

THE RULE OF LAW ORAL HISTORY PROJECT

The Reminiscences of

Anthony G. Amsterdam

Oral History Research Office

Columbia University

2010

PREFACE

The following oral history is the result of a recorded interview with Anthony G. Amsterdam conducted by Myron A. Farber on April 1, 2, 8 and 9, 2009. This interview is part of the Rule of Law Oral History Project.

The reader is asked to bear in mind that *s/he* is reading a verbatim transcript of the spoken word, rather than written prose.

MJD

Session One

Interviewee: Anthony G. Amsterdam

Date: April 1, 2009

Interviewer: Myron A. Farber

New York City, NY

Q: This is Myron Farber interviewing Professor Anthony Amsterdam at New York University [NYU] Law School for Columbia University's oral history project on the movement to end the death penalty in the United States. Today's date is April 1, 2009.

Professor Amsterdam, could I just get your birthday for the record?

Amsterdam: September 12, 1935.

Q: I noticed in looking over some materials that at one point in discussing *McCleskey v. Kemp* [1987], you said you were going to digress into common sense, and that is what I am going to try to do here a little bit today. And to the extent that there is very much legal emphasis to this interview, I would like to try to make it accessible to a general reader or listener of this transcript years from now.

Amsterdam: Good.

Q: What we'll do is talk a little bit about your life before any of the death penalty cases and lead our way down the path toward *Furman v. Georgia* [1972]. I may not get there today but that is where we're headed.

Amsterdam: Fine.

Q: Your title here is University Professor?

Amsterdam: That is correct.

Q: And what do you actually teach?

Amsterdam: I teach criminal law and constitutional law but the thing that makes me a University Professor is that instead of taking a purely legalistic approach, I look at it from the standpoint of the humanities, including literary theory and narrative, with a lot of emphasis on lawyers' use of techniques of storytelling, of conceptualization, of cognitive input that are not strictly legal.

Q: And the terms "clinical work" or "clinical teaching" -- are you familiar with that, in terms of what you do?

Amsterdam: Yes. That is a general grab bag categorization for a lot of different things. Originally clinical legal education, going all the way back to the days of Jerome [N.] Frank, involved having students handle actual cases instead of simply sit in a classroom. It was the legal equivalent of a medical student actually treating patients. But nowadays it is much more complex than that. Nowadays it includes the use of simulation techniques -- role-playing.

Students, for example, in examining the process of constructing a case out of facts after interviewing a client, may role-play the client themselves as well as role-play the lawyer.

Or we may use actors from the University's drama department -- interestingly, Anna Deavere Smith is on our law faculty here -- to assist the students in a non-threatening situation, one where real clients' interests are not yet at stake, to develop the techniques and the skills and the insights that are necessary for actual practice.

What we have at NYU is a three-level clinical program. It starts out in the first year with an introduction to lawyering skills called the Lawyering Program, which is mandatory for every student in the law school. We are the one law school in the country that has that. We teach basic techniques such as interviewing, negotiation, some litigation skills, examining witnesses, and case conceptualization -- how do you think about putting a case together? How do you turn a client's story, when a client walks in the office and says "It hurts," into a legal issue that you can do something with? Then at the second level we have students do a lot of simulation work. So we may simulate, for example, a situation of a client who is arrested. The students take that case all the way through from arrest to verdict in a criminal case. At the third level we do the more traditional clinical legal education. Students actually handle clients' cases because by this time they have had an extraordinary amount of training. They really are up to get the benefit of that experience. That is essentially what we do. That three-layer model is something I have spent a large part of my life developing.

Q: It must have been very different here before you came to NYU in 1981.

Amsterdam: Well, yes and no. NYU was always a school with a strong clinical program, but their program was of the traditional sort, putting students right into court in their third year. There was none of the preparation for that in the first two years. What has happened

by way of change is the construction of this three-tiered program, which is a progression. Instead of thinking about the highest level of clinical training that you can give a student as being reachable within one year, we start from zero -- the first day of law school -- and they have three years to escalate up to the highest speed they can get. That is what's new about our program.

Q: Right. Are students generally enthusiastic about that approach?

Amsterdam: Yes and no. It's probably not for everybody because many people who come into law school really do not want to be client-centered lawyers. They are more interested in some other things. I would say that a large percentage of our students are very much turned on by this. Certainly the students who elect to go all the way through and take all three years are very excited by it. But what is nice about our arrangement is that a student is not required to do more than the first year so that those students for whom this is not exciting stuff, this is not really what they're in law school for and it is not what they want to do, get off the train at the first station. Some of them may feel like they would like to get off a little before the first station.

[Laugh]

Amsterdam: But most of them --

Q: Well, we always have Columbia up in Morningside Heights.

Amsterdam: -- stay on and are pretty happy.

Q: The other students who come into law school here, or just generally, what do they have on their mind as a career?

Amsterdam: There are a number of things that they have on their mind. Some of them are academically inclined and want to go into teaching law. What fascinates them is the play of ideas -- problem solving at what I would call the doctrinal-conceptual level, making sense out of the law. Certainly, the law can be an intellectual exercise. From the days of [Edward] Coke and [William] Blackstone on down, wrestling with ideas for their own sake has been an important part of the law.

What we are doing in our program is trying to get people to understand that the process of thinking about facts and the process of understanding what is bugging a client is every bit as intellectually demanding and every bit as susceptible to systematic analysis as traditional ideas and concepts and doctrines. But there are some students who just simply don't turn on to that -- they really are fascinated by the more abstract aspects of law.

Another thing is that there are many students who regard law school as paying their toll to a gatekeeper. They just want to get out and practice law, and they don't really feel that it is a matter of acquiring any set of basic skills. They may feel they already have the interpersonal skills they need. Some of them may, in fact, feel threatened by the idea that they don't and that these things have to be taught. We are dealing today with a situation in which because of the economic state of affairs, some of our students have been slotted into law school since junior high school. Their parents have been saving money to be able to put them through law school for so long that by the time they actually enter law school, they're

burned out. And what they really want to do is pay their union dues, get into this place, get out of this place, and start earning enough money to repay their educational loan debts and repay their parents.

Q: Right.

Amsterdam: It's hard for somebody in that frame of mind to take terribly seriously something that requires real emotional insight and some depth. It's a lot easier to learn the fifty-one civil rules and be able to itemize them and lay them out in a set of lines. The kind of legal education *we* do does not lend itself to a student summarizing, "What I learned in the last hour," let alone, "What I learned in the last semester -- "

Q: Right.

Amsterdam: -- and then reciting it back in an examination in one, two, three, four, five order. So it is more demanding of somebody with short patience who is really anxious to get on about the business of practicing law and life than some of the more systematized intellectual stuff.

Q: Let me ask you about your own parents. Were they slotting you to become a lawyer from the time you were in junior high school? Where was this, by the way? Philadelphia?

Amsterdam: Yes. I was born in Philadelphia, grew up there. I think my parents were fairly flexible. I don't think any of us had the remotest idea what I would be interested in or what I would do. My dad was a lawyer but for a very long time had not practiced law as a

litigator or a legal counselor. When I was really quite young, he went into the Army -- the Second World War. He was beyond the age where he would be drafted but was a very patriotic guy and went into the legal aspect of military government and was away for a significant period. The entire period of the war.

Q: Right.

Amsterdam: When he came back, I think that he didn't really have a lawyer's perspective. I don't think they would have thought of me as a second-generation lawyer, even if they had been disposed to try to slot my life. But they really didn't. They were very flexible about it.

Q: What did he do for a living? After the war?

Amsterdam: He started out by being a legal advisor to corporations but became what was, in effect, a corporate executive. He managed and ran corporate business rather than the strictly legal side of things.

Q: And your mother, was she a homemaker or --?

Amsterdam: Again Myron, it is hard at this remote date to remember how important the Second World War was in shaping people on the home front. Just before the war we had moved into a new house. My parents, at the time I was born, were living with my paternal grandparents. For the first while in my life, the two generations of Amsterdams above me shared a household. I was on the upper floor, the third floor.

Very shortly before the war, my parents -- for the first time -- bought their own house and moved into it. Then the war came along and my dad enlisted. Mom was left with the house. And so we did the whole victory garden and organizing and all of that sort of stuff. My mother never had a profession or an income-earning occupation, but was always very, very occupied with one thing or another -- community organization, charitable work, victory garden, working in the schools, the whole business.

Q: Was this actually in Philadelphia or in the suburbs?

Amsterdam: The house that I was just describing for you, in which I spent the first four, five, six years of my life, was literally two blocks within city limits. The place where I went to the 5 & 10 and Horn & Hardart's was on City Line Avenue. City Line Avenue really was the city line and it was two blocks from my house. My parents gave up the house they bought just before the war because economically they couldn't swing it when my dad was in the service. The new place was on the other side of the line. It was in what is called, in Philadelphia terms, the "Main Line," a little further out.

Q: Yes.

Amsterdam: That is very society hill, society stuff. But we weren't in that area, we were just over the line.

Q: Right. Your father's name was?

Amsterdam: Gustave G. Amsterdam.

Q: And your mother's name was?

Amsterdam: Valla née Abel. That is her maiden name -- A-B-E-L, Valla Abel.

Q: I take it you went to public schools there?

Amsterdam: Yes.

Q: Right. And from public school you went to Haverford?

Amsterdam: Right.

Q: Four years there?

Amsterdam: At Haverford, yes.

Q: Good experience?

Amsterdam: Excellent.

Q: Rigorous?

Amsterdam: I'm sorry?

Q: Rigorous?

Amsterdam: Yes and no.

Q: That's what its reputation was, wasn't it?

Amsterdam: Yes and no. Very free-wheeling from the standpoint of your ability to choose what you wanted to study and to take your own approach to the study. Haverford was very encouraging of students taking the initiative in designing their own program. It was rigorous in the sense that once you picked something, they pushed you to do it thoroughly and systematically. But it was not rigorous in a restrictive sense of confining either a class of students to lockstep or any one student to the traditional path.

I did a very mixed major. I will tell you the truth, Myron, I can't even remember whether this was the case -- but technically I think my major was technically French. I was all over the curriculum because I put together a package of what interested me, literature -- French, European, English, American -- and some art history at Bryn Mawr. So Haverford was not rigorous in the sense of rigid, but rigorous certainly in the sense of demanding.

Q: And you graduated Haverford in 1957?

Amsterdam: 1957.

Q: And they claim that your major was French literature.

Amsterdam: That wouldn't surprise me.

Q: Is that the normal path for someone headed for law school?

Amsterdam: No, but I didn't even imagine at that point that I might be headed for law school. As I mentioned to you, I'm really not a second-generation lawyer. There are some families in which it's pretty much assumed that you are going to follow the career of the law because your dad is a lawyer. We have a number of students who are marvelously and wonderfully positively motivated by the experience of watching their dad try a case or work with a client or bring about some extraordinary result for a client, and they come in all fired up by that.

My dad, although a lawyer with a law degree, a member of the bar, wasn't really a practicing lawyer in that sense. Fairly early on, for reasons that I don't think I could really explain, it was pretty clear to me that I was not going to follow the path of corporate work. Not because I had anything against it or disdained it or thought little of it, but simply it wasn't for me. I knew it wasn't for me. I did not really identify myself as following that path. I would never have thought, at the time that I was three years into college, that law was where I was going to go.

Q: You would not have thought?

Amsterdam: I would not have thought that.

Q: By the way, when you were in college, with all this emphasis on European literature and

life, did you ever go to Europe?

Amsterdam: Oh, yes. A number of trips, from a couple of month-long periods in France to rock climbing on Crete. I kicked around Europe a good deal.

Q: Alone?

Amsterdam: Sometimes alone, usually with friends. I don't know whether they still do it today, but in those days it was bikes and youth hostels and backpacks. That was what it was about.

Q: Americans, on the whole you think, were welcome in Europe at that time?

Amsterdam: We felt reasonably welcome. We were not tourists who had money to spend and so we were not welcomed with the adoration of a Swiss inn keeper who sees a multi-millionaire descending on the chalet.

Q: By helicopter perhaps!

Amsterdam: But lower your sights a few thousand dollars a night and for the people who sold hot cross buns in Wales, we were welcome. Myron, you won't believe this, but we comparative-shopped for hot cross buns. We would walk down the street and look in several bakeries and see who was offering day-old hot cross buns at the lowest price. In that market, we were reasonably welcome.

Q: I take it that was not when you were traveling with your parents?

Amsterdam: That was when I was traveling with my friends. I went to Europe only twice with my parents, as compared with a dozen to twenty times with friends.

Q: Was there a lingering sense -- maybe you didn't encounter it or didn't question it -- of, "The Americans have been here not that long ago and helped us a lot here in Europe?" Or, "You were here. It's time that you went your way and we went ours."

Amsterdam: There was certainly some of the former. There was no doubt that when you appeared and either were recognizable as an American or identified yourself as an American, the initial expectation that they would have was that you were a "goodnik." I think that's fair to say and I never -- probably until you just said it a few minutes ago -- would have realized that that was a fall-out from the war. But my guess is that it probably was. Even in Britain, Americans were fairly well thought of. Nowadays I suppose with -- what was that movie? *Foyle's War?* -- in retrospect we begin to perceive that the American "occupation" of Britain may not necessarily have been something that all the Brits loved. But we never sensed that there was any negativity. For the most part I think the Brits realized that the Americans had helped win the war and they were much more at risk than the Americans in the war.

Q: Right.

Amsterdam: So I think there was a feeling that, for the most part, Americans were good guys.

Q: At some point you sat down and wrote an application to the University of Pennsylvania Law School to become a lawyer. What prompted that then?

Amsterdam: Very, very complicated question and I'm not sure I can unscramble it completely myself. I guess I need to start by saying that that was not a decision that I was going to become a lawyer -- it was a decision that I was going to try it out.

Simultaneously with going to the University of Pennsylvania Law School, I was attending lectures in art history at Bryn Mawr and was considering the possibility of going and doing graduate work in art history and moving on along that path. I was exploring both of the two at the same time.

I think the reason why I decided to try law school was a combination of a couple of things. First of all, while my major interests were in literature and the fine arts, I was turned off on the idea of graduate school in those fields. And graduate school in those fields would have been necessary to a career in those fields. Why was I turned off on graduate school? I think the answer to that is that while I could have, with great excitement, spent the next five years, ten years, or a lifetime on [George Lord] Byron, I was damned if I was going to spend six months on verse 3, canto 2, book 1 of *Don Juan*. That was what the graduate schools were into at that point. Everybody imagined that the big thinking had been done. The Eric Auerbachs of this world, the Northrup Fryes of this world, had already conquered all the Everests. All the graduate students were supposed to explore were the crannies a quarter of the way up the mountain --

Q: Great.

Amsterdam: -- and spend a year on two verses. And that was not for me. That was sort of why I went into art history. Although I had majored in French literature -- actually I had read a lot of European literature in all languages, and American and English literature -- I did not want to study the details of it. It wasn't scorn for details. It was that I did not want to focus entirely on the trees and forget about the forest -- for years! I had relatively little study in art history. I took a couple of courses while I was at Haverford. We had a program with Bryn Mawr that let people take courses over there. I took a couple of courses, but I was still at the opening stages of that and had the whole world of it in front of me and wanted to explore that. And that was the avenue that I was thinking about as continuing my fascination with the arts and with the more literary side of life.

But I could neither follow the path of literature because graduate school was unattractive in its myopic concentration on details, nor was I far enough along in the art history thing to imagine that I was ready to do anything with it without spending a good deal of additional educational time. So I wanted to explore the possibility of doing something that I could make a living at.

But there was a second theme to it. I had already begun to see that there was another side to the law than the one I had always thought about. *Brown v. Board of Education* [*Brown v. Board of Education of Topeka*, 1954] happened just a little bit before this time, and that put me onto the idea that law could open up avenues and could be a force for creativity. Had I been more socially oriented at that time -- oriented toward a perspective on society as a whole -- I might have thought about it as suddenly realizing that law could be a force for

change. But because I was coming at this from a sort of literary path, it was almost a kind of Wolfian experience in self-discovery. For a lot of people college is just that, and it certainly was for me.

Q: Sure.

Amsterdam: I suddenly realized that the law could be a place where one could be creative. I mean, a bunch of lawyers had suddenly upset not only a way of life but a way of thinking about life. *Brown v. Board of Education* was a profoundly innovative move and it gave me the idea that it might be worth exploring whether law was a career in which I could do something that was creative, that was interesting, that was imaginative, alive, adventurous, and -- unlike graduate school and literature, unlike art history -- it might actually pay you enough to eat lunch sometimes.

Q: As many hot cross buns as you could eat.

Amsterdam: As many hot cross buns as I could get day-old.

Q: Right. So you enrolled at Penn and went three years there --

Amsterdam: Right.

Q: -- graduating in 1960.

Amsterdam: 1960 is right.

Q: And it's no secret that you were summa cum laude and you were editor in chief of the *University of Pennsylvania Law Review*. Isn't that correct?

Amsterdam: Yes.

Q: So you may have wandered into it but you found your niche pretty quickly, right?

Amsterdam: Well, yes and no. It depends on whether you mean an emotional niche, a real sense of belonging, or whether you simply mean that I could play the game adequately. I certainly discovered that it was possible to play the game adequately. I don't think I ever really decided, even two-thirds of the way through law school, that it was for me and that I was going to stay. It continued to be a very part-time occupation for me. All the way through law school, I was spending most of my time and energy really at other things. I continued to read mostly literary stuff. I continued to do the art stuff. I was working at that time -- it had started actually while I was in high school but it continued for a while -- in a museum called the Rosenbach Museum in Philadelphia. The Rosenbachs were collectors of art but also they had a fabulous library. They had the manuscript of [James] Joyce's *Ulysses* and a number of other things.

And so if what you are asking is whether, in the sense of a niche, I discovered that it was for me, I don't think that's right. I don't think I really did. As I got into my third year, I began to feel fairly comfortable with it. It became obvious that I might very well stick with it, but I still hadn't decided that that was going to be the case.

Q: At some point -- not having had this experience I'm unfamiliar with the details -- but you applied for a clerkship with Felix Frankfurter of the Supreme Court of the United States, isn't that correct?

Amsterdam: No.

Q: [Laughs]

Amsterdam: Truly no, it isn't.

Q: I withdraw the question.

Amsterdam: Okay.

Q: No, no, no.

Amsterdam: So how did it happen, you may wonder?

Q: That's right, that's right.

Amsterdam: The answer to that is one of my professors at Penn, Louis Henkin, was a former clerk of Felix Frankfurter's and one of Felix Frankfurter's very close continuing former clerks. The Justice was very close to a lot of his former clerks, but Lou was one of the ones that he was closest to. And Lou came up with this idea that Felix Frankfurter might take me on for a clerk, which was a bizarre idea because Felix Frankfurter had never

before taken a clerk from anywhere but Harvard Law School. I would never have entertained the idea of applying for a clerkship with Felix Frankfurter. It wasn't done. But Lou came to me with the proposal. He had already talked with the Justice and somehow had persuaded the Justice that it was a doable thing. And that's how it came about. I didn't really apply for it.

I was thinking about a range of different things which might have been in the law but the idea of life as a planned venture in which you set your sights on something and pursue it, like a knight on a quest, is not my experience. Fortunately a lot of things usually happened to make a decision for me before I had to make one. In this particular case, it was an interesting and intriguing enough idea to clerk for Felix Frankfurter that before I really decided what I wanted to do next, that was a course that seemed a good one to take.

Keep in mind that all throughout this period, none of these commitments are more than for a short period of time. Law school is only three years and a clerkship is only one year. For somebody who hasn't really decided what they want to do, these are acceptable choices without having to have a game plan of your life very firmly in mind. And I certainly did not. I didn't choose the life I led at all. I never was slanted into anything I couldn't live with but on the other hand, to regard this as a design credits both intellect and will with a lot more force than mine had.

Q: What did your father think of you going on to be a clerk in the Supreme Court?

Amsterdam: They thought it was kind of exciting. Again, my dad was not into law as such. But he had never left the ethos of a lawyer and so that was kind of a pinnacle in many ways.

The Supreme Court of the United States is the highest court of the land and I think they were very pleased, partly because they saw it as a possibility, an opportunity, an opening for their kid and partly because by taking it, I demonstrated that I could make *some* damn choices that seemed to make some sense.

Q: It seems as if your life has been solely centered on Ben Franklin's town all this time. You had to go down to Washington to see Felix Frankfurter, no?

Amsterdam: Right.

Q: Do you recall that first meeting with him?

Amsterdam: Yes. After Lou broached the idea, and I think basically sold it to the Justice. The Justice would not go through it without an interview. So I did go on down to interview with him. Lou had counseled me that as long as I was going down to the Supreme Court of the United States to interview Felix Frankfurter and as long as I was willing to consider the idea of a clerkship, I might also interview another justice or two. I ended up also interviewing with Potter Stewart. This was not with a very definite idea that that was what I wanted to do, but Lou wisely advised me that if I were willing to consider a clerkship with Justice Frankfurter, it wasn't entirely because of the personality of the person -- it was something that I accepted as something I might like to do, and I had to consider a couple of alternatives. So I did interview and I recall both my first interview with Felix Frankfurter and the same day an interview with Potter Stewart. They were very different people.

Felix Frankfurter really did bowl you over. He was a bundle of energy at that point. This

was very, very late in his life. Actually, at the end of the year of my clerkship, he pretty much went into retirement. I don't remember whether he formally retired at that point, but the year after I clerked for him I continued to work, moonlighting in his chambers for a while. At that point he was writing memoirs, writing speeches, collecting materials and things like that and I helped him with it.

It is quite surprising in many ways, looking back after all these years, at how much vigor and how much energy at this very, very late stage of Felix Frankfurter's life he had. But he would greet you -- or at least he greeted me -- boisterously on first appearance. He never stopped talking. He was an aggressive conversationalist. I don't remember whether it was actually in the first conversation or whether what I'm remembering is also something that happened from time to time while I was a clerk, but if Felix Frankfurter wanted to know what the weather was like out there, he would say to you, "How cold is it? It's cold out there today?" You would say, "Not very cold, Justice Frankfurter." "How come you're wearing an overcoat? I see you have a scarf. How come you have a scarf if it is not very cold?" and you would undergo a cross examination of five or ten minutes until the Justice calculated, to the degree, that the temperature outside was fifty-four degrees. He managed to extract that by a series of damaging admissions through a cross examination. I'm still remembering that that was the character of that first interview, as well as many others after that.

Q: And Potter --

Q: -- Stewart, you saw him the same day?

Amsterdam: Yes, I did. He was much more laconic, bright, very systematic, very orderly,

had a set of things he wanted to know and, without being pushy, extracted them from you. Bright guy, and a good guy, Potter Stewart.

Q: And how did you decide? Or did --

Amsterdam: Felix Frankfurter came through with the offer very shortly after the interview, and that had been my original impetus in going down there.

Q: Right. But not to belabor it, is it possible to summarize -- as you went into that job -- what was your understanding of who Felix Frankfurter was in legal history or history?

Amsterdam: I don't think I had a view of Felix Frankfurter's political position, or let's say posture, on the traditional spectrum of liberal to conservative. I had a notion that he was a very thinking Supreme Court Justice, a first-rate intellect, somebody who was profoundly steeped in the traditions of the law, and it would be a terrific intellectual experience to clerk for him. That was pretty much it.

I've got to say that coming out of Haverford and Penn Law, and even the experience of being editor in chief of the *Law Review*, in those days I probably put a lot more stock in head knowledge, straight-out intellectual smarts, and the experience of doing intellectual calisthenics with your grandmother, than I would today. Felix Frankfurter was kind of the icon of the intellectual Supreme Court Justice, in the tradition of [Oliver Wendell] Holmes and [Louis D.] Brandeis. He viewed himself that way and he was viewed by the legal world as that, rather than seeing him, as I might today, on the political spectrum. My political orientation, even in those days, was not directly in line with Felix Frankfurter's, although

he was a lot more liberal than most people give him credit for. He is generally conceived of as relatively conservative, not by today's standards of Supreme Court Justices who are called conservative when they are actually right-wing reactionaries. But by the standards of those times, Felix Frankfurter was thought about as conservative. That probably is something of a bum rap but he was a lot more conservative, to be sure, than I was or am now today. But I never thought of it that way. I never had an image of him in terms of where he stood on constitutional issues. I always, at that time, was thinking of him more as an intellect, as a brain, as a mind.

Q: And that year you spent there as a clerk, I take it you were not the only clerk.

Amsterdam: We were three clerks in his chambers at that time. John [D.] French, Daniel [K.] Mayers, and myself.

Q: And was it a real learning experience?

Amsterdam: Absolutely. Wonderful experience. Felix Frankfurter was, in fact, a terrifically intelligent, thoughtful, wise guy, but the experience was also a good learning experience because the body of Supreme Court clerks were a fascinating group with a lot of diversity and a lot of different perspectives, all very, very smart. At least in those days. There were fewer clerks then than there are today. But in those days it was a real collegial enterprise. The clerks all ran together, spent time together. Not just your own co-clerks in your own chambers, but we were next door to Justice [William J., Jr.] Brennan's chambers and I was in and out of there all the time. Richard [S.] Arnold, later the Chief Judge of the Eighth Circuit [U.S. Court of Appeals], Danny [A.] Reznick, who later was with Legal Aid and has

done public interest and defense lawyering all his life, were clerks for Justice Brennan at that time. Brennan was -- and now that you look at it politically -- on the other end of the spectrum from Felix Frankfurter, but I was just as close with those guys as with [John Marshall] Harlan's clerks. It was a real mix of very bright, very interested young, gung-ho people.

Q: Any women?

Amsterdam: There were no women clerks in my year. That started very shortly after that.

Q: Not in your year and not previously, as far as you know?

Amsterdam: I don't know.

Q: Right.

Amsterdam: When I said "that started," I meant in terms of any large numbers.

Q: If one were trying to isolate what streams flowed together to finally make a lawyer out of Tony Amsterdam, that year with Felix Frankfurter was important, quite important, quite useful? In terms ending up being what you became?

Amsterdam: Quite important, but quite important in a number of different ways. One, it reconfirmed my notion that there could be some exciting intellectual travels in the law. That was partly because of the Justice's own intellectual brilliance and the dogged way in

which he would pursue every idea into its deepest den, but partly also because the issues in the Supreme Court cases were the cutting edge of law.

The very nature of the Supreme Court is that the most controversial issues -- the issues that could go either way, that enmesh the contending ideas, the contending forces that have almost equal weight -- that was a very large part of the Supreme Court stock and it is generally a very small part of the law. But being fairly naïve at that point, I got to believe that that would be a major part of the law. Since that was exciting and heady stuff, that attracted me to stay in the law.

Secondly, Felix Frankfurter took a very personal interest in steering me to stay in the law. He knew that I was tempted to do other things. He really believed that, for some reason or other, it was important that I stay in the law. He worked out my next step, which was to be an Assistant United States Attorney in the District of Columbia. At that point, the U.S. Attorney there was David [C.] Acheson, who was the son of Dean [G.] Acheson. Dean Acheson was a very close friend of Felix Frankfurter, one of his closest friends, as a matter of fact. What Lou Henkin had done for me to get me into the Supreme Court, Felix Frankfurter did to get me out of the Supreme Court, and obviated the need for me to make any decision as to what I was going to do next. That actually put me into a position where I then got exposed to other aspects.

Myron, what I have got to say is I think a number of things were coming together. First of all, in the Supreme Court of the United States, I am seeing and beginning to turn on a bit to the idea that there are a lot of injustices in the law and part of the job of lawyers is to try to effect some change in the direction of improvement of society's ability to do justice. I had

not really perceived that very much in law school -- a little with the *Brown v. Board of Education*. I had understood that that was part of the game, but it had still been, for me, a purely heady thing. In the Supreme Court of the United States I realized that there were some very powerful drives that were not just simply of the head but of the heart.

Secondly, when I went into the U.S. Attorney's office, I began to see other aspects of the law. People in profound emotional trouble, people with genuine and life threatening plights, and while the law couldn't solve those problems, the creation and maintenance of certain kinds of legal institutions was indispensable in letting them survive.

And that began to come together as suggesting the idea that maybe there was something worth doing in the law. Had it yet turned into some kind of vision or mission or quest? No. But more and more I was beginning to feel that, instead of returning to the purely literary, there was something here that I might get some real satisfaction from.

Q: How influential is a clerk on a justice? Just take your own case. Did you ever have a sense that, "Felix Frankfurter has got to vote on this and I'm going to steer him this way or I'm going to give him these facts, and by God, he's probably going to be following my line of thinking!"

Amsterdam: I think it's real different with different justices. I think that some justices make up their minds and the law clerk simply carries out the wishes of the justice. More troublesome than that is that, I think, some law clerks have an image of what their justice is going to decide and pitch to that audience. In other words, I think that the law clerk prejudices where the judge will go and because the law clerk wants to be a good law clerk,

because the law clerk wants to be appreciated, because the law clerk wants to turn out what the justices wants, the law clerk steers the justice -- who is more flexible than the law clerk believes -- in the direction that the law clerk predicts that the justice wants to go. And I think that is a relatively unrecognized phenomenon, but I think it is very real.

Other justices, I think, are more amenable to listening to their law clerks and being persuaded to go one way rather than another. But there are a number of variables. One has to do with the stage of the justice's own career. I think the justices, like most other people, become the captives of their own self-image at some point. After years of a Felix Frankfurter debating a Hugo [L.] Black on certain issues, the notion that some law clerk can come in and change the justice's mind on issues on which the justice's mind has become fixed, not only through a process of reflection and meditation, but by a process of adversarial debate in conference against Hugo Black for years -- be realistic. Your law clerk isn't going to change that mind very much

It also has to do in part with the nature of the issue. Some issues, justices feel very much more passionately about. Bill [O.] Douglas would not have been affected very much by a law clerk on a free speech case. Even if the law clerk didn't realize, going in, where Bill Douglas was going to come out on the free speech case, Douglas would not have been affected by it. Or probably in a tax case. But in a pipeline case, in a federal jurisdiction -- ancillary jurisdiction over state law issues -- those were not issues on which Justice Douglas felt passionately, nor were they issues on which Felix Frankfurter felt passionately. So on those kinds of issues, a law clerk could have more effect.

Also, it is very, very important to understand that although the Supreme Court of the

United States does, more than most lower courts, decide cases that turn on big policy issues and on pure law stuff, *facts* are very important. And the law clerks have, in many ways, a grasp of the facts that the justices cannot. The cases come up on extremely complex records and buried in this enormous, voluminous record are some key fact or facts that the justices may not have been aware of at the time the case first came up. The record isn't even before the Supreme Court of the United States when the Court decides to grant review. They grant review on a petition for writ of certiorari. The record comes up only after the Court agrees to grant review.

So this record comes up. The justices have not thought about it, they have decided what they think the issue is in the case, and the law clerk then comes up with some fact that changes the issue. It says, you know, the issue that you thought was presented here is not in fact presented, which may result in anything from a different decision, a broader decision, a narrower decision, or dismissing the case on the ground that the issue that we thought this case was here to resolve is not presented.

Q: In the year that you were with Felix Frankfurter, was there a case that stuck with you, or sticks with you, that, "This was an important case and I had some influence on it," or "I didn't?"

Amsterdam: There I have got to draw the veil of silence because law clerks don't talk about that kind of thing. Or at least they didn't in my era. I still owe Felix Frankfurter the protocol of my era. Today I understand law clerks talk about that sort of thing, but we never did and we weren't supposed to.

Q: Was there a case of the magnitude of *Furman v. Georgia* [1972] or *Brown v. Board of Education*, the term that you were in the Supreme Court?

Amsterdam: There were a number of cases. The *Communist Party of the United States v. Subversive Activities Control Board* [1961] case. Several major political cases with questions of whether the Court would go beyond the traditional bounds into areas regarded as political questions. We had a number of biggies.

Q: Right, right. [Earl] Warren wasn't yet Chief Justice -- Warren wasn't on the Court was he?

Amsterdam: Yes, he was there.

Q: Warren came in 1953. He was there, but was he Chief?

Amsterdam: Oh, yes.

Q: In any event, you spent a short period of time afterward as Assistant U.S. Attorney in D.C.

Amsterdam: Right.

Q: Then you moved on to teaching at Penn.

Amsterdam: Right.

Q: That sounds a little academic for you at that time. Still perusing literature, art?

Amsterdam: Yes. What had actually happened was that I really didn't feel that I wanted to stay on the prosecution side of the fence. What I discovered in being an Assistant U.S. Attorney was that I liked the aspects of the law that weren't purely heady but got more into people's real problems. But I did not see my role in that as a government lawyer.

I thought I would have more flexibility to choose what I wanted to do if I became an academic because I could -- keep in mind, Myron, that all throughout my experience I had spent as much or more time moonlighting than doing whatever my primary thing was. Even in high school. I was the editor of the literary magazine at the high school and spent more time at that than I did on standard studies. Throughout college I had spent more time on other things. Throughout law school I had been doing art history. And so the idea that I would be a law teacher was not so much a full-time dedication to teaching as a career than the notion that teaching was a platform from which I could do a number of things. I could advance the growth of areas of the law in which I had academic interests, work with students and teach. But I could also moonlight in choosing what I wanted to litigate and where I wanted to get involved in causes.

So I guess that was a more deliberate choice than ones I had made before. I really considered what options that would give me. It seemed to me to make sense that I would get that freedom for myself. So I chose to become an academic. At least tentatively

Q: Did you entertain the thought of going to some other law school? Or going somewhere else in the country than back to Penn?

Amsterdam: That was a wonderful question because today when you ask it is probably the first time I realize that I did not. And it was so perfectly consistent with what I had done, which is an opportunity opened up and I would take a look at it. That's what happened with the Felix Frankfurter clerkship, that's what happened with Dean Acheson and David Acheson and the U.S. Attorney's Office. Something very attractive was put on my platter. I would look at it and I would ask, is this the kind of thing that makes sense for me? I guess really what I'm saying is the only comparative shopping I had done up to that point in my life was for hot cross buns in day-old bins in bakeries in Wales. When it came to the big things, I did not comparative shop.

[Laughter]

Q: You went back to Penn to teach in 1962.

Amsterdam: Right.

Q: How conscious were you, by that time, of the Civil Rights Movement in the United States and all the activity that had been taking place in the South? Did you ever wander down South to see for yourself?

Amsterdam: Yes. Really only in two settings, both of which stuck with me and both of which I think were percolating along with much of the other consciousnesses you just

described. Let me just give you those two episodes and then I will come back and answer your broader question more directly.

When my dad came back from the war, my dad and mom and I went on a long car tour through the South and Midwest and then back home. And he had just come back. He was military governor of Luxembourg toward the end of the war and so did not return when most of the troops returned. He returned several years after that because he was in charge of occupied Luxembourg in the wake of the war. He had been away a long time. He and mom decided that they were going to take me out of school and take me for a long drive. The three of us would be together for the first time in a long time and although much of that trip really was a business of reconstituting family, I was reasonably aware of the environs in which we were.

Throughout the South, the segregated condition of life really did hit me. Again, background washes for a minute. Where I grew up was two blocks from City Line. That was a pretty much all-white, and, in fact, all-Jewish neighborhood. My elementary school was people of middle and upper middle class, Jewish, all white. However, my junior high school was situated literally at the corner at the intersection of three zones -- the Jewish neighborhood that I just described, an Italian neighborhood, and an African American neighborhood. And the junior high school had African Americans, Italians, Jews, at which point again, serendipity set in. Since my name was Tony I could not be identified with the Jews and what happened was that I was forced to cross lines from the very beginning and had friends in all sectors.

Again, serendipity. I got polio while I was in junior high school. And when I returned,

probably because I had made friends with all of the groups there, I experienced a really powerful sense of support. Polio was a big thing in those days and I got bulbar, which could kill you.

Q: I'm sorry, you got --?

Amsterdam: I got bulbar polio, which could kill you in those days.

Q: Could you spell that?

Amsterdam: Bulbar, B-U-L-B-A-R. Bulbar polio. It paralyzes the neck and throat muscles and kills you. I was in an iron lung for a while.

When I returned, partly because polio was a big scare in those days and therefore people, even more than just simply empathizing with a colleague or a friend or a schoolmate who's ill, you become something of a miraculous survivor whom people empathize with. I got a tremendous outpouring of support and friendliness on the part of everybody. I guess before that I really had had very little intercultural experience at all because my horizons were pretty narrow. But from that point on, I just could not see people in classes or races. People really were -- not for some intellectual or ideational reason but just simply because that's the way life was -- all alike and equal for me.

And that continued on through college. Two of the guys that I spent a lot of time playing basketball with at Haverford were African Americans. And so when I went down South I was absolutely startled and shocked. I had known about conditions in the South but the

kind of contrast -- I had had this swing through the South with my parents and suddenly seen a truly polarized society. The South in those days really was apartheid; there was no question about it. I mean *everything*. There were two washrooms, two drinking fountains -- that stuck with me. Throughout all the rest of my experiences, I kept comparing. In college I compared my recollection of what the South was like.

The second setting was in Haverford. There were some sit-ins in Delaware and I went down and participated in those. That was part of the Quaker ethic and the students who organized that were primarily Quakers. Haverford is a Quaker school, Friends school. I probably would have been involved no matter who organized it but the fact was, again, serendipity. I happened to be at Haverford when people were happening to organize it.

So two very different periods of my life, one fairly early, one fairly late, with sandwiched in between them these other experiences of a very different world in which the South struck me as aberrant. Not just odd but aberrant. My own feelings didn't run to expect or even understand how people could view the human race as divided into two separate and unequal groups.

Okay, so to answer your question now more directly. None of this is in the forefront of my mind at any point that you're talking about. It is percolating, though. All of the experiences that I've just described -- the diverse thoughts, the positive ones, the ones that made me empathize across a broad spectrum of human beings, and the ones that leave me startled and surprised and struck and shocked by the fact that other people don't see things that way and don't behave that way.

All these were going on at a maybe subliminal level in my head. The thing that brings them all of a sudden together is, again, serendipity. What had happened was that in my last year of law school I had written a note. Students on the *Law Review* wrote an extended legal analysis called a note. My note was on something called "the vagueness doctrine." I developed the thesis that the vagueness doctrine was something else than an abstract principle requiring certainty in the law. It was a tool for the Supreme Court of the United States to deal with some very difficult practical situations, including situations in which race discrimination was practiced under color of a vague law. A law such as disorderly conduct or disturbing the peace was defined so indefinitely that almost anything could be disorderly conduct or disturbing the peace. African American demonstrators in the South could be arrested and held before the court and criminally convicted for something that a white heckler at a rally would not be.

The vagueness of the law was less a deficiency in itself -- wait. At that time before I came to this subject, the void for vagueness doctrine was generally viewed a matter of fair warning. That is, a statute which prescribes acts in terms so unclear that you or I cannot know what the law commands is unfair and we cannot be penalized for violating it. That was the traditional idea.

But I said, yes, that's there but that's only part of it. Another part of it is concerned with the discriminatory administration of the law. Another part of it still is that there are refractory and recalcitrant state courts which make fact findings against civil rights demonstrators and such folks. The Supreme Court of the United States, because of its traditional doctrinal limitations, does not second-guess lower courts on fact finding. It needs a way to strike down a conviction supposedly based on findings of fact. The vagueness

doctrine comes into play because the Supreme Court can say, “This statute is too vague. The state courts made findings that we really suspect, but do not have the power to second-guess, that this conduct really *was* disturbing the peace or this conduct really *was* disorderly conduct. We can’t doctrinally second-guess their factual findings, but what we *can* do is say this statute leaves so much room for those kinds of factual findings that we can strike it down as unconstitutional.”

In this note, I developed the theory that this was the way the vagueness doctrine was being used by the Court and it had the potential to be used that way. Because I wrote that note, the Legal Defense Fund [LDF], which was handling a lot of these demonstrator cases in the early days of the civil rights movement, suddenly saw me as a potential source of help, aid, and assistance. They called on me to help out with some cases and some issues involved in the defense of the civil rights demonstrators charged with crimes under these various vague statutes.

A second piece of serendipity, at this point, is that a colleague of mine, Caleb Foote, had been scheduled to help the Legal Defense Fund in a case that didn’t happen to involve these issues. It was a straight-out race case, which also happened to be a death penalty case. But death was not the central issue in the case at that point. He was scheduled to go up to the Legal Defense Fund for a meeting to brainstorm the case. He got sick and he asked me if I would pitch in and go up there. So I did. And what happened is that within the period of about two or three months, I suddenly found myself involved in two or three different layers of Legal Defense Fund consulting and work. And that’s when all of a sudden my life turned around. Within months, I suddenly said, “This is really the first thing I’ve done that I can fully identify with.”

Q: That you can fully identify with?

Amsterdam: Yes.

Q: Now, let me ask you this. What was the Legal Defense Fund at that time? When people speak of the Inc. Fund, is that the exact same thing as the LDF Fund?

Amsterdam: Yes. The technical title of the Legal Defense Fund was NAACP Legal Defense and Educational Fund, Inc. It was incorporated. And Inc. Fund was just short for the Legal Defense Fund.

Q: So when one sees in the literature LDF or the Inc. Fund, it's all the same thing.

Amsterdam: Right.

Q: When you came into the picture around 1963, how important was the Inc. Fund in doing the kinds of things it was doing and what was its objective?

Amsterdam: The Legal Defense Fund was the prime civil rights litigating organization in the country. The only other organization with the kind of visibility that the Inc. Fund had and the kind of docket it had and the scope of its docket was the ACLU [American Civil Liberties Union]. But the ACLU was less programmatic than the Legal Defense Fund. I also worked with the ACLU. Within a year of the time I worked with the Legal Defense Fund, I also worked very heavily with Mel [L.] Wulf, who at that time was the legal director

of the ACLU. Mel and I worked out in Nebraska together on one of the first death penalty cases I ever had. So I was working with both of the organizations. But the Legal Defense Fund was more proactive and the ACLU was a more reactive organization. The ACLU felt responsible for representing the Bill of Rights and people who were oppressed in any of their civil rights. It had a broader range of calls on it for help and it felt obliged to respond across a broader range.

The answer to your specific question on the Legal Defense Fund's mission is that it had been, and always was, devoted to the advancement -- and that's what the "A" in NAACP is all about -- of the rights of African Americans. Because this was coming off the great victory in *Brown v. Board of Education*, education was the cutting edge, for a couple of reasons.

One, the demise of the segregated school system had been the beginning of the end of apartheid generally. The Legal Defense Fund put a lot of energy into education on a purely symbolic level. If the segregated schools could be ended, that would be a major symbolic change toward the end of segregation of the second-class citizenship for African Americans.

Second, it was very practically and pragmatically understood that education was the key to advancement. Thurgood Marshall was not just kidding the Court or himself when he said that education to be a citizen was the primary necessity for full citizenship. So the Legal Defense Fund was, in its larger aim of advancing the rights and interests of African American people, heavily, heavily concentrated on education.

Amsterdam: Once you got massive resistance in the South, the fight over the schools became 50 percent, 60 percent, 70 percent of the Fund's docket and they worked very

heavily on the schools. However, they also got involved fairly early on in voting rights and, to some extent, economic discrimination. Ever since the days of the Scottsboro Boys cases, though, the Legal Defense Fund had had some role in criminal cases. In the days of the Scottsboro Boys there were no African American lawyers in the South. And in 1963, when I actually got involved with the Fund, there were ten. Throughout the South, there were ten African American lawyers, all cooperating lawyers with the NAACP Legal Defense Fund.

Q: Are you saying there were a total of ten?

Amsterdam: Yes.

Q: Meaning no matter what they were practicing?

Amsterdam: Well, am I saying that there might have been some folks I didn't know about? I doubt it, but that's what I am saying, yes. Certainly that was my understanding at the time. I thought I knew every African American lawyer in the South and there were -- oh, wait a moment, hold it. Deep South is what I'm saying. There were more than ten if you count Virginia, Delaware, Arkansas. But if you are talking about Alabama, Mississippi, Georgia, Florida -- maybe ten total.

Q: Right.

Amsterdam: The Legal Defense Fund therefore, from the days of the Scottsboro Boys on down, had had a major role in defending African Americans charged with violent crimes, against whites in particular, in death cases -- murder and rape. These were cases in which

the race card was most important. The Scottsboro Boys case was the model for cases in which either African Americans were unjustly accused -- they weren't guilty in the first place -- or cases in which, even if there was a crime, the nature of the crime was completely misunderstood and distorted because of the perception that African Americans were violent. So what might have started out as an altercation in self-defense ended up as aggression on the part of the African American. In all of those cases the Legal Defense Fund, being the only organization which could send lawyers into the South from the North or work with local lawyers to get some semblance of a genuine defense for these hated, despised clients, became involved in those cases.

That was not its primary mission. It was not about criminal defense generally, let alone abolishing the death penalty, but it was forced into the role of defender of the otherwise undefendable and undefended criminal defendant. Its primary role at that time was litigating school desegregation cases. I spent a lot of time on school cases in those days.

Q: You yourself did?

Amsterdam: Absolutely.

Q: For the LDF?

Amsterdam: Absolutely.

Q: Traveling about? Writing the briefs?

Amsterdam: Mostly briefs. All of the school cases in which I was involved were already in either the Court of Appeals or the Supreme Court of the United States. The record was already made and I did not spend time traveling around. I was not one of those front-line, incredibly courageous guys who escorted the students into the Little Rock schools.

Q: Right.

Amsterdam: That was not my role. My very first experience with a computer, Myron, was with the Legal Defense Fund. It had one of the first computers ever made. It was something called a Vydec. Vydec was made by one of the oil companies, as I remember it, and it was brought into the Legal Defense Fund and set up in a room. It looked like a dinosaur -- it occupied the entire room. And the Legal Defense Fund was persuaded to get this thing. I'm going to get to why this story is relevant in a moment.

Jimmy [James M., III] Nabrit, who was number two at the Legal Defense Fund, and I were co-counsel in one of the major school desegregation cases. It may have been *Swann v. Charlotte-Mecklenburg Board of Education* [1971]. It may have been the Richmond municipal multi-district desegregation case, I don't remember. Bill [T., Jr.] Coleman was involved as well.

And we had a deadline of midnight to get the brief filed. We had the eleventh draft of that brief in that Vydec machine, ready to go. And at 11:45 p.m., with the brief due at midnight, the son of a bitch quit on us. The Vydec expired. Like a dying dinosaur, you could see its lights go out, one by one. And there we were with a brief that we had worked on for twenty-four hours a day -- it was a tough case. We had been without sleep, we had worked on this

brief for four or five, maybe six, days straight. Our entire product was in the bowels of this monster and the monster died on us.

There were other school case experiences but that was a rather unique one and rather memorable. But, yes, I was involved in a lot of school cases with the Fund at that point.

Q: When you came into the picture at LDF, just remind history, who was Charles [H.] Houston?

Amsterdam: Who was Charles Houston?

Q: Yes.

Amsterdam: He was one of the great defenders of African American rights, a leading civil rights lawyer at the time.

Q: That's right. But his time was when?

Amsterdam: Oh, the 1940s.

Q: He became Dean of Howard University Law School, did he not?

Amsterdam: Right.

Q: The NAACP Legal Defense Educational Fund was founded in 1939.

Amsterdam: Right.

Q: Was he instrumental in that, do you recall?

Amsterdam: I don't really know the history of the formation of the Fund. I know that it split off from the NAACP. The NAACP had a legal arm or a legal wing, and the Legal Defense Fund split off as a separate entity. I don't know whether the reason for that was that in those days legal organizations didn't have the same tax consequences -- I suspect that was probably the original reason for it.

Q: Yes, I think that was the case. But can you put into the picture the role, to the extent that you understood it, of Thurgood Marshall in 1940s and 1950s. When you came to the LDF, Jack Greenberg was running it, right?

Amsterdam: Right. Thurgood Marshall had been the executive director and the chief lawyer for the Legal Defense Fund prior to Jack Greenberg. The constant figure, the one who was second in command under Thurgood, and also under Jack, was Constance Baker Motley. So the regime continued. Jack was very close to Thurgood. There wasn't much change in regime, although there was a change in personnel.

But the Fund continued to primarily follow the course Thurgood had charted. Thurgood was a lawyer's lawyer. Although an astute politician, he was also a brilliant legal theorist heading up an organization whose defining character was as a law shop, as compared with the NAACP, which was a political and support organization, a membership organization.

The Legal Defense Fund was never a membership organization. It didn't have a constituency in the sense in which the NAACP did. It was the lawyer that was there for African Americans in trouble and it had its own proactive campaign.

The big debate in those days about the role of the Fund was the question of whether the Fund should have its own separate agenda or be more like an ACLU for African Americans than it was. That is, the Fund under Thurgood chose a course to social change. The lawyers decided what they thought was the objective and what they thought should be the means, as compared with the NAACP which was largely responsive, as a membership organization, to the wishes of the community. There was a good deal of debate at that time about whether the Legal Defense Fund was too lawyerly, too elitist, whether decision making was being done by too small a group of people who, however brilliant, necessarily reflected the designs and the desires and the plans and the thinking of a relatively small group, as distinguished from being lawyers who served the clients' ends for whatever group of African Americans had their own separate objectives.

Q: Right.

Amsterdam: So the Legal Defense Fund, under Thurgood Marshall in particular, took on the characteristic of people who not only implemented but *designed* a proactive legal program for the advancement of African Americans. That was still the role when I joined it.

What happened fairly shortly after that was a combination of things. The Legal Defense Fund did become -- and I think this was part of the change in character of the times -- somewhat more responsive to and somewhat broader in its representation of African

American groups who had their own agendas. And the Fund, in addition to having its own campaigns, also became, more broadly, a defender.

I think that was probably because of a major historical development, of which you are aware, which is that when Martin Luther King Jr. took the people to the streets to make a reality of the Civil Rights Movement, they got busted. And all of the statutes and all of the laws that I was talking to you about -- vagrancy laws, disorderly conduct, and all of that stuff -- were slapped on them. The Legal Defense Fund necessarily became aware that that was where the action was and that, in addition to its own school cases and voting rights cases, it also had to defend Martin Luther King and Martin Luther King's equivalents in other places. I mean, there was nobody exactly like Martin, but there were leaders like Martin in all of the communities and these people needed help and they needed support and they needed legal backup. So the Legal Defense Fund got into more general defense of civil rights people rather than simply its own program at that time.

And then the next step -- and this is now several years along, but not long, a short period of time -- was that the Legal Defense Fund became aware that the same settled laws that were being used to punish demonstrators were also used as instruments of economic oppression. And the Legal Defense Fund became aware, very soon after I got involved with it, that fighting the economic fight against caste discrimination was a major part of the battle for advancement of African Americans. African Americans were the victims not only of overt and covert racial bias but also of the creation of a social caste system that had locked them into the economically deprived and underprivileged caste. Until some things were done to break that down, African Americans could not find their place in the sun, meaningfully, in this society.

So the LDF, fairly shortly after that, became involved with a project to deal with poverty issues as well. They got a Ford Foundation grant for something called the National Office for the Rights of the Indigent. NORI was the acronym. In a very short period of time, the mission of the Legal Defense Fund changed somewhat. It still was an organization in which the lawyers largely charted the course, but there was more defense and support of community people and more diversification and broadening of the perception of what was necessary in order to advance the rights of African Americans.

Q: And how much was the death penalty on their agenda?

Amsterdam: It was on the agenda because of the phenomenon that I described to you, as the LDF's necessary role in Southern cases from the Scottsboro Boys on down, of being the only organization able to defend African Americans charged with these crimes.

Q: I understand that, Tony. But what I'm saying is that given the picture that you just laid out, if the LDF had a dollar to its name, what percentage of that dollar do you think, by the time you came into the picture around 1963 or 1964, would be going toward death penalty work?

Amsterdam: Six cents.

Q: Six cents. Where was it headquartered when you came into the picture? Was it up at Columbus Circle?

Amsterdam: Yes, Columbus Circle.

Q: And do you remember the name Frank Heffron?

Amsterdam: Yes.

Q: How about Mike Meltsner?

Amsterdam: Sure.

Q: Was Jim Nabrit a professor?

Amsterdam: No, Jim was never in academia. You're thinking of Jim's dad, who was actually president of Howard University.

Q: Right.

Amsterdam: And a professor there before.

Q: What I'm trying to create here is a picture of who the law firm was, so to speak. I mean, who the people were right there on a regular basis. There was Greenberg. Was Constance Baker Motley? Or was she --

Amsterdam: Connie Motley was the number two. There was a whole roster of people. [C.] Steve Ralston, Norm [J.] Chachkin -- I guess Chachkin actually came later, he was younger

-- Norm Amaker, Leroy Clark, Mike Meltsner, Mel Zarr, there was a whole crew.

Q: Were they volunteers like yourself?

Amsterdam: No, they were staff lawyers.

Q: They were staff.

Amsterdam: All the people I named were staff lawyers. LDF worked in the following way. It had a legal staff on Columbus Circle. At that time the offices were all on one floor. Later they went to two but they were all on one floor at that time. LDF had cooperating lawyers in every locality. Cooperating lawyers were lawyers in private practice who were co-counsel with Legal Defense Fund attorneys. In some cases they were simply paid by LDF -- without the involvement of LDF staff lawyers but with LDF staff lawyers as backup, research aid, that sort of thing -- to handle particular kinds of cases. Certainly all of the African American lawyers in the South were that, but there were very few of those, as I mentioned to you.

In the northern part of the South, in Virginia, Delaware -- people like Lou [L.] Redding in Delaware were not LDF staffers. They were local African American lawyers and many of them had been lawyers in the northern part of the South for many years. Of the ten lawyers that were in the Deep South, *none* of those had been trained in the states in which they were. The two African American lawyers in Mississippi -- there ended up by being three -- had gone to law school in Missouri and then gone back to Mississippi. Carsie [A.] Hall and Jesse [W.] Brown were educated out of the state.

The Legal Defense Fund staff was not spread over an age range, and I don't know why that was. It may very well be that what happened was that the Fund had suddenly come into enough money to hire a number of lawyers at the same time, but all at the junior level. What was going on at the Fund was there were a couple of people at the top who were fairly advanced in their career. They were people with many years of experience. And there was a tremendous crowd of young people, very, very inexperienced, very gung-ho, real shock troop types with the ethos of a parachute commando troop.

Q: Right.

Amsterdam: And the guys you are talking about, Frank Heffron, and Mel Zarr, Mike Meltsner, Leroy Clark, those guys were all in that age phalanx. They were my age, which at that time was very young.

Q: Is there a way to draw a general picture of what the situation was like in the country with regard to the death penalty circa 1965? Certainly the numbers of people that were on death row was 125 in 1955, 435 in 1967, and 620 by the time of *Furman v. Georgia* in 1972.

Amsterdam: You're not talking about total numbers on death row, because there was more than that at the time of *Furman v. Georgia*.

Q: *Furman* was like 629, I think, something of that sort. 631 when *Furman v. Georgia* was decided. But while those numbers had been rising, the numbers of executions -- which had been at a high point in 1935 at 199 -- had been falling for more than a decade before the

push that you people made in the mid-Sixties. From 105 in 1951 to 21 in 1963, 15 in 1964, 7 in 1965, only 1 in 1966, and 2 in 1967. Looked at it another way, in the 1950s executions averaged 72 a year whereas from 1960 to 1965 the average was 19.

You summarized it once as saying that between 1930, when nationwide official statistics started, and 1972, when *Furman v. Georgia* was decided, almost exactly half of the persons executed for murder in the United States and about 90 percent of those executed for rape were African Americans, although African Americans never constituted more than 11 percent of the nation's population during that period.

Is there something there that you see? When you see the death row populations -- accepting those figures for the moment -- rising in that period from the 1950s into the 1960s, and the executions declining significantly before the *Furman* case, what does that tell you? And were you conscious of what that situation was when the LDF made a push for a moratorium on executions in 1966?

Amsterdam: The place where we crossed the Rubicon was 1966, when [Orval E.] Faubus left us with six clients in Arkansas and departed the state for a governors' conference. 1966 was the time when we deliberately decided that was what we were going to do.

Q: What we were going to do was what?

Amsterdam: Stop executions in this country.

Q: The numbers that are being sentenced to death were increasing.

Amsterdam: Right.

Q: And the numbers of executions were declining.

Amsterdam: Right.

Q: Did you actually get together at the Fund and say, "I have been helping you out for a couple of years but now we have got to have a purposeful strategy of how to deal with this situation," or was this just another thing that you fell into, so to speak?

Amsterdam: No, there were deliberate strategies. The decision to stop all executions was a deliberate strategy. But it was not a deliberate strategy in the same sense in which, for example, we had had a school desegregation strategy or a strategy to invalidate the vagrancy laws or disorderly conduct laws. Those things were a strategy that said, "We have a certain objective and we've considered alternative means to it and this is the approach we are going to take."

The only decision we made in the death penalty area, at that point, was to stop all executions. I will tell you in a minute what the reason for that was, and it was compound. But what I really want to emphasize is that if you look at the campaign to stop and eventually eradicate the death penalty, you will be looking in vain for the development of a set of legal theories which are chosen with that aim, and only with that aim, in mind. Unfortunately we never had that luxury. The reason we didn't have that luxury is that when you get involved in an individual case, you become the lawyer for that client. You are

responsible for that client's life. Anything that will save that client's life, you are obliged as a professionally and emotionally committed lawyer to do. If that means taking positions in a client's case which disserve some long-range social goal or law reform change, you have got to take them anyway.

Q: Which serve? Which serve some long-range change?

Amsterdam: Which disserve.

Q: I thought you said disserve.

Amsterdam: That's the point, and that's the difference between this and defense of civil rights demonstrators. Civil rights demonstrators very often didn't give a damn whether they got convicted or not. I was involved in the Chicago Seven case. The Chicago Seven voted 4 to 3 to not put on a defense, and that's what the lawyers did! Legally winning cases was not what a lot of that was about. Winning principles, winning issues was what it was about. School desegregation, of course, you wanted to get individual African American kids into school, but the larger objective of desegregating the schools was something that the lawyers and those kids themselves shared.

In a death case you have got to keep your client alive. The individual case is so demanding as compared with some long-range social objective -- even abolition of the death penalty -- that while you try to follow strategies which will both save this guy's life and advance the long-range cause of abolition, if there is a shred of conflict between those two, your job is to take the position that will save this guy's life.

So a lot of our legal development was not, as in the school cases or the vagrancy cases, the choice of developing this legal theory or that legal theory because it was most likely to win at that moment in time, taking this case to the Supreme Court rather than that case because this had the best facts and you could win it. You could do those things in demonstration cases, you could do those things in vagrancy cases, you could do those things -- and we did them -- in school cases. You can't do them in death cases. In death cases, you raise every issue that client has and you litigate in the interest of that client. Whether that will serve the long-range cause of abolition is secondary. It has to be secondary -- you've got a client's life at stake.

Q: But what sparked this decision in 1965, 1966, to try to stop all the executions in the country?

Amsterdam: Two things.

Q: And by extension, I assume, all the sentencing of people to death.

Amsterdam: Not by extension, no. We would have if we could have but we didn't have the resources to do that.

Q: Okay.

Amsterdam: And that's why we developed what later we came to verbalize as a goal-line stand, which is trying to stop them at the stage of execution, or post-conviction. We didn't

have the people power to get involved in trials.

But the answer to your question -- two things. One was legal. The one place where there was a perfect consistency between serving the individual client and advancing the long-range cause of abolition was to stop every execution. If we could increase the number of people on death row who had not yet been executed and stop the trickle, trickle, trickle of people to the death chamber which had been going on for ten years, we could do two things that would make it more likely that we would win individual cases.

One was that it would simply change the dynamic. Instead of the Supreme Court of the United States deciding whether it would stop executions, it would put the Court in the position of deciding whether to start them again. And that makes a tremendous difference from an emotional and conceptual standpoint. To say to a court, "You stopped school segregation" -- although you never really did and didn't put your money where your mouth was and never really backed up what you did -- "You have got to stop executions in the same way. You've got to strike this great blow that will end this social institution." Instead, we said, "It's dead, it's over, it's done with. Do you guys want to start it again? Do you want to be responsible for starting it up again?"

We realized that momentum was important, that inertia was important. If we could bring the system to rest instead of having it go on in a state of inertial motion, we would be terrifically advantaged in terms of being able to stop individual cases, as well as eventually get rid of the death penalty as whole.

By the way, I want to come back to the question of when we decided we were against the

death penalty. Don't assume that we were abolitionists from the beginning because that is simply not true. We have to come back and talk about that. We got into this because of race, not because of the death penalty. We became convinced that there was something inherently wrong with the death penalty long after we got into death penalty cases.

That's why, Myron, I want to point out to you that the reason the LDF was in this and the reason I got involved in it with the LDF was the legacy of Scottsboro. It wasn't about the death penalty. It was about unjust lynchings, legal lynchings, of African Americans for crimes against whites. Individual injustices, in particular cases, on racial grounds. That's why we got into these things. Okay?

But let me continue on, answering your question. One half of the legal strategy which drove us into wanting to stop all executions was the idea of changing the perception of what was involved from stopping executions to resuming executions. Related to that, but conceptually different, was the idea that if you could de-normalize execution -- if you could create the image of execution as something that was not a functioning part of society's defense against crime -- that the likelihood we could get the Court to knock it out would be vastly increased.

Now, I say that is related, but it is different. Because what I was talking about before, in terms of inertia, had more to do with the judges' own self-image and the question of what they are being asked to do. "Am I a social activist here who is being called upon to stop something that society has going on? Or am I somebody who is being asked to re-invigorate a barbarous institution that is dying, on its last legs?"

Now I am talking about a slightly different idea. It is a more intellectual one. It says, "We

can live without the death penalty. We haven't had it for ten years. The crime rate hasn't gone up. Nothing is seriously wrong." In recent years, it has been going along at a trickle but you might explain that by saying, "Well, we're being more and more selective. We still need it and we're choosing the real worst cases." But once it is stopped altogether, there is no way you can think about this as a part of the normal mechanism. Society gets along just fine without the death penalty. So all these purported justifications for it that warrant your approving a penalty which is barbarous on its face, which is racially discriminatory and economically discriminatory, those justifications don't hold up. You've seen we can live without it.

Those two reasons combined as a strategy. Notice how this fits with what I said before. This is a strategy not only for achieving the end result of abolition but enables us to get a stay in each case and keep each client alive because all of the pressures that come to bear on the courts also apply in each individual case. So here is the one place where you have got a coincidence of the interest of the individual client and the larger cause.

Another reason why we decided to go for a moratorium had nothing to do with law at all. It was purely moral. Faubus walked out of the state of Arkansas to go to a governors' meeting in California. This was 1966. He had not signed a death warrant for a number of years and Arkansas was reflective of exactly the same situation you've described, Myron, when you asked the question. There were very few executions and a very large death row. He signed six death warrants and took off from the state. We represented two of the six clients. We had developed a set of legal arguments because, as I said a moment ago, when you represent an individual client you've got to raise everything and the kitchen sink. We had developed challenges to five different aspects of procedure in death penalty cases as well as

claims of discrimination, innate barbarism, cruel and unusual punishment, the whole shebang. We had in a petition for a stay of execution, twenty good issues. Issues that were good in the sense that they looked sound, they were well-reasoned, they were well supported by analogous authority. Of course, we didn't have any rulings that the death penalty was bad on any of these grounds, but we had good precedents for the analogy as to why it was bad.

And as a result of that we walked into federal courts in Arkansas and within days we had our two clients' executions stayed. We then looked around and we said, "There are four more guys on death row. It's obvious that if we went in for them, we could get them stayed. We just got two guys stayed on a set of claims that are equally applicable to these other guys. They don't have lawyers. What do we do?" And we literally found ourselves in the position of somebody passing someone in the gutter bleeding to death. The question is, do you apply a tourniquet or don't you?

So the decision was only in part a legal strategic choice. It was partly having the tools to stop people from getting executed and knowing that we could do it. Were we going to let people die simply because they either didn't have lawyers, or the lawyers they had were not equipped with the set of tools we had?

Q: Are those set of tools sometimes referred to as the Last Aid Kit?

Amsterdam: They became the basis for the Last Aid Kit.

Q: Hundreds died because they never had lawyers?

Amsterdam: Right.

Q: Laying aside the others, between the time you went back to Penn as a teacher and the mid-1960s, did you yourself have a clear mind as to where you --

Q: -- stood on the death penalty?

Amsterdam: No. It was no more on my radar screen than the LDF's radar screen. I said six cents on the dollar for LDF. It was probably four cents on the dollar for me. If you had asked me the question what I thought of the death penalty, I would have said I thought it was counterproductive and seems to me excessive. But that it was a small issue.

And you know, if you don't look at the death penalty in a certain way, it is a small issue.

The number of people who, at the most, get executed in this country is small pickings compared to the hundreds of thousands of people who are victimized by the criminal justice system. We have the most barbarous system in the world from the standpoint of imprisonment and particularly long-term imprisonment. We have a rate of incarceration in this country which is ten times the rate of incarceration of countries which have our crime problem, such as France and Germany. If you look at crime generally, or you look at social justice generally, the death penalty in terms of the numbers of people that it affects and the numbers of people who are treated unjustly by it, it is a small issue.

Until I understood the death penalty much more than I did when I was a kid and went through law school and clerked -- I was still a kid. The perspective I now have on the death

penalty is that it is a microcosm of society's inability to deal fairly and rationally with issues. Until you develop that perspective, it's a drop in the bucket. And so it was not a big thing for me. I didn't have any particular reason to make up my mind on it. I guess I was against it but I didn't have to decide.

Q: All right. Shall we pick up tomorrow on that point?

Amsterdam: Yes.

Q: Thank you.

[END OF SESSION]

MJD

Session Two

Interviewee: Anthony G. Amsterdam

Date: April 2, 2009

Interviewer: Myron A. Farber

New York City, NY

Q: This is Myron Farber on April 2, 2009, continuing the interview with Anthony G. Amsterdam at New York University Law School for the Columbia University oral history project on the movement to end the death penalty in the United States.

Tony, if I can go back to something that I believe you may have said yesterday. When you came into the representation of people in facing death around 1963, you did not then consider yourself an abolitionist. Is that correct?

Amsterdam: That's correct.

Q: Can you tell me again, what were your feelings about that? Were you just representing people as a lawyer, no matter what? Did you have strong feelings about the death penalty at all?

Amsterdam: No, I didn't have strong feelings about the death penalty because I had not thought all that much about it. My involvement in those cases had to do with my concern about racial equality and my professional identification, at that point, with the Legal Defense Fund, which was an organization concerned with eradicating race discrimination in every aspect of American life. Since the Scottsboro Boys cases, the use of the death

penalty as an instrument of oppression and repression of Southern blacks who committed crimes against whites had been a high item on the agenda -- high because it was a race issue, not because it was a death issue. Death simply was the extremity. Because of its enormity, it emphasized how oppressive a regime of subordinated blacks was. But it wasn't about death. It was about race, as far as we were concerned.

Q: And was it also about rape, more so even than the death --?

Amsterdam: Yes. We decided to first take on the death penalty for black-on-white rapes. In 1965 we launched a major empirical study with Marv [Marvin E.] Wolfgang. We sent law students throughout the South to gather records to prove that the death penalty was being discriminatorily administered on grounds of race.

That just emphasizes the point that race was our focus rather than death. If we had been concerned as abolitionists, we would have gotten into the death penalty for murder just as quickly as for rape. It wasn't about the death penalty, it was about race. We knew that the death penalty was also being administered discriminatorily with regard to murder. Because it was a notorious outrage that the death penalty was being imposed on blacks who raped whites, we knew that we had a better chance of convincing judges of the truth of that proposition. When you argue empirical facts to judges, Myron, you start with a proposition that the judges already believe. And everybody knew --

Q: I'm sorry, the judges already --?

Amsterdam: You start with a proposition the judges already believe. That is, something

that they have a motherwit, instinctive, intuitive understanding of. They will only accept or adopt hard statistics if they already know that your ultimate fact is true. And everybody in this country knew, at that point, that the death penalty for rape was an institution that was visited entirely on blacks who raped whites and nobody else. So we knew that we could convince the courts of that, and we set out to do so. And then we were going to go for the death penalty as racially discriminatory in the case of murder. But you'll notice it is still all about race. It's not about death.

Q: Did you just say that you go into a case wanting to know what the judge believes *before* you even present him any evidence?

Amsterdam: Oh, sure. That's the only way you can ever convince anybody of anything. You look for what they already are inclined to believe and then you give them a good excuse for believing it.

Q: In any kind of case?

Amsterdam: Yes.

Q: Does that apply at an appellate level?

Amsterdam: Sure. You may regard me as a cynic, Myron, but I don't think judges are open-minded for the most part. I've been in this game for fifty years and I've seen very, very few judges who can be persuaded of facts that run contrary to their predispositions and their preconceptions. For the most part, you try to figure out what a judge's preconceptions are,

utilize those that favor your case, and present evidence that lead the judge to be able to cite something in support of his or her presuppositions.

Q: Okay.

Amsterdam: That is what it is about.

Q: Okay. Were you ever on the staff of the LDF?

Amsterdam: Technically, no. Practically, yes. That is, I moved into their office and was there twenty-three hours a day.

Q: While you were teaching at Penn in the mid-1960s?

Amsterdam: Yes and no. While I was actually teaching and had classes going on, I would go up to LDF at night or I would go up to LDF and spend an entire weekend there, the entire summer, throughout spring breaks and whatever. There was a period of time when I was on a sabbatical that I was also full-time at LDF.

Q: Okay. When this moratorium was decided upon, in 1965, 1966 --

Amsterdam: The moratorium started in 1967. There was a ten-year moratorium from 1967 to 1977.

Q: Technically, I suppose you could say the moratorium lasted until 1979. In 1977, [Gary M.]

Gilmore wanted to be killed.

Amsterdam: Well, yes, but we got a stay for him because his brother didn't want him to be killed and his mother didn't want him to be killed and also, as a practical matter, we knew that once he was killed the floodgates would open and a lot of other people were going to get killed. It's the same thing I was telling you yesterday. If killing people is business as usual, it's easier for judges to do it. We knew that when Gilmore was killed, that would start the process again. So you're right that Gary Gilmore was a volunteer, but his case was still litigated and we opposed that execution on behalf of Mikal Gilmore, his brother.

Q: Yes. Have you read his book? *Shot in the Heart*, I think.

Amsterdam: No. I read a piece he did in the *Rolling Stone* but I haven't read the book.

Q: *The Executioner's Song*?

Amsterdam: Well, that's [Norman] Mailer's story of the Gilmore case.

Q: Yes, I'm talking about that now. Before I was talking about Mikal Gilmore's book. But *The Executioner's Song* is based upon Gilmore's life, is it not?

Amsterdam: Yes.

Q: There are some who say that was Mailer's best book. I'm not a great fan of his, but that's what I hear.

When the strategy that came to be known as the moratorium strategy was devised, did people sit around a room at the LDF and say, "What should our strategy be?" And then it was decided it would be a moratorium strategy?

Amsterdam: No. As I mentioned to you yesterday, the precipitating event was a moral crisis rather than a strategic conference. It was the occasion when Governor Faubus left Arkansas and left six guys on death row. The time at which we crossed the Rubicon, in our own heads, was when we decided that we had stays for two people and there were four other people who were going to die within the next month. They didn't have lawyers, and they were not people who would have previously fit within our game plan. Three of them were white and one of them, the African American, didn't fit the model of the cases we had been litigating. The question was whether we were going to let these guys die.

When we decided that we could not, in conscience, let them die when we knew we had the tools to save them, we got involved in those cases. We got a couple of stays and then the acting governor stayed the remaining two on account of the stays we had gotten from the court. The governor, at that point, knew we could just go in and get stays on the other two as well, so all six were stayed.

At that point we did sit down, but we did not sit down from the standpoint of some high-level war strategy planning conference. We asked ourselves, "What the hell have we gotten ourselves into? Are we now going to go nationwide?" It was exactly the same thing that justified our getting into four cases we weren't in. Getting stays called for our getting into every case in the country at this point.

Q: That's it! That was the idea.

Amsterdam: Well, that was the question. It wasn't the idea, it was the question.

Q: To get into every case in the country?

Amsterdam: Absolutely. Let me put it this way. To stop every execution in the country meant getting into every case in the country in which help was needed. Of course, if there was a guy who was about to get executed and he had capable lawyers, we weren't about to run into those cases.

Q: Black or white defendants?

Amsterdam: Black or white defendants, yes.

Q: Or anything else. Did you feel you had staff?

Amsterdam: Well, that was the issue. That's why I'm trying to get across to you that it was not some massive strategy. We looked at ourselves and we said, "How the hell can we do this? We don't have the resources to do this." You're talking about nationwide! You're talking about going into places where LDF has no cooperating lawyers, you're talking about places where we have no presence, where the judges don't know us, where we have no expertise, where we don't know the local law. Are you going to do that, or are aren't you?

Q: Where you don't even know the judges' prejudices!

Amsterdam: Absolutely. But the decision was made. It was a bunch of people sitting down in a room, searching our souls and searching our resources, and asking ourselves the question, "Could we do it?" And we decided to do it.

Q: Where did you find the people to do that? And didn't it cost money?

Amsterdam: Well, I'll need to answer both those questions. Most of the people who were going to do it were already on board. One new person, Jack Himmelstein, was brought on in 1967. He was a young guy who had actually been abroad at the Anna Freud Institute after graduating from law school. He had come back to this country and was looking for a job. LDF took Jack on to do the central administration of the death penalty stuff because the lawyers who had been working on this -- Mike Meltsner, Frank Heffron, Mel Zarr, Norm Amaker, and Leroy Clark -- were all guys who had other cases as well as death cases at this point, and, of course, I had other things as well. We needed somebody to be full time at this and we brought Jack in.

Other than that, all of the people who were to be involved centrally at LDF were already on board. On the other hand, a lot of expenses were incurred in this and Jack Greenberg made the decision to tap the Ford Foundation for a grant for the National Office for the Rights of the Indigent to fund death penalty work, among other things. Jack was and is a person of enormous vision and he understood the symbolic significance of the death penalty with regard to race in this country. And he also understood something Charlie [Charles L., Jr.] Black said a number of years later -- which probably didn't occur to us at that time -- which

is that if you accept the death penalty as a permissible punishment, every other inhumanity in criminal law pales to insignificance and becomes readily acceptable. And if you accept race discrimination in the death penalty, you can accept race discrimination in any lesser aspect of life simply because the death penalty is the most enormous of things. Jack understood that the death penalty was a relatively rare phenomenon, in the sense that more African Americans are treated unjustly, discriminated against, and dehumanized in prison sentencing than in death sentencing. There are thousands and thousands and thousands more people sentenced to long terms in prison than get sentenced to death. But Jack understood the symbolic importance of race discrimination in capital punishment and of the death penalty, and so he was willing to make a very difficult decision to use money which the Ford Foundation gave LDF to deal with poverty issues and race in poverty, to use a part of that for the death penalty campaign.

Q: Did Ford know that?

Amsterdam: I don't really know, Myron. Jack, I'm sure, reported periodically on the grant. Whether they knew it at the moment that Jack made that decision, I don't know.

Q: Okay.

Amsterdam: But the NORI money continued to support that for the next several years, so Ford clearly knew about it within a very short period.

Q: And this decision to go nationwide with regard to this and defending all cases -- was there any dissent from that within the halls of the LDF?

Amsterdam: I don't know about board members who might have dissented. My recollection is that there was some concern on the part of the board as to whether LDF was expending too many resources on this. But my belief is that was later. Although I was on the LDF board, I don't think I went on the board until years later. So I wasn't really privy to what was going on at that level. At the staff level there was no dissent at all. Jimmy Nabrit was second in command. Steve Ralston, who was one of their more senior litigators at that point, went over and headed up their new California office. We got immediately deeply involved in California cases because California became a storm center. [Ronald W.] Reagan came in as governor at that point and started signing warrants. His predecessor had not. So all of a sudden we found ourselves with a big mushrooming of death cases.

Steve Ralston, therefore, was a major figure. All of the guys were 100 percent gung-ho for this. And while there were other staff lawyers in the LDF office who were involved in other projects and had absolutely nothing to do with the death penalty, it was a tight, tight, little organization with a really good *esprit de corps*. People just really loved this operation. Of course it took resources away from other things and it meant that Mike Meltsner and other people spent more time on this, but that was something LDF was used to. LDF was responding to emergencies in school cases all the time and every new September there would be a series of crises and injunctions and stays. So these lawyers were used to having their colleagues in one case suddenly jerked out from under them and assigned to something else.

Q: Right.

Amsterdam: I didn't have the slightest sense that any of the staff at LDF was anything other than fully supportive of this.

Q: One objective is to -- at least from a procedural point of view -- stop executions. Was the objective at that time to get the death penalty declared unconstitutional?

Amsterdam: Not for a while, no. The objective was to save our clients from getting killed and to create a legal environment for the claims we were making, one of which was that the death penalty was unconstitutional as a cruel and unusual punishment. But that was only one of a dozen claims. We wanted to create an environment in which all of those claims would be taken seriously. Almost all of them were legally novel. We thought we had precedents by analogy for the various claims, but we had no direct legal support for most of them. In order to get them taken seriously by courts, we had to create an environment and an atmosphere in which executions stopped and killing people was not business as usual. The judge, in deciding whether or not to grant a stay, would have to decide, "Am I going to start killing people again? Am I going to be the person who gives the green light to executing the first person who has been executed anywhere in this country for three or four or five years?" That's the environment we wanted to create.

Within a very short period of time, because we were arguing that the death penalty was unconstitutional, among other arguments, we began to want to win that argument. I don't know any lawyer in the world who makes arguments and doesn't want to win them. It sure became our purpose to get the death penalty declared unconstitutional. But at the beginning, no. We had much more immediate goals than that.

Q: Pragmatic, practical goals.

Amsterdam: Yes.

Q: Were you mindful in 1964, 1965, 1966 of what did exist as an abolitionist movement in the United States against the death penalty? People, religious groups, other groups, had been arguing against the death penalty in the halls of legislatures for years. Were you mindful of that and did you -- God forgive me for using this word -- interface with any of those people?

Amsterdam: I suppose we were aware of it in the backs of our heads. The answer to that question, Myron, is largely what we were talking about yesterday, which is that because we were not focused on the death penalty as such, we never stopped and meditated directly on the point that you just made, that such folks existed. The first time when we really began to “interface” with these good people was when we made our first full bore briefing against the death penalty in the *Boykin* [*Boykin v. Alabama*, 1969] and *Ralph* [*Ralph v. Maryland*, Fourth Circuit, U.S. Court of Appeals, 1970] cases. Before we were ready, we suddenly were confronted with the situation of the Supreme Court of the United States taking up a case that potentially implicated the cruel and unusual punishment argument, in *Boykin*.

I've got to tell you, Myron, this entire period from 1966 through 1972 is a black hole in my recollection. We were just simply running from pillar to post. Once we decided that we were going to stop every execution in this country, it was literally a twenty-three and a half hour, seven day a week job for years. For six years. And it's a whirl, it's a blitz, it's a blur.

And *Boykin*, what happened was --

Q: I want to come to *Boykin*.

Amsterdam: But to answer your question about interface with these groups, I have got to say a word about *Boykin*.

Q: Okay.

Amsterdam: What happened was that we learned, belatedly, that the case was on its way to the Supreme Court of the United States. We were very worried, as we had been in *Witherspoon* [*Witherspoon v. Illinois*, 1968], that a case that we had not previously been involved in was taking up to the Court issues in which the record was not fully developed and the other claims that we were making, which were supportive of and synergistic with the claim before the Court, would not be in the case. We therefore had to file an amicus brief.

My point is that we learned that belatedly. I went into deep, deep seclusion. I just shut everything else out of my life and sat down and in two weeks produced an amicus brief that changed our entire approach to this. I had to come up with a theory and suddenly we came up with a brand new theory. That theory required us to draw on materials that were the product of the organizations that you've been describing, the abolitionist organizations. We suddenly had to become familiar with the literature, the communications, the arguments of the abolitionists. We immediately began to talk to people like Hugo [A.] Bedau and other folks who had been engaged in this struggle for years.

But that was the result of having to take a new direction in the face of a new crisis. In two weeks, confronted with a need to get into the *Boykin* case and get the Court to look at things in a new way, we had to come up with a new theory and to come up with a whole new approach to the Eighth Amendment. That then opened, in our own minds, a need to know things we didn't know. And that's when we began to say, "Who does know these things?" And that was when we got in touch with the abolitionists.

Q: What year was *Boykin* decided? It was 1969, wasn't it?

Amsterdam: *Boykin* was decided in 1969 but we actually briefed it in 1968.

Q: But, Tony, is the implication here that there was no real coalition of the litigators and the long-time abolitionists?

Amsterdam: Not then.

Q: Not then. Is it fair to say that for years the abolitionists had really been working the halls of state legislatures and the ACLU, perhaps more so than they had been litigating anything?

Amsterdam: Yes, that's accurate. Although, as I mentioned yesterday, the ACLU was involved in some death penalty cases at an early time. Because of the ACLU's general reactive rather than proactive posture, they would get into these cases in states where there weren't any lawyers to represent a guy about to be sentenced to death. They would

handle it on an individual basis and raise a variety of claims. But they didn't have the resources to be as systematic as the Legal Defense Fund, so they never developed this full panoply of claims.

The first time when a major ACLU operation went into the death penalty area was in 1967 when Reagan executed Aaron Mitchell and precipitated LDF's concentrating on California. We then made common cause with the ACLU of northern California and that brought the ACLU in big time as well. But prior to that time, no. The ACLU had handled individual cases -- the [Thomas A.] Alvarez case that I mentioned in Nebraska, for example. Mel Wulf and I did that one together long before all this other stuff came up. But there was no collaboration or coalition with either abolitionist groups or other legal defense organizations.

Q: Okay. Do you remember reading an article written in 1961, maybe in the *Stanford Law Review*, by Gerald [H.] Gottlieb?

Amsterdam: Yes, sure.

Q: What was his argument? Wasn't it an Eighth Amendment argument?

Amsterdam: Yes.

Q: Right. Was that something, at that time when you read it, fresh to you?

Amsterdam: Yes. Yes. Absolutely.

Q: Influence your thinking?

Amsterdam: It was novel and creative.

Q: Right. An influence on your thinking?

Amsterdam: Not really.

Q: How about Walter [E.] Oberer's article about scrupled jurors, that same year? Mind you, you're still at the Supreme Court, aren't you? 1961?

Amsterdam: In a dozen cases. Oh, you mean when those were published?

Q: Yes.

Amsterdam: The question you asked me was whether I remember these articles. I do, but I didn't read them at the time they were published.

Q: Okay. I do want to get to that.

Amsterdam: I wasn't focusing -- nor was LDF -- at the beginning on the death penalty as such. So whether you're talking about political or intellectual issues arising in magazines on the death penalty, that was not within our horizon. That was on somebody else's horizon.

Q: Got it. Let's talk for a moment about Arthur [J.] Goldberg, who joined the Court around

1962. Justice Goldberg had a clerk, Alan [M.] Dershowitz. Do you know that story about Goldberg and how he wanted to approach the idea of the death penalty in terms of the Court?

Amsterdam: I've heard the story. I heard it many years later. We didn't know about it at the time.

Q: You did not?

Amsterdam: All we knew about was the publication of the opinion. We didn't know the inside story of Alan and --

Q: In the case of *Rudolph v. Alabama* [1963] --

Amsterdam: Right.

Q: -- when Goldberg dissented and urged the Court to take up -- what was it he actually wanted them to take up?

Amsterdam: He wanted to take up the death penalty for rape.

Q: For rape?

Amsterdam: Yes.

Q: That was in a case where cert wasn't granted, isn't that correct?

Amsterdam: That's correct.

Q: So the case was never argued on the merits in the Supreme Court?

Amsterdam: Right. We won that issue in another case called *Ralph v. Maryland* in the Fourth Circuit Court of Appeals a couple of years later. But at the time that the Justice wrote that opinion, we were still focusing on the racial issue -- death penalty for rape of a white by an African American. That was where we were at that time. He broadened the issue to raise a question of the death penalty for rape generally.

Q: Yesterday we spoke a little bit about the influence of the Civil Rights Movement, generally speaking, upon the development of the LDF and on your own thinking. Let me ask you, how consequential was it that the Warren Court existed -- at least up until 1969 -- on what people like yourself or others at LDF thought was possible to do in the courts? As opposed to, let's say, a court like the Supreme Court today?

Amsterdam: Real good question. I think that the fact that the Warren Court had made a number of moves -- *Brown v. Board of Education* was the most conspicuous but not the only one. The Warren Court had overruled a number of old, what we regarded as regressive decisions, and had undertaken what some people in the law reviews called things like the criminal law revolution or the constitutional law revolution.

In an era of that sort, one's entire attitude toward the law and a lawyer's job changes. The

ambition, if you will, as to what a lawyer can accomplish and therefore all of your moves, your strategies, the way you think about cases, is radically different in an era where you think it is possible to get change in the law, as distinguished from an era where it is not. It's almost as though -- I mean, imagine yourself playing baseball and all of a sudden somebody tells you that you don't have to run to first base before you go to second, you can run the bases in any order you want. You just change all your thinking about what the game is about. And that's exactly what happens when you have a court like the Warren Court.

Conversely when you end up with a court like the [Warren E.] Burger Court or eventually the [William H.] Rehnquist Court, your thinking changes back again, or it changes in a different way. Lawyers have different goals, different objectives and different strategies. Absolutely, you are right that the Warren Court had telegraphed that it was taking a new view of the judicial role and the role of the Constitution in American life. It perceived its job as a court as using the Constitution to advance rights rather than simply, "We will use the Constitution to correct egregious deviations from established norms, but we aren't going to do something new with it."

The awareness that the Warren Court was up and ready to run made all the difference as to what we would undertake. And that was true not only of the death penalty area, it was true throughout the length and breadth. That's why we were able to attack the vagrancy statutes, that's why we undertook a campaign in the economic area as well as in the racial area, as well as informing how quickly we moved from school desegregation to challenging race discrimination in all public facilities, such as beaches. All of that was because of the Warren Court. We knew the Warren Court was a court that could entertain new claims. It

didn't mean they were patsies. It didn't mean they were going to rule for us on these issues. But they had their eyes open and they had their ears open and we were ready to go in and argue to them.

Q: You mentioned a few minutes ago that in the summer of 1965, LDF sent some law students into the South to examine court records on rape cases, material that was then analyzed by Marvin Wolfgang. Was that idea of using that kind of social science research novel, in any sense?

Amsterdam: Not really. You have got to look at two different waves. The idea of using social science data in constitutional litigation was as old as Brandeis. In fact, the use of what is now called the Brandeis Brief -- a citation of statistics and things like that in briefs -- was Louis Brandeis's contribution. So he got the New Deal labor protective legislation sustained by using social science data in that sense. The idea of using expert witnesses to prove specific facts by gathering new data and analyzing them was another wave and it was later. That is, Brandeis' start didn't involve that. It involved citing materials in the public domain rather than creating new stuff. But of course, when the LDF went into the school desegregation business, the use of expert witnesses was almost inevitable. These included people from Ken [Kenneth B.] Clark and his studies on black and white dolls -- how kids reacted or the effect on their self-images proved by kids playing with dolls -- to experts in education.

Once the first wave of *Brown* litigation had run its course and the schools began to find more sophisticated ways to discriminate, then you had to have expert witnesses get in there and look at what they were doing and answer the question of if this is neutral or obviously

some kind of a ploy. So by the time we wanted to look at this issue in the race area, the idea was out there. The design for this particular study, Marv Wolfgang's study, however, was radically new. We had to design that from scratch. There had not been any kind of a systematic effort to do a controlled study of the effect of race in criminal sentencing. By controlled I want to emphasize the fact that you really cannot just walk in with the stats we had, which were that 90 percent of the people who had been executed for rape in the United States since statistics began to be kept in 1930 were black. Because it might very well be that 90 percent of rapes were committed by black people. In other words, you need to have the obvious controls.

The first question is, how many people of each race are convicted of rape? You need a four-by-four table, white-on-white, black-on-black, white-on-black, black-on-white. But as soon as you've done that, then you've got to ask yourself, "Wait a moment. Even if you have those figures, might it not be that the reason that African Americans were being sentenced to death for rape of whites is that African American rapes on whites were more violent?"

I could see right away that what was going to happen was that the lawyers on the other side were going to come in and say, "Our lily-white Southern women don't voluntarily consort with African Americans, and in order to get them to submit, African Americans have to be more violent than when they're raped by whites." Now that's bull, but you can expect that people are going to come in and argue that. So what you have to do is study the facts of individual cases. You have to ask in how many cases of each racial combination was there injury to the victim? How many cases was a knife used and how many cases was a gun used? And once you get past that you have got to ask questions like, is the reason these guys are sentenced to death that the African American rapists have prior criminal records

that the whites don't? If you really want to prove discrimination, you have to control for all the other variables. That was brand new. The idea of doing a knock-down-drag-out study of all of the variables --

Amsterdam: -- that could affect sentence in a criminal case, to isolate race as the determinative variable, was new. But the idea of social science research --

Q: No, no, no. I meant what you just said. But -- correct me if I go wrong here -- later on people like David [C.] Baldus would do a lot of that kind of work. Isn't that correct?

Amsterdam: That was later.

Q: That was later. I'm saying later on.

Amsterdam: Yes. We brought David into *McCleskey*. That was after *Furman*.

Q: That's right. And well after *Furman*. But the kind of material that was gathered and analyzed by Wolfgang, was that really useful at that time?

Amsterdam: Absolutely. We would never have gone into an era where a David Baldus later could do the kinds of studies he had done if Marvin had not opened that whole sector up. It was enormously useful. Part of what you're doing in any major campaign to change rules of law is not simply to win legal victories in courts with the evidence you present, but to change public perception of the institutions. The Wolfgang studies affected a lot of people. They affected the academic community. They woke the academic community up to the fact

that something was rotten in Denmark -- Denmark being south of the Potomac, for present purposes.

Q: Right.

Amsterdam: The acceptability of the LDF's commitment to this was -- by its own Board of Directors in the long run -- affected by the fact that everybody at LDF looked at the Wolfgang study and said, "This is shocking. This guy has proved what we have all suspected all the way along, which is that the death penalty is literally an instrument of racial subordination. The death penalty for African Americans who rape whites is the prime symbol of the traditional apartheid of the American South."

Q: I would like to discuss something when we talk about *McCleskey*, if you will. Let me turn to some of the cases that preceded *Furman*, by only a few years, and let me ask you how consequential they were.

The *U.S. v. Jackson* case, decided in 1968, was argued by Steven [B.] Duke.

Amsterdam: Right. Yale Law School.

Q: Right. Was that of any moment? The Supreme Court, as I understand it, rejected the Lindbergh law -- the federal kidnapping statute requiring the death penalty be imposed only on the recommendation of a jury.

Amsterdam: Right.

Q: Useful to you?

Amsterdam: Yes. We knocked out the death penalty in half a dozen states because the statutes they had were like that federal statute. That is to say, they provided that the death penalty could only be imposed by a jury. If a defendant waived a jury trial and got sentenced by a judge, he could escape death. Or, in a number of states, they provided that the death penalty could only be imposed if a defendant was convicted after a trial. And so if a defendant pleaded guilty, the defendant could escape the death penalty. We extended *Jackson* in a number of cases. The leading one was called *Funicello v. New Jersey* [1971], but we knocked out the death penalty in several states on the precedent of *Jackson*. We extended *Jackson*, which immediately dealt only with the question of avoiding the death penalty by waiving a jury. We extended it to cases where the death penalty could be avoided by pleading guilty. And that had a major effect. It enabled us, in a number of states, to get stays where we then could present all the other issues we had. We actually knocked out the state statute on that ground in New Jersey, North Carolina, a couple of other states.

Q: How about the same year, *Witherspoon v. Illinois*? Now, if I understand it correctly, that held that jurors' mere reservations about the death penalty were insufficient to disqualify them from serving. Is that a correct holding?

Amsterdam: Yes, absolutely right.

Q: How important?

Amsterdam: Quite important. What I liked about your description of *Witherspoon*, Myron, is that it was very vague. So was *Witherspoon*. You were quite accurate as to what was held and, therefore, what we called *Witherspoon* issues tied up death cases for years. In cases in which the other, broader arguments that we were making had not yet gotten enough of a beach head for us to get stays, we used *Witherspoon* to get stays in those cases. Then the other broader issues could be litigated.

So *Witherspoon* was a very powerful tool. I believe that there were only two states, at that time, where juries were not death-qualified. And because *Witherspoon* was vague on the question of what the test being used for exclusion of jurors was, it was unclear for years. I would guess that over the period from 1967, when *Witherspoon* was decided, until the *Witherspoon* issue petered out ten years later, that probably 200, 250 death sentences were set aside on *Witherspoon* grounds alone. And it would have been more than that if it wasn't that other issues eventually overran it. We knocked out whole death rows on broader issues. Most of those were people that were still sitting there on death row and were still alive rather than dead because *Witherspoon* had gotten stays for them.

Q: Because this might be looked at years from now, would you just explain the "scrupled juror?" Before *Witherspoon* what was the situation?

Amsterdam: Prior to *Witherspoon*, prosecutors were permitted to ask jurors, "Are you opposed to the death penalty?" And if a juror said, "I am opposed to the death penalty," the prosecutor could exercise what's called a challenge for cause, or an excuse for cause. In every case, the way you select a jury is you bring in a panel of people. You select the jury subtractively by removing people from that panel for two or three different reasons. One

reason is what's called for cause. If a juror can't be fair then the juror is thrown off for cause. There is no limit to the number of jurors who can be excused for cause. You can throw out everybody who can be unfair. Then there is something called peremptory challenges. At the end of the excuse of jurors for cause, the lawyers get twelve -- in a capital case, twenty in some jurisdictions -- absolute blackballs, to just throw jurors off for any reason or no reason. But those are limited. You have only got twenty. You can't do it for everybody. And then the third reason why jurors go off are things like hardship excuses, the juror has to work and so forth.

That's the way you select a jury.

What the prosecutor could do before *Witherspoon* is simply throw off the jury anybody who did not believe in the death penalty, on the theory that if you didn't believe in the death penalty, you couldn't be fair to the state on the issue of punishment when the jury had to decide punishment. What *Witherspoon* held was that that was too indiscriminating and broad an exclusion because people could be fair even though they might be, in a general sense, opponents of the death penalty.

For example, take the other side of the spectrum. People who have read about a case in the newspaper and even have formed an opinion that the defendant may be guilty, may sit on a jury if they are willing to swear that they can put that out of their minds and decide the case only on the basis of evidence heard in the courtroom. And what the court was convinced of in *Witherspoon* was that some people who are opposed to the death penalty could say, "Yes, but it is the law. If I am brought in and take an oath as a juror, I can fairly consider it and be willing to follow the rules and impose it if it's called for." Then they're

allowed to sit. What *Witherspoon* held was you had to make a more discerning, a more specific inquiry to find out whether the juror was capable of putting the scruples aside and fairly considering the alternative of death as a punishment. If jurors were excluded on a broader basis than that, then the jury was unconstitutionally selected. That's what *Witherspoon* held.

Q: That's right. And previously it had been if you said you were opposed to the death penalty, you were not going to get a chance to serve.

Amsterdam: That's right.

Q: The case you were talking about, *Boykin v. Alabama* decided in 1969, now that was not a murder case, right? That was robbery, I think.

Amsterdam: Right.

Q: Now, you argued that case, did you not? Before the Supreme Court?

Amsterdam: I don't even remember. I might have. I will tell you the honest to God truth Myron, that is one of my blanks. This was the period of time when I was running around doing everything. I don't remember.

Q: Well, you certainly wrote a brief.

Amsterdam: I don't remember the argument. My recollection is that we appeared as amici

and I would not have ordinarily argued in a case where we were amicus. But I do remember revving up -- maybe it was just a moot for that.

Q: By the way, you alluded to how much time you were putting in. Were you literally traveling during a lot of that time? Did you go from pillar to post?

Amsterdam: I don't remember being in any one place for more than a couple of days. Toby Simon filed a class action to stop all executions in Florida. We get a crisis call that says, "The judge has asked us to file papers justifying filing a class action habeas corpus. It has never been done in Anglo American history. People are going to come in and say this is a habeas corpi and not a habeas corpus. Figure it out."

We fly up to Cambridge to talk to Al Sachs, who's at Harvard, an expert in class actions. We knock out some papers, get a stay in Florida. One day before we get the stay in Florida, Reagan executes Aaron Mitchell in California. The California people go berserk, we get on a plane and fly to the other coast from Florida. That went on for six years, Myron. Six damned years.

Q: Were you married at that time?

Amsterdam: Yes.

Q: And in *Boykin*, and it may have been just briefs, but you argued that evolving standards of decency, lack of standards -- sentencing standards -- for jurors that [Edward, Jr.] Boykin didn't know he might get the death penalty when he plead guilty. You raised these various

issues then, some of which are certainly going to reemerge in later cases, especially the evolving standards of decency --

Amsterdam: Right.

Q: -- and the lack of sentencing standards. But that case was only decided on very narrow grounds, was it not?

Amsterdam: Right. And that's true of *Maxwell* [*Maxwell v. Bishop*, 1970] later.

Q: What were the grounds?

Amsterdam: In *Boykin*, the case eventually was decided simply on the ground that an insufficient inquiry had been made as to whether Boykin's plea was knowing and voluntary. Whether his guilty plea was an effective legal waiver because it was made intelligently, knowingly, and voluntarily.

Q: Right. And *Maxwell* was a rape case, was it not?

Amsterdam: Yes, it was.

Q: And decided in 1970.

Amsterdam: Right. And was decided on *Witherspoon* grounds. It was argued twice and it was eventually decided simply on the ground that you were asking about a little while ago,

Myron, *Witherspoon*. It ended up by being a *Witherspoon* case. The jurors had been excluded simply on the basis of general scruples.

Q: Now, sometime in late December, the Supreme Court --

Amsterdam: Late December of?

Q: Not the Supreme Court, the Fourth Circuit, in late 1970. The Fourth Circuit decided a rape case.

Amsterdam: *Ralph v. Maryland*.

Q: *Ralph v. Maryland*. And didn't they hold there that the Eighth Amendment, cruel and unusual, prevailed?

Amsterdam: Yes. And amazingly the opinion was joined by [Clement F.] Haynsworth, who had been opposed --

Q: No!

Amsterdam: -- who had been opposed for appointment to the Supreme Court of the United States as being too reactionary and too conservative for the Court.

Q: Before? Before?

Amsterdam: Yes.

Q: Haynsworth and what was the other? [G. Harrold] Carswell?

Amsterdam: Carswell.

Q: That's right.

Amsterdam: But Haynsworth was actually on the panel and voted for us in *Ralph*.

Amazingly.

Q: Right.

Amsterdam: Although, actually, Haynsworth took a bum rap. He was a much better judge than he was portrayed as being at the time of his Supreme Court nomination. In any event, yes, we won the *Ralph* case in the Fourth Circuit.

Q: Right. And was that itself unusual? This decision, based on Eighth Amendment grounds?

Amsterdam: It was quite unusual in two senses. One, it was our first major victory using the Eighth Amendment. It foreshadowed *Furman* a number of years later. But secondly, it was unusual in that a lower court got way, way out ahead of the curve, ahead of the Supreme Court law, and adopted one of our arguments. That gave a great deal of added credibility to the various arguments we were making. That a court took them seriously enough to actually invalidate a death sentence.

Q: The following year was the case of *McGautha v. California* [1971] and also I think *Crampton v. Ohio* [1971], but generally known as *McGautha*.

Amsterdam: Right.

Q: Were you in that case?

Amsterdam: We filed amicus briefs in both cases. Neither of those were our cases and we didn't really get into them

Q: Okay. And when you filed on that, were you arguing, or was it generally being argued, along Fourteenth Amendment due process grounds rather than Eighth Amendment grounds?

Amsterdam: Yes. Although we were not involved in those cases, *Crampton* and *McGautha* brought to the Court the arguments that we had fashioned and that were part of our Last Aid Kit. Not all of the arguments, but some of them, and the ones that those cases specifically presented, were about Fourteenth Amendment due process rather than Eighth Amendment cruel and unusual punishment. That is correct, Myron.

Q: Harlan wrote the majority opinion. It was decided 6 to 3 in 1971. Do you remember what the nub was?

Amsterdam: Yes. He essentially tossed out all the arguments, essentially, and rejected each

and every attack that was made in either of those cases on the major procedural defects that we had been arguing about in capital trials.

Q: And the Court held that neither the absence of sentencing guidelines nor the single verdict trial procedure was unconstitutional.

Amsterdam: That's correct.

Q: Now, this is 1971.

Amsterdam: Right.

Q: In fact, Justices White and Stewart joined in that majority, did they not?

Amsterdam: Yes.

Q: Right. That would change pretty soon.

Amsterdam: Yes. And notice that it itself was a change. Don't put too much weight on *McGautha* for this reason. You were asking earlier about what the Warren Court ethos did for us. Keep in mind that what has happened is that between the two arguments in *Maxwell*, Earl Warren goes off the Court. Warren Burger comes in as Chief. Abe Fortas resigns, and [Harry A.] Blackmun, who had decided the *Maxwell* case against us in the Eighth Circuit, joins the Supreme Court. By the time *McGautha* and *Crompton* are argued we have got a *very* different Court, in which two judges who we expected to be fairly

sympathetic to our arguments are gone; they are replaced by two judges who ironically have already declared themselves in one way or another against our position.

Q: The ones that were gone were Fortas --

Amsterdam: -- and Warren.

Q: And the ones that were in were Blackmun and --

Amsterdam: -- Burger. Burger was involved in the *Frady* case [*Joseph Frady v. United States of America*, 1964] in the District of Columbia that I had argued years before any of this stuff, while he was still on the D.C. Circuit. Interestingly, Warren [Burger] was the guy that got me into that case. He was somebody that I had pretty good relations with. I used to be in the U.S. Attorney's office in the District.

Q: Right.

Amsterdam: And he wrote a fascinating opinion in which, I think largely because simply we were friends, he said all sorts of complimentary things about my arguments and then threw them out. As a result of that, and his general criminal procedure orientation, we had every reason to be pessimistic about him. And Blackmun, of course, had tossed us out when he was on the Eighth Circuit in *Maxwell*. We had every reason to be pessimistic about both Burger and Blackmun. So *Crampton* was absolutely no surprise. *McGautha* was absolutely no surprise. We had already begun to shift our feet a bit at that point and rethink what kinds of arguments would and would not sell. And we saw that ship go down but we knew

that the torpedo had been fired when the two replacements had hit the Supreme Court of the United States.

Q: What came to be known as *Furman v. Georgia* was really four cases, is that correct?

Four or five.

Amsterdam: Five.

Q: Five?

Amsterdam: Yes.

Q: Do you remember what they were?

Amsterdam: *Furman* --

Q: *Furman v. Georgia*, *Aikens* [*Aikens v. California*, California Supreme Court, 1972],

Branch v. Texas --

Amsterdam: *Jackson* [*Jackson v. Georgia*, 1972]. Lucius Jackson.

Q: Right.

Amsterdam: And there's one more but I'm not remembering.

Q: Of the four cases that the Supreme Court took on and decided in 1972 --

Amsterdam: *Jackson* and *Branch* were rape cases.

Q: Exactly. And *Furman* and *Aikens* were --

Amsterdam: -- murder cases.

Q: Murder cases. *Aikens* was mooted out, even though you briefed it heavily. *Aikens* was mooted out because I think the California --

Amsterdam: Yes, as a matter of fact the *Furman* brief incorporated the *Aikens* brief by reference. The *Furman* brief itself, ironically, is about twenty pages. *Aikens* is 120 pages and appendices. The major briefing took place in *Aikens*. What happened was we got a call from the California Supreme Court asking that they wanted a case reargued. The case was called *Anderson* [*California v. Robert Page Anderson*, 1972]. They had rejected a cruel and unusual punishment argument three years before. And we argued it, we won it, and we immediately moved to dismiss *Aikens* as moot.

Aikens was a horrible, horrible case on the facts. It was so ugly on the facts that I would not let my secretary type the brief. I typed the brief myself because I could see her having nightmares. So *Aikens* went away. That's right.

Q: And the Supreme Court of California ruled that the --

Amsterdam: -- the death penalty was unconstitutional, and cruel or unusual punishment, under California law.

Q: That's right. Although that was not long thereafter overturned on a proposition by the voters of California and the death penalty reinstated.

Amsterdam: Right. The California constitution was amended to overrule that.

Q: That's right. So here we have these several cases, two rape, one murder in *Furman v. Georgia*. All the defendants were black.

Amsterdam: Correct.

Q: All the victims were white.

Amsterdam: Correct.

Q: And you asked the Court to decide this on what grounds?

Amsterdam: We asked the Court to decide this on cruel and unusual punishment grounds because all of the due process claims were shot down from under us in *McGautha* and *Crampton*.

Q: Is it possible to summarize what the Court had decided, with regard to cruel and unusual, over the years?

Amsterdam: Very, very little. The Supreme Court had specifically rejected the argument that execution by electrocution was a cruel and unusual punishment in the famous [William] Kemmler case, which involved the western world's first experiment with the electric chair. The Supreme Court of the United States allowed Kemmler to be fried to death in New York's new electric chair. The Supreme Court of the United States had rejected a claim that Willie Francis in Louisiana was being subjected to cruel and unusual punishment when he was executed twice. The first time the electric chair misfired, and the second time they wanted to put him in, the great late [J.] Skelly Wright out of Louisiana represented Willie Francis and argued that frying a guy twice was cruel and unusual punishment. The Supreme Court of the United States disagreed and held that it was not cruel and unusual.

Q: Around when, do you know?

Amsterdam: Willie Francis was in the 1950s.

Q: Could that have been 1947?

Amsterdam: Could have been.

Q: Was that *Francis v. Resweber* [1947]?

Amsterdam: Yes. *Francis v. Resweber*.

Q: Right.

Amsterdam: On the other hand, there was a case that didn't involve the death penalty -- and in fact did not involve a criminal sentence at all -- *Trop v. Dulles* [1958]. Earl Warren had defined the reach of the cruel and unusual punishments clause as embodying what he called "evolving standards of decency." The idea that the Eighth Amendment standard changed -- that as civilization grew more respectful of human decency and human dignity, higher standards might be set for criminal punishments -- was ushered in by Warren's "evolving standards of decency" line.

We then seized on that, in effect, and came up with an argument. It was, in fact, the argument that emerged out of that mind-numbing week of writing the *Boykin* amicus brief. That is the argument that we eventually made in *Furman*, about evolving standards of decency. It was a very new and novel argument, though, not immediately obvious on the basis of the *Trop v. Dulles* precedent. What we were arguing was that, while that standard was right, courts had never really understood what was to be tested by the standard. Our argument was that the question of whether a punishment was cruel and unusual was not whether the enactment of a statute imposing this punishment affronted evolving standards of decency, but whether the actual administration of the statute -- the imposition of the penalty authorized by law -- was inconsistent with evolving standards of decency. That was a radical new idea.

The idea was that what you test in deciding whether a punishment like death affronts civilized standards of decency today is *not* whether the public rises up in arms when the legislature puts the statute on the books, but whether the actual sentencing of people to

death and their execution is being accepted by the public.

Q: And what you were saying, were you not, was that in the death penalty situation -- "A lot of states may have these statutes but nobody today is carrying them out."

Amsterdam: Exactly. And that's what had happened --

Q: -- and that's what counts.

Amsterdam: Precisely. And essentially the analytical move that we made was to take the result of the moratorium strategy itself and turn that into a substantive argument on our behalf. As you pointed out when we were talking yesterday, death sentences had decreased from 199, as a high back in the 1930s, to an average of twenty-five and then down to ten and then down to three or four -- even before we got the moratorium under way. And then they trickled down to nothing.

And so what we said was, "These statutes may be perfectly fine on their face and the public can accept them, but the reason why the public can accept them is that they are never practically enforced." That only one or two peculiar, aberrant guys, people who are pariahs -- African Americans -- will arouse all of the antagonisms and biases of a biased public and get sentenced to death. "Acceptance of the death penalty in this country today," we told the Court, "amounts to the public being willing to fry a few pariahs." And we said, "What the Eighth Amendment requires -- and the difference between the question that this Court as a constitutional court must answer, and the question that legislatures must answer -- is whether, if the death penalty were regularly and even-handedly applied in all of the cases

for which the legislature has authorized it to be applied, it would be acceptable as a matter of public decency." And we said to the Court, "Think about that for a moment." And the Court thought about it and answered the question, "No."

Q: Right. Just generally speaking, you argued *Furman* before the Justices.

Amsterdam: Right.

Q: Are there special skills to arguing before the Supreme Court?

Amsterdam: I mean, yes and no, Myron. It isn't some big Herculean feat that requires superhuman powers. There are special skills to doing everything. Fixing a TV requires skills. The more you know about the Justices, the more you know about the attitudes of every one of those nine people up there, the more in the grip of your particular case you are, the more you've thought about the issues, the better job you do. In that sense, yes. But it's not something that requires Paul Bunyanesque legal skills.

Q: You also worked into *Furman*, did you not, that the people who were being fried, or were scheduled to be fried -- as you put it -- were the people who were the most disadvantaged, the lowest of society.

Amsterdam: Right.

Q: We mentioned a couple of statistics yesterday. On page fifty-two of your brief, you point out that -- and these figures are for the years between 1930 and 1967, as they appear in the

NPS [National Prisoner Statistics] --

Amsterdam: National Prisoner Statistics. It is an official publication, originally of the Bureau of Prisons, later the Department of Justice.

Q: That with regard to murder, the number of persons executed between 1930 and 1967, literally the same number of people -- white or Negro, as they were called at that time -- were executed.

Amsterdam: Right.

Q: With regard to rape, 89.1 percent were Negro, 10 percent white.

Amsterdam: Right.

Q: And some other smaller categories in there. When you put that in there, what was the point you were trying to make? Did you think that the Supreme Court would be sympathetic to another argument about race?

Amsterdam: Yes. When you say another argument about race, the Supreme Court of the United States had not yet rejected a straight-out equal-protection type of argument. That was later that they did. But at that time they hadn't.

But again, Myron, keep in mind what you and I have just been defining as the essence of our Eighth Amendment argument. It was that, in testing the death penalty against the

Eighth Amendment, this Court must ask the question, "Would an even-handed and regular application of the death penalty in all the cases that the legislature has authorized be acceptable to the public, or is the way the death penalty is presently being used accepted by the public only because it is rare and visited on pariahs?" Race is key to the issue of whether somebody is a pariah. Basically what we were saying is -- the legislature has authorized broad and general use of the death penalty. For the most part, jurors vote with their feet that the death penalty is unacceptable. When they do accept it, it isn't because the death penalty as a general penalty is acceptable; it's because some few, poor, ugly, hated, despised, discriminated-against people come in front of jurors who are willing to put that person to death. They would never use the death penalty against one of their own peers.

Race discrimination, therefore, is one of the several key points in the argument that the death penalty, as administered, is acceptable only because of who gets it, not because the penalty itself would be acceptable.

Q: And literally, also, because of the numbers. You are arguing that, "If a whole lot of people were being killed, the public wouldn't stand for that."

Amsterdam: Right.

Q: Now, you were originally representing [Earnest James, Jr.] Aikens, I think, when it was mooted out.

Amsterdam: Yes, we made the major argument that won *Furman* in the *Aikens* brief.

Aikens was never argued in the Supreme Court of the United States.

Q: And on the other side, was there Dorothy Beasley?

Amsterdam: Yes.

Q: Was she making the main argument for Georgia? In *Furman*?

Amsterdam: Yes. Dorothy Beasley argued the case for Georgia.

Q: Do you recall just what her argument was? In sum.

Amsterdam: No. Her argument didn't have to have the kind of specific theme, if you will, that our argument did. Her argument was basically playing defense. All she had to do was deflect the ball from the basket. I'm not remembering that she had one argument. She had a lot of answers to our arguments, but it wasn't one theory and didn't have to be. I wouldn't, in her position, have advanced some specific theory either. It was simply, "All this stuff is a bunch of bunkum. There's no legal basis for any of this. These guys, these Amsterdams and Meltsners and folks are in here, asking this Court to take upon itself a legislative judgment and supersede the wisdom of the legislatures and the people that they want the death penalty."

Q: Right.

Amsterdam: She had a lot of very specific answers to each of our various claims, but that

basically was her strong point and it should have been.

Q: Do you remember the Justices giving you a hard time in the oral argument? Although I'm not sure whether anyone who gets a hard time -- what that means.

Amsterdam: I did not think the Court was terribly hostile in *Furman*. Harry Blackmun got on me. Harry Blackmun tended to do that. Remember, he was on the Eighth Circuit in *Maxwell*. From *Maxwell* on down, there was something going on between me and him. I don't know what it was, but he really wanted to ride me for some reason. But I didn't take that terribly seriously because that was so obvious that that was what was going on. I don't remember other people being particularly hostile. No.

Q: Okay.

Amsterdam: Blackmun, really was just -- he was being Harry Blackmun.

Q: The Court decided in June of 1972. Now, truly, did you think you were going to win this case? And what would constitute a victory?

Amsterdam: We knew that it was a cliffhanger. We genuinely believed that it was possible to win. We knew it was an uphill fight. If you had asked the odds I would have said the odds were against us, but the odds were not astronomically against us. We really had the feeling, at that point, that what we had been trying to accomplish by the moratorium strategy was going to work for us.

Amsterdam: Five Justices of the Supreme Court were confronted with the question of whether they would restart an execution machine which had now not killed anybody in six years and which had been grinding down to a halt even before that. Were they really going to give it a shot in the arm and start the country killing people again? We thought our arguments were good enough so that five Justices on the Court might say, "Stop, quit. Enough's enough. Done for." The legal arguments we had were good enough as rationales for that result so that we had a chance of winning.

Q: Are you saying that even at the level of the Supreme Court of the United States, you're feeding Justices things so they can confirm their own initial beliefs before the case?

Amsterdam: Sure. What do you mean, "Even in the Supreme Court of the United States?"

Q: Well, you were making reference.

Amsterdam: That Court is notorious for that. The Supreme Court of the United States is at the head of the list in ratifying its druthers. Just as it's at the head of the list of other odd things that courts do.

Q: Okay. The ruling is handed down on June 29, 1972. Let's take it Justice by Justice, or group by group. In the majority you have two votes, Marshall and Brennan, voting to strike down the death penalty, is that correct?

Amsterdam: Their opinions would have made impossible any death sentencing consistent with the Constitution.

Q: Did you expect those two to vote as they did?

Amsterdam: They would have been high on our list of probables.

Q: Why not more than probable for someone like Marshall, who had argued *Brown*, who had been running the LDF, who was black?

Amsterdam: Thurgood Marshall was the son of a police officer. Thurgood Marshall was a pretty straight shooter in a whole lot of ways. He was generally not that liberal on criminal procedure issues. He was more liberal, or looked more liberal, than some people on the Court who were aggressive. But you could not call Thurgood's vote in the bag by any means. Thurgood wrote an opinion against us in a death case in which we had brought a lawsuit challenging the FDA's [Food & Drug Administration] toleration of the drugs that were used for lethal injection, for example.

Q: Later on, you mean?

Amsterdam: Hmm?

Q: That must have been later on, no?

Amsterdam: Yes. But what I'm saying is don't put Thurgood in the bag of whenever the Legal Defense Fund is up there he's going to vote for you. That was not true. I lost Thurgood's vote in some cases.

Q: Right.

Amsterdam: Brennan, as a matter of fact, was a more likely candidate because Brennan had joined Goldberg's dissent back in *Rudolph*. The answer to your question, Myron, is that those Justices were highly likely to go for us if anybody was, but they were not in the bag.

Q: Okay. White and Stewart went for you. White and Stewart were in the majority in *McGautha*.

Amsterdam: Yes.

Q: And now they're in the majority for you.

Amsterdam: Yes. Stewart would have been one of the people that I also would have predicted we had a reasonable shot at. Much less so, of course, than Brennan and Marshall. But Stewart had written *Witherspoon*, and the interesting thing about *Witherspoon* was that the Court could have done either of two things. It could have held that death-qualified juries could not sit at the guilt phase of a capital trial and that [William] Witherspoon's conviction would be set aside because death-qualified juries tended to be prosecution-prone. Or it could have held simply that death-qualified jurors couldn't sit on penalty. And Stewart wrote an opinion holding that Witherspoon's death sentence, but not his conviction, should be set aside -- which told us something about the fact that Stewart had qualms about the death penalty rather than being worried about the underlying fairness of the trial itself. So Stewart had signaled a kind of sensitivity that suggested that he might respond to

these kinds of issues.

"Whizzer" White [Byron R. White] was a strange guy in a whole lot of ways but one who believed powerfully in fairness. The other characteristic of White was that he was a powerful realist; he had no illusions about institutions. He could see them as they were and was willing to pass judgment on them as they were. He was not one to kid himself or the world by pretending that things were as they were not. Since we were convinced that we had a pretty striking set of quarrels with the way the death penalty was administered in reality, part of our argument was that the Eighth Amendment test looked at the way the death penalty was actually administered rather than at the legislative acceptance of it as theory. This was aimed at Byron White, and we thought that somebody who was as realistic as that would listen to an argument like that.

So while Stewart and White were harder sells by far, we saw them as potential people we might reach.

Q: And was White concerned about the fact that you had a single verdict?

Amsterdam: White? No, I don't think so. I didn't see any particular appeal of that issue to him.

Q: And Stewart. When Stewart wrote, what came to be the most famous line, I think, out of the case, that, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual," what is he saying? I mean, is he saying the same thing as White?

Amsterdam: No, what Stewart is saying, I think, is a basic acceptance of the idea that the death penalty is being arbitrarily applied, that it is not a regular part of society's criminal machinery, that it is in fact an aberrant, bizarre lashing out in a few particular cases, and that is not the way a rule of law ought to work.

Q: All right.

Amsterdam: The irony is that an argument very like that had been rejected as a matter of due process of law. You would think that the concept of the rule of law and due process of law would have been a more natural home than the Eighth Amendment for the concern that Stewart was expressing. But, that said, the point is that that is what Stewart is expressing. And of course, that was the heart of our arbitrariness argument in *Furman*. It was the argument that when the death penalty gets to be this rare, when it is imposed as infrequently as it is, that it *is* like being struck by lightning. Murderers are convicted and sentenced every day, and a rare few, picked by a bizarre and ghastly lottery, are consigned to oblivion and all the rest of them go off to prison.

Q: When I read into the record those figures from your brief with regard to race and murder and rape, to be fair to you, you would want me pointing out that while the executions of whites and Negroes were virtually the same for that period, Negroes never comprised more than a small percentage of the population.

Amsterdam: That is the power of those figures. Equal numbers does not mean equality.

Q: Right.

Amsterdam: When you have the African Americans as 11 percent of the population getting 50 percent of the death sentences!

Q: How about [William O.] Douglas in this case? Had you counted on Douglas?

Amsterdam: Yes. Douglas was a very likely vote in our favor. Bill Douglas was an extraordinarily enlightened guy, somebody who really did not hesitate to take the view that the Constitution was meant to set a standard somewhat higher than the lowest common denominator of what is popularly accepted in a regressive society. We expected that Douglas would resonate to these arguments.

Q: Right. And he argued that the sentencing procedures were discriminatory.

Amsterdam: Essentially.

Q: Right.

Amsterdam: Part of the traditional language of the law is that when the various guarantees of the Bill of Rights were applied against the states, the terminology that was used was that the Sixth Amendment and the Eighth and so forth were “incorporated into the due process clause of the Fourteenth.” The joke about Douglas' argument is that he had incorporated the Fourteenth Amendment into the Eighth. His opinion, although holding the death penalty unconstitutional under the Eighth Amendment, was really an equal

protection opinion. He was primarily moved by the inequality in sentencing.

Q: Isn't it fair to say that the component of your argument that turned on race influenced both Douglas and White?

Amsterdam: Absolutely. No question about it.

Q: In this case you had nine separate opinions, running some 50,000 words. Nine opinions, that sounds cruel and unusual itself. How unusual is it in a case to have the Supreme Court have nine separate opinions?

Amsterdam: I'm not a Supreme Court scholar but my sense is that the publishing of nine opinions in a case is rare to the point that maybe it never happened before. People have said that to me, but I never checked it. Certainly the length of the opinions, coupled with the sheer number of pages, of pulpwood that went down the drain, was quite unusual.

Q: How would you best summarize -- although they wrote individual opinions -- the view of the four in the minority here?

Amsterdam: It's really very much the same as Dorothy Beasley's argument that you asked me about before. The four in the minority were essentially naysayers. That is, they found that we had not carried the burden of persuasion that an argument for change in the law requires. They rejected the idea that the Court could, on Eighth Amendment grounds, render an opinion that was basically about inequality. They pointed out that the Court had rejected very similar arguments as a matter of due process in *McGautha* and *Crampton*,

and they asked, "Why are these arguments coming back to bite us in the rear under the Eighth Amendment? There is nothing special about the Eighth Amendment that makes these arguments resonate better as an Eighth Amendment argument than they did as a Fourteenth Amendment argument."

But again, like Dorothy Beasley, this isn't and didn't have to be, an affirmative theory about why the death penalty was good. The burden was on us and the four justices said, "We're not persuaded by any of these arguments."

Q: But if you had to say, just in a tight phrase, what was it that united the five in the majority?

Amsterdam: It's no business of courts to be second-guessing legislatures.

Q: That's the minority.

Amsterdam: That's what you're asking about.

Q: No.

Amsterdam: Oh, I'm sorry, you were asking about the minority.

Q: I had moved away from that, but that's key. You're saying that the minority view largely was that this is not for the Court, this for the legislature.

Amsterdam: Yes, it's legislative. The Court shouldn't be involved.

Q: Right. But with regard to the five in the majority, if there was any phrase that united them, it would be that the death penalty as administered in the United States was arbitrary and capricious. Is that fair?

Amsterdam: Yes, that's correct. Although the terms "arbitrary" and "capricious" would have meant different things to the different justices.

Q: Now, at that time, I think you had something like 629 men and 2 women on death row in the United States.

Amsterdam: You said that. I think it was more, Myron, but I'll accept that for now.

Q: Now they weren't facing death? The result of the Supreme Court decision was that these sentences were commuted to life?

Amsterdam: The result was that the death sentences could not be executed. What would happen next in the cases, whether it would be life or they would be resentenced to something else, was dependent on the state law in each state.

Q: Exactly. Do you have any idea what, in fact, happened to those 631 people?

Amsterdam: Yes. As a matter of fact that has been studied. The so-called "class of *Furman*" was the subject of a book, which I'll be glad to give you. It was written by somebody who,

person-by-person, interviewed everybody in that class years later. Did I follow it individually? No.

Q: I take it that the vast majority, though, would have served life terms. Is that correct?

Amsterdam: No.

Q: No.

Amsterdam: Well, they would have served many years. Most of them who were fairly young at that time have since been paroled. They may have been under long sentences but LWOP, life without parole, was not in those days prevalent, as it is now.

Q: Right.

Amsterdam: Most of those life sentences were susceptible to parole and most of those people were eventually paroled. The whole point of the book that I'm talking about is that these guys who were deemed murderers and ready to be put to death had an incredibly low recidivism rate when they were released. And most of them eventually were released.

Q: Did you ever hear from any of them? Or did the LDF ever hear from any of them?

Amsterdam: Yes. I had a lot of exchanges of mail with a lot of these guys afterwards, for a time. Eventually they went their ways and we went ours.

Q: I understand that LDF threw a party that night.

Amsterdam: I was in California, but yes.

Q: You weren't there?

Amsterdam: I could hear some music over the phone.

Q: Right. And they nicknamed the band they brought in "the Eighth Amendment."

Amsterdam: I think that's right.

Q: Right. And Jack Greenberg -- correct me if I go wrong here -- issued a statement along the lines that this was the end of capital punishment in the United States?

Amsterdam: I'm not sure. That's possible.

Q: Right. What did you think?

Amsterdam: I do know Jack took a relatively optimistic view, although I'm not sure that Jack's own prediction would have been 100 percent in line with what you just described. I think that was his public position.

Q: Okay. You say you were in California?

Amsterdam: Yes.

Q: Doing what?

Amsterdam: I was teaching at Stanford.

Q: How did you hear of the decision?

Amsterdam: The decision was bound to come down on one of two or three days because it was either the last or the next to last day of the term. We knew it was going to come down. So I had the radio on. You know, 6 a.m., 5:50 a.m. California time. It was nine o'clock Eastern time. When the opinions were announced people began to scream over the radio that the Supreme Court had done this bizarre thing.

Q: And were you alone when you heard this? Do you remember, literally, what your reaction was?

Amsterdam: Relief.

Q: Relief.

Amsterdam: Relief. I told you, I had been running around non-stop, twenty-three hours a day for six years. That gets to you.

Q: As you just pointed out, you had moved to Stanford in 1969. Is that correct?

Amsterdam: I think that's the right date.

Q: Apart from your teaching, your classes, and the LDF work, were you engaged in other work as well?

Amsterdam: Oh, God, yes.

Q: Like what?

Amsterdam: A lot of ACLU litigation. I was on several of the ACLU of Northern California. And a lot of committees and a lot of poverty-law stuff. My wife was a Legal Services [Legal Aid Society of San Mateo County] lawyer.

Q: Her name is?

Amsterdam: Lois [P.] Sheinfeld. S-H-E-I-N-F-E-L-D. Lois Sheinfeld.

Q: Right.

Amsterdam: She and I were involved, for example, in the *Valtierra* [*James v. Valtierra*, 1971] case in the Supreme Court of the United States challenging a California referendum on low-income housing. I was involved in a whole lot of issues other than the death penalty.

Q: Was this before you represented Angela [Y.] Davis? Or did you ever represent Angela

Davis?

Amsterdam: I did represent Angela Davis.

Q: During this period, or subsequent to?

Amsterdam: Yes.

Q: During this period.

Amsterdam: Well, while I was in California, sure.

Q: Right.

Amsterdam: As a matter of fact, the relationship between Angela Davis and the litigation you're talking about is that after the Supreme Court declared capital punishment unconstitutional, we were able to get Angela out on bail. She had been being held without bail because her offense was capital. Once the death penalty was struck down, Judge [Richard] Arnason took a look at this again and said, "Hey, wait a minute. She's being held without bail because she is charged with a capital offense but it ain't a capital offense any more because the death penalty is unconstitutional." That's how she got out on bail.

Q: Right. And had you represented or were you representing, during this period, Earl Caldwell?

Amsterdam: Yes.

Q: Right. And he was a reporter for the *New York Times*?

Amsterdam: He was a reporter for the *New York Times* who was ordered by the Grand Jury to reveal his sources of stories about the Black Panthers and other African American militants. He refused to do that, and the question was whether or not he could be held in contempt for refusing to do it.

Q: Actually, the same week that *Furman* was decided, I believe the Supreme Court decided *Branzburg v. Hayes* [1972].

Amsterdam: About that time, yes.

Q: That's right. Okay. Just before we leave today, when *Furman* was ruled upon and you felt this relief, did you think that it would be a material change -- really material change -- going forward in terms of people facing the death penalty? Whether Greenberg said it for public reasons or not that this was the end of the death penalty in the United States, your own feeling was --? Not as you look back on it now, but your feeling then?

Amsterdam: No. I never for a minute thought that the death penalty was over. Not literally, in the terms in which you ask it, "Is this the end of the death penalty?" But you asked a different question a minute ago, which is whether there would be a material change going forward. It was clear there would be a material change. The rules had changed and the fight would be a different fight and we would be in a different position in the fight. But the

idea that the death penalty would go away -- no way.

We had been involved in a number of earlier cases in which we had learned that lesson. *Miranda* [*Miranda v. Arizona*, 1966] was one of them. I was involved, at that time, with the ACLU of Philadelphia, which filed an amicus brief in *Miranda*. It was, in fact, the brief that Earl Warren quoted large excerpts from in *Miranda*. Everybody at that particular point after *Miranda* was decided said, "You know, this is the greatest thing since sliced bread. It's going to make all sorts of changes." And within three years, police were getting confessions exactly the same. They were conducting interrogations exactly the same as they had. We got the Supreme Court of the United States in *Terry v. Ohio* [1968] to put limitations on "stop and frisk." Within three years after that, cops were stopping African Americans and frisking them in exactly the same way.

Law doesn't change the world right away. What happens is that the institutions that you bring constitutional law to curb *immediately* find resilient ways to overcome those curbs. And there was no doubt in my mind that was what was going to happen with the death penalty as well, that it was going to come back in some other form and we would have to fight it in some other form.

Q: Was it already clear from the opinion, at least from the point of view of the minority -- Burger, Blackmun, Rehnquist, and the new justice, [Lewis F., Jr.] Powell also? Was it already clear that if the states were to adopt guided discretion procedures for jurors, the death penalty could survive? Even among some in the majority, as it would turn out in *Furman*, if there were a change in the procedural handling of the death penalty by jurors and courts, could it survive? Wasn't Burger and the minority saying, "Look, the day is not

over." If some of these people in the majority are bothered by the single verdict by the jurors and if you change that, the death penalty is with us still?

Amsterdam: What the four justices in the minority were clearly saying was, "We will revisit this decision and reverse it the first time we get a chance." So the question had nothing to do with the minority. The question had to do with what would shake loose however many the majority votes.

The readings were very pessimistic because, not only is what you said true, which is that the lowest common denominator was arbitrariness and, therefore, if the states found some way to come back with a death penalty that could be said not to be arbitrary, that penalty would be sustained. But more than that, if you read White's opinion -- White's opinion was very explicit in saying, "I am convinced that the death penalty, as it has been administered, has run its course. I'm not at all convinced that these guys aren't right in saying that the public has voted with its feet and the death penalty is on its way out. And with that in mind, I'm going to strike it down." I read that from the beginning as saying, "This is a trial balloon. If the states come back, and find some way to come back"-- and they don't even have to come back with the kind of guided discretion you're talking about -- "if they come back, I, White, will find some way to uphold the death penalty." So there were a lot of different ways in which you could look at this and say, "It's predictable. It's going to be back."

Q: What, in fact, did the states do after *Furman*?

Amsterdam: The states came back with two different responses to *Furman*. Some states

made the death penalty mandatory. That is they simply dealt with the problem of arbitrary and discriminatory sentencing by removing discretion. Everybody convicted of a particular crime -- first-degree murder -- everybody whose crime met those definitions was automatically sentenced to death. Other states adopted what you've just called guided discretion, and that was modeled largely on the Model Penal Code, which had been promulgated by the American Law Institute [ALI] as a model for capital sentencing many years before. And the idea there was, if what's wrong with the death penalty is arbitrariness, then we can avoid arbitrariness by providing standards that jurors will use in selecting, from among the total number of people convicted of a capital crime, which ones will get death and which will not.

Q: In other words, you won't be hit by lightning.

Amsterdam: That's right. That approach was responsive to exactly the question you were asking me a few minutes ago. Somebody read the opinions discerningly and said, "The common denominator of the justices who voted to strike down the death penalty was arbitrariness. So what we will do is we will create a regime that doesn't look arbitrary. Whether it *is* arbitrary is quite another question." For example, some of the guidelines said that you could sentence somebody to death if the killing was "especially heinous, atrocious, and cruel." Now you tell me whether that's a real guideline or whether that is simply cosmetic. But the theory, in any event, is that the sentencing under a statute like that would no longer be arbitrary.

Q: I think ten states took the mandatory approach, which would ultimately be struck down in *Woodson v. North Carolina*.

Amsterdam: 1976, right.

Q: And twenty-five states took a different approach, the kind of guided discretion approach that you were talking about.

Amsterdam: Variations of guided discretion, yes.

Q: Let us pick up then, next week, with the *Gregg* [*Gregg v. Georgia*, 1976] ruling and take it through at least *McCleskey*, if that's okay with you. Unless you want to continue right now.

Amsterdam: Any way you want to go is fine.

Q: Your argument in *Furman* was that if the death penalty was uniformly, regularly and even-handedly applied to all first-degree murders or any other group like that, it would still affront the Eighth Amendment. That argument was really only bought by Marshall and Brennan, isn't that correct?

Amsterdam: Correct.

Q: Should we take it to *Gregg*, or do you want to pick up with *Gregg*?

Amsterdam: Whatever you want.

Q: We have been running almost two hours. Let's take it to *Gregg*:

It's 1976 and the Court now has more before it more than just *Gregg v. Georgia*? It was --

Amsterdam: Yes. *Woodson* out of North Carolina, Stanislaus Roberts out of Louisiana [*Roberts v. Louisiana*, 1976]. There were a total of five cases up there at that point, on the merits. And there were dozens of others stacked up.

Q: Came to be called *Gregg v. Georgia*.

Amsterdam: Yes, that was the lead case.

Q: Was this the first opportunity the Court had taken to look back on these changes that had been made with regard to *Furman*?

Amsterdam: Yes.

Q: What happened?

Amsterdam: The Court upheld the guided discretion statutes and struck down the mandatory statutes -- the ten statutes that imposed death as the automatic punishment for categories of crimes.

Q: Mandatory was unconstitutional?

Amsterdam: Mandatory was unconstitutional.

Q: Because?

Amsterdam: Actually there was more than one reason given but to cut to the chase, two things. First of all, the death penalty should not be applied in disregard of the individualizing characteristics that may call for mercy. The people who commit crimes should not be treated, in the language of the opinion, as a faceless undifferentiated mass to be subjected to the penalty of death. In short, the humanity which the Eighth Amendment requires in criminal sentencing was disregarded by throwing out all of the factors about individual human beings that might call for mercy in a particular case.

Secondly, the Court was realistic enough to perceive that even though the statutes were mandatory on their face, they would never be applied that way. Jurors would either convict of some lesser included offense or governors would commute or the prosecutors would drop the penalty on a plea bargain. That ended up being pre-*Furman* all over again, even though the statutes called for the death penalty in all cases, precisely because the Court understood our argument that the public would never accept the even-handed administration of the death penalty for everybody in a category.

Q: Right.

Amsterdam: The Supreme Court realized that these statutes were a charade. You would have the same unguided discretion, the same arbitrary discretion.

So, for those two reasons, the mandatories were struck down.

Q: Now, guided discretion -- perhaps we're so familiar with these terms that we're throwing them out here without defining them. What had happened with regard to dealing with the arbitrariness in terms of the states not being mandatory but using guided discretion?

Typically how did "guided discretion statutes" work after *Furman*? Before 1976?

Amsterdam: I'm giving you a typical one. They ranged enormously. A trial was conducted in two stages. The first stage was to determine whether the defendant was guilty or innocent, and of what degree of the crime. If the jury came back with a crime which was death-eligible -- subject to the death penalty -- then a second phase of the trial was commenced. The jury then considered a laundry list of aggravating circumstances and mitigating circumstances, and on that basis decided whether the defendant would be sentenced to death or some lesser punishment. If it were a lesser punishment, the judge usually decided exactly what the lesser punishment was. Nowadays it is almost invariably life without parole, but in those days it might have been something less than that.

The list of aggravating and mitigating circumstances was set out in the statute. And because these statutes were based on the ALI Model Penal Code, the list was fairly much the same from jurisdiction to jurisdiction -- killing of a police officer; killing in the course of certain enumerated felonies, such as robbery, rape, arson, burglary; killing of two or more people; killing that was heinous, atrocious, and cruel.

Q: These were the capital crimes.

Amsterdam: No. These are the factors that the jury considers, after it has found a defendant guilty of a capital crime, in deciding whether or not the person will be sentenced to life or death. These are factors that they have to consider when they have to choose whether somebody who is guilty of a capital crime will be sentenced to death or not.

Q: Aren't they called the aggravating factors?

Amsterdam: Yes. Aggravators.

Q: And on the other side, the jury is supposed to consider, by the statute, mitigating factors.

Amsterdam: Most statutes. Interestingly, Georgia never had that. But most statutes did.

Q: Typically, mitigating factors would be --?

Amsterdam: Typical mitigating factors would be -- defendant was only a minor participant in the crime and was not the trigger man, was the wheel man in a get-away, the car driver; the defendant was under emotional strain at the time of the crime; the defendant was under duress; if the defendant is one of several people, some other guy was the head honcho in the crime; defendant cooperated with law enforcement in solving the crime. A whole laundry list.

Q: Not defendant's upbringing, for example?

Amsterdam: Almost no states specifically listed the defendant's upbringing as a mitigating

factor.

Q: Defendants who would not have testified at trial, do you know whether they started testifying in this second phase?

Amsterdam: Yes. One of the whole purposes of the two-phase trial was to allow for the presentation of evidence that brought into play these aggravating and mitigating factors. The defendant's testimony might be relevant to any one of the mitigating factors.

Notice that you asked me the question whether or not the defendant's upbringing was a statutory mitigator. Many of the statutes did not limit mitigation to the statutorily enumerated ones. The statutorily enumerated ones could be considered but other things could be considered as well, and therefore the defense might present evidence of the defendant's upbringing as well.

Amsterdam: While it did not become, by any means, standard procedure for the defendant to testify at the penalty phase, it was possible and many defendants did. That depended on what the defendant had to say and what the lawyer's strategy or theory of the case in mitigation was.

Q: Who was representing [Troy L.] Gregg? Was it the LDF?

Amsterdam: No, we came into *Gregg* as amicus.

Q: But didn't you argue *Gregg* before the Court?

Amsterdam: No, I argued the *Woodson* case and the *Roberts* case. The Louisiana case.

Q: Okay.

Amsterdam: There were five companion cases, argued over two days.

Q: What was your argument -- whether it was briefed or whether orally? What was your argument? The issue in *Gregg* is what?

Amsterdam: The issue in *Gregg* was essentially whether the new procedure, with its aggravating and mitigating circumstance in a two-step trial, had solved the arbitrariness problem of *Furman*.

Q: Exactly. And what did you argue?

Amsterdam: That it had not, that this was pure cosmetics. The very notion that asking a jury to decide the question "was this capital crime particularly heinous, atrocious, and cruel" was bizarre and silly as a way of regulating arbitrariness. Those standards were rubber yardsticks. Juries and prosecutors would continue to do exactly what they had done before *Furman*, which was to limit the death penalty to people who were ugly, minority group members, pariahs. Those standards were a facade for the continuation and perpetuation of the same arbitrariness that had always existed.

Q: In other words, you were saying nothing of importance had changed since *Furman*.

Amsterdam: All the changes were cosmetic.

Q: Right. And the vote there?

Amsterdam: You know -- we lost. Right? That's all that matters.

Q: Right.

Amsterdam: The Court is not notoriously realistic. I had mentioned to you earlier that Byron White had signaled that all he wanted to know was whether the states were still serious and would come back if he struck it down as a trial balloon. It was no surprise that in the Supreme Court of the United States, five votes would uphold anything they came back with.

Q: Right. Let us pick up next week, if you will, on what happened after *Gregg* was decided.

Amsterdam: Fine.

Q: Thank you.

Amsterdam: Sounds good.

[END OF SESSION]

MJD

Session Three

Interviewee: Anthony G. Amsterdam

Date: April 8, 2009

Interviewer: Myron A. Farber

New York City, NY

Q: This is Myron Farber on April 8, 2009, continuing the interview of Anthony G.

Amsterdam regarding Columbia's oral history of the movement to end the death penalty in the United States.

Tony, let me go back for a moment to *Furman*. When we talked the other day you mentioned that you were out in California, at Stanford Law School where you had started teaching in 1969, when the *Furman* opinion was handed down by the Supreme Court. Can you recall -- as you felt at that time, not as you felt subsequently -- what you thought the situation was when you had an opportunity to actually read the nine opinions in that case? What you thought had been achieved and where you thought you were headed then? Jack Greenberg put out this statement that this was the end of the death penalty in the United States. But I would like to see if we can just capture what you thought when you read the opinions.

Amsterdam: For the first time the Supreme Court of the United States had developed a body of doctrine that would limit the death penalty and force it to operate within certain channels. It would also give us an opportunity to attack the death penalty on a number of grounds and progressively put it out of business.

There was no way in which those nine opinions were going to immediately put an end to the

death penalty. The opinions were quite clear that the justices had a number of narrow grounds for invalidating the death penalty as it then existed. It was equally clear that the states would come back with statutes that would try to meet the objections of the opinions. Latent in the opinions were doctrines, analyses, principles, and reasonings that we could use to attack the new statutes. It was going to be a long fight ahead; we might win, we might lose.

Q: And, in fact, the *Furman* opinion knocked out some thirty-eight state laws with regard to the death penalty. It was only a matter of days before many of those states began to work up some sort of new statutes -- guided discretion or mandatory. By 1976, *Gregg* was representative of a collection of cases, was it not?

Amsterdam: Right.

Q: Right. Here you were before the Supreme Court for the first time since *Furman*, again on the death penalty. Is that correct?

Amsterdam: Yes.

Q: What was the issue?

Amsterdam: There was more than one issue. As you said, there was a collection of cases. The question was the constitutionality of the two major kinds of statutes that had been enacted in the wake of *Furman*. The way we analyzed the case, each statute and the practices under it had to be looked at separately. The cases fell into two broad categories --

the mandatory statutes and the so called "guided discretion" statutes. The question was whether either of those two, or both, satisfied the constitutional commands of *Furman*.

Q: In defining guided discretion for a layman who may be looking at this some time -- guided discretion narrowed the range of death-eligible crimes and provided criteria for aggravating and usually also for mitigating circumstances to help guide the sentencing decision. It provided for a penalty phase where, if the defendant was convicted of a death-eligible crime, the jury would then consider in a separate penalty phase whether to give life or death. Is that basically what it amounted to?

Amsterdam: That is the general model.

Q: In 1976 when *Gregg* came along, the United States took a position. It had not taken a position in *Furman*. Isn't that correct?

Amsterdam: I believe that's right. I don't recall that the Solicitor General filed anything in *Furman*. I could be wrong; it's been a long time. But I don't think so.

Q: But by 1976 the Solicitor General of the United States, who appears before the Supreme Court to argue the government's position, was none other than Robert [H.] Bork. He hadn't been "Borked" yet. He was still the Solicitor General. Do you recall whether Bork took over from the other attorneys who were representing the states in *Gregg*? Was he the main opponent to you?

Amsterdam: No, I don't think so. I think he was a respected figure who made an excellent

presentation, but I don't think that he supplanted or superseded the lawyers on the other side. They ranged in ability and sophistication, but they were a good group.

Q: The question in *Gregg* was whether these guided discretion statutes could be upheld by the Supreme Court. The Supreme Court had virtually invited the states to do this. The minority in *Furman* had done that. Is it fair to say that your argument in *Gregg* was that -- and I quote -- that "these guided discretion statutes merely perpetuate the arbitrariness condemned in *Furman*?" And you go on to say, "In its parts and as a whole, the process is inveterately capricious. To inflict death through such a process is to inflict unconstitutional, cruel and unusual punishment within the fundamental historical concerns of the Eighth Amendment."

You were saying, in effect, that, "We've got these guided discretion statutes which perhaps are an improvement upon what had been before." And now you're saying, four years later, "You have got them but they are as bad as what we had before!" Is that what you're basically saying?

Amsterdam: We were saying that the change was cosmetic. When you say, "It was an improvement, would you agree?" No, I wouldn't agree. And I didn't agree then and I don't agree now. Had the statutes provided standards that were administrable and actually likely to control the decisions in individual cases, then that might well have been an improvement. One would have to see whether they were, in fact, administered by the state courts in a way that effectively did control discretion. But if they even had had a promise of it, that would have been an improvement. The statutes that came back had no such promise.

I have to give you one example and I hope this will make intelligible what the problem is. The Georgia statute before the Court in *Gregg* in 1976 provided that the death penalty could be applied if one aggravating circumstance was found. Among the aggravating circumstances enumerated in the statute was that the killing was "outrageously vile, horrible or inhuman, involving 'depravity of mind.'" Anybody who believes that that limits the discretion of the jury to do what it damn pleases, whenever it damn pleases, is an utter fool.

Q: Did the Georgia statute provide for mitigating circumstance?

Amsterdam: No, it did not.

Q: You lost *Gregg*, though.

Amsterdam: Yes.

Q: Do you recall what the vote was in *Gregg*?

Amsterdam: Do I recall what the vote was? It was either 6 to 3 or 7 to 2.

Q: I think maybe 6 to 3. From having lost that case, what was the situation with regard to the application of the death penalty between that decision in 1976 and when you were back at the Supreme Court in 1987 with *McCleskey*?

Amsterdam: There were a dozen major Supreme Court decisions about the death penalty

itself and twenty about procedures involving application of the death penalty, which made the law extremely complex.

Q: Do any of those decisions stand out in your mind with regard to constitutionality?

Amsterdam: Sure, a whole series of them. Perhaps the earliest one was *Zant v. Stephens*, which qualified even more what the *Gregg* set of cases had held. That was in 1983. *Pulley v. Harris* came along in 1984. Then there were, as I say, a dozen less important but fairly significant decisions before *McCleskey*.

Q: Let me mention a couple of cases of this period. *Woodson v. North Carolina* threw out the mandatory statutes.

Amsterdam: Right. But that's the same date as *Gregg*.

Q: Then there was *Coker v. Georgia* a year later in 1977, where the Supreme Court banned the death penalty for rape of an adult.

Amsterdam: Right.

Q: There was *Ford v. Wainwright* somewhat later in 1986. In other words, to be fair to them, the Supreme Court wasn't really antagonistic to moderating the death penalty at that time.

Amsterdam: The Court, for a while, concentrated on trying to improve the procedures through which the death penalty was administered. The Court did not do very much by way

of restricting the reach of the death penalty. *Coker* and a couple of cases that followed it were the closest the Court came at that time to limiting the reach of the death penalty. It excluded the death penalty for rape. It excluded the death penalty for robbery.

Then a case called *Enmund v. Florida* [1982] held that the death penalty could not be imposed on a simple wheelman, somebody who was an accessory to an underlying robbery-murder in which someone was killed but who did not themselves kill, was not the trigger person. So the Court did limit the reach of the death penalty a bit. It didn't limit it very much. It went through a short period of trying to improve the procedures through which the death penalty was administered. And then after a very short period of time, it gave up that effort completely, reversed itself and reverted, in effect, to allowing states to do pretty much anything they wanted.

Q: What was the background of the *McCleskey* case? Warren McCleskey had been in a robbery, had he not?

Amsterdam: Yes.

Q: And someone was killed. Was it a police officer?

Amsterdam: Yes.

Q: Was it clear that Warren McCleskey, as opposed to others he was with, actually shot the police officer?

Amsterdam: It was never clear.

Q: And Warren McCleskey was black.

Amsterdam: Yes.

Q: Just tell me, if you will, what was the basis for the argument that you presented with regard to *McCleskey*? You ultimately described this decision as the “*Dred Scott* decision of our time.” Was the *McCleskey* case as important as you regarded it then?

Amsterdam: Extremely important. By the time of *McCleskey*, the Supreme Court had given up its effort to regulate procedure so as to assure that the death penalty would be fairly, even-handedly, non-discriminatorily enforced. Since it no longer was willing to insist on procedures that were likely to keep the death penalty from being applied discriminatorily, we set out to prove that the result of its abandonment of regulation was that the death penalty was in fact being applied racially discriminatorily.

We had the foremost social scientist in the country -- Dave Baldus and his crew at the University of Iowa -- do an empirical study of the way in which the new Georgia statute, which had been approved by the Court in *Gregg*, was being enforced with regard to race of the defendant and race of the victim. The data that they gathered and the analyses that they conducted proved hands down, beyond any shadow of a doubt, that race was affecting the administration of the death penalty. Whether you got the death penalty or not depended on the race of the victim and the race of the defendant.

We took the case to the Supreme Court of the United States to ask whether that result violated the Eighth Amendment prohibition against cruel and unusual punishments. We argued that since *Furman* had insisted that regularity and even-handedness in the administration of the death penalty was an Eighth Amendment command, and since we had demonstrated that the death penalty was being applied unequally in racially discriminatory ways, the Eighth Amendment was violated. We also argued that it violated the Equal Protection Clause of the Fourteenth Amendment, which had been put into the Constitution to prohibit racial discrimination.

The Supreme Court rejected both of those arguments in *McCleskey*.

Q: You had been arguing racial discrimination since *Furman*, at least.

Amsterdam: Before.

Q: It was an important element, was it not, in the thinking of Douglas and White when they gave you their votes in *Furman*?

Amsterdam: Yes.

Q: The Court, by the way, had changed by 1987. It had changed by 1976, had it not?

Amsterdam: Right.

Q: Douglas was gone. Was [John P.] Stevens new on the Court at that time? I think so.

Amsterdam: You're talking about 1976?

Q: Yes.

Amsterdam: I'm trying to remember exactly when that was.

Q: In 1975 Stevens replaced Douglas. He was on the Court for *McCleskey*.

Amsterdam: Yes. He was certainly on the Court for *McCleskey*.

Q: That's right. Going back to Baldus for a minute -- what was materially different? You had argued this kind of thing in *Furman*. You were arguing it again in *McCleskey*. What was so different? Was the Baldus study the real difference?

Amsterdam: Well, two differences. First of all, the Supreme Court had never directly addressed the question of race discrimination as a claim. The claim in *Furman* was that the death penalty was being applied so arbitrarily and so infrequently that the only explanation for why it was being applied, even in the few cases it was, was that the public could tolerate a racially discriminatory administration of the death penalty. But the argument was not that racial discrimination itself violated the Constitution. That was not the direct argument presented. White and Douglas and, for that matter, Stewart as well, were affected by the existence of discrimination. That is true, but that was not a part of our legal argument or their rationale. So one thing that was different was that the issue of discrimination really was before the Court on the merits for the first time. Race had always

figured factually in our presentations to the Court, but the legal argument had never centered directly on race at that point, except in connection with cases like *Rudolph* and *Ralph*, for rape.

The second thing is, yes, Baldus made a difference. Up until that time, to the extent that race was part of the argument at all, it was an argument that the procedures were insufficient to protect against discrimination. What Baldus did was come along and say, "Discrimination is not a speculation, it's not a guess, it's not a supposition – it is a fact. People are being put to death because of the race of the victim and the race of the defendant. It's incontrovertible when you look at the evidence and you look at the facts that that is what is happening." And we took that to the Supreme Court of the United States and said, "It seems to us that violates the Constitution."

Q: Right.

Amsterdam: That was brand new.

Q: Was it happenstance that you had this Baldus information, or did you and those around you say, "We know there is racial discrimination and we have got to find some social scientist who is going to really nail this down," and someone picked up the phone and called David Baldus? In other words, how did that come about?

Amsterdam: In the period immediately after the 1976 decisions, it looked as though it might be possible to invalidate the death penalty piecemeal by litigating about the procedures through which it was administered without having to study the result of those

procedures in fact. As the Court, bit by bit, rejected the various attacks we were making on those procedures, it became clear that we had to confront the Court with the consequences of the rulings it was making. It was, to use the presently acceptable phrase, "deregulating death."

Q: That was Robert Weisberg's phrase, wasn't it?

Amsterdam: Among others, yes. What we needed to do was say, "What happens when you remove all of the safeguards that you promised in 1976 that the new statutes would deliver?" The only way to answer that question was to have that studied. At that point, David Baldus, who had been with NSF [National Science Foundation] -- a highly regarded scholar, a sociologist and a lawyer -- seemed to us to have the kind of stature needed to command respect for a study that would test the results of the deregulation. And so we asked him to do it and he agreed to study the first seven years of administration of the Georgia statute under the new statutory regime.

Q: I would like to refresh your recollection on something that you mentioned in, looking back on the case in 1988, in which you said that, "Out of seventeen defendants charged with the killings of police officers in Fulton County, Georgia,"-- that's Atlanta -- "between 1973 and 1980, only Warren McCleskey, a black defendant charged with killing a white officer, had been chosen for a death sentence. In the only other one of these seventeen cases in which the predominantly white prosecutor's office in Atlanta had pushed for the death penalty, a black defendant convicted of killing a black police officer had been sentenced to life instead."

On the face of the evidence, was Baldus' analysis really necessary?

Amsterdam: I think it was necessary. The data you just provided is highly suggestive that there is probably race affecting the result, but if you go into a skeptical Court with data like that, they are going to begin to ask questions like, "How do we know that in the other cases the prior criminal record of the defendant was not less serious than Warren McCleskey's? How do we know that in each of these cases the crime was not less brutal than McCleskey's? How do we know that --?" and they would then go through twenty-eight variables and we would have no answers to those.

What David Baldus did was to go out and look at every single factor that might affect the sentence in a criminal case -- the ones which were identified by the statute in Georgia as aggravating factors. And every fact that the criminological literature indicated had ever been used for mitigation or aggravation in capital or non-capital cases -- two hundred and thirty-odd variables -- to make absolutely sure that none of these other variables affected the result. When he found that they did not, then to use the phrase you used a little while ago, the facts had been nailed down. Nobody could fail to understand, if they looked honestly at the data, that race and only race was affecting the result of whether people got life or death.

And so when you ask why would I call this the *Dred Scott* decision of our time, it plainly is. *Dred Scott* held that African Americans have no rights that white men are bound to respect. The Supreme Court of the United States in *McCleskey* held exactly the same thing. Confronted with evidence that race was the factor that was piping the tune of life or death, the Supreme Court of the United States held that that violated neither the Equal

Protection Clause of the Fourteenth Amendment nor the Eighth. That was an incredible decision. It commits this country to an acceptance of racial discrimination as a part of its fundamental law.

Q: Were you surprised by that decision?

Amsterdam: Not really. The Court was not a great Court. We had earlier hopes that had been disappointed -- that the Court would be honest in enforcing the rules that it promised it would enforce between 1972 and 1976. It had made very clear that its decisions were hypocritical and that it would bend whatever needed to be bent in order to uphold the death penalty. And so it was no great surprise that they bent the Equal Protection Clause as well as the Eighth Amendment to make space for the death penalty. But that doesn't make it any less an outrage. It's a predictable outrage, given the bench that was then sitting.

Q: And the majority opinion was written by a fairly new Justice, Lewis Powell.

Amsterdam: Correct.

Q: Do you recall what Powell emphasized?

Amsterdam: When you say fairly new, Powell had been there since 1972.

Q: Had he been there that long?

Amsterdam: Yes. But I'm sorry, go ahead. You were asking a question.

Q: To drive to the heart of what Powell said --

Amsterdam: Powell was willing to admit, on the face of it, that the Baldus study showed what he called a "risk" that race was affecting the administration of the death penalty. If you take a close look at his opinion -- and I have done this and actually written on this subject -- what you will see is that he uses an amazing array of rhetorical and verbal tricks to describe the findings of the Baldus study as simply involving a risk, rather than admitting that the Baldus study showed factually that race was piping the tune as to whether people got life or death.

Powell said that all statistics can ever show is a risk, which, of course is utter nonsense. Statistics are used to prove what is in fact happening. But he then went ahead and said, "A risk of racial discrimination does not violate the Eighth Amendment or the equal protection clause." We know now in retrospect that [Antonin G.] Scalia actually circulated an opinion that proposed that the Court be somewhat more honest and admit that race discrimination was affecting the death penalty and say, "Race discrimination affects everything in our society and it's acceptable." I think that Powell made a conscious and deliberate decision that to admit that race discrimination was going on would have been unacceptable -- unacceptable legally, unacceptable as a matter of political theory, and unacceptable popularly. And so I think he masked the discrimination that was going in and in effect reduced it to a "risk" instead of a fact and was then able to come up with an analysis that upheld it.

As you probably know, shortly after he retired from the Court, when he was asked whether

he would change his vote in any cases, he named two, one of which is *McCleskey*.

Q: That's right. What would have been the consequence if he had voted the other way? If *McCleskey* had been won? What would have been the consequence for the death penalty?

Amsterdam: I think it would have died very quickly. If the Court had attempted to assure that the death penalty was being enforced on any other than discriminatory grounds, the states really would not be able to maintain it. It is only through the fact that the few people who do get the death penalty are disfavored, despised members of a minority that the death penalty continues in this country. If we erected real protections and safeguards, or policed the administration of the death penalty, it would go away very quickly.

Q: But with regard to the matter of race, do you think that was so powerful an element that had Powell just gone the other way -- as he later said he wished he had -- that that would have crippled, if not killed, the death penalty?

Amsterdam: Yes. It would have crippled it, not because of some abstract doctrine, but because if adequate enforcement procedures had been insisted on to assure that discrimination was not occurring and if defendants could litigate the question of whether there was discrimination, the death penalty would have been rendered, as a practical matter, unenforceable. There simply is no place where the death penalty has been studied, Myron, where race discrimination has not been found. There have been dozens of studies prior to and after *McCleskey*. The Baldus finding that we put before the Court in *McCleskey* has been replicated in every state in which the phenomenon has been studied.

If instead of publications in law reviews and other journals of the facts, those facts had been aired in courts, and the courts had insisted that when those results were shown, death sentences would be set aside -- the death penalty would have been eviscerated.

Q: At the time of *McCleskey* in 1987, if the case had been an employment case or something like that, and race was shown to the extent that Baldus showed it, what do you think would have been the result?

Amsterdam: Well, we know what the result would have been.

Q: At that time?

Amsterdam: At that time. Our brief in *McCleskey* argued that the same statistical procedures that Baldus had used to prove that the death penalty was being enforced discriminatorily on account of race would have satisfied all of the standards that the Supreme Court had set down for proving race discrimination in employment cases. And jury selection cases -- even in criminal cases for that matter. If the same statistical results had been used to prove that in selecting people for juries African Americans had been systematically excluded, the case would have been won. So it wasn't just employment. It was even in criminal cases.

But as I said, the Supreme Court at that point was about the business of twisting the Constitution in whatever way it needed to be twisted to make space for the death penalty. When exactly the same procedures that were sufficient to show a constitutional violation in any other area were put before the Court as a challenge to the death penalty, the Court

simply would not accept the result. It upheld the death penalty and threw out the proof.

Q: That racial discrimination that you say was proven in Georgia and proven later elsewhere, was that essentially a Southern phenomenon? If one were to historically separate out the death cases out of the South from the rest of the country, would you find the same thing?

Amsterdam: Race discrimination was more intense and more obvious in the South than in other places. It is dubious that the difference really is very great but there probably is a small difference in the amount of discrimination. But the fact of discrimination exists all over. It's no different in the West and the Midwest than it is in the South.

Q: Well, the overwhelming number of death sentences and executions in the United States has historically been in the South and continues to be. Is that an inevitability in the South? Whatever it is that caused the South to be like that, whatever its historical roots, is it something that is going to just continue indefinitely as long as the death penalty is on the books?

Amsterdam: I think that the South will continue to be disproportionately represented in death sentences and executions, yes. Again, I don't think it's because race discrimination affects the results significantly more than elsewhere, but other phenomena come into play. There is a thesis that has been kicking around for many years that the South is a peculiar part of American society in that it is a so-called honor society. That is to say, the Southern ethos is violence. It responds to violence --

Amsterdam: -- with violence. Anything that gives offense arouses a vengeful response, a rage reaction, overkill literally – an urge to kill them all off and let God sort them out.

And there is certainly a procedural facet in the South. Appellate courts have always been somewhat less demanding in reviewing procedures in the South than they are elsewhere. In a lot of jurisdictions in the South, criminal lawyering and defense lawyering are not as good as they are in a number of other places. That is not necessarily a product of the quality of individual lawyers; it is the quality very often of the resources made available to defense offices. Take a state like Alabama, which happens to have the highest rate of additions to death row in the country at the moment. They also have virtually no taxes and are subsequently at the bottom in terms of quality of their schools, quality of medical care, etc. That has got to factor into the fact that they are putting so many people on death row. There are no resources. There are no organized public defenders. The lawyers who are appointed to represent people in capital trials are paid a pittance, if anything. The judges do not give them money for investigation and so forth. All of that affects the death-sentencing rate. So it is partly race but it is partly a lot of other things in the South.

Q: I mentioned *Coker* before, which had eliminated the death penalty in 1977 for rape of an adult. But I've seen a figure that says that of the 771 persons of identified race known to have been executed in the South between 1870 and 1950, 701 were black. Is that possible?

Amsterdam: That sounds about right. I have seen figures very close to that but I don't recall that I've seen that exact figure. But that's right, more or less.

Q: In 1995, in a brief by the LDF for a case in South Africa – for which I assume you were

in good part responsible -- you said the following, "In the post-*Furman* era, African Americans continued to be vastly over-represented in the selection for death, comprising approximately 40 percent,"-- this was in 1995 you were writing this -- "of those individuals. Moreover, as in the pre-*Furman* years the death penalty is still a punishment reserved for those who kill whites. Of the 257 executions that have been carried out since re-imposition of the death penalty, only 1 white, a contract killer already serving a life sentence for multiple murders, has been executed for killing an African American." I ask you again, is that possible? Of 257 executions after the end of the moratorium, only 1 white?

Amsterdam: Only one white for killing an African American, that's correct. The statistics show that the harshest punishment and the major use of the death penalty is for blacks who kill whites. The second most severely punished group is whites who kill whites. Far less often, blacks who kill blacks get the death penalty. There are almost no death sentences for whites who kill blacks. That four-by phenomenon has been reported again and again and again. It is, in fact, the subject of what lawyers have known for many years. There is an old joke that I've heard in six different states describing the law of the state for homicide and it goes this way. If a black man kill a white man, that be first-degree murder. If a white man kill a white man, that be second-degree murder. If a black man kill a black man, that be manslaughter. But if a white man kill a black man, that be justifiable homicide, unless a woman is involved, in which case the victim died of apoplexy.

And what is ironic is that that old story has been validated scientifically by every single study that has ever been done of the effect of race on the death penalty.

Q: One of the things that Baldus' results pointed to, and as you say has been verified by at

least some scholars since that time, was that the race of the victim was critical. But also the race of the defendant. What was more proven, race of victim or race of defendant? Was race of defendant subsumed by race of victim?

Amsterdam: Race of the victim was the more salient result. The reason why race of the victim is the more salient result is exactly the reason you gave, which is that the death penalty is almost never imposed for people who kill blacks. Since most killings by blacks have black victims, the race-of-the-defendant phenomenon is masked by the massive, vast difference in application of the death penalty with regard to race of victim. Race of defendant is operative and there is discrimination by race of defendant, but that effect is masked by the overwhelming race-of-the-victim effect.

Q: Before I turn from *McCleskey*, let me again read something that you wrote because I think it is very concise with regard to the *McCleskey* case. In 1988 you wrote, "The bottom line is this. Georgia has executed eleven murderers since it passed its present statute in 1973. Nine of the eleven were black. Ten of the eleven had white victims. Can there be the slightest doubt that this revolting record is the product of some sort of racial bias rather than a pure fluke?"

Now, the Supreme Court didn't buy it for the reasons that you said that Powell wrote or that others joined in. So this is what you had to walk away with -- this opinion. Did that make a difference in the litigation strategy of the LDF? In other words, did there come a time when this great effort -- the moratorium that had preceded *Gregg* and these efforts like *McCleskey* -- was it clear to you that this day was past and we had to fight another way? Was there conversation about that? Was there a result about that? And did you do things

differently after that? Out of necessity?

And would you also comment on Jack Greenberg? Jack Greenberg was the leader of the LDF. I don't have the dates but during this period, was he not?

Amsterdam: Yes.

Q: Can you comment on his qualities as the head of the LDF? And then pass on to what I was saying about whether the litigation strategy had to change?

Amsterdam: Jack was a brilliant strategist. He was, as legal director of LDF, a fine legal analyst, but somebody who understood the political dynamics of the Court and the country as well. And he had not simply practical wisdom, but vision. He knew how to pursue goals by structuring a litigation campaign. He inherited that from Thurgood Marshall. That was also Thurgood's genius. Although Jack and Thurgood were very different in personality and background, they shared that common genius. I'm not sure what more you want to know about Jack. Is that sufficient?

Q: Was he running LDF at the time of *Furman*?

Amsterdam: Yes.

Q: And at the time of *McCleskey* in 1987? And thereafter?

Amsterdam: *McCleskey*, I don't think so. I think that he was no longer there. I don't

remember exactly when Jack left LDF. As I mentioned to you, or perhaps when we were chatting, Jack continued to be involved in the policy councils of LDF well past the time when he ceased to be the director-counsel. So I'm not remembering exactly when he left as director-counsel. But I think I'm remembering that Julius [L.] Chambers was director-counsel by the time of *McCleskey*.

Q: But you were certain at the time, after a case like *McCleskey* that the votes weren't there and they weren't going to be there for some time, if ever.

Amsterdam: In terms of any massive cutback on the death penalty or in-general invalidation, the votes were not there. We might still win small procedural issues here and there, but it would not be likely in the near future that the death penalty would be knocked out to any extent.

Q: Did that mean, twenty years ago now, circa post-*McCleskey*, that LDF had to rethink its litigation strategy? I mean, you had sort of been going for the big push, had you not? The knockout blow?

Amsterdam: Well, a number of things come together. We had been looking for the knockout blow. The question then became whether LDF should continue to pour a large amount of resources into a battle which it had undertaken, in the first place, not simply to represent individuals but to achieve a large social objective. You have to keep in mind two things when you answer the question you just asked, "What is LDF going to do now?" One is that perhaps the major long-run result of the LDF-death penalty campaign was the creation of a bar of defense lawyers around the country who specialized in death-penalty defense and

were a sophisticated, orchestrated group that got together and planned things like educating and training other lawyers. The LDF campaign produced, as an indirect result, the creation of a capable, nation-wide death-penalty defense bar. LDF then had to decide, since that bar now exists, should we continue to pour our resources into doing this under our own auspices, or are the people who are out there now, doing it, able to do it well enough so that we don't have to continue to pour resources in?

And then there comes along the second point that has to be added to the analysis, which is there was a tremendous call for LDF resources to do all sorts of other things because the same Supreme Court of the United States which is making space for the death penalty has perverted the equal protection clause so that white people can complain about discrimination against whites from affirmative action programs. And the Supreme Court of the United States, by this point, is gutting the Constitution and all constitutional protections for minorities. So the Legal Defense Fund had an awful lot else on its plate and had to decide if it was going to keep playing the major role in the death penalty. And a judgment was made that it would not. Quite predictably and quite reasonably.

Q: That was okay with you?

Amsterdam: Sure.

Q: How did that manifest itself? What was the result? What happened?

Amsterdam: As I mentioned, other people, other organizations, moved in to fill the ground that the Legal Defense Fund had been filling.

Q: Would that include the ACLU? Henry Schwarzschild? The ACLU had a capital punishment project that he ran, I believe, starting in 1977.

Amsterdam: It was not largely a litigative project. It was mostly an educational and legislative project that Henry ran. But after the war, the Vietnam War, Henry got involved in the amnesty issues. Like LDF, in effect, other issues overran Henry's agenda. And the ACLU as a national organization did not play a major part in the death penalty fight until two years ago when the ACLU created -- in 2007 -- a death penalty unit in Durham, North Carolina, that does significant death penalty work. Individual ACLU offices in particular states did do yeoman's work in death-penalty cases. Lawyers, the major players in local ACLUs, as individuals, did remarkable work in representing death-penalty defendants charged with and convicted of capital crimes. But the ACLU nationally was not the organization that stepped into the Legal Defense Fund role. That was largely a matter of other organizations -- some private, some public defenders. The picture gets very, very complicated at this point. The ACLU does play a major death-penalty defense role in California. Michael Laurence, who now heads up an organization called the Habeas Corpus Resource Center in California, was then with the ACLU of Northern California and was one of the major players. He represented capital defendants in California, Arizona, and Nevada. The ACLU of Southern California had a powerful death-penalty defense presence. So in California, the ACLU was a powerhouse. In a couple of other states the ACLU played a major role, but the national did not.

Q: How about Amnesty USA or Amnesty International? Have they played any kind of significant role after LDF pulled out?

Amsterdam: Amnesty does not litigate. Amnesty has never played a role in litigation in the death penalty. It is an organization whose effect primarily in the United States has either been public education, public relations, or letter campaigns around clemency and commutation and that sort of thing. You have got to keep in mind that the United States is still a fiercely isolationist nation in which the people generally bitterly resent and resist any international influence or pressure on the United States. Amnesty is handicapped in this country, as against many other countries where it operates effectively, because many other countries see themselves as part of the globe. The United States does not. The American public has always been wedded to this notion of American exceptionalism. We don't listen to anybody else anywhere else. So Amnesty's power to effect very much in the United States is very, very weak.

Q: The other day I mentioned something called the Last Aid Kit. You said, "That came later." What was the Last Aid Kit?

Amsterdam: In the wake of the crisis that I mentioned to you in Arkansas, when we were left with the power to get stays and a number of unrepresented defendants, we decided that we had an obligation to get into those cases. We decided that we had that same obligation nationwide. We simply did not have the resources ourselves to go running into every court in the country where there were death sentences. So what we did was to create a set of forms that pleaded and argued each of the constitutional challenges we had to the death penalty itself, to the death penalty's application in particular kinds of cases, and to the major procedures used throughout the nation to administer the death penalty. That was reduced to forms. The forms were distributed and circulated throughout the country so that

a lawyer could go in and get a stay of execution by doing very little other than filling in a short factual statement and filing the papers. These papers went all the way from the lowest court to the Supreme Court of the United States. The sheath of papers was two-and-a-half inches thick, a series of motions and briefs that took the case all the way from the lowest court to the highest court in the land.

I should mention that this was an idea that LDF had developed in the days of civil rights demonstrations. When we were defending demonstrators in Mississippi and Alabama, when we were defending Martin Luther King's demonstrators in Louisville and all over, we created habeas corpus petitions *en masse* that we would file whenever there were mass demonstrations and 500 people would be arrested. In those days they were run off mimeograph machines with wax stencils. There was no other way that you could get those cases into court. So this technique of having pre-prepared forms that you would distribute that would enable a lawyer to produce absolutely first-rate legal work -- something that ordinarily would take days or weeks or months -- in minutes, because all they had to do was fill in the blanks, this was something LDF had developed in other contexts and we applied it to the death penalty. And that was the Last Aid Kit.

Q: And it was used, with regard to the death penalty, heavily. In what period of time are we talking about? Was it pre-*McCleskey*?

Amsterdam: It was pre-*Furman*.

Q: Right.

Amsterdam: It ran from 1967, 1968, all the way through 1985. We had a Last Aid Kit that raised the discrimination issue. I would say a period of eighteen years, from 1968 through 1985 or 1986.

Q: By the way, who presented the oral argument for LDF in *McCleskey*?

Amsterdam: Jack [C.] Boger.

Q: Jack Boger. Let me mention a few cases that came at around the time of *McCleskey* or afterward, Supreme Court cases. *Ford v. Wainwright* in 1986 held that the insane could not be executed. Isn't that correct?

Amsterdam: Right.

Q: *Batson* [*Batson v. Kentucky*] in 1986 held that racial discrimination in jury selection was no good. Is that correct?

Amsterdam: *Batson* involved a particular kind of racial discrimination in jury selection. Racial discrimination in jury selection had always been unconstitutional since 1880, if what you did was kept African Americans off the jury panel altogether. That is, if the jury commissioners excluded them. What *Batson* was about was when prosecutors used their so-called peremptory challenges discriminatorily to throw blacks off a jury. That was held to violate the Constitution in *Batson*.

Q: Okay. *Thompson v. Oklahoma* in 1988 held that the execution of minors below sixteen

was unconstitutional.

Amsterdam: Right.

Q: In *Ring v. Arizona* in 2002, which overruled *Walton v. Arizona* [1990], the holding was that a death sentence where the necessary aggravating factor was determined by a judge, as opposed to a jury, was unconstitutional, correct?

Amsterdam: Right.

Q: In *Atkins v. Virginia* in 2002 the execution of the mentally retarded was held to be unconstitutional. That reversed *Penry v. Lynaugh* [1989], right?

Amsterdam: Right.

Q: In 2008 the death penalty was held unconstitutional for any crime where the victim wasn't killed. Wasn't that *Kennedy v. Louisiana* [2008]?

Amsterdam: What *Kennedy* did was to apply the *Coker* holding that the death penalty was unconstitutional for rape to a child.

Q: Right. The reason I recite some of those cases is because I want to go back to a point that you made earlier and that has to do with what you and others have called the "deregulation of death" by the Supreme Court. A recitation of those cases might cause a layman to think, "Well, wait a minute. The Supreme Court is doing things that, even if it's not getting rid of

the death penalty, seem to work in favor of defendants. At least sometimes, right?" If that is the case, what really was the "deregulation of the death" by the Supreme Court? What manifests that?

Amsterdam: Let me give a two-part answer to that, Myron. First of all, if you identify six cases in which the Supreme Court ruled for us but ignore the eighty-two in which it ruled against us, then yes, you can say that the Supreme Court is still active in the area.

The second answer to that is a more general one. I think you need to think about it this way. If the Supreme Court of the United States had followed through honestly and non-hypocritically on the promises it made when it upheld the death penalty, you would have a very different kind of regulation of the death penalty, one that would have strangled the death penalty to death instead of simply chipping away at the most extreme outrages in administration of the death penalty, which is what the Court has done in the various cases that you describe.

Look at those various cases. *Ford v. Wainwright* -- could any society one step above Attila the Hun believe that it's appropriate to put somebody to death who is out of their mind, who is crazy? Alvin Bernard Ford thought that he was going to meet his god. He thought that his execution was his pathway to heaven.

A more recent case we won involved somebody else who was mentally incompetent to be executed, Scott [L.] Panetti in Texas. The guy was of the view that the State of Texas was in league with the devil and that the reason why he was being punished was not that he had committed murder but that he was preaching the gospel of the Lord. Now, do you really

want to tell me that it's an enlightened administration of the death penalty, or any great circumscription of the death penalty, to hold that those guys can't be executed?

Kids under sixteen, there isn't any other country in the *world* that would think about executing kids under sixteen! And so when the Supreme Court, after upholding thirteen years before the execution of people seventeen and eighteen, finally turns around and by one vote outlaws the death penalty for kids under eighteen -- You know, at that time, the one other country in the world which was reported to be willing legally to execute people under eighteen was Kazakhstan. And when that fact was reported in the press, the ambassador of Kazakhstan wrote a letter to the *New York Times* saying, "Don't be silly, we don't do that." So the United States was the one country in the world that continued to execute people under eighteen. Are you really telling me that you think it is a serious regulation of the death penalty that the Supreme Court outlaws that, or outlaws the death penalty for mentally retarded people?

Let me put this thing in some realistic and serious perspective. The Supreme Court of the United States in *Gregg* in 1976 upheld the death penalty on the following assumptions. And I am now repeating what you said and it is exactly accurate. One, there were supposed to be rules requiring that eligibility for the death penalty be limited by the finding of something like an aggravating circumstance. Secondly, the defendant was supposed to be able to present mitigating evidence so that a jury could take account of mitigating factors in the defendant's character and background and the nature of the crime. That was why the separate penalty trial that you mentioned, after the defendant was convicted, was important. The defendant could present mitigating evidence.

Q: Probably the main event, right?

Amsterdam: Right. And then there was supposed to be "meaningful appellate review" of the death sentence. Now, watch what happened. As early as 1983, in a case called *Zant v. Stephens*, the Supreme Court of the United States held that if one aggravating circumstance was proved, the states could allow anything at all to be considered. There was no meaningful regulation if one aggravating circumstance was presented. Every other aggravating circumstance could be left undefined. The jury could, by whim or will, use any factor it wanted to impose the death sentence. So now the so-called circumscription, the regulation by narrowing of the death penalty, depends on an aggravating circumstance.

The Court then preceded, one-by-one, to hold that almost every aggravating circumstance, vague or indefinite as it might be, was enough so that, for example, in Idaho the Supreme Court upheld the aggravating circumstance of "utter disregard for human life." Now you tell me what murderer would not be found to have utter disregard for human life? The supreme court of the state had construed that aggravating circumstance as applicable to cold-blooded, pitiless killers. Now you tell me what killer is not cold-blooded and pitiless? The requirement of an aggravator as a precondition for eligibility became a sham, an absolute sham.

Let's look at mitigation. The Supreme Court of the United States has held that even though a jury is supposed to consider mitigation, the judge doesn't have to tell them that they must consider mitigation. In cases like, for example, one out of Virginia in 1998 called *Buchanan v. Angelone*, the judge would not tell the jury that they had to consider mitigating circumstances. Ironically, the Virginia Supreme Court had held that even though the

statute provided for mitigating circumstances, the Virginia Supreme Court held that the jury didn't have to be told about them because that would make the death penalty arbitrary under *Furman*, if a jury knew that it could consider mitigation. If you look at the jury charge given to the jury in [Douglas M., Jr.]Buchanan's case -- that the Supreme Court of the United States held constitutional -- it was an absolutely perfect match with jury charges before *Furman*. What had happened was that the Supreme Court had whittled away both the requirement of aggravation and the requirement of mitigation so that juries were getting instructions and deciding life and death in exactly the same way they had before *Furman* in 1972.

As early as 1984, the Supreme Court of the United States, in a case called *Pulley v. Harris* out of California, had eviscerated the requirement of appellate review. What happened was that although the statutes before the Court in 1976 had seemed to promise that the appellate courts would review the death sentences imposed by juries for proportionality, to assure that the death penalty was being applied even-handedly, the Supreme Court of the United States said, "We said that was a factor in upholding those statutes, but it was not an indispensable factor." The Supreme Court, one by one, pulled the rug out from under each and every one of the protections that it had insisted upon in the 1976 cases. At the same time, the Supreme Court of the United States eviscerated every other procedural protection.

For example, in *Lockhart v. McCree* [1986] we challenged the so-called death qualification of jurors, proving -- again, statistically -- that when you excluded from juries people who were opposed to the death penalty, you would create prosecution-prone juries. That is, juries who are more likely to believe police officers, believe the prosecution evidence, and less willing to apply the requirement of proof beyond a reasonable doubt with any strictness.

The Supreme Court of the United States said, "Maybe that's so, but the state still has the right to exclude jurors who have qualms about the death penalty, even if the result of that is to skew the trial in favor of the prosecution." In other words, "If we have to choose between the death penalty and a fair trial of the facts, we will chose the death penalty and throw over any requirement in fairness." In *McCleskey*, as you noted, "If we have to chose between throwing out the death penalty and accepting a racially discriminatory administration of the death penalty, we will accept the death penalty and to hell with racial equality.

You mentioned *Witherspoon v. Illinois*. The Supreme Court of the United States in 1985, in a case called *Wainwright v. Witt* [1985] out of Florida, limited the rule of *Witherspoon* so that trial judges pretty much can now decide that jurors are unable to apply the death penalty in virtually every case where a juror has any qualms against the death penalty.

So that, Myron, is what we're looking at. We're looking at the step-by-step, systematic evisceration of every procedural protection that surrounds the death penalty. We now have procedures which are no better, no more protective, no more likely to curb arbitrariness and discrimination, than we had before *Furman* in 1972. All we've got is an intensely hypocritical regime.

Q: At the Supreme Court?

Amsterdam: Yes.

Q: You have been pointing this out for some time. The Supreme Court, I assume, knows

how you feel about this. Do you ever find out whether they hear you? Not in court rooms, but through what you write or what you say, that you are that critical of them? Do you get any feedback on that?

Amsterdam: You mean with the Justices?

Q: Yes.

Amsterdam: Yes, that's why I don't appear before the Supreme Court any more. I've got a lot of enemies up there.

Q: When did you last appear before them?

Amsterdam: Gee, I don't really remember, Myron. It's been a long while. When it got to the point where I had been a very visible opponent of the nominations of --

Amsterdam: -- more than half of the Justices, I got out of the business of appearing in front of them. That was the point at which I became much more willing to state, in writing, what I thought of the Court, which didn't help either.

Q: You were vocal in opposing some Justices who got through?

Amsterdam: Yes.

Q: Like whom?

Amsterdam: I had been in the forefront of the opposition to people like Haynsworth and Carswell, so from that point on down. But they didn't get through.

Q: How about those who got through?

Amsterdam: Virtually all of the appointments under the Republican administrations, I was heavily, heavily involved in Rehnquist's Chief Justice nomination.

Q: How about [John G., Jr.] Roberts and [Samuel A., Jr.] Alito?

Amsterdam: Not so much. What happened was that both of those nominations sailed through really quickly and we really did not have a whole lot of time to mobilize.

Q: Right. And your name on a brief before the Supreme Court, is that the kiss of death? Is that a death penalty for the case?

Amsterdam: I don't appear on the brief in any case in the Supreme Court of the United States.

Q: Because?

Amsterdam: Because I believe that these are people who carry water. I think that they are resentful of folks who disagree with them and are publicly critical of their actions.

Q: In 1999 you accused the Supreme Court of atrocity. Atrocity! That's a pretty strong word. You said, "They're mightily pissed off and the way they act amounts to atrocity." Last fall, appearing before the Southern Center for Human Rights in October, you said what you said a moment ago, that "Since 1976, the Supreme Court has systematically dismantled every one of these supposed protections from *Furman*, diluting some to utter insipidity and disregarding others, until there is nothing left of them." In other words, you haven't been hiding under a bush about this. You have been saying this for some time.

Amsterdam: That's right. The two phenomena you described, Myron, go hand in hand. When you stop litigating in front of the Supreme Court openly, then you can openly criticize the Court. You cannot do the two things at the same time. The two were synergistic for me. When I got to the point when I knew I was in disfavor up there, I stopped litigating. That allowed me to open my mouth a lot more freely in public about what I thought of the Court than I could do when I was constantly appearing in front of the Court.

Q: Just parenthetically, do you ever think of what it might have been like to be a Justice yourself?

Amsterdam: No. I don't have a judicial temperament.

Q: Well, you have been described by responsible parties as the most brilliant lawyer of your generation, as the guiding genius of the LDF strategy for many years. Would you agree with that? The latter anyway?

Amsterdam: No. That's Paul Bunyan and Babe the Blue Ox. Great myths. Everybody likes

huge mythical figures.

Q: You never seriously entertained, though, the thought of certainly being an appellate judge, even on the Supreme Court?

Amsterdam: No. Judges are reactive figures and I've always thought what made lawyering fun and worth doing was being proactive. I don't think I could ever see myself as a judge. And that is both for important reasons and trivial ones. The important one simply is that I really want to make changes and judges' jobs are not to make changes. They are to listen to the arguments that lawyers give and to try to faithfully decide what the right legal results are. I'm not objective and dispassionate in that way. And secondly, judges have to listen to a lot of crap, a lot of trivia, and deal with issues in cases that are not important to them. They may be most interested in civil liberties but they've got to decide antitrust cases and tax cases. I would have been as impatient as Justice Douglas was with tax cases. He couldn't stand tax cases. People thought that he ruled in favor of the taxpayer all the time because he cared about those cases, but he didn't. He just didn't want to know anything about them and he assumed -- probably rightly -- that in any fight between the government and individuals about money, the government had the upper hand and he ought to vote for the individual.

That's what I would have done in most areas of the law. I would have been bored to death if I had to sit and listen to arguments about issues I didn't know anything about or care anything about.

Q: One thing you didn't mention, or maybe I didn't catch it quickly, what happened with

habeas corpus in terms of death penalty cases as far back as the 1980s? And would you factor into that the consequences of the Antiterrorism and Effective Death Penalty Act of 1996?

Amsterdam: That's a wonderful question, because what is going on with habeas corpus is that the death penalty litigation has spread a pall of disregard for fundamental human rights across the entire spectrum of criminal procedure issues. It was because we were so successful in using federal habeas corpus to prevent executions in death cases, and attorneys general and legislators became upset with that, that the writ of habeas corpus -- the traditional Anglo-American protection of the rights of the individual against injustice in the criminal process -- was systematically gutted by the Supreme Court of the United States in a number of decisions and by action outside of court on the part of individual Justices. Justice Powell chaired a commission that recommended restrictions on habeas. They were reasonable restrictions in some ways, although they were antithetical to the Anglo-American tradition of freedom embodied in The Great Writ. But they were not utterly obnoxious. When the Judicial Conference of the United States wanted to study those and consider whether it would recommend those to Congress, Chief Justice Rehnquist did an end run around the Judicial Conference and proposed legislation to Congress, which proceeded to curb habeas corpus. The Court had already imposed restrictions in its own right -- unwarranted, unprecedented, anti-historical restrictions on habeas.

By the way, Warren McCleskey's second appearance before the Supreme Court was the occasion of one of those restrictions. The Supreme Court of the United States held that repeated petitions for the writ of habeas corpus would not be entertained if some of the claims that were raised in a successor petition might have been raised earlier in the case.

Since the earliest days of habeas corpus in the British courts, that had never been the law. The Supreme Court made that up out of whole cloth. Why? Because we were so successful in stopping executions and the Court was so frustrated that they had given the green light to killing people in 1976 and nobody seemed to be taking the Court seriously. Executions still weren't going on. We were going into court filing habeas corpus petitions to get executions stayed. The Supreme Court of the United States got utterly, utterly frustrated, and the best way that they could curb our practices was to gut habeas corpus, which they did, in a series of decisions. Then Congress came along in 1996 and curbed habeas corpus still more. Since then there have been additional efforts which some of the legislators are still pushing for, so far not successful, to curb habeas corpus still more.

It's just one example of many changes in procedural law, for the worse, because space had to be made to administer the death penalty. Courts get very, very upset once they have crossed the Rubicon, once they have decided that they will allow the death penalty, and nobody seems to be taking them seriously. The Supreme Court of the United States gets very concerned about this, so they start to curb any constitutional rule that a defendant can invoke to say that there was error in his trial.

Q: What was the motivation of Congress, though? What was driving them? It was after the Oklahoma City bombing, wasn't it?

Amsterdam: Again, that's a pretty good example. It was right after the Oklahoma City bombing. The bombing played a major part. Again, the idea was, "We have got to get [Timothy James] McVeigh." We are looking at a regime in which if people are allowed to

bring repeated challenges to the constitutionality of the procedures in death-penalty cases, we may not be able to deal swift justice to Timothy McVeigh. So a vote against the Antiterrorism and Effective Death Penalty Act would have been a vote to approve bombing the Oklahoma City Court House and killing many, many people. Congress doesn't have the guts to stand up against that kind of a charge, and so people lined up and voted for restricting federal habeas.

Q: Subsequent to *McCleskey*, is it fair to describe what was done with regard to representing defendants as guerilla warfare in this country? This effort to hold up one case after another? Isn't the bottom line that if you're not going to win these cases, you're going to string them out as long as you can, and in fact, hasn't that happened?

Amsterdam: During the period of the moratorium, that was certainly a part of the strategy. In our judgment it was important to keep anybody from being executed not only because once we were in a case we had the ordinary obligations of a lawyer to the clients to do everything in their interest, but because we thought that it would make a vast difference if the Court saw its role as starting executions going again versus simply continuing them going. At that time there very definitely was a strategy that involved preventing executions. Notice, though, that that doesn't meet the description you just gave because that was *not* a strategy that said, "Even though we're bound to lose in the long run, we are going to stall it as long as possible." That was a strategy that said, "We're going to stall it as long as possible because it will increase the likelihood of our winning it in the long run." Which is a very, very, very different thing than the one you described.

Q: Right.

Amsterdam: I think that nowadays there is no nationwide strategy. Whenever one is in a particular case, of course you try to keep your client alive as long as possible. But it's not guerilla warfare in support of a cause. This is very much a product of what I was just describing to you a little while ago, which is that now there is a dedicated, devoted, and very capable defense bar in virtually every jurisdiction in the country, which gets good lawyers into these cases. Once a good lawyer is in the case, you are going to do everything you possibly can to keep your client alive as long as possible. Very often the reason for that, though, still doesn't meet your description, which is, "You know you're going to lose in the long run." You don't know you're going to lose in the long run. If you keep your client alive long enough, the law may very well change and you may win in the long run. There were a substantial number of people, for example, who would have been put to death after *Stanford v. Kentucky* [1989] who managed to stay alive because of the procedural litigation about other issues. When *Roper v. Simmons* [2005] came along sixteen years later and outlawed the death penalty for eighteen-year olds, those people were not executed.

Let me tell you about the cases of Earl Washington [Jr.] in Virginia and Anthony Porter in Illinois. Those were people who were kept alive for years by litigation about the procedures in their cases. DNA evidence then evolved to the point where it could be proved that they hadn't committed the crime. Earl Washington was not executed because of the one-after-another procedural delays that kept him alive until we got to the point where a governor of Virginia said, "There is enough dispute about whether this guy did it, because of new DNA evidence, that I'm going to commute his death sentence. I'm not going to pardon him, I'm not going to release him, but I'm going to commute his death sentence." And then a number of years after that, with *new* DNA evidence, a new governor takes a look at this and says,

"Now we know absolutely for sure that Earl Washington didn't commit this crime." So he was kept alive -- by what you call guerilla warfare -- long enough so that we find out he was innocent. They would have killed an innocent man but for this "guerilla warfare."

Tony Porter was in Illinois. Tony Porter's case resulted in Governor [George H.] Ryan commuting everybody on death row in Illinois. Porter was innocent, a guy who was kept alive for years by procedural litigation in his case until a journalism class decided to get interested in his case, investigated it, and turned up evidence that proved that he was innocent. He hadn't done the crime for which he was sentenced to death. So be careful about the way you use "guerilla warfare." If you are talking about the kind of thing that corporations use, they stall litigation for years whenever they're sued for damages and they take discovery to the point that they wear the plaintiffs out, not because they have a good case or a good defense, but because they simply want to exhaust the other side, that's not essentially what we're doing by any means. It never has been and it sure is not today.

Q: Not entirely in passing but at one point you mentioned the costs to the state of the death penalty. I mean, in the context of Alabama you were saying they don't have much money for anything like funding adequate defense counsel.

Amsterdam: Right.

Q: Just the other day in the *New York Times*, there was a piece about states wondering if it was time to repeal the death penalty in their own jurisdictions because it just costs too bloody much. And even when Governor [William "Bill" B., III] Richardson of New Mexico signed the bill with regard to repealing the death penalty just a couple of weeks ago, it

mentioned cost. Is that an important factor? Does that bring some hope at all?

Amsterdam: We have always been aware that that would be an important factor. In any rational choice of crime-control strategies, the death penalty has got to be at the bottom of your priority list.

And one reason why we have -- "we" being people who are opposed to death penalty -- have gotten increasing support from police administrators is that when they become aware that the question is, "Should we be putting money into street lights, putting money into more police officers on the beat, putting money into overtime for police officers when they're forced to work longer, or should we be putting it into capital punishment," unanimously, police chiefs understand that capital punishment has the least effect, if it has any, on controlling crime. All these other things, such as new police equipment, would be better uses of money.

What has happened in the last little while is that because of the economic turndown in the United States, the crisis in the economy that we are now facing, an issue that we have been raising for years has suddenly come to the forefront of the public agenda. For Governor Richardson and the New Mexico Legislature, the issue of cost was a relevant factor to be considered. It's not because this is a new phenomenon, or even a new awareness; it is because we are entering an era of scarcity where harder and harder choices have to be made and the question is, what can the government prune back? What things are extravagances and dysfunctional expenditures of government at a time when the United States economy and the economy of every state and municipality is hurting very, very badly?

Q: This, of course, assumes that the cost of putting someone to death, from beginning to end, from arrest to death, is in fact a lot more expensive than housing that person after conviction for life. Does anyone question that cost?

Amsterdam: Nobody who knows the data questions it. When you talk about housing people for life what you are talking about is adding incrementally to the population of huge prison facilities which exist whether or not you've got the death penalty. It is true that you're adding a few people who are in prison for a longer period of time. But it's not as though you are building a new prison for these people. The prisons exist and will continue to exist, and continue to cost what they cost, whether you have the death penalty or not. The difference is that at every stage of the case in a capital case, more money is expended. And very few of those cases end up with death sentences. What you are talking about, in effect, is a rocket program in which you have to launch a thousand missiles to land one on the moon. And you are paying for boosters and rockets and all the equipment for a thousand missiles. Every capital prosecution involves added costs -- added time in jury selection, added time in criminal defense, added time in prosecution, added time in in-court procedures. Those costs are incurred whether a death sentence actually results or not. Fewer than 10 percent of cases in which death is a possibility end up with death sentences. And so you are paying, for court costs, for capital prosecution -- much more expensive than non-capital prosecution -- for ten times the number of cases than those in which a death penalty is imposed.

Q: Did you say only 10 percent of those for which the death penalty could be given end up in death being given?

Amsterdam: Yes. Actually, that's probably a conservative estimate. It's probably lower than

that but we do not have exact figures.

Q: What happens to the other 90 percent? You're talking about post-conviction?

Amsterdam: No. I'm talking about from the time of indictment on down. What happens is they get convicted of lesser included offenses, they get convicted of a death-eligible crime but don't get the death penalty, and so forth. The death penalty is discretionary. That's the whole point about mandatory death penalties being unconstitutional.

Q: The fact is that today you have got more than 3,300 people on death row. Yet death sentences have been going down in recent years, the executions have been going down in recent years. But you still have got all these people sitting there on death row. What is going to happen to them?

And can you also comment on the phenomenon of life without parole as opposed to life, and what the background of that is? Whence cometh life without parole and has it been a real influence on the death penalty situation?

Amsterdam: It is a striking characteristic of the death penalty in this country that the country puts so many people on death row but is reluctant to execute them. For a long period of time that was because of our work in the moratorium strategy, but that's not true today. Today the reason for people spending many, many years on death row before they can be executed is a case of queasy conscience of everybody involved. Appellate courts sit on these cases forever. They can't make up their minds. Once post-convictions proceedings are filed, courts see errors in the cases, see problems in the cases, and wrestle with their souls

for long periods of time before they deny relief.

Under the body of Supreme Court law which dismantled and deregulated virtually all procedural protections, ultimately the courts very often end up approving a death sentence. But they have to wrestle with their souls to do it because they see that these are cases of injustice. Very often we do see a lot of hesitation on the part of judges, even those who ultimately will accept the death penalty. They are seeing a lot of cases that should not be death cases and they know it. So that is really what is holding things up. It really is a case of national bad conscience about death sentences. It is a lot easier to accept the death penalty on the books as a symbolic statement that America is still strong enough to insist on killing people. It is quite another thing to put individuals to death. And the country gets antsy and upset and troubled with each execution.

I'm going to now move to your life without parole question. Notice that it is an extraordinary exhibition, I think, of awareness at a subliminal level of all that is wrong with the death penalty that we agonize about it so much. We don't agonize about life without parole. We don't agonize about life sentences. We don't agonize about the fact that almost a third of young African American people in this country are in prison because of absurd drug laws and that sort of thing. You would think that a decent and civilized country would agonize about all of those things, but we don't. Yet we do agonize about the death penalty. That really does say that the death penalty is sort of out of bounds even among abominations.

LWOP -- that is, life without parole, LWOP, in the jargon -- is another barbarism. It is not quite as bad as the death penalty for several reasons but it's pretty damn bad. One of the

reasons why it is not quite as bad is that if somebody is in prison for life, and if evidence of innocence surfaces, they can be released. A number have been, just as a number of people have been released from death sentences because of innocence. But notice that usually evidence of innocence does not emerge a year or two after trial. Something has to change. What very often changes is an entire atmosphere or environment, so that witnesses who were hesitant to come forward at the time of the crime, or for many years thereafter, end up by coming forward.

I'll give you an example. There's a guy named Lloyd [E.] Schlup who was convicted of an in-prison murder in Missouri. At the time he was convicted there was a state of tension between African American and white inmates amounting to gang warfare inside the prison. And Lloyd Schlup was convicted -- he's white -- of killing an African American inmate. The actual killing was witnessed by a lot of people, including a lot of African American inmates. And they were unwilling at that point to come forward and tell their story, which would have exonerated Lloyd Schlup.

So Lloyd Schlup was convicted of murder and sentenced to death, even though at his trial a videotape was presented by the defense that showed him casually sauntering into the cafeteria at the prison for lunch a very short while after the killing and then showed other guys running in, in a frantic state. He apparently was already in the cafeteria or very close to it at the time of the killing. Despite that, the state prevailed because of the testimony of a couple of guards that there had been a period of time after the killing, before the alarm was rung, and that if he ran and somehow caught his breath and then sauntered into the cafeteria, he had time to get there. What happened, not after two years, not after four years, but after ten years, is that the atmosphere in the prison changed. The guards who testified

to that were no longer employed and they changed their testimony. The inmates who had seen it came around and were willing to say it wasn't Lloyd Schlup because there was no longer the same African American and white gang tension that there had been.

If somebody is put in prison for life and twelve years or fourteen years later these kinds of atmospherics change and the person turns out to be innocent, they can get released. If they're killed there is no way we can correct that. So death is worse than LWOP in that way. When you ask about the difference between death and LWOP, we know what LWOP is. It's pretty ugly. You put people in a long-term facility for years. They have no hope of a future. They spend the rest of their lives there. We don't know what killing a person is. The most extraordinary thing about the death penalty is that human beings send some other human being off into something that none of us understand. We don't know what death is. We don't know what the end of life is. We have no idea what we are doing when we kill somebody. So the death penalty is worse. Is LWOP bad? LWOP is still pretty atrocious.

Q: I think thirty-seven of the thirty-eight states that have the death penalty also have LWOP and apparently this is increasingly used. I remember that there was a time when, according to the Capital Jury Project, what guided jurors most in these penalty phases with regard to giving life or death was not some of the things you might think emerge from mitigating circumstances or the horrible youth of the defendant or anything biological. What the juries were most concerned about was the future dangerousness of the defendant.

If you give them life without parole you are sort of taking care of that, are you not? In a way it's getting you off the hook. You don't have to give death. If you are worried about their future dangerousness, give them life without parole. They can't get out. Isn't that a way for

a juror who is not strong one way or the other to deal with it?

Amsterdam: You're absolutely right that the fact that the alternative sentence to death is life without parole will cause some jurors to vote against death. That is why there was considerable litigation about whether the judge was required to charge the jury that the alternative was life without parole. For a while, although life without parole was the alternative in a number of states, the judge was not required, and indeed was forbidden, to tell the jury about the alternative. What the judge said was simply, "If you don't sentence the defendant to death, I will decide what the sentence is." And the Supreme Court of the United States has still not held that it is a matter of constitutional obligation for a judge in every case to tell the jury about the alternative. If the prosecutor makes an issue of future dangerousness and if LWOP is the only alternative, then it is constitutionally obligatory. But if the prosecutor simply hints at the idea that the guy is dangerous and does not make an overt and explicit argument about future dangerousness, the judge may not be required to charge the jury that the alternative is life. So the jury doesn't even know about the fact that if they don't sentence the defendants to death they will be imprisoned for life.

Q: Where did this life without parole come from? How long ago?

Amsterdam: I don't know how long ago the earliest life without parole statute came in. The extraordinary expansion of it to the extent that it has expanded today -- which is thirty-four death-penalty jurisdictions, once you take out New Jersey and New Mexico which have just abolished legislatively -- there are thirty-four out of the thirty-five which have LWOP as the alternative. But there is also LWOP in states that do not have the death penalty. Then there are these incredible three-strikes statutes which involve LWOP for minor crimes if a

person has been convicted of them three times. That escalation has been in the period between about 1989 or 1990 to the present. There has been a vast expansion of incarceration in every way. Not only has there been a proliferation of life without parole statutes, but minimum sentences of imprisonment have come in in a number of jurisdictions. Maximums have been extended, even when they're below life. Crazy things like -- within the ten years between 1990 and 2000, forty-five states changed the rules governing juvenile court to allow more young offenders to be sentenced as adults for the purpose of increasing the harshness of punishment. America is in a powerfully punitive mood, and LWOP is only one of a number of symptoms of that. And that's been since the end of the 1980s.

Q: Let me end today by just asking again, if there are 3,350 people on death row in this country today, what is apt to happen to them?

Life without parole

Amsterdam: Based on experience in the past, some significant number of them will end up by being executed, in a trickle. A lot of them will not be because once the judicial proceedings which are still going on in their cases have run their course, the death sentence will be set aside. Usually they will either be retried, convicted of a lesser included offense, or convicted of that offense again and not get death. In many cases they will plead out to a lesser included offense. What happened in Lloyd Schlup's case, even though he was innocent, was that when a new trial was ordered, the prosecution, the deal that they offered Lloyd Schlup was he would be sentenced to --

Amsterdam: -- time already served. So he pleaded. That is going to be the predictable fate of most people on death row.

There will also be some commutations. Commutation is becoming somewhat more of a factor than it used to be. You have got to keep in mind that governors, for the most part, do not exercise their clemency powers until after all court proceedings are ended. Because of the moratorium strategy and because for many years executions were being set aside by the courts in large numbers, the gubernatorial practice of clemency atrophied. I think that with the Antiterrorism and Effective Death Penalty Act and a number of other limitations on court review, we will see more commutations.

So a significant number of the people now on death row will probably not end up dead.

Q: I wonder whether it will come as a surprise to Americans to realize that not only is what you just now said most probably true, but that even in the past some 80 percent or more of people on death row are never executed. Their case go back and forth and back and forth and something else happens other than death. I don't know whether that would surprise most Americans.

Can we pick up tomorrow then?

Amsterdam: Sure.

Q: Thank you.

[END OF SESSION]

MJD

Session Four

Interviewee: Anthony G. Amsterdam

Date: April 9, 2009

Interviewer: Myron A. Farber

New York City, NY

Q: This is Myron Farber on April 9, 2009, continuing the interview with Anthony G. Amsterdam at New York University Law School for Columbia University's oral history project on the movement to end the death penalty. Tony, let me clarify something from the first session that I am not sure I got right. Your title here at NYU is both University Professor and Professor of Law?

Amsterdam: Right.

Q: A University Professor is what?

Amsterdam: It's a special appointment outside of any individual department that applies to people who teach in more than one discipline.

Q: As you do?

Amsterdam: Yes. It's something of an honorific.

Q: Do you teach actually outside the Law School here?

Amsterdam: I have, but the reason I have it is that within the Law School I teach subjects

that have to do with literature and the implication of drama and film for litigative advocacy.

Q: Just out of curiosity, do you ever read novels set in the world of the law?

Amsterdam: I read a lot of novels, but I don't read any that are set in the field of the law except Ric [N.] Patterson. Ric has worked with us in some of the training programs that we have for post-conviction lawyers. Most of the other stuff -- reality makes fiction pale, frankly.

Q: You mean you're not a devotee of John Grisham?

Amsterdam: No.

Q: Scott Turow?

Amsterdam: No.

Q: Okay. I want to return for a moment to a subject we discussed briefly yesterday. Last fall you were giving a talk at the Southern Center for Human Rights and you said the following

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The Supreme Court has consistently held that the constitutional standard for effective assistance of counsel is so lax that any law school graduate with an I.Q. twenty points higher than his blood alcohol level can pass it, and has repeatedly held that capital defendants represented by lawyers who knew no

law, investigated no facts, and had trouble recognizing their client at trial because they had only met him once before, had succeeded in forfeiting all of the client's legal and factual claims by failing to present and preserve them at trial.

I would like to ask you about this whole question of counsel and the quality of counsel. There are some people who say that these accusations about inadequate counsel are wildly exaggerated and entirely anecdotal. What do you think? Today? Maybe that was the case in the South in 1947, but is it true today?

Amsterdam: Well, I don't know what the quarrel -- that it is exaggerated, or that it is anecdotal -- means. Anything that happens in a single case is anecdotal in that sense. If "exaggerated" means that claims are being made that lawyers in every death penalty defense case are like that, that would be exaggerated. I would never have made such a claim.

What you read was a statement that the Supreme Court of the United States had rejected claims of ineffective assistance of counsel consistently in cases like that. That is true and lawyers in individual cases are performing like that today. They are forfeiting the rights of clients through incompetent performance. Am I saying that all lawyers who represent capital defendants are like that? Of course not. But what I'm saying is that it is an outrage when the Supreme Court of the United States is confronted with such cases every day today and upholds the performance of counsel or refuses to review the case.

Q: Although I think you indicated yesterday that one result of the efforts to litigate the

death penalty over the years has been a strengthened defense bar.

Amsterdam: Absolutely. There are extraordinarily capable lawyers in most states who do death penalty defense work today. On the other hand, judges in a number of states choose to appoint lawyers who are not remotely qualified to handle death cases. Sometimes, as in Texas, you have the belief that the reason they have done this is that lawyers who are unprepared, lazy, unassertive, make the judge's life easier. They make trials go very, very fast. They get people sent off to death row without a lot of work on the part of the judge. They very seldom occasion reversals of the judge's rulings because they don't object to objectionable rulings. Take Gary Graham's case as an example [*Graham v. Johnson*, 1999]. A lawyer named Ron [G.] Mock, who was chosen by the judge, I believe, for exactly this reason, forfeited all of Gary Graham's rights. Gary Graham was probably innocent. He certainly had all sorts of procedural violations in his case in Texas.

There were at least two lawyers in Texas who slept through large portions of their client's trials. In one case, Calvin [J.] Burdine [*Burdine v. Johnson*, 2001], the lawyer's name was Joe [F.] Cannon [*Burdine v. State of Texas*, 1996]. A three-judge panel of the Fifth Circuit, of the United States Court of Appeals, upheld his conviction although everybody admitted that the lawyer had slept through the trial, because the three-judge panel said, "We can't be sure that while he was sleeping anything important was going on."

Q: No, that can't be --

Amsterdam: Fortunately, through the Fifth Circuit en banc, we got that case set aside, 9 to 5. But the idea that five judges out of a fourteen-judge court were willing to uphold the

conviction and death sentence of somebody whose lawyer had slept through his trial is pretty shocking. Yet they were applying U.S. Supreme Court precedents in doing that.

These are not 1940s cases; these are 1990s cases. And it is still happening today.

Q: Let me return for a second to the matter of habeas corpus we were discussing yesterday. Again, I'm concerned that someone not altogether familiar with the law might be reading this or listening to this sometime in the future. Habeas corpus, sometimes known as the Great Writ, allows a defendant in a case to turn to the federal courts when he feels that his constitutional rights in the state courts have been abrogated, is that correct?

Amsterdam: That's correct.

Q: How did that aspect change, practically speaking?

Amsterdam: How did it change?

Q: How was it restricted, practically speaking, in recent years?

Amsterdam: First of all, the Supreme Court of the United States, without any congressional action, instituted several restrictions and curbs on the use of federal habeas corpus. They held, for example, that if certain claims had not been raised in the state court they could not be raised in federal habeas corpus.

Q: Was that a change?

Amsterdam: Yes, it was. The earlier rule laid down by the Earl Warren Court was that unless the defendant or his lawyer had "deliberately bypassed" the state courts -- in other words, sandbagged them by saving a claim for federal habeas -- the fact that the claim had not been presented in state court would not bar federal habeas consideration of the claim. The change was that the Burger Court held that the "deliberate bypass" standard was no longer applicable. If a lawyer simply failed to raise a claim for any reason or no reason, including negligence, the claim was barred in federal habeas. A similar rule was applied if you made the claim in the state court and then repeated it in federal habeas, if there was evidence that you sought to present in federal habeas that hadn't been presented to the state court. You not only had to exhaust the claim -- present the claim in the state court -- but you also had to present every piece of evidence that you had.

The Supreme Court also, for example, held that federal habeas courts would not entertain claims of illegal search and seizure, even though the Constitution of the United States was held to preclude the admission by the prosecution of evidence illegally obtained through a search and seizure by the police. That claim can no longer be raised on federal habeas corpus.

And so there were half a dozen changes. I could give you more illustrations but that is a basic sense. All of that was done by the Court itself, with no authorization of Congress.

Then Congress weighed in with the Antiterrorism and Effective Death Penalty Act of 1996, which imposes a whole lot of new restrictions. It imposes a statute of limitations. It says that you have to file a federal habeas corpus petition within twelve months of the time that

you are out of state court. The most destructive and debilitating of the rules of the new statute is that on federal habeas corpus, the federal courts no longer decide whether your federal claim is valid -- whether or not your constitutional rights have been violated. They now simply ask the question was the state court unreasonable in failing to apply the existing precedents of the Supreme Court of the United States to your claim. This means that you don't have a right to have your federal claims enforced in federal court; you only have a claim to have the federal judges decide whether the state judges were two standard deviations from the mean in their adjudication of the claim.

I mean, how would you like to have medical insurance that says that your doctor doesn't have to be right in diagnoses; all that has to happen is that if your doctor is not unreasonable, you should take the pills? That is what we've got in federal habeas corpus today. Habeas corpus has shrunk to a pygmy version of what it was traditionally.

Q: Can you recall to me a case, not too long ago, that barred the admissibility of new evidence of innocence?

Amsterdam: You are probably thinking of a case called *Herrera v. Collins* [1993] in which the Supreme Court of the United States held that you could not obtain federal habeas corpus relief on the ground that you were innocent, that "mere" innocence is not enough for relief. Or to put it in the simplest terms, the federal Constitution is not violated if a state executes an innocent person unless there is some procedural violation in the case, which itself offends some federal constitutional procedural rule. The fact that you are substantively innocent of a crime is no bar to your execution. In fairness, I should say that a one-judge majority of the Court left open the possibility that in a truly extreme case of

innocence -- I mean you don't have to be just innocent, you have got to be very, very innocent -- if the state courts and the state procedures provide no remedy at all, there might be a federal constitutional violation in executing you.

But, of course, that is an imaginary situation because it is clear that some of the judges contemplated that state executive clemency would be a procedure that would be available. It is technically available in every state, even though the governor will very often deny a commutation. Leaving the door open for federal habeas in that situation is probably a paper rule that has no practical significance.

Q: Does the name Joshua Marquis mean anything to you?

Amsterdam: Yes.

Q: I think he's the district attorney of Clatsop County, Oregon.

Amsterdam: That sounds right.

Q: In the compendium put together by Hugo Bedau, Marquis wrote, "To compare the capital punishment system of 1975 to that of the twenty-first century is akin to comparing the safety features of a 1975 Chrysler to the safety technology present in a new Honda Accord." He cites a study of the federal death penalty in the Clinton administration, according to him, " -- the results of which mirrors the national trend, which -- contrary to the conventional wisdom -- shows that all other things being equal, a white murderer is about twice as likely to be executed as a black murderer." A white murderer is about twice as

likely to be executed as a black murderer. Does that make sense to you?

Amsterdam: I would have to see his figures to know exactly. I would never criticize somebody's conclusion on empirical data without looking at the data.

Q: Right.

Amsterdam: But I will tell you that that makes no sense at all to me in terms of a prediction, based on the data I know about. I would qualify that only by saying that as you and I talked about yesterday, the fact that because the race-of-victim discrepancy is so great, it masks the race-of-defendant discrimination. It is not inconceivable to me that you could manipulate data to produce that result. One thing that is known is that almost all killings by African Americans are of other African Americans. Most homicides and most first-degree murders, capital murders, committed by African Americans are committed against African Americans. Since almost no one is sentenced to death for killing an African American, large numbers of African Americans who kill are not *practically* eligible for the death penalty. So you could end up with having twice as many whites sentenced to death as blacks and that's not indicative of non-discrimination. It is indicative of the fact that race-of-victim discrimination swamps race-of-defendant discrimination. So I would have to see Marquis' data in order to know what kind of games he is playing to produce that result.

Q: Let me raise a couple of the arguments that people who debate the death penalty regularly discuss, such as deterrence, subdivided sometimes into "specific deterrence" and "general deterrence." Are those terms, specific and general, ones that are thrown around with any regularity?

Amsterdam: Yes. I know what both of them mean, although the term “specific deterrence” is meaningless. What they are really talking about is incapacitation. Specific deterrence has to do with keeping the individual defendant from killing again. It is meaningless to talk about specific deterrence.

Q: And general deterrence as an argument for the death penalty? How do you respond to that?

Amsterdam: Myron, there is no single phenomenon in criminal justice that has been studied as extensively, through so many techniques and so many years, as that one. And the data is absolutely cold turkey that there is no general deterrent effect of capital punishment that exceeds that of life imprisonment. Every technique that could be used to study that phenomenon has been used to study it. Jurisdictions which have the death penalty have been compared with jurisdictions that do not. When a jurisdiction puts the death penalty in, the years before and the years after have been studied and compared to see whether the existence of capital punishment does reduce or drop the murder rate. When a state abolishes the death penalty, years before and years after are compared to determine the same thing. People have even studied the incidence of murder in the weeks or months before and after an execution to see whether there is any evidence at all that the execution rate or the existence of a death penalty on the books makes any difference in the world. All of the data is uniform in showing that it does not.

There have been a number of so-called econometric studies which have been done, originally starting with a guy named Isaac Ehrlich, who produced a new wave of empirical

data purporting to show that there was some deterrent effect. Every responsible scholar who has studied Ehrlich's work and the work of the people who followed Ehrlich has found that those studies are defective. They simply do not control the relevant variables. Most of the folks who follow Ehrlich are teachers in community colleges. I don't want to trash community colleges or the teachers in them but, frankly, these are not the highest-level researchers in their fields. They are trying to write in a field in which they can show some affirmative data to get themselves tenure. That is basically the quality of the few studies that have indicated any deterrence at all. And what these guys do is they control their variables in such a way as to show that if the New York Yankees were to put on the field a team of nine midgets and therefore shrink the strike zone, that they would get more walks and that the Yankees would win more ball games. They don't, however, take account of the fact that a midget might not be able to pitch, field, or hit the way the New York Yankees do. And so if you leave out the control variables and proceed to analyze only the size of the strike zone, you can prove -- as these guys do prove -- that the death penalty deters, that a four-foot-ten crew of Yankees would win the pennant every year. That's the quality of their research.

Q: Wasn't it Ehrlich himself, or some of those who followed, who argued that eight lives were saved by every execution?

Amsterdam: Some of these junk-science studies that I have told you about have actually put the figure at seventy-five. The original Ehrlich study indicated that eight or nine lives were saved for every execution. The Solicitor General of the United States rushed into Court in the *Gregg* case and its companion cases in 1976 with the first Ehrlich study. And that was showing eight or nine lives saved for every execution. Some of these subsequent junk-

science studies have shown figures up to seventy-five lives saved for every execution, simply by not controlling the relevant variable or by using the wrong proxies in their econometric measures.

Really, really capable people, like Jeff [A.] Fagan up at Columbia, John [J.] Donohue [III] at Yale and Richard [A.] Berk at the University of California at Los Angeles, have analyzed all of these studies. These are the top people in the field, Myron, and they have flunked every one of these studies as simply procedurally defective. If I use the wrong techniques, I can prove anything to you with data. You know, there are three kinds of datas, as they say -- lies, damned lies, and statistics. These are the statistical versions of damned lies.

Q: Was it in *Gregg* or *McCleskey* that the Supreme Court made some observations about the utility of the statistics that were being used with regard to race at the time?

Amsterdam: There was no discussion of this in the *Gregg* cases. In *McCleskey*, what the prevailing Powell opinion did was to say, "We accept, as given, *arguendo*, the conclusions of the Baldus studies." Having said that though, as I indicated, the Court actually misstates what the conclusions of the Baldus studies were. It describes what the Baldus studies show as "a *risk* of racial discrimination affecting death sentences." If you look at any individual case, of course all you can talk about is a risk because what statistics always do is to ask the percentage probability that in any individual case a phenomenon will occur. But if you ask the question over a hundred cases, statistics don't show a risk; they show what actually happens! That is the nature of statistics. So what the opinion did was, it purported not to criticize the Baldus studies; it accepted the methodology and purported to accept the conclusions; but then it simply misstated the conclusions.

Q: Did it give real credence to statistics as a tool in that area? Didn't the majority in *McCleskey* say that you had to demonstrate that the particular parties involved in a prosecution or the jury were, in fact, biased?

Amsterdam: Yes.

Q: Or judges?

Amsterdam: Yes, but Myron, you have to distinguish two things. You have to distinguish between what the Court said about the validity of statistics in order to prove a fact and what they said the facts had to be to bring a rule of law into operation. You are right in saying that the bottom line was that statistics are never going to prove a case of discrimination that violates the Equal Protection Clause or the Eighth Amendment. But that is not because the Court was saying statistics cannot prove the fact, it is because the Court was saying the fact does not trigger the legal rule. You cannot get your death sentence set aside on Equal Protection or Eighth Amendment grounds by proving statistically that discrimination is affecting death sentences, although by the same kind of statistical evidence you can get relief for employment discrimination or you can get your conviction set aside on the ground that blacks were excluded from your jury. The reason was not that the Court was saying that *factually* statistics were less able to prove discrimination in capital sentencing, but that the requirement for a constitutional violation in capital sentencing was different.

And that's the same thing I was telling you yesterday, which is that the Supreme Court has

twisted every rule of constitutional law and evidence in order to uphold the death penalty. What the Court said was that because sentencing decisions are so complex and a jury can take so many factors into account, we simply can never say that a jury was biased in an individual case, even though statistically the result of sentences across many cases shows racial bias. Now of course, that is absurd; it's bizarre. Did the Court really believe that hiring decisions by employers are not multi-factor decisions? Does the Court really believe that the decisions of jury commissioners to select people to serve on juries, when the standard for jury selection is whether citizens are upright and reputable in the community, that those are not multi-factor decisions? Did the Court really believe that when Baldus studied 230 variables and controlled them all, that he wasn't controlling for these factors? The decision is utter nonsense, but that is what the Court held.

Q: With respect to deterrence, if you had to take a guess at it, would you say that the belief in deterrence is popularly held?

Amsterdam: It used to be but I am not sure it is any more. The opinion polls on the death penalty have shown a number of changes. There used to be a very powerful general belief in the deterrent efficacy of the death penalty. The latest polls show considerably less confidence in that. What is even more interesting than that is that when the polls ask, "Do you believe that the death penalty deters? Do you support capital punishment?" and then go on to ask the question, "If you didn't believe that the death penalty deterred, would you continue to support capital punishment?" what they find is something fascinating. Many people who support the death penalty do say they believe in deterrence. They also say that they would continue to support it if they didn't. This is highly suggestive of the idea that belief in deterrence follows and is a product of support for the death penalty rather than

vice versa.

But to specifically answer your question, the level of confidence in general deterrence has fallen in the latest polls. People do not seem to be as persuaded of that as they used to be. The shift nowadays is that the reasons for supporting the death penalty seem to have to do more with something called just deserts, a kind of moral eye-for-an-eye quality.

Q: Retribution.

Amsterdam: Yes. Very much.

Q: Right.

Amsterdam: The utilitarian justifications for the death penalty seem to be less powerful today, quite possibly because there has been enough discussion, even in the public press, of how little empirical support there is for general deterrence. I think even somebody who has debated capital punishment in high school is aware of the fact that general deterrence arguments no longer have any support at all.

Q: Did the Supreme Court -- the majority, minority, anyone -- address the question of retribution in *Gregg*?

Amsterdam: Yes. The leading Stewart/Powell opinion explicitly addressed retribution and it said that while retribution is no longer an appealing idea, it continues to be a valid justification for punishment. The death penalty is a punishment chosen to express the

peculiar outrage of society against the most outrageous crimes. Human beings have an instinct for retribution so that if the law does not provide capital punishment, we will see lynchings. In short, the idea was that government is permitted to use the death penalty in order to beat the lynch mob to the rope.

Q: In your frequent and no-holds-barred criticisms of the Supreme Court in a variety of forums, I don't see you feel the need to single out particular Justices. You make the point that you're not talking about other Justices. For example, you get decisions that are 5 to 4 or 6 to 3. Does it trouble you at all that you don't go out of your way to say, "I'm not talking about Ruth Bader Ginsburg, or I'm not talking about this Justice, I'm talking about those Justices?"

Amsterdam: Well, I'm talking about the Court. I doubt that I have ever said that all Justices fit the same mold, that the nine Justices of the Supreme Court are subject to *x* or *y* criticism. What I talk about is the Court. The Court behaves as a whole. When I lose a case 5 to 4, my client is not five-ninths executed; my client is put to death 100 percent. I feel perfectly comfortable in criticizing the Supreme Court of the United States, who killed my client, as a court.

Q: Let me ask you about the argument that is put forth at times by people who support the death penalty, that it brings closure to families of victims and friends of victims. Do you buy that at all? Do we even know what that means?

Amsterdam: Yes, I do. Well, I mean, I know verbally what the term means. There are two organizations of murder-victims survivors -- Murder Victims' Families for Reconciliation

[MVFR] and Murder Victims' Families for Human Rights [MVFHR] -- which are staunchly abolitionist. Those organizations have been extremely effective in debunking the myth of closure. Even without them, I would always feel extremely uncomfortable in trying to either predict or morally judge the reactions of another human being. Somebody whose child or wife or parent has been murdered will feel an intense natural human reaction to that tragedy. It will not only be sorrow, it will not only be grief; it will be rage and anger. I cannot morally judge, and wouldn't purport to judge, whether those kinds of reactions are sound or unsound, healthy or unhealthy. But for government to base a punishment on the notion that closure, that the healing of those wounds, is governmental business -- that I can criticize.

The organizations that I just described to you do not believe that closure is a real phenomenon. They talk with a lot of members of families of people who have been murdered, including people whose murderers have been executed. And they have asked whether they feel better as a result of the execution, whether that has effected closure, whether they feel satisfied. And they are fairly convinced that it is a rare phenomenon that the survivors feel any better, that there is, in fact, emotional closure at all. What you do get, and I certainly will not dispute either the genuineness or the fact of it, is that prior to the execution of the killer of their loved one, many family members will express the feelings that they want that person killed and they believe that that will bring them closure. I have seen almost no reports, anywhere, *after* the execution where the victim's survivor has said, "I feel better," or "I have experienced closure." And the MVFR members and the members of the community of Murder Victims' Families for Human Rights, who talk to a lot of these people, dispute that it ever is the case that they have run across folks who feel this way.

Think about the McVeigh situation. The federal government actually brought the survivors into a huge room and they watched the execution on TV. Everybody was waiting, waiting, waiting, for McVeigh to --

Amsterdam: -- say something, explain what he had done, create some epiphany by satisfying people with an explanation. And of course, he went mute to his death. Read the press after that. People were interviewed and these folks who were waiting for closure and waiting for something, felt hollow. They felt betrayed. They wanted something to come out of this experience and it didn't. Again, I'm not going to judge anybody's emotions, let alone somebody who is going through the horrible tragedy of having a loved one murdered. But the idea that you can justify the death penalty as a governmental policy because of some theory that it closes out the pain of victims, that's silly.

Q: Although I'm not sure that whatever McVeigh might have said, if he had said anything, would have made a difference.

Amsterdam: That's exactly right. But the point is that they were, if anything, worse off.

Q: Let me ask you, one of the lawyers for Tim McVeigh was a man named Richard [H.] Burr, a lawyer in Texas. Burr is a proponent of something called restorative justice. Have you ever heard of that?

Amsterdam: Yes.

Q: What is your understanding of what that means? As I understand it, it relates to lawyers

and/or other representatives of the defendants seeking contact with the families and representatives of the victims. The net result would be perhaps the victims' families would then feel that they didn't really have to push for the death penalty. They would learn something from the defendant, through his representatives, of interest or use to them, matters relating to the actual death or the location of the body, that would be restoring to them, that they wouldn't get, perhaps, through a regular trial. Is that your understanding of what it is about?

Amsterdam: That is certainly a part of what Dick is saying, that is that if some effort is made to bring together the survivors of a murder victim -- the family members who have been agonized by that crime -- and the defendant or the family of the defendant and the lawyer's role or the social worker's role is simply as an intermediary, not as an independent player -- that some kind of coming together, some kind of healing, can occur. I think what Dick is pointing out is that this is a possible phenomenon that will work in some cases, not that it would work in every case or that it is some sort of mandatory procedure that you would be going through.

I take it you know about the experience in South Africa after the revolution, when the Afrikaner apartheid regime was replaced by a government of black Africans. At the time that the apartheid regime was overthrown, the black population in South Africa vastly outnumbered the whites. Had they turned on the whites, as was feared, there could have been slaughter in retribution for the violent repressive behavior of police and government officials over many years in torturing and killing the leaders and, in many cases, followers of the revolutionary movements. Instead of putting into effect criminal trials and punishment of the police and the government leaders who had been responsible for horrible

violence and for genocide against blacks, what was put into effect was a tribunal very much like the institution that Dick Burr was talking about. People who had been police officers and abused black Africans were brought in and they admitted what they had done, explained what they had done, and they talked with the survivors of the people they had killed and sometimes the very people they had mutilated. And there was a coming together, a forgiving, and a healing of the community.

Interestingly enough, when the new Constitutional Court of South Africa struck down the death penalty -- the very first decision that court rendered after the revolution in South Africa -- a number of the justices referred to a tribal tradition. The word *ubuntu* is expressive of the idea of forgiveness. It expresses the idea that when a horrible crime has been committed, both the person who commits it and the person scarred by it are hurt. They are hurt in different ways, but they are hurt. And they can heal their hurts by coming together. Now, can they do that all the time? Is that the stuff of human nature that is invariable? I doubt it. But it's an ideal and sometimes it works. And all Dick Burr is saying is that should be a part of justice, too. Precluding that by some kind of automatic rigid rule that says, "We kill them and we assume that when we kill them that is going to bring closure," undersells the capacity of human beings for compassion, forgiveness, for true healing. I think that's what Dick is saying.

Q: Let me turn again to this business about aggravating and mitigating factors in the penalty phase of a capital case. Yesterday you cited instances after *Gregg* by the Supreme Court, where the aggravating factors were absurd. Almost anything could qualify as an aggravating factor. Were you saying that there were statutes that were approved and maybe statutes that are on the books today where there are no mitigating factors?

Amsterdam: What I said was that there were no statutory mitigating factors. The Georgia statute, which was approved in *Gregg* itself, does not provide for any mitigating circumstances. That doesn't mean that the defendant is not permitted to present evidence in mitigation. The *Lockett* case imposes a constitutional requirement that the defendant be allowed to present mitigating circumstances, but what it does not do is require a list of mitigating circumstances.

Q: *That* statute. But if you look --

Amsterdam: That statute. But many of them do.

Q: Many of them do?

A: Yes. The majority of the new statutes do, by far.

Q: Is a key reason for having these mitigating factors to humanize, so to speak, the defendant before the jury?

Amsterdam: I've got to ask the question, Myron, what you mean by the "key" reason. If you want a practical political answer to that question, the real reason is very simple. It is that after *Furman* struck down the old statutes, Dorothy Beasley and some other people looked around to see what they could do to enact new statutes. They found the ALI Model Penal Code. The ALI Model Penal Code had aggravating circumstances and mitigating circumstances. They went out and enacted it. The Supreme Court of the United States

upheld the statutes and everybody else copycatted the statutes. So what's the reason? The reason is they wanted a death penalty and, like most lawyers, you go out and pick up the first tool. If some court says you can use it, you go on blindly using it.

Q: That's what I mean. When you get to the point of a penalty phase and the defendant has the right of using mitigation evidence, whether it's in the statute or not, is the idea running through the lawyer's mind typically, "I have got to show the jury through this mitigation testimony that this defendant is a human being and does not deserve to die?"

Amsterdam: Yes. I would embellish that just a little bit. I think that the basic point of the lawyers who are presenting mitigation evidence is to bring home to the jury that the defendant, like any other human being, is not the worst *thing* that the defendant has ever done. That is, every human being is more than his or her worst act. If you think, or if I think, or if any juror thinks about the most evil and horrible thing that they individually have ever done and then they ask, "Is that me? Is that the whole of me? Does that sum me up? Is it fair to say I, as a human being, am that worst thing I ever did, and no more than that and no other than that," I think most of us would answer the question, "No." And what the defense lawyers are trying to do is to build on that point and to create a picture of what the defendant really is like. There is no single kind of formula for mitigation. Mitigation is sometimes testimony about the good things that a defendant who killed or committed a murder has done. The people that they have helped, the people for whom they have done good things and to whom they have been kind and generous. Sometimes it is testimony about bad things that happened to the defendant -- an abused childhood, things that explain how and why the defendant became what it is that the defendant is. So there is no single formula.

Q: Is there any way at all to estimate how successful that is?

Amsterdam: Do you mean estimate it statistically? Of course there are many, many, many cases in which the experience in an individual case has demonstrated that it is extremely effective. Take, for example, an article in the *New York Times Magazine* section by Alex Kotlowitz a number of years ago based on intensive interviews with the jurors in a capital trial who were death-qualified. It mentions that at the end of the guilt phase of that trial, those jurors were ready to kill the defendant.

I should note, by the way, that this was a trial in which a clerk in a convenience store was killed in a robbery. The entire episode was caught on a surveillance camera. The defense showed the tape at the very beginning of the trial. Defense, not the prosecution, showed it. And it was horrible. It was horrifying, like a lot of these surveillance tapes which are shocking to watch. It understandably put the jury in the mood to kill this guy right off.

And then the story of his life was slowly unfolded through numerous witnesses who described what his background had been, how his parents had treated him, how he grew up. The rays of hope that appeared and were disappointed as he was raised and shuffled from foster home to foster home. And at the end of the trial these jurors gave him life and not death. And in the *New York Times Magazine* section these twelve jurors are shown on the front cover, and also in a photograph at the beginning of the Kotlowitz story, standing there looking like grim death. You look at these folks -- they were not only death-qualified but they entered that trial with blood in their eye, ready to kill a person, and after they saw that videotape they were only more ready to kill him. But the defense use of mitigation

testimony turned that case around and they ended up voting for life. I use that case in illustration only because it's very high visibility. All you have to do is get the *Magazine* and read it. But there are lots of cases like that.

Q: Right. Let me mention two cases that are high profile right now. In Atlanta a man had killed four people --

Amsterdam: [Brian G.] Nichols.

Q: -- during a courthouse escape, including the judge.

Amsterdam: Right.

Q: He was found guilty last November of murder, dozens of other counts in this rampage in 2005, and yet he was given life without parole.

Amsterdam: Right.

Q: Now, this happened in front of I don't know how many people. I'm talking about surveillance tapes. A judge was killed. And yet there was a divided jury on death. Does death in this country always have to be unanimous?

Amsterdam: No, it does not. In some states a judge can override a unanimous jury verdict for life. There is no single procedure in the states. In most American jurisdictions which have a death penalty today, the jury does have to be unanimous for death. But in some

jurisdictions, a death sentence can be returned by less than a unanimous jury.

There was, by the way, considerable talk in Georgia after the *Nichols* verdict [*State of Georgia v. Brian Nichols*, 2008] about changing Georgia's law to make it easier to impose a death penalty.

Q: Georgia law which currently does require unanimity.

Amsterdam: Yes. That is why the *Brian Nichols* verdict came back with less than death. My understanding is that the jury was divided in that case.

Q: Have you any intelligence on whether the jury was influenced by any mitigating testimony with regard to Nichols or whether simply you had some people on that jury who just didn't believe in the death penalty?

Amsterdam: I can be pretty confident on that one. I can be pretty confident that we did not have people on that jury who simply didn't believe in the death penalty. I thought you were going to ask whether one could be confident that what turned the corner was mitigating circumstance versus some other specific factor in the case. I can't tell that and I don't think anybody can. The jurors were not required to explain how they came out. But I think it's absolutely clear from the long *voir dire* examination that preceded that case that those jurors were death-qualified. There was nobody on that jury who would simply reject the death penalty because they didn't believe in ever imposing a death sentence.

I don't know the other case you were going to talk about, but [Zacarias] Moussaoui is

another [*United States v. Moussaoui*, 2006]. The federal jury came back with no death in Moussaoui's case. They were death-qualified, and the reason they came back probably had to do with mitigating circumstances.

Q: The other case that I wanted to ask whether you had followed was this case in New Hampshire where a young man was recently sentenced to death for killing a Manchester, New Hampshire, police officer in 2006 [*State of New Hampshire v. Michael Addison*]. This was the first death sentence in fifty years in New Hampshire.

Amsterdam: Right.

Q: As was noted in the press repeatedly, in New Hampshire during this period, a millionaire who had hired hit men to kill someone had gotten only a life sentence just a year or two earlier than this case. How do you read that? I mean, fifty years, no death penalty. Even in the case of this man who hired a hit man! And yet Michael Addison is sentenced to death.

Amsterdam: Michael Addison, by the way, is African American, but it does not prove anything because in New Hampshire -- one death sentence in fifty years. How do you analyze that statistically? Do you say, as Justice Stewart said in *Furman*, it's like being hit by lightning? It's that. It's probably discrimination but it's improvable discrimination because, one death sentence in fifty years, you have got no control variables. You have got no way at all of saying that the factor that brought about that result was race. I may suspect it, and you may suspect it, but we don't know.

Q: Right.

Amsterdam: What I make of it is precisely that because of the completely discretionary nature of the decisions that are made -- the prosecutor's decision to seek a death sentence, the juror's decision to impose one -- that the death penalty is available for use for a wide variety of crimes for which it is not in fact imposed. And when some individual is singled out to be sentenced to death, it almost always is because some particular fluke, some crazy quilt factor in the case produced the result. It's always because the defendant is unappealing, unappetizing to the jury. You know that the jury is going to come back with death when you look jurors in the eye and they are looking at the defendant like something on a microscope slide, like a germ. Any time they are seeing the defendant as another human being in the court, you're not going to get a death sentence.

What is it that in a particular case produces that evil eye look that the jury is taking at the defendant? It is certainly sometimes race. It is certainly sometimes the physically unattractive quality of the defendant, the threatening appearance of the defendant. It's quite extraordinary. We have a number of cases in which, in juror interviews, the jurors have said that the reason that they were moved to give a death sentence was that the defendant appeared to be cold-blooded and spaced out in the court room, like he didn't care, like he didn't give a damn. And very often the prosecutor, in closing argument, will point that out and argue it. Fascinating -- because there are cases of people who are actually on medication throughout the trial to control emotional responses. Jurors don't think about this stuff, but it's true. These are defendants who learned from their childhood on, both because they were taught -- very often it was beat into them by their fathers -- that boys don't cry, that you don't express emotion, that the way to be a man is to sit there stolidly

and not show anything. So these guys are being what they were taught to be and, literally, are being put to death because of their demeanor.

I don't know enough about the *Addison* case to know how that guy looked in the courtroom, but that could be it. We don't know what to make of it. What we know is that we have created an institution in which human life can be taken for any reason that strikes the jurors as a good reason to do it. We have it papered over with aggravating circumstances and mitigating circumstances, but the jurors can treat virtually any crime as aggravated because of the vague nature of the aggravating circumstances and they can, having heard the mitigation, ignore it. Or very often they won't hear it because they don't understand what's going on.

Q: Relevant to that, in 1991, the Supreme Court approved the use of victim impact testimony at the penalty phase.

Amsterdam: Correct.

Q: Has that victim impact testimony, as far as you know, had an impact?

Amsterdam: Yes. Again, we never know -- well, never is too strong. We seldom know what has impacted a particular juror. The reason I qualified my never is some jurors will be interviewed after a trial, will talk with investigators, and we can learn what affected them. But most of the time we don't know that. On the other hand, I think it is safe to say that victim impact testimony has made a difference.

Q: This is testimony by survivors of the victims?

Amsterdam: That's correct. What happens is that a wife of a victim will come in and testify how much she's been bereaved, how much she's been deprived, how much she loved her husband who is lost. She will describe how her child is fatherless and weeping.

Q: She can show pictures and that kind of thing, no?

Amsterdam: Yes, absolutely. Prosecutors put this on because they firmly believe it makes a difference. I think that we can trust their judgment that it probably does. Defense lawyers who have sat through it and watched jurors react emotionally to it -- cry, physically look as though they're shocked, appalled, stunned -- are feeling that this is having an impact. That is about the most one can say without a systematic poll of jurors. Between the prosecutors behaving as though they thought this made a difference and defense lawyers looking at jurors and seeing their reaction to it, probably it is making a big difference.

Q: Since 1977, I think all but one state has adopted lethal injection as a means of executing. Does the manner of death mean anything in terms of how one should feel about the death penalty? I suspect there are some people who think, "Well, lethal injection, they just put a needle in somebody. It's better than gassing. It's better than the electric chair."

Amsterdam: I think that the popular sense of lethal injection is probably as you just described. I think that the medicalization of the process of putting somebody to death has made it more acceptable to a lot of folks who may have been a bit queasy about it. Most people do think that, "I get my flu shot. My kid gets his flu shot. This is the same thing."

That is a gross misimpression. The elaborate apparatus is created to kill people by lethal injection while at the same time keeping the identity of the executioner a secret. The people who push the plunger are not even in the same room and you have these plastic tubes going five, ten, fifteen feet across the room, connected to the defendant who is stuck with a catheter. Nobody is watching the injection site, so that the chemicals can go into the muscle instead of into the vein. It's a horrible scene. The idea that it's like getting a flu shot -- only the wildest of imagination could draw that parallel. But that is the general image.

Q: And the Supreme Court last year upheld the use of lethal injection, did it not?

Amsterdam: Yes. It left open the possibility that under some circumstances lethal injection or other modes of execution could be found to be cruel and unusual punishment. But for the most part it gave its blessing to the present modes of execution.

By the way, a result that also ignores reality. The Supreme Court did not, I believe, give fair attention to that record and -- if you will forgive me again, Myron -- I'm talking about the Court. I will not identify individual Justices. But there were two cases up in the Supreme Court of the United States at the same time, one coming up from Missouri, which had a much, much, much, much, much better record as to what was really going on in lethal injections, and the case that the Supreme Court of the United States actually took. The Supreme Court of the United States granted review in the *Baze* [*Baze v. Rees*, 2008] case that it actually decided, despite the concurrent pendency in the Court of an application for review of the Missouri case. When review was granted in *Baze*, the lawyers in the Missouri case made a motion that the Court should grant review in the Missouri case as well so that the records in both cases were before the Court and the Court would be fully informed as to

what really happens in lethal injections -- what the dangers and risks are, what the agonizing pain that will be suffered if the so-called three-drug cocktail used in both states goes awry, as it can go awry very, very badly.

And the Supreme Court of the United States denied that motion. They did not accept the Missouri case for consideration at the same time as *Baze*. They then decided in *Baze*, on the basis of the record there, that they could not say that agonizing death had been proved. This is outright, sheer, outrageous hypocrisy. This is having two cases in front of you -- one in which you have got a full record, the other in which you have got a partial, lousy record -- and choosing deliberately to decide the case which has the lousy record and then saying "not proved." I mean, that's an outrage. That, Myron, is a shocking outrage. It's a travesty of justice for any court to do that. The Court, in effect, closed its eyes to the facts and then said you haven't proved the facts. It wasn't because the facts weren't proved; it is because the Court chose the weaker of two records, knowing exactly what it was doing.

Q: California has the largest death row in this country at the moment. There is a moratorium on executions in California, if I understand correctly, that relates to the subject of lethal injection. Isn't that correct?

Amsterdam: Right.

Q: What is the problem as you understand it?

Amsterdam: The Supreme Court of the United States, in upholding lethal injection in the *Baze* case, left open the possibility that certain defects in the procedure -- lack of safeguards

and that sort of thing -- could make the lethal injection process cruel and unusual punishment. You have got to understand that the process, as presently prescribed, is three drugs. The first drug is supposed to render the person unconscious. The second one, in effect, is a muscle paralyzer and keeps any voluntary muscular movement from occurring. And then the third drug stops the heart. The third drug literally burns through the veins and if the person is not unconscious as a result of the first drug, it would be agonizing death to be put to death by the third drug.

You see the problem. If the first drug does not make the person unconscious, the second drug stops the person from showing any discomfort because no muscular movement can be made. It is, in effect, a chemical strait jacket. So what happens is that if the first drug is insufficient to make the person unconscious, the second drug renders them incapable of showing agony. What will happen is that they will be literally tortured to death by the third drug and nobody will see it. The California procedure and the procedure in a number of other jurisdictions allows this to happen. In the Missouri case, by the way, testimony by the doctor who administered the lethal injections in Missouri showed that he was dyslexic. He admitted that he frequently got his drug mixtures wrong. That is the kind of record the Supreme Court refused to look at.

Q: Did you say doctor? I thought the AMA [American Medical Association] position was that doctors should not be involved in it.

Amsterdam: It is. But that is neither binding on individual doctors nor is it the law in any particular state. That is the position of the professional organization, the American Medical Association. Lawyers violate the ethical rules of the legal profession sometimes and some

doctors violate the ethical canons of the medical profession.

Q: But you were saying in California --

Amsterdam: In California they have a number of very risky aspects to their procedure. Long before the case went to the Supreme Court -- the *Baze* case and the Missouri case -- a California evidentiary hearing had convinced a federal district judge, who was very skeptical, who was no crying towel by any means, that the California procedure had very, very serious defects. For example, a person on a gurney waiting to die will suffer agonizing pain if that first injection does not make him unconscious. And evidence was presented that in a significant number of executions the person was not unconscious -- there were signs of consciousness that could be observed for long periods of time after the injection of the first drug. The judge heard all this and said "this is problematic, this is a serious problem," and ordered that executions stop until the procedures were corrected so that the risk of this was averted.

It can be averted, by the way. The three-drug cocktail which is being used in the United States today is forbidden in euthanasia of animals. It used to be permitted but it is now unethical for vets to put your dog to sleep by the procedures that are being used to kill human beings.

Q: I think another aspect in the California case -- I don't know if it is present elsewhere -- was that the people who actually were administering this three-drug cocktail, were prison officials, ill-trained to do such a thing. The whole procedure at fault, according to the defense, was more than just what you're saying with broader problems.

But in any case, let me turn to the subject of innocence. In recent years, with the use of DNA, it has been definitively established that some people who are imprisoned for life, or perhaps even some facing death, have been found to be innocent and have been released from prison. But you will hear some people, like Federal Judge Paul [G.] Cassell in Utah, say that there isn't any proof. There are some people who are innocent who get caught up and convicted. I think even Justice Scalia might have taken this view. But Judge Cassell will say something like, "No one has proved that anyone who was innocent has actually been put to death."

This whole question of innocence, is it a powerful force today that can be used to effect the continuation of the death penalty here in the United States?

Amsterdam: There is every indication, based on poll data and on --

Amsterdam: -- the general direction of juries in imposing death sentences in the last fifteen years, that innocence is an issue that concerns people. The specter, the possibility of executing an innocent person, is an argument that bothers some people. The subject of innocence was mentioned by the Governor of Maryland, for example, very recently in announcing that he was supportive of an abolition bill in Maryland. In the legislative debates in New Jersey that preceded New Jersey's abolition of the death penalty, innocence was an issue that was mentioned. In New Mexico it was mentioned. So we have every reason to believe that it is an issue that affects people. And it affects, if you will, the acceptability of the death penalty.

The point is fairly intuitively obvious. Putting people in prison for life without parole is a very serious problem when somebody is innocent. Even though it is a horrible injustice to put somebody in prison for life and then discover fifteen years or twenty years later that you have taken fifteen or twenty years of their life for a crime they did not commit, at least they are still alive and you can rectify the injustice by releasing them at that point. You can't if they're dead.

And when people like Cassell say that the reason why they are not impressed with the execution of the innocent is that it has never been proved -- first of all, Scalia did write an opinion saying exactly that same thing. Ironically, because he hadn't read the morning newspaper, that was the very same morning that the *Chicago Tribune* story came out about an innocent man who had been executed in Texas. But the reason why it has not been "proved," that innocent men have been executed is that there is no incentive, as a practical matter, once somebody's been executed, for anybody to go out and investigate the case. For the most part it comes up serendipitously that you discover they were innocent.

For example, you and I were talking the other day about the Tony Porter case in Illinois.

Q: Right.

Amsterdam: It was because a journalism class went out fortuitously and investigated that case that Tony Porter, who had been kept alive only by litigation about procedural and other issues, turned out to be proven innocent. Everybody acknowledges today that Tony Porter did not do the crime for which he was on death row. Now you know and I know, and anybody who's sensible enough to think twice knows, that but for the incredible fluke of a

journalism class having settled on that case to investigate, he would be dead. Now can you really imagine that if lives are being saved because of those flukes, if innocence is being discovered because of accidents like that, that there will not be cases in which people are put to death because those accidents *don't* happen? It's bizarre; it's amazing. Somebody like Cassell must have enough brains to know that he's making a specious, spurious argument.

Another reason why nobody has come up with proof that people who have been executed were innocent is that in a few cases where efforts had been made to investigate DNA-evidence testing after somebody was executed, the prosecutors have resisted to the death DNA testing in those cases. In Virginia an assistant district attorney actually got up in court, in a suit by a ministry seeking evidence of DNA testing in a case where somebody had been executed. The Virginia assistant district attorney got up in court and said, "Your Honor, you should not turn over this evidence for investigation because if it were ever shown that Virginia had executed an innocent man, we would be pilloried, we would be criticized, we would be anathema." So the judge denied it.

And then a guy like Cassell gets up and says it has never been proved.

Q: But innocence, as an issue, was around long before there was DNA testing. Surmised anyway, by people that this man was --

Amsterdam: Oh more than surmised. There were several books that chronicled the stories of innocent people who had been executed, including one by Jerome Frank, many, many years ago.

Q: Yes.

Amsterdam: Jerome and Barbara Frank.

Q: But the DNA, that's --

Amsterdam: But, Myron, you have got to understand the power of myth. Science in our era has displaced God as a subject of belief, credence, and worship. And people honestly believe that DNA can prove 100 percent something. DNA evidence, if you look at it with an understanding of what is really going on, is simply our present best science. And one always takes one's present best science to be true. In the days when criminal trials consisted of trial by battle, the people believed that the guy who fell off the horse first was guilty of the crime.

Q: Oh, really?

Amsterdam: They were sure because God was the one who had told them that knocking that guy off the horse proved he was guilty. In the days when they tried criminals by dunking them in the river and seeing whether they floated or sank, the people believed passionately that they were 100 percent sure they got it right. And then we went to eye-witness testimony, and then we went to fingerprint testimony. By the way, what the DNA evidence has shown us is that we can no longer be confident about fingerprint testimony. And I guarantee you that twenty years from now we will be as skeptical about DNA evidence as we are now skeptical about fingerprint evidence. All that DNA should prove to people who think seriously about the history of evidence is that no procedure by which

human beings attempt to find the truth is infallible. Our science is always just accurate by the standards of now, and always more accurate than the science that preceded it. People today have this incredible faith in DNA, which is maybe better than trial by battle, maybe better than dunking people in rivers, but the idea that it makes us God, that it's infallible, that 100 percent we know the truth? That's bull. Utter bull.

Q: Back in 1977 you gave an address to the Commonwealth Club of California that was later reprinted in the *Stanford Law Review*. This was within a year after *Gregg*. And it contains a sentence that I find striking. This is you speaking, "This does not mean that we should do away with capital punishment. Some evils like war are occasionally necessary and perhaps capital punishment is one of them."

When we were speaking earlier, you explained to me how you had come into this whole question of the death penalty because of the race issue and your original link with the Legal Defense Fund. It was only later that you became an abolitionist. Could you comment on what you said back in 1977 and why you said it then? I assume you, of course, believed it then. Do you believe that today, or has this work made you a hard and fast abolitionist?

Amsterdam: Not a principled abolitionist in the sense that I would oppose a possibility of taking human life as a punishment for crime under certain circumstances. But as a practical matter I am an abolitionist because I cannot imagine a regime that would meet the conditions that would, for me, be acceptable as the precondition before life could be taken. What has made me a practical abolitionist is the experience of being involved in trials, reading records, investigating facts, looking at statistics, designing and interpreting statistical studies, which show how the death penalty is actually administered. There is

absolutely no doubt in my mind that the death penalty in the United States today is being administered through regimes that simply cannot fairly, even-handedly, accurately, reliably, make the decision to take human life. At the moment, I am disposed to think it may be beyond the power of human beings to design such a system, but I'm not doctrinaire enough to be 100 percent convinced of that. As a practical matter, it doesn't matter because the things that trouble me about the administration of capital punishment are probably coextensive with the human administration of it.

I guess really what I am saying is that I would trust God to run a system of capital punishment, but I have not seen any human beings that I would trust to run one.

Q: Can you give me any example of what would be okay for the state to kill for capital punishment? When you were arguing before the justices in *Gregg*, didn't Chief Justice Burger say to you, "Show me an example where the state can put somebody to death?" And that was a problem for you then, was it?

Amsterdam: I think my answer to that, at that point, if I'm remembering correctly, was a technical legal one. My answer was, "The Court does not have to cross the bridge of things like military capital punishment, because I do think that war situations may be somewhat different than situations when there is no war." Between you and me and the tape -- because I don't mind saying this -- I don't think war situations are very different. What we have learned, if anything, from the so-called war on terror of the Bush administration is that some of the very same evils that affect civilian administration of the death penalty can also affect administration of the death penalty in situations where there is something like war or the war on terror.

But to come back specifically to your question, if you are asking me a crime for which the death penalty could be imposed by some government that presently exists in the world? No, I can't give you one that I would find acceptable. But what I'm saying is that I'm not prepared to say that it is beyond the power of human society to create a government and an administration of justice which could be trusted to take human life.

Q: Okay, but there are plenty of people in this abolition movement, regarding the death penalty, who would differ with that. Right?

Amsterdam: Yes.

Q: That would say never, never, never.

Amsterdam: Absolutely. And I respect their views just as I respect the views of some people who believe in the death penalty.

Q: Right. But is there, as far as you can determine, really something that can be called an abolitionist movement, an anti-death penalty movement? I'm not talking about individuals; I'm talking about a movement. No one with a brain would say we didn't have a civil rights movement. No one with a brain would say that we didn't have a feminist movement. Is there an anti-death penalty movement, really?

Amsterdam: Yes. I think that the fact that within two years, two jurisdictions, New Jersey and New Mexico, have abolished the death penalty -- the fact that there is presently

pending, in Maryland, legislation to abolish the death penalty, with the support of the governor -- the fact that in the last session of the Maryland Legislature, the House of Representatives did pass it -- the fact that in a couple of other states one house of the legislature has passed the death penalty, all this suggests that the efforts of specific abolitionist organizations -- are you distinguishing between organizations and movements? You know very well that there are *organizations* that are against the death penalty. There is more than one national organization with chapters in a variety of states. So you can't be asking whether there's a movement in that sense. There is organization. The question is whether that organization is galvanizing action in any significant way. And there is absolutely no doubt that that organization was very effective in the New Jersey and New Mexico campaigns. It is very active now in Maryland. So if your definition of a movement is concerted groups of people with an aim and a goal to achieve a social objective, and are they getting there, are they succeeding in some places, then yes, there very definitely is an abolitionist movement.

Q: And are you specifically referring to the National Coalition to Abolish the Death Penalty?

Amsterdam: Yes.

Q: You wrote in 2007 that, "In the long run the Supreme Court will probably deliver the constitutional *coup de grace* to capital punishment after enough other agents in the criminal process and organs of government -- prosecutors and juries, state courts and legislatures -- have become so disaffected with the death penalty that death sentences turn vanishingly rare." And they are turning rarer. But can you envision, on the horizon, the Supreme Court knocking out the death penalty?

Amsterdam: In a short horizon, no. What you just read is an accurate statement of my long-range prediction. But that is a pretty unremarkable observation that I have made there. It amounts to a platitude. When the criminal justice organs of this country have repudiated the death penalty -- have voted with their feet sufficiently so that the Supreme Court of the United States perceives that the penalty has been generally rejected -- the Court will deliver the *coup de grace*. No question about it. I don't think anybody doubts that. The question is how much --

Q: I'm sorry. When the Court perceives?

Amsterdam: When the Court perceives that a sufficiently wide spectrum of American actors -- legislators, prosecutors, juries who populate the criminal justice system have lined up against the death penalty, no longer accept it as a functioning part of the system -- the Court will knock it out, constitutionally.

Q: You're saying the Court is going to follow the public, not the Court is just going to do it just because the Constitution should be interpreted that way?

Amsterdam: Yes. You know, Myron, the old Mister Dooley cartoon aphorisms about the Court following th' illiction returns? The Supreme Court of the United States follows the public. The Supreme Court of the United States is not a very courageous or imaginative organization. They very frequently follow public opinion. They certainly don't undertake to lead it.

Q: The first and the last time in which the opponents of the death penalty outnumbered the supporters of the death penalty, according to the polls, and especially the Gallup poll, was in 1966. Even today, according to a Gallup poll in November 2008, they say, "The majority of Americans continue to support the use of the death penalty as the punishment for murder. Most Americans, 71 percent, also say the death penalty is used either about the right amount or not often enough."

Now, if you are saying the Supreme Court is going to follow these other elements of society which you mentioned and the public at large, we are going to be waiting a long time for them to overturn the death penalty, is that correct?

Amsterdam: Well, if you're asking my prediction, my prediction is it will be a long time. If you're asking whether the 71 percent figure you just read has any part in why I predict it's a long time, it does not. You have got to give me the exact questions that were asked by the Gallup poll and I will tell you what those figures mean. The way you read them, the Gallup poll figures are meaningless. I say that because the Gallup poll has asked for many years the question, "Do you support the death penalty or do you not?" And on that kind of a vote, we've been up to 82 percent in support of the death penalty, which is where it was about fourteen, fifteen years ago. It is now down to 71 percent.

Q: Well, actually it's down to 64 percent. 71 percent was a broader statement.

Amsterdam: As soon as you ask the question of if you had to choose between the death penalty and life without parole, what do you do?

Q: That's right.

Amsterdam: And as soon as you ask the question, "Suppose you believe that life without parole really meant life without parole," and you didn't accept the popular notion -- which is bizarre -- that people who are sentenced to life without parole in fact get out in seven years. If you get all that stuff out of the way, and then in addition if you ask the question, "Suppose that you had to choose between these two things -- taking somebody who committed murder, putting them in prison for the rest of their lives and never letting them out, guaranteeing that they would not get back out, and taking the wages that they earn as prison laborers and giving them to the support of the victims of crime, would you prefer that or would you prefer the death penalty?" The numbers drop from 71 percent to a minority.

Q: In fact, when they asked that, they found that 48 percent preferred the situation that you just described versus 47 percent for the death penalty.

Amsterdam: That's right. That is why I say your 71 percent figure is pretty hollow.

Q: I hear you but a simple question that would argue in favor of the death penalty for a person convicted of murder, from 2002, it was 68 percent in favor and 26 percent not in favor. In 2008 it was 64 percent in favor and 30 percent not in favor. That raw figure there doesn't deal with the situation that you just described a moment ago. But what I was really trying to get at is that the Supreme Court overturning the death penalty is not around the corner.

Amsterdam: You're absolutely right. It's not around the corner.

Q: So that when some people say that it's on a teetering foundation -- including James [R.] Acker, who you have a lot of respect for don't you?

Amsterdam: Yes.

Q: A few years ago James Acker wrote, "At the turn of the twenty-first century, changes both external and intrinsic to the punishment enterprise have left the death penalty on a teetering foundation tilting precariously toward demise."

Amsterdam: I think you have to understand what Jim is saying. As late as 1990, I think that it would have been inconceivable that you would see two states in two successive years legislatively abolish the death penalty. And that follows New York's failure legislatively to reinstate it, after the state's high court knocked it out. You really have three abolitions within three years. That would have been inconceivable as long ago as 1990. So there is a real movement and real momentum in this direction.

His image of teeter is actually a pretty good image because things are tipping. If teeter is taken to mean that, the thing is going to collapse in ten minutes, that the entire institution is going to come apart at the seams in a few years, I disagree, with all respect for Jim, if that's what he means. I don't think that's what he means, though. I think what he is saying is we are seeing a beginning of a movement that will become an avalanche. It will be progressively broader and faster as time passes. But it's not going to happen in a minute; it's not going to happen in a couple of years.

Q: Tony, apart from the death penalty, you are teaching; there is the death penalty work that you have done as a lawyer; you are also involved with other aspects of human rights, are you not?

Amsterdam: Yes.

Q: Can you mention a little bit of that to me? What it is that you have done over the years, or what you're doing currently? I know one person involved in human rights litigation who describes you as an oracle. It's a quote -- as an oracle! "You can sit around the table and fifty of us can say something then he" -- meaning you, Tony -- "speaks and that is the end of the argument."

Amsterdam: That's because I don't stop speaking, Myron, as you've discovered.

Q: [Laughter.]

Amsterdam: I don't shut up, so other people go to sleep. Naturally that will be the end of the argument.

Q: No, but give me some idea, if you can, of the other kinds of human rights work you have done or are doing.

Amsterdam: Pretty much the whole spectrum. I was involved with the NAACP Legal Defense Fund throughout pretty much the whole range of its docket, from school

desegregation cases to challenges to vagrancy statutes and things of that sort. The sort of low-level criminal machinery that was used to oppress civil rights demonstrators throughout the South. We mounted a campaign against that, very much like the campaign against the death penalty, and managed in state after state to knock out vagrancy statutes, disorderly conduct statutes, disturbing the peace statutes. These were the statutes under which Martin Luther King and other demonstration leaders and their followers were arrested in droves in the early days of the Civil Rights Movement.

We knocked out some statutes where we even made friends of local majority populations. For example, in Mississippi and Alabama, so many demonstrators were being convicted by justices of the peace who were paid under a fee system -- that is, they got two dollars for everybody they convicted -- that we filed law suits challenging that system. And those were the only law suits that were popular throughout the state. We would walk into a courtroom and the clerks would take a look at this complaint and they would say, "Wow!" because they had just been fined for traffic offenses by the municipal, "Great!" We actually had one or two popular lawsuits. But for the most part they have been law suits to restrict or terminate practices that were oppressive of minority groups.

A lot of litigation against police practices, the early litigation against stop and frisk. I don't know whether you remember the Zebra case in San Francisco. Police were dragnet stopping every African American male between twenty-six and forty because they had the notion that the so-called Zebra killer fit that "description." Litigation against that kind of police practice. Not just specific procedures like stop and frisk, but dragnets of that sort. A lot of litigation about straight-out criminal procedure issues, search and seizure. We filed an amicus brief in *Miranda*, the United States Supreme Court case requiring warnings before

an incriminating statement or confession could be taken from a defendant. So, a lot of criminal procedure stuff.

I have been involved with the whole Guantanamo litigation over the excessive Bush administration reaction to the threat of terrorism -- incarceration of suspected terrorists at the naval base at Guantanamo Bay, an island beyond the law, as the Bush administration thought it.

Q: With Guantanamo and what some people regard as the infringement of constitutional rights by the Bush administration, do you work independently?

Amsterdam: No, I was a member of a rather large team of lawyers who were involved in the first round of litigation about Guantanamo to get to the Supreme Court of the United States -- two cases, *Rasul* [*Rasul v. Bush*, 2004] and *Al Odah* [*Al Odah v. United States*, 2004] --and through several consecutive rounds, including the last major case, *Boumediene* [*Boumediene v. Bush*, 2008] -- decided by the Supreme Court of the United States. I have worked as a member of the substantial team of lawyers involved in each case. Not the same team each time but with a large overlapping population.

Q: You could have been an art historian.

Amsterdam: I should have been an art historian, Myron.

Q: Looking back on it, at least from the vantage of today, has all this work been satisfying? As satisfying as you could have imagined a career? It probably wasn't what you originally

anticipated, but as it has worked out, a good life for you?

Amsterdam: I can't give you an "A" on that. I'm not sure I can give you a "B+". You mentioned when we were talking about Jack Greenberg that Jack's feeling about his life is one of considerable satisfaction. And thank God for that because he deserves it. Jack was described in one article I read, I think once, as the line strikes me, "A satisfied mind." And I think that was kind of a side-bar title or something like that. And it struck me and it stuck with me for years because that is a fair description of Jack as I know him. He expresses that. He really does feel that the way he spent his life has been rewarding.

I can't say that. I think that I might not have been any more satisfied with any other life that I had led but to describe this one as satisfying would be a mistake. There have been some good moments. There have been some cases where I felt that, as a result of a lot of hard work, we inched society a little closer to fairness, humanity, decency, civilization. It has almost always been one step forward, two steps backward, though. Society is a huge, inertial lump, for the most part. Lawyers can do relatively little to effect significant movement.

The trouble with working in the fields in which I work is that your aspiration outruns your ability by a substantial margin, and so satisfaction is a hard commodity to come by.

Q: Well, there's always tomorrow. Thank you, Tony Amsterdam, and with that we will close this interview until such time as we might decide to reopen it. Is that good enough for you?

Amsterdam: Good.

Q: Thank you so much.

Amsterdam: Thank you.

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