Legal Defense Fund Oral History Project

John (Jack) Boger

Interviewed by Seth Kotch

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This transcript has been reviewed by Jack Boger, the Southern Oral History Program, and LDF. It has been lightly edited, in consultation with Jack Boger, for readability and clarity. Additions and corrections appear in both brackets and footnotes. If viewing corresponding video footage, please refer to this transcript for corrected information.

[START OF INTERVIEW]

Seth Kotch: This is Seth Kotch from the Southern Oral History Program at the University of North Carolina at Chapel Hill. It is February 24th, 2023, and I am here in Chapel Hill, North Carolina with John Charles Boger at John Boger's home in Chapel Hill to conduct an interview for the LDF Oral History Project. Thank you very much for being here and sharing your story.

John [Jack] Boger: It's a pleasure.

SK: I'd like to ask you to introduce yourself.

JB: Sure. I'm Jack Boger, John Charles Boger. And from 1978 to 1990, I was a Staff Attorney with the NAACP Legal Defense Fund. Came to Chapel Hill thereafter and became a law professor, teaching in some of those areas, and eventually became the Dean from 2006 to 2015. Retired in 2017 and have tried to stay active in some things and in touch with LDF, but it's a pleasure to do this.

SK: Well great, we're done. That was good.

JB: [laughter] Okay.

SK: So, you were born in Concord, North Carolina, not far from Charlotte?

JB: Right.

SK: Can you talk a little bit about your upbringing?

JB: Sure. I was born in 1946. I was a twin, first baby boomer generation, and grew up in the 1950s there. It was a little mill town of 16,000 people. My parents, my mother was a Roosevelt Democrat, and really more progressive, to use a contemporary term, than a lot of her friends were. And my father was a small businessman. And looking back on it, one thing that has struck me is that, for a variety of reasons, sort of personal and religious, I was

always sort of puzzled by the racial divide that I noticed growing up. You know, you read that everyone was supposed to be equal, child of God, and the rest, and yet it was clear during that time of rigid segregation that Black folks didn't come downstairs in the movie theaters. They stood in separate parts of the bus stations. They weren't working in any of the stores, et cetera. [00:02:00] And from the time I was a sixth, seventh, eighth grader, that was something I was troubled by. Then, of course, the Civil Rights Movement began to come visible in 1956, [19]57, [19]58. And while it was not covered very well in the local papers, the *Charlotte Observer* and Raleigh papers were clear that they didn't want to highlight the sit-in movements and any of the rest, it was hard for a 10, 11, 12-year-old to avoid that. And I do remember, looking back, that in the ninth grade, I wrote a couple of essays. We had to write an essay once every two or three weeks and one on the status of the Black caddies at the local golf club and how poorly they were treated. How harshly, and inhumanely. And another little vignette that was terrible, fourth-rate Flannery O'Connor, about some Black woman on a bus, hearing that her son, who had been in a demonstration, had been killed and et cetera. And at the time, I didn't think much about it one way or another, but it's clear that was part of a developing sense that these issues mattered to me. I got to Duke as an undergraduate in 1964, and that first fall, Martin Luther King came, shortly after he had received the Nobel Prize and gave a standing-room-only talk about justice and civil rights. It was terribly moving to many of the students, including myself. And then, my senior year, I was in, I was a religion major, thinking about Divinity School. And I was at a conference with a German theologian, on the "theology of hope," Jürgen Moltmann, and somebody came down the aisle and said, "Dr. King has just been shot in Memphis." And the notion of the theology of hope sort of receded pretty quickly. I went and conferred with a lot of my

friends and eventually we started an effort to try to get the president of the university to acknowledge the role of all of us in this. [00:04:03] And maybe to address the issues of the non-academic workers, who were being paid sub-minimum wages. To make a long story short, that turned into a 1,600 person four-day sit-in on the Quad, nonviolent, that ultimately had the trustees all fly down from where they were and initially say, "We're going to throw all those kids out of school," [laughter] only to learn that, 1,600 out of [Duke's] 4,000 students, they decided they weren't going to throw us all out. But that was obviously a racial justice sort of thing. I went on to Divinity School at Yale, thought I might become a minister or something, but then I realized what I really wanted to do was civil rights work.

SK: That realization, just pulling you back towards when you were a middle schooler, a high schooler, you presumably could have avoided a lot of what you were seeing as a white kid who could move comfortably in your space. Were you getting messages from your parents, from your church, that you should be paying attention to what was going on around you?

JB: My parents were certainly sympathetic to what was happening, but there was not any kind of conversations about "you really should," — when I would speak, they would say, "You're right about that," and a couple of ministers in our church, our youth ministers, were also supportive, but it was a Methodist Church in this little town and while it was not overtly racially hostile, it was not uncomfortable in the highly segregated world. One of the things I realized later, much later, is that I went all the way through grade school and middle school and high school and college, and I almost never encountered a single Black student. There were none in the high school or below. And I think Duke, when I went in [19]64, had 12 students out of 1,000. And that was up from five the year before, up from zero the year

before that. [00:06:00] So, it was a very segregated world, and I didn't have a lot of interracial contacts, because I didn't know many Black folk except a couple of yard men, you know, and cooks, and people that were domestics or workers.

SK: Right. And that's part of maybe North Carolina's gradualism and desegregation that we would see in other elements at other places that you may have litigated at some point in the future. Just trying to push the needle just slightly faster in one direction. So, you did end up getting a Master's in Divinity at Yale?

JB: Right.

SK: Can you talk a little bit about what inspired that other than [inaudible]?

JB: Well, I was principally drawn by issues of social ethics. That would have been true, both as an undergraduate and when I came there. There was a professor, Jim Gustafson, who taught my very first class, it was about abortion, I remember. I had never thought about it at all, and he was the first person that brought that up. But issues of racial justice there— but it was a time when there was so much going on in the area of both racial justice and also, of course, the anti-Vietnam issues which were very, very prominent. And at one point, I left school to go try to lead the Southern Regional Office of the Vietnam Moratorium [laughter], only to find out there was nobody in Atlanta with whom to — I remember going to Washington. They said, "Find the leaders in Georgia who are against the war and start to work with them." And I found one woman named Linda Jenness who was a perennial communist [Socialist Worker] candidate for Governor, and that was it. [laughter] So, I came back to school because there really wasn't anybody with whom to build a movement. But so, all those issues pulled me. And I had not ever thought about law as an undergraduate. I knew some people that had. But then I saw what lawyers were able to do,

and the changes they were able to make after the Civil Rights Act of [19]64 and what was following, I thought, "I'd really like to do that," so I came to Chapel Hill where there were some wonderful people, like Dan Pollitt and others who were sensitive to those issues. [00:08:13] And took all those courses, but ironically at the time I graduated in 1974, it was such an unusual period. All the top students at Harvard and Yale and Columbia and Stanford wanted to do either poverty work or civil rights work. So instead of going to the big firms in New York or Washington, they were all fighting over these jobs in civil rights, and I didn't have a chance. So, what I did as an alternative when I graduated, was to go to a firm in New York City, Paul Weiss, Rifkind, Wharton & Garrison, which had a reputation as being the "progressive Democratic" law firm, which is, of course, a contradiction in terms. It was still a Wall Street firm [laughter], represent — in fact, my first client was a financier who had embezzled $30, $40 million, back when that was a lot of money, was living in the Cayman Islands or something and we were trying to defend him. On the other hand, they were perfectly happy to see me get involved with some cases in Harlem and low-income tenants and that sort of thing.

SK: And you clerked for Justice Samuel Silverman?

JB: It was an odd thing, yeah. They had had a guy who had been their head of litigation department, who had gone down to the New York State appellate courts to prepare [as a state judge] for going on the U.S. Court of Appeals for the Second Circuit. Bobby Kennedy had said, "When I'm President, Sam, I'm going to make you an Appellate Judge." Only Bobby Kennedy, of course, never survived, and Silverman decided he liked being a judge, and so he would take somebody from Paul Weiss, who, quote, "had never clerked but should have." And I got picked one year as the person who had never clerked but should

have and spent some time working with him in the system, which was very valuable to see, from a judge's point of view, how law is made.

SK: [00:10:05] And did that clerkship contribute to your sense that you wanted to do the kind of work that you were headed towards?

JB: Less the clerkship. The luckiest thing professionally that ever happened in my life is that one day I was found by the assigning partner, who assigned cases, only to be working about 45 hours the couple of previous weeks. And he said, "You need another case, and we've got a pro-bono case from the NAACP Legal Defense Fund. It's a death penalty case." It was in 1976, in July, and the [Supreme] Court had just decided five cases, *Gregg* in Georgia and *Proffitt* in Florida, and so forth. One of them was *Jurek* in Texas, and they said, "We need help with volunteer counsel from a big firm. Would you be interested?" And [laughter] it was the easiest thing I ever had to say, I didn't want to tell [Paul, Weiss], "If I can, I would love to leave you and go work for the Legal Defense Fund," [laughter] but I said, "Yes, I'd love to do that." And so I jumped right in, and there was a wonderful partner, Jay Topkis, who was himself an ACLU [American Civil Liberties Union], LDF, sort of person on the side, so he was a wonderful [corporate] litigator as a private matter, but his heart was definitely in those kinds of [public interest] cases. So, he let me spend four or five hundred hours going down to Texas, and meeting Jurek and trying to figure out what kind of issues there were. And then I worked with the people at LDF, who were happy to have some earnest young lawyer who was interested to augment their work at a time when all of a sudden, things had exploded. They had held everything together, hoping the Supreme Court would declare the death penalty unconstitutional, and instead the Court had said, "It's all

right to go forward [with capital prosecutions] in Georgia and Florida and Texas." And the dam had burst and they [LDF] needed help from the private firms to man the cases.

SK: Can you talk a little bit about that moment in death penalty jurisprudence, what things were looking like, because I think the progression that you were talking about might be moving from *Furman*, in 1972, when it appeared that the door was open, either to a blanket ban or to reinstatement? And then *Gregg*, which appears to have shown right through the door.

JB: [00:12:16] Right. I've written about that before and a lot of other people have too. Mike Meltsner wrote a wonderful book from the LDF perspective about the effort. The Legal Defense Fund began really in the early 1960s to ask the question whether they wanted to get involved in opposition to capital punishment, principally because of its adverse effect on Black men in rape cases. And the Supreme Court had indeed invited a brief to the court at that time. Arthur Goldberg had issued an opinion, a denial of certiorari that sort of said, "Maybe there's an issue about whether the death penalty is unconstitutional." Alan Dershowitz was his [law] clerk at that point and the two of them had invited it. And Jack Greenberg, who ran the LDF, at that point said, "We might ought to think about getting involved in this area." To make a long story short, they [LDF] got a few people involved, and began to think about it, and said, "You know, a lot of the issues against capital punishment for African Americans aren't just about rape, although there's a huge disparity in the death sentencing of Black men who have raped white women and others, but murder as well. And once we think about that, it's true not only about Black defendants, but white defendants as well. And there are a couple of other major issues about the way capital punishment is administered that have constitutional dimensions. And maybe we ought to

oppose the whole process of capital punishment." Instrumental to all that was a guy [law professor] named Anthony Amsterdam, Tony Amsterdam, who had been at Penn, later went to Stanford, and then came ultimately to NYU [New York University], who was one of the three or four certifiable geniuses that anybody I have ever talked to, me included, had seen. [00:13:59] And Tony threw himself into that effort and he became almost like a silent partner to all the LDF work. And they helped build a series of cases that led up to what was going to be the ultimate challenge: the death penalty was cruel and unusual because it was so capricious and arbitrary and infrequent. And the [Supreme] Court initially looked like they weren't going to accept that, and then ultimately did accept it in 1971. And it was argued, and the case came down, *Furman v. Georgia*, in which the court, in what was then the longest decision it had ever written, nine different opinions, five-to-four said the death penalty, as it is currently operating, is unconstitutional. Amsterdam had, in fact, argued the case brilliantly. One of the things he had said, though, is, "The death penalty is really an atavism. It's running of its own accord, and if you stop it, if you turn the lights back off, it won't revive." Which was, it turns out, very false. Once the death penalty was struck down, the states in the South particularly said, "What can we do to revise the structures of death penalty sentencing to make it constitutional?" And they made some adjustments. And then LDF came in and said, "Well, let's attack those [revised] statutes in Georgia and Florida and Texas and Louisiana." And one other one, it slips my mind immediately. And so, that second wave of major litigation came back to the Court in 1975, and then in 1976, a plurality of the Court said, "You know, we think the death penalty can be administered constitutionally and the infirmities that we'd found in *Furman* appear to have been corrected. And we're not going to assume that they [those constitutional flaws] have not

been successfully eliminated from the penalty." And so, they let the big states of Georgia, Florida, and Texas go forward, and other states got the signal, "You too, if you're like those statutes, you too, can go forward."

SK: [00:16:16] I know that one effort North Carolina made, and maybe some other southern states as well —

JB: North Carolina was the other state.

SK: — was to restore a mandatory death penalty upon conviction. That was not the route that was ultimately deemed appropriate. Can you talk a little bit about how the landscape was remade in order to create a death penalty that could be constitutional?

JB: Well, there were several [constitutional] critiques to be made by LDF. One of them was that many of the statutes, pre-*Furman,* didn't have a separate penalty phase. The issue of whether the person was guilty of the crime, and whether they deserved death was all decided in the same jury room, at the same time. The [LDF] argument that was made was that sometimes, the issues that bear critically on whether somebody should receive a death sentence would actually hurt them on the question of guilt or innocence. They did it, but they were acting under a compulsion. They did it, but their IQ is so low, or they've been so abused as a child, that they have irrational — so you [defense attorneys] were forced to a choice, "Do I tell the full truth, almost assuring the conviction, as a lawyer, in order to try to help on the sentencing phase?" And so, the argument is that you [courts] should bifurcate that out and have one [proceeding] to decide guilt or innocence. And then, only if the person is [found] guilty, do you raise the question of what's the sentence. A second big issue is whether the jury needs guidance on that question. And the arguments were made, you know, there's some factors, what they call aggravate a homicide. I mean, every homicide is

terrible, but some homicides have qualities in them — you've done it out of deliberate cruelty, you've done it as part of a felony, kidnapping somebody and then killing them, or you've killed a police officer or vulnerable old person, et cetera. And then there are other qualities that are mitigating. [00:18:01] The defendant in fact was the subject of child abuse, himself or herself, or they were actually the lookout and somebody else actually fired the weapon, et cetera. So, the argument was made is that the jurors needed to be instructed by the law, by the judge, on aggravating and mitigating factors to help guide their determination. And some, the states that did that were the ones that the Supreme Court approved. As you say, North Carolina took another approach. They said, "We won't have any arbitrariness if everybody who is convicted of murder automatically gets the death penalty." But the Court looked at that and said, you know, there's some homicides that truly are of much less culpability and severity. Two people arguing over whether the Eagles or the Kansas City Royals or the Chiefs should win the Super Bowl, are both drunk, et cetera. A different kind of question if one slams the other one with a glass and the person dies than if somebody plans the murder of their wife for insurance purposes, for example. So, saying all of those people deserve death was considered not individualized enough a determination. So, anyway, all of those issues had been addressed by the Court in 1976. And to some extent, I think some of the prosecutors and attorneys general thought, "Well, this is now all over." But it really wasn't all over. One of the reasons for that, God bless him, is Amsterdam, because apparently, and this was right before I got there a year or two later. After *Gregg*, and *Proffitt*, and *Jurek* were decided, Tony went off in a period of about 10 days, meditating, and came back with a document that was 8.5 by 14 [inches] times 50 or 60 pages. [00:19:57] It was later called the "Ridiculous Memo," because every page would

have something at the top saying "Here's the name of the claim." "Death Qualification." "What's the Nature of the Claim?" "The claim is that the people who are being selected for sitting on death trials should not be 'death qualified,' should not be asked about the reason of their sentence while they're still deciding guilt or innocence." "What's the constitutional basis?" "What are the citations and quotes within the Supreme Court's own jurisprudence that suggests that that's right?" "What are the major issues that need to be raised?" "In the other direction, what's the evidence it would need?" And that was Issue One. And you go to Issue Two, and you go to Issue 12, and you go to Issue 20. And when I was at LDF, we would say, 1989, Arkansas was raising number 26 of Tony's list of issues. It was a brilliant feat of imagination about what still remained to be done. And one of the crucial issues, of course, was whether the death penalty, in fact, was still being applied in a racially discriminatory manner.

SK: There's a lot to discuss there. One thing I want to briefly ask you about, I think that some people who watch or read this interview in the future might be surprised to learn that rape was even part of the conversation when we talk about capital punishment in the United States. Can you talk a little bit about that story?

JB: The rape story.

SK: Yes.

JB: Yeah. It had been noted, and indeed I said LDF got involved because it saw that the incidence of death sentencing for rape, and particularly of execution, after the sentence had been imposed, had become hugely disproportionate. From I think the [19]30s through the [19]60s, there were 350 or so people who were put to death for the crime of rape. And I think all but 10 or 12 were Blacks who had raped white women. And it was pretty clear that

was not the pattern overall of rape. [00:22:04] It was enforcing a post-Civil War, pre-Civil War, code that Black folks are not supposed to have sexual relations with white women, and that was really one of the questions that Justice Goldberg and his colleagues invited attention to, but it actually didn't come to the Court in that form until the year after the *Gregg*, *Proffitt*, and *Jurek* cases came up. And [LDF staffer] David Kendall had a case that he brought that raised the residual issue of whether the death penalty for rape was racially discriminatory. Now that actually had built upon the first social science body of evidence that LDF helped to create. Because I told you that in the mid-1960s, LDF decided "We're going to go after the death penalty," and what it did at that time, Tony Amsterdam [and Jack Greenberg] recruited Marvin Wolfgang, who was a sociologist and criminologist, I think at Penn. And they decided to do an empirical study of the incidence of rape in 10 or 12 southern states using exemplary districts. You wouldn't pick every district in North Carolina. You'd pick six, or eight, or 10, and see how many people were charged with rape, how many people were convicted, how many people with death sentences, and what were their races. And what other attendant factors were involved that might make it more or less aggravated. And that litigation went forward ultimately in an Arkansas case, *Maxwell v. Bishop*, and the Supreme Court denied cert, it wouldn't hear the racial evidence. And indeed, in the Eighth Circuit— which the case was brought in habeas corpus in [the federal district court in] Arkansas and moved up to the [United States Court of Appeals for the] Eighth Circuit. The [deciding] judge who wrote the opinion saying, "I don't think the statistics will ever be the salvation of Mr. Maxwell," was Harry Blackmun. [00:24:04] And so, [Justice] Blackmun, who later becomes an anti-death penalty person and joins the dissent in *McCleskey*, as an earlier period, very smart guy, Harvard math person, said, "I'm not sure

these statistics convince me." So, when the [Supreme] Court decided *Furman*, it did not have the issue of race before it. Although a couple of the Justices said, "My particular reasons for it, or my sense," — I think Douglas said that, and I think Marshall did as well — "that race is so attendant as a factor in who gets death for it." But anyway, David Kendall then brought it up in 197[7] in the *Coker* case and interestingly enough, Kendall had clerked for [Justice] Byron White. And so White was basically his mentor. And he argued the case in front of the Court, and White wrote the opinion outlawing death penalty for rape of an adult woman without ever mentioning race. He says it's disproportionate and something else, but it's a feature I'm going to bring up if we talk further about race and the death penalty — the reluctance of the Court as a whole to candidly face the extent to which race influences juries' sentencing outcomes. And so, while all that [racial] evidence was below the surface, he [Justice White] ultimately says, "No, killing a person through execution for a nonlethal crime, even a crime as terrible as rape, is disproportionate." But it ended, now it didn't end it for rape of children. That was left open, and there were a couple of other attendant factors, but by and large, that was the end of it.

SK: [00:26:00] So, by the time you begin your formal career at LDF in 1978, we're over this hump nationally, in terms of making decisions about how capital punishment will be administered, and we appear to have maybe, and correct me if I'm wrong, established some degree of legal language that is getting towards the idea of disparities of some kind but is avoiding directly engaging with race or at least is taking some opportunities to side-step it.

JB: Well, there were a couple of things that were happening at the same time, and I agree with everything you've said. There was a nascent effort post-*Gregg*, post-1976, by

social scientists, to once again look deeply into, not just at the rape cases, but all the homicide cases in various states and see whether they could find any continuing evidence of discrimination. It's as if you'd launched out from Southport in boats, going out to the Gulf Stream, and say, "We're going to go down deep and see if we can still catch these big fish, whether they're still there." But that wasn't, it was happening so slowly, it takes a long time to collect that evidence. That wasn't the very first thing the Legal Defense Fund was doing. It was looking for arguments that there are disparate times where death is too grave, indeed there was a case called *Godfrey v. Georgia* where a husband and wife got in a [verbal] fight and then, I think, there was a drunken brawl. The husband killed the wife, I believe I've got the circumstances right. And the Court held, "That's not a serious enough form of homicide, in Georgia, to regularly receive death." They [the Court] weren't making the judgment for themselves. They were saying "Georgia juries don't usually give death for that, and therefore it's disproportionate in this one case that, that by lightning, Mr. Godfrey winds up, subject to possible execution." The other thing that was happening, though, the Court, the LDF was trying to suggest that there was a "special need for greater reliability" in capital cases. [00:28:10] The Court had said as much when it wrote, well, *Furman* and the *Gregg* plurality decisions. And so, we [LDF] were saying, and at that point I was there, "That means that in all sorts of areas where the criminal justice system previously has allowed an amount of leeway" — in prosecutorial closing argument, for example — "you can't do that anymore in the death cases because you can't allow that kind of arbitrariness or capriciousness. You've got to be procedurally more careful. These cases require special care. Put your mask on. Put your gloves on. They are special cases." And so, they were trying to make that argument and then carry that forward into a lot of situations.

SK: This idea that death is different.

JB: Death is different. Exactly. Now when I got to LDF, it was February of 1978, and it was wonderful. I was delighted to have gotten the opportunity, and David Kendall had been my predecessor, the person who argued *Coker*. But I remember walking into the office the first day at 10 Columbus Circle, right at the southwest corner of Central Park. And there on his [Kendall's] desk were like, 12 cases from different states, from Georgia and Alabama and Louisiana. And — I looked it up, and I was referred, on the first month I was at work, to 18 different capital cases in eight different states with people calling saying, "What do we do now?" And I had to learn, I already knew something about the overall LDF strategy, which if you'd like I'd be — what they had done in the 1960s and had recurred after *Furman* and then again after *Gregg* was to realize that there were going to be thousands of people across the country who received death sentences. [00:30:14] And their cases would move up from trial to the state supreme court, to a request to have the Supreme Court of the United States hear them. And then they would go through two subsequent sets of processes. They would go through state-level post-conviction processes. The states all had statutes that said if something couldn't have been raised at trial that may bear on the justice of the outcome, you can bring that before a state trial court [in post-conviction proceedings]. For example, if a lawyer had been ineffective, the trial lawyer in trial doesn't get up and say, "I want to let you know, I'm ineffective." It's somebody else who later says, "I can't believe he didn't do that, that — everyone does that. That's ineffective not to have done, so let's go into habeas corpus in the state [post-conviction] system and raise that claim."

SK: Can I ask you to just pause and define what you mean when you say, "go into habeas corpus?"

JB: Sure. People [criminal defendants who are indigent] were given court-appointed counsel at trial. *Gideon v. Wainwright* and the rest. People were given court-appointed counsel at the state supreme court level. After that, they were on their own. To go to the Supreme Court of the United States saying, "Something that was done at one of these two lower levels is wrong constitutionally," was up to a volunteer lawyer. Then, if you wanted to take advantage of the state post-conviction system or the parallel federal habeas corpus, the federal post-conviction system, you had to file a document, a "writ of habeas corpus." Or a request for a writ, a petition for habeas corpus, and say, "Madame Trial Judge, my client's trial was not fair because of the following eight reasons." And you'd lay those reasons out, and you'd say, "And I want a hearing on those reasons." [00:32:02] And then the judge would have to rule on that. And that's what I mean by going into post-conviction. Well, to get back to where I started, you'd have 1,000 people or more who were at trial [facing capital murder], 700 of whom may have gotten death sentences. Three hundred of whom may be on appeal in various states. A hundred of whom may be in state post-conviction [courts]. Fifty of whom may be in federal habeas. As you moved your way through this. LDF's strategy was to say, "Let's go to the states that have the most active capital punishment dockets — " Georgia and Florida and Texas were the biggest examples, but North Carolina had some, Oklahoma had some. " —and let's be sure that either LDF itself or allies, as lawyers in whom we repose great confidence, have those lead cases. Because those are the cases in which the judges at the appellate levels impose conviction. And ultimately the Supreme Court are ultimately likeliest to decide what we call "systematic issues" or "system issues." Now in a post-conviction case, you could raise the claim, for example, that your particular client was manhandled by the police officer, or the lineup was

terrible. And that might be enough to save your client's life, but it would have no bearing on the next case. But there are other issues. Saying, for example, "The state of Georgia's statute is structured in such a way that something, that death is not given the special procedural protection that you've promised, court." And that's a systemic claim. If that's true about your client and you win, then every other Georgia person who has that problem also wins. So, what you do is to build issues, you think of issues that will have that kind of systematic effect, and then you run to every single volunteer lawyer in the state and say, "Please, put this issue in your written filing, or amend your filing that you've made, to add this issue." [00:34:10] And say to the judge, "Judge, I'd really like to have a hearing on this, but actually, there's a case two steps ahead of yours and they've raised that issue, and probably Judge Jones is going to hear that, and maybe you want to go ahead yourself and do it or maybe you just want to wait for Judge Jones to decide it." And in effect, the tendency was for judges to say, "Well, I'll let somebody else do that." And so there you are in control of the cases that are the furthest advanced.

SK: How do you square what I assume was your human desire to be helpful to people who were in urgent need, people who are waiting on death row, or are moving through the system somehow with the more systematic and strategic move to gather cases under this umbrella in order to create change on a larger level?

JB: Well, LDF couldn't have begun to do it alone. We had three, sometimes four [LDF staff] lawyers at most for the whole country. And so, what we were was kind of a backup center, and we would look in every state for somebody. In Georgia, there was a woman [at the Georgia ACLU] named Patsy Morris who was just unbelievably fine. She was the daughter of a blue stocking, Manhattan, sort of rich person, who had come South [to

live in Atlanta]. Patsy was heart and soul into this, and you'd call her, and she'd say, "Jack, here's where every one of the fifty-five cases are, because I've called every one of the lawyers, and here's who doesn't have a lawyer, and here's what happened in every court last week, and here's what we need to do next." And so then, if you had one of those in Georgia, and you had one of those in North Carolina, where Tye Hunter and Adam Stein and those people were working, you need somebody, it's almost like a manufacturing firm. You've got the manufacturer at one level, but then you need wholesalers at the state level who are aware of what is happening, and then you need retailers who are actually delivering, if you would, the "death penalty product," in every one of the courts. [00:36:11] And the most precarious thing were the places where you didn't have that person at the state level, because we [LDF] couldn't handle, over the transom, 55 people [capital defendants] calling from Mississippi saying, "Help me with my case." You just — the first, as I said, month I was at LDF, I had 18 different clients. You got to know the case, got to know what the issues are, got to know who's the lawyers and who's not the lawyers. If that would have been the case every month, it would have been impossible. So, you tried to build the structure. And, of course, that meant that you were constantly offering to come to do conferences. We'll do a conference in Atlanta, we'll do a conference in Jackson, we'll do a conference in New Orleans, et cetera. We want all of the [criminal defense] lawyers from Louisiana to come, we want them to hear what the latest sort of strategies are, what we've heard in the courts. Even though you're in the Fifth Circuit, you need to know in the Eighth Circuit the judges are doing this or that, and that might be something possible that we could take over from the Eighth [Circuit] and put it into the Fifth [Circuit]. So, you were constantly refining the claims that you were trying to make and trying to recruit [new

lawyers to take cases]. Now, it was hard in the South to get [private] lawyers in some states — North Carolina was better than many — who would agree to do this. Because they were highly unpopular cases. One of my clients had gone into a little 7-Eleven type place on a Sunday morning and had taken a sort of poor clerk in the cooler and killed him. Nobody in that little town wanted to defend that person. So, one of the other things that LDF did was to begin to look, particularly at the major law firms in places like New York and Washington and eventually in the South, but it took a while, and sort of say in the litigation departments, "You got any young people who are sort of restless like I was at Paul, Weiss? [laughter] We can give you a case that is really a pretty big deal. [00:38:19] Here's a case in North Carolina of a client who's got these and these and these facts." Well, it turned out that the partners in a lot of these firms saw how useful this was. They were important cases in their own right. If things really began to happen, the partners could jump in and argue the matters before the judges. But to send some young associate down and say, "Why don't you go down to Sanford, North Carolina, and root around and figure out what went on and find some witnesses, and see who else is involved," was the thrill of a lifetime for many of these young associates. And they were doing high quality work, as compared to indifferent people who weren't, and they were not at all afraid of what the local judge would say because they live in Bethesda. [laughter] They live in Queens, or whatever. So, we developed 100 or more relationships with people. Jenner & Block in Chicago. And I look back now, Seth Waxman was one of the very first people I got involved in a Georgia case, and Seth later became attorney — Solicitor General of the United States, and right now is one of the leading advocates before the [Supreme] Court. But Seth was this young guy who came

down from D.C. and jumped into Jack House's case and worked it. So, another part of your effort was to try to court and bring in all these folks who were doing this stuff.

SK: How was that even possible for someone who had only left law school four years previous?

JB: [laughter] Well, if Tony Amsterdam hadn't been in the background, I'd have been totally over my head. [00:40:02] Even with the work of LDF, because the problem is the lawyers who really knew the death penalty—except for two I want to mention, Jack Greenberg knew it very well, but was obviously otherwise very engaged, and Jim Nabrit, who was the number two, lovely human being and wise, and you could come and sit down with Jim and he would understand all of these things, but couldn't stay current with what just happened in the Fourth Circuit, et cetera—was Amsterdam, I mean, who was unbelievable. You'd — Tony, you'd take a call from Tony, "Jack, I understand you've got something going on in Georgia. I suppose you're going to have to write a brief, I mean, probably say something like — " And then he'd start quoting, not only cases, but the language from cases, out of his head, and put together something. And you'd write it up. I mean, you'd obviously add a fair bit to it, but the skeleton had been built. Or else you'd write it the other way. You'd write a brief. And I've heard hundreds of people say this to me, not just dozens, "I wrote a [draft] brief for Amsterdam and sent it to him, and it got turned around four days later, and it's written like a calligrapher. Every little thing, it comes out with every little letter perfect." And it, you [your draft] might say, "Your Honor, we believe that the plaintiff—" And you'd have three lines and Tony would X those three lines out. But he would find something down below to come back in. And then he'd put a little thing on the side. And the little thing on the side was the best prose you'd ever read in your

life. [laughter] And yet it's like he didn't say, "Your brief is no good." He would find the places in your brief that were okay and build it with that. So, he would do 10 of those a day, sometimes. I mean, "Jack, do you have a time to talk between three and four?" I'd say yeah, "I can." He'd say, "No, I mean between three or four in the morning." And you'd say, "Well, no Tony, actually I'm, I kind of sleep during that time." "Oh, okay, well, we'll do something else." So, anyway, that was part of what you had. [00:42:05] And then some people were given to, and I probably was one of them, to being able to sort of meet a lot of other people [lawyers working on their own capital case] and listen to them. You had to be relatively patient because some people would have very strong, wrong ideas about what they should be doing. But you had to know when you needed to intervene and say, "We cannot let Jones do this. Jones would really ruin everything if he does it. We've got to have some other way to get to him, to have him not jump ahead of all of those other people I told you were lined up behind the big case."

SK: This a human management issue, dealing with people who are local on the ground, in the places where the defendants are, but also with people who are quite remote from it, parachuting in productively, but —

JB: Yes, yes. I had a slight advantage in being from the South, working in the South, although I do remember one case in Georgia where we were before a judge about 20 miles south of Savannah. I've forgotten the county's name now. And he [the judge] said, "Now we've got a number of 'Yankee lawyers' from Savannah come here." And you thought, "Oh, my gosh, if he thinks Savannah is 'Yankee!'" Then he said "Counsel, where are you from?" And I said, "Well, I grew up in North Carolina, your Honor, but I'm actually now in New York." "New York. You're from New York City." And I said, "Well, I don't

live in the City," but — so you try to moderate. But the other thing, to be honest, Seth, is that, I would say in 60 percent of the courts we went into, we were treated with surface cordiality, but that's all. They knew. Indeed, I had one judge who was actually pretty gracious in saying, "Mr. Boger, I'm going to tell you what I'm going to do." And he [his courthouse] was actually near one of the prisons in one of the states. [00:44:01] He said, "I'll let you put on any evidence you ever want to put on. [But] I'm never going to rule for you, no matter what your evidence is. And you need to understand that. I get elected in this district and the prison is in this district." And I said, "Well, Judge, I really appreciate that." And instead of saying, "That's an outrage, law shouldn't be done that way," you think, good, if I can make my [factual] record in your court and you don't cut me off, I can then go to a higher court where they [the judges] don't get elected in that district, et cetera. But yeah, then there were times that they [the judges and the State's attorneys] were just really, really mad to see you come in. They didn't like us. And particularly when you came back a second time. "Didn't we see this case three years ago?" and you'd say, "Yes, your Honor, but we've learned something that we didn't know then and we're trying to come back to you."

SK: I think "they didn't like us" is a wonderful epigraph for this period.

JB: [laughter]

SK: [00:44:57] So maybe I'll, maybe we'll talk about this a little bit more. We were just chatting about the idea that is sort of shocking to a layperson that a judge or another person in a court setting where we have a reasonable expectation of the performance of impartiality, would tell you, "You can bring your, whatever you're going to bring forward here and we'll let the process play out, but it's not going to go your way."

JB: Yeah, no. I encountered all kinds and qualities of judges in these cases, from people who were forthright like that to people whom you knew were so hostile that that would be the outcome, but they wouldn't say it. And then you'd have— you realize that law as it's distributed out from the centers of learning about law is unevenly distributed. There was a county in rural Georgia where the judge, I cited one of the leading confession cases that the Supreme Court had decided in the 1950s. [00:46:04] And not an obscure case at all. And he said, "Was that decided in this district?" And I said, "No, your Honor, that's a [United States] Supreme Court decision." And he said, "We don't have any of the Supreme Court reporters [the set of lawbooks reporting the Court's opinions] in our county" — to wit, there is nowhere you can go, in a pre-social media, pre-Internet age, in our county to even see what the Supreme Court of the United States has written on anything. You go, wow, okay. That tells you something. Again, you want to put those [citations] in your case because, sometime later, somebody [another judge in a higher court] will say, "You didn't present this at the timely manner before Judge Kotch." But if Judge Kotch doesn't have any federal reporters in his life, he's plainly not going to be affected by it.

SK: And this speaks to the power of, firstly, a broad educational mission, period, that we see playing out in the news every day today, but also to the specific educational mission maybe that you had to bring attorneys in the South and in other places where you were doing litigation support to inform them?

JB: Well, sure, we did a lot of that, although the only people that worked with us were already willing, for the most part. I mean, we had a few people who had been trial counsel who stayed in the cases who really didn't have much either aptitude for, or interest in, this post-conviction process. Because the other thing I guess I didn't clarify is when you

get to state post-conviction and federal post-conviction, unless you have a sleeping or "silver bullet" sleeping issue — you find out that the prosecutor has done something wicked and illegal — most of the claims are constitutional claims. And so, they're claims about what the Fifth or Sixth or Eighth or Fourteenth Amendment of the Federal Constitution or their state equivalents require [under new or varied circumstances]. Lots of lawyers can be a good trial lawyer, and never think about those issues at all. [00:48:04] They operate within the framework that those constitutional assurances have provided, but they don't raise that ["new" or "alternative" claims] in court. They're looking to see whether somebody looks like they're nervous, and you can cross-examine them in a particular way. So, that's their expertise. Now, if they wanted to stay on in the capital cases, yes, we would often do a lot of teaching, so to speak. We started a series of annual [summer death penalty] conferences, at Airlie House in Virginia. LDF had done that more generally for civil rights since the 1950s. But we started one, I think in about 1981 or [19]82, where we'd bring lawyers from all over the country for three or four days to this residential place in rural Virginia, and talk about what the latest [death penalty] law was, what the latest social science was, and send them back out. So, it was like a summer school, if you would, for these lawyers. And the other dimension of it is that we'd be talking with the press. Now, the big division of responsibility, when I first joined LDF, was at the National ACLU, which did work on capital punishment issues, primarily worked on public policy and advocacy and legislation. They were not [involved in capital litigation] at the national level in many cases. Some of the state ACLUs were deeply involved in their state, but not at the national level. On the other hand, they'd [the national ACLU] be talking to Congress, or they'd be talking — but LDF found itself doing a lot of talking. I remember people at the *Time* magazine or

Newsweek back when those were important journals. [laughter] Or *The New York Times*, which is still important. And sitting down with somebody from *The Washington Post* and saying, "Let's go to lunch. Now, let me tell you what we're doing and explain to you why this is important," not so they'd write a story, but so they would have the breadth of understanding to see where things were going. [00:50:05] And that was another kind of teaching responsibility that we would have.

SK: And the educational connection too really speaks to some of the similarities between the ongoing Civil Rights Movement and your litigation and support work. I'm thinking of southerners returning home, having left to come back to their area to sort of do the good work where they started out. I'm talking about the partnerships between national and regional, local organizations, and people. People getting on buses and going south to do work. Local education campaigns. Did you see the work that you were doing as part of a movement?

JB: Oh, I definitely thought there was an anti-death penalty movement. I did, and I did think it was centered out of LDF and a couple of other places, the national ACLU, in terms of its litigation domain. But a lot of the movement in the sense of opposition to it and support for anti-death penalty work was local. There were people in Virginia, a woman named Marie Deans and some other folks in North Carolina and South Carolina [and Georgia, Texas, Florida and California]. We didn't have to stir them up. They were stirred up about it, at least in the criminal justice area. Now it was a different cut of LDF's cadre of what they used to call "local counsel." LDF in the 1950s and [19]60s had had largely African American folk who in the different states were willing to bring the school desegregation suits, the early employment discrimination suits, the voting rights suits, that

no white person would touch. And they were heroic, and their places would get firebombed, and they'd get threatened with arrest. And that cadre of people was a generation, really, older than the one I knew well. But they would come to those [LDF's] annual Airlie meetings and sit there and play poker or whatever. [00:52:02] And they had been great heroes in the earlier part of the Civil Rights Movement. But the death penalty movement had its own quality, and some of those people were connected to the Legal Defense Fund, but some of those people were working absolutely independently on their own. And I had enormous admiration for them. And frankly, it was easier in some respects to fly in from New York and do two days' worth of a hearing and then fly back than to be the person sitting there with folks in synagogue or church, Saturday or Sunday, [with their neighbors] saying, "I don't know what in the world you're doing [representing these killers], and I don't know why we should take you seriously anymore," or whatever, and saying, this is important.

SK: Absolutely. How did you feel your work fit in in LDF offices, when you're there in the late [19]70s, early [19]80s? You are working these capital cases — because death was different, did your work feel different than other areas?

JB: Well, I had great friends at LDF and still do, but there were a fair number of people who thought the death penalty project was the outlier [at LDF]. It was not the, it was not going to advance anybody's housing opportunities. It wasn't going to get anybody employment. It wasn't going to bring children to school. Indeed, there was a sense in which a lot of the work, appropriately, was for deserving African Americans who had been repressed. We were representing people, [almost] all of whom committed a homicide, at least. Some of whom were white, some of whom were not. And the [staff's] attitudes toward

the death penalty [work] were somewhat charitable. But not necessarily enthusiastic by everybody. Indeed, Jack Greenberg had to fight the [LDF] board. The board would regularly say, "I think we ought to cut back on something. We don't have enough money. And maybe the death penalty [work] is the first thing to go." And he just wouldn't let that happen. But it was cordial. I never worked with a group of people — some 20 or so lawyers at a time, with a slightly changing cast of characters — who were more fun to be with. [00:54:04] I mean, they had all given themselves over to the kind, not just the issues, but you'd be there Saturday night and it'd be eight or nine or 10 people there, because things had to get done and nobody was there [at LDF] because they were making the top money in New York. [laughter] Nobody was there because their children were there, their families were there. They were there because they really believed in what they were doing. And that's a wonderful group of people to work around. I guess I've heard some military people say, "I developed a family there in, wherever, Afghanistan, World War II." I felt that about the LDF people.

SK: And I want to ask about who some of those family members were. One small question first, though, is you mentioned that you weren't living in the city, so you were commuting in from somewhere else. What were your daily routines like in those early years?

JB: Well, it's funny because we bought a house in Montclair, New Jersey, which is about a 40-minute, 50-minute train, bus ride out, about a month before I joined LDF. So, I would be taking a bus in whatever the time of day or night it was and then walking from 42nd Street, where the bus terminal came into New York, about 10 blocks through the raunchiest part of Eighth Avenue with the sort of sex stores and all the rest up to 10

Columbus Circle. Jennifer, my wife, was incredibly generous. But there was a lot of time away. And I actually looked at my old notebooks to see. And in 1983, I took 22 overnight trips and was away 77 days. Seventy-seven is a big fraction of a year. And it's not like that every time I was not away, I was at home, because we would write, I think we talked about it among ourselves, on average about 20 50-page [legal] briefs [or pleadings] a year. [00:56:07] So, you'd write about one and a half [briefs] a month. And all the other stuff you're doing, the telephone calls and the hearings and the [conferences] — you're still writing a formal legal brief with footnotes and all the rest. Fifty pages' worth, every two or three weeks. And getting those things in, and some of those were under stays of execution. In other words, a death sentence would be set for Jones, and you had to get something [filed] into a court that was credible enough that the court would say, "We've got to hold up that death, hold up that execution [pending further review of these papers]," et cetera. So, it was a lot of, it was nonstop.

SK: I bet. I'm going to ask you some more about that just in a moment. But I do want to hear first, if I can just ask you about some of the people who were in the office in those early days.

JB: Well, the people in the death penalty unit, I mean, as I say, David Kendall overlapped with, and — and he went on later, as you may remember, to defend Bill Clinton in the Senate on his impeachment. And has had a brilliant career, and [I] stayed in touch a little bit with David — but Joel Berger, who was a former prisoner's lawyer and prison conditions lawyer in New York, was [initially the senior LDF lawyer on the scene], he had Texas. And Joel was kind of a Groucho Marxish sort of guy with a big mustache and a kind of ironic New York attitude. There was a woman named Bonda Lee, who was African

American, and she had been the one who had been my [LDF] liaison before I came to LDF on the *Jurek* case [while I was at Paul, Weiss]. And she went off to teach eventually, at , I think, NYU. And Peggy Davis, a woman named Peggy Davis as well, but then a woman named Deborah Fins, who had the Florida cases.[1] [00:58:01] And she was involved in one of the very first executions that we had [experienced as a team], where John Spenkelink was executed in Florida. She [Debbie] was a very warm and sensitive person and extremely useful. And then a bunch of other folk. I'm still talking about the death penalty squad.[2] One of the other interesting things, we wound up recruiting, as summer clerks or semester clerks, a number of people [to LDF] who later became pretty well-known. Deval Patrick, who later became Governor of Massachusetts, worked for LDF [as a young Harvard Law graduate], and indeed was at LDF at the counsel table [with me] when *McCleskey* was argued. Tim Kaine, who became Governor of Virginia and then [United States] Senator and then Vice-Presidential candidate so unsuccessfully, God bless him, was a regular person that we were involved with and some other sort of people like that as well. Across the office, it was just a range of people. I did one case with Lani Guinier, who was the great voting rights person, and it had to do with a person [a former associate of Dr. King] who'd been charged with [federal] voter fraud in Alabama. And it was a criminal charge. And she knew the voting law, but she didn't know the criminal stuff. And I knew the criminal things. Nobody was going to "execute" Spiver Gordon, but I knew about the criminal [issues]— so, we worked together on a brief and flew down [to Montgomery] and jointly argued that case [before the

[1] During transcript review, Mr. Boger clarified that Bonda Lee had the Florida docket before Peggy Davis, who inherited it and was then his LDF liaison on the *Jurek* case.
[2] Mr. Boger noted that LDF's death penalty team "later changed to include Jim Liebman, Dick Burr, George Kendall, Steve Winter, and for a year or more, Vivian Berger from Columbia and Julia Boaz, a Yale Law student. We had two wonderful paralegals, Carol Palmer and later, Tanya Coke, who published a 'Death Row USA' update on all cases nationwide and did dozens of other things every week."

Eleventh Circuit]. And so, you'd do that. But then, there were just many other lawyers around, Ron Ellis and Clyde Murphy [in employment law], I think.[3] A whole slew. Or Jim Liebman is of course, a person who worked with us, who was a brilliant lawyer, who later became a professor at Columbia and wrote "the book" on habeas corpus. In fact, when Jim came out of a Supreme Court clerkship, I said, "Jim, I want you to write a 30-page little memo on how habeas procedures work, because there are a lot of good lawyers who just don't know that." And Jim wrote like a 500 page, [laughter] instead of a 30-page, he wrote a 500-page thing, says, "How's this?" And you said, "Well, it's certainly full." [01:00:06] And you could tell that he was headed for academia. And he did some wonderful work as well. But I, well, let me mention something else. We were so blessed with [our non-legal] staff. There was a guy, Oscar Fambro, who was a Xerox operator [and mail room specialist] from rural Georgia, who knew one of the counties. And I worked with him on one of the [capital] cases where he knew the local people and would tell me, "You need to go talk to so-and-so back home down in — " And Earl Cunningham and others and Donna Gloeckner [our librarian], who would be there at any time of day or night.[4] You need them at three o'clock in the morning on a weekend, they would be there, et cetera. So, it was a wonderful working environment.

SK: So, you talked about arguing a case jointly with co-counsel with Lani. You served as co-counsel on a number of cases before the Supreme Court. You then went on to serve as Counsel of Record on a number of cases in front of the Supreme Court. I do want to ask you about the experience of arguing in front of the court, because I feel like outside of

[3] During transcript review, Mr. Boger added the names of Steve Ralston and Norman Chachkin.
[4] During transcript review, Mr. Boger added: "And Velma Harris, the gracious receptionist and telephone operator."

the LDF circle, it's not all that common for Americans to have that opportunity. Can you just illuminate just a little bit what it means to be a co-counsel versus Counsel of Record and what those roles entail?

JB: Well, it varies. The co-counsel role varies a lot because the first time I did that was in 1981, in a case called *Eddings versus Oklahoma*. And a young guy [Oklahoma lawyer], Jay Baker, had raised a claim that his client shouldn't be executed because he was underage when he committed the crime, under the age of 18. And the Court agreed to hear his case, the Supreme Court of the United States. He'd never written a brief in the Supreme Court before. And so, he called us and said, "Can you help me with that?" Well, I threw myself into it and wrote a very extensive draft. [01:02:00] We were going up to Fordham Law School, which was the nearest place we had lots of materials. And worked with Jay to frame that and with Tony Amsterdam. But then Jay was going to argue it [orally]. We weren't going to take it over from him, so we would help prepare him [by] doing moot arguments. We would try the case as if we were the justices and he was the lawyer, and then stop him and say, "No, Jay, that one doesn't work very well, does it?" Or he would say, "I don't like what we're saying here," so you'd try to get yourself, it's like practicing football.

SK: Is this strategy or professional courtesy or both or neither?

JB: Oh, anytime a [capital] case went to the Supreme Court, if we had a chance to be part of it, we wanted to be. We didn't want a lawyer to go into the Court and give away an issue, or argue it in a way that, in our judgment, was likely to lead to a defeat where there was a chance — so, we were always thrilled to ghost or co-write and certainly always thrilled to do the moot arguments with people. I think I did five or six of those where, and most of those I will say, other very fine counsel had the case, but I was helping them do the

final parts of the draft and then we would [moot the oral argument] — David Brock in South Carolina and John Carroll, who had been head of the Southern Poverty Law Center and then became a federal magistrate. And I'd sit at the counsel table with them. But I wasn't doing the argument. Then, when you're Counsel of Record, that term really means often, most often, that you're the person who's going to do the 30-minute oral argument in front of the Court. And I did four of those over my time there.

SK: [01:04:03] I think a lot of people would be surprised to learn that you are limited to 30 minutes.

JB: Well, you're not anymore. The current Court with Justice Roberts has let cases go on for [much longer]. But all the time that I was there [at LDF] and, indeed all the way through until the most recent COVID period— but yeah, 30 minutes total and you can parse it out. [01:04:03] You can say, "I want to take," if you're the first advocate, "23 minutes and reserve seven." And so, you'll get 23 and then they tell you to sit down and I do remember [Chief Justice] Rehnquist at one point saying, "Counsel, your time has expired," in the middle of a sentence. And he meant, "I don't want you to finish the sentence." Now there would be other judges or justices who would say, "Finish up what you're saying," but yeah, it was very circumscribed.

SK: When you first entered the Supreme Court in 1981, 1982, you'd been at LDF for three or four years. That's not that long. Did you feel prepared? How did you prepare?

JB: Well. The first time I argued, yeah. It was in 1982. And it was a case, John Eldon Smith, oh, Stephens, I'm sorry. *Zant v. Stephens*. Alpha Otis Stephens. Sure, I felt prepared because I'd never prepared as much for anything in my life. I went to our little church on Fridays or Saturday mornings sometime and stood in the pulpit, this little, tiny

congregation of about 100 with nobody there, and would ask myself questions and answer questions for myself. And then LDF had a long-standing tradition, going well beyond the days before the death penalty, of doing these moot courts, would get people from Columbia and NYU and other lawyers, ACLU and LDF faculty. And they'd sit there and run you through four or five hours [of questioning]. You've only got [3]0 minutes in front of the Court, but they'd do four or five hours' worth and they'd try things out and you'd make an argument and say, "You know, do you realize what happens when you do that? So-and-so is going to ask you a question that will take you all the way over here and you want to be over there. That's where you want to spend your precious 30 minutes. So, don't do it that way. What about...?" And you'd just reframe the way you'd maybe do it.

SK: I want to get to some of these cases, but I'm curious, too, maybe in a broader sense. [01:06:01] You are in a space where maybe, I'm not quite sure how to phrase this. You know, outside of the legal profession, we might think that this is about persuasion, and certainly there must be some of that involved. But also, you're dealing with Supreme Court justices who are sitting where they're sitting, in part because they have demonstrated to the president who is appointing them that they share an ideology or at least a set of beliefs that basically overlap. Did you feel like you were a persuader in the court?

JB: Well, what we would do is ask ourselves, "Okay. If even [Chief Justice] Rehnquist or [Justices] White or O'Connor has a point of view on criminal justice issues that's different from what we would have preferred, is there still anything in this case, in this argument where you can say, 'Justice O'Connor, remember, you're the one' — that is, and you wouldn't put it quite that crudely –- 'you're the one that has said you want X, Y, Z. Well, that's just what would lead here to an outcome in our client's favor.'" So, a lot of the

process of preparation was saying, in effect, “Given this hand that I’ve just been dealt with very few aces and kings and a couple of nines and sevens, is there still a way to make the argument that would let me prevail?” And sometimes you’d feel — I sat at counsel table for John Carroll, who had a client called John Evans, who had gotten out with another person from prison in the Midwest and committed some 20 to 25 armed robberies and a few kidnappings and then had killed somebody, shot them on the floor as they crawled away and then told the jury, “I want to represent myself and you should execute me. I want to be executed.” And you’re now arguing that he shouldn’t be put to death? Well, that’s not a very easy case to make in front of anybody. And poor John had that one. So, I’m not sure we had any sense of where we could find five votes on that. [01:08:03] But the whole point is finally a numbers game. “Are there five justices who, for one reason or another, will agree with at least some parts of my argument?” And it may be that you have to stitch it together. “I can get two people on everything I’m saying. I can get the third person on this other thing, but maybe on these facts I can get one or two of the other justices to join it.”

SK: It’s a lot to do in 28 odd minutes.

JB: Well, that is one of the problems of doing that in 30 minutes is if you have a justice whom you know doesn’t agree with you. And he or she is trying to take up all your time, you’re mentally saying, “Every minute I spend doing this is wasted and no, I will not persuade this justice and I really want to [move elsewhere].” So sometimes you might say, “Justice Scalia, as Justice Powell has said...,” and then you try to turn toward Powell and say, and you quote Powell on something that is related to what Scalia had said. And that’s what’s part of the practice [of oral advocacy] is about, is to ask yourself, are there places in their corpus of their writings and their pronouncements where you can find links? We called

them “flips,” where you can flip [the argument] from something you know is bad for you towards something that some of the justices just think is at least plausible for you, et cetera, and you’d try to think about that. And then, of course, whatever you had in mind when you get into the argument, it winds up often being very different than you expected. You ask about what it was like to do it [a Supreme Court argument]. I mean, I was nervous as a cat, of course. I mean, you go down [to D.C.] the day before and then you have to go early in the morning to meet with the Clerk [of the Supreme Court]. And just walking out from the hotel we had, which was near the Capitol Hill where the Court is, it’s kind of like “I’m not sure I can make it up the hill, I’m so nervous.” And you go in [to the Court building] and you’re thinking, “Oh my God, I’m not arguing until 11 o’clock in the morning and it’s 8:15.” [01:10:01] But I found, because I’m a person who didn’t do athletics, that all of that “fight or flight” stuff really was true. About when your glands and what they produce. Because I was just really terrified, I could hardly eat, et cetera. And then a moment would come, well before argument, and you’d think, “I’m really ready to do this now. And by gosh, we’ve got the right answers and let’s bring it on.” And I learned to really expect that. And it made it less nerve wracking to go through the first part because you said to yourself — and it never went away for me, I never was not nervous before a big argument. But then the nervousness turned into the desire for action. And that was a relief.

SK: That sort of battle calm to keep the sword swinging, I suppose.

JB: There was a guy, wonderful guy who did capital punishment work in Georgia called Millard Farmer. Notorious. Outrageous. Millard was hysterically funny, over the top in some ways. But he told me that he went in the bathroom and vomited every single day

before a hearing. Every single day. And he was in his 50s, which to me at that time seemed very old. [laughter] But that was how he got ready.

SK: You've worked on a number of notable cases. One of the best known is, has to be *McCleskey v. Kemp*, which I believe was decided in 1987.

JB: Right.

SK: Can you talk a little bit about how you first encountered that case, if you do remember those early moments and then we can maybe get into the weeds just a little bit?

JB: Sure. I, when I first came to the Legal Defense Fund in [19]80 or [19]78, a year or so later, there was talk within the office that we wanted to bring a case about social science showing that there's a pattern of discrimination in death penalty sentencing. [01:12:00] And the question was, "Who wants to be the point person at this point?" Not in the Supreme Court. This is the "little red hen" [moment]. Nobody is saying, "Do you want to argue in the Supreme Court?" "Do you want to go to all the social science stuff?" And I said, "Sure, I'll do that," partly because I didn't know anything about statistics or social science, but it meant that I got involved with that and then got involved with an effort that, you found out who the social scientists were around the country who were doing this work. There was a guy, Hans Zeisel, was a refugee from the Holocaust with his family who was at the University of Chicago, and there was Bill Bowers and Glenn Pierce at Northeastern, and Mike Radelet [in Florida].[5] And Barry Nakell in North Carolina. So, you knew that there were these people doing studies. And one of them was David Baldus. And at some point, [Jack] Greenberg said, "I want to try to get some serious money so that we can, in fact, fund, underwrite, a good study, in one or more jurisdictions, that will be the vehicle that will let us

[5] During transcript review, Mr. Boger added Welsh White at the University of Pittsburgh to this list.

come back to the Supreme Court saying, 'Now we've done it. We've proved what you thought was not happening anymore is still happening.'" And they got some money. They got some from a Unitarian church on Long Island, [which administered] the Veatch Foundation. And then they got a quarter of a million dollars from the Edna McConnell Clark Foundation, which is equivalent to a couple million now, and began to talk about who might be a person capable of doing a study and where we would bring it. And David Baldus came to light early because David was already working independently as a University of Iowa law person [professor], but had written a great book about statistical proof of discrimination in employment cases. So, he had [the legal issues about] statistical proof in law down. And then he turned his attention to the death penalty and was doing a study with other money in Georgia. And David came in [to LDF] in July, I think, of 198[0], talked with us [Jack Greenberg, Tony Amsterdam, and the death penalty staff], and we talked about the prospect of his being our chosen vehicle for this. One of the reasons that Georgia was attractive [to study], just, by the way, is that one of the [chief] difficulties of collecting the [criminal justice] data is that in some states, it's a question of going to every county courthouse, and going in and saying to the clerk, "Can I get the records in case number one and two and seven and nine and 41 and 62?" Georgia had actually collected, in Atlanta, in the [office of the State] Board of Pardons and Paroles, [most of] the trial records — not just the transcripts, but the prosecutor's notes, the witness statements, et cetera — for all of the cases [statewide] that had resulted in, not just death, but death or a murder [and manslaughter] conviction. So, you could go to one place and sit down and gather records from [159] or whatever there are counties in Georgia.

SK: Why would they do that?

JB: They were doing it for their own parole purposes. It was in the Board of Pardon and Parole. God bless them. We never said, "This is a bad idea, don't you know what we're going to do now that we've seen this?" So, David persuaded us that [Georgia] was a good place [to study]. There was a time at which we thought about wanting to do a study in some other states. But we, in a sense, underestimated the difficulty of finding a person willing to do it and the amount of time and expense. And when the [Supreme] Court would take cases, if the Court had not taken the Georgia cases, we might have wanted an Illinois study or a study in California. But they didn't. So, David began to work on putting together a study. Now, the first one he had done [an initial study of Georgia murder cases in the post-1972 period], and I am in the weeds now, he'd only looked at two, what they called "decision points." He'd said, "We're going to look at all cases in Georgia from after *Furman* in [1972] to [1976-1977] or [6] in which there had been a murder conviction and then ask, 'In which of these cases did the prosecutor move on to a capital sentencing trial?' [01:16:08] And then we're going to look, that's the first decision point [studied by Baldus], at what the jury did." And we said, "David, you've got to know that some of the discrimination [that might exist in Georgia] comes in much earlier. A pretty aggravated case involving a white person who may have killed a Black person, comes to the prosecutor and they say, 'You know, I think this is a manslaughter case. I'll plead this one out.' And it never gets recorded as a murder case, or vice versa." And David was fully in agreement. He said, "Boy, if I had the capacity to go back, I would go from the first moment there was a charging decision made by anybody, the police, a prosecutor, and then look forward at everything we could get." And we said, "Let's imagine you can do that." And then we started to build. He built, with the

[6] During transcript review, Mr. Boger corrected the dates to 1972 to 1976-77.

advice of us and some other people as well, a questionnaire that would ask every question about why what looked like race [discrimination in a particular case] might not be. If, for example, you could show that the cases involving Black defendants and white victims, which turned out to be where the most racial discrimination was, that's where you were much more likely than ordinary to get a death sentence[7]— if those [Black defendant-on-white-victim cases] all turned out to be multiple homicides, you killed two people, or particularly bloody, you sliced people open and their bowels fell out or something horrible like that [then maybe it was those factors, not race, that explained the sentencing outcomes]. So, you say, "Well, in order to address that, let's have a question [in the questionnaires] addressed to every possible thing we can think of — about the defendant, the victim, the circumstances, the crime, other [prior] crimes that take place, the defendant's past record, et cetera." Well, then all of a sudden, you've got a questionnaire that's got 30 or 40 pages and 300 or 400 variables, as they call them. And what you've got to do is to collect data on all of those. And then with the magic of computers and statistics, you can say what factors appear to have made a difference [in whether a defendant received death or some lesser sentence], and what factors appear not to. [01:18:07] And it's possible at least, that what looked like racial factors would "wash out," would turn out to be something else. So, Baldus went to work doing that. Meantime, what we had to do is to tell every lawyer doing capital work in Georgia, "Make a claim there's racial discrimination in capital sentencing in Georgia. You want an opportunity to prove it. You want to bring in Professor Baldus or somebody else like that to do it. And have that in your case. So that when the time comes, if Baldus's material is in fact accepted, and it prevails, all of you will have raised the claim."

[7] During transcript review, Mr. Boger added: "Baldus wanted to know whether that subset of cases was also where other very highly aggravated factors appeared more often."

SK: I hope this isn't a crude way of putting it, but it sounds like there was a question as to whether or not race was an aggravating factor, like other factors.

JB: Baldus's book, right on my shelf, right now, says that race mattered more, race of the victim in Georgia [in determining the eventual sentencing outcome], than whether you had a prior murder or armed robbery conviction.

SK: Did you say race of victim?

JB: Yes, yes. And what Baldus ultimately found is that there was some race of defendant discrimination — where the prosecutor would be more harsh on the case because of the race, the defendant was Black — in rural Georgia. But that was kind of washed out in the urban areas where there was a greater African American population and the prosecutors were a little bit less — but in both places, the race of victim discrimination was very strong and was not able to be "washed out" by anything else that was ever shown. And it was an odd thing for some people. I think there were some Justices even who never understood why that was discrimination. [01:19:59] But the argument is, if what we do is have a penal system that especially, especially harshly punishes you if you kill somebody who's white, we're really protecting white lives more than we are nonwhite lives. And if it's a, they call it 'Black on Black crime,' who cares? Blacks aren't politically powerful. So, whatever we do, we're not going to have anybody come and say, "How dare you [not prosecute capitally someone who killed]?" Unlike the daughter of the [white] dentist or the doctor's son or whatever. So, we'll just plea those cases down. It takes a lot of work to do a capital trial. Don't need much work. Just do a plea. Say "We could give you death, but if you'll take a life sentence, well, you could end right today."

SK: It strikes me that what's so powerful about making the race of the victim your focus, whether you're a litigator or whether you're someone whose interest is in protecting white victims, that every white defendant who receives a death sentence with a white victim can actually strengthen your argument that the death penalty is fair. Whereas if there's a Black defendant with a white victim, it can strengthen your presumption that that's the most important kind of crime.

JB: Well, in what you've done though, by asking the question that way, I think is to underline that LDF was ready to take the evidence where the evidence led, and indeed Baldus's deal with us was as follows: "If you give me this financial support, I will do the work. If we find something interesting, I will testify for you. But if I find something that you don't like, I'm going to publish it, and you can't restrain it. There's no suppression of evidence on this." And we said, "Absolutely." We're betting, in effect, the bank, that what we're going to see is continued racial discrimination. And he came back. Indeed, we liked him a little because he was a little bit skeptical of it. He said, "I really do think that some of the [statutory] changes made since *Furman* are likely to make a difference in the fairness of the system overall." [01:22:00] And he was the one that came back and said, "Holy smokes, to my surprise, this really is —" The most convicted people you can get are the people that start out skeptical and then are persuaded by the evidence. And that's what Baldus turned into.

SK: That's so interesting. Would he have been looking at, forgive me if this is too specific, between *Furman* and *Gregg*, there are not executions, although there are people who are ending up on death row in that period. There's another period after *Gregg* or maybe

Woodson where people are on and off death row again. When are people meaningfully reentering death rows with the actual possibility of being executed?

JB: Well, the first execution that took place after *Furman* was 1977, and it was a "volunteer."

SK: This is Gary Gilmore. Right.

JB: Gary Gilmore [who gave up his appeals and sought his own execution]. Yeah. But then there began to be one or two other volunteers. Steven Judy in Indiana, I think was [19]79. And I was three or four years in before people — John Spenkelink in Florida was not a volunteer. But I was three or four years in [to my work at LDF] before you started to see people who had reached the end of their tether and didn't have anything else [pending constitutional claims] to protect them. And didn't have another round [of claims] available and started to see executions. I mean, over the course of my 12 years there, I think — I think there were five people I represented who were executed. It is really, it was terrible. I saw Warren McCleskey's execution. I was present at, with the families for two of the other executions, but not in the presence of the sad victim of that.

SK: And if you're prepared to, I do want to ask you just in a moment about that experience, because I imagine that that was one of the most difficult things personally, professionally, you would have to do as part of this career. Just stepping back just a moment to Baldus. So, you're working with Baldus before you hear the name McCleskey?

JB: Yes. Oh, for sure, indeed. When you think about it, we put these claims [of racial discrimination] into all of the cases. [01:24:03] It's really one of the things I admired about the Legal Defense Fund and subscribed to. They did not say, "If it were a civil matter, we're trying to decide whether some particular form of speech should or should not be

prescribed. We're going to look for a very good case in which the facts underscore the sadness or the outrageousness or the justice of what we're doing." And all public interest outfits do that routinely. Now, that's not what a local lawyer will do. A local lawyer might take whatever case they get. But on the other hand, LDF said, "Look. If all these people are facing death, we've got to basically put these claims forward not just in the 'attractive cases,' but in every case." And most judges in post-conviction are not obliged to hear your claim. They can just say "denied." You can give a 50-page argument and they can say "denied" in one word. So, you're rolling the dice. And McCleskey had a judge, Owen Forrester, in Atlanta, who in May of 1982 said, "I think I'll look further at that." I originally thought, when I wrote something earlier, a couple of years ago, that he had said at that point, the new Baldus information is in. He [Judge Forrester] actually had an earlier version of Baldus's stuff and said, "That's enough, that I want to hear it." But by the end of the summer [of 1982], in the fall, Baldus really had some of the results of the study that we had helped him commission and do. And he [Judge Forrester] said, "I want to hear it." Well, if you were looking just coldly, without regard to the individual, you'd have said, "This guy has two prior armed robberies, convictions. He's alleged to have committed another armed robbery and killed a police officer who tried to intercept him in the furniture store where they were all gathered. That's not the case we want to bring." [01:26:05] We didn't begin to think of that. We just said, "It's in that case. If that's the case you want to call to a hearing, that's the case we'll go to a hearing in." So, that's how — and Bob Stroup, who's an attorney in Atlanta who had been the local counsel for Mr. McCleskey, I had heard his [McCleskey's] name before the hearing, but I had not really met McCleskey because he was just one of the 20 or 30 capital clients who were fairly far along in Georgia until after we

said, “We’re going to start to working in this, toward a hearing which may lead to the Supreme Court.”

SK: How did you think about or plan to ultimately begin preparing for the specifics of *McCleskey* as opposed to some other cases?

JB: Well, there were a lot of people working, of course. Baldus was the most important and he was actually refining his data and doing what he could [to test every single possible alternative explanation for the racial discrimination he was finding]. And [Tony] Amsterdam and other people at LDF, and other social scientists. Sam Gross is a person I failed to mention to this point, which Sam was a lawyer and social scientist who was very instrumental in working with LDF on lots of its social science work, including *McCleskey* and then the death penalty. And Tim Ford was a guy in Seattle who had done wonderful work for us, and Tim was actually one of the Counsel of Records on the matter [during our hearing before Judge Forrester]. We all began with Amsterdam and others looking at, “How is this case starting to come together? What is Baldus showing and how can we put it forward?” Now to get ready for a hearing like this, which is what the judge ultimately ordered. He originally said, “We’re going to have a hearing in the fall of 1982.” And then the party said, “Well, wait a minute, I want to hear what the state’s expert witness is going to say. And I want to hear what Baldus is going to say.” [01:28:05] And you say, “Okay, well, we’ll schedule a deposition where that can be done.” And as all those things are being scheduled, Baldus is continuing to refine his data. So, to cut to the chase, it took until next August, August of [19]83, before we actually got to a hearing. But we were refining what he [Baldus] was coming up with. The problem, and ironically, with David’s research, is that there were so many different ways to do the analysis, all of which showed racial

discrimination. A lot of people will look to a statistician and say, "I know you have six different methods of doing your analysis. Can you find one that will show what we need?" And will insist that one is the right one and the other ones aren't right. Baldus was willing to do all the different methods, and Baldus could have data sets that would have the 40 most important, the 10 most important variables, the 20, the 40, the 80, the 200. So, in a sense, we were troubled because it was a hard case to make because there was a lot of complexity to it on the one hand, and yet it always came back, it always triangulated to the "no matter what we do, race stands out." Indeed, during the hearing we ultimately held in the summer of 1983, this was considered a big deal back at this time. We said to the judge, Judge Forrester, "Judge, we're hooked up in the courtroom to a computer back in Iowa. And you can tell us, you're a former strike force drug prosecutor, what factors you think explain the death penalty in Georgia, the 10 or 20 or, just name one. Just give us a picture. Prior record, aggravation of the crime, and we'll put those in and we'll send you back a report on whether your factors make the racial discrimination worse or less worse." [01:30:14] And he said, "I don't think you're going to see any discrimination after you do what I tell you." And we took his factors and about 20 minutes later came back and said, "Actually, there's more racial discrimination under your model, as they call them, than there is under the model we're using." So, rather than being less powerful, it was more powerful, and the judge was, "Oh, okay."

SK: So, is this effective? Did you get pushback from people when you tried to show them that?

JB: This particular judge I liked as a person, I had worked with him on a couple of other matters. He was a Georgia Tech engineering graduate. He was a former, as I said, a

DEA drug prosecutor, appointed by Reagan. He was the kind of guy who said, "Mr. Boger, I don't think we have any more racial discrimination in Atlanta. Andy Young has been named the mayor, and once you've had a Black mayor, race is no longer a factor." And I think he meant it. So, he was also not a person that really relished complexity. And he looked at all this stuff [our statistical evidence] and says, "My gosh, there's all these factors. I don't think I see race here." The one thing he did do for us twice, because *McCleskey* came to the Supreme Court twice and it [the case] came through his court twice, he said, "You may not have race discrimination here, but I find another reason to reverse his conviction and give him a life sentence." And the second time it came through, he found another reason and gave him life. So, he [Judge Forrester], I think, had a sense that McCleskey wasn't really death worthy, but he was not going to go out on a limb and accept the statistical proof. [01:32:00] The other thing we talked about very self-consciously is the teaching part of this kind of case. How do you explain this stuff to people? And we had a little analogy, "Your Honor, if there were a field and you were trying to decide whether a particular fertilizer worked, what would you do? Well, you'd put fertilizer on half the field and not on the other half, and you'd put the same seeds down. And maybe even if the field's better at one part than the other part, you'd checkerboard it and you'd put the fertilizer here and here and non-fertilizer —" And that's what social science evidence can do. And that's what we mean by "holding other factors" — the hillside, the amount of rain, the amount of sunshine — we're going to hold those to a constant. So, you're trying to do that without being patronizing [laughter] and say, "Little boy, let me explain this to you." And so that was a major part of getting ready.

SK: [01:33:03] Was there resistance to the idea of introducing statistical information into the courtroom, whether at the state level or ultimately the federal?

JB: The judge was— that was the other part. The judge was receptive to hearing it. He was kind of interested. The state was really exasperating, because they took a [Muhammed Ali] rope-a-dope approach, "Oh, you can never use data to show anything like this. This is completely impossible to do." And you said, "Well, that's funny, because every prosecutor we have, to decide whether or not they're going to charge a person capitally, they look at, 'Gee, is this a case of a person with a prior record? Is this a person who had a codefendant?'" All the factors we're talking about. That's what they do. They just don't use math to do it. But they're doing it intuitively all the time. And we're trying to decide whether it works or not. And if you can tell us there's anything, if you ever give us one model that would show that race washes out, we'd be in a lot of trouble. It's now 2023. We tried that case in 1983. I have never seen anything in writing or otherwise, by any social scientist on the other side, disparaging the ultimate model that Baldus came up with.

SK: So, Baldus's model has stood the test of time. In *McCleskey v. Kemp*, the Court ruled that statistical evidence was not sufficient to save his life.

JB: Well, we had two different claims. We made an Eighth Amendment claim, the death penalty is cruel and unusual [if it's applied arbitrarily], and we argued you didn't need proof of intent for that. And then the Court itself, it held that in the Equal Protection Clause, you show an equal protection violation not just by showing that people's outcomes are different, but that the government intended there to be a difference based on race or sex or whatever. And so, the question was, what does it take to prove intentional discrimination in that context? [01:35:10] And we argued, and the Court had ultimately, had earlier held that

there are certain circumstances in which you can make that inference. Indeed, there had been a recent one [decision] in which North Carolina had had Black and white county agricultural agents, extension agents who work with farmers [in each of the 100 counties in North Carolina]. And each of the counties had county commissioners who had appointed these people and paid them. And the pay for African Americans turned out to be lower, on average, $300 or $400 [per year]. So, the argument was made that that was discrimination and the response was, "No, it's not." And actually, that came up to the [Supreme] Court, and the Court said, "We do find that you've taken into account their [extension agents'] prior education, the amount of experience they've had, three or four other variables, and it otherwise is not explained except as intentional discrimination." And we thought, "If, gosh, that case, *Bazemore v. Friday*, with four or five variables, the Court's willing to accept them — I think it was Justice Powell, in 1983 or [198]4 — surely our 400 variable multiple [models in the Baldus study]— we've done it 15 different ways." We also had experts from MIT and Stanford and Carnegie Tech writing amicus briefs saying, "I don't know whether I'm for or against the death penalty, but this is the finest social science study I've ever seen in the criminal justice area." But the Court. No, the court didn't accept it [that we had shown discriminatory intent]. And there are a couple of reasons, I think. The most surprising to us, one we learned later, was that the brand-new justice, Antonin Scalia, ultimately did write his colleagues an internal memo in which he said, "I can't say that I disagree with Baldus's methods or his conclusion. I think there is race discrimination, but I think it is inevitable in our society, in criminal sentencing, and therefore I'm not disposed to do anything about it." Except for that last sentence you thought, we've got to, we've got — but he [Justice Scalia] never wrote it [published his reasoning]. And it came out five, eight or 10 years later, from a

surprise source, because it didn't turn into opinion, but "I think there is racial discrimination. I think you've proved it. So, what? We're not going to do anything about it."

SK: [01:37:43] In other words, if racial discrimination is normal, it shouldn't be addressed.

JB: It shouldn't be addressed. And you wanted to say, "First of all, you all are the ones that said, 'death is different.' If there has been discrimination in hiring, in county agricultural agents' salaries, you're ready to reverse. Hiring in General Motors, you're ready to reverse. Putting people through an electric chair versus giving a life in prison? 'Oh, well, it's just part of the process.'" I think [Justice] Powell himself, who wrote the [majority] opinion [in *McCleskey*], didn't fully appreciate what he was looking at. Indeed, one of the finest, there are a lot of fine analyses of it [the decision], but [death penalty lawyer] Steve Bright wrote — or no, it's Jim Liebman wrote and said, "Everything Powell wrote leads to the conclusion exactly the opposite of the one that he made."

SK: And just a few years later, Powell said that he regretted that decision.

JB: He was asked by his biographer, John Jeffries, had he ever issued an opinion, or did he ever vote that he regretted. And he said only one time and that was *McCleskey*, and he appeared to have gotten to a place where he didn't believe the death penalty was appropriate anymore. But of course, that was far too late for Warren McCleskey.

SK: Right. So, talk to me about Warren McCleskey. Did you come to know him personally or are there recollections of him that you would like to share? I'd also like to hear about the experience of having a client who was executed.

JB: Well, he was a lovely guy. There were, I would go see — okay, I'd leave Newark Airport, fly to Atlanta and rent a car and drive an hour down to the Georgia

Diagnostic and Classification Center in Jackson, Georgia, where their modern, surreal sort of looking prison was. And I would sort of say I'm there for two days and I'd go in at 10 o'clock and I'd see Roosevelt Green; at 11:30, I'd see Billy Mitchell. And at one o'clock I'd see, and I'd do five of those. And then I'd go back the next day and do five more. And that was how I stayed in touch with the eight or 10 clients that were really my clients in every way. And Warren became one of those. [01:39:53] And he and another guy [death-sentenced prisoner] named William Neal Moore, Billy Moore, were good friends, and very religious and spiritual. And so, I could talk with them both legally. Warren, Warren understood the legal stuff we were talking about, and I could talk to him about his own life, and he was very reflective and not angry or judgmental. He had grown up in a very, very tough situation, with some family that was involved in shot houses, and undercover, giving people drugs and alcohol and gambling, et cetera. And so, his upbringing had been pretty terrible and he'd done a lot of things that he regretted, but he had changed so that he and Moore were people that the prison guards would actually tend to move near guys that had come in who hadn't settled down and said, "If you get under the influence of Warren McCleskey and Billy Moore, you'll be a better person." So, I came to like him [Warren] a lot. I didn't go, I never did with clients, back and learn their early life histories in the way that mitigation specialists would have if it were a trial. I just didn't have time to do that. So, I didn't get to know his sister well. But I did know him. And yeah, it was terrible to see at the end. Before we got to the end, I will say, and I won't expand on it, I promise. We've talked a long time. But once *McCleskey* was lost, a day later, I flew to Atlanta and went out and saw him [Warren] and explained what had happened. And he said, "Is there anything left?" And I said, "Well, Bob Stroup and I are going to look to see if there's anything left."

And to make a long story short, we found evidence that the state had suppressed a 21-page "confession," that they had ostensibly gotten from McCleskey from an inmate who was in the cell next to his. [01:42:03] And then we started to ask the people in the prisons, the local jail system, "Who was this guy?" And we found some old guy [jailor] who had retired who said, "I know what happened there. The detective in the case had asked me to move this guy next to McCleskey and told the guy, 'Get something on him.'" Well, that's at least two different constitutional violations. You can't actually have a person working for the state after Miranda warnings have been given without telling the lawyer, "Your client is going to be interrogated by an undercover agent." And secondly, if there's something that is like — oh, and they ultimately then promise this guy some favor in exchange for it [his testimony]. Well, all that stuff came tumbling out, and we came back to the [federal] court and Judge Forrester was horrified. "You're kidding. You did [found] that?" And State tried to obscure it, but there was no obscuring at all. So, he gave us relief, at which point the Eleventh Circuit said, "You should have found that earlier. And you've waived the opportunity to raise it." And we said, "That's funny because at trial, the lawyer [McCleskey's] asked, 'for all written statements,' and it [the 21-page statement] wasn't given. On appeal, the lawyer asked for anymore statements. In state post-conviction, they [Bob Stroup] asked the prosecutor, 'Is there any more statements?' four or five times. 'No, no, no, no, no.'" "Well, you should have found it." Well, the only way we found it is a guy named Ulysses Worthy, who had retired from the jail system, remembered that the DA had done it.[8] So, we got all

[8] Mr. Boger clarified that "a Fulton County attorney, unrelated to the case, looked through McCleskey's criminal file and voluntarily turned it over to Bob Stroup after we had lost McCleskey's appeal in the Supreme Court in 1987. Then we used that document to locate Ulysses Worthy."

the way back to the Supreme Court of the United States on that issue. And I argued that in 1990. And Justice Kennedy, I believe, wrote that we had waived the claim.

SK: Was that *McCleskey v. Zant*?

JB: Yes, yes.

SK: I think people would be surprised and maybe not at all surprised to learn that a life-or-death decision comes down to minutia of timing.

JB: [01:44:05] And to us, I mean, I opened the argument [in the Supreme Court]. I still remember saying, "We've been blindsided by the State." The State has — they [the Court] didn't want to hear any of that talk at all. My real footnote to this, and I would get back to the end of this. [Sidney] Dorsey, who was the sergeant, the police sergeant on this case [who arranged the transfer of the jail inmate to 'get something on McClesky'], subsequently runs for Sheriff in DeKalb County, which is just northwest of Atlanta and wins. Serves a term as sheriff, runs again, and loses. The night he loses, he has his number two assassinate the winner.

SK: Wow.

JB: He is convicted of murder. Sergeant Dorsey is now doing a life sentence for his murder. So, the person who, in fact, had done this secret action to try to get McCleskey death sentenced is himself a person subsequently committed and convicted of murder. So, the ironies are pretty rich.

SK: Oh, for sure. Two people, McCleskey and Dorsey, both of whom stood trial for the murder of a law enforcement officer had different fates.

JB: Yeah, and there's a long story about why McCleskey likely didn't do the shooting [of the police officer for which he received his death sentence], but I'll leave that to the side, unless you're wanting —

SK: Well, I think, let's talk about it just a bit. Again, I think people would be surprised that someone who maybe didn't actually commit the very serious crime that they've been accused of actually ends up in the execution chamber. And this felony murder might not be what you're talking about, but I think a lot of people accept the idea that the worst of the worst are the people who end up being executed.

JB: Well, McCleskey was one of four people who robbed the Dixie Furniture Company. He was not the leader. There was another guy who was the leader, more experienced than the rest of them. [01:45:57] Subsequently, they [the police] did an analysis of the bullet that was used in the killing. And it was a Brazilian gun. I've forgotten, I'm sure now, the name of it — the Rossi. And they asked the girlfriend when they picked up the other people, and ultimately McCleskey, "Who had which weapons?" And she said, "My boyfriend had the Rossi, McCleskey had a .38." At trial, she switched and said, "My boyfriend had the .38, McCleskey had the Rossi."[9] But when she didn't know what the consequences were, my boyfriend had what turns out to be the murder weapon. Number one. Number two, the timing didn't entirely add up. And number three, the guy who said, "I heard McCleskey say it," had been literally moved from one part of the jail to the other, told [by an Atlanta police sergeant] to 'get something' [on McCleskey]. He [the jailhouse informant] was semi-illiterate, and yet they had prepared a 21-page statement. He couldn't have done 21 pages on his whole prior life. So, they had obviously written something [for

[9] In transcript review, Mr. Boger corrected this: the gun was a .45, not a .38.

him to sign], and then [the prosecutor] decided not to admit it because it was so preposterous that he would have done it. It was about as, and McCleskey always said, "I was involved in the matter [furniture store robbery]. I didn't do the shooting [of Officer Schlatt]." So, I really felt like that was the case.

SK: As a brief interposition at this point, by the late eighties or early nineties, you have a son and a daughter. What's your family life like? [01:47:35]

JB: I stole the moments I could when we were back home, and it was nice to see that my calendars do have the, "Went to the park with Peter and Gretchen," "Went out to see this or that." Part of the reason I stopped doing the work [at LDF] was that I realized that they were getting to be sixth graders and ninth graders, and a year in which you're away 77 days. And then half the time you're back, you're writing briefs at the office. It was not conducive to good family life. And it was my wife's generosity that she realized how much this had meant to me. But it was appropriate. I remember at one of the death penalty conferences, the summer conferences, saying, "Maybe this is just me, but I want to tell you, I don't think we're going to end the death penalty anytime in the next four or five years. Indeed, all of you may need to think about your life and giving all that you can to it, but understanding that it might go on longer than you will be able to pursue it."

SK: That's a remarkable thing to share with people who had dedicated countless hours and years to doing this work.

JB: Well, it was actually not the moment I had decided [to leave LDF] myself [laughter] and was just justifying [that choice]. But I really was saying, gosh — it was related to something else that somebody had said about doing this work. And maybe this will take us back to what happened with Warren that night [of his execution], and maybe it

was Greenberg or Nabrit, but they said, "You know, if you're doing work at Sloan-Kettering or Mount Sinai, you're going to have lots of clients, patients, who are not going to make it. And your job is not to be sure that they all survive, but to be sure they got the very best medical treatment that anybody could give them. And legally don't ruin yourself emotionally over the fact that you lose some of these people. The courts are against you. You know, the evidence is sometimes against you. You do the very best you can and it's out of your hands." [01:49:49] So, I both believe that, I probably believe that religiously too. It would be fairly grandiose to sort of say, "I can make everything different than it always was." And I saw that with other people at LDF who, it's one of things, there was very little ego there. They were doing it because they thought it was appropriate to do, but they didn't think they were going to be the fulcrum around which the entire country's racial politics are ultimately changed.

SK: So, let's go back to Warren McCleskey.

JB: Yeah, we realize we got, we're getting close to the end [for Warren]. And I had never wanted to see an execution, but I wanted to be there [for Warren], because there was nobody else who was local for him who was going to be able to be in that group of people who watched. And so, I said— I also knew I was getting close to the end, indeed was at the end of my time [at LDF] because it was 1991. And so, I said, "I'll go." And I met with Warren earlier that day and he was more philosophic about it all in some respects than I was. And we talked and talked about people he wanted me to contact and things of that sort. And so, I did that. And I then went to this godforsaken little sort of one-story cinderblock place behind the prison where they had their execution chamber. And it was late at night, and it was out of a movie. It was raining heavily. And so, we went in and sat there with the

sound of the rain on the little roof. And on the other side of the glass panel comes McCleskey and starts to issue a last statement in which he apologizes to the family of Mr. Schlatt, the police officer, not for his own doing, but the fact that he was involved in the process and the rest, and then all of a sudden, everything stops and there's a stay of execution that's been granted. Some of the people who I'd known were working in Atlanta had done one last-minute request, and he was taken out of the chair. [01:52:01] And 29 minutes later or something, he comes back and they sort of re-hook him up and he begins his statement again and they don't, by mistake, turn on the microphone. So, I didn't think of it at the time, but would later. It's such a metaphor, that he's trying to speak, and the State has kept the microphone off. And then you go through this couple of horrifying minutes. It was not as lightning bolts coming out of anywhere as I thought, but you're still watching somebody that you care a lot about, love in effect, being deliberately put to death, and that was it. I mean, I had to actually go back to— it was the middle of the night, so it was like six o'clock in the morning when I went, got back on a plane, went to D.C. where I was doing something on the Poverty and Justice work that day with a Senate committee or something. So, it was probably a good transition. I didn't have to process my emotions quite as much because I had something else I had to do.

SK: Right, the work goes on.

JB: Yeah.

SK: Between that moment of that execution and when you come on as Director of the Capital Punishment Project in 1982, shortly before that moment in 1982, you said, and sorry to pull a quotation on you.

JB: No, that's fine.

SK: You said that you thought maybe in 1979 that the United States was sitting on the verge of a significant period in capital punishment legislation. And it makes me wonder if over the course of that 10, 12 years, that pronouncement, which could be read as hopeful, if your read of that became more pessimistic.

JB: Well, I thought, for a while after 1976 the [Supreme] Court, if you look at it, engaged in a series of decisions, the *Coker* decision on rape and the *Godfrey* decision on disproportionality, and one or two others where it appeared to start saying, "You know, let's be careful." [01:54:07] And we're saying, "If they're careful, and if we can have this other social science evidence [of continuing racial discrimination], we can actually take this in the other direction." And then there began to be some briefs filed by a [conservative legal] operation out in California that at first — now Tony, I'm sure, Jack Greenberg didn't, but I thought, "These are silly." These briefs are saying, "You know, states want to execute people. And you, the [Supreme] Court, you're keeping them from doing it. All these damn decisions you're rendering are kind of cutting out [death sentences], not just for individuals, but in some respects for whole states. You've got to stop doing that." And you thought, "That's not a constitutional argument." I'd fail a student who made that argument. It worked. I think the Court said, "If the states want to do this badly enough, who are we?" And maybe in their defense, although I wouldn't defend them, they'd say, in a federal system, maybe it's the role of states and local authorities to make this judgment. I would say, "Yeah, but you were the ones who said, if they do this [impose capital punishment], they've got to do it in a rigorously fair way. And they're not." [01:55:15] But they began to pull back and there's some [19]83 decisions they did. And then obviously, *McCleskey* they did. They came back [to strike down] in other circumstances. And what they tended to like

are the cases that were individual problems that could be fixed. There was a case called *Skipper vs South Carolina*, I sat at a counsel table with David Brock, who's a wonderful lawyer, but his [sentencing] trial [Skipper's] counsel had tried to put on some evidence. The defendant, if he got a life sentence, would be okay in jail. And he had two jailers who were going to say he [Skipper] was a good guy and they would feel okay with [seeing him live]. And the trial judge ruled it out. And then in closing argument, the prosecutor said, "If you let him [Skipper] live, he's going to rape other people in prison. You know, he's a terrible person." And that got to the [Supreme] Court. And the Court kind of said, "Wait a minute, you're not going to have the evidence from real people that say, jailers, 'He [Skipper] is okay.' But you allow the prosecutor to argue that he's not? Reversed." And I think they probably felt good for themselves. And you go, that's nice for Mr. Skipper, and it was a wonderful victory for David. [Yet] that doesn't begin to address some of these larger questions. But there's a series, and then they looked at, frankly, issues of juveniles and they look at issues of [developmentally disabled] and began to say, "Maybe there are categories of people who shouldn't be eligible for the death penalty." So, they were doing some of that. On the other hand, they were letting [other] things just go nuts. And Georgia wasn't the only place where there was racial discrimination. Everywhere else subsequent to *McCleskey* that there have been social science studies done, I say virtually everywhere else, North Carolina among them, but Pennsylvania and Nebraska and Connecticut, people have found the same kind of disparities, based on race of victim, that Baldus did in Georgia.

SK: Another name you mentioned when you were discussing Warren McCleskey was William Neal Moore or Billy Neal Moore. Can you talk a little bit about him?

JB: [01:57:12] Yeah, he was not originally my client, but I was happy to fall in [as co-counsel] with Dan Givelber from Northeastern, who was his lawyer, and ultimately get involved in his case and ultimately do one of his Supreme Court arguments. Moore had been a guy raised in perfectly terrible circumstances out in Ohio. His father was in prison for most of his youth, and he [Moore] was helping to raise the family, and he went into the military. And he went to Germany and got married and came back home, and his wife left him. And he was trying to raise their child as a guy on base, in a fort just north of the Georgia-South Carolina line. And a friend of his said, "Let's come down [to Georgia]. My uncle's, my grandfather has got some money in his house." And they came down and went into the house and down came grandfather with a shotgun and started shooting in the dark and Moore pulled a pistol and shot him. The next day, Moore confessed. He told them [the police] where to find the pistol. He apologized to the family; he did everything you could possibly do. He got a lawyer that waived trial, waived a sentencing trial in front of the jury and said, "We'll just do this in front of the judge." And the judge gave him death. [His lawyer] didn't put on any of the evidence I've just told you. Didn't tell about his childhood, didn't tell about his good military record, didn't tell about [his secondary role in the crime]. So, Moore [post-conviction lawyers] struggled for a decade, as did most of them, to try to find some other ground [to justify reversal of his sentence]. And ultimately a wonderful woman with whom I worked, [Rev.] Murphy Davis, who ran a program for both death penalty inmates and for people on the streets of Atlanta [Open Door Ministry], went down and spent a week going to the county where Moore's crime took place, to find whether we could see the witnesses that would support him, not for a legal issue, but for clemency. Everybody, including the family of the victim, including the mayor of one of the towns,

said, “Moore should live. Moore was not a bad guy. Indeed, he started writing many of us and we’re now in contact with him.” [01:59:24] Billy had a correspondence with 50, 100 people around the country. It was — so ultimately, to cut to the chase. He got clemency, and then the clemency board [Georgia Board of Pardons and Paroles] was so impressed that they let him out of prison. And he’s been out for 25 years and is in Rome, Georgia, and speaks on death penalty issues, et cetera. He’s a remarkable — But he’s an example of the redemptive possibilities of people. And, of course, I don’t think his crime was really that aggravated to begin with. A very bad choice made in the middle of the night. He was not out for the money. The family was so mad at the guy who was actually the, instigator by the time we got there, that’s the person they wanted to go after. And he was never charged with anything. So, Moore has become a person who’s talked around the country on, I don’t know if you’ve ever had a chance to hear him, but he’d be a great speaker to bring to, who can talk about what it’s like to live on Death Row, and do that life and to come out.

SK: It’s a great idea, actually. He’d be a wonderful classroom speaker, I think.

JB: He’s been to Harvard and Yale and all sorts of other places.

SK: Maybe he can come slum it down in —.

JB: [laughter] No, no, no, no. North Carolina would be fine. But I mean, Steve Bright’s had him up to Georgetown. [02:00:42]

SK: Right, exactly. Well, listen, let’s talk just a little bit more about the death penalty. And then I want to hear about the Poverty and Justice Program, this is when you moved at this crucial moment. We’re moving towards the discussion of death qualification, which I think is important for us to talk about, because I do think that as much attention as the death penalty receives, the idea of death qualification, which I’m going to ask you to

define and maybe gets short shrift, but first, so we'll just put a pin in that. First, another case that I just want to hear briefly you discuss is *North Carolina vs. Rook*. John William Rook, decided maybe in 1981.

JB: Yeah, Rook was, —that was such a poignant case. I did less [death penalty] work in North Carolina than I had expected to, because North Carolina had such a fine roster of capital defense attorneys. But this was a case that David Rudolf was involved in and involved a young guy who had, again, absolutely terrible home circumstances and had committed a horrible killing of a young woman in Raleigh out in a field, where he had killed her and then run the [his] car over her, up the hill, et cetera. And there was no question of his involvement in it. No question. It was brutal. One of the things we got involved to look at was how he had come to do it. And over the course of the 10 or 12 years I was with LDF, at the trial level, [capital defense] lawyers were getting better and better at looking into the backgrounds of the defendants at trial and telling the stories. But they had not been early, and John was one of the cases where they hadn't. Turned out he was from a family that was so violent that it was almost beggars' imagination. They were living in Raleigh, and the parents would get drunk and take their three or four kids and tie them up naked in the middle of the floor and with their friends would bet, "We're going to throw an ashtray up, which kid is it going to hit?" [02:02:43] And it would hit John, or it would hit his sister, that kind of thing. He ultimately was moved into foster care and then was put in the state reform institutions. And the argument that we wanted to make was that they had been so deficient as a state in the foster care that they had given because all those were terrible placements. And in the facility, the training school, which ultimately was closed down for its rape and other things. And when he [John Rook] left at 18, they said, "Needs follow-up care, could

be violent unless he gets it." And it was only shortly thereafter that this [crime] happened. And so, we said, in effect, the state is [partially] culpable. This was "their child" taken from these horrible parents, put in these insufficient facilities, et cetera, and we didn't get much purchase from that. And the day before he was executed, he told us, he said, "I want to make a video," which I still have somewhere, "And just tell people how foolish I was and how terrible this all is and how much they said, listen to the people that are telling them to be good." And so, he was totally confessional about how sad his situation had been, but how foolish it [he] was. And he said, "I don't want other people to go through what I've gone through and I'm sorry for it." So, I remember the night, I didn't see his execution, but we were trying to get a stay [of execution], and I was in Central Prison and came upstairs to the level at which he was being held. And he was being held on one side of an area with open windows. They were the windows, but you could see across. And he just looked at me like this [makes a "what's happened?" gesture]. And I went like that. I put my thumb down and said, "It didn't, it didn't work." And he nodded and he was gone. But it's so sad.

SK: [02:04:41] Yeah, that's a remarkable story. I feel like there must have been people who pushed back, and it might say something when you, for example, describe the abuse that he suffered and the trauma that he suffered. And by the way, I just want to note that I think that this is the first that I've heard of an argument that sort of—I'll try to not add too many parentheticals — that I haven't heard of it doesn't mean it hasn't been done a million times, but the first I've heard of an argument that goes beyond the idea of a difficult childhood being a mitigating circumstance for someone and says, in fact, that the difficult childhood was something that could have been addressed by state actors and the state, in fact, bears a great deal of responsibility for what happened afterwards. But there must have

been people who pushed back and said, “Listen, I had a bad childhood, and I didn’t kill anybody.”

JB: I’m sure there could be. But that doesn’t mean that death is the appropriate punishment for the person. Certainly, this person is dangerous still and probably needs lots of therapy and life sentence, but not necessarily death. Actually, the one dimension of state responsibility I forgot. We got evidence that showed that the Wake County Department of, what do you call it, Child Welfare [Social Services], said to McCleskey’s parents, “You’re really not doing well by your children.”

SK: I’m sorry. Just to clarify, this is Rook or McCleskey?

JB: [02:06:05] Oh, no, this is Rook. “If you stay in Wake County, we’re going to have to take this child away from you. There is a place renting now, about a quarter mile away, outside Wake County. If you move there, then we’ve lost our jurisdiction.” And they [the family] moved [and kept John in their custody]. And so, talk about really defaulting on your responsibility.

SK: Wow. To say the least.

JB: Yeah, no. It was the progression of facts that we got that made us say, “We want to hold the state culpable for this. They’re just as responsible for what happened, not for the killing itself, but for the circumstances that led up to it, or at least enough responsible.” I think we used a latches notion, so a notion that at a certain point you can’t legally make an argument otherwise available to you because you had such a responsibility for it, that it’s partly your fault.

SK: [02:07:00] Right. So, let’s talk a little bit about death qualification. These capital cases are taking place before a jury that has signaled that they will be willing to

impose a sentence of death in that second sentencing phase of the bifurcated process you described.

JB: Right. One of the things that was looked at early is whether, if you have two phases of a capital trial, the guilt-innocence phase and the sentencing phase, it matters whether you have removed from the guilt phase of the trial prospective jurors who say, "I couldn't give a death sentence." Or likely couldn't give a death sentence. And the argument was, if that makes a difference in the deliberations on guilt or innocence, then you should wait and do death qualification only at the penalty phase and make sure you have 12 jurors who would [be willing, if the facts and circumstances justified it, to] give death. But you don't have to do that in order to decide the guilt or innocence question. There was an enormous body of social science built up, 20 or so studies of increasing sophistication, that would model what are the outcomes on guilt or innocence questions if you have a jury from which all of those death opponents have been removed or not. And it turns out that the juries are much more punitive on guilt-innocence questions, if in fact they're willing to give the death penalty. They're not only more punitive, they are more likely to disregard the judge's instructions on careful issues of law. They're more likely to believe police officers, but less likely to believe lay witnesses. In other words, you can come in and show a variety of ways— and the most sophisticated studies would have model [simulated] cases that would be heard in front of jurors, that were very close on whether it's a first-degree case or a second-degree case or a voluntary manslaughter case. And behind a screen would sit the social scientist and they watched the jurors do this 20 times, different jurors, and then find out who was against the death penalty and who wasn't, and then see what the outcomes were. [02:09:19] And they showed there was a systematic difference, a meaningful

difference, between the likelihood that they would be more punitive or less punitive. So that suggests that it really mattered. And of course, it shouldn't matter to the guilt-innocence determination what you think about capital punishment. So, those issues were put in some case in California called the *Hovey* case, and all the social scientists testified. And to the surprise of the people who brought those, the Supreme Court of California, which was considered a liberal Supreme Court, rejected the claim. The issues were then sought to be put in an Arkansas case. And I was involved in it. Sam Gross was the genius behind this. Sam was one of the people from the university, first at Stanford, then at University of Michigan, who was coordinating all this social science evidence. And Sam couldn't come to the hearing we held in Georgia, his mother had died or something like that.[10] So, Jim Liebman and I from LDF put on the case for two weeks before a federal judge, Thomas Eisele, who was a Harvard-trained, smart guy. And ultimately, he bought the evidence. He listened to the state's experts. He listened to our experts, and he said, "You're right. This does make a difference [in guilt determinations]. It shouldn't happen." The case then went up to the Eighth Circuit, which decided to hear it *en banc*, and it was the only time I'd ever been to the Eighth Circuit. I'd never been to St Louis, but I flew out, I remember the day before, and looked at the Arch and said, "Hi, Arch, I'm going in to do my work," and watched the court deliberate the day before and then argued in front of the court and we won five to four. So, we had won at the District Court and we won at the Court of Appeals on that this made a difference. And then the Supreme Court granted certiorari. And Sam [Gross] argued it, and that wasn't the reason, but we lost. We later have got [confidential] notes that we found in [Justice] Lewis Powell's file — because Lewis Powell put all of the

[10] During transcript review, Mr. Boger noted that the state was Arkansas, not Georgia.

notes of his time on the Court, in many cases, in the Washington & Lee Law Library. [02:11:27] And you can now go online and pull them out. And the response [of the Justices], when they get this is, "This is another typical Tony Amsterdam thing." That was what one of the Justices said. And another Justice, I think it was [Chief Justice] Rehnquist sort of said, "I don't care what this [social science evidence] shows. This is okay. It's what the jury, what the states want. We're going to go ahead with this." And so, in a way, much as we found out later in *McCleskey*, Gross walked into a Court that had already largely decided, "This social science evidence is not going to keep us from doing what we think is a good thing, or at least a permissible thing."

SK: Which sort of suggests, and perhaps this is silly, but it suggests that bifurcating sentencing was not the solution that it was purported to be or that it was offered as a solution that wasn't actually intended to solve a much bigger problem.

JB: Well, I think one of the things that ultimately built frustration against LDF, which I think did emerge in the Court, is that, "No matter what we do, we struck all the death sentences in *Furman* and Tony Amsterdam told us they wouldn't reinstitute. They reinstituted and in fact included some of the things they had argued should happen. Sort of guilt-innocence [from the penalty phase of capital trials], and separation, aggravating and mitigating factors. And then you come back and say, 'That's not good enough.' Then, in fact, you come in when we say we think this is all fair and say, 'There's race discrimination, and there's this.' You'll never stop. Your objective is to end the death penalty, not simply to make constitutional issues." And Tony actually withdrew from being an advocate in the Court because he didn't want to have any sense that he was there trying to pull one over on them, or marshal, muscle them out or anything. And I think LDF lost some of its power in

the Court just because there was the sense, "You're on a crusade and you may outthink us, and you may out prove us, but we are still the Court and we're not going to be prey to this."

SK: [02:13:38] There's no pleasing you people.

JB: [laughter] That's right.

SK: I mean, that's such a, it's a fascinating look into maybe the culture of the world that you were living in, or at least into the many kinds of considerations that you had to consider.

JB: Well, and you also knew that — I'm not talking just about the Supreme Court now, that the playing field was going to be really pretty tough. I didn't tell you, in the middle of the trial in *McCleskey* in the district court, federal district court in 1983, the second week of that hearing, they [State of Georgia] set an execution date for one of my clients, and I had to leave the hearing and drive down to Macon to get a stay. And then the day we finished [McCleskey's hearing], the stay was denied, and we had to work all weekend. They [the state] did that several times to us. They'd say, "You guys think you're so smart. We're going to set an execution date that'll have you having to leave your own capital hearing in order to go save another client." There's a fair bit of that.

SK: Acknowledging that things are so dire that they can structure your days and weeks, putting out fires.

JB: Right. [laughter]

SK: That they can keep lighting—

JB: We can set another fire. [laughter]

SK: Right, exactly. On that, I suppose you've touched on this, and I don't want to ask you to repeat yourself if that's not necessary. But as you're working with your fellow

attorneys, with local counsel, with families and others, clearly this is exhausting work physically because of the travel involved and your time away from your family and things like that. I imagine this is also taking an emotional toll or perhaps not. Well yeah, I think you've told me that.

JB: Yes. Although I didn't find myself getting more and more disconsolate. You really did sort of take heart from the sense of what had been done by earlier generations, people in the [19]20s and [19]30s who were arguing for the NAACP and what became the Legal Defense Fund at a time when you weren't making any progress at all on school desegregation or any of those things and said, this is a tough, tough battle. We're not mistaken about that. Really. It's clear. [laughter]

SK: [02:16:21] And that's the big question that I have. The stakes are so high, both systematically and individually. And I'm curious how one copes as part of an advocacy group or a litigation group and as an individual with this idea of exhausting oneself fighting the battles, when it's not clear if the war will be won, losing battles one week, winning them the next. How do you rationalize who you are and what you do with that?

JB: Well, I think most of the people that I knew, the overwhelming number I knew, were of the temperamental mindset that "I need to be doing what is just or right or helpful." But as I suggested earlier, I can't control the outcome. All I can control is my participation in it and feeling a certain kind of then reinforcement by others, who say, "You know, Steve, you've done wonderful work on that," or Millard or whoever it is, "That, that was a terrific job you've done, whether you've succeeded or not. That's, of course, the objective. But your responsibility has been fully met by what you're doing." And I try, I really think I don't

remember people — I can be deeply, very sad when we lost some client that we were close to. But in the work, just continuing to feel, "This needs doing."

SK: And as in the case of Warren McCleskey, there's always more work to do as part of that process. Yeah, speaking of more work, you step, step down, step aside as Director of the Capital Punishment Project and move into Julius Chambers's initiative, the Poverty and Justice Program. [02:17:45]

JB: When Julius Chambers came up from North Carolina to succeed Jack Greenberg as Director Counsel [of LDF] in 1984, I was delighted. I didn't know Chambers but got to know him over the course of the next year or so, and very different sort of personality. Jack [Greenberg] was immediately articulate and fluid, and Julius was more ruminative and thoughtful in asking more questions than he was [immediately providing answers], but he was troubled by the persistence of inequity and really poverty among African Americans for whom he had fought for school desegregation and for employment opportunities in textiles and furniture, companies and other things that there was so much still structurally inhibiting African Americans from full participation in life. The result, really, of decisions that had taken place over decades that couldn't be turned on a dime. If you've run the major freeway through the Black center of Durham and destroyed the Black Wall Street, as it was called, you can't undo that. You might do something different. But so, Julius was saying, "Are there things that we can do that will address both the problems of racial inequality and of poverty, of economic inequality that have structured life for Black folks so that it's very hard to move toward full participation in society?" I was intrigued by that question. I also was asking myself a little bit of the question that you asked earlier: "Can I adjust my life pattern in a way that will give me more opportunity to stay, at least in the New York City

area, and still work with this organization that I'm so fond of and believe in so deeply?" [02:19:45] And so I said to Julius, "I'd love to work on that at some point." And I began by about 1986 thinking we were going to move into that full time. Well, I've looked back at my notebooks and 1986 and 1987 was when *McCleskey* was granted and a couple of other things happened of that sort. And I lose a client or two when I'm down working on those matters. But beginning in about [19]86 and [19]87, we begin to try to frame a set of programs at LDF that would address those issues. And we were lucky to have a guy named Jim Steyer, who had just come out of Stanford [Law School] and was a ball of energy and had worked on one of our capital cases, a North Carolina case, Robert McDowell. And Steyer said, "I might be interested in working on this matter for six months after law school with you." And we got Steyer, and what he would do is run around all over the northeast, to M.I.T. and Harvard and Columbia and Georgetown, and talk to the contemporary social theorists. These are not the statisticians, but the people that are saying, "Why is there a racial underclass? Why is there so much under-participation in higher level employment by African Americans? And what can be done about it, even if it's not classic employment discrimination where you say no to the qualified candidate?" And we began to try to develop a program that would address those issues. And I recall coming up with at least four areas in which we wanted to work. One was in education, but not with school desegregation, but with the idea of looking at school finance inequities and school "adequacy" inequities that it turns out there's a lot, particularly in the northeast and north central states, and increasingly now in the southeast, of school districts where Blacks are in one district and whites are in the adjacent district or whatever, and they have very, very different outcomes. [02:21:49] So, we're asking ourselves as a way to start to address some of those matters. It's

not just the classic Supreme Court decision in the [*San Antonio v.*] *Rodriguez* case in which we ask whether the Equal Protection Clause of the Federal Constitution prohibits that. We also were going to look at health care and noticed that there was a lot of evidence that health care authorities were engaged in actions that were inimical to the African American communities. For example, there'd be metropolitan hospitals in New York or Baltimore or whatever that we were calling "runaway hospitals" that start to move out to the suburban neighborhoods and say, "We're still downtown," but everything good is being built out in the suburbs, where a predominately white population lived. So, we were going to look at that. We were going to look at employment, although never did as much in that area as we hoped. And it's going to come to me, but there was a fourth area we were interested in. In any event, we — oh, housing, of course. We hired a guy named Jon Dubin and said, "Jon, we want you to help us think about ways in which we can address housing disparities that aren't about a real estate agent sending [Black] people home instead of, but about something different." And he [Jon] came up with a couple of cases, some of which were statutorily based, showing, for example, in Huntsville, Alabama, and in Newark that housing authorities were tearing down 200, 400 acres or 400 acres, 400 units of Black housing and not replacing it with anything. And the federal statute said that's got to be a one-for-one replacement. But nobody was taking it seriously until we started suing and said, "No, you can't take down those 400 apartments for Black people in central Newark without putting something else there for them. And we can enjoin you from doing that." And so, it started to say, "You've got to take seriously, these [federal statutory] housing things." [02:23:52] He [Dubin] did something in Florida, which was very interesting and got lots of social law review interest. He showed that in Cocoa Beach, Florida, there was a traditionally Black

neighborhood, and it was near places that had become very chichi and popular, and they wanted to get the Black people out. And so, they [the local zoning authorities] engaged in what was called, we called, "expulsive zoning." Let's start to say, "You can't have any auto mechanic shop in this neighborhood." And there was already one there. You look at what the Black folks have and say "None of those things can be there. You all have got to leave." And so, we sued to try to stop that. In the education area, the biggest thing we brought was a suit in Hartford, Connecticut. Hartford, turned out as the capital of Connecticut, to have a school district that was 91 percent Black and Latino, 95 percent poor, free and reduced-price lunch level parents, surrounded by 19 school districts, in the same metropolitan area, that were overwhelmingly white and overwhelmingly middle and upper class. Now, they [school officials] had not laid down those lines to avoid integration. They laid down those [town] lines in 1680 or 1720. But what had happened after World War II, and particularly in the 1960s, that whites had moved out of the city and left these underfunded schools. Well, they [Black Detroit area parents] had tried school desegregation claims, but the Supreme Court of the United States, in 1974 had said, "I'm sorry, we're not going to let inter-district transfers of students take place, except under very exceptional circumstances," which couldn't be proved because nobody had done this deliberately in the sense of government policy. So, that was the *Milliken vs. Bradley* case. They [parents] had also won a school finance case in Connecticut saying you've got to give more money to places that have bigger problems. But we began to develop social science evidence and got people from Johns Hopkins [and Columbia] and Miami, and all to say that one of the important 'inputs' for student education are middle class students — of whatever race. [02:26:01] And so, that if you've got a place that has extremely poor students, they will tend to do badly no matter how much they [and

their teachers] try. And ironically, if you deconcentrate them, the same students will do pretty well if they're in middle-class settings. And so, you, the State of Connecticut, have the obligation to move these students around in the same metropolitan area, not nearly as big as Charlotte-Mecklenburg, which was a single district, in order to do that. And we got the American Civil Liberties Union, and the Puerto Rican Legal Defense Fund and the Connecticut Civil Liberties Union and a bunch of other groups. And we built that case. [Former LDF staffer] Jim Liebman was very important. One of the things that made it possible, and I'll stop here in a second, it was only in the mid [19]80s that states began engaging in statewide testing of all their students. And in a way, you understood why they did it and with the right reasons, but it all of a sudden gave us a lever. It would be one thing to say, "I don't think the students over in Asheville are doing as well as the students in Charlotte." It's another thing to be able to say, "Seventy-eight percent of the students in Asheville are at grade level and only 46 percent of the students in Charlotte are at grade level. And that's your test telling us that." So, it [Hartford] was one of the earlier cases. There now have been a whole raft of them that used student performance issues to try to say, "You've got to do something to change this." And that case [*Sheff v. O'Neill*] went on. It was finally settled in 2022. It [the plaintiffs] won initial relief in 1996. I had left [LDF] in 1990 and it won in 1996. But getting effective relief was a much harder thing, even in a rich state like Connecticut, because those white communities didn't want lots of nonwhite kids coming out or they didn't want to be going themselves into Hartford. And it's taken [a long time], but it's been a way to push on those structural issues. [02:28:04] One other thing I'll say and then I'll stop. We realized pretty soon that we couldn't do this or shouldn't do this alone. And Jim Gibson, who was a funding officer at Rockefeller [Foundation], said to me, I

can remember, “I’m giving money to you [LDF], I’m giving money to the ACLU, I’m giving money to the Legal Services programs [Legal Services Corporation’s National Housing Law Project and its Health Law Program] and none of you are even talking to each other and you’re all working on the same issues. You ought to get together.” So, we conceived the idea of having a new organization formed. We originally called it P-A-R-C, PARC, and somebody said, “That sounds like you’re in neutral or worse. Why don’t we call it PRRAC, the Poverty and Race Research Action Council, and bring together the leadership of many of these social justice and legal services entities to talk about what can be done and collectively or how they can use each other’s methods?” And it worked extremely well. We got John Powell, who was [the national Legal Director of] in the ACLU, and one of the, he was African American, one of the first people pushing the ACLU past the First Amendment speech and religion and debate into racial justice issues. And some people at the legal services organization, including the National Housing Law Project for Florence Roisman and some other people, and a guy named Alan Houseman at CLASP [the Center on Law & Social Policy] and then people from the Georgia Legal Services Program, the Tennessee program, et cetera, about 30 of us, self-consciously with some Asian American people, and some Latino people as well, and would meet every six months and say, “What should we be doing about the intersection of race and poverty?”[11] If it’s only about poverty, we should talk in another time. If it’s only about race, we should talk at another time. How do we deal with these joint problems? And who are the social scientists that can help us think this through?” So, we developed a social science advisory board and began funding people who

[11] During transcript review, Mr. Boger added: “Another key member was Jose Padilla, the Executive Director of California Rural Legal Assistance, the legendary program that had represented Cesar Chavez and the United Farmworkers in California.”

would help guide this sort of discussion. In the late [19]80s and early [19]90s, there was a lot of stuff about the "urban underclass" and all of those sorts of issues, and we were trying to be the legal participant in all of that. And I think some good work was done.

SK: [02:30:21] Did the Poverty and Justice program sort of get absorbed into the PRRAC program?

JB: No, at some point and I don't know when it was, I know Poverty and Justice [the program at LDF] continued through at least the late [19]90s.[12] And there's a woman, Marianne Engelman Lado who was a poverty and justice lawyer all the way, L-A-D-O. Oh. And she's now at Yale [Law School], I think. And John [Dubin] left. He's now at Rutgers and is the head of clinical programs at Rutgers. But other people took that on. And at some point, I think it ceased to be the issue that people [LDF lawyers] pursued [full time]. And I think they're now back doing some economic justice work with some newer lawyers whom I don't know.

SK: You've mentioned a couple of times, not fundraising specifically, but the idea of getting money from donations [laughter]. So, not to bring back any bad memories. I am wondering about how this work is funded and sustained over time and the infrastructure that was in place that maybe you were or were not part of to keep that money flowing.

JB: I saw it [LDF's ongoing fundraising efforts] from the corner of my eye. Greenberg had been great at fundraising, and while there was active outreach to individuals and our small donors, the key to LDF was having been so preeminent in its world that Ford [Foundation] and Rockefeller [Foundation] and some of the big foundations were providing very substantial amounts of money, a million dollars when that was a lot and whatever. And

[12] During transcript review, Mr. Boger added: "Dennis Parker was a key staffer for awhile, before he left to lead the ACLU's racial justice program."

they would occasionally say, I mean, when we got Poverty and Justice [Program] money, I went to Ford and Rockefeller, went with Julius [Chambers] once or twice— Let me tell you a funny story. We went to see a mid-level Ford Foundation person who had previously been a legal services lawyer. Her name is going to come back to me in a minute, and we made our pitch. And at some point, she said, "When you're done, can I come around the table, Dr. Chambers, and just touch you? You know, you've been a hero of mine since I was a little girl." [02:32:40] When we got in the elevator and I said, "Julius, I think this is going pretty well." When your funder is saying, "I want to touch you" like a saint, we may get some dollars here. So, he was great at it. And Jack Greenberg had been wonderful at it. And they would say, "We're going to cut you off." And then when they got to the "cut off" time, saying, no, we're going to give you some more money, that we're [LDF] doing work that was good enough and well received enough that, until the funders turn their attention to something completely outside of racial justice or poverty, you were going to be one of the repeat players."

SK: So, just a little bit curious. Just maybe one more word or two on Julius Chambers. You, in discussing the Connecticut case and the inequities in educational outcomes for different students in this packed district, you made a brief reference to Charlotte as being a maybe relatable scenario to the city in Connecticut, it's, of course, a good reminder to all of us, especially in the context of the death penalty, that questions of racially discriminatory outcomes are not limited to the former Confederacy. But are you making a reference there to Julius Chambers bringing his experience from Charlotte, from North Carolina, especially the *Swann* case to his national work?

JB: Well, I mean, he certainly did that. But Julius had, of course, had also been key in two of the Title VI cases in which he represented previously excluded people working in the yards of Duke Energy, Duke Power and some of the tobacco, who couldn't get inside the plant because they could never get seniority for it. So, Julius had a very strong, I think, intuitive understanding of that economic subordination. I mean, indeed, his father, there was the famous story. His father had been a mechanic and he had done some work once for a white guy on his car or truck, and he came to get the truck, and Julius's father asked for the money, and he [the car owner] said, "I'm not going to pay you." And Julius, looking at his father, realized there should be something to be redressed there and there wasn't going to be. So, I think Julius just was incredibly sensitive to the other ways, besides the formal text of statutes, in which Black people's status had been held back over decades and millennia or, not millennia. But yeah, centuries.

SK: [02:35:16] And of course, it makes me think of Concord and other mill towns where African American workers were allowed in the building, but only perhaps after white workers have gone home because they were employed as sweepers or—

JB: I worked one summer, before I got married to my wife, in a mill. It was a finishing mill, and we did "napping," which sounds like an easy thing to do, except what it is, is taking the cloth and running it over these spinning sorts of cylinders, and each have tiny pinpricks. And what you're doing is creating sort of fuzzy stuff like the inside of a jewelry case, or whatever or certain kind of fabrics. And the only Black people allowed, this was 1970, in the mill were the people who came behind the big spinning machines to sweep away the stuff and tried to keep their arms out of the way, because otherwise it'd be in the machine. That was, it was the only position for any Black person. Yeah. So I remember

thinking. Later, looking back, that the only Black people I knew growing up in our downtown area with a job were the men or women who work in the back of the cleaners where they had steam stuff and they were, they were pressing the stuff in this 110 or 120 degree temperature. Not a single person in a store as a clerk, and that was with a college [an HBCU], Barber Scotia, there that had, among other people, educated Mary Bethune, who was one of [Franklin] Roosevelt's just below cabinet-level people. She couldn't have gotten a job at the cash register.

SK: There are so many more questions to ask, but I'm going to try to limit myself to just a few more. In 1990, you leave LDF and come back to North Carolina and you take a position at the law school here at the University of North Carolina at Chapel Hill.

JB: [02:37:20] Right.

SK: And some years after that, at least the storyteller in me, such as they are [laughter], wants to say that there is some sort of return to the question of the significance of statistical evidence, of a pattern of racial discrimination unconnected to individual acts of racial discrimination that you take up at UNC with some faculty members on the Chapel Hill campus. Can you talk a little bit about the work that you did to initiate that?

JB: Sure. Sure. Happy to do that. With one aside, and you've gotten used to hearing my asides, I'm afraid. When I got back in 1990, I was delighted to come home to the law school I had actually been a student at. But it turned out that my expectation that I'd be doing criminal justice work, capital work wasn't going to be realized, because there were so many good people already on the [UNC Law] faculty, Rich Rosen and Lou Bilionis and others who were teaching it [criminal law] that there really wasn't an open place. And law schools are not places where they say, well, you can teach a section. There's either a need or

there's not. So, I didn't do that. And so, I didn't teach capital course either. I did start teaching education law, which actually turned into a course about some of these educational inequities [I'd investigated with the Poverty & Justice Program at LDF] and a lot on school finance. And I did teach a course called Race and Poverty Law, which really drew directly on my [LDF] work. But toward the late part of the 1990s, there were lawyers here in town who were very interested in, and across the state, in whether there were racial inequities in capital sentencing in North Carolina and wanted to do something about that. And there was some private money from a rich guy from Atlanta who'd moved up here named Jim Crow, who said, "I'll give you $25,000 for a study." And Tye Hunter and Ken Rose and other people [capital defense attorneys] who were planning worked in general, and conferred with Isaac Unah, who was a social scientist at the Department of Political Science [at UNC-Chapel Hill], I think, undergraduate campus, and grabbed me and said, "You worked on *McCleskey*. Would you be interested in working with this person?" And I thought it was a great opportunity. I said, "Sure, I'd love to get back into looking at that." [02:39:35] Called David Baldus and said, "David, we're about to do this. We would love to have you be, in effect, the Tony Amsterdam, looking over my shoulder as I look over Isaac's shoulder as we gather data about what's happening in North Carolina." So, we spent a year and a half or more doing that. And Isaac came up with some preliminary studies that showed that there was racial discrimination in capital sentencing in North Carolina, and there was eventually going to be some litigation around that. And then, I moved into other administrative tasks and was not as involved in it. And I can't remember when the Racial Justice Act, at the state level, was an effort to have North Carolina statutes that authorized judges to hear that kind of evidence and to grant relief to capital defendants if they could show that they had been

the victims of that kind of discrimination. And that was enacted, I think, in 2008 or [20]09 or something like that. And there were some cases [asserting racial discrimination, based upon Isaac Unah's data and upon more recent and comprehensive North Carolina sentencing studies] that moved forward. By that time, I was a law school dean, and my days were completely eaten up [with administrative matters]. So, I was delighted to see it happen. But wasn't myself directly involved in it. Only in those early days with Isaac.

SK: Understood. I realized I didn't ask you why you left LDF. I figure I should probably take the opportunity.

JB: Well, you did in a way, because I did say to myself, "My kids are getting to an age where if I don't leave [LDF] now, they'll go off to college and I'll hardly know who they were." And my mother [who was here in North Carolina] was getting older and I was the only kid of four of us boys, and I was the only kid who could come South. The rest were ensconced in Boston [or DC]. And so, I thought, "You know, maybe I'll do this." And I had started teaching. I had started teaching at Harvard [Law], a winter course on the death penalty in 1985 – with a guy in the class named Bryan Stevenson as one of my students — and enjoyed it and then taught a spring course [at Harvard] on habeas corpus, I would fly up [to Cambridge] one day a week and do that with Betsy Bartholet, who was the professor. And then taught at night at New York Law School, not NYU, but New York Law School, which was just up the block from LDF. And found I liked the teaching piece. In a sense, it's almost like what I had said to the death penalty crowd at the Airlie conference. "You're not the only generation that's going to be working on this." There is real satisfaction in saying to 19 or 20 year olds, "Here, let me help you think about how you can think about these issues." And so, teaching looked pretty good. [02:42:15]

SK: I think there is a whole interview that, we'll close this one down and then we'll reconvene in five minutes, focus on your career at UNC. We'll put that one on pause for the moment. But not unrelated was your interest in the idea of creating an archive at LDF. Can you talk a little bit about that effort?

JB: Well, the one other thing I'll mention that does relate both to the earlier things we talked about and one of the great joys of my time at the law school was helping, with Gene Nichol's supervision, to create a [UNC] Center for Civil Rights at the law school in 2001, which replicated the kind of work that LDF was doing [in an academic setting], and which was able to recruit Julius Chambers, who was a Chancellor at [North Carolina] Central, to come over and be our [inaugural] director, and I became his deputy director and so, until I became Dean. And then afterwards, in terms of support, was thrilled that we created a mini LDF kind of thing that had a teaching component with Chambers, who had been so central to LDF in New York and had been such a central figure in North Carolina.

SK: I love the framing of the Center for Civil Rights as a mini LDF. Can you just talk a little bit more about what that center meant and what it did?

JB: It was meant to do three things. It was meant to identify important issues of race and economic inequality, particularly in North Carolina, and reach out to some of those communities and offer legal help. The straight LDF sort of thing. It was meant to try to gather social scientists and others, not empiricists, and think about and address intellectually issues of racial injustice. We did stuff on the re-segregation of southern schools. We did stuff on health care inequities by race. [02:44:16] And then it [the Center] was meant to gather young law students and say, "Here's how you do this work. Here's how you think about this work. Here's what you might do if you went out [as a full-time civil rights

lawyer].” And we had people who left [UNC] and have gone to LDF, and they’ve gone to the ACLU. And Chris Brook, you know, became head [the legal director] of the [North Carolina] ACLU and sat on the Court of Appeals. He was a summer clerk with the Center for Civil Rights. So that was [satisfying]. It was. And then we had LDF people come down [to Chapel Hill]. We would do joint things with them. It was a pleasure.

SK: You mentioned at the beginning of our conversation that a lot of the people who were your law school peers in the elite institutions around the country, at least on the East Coast, were all focused on not going to corporate law or entertainment law but going into work on poverty and discrimination. When you many, not many, years later, when you came back—

JB: [laughter] Many years later.

SK: —to a law school setting, were there differences in the student body and what their goals were?

JB: There was receptivity. But that was the end of the Reagan years, in the late 1980s and early 1990s. And there was a lot more [student] interest in doing well [financially] and going into big firms. And, but Chapel Hill, frankly, has always had a huge public interest dimension in its law school, and I think in some of its other schools as well. So, I never felt like I was coming back to a place that no longer cared about those [civil rights or social justice] issues. I would say that I think probably in that sense it was better than some of the places in the Northeast where most of the kids were kind of saying, “How can I be a private equity firm investor?" or whatever, that focus on wealth and self-advancement kind of reasserted itself in a lot of those major [law schools]. On the other

hand, it was Harvard that asked me to come teach the death penalty. And there's still some wonderful people at a lot of those places. [02:46:18]

SK: I'm going to see if you can limit your response to five or six responses here. And before you think I'm teasing you, I'll just ask the question, which is, what should I have asked you in this conversation that I didn't? Or more simply, what would you like to add?

JB: Almost nothing that I can think of, really. We've talked about a lot of things. I could expatiate out on any of these people. There're so many just treasured people from LDF itself, and those who worked on both issues. But I mean, capital punishment tended to draw people toward it who were wonderful human beings, who were spiritual — I don't mean necessarily religious, but who looked [at their clients] and said, "There is a person who's done something really, really terrible." As Bryan Stevenson would say, "That can't be all they're about." So, they were wonderful to work with and I'd love to talk about them. But you can't do that in an interview like this. There're just too many people to give— It's like those horrible things at the Academy Awards where you keep saying, "Nobody else cares what you're saying, please just go on." And yet, I understand, because you say, how could you not talk about Patsy Morris and what she's been? Or George Kendall or whoever, David Bruck and the other great stories about each of them. But I think we've covered the basics, more than the basics.

SK: Great. Well, it's been hugely informative and a real pleasure. I really appreciate it.

JB: Me too, I've enjoyed it.

SK: Thank you.

JB: Thank you.

[02:47:59]

[END OF INTERVIEW]