THE HISTORICAL SOCIETY
OF THE NEW YORK COURTS

ORAL HISTORY PROGRAM

Honorable Stewart F. Hancock, Jr.

Found on exterior entrance to New York Court of Appeals

**THE HISTORICAL SOCIETY
OF THE NEW YORK COURTS**

**140 Grand Street, Suite 701
White Plains, New York 10601
914.824.5717
History@nycourts.gov
www.nycourts.gov/history**

ORAL HISTORY

**Subject: Honorable Stewart F. Hancock, Jr.
New York State Court of Appeals**

An Interview Conducted by: Marion Hancock Fish

Date of Interview: June 18, 2011

Location of interview: Mitchell, Goris & Stokes, 5 Mill Street, Cazenovia, NY

HANCOCK

In 2005, ***The Historical Society of the New York Courts*** (the Society)established an oral history program to document the recollections of retired Judges of theNew York State Court of Appeals (New York's highest court), retired judges and justicesfrom other courts in the State, and prominent New York lawyers (Subjects). Starting in2009, all interviews were videotaped. Interviews prior to that time were either audio orvideo taped. Interviews were conducted by informed interviewers, familiar with both the Subject and New York jurisprudence (Interviewers). The transcripts of the record are reviewed by Subjects and Interviewers for clarity and accuracy, corrected, and deposited in the Society's archives. An oral history transcript is not intended to present the complete, verified description of events. It is rather a spoken personal account by a Subject given in response to questions. It is intended to transmit the Subject's thoughts, perceptions, and reflections. It is unique and irreplaceable.

It is recommended that this oral history be cited as "An Oral History of Hon. Stewart F. Hancock, Jr., conducted on June 18, 2011 by Marion Hancock Fish, at Mitchell, Goris & Stokes by The Historical Society of the New York Courts.

THE HISTORICAL SOCIETY OF THE NEW YORK COURTS

Oral History Project

INTERVIEWEE: **Stewart F. Hancock Jr.**

INTERVIEWER: **Marion Hancock Fish**

DATE: **June 18, 2011**

[Begin Audio File 1]

MF: I'm Marion Hancock Fish, daughter of Stewart F. Hancock, Jr. and today we're recording an oral history for the Historical Society of the Courts of the State of New York. My father, Judge Hancock, has had a distinguished career on the courts of the State of New York as well as a practicing lawyer and today we are going to discuss his career, both his early years as a practicing lawyer, his time on the bench which began with the Supreme Court and then the Appellate Division of the State of New York, and then of course with the Court of Appeals and then his many active years after retiring from the Court of Appeals in private practice. I think a great place to start would be the early career following graduation from Cornell Law School. So let's begin, let's start this journey, and if you want, talk a little bit about your early career after completing law school down at Cornell.

SH: All right, Marion. After graduating from law school I took the bar examination and passed it and the Korean War had just started and I was a reserve officer in the Navy, Reserve Lieutenant JG, and so after passing the bar, or after taking the bar, I thought it would be good for me to go back in the Navy. I assumed that I would be probably called in anyway so I volunteered to go back to active duty in

the Navy and requested CDOD in the Korean area. [00:02:00] And so I was ordered to the *USS St. Paul* which operated off Korea with Task Force 77 and was doing a lot of shore bombardment and that sort of thing. And the *St. Paul*, by the way, participated in the withdrawal, covering the withdrawal, of the Marines from Hungnam, Christmas of 1950. One interesting thing happened while I was on the *St. Paul*. We came into Sasebo, Japan, and an all ships message went out and as a result of that I was sent in to shore to act as defense counsel for two sailors who had been accused of murdering a rickshaw driver.

MF: It was your first criminal trial.

SH: My first criminal trial. Knew absolutely nothing about trial practice or anything like that but on balance I think I did a pretty good job. One thing I was successful in doing was keeping confessions out. They were accused of first degree murder and so I was successful in getting them off on manslaughter instead of murder, which would have been very serious. It's a long story, I will not go into it, but much of it involved medical testimony about whether or not there were signs of strangulation and there's a lot of literature [00:04:00] about what you have to show to prove strangulation and how it's different from just the ordinary signs of asphyxia and so on. I won't go into that. So that was my first actual practice in the courts. When I had gone to Cornell Law School I thought that I was going to major really as a lawyer in estate practice and --

MF: T and E, right?

SH: Trusts and that sort of thing. I became very interested in trust law and in future interests and that sort of thing because I was fascinated with the course taught by

Horace Whiteside.[1] Matter of fact, I wrote an article for the Cornell Law Quarterly --

MF: On the Rule against Perpetuities.

SH: (Laughter) The Rule against Perpetuities, something about which --

MF: 21 years.

SH: -- I know absolutely nothing now. So I must say that during my whole legal career, more than 61 years, I have written a total of one will.

MF: That's good.

SH: I never probated an estate, had absolutely nothing to do with estate law. And when I went back to the office --

MF: Hancock & Estabrook.

SH: Hancock & Estabrook --

MF: Which was then?

SH: Hancock, Dorr, Kingsley and Shove, I think. Hancock, Dorr --

MF: Ryan and Shove?

SH: -- Ryan and Shove.

MF: [Inaudible.]

SH: Lewis Ryan and Mr. Benjamin Shove. So I immediately found myself trying lawsuits for insurance companies defending [00:06:00] insureds mostly in property damage cases in City Court. It was then called Municipal Court and I can remember distinctly that the first case I tried involved the huge sum of $45.

MF: It was important to somebody.

---

[1] Horace E. Whiteside, Professor of Law, Cornell Law School, 1922-1956.

SH: (Laughter) It was. And matter of fact, I don't know whether I won it or lost it. But anyway, did that, then started trying lawsuits in Supreme Court, personal injury cases. Tried all sorts of other cases, some cases in federal court, and did that for about nine years and then I was asked if I would be willing to run for the Syracuse Board of Education. So I replied that really I don't --

MF: Know anything. I was going to say, you don't know anything about education.

SH: (Laughter) I don't know much about city government and less about the Board of Education and they said you don't have to know anything. And so I said all right, I'll do it. And that has sort of been the way my career has been. I'd received, been so fascinated in the opportunities that have come my way --

MF: Fortunate.

SH: -- and so fortunate. And so this was one and I said why not, it sounds interesting. So I did, got elected very easily. All I had to do was go around and talk with some elderly ladies at teas and that was really all you had to do. (Laughter) And I got elected. The candidate for mayor [00:08:00] at that time was William Walsh[2] and he was elected Mayor and I got to know him and so he asked me if I would become his Corporation Counsel and so I did do that and it meant having to give up sitting on the Board of Education but they urged me to do it and so I accepted that. And did that for two years and found that that was a very educational, fascinating two years. I really started my own little law firm with Les Deming from Bond, Schoeneck and King and Bill Roy from the McKenzie office who was

[2] William F. Walsh, Mayor of the City of Syracuse, 1961-1969.

a trial lawyer and did that for two years and at the end of two years then I was asked by John Hughes --

MF: Senator John Hughes.[3]

SH: Senator John Hughes, who had had to step in to become Republican County Chairman during the Kennedy/Nixon campaign where there was a scandal involving the current then Republican County Chairman and he had to step into the breach so to speak and take over everything. And so he'd been doing that since 1960 and this was now the beginning of 1964. So they explained that he was exhausted doing this and running his law firm -- he was a very important Senator in New York -- and so they asked me if I would step in to become Republican County Chairman. Again I said I don't know anything about it and they said, [00:10:00] I'm not sure they really said, you don't have to know anything but --

MF: But you could learn.

SH: They said I could learn. So I thought about that and again I said why not. And so I did that for two years. Well, it turns out, and I'm being facetious here, that Senator Hughes was much more knowledgeable than I about what the political situation was because this was 1964 which turned out --

MF: Disastrous.

SH: -- as you know to be an absolute disaster for the Republican Party. And this is a statistic which I know was true. Since the founding of the Republican Party in 1856, Onondaga County had never gone for any presidential candidate other than

[3] John Hughes, New York State Senator, 1947-1972.

the Republican candidate until 1964, even in 1932[4] when Alf Landon ran against FDR and only got a total of 18 electoral votes in the whole country, Onondaga County went overwhelmingly for Alf Landon[5] against FDR[6] until my first year --

MF: Good job. (Laughter)

SH: We lost everything and --

MF: So then two years later --

SH: Well, yeah, but I just have to tell you we lost the county by something like 60% to 40% and totally wiped out, lost Supreme Court seats, everything. [00:12:00] I felt as though I'd been run over by a steamroller or something. And so any rate, then the next thing that happened, and this happened sometimes to aspiring politicians, you hear what you think might be a groundswell for you to run for something and sometimes it turns out not be a groundswell but a ripple.

MF: Or even less, yeah.

SH: So I thought I heard a groundswell for me to run for Congress to get the seat back --

MF: In 1966.

SH: -- which we had lost in 1964 and Jim Hanley[7] had been elected to Congress and I was the first of several candidates to run against him, lost handily, and that was

---

[4] Mr. Landon was the Republican candidate for the Presidency in 1936.

[5] Alfred M. Landon, Governor of the State of Kansas, 1933-1937.

[6] Franklin D. Roosevelt, President of the United States, 1933-1945; Governor of the State of New York, 1929-1932.

[7] James M. Hanley, Member of the United States House of Representatives, 1965-1981.

the end of what I refer to as my meteoric political career. Like a meteor only in that it was one quick bright light and then it all goes dark. (Laughter) And so probably the best thing that ever happened to me.

MF: Crash and burn.

SH: Yeah. Because had I been elected to Congress I would have had to run again and so on and with six children that was just not the thing for me to do.

MF: Yeah, we didn't behave too well for you on the campaign trail. (Laughter)

SH: I thought you were great. So I went back then to the Hancock office, tried cases, argued appeals, wrote briefs, cases both in federal and state court, and then I received another one of these opportunities, or I had another one of the opportunities which I've been so fortunate to receive, and [00:14:00] I was asked if I would be willing to have Governor Rockefeller[8] nominate me as a Supreme Court Justice to fill a vacancy created by the death of Justice Vinette.[9]

MF: What year was that again?

SH: That would have been in 1971. And so I had never thought about being a judge, it never really occurred to me. I had of course been in courts and litigation was my career up to that time and so at first I really wasn't interested in it and then I began to think about it and thought that perhaps if I thought I might have a career as an appellate judge that it would be something that I should really seriously consider. So I explored the possibilities of my going on to become an appellate judge, decided that this might really take place, and so I decided yes, I will do it. So that

---

[8] Nelson A. Rockefeller, Governor of the State of New York, 1959-1973; Vice-President of the United States, 1974-1977.

[9] George H. Vinette, Justice of the New York State Supreme Court, 1958-1971.

was the start of my judicial career. And I was appointed and then had to run again but it was an easy campaign because the Fifth Judicial District which I was in --

MF: Very Republican.

SH: -- was pretty much heavily Republican so it didn't amount to too much. But just briefly about being a Supreme Court Justice, it was a wonderful, wonderful experience in those days. Unfortunately I think that it's not the same now [00:16:00] because then if you were a Supreme Court Justice in the Fifth Judicial District you rode the circuit so to speak. You'd go to Lewis --

MF: I remember.

SH: -- and Jefferson and --

MF: Herkimer.

SH: -- Herkimer, so you weren't in Onondaga County all the time. And I found going to these other counties to be extremely interesting and lots of, I'll use the word fun. Because --

MF: Lawyers from all different areas, communities.

SH: Yeah. It was very good from the standpoint of the system of justice also because you would go into a county where you really weren't known and where the judge coming in really didn't know who disliked whom or what the cliques were.

MF: None of the biases.

SH: It was best not to know any of those things and you went and you just do it without really knowing who the players are. You just do the best you can. I liked it also from another standpoint and that is that I really enjoyed the court attendants, meaning --

MF: Yeah, Zobotka?

SH: Well, Ziggy Zobotka in Onondaga County and this one case that we may talk about for a second that's sort of funny, but in Oswego County in particular there were two very old court attendants who to me [00:18:00] at that time seemed that they were maybe 95 or 100 years old.

MF: Your perspective's a little different today.

SH: Absolutely. (Laughter) I'm sure I wouldn't think so. They would be young now. But one of them was assigned to me, Irwin Booth, and so Irwin was a widower, he lived over the Pontiac Hotel across the river and it was said that there were several ladies pursuing him and (laughter) he could never get my name straight. And he would introduce me into court in a sort of feeble voice [imitates], "Hear ye, hear ye, court is now in session, the Honorable Stewart Francis Babcock presiding" and then he'd tap his gavel and say, "Everyone please be seated" and he would sit down in his chair next to the bench and in 15 seconds he would be fast asleep. So I'd call a recess and have to pick up my bench book and rap it and Irwin would wake, come like a spur, and call a recess. So those counties, they were just enjoyable, lots of characters, lots of fun. Then in I think 1977 I was appointed --

MF: To the Appellate Division?

SH: Yeah.

MF: How did that come about, do you remember? That was Carey, right?

SH: [00:20:00] Yeah, Governor Carey.[10] I don't know. I was recommended and --

[10] Hugh L. Carey, Governor of the State of New York, 1975-1982.

MF: And even though he was a Democrat --

SH: He was a Democrat and I was a Republican, but to the Appellate Division in 1977 by Governor Carey.

MF: It was an extraordinary bench, right?

SH: We had some very, very good people. And that was an extremely interesting time, very pleasurable time for me. We had interesting work.

MF: And great judges.

SH: We had good judges. We had Judge Simons[11] who went to the Court of Appeals, Dick Cardamone[12] who's on the Second Circuit now and --

MF: Dolores?

SH: -- Dolores Denman[13] and Judge Bob Witmer,[14] father of Bob Witmer of Nixon Hargrave.

SH: Yeah, in Rochester.

SH: And so we had very good people. And in those days, it seems to be different now, and it may well be because they have such a big case load but I'm not sure whether that's entirely true, but we wrote a lot of opinions and I wrote --

---

[11] Richard D. Simons, Associate Judge of the New York State Court of Appeals, 1993-1997, 1983-1992; Acting Chief Judge, 1992-1993; Associate Justice of the Appellate Division of the Supreme Court, Fourth Judicial Department, 1973-1983; Third Judicial Department, 1971-1973.

[12] Richard J. Cardamone, Judge of the United States Court of Appeals for the Second Circuit, 1981- —; Associate Justice of the Appellate Division of the Supreme Court, Fourth Judicial Department, 1971-1981.

[13] M. Dolores Denman, Presiding Justice of the Appellate Division of the Supreme Court, Fourth Judicial Department, 1991-2000; Associate Justice, 1981-1991.

[14] G. Robert Witmer, Associate Justice of the Appellate Division of the Supreme Court, Fourth Judicial Department, 1967-1980.

MF: Close to 100.

SH: -- many, many opinions.

MF: 80 to 90.

SH: I didn't know it was that many but I know it's a lot of opinions that I wrote, signed majority opinions on the Court of Appeals[15] and dissents. I know some of the dissents wound up in reversals on the basis of my dissent. We always called that a four bagger. (Laughter) [00:24:00] I don't really have time to talk about it but if you dissented in one of those cases and you knew it had gone to the Court of Appeals you sort of watched it carefully to see what might happen. And so eventually if it came down and it got reversed, and particularly if it got reversed on the basis of your dissent, that was a four bagger. So when that happened we would go into conference with the full court sitting around and they busily --

MF: You try not to gloat.

SH: No, you'd be busily looking over the agenda for the meeting. And then somebody would say, "Oh, I understand that case came down" and give me the name of the case and "Oh, was there a decision in that?" So if you asked them and they would say, "What did they do?"

MF: How many times did you get to do that?

SH: I'm not sure exactly but several times. But I wrote some --

MF: Yeah, let's talk about it. Do you remember some of your --

[15] Reference to Appellate Division intended.

SH: Yeah. One opinion which made some law, I think, and was affirmed, the basis for a couple of opinions in the Court of Appeals, was the Buffalo Dome case. [00:24:00] You've got the name of the case there? Let's see.

MF: What was it about, the Buffalo Dome case?

SH: It had to do with the measure of damages for, what is --

MF: Oh, it's *Kenford*. *Kenford versus Erie County*.[16]

SH: *Kenford Company against Erie County*. So Erie County had agreed with the Kenford Company that Erie County was going to --

MF: Develop an area, right?

SH: -- build the huge Buffalo Dome and Erie County had contracted with Kenford that after the dome was built Kenford would manage the Buffalo Dome for 20 years or something like that. And so the county decided that they couldn't do it because they couldn't raise the money, they couldn't afford it, so they had to --

MF: They canned the project.

SH: -- call the whole thing off, exactly. And so Kenford sued the county of Erie first to collect what the damages were going to be on their contract with the county and that was knocked out by the court. And then they claimed that they should get the capital gains that they would have made because [00:26:00] they had bought property around the dome at a low price and they thought that after the construction of the dome there would be a great deal of increase in value and so on. So that's what the case was about. So I wrote a concurring-dissenting opinion on the question of whether or not they could possibly prove any damages with

[16] *Kenford Co. v County of Erie*, 108 AD2d 132 (4th Dept 1985, Hancock, Jr., J.P., concurring in part and dissenting in part), *revd* 73 NY2d 312 (1989).

respect to the alleged increase in value that they might have had. And so the Court of Appeals agreed with me that you couldn't do that. Because really what it would have amounted to would be that not only did the county agree to build the dome but they agreed in effect to --

MF: Increase the value of --

SH: Well, yeah. To guarantee --

MF: An increase.

SH: -- if anything went wrong that whatever profits might have been made by the Kenford Company would be reimbursed. So the case has been cited as an important case on measured damages. And let me see, I don't know whether there are any other cases to mention.

MF: Yeah, *Seminary versus McCarthy*,[17] admissibility against a criminal defendant of the victim -- oh, the hypnotically induced recollection.[18] That was one of them.

SH: Yes, I remember that and I think that had to do with expert opinion and that it could not be introduced in evidence. I think that may have been a new case. But what's the *Seminary*?

MF: [00:28:00] That was that one.

SH: No, *Seminary* --

MF: That was different.

SH: *Seminary* I think might have had to do --

MF: That was Rule against Perpetuities.

---

[17] *Buffalo Seminary v McCarthy*, 86 AD2d 435 (4th Dept 1982).

[18] *People v Hughes*, 88 AD2d 17 (4th Dept 1982).

SH: Rule against Perpetuities. The only case --

MF: Harkening back to your roots.

SH: That's right. The only case that I've had anything to do with having to do with the Rule against Perpetuities. And so yes, it was good that I finally had an opportunity to use what I'd written about in my law review article.

MF: There was *Delong versus County of Erie*[19] and that was municipality's negligence.

SH: OK, I remember that very well and that went to the Court of Appeals and was affirmed and I'll tell you briefly what that was about. Mrs. Delong was at home with her two year old daughter and she heard a rap at the back door and she saw somebody out there. There was a man there and so on. And so she called 911 and so they asked, "Fine, we'll be right there and what is your address?" And so she gave, and I can't remember the name of the street but let's assume she said it's 219 Victoria. And so there is a Victoria in the city of Buffalo and she was in a suburb, I can't --

MF: A town.

SH: A town. I can't remember exactly what it was. And there's a Victoria there. [00:30:00] And so the 911 people said, "We'll be right there, don't worry" --

MF: And they went to the wrong place.

SH: They went to the Victoria in the city of Buffalo. Meanwhile the intruder came in and it was just absolutely awful. He stabbed her and so on and she, I do remember this, she was seen coming out of the front door by a witness on the sidewalk covered with blood and she came out and finally passed out on the sidewalk in

[19] *DeLong v County of Erie*, 89 AD2d 376 (4th Dept 1982).

front of her house. And so I've told this to my class at Syracuse Law School is that classic example of what you don't ask on cross-examination. The lawyer for the county on cross said, "Did she say anything before she died?" The answer was yes. Of course you get a yes, now the jury is there -- after that, have to --

MF: Yeah, you got to get the answer, know what it was!

SH: -- ask what did she say. So her answer was, she said, "My baby, my baby." And up in the front door of the house a door opened, here's a little two-year-old.

MF: Standing there --

SH: I think that [00:32:00] probably doubled --

MF: The damages, the reward.

SH: Yeah. Well, the law that was against, a municipal law, and what you have to show to get a claim, a proper claim against a municipality, you have to show that there was an undertaking --

MF: An affirmative undertaking.

SH: An affirmative undertaking to --

MF: Respond, yeah.

SH: Yeah. It's just without that there's a municipal immunity. I mean just failing to do it, but if you undertake to do it and don't do it then it's an exception to the protection afforded by the statutes for municipalities and just being plainly negligent is not enough. OK, what else, well --

MF: Yeah, so, that was an important case.

SH: Yeah, that was.

MF: Let's see, a couple of others that, well one of the others was employment discrimination, *State Division of Human Rights versus the Department of Correctional Services*.[20] They had violated the Human Rights Law.[21] Gender is not a bona fide occupational requirement for the job. Oh, this was the female cook and she wanted to work at the all male correctional facility.

SH: Oh, yeah, I remember that.

MF: They refused to hire her because of the danger of attack.

SH: And we said that they should hire her.

MF: Yes.

SH: I don't know whether that went to the Court of Appeals [00:34:00] or not. I'm not sure.

MF: There was no appeal in that case. But the Court of Appeals did affirm in the *Xerox* case --

SH: Oh yes.

MF: And *McDermott*.[22]

SH: I think that was whether obesity is something that comes under the disabilities law and what's the technical word?

MF: It's the Human Rights Law. If there's protection against discrimination.

SH: Yes, that's true but the holding was I don't have any idea that --

---

[20] *State Div. of Human Rights v New York State Dept. of Correctional Servs.*, 61 AD2d 25 (4th Dept 1978).

[21] Executive Law art 15.

[22] *State Div. of Human Rights v Xerox Corp.*, 102 AD2d 543 (4th Dept 1984), *affd* 65 NY2d 213 (1985).

MF: Held that obesity could constitute a disability within --

SH: A disability, that's right, within the meaning of the Human Rights Law. That was a novel holding. I think that went to the Court of Appeals.

MF: And it was affirmed.

SH: It was affirmed.

MF: I don't know if there's any others. I didn't have any notes on any others for the Appellate Division that you wanted to mention.

SH: I don't really think so. There are so many that we could talk about. But then I'll say that being on the Appellate Division was really in a way a high point of my judicial career because we had such a good bench and because it was very collegial and it was very pleasant. We worked very, very hard. You had lots of cases, lots of interesting cases, but it was a collegial, very pleasant environment. And so then I was appointed to the Court of Appeals [00:36:00] by Governor Cuomo.[23]

MF: Another Democrat.

SH: Another Democrat. And that was in 1986. So I was on the Court of Appeals for eight years and so there are maybe a couple of cases, several cases.

MF: Yeah, several. Yeah, several Court of Appeals cases you wanted to talk about. I guess we could start with some of the civil cases. We've kind of broken them down between civil and criminal. One of the civil cases we have notes on here is

[23] Mario M. Cuomo, Governor of the State of New York, 1983-1994.

Steinhilber versus Alphonse[24] which was the defamation case with a union action and we had the defamation against a woman who was a scab.

SH: (Laughter) Well, as you just indicated, it was out of a labor dispute involving, she was obviously against the members of the union. Whether she was trying to break the strike or not, I'm not quite sure. Louise Steinhilber. So those who were opposed to her and in favor of the union, they sent out lots of -- I won't say lots of literature but I think some literature calling her Louise the Scab and other things like that. And she sued for defamation. So the basic question was whether or not this [00:38:00] was really nothing but part of a labor dispute where obviously what they're saying is not to be taken as a fact.

MF: It's just opinion.

SH: It's opinion.

MF: Pure opinion, right?

SH: Pure opinion and said perhaps with obvious exaggeration, not to be taken seriously. The sort of thing that you might expect, accusations, name calling going back and forth, in a labor dispute. So I think this was sort of a new case as far as New York defamation law is concerned on the question of what really constitutes opinion, what constitutes hyperbolic kind of talk which isn't supposed to be taken seriously. A lot depends upon the context obviously. And so --

MF: You have to look at the whole picture, not just the words.

SH: Look at the whole thing, what's the setting of what the words were stated in and so on. OK, what else?

---

[24] *Steinhilber v Alphonse*, 68 NY2d 283 (1986).

MF: So that was an important case

SH: It was.

MF: And you had affirmed the decision from below.

SH: Yeah.

MF: You wrote that.

SH: Yes.

MF: Well, and then you know, probably one of the cases that you had the most fun with because of some of the things that happened afterwards, the America's Cup case, *Mercury Bay versus San Diego Yacht Club.*[25] And you didn't write the majority opinion but instead wrote what to you became a very kind of fun dissent. (Laughter) But it was an important case [00:40:00] as well.

SH: Absolutely.

MF: Tell us about that.

SH: OK. The way that started was that --

MF: Yeah, tell the story.

SH: Mercury Bay was a challenger and Mercury Bay decided to challenge the holder of the America's Cup, which was the San Diego Yacht Club, by entering a very large, very, very large monohull. Now, up until this particular time when the America's Cup races were held, and I can't remember exactly what the dates were, they'd always sort of had an unwritten rule that they were supposed to be 12 meters but --

MF: Was there a catamaran involved too?

---

[25] *Mercury Bay Boating Club v San Diego Yacht Club*, 76 NY2d 256 (1990, Hancock, Jr., J., dissenting).

SH: Yeah, but that comes later. So San Diego, and this monohull that they entered, proposed to enter, was huge.

MF: Gigantic, yeah.

SH: But it was within the limits. And so San Diego Yacht Club got annoyed, mad, and so they brought a lawsuit trying to knock out the challenge by Mercury Bay.

MF: Their boat?

SH: Yeah, say that this was not within the deed of gift and so on. And so they lost and then Mercury Bay was declared entitled to be a challenger. So then the San Diego Yacht Club said OK, if you want to play it that way --

MF: I'd forgotten [00:42:00] that this is how it came about, OK. They went for the catamaran.

SH: Fine, fine, we're going to enter as a defense a catamaran. And so Mercury Bay then turned around and sued San Diego saying no, you can't do this, a catamaran is not within the prescribed measures and limitations within the deed of gift which had been given by I think Mr. Brewster, I can't remember his name, way back in 1881 with America's Yacht Club.

MF: When it was founded.

SH: Yeah. And so that's what the case was about.

MF: And Mercury Bay, are they New Zealand?

SH: They're in New Zealand, yes. It's a New Zealand yacht club. So that came on at the Supreme Court and oddly enough, they came before the current New York State Judge, Carmen Ciparick[26] who was then on Supreme Court. And she held

[26] Carmen B. Ciparick, Judge of the New York State Court of Appeals, 1994-2012.

with New Zealand, Mercury Bay, saying that no, you can't have a catamaran. Nobody had ever heard of catamarans at the time that --

MF: You can have a really big boat but not a catamaran.

SH: Well, yeah, that's true but no one at the time in 1881 had ever heard of catamarans, particularly a catamaran going in a race or anything like that. So she held that that was illegal. Then it went to the Appellate Division, the Appellate Division reversed and said that the [00:44:00] catamaran was legal.[27]

MF: Were there dissents on the Appellate Division?

SH: I don't think so.[28] Then it came to the Court of Appeals.

MF: And was this all fast tracked because of the --

SH: No. What had happened, they held the races and then said we'll hold everything and if --

MF: The award until --

SH: -- depending upon whether it's knocked out. If so, then the races are invalid. Well, they did hold the races and the catamaran -- this is in the record really, I know. The newspaper reporters would follow it along and the catamaran would get so far ahead that it would luff up into the wind. You had to bring the windward hull down and to slow it down and so on, trying to let it catch up, trying to make it look good. It was just a farce. And so it came to the Court of Appeals and I dissented -- one of the points, and you don't want to go into this in detail but the

---

[27] *Mercury Bay Boating Club v San Diego Yacht Club*, 150 AD2d 82 (1989), *affd* 76 NY2d 256 (1990).

[28] There was a concurring opinion (150 AD2d at 100 [Rubin, J.]) and a dissenting opinion (150 AD2d at 110 [Kassal, J.]).

only prescriptions really of any significance in the deed of gift had to do with length on the low water line. How long can the boat be? And this can only have relevance to a monohull because it's relevant to the [00:46:00] hull speed of a monohull.

MF: But it's different with a catamaran.

SH: It has absolutely nothing to do with a catamaran and the formula for figuring out hull speed is twice the length of the low water line and take the square root of it, gives you roughly what the hull speed of the boat is. So say it's 32 feet on the low water line, double it, 64, take the square root of it, eight knots. A catamaran obviously doesn't operate like a monohull, the water pushes up and has absolutely no relevance to a catamaran. So they never could have been intended to apply to a catamaran. I couldn't get the majority of the Court of Appeals to accept that argument.

MF: Who wrote the majority opinion?

SH: I am not sure. I think Judge Fritz Alexander[29]

MF: Yeah. Not Wachtler?[30]

SH: Anyway so Vito Titone[31] --

MF: Yeah, he joined you in the dissent.

---

[29] Fritz W. Alexander, II, Judge of the New York State Court of Appeals, 1985-1992.

[30] Sol Wachtler, Chief Judge of the New York State Court of Appeals, 1985-1992; Associate Judge, 1973-1984.

[31] Vito J. Titone, Associate Judge of the New York State Court of Appeals, 1985-1998.

SH: Yeah, he joined me. He came to me and said, "I don't understand what's this square root stuff you're talking about." I said, "Vito, you don't have to understand it, just agree with me," so he did. (Laughter) So then what happened thereafter was that Carmen Ciparick called me up three or four months later and she said, "Guess what, I just got, maybe a fax, of a law review article written in the New Zealand Law Review about the America's Cup decision" and so I said, "What did it say" and she said it said the majority opinion was utterly ridiculous.[32]

MF: And that you were a genius?

SH: [00:48:00] Yeah. (Laughter) Almost. What it said about the dissent, well, almost that. So I said send it up. So she did send it up and then Vito came down and we looked at it and the first few pages were all about the arguments and so on but the last paragraph -- it said something like this: "And when the members of the majority of the Court of Appeals go reach the other side of the River Styx there will be the dissatisfied ghosts of (laughter) Judge Cardozo[33] and Judge Lehman,[34] all the famous Judges of the Court of Appeals and the dissatisfied ghost of Mr. Brewster --

MF: Yeah, the founder of the Cup.

SH: -- the donor of the America's Cup." I've forgotten -- "their faces, or their visages perhaps, saying it all."

---

[32] Edmund Thomas, *Mismatch or Misjudgement: The Mercury Bay Boating Club Inc. v San Diego Yacht Club et al.*, 1990 NZLJ 190.

[33] Benjamin Nathan Cardozo, Chief Judge of the New York State Court of Appeals, 1927-1932; Associate Judge, 1914-1926.

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

MF: They take their sailing seriously, right?

SH: Yeah. So I told Vito when he came down, don't read the rest of it, just read this paragraph. So of course we sent it around to colleagues. So that was fun.

MF: But then you made some good friends and you and mom went to New Zealand.

SH: That article was written by Ted Thomas and we went to New Zealand and met Ted and Margaret Thomas and became good friends of theirs. By the way, I'm going to have to send them an email. [00:50:00] Then we went to the South Island and had a good time there and in the South Island, I might as well mention this, that's where I --

MF: Bungeed.

SH: That's where I bungeed and --

MF: You were so old you got to do it for free.

SH: I got to do it for free, yeah.

MF: And your poor wife had to watch that. Poor mom.

SH: That was fun though. Yeah, that's where bungee jumping started. So we had a great time and so that was good.

MF: So another case that you wanted to talk about from the Court of Appeals was the plastics case, *Society of the Plastics Industry versus County of Suffolk*.[35]

SH: Yes, that was a case in which I dissented. Judge Kaye, later Chief Judge Kaye,[36] wrote the opinion and really her opinion cut back rather substantially on the standing rule, made it much tougher to show what standing might be. The old rule

---

[35] *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761 (1991).

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

used to be that if you could show that [00:52:00] your client was adversely affected by the particular law that might have been passed and so on, that there was some adverse impact, that that was really enough to show standing. And so in this case the ordinance which was passed by the County of Suffolk really entailed some very strict requirements as to what you had to do with plastics, plastic refuse and that sort of stuff, and very, very tough. And the Society of Plastics, which owned property in the County of Suffolk, brought a lawsuit to try to invalidate this particular local law or ordinance, whatever it might have been. And so the majority said that the Society of Plastics did not have sufficient standing to bring the lawsuit because they could not show any specific harm which was different in kind or degree from other harm suffered by other residents in Suffolk County. So what was new was this requirement that you had to show some kind of harm different in nature or degree. That had never been the rule before.

MF: A special impact.

SH: A special impact. And so [00:54:00] I dissented stating that that was unfair, that they were affected just the way everybody else was and that that was sufficient. And so the majority opinion ruling has been the subject of numerous, many law review articles and many cases tried to distinguish it afterwards.

MF: But it still stands? Or is it weakened?

SH: I think it still stands but it is criticized. And I know that a few years later I was asked to go down and talk with a group at Albany on this case and on the requirement of standing. So although as far as I know the majority in the case is

still the law of New York. It gets a lot of criticism and a lot of it is based on my using the reasoning that I set forth in that dissent.

MF: So an important case.

SH: Yeah.

MF: There were several criminal cases that were noteworthy when you were on the bench. I think the first one, probably the earliest, because this was in 1987, is *People versus Marrero*[37] and that involved the defense of mistake of law, you could call that. And you also were dissenting in this case.

SH: Yes. And the mistake of law defense was based on a statute in the Penal Law and I've forgotten --

MF: 265-20.

SH: Yeah, 265-20 of the Penal Law.

MF: [00:56:00] Oh, the defense is actually, I'm sorry, 1522A.[38]

SH: 1522A, which stated that if the defendant could show that his or her actions were the result of a bona fide mistake as to the law involved based on a statute or based on some regulation and that that was the reason that the particular act was committed, that that was good.

MF: That could be a valid defense?

SH: Yeah. And an existing, and I think that is clearly the way the statute is written. I don't have it in front of me but --

MF: Yeah, that is what it says.

---

[37] *People v Marrero*, 69 NY2d 382 (1987).

[38] Penal Law § 15.20 (2) (a).

SH: So the majority opinion really superimposed on what the statute said the requirement that it must be based on a statute or regulation which is later held to be invalid or which is held to be unconstitutional or something like that. So, clearly this excuse --

MF: That's not what the statute says, right? It doesn't say that.

SH: Clearly the statute doesn't say that. And so --

MF: They interpreted it.

SH: They interpreted it exactly the opposite of the way that the statute is written and so I dissented on that and it's probably one of the best dissents that I wrote.

MF: [00:58:00] You were joined by Kaye and Alexander.

SH: Joined by Kaye and Alexander and my dissenting opinion is in many criminal law books --

MF: Treatises.

SH: No. Used in colleges and law schools, basic criminal law. Many of them cite this and it's been the subject of many, many law review articles which criticize the majority opinion. Of course it's a holding which is contrary to many established rules on construction of statutes. The first rule is --

MF: Plain meaning. Read the words.

SH: Read it and apply it the way it's written. That was an important case. It is important.

MF: So that was one of the highlights. You know, the other, I think what really became one of your areas of key interest were the state constitutional law cases

and there were a few of them but this really kind of led into later on your work that you did on --

SH: New York State death penalty law.

MF: So the first case was the *People versus Scott*.[39]

SH: Yes.

MF: That was the open fields case.

SH: That's correct.

MF: Marijuana.

SH: That is correct. The old rule, I think under *Oliver against United States*,[40] [01:00:00] is a very, very stringent rule saying that the owner of open fields has no right of protection in whatever is in the open fields and that's a strict, very, very strict rule. And so what happened in this particular case, was it *People against Scott*?

MF: Yeah.

SH: *People against Scott* was that someone had gone on the open fields of this particular landowner and gone into an enclosure and seen something that looked like it might have been marijuana. And so this -- went to a district attorney or someone who later got a warrant to go and inspect the property and they went in and inspected the property, took pictures of it and so on, and later brought a criminal action against the owner of the property for illegally growing marijuana on the property. And so what we held was that under the Constitution of the State

---

[39] *People v Scott*, 79 NY2d 474 (1992).

[40] *Oliver v United States*, 466 US 170 (1984).

of New York, under state constitutional law principles, where you can give greater protection than the Supreme Court of the United States gives under the analogous provision of the Federal Constitution, that you could give greater protection and so we held that under the State Constitution, I think it was article I, section 12 maybe, we could give greater protection than the Supreme Court allowed under the Fourth Amendment of the United States Constitution. And so that was a basic decision employing the state constitutional law principle that you could give greater protection but not less.

MF: How did you get the others on the bench to go along? Do you recall the challenges there, or?

SH: Yeah, I know that Judge Bellacosa[41] wrote a long, long dissent arguing with us, but [00:02:00] this wasn't the first of New York court decisions on state constitutional law but it applied it and I think it was a four-three decision and I know that Judge Kaye agreed with it. I know that she wrote a concurring opinion in the case, I know. And I'm sure that Judge Titone went along with it and who the fourth judge was I'm not sure. It might have been Judge Alexander at that time but I'm not sure. But then there was another state constitutional case which --

MF: *People versus Diaz*,[42] the plain touch.

SH: *Diaz*. Yeah.

MF: You didn't write that.

---

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

[42] *People v Diaz*, 81 NY2d 106 (1993).

SH: I did. And this involved a situation where a police officer patting down, just a pat down of somebody who looked suspicious, a suspect, which is perfectly legal. You can pat down to see if there are weapons and so on. A *Terry*[43] search. Patted down and sort of said, "Mm-hmm, I think that this feels to me like there might be drugs in that pocket." So pat down, reached into the pocket and pulls out a packet and opens it up, aha, I was right, it contains [00:04:00] marijuana or whatever it was. So the question in the case was whether there is such a thing as plain touch. There's a plain view exception to the Fourth Amendment and plain view is when you walk up to a piece of property and you can see on the property and you see let's say that there's a machine gun on the property, something that's clearly illegal and contraband and so on. Then you can go on the property and seize it. That's the plain view exception. But because there is no need for a search.

MF: Yeah, it's right there.

SH: All there is is a seizure. So why that doesn't apply, and they tried to argue that the plain view exception applies here, is that reaching into the pocket is a search and that violates the person's right of privacy under the equivalent New York State constitutional equivalent of the Fourth Amendment which I do think is article I, section 12. I could be wrong though. So that's what that case --

MF: That was the second of the two.

SH: Yeah.

MF: And then after that you wrote a couple important law review articles that were published in the Albany Law Review kind of expanding on your thoughts with

[43] *Terry v Ohio*, 392 US 1 (1968).

respect to the New York State Constitution and this was really kind of the beginnings of your interest with the death penalty. And we'll come back to that but maybe want to mention it.

SH: I know that I gave a lecture [00:06:00] at Cornell Law School, state constitutional law, criminal lawyer's first line of defense, something like that. So I did talk about the New York State constitutional issues that are -- I'm sure I talked about *People against Scott*, *People against Diaz* and many other cases. And so that did later become very important in the work that I did on New York State death penalty law, which perhaps you're going to talk about later.

MF: Yeah. Judicial involvement in medical treatment decisions, I know we just reviewed this a little bit and the case of *Matter of Westchester County*[44] that later on actually ultimately led to some changes with our New York State law just this past year, 2010. But maybe you want to talk a little bit about that case and you then were so interested in it you also wrote an article about it, "The Role of the Judge in Medical Treatment Decisions."[45]

SH: Yeah, I remember that case. I think, I could be wrong, I think Judge Wachtler might have written the majority opinion. And so the majority held on to an old rule, I think *Matter of Storar*[46] which really --

MF: Clear and convincing, right?

---

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

[45] Stewart F. Hancock, Jr., *The Role of the Judge in Medical Treatment Decisions*, 57 Alb L Rev 647 (1994).

[46] *Matter of Storar*, 52 NY2d 363 (1981).

SH: Yeah, adopted a very, very strict requirement for someone who may be in a terminal situation and [00:08:00] who really doesn't want extraordinary life care supports and that sort of stuff. *Storar* was very, very tough and I think it said, as I recall it, that there had really have to be a clearly demonstrated desire on the part of the patient made at a time when the patient knew what he or she was talking about and so on describing what the future conditions might be --

MF: And what they would want or not want.

SH: Under those conditions I don't want to have continued life support. Almost an impossible test to meet. And so --

MF: You dissented.

SH: -- I dissented on that, disagreed with that rule, thought it ought to be liberalized. And I think, as I recall this particular case, the lady was able to express what her desires were and I think that she obviously hadn't stated that clearly years before but at the time that she was in this terminal situation she was clearly able to state what her views were --

MF: And you felt that was enough?

SH: I think her family also went along with that, but I'm not really sure. But anyway, subsequent to that, as I understand it, recently, 2010, a state law has been passed which more or less adopts the view of the dissent in this *Westchester County* case.

MF: The Family Health Care Decisions Act.[47]

SH: Yes.

---

[47] Public Health Law art 29-CC.

MF: And that was something that you had actually promoted after [00:10:00] the decision. You suggested that the legislature maybe could take action. It just took them about 15 years to get it done.

SH: (Laughter) I think that's true. Nothing new about that.

MF: Before we come back to the death penalty let's talk a little bit about comparing your time on the Court of Appeals to the Appellate Division or just reflecting in general about your time on the Court of Appeals. Obviously much bigger stakes between the two.

SH: That's true. My eight years on the Court of Appeals were, I think, a tremendously educational, broadening experience for me. I had learned an awful lot on the Appellate Division and going on the Court of Appeals I think made me look at things in a broader perspective. I know when I was on the Court of Appeals we went, Ruthie, my wife, and I went to the Aspen Institute and that was fascinating. And then --

MF: You did that more than once, didn't you?

SH: Well, no, I didn't do it more than once but then we spent three weeks or so at Oxford and both of those times -- we had a fascinating time at Aspen because the famous author of the book *Justice*[48] who's getting so much [00:12:00] publicity now. Oh my heavens, what's his name?

MF: Tuben?

SH: No, not Tuben. Anyway I'll come back to it. I'll think of it in a minute. Was the head of our program.

---

[48] Michael J. Sandel, Justice: What's the Right Thing to Do? (Farrar, Straus and Giroux 2009).

MF: So he was a great communicator and really articulate.

SH: Yes. Oh my heavens. He was recently written about by Thomas Friedman in the New York Times.

MF: I missed it, OK.

SH: And he is worldwide. And so we had him as our seminar leader, which was absolutely fascinating. And then we went to Oxford for one summer for about, oh I don't know, three weeks or so and I took a course there. Modern philosophy. So those were interesting. All of those things sort of broadened me, gave me a broader view and I think had the result of perhaps making me toward the moderate or perhaps more liberal side of the court, particularly in criminal cases. And so I think I wound up being somewhat more in the middle than I would have been otherwise. Yeah, but the whole thing was very broadening, bigger cases, cases coming out of New York City which of course you didn't have in the Fourth Department.

MF: So some really great lawyers?

SH: Yeah, excellent lawyers. But on the downside it was not as collegial. It was not as much fun really. [00:14:00] You didn't have the feeling of that you could relax and talk with somebody or go discuss a case with somebody. I mean it was much more rigid sort of. And so in that respect I missed the collegiality of the Fourth Department.

MF: But it really broadened you intellectually, right?

SH: I think so. Yeah, definitely.

MF: Which is something that has certainly carried forward.

SH: Yeah, I think so.

MF: Because your interest in philosophy and --

SH: Tried to keep up the best I can with the amount of time we have. Michael, what is his name? I'm trying to think.

MF: This author?

SH: Yeah.

MF: Maybe it'll come to us before the end. So you left the Court of Appeals, not because you wanted to but because you were just too old, right?

SH: Too old, yeah. Well, we left under the rule which I call, you've heard me use it many times before, the rule of statutory senility which sets in on the 31st day of December in the year in which the judge, he or she, turns 70. That happens to be New Year's Eve of course so at the stroke of midnight, whether the judge, he or she, may have had a little --

MF: Champagne.

SH: One or two martinis or champagne or something. That's irrelevant. At the stroke of midnight that judge is statutorily senile and cannot be a judge any more. And that doesn't mean that the judge can't go back and be a lawyer.

MF: Different standards.

SH: Yes, that's right. And of course everybody says that [00:16:00] this just shows that federal judges are much smarter intellectually and have much more ability because they are judges for life. Because according to the Constitution of the United States state judges --

MF: Not so in New York.

SH: No. We're not as smart and so they have to get off, they get senile earlier. And so for me it was wonderful. I mean because it gave me a chance to start a whole new career which I started when I got off the court in 19 -- So I got off the court under this rule at the end of 1993 and for me it turned out to be absolutely a wonderful thing for me because afterward I had a whole new career. [00:18:00] When I thought I was going to retire or just about to retire I was concerned that I might not have enough to do and I decided to go back to my old law firm, Hancock & Estabrook in Syracuse, but I sort of had visions of sitting in a corner office and having the managing partner talk to the youngest associate and say, "For god's sakes, go ask him something, he's sitting there reading the New York Times, working crossword puzzles." And the youngest associate says, "I don't have anything to ask him." "Well, think of something, make something up."

MF: But that's not what happened.

SH: Didn't happen that way but to be sure that it didn't I signed up to teach at the Syracuse Law School, the same seminar type of problem analysis course that I had taught when I was on the Appellate Division but I'd given up when I --

MF: When you went to the Court of Appeals.

SH: Went to the Court of Appeals. And so I did that and I've been teaching that course ever since. I'm still teaching it, will teach it next fall. So that was good. But then I found that indeed there would be a lot for me to do. I began to do a lot of arbitration and some mediation.

MF: Did you have to do any sort of training?

SH: I did.

MF: You had to do some training to -- ?

SH: I did. Went to a seminar on international arbitration and went to several other arbitration things and joined the various arbitration groups. [00:20:00] For instance, I'm a fellow of the College of Commercial Arbitrators and that sort of thing. So I did a lot of arbitration, some mediation, and then I found that what I was being called upon to do, and I spent a lot of time doing this, was acting as an expert witness on questions of New York law and cases pending in foreign jurisdictions. So I testified --

MF: Taking you around the world.

SH: Yeah, well, I testified a couple of times, two or three times in Paris and several times in London, once in The Hague, I remember. And then in cases --

MF: And those were mostly commercial, all commercial?

SH: All commercial cases.

MF: Where they contracted to --

SH: International commercial cases of one kind or another.

MF: Contracted to be governed by New York law.

SH: That's true. Another thing I did, got into for awhile, I just happened to think of this, was acting as a judge in the contest, the international law contests which are held every year in Vienna. And those are all problems under the international commercial code --

MF: Treaties? Is there a treaty?

SH: There is a treaty, yes. So I did that. I was the Chief Judge of the first one of those that they held at Vienna. I've forgotten what the date was, and went to two or

three others after that. And so [00:22:00], I've had some very, very interesting experiences in acting as an expert in various international --

MF: Cases involving billions and billions, some of them huge.

SH: Some very, very big, that's true.

MF: That satellite case.

SH: That was a case in which I sat as an arbitrator and that was a very, very interesting arbitration case in which the satellite involved was set off on a Russian-made rocket somewhere in Kazakhstan or some place like that. So the satellite goes up and takes a ride up on the end of the rocket and then they release it after it gets up to the geocentric orbit, which I don't know how many hundreds of miles it is above, that is when the speed of the satellite going around is exactly equal to the speed of the earth turning so that the satellite once it's up there in position seems to be staying in exactly the same place. Well, the satellites go up with their wings which really are to be, they're really the source of the power once they're up there.

MF: Light from the sun, right?

SH: Yeah, they absorb the sunlight and generate all electrical power. They go up with the wings [00:24:00] in like this (gestures) and when they get up a signal is sent up electronically and they're supposed to deploy so that you have the wings out there are now with the panels absorbing the sunlight, it generates electricity. Well, what happened with this particular satellite is that one wing deployed and the other didn't and so it was getting only half the power and so that's what was involved in this case. Big, big lawsuit. In arbitration as to whether, it was against insurance companies and the insurance policy said that a total loss is when the

damage is more than, it might be equal to or more than, I think it said more than 50%. So that's what the case was about.

MF: The extent of the damages, measuring the damages.

SH: Right. Well, first question, was it more than 50%? But lots of interesting arbitration cases, mediation, and so that's what I have been doing and been very, very busy doing that for about 18 years. Now just recently, it can't be anything having to do with my age, I assure you of that, but I don't seem to be getting the arbitration, mediation and that sort of thing now that I'm 88 and going on 89, but so what I've been doing in addition to teaching, in addition to acting as the Chief Appellate Judge [00:26:00] of the Oneida Nation, I'm doing almost entirely pro bono appellate work. So as matter of fact, I have four, let's see --

MF: You have four going right now?

SH: Yes, I would say --

MF: *Carncross*.[49]

SH: I have *Carncross* which is an appeal which is pending in the Second Circuit Court of Appeals and this is from the denial of a writ of habeas corpus at district court level. So that has been appealed to the Second Circuit Court of Appeals in New York. And just today, or yesterday as a matter of fact, I have an answer --

MF: To which you need to reply.

SH: To which I have to reply within two weeks, I think it is. So that is something I'm going to have to turn to. Then recently I got a grant for leave to appeal in a case,

[49] *Carncross v Poole*, 448 Fed Appx 150 (2011).

People against Ingram,[50] which I took and am doing for the Hiscock Legal Aid Society. And then there's another case, *People against Holt*,[51] which I'm doing for the Hiscock Legal Aid Society which I'm currently writing the brief and will argue that case in the Appellate Division, Fourth Department. I guess there are three.

MF: All criminal defense.

SH: They're all criminal, they're all in one way or another appellate cases and they're all in one way or another pro bono. [00:28:00] So I'm very busy doing that and I enjoy doing it. These cases all add interesting intellectual problems, interesting legal problems. So that's one of the things. And sure, I do get some satisfaction out of having the feeling that I'm using my talents to give back and to help someone and I'm able to do it, I have the ability to do it, so why not? But I would say the equal reason is that the problems are interesting to me and so I enjoy doing them.

MF: I think here might be a good time to jump back because you didn't really talk much at all about all of the death penalty work that you've done. And I think it kind of stemmed out of your work when you were on the bench looking at the State Constitution. And then after that, after you left the bench, you really got involved more.

SH: That's true. The reason I got into the state constitutional issue involving the death penalty was because I gave to one of my classes what I felt would be a very

---

[50] *People v Ingram*, 81 AD3d 1277 (4th Dept 2011), *revd* 18 NY3d 948 (2012).

[51] *People v Holt*, 93 AD3d 1304 (4th Dept 2012).

interesting question, whether or not the New York State death penalty law would be constitutional under the New York State Constitution.

MF: So this would have been right after you went back to teaching?

SH: It would have been a couple of years after that anyway. So one of my students wrote a very good answer which I thought was very good and so I decided [00:30:00] to take really the basis of her answer and turn it into a law review article,[52] which I did with Annelle McCullough who had been a former clerk of mine while I was at the Supreme Court level and who by the way contributed a great deal to many of these opinions and decisions that we've just been talking about. She was involved and helped me a tremendous amount in all of these. Anyways, by this time Annelle, I think, was then perhaps already acting as a clerk in Federal Court.

MF: She loaned her time to it, yeah. I think that's right.

SH: Yeah. So I asked Annelle if she would like to coauthor this with me and with the law student who had written the article, whose name I can't remember right now.[53] But anyway, so we wrote this article and --

MF: I think it's '96.

SH: It might have been '96. I'm not sure, but as a result of that article then I was asked to get into a, file a brief and argue a case, I think it was *People against Brown* which was pending in Albany County. Brown, I believe, was represented by one

---

[52] Stewart F. Hancock, Jr., et al., *Race, Unbridled Discretion, and the State Constitutional Validity of New York's Death Penalty Statute—Two Questions*, 59 Alb L Rev 1545 (1996).

[53] Alycia A. Ziarno, née Farley.

of the top criminal defense lawyers [00:32:00] in Albany County and he had been accused of first degree murder and could conceivably have received the death penalty. So I got into that and then when some time later some death penalty appeals started going to the Court of Appeals I wrote two friend of the court amicus briefs on behalf of a group of lawyers in New York City, some very prominent lawyers, and other groups. And the first one of which --

MF: *Cahill*, right?

SH: -- was *People against Cahill*.[54] And then there was a second one.

MF: The second one, did we, it might be *Hernandez* but I think we weren't quite sure.

SH: Yeah, I'm not sure what the second one was but I submitted essentially the same amicus brief and I'll tell you what the basis of it was, but in that second one I believe it was Judge Smith, George Smith,[55] concurred but did so stating that the court should reach the underlying question of the constitutionality of the death penalty law under the state constitution. The majority didn't do so. All of the cases that went to the Court of Appeals on the death penalty [00:34:00] ultimately wound up being reversed and rejected all on technicalities. The Court of Appeals never reached the underlying issue of whether or not under the New York State statute and New York State constitutional law the death penalty act should be held unconstitutional on the basis of the New York State Constitution.

MF: Yeah, they dodged.

---

[54] *People v Cahill*, 2 NY3d 14 (2003).

[55] George Bundy Smith, Associate Judge of the New York State Court of Appeals, 1992-2006.

SH: They dodged it. They never got to it. The basis, I don't know whether you want me to go into this.

MF: Yeah, sure, it's interesting.

SH: But very briefly, the real question in the argument that the court should adopt the New York State Constitution involved the case of *McCleskey against Kemp*.[56]

MF: The Supreme Court case.

SH: Yeah, which I think came down around 1965 or something. Maybe not that long ago, I'm not sure.

MF: Maybe not that old.

SH: But prior to *McCleskey* the rule had been when they're looking at the whole thing could it be said that the application of the death penalty was not arbitrary and capricious and was it fair --

MF: Just the general --

SH: Really the basis of it.

MF: General overall fairness.

SH: Yes. And so along came *McCleskey* and whatever that year was and it really tightened up the test [00:36:00] under the United States Constitution Eighth Amendment, cruel and unusual punishment. And it said that you really had to show something beyond the question of whether or not it was arbitrary and capricious and made it much, much more difficult. So that was a five to four decision and it involved the case of a black defendant in --

MF: With a white victim, right?

---

[56] *McCleskey v Kemp*, 481 US 279 (1987).

SH: Yeah, a white victim but what state?

MF: Was it Georgia?

SH: Yes, in Georgia. Who had been convicted of first degree murder and sentenced to death. And the Supreme Court accepted absolutely as proof the statistic that showed that a black defendant accused of murder and possibly given the death penalty was 22 times more likely to receive the death penalty in the state of Georgia than a white defendant in the same circumstances. So it showed absolutely without any question that there was prejudice against the blacks in the question [00:38:00] of the administration of the death penalty law.

MF: So we were talking about the Supreme Court decision of *McCleskey* and how you would distinguish that here in New York applying the New York Constitution and what you thought was wrong with *McCleskey*.

SH: *McCleskey* involved the conviction of a black defendant in Georgia who had been sentenced to death and the Supreme Court in *McCleskey* accepted the statistics which showed, as I recall it, that a black defendant in Georgia was 22 times more likely to receive the death penalty than a white defendant under the same circumstances. And *McCleskey* had really turned back existing law and adopted a much tougher rule stating that it was necessary in order to prove discrimination or in order to prove that the death penalty had not been fairly applied, that you had to prove actual prejudice which is something which is almost impossible to prove. [00:40:00] And so in the arguments that we made under the New York State death penalty --

MF: In applying the New York Constitution.

SH: New York State Constitution to the New York State death penalty, we argued that this would have been impossible to show and that under the situation in New York where you had the application of the death penalty really dependent upon decisions of the District Attorney in each of the 62 counties of the state where the makeup of the citizens politically and philosophically and every other way was entirely different in all of these different counties throughout the state and where the District Attorneys had entirely different attitudes, it would be absolutely impossible to determine fairness because it would depend on luck of where the --

MF: Crime occurred.

SH: Yeah, where the prosecution was taking place. For example, I think at that time, I know that Morgenthau[57] was District Attorney of New York and there was something like 1,000 first degree murder cases which had taken place and he never requested the death penalty law be applied or considered in any one of those. Where you take a --

MF: Onondaga?

SH: Well, Onondaga County but take Wyoming County or some of the rural counties where they're more like to call the death penalty into it, say that it should apply [00:42:00] in even a minor case. So clearly in New York this would have been, application of death penalty law would have been arbitrary and capricious and we thought that the New York State Constitution should be applied and that we should back away from *McCleskey against Kemp* and adopt the prior rule in the

[57] Robert M. Morgenthau, New York County District Attorney, 1975-2009.

Supreme Court which was that the test would be -- was it arbitrary and capricious, would it have been fair and so on.

MF: So you spent quite a bit of time?

SH: We spent a lot of time on that.

MF: You were really interested and involved. I think it's an important part of your legacy.

SH: It was and I wish I could remember it better because all of this took place quite a while ago.

MF: But the history's there.

SH: The history's there.

MF: Scholars can study it.

SH: Yeah.

MF: We've talked about almost everything in your career. We began with your early days after Cornell Law and brought you right up to current with your continuing teaching at SU Law School. Maybe you want to spend a few minutes just talking about some general observations about your career. Any -- ?

SH: I'd say that I can't imagine anyone who has had as much luck and as many good breaks and opportunities as I've had. I mean [00:44:00] so that it's just been one opportunity after another. And so I guess, I've said it before but I always sort of taken the challenge so to speak and say something that's come along, it sounds interesting, can I do it or can't I do it, there's only one way to find out and that's try it. Give it a try. And so I've done that. So for me it's been wonderful because I've had a wonderful, interesting, fascinating career as a judge and as a lawyer.

And I would say as far as being lawyer and judge is concerned to me there are great advantages in being a generalist which I've always been, which a trial lawyer is necessarily a generalist in that you don't know what the case is. Oftentimes it's something brand new, you have to learn it, you have to learn something new. So they're always interesting and so I think what makes it enjoyable to me perhaps is the fascination and the variety that the practice of law has brought to me.

MF: Intellectual stimulation?

SH: Yeah, intellectual stimulation. And it's still doing it. I have some very, very interesting problems in these cases that I just mentioned that I'm handling. And then I think there's another aspect to the legal profession [00:46:00] too, and I'm sure you're finding this to be so, that it brings you in contact with people, it's a people business. All kinds of people, interesting people, good people, bad people.

MF: Annoying people.

SH: (Laughter) Annoying people. And so that's an aspect of it. And also you're always doing something. It keeps you busy, keeps you going, keeps you learning. And then I guess I know that somewhere somebody quoted something that I said there, quoting Judge Kaye.

MF: Yeah, Judge Kaye, the range of common law questions.

SH: Yeah, I agree with that but before that.

MF: There are a few quotes and they started on the page before. Which one? What's the purpose?

SH: Yeah, what's the purpose.

MF: What's the law's soul?

SH: Yeah. What is the law's purpose, what of the law's soul? It has been my fascination with the law itself and the legal process which as much as anything has sustained my interest and inspired my enthusiasm. [00:48:00] Lawyers who can from time to time grasp law's underlying purpose will better serve their clients and find a deeper fulfillment in the work. And I think before that I said, why don't you read this to me? The law's underlying purpose. I've forgotten what it said.

MF: You have a couple of things here. You had Karl Llewellyn.[58]

SH: Oh yes.

MF: This is a good quote. Karl Llewellyn: The hardest job of the first year of law school is to lop off your common sense of justice, to knock your ethics and your sense of justice into temporary anesthesia; you are to acquire the ability to think precisely, to analyze coldly, and to manipulate the machinery of the law.[59]

SH: OK.

MF: It is not easy thus to turn human beings into lawyers. (Laughter)

SH: I read that quote every year to my students and so then I say, "Of course Karl Llewellyn was being facetious, he didn't really mean this." But I said, "If any of you as a result of your first year or your second year of law school have been turned into machines and if you analyze coldly, if you want to manipulate the machinery of the law, I intend to change you back into human beings."

---

[58] Karl N. Llewellyn (1893 - 1962), Professor of Law, Yale Law School; Columbia Law School; University of Chicago School of Law.

[59] Karl N. Llewellyn, The Bramble Bush at 101 (Oceana Publications 1951).

MF: And find the soul beneath?

SH: Right. So I do try to do that in my [00:50:00] seminars and they've been well received. I get very high marks from the students.

MF: They love you. Yes, they do.

SH: I'm not sure about that but --

MF: And you know, I think here's the quote and I'll just read it, that I think you were looking for. "What does lie beneath the fabric of the law? I believe that the only legitimate purpose of the law is to improve society and that beneath the fabric of the law lies some idea of good, some concept of what is right and fair for a society at a particular time in history."

SH: Right.

MF: Well said.

SH: (Laughter) Absolutely brilliant.

MF: You wrote that.

SH: I did?

MF: Yeah.

SH: (Laughter) It does sound familiar now.

MF: I'm just going to thank you two. That's all I'm going to say.

M: Hang on just a second. All set.

MF: I think that's a great place to stop. Let me just add that I want to thank our wonderful videographer, Ken Barber. He’s done a great job.

SH: Thank you, Ken.

MF: And then Annelle McCullough who is here today with us, your clerk from years back who has been just wonderful to you throughout your career and did a great job helping us prepare for this morning.

SH: Absolutely.

MF: So thank you.

SH: Without Annelle I wouldn't have gone on the Appellate Division and I wouldn't have been on the Court of Appeals.

MF: That's right. So thank you both. And thank you.

SH: You're welcome. Thank you.

MF: That was great.