you know, I'm not saying this critically, my view is different. But there is much to be said for his view, which is that, you should have strong dissents in many of these cases, to point the way, perhaps for a change in the law in the future, or to telegraph something to the legislature with respect to changing the legislation under review. So there are these two different views, but as I say, my view was to try to develop consensus.

And sometimes, to develop consensus, you would compromise. In other words, let's say you had two grounds on which to affirm. And someone was going to reverse on one of the grounds, so that that was going to be a dissent. Well, you say, 'All right, let's affirm on the one ground that we can all agree on. Then there would be no dissent, and at least we've decided the case. We'll wait for another day to resolve the other part of the question.' The other thing that I used to press very hard for, and I think somewhat successfully; I don't think there should ever be a dissent when it comes to the interpretation of legislation. If the legislation [0:26:00] is read by the majority of the Court to say, 'You can't cross this line,' then for three judges to say, 'I think you should be able to cross this line, even though the majority says you can't cross this line.' Well, what difference does it make what you think? You know, the fact is, the majority has read the statute in such a way. That's definitive, a dissent is meaningless.

¹⁷ Jonathan Lippman, Chief Judge of the New York State Court of Appeals, 2009

But there are areas of law, because we are, of course, a common-law state and country, where it's precedent that establishes the law. And so, if you feel that the precedent established is not a good precedent, then you express your view in a dissent, and hopefully, down the road, the majority will see it your way. We mentioned before the case of *People v. Heller*, and my concurring opinion. In time, it evolved that way, so that now it became a regional thing. It became so complex, that you don't have any obscenity decisions anymore, because who is to judge what the community standard is? And by the way, it's interesting -- because I now teach the First Amendment -- and it's remarkable to see how the obscenity cases which used to be so prevalent in our jurisprudence have now disappeared. I think one of the reasons for that, just as a footnote, is because now the Internet, which is not governed, and cable, can show obscenity with impunity. So people aren't as fussy about it as they used it to be.

NC: Replaced in part, today, in the First Amendment area, by cases that deal with the intersection between First Amendment [0:28:00] rights, and public speech. And I know that you had one of the leading decisions in New York, and eventually very influential at the United States Supreme Court, in that area, the *Chapadeau*¹⁸ case. Can you tell us a little bit about that?

SW: *Chapadeau v Utica Press*. We had all been familiar with the standards set by the United States Supreme Court with respect to public figures, and the fact that, if a public figure was the subject of libel or slander, that there was a high threshold. When you're a public figure, it would have to be proven, in order for you to be

¹⁸ *Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196 (1975).

successful, that the person who slandered you, or libeled you, did so with actual malice. Well, that's fine for a public figure, but what about the private figure? And the Supreme Court more or less said, 'Well, a private figure, that becomes a matter of tort law, that's a matter of state law.' And one of the first cases that came along, was a school teacher in Utica named Chapadeau, who was arrested for possession of marijuana, but the newspaper story talked about heroin. And he sued. It came to our Court, and we had to decide what the standard should be, and we formulated the standard of actual negligence. But it had to be shown that it was willful, or wanton, careless disregard for the reputation, in order for the plaintiff to be successful. And [0:30:00] that standard was adopted by most other states. So we were able to maintain our leadership in that role.

There were other cases too, where New York was able to be predominant in establishing rules of law. We were one of the first to get rid of Sunday blue laws. That was a decision which I wrote,¹⁹ and it struck all of us that it was bizarre, that you could buy a comic book at a newsstand on a Sunday, but you couldn't buy a bible in a book store. And it was all under the guise of the blue laws.

NC: For those of our listening audience that may have never heard of the Sunday blue laws, could you describe for them --

SW: Oh, I'm sorry, yes, yes.

NC: -- what the law provided back in the days before this case came to the Court?

SW: The law set a group of items which could be sold on a Sunday, the kind of stores which could be open on a Sunday, and those which had to be closed. In the

¹⁹ *People v Abrahams*, 40 NY2d 277 (1976).

decision, we referred to it as a gallimaufry. It was a patchwork, quilt, of exceptions that made absolutely no sense. Now a legislature can be arbitrary. In other words, they can say, 'You can drive on the right-hand side of the road, but not the left-hand side of the road.' 'You will file your taxes on April 15th.' That's arbitrary, you're picking a date, or a place, or a time. But it has to be rational, it can't be arbitrary and capricious. And that's what the [0:32:00] blue laws turned out to be, arbitrary, and capricious. Because you could buy a tire, but you couldn't buy windshield wipers, it was absurd. So we struck it down, and we said that, 'All but certain industrial areas could be open on Sunday.' There's another example, by the way. The first case that came along was *Acme Markets*,²⁰ and our Court split. I wrote a concurring opinion which was joined in by Judge Jones to strike down the blue laws as unconstitutional. And the majority said no. But a couple years later, when these exceptions kept springing up, our Court was unanimous in setting it aside.

NC: How much time had elapsed, Judge, between *Acme* and --

SW: I would say about three years.

NC: And, without revealing any of the confidences of the Court's deliberative process, the concept of stare decisis, I know, has always been a very significant and influential doctrine at the New York Court of Appeals. I can recall a case involving in rem jurisdiction, where a split Court upheld the jurisdiction. Then there was a change in the makeup of the Court, and another case came to the Court. And I believe it was Judge Breitel who wrote a 7-0 opinion in favor of the

²⁰ *People v Acme Mkts.*, 37 NY2d 326 (1975).

earlier decision, even though he had written the dissent -- in the earlier case. And spoke at great length of the importance of stare decisis. How long does a precedent endure?

SW: Usually, precedent, where you set forth the law, [0:34:00] not that it's an invariable rule of thumb, it's usually 20 years. In other words, 20 years later, they start looking at it again, in light of changed circumstances. I remember, not to digress, but I remember one of the first opinions that I wrote, a majority opinion, overruled a Cardozo Court decision.²¹ The Cardozo decision had to do with contributory negligence. The decision applied a rule from the days when there were horses and buggies. In those days they said the passenger can be contributorily negligent. The passenger could have grabbed the reins. The passenger could have pulled back the whip, there are many things the passenger could have done. When a case came to us involving the contributory negligence of an automobile passenger, I said, 'That law is no longer valid. There's no longer that consideration.' And I remember writing the words, 'Insofar as the case of -- ', naming the Cardozo decision, '-- held a contrary view, it is now overruled.' It is seldom that you read that in a decision, but sometimes you have to, to make the law clear. Now, going back to your question, when you merely, during that 20 year period, confirm prior precedent, then it's not as lasting as when you first declare the precedent. Because there will come a time when it will be overruled. Now the blue laws were in effect in this state for a hundred years. So you could say that the precedent overruling that really came after a hundred years, not after

²¹ *Gochee v Wagner*, 257 NY 344 (1931), overruled by *Kalechman v Drew Auto Rental*, 33 NY2d 397 (1973).

three years. Because the three year decision was just a weak [0:36:00] affirmance saying, 'Well, maybe this is not the time.' But then unanimously we held, 'This is the time. Enough already.' But there were so many along the line, that, you know, memory escapes me right now, but precedents that we established.

NC: And we're going to delve into them in a little bit more detail as we go along. But mention of the name Cardozo strikes a very familiar and warm chord in my heart, and in the hearts of many of those who know you well. You have another connection to Judge Cardozo, other than having overruled him.

SW: (laughter) I know. No, I, (laughter).

NC: Would you let the people of the state know a little bit more about that?

SW: Judge Cardozo of course was the leading light of our Court. He and I went on the bench just about the same time, at the same age, I should say. And we served as Associate Judges for just about the exact same period, and then we both became Chief Judge at just about the same period in our career, and we both served nine years as Chief Judge. And he went on to the United States Supreme Court, and I went somewhere else, which we'll discuss later on. But we did have parallels, at least for a few years. I would never, never claim any parallel with respect to his genius and his jurisprudential skills. But I recall when I was appointed by the governor, Governor Mario Cuomo, as the Chief Judge, he swore me in, and my mother was there with me. And we're walking [0:38:00] out, Mario said to my mother, 'How old are you?' And mother said, 'Can you keep a secret?' And the governor said, 'Yes.' And my mother said, 'Well, so can I.' Which was the first time I ever heard Mario Cuomo silenced. But from there, I went with my mother

to my new chambers. And in my chambers was Benjamin Cardozo's desk. I said to my mother, I said, 'Mom, that was Benjamin Cardozo's desk.' And she looked at it and she said, 'Yes, but remember, in 50 years from today, it will still be Benjamin Cardozo's desk.' Which was a unique talent my mother had, of keeping me grounded.

But, of course he was always the icon of our Court, and established a great high-water mark for the New York Court of Appeals, which was maintained, sometimes not as high, and sometimes, it varied, because it's a human institution, with human beings populating it. But it still has been a very strong common-law court, and it's respected as such throughout the nation. The other position, or the other job that a Chief Judge has, is the administrative role. This is enormously, enormously, trying, taxing, and time-consuming. And it's an entirely different role. Mario Cuomo always felt very strongly that it should be divorced, that you should have no [0:40:00] administrative responsibilities as Chief Judge, that that should all be in the Chief Administrative Judge, and that the Chief Judge should tend to his or her court work only. But that hasn't happened yet, and so you find yourself with enormous pulls, and stresses.

I can remember the first day I was Chief Judge, I received a call from Ed Koch,²² who was then mayor of New York City. And he said, 'Riker's Island is overflowing, we're going to have to bring barges in from the Falkland Islands to put the prisoners in, because we can't get the prisoners state-ready. (That is when they're sent upstate to the penitentiaries.) And Koch said that one of the reasons is

²² Edward I. Koch, Mayor of the City of New York, 1978-1989.

that Bob Morgenthau²³ refuses to have a lobster shift.’ That is, he refuses to have his DAs working around the clock. We, of course, had our judges working around the clock, to handle arraignments. And so, he asked if I would intercede with Morgenthau. Well, this was a honeymoon period. I’d just been made Chief Judge, so I called Bob Morgenthau, who was in a conference somewhere in North Carolina, and I said, ‘Bob, you’ve got to do this favor for me.’ And after going back and forth several times, he agreed to do it. I then called up Koch and I said, ‘OK, you’ve got your lobster shift. Now you have to do a favor for me.’ And he said, ‘Anything.’ I said, ‘You’ve got to stop going to the press and beating up on the judges.’

One of the big problems I had, Nick, when I came into office, was the very low morale amongst the judiciary. They had been berated publicly, they had been overworked, [0:42:00] they had been unfairly criticized. When a judicial system is overtaxed, there is a great deal of pressure to move things along. And when you move things along, you sometimes make mistakes. They’re not your mistakes, they’re the mistakes of a process, and the system. We had an incident very recently here in New York City where Mayor Bloomberg²⁴ criticized very unfairly a criminal court judge, because she let someone out on bail. It was shown that she actually had about three minutes per case, and there was certain information that was not imparted to her, which would have gravitated against her granting bail, but you know, no one wants the explanation. It’s such an easy target

²³ Robert M. Morgenthau, District Attorney of New York County, 1975-2009.

²⁴ Michael R. Bloomberg, Mayor of the City of New York, 2002 - ___.

for someone in political office to condemn a judge, or the judiciary in general. I remember, Senator D'Amato²⁵ at the time, saying, 'The New York State judiciary is rotten to the core.' And when I challenged that statement, he said, 'Let's debate it.' Well, you know, this is the absurdity of it, but a great populist thing to do is to beat up on judges. I had a lot of problems with Koch over the years, but the one thing I will say for him, is he respected that request, and from that moment on, stopped beating up on our judges, which was a tremendous gift.

Another problem was that we had courthouses that were falling apart. When the state took over the court system, and established the Unified Court System, and the Office of Court Administration, it was agreed that the municipalities would still remain responsible for the courthouses. In other words, the [0:44:00] state would pick up the salaries of judges, and court personnel, and so forth. But the courthouses, the infrastructure itself, was the responsibility of the municipalities. And the municipalities didn't live up to their obligation. So, I went with, my then Chief Administrator, who was Matt Crosson.²⁶ Matt and I toured the courthouses in the state, and they were a disgrace. I can remember in Suffolk County, they had an old courthouse in Riverhead, and they were trying cases in the basement. When they flushed the toilet upstairs, the noise in the basement was so loud that they had to suspend the trial until such time as the toilet stopped flushing. In Queens County, we had a Supreme Court Justice chambers in the attic, you had to walk up attic stairs, and it was the smallest room imaginable, and that was his

²⁵ Alfonse M. D'Amato, United States Senator (R-NY), 1981-1999.

²⁶ Matthew T. Crosson, Chief Administrator of the Courts, State of New York, 1989-1993.

chambers. The clerk's office was in a safe. They had a huge safe that was open, and they had furniture in the safe. And so, Matt Crosson devised court facilities legislation that was remarkable. We were able to lobby the legislature hard enough to get it through, and that was that every municipality had to submit a plan for either the renovation or building of court facilities. And if OCA approved that plan, the municipality had to act on it, and do what the plan called for. If they didn't, then the court system was entitled to cut off state aid to that municipality. Now getting that legislation through was remarkable, but without it, we couldn't have had the courthouses rebuilt, so when you go to visit [0:46:00] the courthouse in Suffolk County, or Queens County, or Bronx County, or all through the state of New York, you'll see new courthouses. This was our responsibility, because before that, it was not only justice denied, it was justice degraded.

And then we had budget problems, which every Chief Judge has. In my particular case, it became really acute, because they refused to give salary increases, even though we budgeted for it, which was an old malady. When I put my budget through, it was in the middle of the crack epidemic, where we had the courts running around the clock. We had to close down some of our civil parts to put more judges in the criminal parts, and so the civil calendars were becoming backlogged. When I put in my budget Mario Cuomo arbitrarily took 10% out of the budget. He increased the Department of Corrections budget by 10%. And I said to him, 'Mario, why are you giving more money to the Department of Corrections?' He said, 'Because they're being flooded with prisoners.' And I said, 'Well how do you think they got there? They didn't go there voluntarily, every

one of them came through the court system. So why don't you increase our complement as well?' Well, it wasn't a popular thing to do. And so, I sued him. It was a terrible, terrible thing that I did, and it affected me in more ways than I can begin to tell you. But I had to lay off 500 court employees, because we didn't have the money to pay them, and --

NC: Now I want to be clear here, Judge, when you say it's a 'terrible thing you did,' you mean it was terrible that you were forced to lay off the 500 employees?

SW: And terrible that I was forced to sue the governor. [0:48:00] That was a constitutional confrontation that should never have been. But it was a matter of desperation, and this was a very difficult time for me, and I suffer from a bipolar disorder, and this only exacerbated my condition, which eventually led to my doing bizarre things for which I am terribly ashamed, and which caused me to resign from the bench, and to go be sent to a mental health facility in the federal prison system. But, this is one of the precipitating factors, and I don't mean to be blaming anyone for this, I blame no one but myself, I'm just, you know, telling it as a matter of explanation, it was, you see, in our court system, the last ones hired are the first ones fired. So these were 500 court employees, court officers, who had bought homes, who were having children, and now I was telling them, 'You're fired'. And it was just, it was a terrible experience for me. And then having to bring this lawsuit against the governor, which was unfortunate, and the governor was a very combative fellow, and so he was holding a press conference every day, and I remember saying to him, 'I need more judges, and I have to pay them more money.' By the way, he's my benefactor, I don't mean to say anything

critical of him, but he was doing his job, and I was doing my job. He said, 'Why do you need more money?' [0:50:00] And then because he had a great sense of humor, he said, 'You know, judges don't even have to buy pants, you know, they wear robes.'

NC: (laughter)

SW: He would say, 'Then, what do they want, ermine robes?' And I said, 'No, they want a decent wage.' I said, 'I can't get the kind of people I want to become judges when they're paid what the State is paying them.' And he said, 'I have people lined up around the block for those jobs.' I said, 'Those are the people I don't want. I don't want those people, I want people that want to be able to support their families and still serve their state by giving their enormous talent to the judiciary.' Well as I say, that all ended up in a lawsuit, and then he sued me in the federal court. That case was dismissed, and then ultimately we settled our case and I got the money I needed to rehire these people, and to put the court system back on schedule. But that was a terrible, terrible time.

But there were other, you know, other challenges that come along. I remember the certification process. We were having a situation where our law was becoming federalized, because the federal courts were guessing what the New York courts would decide, in order to decide a case, because under the federal case law, the Supreme Court case of *Tompkins v. Erie Railroad*,²⁷ the federal courts had to apply New York law in most cases. And so we needed a certification process.

NC: What happened in those circumstances where New York law was unsettled?

²⁷ *Erie R. Co. v Tompkins*, 304 US 64 (1938).

SW: Exactly. And so the legislature passed a law which said that the Court of Appeals could answer those questions. Well that law [0:52:00] was meaningless, because our State Constitution prohibited it. So we had to amend our Constitution in order to allow for certification from the Second Circuit. That process has worked beautifully now, but it was very difficult to get that through. Because to amend our Constitution we had to have two passages, and then it had to go to a state-wide referendum.

NC: Maybe you can expand for us a little bit on the process itself. How you managed to eventually get the Constitution amended?

SW: Yes. A lot of these things are done through personal contact. First, you meet with the members of the judiciary committee of the state legislature. I had a wonderful relationship with Warren Anderson,²⁸ and later with Ralph Marino,²⁹ the two majority leaders of the Senate, and a great relationship with Stanley Fink,³⁰ and then with Saul Weprin,³¹ and then later on with Mel Miller,³² to work this thing through. And, if you were able to persuade them, then you were pretty well home, because this is not something the governor would normally have any interest in. And so, you meet with them, you talk to them, you persuade them, you have the bar associations act on it, and pass resolutions that are encouraging it, and so the

²⁸ Warren M. Anderson, New York State Senator, 1953-1988.

²⁹ Ralph J. Marino, New York State Senator, 1968-1995.

³⁰ Stanley Fink, Member of the New York State Assembly, 1969-1986.

³¹ Saul Weprin, Member of the New York State Assembly, 1971-1994.

³² Melvin H. Miller, Member of the New York State Assembly, 1971-1991.

legislators see that it's a good thing, that it doesn't cost anything, and so they say, 'let's do it.'

Other legislation that we had was somewhat more difficult. When we tried the consolidation of the courts, this is something that, we had a first passage, actually, for the consolidation of the courts. Because we have a court system in New York State that is absolutely unfathomable. [0:54:00] I spoke at the Chautauqua Institution. There were 5,000 people in the audience, and I was talking about the court system. I said, 'If anyone in this audience can name all of the courts in the State of New York, I will give you \$100,000.' And I didn't have a single volunteer. And it's a good thing.

NC: Because you didn't have the money on you? (laughter)

SW: Not only because of the money. But I didn't know whether they'd be right or wrong, because I couldn't name them myself. I mean, a recorder's court in Albany County. In Nassau County, you have the District Court, you have the County Court, you have the Surrogate's Court, you have the Supreme Court, you have the Appellate Term of the Supreme Court. Then you go to the Appellate Division. You cross over the county line into New York City, you have the Criminal Court. You don't have a County Court, you don't have a District Court. You have a Criminal Court. Then you have a Civil Court, which you don't have in any other county. And then you go over to Suffolk County, there's another group of courts. And then, of course, you have the police courts, where you don't even have to be a lawyer to serve as a village magistrate. So all of these courts, we wanted to somehow consolidate them, make some symmetry. Our Supreme

Court is not our supreme court, as you know, it's the highest court of original jurisdiction. But the supreme court is really the Court of Appeals, not to be confused with the Appellate Division, which is a division of the Supreme Court. And it shouldn't be confused with the Appellate Term, which is a term of the Supreme Court, but has appellate jurisdiction over some lower courts. It's a hodge-podge. And so, we proposed legislation, as I say, we got a first passage, and then it was killed. So, all legislation is not simple. One of the pieces of legislation we got through, [0:56:00] which is why I'm here now, I guess, is having the Court of Appeals judges appointed, as opposed to elected. I mentioned earlier that I ran for election. But today, and I teased the members of the Court, I spoke recently at the Albany Law School and all the members of the Court were there, and I said, 'We had to run for an election, over a six month period. All you people had to do was buy a 35 cent stamp and put it on an envelope on your application.' But that's the way it should be of course. The election of judges was not too bad when we had very responsible political leadership. I mean the elected system was responsible for Crane³³ and Cardozo and Lehman,³⁴ and Breitel, and Fuld.

NC: And Fuld.

SW: Yes, they all came through the elected system. But after the political party infrastructure in this state declined, and I say that without hesitation, the people

³³ Frederick E. Crane, Chief Judge of the New York State Court of Appeals, 1934-1939; Associate Judge, 1917-1933.

³⁴ Irving Lehman, Chief Judge of the New York State Court of Appeals, 1939-1945; Associate Judge, 1924-1938.

that are now being nominated were not the same kind of people that we had in the past. But I can remember when we had two vacancies in the Court of Appeals. We had two resignations, and it came time to appoint two judges, Malcolm Wilson³⁵ was the governor at the time. And, I was very anxious to have an African-American on the Court of Appeals, we never had one. To think of that in a state of this sort, also we never had a woman. We never had an African-American. So I went to Malcolm Wilson, and I said, 'Malcolm, you have an opportunity to appoint an African-American judge.' And he said, 'Who would you recommend?' I said, 'I would recommend Harold Stevens.'³⁶ [0:58:00] Harold Stevens is the PJ of the 1st Department. He had a wonderful history. Came from a dirt shack in South Carolina, worked his way up, and now he's the PJ of the 1st Department.' He said, 'Would he take it?' I said, 'I don't know, but I'll ask him, if you'll appoint him.' He said, 'I'll appoint him if he'll take it.' So I went to see Harold, went up to his apartment, and his wife Ella was there, and I said, 'Think about this, Harold, you'll be the first black judge to sit on the New York Court of Appeals.' He said, 'No, no, I'll be the first Negro judge on the Court of Appeals.' He said, 'I fought all my life in the South not to be called 'black.' He said, 'I'm a Negro.' I said, 'OK, let me rephrase that. You'll be the first Negro judge of the Court of Appeals.' And he took the appointment. And, I'm very proud of that, because it really broke the ice.

³⁵ Malcolm Wilson, Governor of the State of New York, 1973-1974.

³⁶ Harold A. Stevens, Associate Judge of the New York State Court of Appeals, 1974.

NC: And I know, Judge, that diversity in the court system is an issue that has always been near and dear to your heart.

SW: Very, very important. You know, we didn't have any diversity on the Court as far as color, or gender was concerned. Now that's been changed. And I was delighted when I was appointed Chief Judge, that Fritz Alexander³⁷ was appointed with me as an Associate Judge. Harold Stevens lost the election, and that was very sad. We delivered the Republican nomination for him, the Democratic nomination, the Liberal party nomination, and the Conservative party nomination. So how did he lose? He lost because Jack Fuchsberg³⁸ ran a primary against him on the Democratic side, and beat him, and then went on to become an elected member of the Court. That was the great spur [1:00:00] for the appointed judiciary, because when we saw Harold Stevens being beaten -- with all due respect to Jack Fuchsberg -- by someone who had no judicial experience, whose only claim to fame was the Baby Lenore case,³⁹ where he told the mother of a baby to move out of the jurisdiction so that New York courts couldn't have jurisdiction over the suit, and that became his theme.

The first black to be appointed for a full term then, was Fritz Alexander. I remember when Fritz and I were appointed and I was speaking at some gathering, I had known Fritz for many years, we went to the judicial college in Nevada

³⁷ Fritz W. Alexander II, Associate Judge of the New York State Court of Appeals, 1985-1992.

³⁸ Jacob D. Fuchsberg, Associate Judge of the New York State Court of Appeals, 1974-1983.

³⁹ *People ex rel. Scarpetta v Spence-Chapin Adoption Serv.*, 28 NY2d 185 (1971).

together. I remember saying to him, 'You know, one of the unfortunate parts about being appointed to high office is that you have to reveal your financial assets.' I said, now, the good Lord has been very kind to me, and I had a nice, solid, financial statement. But Fritz showed a net worth of \$13,000. Which told me a lot. Number one, it told me that you don't go into public office unless you're willing to have your financial background bared. And number two, it taught me to never, under any circumstances, take financial advice from Fritz Alexander.

NC: (laughter)

SW: But Fritz was a delightful colleague, I'll tell you a wonderful story about Fritz Alexander. He came to me one day and he told me he would like to be married. He was widowed. He said: 'I'd like to be married. I'd like to be married in the Court of Appeals Hall, and I'd like you to perform the ceremony.' I said, 'Fritz, I can't do that.' I said, 'We've never had a wedding in the Court of Appeals Hall,' I said, 'That would be [1:02:00] a very dangerous precedent.' He said, 'Well no, let's think about the precedent. Let's say that any African-American who wants to get married, who's an Associate Judge of the court, for him --', I said, 'OK, on that narrow ground --' (laughter)

NC: On those narrow grounds, we can affirm. (laughter)

SW: Yes, and so I performed the wedding ceremony, a very happy day for Fritz, who unfortunately died after he left the Court.

NC: But Judge, if I can return you to the Franklin Williams Judicial Commission on Minorities, which you created. Could you explain your motivation in getting involved, what you hoped to accomplish, and perhaps equally important, because

I know you've spoken on this subject very recently, where do you think it stands now?

SW: Well, first of all, as I said, diversity is so important. I can remember when we would have cases and Harold Stevens first came on the Court, he gave us a perspective that the Court didn't have before. When we had a case involving a bodega in the inner city, the dynamics of the community, he knew it. We read about it, but we didn't understand it well enough. So this adds a dimension. But the entire court system was lacking in the kind of affirmative action that was necessary to get more people of color involved in the system. So I decided that there should be a commission formed. Now, by the way, just a slight diversion. My predecessor, Larry Cooke, had started the [1:04:00] Gender Bias Commission, to get more women in the court system. And, unfortunately, because of the budget constraints, it had become dormant. I was able to resurrect it when I first became Chief Judge, and we were able to have the final report presented in the Court of Appeals, and Judge Judith Kaye,⁴⁰ who was then a member of the Court, handled the festivities of the day, and it was a very exciting time. On our Law Day ceremony, we called it, 'The Lady in the Harbor and the Lady in New York,' and it was a tribute to the first woman lawyer in New York State. But going back to diversity, there was the 'felt conclusion,' to use Oliver Wendell Holmes'⁴¹ expression, that we needed to have more minorities in the court system.

⁴⁰ Judith S. Kaye, Chief Judge of the New York State Court of Appeals, 1993-2008; Associate Judge, 1983-1993.

⁴¹ Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States, 1902-1932.

And my experience with Harold Stevens brought me to that conclusion. Because when Harold lost the election, we still had -- we had an all-white bench again. Until Fritz was appointed. So, I called up Vernon Jordan.⁴² And I told him that, 'I would like to form a commission for minority concerns, but I want it to be headed by an independent, strong-minded, intelligent black person, and you're the person I would like.' He told me he didn't have the time, but he said, 'I'll [1:06:00] recommend someone to you. Franklin Williams.'⁴³ Franklin Williams had just finished his stint as Ambassador to Ghana. He was on Thurgood Marshall's⁴⁴ team during *Brown v Board of Education*.⁴⁵ He had wonderful credentials, and at that time, he was Executive Director of the Phelps Stokes Foundation.

So I went to him. He was a beautiful man, with whom I developed a very close relationship over the years. He looked at me and said, 'If you're looking for someone who's going to tell you how great a job you're doing, or how good the court system is, or someone who's going to give you a Band-Aid, I don't want to talk to you. If you're willing to take the bruises if they're necessary, and the criticism, and even the condemnation, then I'll take it under two circumstances. Number one,' he said, 'I don't want the courts to fund me. I want to raise my own money for this study. And number two, I want to appoint my own personnel. I

⁴² Vernon E. Jordan, Jr., President, National Urban League, 1971-1981.

⁴³ Franklin H. Williams, Chair, New York State Judicial Commission on Minorities, 1988-1990.

⁴⁴ Thurgood Marshall, Associate Justice of the Supreme Court of the United States, 1967-1991.

⁴⁵ *Brown v Board of Education*, 347 US 483 (1954).

don't want anyone from the courts.' And I said, 'You've got it.' I said, 'Where are you going to get the money from?' He said, 'What are you doing next Friday?' I said, 'I'm free.' He said, 'Come with me.' We went to the Rockefeller Foundation, the Ford Foundation, and one other that I can't quite recall, and he raised a million and a quarter in one day. Which was stunning. And he said, 'You know why I was able to do that?' He said, 'Because you came with me.' Well. (laughter) If I tried to do that, I couldn't have gotten 50 cents.

But, [1:08:00] he hired Ms. Handy,⁴⁶ and he hired a staff. And he did a wonderful, wonderful job. As he was developing this, he and I traveled around the country to different states -- because I was very active in the Conference of Chief Justices, and had them start Minority Commissions -- we were the first in the country, and we ended up, by the time Frank died, with 20 of them throughout the country. We were very proud of that.

We were in Nevada together, I remember, and he started to cough. I asked him what was wrong and he said, 'I don't know, I have to go to the doctor, I've developed this awful cough.' After a couple of weeks he said he wanted to have lunch with me, so the two of us sat down, and he said, 'You know, I thought I might have pneumonia, it was so bad.' So I said, 'Well, apparently, thank God, it's not.' He said, 'No, it's cancer. I have lung cancer, and I've only got a couple months to live. I could live longer if I took treatments. But I don't want to, I just want to go.' And he never took any treatments, and he died shortly thereafter.

And it was one of the really sad days of my life. I remember, one time, we were

⁴⁶ Edna Wells Handy, Executive Director, New York State Judicial Commission on Minorities.

celebrating the 150th anniversary of the Emancipation Proclamation. And, we were going to have festivities in the Court of Appeals Hall. I had found out that the Emancipation Proclamation was in Albany, in our state archives. It seems that it was brought up from Washington after the Civil War and and Seward⁴⁷ raffled [1:10:00] it off in order to raise money for the Union soldiers who were hospitalized up in the Northern region. Some gentleman from Schenectady bought all the raffle tickets, after he won he donated it to the State of New York. So it was in the state archives. We had four state troopers go in there and take out the Emancipation Proclamation, with all the interlineations and the strikeovers in Lincoln's hand, and bring it into the Court of Appeals Rotunda. And we had a ceremony. When I spoke at the 25th anniversary of the Franklin Williams Commission for Minority Concerns, and there was a picture of me and Frank Williams, standing in front of the Emancipation Proclamation. The caption just indicated that it was me and Frank Williams in the Court of Appeals Hall. And I said to those assembled, 'Do you know what that was we were standing in front of?' They didn't know. This is what happens when history can be somehow blurred and lost.

NC: And I think our colleagues at the Historical Society would use that to buttress the reason why these --

SW: Exactly.

NC: -- oral histories are so important.

⁴⁷ William H. Seward, United States Secretary of State, 1861-1869.

SW: Absolutely, absolutely, because things have a tendency to disappear sometimes.
But --

NC: What did you consider the greatest accomplishments, within the New York judicial system, of your efforts on behalf of minorities, and subsequent to your leaving the Court, was that momentum maintained?

SW: Now, I don't know the answer to the question, whether the momentum was maintained. I know that we did an awful lot of good. We were able to have a lot of African-American judges on our bench. I was very disappointed with some of Governor Pataki's⁴⁸ appointments to the Appellate Division, [1:12:00] or lower courts. In New York City. He was bringing judges from upstate New York, who were white Republicans, and putting them into our inner city courts, and I thought that was a mistake. But I think by and large, there's still been an awareness and a consciousness, the Franklin Williams Commission is still going strong. The Commission members are, of course they're rotated. But, I think that the spirit has been maintained, and all to the benefit of the court system, of course. One of the great moves with respect to diversity, was the appointment of Judith Kaye as an Associate Judge. The first problem we had was that we only had one restroom in the robing room. Who would ever think that a woman would be on the Court? And so, I was the one who came up with the solution for that problem. I said, 'Let's put a lock on the door.' Which we did. (laughter) But Judith was, beside being a delightful and wonderful member of the Court, and colleague, she was also an extremely bright woman and excellent lawyer. I remember, Mario

⁴⁸ George E. Pataki, Governor of the State of New York, 1995-2006.

Cuomo, when he was elected governor said, 'I'm going to appoint a woman to the Court.' And we were all very encouraged by that. And Judith had applied, and Mario called me up and called up Joe Bellacosa⁴⁹ who was then [1:14:00] the Clerk of the Court, and he asked both me and Joe, our opinion of Judith, and one other person, and we were both very high on Judith. We had met her because she had been appointed to the Clients Fund, and so we knew about her, we knew of her, we knew her background, and we had met her in formal circumstances, and again, a very impressive woman. And she was named to the Court.

When she first came on the Court, we were tied in a case. We only had six judges then, because the vacancy hadn't been filled. And were tied on a case, and it was 3-3, and we just couldn't break the tie. So we decided we'd wait until Judith came on the Court. And she came on the Court, and we held a second oral argument, and then we went into the room where the decision was being made, and Judith gave her thinking on why she was voting a certain way, and we all agreed with her. She didn't understand that. She said, 'Why is my vote so compelling, am I that good? Am I that persuasive?' (laughter) The reason was, that as I said before, we tried to reach consensus, and this case, a dissent wouldn't have meant anything. And so the fact that she voted that way, brought the whole Court that way. Of course we told her that she was so persuasive that we couldn't resist her logic. But she was a delightful colleague, and participated in a wonderful way in Court, in its deliberations and its leadership.

⁴⁹ Joseph W. Bellacosa, Associate Judge of the New York State Court of Appeals, 1987-2000.

I could remember, during my final [1:16:00] months, when I felt myself coming apart, I said to her, ‘How would you like to be the next Chief Judge?’ And she said, ‘We already have a good Chief Judge.’ And I said, ‘Well, as soon as the budget reaches a billion dollars, I’m going to get out.’ As it turns out, the budget did reach a billion dollars, but that’s not the reason why I got out.

There’s one story I want to tell you about Judith just to show you what a wonderful sense of humor she had. We had a case called *Arcara v Cloud Books*,⁵⁰ and it involved a pornographic film called, ‘Debbie Does Dallas.’ We didn’t see the film, but there was a description in the appendix of the brief. And one of my law clerks, whom you know, Nick, very well, Mike Trainor, Mike Trainor came in and he said, ‘Judge, this isn’t Debbie Does Dallas, I read this.’ He said, ‘This is Debbie Does Dallas 2.’ So, I let it pass. And that night at dinner, we all had dinner together. It was a very strong comradeship, I don’t know how long that lasted, or whether it still survives, but this was a very important thing to our Court. I could remember, during the last oral argument of the day, we used to pass slips around as to what restaurant we wanted to go to. We were originally members of the University Club.

NC: Fort Orange Club?

SW: No, the University Club. We discovered much too late, that [1:18:00] the University Club did not accept women. And so, we all resigned, and it became a question every evening as to where we would eat. We would always start the dinner with a glass of wine, and we would always toast the Court. That was our

⁵⁰ *People ex rel. Arcara v Cloud Books*, 68 NY2d 553 (1986).

way of coming together after sometimes a very fracturing and fractious kind of confrontation during conference. At any rate, that evening at dinner, we were discussing the case, and I mentioned Michael Trainor's revelation that this was really 'Debbie Does Dallas 2.' That evening, we went back to working in our chambers, as we did every evening. And while I was standing there with my clerks, with Michael Trainor, Judith Kaye walked in and said, 'Sol, I just read that appendix again. That wasn't 'Debbie Does Dallas,' that was 'Debbie Does Dallas 2.' And Michael Trainor said, 'See, I told you, judge, I told you!'

NC: (laughter)

SW: But, you know, Judith had that kind of sense of humor, and that kind of ability to participate and to add a dimension to the Court.

NC: Judge, you cause me to digress. I'm fond of a story that you've told many times in many places, so perhaps we should preserve it here, about the occasion when you as a young lawyer went up to Albany, and had dinner, and I believe that was the Fort Orange Club, but I could be wrong again.

SW: That was the Fort Orange Club. Yes, that was the Fort Orange Club, and I used to go up there as a young lawyer, and I'd see the seven judges of the Court of Appeals sitting there, and I would say, 'What in the world are these giants, what in the world are they talking [1:20:00] about?' And then I would tell the story that some years later, I'd be sitting with my six other colleagues and I would still find myself wondering, 'What in the world are they talking about?' (laughter) Because in those days, well, I'll tell you, Jack Fuchsberg had run against Charlie Breitel for the Chief Judgeship, and he lost that election. He won the next year, but they

didn't talk. There was a great bitterness between them. And that kind of separated the Court. Some days Jack would come to dinner, and some would eat here, and some would eat there. And so, one of things that I was able to do was to make dinner a very important part of our ritual. And I say, we went to dinner every night together, and it was a wonderful experience, a good experience, which cemented over some of the differences. Because I'll tell you, in conference, there was a lot of passion. This is not a procedure which was surgical in its nature. There were sessions where we had arguments, and very strong ones at that. I can remember one case, which involved the assessment rolls of the state of New York. It was *Hellerstein v The Town of Islip*.⁵¹ The argument was, that in the Town of Islip, which is a good part of Suffolk County, they had what they called a 'Welcome Stranger' tax. Fire Island was part of the town of Islip. Professor Hellerstein argued [1:22:00] that his house was assessed at a certain value, but that if you had been a year-long resident, your house was assessed at a far lesser value. He said this was terribly wrong, because the New York statute said, 'All real properties shall be assessed at the full value thereof.' So, during the oral argument, I asked the lawyer for the town of Islip, 'How do you account for this?' He said, 'Well actually we have fractional valuations.' I said, 'Well, when the statute says full value, doesn't that mean full value and not a fraction of the value?' And he said, 'No, because —' of this, and because of usage, and so on and so forth. So we went into conference, and I drew the case. I reported to reverse, to set aside the assessment roll, because the statute was being violated. And Charlie

⁵¹ *Matter of Hellerstein v Assessor of Town of Islip*, 37 NY2d 1 (1975).

Breitel was very, very upset with me. He said, ‘You don’t understand something, what you’re doing is upsetting all of the assessment rolls in every village, town, city, county in New York State. You’re going to have chaos.’ So I said, ‘Now Charlie, you’re the first one who taught me that there are ways of doing things, of working things out over time to avoid chaos,’ which is what we did, when we declared the moratorium on city bonds that saved the City of New York, which is another story altogether. The Flushing National Bank case,⁵² which Charlie wrote, and Charlie said, you know, ‘We’ll phase this in, and we’ll work this out, and there won’t be chaos.’ I said, ‘Well, why can’t we do that here?’ And he said, ‘Oh, you don’t understand, this will create --’; at any rate, the Court was badly split, and Charlie was a master at trying to move the Court. I used to accuse him of rope-a-dope, where he would sit there and let us all flail around, and then he would come in with his very strong and focused arguments. [1:24:00] But, in the case we didn’t fold -- and then finally he said to me, ‘Do you know something?’ And this was getting quite heated. He said, ‘If you ever decide to leave the Court and run for public office, you’ll never be elected, because you’ll always be remembered as the person who destroyed the tax base of the State of New York.’ That’s how strong these things became. But we did reverse, we gave the legislature six months to remedy the assessment method if they wanted to. They then extended it and extended it, and after three years, finally revised the law. But I think we did the right thing, and the legislature did the right thing. But the point I was making was that this argument, I can remember it lasted for a couple of

⁵² *Flushing Natl. Bank v Municipal Assistance Corp. for City of N.Y.*, 40 NY2d 731 (1976).

months, and if, in the evening, we didn't get together after some of these arguments and talk and try to resolve our differences, then we would have been in serious trouble. I don't know what they do today, I do hope that they maintain that tradition.

But when, Judith Kaye came on the Court, she took her degree of teasing. She never drove a car; she doesn't have a driver's license. And so, that was always a subject where we made fun of her, because whenever we had a case that involved a motor vehicle, we would say, 'What do you know?' (laughter)

NC: (laughter)

SW: And she went to become a great Chief Judge in her jurisprudence and her management of the Court, and certainly in doing something which I thought was very, very vital. I had started the special courts. I started the commercial court, and I started the community court in Times Square. But she made an art form of the special treatment courts that she established, the drug courts, [1:26:00] the domestic violence courts, and I worked with her on starting the veteran's courts, and also on the mental health court. I remember I went to her, to think about starting a mental health court. She said, 'Well, should we establish it as part of the family court?' I said, 'I think, perhaps as part of the drug court.' Well we brought in Judith's head of special courts, Jonathan Feinblatt⁵³ and he said, 'It should be a free-standing court.' And so Judge Kaye started the first mental health court in Brooklyn. And now, later on I discussed with her the idea of the veteran's courts, we now have 14 of them in the state of New York. So, she started that, and it took

⁵³ John Feinblatt, Director, Center for Court Innovation, 1996-2002.

a great deal of imagination and perseverance, and it resulted in very solid accomplishment. She deserves all of the credit.

NC: Judge, just rounding out the picture of the administrative aspects of your position as the Chief Judge, certainly two accomplishments that are always spoken about with respect to your tenure, are the change in the jurisdiction of the Court of Appeals, how one gets a case there, and at the trial court level, the change to an individual judge assignment system. Could you give us a little bit of background on how that came about and why you thought it was necessary?

SW: Yes, let me take that in inverse order. First of all, when I was a trial judge, I was astonished by the fact that a single case would come before a dozen different judges. A motion would be made for some kind of relief, the judge would decide it. And then, the case would be brought before another judge, for some [1:28:00] other relief, and time was passing, and our calendars were five and six years behind time. There was a lot of judge shopping, and moving cases around for no good reason. And the idea occurred to me that once a case is assigned to a judge, all the motions should be brought before that judge. The lawyer shouldn't have to replead the case and explain the case and argue the case in the context of that particular motion. When the case is assigned to a judge, that judge should keep that case right through to the trial of the case. That would eliminate an enormous burden, a lawyer would be embarrassed to bring a duplicity of motions before the same judge. And so one of the first things I did was to establish an individual assignment system, with variations in different counties depending upon how it was to be done.

Now this was a tremendous undertaking, because it was changing the calendar practice of all the courts in the state. And Joe Bellacosa was enormously helpful. He was my first Chief Administrative Judge, and Joe went to courthouses all over the state. He and Bob Sise,⁵⁴ did a tremendous job in educating the courts, in educating the judges, in educating the bar. Some members of the bar were very resistant, but nevertheless it was put into place, and it's still in place. And it helped us take two to three years off the delay time in the civil courts, so that, I think was a tremendous accomplishment, and very difficult. And again, there are still some people who have trouble with it. It has been modified in various counties. In some counties, the case is assigned to a particular judge, [1:30:00] who will handle all the motions, but then he will transfer it off to another judge for the trial, and that's OK, so long as we don't have a dozen judges involved in each case.

The other matter was the certiorari matter. When I first came on the Court, we had an enormous caseload. If there was a dissent in the Appellate Division, the case would automatically come to the Court of Appeals. If there was a reversal in the Appellate Division of a Supreme Court nisi prius decision, it would automatically come to the Court of Appeals. The cases were coming into the Court of Appeals in enormous volume. We used to work five full days a week, two weeks out the month, so it was 10 days in Albany of solid work. Sometimes 9, 10, 12 cases a day. And it was just too much, the burden was extraordinary. We didn't even have a central staff when I first came on the Court. Hugh Jones and I

⁵⁴ Robert J. Sise, Chief Administrative Judge of the New York Courts, 1983-1985.

convinced them to have a central staff of three people, now I think they have a dozen members of central staff. We were struggling with these caseloads, and it was just beyond measure. And so, we thought we should be a certiorari court. In other words, we should be able to pick our cases, we shouldn't have them coming up automatically.

The ultimate convincing element was a judge in the Appellate Division, 1st Department. He used to write one-judge dissents in the Appellate Division. Sometimes not making judicial sense, but it meant that the whole case came up to our Court. For example, there was a case involving the establishment of a domicile, as opposed to a residence. [1:32:00] And the whole Appellate Division was in agreement, but this judge wrote a dissenting opinion in which he said, 'Jesus was born in Bethlehem, but all his life he was called a Nazarean.' Well, he was trying to prove that it doesn't matter where you're born, your residence can be somewhere else. That brought the case up. Election cases, one year the PJ of the 1st Department, resented the fact, I think, at least he told me this, that we used to sit up there and hand-pick election cases when they sought leave to appeal. So he granted leave on every single election case in the 1st Department to go up to the Court of Appeals just to show how hard his Court worked. So we decided, we can't allow our calendar to be controlled this way. And so we urged the enactment of Chapter 300.⁵⁵ Now that took very heavy lobbying, with Stanley Fink and Warren Anderson, because lawyers didn't like that. Lawyers wanted the key to our courthouse, and they were going to be limiting appeals. That was a real

⁵⁵ L 1985, ch 300.

struggle. But finally, again with the help of Joe Bellacosa we got passage of that.

There were other pieces of legislation which we also got through the legislature at the same time, but that was key. Without that legislation, the Court of Appeals could not have continued to function at a high level.

NC: On the administrative side of your role, Judge Wachtler, any other subjects that we've left out here today that you feel we should touch upon?

SW: Oh, you know, when we leave here, Nick, I'll think of a million [1:34:00] things. I can't think of them right offhand. I can tell you about the community court, which I thought was a real milestone, and became a national model, and which was the forerunner of the special courts. We know that a lot of quality-of-life crimes have fallen between the cracks, that the turnstile jumpers, the graffiti artists, these people would be given a summons, and they would throw it away, and nothing would happen. So we had the idea that -- this was before Giuliani⁵⁶ -- that the best way to clean up the Times Square area is to punish the people who do things which disturb the quality of life in this area. We decided that we were going to start a community court. And we scouted around and we found that there was an old magistrate's court in the middle of the Theater District that was being used to store theater props. It belonged to the city. So we told the woman who was doing the storing that her lease was up. We made that into the community court. Fritz Alexander had left our Court by that time, and was now working with Mayor Dinkins⁵⁷ as the Deputy Mayor for Criminal Justice. I said to him, 'Will

⁵⁶ Rudolph W. Giuliani, Mayor of the City of New York, 1994-2001.

⁵⁷ David N. Dinkins, Mayor of the City of New York, 1990-1993.

this downward spiral never cease? You leave our court to become a Deputy Mayor?’ I said, ‘Next, you’ll be a crossing guard.’

NC: (laughter)

SW: Fritz was very helpful, and Mayor Dinkins was very helpful, and they allowed us to establish our community court, and we assigned a judge to it, and then we asked Bob Morgenthau to give us an assistant DA, and he said no. He said, ‘I don’t believe in [1:36:00] special courts, and you’re not going to get a DA.’ By the way, to this day, New York City does not have special courts because of Bob Morgenthau’s influence. Fortunately, District Attorney Vance,⁵⁸ with whom I met a few months ago, has been very receptive, and he started a mental health court, and he will be moving into the right orbit. But Bob Morgenthau did not want special courts. So, I said, ‘OK Bob, then I’ll have the Governor appoint a special prosecutor.’ He said, ‘In my county?’ I said, ‘We have a court. We need a prosecutor in that court. If you won’t provide one, the governor will.’ So he said, ‘OK, I’ll give you a DA.’ Now we have two such courts in the city. And, as I said, it’s become a national model, that particular community court, does a wonderful job. And the sentences meted out are sentences to clean up the community. So if you go into a bus terminal, you’ll see a lot of people that are working off their sentences. Cleaning up the graffiti, that they’re responsible for.

NC: I suppose we can’t wrap up on the administrative end, without some reference to a ham sandwich.

⁵⁸ Cyrus R. Vance, Jr., District Attorney of New York County, 2010 - ___.

SW: (laughter) Oh, when I was first made Chief Judge, I was being interviewed by the New York Daily News. At that time, I was on a crusade, which was an unsuccessful crusade, to do away with the grand jury in New York State. Some 30 other states have done away with their grand jury. The grand jury was originally formed as a protection for an accused, because the theory was that you took people from the community and the crown with all its resources would be after a certain individual, to prosecute that individual. And the individual [1:38:00] had really no defense. So with Magna Carta, they said, 'We'll have a group of citizens from that community, and let them say whether this is the kind of person that would have done such a thing. We know him, he's the local miller. Is he the kind of person who would do it? Is there a probable cause to believe he did do it based on the crown's evidence or not?' And quite often they would say, 'No, you don't have sufficient evidence to try this man,' and they let him go. Well that was the original purpose of the grand jury. Now, it's been so contorted, that today the grand jury room is right next door to the DA's office, in the same building. And the only person who comes before the grand jury is an assistant DA. And the 36 people sit there, and the DA tells them all the evidence against the accused, and then the DA says, 'I think we should indict.' And they indict. So I believed that you should have an indictment simply postured by the district attorney, based on affidavits, and then, if necessary, have a preliminary hearing, which is what all the other states do. When I was asked the question why I felt that way, and I just gave the explanation I gave, I said, 'Any prosecutor who wanted to could indict a ham sandwich.' And that was picked by my classmate, Tom Wolfe, in Bonfire of

the Vanities, and it became something that I regretted, because I thought that that would be the only thing I'd be remembered for. But now, given my bad deeds during that bad time, I would be satisfied if that were the only thing that I was remembered for.

NC: Well, before we talk about your [1:40:00] leaving the Court, and your post-Court career, let's go back for a moment to the adjudicative aspect of your job. Reports, you sat on something close to 11,000 cases, wrote nearly 400 majority opinions. We've spoken about a couple here. Another one of the cases that is often cited in connection with your notable decisions, is the case involving the question of whether a husband could be charged and convicted of the rape of his wife.

SW: We had a statute in New York State that said that a husband could not be convicted of raping his wife. There was this case up in Buffalo, *People v Liberta*⁵⁹ was the name of the case, where a couple were separated, and the father had visitation and brought the son of the marriage to a motel room. When the wife came to pick up the son, the husband beat her mercilessly and raped her in the presence of their son. The district attorney indicted him for rape, and convicted him, and the conviction was set aside because the statute said he couldn't be convicted of the crime of rape. The case came up to our Court and we unanimously reversed, and declared the statute unconstitutional. That also became an important case, because many, many states had such a law, which is unthinkable today, but in the time it was written, a wife was a chattel. And sometimes, laws [1:42:00] endure that should not.

⁵⁹ *People v Liberta*, 64 NY2d 152 (1984).

There's another series of cases that I found very interesting. When I was Chief Judge, I spoke at the Chautauqua Institution. I was debating Ed Meese,⁶⁰ who was then the attorney general, and the subject of the debate was 'judicial activism,' and his theory, and position was, that judges should not make law, that judges should merely interpret the law already made. I asked him the question, 'Assume you're a judge in a case, and someone comes in that says that there's a patient on life support, and they want to withdraw the life support system,' and the district attorney says, 'Well if you do, then I'm going to hold you guilty of manslaughter.' And the judge is faced with that decision. Do you then refer it to the legislature to pass a law with respect to what to do assuming there is a legislature in session -- and his answer was, 'Yes, the judge should decline jurisdiction.' Well, the stupidity of the answer, if you'll forgive me, has been reflected by a lot of people since. Many people in public office say, 'Judges shouldn't make law.' Well judges don't walk up and down hospital corridors looking for business. The fact is that there are some cases which require immediate decision, and the right-to-die cases were those cases. The first case was just the case that I outlined to Ed Meese, it involved a Franciscan brother who was on life support, he was in a vegetative state. And the Court found that inasmuch as he had, during his lifetime, expressed a desire not to be maintained artificially, we said that the life support system could be withdrawn, [1:44:00] that was the *Matter of Eichner*,⁶¹ and the Brother Fox case. I wrote that decision

⁶⁰ Edwin Meese, III, Attorney General of the United States, 1985-1988.

⁶¹ *Matter of Eichner v Dillon*, 52 NY2d 363 (1981).

along with the companion case, *Matter of Storar*,⁶² which was a man who was 35 years old, but had the mentality of a five year old. He had bladder cancer, and his mother did not wish him to have blood transfusions. Without the blood transfusions, he would die. With a blood transfusion, he could live for another couple of months, and be a mischievous young man, even though he was in an older man's body. We decided that she could not remove that life support system, because it was not an extraordinary procedure to give him a transfusion, and we opted for life. These were all very significant decisions, because they were the first that were decided. And our Court was able write a lot of law, in the *Fosmire* case,⁶³ in the Westchester hospital case,⁶⁴ in several cases, which really set a pattern. And we established a rule of law with respect to the amount of proof required as to prior wishes with respect to life support, and that was clear and convincing evidence. That test was adopted by the United States Supreme Court, and credit was given to our Court for having formulated that test. So, this was a very important area that we went into. And there are other, so many, Nick, over all that time. But, I was very pleased and proud and honored to have had the opportunity to write these opinions.

NC: Judge, we've alluded to the end of your tenure on the bench. You've alluded to your own mental condition. In what I truly believe is the most dramatic demonstration [1:46:00] of turning tragedy into triumph, you have, for so many

⁶² *Matter of Storar*, 52 NY2d 363 (1981).

⁶³ *Matter of Fosmire v Nicoleau*, 75 NY2d 218 (1990).

⁶⁴ *Matter of Westchester County Med. Ctr. (O'Connor)*, 72 NY2d 517 (1988).

years since those events, led remarkable efforts with respect to the advancement of society's knowledge and treatment of mental illness. Would you take us through those efforts on your behalf?

SW: Yes, Nick. First of all, thank you for that observation. There's a series on television now called 'Homeland,' and I was interested to see it, as it was reported as the President's favorite series. There was a depiction of a woman, the heroine of the story, who suffered from bipolar disorder. And in the last episode, they showed her break down, and I couldn't watch it, because I could identify with it. It's a time when your judgment is terribly skewed, you do things that are very difficult to understand after you review them, in retrospect. But mental illness is not considered as a normal illness. It's somehow stigmatized, so that it's kept in the closet. When I first had my complete breakdown, and I was in a psychiatric ward, the psychiatrist asked my wife if there was any family history. And she said, 'Not that I know of,' and I certainly knew of none. He said, 'Ask your mother-in-law.' So she went to my mother, and said, 'Was there any history of mental illness?' And my mother said, 'It's not my fault.' My wife said, 'What's not your fault?' She said, 'The suicides.' It seems that [1:48:00] my grandfather and grandmother had committed suicide, my grandmother in a very dramatic way by cutting her own throat with a kitchen knife. Now all my life, I had been told that my grandmother died of a broken heart, and here I was as a 60-year-old man thinking that a broken heart was some kind of physical ailment. It was profound depression, and now one of my grandchildren has shown signs of this. But fortunately, because we're aware of it, he's received treatment, and he's going to

be fine. I was not aware of it. I resisted treatment, my wife as a social worker pleaded with me to go to a psychiatrist when she saw me coming apart, and I told her, 'I might be running for governor one day. How can I possibly go to a psychiatrist? The stigma would be unbearable.' So I didn't, which is my own narcissism and my own terrible negligence, and fault, and as a result of that, I hurt a lot of very innocent people.

So my mission now has been to speak, and I speak before groups on a regular basis, associated with the National Alliance for the Mentally Ill, talking about the stigma of mental illness, talking about the fact that, in my case, one door closes, and another door opens, but it's hell in the hallway. And I'm just trying to get out of the hallway. And one of the best ways for me to do it is to talk to other people who are similarly afflicted and hope that they're smarter, far smarter than I was. And that once they're on medication, they stay on the medication. Because that's the big problem we have today with most people who suffer from this kind of disorder, they feel so good [1:50:00] when they're in the euphoric state, it's a marvelous feeling, so that you don't feel you need the medication. In my case, I self-medicated. I didn't want to go to a doctor, so when I was depressed, I took amphetamine-like drugs, and when I was up, I took a drug that's no longer on the market, Halcion, and I took a lot of them. And I just destroyed my life, my professional life. Now I'm teaching, I teach constitutional law at the Touro Law School. I handle arbitration and mediation cases, and I do a lot of public speaking and writing. I'm trying to pull my life back together.

NC: And you've taught us so much in the field of mental illness, especially as it relates to the court system and the law. How much further do we have to go?

SW: We have a long way to go. I think today that I would be a marvelous judge, but no one would ever think of someone with a history of mental illness becoming a judge, even though the mental illness is well-controlled. And the point is that, if someone had a weak heart, or someone had tuberculosis, or someone had cancer, there's always some quarter given that person. When someone has mental illness, that person's kept in the closet. And the hope is that we can remove the stigma. More and more people, by the way, are coming out of the closet, people who suffered from mental illness, and that's a good thing. Telling about their experience. I was with Mike Wallace not too long ago, he told me that for three years, his life was shut down. [1:52:00] And he committed some terrible acts. But, he's fine now, and he's on medication, so there is a cure. And you just have to urge people to tend to themselves.

NC: Well, Judge, I remember those days, and I remember often saying to myself and to others who raised the subject, 'There, but for the grace of God.' Sitting here today, I often say to myself, 'With the grace of God, we will find another Sol Wachtler,' who can make the kinds of contributions that you have made to this state, to our judiciary, and to the communities with which you have interacted for these many years. I personally want to thank you for those years of service. I want to thank you for taking the time for being here today.

SW: Thank you very much.

NC: And for being my friend and mentor.

SW: Thank you so much, Nick, and thank you for your time this afternoon, I really appreciate it, and your kind words, thank you.

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