

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

**ORAL HISTORY PROGRAM**

**Hon. Howard Levine**



*Found on exterior entrance to New York Court of Appeals*

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

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**ORAL HISTORY**

**Subject: Hon. Howard Levine  
Whiteman Osterman & Hanna LLP  
New York State**

**An Interview Conducted by: Alicia Ouellette**

**Date of Interview: May 10, 2012**

**Location of interview: Whiteman Osterman & Hanna  
One Commerce Plaza, Albany, NY**

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

**Oral History Project**

**INTERVIEWEE:** Hon. Howard Levine

**INTERVIEWER:** Alicia Ouellette

**DATES:** May 10, 2012

**[Begin Audio File 1]**

AO: I am a professor of law at Albany Law School, and I am a former law clerk to the Honorable Howard Levine, with whom I'm sitting. We're going to talk today some about what makes you, and how you decided cases, and get some of this on the record. I thought we could start from the beginning. You're the son of two lawyers.

HL: Right.

AO: You grew up in Schenectady. I wondered what your childhood was like and what it was like to grow up with a working mom at a time when there weren't a lot of working moms.

HL: That's true, and not many working lawyer moms in those days. She was sort of a pioneer.

AO: She must have been.

HL: Coming out of law school in the late '20s. To a degree, I guess my father reflected some of the sexist prejudices in those days because I don't think she was

encouraged to do as much as women lawyers do today, so it was more of a supportive role. She had a few of her own clients. What I got mostly out of it is I learned how to cook as a teenager because if she came home late from the office, I had to prepare some kind of modest supper for everybody. So that's when I learned how to cook.

[0:02:06]

It was a good growing up. I think they were very strong on getting a good education and they gave me a lot of good guidance, including encouraging me to apply to Yale for my undergraduate education, because the most natural thing in Schenectady in those days was to go to Union College for your college education, but they wanted something more for me and they gave me very good guidance in that respect.

I was not encouraged to be a lawyer. My father, I guess was always a frustrated doctor and he wanted me to go into medicine, but when I got to Yale and started a pre-med course, particularly chemistry and biology. I learned very quickly this was not for me, and that was a good thing.

AO: So you started as a pre-med.

HL: I started as a pre-med yeah, but very quickly I learned it was not for me, and that was all to the better I think. I think I turned out to be a better lawyer than I would have been a doctor.

AO: So what did you end up majoring in?

HL: I majored in history.

AO: In history. And did you know you wanted to go to law school at that point, when you were...

HL: Yeah, pretty much so. It was a good combination of intellectually stimulating and challenging, and a lot of interesting things you could do to help people, so it had a lot of appeal for me and surely, I don't have any regrets.

AO: Did the fact that your parents were lawyers, did that make you want to be a lawyer? I mean you had been discouraged --

[0:04:00]

HL: I did. I thought the dinner conversation over some of the events of the day or some of the cases my father was dealing with were interesting and yeah, I think definitely that kind of home atmosphere looked appealing to me.

AO: And so at Yale, did you have any particular teachers that were especially important?

HL: Undergraduate, I had a marvelous teacher who encouraged my subspecialty, which was intellectual history, and I still remember him. He had a very big influence on me and I think intellectual history served me well in my capacity as an appellate judge too, because what do we do if we don't look at values? It's hard to ignore values in hard cases -- important cases -- and an analysis of the history of the evolution of those values and where perhaps they're going in the future, which is intellectual history in a sense, is the way to do it, part of my approach, which you probably remember.

AO: I do remember and I'm going to come back to some of the decision making, the judicial decision making. I'm curious, though, did that study of intellectual

history, was it relevant at all when you were in law school or were you learning more black letter law?

HL: I think it was always relevant.

AO: It was relevant, it was useful.

HL: Yeah, particularly going to Yale Law School, which was very policy oriented.

And so some analysis of where the ideas were coming from and were they worthy of acceptance and so forth, was helpful, yes indeed.

[0:06:05]

AO: Did you decide during law school, what kind of law you wanted to practice? Did you have any idea you'd end up spending years as a Family Court Judge?

HL: No. The answer is no. I sort of entertained the idea of going the route that you've gone, of teaching. As a matter of fact, I taught freshmen, first-year students, when I was a third-year student.

AO: What did you teach?

HL: I taught legal writing, research and writing, and I thought that getting an exposure to the big city, big firm practice, would be good training, so I went to New York for a few years, but I always really did have the idea of teaching at that point.

AO: So that was sort of your game plan. Things went awry or astray.

HL: Yeah, things went different.

AO: As often happens. So you stayed for just a couple years at Hughes, Hubbard. Was that a good experience for you?

HL: It was a marvelous experience. I worked for this brilliant lawyer who was one of the senior partners of the firm and sort of the intellectual guru of the firm, and

remained a friend of his throughout his life. He was really an amazing person. He lost his father when he was a youngster and he lived in South Dakota with his mom, got a scholarship to the South Dakota School of Mines, was valedictorian of his class there. Then he got a scholarship to Yale Law School and he was valedictorian of his class there.

AO: Wow, out of the School of Mines.

HL: Out of the School of Mines. Homer Surbeck.

[0:08:00]

He was law clerk to Chief Justice Taft, and then he went to work in New York, for the predecessor firm called Hughes, Sherman and Dwight, which at that time was led by Chief Justice Hughes, who was in-between his two terms on the Supreme Court. Remember, he was on the Supreme Court and then he left the Court and he ran for president against Wilson, unsuccessfully, and then went into practice in New York, and he was sort of Justice Hughes's bag carrier, so to speak, and described how Hughes would prepare for oral argument in the Supreme Court of the United States with his assistance. Then when Hughes went back on the Court as Chief Justice, the firm split up over some ethical issues and that's when the Hughes, Hubbard firm was started in the '30s, the late '30s. He had the best legal mind I ever encountered, better than any of my professors at Yale Law School.

AO: Wow. So what did you learn from him?

HL: I learned how to be analytical and how to write very simply. I hope I learned it.



AO: Well, I think you did, I think you did, and I think I can remember you referring to him during the clerkship and saying that you know, it was sort of the synthesis that you talked to me about.

HL: Oh yeah, he was very meaningful to me.

AO: To be able to read each case and then draw from it, a common principle.

HL: That's the way he approached it, a common principle, and close analysis to make sure you get really to the essence, the nub of the case, and that was where you start.

AO: Right.

[0:10:00]

HL: As I said, it was a friendship that lasted. I used to come to the firm reunions and see him. Late in life he married and he had a real true love Margaret Packard, and she was part of the Hewlett-Packard family. They met because they were both followers of Norman Vincent Peale; he was the matchmaker. She was widowed and it was truly the great love of both their lives and when he died, she called me to tell me, and that was very meaningful to me.

AO: Nice. So why did you leave and go back to Schenectady from the big city.

HL: Why did I leave? Well, I was doing fine but my dad, who was for years counsel to the Speaker of the Assembly, Oswald D. Heck... This was in the late '50s and Heck was planning to run for Governor against Averell Harriman, and a man by the name of Nelson Rockefeller came along and kind of cut off his chances of doing that. He had been Speaker for a quarter of a century I think, and still holds the record of longevity as Speaker, and decided he was going to get out. My dad

was very, very close to him, and he was named as a co-executor of Ozzie Heck's will. Anyway, they were going to get a judgeship for my father and they created a new judgeship in the Fourth Judicial District for that purpose and then Heck died and as the expression goes, "There is nothing quite so dead as the death of your rabbi," and Heck was his rabbi. So the judgeship was bartered out in order to eliminate one of the candidates to succeed Heck as Speaker.

[0:12:20]

AO: And your dad lost.

HL: And my father lost that judgeship and I suppose at that point, to an extent to vindicate my father to a degree, that's when I began to think about a career as a judge, rather than going to be a law professor.

AO: That's interesting. So you came back to Schenectady.

HL: With two little kids.

AO: Okay, so you were married. Were you married in law school?

HL: Law school, yeah, after my first year.

AO: Wow.

HL: Barbara, of course, was as much part of the law school class as I was.

AO: Sure.

HL: There's some very, very close friends that we made in law school.

AO: Were your kids born during law school?

HL: No. Oh yes, Neil was born in March of my third year and then Ruth was born when we were in New York.

AO: So you came back with the two little kids and you got a job in the DA's office, is that right?

HL: Correct because I wanted to get some trial experience.

AO: All right. So what kind of cases did you handle in the early days?

HL: I had wonderful cases. A couple of homicides and a big corruption case, so I had some really good cases and enjoyed the experience.

AO: What was your best win as a prosecutor?

HL: Probably a corruption case involving a Republican ward president, one of the major bookies in town and a police officer.

[0:14:02]

AO: What did they do?

HL: They were busy giving the bookie information on what was going on with the vice squad and the State Police because the police officer was on the vice squad.

AO: So that was satisfying?

HL: Yeah, that was a good case, that was a fun case.

AO: Was that before or after you ran... you had to run for DA, right, there's an election?

HL: Of course. That was before. I was an assistant then.

AO: You were an assistant at that point. So you made the decision to run.

HL: Right.

AO: What made you decide to do that?

HL: Well, I think it was the natural progression, certainly in our area, a very common progression from being DA to a judgeship.

AO: So you really had your eye on a judgeship.

HL: I did.

AO: That's really interesting. So what's it like to campaign?

HL: I actually enjoyed it.

AO: Did you?

HL: Yeah, I came to enjoy it and the family enjoyed it, at least the first time around.

The kids got involved.

AO: They did?

HL: Yes, they did. Neil was ten, and Ruth was about eight. Ruth was very big into it.

AO: Was she? Something that inspired her later?

HL: Perhaps. The thing I think that is so satisfying about it is you've got people who are so dedicated to you. You don't really know why they become so dedicated and loyal and fiercely partisan for you, and it's wonderful and you make some really good friends that way. It's nice when you're doing the hands-on campaigning to find people responding to your warmth.

[0:16:00]

I guess that's the Bill Clinton syndrome. If you go into politics, that's one of the big appeals and if it doesn't appeal to you, I'm wondering whether -- including I'm now thinking of some of the candidates who are around this year, as to whether or not it's worth going into politics if you don't get the satisfaction out of those exchanges and contacts with ordinary people.

AO: Right, right. Well it's a very different kind of...

HL: I'm saying that for both of the candidates. I'm not sure either one of them enjoys that.

AO: I mean the elections are very different now with the Internet.

HL: Oh yeah, terrible, yeah.

AO: So when you were campaigning, you actually would go door to door?

HL: Door to door or shopping centers or well you know, there were a number of occasions, those kind of speeches you make, campaign speeches, campaign events, mostly party campaign events, and then going to a lot of dinners of various civic organizations, where you were expected to be there and press the flesh.

AO: Right, right. Was it different campaigning for Family Court than for DA?

HL: Not particularly. Neither of them, you know being the kinds of offices that you can say this is my program for DA, okay. My program is the same as every prosecutor's program; do a good job, fight crime. As far as Family Court was concerned, a lot of people thought was not a good move on my part.

AO: Oh, is that right?

HL: Yeah. There was a feeling that Family Court would be a dead end because it was in those days, not exactly a judgeship with a lot of stature. A lot of people thought you were basically a glorified social worker, or it wasn't judicial enough.

[0:18:10]

AO: Too many real people with real problems.

HL: Right, right. I really loved my experience in Family Court, which had a great influence on me I think.

AO: Right, you've said that. I read over one of your lectures and you talked about the Family Court years and the prosecutor years as being the most influential time.

HL: That's right. Both of them were very influential.

AO: How so, in what way?

HL: Well, when I was DA, it was the greatest revolution in criminal law and social order. It was the '60s, so we had the drug revolution, the feminist revolution, the student revolution, because Vietnam was the hot issue as far as students were concerned, and there was a revolution in constitutional criminal procedure. We had all the great cases from the Warren Court, on confessions and lineups and all of that, completely changing behavior of police in terms of arrests and interrogation of suspects and so forth. I guess I became appreciative of the need for stability, the need for some kind of social order, and reflecting also on the fact that you can't stop the clock, you can't stop cultural change as well. In Family Court, there were also great changes that were taking place in the '70s.

[0:20:00]

What I loved most about Family Court I think, was that you really -- a Family Court Judge had the opportunity to encourage, more than most other judgeships, had the opportunity to initiate and push for programs that would strengthen families and help kids, and we did some very revolutionary things in those days.

AO: What kinds of things did you do?

HL: Well, we had an intensive probation project which had a federal grant, which was named one of the 10 best delinquency programs in the United States at that point, and the idea was to divert kids from the system. In those days that was very novel.

Now, everybody talks about it, but that was very novel in those days. Also, rather than ship them off to training schools or other institutions out of town, to give them intensive supervision in their own homes, and that too was a revolutionary idea.

Then we initiated the idea of supervised visitation, when there was some danger of the non-custodial parent's conduct, with the children, rather than just cut that parent off completely from visitation. With one of the churches and volunteers, we worked out a supervised visitation program, and then we did some great stuff with using volunteers from the community, mostly women, either in Junior League or AAUW [American Association of University Women], with helping mothers who had been found neglectful of their kids, and giving them somebody who was not in government or official, to talk to and get support from and get advice from, sort of a big sister sort of an idea. Those were all very good and very successful programs.

[0:22:18]

AO: Do you remember any of the individuals who were involved in those programs?  
Does anyone stand out? The participants?

HL: The participants.

AO: Or one of the kids?

HL: Well, I would see them. In a community like Schenectady, one of them could be waiting on my table when I was out at a restaurant.

AO: Right, right. "Hi, Judge."

HL: Exactly. I still find people who tell me how helpful I was in some respect.

AO: And it made a difference, right. What is it about being a Family Court Judge that lets you do that kind of programmatic stuff that you might not be able to do? Are there more resources?

HL: There are more needs for those things. I just think the work of the Court, dealing with these social problems, is different than say a Criminal Court Judge would have or a Judge presiding over civil cases. I think that model works in Family Court.

AO: Yeah. Some creativity makes sense, right? So you went from Family Court to the Appellate Division?

HL: No, I had to go through the Supreme Court.

AO: Oh, the Supreme Court, that's right.

HL: That was one of the reasons I went to the Supreme Court.

AO: One year. It was a fairly quick stop at the Supreme Court.

HL: Yeah, but it was a long stop in Family Court. I had a full decade in Family Court.

[0:24:01]

AO: And so did you have to -- did you get reelected to Family Court or was that one term?

HL: That was just one term and the year that my term was up, I ran for Supreme Court in the Fourth Judicial District, and that district runs from Schenectady all the way to the Canadian border and west, covering Montgomery County and Fulton County in that area.

AO: Was that a hotly contested election?



HL: No. That was still in the period when in that district, the Republican candidate usually sailed through, but it was a contested election. I never had a non-contested election. I was campaigning in 11 counties, which was interesting, because there's a wide variation in the populations, as you probably know, from the North Country being very different from Schenectady.

AO: Right.

HL: I found that interesting.

AO: And so campaigning in that broader region must have been kind of tough on family time.

HL: Yeah, but it goes very fast of course. You basically start intensively campaigning in September and then early November you've got the election, so it's really a couple of months. I always found the time on the campaigns went by very, very quickly.

AO: So then you were a Supreme Court Justice.

HL: Right.

AO: What kind of cases did you hear in the Supreme Court?

HL: Well, as you probably know, in this area, most of the trials are personal injury cases, and the calendar is mostly personal injury lawsuits; motor vehicle accidents, fall downs, product cases, stuff like that.

[0:26:04]

The mix is a little different in the Third District, the district with Albany, because of the fact that all of the suits against State government mostly have to be initiated -- you're a New York practice teacher, you know better than I.

AO: Right, right, the Article 78 cases.

HL: Article 78 cases that have to be initiated in Albany, and so the Third District Judges get a larger dose of the administrative law kind of cases.

AO: Which you probably would have liked.

HL: I would have, but we got some of it. We got some of it, and it was interesting.

AO: How did you like dealing with juries?

HL: I never had any problem with juries. I rather like juries.

AO: Yeah?

HL: Yeah. And again, it's a matter of getting some rapport with people of all walks of life, which I enjoyed. Because I had a decent amount of trial experience, and I did jury -- I did assignments while I was in Family Court, in other jurisdictions, in other courts, so I did a number of terms of criminal cases and I did civil cases; cases that came down to County Court from Supreme Court that were personal injury cases. So I did a good measure of presiding over jury trials while I was still a Family Court Judge, so I didn't have any particular trouble with it. I guess I would have to say though, that I found the work less interesting and less challenging, the ordinary day-to-day, presiding over trials and trying to get settlements of cases with the parties and the lawyers in the Supreme Court; I found it less challenging than Family Court.

AO: So when it was about money rather than about the human beings.

[0:28:04]

HL: Money rather than about people's lives and children, I found less challenging. So I was all set to try to make the Appellate Division.

AO: Did you see a difference in the quality of lawyering in the different courts?

HL: Yeah, I mean the really good trial lawyers were not trying cases in Family Court. Very rarely would they come into Family Court. Really skillful trial lawyers were appearing before me more often in Supreme Court, but you get a wide variety of talent, some of them pretty terrible. "I'm in the middle of trial and he's butchering the trial, what do I do to protect his poor client," which is a dilemma.

AO: What would you do if you would see a client being a victim of his or her lawyer?

HL: Of his lawyer? I can remember one and I remember the defense lawyer, who has never forgotten the case, who was not very happy with me because I sort of bailed out his adversary. He took it good naturedly. There wasn't an awful lot of money involved in it. We still joke about it when we see each other.

AO: Is that right? How did you do it, how did you bail him out?

HL: Well, I asked him certain questions.

AO: Asked one of the witnesses?

HL: Yeah, which sort of developed an alternative theory of recovery.

AO: So you definitely lent a little hand there.

HL: I did. I put one hand on the scale of justice.

AO: On the scale of justice, that's funny. So from Supreme Court to the Appellate Division, how did that come about?

[0:30:03]

HL: You never quite know how it came about, but of course there is a certain amount of obviously politics involved in it. Hugh Carey was Governor; it's a gubernatorial appointment, and Governor Carey was a Democrat and I was a

Republican. I think the Presiding Justice, Mahoney -- A. Franklin Mahoney -- had some sway in terms of influencing the Governor on appointments, and it was more or less a Fourth District Appointment. There was the vacancy that was from a Fourth District Judge who reached mandatory retirement, so there was some possibility that Governor Carey would follow the tradition of keeping an Appellate Division that had judges from each of the three judicial districts. The main candidate for the job was then Administrative Judge for the Fourth District, not a bad judge by any means but a judge who had a reputation for a fairly bad temper, and I think Frank Mahoney decided...

[0:32:00]

First of all, I had written a bunch of decisions that got published, as a Family Court Judge, so he had a pretty good sampling of my writing skills. I think he just felt it would be a better appointment; better for the court, not having somebody with a bad temper and having somebody who was scholarly, which was already pretty much my reputation at that point.

AO: Right.

HL: So I think he had a lot of influence on it, and there were a couple of others. It may have been that the late, great Mayor of Albany Erastus Corning might have also, toward the end, weighed in on my behalf because we were both alums of Yale. He was a very big Old Blue, and we had been friendly. I had worked with him on some fundraising for Yale at one point or another, and we had seen each other at some alumni occasions. He was another terrific personality that I'm glad I had an opportunity to get to meet and get to know a little bit. An enigma in many ways

because he was such a machine politician and yet he was a brilliant guy, Phi Beta Kappa from Yale.

AO: Is that right?

HL: Yeah. And a master politician. So I think toward the end, he kind of got into the picture a little bit too, but in any event that's what happened. I'm not sure how it happened.

AO: So you might have had friends in the right places, but the Governor made the right appointment I think. It worked out.

HL: With a little bit of luck to make it in after a year, only a year on Supreme Court, in contrast to my long period of waiting for an appointment to the Court of Appeals.

AO: That was a large part of your time at the Appellate Division it seemed like. You were a finalist five times, is that right, before...?

[0:34:06]

HL: I think it was seven or eight times.

AO: Seven or eight times before.

HL: I think the whole Court turned over, all but one.

AO: All but one?

HL: Yeah. I think the only one who was on before I was nominated was Dick Simons. That was the first -- oh, well I guess Judge Cooke was the first appointee under the system of commission, so-called merit selection, and then Dick Simons was the next. Then, the year that Judith Kaye got nominated was the first year I was nominated, and that would have been in 1983 or '84. So from then until 1993, I was on the list every time there was a vacancy, and there were seven vacancies.

AO: So was it a horrible disappointment each time?

HL: No. I liked the work on the Appellate Division; we had a very collegial court . I enjoyed the people I worked with, and I had a certain measure of influence. Of all the four departments of the Appellate Division, I think the jurisdiction of the Third Department is the very most intellectually stimulating because of all the state litigation mostly.

AO: Right, the administrative law.

HL: All the administrative law stuff and good criminal cases but not drowned in criminal cases like the First and Second Departments in the New York City area. I enjoyed what I was doing, I was glad that I got paid for it.

AO: It's a good gig.

HL: Yeah, it was a good gig is right, and a happy court, it was a very happy court.

[0:36:01]

AO: Is that right? Who were your buddies on the Third Department?

HL: Paul Kane, who was an Albany Law graduate, and Frank Mahoney, who I revered and we were very close. Judge Casey -- Jack Casey -- a great guy, great fun, a great sense of humor, and then Tom Mercure the last several years came on the Court and we became close. So it was really a nice group.

AO: And so going from being a trial court Judge to an appellate court Judge, you seem to have been born to be an appellate court Judge but was it a tough transition to be stuck with a record that you couldn't change?

HL: No. I didn't have any trouble with it frankly at all. I think probably I was a better appellate judge than a trial judge. I don't think I was a bad trial judge, but I don't

think I was one of the people who just loved it and did it so effortlessly as some of the judges. I really loved being an appellate judge.

AO: You found your home.

HL: Yeah, I did.

AO: So you were known as the great dissenter on the Third Department. Why do you think you dissented so much there?

HL: It really wasn't a lot of dissent.

AO: It wasn't so much?

HL: Just by comparison I guess. It was a court that did not see a lot of dissents, a lot of disagreement, and in certain areas, I thought they were a little behind the times, particularly in criminal procedural rights, so I did a good measure of dissenting in those.

[0:38:00]

In a lot of them, the Court of Appeals upheld my position, and of course, it was very funny after a reversal came down on one of my cases. I would come into conference and I would expect somebody to say something about it but no, they completely ignored the fact.

AO: Even when it would be a reversal on your dissent?

HL: Yeah, sure. A little gamesmanship, which I enjoyed also, I thought it was amusing.

AO: I'm sure you did.

HL: I never rubbed it in, I was good about that.

AO: I don't think you dissented as often in the Court of Appeals. Is it something about the Appellate Division?

HL: No. I think it probably was pretty much about the same.

AO: So you think the Third Department dissents were about the same as in the Court of Appeals?

HL: Well, I think my percentage in the Court of Appeals went down over the years. I dissented probably more than I did in my later years on the Appellate Division, and I guess it's also a question of influence and respect in both courts. In both courts, I started out doing more dissenting and ended up toward the later years dissenting less because they agreed with me more.

AO: You were able to convince them.

HL: I think there's a natural progression that way too.

AO: So you finally got the call you'd been waiting for.

HL: For about eight years.

AO: For about eight years, another Democratic Governor Mario Cuomo called you. Can you talk about what that was like?

HL: Well it was kind of funny. It was in the summer, toward the end of summer, in August, and I was already back to the office preparing for the September term of the Appellate Division.

[0:40:06]

As it happened, our daughter Ruth's kids were spending a good deal of the summer with us that summer and the summer before that, they were going to the JCC day camp. You know, they were our little city kids, fresh air kids.



AO: Fresh air kids in Schenectady.

HL: In Schenectady. Ruth was up, and the Governor called the house and got Barbara, and he said, “Would you like me to appoint your husband to the Court of Appeals?”

AO: He asked her?

HL: Yes. Is it okay with you if I offer an appointment to the Court of Appeals. She handled it all right.

AO: Did she negotiate at all?

HL: No, she didn’t ask for any conditions.

AO: Knowing Barbara.

HL: That’s right. You would expect her to have the last word.

AO: As long as he’s home for dinner.

HL: Oh, that’s a good point isn’t it? We may discuss that later.

AO: We may discuss dinner.

HL: So he then called me and everybody went over for the press conference, including the grandchildren, and that’s the way it went and it was certainly a happy day.

AO: I bet, very joyous. How quickly did you start getting cases?

HL: Well, I had to go through the confirmation process and the legislature did not come back for confirmation until early September, so the first week of the term, I hadn’t yet been confirmed. I didn’t come on until the second week of the term. As a matter of fact, I think I only sat one day of the September session.

[0:42:04]

AO: Do you remember any of the cases from the first session?

HL: I wrote one.

AO: You did? What was that?

HL: *People v. Alls*.

AO: Oh, *People v. Alls*, okay.

HL: That the present Clerk of the Court reminds me about because he and I chatted over it a lot in the process of getting it decided. It was a case that the Court had split three-three, and it had to be reargued, so I was the vote that everybody was looking at, to which way I was going to go with it, and of course I drew the case then and it was a four-three decision.

AO: Do you want to talk about what it was about?

HL: It was about an inmate in a state prison who allegedly committed a crime and was interrogated without being given Miranda warnings.

AO: No Miranda warnings, right.

HL: That was the issue, as to whether or not there were any self-incrimination rights of an inmate, and the Court split four-three.

AO: And you resolved it in favor of the inmate.

HL: Of the inmate.

AO: On the argument, did you ask questions?

HL: Oh, I did. I was probably the most aggressive questioner at the Third Department. As a matter of fact, the Third Department did not have a reputation of being actively engaged in oral argument; it was more of a listening court, and I was known as the big mouth of the court.

AO: I think that's right. People sort of feared the Third Department when they saw your name on the calendar.

HL: Oh, really?

AO: Sure.

HL: You were in the AG's office in appeals and opinions.

AO: Right.

[0:44:00]

HL: And I'm sure you heard from some of the old veterans in there about exchanges with me at the Third Department.

AO: At the AG's office, we'd do lots of mootings of the cases, and I was often asked to play the role of Judge Levine.

HL: Is that right?

AO: Yeah. During which I would assume the posture, sit back.

HL: Lean back.

AO: Lean way back. It always seemed to me, watching you, that you really enjoy the oral argument part of it.

HL: Oh, I do, yeah, and I got a lot out of it.

AO: Sometimes you'll hear lawyers say that oral argument is just for show, the judges come in and their minds are made up. Would you agree with that or do you think that it makes a difference?

HL: Well, it depends. There's a good answer, it depends.

AO: There you go, it's a lawyer answer.

HL: There are the cases that are pretty clearly where you know before oral argument where you're going with it, and then the purpose of oral argument, of asking questions in those cases, is not necessarily to resolve confusion or uncertainty in your mind but to ask some questions that might help some of your colleagues and educate some of your colleagues as to how they should vote on the case.

Then there are the cases where you're not at all certain of what the result should be and where you have some real problems with each side's position, and then the oral argument is very helpful. If you've got good lawyers in front of you, then the oral argument is very helpful, when you get an answer which helps satisfy you on one of the matters, the issues that you have doubts about. So yeah, I think it can be very helpful.

AO: Can you remember a time when someone won or lost a case on oral argument, where you thought that does it?

[0:46:06]

HL: Yeah, I'm sure there were several cases. I'm not sure that I could easily, quickly identify. I think in one of the cases during your clerkship, you tell me whether you agree because you probably were there for the argument, but I think the Establishment Clause case involving the inmate, *Griffin v. Coughlin*.

AO: Right, *Griffin*.

HL: The AA, twelve-step mandatory.

AO: The First Amendment, yeah.

HL: I think there was a couple of questions in there to the AG, which were not answered satisfactorily, sewed it up for me at that point.

AO: That was a very interesting case.

HL: It was, yeah.

AO: I remember as a clerk sort of the process of getting the case and --

HL: Preparing for the conference.

AO: -- preparing for the conference, preparing you for the conference, and saying I think this one's a big one. One of the things that was different in the Court of Appeals from the Appellate Division was you didn't know which case you'd be writing on before the argument.

HL: Right. The Third Department, I think to this day still gives you the heads up in advance as to which case you're drawing before the argument.

AO: Do you think that makes a difference?

HL: It took me a while to adjust to it. I surely liked the old way in many ways, because you really knew your case and you were ready to go completely, but the other aspect of it is that when you don't know, of course you have to prepare each of the cases more intensely, and so you're going to be better prepared for all the cases when you don't know in advance which case you're going to draw before oral argument.

[0:48:17]

But that only works well when you don't have a lot of cases on. If you're at the Appellate Division, where you may have ten cases on the calendar, you can't prepare for ten cases. When you've got five or six cases, you can pretty well adequately prepare for all of them. So it works better for the Court of Appeals the

way it is, and it worked well for the Appellate Division, given the nature of its dockets.

AO: And it made it kind of fun at the Court of Appeals in terms of you'd come back from argument and we never knew which straw you would have drawn.

HL: Maybe for purposes of this, I ought to explain the process.

AO: Maybe you should explain.

HL: Well, the process is that you don't know in advance which case you might draw, and at the end of the day's argument, the members of the court retire to one of the anterooms from the courtroom and each case is on an index card face down, and the judges draw blindly and don't know the case that they get until they turn over the index card and find out which case they got.

AO: And it was truly blind.

HL: And it was truly blind.

AO: No marks on the index card.

HL: No. I mean there were rumors before I was on the Court, when Chief Judge Wachtler presided, there was some conceivable indication to some of the judges as to which case is on a card.

AO: There may have been a corner tipped or something.

HL: Something like that. I don't know if there's any truth to it; it's pure hearsay. I wasn't there.

[0:50:00]

But it was legit, totally legit in my years. Then, after you draw the case, as you probably remember, I'd come back and we'd go over that case and see whether we had it right and whether we understood it.

AO: There was always a large glass of milk involved at that point, right?

HL: Yeah, true.

AO: Milk and cookies.

HL: That's right. In a hard, complex case, that discussion might go on into the evening hours from time to time.

AO: Right, and the discussion was with your clerks.

HL: Yeah, and the discussion was with the clerks.

AO: So you would bring both clerks, even though one clerk worked the day.

HL: Exactly. I would take some notes and I, at the conference the next day, the Chief Judge would go through the calendar and when the case that you drew was reached, you'd make a presentation to the rest of the court around this conference table, and then there would be... starting with the most Junior Judge, each Judge would express a position on the case, either in agreement or disagreement, and then commonly there would be a vote. If, as the reporting Judge, you got at least three Judges to agree with you, then you would take that case home to write the opinion. If you didn't get three Judges to agree with you, then the first Judge who expressed disagreement would get the case to write the majority opinion and you would then have to decide whether you were going to write a dissent. So that's basically the way it worked.

AO: How specific were your reports? As I recall, a lot of times we spent the evening. Say we had the *Griffin* case and we said, "All right, we've got to start figuring out something," but it was fairly preliminary at that point sometimes.

[0:52:09]

HL: Sometimes, and sometimes not so preliminary, but in a hard case, of course it's a tentative conclusion. Not often but every once in a while, I can recall reporting a case that I got agreement from at least the majority of the judges or maybe the entire court, and then taking the case home and trying to write it and finding out that I really felt the case ought to go the other way. Then it's a matter of mea culpa. You email your colleagues and say, "I think I got it wrong, I'm sorry that I misled you all and here's the reason why I think it should go the other way," and that would be a really extensive memo.

AO: Right. And even sometimes a sort of draft of what you thought you were going to write.

HL: Yes. It would be a memo, and that would be something you could virtually convert into an opinion. That didn't happen very often but a couple of times over the nine and a half years that I was there.

AO: We've been talking about the clerks a little bit. Are we good on time? Okay. Why don't you describe how you used your clerks and some of the relationships with clerks?

HL: It was a wonderful relationship and an intimate relationship. In selecting clerks, I looked for the kind of personal quality -- in addition to looking for people who were smart and knew how to write, I looked for people who could stand their



ground and I looked for people who had good analytical skills, and I also looked for people who had good personalities, people who were comfortable with themselves, able to laugh at themselves a little bit and could get along with clerks in my chambers and in other chambers, and who had good, self-confident personalities like you.

[0:54:39]

It was interesting. Not only did you have good, close relationships and friendships with the clerks who served with you in my chambers, but you had very good friendships with a number of the clerks in other chambers. I think that was important because influencing them was one way to get to the Judge that they served, right?

AO: That's right. And I think you took advantage of that on some cases.

HL: I did. I encouraged it, and there were some very good things that happened out of that situation.

AO: There were times when you would go to conference with the judges and you would say go down to the clerks meeting and talk to Libby or have a talk with the Kaye clerks.

HL: Yeah, have a talk with Audra Zuckerman in Judge Kaye's chambers.

HL: You may not remember this but I do. The Court, in my opinion, had gone haywire on reversing in criminal cases, on non-preserved procedural issues, under the so-called mode of proceedings doctrine.

[0:56:09]

AO: Right.

HL: They had expanded it. That was a very narrow doctrine -- the requirement for preservation -- so that the judge who was presiding over the trial could have the error brought to his or her attention and correct it there. A very strong tradition in the Court of Appeals, which is a court of law, and preservation is essential in that respect, but they had really expanded it to almost the point where almost any kind of statutory violation of the criminal procedure law because a mode of procedure error and requiring reversal without preservation. I had dissented in a number of those cases, and I kind of felt maybe we were ripe for doing something about it. So I sent you over to talk it over with Audra Zuckerman in the Chief Judge's chambers, and she had criminal experience. I think she had been a Legal Aid defense lawyer and she got the idea, and the two of you, I think, put together a memo, outlining the evolution of the mode of procedure doctrine. Is this all coming back to you?

AO: A little bit, yes.

HL: Well, you may not think this is as important as I did, and I still to this day do.

AO: Well, it changed the jurisdiction of the Court.

HL: It did; it changed the Court. It changed the approach of the Court back to almost -- except in the rarest cases where the prejudice really just made the trial a travesty, that even in constitutional violations, preservation was required, and it was a good thing to get back there.

AO: Right, and I think the Court started to remind the Judges that on the leave, because one of your jobs as a Court of Appeals Judge was to do the leave grant applications in the criminal cases. We had a number of cases that came up on

what looked like really juicy, interesting issues, and then they turned out not to be preserved.

[0:58:19]

HL: Not to be preserved, yeah I agree. So anyway, I think that kind of effort with the other clerks often made a lot of sense and was helpful to the Court.

MALE: Shall we take a little break?

AO: Take a little break, sure.

MALE: I will change tapes.

(pause in recording)

MALE: I'll start our recordings. All set, whenever you're ready.

AO: We were talking about your time on the Court of Appeals and when you first got there it was a rough time for the Court. Judge Wachtler had resigned.

HL: The first ever scandal for the New York Court of Appeals, right.

AO: What was that like for you and for the Court? How did that play out?

HL: I think it was an emotional time for some of the Judges on the Court. There were those that were close to and intimate friends of Judge Wachtler, who were very full of pain and I guess to a degree some anger over the way he was treated. Then, as there is often in any court, there were those who were not so friendly with the Chief Judge, as a block in the Court, and some of those emotional feelings came out in the course of the personal tragedy for Judge Wachtler and a tragedy for the Court.

[1:00:14]

The Court so much relies upon its reputation for integrity, fairness, stability, and for something like this to happen, and particularly happen with the Chief Judge, is a matter of quite legitimate concern. So there were undercurrents going on that I was not familiar with before, and the Court at that point, I would say, was not quite as collegial as it had appeared and certainly not as collegial as the Court that I left, which was a very collegial court. Then of course we had a new Chief Judge --

AO: Right, Judge Kaye.

HL: -- who had to step into this situation, and Judges who may have had aspirations and those aspirations of becoming Chief Judge were dashed, and there wasn't going to be any change in the near or even distant future, so there were all sorts of emotional things going on, but everybody I think pulled together for the betterment of the Court. There were cases of course where the strong feelings were evident in the writings. It was not a completely secret matter that there were some divisions in the Court, with strong feelings, because they came out in the writings.

AO: And you think some of that traces to Judge Wachtler?

HL: I think so. Yeah, a lot of it traces to the people on the Court and their feelings about Judge Wachtler.

[1:02:03]

AO: That's interesting. And so you had a Chief, Judge Kaye, who of course was very much about trying to build a collegial court.

HL: Trying to build a collegial court and carrying on the traditions of the Court, and not letting some of these strong feelings spill into the writings and so forth, yes. I would have to say that Chief Judge Kaye did a very admirable job of restoring the stature of the Court, the reputation of the Court, and keeping some of these undercurrents from really erupting.

AO: Keep it private, right?

HL: Yeah.

AO: One of the things that was important to Chief Judge Kaye was dinner with all of the judges, and you were a little stubborn about that. Can you talk about that?

HL: Sure. I think that there had been a tradition, not quite as much of a tradition as she maintained, but there was a tradition of Judges burying all the disagreements and going out to dinner and having a drink together before dinner, you know not discussing the cases and just enjoying each other's company. I think she felt that this was a very important matter for her, but I was a local Judge and I had a home life, and my bride was not happy with the idea that a half-hour ride away I was out having dinner because of this tradition. She wasn't happy about it and I felt that she had borne a lot of problems over the years and financial sacrifices over the years for my career, and had lots of nights alone, while I either did politics or work, and that she was entitled to have my company, and her feelings had to be respected.

[1:04:11]

So I balked at it, and eventually, Chief Judge Kaye gave up essentially on trying to get me to do otherwise. I would eat with the Judges maybe once or twice during a session but not every night.

AO: So you don't think it was a problem in the end, that you didn't go out to dinner?

HL: No, it didn't turn out to be a problem, it surely didn't turn out to be a problem. I think the tradition was a little overdone anyway, frankly, and I don't think it's been followed since I left.

AO: Oh, is that right?

HL: We have a couple of local judges on the Court of Appeals, Judge Read and Judge Graffeo, and I don't think they eat every night with the Judges either. So it was a tradition that probably is pretty dead at this point. I mean obviously the Judges who are from out of town and are staying overnight away from home and have to be away, it's very nice to have the company of other people to have dinner with, but for the local Judges, I think the way it worked out was that they do it occasionally but not every night.

There were some periods when that was honored in the breach even before, mainly because of some very strong, hostile feelings among some of the Judges. I remember that Chief Judge Breitel was not an admirer of one of the other Judges who was elected during that period and they did not sit down for dinner together.

[1:06:00]

AO: But that was then, of course not your problem.

HL: No, that wasn't my problem. My problem was just simply that my wife wanted me home for dinner, and I was more than happy to go home for dinner.

AO: You also kept your home chambers in Schenectady, in the Schenectady County Courthouse, rather than moving into the more lavish Court of Appeals. Why did you do that and why was that important?

HL: I think I apprehended some danger of being isolated. I think it's very easy, the higher you go on the judicial ladder, the more the danger is you'll be isolated from others, and I loved being in a courthouse, I loved being around trial lawyers and trial judges, and as you probably remember...

AO: A parade of people.

HL: A parade of people came in to just shoot the fat, so to speak, right?

AO: Right.

HL: Gossip a little bit.

AO: You continued to do weddings in chambers.

HL: I did wedding in chambers and out of chambers, and the trial judges who came in from out of town to try cases in Schenectady would always come in to see me and gab.

AO: So it kind of kept you grounded, being there.

HL: That's the idea. That was the purpose of it, and I'm glad I did it that way to be in a working courthouse.

AO: So the sessions were always really much more intense -- when the Court was in session it was intense work, and some of the most intense times were when there were those election cases. Those were often written as per curiam decisions.

HL: They were almost always. Very rarely would a single judge sign on for the election cases, that's a tradition.

AO: But maybe for the purposes of this interview, you could describe how -- I know we had at least one where we spent the night working, writing a decision on the day it was argued. Could you kind of describe how that happens?

[1:08:00]

HL: The whole process has got to be very fast, starting from the trial level, through the Appellate Division and finally our Court because of the tight schedule. Most of these cases come out where one side is trying to prevent the other side from being on the ballot, so they attack the validity of the petitions and attack the validity of the signatures on the petitions. New York is very rigid. New York has always been very rigid about dotting the Is and crossing the Ts with respect to doing what is necessary to get on the ballot, probably overly rigid and strict about that. So it's kind of a game, I think, that is played by the pros to keep adversaries and amateurs out of the democratic process. But it has to be done very quickly because usually you have just a window of opportunity to get that done before the actual election takes place.

Most of these are in primary elections, which were in September, and so all these cases come up toward the end of August because the ballots have to be printed and distributed and so forth, probably by the second Tuesday in September I think, which is the primary day in most cases. So it has to be done quickly, it's not something you can sit on. It just has to be done one way or the other and it's a matter of days, probably a matter of a week between the time that the case is heard at the trial level in the Supreme Court, and when it gets to the Court of



Appeals, and part of that process is it usually there has to be a leave application made and granted by the Court of Appeals. We don't have to take those cases.

AO: Right, right.

[1:10:00]

HL: Unless there's a two-judge dissent at the Appellate Division.

AO: There can even be argument in the leave applications.

HL: Oh, and there are, there's always argument on the leave application or most always argument on the leave application, and the process there was if we had say six cases, the Court would divide up two Judges each, and each would hear one of the applications, each of the two Judges would hear one of the applications and then report with a recommendation as to whether the leave should be granted. So it is a very fast process and you're right, I drew one of those cases and we had to get the opinion out in 24 hours and we did.

AO: We did. It was a long night, and I think there was some junk food involved.

HL: Yes, I recall some of that.

AO: But those were fun cases.

HL: Yeah, they were, I liked them.

AO: It definitely called on a different kind of energy than the more deliberative cases.

HL: That's right.

AO: Generally, the cases -- the workflow of the Court -- was such that you would hear argument in one session and then the decision would be handed down the next session. Occasionally it would go over.

HL: Very occasionally, but I'll tell you, that was a matter of great pride to me, that the Court was that disciplined, to get the vast majority of decisions down within six weeks, which is pretty much the cycle of court sessions, and get those cases down within six weeks of argument, in contrast to the federal courts of appeals, where months upon months upon months can go by between argument and a hand down of the decision. So I always felt very good about that. It's a great tradition.

AO: During that six weeks, there was sometimes some shifting of votes that have gone.

[1:12:01]

HL: We could have some shifting, because you would have, when you got disagreement, you'd have sort of a dance of circulation of writings. You'd start out doing an initial writing and you'd circulate it, and then you would get a dissent, and then you would turn around and revise your writing to respond to the dissent, and then the dissent would respond to that and as you know, that could go on quite a bit. Then on occasion, somebody would change his or her mind and I'm sure you have one matter very much in mind, in which I changed my mind and the case went over.

AO: The *Jacob* and *Dana* cases. This was about adoption by same sex couples.

HL: The same sex adoption cases.

AO: You actually held that case over the summer.

HL: I did, that's what I did.

AO: Which had almost never happened.

HL: That's right, it rarely happened, not never. It happened a few times. It happened in *Alls*.

AO: Right, right.

HL: Sometimes it happens because you don't get a majority.

AO: And because there are these decision days that the Court has. There's a real deliberate attempt to clear off all the cases and get them handed down before the summer break, but in *Jacob* and *Dana*, the Court was split. You initially were going to vote one way and then you...

HL: I was. I was going to vote that the statute prevented the adoption by the partner of the natural parent -- the mother natural parent -- by her same sex partner, that the statute didn't permit that.

AO: What changed your mind?

HL: What changed my mind? My feelings always were that this was not good for kids and that it wasn't the child's fault that its mother was not heterosexual. I couldn't see any really good social advantage that would be gained by preventing the recognition of the union when the partner of the mother was acting as a parent and had become bonded with the child in a parent-child relationship. I didn't see anything good that came of that, of preventing.

[1:14:45]

AO: Of preventing it.

HL: Preventing that from taking place. So I must say, I was looking for some way within my judicial ethical framework, finding a way of justifying going the other way and as you remember, I did find what I considered a rationale for changing

my vote, which basically was there's at least some constitutional doubt as to whether or not penalizing a child in this situation was a denial of due process or equal protection for that child. You must remember this vividly.

AO: I remember it very vividly.

HL: Because we were struggling with it.

AO: Yes. One of the things about you is you tried to find clerks who would argue with you.

HL: You did.

AO: We experienced that and many other clerks I think, where you enjoyed that.

HL: I did, always.

AO: That was a case, I think, in which we spent a lot of time discussing.

HL: We did, and you already had reached where you wanted to go with the case -- the other way -- a lot earlier than I did, but of course we just came from different points of view and I obviously was much more attuned to the need for discipline and restraint, and not just go result oriented, that was part of my being, so to speak.

[1:16:16]

AO: Right, I think that's in your DNA, yes.

HL: And so I had to find a way to do it that was a responsible, rational way to do it.

AO: In your speeches and writings about being a Judge, you've talked about the importance of bringing values to bear to judicial decision making. Is that an example, do you think, of that kind of judging?

HL: Oh yeah, sure, right, right. Knowing the reality of what was going on in this family and what the effect on this child would be, from my Family Court days, I think was something I brought to the table.

AO: So although reading the statute at first, you thought the answer went one way.

HL: I think, frankly, the more reasonable way to read the statute -- the easy, plain meaning way to read the statute -- would prevent it, but that didn't necessarily mean that you couldn't read it the other way or find enough ambiguity in it to bring to bear these other considerations.

AO: As I recall, we found a couple of cases in which there had been adoptions by couples who got married after military deployment and the application of the statute was ambiguous.

HL: Yeah, we did.

AO: So you were comfortable that it was not, you were not --

HL: I was not being just a result oriented Judge in changing my vote.

AO: There were lots of cases involving search and seizure while you were on the Court, and it's interesting, looking at what people have said about you as a Judge, because often people will say "Oh, he was pro-prosecution, you know, a Republican conservative judge." Some of the students who write about you will say that, and I'm not sure that the record bears that out.

[1:18:13]

In one year, you decided the -- or you wrote a dissent in the *People v. Spencer* case, in which you did take a position that was pro-prosecution and that was the case where the...

HL: Was that the informational stop?

AO: Informational stop.

HL: Informational stop, yes.

AO: Informational stop, right. There was a girlfriend, a woman who had been beaten up and she was driving around with the police and said, "There's my boyfriend's best friend, and he'll know where he is."

HL: Best friend and he'll know where this guy is, and they made an informational stop. I'm still convinced I was right in this case.

AO: There was also the seatbelt case, *People v. Banks*, in that same year.

HL: Oh yeah, there was that and there was *People v. Robinson*.

AO: That was the third in my trifecta, and in both *People v. Banks* and *People v. Robinson*, you wrote against other Judges.

HL: I wrote to reverse.

AO: And wrote to reverse.

HL: Reverse the convictions, right.

AO: What distinguishes those cases or how did you approach those search and seizure cases?

HL: I approached them pretty much the way I approached most cases, which is to say what are the underlying -- and particularly constitutional cases -- what're the underlying values represented by this provision in the Constitution and how does it relate to the reality of what the police are doing, and even though, on a formalistic basis you could say that there was no violation of any rights on a formalistic basis, but if in the reality, you were letting the police do something

that really violated the underlying values in this constitutional amendment, namely with respect to the Fourth Amendment, that the police are not to indiscriminately and have complete discretion as to whether or not to engage in their conduct.

[1:20:36]

There had to be some standard by which their conduct was measured and if the reality of the situation was that the police were able to do something intrusive at their entire discretion, without controls, then that shouldn't happen. In the case of *Robinson*, which is probably the most clear cut of those cases --

AO: Right, the pretextual traffic stops.

HL: Pretextual stops, because the fact of the matter is, if you want to stop somebody -- if a cop wants to stop somebody on a highway -- there will be inevitably a point when a motor vehicle violation will occur. Then the cop is able to stop the vehicle at his or her complete discretion without any kind of controls and standards that are underlying the Fourth Amendment. Unfortunately, I didn't get a court on that one.

AO: Right, you did not, and you didn't get a court on *Spencer* either, where you went the other way.

HL: No that's right, yeah. *Spencer*, when I went the other way, but I did get a court on the seatbelt case. That was a case where there was an unreasonable detention of the vehicle without writing a ticket. They just held the -- wasn't that the case?

[1:22:08]

AO: They were stopped for the seatbelt in *People v. Banks*, right.

HL: *Banks*.

AO: *Banks*. The officer ran the license, there was no violations, started to write up the ticket and then said, "Hey, can I look in the backseat?"

HL: But the suspect had been detained for a long time before. They just fooled around with it and fooled around with it.

AO: Fooled around with it until they found --

HL: Until they could get the guy to think, "All right, maybe I'll take a chance on this and let the cops -- hopefully the cops won't find the drugs, and I can get out of here."

AO: Right. And you did get a court on that.

HL: I think we got a unanimous court.

AO: That was a unanimous court on that one, and you struck that down and you took some heat.

HL: The *Robinson* case was very --

AO: This was a time during which the Pataki administration was kind of coming after the Court of Appeals Judges.

HL: The Court yeah, that was true. I don't think we really took a lot of heat on that case because you had some people in the administration who had DA backgrounds and knew the system. They were very incensed over and knew what was right and what's wrong. They were very unhappy with *Spencer* but then again, so was I, and I could understand that because informational stops -- to cast out on the validity of making a stop for informational purposes -- in a case where it's very important when you have somebody out there with weapons and who



had committed a violent assault, and to say you can't stop somebody who was a legitimate source of information didn't sound like a good idea to me. I think there was not a lot of heat about *Banks* because it was so obvious.

[1:24:06]

AO: There was a time that the Pataki administration was proposing to impeach Judges.

HL: Formally, yeah. Well these were these mode of proceedings cases, really. They were the cases that they really got burned up about, was a case involving an unpreserved objection of what was considered to be erroneous submission of instructions to the jury.

AO: That's right.

HL: It was a terrible case but the precedents -- that was a case which I really thought was wrongly decided, but I was constrained by the cases that came before I was on the Court, that found a mode of proceedings error in those cases. So I think in that case I concurred on constraint. I didn't concur with any of the other writings. I just said I'm stuck with these precedents and there's not a court to overrule them and so that's the way I...

AO: Were you ever involved in overruling a decision?

HL: On a case?

AO: Yeah, a case.

HL: A precedent?

AO: Yeah.

HL: I was on at least one. I'm sure I was in more than one, but I remember one vividly which dealt with the standard of care by common carriers. The standard was that

of reasonable care, which is a general negligent standard of care, reasonable care, and then a jury decides whether you exercised reasonable care for this injured person, but there was a higher standard for buses and trains and other common carriers.

[1:26:02]

That had been around for like a century and we decided that the time had come to just bring it back into the regular standard of care, and so we overruled that old precedent.

AO: What does it take to get to that point that you overrule precedent?

HL: I think -- and I would surely love to see the United States Supreme Court using more restraint in overruling precedents. For me, there's got to be some indication that this precedent is no longer working, that it doesn't any longer reflect current values, that it's creating confusion and resistance and resentment, and over time, it's become unworkable.

AO: That's a pretty high standard.

HL: Right, and it doesn't happen overnight. You don't get an overrule from one year to the next, and you don't get an overrule merely because there's a change in the composition of the Court.

AO: I think that's true on the Court of Appeals generally.

HL: Well, there's at least one case in which basically there was an overrule within a matter of -- and I'm not going to identify the case because it was after I left.

AO: All right.

HL: There was basically an overrule because there was a change in the composition of the Court.

AO: So it does happen.

HL: Yeah, it does happen. Not a good idea.

AO: And you would argue against that.

HL: Oh, I would; I think it's not good.

[1:28:00]

As it turned out, it created a lot of problems, resulting in a flurry of habeas corpus litigation in the federal courts over it. It wasn't a good idea in my view.

AO: I thought maybe we could talk about the educational financing cases, which sort of haunted you it seems. You saw them three different times.

HL: It was up a lot and ultimately, I had written in favor of a more narrow application of the constitutional requirements under the education article.

AO: So the first time up, you said the complaint, that throughout the complaint the court essentially did, right? They hadn't made the case. The next time up, no capacity -- it was the city versus state -- no capacity to sue.

HL: Oh, that's right; yeah, now you're bringing it back to me.

AO: *R.E.F.I.T.*, was the first.

HL: One of those I wrote I think.

AO: I think you did, yeah, yeah. I think you actually wrote city versus state also.

HL: Yeah, maybe I did.

AO: That talked about the doctrine of municipalities not being able to sue the state.

HL: Sue the state, right.

AO: And then finally, in the *Campaign for Fiscal Equity*, you wrote a concurrence.

HL: A concurrence, which was a much narrower application of the education article.

AO: These seem like hard cases for the Court to deal with.

HL: They are.

AO: Why are they so hard? Is it the separation of powers issue?

HL: Well, the issues are not really appropriate for how to decide the case judiciously. They're not appropriate for judicial determination because they involve so many disparate elements that a court is not really competent to weigh. It's really a legislative-executive function, and how do you know whether or not you have just the right amount of resources that will give you a fair and adequate education?

[1:30:40]

AO: A sound basic education.

HL: A sound basic education. How can you say that when your resources are in the highest level of per student dollars paid for education in the country, that that doesn't amount to a fair and... what is it? I keep forgetting.

AO: A sound basic education.

HL: Sound basic, right. How do you divorce that from the fact that children who don't achieve in school come from broken homes, parents who have little attention to their education?

AO: Kids who don't eat breakfast.

HL: Kids who don't eat breakfast, what do you do about that? All of those various factors which affect how the child will achieve in school. What does a basic education consist of? Do you have to have a computer education in this day and

age, and you didn't back when this article was enacted? So all of these disparate elements which are things that an executive or a legislator can consider and can pull in all sorts of investigative resources, and will have all the time in the world to decide it, and then you're substituting a court that has to get the case out in a month and a half and is bound by a record which may be incomplete, on all these various factors that should be considered and weighed.

[1:32:26]

So that's why basically I thought there's a minimal level. You can say the usual reading and writing and arithmetic levels, the basic things you need to function in some fashion, but after that it's not up to courts to decide.

AO: Ultimately, in the *Campaign for Fiscal Equity* case, that was exactly what, by joining or concurring in the majority, you did say that they had made a case.

HL: There was a pleading case, remember?

AO: There was a pleading case, right.

HL: So they had alleged that the deprivation went to that degree.

AO: Right. The definition that you came up with, the words you used, reading, writing, arithmetic, you didn't use that in the decision. You said basic literacy, reading and writing, and computational skills, and in a public educational system, citizenship awareness. Did that come from a source, or how did you get to that definition of what constitutes a sound basic education?

HL: Well, you had to give some meaning, they had something in mind when they did it, when they put that in the Constitution, and I would suspect that's sort of what

they had in mind. In those days that was the education that you were supposed to get.

AO: That was what you got.

HL: The three Rs, and I threw in civic education, which I think is part of a basic education.

[1:34:07]

AO: Right.

HL: Learning about your government, learning about your country, I think is part of being a sound education.

AO: I think these cases are -- you know, in that process of watching the Court decide something like that, where it feels like the Court shouldn't have to be making this decision.

HL: It's not going to necessarily make a good one. It doesn't have the tools to make a good one.

AO: And yet, you have to do the best that you can.

HL: You have to do the best you can, right. Well, as it turned out, I think it came up again after I left.

AO: Right, right. Well, there was a long trial on it.

HL: There was a full trial and it went through hearings and findings, and the Court I think more or less came back to where it would have been had it gone -- where I had it more or less. It's funny how it went you know. What do you think?

AO: I think those were hard cases.

HL: They were very hard cases, but they really went way back from where the masters, the special masters or whatever, the referees, had recommended.

AO: Right. I think it's an impossible problem to fix and it's certainly not something that belongs in the courts, and yet the courts have to do something when the legislators don't do their job.

HL: That's true, but I think we avoided having the kind of confrontation between the Court and the legislature and the Governor, that happened like in New Jersey, where they almost held the legislature in contempt and were going to do lots of things that are not a good idea in a system of checks and balances and equal branches of government.

[1:36:05]

AO: Are there any other decisions that you wrote or dissents that you wrote, that stand out as being especially important?

HL: A couple of constitutional cases that I was in the dissent in both of them initially, and ultimately got vindicated. The first set of cases involved the takings clause, regulatory taking.

AO: The Jewish nursing home pieces?

HL: No. It was *Lenox Hill Hospital*.

AO: *Lenox Hill Hospital*, right, right.

HL: *Lenox Hill Hospital*. It was a regulatory taking case. The owner of the property -- it was a rent control issue, and they passed a rent control in the area of Lenox Hill Hospital basically because they needed low rent for residents and interns and nursing staff in the neighborhood. There was a lot of confusion at that point as to

what the standard was, of review. The general standard was: did the regulation substantially further a legitimate State interest, which is the standard you use in any kind of due process -- sort of the general due process standard -- with a lot of deference to the legislature. The Court, reading a couple of Supreme Court cases, and as it turned out misreading, superimposed a more strict standard, that there had to be a close nexus between the regulation and the legitimate State interest, governmental interest.

[1:38:05]

As in all the cases where there's a strict scrutiny standard in one form or another, the government loses. As soon as you choose a strict scrutiny standard, the government is going to lose 99 percent of the cases, and this is what happened in that case.

Then we got a case called Breyer -- something or other -- Associates or something against the town of Mamaroneck, and that was a rezoning of a golf course from residential and recreational to purely recreational. This golf course was about to end up being a large ultraluxury housing development, and the change prevented that. But in the meantime, if you read between the lines and the tea leaves, it became pretty clear that the Court had over-read these earlier decisions and that they only really applied when what was happening was the regulation in effect, required, extracted a dedication of property, a land property to the uses of the municipality, and so they were extraction cases and they weren't pure regulatory cases.

AO: Okay.



HL: They were cases where basically the private developer was being held up to give something away in order to get approval of the development, which is more like a physical takings, you have to give up some property right.

AO: Right.

HL: So that meant that basically we were in effect overruling *Manocheian*, we just didn't have to say so. The other case, and I'm trying to remember. I had it in mind before but now I'm having trouble thinking of it. It was a preemption case.

[1:40:00]

Now, I had a number of preemption cases under the Supremacy Clause, and they're good cases. They're fun to analyze, lots of decisions. You always had a bunch of concurring opinions and you kind of had to put them together and see where the United States Supreme Court majority really was in these cases. Anyway, this case *Drattel v. Toyota* was a case of whether or not federal automobile safety regulations superseded and preempted State tort claims. This was a seatbelt versus airbag case where the negligence, the product liability, was based upon the absence of doing an airbag. I was a lone dissenter, saying that there was preemption, implied conflict preemption. Later on, the Supreme Court decided the *Geier* case, in which basically, five-to-four, they agreed with me, so I was vindicated in that one.

AO: Another good moment.

HL: Yeah, always a fun moment.

AO: Did anyone notice that in the Court of Appeals?

HL: Oh yeah, yeah.

AO: Unlike in the Appellate Division, where the Court of Appeals agreed with your dissent.

HL: At that point we were having a yearly kind of retreat for appellate judges, and we would get really good constitutional scholars to come, and it was the year that *Geier* had just been decided and it was one of the cases that... Chemerinsky?

AO: Erwin Chemerinsky, yeah.

HL: Whatever his name is from USC or Berkeley or whatever Law School. He recited the case and Judith Kaye looked around at me and stuck her tongue out. (Laughs)

[1:42:00]

AO: That's great.

HL: And I gave her a big smile.

AO: She took some pleasure in that. So one of the things you've done after being a Judge is to actually go back to the Court and argue.

HL: I did, unsuccessfully.

AO: What was that experience like though, arguing before your former colleagues?

HL: It was difficult.

AO: It was a big case.

HL: It was a big case, and it was tense. I'm not generally tense in arguing, but I found it difficult to get up there. But anyway, we got through it, and I survived.

AO: You got through it; you survived the loss.

HL: I survived the loss.

AO: Got through being called Mr. Levine.

HL: That's right, but that's okay; that was good.

AO: So you've done quite a bit in addition to arguing some cases after leaving the Court. One of the things you did for a little while was to live out your earlier life ambition and become a law professor.

HL: I did.

AO: What was that like and why did that not last? Was it not what you expected?

HL: Well, I found... As a subject, I taught administrative law, as you probably remember, and administrative law is a subject very close to my heart. The first year I taught it, I had a good class that I didn't have to pull teeth to get class discussion and response and so forth. The second year, I didn't have as good a class and so I was not getting the personal satisfaction out of it that I had before.

[1:44:08]

And then, I was planning on teaching the following fall and that was the summer that my daughter Ruth died and I just didn't have the stomach for it at that point. So that's why I essentially... It was sort of an emotional... issue of emotional strength at that point, and I just didn't have the emotional strength to do it.

AO: Sure. So let's talk about Ruth a little bit.

HL: Good.

AO: Ruth died at age 46, is that right?

HL: Right.

AO: Of breast cancer.

HL: Metastatic breast cancer.

AO: And she was one of your pride and joys.

HL: She surely was, she was great.

AO: Tell us about Ruth.

HL: Ruth had, I think, a good combination of her parents. She had her mother's common sense and down to earth, knowing what was right and what was wrong, and her mother's self-confidence in her attractiveness and desirability. She was very popular with men and boys over the years. She had a charismatic personality and she wanted a judgeship. She had been in the Manhattan DA's office for five or six or seven years, something like that, and had done very well there. She was one of Linda Fairstein's primary assistants in the Sex Crimes Unit of the DA's office, and she had the same kind of self-confidence as a courtroom prosecutor.

[1:46:08]

I remember one time, to illustrate that, she was trying a serial rapist case in front of a Judge who had a reputation for abusing lawyers all the time, Harold Rothwax, who was a very bright guy, a bright Judge, and amused himself by belittling the lawyers in front of him, particularly the DAs. I was down for a meeting of some variety when I was on the Appellate Division, and I was at a meeting, but I was going to be able to break out around 11:00 and go over and watch her try her case for a while. She came up to Judge Rothwax and said, "Judge, my father is planning to come over to watch me in the trial around 11:00 until lunch break, and I'd appreciate it... You can abuse me as much as you want before he comes and after he leaves, but during the time he's there, would you mind being decent?" And of course, he smiled, and she got away with it, of course.

But that's the kind of self-confidence she had, and Judge Kaye liked her very much as a Judge, when she became a Judge, and so she was appointed to this initiative, this remarkable initiative that Judge Kaye had put together, the Integrated Domestic Violence Court. The unique part of it was it put all of the various jurisdictions of the courts in a case of domestic violence, a typical case of the matrimonial aspects, the Family Court, family offense aspects, the custody aspects, all before one Judge, rather than have it being handled in the Criminal Court for part of it, Family Court, Supreme Court.

[1:48:06]

AO: Right, makes good sense.

HL: This was a very big experiment and Ruth was appointed by Judge Kaye to lead that initiative in New York City, and she did a superb job and it was one of the proud achievements of Judge Kaye that Ruth really pulled off. So this was quite a loss, personally and otherwise.

AO: And it must have made you incredibly proud when she became a Judge.

HL: Oh it was great, it was wonderful.

AO: You have two other children.

HL: I do, two sons, both lawyers.

AO: So the lawyer gene runs deep in your family.

HL: Yeah, it's third generation. I don't know whether we're going to get another lawyer out of the next generation. So far I don't see it, but Jim's kids are still young enough to see the light.

AO: He married a doctor though.

HL: He married a doctor.

AO: So he may have mixed the gene pool up a little bit, you never know. You remain close with your family.

HL: Oh yeah, very close.

AO: You've taken some wonderful trips together.

HL: We've taken trips together and we get together for the holidays and stuff like that, so it's nice.

AO: And do you think that's important for people to do, either as judges or as lawyers, to carve out, like you did with the dinnertime and you've done with your kids and grandkids?

HL: Yeah, I think for the kids it's a very important thing, including being bonded with grandparents. I think grandparents play a special role with children. I know your in-laws are close to your children.

AO: Yeah, yeah.

HL: And you know there's a reason for that closeness don't you? Why grandparents and grandchildren are bonded?

[1:50:02]

AO: Because you can say goodbye at the end of the day?

HL: No, because they have a common enemy.

AO: Okay. Well whatever works, right? Whatever works.

HL: Right.

AO: But you haven't decided to be a full-time grandpa, I mean you're still working, doing arbitrations You've had some interesting arbitrations.

HL: Yeah, I've had interesting arbitrations.

AO: What's been the most interesting arbitration?

HL: The couple of international arbitrations that I've had were very interesting, and big stakes, lots of money involved. Either major international companies or fights between nations and banks for example.

AO: Right, right, yeah.

HL: You get good lawyering and you're back in the trial level of hearings, and making evidentiary rulings and trying to keep everybody from battling one way or another. You get good lawyers and good colleagues.

AO: So you're enjoying that?

HL: I've enjoyed it, yeah.

AO: Now you also got involved with the sex abuse scandal in the Roman Catholic Church.

HL: I did, with its diocese the Albany Roman Catholic Diocese.

AO: What was your role in that?

HL: My role basically was because of an old friendship with Bishop Hubbard going back to the days when he was a street priest, and I was either DA or a Family Court Judge. To try to find a way that would be independent and more neutral, to handle the grievances of victims.

[1:52:00]

As you know, in New York the tort statute of limitations pretty much had prevented these cases from going to court, with big verdicts, big judgments against the church, but this diocese was ready to provide some kind of

compensation and some kind of atonement. So in a sense this was sort of -- what we were suggesting is sort of like a restorative justice model where by mediation, there would be a meeting between the representatives for the diocese and the victims with a neutral mediator, and in the course of that, they would work out a way that there could be an apology and an offer to provide some measure of compensation and some services, sometimes services.

So we trained a group of mediators who were already involved with doing mediations with employees and the state, and we trained them in the psychological and emotional aspects of what these victims had gone through, and they were a terrific group of mediators. I think by and large, even though there was resentment by victims -- we interviewed victims to design the program.

AO: You did that, right.

HL: We interviewed victims, talked to victims' organizations and so forth, to design this in a way that would provide some kind of comfort and solace and atonement, and I think it worked. The one problem with it was that a lawyer in this area became radicalized over the whole thing and couldn't get over the fact that we were getting paid even though we were neutral, and believe me we were very neutral. Not everything that we wanted to get done was immediately grabbed by the Diocese being okay. We had to do some arm twisting to a degree to get the Church to not feel its authoritarian role was an appropriate role. That's very hard for the Roman Catholic Church to accept.

[1:54:45]

AO: Sure.



HL: But he had a bunch of these people he had signed up as clients and he didn't do anything for them because of the statute of limitations. All of it was an expectation that some day the legislature would change it, which has not yet happened.

AO: Would change the statute. Right, right.

HL: So there were a number of people, because of their representation by him, that never went through this process.

AO: And is that process over?

HL: The process basically had to be over; it was expensive and we ran out of customers essentially. To this day, those people have not received any closure for these terrible, traumatic events that took place, but I'm very happy with what we did for the victims, and also for the Church, it's very important. The Church, under Bishop Hubbard, does a lot of very good things. A lot of good social services and other good things that it does in this community, and it pretty much took the heat away from preventing -- that was preventing them from doing what they did well.

[1:56:03]

AO: Right. Interesting now problem solving has been such a part of your career, mostly as a Judge, that you've been doing so much of that. So we're almost out of time and I guess I'll close by just asking you to talk about what is it that when you look back on the sort of remarkable career, is the thing -- you know, what do you feel most proud of?

HL: I don't think I could identify one thing. I think that I led the career that I had only dared dream of. You know, it's very unusual to have the amount of luck, everything falling into place at the right time, and of course not everybody can go to the New York Court of Appeals, and so I think I've had a lot of good luck, but I do think that I have been honest in the way I've conducted myself and done the best I could. I don't have any regrets.

AO: What a great thing to be able to say, that's great. That's all I've got and thank you so much for doing this.

HL: Well it was fun, wasn't it?

AO: It was.

HL: Did you enjoy it?

AO: Yes, I learned a lot.

HL: Good.

**[End of Audio File 1]**