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# CALIFORNIA LEGAL HISTORY



JOURNAL OF THE  
CALIFORNIA SUPREME COURT  
HISTORICAL SOCIETY

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*Tribute to*

## JUSTICE KATHRYN MICKLE WERDEGAR

GOODWIN LIU\*

It's my pleasure to say a few words about our departing colleague, Justice Kay Werdegar. To say that I admire Justice Werdegar is kind of like saying Catholics admire the pope. Justice Werdegar is not the pope, but she is a judge who is liked and admired by virtually all other judges, no matter how young or how old, no matter which way they lean on issues of the day.

When I joined the bench six years ago, Justice Werdegar was starting her eighteenth year on this court. At that time Kay had thirty-five more years of experience in the law than I did. But from the very first day she treated me as an equal, and we became fast friends and close confidants. For the past six years I have regularly turned to Kay for a dose of common sense, for a thoughtful sounding board even when we disagreed, and, I will admit, to trade occasional gossip.

Like all of my colleagues, I am so proud to have served with Justice Werdegar. And while I am very well happy for Kay and for her husband, David, and her sons, Maurice and Matthew, that she will now take well

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\* Associate Justice, California Supreme Court. Adapted from remarks delivered at Justice Werdegar's final Supreme Court oral argument sessions — in San Francisco, May 30, 2017, and Los Angeles, June 6, 2017 — and the Retirement Celebration at the Supreme Court in San Francisco, August 2, 2017.

deserved time to smell the roses, I cannot hide my melancholy in losing Kay as a colleague on this court.

Justice Werdegar's ascent in the legal profession was not foreordained. She was born in San Francisco to a mother whom she lost unexpectedly when she was four. She overcame significant challenges growing up and, inheriting her father's belief in education, went to college at UC Berkeley. At the time, the workplace more closely resembled *Mad Men* than what we have today. But Kay once said, "I was not going to be a secretary." She had other interests, however unconventional for that era.

After college, Kay was admitted to Boalt Hall, one of two women in a class of 350. In law school, she excelled. Her friend and classmate Pete Wilson said, "In the first semester, everybody wanted to carry her books. After the first semester, everybody wanted to look at her notes." By the end of her second year, she had been elected editor-in-chief of the *California Law Review*, the first woman in that role. But she did not assume the office, instead moving to Washington, D.C., for her third year of law school to be with her husband as he finished medical training. She graduated first in her class from George Washington Law School in 1962.

Kay's first job out of law school was working in the Civil Rights Division of the United States Department of Justice under Attorney General Robert Kennedy and his deputies, Burke Marshall and John Doar. Imagine for a moment what it was like to work in the Civil Rights Division from 1962 to 1963. Among other things, Kay helped write an amicus brief to help free Martin Luther King, Jr., from jail. At the end of her one-year stint, in August of 1963, Kay was among the thousands who attended the March on Washington for Jobs and Freedom and heard Dr. King give his "I Have a Dream" speech on the steps of the Lincoln Memorial. With these early experiences, it is no wonder Justice Werdegar has always viewed the law with an eye toward its impact on the lives of everyday people.

When Kay returned to California, her gold-plated resume was met with rejection letters from all the major law firms. Kay is reluctant to attribute this to sex discrimination, but her experience echoed what happened a decade earlier to another top-of-the-class graduate, Sandra Day O'Connor, who likewise had trouble getting interviews with law firms and, in the one interview she got, was asked, "Now, Miss Day, how well can you type?" Justice O'Connor once said, "The view that women could not

cut it as lawyers enjoyed an embarrassingly long shelf life in our United States.” Like Justice O’Connor, Justice Werdegar has done her part, and more, to shatter that myth, all the while being a devoted spouse and engaging mother to her two sons.

After a distinguished career as a research attorney and then justice of the First District Court of Appeal, Kay was appointed to this court by Governor Wilson in 1994, and has twice been retained by the voters.

Her accomplishments on this court over a twenty-three-year career are too numerous to name. She has authored many important opinions on workers’ rights, privacy, discrimination, the right to die, and much more, including several dissents later vindicated by this court or the United States Supreme Court, including the recent *Bristol-Myers-Squibb* decision in which she was vindicated once again. Her writing is serious and penetrating, never flashy or pretentious, with a careful calibration of fidelity to doctrine and practical judgment.

It can be said without qualification that inside the conference room Kay is truly liked and respected by all of her colleagues. The over-forty crowd here will appreciate the paraphrase to E.F. Hutton: “When Justice Werdegar talks, people listen.” It is not just because of her legal acumen; it is also because Kay herself listens well. She has good judgment, she disagrees without being disagreeable, and she is tough, independent, and no-nonsense, but always modest and quick with the right touch of humor. She is, in many ways, the very model of a judge.

Personally, I will miss Kay on the bench, in the conference room, and down the hall, and I will miss Kay off the bench, as on the several occasions when she took time to attend an event where I was speaking just to hear what I had to say. I remember returning the favor once, five years ago, when Kay gave the prestigious Jefferson Lecture at UC Berkeley. For forty-five minutes, she captivated the audience with a scholarly talk on direct democracy in California. You could hear a pin drop. On that occasion, I sat next to the former dean of Boalt Hall, Jesse Choper, who whispered in my ear, “She is really impressive.”

So, Kay, I will miss our conversations about the law to be sure, but also about our travels, our mutual interest in piano, our experiences as parents and work-life balance. Although I am reluctant to accept your departure, the quality of your judgment again shines through, for you are leaving at

the top of your game. Every day you bring intelligence, grace, and quiet dignity to the work we do, and history will record that Kay Werdegar is one of the most able justices ever to serve on this court.

The people of California are indebted to you for your lifelong contributions to the cause of justice. You have more than earned your retirement, and we all wish you and David much happiness in the years ahead.

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*Tribute to*

## JUSTICE KATHRYN MICKLE WERDEGAR

MING CHIN\*

It is my distinct pleasure to honor the remarkable career of Justice Kathryn Mickle Werdegar. On August 31, which just happens to be my birthday, Justice Werdegar ended her incredible twenty-three-year career as an associate justice of the California Supreme Court. I suppose I am uniquely qualified to talk about the beginning of Kay's Supreme Court experience. I was literally there the day it happened. As a matter of fact, other than Governor Wilson, I was probably the first person to find out about Kay's appointment. You see, the governor called me first to tell me that I was *not* getting it. A few minutes later, Kay came into my chambers in the First District Court of Appeal, which was right next door to hers, to share the good news. She said that when the governor called her, all he talked about during the first part of the conversation was me. And so, when he finally finished, she wanted to say, "So why don't you appoint Ming?" I said to Kay, "Well, why didn't you?"

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\* Associate Justice, California Supreme Court. Adapted from remarks delivered at Justice Werdegar's final Supreme Court oral argument sessions — in San Francisco, May 30, 2017, and Los Angeles, June 6, 2017 — and the Retirement Celebration at the Supreme Court in San Francisco, August 2, 2017.

Of course, I was very happy for Kay. And I wasn't at all disappointed. I have to agree that Kay was the right choice. Of course, I *can* be magnanimous, because Governor Wilson appointed me to fill the next opening on the court less than two years later.

Kay and I were the last two justices appointed to serve on the Lucas Court. When Chief Justice Malcolm Lucas retired in 1996, Terry Flanagan, who was Governor Deukmejian's appointment secretary and a very talented artist, was commissioned to do a drawing. Terry called it *The Last Luncheon*. It was inspired by Leonardo da Vinci's *The Last Supper*. It just happens that there were twelve justices who served with the late Chief Justice Malcolm Lucas. If you look at the picture, Kay and I are seated at the far right. I am told that Kay is Saint Jude, and I am Saint Simon. We are both grateful neither of us is Judas.

When Kay was appointed to Division 3 of the First District Court of Appeal, she was the only woman justice on that court. Fortunately, she never seemed to hold it against me that, a year earlier, I had been appointed to replace the first woman justice on the First District, my good friend and former colleague on the Alameda County Superior Court, the late Justice Betty Barry Deal. Kay, of course, later became the third woman justice appointed to the California Supreme Court. I might add that in the last six years of her service on the court, women held the majority. So, a lot has changed in twenty-three years, and Kay has led the way.

During her twenty-three years on the court, Kay authored landmark majority opinions, from *Romero* to *Brinker*. They have been widely recognized for their high level of scholarship. At the same time, she remained fiercely independent and steadfast in her principles, willing to go her own way when convinced of her position. In fact, she recently told the press she was most proud of her dissenting opinions. And it turns out that the two dissents of which she is proudest were in cases where I authored the majority. Are you beginning to see a pattern here? She gets the appointment before me, is proudest of dissents to my opinions, and retires on my birthday. Should I be taking offense?

Seriously, even when we had legal differences of opinion, Kay was unfailingly cordial. When she announced her retirement, I told her I could not recall one harsh or angry word passing between us during all of the twenty-four years of working together. I was pleased when she replied that



was her recollection as well. We have disagreed on some major issues, but our working relationship has never been disagreeable. I attribute that to Kay's legendary grace and dignity.

When she announced her retirement, I also said to Kay, "I'm not sure I know how to do this job without you sitting next to me." At conferences after oral argument, I've gotten to hear Kay's wisdom before I speak. It's going to be hard to get along without that. I'm grateful to David, Maurice, and Matthew for sharing this truly remarkable person with us. I hope that, in her retirement, she finds time to get reacquainted with her piano and to find new hiking adventures that will lead to wonderful untrammelled spots and to beautiful vistas. Kay, we will miss you. Good luck and Godspeed in your retirement.

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*Tribute to*

## JUSTICE KATHRYN MICKLE WERDEGAR

CAROL CORRIGAN\*

You have heard some great and well-deserved encomia about Justice Werdegär, her history, her accomplishments, and the impact that she has had on this court as an institution.

And now it's officially the last session of the season. I think, for each of us who sits here, we are struck at how lastingly "last" this session is for all of us who have been a part of the Werdegär era. It has a nice ring, don't you think: the Werdegär era. But there is something else that will most assuredly last, and that is the impact that Kay Werdegär has had on each of us, her colleagues, how she has touched us as people and as judges.

Her influence will last not only in her opinions but in the way we have all learned from her how to approach the work, how to create consensus, how to guide the law. The Werdegär effect will last because she has become part of the heart of this institution. And I want to tell you just one little story about one way in which the Werdegär effect will last.

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\* Associate Justice, California Supreme Court. Adapted from remarks delivered at Justice Werdegär's final Supreme Court oral argument sessions — in San Francisco, May 30, 2017, and Los Angeles, June 6, 2017 — and the Retirement Celebration at the Supreme Court in San Francisco, August 2, 2017.

Judges are many things, and some of them are not so bad. But when you sit as a justice on a court of review, one of the things you are is a professional writer. Now when Justice Werdegar was elevated to this court, I was appointed to her position on the Court of Appeal. As it sometimes happens, when she left that court there were a few cases in the pipeline in various stages of readiness, from notes to outline to evolving drafts. And I got the unique opportunity to study those various stages of the work. It was a wonderful opportunity to delve into the architecture of a Werdegar opinion, to see how she built them from the ground up and from the inside out.

They say that easy reading is hard writing, and having the chance to study those notes and drafts showed me just how hard writing proceeds, the attention to detail, the solid grounding on which the logic of the opinion rests, the ear and the eye for the flow for the opinion that brings the reader along, the deft and memorable turns of phrase that enliven an opinion and urge the reader to keep going, the way a gifted writer teases clarity out of the fog of verbiage with each successive draft. I have to say it was a little like being able to look over Leonardo da Vinci's shoulder at his sketch book and see how he approached the work, not as a painter but as a writer.

Kay, now you've been compared to the pope and Leonardo da Vinci, so it's a good day for you. But I must say it was a wonderful tutorial for a rookie, who was working very hard to fill very distinguished shoes. When I came to this court, I got to know Kay not just from her work but as the woman behind the work, and she became a welcoming colleague, a mentor, and a role model.

As a justice, Justice Werdegar has been known for her scholarship, of course, and as well for the balance she strikes between her regard for precedent and the flexibility the law needs to grow with the evolving society that depends on it. Kay, it has been a pleasure to sit with you, to serve with you, to get to know you as a friend and a colleague.

Your wonderful career, your opinions, and your commitment to the law will help guide the future of California jurisprudence for generations to come. Your contributions will definitely last, because you have become part of our DNA, part of what you have passed on to us and what we will pass on to colleagues to come.

Your wonderful attention to the writing, your commitment to the notion that we are constantly called upon to be collegial, your understanding

of our history — have now all become a part of our history. You've made every one of us better: better judges, better teachers, better colleagues, better people. We will miss your gracious presence every day, but we will never forget your influence on each of us as a leader and as a friend.

We wish you and David every blessing in this new phase of the adventure. May it be filled with great joy and wonderful surprises. Thank you, my friend.

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*Tribute to*

## JUSTICE KATHRYN MICKLE WERDEGAR

MARIANO-FLORENTINO CUÉLLAR\*

To be honest, I have been dreading this day because my first reaction when I heard that Justice Werdegar was planning to retire was understanding and empathy. I cannot fault her for recognizing that, at this point in her career and after so many decades of service, it's exciting to start a new chapter. I have to say, Justice Werdegar, you have earned some extraordinarily beautiful days. But I found myself almost reluctantly tempted to try to talk her out of it. Once I got over that, I found myself inclined to call up the governor and try to talk him into nominating Kay Werdegar to the Supreme Court of California. And the reason why is that there is no way to describe this job, what it feels like, what it means to be on this court without having Kay as a colleague.

Every day that I've been on this court I've thought about how her influence is felt, not only in the pages of our opinions, but in the norms that we have, and the ways we interact with and listen to each other. I'll just

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highlight a few reasons why that has been so meaningful for me and why I know I will miss her so much.

It's been almost three years since I was nominated to this court, and this is the greatest professional honor I've ever had. It's a very humbling experience, though, because you learn constantly about your own limitations. You learn from people around you. And what I will cautiously observe is that something that sounds really simple can be difficult to even describe. Judging is about judgment, and what I feel extraordinarily privileged about in getting to work with Justice Werdegar is that I've seen judgment in action, and I've had the privilege of learning from it. She's persuasive, she's persuadable, she's practical, and she's principled.

When you're a new Justice, one of the more intimidating things that happens on occasion is when somebody you deeply, deeply respect — which basically means anybody on this court — disagrees with you. You have a sort of fantasy when you begin that pretty much every decision you make, every time you try to persuade your colleagues, that they're going to look at you across the table and say, "Oh, I'm persuaded; that makes sense." But it doesn't always turn out that way.

That's why the job is difficult and also why it's challenging and interesting. And I remember quite clearly one of the first times that Justice Werdegar disagreed with me. When Justice Werdegar talks, everybody listens. I'm listening, and I'm doubting my own conclusion. And after additional reflection, I decided to go down to her chambers and we had a chat and exchanged some emails, and eventually she conveyed to me that I persuaded her. And there were as many times later when she persuaded me. The grace with which that interaction played out, because of her questions and her probing intellect, left me with a really lasting impression of what the ethics of being on this court really meant and showed me what I should aspire to achieve — kind of asymptotically; you never quite get to that ideal, but you hope for it.

That level of interaction with a colleague's respect, erudition, thoughtfulness, and patience combines with something else that is extraordinary about her: she is particularly well prepared, sharp, and absolutely engaged with the cases and the materials. I often find myself about to ask a question, and she asks the question better than I could have.

I am reminded a bit of an important textual legal source for many of us, which is, of course, the Star Wars movies. There's a line in the third Star Wars movie — it's perhaps not the best Star Wars movie — but it's a line where two Jedi are interacting and Mace Windu says to Yoda, "You refer to the prophecy of the one who will bring balance to the Force." And Yoda says, "A prophecy that misread could have been." In this context the prophecy was not misread; Justice Werdegar has brought balance to our court, and I thank her for that.

And then that leads me to an observation about judging that I feel almost humbled to make because I've only been on the bench for a tiny fraction of the time that she has. But it's quite clear, even in the time I've been on the bench, that this is a job about trying to understand how the world works. And trying to bear in mind that perspective as you think about how to make sense of our laws and how to be faithful to the ideals behind those laws. And I see that in Justice Werdegar.

I admire that. I find that especially meaningful and important at a time when so many Americans are thinking about the courts. So, I want to just say thank-you for the chance to learn from you. But I also want to say thank-you for something else.

I have very much etched in my mind the first interaction between Justice Werdegar and my daughter, who was then about thirteen, and I can see how Justice Werdegar inspires people. So here is this conversation unfolding about piano, about music, and about what's important to my daughter. And I remember just how my daughter's eyes sparkled, and afterwards we said goodbye to Justice Werdegar, and my daughter asked me a little bit more about her life. And I tried to distill, some of what Justice Werdegar had done in her life. My daughter looked up at me and said, "You're very lucky you get to work with her." And I thought about how in these simple acts of grace, the scope of her career, her judgment, and tone of her voice could inspire a child in a way that I know will leave a lasting impression on her forever.

So, Justice Kathryn Werdegar, my friend, my colleague, I have to express my great happiness and excitement for you but also my sadness that you're leaving the court. I have enjoyed tremendously having you as a colleague and learning from you, and I must say that in the last few days I've been reflecting quite a bit on what your leaving the court means. It is in a

way a close of a chapter in your own remarkable career but it's also in a way a close of a smaller chapter perhaps in my career, where this was the court that I joined. You were one of the colleagues I had joined, and I am eternally grateful to you for your insight, your patience with me, your wisdom and wit — so much wisdom, in fact, that there should be a musical in your honor. It would perhaps be called, “Kay’s Way: A Very Traditional Musical,” and it would have just incredible songs. There’d be one song called, “The Doctor and Lawyer”; there’d be another song, perhaps, about the inner workings of the court, but it would be “Going from three to four, and four to three.” You could imagine the suspense and bittersweet moments — but especially the joy — built into that musical. Its centerpiece will be a song called, “Kay’s Way,” and the last few bars of it would go something like this: “But what else to say, it’s just Kay’s way.”

For letting me experience Kay’s way, for being such a great friend and inspiration — thank you. Best of luck and congratulations again.

★ ★ ★



*Tribute to*

## JUSTICE KATHRYN MICKLE WERDEGAR

LEONDR A KRUGER\*

Like so many of my colleagues, it's hard to imagine that this day has come. I think we were all surprised, me no less than any of the others. And a little bit saddened to hear that Justice Werdegar had decided to retire, as happy as we are for her that she will get to enjoy this next chapter of her life.

This is a very bittersweet day for this court. It's bittersweet because, for all of the reasons you've heard, Justice Werdegar has been an icon of California law. She has had a remarkable career in public service. She's been a pioneer, and she has served as an inspiration for countless aspiring lawyers who have been lucky enough to follow in her path. She has left an indelible mark on the law of this state. It is truly impossible to imagine what it is like to serve on this court without her.

I recently had the pleasure of visiting her alma mater at the law school formerly known as Boalt Hall, where all the students sitting around a dinner table asked, "What is it like to work with Justice Werdegar?" She is an icon.

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\* Associate Justice, California Supreme Court. Adapted from remarks delivered at Justice Werdegar's final Supreme Court oral argument sessions — in San Francisco, May 30, 2017, and Los Angeles, June 6, 2017 — and the Retirement Celebration at the Supreme Court in San Francisco, August 2, 2017.

The truth of the matter is that it is a remarkable experience for us, too. But, as much of an icon and inspiration as she has been for generations of men and women who have aspired to careers in the law, you would never know it from sitting around the conference table with her, or sitting at her coffee table in her office and talking to her about the law because the one thing that you can say reliably about Justice Werdegar is that she, despite her profound scholarship, her diligence, her probing insight, is, above all else, warm and unassuming and unfailingly gracious and welcoming to each and every one of her colleagues.

As much as anyone else on the court, she is responsible for creating an atmosphere of collaboration and of working hard to get the answers right, to do our best to serve the people of California with that same graciousness and diligence and unfailing probity. She sets an example through a mode of unassuming but firm leadership that demonstrates an unfailing commitment to the spirit of collegiality that makes this court such a remarkable institution, to the integrity of its decision-making, to principles of justice, and to the rule of law.

It has been an enormous privilege to get to serve with Kay Werdegar on the California Supreme Court for the last few years, and I will miss her deeply. My only regret is that we couldn't have served together longer. We are all, Californians and colleagues alike, very much in Justice Werdegar's debt. Kay has performed a remarkable service for the court and for the people of California, for which we will all be grateful. It is a sad day for those of us who've had the pleasure to serve with her, but we take comfort in knowing that we have been fast friends and will continue to be friends for many years to come. Congratulations, Kay, and best wishes for all your future endeavors.

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*Tribute to*

## JUSTICE KATHRYN MICKLE WERDEGAR

TANI CANTIL-SAKAUYE\*

I join in all that's been said and can hardly improve upon my learned colleagues' descriptions of the affection and the respect of and iconic, giant presence of Justice Werdegar, not only on our judiciary but on our jurisprudence. I would say that, though compared to Jedi masters and the pope and da Vinci, I have admired and watched Justice Werdegar through the years, and she has blazed her own trail with style, grace, wisdom, and tenacity.

What comes to mind for those of us who are over forty is the Fred Astaire/Ginger Rogers dancing duo, and what they said about Ginger Rogers is that she did what he did but backwards and in high heels, and that, to me, sends shivers up my spine, because that's you, Kay. She makes it look effortless.

You've heard about her clarity of writing, her clarity of thought. You've observed her piercing questions that get to the heart of why we're here over an issue. She does it with ease. She makes it sound so simple. She's able to really distinguish the irrelevant from the relevant.

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\* Chief Justice of California. Adapted from remarks delivered at Justice Werdegar's final Supreme Court oral argument sessions — in San Francisco, May 30, 2017, and Los Angeles, June 6, 2017 — and the Retirement Celebration at the Supreme Court in San Francisco, August 2, 2017.

When I heard that she wanted to see me — I felt my stomach sink. And when she sat down and announced to me that she would be leaving, it was unfathomable to me because of all that's been said about her being such a strong core of the California Supreme Court. Imagine that for many years, especially the last several, she is, under our culture and standard, the first to speak at conference when we gather all seven around the table in my chamber. So when the case is called, I turn naturally to Justice Werdegar for her seniority to speak about her position on the case and whether review should be granted or otherwise.

And she always speaks with wisdom. She speaks with incredible intelligence. She speaks with a view that is statewide. And she speaks in a way that reminds us all of our duty here at the high court and what we're supposed to be doing here. She also has, to me — watching from my perch at the table — incredible expressive moments that truly speak a thousand words. And when we're lucky, incredibly dry humor that makes us all laugh, notwithstanding the serious nature of the work that we approach.

And all of this time she has raised a wonderful family. You heard that she has come up through a time when women were not welcome in law school, in law, or on the bench, and yet she persevered, and she was a pillar in her family, raising wonderful, accomplished adult young men today. Her niece is in the audience. Her family reaches far and wide in loving support. I've had the opportunity to break bread with Justice Werdegar and her family, and when she sits down at that table she commands that table also.

To hear all that she's done, in addition to her twenty-three years on this bench alone, at the same time with her family, with her children and her grandchildren, and at the same time carrying on this case load and being present and setting an example of what it is and why it is and how we should sit on the highest court in California has been an experience none of us will ever have again.

She has broken every barrier, every ceiling. So, all young women, all people of color, all young lawyers, she was our first. We watched it happen, and she did it quietly with dignity and with integrity and backwards in high heels.

Kay, today we are here to see you and say farewell. Thank you all for being here to celebrate Justice Werdegar. We've heard a lot about Justice Werdegar's background and her hard work and her incisive intelligence, but I also want to point out her deep interest in the California Supreme Court

Historical Society, whose members are here also to join in to pay tribute and celebrate Justice Werdegar's retirement. So, please rise, and thank you for being here — Selma — from the Historical Society.

We have a Resolution, which I'm going to leave up here, Kay, for you, but I wanted to read some paragraphs from that, and some thoughts that haven't really been mentioned here in the discussion or the speeches about your illustrious career:

Whereas Justice Werdegar emerged as one of the most powerful women in California law, and armed with a strong sense of justice, wrote decisions passionately defending the rights of consumers, employees, the disabled, tenants, patients, and victims of gun violence. Her jurisprudence will continue and live on and guide and shape and protect many more Californians, and across the country, for years to come.

Whereas Justice Werdegar's dedication to service throughout her career has afforded her many, many honors and awards, including the Queen's Bench Lifetime Achievement Award, and the Italian American Lawyers Association Honorable Edward A. Panelli Outstanding Justice Award, now therefore be it resolved that I, Tani Cantil-Sakauye, Chief Justice and Chair of the Judicial Council, do commend the achievements of Justice Kathryn Mickle Werdegar and express the gratitude of the entire judicial branch for her contributions to the promotion of public trust and confidence in the integrity and independence of the judiciary and for her applications of the rule of law to protect the rights and liberties guaranteed to all Californians by the Constitution of our great state.

I count myself incredibly fortunate, Kay, to have spent six-and-a-half years and learned from you on this bench. Like all of us here, we will miss you. It will be difficult to discern how we go forward without you. You will always be the echo in our heads about our duties and responsibilities statewide, not only on the cases, but about outreach by the Supreme Court and what it means to be on this court.

So, Kay, rest assured that you will be forever in our precedents, and always in our hearts. Thank you all for being here and, Kay, much love — every wish.

*Tribute to*

## JUSTICE KATHRYN MICKLE WERDEGAR

RONALD M. GEORGE\*

I am happy to join in the celebration of Justice Kathryn Werdegar's retirement after her service of twenty-three years as a justice of the California Supreme Court, following decades of public service rendered in other venues. My only hesitation in reciting this chronology of many years is that doing so might give rise to the false impression that with the passage of time, there might be an understandable slackening of the vitality, devotion, and commitment that she has displayed in her work as a jurist.

To the contrary, these qualities have continued to manifest themselves unabatedly over the years. My initial exposure to them arose from our first get-together, which took place sometime in the mid-1990s after I had moved to San Francisco with my wife Barbara to join the high court. Justice Werdegar graciously extended an invitation to us to join her and her husband David for dinner at their home in Marin County, to be preceded by a hike on the slopes of Mount Tamalpais. When we arrived at the

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\* Chief Justice of California, 1996–2011. Remarks prepared for the Retirement Celebration for Justice Werdegar at the California Supreme Court, San Francisco, August 2, 2017.

trailhead, it had begun to rain, and ominous clouds foretold the drenching that we were soon to experience. David and Barbara sagely chose to substitute an afternoon of antiquing in San Anselmo, but neither Justice Werdegar nor I was the least bit inclined to admit being intimidated by the stormy weather. So the two of us proceeded with the hike, returning totally soaked to the Werdegars' home and having to shower and put our clothes in the dryer before sitting down for dinner. This experience served as an early introduction to her stamina and determination, and as a firm foundation for the collegiality that would follow during our sixteen years together on the California Supreme Court.

Justice Werdegar's meticulous work in crafting the opinions that she authored for the court and those that she wrote separately, as well as the contributions that she made to the work of her fellow justices, have greatly enhanced the guidance provided by California's high court to the lower courts, the bar, and the public, and frequently to the courts of other jurisdictions.

In her jurisprudence, she has always been mindful of the need to extend the protection of the law to the powerless and the disadvantaged — be they the hourly restaurant employees seeking meal and rest breaks in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, or the unarmored three-spined stickleback, a tiny prehistoric-looking fish threatened by land development in *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204.

In addition to her legacy of well crafted decisions as a justice of the Supreme Court and the Court of Appeal, Justice Werdegar has made substantial contributions to the administration of justice. She chaired the Supreme Court's Advisory Committee on Rules for Publication of Court of Appeal Opinions, whose recommendations in 2006 led to the court's adoption of rules clarifying and expanding the criteria for publication of opinions rendered by California's intermediate appellate courts, and adopting a presumption in favor of publication when specified criteria have been met.

Echoing her exceptional career as a law student — as no less than number one in her graduating class — and later as an associate law school dean, she took a leading role in legal education by authoring publications for the bench and bar, and in her service on various committees of the Judicial Council.

I greatly value our friendship and consider the time we spent together as colleagues on the nation's finest court to be among the highlights of my own judicial career. Joining the many others who are deeply grateful for Kathryn Werdegar's numerous contributions to the law of our state and our nation, I wish her the very best in all her future endeavors.

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*Tribute to*

## JUSTICE KATHRYN MICKLE WERDEGAR

JOSEPH R. GRODIN\*

About forty years ago, I was chair of the hiring committee for the First District Court of Appeal, and I interviewed a young woman for a position on the court's central staff. Though you would never know it from her shy and modest demeanor, she had a remarkable record of academic and professional accomplishments, and I did not hesitate to recommend her to the court. It is on this basis that I claim credit for launching Justice Werdegar on her extraordinary judicial career.

When we talk in the public arena about great judges, we are inclined to focus on influential opinions which moved the law in a new direction, for those are the inflection points easiest to identify and describe, and easiest to understand by people who are not lawyers. And during her tenure on the court, Justice Werdegar had her share of blockbusters. But those of us who are familiar with the process of judging know there are other yardsticks, possibly more significant yardsticks, for measuring a judge's performance.

One of these is craft — the ability to analyze a case down to its essentials, to view it in the context of precedent, to explain the issues in terms

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\* Former Associate Justice, California Supreme Court; Distinguished Emeritus Professor, UC Hastings College of the Law. Remarks delivered at the Retirement Celebration for Justice Werdegar at the California Supreme Court, San Francisco, August 2, 2017.

that are clear and understandable, to give due account to the competing arguments, with respect for the views of one's colleagues, in a fair and open-minded way, and to offer a persuasive rationale for the opinion's conclusion. Is "craftswoman" a word? If so, it applies to Justice Werdegar.

In addition to craft there is what might, for lack of a better term, be called judgment. And judgment is more difficult to describe. There is a temptation to use the term to describe an outcome with which one happens to agree, but when we push that temptation aside we can recognize that an opinion reflects good judgment even if we might disagree with the conclusion in a particular case. Judgment entails a sense of balance between competing considerations, as reflected in the scales of justice. We might not be able to explain what the mind does when it is supposed to be balancing, but we can recognize when a person has engaged in the process with seriousness of purpose, maturity of reasoning, and good faith. Wisdom might be a better word. Justice Werdegar has been a wise judge.

But then, there is more to the process than that. The metaphor of the judge calling balls and strikes has its popular appeal, but all of us know it has its limitations, and that there is more to judging than reporting what one sees. What is more is not simply "politics," at least not in the crude sense of political affiliation. And it isn't "ideology," in the sense of commitment to some preconceived notion of how society ought to be organized. Benjamin Cardozo referred to this added factor as "morals and social welfare," or at other times as "social justice," but Cardozo was careful to insist on a distinction between a judge's private morality — his or her "idiosyncrasies of conduct or belief" — and what he referred to as "the customary morality of right-minded men and women."

Now I grant you that this is a difficult distinction to define and defend, as the many writings of legal philosophers before and after Cardozo demonstrate, but there is no getting around the fact that any attempt to describe the judicial process, and any attempt to evaluate the contributions of particular judges, is incomplete without some consideration of what might generally be called "values." And while neither time nor the limits of my own competence permit an intensive exploration of the philosophical parameters of the term, I feel comfortable for present purposes in saying, with acknowledgments to Justice Stewart, I know good values when I see them.

And I see them in the opinions of Justice Werdegar. I see them in her opinions that reflect concern for the environment, for the challenges of the workplace, for privacy, for due process and fairness of treatment, for the importance of protecting against discrimination, for the protection of whistleblowers, for the value of diversity, including diversity of sexual orientation, for the protection of consumers against faulty dangerous products, and, as they say in the *PBS News Hour*, much more. Justice Werdegar is entitled to take particular pride in her dissenting opinions, especially those in which her dissenting views prevailed in her court, as in *American Pediatrics v. Lungren*, protecting a minor's right to decide whether to have an abortion, or in the United States Supreme Court, as in the case in which she insisted that search of a cell phone required a warrant or exigent circumstances. The values reflected in her opinions may not always reflect the public mood at a particular time, but I would argue that they do reflect the enduring notions of liberty and equality that underlie our common core beliefs about the nature of justice.

What our country needs right now, most of all, is not a wall separating us from our neighbors, but support for the rule of law that binds us together as a community, builds common trust, and stabilizes democratic institutions, a wall that protects all of us against arbitrariness, discrimination, and unregulated power, through a truly independent judiciary. Justice Werdegar's entire judicial career — including her judicial craftsmanship, her balanced judgment, her commitment to common values — has contributed in highly significant ways to the maintenance of the rule of law, and for that she deserves our praise, and our gratitude.

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## KAY WERDEGAR'S ENDURING LEGACY

ARTHUR GILBERT\*

Berkeley, 1960. That's what students read about in history books. Am I making an assumption here? Do students even have history books, or any books? And what about reading? I'm informed that students read, in a manner of speaking, what appears on screens on their "devices." And if we are going to quibble about what "read" means these days, I have been told by reliable sources, that they watch "stuff" on devices, like what things were like at Berkeley in the '60s.

I mention Berkeley in the '60s because that was when I became aware of Kay Werdegar, except then she was Kay Mickle. Mind you, I didn't know her. To repeat, I was aware of her. I and everyone else. I bet you already know why. But, first, getting back to the place. I already mentioned, "Berkeley." I don't suppose it is necessary to add "California." But to be more specific, it was Boalt Hall, the law school at the University of California. It is hard to believe, they (whoever "they" are) changed the name of the law school from the imposing Boalt Hall to the uninspiring University of California, Berkeley School of Law. Remind me to ask Justice Werdegar her views on this subject.

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\* Presiding Justice, California Court of Appeal, Second District, Division Six.

But getting back to Kay. No disrespect, but that is how she was known then, and that is how she prefers to be addressed by friends when not in court. The attentive reader will have noted I refer to “Kay” and “Justice Werdegar” in the preceding paragraph. This practice will continue throughout, depending on context and my mood. Apologies to the editor.

But getting back to Kay. She was known to everyone or, to be more precise, she was held in awe by everyone, because she was . . . number one in the class. And, of course, a woman. The percentage of women in law school in the early '60s was . . . well, are you good at fractions? And without even consulting the historical record, we know how many women or minorities were on the Supreme Court. I checked with friends in advanced mathematics and am informed that I may refer to “zero” as a number.

Before her retirement from the California Supreme Court as one of its most distinguished and revered justices, a majority of the justices were, speaking of justice, women. After serving for a brief stint on the Court of Appeal, Justice Werdegar was the third woman appointed to our high court where she served with distinction for twenty-three productive years.

When Kay arrived at Boalt Hall in 1959, one year ahead of me, she was one of four women in that entering class. One woman from that group was a truck driver and another a philosophy major. The truck driver drove away after the first semester, and the philosophy major fled, perhaps to Plato's cave after the first year. Not sure what happened to the other one. The women had a “small, shabby” lounge. The men, in contrast, had a large, well-appointed lounge. I recall that card games and other distractions reigned supreme in the men's lounge. I was not aware of coeducational study groups in or out of the men's lounge.

The professors were all men, until Professor Herma Hill Kay arrived to teach in the second year. Years later Professor Kay compared Justice Werdegar to our judiciary's towering intellect, Chief Justice Roger Traynor.

The dean of Boalt Hall then was William Prosser of “Prosser on Torts” fame. New students met the imposing dean on the first day of law school. Kay, no doubt, experienced the same degree of fear and trembling I did my first morning. As we all sat at our alphabetically assigned spots at the extended semi-circular desks arranged in elevated tiers like an amphitheater, Dean Prosser paced back and forth in front of us. He then stopped and greeted us with these encouraging words of welcome, “Look to the

right, look to the left. One of those people will not be here at the end of the semester.” I heard about a law student who looked to the right, then to the left, and passed out. He was sitting on the aisle.

Kay remembers how Dean Prosser would call on her, the only woman in her section, with questions about salacious tort problems. Or was it salacious questions about tort problems? No matter. In those days, there were few women lawyers, and the dean was concerned that a woman would not be taking a seat that should have gone to a man who would have to support a family. Kay answered his questions “blushing mightily.” She answered all his questions with a significant response at the end of the year. It was a shot heard round the halls of Boalt: first in her class! And she was the first woman elected editor-in-chief of the California Law Review.

Her marriage to Dr. David Werdegar necessitated a transfer to George Washington University School of Law in Washington, D.C. Guess what? Easy guess. There too she was first in the class. Ho-hum. After graduation she distinguished herself as a lawyer with the Civil Rights Division of the Department of Justice, became a law professor, and a staff attorney at the Court of Appeal and the state Supreme Court. It was obvious to prescient Governor Wilson that the citizens of California deserved an appellate justice of Kay’s talents. No sooner had she unpacked her bags after being appointed to the First District Court of Appeal, he appointed her to the California Supreme Court on the retirement of Justice Edward Panelli, the justice for whom she had been a senior staff attorney.

Justice Werdegar’s opinions are noteworthy for their craftsmanship. She is scrupulous in rendering an accurate and precise reference to precedent, whether writing a majority opinion, or a dissent. And her dissents are noteworthy. She says she does not look to write a dissent “to project distinctiveness.” She writes them when she simply believes the majority is wrong.

In *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, a gunman, using semi-automatic assault pistols, killed and wounded several people in a high-rise office building. Plaintiffs, who were survivors and injured victims, sued the gun manufacturer for negligence on the theory that defendant negligently marketed and distributed to the public weapons suited for mass killing. The majority affirmed the trial court’s grant of summary judgment for the manufacturer on the theory the action was essentially a products liability action, involving a risk-benefit weighing analysis. It concluded that

plaintiffs' action was barred because the Civil Code provides that firearms are not deemed defective in design on the basis that the benefits do not outweigh the risk of injury. Justice Werdegar's meticulous dissent reasons that the majority was wrong in concluding that defendant's negligent marketing is barred by the design defect statute. She posits that the significant issue in the case was the triable issue concerning the manufacturer's negligence in marketing an assault weapon to the general public as opposed to police and military users.

Justice Werdegar wrote this dissent when she was up for reelection in 2002. Her courageous dissent calls to mind the late Justice Otto Kaus, who said the threat of being voted off the bench because of an unpopular ruling was like having a "crocodile in your bathtub." Justice Werdegar noted, "[G]un promoters and advocates are very jealous of their rights and assertive and so on. But there it was. That's what I did. I'm proud of it. It's gone nowhere except into the hearts of people who would like very much to put some limits on the misuse of firepower in our society."

In 2006, in a judicial profile of Justice Werdegar in *The Recorder*, Mike McGee wrote, "After nearly a dozen years on the California Supreme Court, it's apparent to those in the know that Justice Kathryn Mickle Werdegar has what the Scarecrow and the Tin Man lacked in the Wizard of Oz — both a brain and a heart."

Here are just a few cases that prove the point.

*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763. A Fed Ex employee was assaulted while delivering a package in an apartment complex known to be dangerous. In a four-to-three decision upholding summary judgment in favor of the apartment owners, the majority held that even if the apartment owners were negligent in keeping the premises safe, plaintiff could not establish a triable issue of fact to establish liability without proving the identity of her assailants.

In her well-reasoned dissent, Justice Werdegar, speaking for her like-minded dissenters, got assistance from the redoubtable Dean Prosser, whom she quoted in a case that causation cannot and need not be proved with certainty.

In *People v. Diaz* (2011) 51 Cal.4th 84, Justice Werdegar concluded in her dissent that the contents of an arrested person's mobile phone could not be searched without a warrant. She received vindication when the

United States Supreme Court in *Riley v. California* (2014) 134 S.Ct. 2473 came to the same conclusion.

In *Bristol-Meyers Squibb Co. v. Superior Court* (2017) 137 S.Ct. 1773, nonresidents of California joined residents of California in a class action suit involving the drug Plavix. Even though the nonresidents neither bought the drug in California, nor were they injured in California, the California Supreme Court held that the nonresidents could sue Bristol-Meyers in California. California had jurisdiction over the nonresidents. Justice Werdegar dissented and reasoned that the absence of a relationship between Bristol-Meyers' activities in California and the nonresidents deprived California of jurisdiction. In a condescending majority opinion, the United States Supreme Court agreed with Justice Werdegar and reversed the California Supreme Court. That hoary precedent from law school days, *International Shoe Co. v. Washington* (1945) 326 U.S. 310 came up for a renewed interpretation.

Justice Werdegar's legacy will endure for decades to come. There are legions of cases that make this prediction a certainty. To name a few: *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. A trial court may sua sponte strike prior felony convictions in furtherance of justice in three strike cases. *Catholic Charities of Sacramento v. Superior Court (Department of Managed Health Care)* (2004) 32 Cal.4th 527. A religious social service agency may not evade the statutory requirement that it provide contraceptive coverage for its employees on the ground it violates constitutional freedom of religion grounds.

*Evans v. City of Berkeley* (2006) 38 Cal.4th 1. The city did not violate the Sea Scout's constitutional rights by requiring the organization to comply with the city's anti-discrimination policies as a condition of obtaining free slips in the city's marina.

One of Justice Werdegar's most important and enduring contributions to our jurisprudence is her opinion in *Conservatorship of Wendland* (2001) 26 Cal.4th 519, a case that decides the agonizing question of what degree of proof is required of a conservator who wishes to withdraw life-sustaining treatment to a conscious, but severely impaired, conservatee who is incapable of giving consent. In a unanimous opinion, written with meticulous care and sensitivity, Justice Werdegar concludes that in the limited circumstance where the conservatee has left no formal directions for health



care, the conservator must prove by clear and convincing evidence either that the conservatee wished to refuse life-sustaining treatment or that to withhold such treatment would be in the conservatee's best interest.

Times have changed from Kay's first stressful year in law school. But in many significant ways, Kay has remained the same. Throughout the years her resolve and fierce determination to do the best did not change. Kay is a role model for women and men. Her commitment to justice and her unshakable integrity is a constant that is manifest in her opinions, articles, and speeches. And she still blushes . . . when receiving praise. She is warm and engaging and genuinely modest despite her monumental achievements.

In her retirement Kay intends, among other things, to hike three times a week, instead of two. She also expects to spend more time practicing the piano. Drawing from my own experience at the piano, this endeavor bears a disquieting similarity to judging. After an hour or so of practicing, the lone participant may feel compelled to register a dissent.

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## AND HERE'S TO YOU, JUSTICE WERDEGAR:

### *Retiring California Supreme Court Jurist Leaves Impressive Environmental Law Legacy*

RICHARD FRANK\*

The California Supreme Court recently announced that Justice Kathryn Werdegar will retire this August, after serving for twenty-three years on California's highest court. Justice Werdegar is the longest-serving member of the currently-constituted Supreme Court.

Over her twenty-three-year career on the Supreme Court, Justice Werdegar has authored at least twenty-five major opinions on a wide variety of environmental law issues. Her enormous influence on her fellow justices is reflected by the fact that the vast majority of the decisions she wrote on behalf of the court were unanimous.

Justice Werdegar's decisions on behalf of the court reflect the broad range of environmental law issues that come before that tribunal. Her environmental opinions reflect both pragmatism and an abiding view that California's environmental laws deserve robust interpretation and diligent enforcement.

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\* Professor of Environmental Practice and Director of the UC Davis School of Law's California Environmental Law & Policy Center. Reprinted by permission of the author from *Legal Planet — Insight & Analysis: Environmental Law and Policy* (UC Berkeley School of Law and UCLA School of Law), posted April 20, 2017.

Among Werdegar's most influential environmental law decisions are those broadly interpreting the scope of "development" subject to regulation under California's Coastal Act (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*); opinions finding that federal food laws don't preempt Californians' ability to file lawsuits under the state's Unfair Competition Law alleging food products are falsely labelled "organic" (*Quesada v. Herb Thyme Foods, Inc.*), and that California is free to regulate the importation of kangaroo products notwithstanding the federal Endangered Species Act (*Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*); that the director of California's Department of Conservation has standing under the Surface Mining and Reclamation Act to challenge a county's approval of mining reclamation plans under SMARA (*People ex rel. Dept. of Conservation v. El Dorado County*); and rejecting a regulatory takings-based challenge to a municipal ordinance restricting conversions of residential hotels to visitor-serving uses (*San Remo Hotel L.P. v. City and County of San Francisco*).

But Justice Werdegar is probably best known for her numerous opinions interpreting and applying the state's most important environmental law, the California Environmental Quality Act (CEQA). Over the past twenty-three years she has authored many of California's most important CEQA decisions, including:

*Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (applicability of CEQA to land use compatibility plan to area surrounding Air Force base);

*City of Marina v. Board of Trustees of the California State University* (declaring invalid the University's certification of an environmental impact report due to remaining, unmitigated project effects);

*Communities for a Better Environment v. South Coast Air Quality Management District* (finding CEQA analysis of a proposed refinery expansion invalid due to its adoption of artificially inflated, hypothetical "baseline" environmental conditions); and

*Save Tara v. City of West Hollywood* (holding that municipal agreements with a developer that predated the city's preparation of EIR violate CEQA by committing the city to a course of action before fully evaluating the project's environmental effects).

In her CEQA opinions, Justice Werdegar has consistently given CEQA a muscular, “common sense” construction that — to this author, at least — seems fully faithful to the legislative objectives underlying California’s most overarching environmental law.

Among the many environmental decisions penned by Justice Werdegar over the years, however, my favorite is her most recent: *People v. Rinehart*. In that 2016 opinion on behalf of a unanimous court, Werdegar upholds the criminal conviction of a miner who had violated California’s ban on environmentally-destructive suction dredging in state waterways, rejecting the miner’s defense that the federal Mining Act of 1872 preempts the state’s dredging ban. Werdegar’s opinion — besides reaching a sound result — is an absolute delight to read. It reveals Justice Werdegar’s love of California history and places this modern environmental dispute in a fascinating historical context. (The *Rinehart* case — analyzed in more detail in *Legal Planet* colleague Sean Hecht’s earlier post — is currently before the U.S. Supreme Court, following a petition for certiorari filed by the Pacific Legal Foundation on behalf of the miner defendant.)<sup>1</sup>

Just as U.S. Supreme Court Justice John Paul Stevens emerged as that court’s most influential environmental voice over the course of his thirty-five-year tenure on the high court, California Supreme Court Justice Kathryn Werdegar has been this state’s most commanding environmental law presence over the past twenty-three years. Her numerous, authoritative opinions on CEQA, preemption and many other key environmental law issues will influence lower courts, environmental lawyers and California’s environment far into the future.

Thank you for your public service and consistent judicial excellence, Justice Werdegar. Your impending retirement from the Supreme Court will leave a void in California environmental law that will be most difficult to fill.

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<sup>1</sup> Editor’s Note: *cert. denied*, 583 U.S. \_\_\_\_ (Jan. 8, 2018) (No. 16-970).

## CELEBRATING JUDGE KAY

JAKE DEAR\*

Over the past three-plus decades, my wife Maureen (Mo) and I have been privileged to know Justice Kathryn Mickle Werdegar. When I first met her in the mid-1980s, she was “Kay” Werdegar — a standout and very well-regarded staff attorney, initially at the First District Court of Appeal in San Francisco, and then on the chambers staff of Justice Edward Panelli at the California Supreme Court.

When she became an associate justice on the First District Court of Appeal, and then on her elevation to the California Supreme Court, I adjusted. I called her either “judge” (the familiar term used by court staff) or sometimes, given our friendly background, “Judge Kay” — the same term by which our son Adam called her. (Court etiquette note: Unless referring to her in front of a group of outsiders, of course; then, by convention and tradition, I’d default to the formal “Justice Werdegar.”)

Whatever the appellation, over the years I’ve known her she has become an honored and trusted friend. And, together with her engaging husband David, a frequent traveling companion. But this is not the forum

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\* Chief Supervising Attorney of the California Supreme Court and head of the Chief Justice’s chambers.

to describe hiking, dining, and adventures in Nova Scotia, the French and Swiss Alps, and various Northern California venues. So, I'll get to the point and briefly sketch three themes that stand out concerning Judge Kay's twenty-three-year tenure on the California Supreme Court.

First, because she herself had been a judicial staff attorney — and hence personally researched and drafted the various types of internal memoranda circulated within the court as part of the deliberative process — after her appointment as an appellate justice she became rather an inspiration to the court's staff. Moreover, she gained from the staff a special form of respect, which she in turn reflected back. For example, after the weekly petition conference at which the justices consider petitions for review and internal memoranda generated primarily by the numerous attorneys employed by the court's criminal and civil central staffs, the associate justices meet, one at a time and on a rotating basis, with those staffs. Judge Kay was known in these settings to not only engage the staff members substantively on key issues that had caught the justices' attention at the conference, but also to do so personally, by addressing staff members by name. And, having been and worked with court staff, she also brought to bear a certain insider knowledge when considering internal disagreements about analysis regarding matters pending before the court. In these and other respects, she frequently diffused looming or festering disputes by a combination of trademark elegance, sprinkled here and there with a certain blinking, a hand gesture to the chest, and slight gasped whisper, "oh dear." Through it all, she was unfailingly supportive of, and complimentary regarding the fine work of, her own staff — sometimes mentioning, in response to a personal compliment, "well, I have a great staff."

Second, she was an engaged and impressive force at oral argument. Brief background: As a general matter, court staff attorneys don't physically attend oral argument. Instead, we watch a live feed in our staff conference rooms, or we view the internet stream at our computer desktops. One advantage of watching remotely in our conference rooms is that we can comment candidly to each other, during and immediately after argument, about what we see and hear. And one of the things that we often remarked upon when Judge Kay was on the bench concerned how very well she *listened*. It was clear that she rarely walked onto the bench with preconceived questions to ask of counsel. Indeed, this reflected one of her

many strengths as a jurist — she had no agenda other than wanting to help the law evolve in the most natural and prudential fashion. She carefully followed what counsel said from the podium — and then pounced gracefully on the word or phrase that was at the nub of the problem. If and when counsel responded in a fuzzy fashion, she gently but persistently followed up until the matter was clarified, or until it became clear that counsel could not, or would not, do so, at which point, being gracious, she sat back, implicitly invoking the mercy rule.

Third and finally, as alluded to above, she had no apparent agenda. That attribute served her and the court well not only at oral argument, but also throughout the entire process of appellate deliberation and adjudication. And on a practical level, I'm sure it was a welcome feature for each of the three chief justices with whom she served, Malcolm Lucas, Ronald George and Tani Cantil-Sakauye. Under the court's procedures, the chief assigns each newly granted case to him or herself, or to one of the six associate justices, for preparation of a "calendar memo" (a pre-oral argument proposed analysis of a case). Normally a version of that work product, assuming it survives a rigorous gauntlet of internal review, eventually leads to an opinion of the court. In this assignment role, all chiefs have balanced several factors, among them 1) keeping workload relatively even in all seven chambers, and 2) the various justices' particular interest in a given case. At times, and often with regard to a particularly sensitive or complex matter, the chief might put a special premium on trying to ensure that the assigned chambers will produce a document that gets to the heart of the matter as cleanly as possible. Judge Kay was always among the judges who could be relied upon to shoulder such a challenging task.

I'm sure that her colleagues and the court staff miss her presence on the bench, around the conference table, in chambers, and in the halls. I most certainly do as well. But we are all better for her enduring contribution to the court as an institution and to the evolving law — and for the elegant example she set in the process.

# JUSTICE KATHRYN MICKLE WERDEGAR

## *A Staff Attorney's Memoir*

GREG CURTIS\*

When Justice Kathryn Mickle Werdegar took the oath of office as an associate justice of the California Supreme Court on June 3, 1994, the state was likely curious about what sort of jurist she would be. Justice Werdegar had served three years on the First District Court of Appeal — barely long enough to have made a ripple on the ocean of California law. Few then were aware of her historic achievements as a woman in law school, her early work in civil rights law at the United States Department of Justice, or her teaching career at the University of San Francisco School of Law. Some at the Supreme Court had known Kay Werdegar as a senior attorney for Justice Edward Panelli during the court's turbulent years under Chief Justice Rose Bird. Those former colleagues remembered her as brilliant but quiet and disinclined to share her personal views. She was taking retired Justice Panelli's seat on the court. Would she also assume his role in the emerging majority led by Chief Justice Malcolm Lucas, as some hoped? Or would she have a “personal epiphany” that led her in a

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\* Head of chambers (1994–2017) to Associate Justice Kathryn M. Werdegar (retired) and chief of staff (1993–1994) and staff attorney (1989–1993) to Associate Justice Edward A. Panelli (retired).



different direction, as Justice Robert Puglia had sharply inquired during her confirmation hearing?

As citizens of the state, the Supreme Court's legal staff shared this general curiosity about the newest justice. As students of California law, some of whom had served the court under four chief justices, staff attorneys were also eager to learn how Justice Werdegar would approach the issues that were demanding the court's attention. For example, how did she stand on the perennial debate, then quite heated, over the role of the state Constitution as a source of fundamental law independent of the federal charter? Staff also wondered how Justice Werdegar's unique familiarity with the court's internal processes would affect her work. What sort of people would she hire to staff her chambers, and how would she interact with them?

Justice Werdegar may have inspired erroneous speculation about how she viewed her new role by hiring three attorneys who had worked for retired Justice Panelli in addition to one who had served with her on the Court of Appeal.<sup>1</sup> People unfamiliar with the inner workings of the Supreme Court sometimes assume that staff attorneys tend to mirror their justices' views and that the justices even prefer such people. Justice Werdegar herself mirrored no one's views and kept would-be sycophants at a polite distance. Instead, she was anxious to make sound and supportable decisions and grasped the need to understand all sides of a problem before resolving a case. Accordingly, she made her chambers a place in which reasoning and conclusions were rigorously subjected to every fair criticism. Only Justice Werdegar's implicit expectation of courtesy and civility allowed this idealistic venture to proceed without rancor. Her chambers were not a place to raise one's voice, but neither were they a place to keep good ideas to oneself.

Answers to questions about what sort of jurist Justice Werdegar would be were not long in coming. She quickly claimed her place on the court as a strong, independent thinker willing to follow the law where it led. Take for example the year 1996, two years after she assumed office. In that year alone, Justice Werdegar dissented from, and provided a fourth vote to rehear, a decision upholding a law requiring parental consent for a minor's

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<sup>1</sup> Justice Werdegar later added at various times a former annual clerk for Justice Panelli, an attorney for retired Justice William Stein of the First District Court of Appeal, and a former attorney for retired Chief Justice Lucas.

abortion.<sup>2</sup> Justice Werdegar also wrote the lead opinion in a case<sup>3</sup> rejecting a landlord's claim that her religious beliefs permitted her to refuse to rent to an unmarried couple, despite the California Fair Employment and Housing Act's prohibition of discrimination based on marital status.<sup>4</sup> And she wrote a majority opinion,<sup>5</sup> unanimous on the dispositive point,<sup>6</sup> concluding that the 1994 draconian sentencing laws known as "Three Strikes and You're Out"<sup>7</sup> did not prevent judges from granting leniency by dismissing prior-conviction allegations in the furtherance of justice.

To have looked for a political or ideological pattern in these early opinions would have been a mistake. Their unmistakable significance, rather, was to identify Justice Werdegar to scholars of California law as a preeminent member of their community, one who thought deeply about the issues and whose opinions reflected careful reasoning and integrity.

For example, Justice Werdegar's 1996 dissenting opinion in *American Academy of Pediatrics v. Lungren*,<sup>8</sup> highlighted one of the central theoretical problems of state privacy law: how does a court identify the rights protected by the state Constitution's privacy clause?<sup>9</sup> The majority had upheld a former statute barring a minor from consenting to an abortion without a parent's consent. The challenged law did not implicate a social norm protected by the privacy clause, the majority had concluded, because "the Legislature has in numerous areas curtailed an unemancipated minor's ability to make choices implicating privacy."<sup>10</sup> Justice Werdegar, in contrast, argued that the voters who had approved the 1972

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<sup>2</sup> *American Academy of Pediatrics v. Lungren* (1996) 912 P.2d 1148, 1197 (dis. opn. of Werdegar, J.), reh'g. granted May 22, 1996, and superseded by (1997) 16 Cal.4th 307.

<sup>3</sup> *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1150 (plur. opn. of Werdegar, J.).

<sup>4</sup> Gov. Code, § 12955, subd. (a).

<sup>5</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

<sup>6</sup> See *id.* at p. 533 (conc. opn. of Chin, J.).

<sup>7</sup> Prop. 184, approved by voters, Gen. Elec. (Nov. 8, 1994), and Stats. 1994, ch. 12, § 1 [codified as Pen. Code, former § 667, subs. (b)–(i), as subsequently amended].

<sup>8</sup> *Supra*, 912 P.2d 1148, 1197 (dis. opn. of Werdegar, J.). See *ante*, fn. 3.

<sup>9</sup> Cal. Const., art. I, § 1 ["All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*." Italics added.].

<sup>10</sup> *American Academy of Pediatrics v. Lungren, supra*, 912 P.2d at p. 1025.

privacy initiative<sup>11</sup> probably did not have “in mind a narrow right circularly defined by reference to statutory law.”<sup>12</sup> Justice Werdegar’s dissent influenced the court’s decision on rehearing to invalidate the parental consent law.<sup>13</sup>

In her lead opinion in *Smith v. Fair Employment & Housing Com.*,<sup>14</sup> Justice Werdegar addressed a claim under the state Constitution’s distinctly worded free exercise clause<sup>15</sup> at a particularly challenging time. A few years earlier, the United States Supreme Court had clarified that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability’” on the ground of religious compulsion.<sup>16</sup> Congress had reacted by requiring religious exemptions from state laws in a statute then being challenged in the federal high court as unconstitutional.<sup>17</sup> Justice Werdegar declined all suggestions to interpret the state free exercise clause by reference to federal law. Instead, she examined the challenged housing discrimination law under the test most protective of religious exercise (i.e., strict scrutiny), assuming its applicability merely for the sake of argument.<sup>18</sup> This cautious approach preserved the court’s ability in a future case to articulate “an as-yet unidentified rule that more precisely reflects the language and history of the

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<sup>11</sup> Prop. 11, approved by voters, Gen. Elec. (Nov. 7, 1972).

<sup>12</sup> *American Academy of Pediatrics v. Lungren*, *supra*, 912 P.2d at p. 1197 (dis. opn. of Werdegar, J.). See *ante*, fn. 2.

<sup>13</sup> See *American Academy of Pediatrics v. Lungren*, *supra*, 16 Cal.4th 307, 339 [“[I]t plainly would defeat the voters’ fundamental purpose in establishing a constitutional right of privacy if a defendant could defeat a constitutional claim simply by maintaining that statutory provisions or past practices that are inconsistent with the constitutionally protected right eliminate any ‘reasonable expectation of privacy’ with regard to the constitutionally protected right.”].

<sup>14</sup> *Supra*, 12 Cal.4th 1143, 1150 (plur. opn. of Werdegar, J.).

<sup>15</sup> “Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State.” (Cal. Const., art. I, § 4.)

<sup>16</sup> *Employment Div. Ore. Dept. of Human Res. v. Smith* (1990) 494 U.S. 872, 879.

<sup>17</sup> The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141 (Nov. 16, 1993), 107 Stat. 1489, codified as 42 U.S.C. § 2000bb et seq. and subsequently amended (RFRA). See *City of Boerne v. Flores* (1997) 521 U.S. 507 [holding RFRA unconstitutional in part].

<sup>18</sup> *Smith v. Fair Employment & Housing Com.*, *supra*, 12 Cal.4th at p. 1179 (plur. opn. of Werdegar, J.).

California Constitution and our own understanding of its import.”<sup>19</sup> The court followed the same approach in a later majority opinion by Justice Werdegar upholding a state law mandating that employer-sponsored pharmaceutical insurance plans include coverage for contraceptives.<sup>20</sup>

In the last of the three notable opinions from 1996, *People v. Superior Court (Romero)*,<sup>21</sup> Justice Werdegar invoked the state Constitution’s separation of powers clause<sup>22</sup> to conclude that a sentencing judge could properly dismiss prior-conviction allegations in a Three Strikes case over the prosecutor’s objection.<sup>23</sup> “[T]o require the prosecutor’s consent to the disposition of a criminal charge pending before the court,” she explained, “unacceptably compromises judicial independence.”<sup>24</sup> Justice Werdegar also employed the meticulous statutory analysis that would become a hallmark of her opinions to convince the entire court that neither the voters nor the Legislature had actually intended their respective versions of the statute to limit judicial power.<sup>25</sup> The overwhelming majority of the lower courts had reached the opposite conclusion.

These opinions brought Justice Werdegar more public attention than she probably expected or desired. But the care with which they were expressed won her deep respect within the court. This esteem increased over time as Justice Werdegar displayed the ability to find consensus in hard cases. For example, she wrote unanimous opinions addressing end-of-life decisions for gravely disabled, conscious conservatees,<sup>26</sup> deciding questions about wage and hour claims that had long eluded resolution,<sup>27</sup> and articulating rules to curb abusive practices associated with habeas corpus petitions in capital cases.<sup>28</sup> Justice Werdegar also became known for identifying instances in which the court’s decisions seemed to be departing from the requirements of federal law. Opinions by the United

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<sup>19</sup> *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 562.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Supra*, 13 Cal.4th 497.

<sup>22</sup> Cal. Const., art. III, § 3.

<sup>23</sup> *People v. Superior Court (Romero)*, *supra*, at pp. 509–518.

<sup>24</sup> *Id.* at p. 512.

<sup>25</sup> *Id.* at pp. 517–530. See *id.*, at p. 533 (conc. opn. of Chin, J.).

<sup>26</sup> *Conservatorship of Wendland* (2001) 26 Cal.4th 519.

<sup>27</sup> *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.

<sup>28</sup> *In re Reno* (2012) 55 Cal.4th 428.

States Supreme Court ultimately vindicated her dissents to decisions upholding warrantless searches of data in cell phones;<sup>29</sup> exercising specific jurisdiction in California over nonresident consumers’ product-liability claims unrelated to the defendant’s contacts with the state;<sup>30</sup> and permitting warrantless, nonconsensual blood testing on the theory that the need to preserve evidence in cases of driving under the influence constituted an exigent circumstance.<sup>31</sup>

Throughout her career, Justice Werdegar continued to devote particular care to cases implicating the California Constitution. One additional example deserves mention. In *Golden Gateway Center v. Golden Gateway Tenants Assn.*,<sup>32</sup> Justice Werdegar dissented<sup>33</sup> from a plurality opinion concluding that the state Constitution’s free speech clause<sup>34</sup> “only protects against state action.”<sup>35</sup> Six years later, a majority of the court moved closer to Justice Werdegar’s view by holding that a privately owned shopping mall could not constitutionally enforce its policy banning expressive activity by a labor union, without attributing any significance to the apparent absence of state action.<sup>36</sup>

The Supreme Court is a busy place with an unrelenting demand for legal writing. People new to the court can be dismayed by the workload of petitions for review, granted cases awaiting decision, petitions for habeas corpus, and automatic appeals in death penalty cases, and by the number of detailed memoranda that must be prepared to allow the court to address these matters fairly. Each justice must find a way to carry a share of this burden. Justice Werdegar asked of her staff only that their written work be fully researched, tightly and transparently reasoned, fair to both sides, and clearly expressed. For a staff attorney, no more challenging or rewarding environment can be imagined.

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<sup>29</sup> *People v. Diaz* (2011) 51 Cal.4th 84, 103 (dis. opn. of Werdegar, J.). See *Riley v. California* (2014) 573 U.S. \_\_\_ [134 S.Ct. 2473, 2481, 2493–2495] [effectively overruling *Diaz*].

<sup>30</sup> *Bristol-Myers Squibb Co. v. Superior Court* (2016) 1 Cal.5th 783, 813 (dis. opn. of Werdegar, J.), revd. (2017) \_\_\_ U.S. \_\_\_ [137 S.Ct. 1773].

<sup>31</sup> *People v. Thompson* (2006) 38 Cal.4th 811, 831–837 (dis. opn. of Werdegar, J.). See *Missouri v. McNeely* (2013) 569 U.S. 141 [effectively overruling *Thompson*].

<sup>32</sup> (2001) 26 Cal.4th 1013.

<sup>33</sup> *Id.* at pp. 1046–1049 (dis. opn. of Werdegar, J.).

<sup>34</sup> Cal. Const., art. I, § 2, subd. (a).

<sup>35</sup> *Golden Gateway Center v. Golden Gateway Tenants Assn.*, *supra*, 26 Cal.4th at p. 1031 (plur. opn. of Brown, J.).

<sup>36</sup> *Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850.

Justice Werdegar wrote extraordinarily well, as her opinions show. She was also a perceptive editor. She preferred to present her revisions in person, sitting side-by-side with a staff attorney at the work table in her chambers. Even the best attorneys sometimes employ rhetorical skill to conceal logical gaps in argument, or research that could be pursued further. At such times, the Judge (as her staff knew her) would typically have identified on her marked-up draft the precise sentence or phrase on which a difficult argument pivoted, and have circled the words that seemed to oversimplify a problem or evade a legitimate objection to the proposed conclusion. Pulling one frayed thread of argument in this manner could unravel pages of reasoning and days of work. Sometimes the Judge would leave her staff to struggle with the remnants as he or she saw fit. At other times the Judge might suggest an elegant solution with a sentence or two in fine cursive. Having corrected problems of substance, the Judge sometimes concluded an editing session by deleting anything the author could not show to be essential, whole paragraphs at a time. Among the staff attorneys who regularly shared this experience, the practice evolved of seeking one's colleagues' critical input before submitting written work, a collaboration for which the Judge often expressed gratitude.

When Justice Werdegar was not prepared to accept the analysis or conclusions in a staff memorandum, she would typically invite the author to attempt to persuade her. Her patience undoubtedly reflected the former staff attorney's respect for and appreciation of staff work. But the Judge also understood that to give someone time to defend an honestly held position, whether or not ultimately tenable, can be a powerful tool for reaching consensus. In this and other ways, the Judge's interaction with her colleagues and subordinates at the court seemed to reflect the assumption that people who are trained in the law, fully prepared through diligent study to address the case at hand, and free of obvious bias, should more often than not be able to agree on what the law requires. The assumption may be more aspirational than predictive. But there is no finer starting point for collegial work in a court. This is the example Justice Werdegar set for us.

# JUSTICE KATHRYN MICKLE WERDEGAR

## *A Congressman’s Tribute*

JARED HUFFMAN\*

Mr. Speaker, I rise today in recognition of California Supreme Court Justice Kathryn Werdegar on her retirement after 23 years of exceptional stewardship on the court and 55 years of public service.

A resident of Marin County, Justice Werdegar received her Bachelor’s degree with honors from the University of California, Berkeley, whereupon she began her subsequent legal studies and became the first woman to be elected editor-in-chief of the California Law Review. She completed her law degree at the George Washington University School of Law, where she graduated as the valedictorian of her class.

Upon graduating from law school, Justice Werdegar went to work as an attorney for the Civil Rights Division of the U.S. Department of Justice in 1962. She showed clear determination and initiative, working directly with Attorney General Robert Kennedy and writing the amicus brief that pressed for the release from jail of Martin Luther King, Jr.

After moving back to California in 1963, Justice Werdegar took on a number of academic and legal challenges before going to work as a research

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\* Member of Congress, 2nd Congressional District of California. Published in the Congressional Record, July 17, 2017.



JARED HUFFMAN

MEMBER OF CONGRESS  
2ND DISTRICT, CALIFORNIA

July 17, 2017

Honorable Kathryn Werdegar  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-4797

Dear Kathryn,

I want to thank you for your fifty-five years of public service, and twenty-three years of judicial stewardship on the California Supreme Court. After learning about your upcoming retirement, I had a Congressional Record Statement drafted and read on the floor of the U.S. House of Representatives. This statement has been added into the Library of Congress, and will commemorate in perpetuity your life-long service to the public and legal community.

Congratulations on your retirement, and best wishes on your future endeavors.

Sincerely,

**JARED HUFFMAN**  
Member of Congress

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attorney for the State Court of Appeal in 1981. Showing a voracious work ethic and attention to detail, she went on to become a senior staff attorney for the California Supreme Court only four years later.

Justice Werdegar's career as a judge began in 1991, when Governor Wilson appointed her to the State Court of Appeal, only ten years after becoming a staff member for that body.



Shortly thereafter, in 1994, Justice Werdegar was appointed by the Governor to the California Supreme Court where she has been ever since.

During her tenure on the California Supreme Court, Justice Werdegar strove to understand the real world impacts of each case brought before her. In doing so, she went beyond politics and ideology to prioritize the rights of people in both her majority and dissenting opinions.

Some notable examples of this include her majority opinion that greatly softened California's Three Strikes law, her 2008 ruling that bans on same-sex marriages are unconstitutional, and her single dissenting opinion that gun manufacturers have a responsibility for the weapons they sell to the public. Because of her clear dedication to the law and rigorous approach to each case, Justice Werdegar is well regarded by her colleagues on and off of the bench.

Mr. Speaker, please join me in expressing deep appreciation for Justice Werdegar's extraordinary service to the legal profession and the public at large by extending to her best wishes on her retirement.

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*Response by*

## JUSTICE KATHRYN MICKLE WERDEGAR

Thank you Chief, and thank you to all my colleagues. Thank you all. You have been more than generous in your comments. It's clear the California Supreme Court knows how to say goodbye. The problem is, you make it very difficult to leave.

This is an emotional time for me. The court has been my home, my community and my extended family, for twenty-three years, or almost thirty, if you count my time as a staff attorney. When I arrived with Justice Panelli in 1985, it was the first so-called Brown court; Rose Bird was chief and Justice Grodin was an associate justice. Then came the Deukmejian court, when Malcolm Lucas took the helm. Later, Ron George was our chief during what became the Wilson court. Today we have an amalgam — the Wilson/Schwarzenegger/Brown court.

During my twenty-three years, I've had the privilege of serving with three outstanding chief justices and eleven different associate justices. Indeed, the entire court has been replaced during my tenure, and at our conferences I have sat in every associate justice chair around the table. In 1994, when I started, the most senior judge was the venerable Stanley Mosk; he

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\* Associate Justice, California Supreme Court, 1994–2017.

spoke first, I spoke last. Today, it is I who speaks first. Soon it will be Justice Chin. So goes the evolution of the court.

As I consider the court today, I cannot imagine a finer group of colleagues — both for their legal acumen and their personal warmth and collegiality. I have no doubt that in their hands the California Supreme Court will continue to be, as Jake Dear documented in his law review article, the premier state court in the country.<sup>1</sup>

For myself, I couldn't have achieved what I have without the support of my superb staff: Greg Curtis, Jason Marks, Kaye Reeves, Larry Lee, and Keith Evens-Orville. And the administrative assistance of Pauline Stafne. I am deeply indebted to each of them.

I shall miss my staff, I shall miss my colleagues, and I shall miss all of you who dedicate your talents to the work of the court. I know I'll miss my parking space. And I certainly will miss the fine care of the CHP.

Thank you all. These have been wonderful years. It's hard to leave, but I am. I wish you all the very best.

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<sup>1</sup> Jake Dear and Edward W. Jessen, "Followed Rates" and Leading State Cases: 1940–2005, 41 DAVIS L. REV. 683 (2007).



ORAL HISTORY

JUSTICE  
KATHRYN MICKLE  
WERDEGAR

CALIFORNIA SUPREME COURT

1994-2017



KATHRYN MICKLE WERDEGAR, ASSOCIATE JUSTICE,  
CALIFORNIA SUPREME COURT, 1994-2017.

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*Oral History of*  
**JUSTICE KATHRYN  
MICKLE WERDEGAR**

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*Introduction to the Oral History of*

JUSTICE KATHRYN  
MICKLE WERDEGAR

EDWARD A. PANELLI\*

My professional association and my friendship with Justice Kathryn Werdegar began more than thirty years ago, when I was the first appellate nominee of Governor George Deukmejian and sat for one year as an associate justice in Division Four of California's First District Court of Appeal in San Francisco.

When I arrived in 1983, one of my first tasks as an appellate judge was to find a qualified staff attorney to assist in the necessary research and writing. At that time Kay was a research attorney on the First District's central staff, and one of my colleagues, Justice Marc Poché, had a close working relationship with her. In fact, he told me she was probably the best lawyer on the central staff at that time. I had known Justice Poché for many years, as he had earlier practiced law in the same building in San Jose where my private practice was located. We weren't partners and weren't formally associated then, but I knew him well and knew I could rely on his recommendation.

That's how I came to know Kay Werdegar at the First District. Before long, I asked for Kay to be reassigned from the central staff and come to

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\* Associate Justice, California Supreme Court, 1985–1994.



work directly for me. The principal attorney was not too happy to give her up, but I told him I wanted her on my staff if she was willing to make the change. She was, and we worked so well together that I invited Kay to join my research staff when Governor Deukmejian selected me as presiding justice of the newly formed Sixth District Court of Appeal in San Jose the following year. Although she could not accept that invitation to work so far away from her home, she was never far from my mind.

As it turned out, my tenure on the Sixth District also was short, just one year. Late in 1985, Governor Deukmejian called to say he intended to elevate me to the position of associate justice of the California Supreme Court. After that momentous conversation with the governor, I immediately called my wife Lorna to give her the good news.

My second call was to Kay Werdegar, and I asked if she would join my staff of research attorneys on the California Supreme Court. To my delight, she accepted immediately. I brought Melanie Gold with me from the Sixth District, and I drew my other staff from among the attorneys who were already at the Supreme Court and who had worked with my predecessor, Justice Otto Kaus: Alice Shore as chief of staff, Barbara Spencer, and a fifth position filled by a one-year appointee.

These staff attorneys were exceptional, and Kay adapted in the tradition of a true professional to the jurisdiction of our state's highest court. She demonstrated outstanding writing skills in the cases assigned to her and drew the admiration of my colleagues. Her assignments exposed her to the full range of appellate issues, and she also bore her share of work on the court's death penalty cases in those years before the Capital Central Staff was created to work solely on those matters.

In time I began to meet individually with each staff attorney to go over pending petitions for review, and Kay was always prepared to offer observations and questions that aided my decisions. Her assigned case memos were well reasoned and well crafted; rarely, if ever, did she fall short in representing my views in writing. She made me look good.

Although we did not socialize outside the court, I came to appreciate Kay's personal side as well. Beneath her impeccable and reserved exterior lay a sly sense of humor and a steady devotion to her husband and two sons. I came to admire her work ethic even more in light of her enormous family responsibilities. I especially remember when she was nervous about

preparing her first Seder dinner for her family, in part because her court workload did not permit her a lot of time to think about cooking. I did find out, however, that the dinner went exceptionally well and that the family was grateful for her thoughtfulness.

After Governor Pete Wilson took office in 1991, his first nominee to the California Supreme Court was Ronald M. George, who later became chief justice. When Governor Wilson had the chance to make a second appointment upon my retirement on 1994, I didn't have to do much to facilitate his consideration of Justice Werdegar. She had been a law school classmate of the governor, and I think it was almost a foregone conclusion that he would appoint her at some point because she is also a very bright woman and an enormously capable attorney with a broad and deep understanding of the law. But I'll never forget what a pleasure it was to see her selected as my replacement and to speak on her behalf at her confirmation hearing.

I take great pride in Kay Werdegar's long tenure on the court — twenty-two years now — and in the significant impact she has had on the development of the law in California. Don't get me wrong. We don't always agree on legal outcomes. Any two justices from any era would say the same. But when I was there I called them the way I saw them, and now she's wearing the robe and doing the same, always with her usual mix of thoughtful attention, intellect, and skill.

I can't take much credit for Justice Werdegar's success; she has excelled in her career through her own talents and hard work. But I can say that we could ask for no finer public servant to respond to the legal needs of our citizens in the twenty-first century. She still brings great substance to her work, just as she did when I plucked her from the First District central staff in 1983, and all of us are the better for it.

*May 2016*

*Introduction to the Oral History of*

JUSTICE KATHRYN  
MICKLE WERDEGAR

JULIA J. NORRELL\*

Kathryn Werdegar and I met one another in 1961 in a course on international law at George Washington University Law School. There were only nineteen women in our entire law school class, and even among that small number Kay and I were both outsiders, she from California and I from Arkansas. We soon found that we had entirely different views of and approaches to law school. Even today we couldn't be more different, but our friendship and mutual respect couldn't be stronger or more enduring.

Any Californian was rare at George Washington, but a woman student transferring from a law school in California was unheard of. Kay had completed two years of law study at UC Berkeley's Boalt Hall. In contrast, I was the product of an educated and highly political Southern family. After taking a degree at the Ohio Wesleyan University, I had been a Fulbright Scholar at the University of Madras in India before entering law school.

Kay was as serious and scholarly as I was cheeky and irreverent. She was accustomed to and excelled at the academic life, while I was at home in the rough-and-tumble world of Washington, D.C., where my mother had, in the early months of the Kennedy administration, succeeded my

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\* Lawyer, lobbyist, and art collector.

late father as a member of the U.S. House of Representatives. In fact, I had taken a leave from law school to manage her campaign.

Kay and I got to know each other when she asked me, “Where do you get your books for the outside reading?” I was not doing any outside legal reading, but I did direct her to the World Affairs Bookstore on Connecticut Avenue near DuPont Circle. In fact, the staff there knew me, but not because I’d gone there to buy law books.

Kay was newly married that year, and soon after our trip to the bookstore I met her husband, David, and went to study with her at the little townhouse in the shadow of Georgetown University that they had rented from Nancy Dickerson, one of the first women political reporters. I remember that first visit because Kay brought out a large binder filled with her notes. “Where are your notes?” she asked me. I produced a paltry two pages, and our friendship began in earnest.

I can say with confidence that Kay was always prepared in law school. She was so diligent that she always researched all points of view. I was just dumbfounded at her work ethic and her love of detail. I think to this day she enjoys preparing, and I think she enjoys the confidence of being prepared.

Trial practice was required of all students in order to graduate. Kay and another woman student were partners, and I served as their witness. They decided to use signs as props while they presented their assigned case on property law. After we picked up the “For Rent” signs they had commissioned from a professional sign store near Georgetown Liquor, the two women practiced and practiced. Then they practiced some more, while David and I looked on in amusement.

In the end Kay received a grade of B in trial practice. It was the only non-A grade she ever got. I can’t say why others received better grades, but it’s worth noting that it was the days of the “good ol’ boys,” and all the professors were men. Nevertheless, she graduated first in our class, displacing another student who had a top academic record and a notable background, including a stint working for U.S. Senator Robert Kerr from Oklahoma.

Kay also had gotten to know my mother, Catherine Dorris Norrell, and was very fond of her. Indeed, my mother liked both Kay and David immensely. I remember we took Kay to the Congressional Club, a club for the spouses of congressional members, which my mother had been president of when my father was in office. Every year the club hosted an event to

honor the first lady, a formal luncheon where you wore hats and gloves. As it happened, Jackie Kennedy was in the midst of a difficult pregnancy, so President Kennedy came and spoke in her place. Kay loved that luncheon and talks about it to this day.

As a member of Congress, my mother could also get Kay and David into the House gallery for events. Over time we introduced them to other important institutions in Washington, such as the Library of Congress concert series, poetry readings, theater, and private restaurants and clubs.

David and Kay were newlyweds then, and they were very sweet together. He knew a lot about food, about art, and he was innately curious. They were adventurous readers, and we were all willing to try something new. We shared many books and people and places in those early months.

But it was a tough year for them in some ways because David had to have gallbladder surgery and his mother, Julia Elting, a matriarch from Bucks County, Pennsylvania, came to care for him. His family was Jewish, and at the High Holidays Kay asked me if I knew of a temple in Washington where she



LAW STUDENTS AT GEORGE WASHINGTON UNIVERSITY —  
KATHRYN MICKLE WERDEGAR (RIGHT) WITH CLASSMATE  
JULIA J. (“JUDY”) NORRELL, 1962.

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could take her mother-in-law. I called a childhood friend whose mother was active in the Washington Hebrew Congregation. After assuring my friend's mother that I was inquiring on behalf of a distinguished Jewish visitor and not just for some curious friend, I managed to acquire for Kay two highly-coveted tickets to the holiday service, a feat that David's mother never forgot.

I suppose my friendship with Kay is partially the product of shared experiences — my showing off the city of Washington, D.C., and she becoming acquainted with it. Though I had no interest or aptitude for the skills every Southern woman (and certainly every Bible Belt Baptist) was supposed to have, I was likely the most Southern person she or David had ever met. Perhaps each of us met a need in the other, or perhaps each recognized in the other an inquisitive bent about larger things. I was myself a great reader and was somewhat hindered in my youth by a desire for affirmation of our humanity, of our very beings. I was delving into philosophy when I might have learned to cook or garden instead. "Oh, let her read," my father would say to my mother.

Kay's approach was more empirical than mine, but her curiosity was as great. She always listened carefully and wanted to learn about a range of ideas, as she does to this day. She knows something about all religions of the world, for example, and she never rejects an idea or a point of view until she has studied it for herself.

Kay and David stayed in Washington a second year so he could complete his military service, and she worked in the Kennedy administration as a staff attorney in the Office of Civil Rights. Just before they returned to California at the end of August 1963, she and I made our way to the Capitol Mall and joined the March on Washington. I think we were both believers, but we couldn't yet articulate our ideas about the changes coming to our world. I do know that in the intervening years the whole question of race and civil rights has been like a tattoo on my Southern soul, one that has been central to my adult life. And I do know that Kay, in her own way and in her own setting, brings to all her efforts a certain recognition of shared social purpose, adhering to both the belief and the practice of love, compassion, and dignity for all others.

I graduated a semester before Kay did, and our paths diverged sharply in the years after law school. While I lobbied in the halls of Congress and started a political consulting firm, Kay took her legal research and teaching

skills all the way to the highest appellate court in California. Although she does everything well, so far as I can tell, she learned something at each stage of her impressive career and came to understand that research and the courts were her natural milieu. She was never one to leap at anything suddenly, but she's a distance runner like no other I know, one who doesn't mind making her way slowly but always aspires to go farther and do better.

I daresay those who underestimate Kay do so at their peril. Her courteous demeanor never betrays her, but she can hold her own in any situation whatsoever, whether it calls for a gentle prod or a razor blade. It became clear to me at some point that she really should end up a judge, and I'm immensely proud that she has done so with such solid results over the course of twenty-five years.

By visiting Kay and David in California many times, I have also had the pleasure of knowing their sons. The first, Maurice, was an adorable baby, and I'm pleased to have been "Aunt Judy" to him and to the brilliant Matthew all their lives and now to the extended Werdeggar family as well: Maurice's wife, Helen Werdeggar, and their children, Ben, Mimi, and Zak; and Matthew's wife, Dr. Monique Schaulis, and their children, Henry and Sena. Kay and David have done a magnificent job at shaping a loving family, at instilling in their children and grandchildren a value system that offers great benefit to them and to society at large. They have most generously shared that family with me.

Although I'm in no position to evaluate Kay's judicial methods or legal opinions, I know her to be inherently oriented towards consensus and inclined to treat all around her with respect, whether they are her judicial colleagues or her staff of research attorneys and assistants. I can only guess that she sets a good example for and even mentors others making their way in the law.

Without a doubt she has set a marvelous example in the matter of personal friendship over more than fifty years, and my gratitude for our relationship runs deep. I don't think either one of us wants to stop learning or achieving, and isn't that the best possible result for any thinking person and for the myriad challenges of our world?

*July 2016*

*Oral History of*

# JUSTICE KATHRYN MICKLE WERDEGAR

Conducted in 12 sessions from October 2014 to December 2015 by Laura McCreery, Oral History Project Director, Institute for the Study of Societal Issues, UC Berkeley.<sup>1</sup>

## INTERVIEW 1 (OCTOBER 21, 2014)

MCCREERY: This is Laura McCreery speaking. I'm in the chambers of Justice Kathryn M. Werdegar at the California Supreme Court. We're embarking on the first in our planned series of oral history interviews. Justice Werdegar, good afternoon and thank you for having me here today.

WERDEGAR: Good afternoon, Laura. It's very nice to have you here. Thank you.

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<sup>1</sup> The original transcript of Justice Werdegar's oral history, titled, "Finding a Path: Reflections on a Half Century in the Legal Profession and Two Decades of Jurisprudence as Associate Justice of the California Supreme Court," is in the archival collection of the Bancroft Library at UC Berkeley. © 2017 by The Regents of the University of California. It is published here by permission of the Bancroft Library with minor edits for clarity and style and with the addition of case and article citations and other notes. Except for the official court portrait, all photos were made available by Justice Werdegar.



MCCREERY: As you know, I like to start with a bit of personal background, and it can be as short or long as you prefer. Would you be kind enough to start us off by stating your date of birth and then talking about where you were born?

WERDEGAR: All right. I was born April 5th, 1936 in San Francisco. I already had an older brother who was two-and-a-half years old. At that time we lived, I believe, on Scott Street in San Francisco. We later moved to Pacific Avenue, which is the home that I remember.

MCCREERY: How long had your family been in San Francisco?

WERDEGAR: Before me I'm not sure. My parents were born in California. My dad was born in Centerville. My mother was born in Fresno but she and her mother and siblings and father came to San Francisco in the early 1900s. When my dad came over to San Francisco I don't know. I would say we'd been there a long time.

MCCREERY: Where was his family from originally?

WERDEGAR: My dad's family? It depends how far you go back. They came from Kentucky, his grandparents. I think his grandfather [B. C. Mickle] was a surgeon in the Civil War. They came out to Fresno in the Central Valley.

My mother's family came from Alsace-Lorraine. Her grandparents met in, I believe, Virginia City and came to San Francisco. My grandmother and her husband were in the 1906 earthquake and fire, and my grandmother was pregnant at the time — a young woman. They had to move to Golden Gate Park and live in a tent. That's a bit of family lore that I wish I had asked my grandmother more about. That was my background in San Francisco.

MCCREERY: How well did you know that grandmother?

WERDEGAR: That grandmother was the one grandparent that I did know. She was my mother's mother. After my mother died she took care of us, so I knew her well.

MCCREERY: I learned ahead of time that your mother did die when you were quite young. Do you mind telling me the circumstances of that?

WERDEGAR: It was unfortunate. It was in 1941, and I guess it was near the start of World War II. She died of a post-operative infection, which was treated with sulpha drugs. Penicillin had been developed, but it was not available to civilians. It was available only on the battlefield.

MCCREERY: How did your father proceed in raising you and your brother himself?

WERDEGAR: Looking back, my heart goes out to him. What a shock it had to be. She was thirty years old, and he was left with two children, four-and-a-half and seven years old. It was just toward the start of World War II, and he didn't really know where to turn.

At first, my grandmother whom I referenced moved in with us. After a year other plans were made because that wasn't working out entirely well. My brother and I had been sent to summer camp up in Healdsburg with a family called the Nalleys, a family that had been referred to my father by some good family friends.

We went up to Healdsburg and spent the summer at the Nalley camp, and the Nalleys agreed to keep my brother and myself — I think it was about for two years. We lived outside of Healdsburg on their farm and walked the proverbial — I mean it! — one mile to school, which was a one-room school with eight grades and one teacher. That's a bit of California history.

That's when I had my first academic achievement because in those days if it was a one-room school with eight grades, some of the grades had no students and some grades had one student or five students. I think I must have been the only student in the first grade. I do remember the teacher asking me to recite my multiplication tables, which I did successfully, and I was skipped to the second grade. So for the rest of my academic career I was always a year younger than my classmates.

After those two years, my father decided that the thing to do was to send us to boarding school. My brother was sent initially down to Southern



KATHRYN JOCELYN  
MICKLE AT AGE 5.

California, where we had relatives. My father's sister was married down there. Their son went as a day student to a school called Chadwick, which was a progressive school of its day. There was none other like it in the country in that it was a boarding school, coeducational, for kindergarten through senior in high school on a working ranch in Palos Verdes. It's all built up now, but at that time I think Chadwick sat on a hill of hundreds of open-space acres. So my brother was sent down there.

My father had me attend Hamlin's. It was then Miss Sarah Dix Hamlin's School for Girls. It's now called Hamlin School. At that time Hamlin's went from kindergarten through senior in high school. It now stops at the eighth grade. It was only girls. The high school students could board. But my father got special permission from the headmistress, Mrs. Stanwood — after whom Stanwood Hall is now named on Broadway in San Francisco — to board me. I boarded there in the third and fourth grades.

After that it was decided that perhaps I should go down and join my brother at the Chadwick School, so I went to Chadwick, this coeducational boarding school in Southern California, for four years through the eighth grade. My brother stayed until he graduated from high school.

It was a marvelous school. The interesting thing about Chadwick is that so many of the students that boarded there — their families lived thirty minutes away. Why was that? In that era, in the mid-forties, they were children of Hollywood. This meant nothing to me as a young child coming from San Francisco, but looking back it was a really phenomenal time.

I'll name some of the families whose children were there. One name everybody will recognize is Ronald Reagan and Jane Wyman's daughter, Maureen. She was there with me in what was called the cottage, which is where the little girls stayed. Jack Benny's daughter was there. Hoagy Carmichael's son. Edward G. Robinson's son.

Benny Goodman's daughter, who was a friend of mine. I spent a weekend at Benny Goodman's house. I hardly knew who he was, but I do remember him playing the clarinet. It's not that I was star-struck. I wasn't at all. It wasn't of my milieu, and I was too young to fully appreciate it all.

Chadwick still exists. It's not a boarding school anymore, and as I say the area around it has all been built up.

After the eighth grade in Chadwick, my aunt — my mother's sister — offered to take me to come live with her, and so I did. She was married and

had three daughters of her own. They had just moved from Brentwood, where the family had a farm — it was a family farm. My grandmother, who had died when I was twelve years old, had left the finances to invest in this farm. It was apricots, peaches, almonds, walnuts. My uncle, my aunt's husband, managed the ranch for the family.

At the time that I was invited to come live with them they had moved from Brentwood, which was then a very rural part of the state, to Lafayette. I started my high school career at Acalanes High School in Lafayette. Acalanes was a fairly new high school at that time. The area has grown up quite a bit, but at that time Acalanes took students from Walnut Creek, Orinda, and Lafayette. There was a Walnut Creek high school as well, but we had Walnut Creek students. Since then I think there's a total of maybe five high schools.

I think I was fortunate in the education I got. Chadwick was a superb education. Acalanes was a fine education. After I graduated from Acalanes I chose to go to UC Berkeley.

**MCCREERY:** I do want to hear about that. May I ask you to back up and talk more about your father's side of the family in the Central Valley and how you interacted with them during your growing up?

**WERDEGAR:** I didn't know them. I don't think any of my father's family lived there when I was growing up. His only relatives that I knew were a sister in Berkeley and a sister and a brother in Southern California. I do have some family history, which I'm not prepared at this moment to recite without notes. But as I say his grandfather was a surgeon in the Civil War and came out to the Central Valley. That surgeon had a brother, Porter Mickle — a very unusual name. Through Porter's name I've been able to do some family research and it seems that Porter had a butcher shop in Hanford, down that way.

I knew my father's mother, but she was an invalid. The entire time I knew her she was bedridden with a stroke, and my father's sister was caring for her, as you would in those days — I mean, for years.

Then down in Los Angeles my father's sister Eileen. I knew her and her family. My brother and I would spend weekends there sometimes from the boarding school. But the rest of my father's family I didn't know.

As I mentioned my mother was born in Fresno. Again, there weren't a lot of conversations in my life about my family history, but what I'm told

is that my mother's father had, through a business arrangement, acquired some property in Fresno and had gone down there to attend to it or manage it. My mother was born there.

The family lore is that they considered naming her Raisina.<sup>2</sup> When I gave a speech in Fresno I made reference to that and said, "Since I'm named after my mother, I would be Justice Raisina Werdegard. But they decided to name her Kathryn."

I am named after her. If you'd like to hear about how that happened, I'll tell you.

MCCREERY: Please.

WERDEGAR: I was not named after her at birth. I was named Jocelyn Marie Mickle. When my mother died — I had a fortitude — I don't know where it came from. I asked if I could be named after her. To my great surprise, my father said yes, I could. So I became Kathryn Jocelyn Marie Clark — which is my mother's maiden name — Clark.

MCCREERY: How did you think to ask for that? Do you recall?

WERDEGAR: As I speak to you, and as I think back on it, I have no idea. For a four-and-a-half-year-old child that was extraordinary. How soon after her death I asked I'm not sure, but I know I was very young. I remember being about knee high and looking up at my father and another person that I think was present and saying, "I want to be called Kay."

What does surprise me is that — it must have been painful for him — it was agreed to. As I say, I became Kathryn Jocelyn Marie Mickle, and I think we stuck Clark in there at some point.

MCCREERY: Say more about your father and how you remember him during this time.

WERDEGAR: I remember him before my mother died and after. He had a great sense of humor. He was a jokester, in a nice way. During World War II, when I was very little, he was an air-raid warden on our block. For those of you who are not familiar with what that might have been, he would have to go out at night with his hard hat and his whistle and his binoculars and search the skies for any possible enemy planes.

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<sup>2</sup> Raisina ["Ray-ZEEN-uh"] was a reference to the raisin, a principal food crop of the Fresno area.

Our home had blackout curtains so that our lights would not be visible. When we had exercises for avoiding bombs or anything, we would duck under the dining table. I remember that. My brother and I at that time in San Francisco had to wear dog tags around our necks, metal dog tags with our name and telephone number on them. This was all in case of chaos after an enemy attack, which happily never happened.

I remember that there were victory gardens on our block, and these would either be vegetables and fruits grown to self-sustain a family or they would be flowers in the form of a “V.” Those are my memories of San Francisco at that time.

Also, when I was at Hamlin’s — I’d have to step back and think what years those were, but you’ll know when I tell you — President Roosevelt died. The United Nations was meeting in San Francisco at the War Memorial. I was just, again, probably eight years old. But the reason it was particularly memorable is that also boarding at Hamlin’s was President Roosevelt’s granddaughter. So Hamlin School had a particularly personal response to this tragic event in the life of our nation.

After my brother and I went to boarding school, my dad for the rest of his life basically lived alone in San Francisco, although my brother would stay with him during school vacations. He practiced law. He was a sole practitioner.

**MCCREERY:** Where did he take his education?

**WERDEGAR:** He started at Santa Clara University. He might have gotten his undergraduate degree there. I’m not sure. He took his law degree at Hastings. He was president of his high school class. I found that through some papers.

This is an understatement: My dad was not one to expand about his life or family history or the impact of the events that had to be horrible for him, left with two small children and really no family to help him out. His sister Mary was a teacher in Berkeley, but she was caring for the disabled mother.

He lived in San Francisco until his death at age eighty-four and had an apartment on Pine Street. He used to like to walk. He was very energetic, high-energy.

**MCCREERY:** How much did he talk with you and your brother about his work?

WERDEGAR: Not at all. People will sometimes say to me, “Oh, your father was a lawyer. That’s why you are.” He never talked about his work.

After I went to law school, my brother, who ultimately became a psychiatrist, said to me, “Dad told me, ‘Don’t ever go into law.’”

I rejoined, “He didn’t think to tell me.” [Laughter]

My dad was quite surprised when I applied to and went to law school and, I think, very proud of me. I’m sorry he didn’t live to see that I became a judge.

Interestingly, when I was clerking — I’m getting ahead of myself here — when I was clerking for the Supreme Court, Justice Panelli, my dad told me that he had clerked for the Supreme Court. I asked him the name of the judge, and he told me. I can’t remember the name, except that it was short, and that’s a great sorrow. The comment I remember — and this is typical of my father — was, “He wasn’t a very distinguished judge, dear.” So I’m looking for a short name in about that era that “wasn’t a very distinguished judge.” [Laughter] I’ve been unsuccessful in my search.

MCCREERY: I wonder what you remember about your mother?

WERDEGAR: My mother was renowned in her time. She evidently was brilliant. She graduated from high school at fourteen, and they wouldn’t give her — it was Miss Burke’s School — they wouldn’t give her a certificate because they felt she was too young to go on to college. I think in a year or two they did allow her to go to what was then called Normal School. I think it’s now San Francisco State [University], but in those days normal schools were where people trained to be teachers. That didn’t come to pass because at age eighteen she married my father, who was thirty.

My mother was a gifted pianist. She played a recital or concert at the Palace Hotel when she was about fifteen years old. All who knew her said that she was lovely and very sweet.

MCCREERY: I understand you took some study of the piano yourself?

WERDEGAR: When I was little, our entire family was taking piano lessons. We lived in a flat on Pacific Avenue — it was rented — right next to what used to be Grant public school, on Pacific Avenue between Broderick and maybe the other street is Baker. As I mentioned, my mother was a gifted pianist, and in the front room we had a huge baby grand. But in the

back room we had a Steinway upright. My dad was even taking piano. My brother and I were started out very young.

One of my memories of childhood is my brother, who of course, two-and-a-half years older, dominated and was a big tease — I have a memory that he paid me to practice for him. So I'd be in the back room and the piano would be going, but he wouldn't be at the keyboard. [Laughter]

MCCREERY: Who was your piano teacher?

WERDEGAR: I can't remember. I had one through high school whose name I remember, and then I stopped at the end of high school. I'm taking again now.

MCCREERY: How well did you take to music?

WERDEGAR: I loved it. When I quit at the end of high school I was playing at a very advanced level, but in retrospect I think I didn't really have the talent. But the pleasure of it is with me even now when I can't even do what I used to do in high school.

My brother also loved it, so I guess it was a family trait but never at my mother's level.

MCCREERY: You mentioned earlier that you were close to your maternal grandmother and that she was in business in San Francisco. Tell me about that.

WERDEGAR: Yes. She was widowed. In those days, when she married — and I can't tell you the year — most men didn't marry until they were "established." James Clark, who became her husband, might have been thirty-five when she was twenty. I didn't know him. I knew neither grandfather. This grandmother that I'm talking about, whose name was Kathryn May Clark, I knew intimately and well and loved her dearly. She did step in when my mother died. And think of how hard it was for her, too.

What was the question? [Laughter]

MCCREERY: Just a bit more about her and her business in San Francisco.

WERDEGAR: Her history, which again I'm piecing together — I don't have firsthand knowledge — she was widowed young and left with three children. She had a good business head, and they lived up by what is now UC San Francisco, UC Hospital. I'm told she would take the streetcar downtown and "go to business." [Laughter]



What was that? I don't know. I think there were some investments to be made. In any case, she had a head for figures and a good business sense and was able to support and raise her three children and, when she passed on, to leave a sufficient amount for my brother and myself to be educated in private schools. I think what she left behind was what enabled us to go to Chadwick boarding school and to Hamlin's for me.

She was a wonderful person. My brother and I loved her very much. She died when I was twelve.

MCCREERY: Do you know the cause?

WERDEGAR: She had an embolism or a heart attack, and she was in her sixties.

MCCREERY: Something sudden at a young age?

WERDEGAR: For that time it didn't seem young, but certainly from today's perspective. But those were very different times.

MCCREERY: What do you remember about living here in the city with your brother in the early years?

WERDEGAR: After we were sent off to boarding school and my grandmother stopped living with us in the Pacific Avenue flat, my father — this was just immediately after World War II, and housing in San Francisco was extremely tight. Whether it was for financial reasons or shortage of housing I don't know, but my father for a short while took a room with another family in the Sunset District. When we would come home from school my brother would stay with him there, and I would stay at an apartment on Franklin Street with a woman friend and secretary of my father's. She was a family friend.

They would go to work. My brother and I would run loose in San Francisco. Today it just wouldn't be done but we, you might say, "ran wild." We weren't wild, but we were free. We'd take the streetcar to Playland at the Beach and just hang out. I think as we got a little older we had to show up for tennis lessons or something. We were not living together at that time, but we would be together during the day somehow.

San Francisco was an entirely different city, of course, a smaller town. I do remember Playland at the Beach. I remember a flagpole sitter on Van Ness Avenue, which was a big sensation at that time. I don't know why he

was sitting on the flagpole, but Van Ness Avenue was all auto-dealer showrooms and for some reason there was this flagpole sitter. [Laughter] I guess the idea was to stay up there as long as he possibly could.

MCCREERY: You mentioned a few of the effects of the war going on. I wonder how that conflict affected your own family, if at all?

WERDEGAR: It didn't, actually, except — no, it didn't. My dad was too old, and of course with a family he wouldn't have been called into the service. I don't think we had any relatives who were. The shortages, of course. Gas rationing. I remember that. My dad, I guess as a warden, had access to more gasoline coupons than perhaps others did.

The Depression was hard. My dad's law practice was sketchy. People would pay him sometimes in goods, not in cash. I have a diamond ring I think someone paid him with. Sometimes it would be food or goods. I don't know when the Depression is thought to have ended officially — maybe in the early forties. Law practice was tough for him, but I think he was good at it.

MCCREERY: You talked about some of the various places you were sent to live. Could I ask you to touch a little more, for example, on your experiences up in Healdsburg, what you remember and what it was like then?

WERDEGAR: All right. Of course, at the time I realized nothing about what my life was, you just did what you were told and went where you were sent. But looking back this was very interesting. As I say, a one-room school with one teacher and eight grades. There were probably not too many then, and I think none exist now.

I went back to Healdsburg and searched down where Sotoyome — that was the name of the school — used to be. It's gone. I think there's a winery now. I do recall staying with the Nalley family in the summer. I would have been seven. We picked prunes. Don't ask me now how you pick prunes, if you pick them from off the ground or off the tree. [Laughter] But it was a nickel a lug, and a lug was this box.

And we picked hops, and hops are these sticky little buds on vines. I remember we had to wear white gloves because they were sticky. Speaking to my brother recently about how it could be that we were doing that, he said — first of all, I don't think it was considered child labor — but he said there were so few workers around then, it being the tail-end of the war.

That may be one reason, or maybe they thought busy hands keep trouble away. [Laughter] I don't know.

I do have that memory, and I have vague memories of what the town of Healdsburg looked like at the time. Of course, that has changed so dramatically.

MCCREERY: How was it to live with the Nalley family?

WERDEGAR: I really don't remember. Going fast forward, the California Supreme Court at one time — we have adopted in recent years this outreach procedure, and we go to different communities. A few years back we went to Sonoma and met with students there. When we do meet with students, each justice is assigned randomly a question that students have submitted.

Randomly I was assigned the question, "What education do you need to become a Supreme Court justice?"

It tickled me to be able to say, "In my case, I started out in a one-room school, one teacher and eight grades, in Healdsburg." Then I continued, "But that's not required." [Laughter]

After that a piece appeared in the local Sonoma County paper where a columnist reported something to the effect that, "Barclay Nalley, hearing about Justice Kathryn Werdegar being educated at Sotoyome School, exclaimed, 'That's Kay Mickle! I remember her well. She lived with us. She had blonde braids.'"

The column concluded by saying, "They are due for a reunion. He hasn't seen her for sixty-five years," or something like that.

After that — I was thrilled to think that there was a Nalley around — I did get in touch with him and learned a little bit about him. He ended up — he was the older son in this Nalley family that we lived with — he ended up himself being a teacher, I think, in that one-room school. But he also described a few things about my brother and myself that were good to hear, and my grandmother. So that was a very nice reunion and a funny coincidence.

MCCREERY: You talked about how you came to live with your mother's sister at the time the family was moving to Lafayette from Brentwood. Could you talk more about that aunt and that family?

WERDEGAR: That aunt came later — a lovely person and very generous and good to take me in.

MCCREERY: Did she have a family of her own at this time?

WERDEGAR: She had three daughters, so she didn't need another girl. But as devoted to my mother as she had been, and just the good-hearted person she was, I became part of her family. I'm still close to her daughters, my cousins, who were considerably younger than I was. But that was my home for four years. It was a good high school experience. I made some good friends at Acalanes. And as I say, I had a good education.

MCCREERY: That must have been a big change for that family, coming in from the farm setting in Brentwood.

WERDEGAR: Yes. [Laughter]

MCCREERY: How did that turn out for them?

WERDEGAR: They had started out living in the city. When my grandmother had purchased this farm — or ranch, as we used to call it — I think they made a life choice to go up there — that was the interesting part — to go up there and live on the ranch and see if it could be financially successful.

In the summers that I would stay up there, I do remember that they would have a roadside stand selling peaches, and I'd be there selling peaches. So these experiences that I've mentioned, picking prunes and selling peaches and living in Healdsburg and Brentwood on the ranch, were really very interesting.

MCCREERY: You mentioned that you found you were a good student from a very early age.

WERDEGAR: Very early.

MCCREERY: When you got to Acalanes High School, what were you interested in?

WERDEGAR: What was I interested in? I took an academic program. I knew I was going to go to college, but there was nothing that spoke to me particularly or that I was aspiring to do or looking toward. I thought about journalism.

MCCREERY: What was the social scene there?

WERDEGAR: It was a nice public high school. It was a good social scene. You know, the all-American idea of Rally Committee and football and

Girls' League. These were good times in a nice area that hadn't — it's still very nice I'm sure — but it hadn't developed much.

MCCREERY: Do you particularly remember teachers who were influential to you at that level?

WERDEGAR: Yes, I do. I had a world history teacher who was a wonderful teacher, and I had a French teacher who was amusing. I liked algebra and geometry *very* much, which is strange. I would go home and do my geometry right away. I just enjoyed it so much.

But that was just something I did. It wasn't the focus. I would go home after school and practice the piano, which wasn't unusual, by the way. In those times it was not unusual for a young person to be taking an instrument. I think that hasn't persisted so much now, just the general idea that that's part of what you do.

MCCREERY: You said a little while ago that you did go on to college at Berkeley. What process did you follow to think about where you would go and to apply? What was it like then?

WERDEGAR: You're influenced by your environment, right? I applied to Cal and Stanford. I was accepted at both, and I chose Cal. Stanford at that time had still very few women.

I went off to Cal, like all my friends did. I went through rush and then joined a sorority, like all my friends did.

MCCREERY: Which one?

WERDEGAR: Pi Beta Phi.

After my first year at Cal, I was somewhat dissatisfied. I felt that I wasn't getting what I thought I wanted out of college. I wanted something more that I couldn't quite articulate.

My brother had gone to Dartmouth. In those days, a Californian would go east, first of all, very rarely. Secondly, there was no college campus visit. No college trips to go see your campus. You just applied. Chadwick had suggested to my brother that Dartmouth would be a good fit. He applied. He was accepted. Those were very different times.

I was somewhat dissatisfied with my experiences at Cal, and my brother said, "Come east."

I applied to Wellesley and to Smith and was accepted by both. I chose Wellesley. I was one of two transfer students in the United States that were accepted that year, and my roommate was the other transfer student. That was very congenial. We got along beautifully.

MCCREERY: You were still quite young when you went east.

WERDEGAR: Oh, probably — whatever — sixteen, seventeen. For me at that time, a California person in the early fifties, going east was like going abroad. It was exotic. I can feel the excitement now as I talk about it. I was really excited. Except for my brother I had never known anybody who had gone east. People didn't.

I had, actually, a wonderful year. But I will say I was working harder than I'd ever worked in my academic life.

At the end of the year I decided I would go back to Cal. These decisions were not easily made, but why did I make that decision? One, I was working harder than I ever had. Two, Wellesley had orals for seniors graduating. I was living, as a transfer student, on a senior floor in a dormitory, and I would see these senior girls just stressed out as they prepared for their orals.

Also, my roommate — one of my closest Wellesley friends — left to get married. My brother was graduating from Dartmouth. A couple of other connections that I had were also disappearing from the scene, so I thought, "I'll go back to Berkeley." Which I did, and I finished at Berkeley.

MCCREERY: Before we leave Wellesley, may I ask what your financial circumstance was there?

WERDEGAR: Somebody paid the tuition, and my brother and I — the circumstances being what they were — my father never talked about this — we assume that the money that my grandmother had left by way of my mother came to us sufficient to pay tuition.

MCCREERY: As you say, it's a very different environment in almost every way. How did you like being there, aside from the academic cautions?

WERDEGAR: I loved it. Wellesley is a beautiful campus. The classes were — it was the best educational year I've had in my life — stimulating, exciting. And I think one thing that was different for me, unlike the milieu I was in at Berkeley — which was not the entirety of Berkeley, but it was the

milieu I was in — people were really engaged in their classes. You talked about your courses after you left class. It was very, very stimulating.

The social situation was so different as well. At that time the male colleges such as Dartmouth and Harvard and Yale and Princeton were not coed, and the women's colleges, of course, weren't. So your social life would tend to be you'd go for a weekend to another campus — although Harvard was nearby. It was just a different situation. Coming as I did from California, and the East being exotic for me, altogether it was a fabulous experience.

MCCREERY: Where were most of the other students from?

WERDEGAR: The East Coast.

MCCREERY: How much did you have in common with them, or how little?

WERDEGAR: Well, my roommate was from New York, very wealthy. Her father was in shipping or something. They had servants when I would go to her house. But so did my Chadwick friends have servants. That wasn't the point. It was a meeting of the minds and congenial. It was great.

MCCREERY: You say it was a hard decision, though, to leave?

WERDEGAR: It was a hard decision because Wellesley had taken us, the two of us, and the two of us after a year left. I felt that was not a good thing to have done.

MCCREERY: You mentioned your roommate decided to marry and leave school altogether.

WERDEGAR: She got married, yes. At the time Wellesley — if you were married I don't think they would welcome you as a student, actually. I'm not positive about that. Maybe if you were married and pregnant they wouldn't. I know, going back so far, there were certain issues about that. But she may just simply not have wanted to complete her education. I can't be sure.

MCCREERY: Certainly, there were expectations of young women in that generation, even those in college, that might have had a bearing on various classmates?

WERDEGAR: At Wellesley my friends — I don't know what their aspirations were. I don't recall that. At Berkeley in that era, the few — not few,

many young women were training to be teachers, grammar school teachers. That was about the extent of career aspirations that I was aware of, for those who had career aspirations.

You have to remember at that time it was not at all common for married women in the middle class and the upper middle class to work at all. A number of them did become primary school teachers and then, perhaps, when they had children stopped out or maybe stopped altogether.

MCCREERY: How was it to return to Berkeley, having been away a year?

WERDEGAR: I was a little different, but it was a smooth return.

MCCREERY: How were you different? Can you reflect on that?

WERDEGAR: I'd seen another path. Perhaps if I hadn't joined a sorority, my experience at Berkeley would have been different. There are many ways to go through Berkeley, but I just continued taking classes and having a very nice social life and then I graduated.

What was different is I didn't get — you were supposed to at that time get your bachelor's degree and your "M.R.S.," and I sort of flunked that. So then I went to work on the campus, actually, in the president's files, which was very interesting.

MCCREERY: Before we leave Berkeley, how did you choose your major of liberal studies?

WERDEGAR: I was a generalist. At Berkeley I had a major that not too long after they eliminated called "general curric" — general curriculum. That allowed me to have a triple major — it was really a liberal arts education — history, philosophy, and English — a wonderful way to go through school, wonderful. But I guess the Academic Senate or whatever later decided it wasn't sufficiently concentrated. I got a good sprinkling of philosophy, history, and English, and I loved it.

MCCREERY: How many other students were taking a similar path? Do you recall?

WERDEGAR: I really don't know. I do know that, having transferred to Wellesley — they did not transfer my grades. In fact, I was set back in some way. My academic record was compromised a little bit at Wellesley.

Certainly, my French language skills were lacking. I had always gotten A's in French. But when I entered my class in French as a sophomore



at Wellesley, the shock was they expected me to speak it, which of course I couldn't. [Laughter] The entire class was conducted in French, seriously. So I had my little *Petit Larousse*, which is not petite at all. It's huge.

Nowadays, of course, languages are taught so they are supposed to speak them. But thus far for me — I knew paper French very well, but I couldn't speak it. That was wonderful but, of course, traumatizing.

The summer following that, my brother and I went on a student group bicycle trip to Europe. I may not have been a graceful French speaker but I could certainly speak French and have no trouble doing it.

But that was a bit of a shock. My grades at Wellesley were not the straight A's I was accustomed to. I was working harder than I ever had. So when I came back to Berkeley I didn't become Phi Beta Kappa, which I otherwise was on track for doing because I got mostly A's at Berkeley. But that sophomore year was a bit of a setback. But it's interesting. The grades may not have been as good, but the educational input was terrific.

MCCREERY: The bicycling trip sounds delightful. Had you had much chance to travel before that?

WERDEGAR: Again, you have to think back to the era. Nobody traveled. This was only — what? — ten years or twelve years after World War II. My brother and I were signed up for this student bicycle trip. We took a Holland America Line ship called the *Groote Beer*. Seven hundred students — it was an all-student ship — seven hundred students on their first trip to Europe. [Laughter] That was a lot of fun.

Practicing for the bicycle trip at Wellesley, I had a bicycle. A lot of people did. It was a three-speed. This was a change — a three-speed. So I practiced on my three-speed. We bicycled through Europe on three-speeds. Those of you who are cyclists and have your ten-speeds — and I don't know how many gears it is now — it's just a joke.

We would stay in youth hostels every night. You had to bicycle in or walk in. You couldn't arrive in anything motorized. At the youth hostel you were expected to do your share of the chores. You'd bring your own tin cup and plate, and you'd be assigned a chore.

During the day, those of us on the trip — there might have been twenty — my brother was on it, I was on it, and one of my very best friends from Wellesley was on it — you could be on your own. So my friend Paula and I

would be cycling on our own, and you'd meet at the youth hostel. That was quite an experience.

Europe was very different then. As I say, it wasn't so long after World War II, and as young Americans we didn't really understand the deprivations and the hardship and the poverty that we saw.

I know one thing we noticed. The women shopping at the grocery store and different stores would have these string bags they would carry from store to store. Guess what? We're back there now. [Laughter] They may not be string, but if you're paying attention you always have your cloth bag now, especially since California has eliminated plastic bags. But also, even if it's paper you bring your cloth bags. We're going back to conservation and frugality, which I think is a very good thing. But after the war in Europe it wasn't a choice. It was what they had to do.

MCCREERY: The nice thing about a bicycle trip is you see so much of the countryside and the smaller places. What impressions did you have?

WERDEGAR: Oh, you do. You'd stop and have lunch in some little village or pleasant field. The other thing is there was none of this high-tech sport gear, none of these easy-care fabrics. I had a gym bag, literally. We didn't have backpacks and whatever apparatus you would strap on your bike now. In it was what I was going to wear for those couple of months bicycling through Europe — one dress and a change of underclothes, I guess, and some shorts. I think we probably had to wear a dress if we went to certain restaurants or museums or whatever.

At the end of the trip — this dress was just cotton fabric. It wasn't drip dry or easy care or non-wrinkle. [Laughter] But I do remember it was green and kind of attractive, with stripes. At the end of the trip we were in Paris, and my friend and I went to a bridge over the Seine. I took my dress out and threw it into the Seine and watched it float down the river. [Laughter] Farewell!

MCCREERY: That's a lovely image. [Laughter] How do you think that trip changed you, if at all?

WERDEGAR: I don't know about changed me.

Backing up to Wellesley, one of the famous aspects of a Wellesley education is mandatory sophomore year — which is the year I was there — art class. It's mandatory. You have the big lectures with the slides, you

have the small sections where you discuss the paintings, and you have a lab where you do what you've been studying. You do the sculptures. You do the oil painting. So it's hands-on. As I say, the school is famous for it. I had just finished that art class. Before that I didn't know anything about European art.

I had just finished my French immersion class. [Laughter] As a consequence it was a perfect time to go. I was young, and life was exciting. And we were free. Now you'd never, I don't think, let your sixteen-year-old daughter go off bicycling by herself. We let truck drivers pick us up, and we're here to tell the tale.

MCCREERY: Yes. Different times. I do enjoy hearing about your time at Berkeley. How do you evaluate that education and its effect on you?

WERDEGAR: I enjoyed my education at Berkeley, but it didn't have the impact on me that this year at Wellesley did. Nor was I particularly directed to be getting anything out of it. As I say, I didn't anticipate I was going to go to graduate school at all.

I'm very loyal to Berkeley, and I think I had a good education. But the impact on me I can't say in the same terms that I've described that one year at Wellesley, which back then was very exotic for me.

MCCREERY: What considerations did you have for what to do next, after you finished your bachelor's degree?

WERDEGAR: I thought I'd better get a job, which I did. As I mentioned, I was living in Berkeley and enjoying it. I went to the president's files. I'm not sure if that even exists today, but our task then was — there was a group of us — to research and answer inquiries of the president's office. A lot of the inquiries had to do with the loyalty oath times. I can't remember other inquiries.

There were no computers then, and I forget how we actually conducted our research. But I know that I enjoyed it; it was very interesting. First of all, it was sort of academic. Secondly, the questions were interesting and the research was interesting.

But I then decided to move to San Francisco, and I transferred within the university system. I took a private job for a short time, but that did not work out. I transferred to UC San Francisco, UC Hospital, where I became what they called a ward clerk or ward secretary.

What that position entails is you stand at the nurses' station, behind the counter, and you're the only civilian on the floor. The floor was the tenth floor, which was what they called a medical floor. You put together patients' charts. You answer the phone. You take messages for the physicians. You send the patients off to x-rays or tests that they have to have. You're sort of central headquarters, surrounded by nurses and doctors. I found that very interesting.

MCCREERY: What do you remember about who hired you and your co-workers?

WERDEGAR: I don't remember who hired me. My co-workers were nurses and doctors. I do remember that at that time I became acquainted with two women physicians who were training as residents. Or one was a professor, and the other was a resident. Truly, I think they changed my life because I had no idea that women could be doctors. It really was a revelation.

I also met my husband there. He was a resident, and we began dating.

MCCREERY: How exactly did you meet?

WERDEGAR: He had been away for a year doing a fellowship in New York. He had earlier been an intern — I don't think they call people interns anymore — but an intern at UC, had gone back to New York, where he was from, to do a fellowship year — to be with his mother, actually, at that time, who was recently widowed — and then come back as a resident.

He came back to the tenth floor, the medical floor. He came to the desk and said to me, asking after my predecessor, "Where's Gay?"

I said, "Gay is gone, but I'm Kay."

While he was on the medical floor we would chat. When he left the medical floor he asked me out. He reports that he didn't think it would be appropriate to ask me out when he was working on the same floor that I was. So we started going out. That's how I met him.

MCCREERY: Say a little about his background, if you would, and his undergraduate and medical training.

WERDEGAR: David was a New Yorker, and he went to the Bronx High School of Science, which at that time didn't allow women. It does now. His father was a dentist, and they lived in an apartment in Manhattan. At age sixteen he graduated from high school and accepted a scholarship,

all expenses paid, at a little school outside of Bishop in the Eastern Sierras called Deep Springs.

Deep Springs is very renowned, for those who know about it. It was founded by an educational visionary named L. L. Nunn maybe a hundred years ago, and it was comprised of a student body of about eighteen to twenty boys. It was a two-year school, and then after that you could transfer. The academic situation and reputation of Deep Springs was such that students could transfer to any school in the country, and they did.

However, L. L. Nunn also started a living unit at Cornell called Telluride House. I think he made his fortune in Telluride, Colorado. David, after Deep Springs, chose to go to Cornell and Telluride House. That's where he finished his education.

We have together visited Deep Springs many times, and it's a phenomenal educational institution. It's a working ranch. The students would study the courses taught by the professors who were available to be there that year, and they were all highly intelligent students. It was a working ranch, and they would milk the cows and skin the pigs and cook the dinner and plough the fields. They did it all, and that was the visionary part of the education.

Deep Springs is now undergoing some controversy and effort to become coeducational. Right now that's in litigation.<sup>3</sup> For its first, perhaps, hundred years it was all male and a very small student body, as I say. David, coming from New York, a Manhattan apartment, on a train across the United States — [Laughter] — this was a real change for him. He's been on the board of trustees, and he's very devoted, as are most Deep Springs graduates.

Then he went to Cornell, and then he went to New York Medical College and then found his way to California.

MCCREERY: What specialty did he have in medicine?

WERDEGAR: He became an internist. He never went into private practice. He went into academic medicine. Although an internist, he started

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<sup>3</sup> Deep Springs College will become coeducational with the entering class of 2018: *Hitz v. Hoekstra* (Cal. App. E058293, April 13, 2017) (affirming trial court decision to permit coeducation); *review denied* (Cal. S241885, June 28, 2017; Werdegar and Cuéllar, JJ., recused) (Justice Werdegar's husband being an alumnus, class of 1947; and Justice Cuéllar being an alumnus, class of 1989).

the family practice department at UC — a great believer in treating the whole patient. This was in the seventies when the idea of family practice was new, but also it was welcomed by the students. For a while the family practice department was the one where the best and the brightest went.

MCCREERY: He was making his career, then, there at UCSF at the time you met. You described how influenced you were by a couple of women physicians you were getting to know.

WERDEGAR: Yes. David thought it would be a good idea if I would get a graduate degree, and I was open to that idea. As I've said in other contexts, I knew medicine wasn't for me and everybody should be grateful for that. [Laughter] So I sort of arbitrarily went over to Berkeley wondering, what would I do? I thought about librarianship and a master's in English, law. Then I thought, "Law really is best. It's a finite program. It seems more solid than an ephemeral master's in English."

So I enrolled in law school. I applied to Hastings. I applied to Berkeley.

MCCREERY: I'm interested in this process of choosing law. What other advice did you get — or did you seek any — from David or from others?

WERDEGAR: No. This is the theme of my life. No advice. David didn't advise me on that. It was just my choice. I must have talked to him about it, but it seemed like a very good idea — and it still does.

I think what's different about my background and upbringing is I didn't have a lot of — clearly, no deep parental involvement. I was on my own. But nobody said I *couldn't* do anything. Nobody pushed me to do anything. I was on my own, and so I chose this path. But no limits were put on me. Nobody said, "You can't do that." I was sort of naïve, actually.

MCCREERY: How so?

WERDEGAR: I had no idea — I hadn't thought about — that being a woman would be an issue. To me it was a more exciting school, and I'd come out of it with a solid education, I hoped, and a degree that would take me I didn't know where, but someplace.

MCCREERY: What did your father say about this, if I may ask?

WERDEGAR: I think he said, "Oh, that's fine." He had no input into it. I don't think he said this wouldn't be appropriate, although I earlier told you [in our preparatory discussions] that, earlier in life as he was trying

to guide my brother he told him, “Don’t be a lawyer.” Because I think my dad’s experience as a lawyer had not been a happy one.

I think my dad, in his heart, really wanted to be a mining engineer. But the Depression was such that that seemed problematic. I’m only supposing, but I think that’s part of it. Law seemed a more solid path.

What he thought when I went to law school? I don’t know.

MCCREERY: In making this decision, though, you were relying on yourself?

WERDEGAR: Oh, absolutely.

MCCREERY: Maybe that’s a good stopping point for today, and we can take up law school next time.

WERDEGAR: All right.

MCCREERY: Justice Werdegar, thank you so much.

WERDEGAR: Thank you.

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## INTERVIEW 2 (NOVEMBER 6, 2014)

MCCREERY: Good afternoon, Justice Werdegar. We would like to begin our second oral history interview session by giving you a chance to look back at some of the topics we discussed last time. What did you want to add to that account?

WERDEGAR: Laura, thank you. It's nice to see you again. I would like to back up and set the scene for my application to law school, the scene in the spring of 1959, when I applied. As I mentioned, virtually all my friends from college had married right after college or very soon after. They were on track to fulfilling what was expected of them and what they aspired to, which was to get married and have a family and support their husband in his career.

I was out of sync, but I want to emphasize that scene because I have, right here, Gail Collins' book called *When Everything Changed: The Amazing Journey of American Women from 1960 to the Present*. She starts at 1960, and I'm starting at 1959. I'll just quote to you what one of her interviewees said:

"It was understood that you'd be engaged for a year, and then you'd get married as soon as you graduated."

Quoting another interviewee, she says, "A girl who gets as far as her junior year in college without having acquired a man is thought to be in grave danger of becoming an old maid." [Laughter]

That may be a little overstated, but it's the reality. You'd get pinned your junior year, engaged your senior year, and married in June or maybe in July or August. So I was definitely out of time.

As I mentioned, I went to UCSF to work, and I was what they called a ward secretary. There, again, I saw these two women doctors. Reflecting on that, I want to say they really changed my life. No one had heard of women in the professions, and seeing them made me realize that there were other opportunities. I did mention that it wasn't going to be medicine, but it did lead me to aspire to something beyond what otherwise I might have considered as an occupation for myself. So I have to belatedly thank them very much.

MCCREERY: Did you get a chance to speak with them about their work and their experiences?



WERDEGAR: Oh, no. I was a ward secretary. They were doctors. I was so impressed. No, but they certainly were critical to my future.

At that time, after working there, having met my — I didn't know it, but — my future husband, David, I decided I had better go on, and he was encouraging me to get a graduate degree. I rather arbitrarily went over to Berkeley. I think I've told you this. I thought about getting a master's in English. I looked into librarianship. I thought about social work. It's not like I was driven to be a lawyer, but ultimately, as is now history, I settled on law school.

I will say I applied to Hastings and to Berkeley. I never thought of applying beyond the Bay Area. Indeed, applying to Berkeley took me out of my environment. [Laughter] Looking back, I think Yale would have been a very fascinating school because in that era, maybe even today, it was the most intellectual law school. It turned out so many of my professors at Berkeley Law were from Yale, and they were brilliant.

But in the fall of 1959, I was accepted at Berkeley, and I moved into I-House, International House, on Piedmont Avenue.

MCCREERY: What was the atmosphere at that time?

WERDEGAR: International House was, as its name suggests, supposed to be a place where international students — Berkeley has educated so many future leaders of their countries — came and lived and interacted. To apply I had to express my interest in mingling with these young people, which was a rare opportunity. But the truth was, a lot of law students applied to live there because the law school was just half a block away down the hill. Happily, International House accepted my application, and I moved in. That was good because there were a lot of other future classmates there, and I did become acquainted with a couple of them that were especially important in my life.

MCCREERY: Which classmates were those?

WERDEGAR: Pete Wilson, whose name might be familiar to our readers as the future governor of California. Believe me, none of us knew that we'd be the future anything. And John Niles, whose father was dean of New York University Law School. John and I became very good friends, and we impacted each other's lives in a way that will come out. John was the future

editor-in-chief of the *California Law Review* for our class, and he was the future law clerk to Chief Justice Earl Warren.

I remember when I first met John at I-House. He was a very intelligent fellow, and success was written all over him. He, early on, asked me what had my SAT score been. When I gave him the number — I have no recollection now what it was, but it was a bit higher than his — it set him back on his heels, which was funny. But we did become friendly competitors and good friends throughout his life. John, maybe ten years ago, passed away.

MCCREERY: What sort of person was he in the years you were law students together?

WERDEGAR: He was smart. He was fun. He was good company and just a friend to be with and play tennis with and so on. I will remark that once we had got to law school, the seating at that time was alphabetical. I don't know if they still do that. But most of the people I knew then and can remember now, their last names start with M, since mine was Mickle at the time. [Laughter] I still am acquainted with Mr. Milch, who sat on my right side. If I didn't meet them at I-House or they had my same initial or we didn't happen to socialize, I wouldn't likely know them.

MCCREERY: Would you say a few words about Governor Wilson at that time?

WERDEGAR: We were all friends. John Niles, Pete Wilson, and I would have coffee together, and so forth. We all lived at I-House. Pete Wilson and I spent time together. We had an occasional date, and we studied together. He was just a fine person and a very good friend to me.

MCCREERY: What did you know of his background early on?

WERDEGAR: Nothing. He didn't come from California, which is interesting. I don't know if you're aware of that, but I think he was born in Missouri and raised in Illinois. His biography is well known. But he came out to California to law school and, as so many do after they come to California, he decided, "This is the place where I want to live."

I'll get ahead of myself, but when I was elected editor-in-chief of the law review and a little apprehensive about the responsibilities, he was very supportive of me.

MCCREERY: Would you say a few more words about what I-House was like and the actual living arrangements?

WERDEGAR: All right. I had a room to myself. I can't remember if I had a bathroom to myself. I do remember the telephone arrangement. You just can't imagine what it was like when there were no cell phones, and in those days we didn't have a private phone in our rooms either. So if you got a phone call your room would be buzzed, and you would go down the hall to the communal phone and take your call. The technique that was used by people who cared — this little button protruded from the wall, and you'd put a bobby pin on top of the button. So if you'd been gone and you came back and the bobby pin had fallen, you'd know you'd gotten a phone call.

MCCREERY: Knowing how busy you were when school began, what chance did you have to interact with the international students who were there?

WERDEGAR: Probably not a lot. But I'm sure — to show my good faith and also to my own personal benefit — I'm sure I showed up at some of the mixers and the minglers and so forth. But it was not central to my life, nor do I think it was to most of the law students' lives. Maybe in the future they might have been more selective. Of course, now Berkeley Law, formerly called Boalt, has a dorm for students. And students get apartments, which I did after my first year. Everybody I knew at I-House did too after their first year or maybe after their first semester.

But I love going back there. It's a wonderful building and a wonderful institution. I have many memories of sitting out on the terrace and having coffee or walking up the stairs with my books after class.

MCCREERY: Say a few words, if you would, about the very beginning of law school. That first year is a storied thing. What was your experience?

WERDEGAR: I remember that I had to register and that there was orientation for the new students. I believe there were only four women. Sometimes I've said there were six, but people I've checked with agree with me. There were only four. So I joined the little huddle of four women.

I did say, trying to make conversation, "Can you imagine? They asked me if I was here on the G.I. Bill." This was in 1959, so I was making this comment.

One of my classmates said, "Well, I am." [Laughter]

So that set me back. It was the classmate Joan Smith, who completed her education at Berkeley, the only one who actually did because, as will appear, I transferred my last year. So Joan was there on the G.I. Bill. I can't

remember if she'd been in the Marines or the Army. I don't know. But I was surprised to hear that.

The two other women. One was a truck driver. One was a woman who had been a philosophy major, and her name was Alison. Actually Alison, after her first year, picked up her grades and withdrew. She decided that law school was not for her. I think she went back to where her heart was, which was to study philosophy. Somewhere along the first year the woman who was a truck driver disappeared, so that left Joan and me.

MCCREERY: What about the makeup of the class in general? Four women —

WERDEGAR: I think the actual number of the class was 300. Again, I've checked this with people, including professors and classmates, and they agree. They think it was 300. I hesitate because it shrank quite a bit. Maybe at graduation it was 200. Actually, that fits with what I'm going to say.

Orientation came, and you're seated according to the initial of your last name. Then you are introduced to what law school is going to be. In those days it was said to you, and it was also absolutely true: "Look to your right. Look to your left. One of you is not going to be here by the end of the year."

They don't do that anymore, and I think one reason they don't is I think maybe they're more selective in who they admit. Maybe in those days their admissions were more liberal and it was just known that not everybody was going to be able to complete it — or love it, like the young woman Alison. She didn't like it at all. She said it was a trade school. It wasn't for her.

I was fascinated by it. I bought my *Black's* dictionary, and there were all these Latin phrases that would come up in our classes. I was just fascinated.

I also was scared to death. I looked at these men around me, and I thought, "All right. Now I have met my match academically, no question." That was my initial impression.

As I said earlier, the people I came to know in the two years that I was there, either they were at I-House and they became friends like Pete Wilson and John Niles or their name started with M. There were only two African Americans in our class. I don't think there was anything like affirmative action at that time.

One of them, I'm so sorry to say, I just saw his obituary this weekend, Gene Swann, who became, I believe, a public defender. At one point he

was asked to head up the police oversight commission in San Francisco. The other was the renowned Thelton Henderson, a famous judge of our time now.

Actually, Gene and I became friends. He was married to Cherie Gaines, an African-American woman who also was a lawyer. They were an extraordinary couple because, if you think it's unusual for a woman or for an African American to be in law, she was a female attorney and African-American and very, very smart. I really enjoyed knowing her and, through her, getting some perspective on what it was like to be the person she was.

Gene was very outgoing, and he would gather some of us — another friend that was a dear friend of mine, Bert Danziger — to go have a Seder at his house. [Laughter] He was just full of fun and high spirits, and his wife Cherie was extremely smart and engaging.

Thelton I actually did not really know, except to say hello, in law school. He was married at the time — and although Gene was married I did get to know him. But mostly I wouldn't have gotten to know any of the married male students.

MCCREERY: Why is that?

WERDEGAR: Because they'd go home to their wives. They're not taking me out or asking me out or studying with me or hanging out at I-House. Their lives are very occupied by school and home, I'm sure.

Let's see. I do want to make the point that, insofar as who I might have come to know, *The Paper Chase* in its time, which was after my time, became quite a famous book — I've met the author, actually, years ago — and a movie. I think it portrayed law school as very rigorous and maybe a little intimidating, which of course it was.

But study groups, as far as I'm aware — and being the only woman in so many circumstances, there's a lot I'm not aware of — but there were no study groups. Now, if there were, the men were having them. I did study with Pete Wilson. But otherwise I studied on my own, which, let me say, is completely congruent with my preference. I would go to bed at ten o'clock before finals. I'm not ever one to burn the midnight oil.

But I did find *The Paper Chase* very, very interesting. Maybe they still have study groups. I wanted to make that point.

MCCREERY: Another theme in *The Paper Chase* is the actual classroom setting and how the sessions were conducted by the faculty. Can you make any comparisons there?

WERDEGAR: I don't remember too well if it was intimidating in *The Paper Chase*. It was intimidating in my experience but not because the professors — with one exception that I'll get to — were trying purposefully to intimidate the students. But they were much enamored of the Socratic method. If you have any familiarity with the Socratic method, you never — the law student wants to know the black-letter law. "A=B and it results in C." But the professors don't get you there that way. It's circuitous and probing, and I think it makes all students a little uncomfortable. Some would say it's hiding the ball. But we did have what's called hornbooks. There you would go and have the great relief of seeing what we called the black-letter law set out.

We did have at Berkeley at that time a crop of young professors who were brand new. Maybe they'd been there a year or two before we came, and they were young. They were just a tiny bit older than many of the students. I will say, at that time the men students perhaps had spent a year or two out discharging their service obligation. And I had been out of school a couple of years, which I don't think is a bad thing before you go to graduate school.

So the professors were young and my class, to this day, will make fond reference to the "four H's." That's Professors Halbach, Heyman, Hazard, and later Herma Hill, who I'll speak about later. We felt we had a golden era. Some of those professors are still teaching, maybe at Hastings, so you can see how young they were. They were all at the time brilliant but developed so as to be authorities in their field and nationally renowned.

Mike Heyman, who was my property teacher and my constitutional law teacher, had just come from clerking for "the chief." In that era and I think for some time after, "the chief" could only mean Earl Warren. He was a big bear of a man, Mike Heyman was, and just wonderful. He would sit back, put his feet on the desk, these enormous feet, and talk to us about what it was like to be clerking for the chief.

He taught me constitutional law, and a point I want to make about that is, in that era — this 1959–1960, or maybe I took it the second year, which would be 1960–1961 — we would study about the Commerce Clause and

other aspects of constitutional law. Criminal procedure would be, perhaps, the last week if the professor hadn't run out of time.

Now criminal procedure is a course unto itself, which I ended up teaching later in my career at University of San Francisco. They even have advanced courses. You might ask why. Because at that time the Warren Court was just beginning to incorporate the rights of the Bill of Rights through the Due Process Clause to apply to the states. This was a revolution and, of course, received with very mixed emotions by the states on whom these rights were being imposed.

Let me say, the states had their own Bill of Rights. In fact, many of their Bills of Rights preceded the federal Bill of Rights. But the Warren Court was incorporating these different federal constitutional rights through the Due Process Clause, and therefore the United States Supreme Court interpretation of those rights would have to govern as well.

So that was interesting about the development of criminal procedure. I ended up teaching it many, many years later. It was an entire course and always a fascinating course.

MCCREERY: As an aside, in general what sort of presence was the working of the U.S. Supreme Court and Chief Justice Earl Warren in your class work at Berkeley?

WERDEGAR: I can't remember that it had any impact except stories from our professor who had clerked for the chief. Sometime in that era, maybe before I went to law school, there were "Impeach Earl Warren" signs around the country. I don't think California was high in that movement. There was so much that California was not actively involved in at that time. We were a very different state, as I will mention when I talk about moving to Washington, D.C.

You asked about my professors. I had these four H's. Also Dean Prosser, William Prosser, who was dean of Boalt when I entered Boalt. Later it became known to me, and it was well known to everybody, he did not countenance or want women in the law school.

His view — and he was not alone in this view by any means — was that a woman is taking a man's place, a man who will need his degree to support his family. A woman is occupying his seat, the implication being

that she certainly isn't going to practice law or she certainly doesn't *need* to practice law. That was the late fifties and early sixties.

Nevertheless, historically it's quite a wonderful thing to have taken torts from William Prosser, whose hornbook, *Prosser on Torts*, at that time was renowned nationally, and I don't know that it's been supplanted. Looking back, "You had torts from Dean Prosser?" "Yes, I did."

MCCREERY: How did you come to learn his views about women in law school?

WERDEGAR: It was "known," and I think I even learned more particularly after I left because there were women — he did not interview me when I applied, but there were women who are on record and I don't know if they came after me — they must have — who said he did interview them and it was a very unpleasant, unwelcoming experience.

But I will tell you, as a student in his torts class and the only woman in the room — because we had sections and I guess the sections stopped at M and my compatriot, Joan Smith, would have been in some other section — I was the only woman in the room, and the subject of torts lends itself to salacious and titillating fact patterns. I do remember that when we were discussing cases such as that, he would pointedly turn to me and say, "Miss Mickle, what do you think?"

I'm known to blush. I blush to this day. I would blush then, but I would answer. I didn't think of it as harassment, but looking back it was rather pointed. [Laughter] Yes. I don't know how the rest of my classmates felt, but I was asked a question and I would answer it.

MCCREERY: Would you say a few words also about the other H's, Professor Halbach and the others?

WERDEGAR: Halbach taught wills and trusts, and he might have written his own textbook. I think later he was head of the Law Revision Commission's national organization on wills and trusts and a very kindly, intelligent, wonderful professor of what I found to be a very complex subject.

They were delightful professors, and except for Professor/Dean Prosser I never felt that any of them, whatever their private feelings were — and I didn't get any sense that they had any negative private feelings — I never felt any of them particularly targeted me or took any extraordinary notice of me.



Professor Hazard taught criminal procedure. And later on, Herma Hill Kay. She came our second year.

At the end of our first year, Berkeley Law had a very meticulous, decimal-point precise class ranking system. After finals you'd go and look at the chart. I think we had numbers on our exams — they certainly do now — so there would be no prejudice according to personalities. So you'd look up your number and what your class standing was.

My class standing at the end of our first year — I was number three in the class. I was absolutely *astounded*. Anybody who took notice — I think my good friend John Niles did — he was very close — he was either second or fourth, I don't know — everybody was surprised.

That put pressure on me because I was as surprised as anybody else. I thought, "I absolutely have to show that this is warranted and it's not a fluke." So I continued studying, and in the second year — at the end of the first semester of the second year — I was number one in my class.

But, backing up, at the end of our first year and during that summer, the word came to the students that a woman professor was coming to Boalt. This sent ripples of excitement through the student body. We were going to have a woman professor. Everybody was excited. That tells you that it was unprecedented.

Berkeley did have Barbara Armstrong as a professor emeritus, who I think graduated in 1915 from Berkeley Law, if you want to talk about a woman out of time and a pioneer. But she was emeritus. She had an office. She did not teach.

Herma Hill Kay, Herma Hill when she came, was going to teach us. She was young, and she had a soft, still does, slightly Southern accent, which was attractive. She taught family law, and that was such a big event.

Looking back on it, I realize — and I've read some other woman of my era's comment about having a woman professor — not only had the law school not had a woman professor, but actually, going through university we'd never had a woman professor, nor had we thought that was odd. That gives you a sense of the times.

Herma Hill. I took family law from her. She didn't say anything at the time, but she later, in her remarks about what it was like, said that I was the first woman she ever taught. So she and I would be the only women in this classroom.

She was kind to me. She took me to meet Barbara Armstrong. She didn't say why. She just said, "I'd like you to meet her." So I met Barbara Armstrong. But I've subsequently said in commenting on Herma Hill that I think what she was trying to do is convey to me a role model, the idea that women could — as she herself was doing but as Barbara Armstrong had done — women could pursue law as a career.

At the end of your first year, if you qualify at the top 10 percent of the class — and it's strictly by the numbers — you're invited to join law review. Nowadays, schools have academic qualifications for law review but you also can "write on . . .," so if you write something and it's acceptable and your grade point average is of a certain level, and not the best, you can be on law review. But then it was strictly grades.

So I was invited, and I did join, law review. I was under the impression that you really should accept that invitation. It was a good credential.

MCCREERY: You had mentioned that your classmate, John Niles, ended up editing the law review.

WERDEGAR: I'll get to that. [Laughter] I'll get to John because our histories were intertwined. He, of course, was also on law review.

What you do on law review, or did then, you choose a topic and you write a "note," a student note, and if it's worthy it's published. Mine was published — hardly worthy. I think John's was of much greater import. Don't ask me what mine was. I can hardly remember. But it was a trivial case note.<sup>4</sup>

But anyway, what I like to say and I did say to a law review reunion after I was on this court was that my little law review note was published in an issue where William Prosser wrote a note about privacy, I think referring back to a law review note that Brandeis had written about privacy. I used that as an example to show what law reviews can do when I was speaking to the law review group. Here was my little student note in the same issue that this giant of a professor, Dean William Prosser, also had his article.

You had to do lots of other things in law review, probably cite checking. I learned the *Bluebook* by heart and learned to love it. [Laughter] That's the citation bible. I don't think it's so universal anymore.

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<sup>4</sup> Kathryn J. Mickle, *Insurance: Effect of Probate Code Section 258: Participation in Proceeds by Beneficiary Convicted of Voluntary Manslaughter*, 49 CAL. L. REV. 571 (1961).

At the end of our third semester, as I said, I ended up first in my class. In the ensuing weeks and months, the law review board chooses the next year's editor-in-chief, and the board itself makes the choice. I don't know what input the faculty has.

Just as invitation to law review was strictly by the numbers, so too the choosing of the editor-in-chief traditionally had always been: the number one person in the class is editor-in-chief. Ultimately it was announced that I had been elected editor-in-chief. What I learned only later was that this did not come as a matter of routine. It was only after tremendous resistance — and I'm not exactly clear the extent of the resistance, how much Dean Prosser resisted it, if at all, I don't know, or faculty — but I do know from sources inside that there was a fight on the board itself if they wanted to give it to me.

At this point I want to say that one validation or verification of this is from Joanne Garvey. I don't know if you've heard of Joanne Garvey. Joanne very sadly recently passed away in the last few months. She was my second-year law review adviser. She was a trooper, Joanne. Her later career just fully displayed her talents and her generosity.

But going back to law school, I read her obituary and this is what it said as it recounted all the achievements that Joanne Garvey had accomplished. They went on to say — it was noted in her obituary that — “While at UC Berkeley School of Law in 1962, Garvey cast the tie-breaking vote on a committee that made Kathryn Mickle Werdegar, now a Supreme Court justice, the first woman editor-in-chief of the *California Law Review*.”

That was in her obituary, and until I read that obituary under the very sad circumstances of noting her passing, I did not know that Joanne had cast the tie-breaking vote, which would be so typical of her.

There was another student on the board that I know was a champion for me, and he has been a champion for me all my life including my judge-ships, and that was Marcel “Marc” Poché, who ultimately became a Court of Appeal judge. I didn't know him at the time. I came to know him very well later. So those were two of my champions.

I was elected, without awareness of the contentiousness of the election, editor-in-chief of the *California Law Review*. This was in the spring of 1961.

I want to mention Joanne, since we're speaking about her. She was an extraordinary woman who during her career accomplished innumerable

firsts. I once was honored to give a speech about Joanne, and I said to the audience, “Don’t expect you’re ever going to be the first at anything because Joanne Garvey has been there before you.”

I asked at that time, which probably was ten or twelve years ago, what she valued or thought was best about what she had done. She said, “I really can’t say. Perhaps I haven’t even done it yet.” [Laughter] Joanne was marvelous and a champion for women.

MCCREERY: What can you tell me about how she advised you as a rare other woman in this field? What kind of interactions did you have?

WERDEGAR: My first law review adviser was a man, and we got along fine.

MCCREERY: Are you able to say who it was?

WERDEGAR: Yes. Richard Rahl. Dick Rahl. He was an extremely intelligent, wonderful man. We stayed somewhat in touch over the years.

The second semester they gave me Joanne, and Joanne and I — in my memory — did not dwell on the fact that — I don’t know how many women were in her class. There might have been three. I don’t know. We didn’t dwell on that at all. She was just an approachable, supportive, good-natured law review adviser.

Joanne was also quoted — I don’t think in the obituary, but it’s a quote that I seem to have — actually, I think this *was* in the obituary. Joanne was also quoted as saying, since she was the first in so many things, that being the first, you don’t want to be the person who — and I now quote her, in her words, “ — to put it bluntly, screws up. So there’s always that feeling, don’t do something bad because it may affect somebody who’s behind you.” I can relate to that. And that does take me to my tenure as editor-in-chief of the Berkeley law review.

MCCREERY: Please.

WERDEGAR: All right. This really does reflect on the saga of my tenure. David, the physician whom I’d been dating since we met at UC Hospital and who had encouraged me to go to graduate school, about the time I was elected editor-in-chief made plans to go to Washington, D.C. to discharge his service obligation by serving as a captain in the Army at Walter Reed Army Hospital.

We had only very recently become engaged, so the question was how to handle the separation. You should know that at that time there was never any tension between the man and woman as to what their schooling or their careers were going to be. It was unheard of for couples to commute or to separate for a year, and of course the communication systems — there was no Skype and no cell phones — [Laughter] so it would have been extraordinary. We talked about my continuing with my Berkeley education. He suggested, “We could meet in Las Vegas once in a while.”

I didn’t find that all that appealing, so I really had some stress as to what I was going to do. I finally rejected the option of his going to Washington and my staying at Berkeley. I even felt that the added responsibilities of being editor-in-chief would make that even more — of course, that’s why he wanted me to stay, because I had this opportunity. But I felt it would be an additional responsibility that would greatly interfere with my new marriage that was going to happen.

So I had to resign as editor-in-chief of the law review, and I want to say here it was an agonizing decision. I was deeply embarrassed and deeply concerned, going back to Joanne’s quote, that it would set back women’s rights for a generation. I was sure they would say — maybe they did. I never heard it. Maybe they did. “Typical woman.” You can imagine how hard that was, but I did it.

But the good news was that my good friend John Niles, who was born to be editor-in-chief, who aspired to be editor-in-chief, was next in line, and he was appointed editor-in-chief. I know that it meant everything to him. Remember, his father had been dean of the New York University Law School, a fine gentleman who later came to Hastings and I met him, Dean Niles. In his time, he was much admired. And I think it had a great impact on John’s career down the road when he ultimately took his first job as a law clerk to Earl Warren.

MCCREERY: Thank you. Before we leave Berkeley, would you say a bit more about how your own legal interests were developing during that time?

WERDEGAR: They were not focused. When I entered law school, I had no idea where this education was going to take me. It turned out, as my grades might suggest — I received, by the way, five American Jurisprudence Awards, which means you were the best student in that class. Five

times I did, so I guess I was a good student. But where it was going to take me I had no idea. I was open to the possibilities.

Once I became engaged and marriage was on the horizon, again, I didn't know how that was going to fit in at all. I had absolutely no role models, no idea, but I was open to the possibilities. It was only later, when I went to GW, where I began to have a focus, which we'll get to, perhaps, at a later interview.

I can say courses that I liked. Everybody loves constitutional law and property. I was thrilled to get an A+ from Mike [Ira Michael] Heyman in property. That was quite a thrill for me. Mike Heyman later played a role in my getting a degree from Berkeley, but we'll get to that later maybe. Do you have more questions about Berkeley?

MCCREERY: Maybe just a couple more. If you would be so kind as to return to Professor Herma Hill, you touched on the fact that she was teaching family law.

WERDEGAR: She was.

MCCREERY: I wonder what sort of place that field had in the curriculum at the time and how much interest there was in that specialty?

WERDEGAR: Divorce law, I think, had not — I think Herma Hill herself became instrumental in advocating for what came to be known as no-fault divorce. I know this only abstractly, not anything that was presented in class. I think we had to be students of community property and understand that not every state was a community-property state.

It is interesting to note that at that time in divorce somebody had to be at fault, and it's known anecdotally that people would create scenarios where it could be said that one spouse was at fault. You couldn't just go in and get a divorce. But that's what I remember. It was mostly about community property, in my memory.

Mind you, I haven't practiced family law, and I haven't thought about it except to be admiring of Herma Hill, who later became Herma Hill Kay, and her impact and her influence on women. She was very supportive of women. Long after I left she brought the few women of the school — many, many more than when I was there — but brought them together and said, "We need a women's union."

That goes to my experience about interacting with men. There was a men's lounge where 99 and 1/10 percent of the students would hang out. [Laughter] So of course I didn't have a lot of casual interchange. There was a women's lounge too. There were two or three of us. There were a couple of women getting their LLM's.

It's not that I didn't have a social life. I was included with some of these people I've mentioned on outings to go to Sausalito for an afternoon or something. But when I would go back to our class reunions — I've only attended a few — people would reminisce. They had played bridge in the men's lounge, and they'd done this and that. They weren't my memories.

I became friendly with Thelton Henderson after law school. Our paths crossed, and we've become very warm friends. He, of course, is a wonderfully warm person of astonishing accomplishment. But we would compare notes about law school, and our impressions were exactly the same for the same circumstance that we were odd people out. Thelton wasn't a woman, and I wasn't an African American, but we were outsiders, so it would seem. I certainly was.

He was married at the time, so he wouldn't have been hanging out usually. I don't know what the men did, frankly. But it was fun and it still is fun to talk to Thelton because we shared some of the same impressions and the same memories.

MCCREERY: You mentioned the other African-American student, Gene Swann. Were you ever able to make such comparisons in conversation with him?

WERDEGAR: Later, no. No, we didn't.

I do want to go back to Thelton, though. He's a true gentleman and often in speeches, if it was at all appropriate, he would say that back in the day when we were at Boalt the phrase was that the number one man in our class was a *woman*. [Laughter] It was very cute. I think that phrase was original with him.

MCCREERY: But it was quite an accomplishment, and I wonder how your fellow students responded when you were named number one?

WERDEGAR: I think with shock. I don't know. But I think if there was resentment in any quarter I would have been oblivious to it. And I didn't feel that there was any resentment.

At the reunions I've gone to, my classmates are most warm and friendly and admiring. I've had one wife of a classmate very touchingly say to me she really envied me and wished she had done something like that, but she understood at the time that she had married and thus wasn't able to go on to graduate school.

MCCREERY: At the time that Professor Herma Hill came and joined the faculty, what observations could you make about her place at the faculty level?

WERDEGAR: I don't know. I do know — again, secondhand — that later on, as more women were perhaps qualified or seeking to be on the faculty — this is just hearsay — Boalt, like other universities had its issues about whether these women were being treated fairly and so forth. My conversations with Herma, which have not been in depth about this, but I deduce from them that she never felt anything but welcome.

But I can't speak for her. She has done her own oral history, as a matter of fact, which I did read and I intend to look back at again. It's published in the California Supreme Court Historical Society journal.<sup>5</sup>

MCCREERY: Yes. She did go on to have, and does have, a very impressive career. Were you able to stay in touch with her?

WERDEGAR: In recent years. I was not at the forefront of anything when we came back to California. I was not involved in alumni affairs or anything. Herma and I came back in touch when I had a more forward career. I was appointed to the Court of Appeal here, and Berkeley rediscovered me. We'll get to that whenever you like.

But when I left Berkeley I asked them — I had to transfer. I had one more year of law school. "I'm going to Washington, D.C." What did my professors recommend? Where should I go? The choices that I put forth were either Georgetown or George Washington. I think opinions tilted toward George Washington, so I applied to George Washington and to my great good fortune they accepted me as a third-year transfer student.

At the time, I wanted very much to know if I was going to get a Boalt Hall Berkeley law degree, and the answer was, "No, we can't do that. You're not taking your third year here."

As my husband said, "It was basically goodbye and good luck."

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<sup>5</sup> *Oral History of Herma Hill Kay*, 8 CAL. LEGAL HIST. 1 (2013).



I did go to George Washington, which we'll talk about at a later time, and I might repeat this next time. I want to say I'm so appreciative that they took me as a transfer student. It was not common in those days at all for anybody to take their third year elsewhere. Later Berkeley instituted a program with Harvard, I think — I learned that — where students were encouraged to go at least to Harvard for their third year, and there was no problem getting their Berkeley degree.

But then it was extraordinary that George Washington would accept my credits from Berkeley, would give me a degree when I'd had only the third year, which is the least rigorous year in law school — give me a degree and, again, allow me to be pronounced number one in the class and give me their cherished Charles Glover Award for Highest Achievement in the Law. I don't think any school would quite accommodate anybody then or today that way, so I'm very, very loyal to George Washington. When we talk about how I got my Berkeley degree, maybe we'll revisit that.

MCCREERY: You can add that now if you like.

WERDEGAR: All right. We're talking about Berkeley. No degree. But as education institutions will do — it's not like they lost track of me — I was always invited to financially contribute to the school. [Laughter] I was an alum for that purpose.

Time passed, and this fellow I mentioned, Marc Poché, who was a year ahead of me at Berkeley and who had championed me to be editor-in-chief but whom I didn't know at the time, he took an interest.

I did cross paths with him later because I was clerking as a staff attorney for the Court of Appeal and he was one of the justices. Backing up, I think somebody, maybe Marc Poché himself, had earlier approached the university, saying, "Maybe it might be equitable to give her a degree."

Mike Heyman, my professor and then chancellor of Berkeley at that time — I later learned — presented it to the Academic Senate at Berkeley. The Academic Senate said, "We will, but she has to give up her George Washington degree."

The word came back to me and I said, "I won't." Imagine. I wouldn't give up my George Washington degree, even though I wanted a Berkeley degree. So that put that to rest for a while.

Then somebody, maybe Marc Poché again — Pete Wilson was elected governor in 1990, and Marc Poché, being the astute fellow he always was and active at Berkeley Law — I think he taught there as an adjunct and so on — and a champion of people — I’m told after the fact, said to somebody, “You might want to give this woman a degree.”

I think he sensed that my classmate, who admired my academic standing and who was my friend, might be turning to me for something. But the story I finally heard is there was a Boalt Hall alumni dinner where Pete Wilson was going to be honored with the Boalt Hall Citation Award. It’s the highest award they give to their alums.

It turned out at that time he was in the [U.S.] Senate, and there was a vote pending. He at the last minute let Berkeley know that he would be unable to attend. They asked him, “Who would you have accept the award on your behalf?”

He said, “I’d like Kathryn Werdegar, Kay Werdegar, to do it.”

Berkeley called me, I think, that morning. Maybe Pete Wilson called me that morning — I was working at CEB [Continuing Education of the Bar] at that time — and said, “I’d like you to do that.”

This was a tremendous honor for me but also a tremendous burden. I remember that day I walked around wherever I was working at the time trying to compose a speech.

We arrived at the alumni event where he was going to receive the Citation Award. We had already decided to go because Pete Wilson, my classmate, was going to get the award. But as attendees we had been assigned, my husband and I, a table back by the bussing station, which was befitting our, probably, contributions and our accomplishments. [Laughter]

I arrived now as the one who was going to be accepting the award for the senator. So I’m whisked up from my bussing station table to the head table. [Laughter] Oh! Well! Who was I seated next to? It was someone I had never met before but who is fabulous and still is at Berkeley and has played a fabulous role in the law school, but after my time. It was Jesse Choper.

I introduced myself to him. He asked about me, making conversation, and I explained to him that although I had attended Boalt and I was a classmate of the senator’s, I left and I never got my Boalt degree. I then proceeded to accept for Pete Wilson and go my way.

What I'm told is that Jesse Choper didn't forget our conversation, and he felt there was something wrong. Lo and behold, in December 1990 I was awarded my J.D. from Boalt Hall, Berkeley School of Law — in 1990. I've seen Jesse Choper many times since and asked him, "How did you do that?"

The only other time he did that was for Secretary of State Dean Rusk. I'm not clear on the story, but Dean Rusk — who one unfortunate student was showing around to tour the school and said, "Dean, won't you come this way?" [Laughter] But anyway, Dean Rusk evidently had attended Berkeley for two years and gone into the military. Somehow this came to Jesse's attention about Dean Rusk, and he saw to it that Dean Rusk got a Berkeley degree.

In my case, I was presented with this degree in 1990, and I never quite knew how he did it. But finally he told me recently. As dean — Choper was dean right after my time — it was time to make up the diplomas for the midterm class of 1990. He said, "I'm just going to put one in for Kay Werdegar." Jesse spoke at my investiture in 1991 to the Court of Appeal and pointed out that I had received my degree in 1990 and I was now becoming an appellate justice, surely the most fast-tracked graduate of Berkeley ever. [Laughter] We're getting ahead of ourselves, but that's how I got my Berkeley degree.

MCCREERY: This was not an honorary degree. This was an earned degree?

WERDEGAR: That's right. It was not an honorary degree. I know Justice Ginsburg refused an honorary degree from Harvard, and good for her. No, this was my real degree.

MCCREERY: What did that mean to you, even in 1990?

WERDEGAR: It meant a lot to me. It means a lot to me today. But Jesse Choper means a lot to me. He's such a *mensch*, a good Yiddish word meaning a salt-of-the-earth good person. They both mean a lot to me. So I'm very loyal to my law schools.

MCCREERY: We will, of course, talk at a later time also about Governor Wilson again — Governor Wilson, as we know him today. But can you say a few more words about your friendship during law school and how he fared in school, as you observed it?

WERDEGAR: Governor Wilson had been, I'm sure — he was a Yale graduate — a very strong student, and he had his choice of law schools. Stanford accepted him and I think every school he applied to in the country did. To my good fortune he chose to come to Berkeley. He was not a top student, but I'm not conversant with where he stood in the class in those days when everybody had a rank, to the decimal point.

I've always felt that was not really a good system, and I don't think they adhere to it anymore. It's just slicing hairs way too thin. Now Berkeley will just have "honors, high honors, pass." They've gone the other direction, and I think other schools will say "top quintile" and so on. I benefited by the system, but I would never encourage that system. It just was far beyond what the value of academic standing could be.

We did study together. He remembered what a good student I had been, and it was in his mind when he considered who he wanted to appoint to the Court of Appeal.

I do want to back up a little bit and tell you one more thing. When I was in law school and my brother came to visit me — my brother, as I mentioned, went on to medical school — my brother spent a little more time with our father than I did. He would occasionally stay with him, whereas I never lived with him after I was five. He said to me, "Dad always told me, 'Don't be a lawyer.'"

I said, "Well, I guess he forgot to tell me." [Laughter]

My father was alive when I did go to law school, and I think he was quite surprised at my academic achievement, but pleased. I don't think he had a strong investment in it one way or the other.

MCCREERY: Thank you for telling me about Governor Wilson. What were his own interests in the law and in career, as you remember it then?

WERDEGAR: I don't remember it, and I don't know if his interest in politics — I know after I left, I think he became more active in a Republican group at the law school. I don't remember that being the case when I was there, and I don't know how clear he was that he wanted to pursue a path of politics. I'm sure he has given interviews where perhaps he's elucidated that better than I can.

MCCREERY: And your other close friend, John Niles?

WERDEGAR: John and I continued our friendship. We enjoyed each other very much. In Washington — well, I'm getting ahead of myself, but he was there clerking and I was there in the Justice Department, and we socialized.

MCCREERY: As you reflect upon your two years of law school at Berkeley, what stands out as most influential to you?

WERDEGAR: Nothing stands out as most influential. I was in the midst of a challenging, in my judgment, academic course, thrilling. I had no idea where it was going to take me. Clearly, in retrospect, it has marvelously impacted my life. I remember the school fondly and my experiences fondly, and I'm just grateful I had them, including studying under Dean Prosser. [Laughter]

MCCREERY: Is there anything you'd like to add about law school?

WERDEGAR: In our next session when I go on to George Washington, I will have something to speak further.

David and I did marry in the fall of 1961 and move to Washington. He then was doing his duty as a captain, and I will say that — as I was rather atypical as a female law student — our marriage was also extremely unusual for the time in that David was Jewish and I'm not. We were very much in a minority then and my understanding is that only 6 percent of Jewish individuals married non-Jews. I believe now it's more like 50 percent or higher. I didn't mention it, but when I started law school it was my understanding — it was from reading a scholar's book on the subject — that 1 to 2 percent of attorneys in the country were women, and California may have had 3 percent of women attorneys. Those circumstances were both a little ahead of the times.

MCCREERY: Thank you for telling me about your difficult choice to leave law school at Berkeley and go to Washington. What kind of support were you getting from your husband in those first couple of years?

WERDEGAR: He certainly was encouraging that I go to graduate school. He has always enjoyed that I have this training and career.

It's not the Ruth Bader Ginsburg story, which I recently read, where she and her husband [Martin D. Ginsburg] co-parented and he took half the responsibilities, and so on. No. But David has always enjoyed and been proud of my career.

MCCREERY: Congratulations on those academic achievements at Berkeley. Thank you very much. Anything to add today?

WERDEGAR: No, thank you. I'll look forward to our next session.

MCCREERY: Thanks so much.

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## INTERVIEW 3 (DECEMBER 12, 2014)

MCCREERY: Good afternoon, Justice Werdegar. You indicated you would like to say a few more words about your time at Berkeley's law school. Would you do that now?

WERDEGAR: Yes. Thank you, Laura. Last time I made reference to the four H's that were professors for my class. They were about as young as we were, and I think I misspoke as to who they were and left out one of those wonderful four H's.

Who they were was Ira Heyman, Professors Hetland, Halbach, and Hazard. So that's Heyman, Hetland, Halbach, and Hazard — I think all early promising stars at the time and later nationally recognized stars. In our second year came the fifth H, and that was Herma Hill. She, as I probably mentioned, became the first woman dean of Boalt later on.

You also asked me whether former Governor Pete Wilson, who was my classmate at the time, had manifested any political aspirations. I think I was unclear whether he had. But reflecting on it, I think the more correct answer is yes, he had some musings about a possible political career.

In fact, it was my impression at the time that a number of my classmates were thinking of a political career. One of them in that context made the comment to me, "Of course, my wife couldn't work." That was how it was. A politician's wife presumably would be giving teas and doing her own campaigning activities on his behalf and what have you.

Going through my files — still back at Berkeley but after I had left — there was a Boalt Hall student newsletter or newspaper dated Fall 1963, so that was two years after I left Boalt. In it there are many interesting things. On the cover, Earl Warren has come back to the school. It was his alma mater, and he was shoveling dirt for a cornerstone of the Earl Warren legal center, which was going to materialize — and has.

But inside there was a letter published from a woman student to the dean or assistant dean saying, would they please consider the condition of the little lounge? This reminds me that there was a men's lounge, large, and this student called the women's lounge the "little lounge."

She said, "Whereas the men's lounge has multiple, maybe ten, lights, we have none. Our sofas and chairs are in serious need of recovering or refurbishing."

There was a response from the dean saying, “The funds for the lounges are provided by the alumni. We did use some funds this last year to improve the men’s lounge. We didn’t have enough for the women’s lounge.” If she would like to come and speak to this dean, perhaps they could discuss what they might do, and she might want to solicit funds from the alumnae, the women alums. I looked this up. I think “alumnae” is plural for women, and “alumni” is plural for everybody. But I thought that was funny.

Of particular interest: That letter was written by a student named Jane Brady. I later came to know Jane Brady as a staff attorney here at the Supreme Court for Justice David Eagleson and later Justice Marvin Baxter. Jane Brady was, in fact, a classmate of Rose Bird.

Also in that newsletter was an article for the ladies. There was a program established for the wives of the law students where they would have speakers, periodically, to let the wives know some of the things their husbands were learning and were studying. They also had a Wednesday evening bridge club set up for the wives. Those were the days. [Laughter]

MCCREERY: What awareness did you have at the time of those events carved out for the wives of students?

WERDEGAR: None. I had no awareness. I was in my own little world, and I had no awareness. [Laughter] Actually, there was one couple I mentioned earlier, Gene Swann and his wife, who was already an attorney. He was the other black student in my class, along with Thelton Henderson — the two of them. I did know his wife, but she was a very powerful, strong, already-credentialed attorney. I doubt I would have heard about the wives’ activities from her.

MCCREERY: I would like to follow up with one other question about law school and your study habits, which you happened to describe to me after we finished recording last time. You had developed a method for turning your class notes into material that you would then use later on. Would you be willing to describe that?

WERDEGAR: Yes. [Laughter] I’m laughing because it seems so meticulous, but it worked. You would study the cases the night before that were assigned, and then you would go to class and there would be class discussion revolving around those cases and other issues. Periodically I would condense my summaries of the cases and integrate them with the class



discussion on those cases and distill it into what seemed to be the important principles and points.

I would do this over the semester. When it came time for finals, I never looked at my casebook. I never looked at my class notes. I had — in those days it was typewriter — it was none of this computer where you could just easily click-click-click and delete — but I would have multiple pages of a course that had integrated everything that had happened. All I had to do was study my outlines.

Later there came to be commercial outlines that people would purchase — I forget the names of some of them — but that did mostly the same thing. Just, of course, it wasn't tailored to the particular law school where you were or the particular professor that you had, but it would outline the subject matter of the class that you were interested in. People later said I could have sold my notes. They probably would have been unintelligible to others, although I did loan them to friends who came later, somebody I had known from high school and college. What use they would have been to anybody else, I don't know.

MCCREERY: Thank you. We wanted to talk today about your move to Washington, D.C., where you continued your law career. How did you and Dr. Werdegar go about moving to the East Coast and finding a place to live?

WERDEGAR: I want to step back and say that I married David on September 1, 1961. We had a very brief honeymoon at Manka's in Inverness, which is west Marin. It was Labor Day weekend. He was at that time — that's why we went to Washington — he had started his service as a captain, being a doctor, in the Army.

We flew to Washington, and he had already rented a little house on P Street in Georgetown. We were a block away from Georgetown University — not the law school — had that been the case, I probably should have gone to Georgetown Law School — but from the undergraduate university. It was a cobblestone street.

Living next door to us was Nancy Dickerson, who at that time was a quite-attractive television reporter. We were in the same general area as President and Mrs. Kennedy had lived in Georgetown before they had moved to the White House, and not far from Dumbarton Oaks. Georgetown was *the* place to live at that time.

I think the unit that we rented was owned by Georgetown University. It since has been demolished. It was a two-story house, very tiny. We shipped out my husband's bachelor furniture, which was very big, and it really was totally oversized for this little Georgetown house. But we did not care.



WEDDING DAY — SEPTEMBER 1, 1961 —  
KATHRYN AND DAVID WERDEGAR.

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We were walking distance from Wisconsin Avenue, which had a lot of little fashionable shops. But most notably it had the French Market, which purveyed elegant French delicacies and food. I never went, really. My husband loved to do that kind of thing and still does. But it was patronized by Pierre Salinger, who was President Kennedy's press secretary. On occasion David would be mistaken for Pierre Salinger, and he thought that was a lot of fun.

He would bring home things that I had not encountered before, such as escargot, that we would serve at an occasional dinner party.

MCCREERY: You had talked briefly at the end of our last interview about the fact that your husband was Jewish, while you were not. I wonder if that's something you could talk about in terms of the early years of your marriage, and what sort of response you got from others?

WERDEGAR: You have to be particular about what others we're speaking about. From my family, which as you know — my aunt with whom I had lived, and so on — my father seemed all right with it. My family was fine. David's family was not.

Insofar as socially, once we were at a party in New York and I met a woman there who was also married to a Jew. It was an "intermarriage," as we were considered. I was thrilled to meet her. I had never met anybody who had had that experience before.

In that era it was like so much else. It's nothing today. Well, I suppose in some families any kind of intermarriage that doesn't reflect who the family is is challenging to them. But generally, in those days, I was told 6 percent of Jews intermarried. Today it's over 50 percent.

But the circles in which we traveled — I'd always had Jewish friends. In fact, my closest friends, coincidentally, had often been Jewish. But being raised — or not raised — the way I was, I sometimes hardly knew that, and it didn't mean a thing to me. But I guess I was attracted to a certain humor and intellect and style of being that I hadn't identified as being Jewish.

But it had always been attractive to me. When I went to Wellesley my boyfriend was Jewish. I might have mentioned this earlier. I didn't even know it until someone said, "Don't you and John have a religious problem?"

It has been an enrichment. To digress a bit, our sons, who are now half-Jewish and half-not, have very much enjoyed that part of their lives, and I'm very happy for them. I think it's very enriching.

But there was pain. David's family was very unaccepting. But we were early, and now nobody takes account of it. Our friends are a mixture.

MCCREERY: Thank you for reflecting on that. Can you say a bit more about the social life that you enjoyed in Georgetown?

WERDEGAR: It was very exciting to be in Washington. The social life wasn't confined to Georgetown. It was Washington, and this was the new Kennedy administration. The president had been elected only six, seven, eight months before, and a lot of young people were attracted to Washington to join the government.

Coming from California, I found Washington extremely exciting in so many ways that maybe we'll touch on as we go along. David was a New Yorker, and he had friends from New York that we would see. Some had come to Washington to do various things.

I'll speak later about this friend Judy Norrell, who I met in law school, through whom we met friends. One was working for the CIA. Of course, he wouldn't say where he was working. [Laughter] We had to discern that after a long acquaintanceship.

Everything about Washington was exciting. There was a sense, both for me personally as I said, coming from California, but for everybody who came to the city at that time, a sense of optimism and hope and renewal. All these people who were young, were in our twenties, felt that whatever contribution we were making, that we *were* making a contribution.

People were deeply engaged in the newness and the hope and possibility of it. Jack Kennedy at his inauguration had said, "Ask not what your country can do for you but what you can do for your country." It was such a refreshing idea. As young people we really bought into that and we believed it.

So parties, social events, were exciting. Everybody was doing something different, and they were all — the people I'm speaking of now didn't have children. We were all that young. Most of them didn't, anyway. It was a wonderful time.

MCCREERY: Let's begin to talk about your law school experience. Would you describe from the beginning your introduction to George Washington University's law school?

WERDEGAR: George Washington was much larger than Boalt. It had an evening division and a day division, and I think it might have had about

1,500 students, whereas — and I'm speculating in both cases — but I think Berkeley had about 600 students. An impression that stayed with me and that I had at the time was how much more mature and serious the students seemed. I think one reason I felt this is that so many of them wore suits. In Berkeley they wore jeans or khakis.

Why did they wear suits? Because a number of them had outside jobs. Classes at Berkeley were scheduled in such a way that it was very difficult for you to have outside employment of any substantial nature. I think the ABA [American Bar Association] rules required that in some way. I'm not an expert on this. But GW had a night and day division, and students in either division could take classes in either division.

I was aware at that time of only about three women, but I'm told that there were as many — in the night and day combined in the three years — there were as many as ten women. I'm told by this friend I was speaking about that there was a locker room that had ten lockers for women, and it accommodated everybody. So we were still a novelty. That was soon going to change, but we were still a novelty.

MCCREERY: As a third-year student, what presence of women was there in your own class?

WERDEGAR: There were three. One, whose name was Norma Bannish, was my moot court partner, and we won our moot court argument to the great chagrin of the men because we used props. It had something to do with rental property or something, and we made a sign that became evidence in favor of our case. [Laughter] They really felt that we had cheated. I can't say we didn't, but I'm not sure. We won.

The other I met in international law, and her name was Judy Norrell. We took notice of each other for two reasons. After class I asked her if she knew where I could get the extra reading that had been mentioned. She just thought this was insane. [Laughter] Who would do that? I, on the other hand, noticed that she could speak extemporaneously about anything that came up, never having cracked the book.

We were complete opposites. She did not like law school, and I liked it. We became lifelong friends. Our children call her Aunt Judy, and our grandchildren call her Aunt Judy. She still lives in Washington, and she's an interesting character in her own right.

It was a fortuitous meeting because her mother, whose name was Catherine Norrell, was a congresswoman from Arkansas. Judy's home had been Arkansas. Catherine Norrell was always wanting to point out that she had been elected to Congress. The few women in Congress in those days had been appointed on the death of their husband. Judy's father had died, but Catherine Norrell *ran* for his seat and she was elected.

This association was extremely fortuitous because, being friends with a congresswoman, we had access to events that were very special, and if you like I'll tell you about them.

MCCREERY: Please do.

WERDEGAR: One that was, of course, very memorable was I was able to have a seat in the gallery of the House of Representatives when President Kennedy gave his State of the Union message in January 1961.

Another was I was able to be a guest at the Congressional Wives Club, which as the title speaks, was for the spouses of congress-people. Again, President Kennedy spoke. Normally it would have been Jackie Kennedy, but she was pregnant with their third child and didn't attend. Their third child, you might recall, was Patrick, and he died soon after his birth.

That was extremely special. Judy knew Washington in and out. She had spent a good deal of her growing up there, even though she was from the South.

MCCREERY: As the daughter of a congresswoman, you were saying, she had grown up exposed to that life. Yet she did not like law school. Did she elaborate on why?

WERDEGAR: She might have, but I can't remember. She went on to become a lobbyist. She never liked the law, and maybe I'll have to ask her. There were reasons, but I've forgotten them. She became a lobbyist, a successful lobbyist, and she has since then become quite a notable art collector of Southern art, Southern black art and photographs. This is how she's most happily spending her years right now.

MCCREERY: What exposure did you have to Congresswoman Norrell yourself?

WERDEGAR: A lot. She was a lovely lady.

MCCREERY: It's interesting to be exposed to someone coming to represent the South in Washington. I wonder what sense of the South you had there in town?

WERDEGAR: I'd like to speak to that. One of my first impressions about Washington — to go back to Georgetown and the cobbled streets and the fall colors. From California you don't get that. Dumbarton Oaks in the fall. The riot of colors!

But I was surprised at how Southern the town seemed. I had expected it to be more Eastern in feel. That might have been a flaw in my sense of geography [Laughter] or an expectation, it being the nation's capital. But it was very Southern.

At that time, 1960, 1961, 1962, 1963, the South was still segregated. Lunch counters, restaurants, hotels, motels, schools were separated. Drinking fountains were separated into "colored" and "white." Washington was not segregated, but there was a sense, nevertheless, a spillover of that Southern reluctance to intermingle whites and blacks.

I had a cleaning woman whom I asked what I could give her for Christmas. She was a black woman, and she said that she just didn't feel comfortable that she could go into a department store and try on or purchase underwear, lingerie, and would I buy some of that for her for Christmas?

Another thing about Washington is it did have a large black population. Some of them, perhaps, doubtless were impoverished, but a lot of them were civil servants working for the municipal government or the federal government. They were very visible in a way I hadn't seen in California. They were clerks and receptionists and office workers. I think Washington had a strong middle class of blacks at that time.

I'd like to observe that back then, in the sixties and seventies, the preferred term, I think, by the community we're speaking of and by people who wished to be sensitive to their concerns — the designation was "colored" or "Negro." You know that over time that's gone by the wayside and "Black" with a capital B became the, I think, preferred, accepted reference. Then it evolved to African-American.

I'm not a scholar of this, but I have an interest in it for the sake of trying to be sensitive to what people are thinking. My understanding now is that different elements of the community either prefer Black or prefer

African-American. That's just an aside. But back in the sixties it was "colored" or "Negro," in opposition to some less agreeable terms.

MCCREERY: Were there any African-American students in your law school?

WERDEGAR: Oh, probably, but I didn't know any. But socially I knew some through Judy. There were African-American women lawyers, too, that we met through Judy, and another African-American couple that was extremely attractive and dynamic. I can't tell you any more about them.

MCCREERY: Some of the very early civil rights activities in the South were beginning to happen at the time you were in Washington. To what extent did that touch you there, if at all?

WERDEGAR: It certainly did. It did ultimately, but you're absolutely right. They were just beginning to happen. Coming from California, I had no awareness of sit-ins, freedom rides, marches. But at George Washington I took a constitutional law seminar, and it focused in-depth on the civil rights issues of the day. It was an eye-opener for me, and in fact, as one might surmise, it was critical in influencing my future path. That was taught by — did I mention? — Professor Robert Dixon.

Another professor I had at George Washington that I want to mention is Professor Monroe Freedman. He was a brilliant man. He was my law review adviser. He has later become a nationally recognized — and very controversial for reasons I can't tell you today — expert on legal ethics. But he was a dynamic person.

Professor Robert Dixon was less dynamic, but he had this seminar and a few of us, a small group, as I say studied in-depth civil rights issues of the day. He set me on my path.

MCCREERY: It sounds as if there were some differences in the curriculum itself that was offered from what you had experienced at Berkeley.

WERDEGAR: Your first two years in law school are largely — this may have changed, but they're largely required courses: torts, property, constitutional law, criminal law. While I doubt Berkeley had a seminar on civil rights, I may have mentioned I did take constitutional law at Berkeley from Professor Heyman, who had clerked for "the chief." That would be Earl Warren.



The last two weeks we rushed through the Bill of Rights because the Warren Court hadn't yet incorporated all the first ten amendments applicable to the federal government — hadn't incorporated through the Due Process Clause — to the states. So certainly I doubt there was a civil rights seminar. International law? Maybe, maybe not.

MCCREERY: How were your own legal interests evolving in law school in that third year?

WERDEGAR: As I say, that seminar was the one I remember most. I also remember international law because of meeting Judy. I took federal procedure. I don't think I found it too interesting. I don't think anybody finds it too interesting. These are things you have to do.

MCCREERY: You mentioned a couple of faculty members. In a more broad sense, I wonder what comparisons you might make between the George Washington faculty and that here at Berkeley.

WERDEGAR: I would say George Washington had some extremely capable professors. What I noticed about George Washington is that, although I was impressed by the men in suits and they seemed more mature, I think at the time, it's fair to say, it was less academic or abstract than Berkeley. Law schools do have different emphases. Many would tell you that Yale is the most intellectual law school in the country. Others might say it has competition in that regard. Some law schools don't aspire to that at all. They aspire to teaching students how to draft a will and draft a contract and do a pleading.

I think it was less academic, but it was more practical because — this was a salient part of the experience — the professors would often be adjunct or part-time professors who were working in government. And a lot of the students would be working in government. So there was a real-world sense of the application of the law in life. That made it very nice, actually. A professor would come down from an agency and teach us something, but he knew what life was really like.

MCCREERY: It was taking advantage, certainly, of being in Washington and those natural strong ties to government.

WERDEGAR: As a classmate of mine who was on the law review in Washington and who was instrumental — and I'm very grateful to him — in

having me be awarded the George Washington Distinguished Alum Award many, many years later. But as he said, “To be a law student in Washington! It was the most wonderful place in the world to go to law school. The three branches of government are there — the White House, the Congress, and the Department of Justice — in these magnificent buildings. It’s the heart-beat of our country’s government, and it’s awe-inspiring.” I was awed by it.

MCCREERY: You mentioned Chief Justice Earl Warren and the fact that you’d been introduced to some of his leadership from taking constitutional law from Professor Heyman. But I wonder to what extent the Warren Court and the doings of that court were integrated with your own course work in the third year?

WERDEGAR: On the civil rights issue, certainly Little Rock schools had been integrated. As the years went on — and certainly when I was living in Washington — the Warren Court was making its impact felt.

As a Californian and a young person, I didn’t have a large awareness of the political aspects of the Supreme Court. I do recall seeing — maybe as a high school student or whatever — “Impeach Earl Warren” signs. It didn’t mean anything to me. Now, as a student of the law, I realized that what the so-called Warren Court achieved is anathema even today to certain people and was certainly a revolution in its time. So I’m more understanding of the emotions that the court generated.

MCCREERY: You mentioned being on law review while at George Washington. Exactly how did that come to pass?

WERDEGAR: I applied. As I have said, George Washington University was wonderful to me. First of all, they accepted me as a student and agreed to give me a degree. One year — and your third year is supposedly the least intense, the easiest, year.

Even having had two years at Berkeley, they didn’t feel they could do that. I don’t know if that was a consequence of the Academic Senate or just attitudes of the time. So first, GW accepted me.

Secondly, I went and applied to serve on law review, and they said, “Fine.” GW not only accepted me, but they must have accepted my grades because, as I think I’ve told you, they allowed me to graduate number one in the class, having spent only my third year there, which in a way is astonishing. It’s also,

perhaps, a little unfair to the man who had every reason before I showed up to think he was going to be number one. [Laughter]

MCCREERY: I know you won the Charles Glover Award at the end of that third year.

WERDEGAR: I did. Again, that was something else. I have a letter saying, "We are pleased to tell you that you have been awarded the Charles Glover Award for outstanding legal scholarship." So I'm grateful to them. My friend Judy, who has continued to live in Washington and been in touch with some of our classmates, tells me that the man who was the presumptive number one really didn't get over it. I don't blame him. But I will say, I'm also told that he's been extremely successful and he's been very, very wealthy. So it didn't impede his life path.

MCCREERY: As you went through that third year, what sense did you have of the other students and what sorts of plans they would have after graduation? Where was that class headed, in general?

WERDEGAR: I have no idea, to tell you the truth. I was a new bride. I had made friends with Judy, but I wasn't engaged with the men in the class. The students were practical. I know that one classmate, to my surprise, came out to California, Chuck Manatt, and became head of the Democratic Party in a particular time in California and also the head of a big firm. I don't think he was from California.

MCCREERY: You mentioned being a young bride, and that reminds me to ask you, as an aside, how your husband's medical career was progressing at Walter Reed.

WERDEGAR: His obligations. He was really stepping away from his so-called career, taking time out. He was doing research at Walter Reed on blood pressure, the correlation between blood pressure and stress and so on.

When I started working he did something that was really creative. He found a food delivery service that we would order. They would come, go up the stairs of our little Georgetown house, and leave these meals and tin covers over them. We would have that for dinner. We'd put the empty containers out on the stairs, and they'd take them away and deliver another meal. I have to credit him with real creativity and sensitivity on that.

MCCREERY: That sort of thing is widespread today, but that must have been quite creative in its time.

WERDEGAR: It was very creative.

MCCREERY: Is there anything else you'd like to say to sum up your year at George Washington Law School or your experience in Washington that very first year?

WERDEGAR: No. I'm just, as I've said more than once, very grateful to George Washington. It was a fine educational third year. I will mention, though, that I regret I didn't attend my own graduation, which I think is a reflection on how little I understood what I had achieved. There was not even a celebration of any kind. Of course, my husband's always one to celebrate so I can't say that he didn't promote one, but I sort of dismissed what I had done in a way that perhaps reflects the time or my particular temperament.

About my ending up number one at George Washington, I was very gratified, not just for the honor of doing that, but I felt it validated what had happened at Berkeley and if anybody thought it was a fluke, certainly this would put that to rest.

MCCREERY: You presumably knew that you would stay on in Washington a bit longer. How did you go about thinking what should be your next step?

WERDEGAR: Yes. David's obligation was two years, so I knew that I would be applying for work in Washington. As a result of that civil rights seminar, I applied to both the Commission on Civil Rights and the Civil Rights Division of the Department of Justice. Both were very new, having been established in 1957 as a result of the Civil Rights Act of 1957.

I also applied to serve as a clerk with Chief Justice Earl Warren, which — in light of my reticence that probably seems a little incongruous, which it was. But my husband urged me to do it. So I did. Going through my files I found a letter received in my last year of law school from my friend, John Niles, who became editor-in-chief after I left Berkeley. He said, "Are you still thinking of applying to Warren? I'm going to apply to Warren."

MCCREERY: Pardon me for interrupting. This sounds like it was something the two of you had discussed earlier, perhaps?

WERDEGAR: I can't remember. It must have been, based on, "Are you still thinking of it?" We had been somewhat in touch. He was a good friend. He said, "There's also a woman, an anomaly like you," or something like that, "who is going to apply to Warren." Then he told me what it was like to be editor-in-chief of the law review. It meant he was never prepared for class. [Laughter]

So I did apply, and as I say David encouraged me to do this. I received a letter inviting me to come for an interview, which I did.

I was escorted down this long marble hall and ushered into the chief justice's chambers. He was seated at an enormous desk. He greeted me very cordially and invited me to take a seat near him or across from him. I'm sure we talked about Berkeley and so forth, but I really don't remember the substance of our conversation.

What I do remember is during our visit he took a telephone call. The way he answered the phone was, "Hello, Governor."

I don't know who the governor was or what they said, but I was just amazed. I thought, "Here I am in the office of the chief justice of the United States, and he's talking to a governor." It seemed so far out of my realm. I was deeply impressed.

"Hello, Governor."

I wish I remembered what they were talking about.

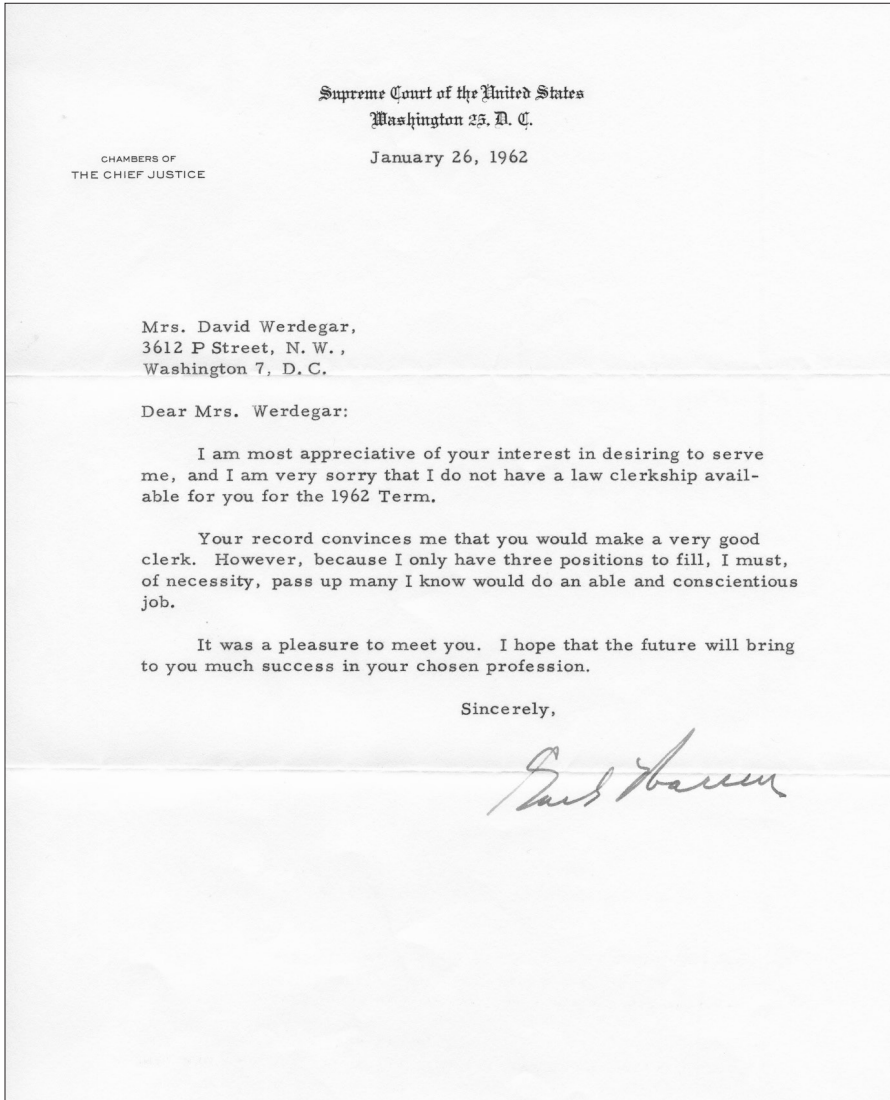
As it happened John Niles was offered a clerkship and took it. We visited when he came to Washington later. I was not, but I have a letter from Earl Warren thanking me for applying and professing that it had been a pleasure to meet me and expressing regret that, as he only had three clerkship slots, he wasn't able to offer a position to every qualified applicant [see following page].

Earl Warren never did have a woman clerk, nor do I believe until after that time did any justice except perhaps — I'm not sure about this, but — Douglas might have had one some years back. I'm not sure.

One might choose to say Earl Warren was prejudiced or biased or so forth, but I can't say that. I met a Boalt graduate some years back who had done research on Earl Warren, and he had in his possession and sent me a copy of a letter that Professor Adrian Kragen of Boalt had written to Earl Warren in 1959, December, asking him if he would be willing to take a woman. I want to quote from that letter. Professor Kragen writes:

“I know, of course, that you have no personal prejudice against the use of women clerks but thought it might be that the character of the entire group working as law clerks might be such as to make it impossible or impractical to fit in a woman.”

You see the delicacy with which they are trying to say, “How would a woman fit in?”



LETTER FROM CHIEF JUSTICE EARL WARREN, JANUARY 26, 1962.

On top of the letter in Earl Warren's handwriting is written: "Wire him that it's okay." So that's a bit of historic memorabilia there.

MCCREERY: You learned later, as you say, that Professor Kragen had written this letter and received a response. But what did you know of him when you yourself were at Berkeley?

WERDEGAR: Oh, nothing. Nothing.

MCCREERY: Do you have any knowledge — was he inquiring on behalf of anyone specific?

WERDEGAR: Yes, he was, and I don't know who it was. This was 1959, so I would have been a first-semester student. Your question is apt because I think Earl Warren asked his alma mater, as many justices do, to feed him potential clerk applicants.

I don't know who it was. The year ahead of me, as I've described before, was Joanne Garvey, who was outstanding. She wasn't number one, but she was on the law review and she became just a star of the legal community later on as she moved through her career — the first of so many different things. But that wasn't Joanne because this would have been a third-year student. If they were seeking it in the winter of 1959, that student would have graduated in 1960. So I don't know, and I don't know if she applied.

But John Niles became a clerk. At that time, I was interested to see that they only had three clerks. Now I think they have more. I'll mention that in those days it was typical to apply to clerk for the United States Supreme Court right after graduation. That has changed dramatically. I don't think you would have a prayer. Now it's expected that you've had at least another clerkship and maybe some practical experience in a very prestigious law firm.

MCCREERY: How did you learn that John Niles had been accepted for such a clerkship?

WERDEGAR: I don't know when I learned, but he moved to Washington and we socialized with him and his wife.

And indeed, going back to my job searches, I'm sure to have clerked for the chief justice of the United States would be an incomparable experience. Nevertheless, the experience that I did have was fabulous. I ultimately

received a letter offering me a position from the Civil Rights Commission and from the Department of Justice.

The Civil Rights Commission was more of a policy-making research entity, and the Department of Justice struck me as more hands-on dealing with the real issues. My letter, interestingly, was written by Byron White, my letter offering me the job in the Department of Justice — soon to become Supreme Court Justice White. But he was deputy attorney general, and he offered me the job [see facing page].

MCCREERY: Do you recall what more there was to the process in making both of those applications? You had some letter of application. Was there a personal interview in either case?

WERDEGAR: On those two I don't remember, frankly, at all. The interview I remember is the one I've just described with the chief justice. They must have met me face to face at the Justice Department. I have no memory about the commission. My grades were outstanding, but I think any entity would want to see you.

I was accepted to the appeals and research section of the department, which is a very small section. Surely — our boss was Harold Greene — surely he would have wanted to meet me. There were four or five attorneys, all of us young.

MCCREERY: Tell me more about the work of the appeals and research section, as you came to know it.

WERDEGAR: Yes, I will. I'd like to speak first about Harold Greene because Harold Greene was a *mensch*. That's a word that means just a splendid human being. In addition, he was an excellent lawyer.

He was a German Jew who fled Germany from the Nazis and ultimately, after some way stations, came with his family — his parents and himself — he was a young man — to this country. He served as an interrogator in the U.S. Army of German prisoners of war for military intelligence. Then he went to George Washington Law School — and that probably helped me when I was applying — and was appointed after doing some other things as the first head of the appeals and research section.

He became nationally known much later as the federal judge who presided over the breakup of "Ma Bell," AT&T. But he professed that he simply agreed to a settlement between the government and AT&T — because that



UNITED STATES DEPARTMENT OF JUSTICE  
OFFICE OF THE DEPUTY ATTORNEY GENERAL  
WASHINGTON, D. C.

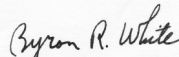
Mrs. Kathryn M. Werdegar  
3612 P Street, N.W.  
Washington 7, D.C.

Dear Mrs. Werdegar:

It is my pleasure to offer you a position in the Department of Justice for assignment to the Civil Rights Division following your graduation from law school. You may enter on duty at a convenient date as a GS-9 at an annual salary of \$6435. We expect that you will be admitted to the bar either before or within nine months of entering on duty. Like most other government monetary commitments, this offer is, of course, conditioned upon legislative appropriations supporting the Department's budget requests and, as in the case of all officials and employees of the Department, the appointment is subject to the results of a routine investigation as to character and fitness which can be instituted promptly upon the receipt of the requisite forms.

Please execute and return the enclosed Form 86 in quadruplicate and Form 87. It will expedite the character and fitness investigation if you will furnish several character references in addition to those mentioned on the preliminary application form.

I wish to congratulate you on your record of achievement in law school and upon being chosen to become a member of the Department's staff.



Byron R. White  
Deputy Attorney General

LETTER FROM DEPUTY ATTORNEY GENERAL  
BYRON R. WHITE, SPRING 1962.

was faulted at the beginning — I'm not an expert on this but I remember it raised a lot of eyebrows. Was this going to be good? But I think it was the antitrust division of the Department of Justice against AT&T. They reached a settlement, and at that point Judge Greene approved the settlement but he wasn't responsible for it.

He's also credited with helping to pass the Civil Rights Act of 1964 and 1965. In his obituary he was called one of the legends of the American bar, so he was a splendid man.

Going to what we did in the division, he was credited with helping to pass the Civil Rights Act and that's what we were working on in 1962 and 1963. This was the emergence of civil rights. There was political pressure on this administration to do something about it, and I think the attorney general, Bobby Kennedy, was vigorous in his wish.

**MCCREERY:** As an aside, you talked about becoming excited about these areas while still in law school and being there in Washington. What were your own views and proclivities with regard to civil rights issues in terms of political background and so on?

**WERDEGAR:** Obviously, I had an affinity for assisting people who were suffering injustice. I wasn't highly political. It goes back to my being friends with Jews who — I hardly knew they were Jews. It wasn't an issue with me, even though nobody I knew in my family or in my other social life had ever known any Jews, taking us back to an entirely different era. So my instincts were with civil rights, and this was something I could really get excited about, and with reason.

You asked what our responsibilities were. We did a little bit of everything, depending on what the issue was. I'm here to say we made it up as we went along. One thing we did is we researched and drafted early legislation about enacting a federal public defender's office. To that time there had been no federal public defender. Some states had public defenders. We drafted legislation to abolish segregation in public accommodations, such as hotels and motels, restaurants, and theaters.

We drafted speeches for the attorney general on civil rights issues, and I do remember one phrase of mine that made it into Attorney General Bobby Kennedy's speech on public accommodation law. It went as follows: "Pity the plight of the Negro traveler." And that's what he proclaimed.

The point was, as was expounded on after that introductory phrase, that the Negro traveler had to be very concerned about where he or she was going to stop for the night, where he or she could eat, where he or she could have a comfort stop. It's almost impossible to fathom right now, but they were not assured of a place to sleep at a lodging along their route. Amazing.

MCCREERY: You mentioned Attorney General Kennedy's vigor in pursuing these ideas. What sorts of directions did you get from Harold Greene and others about how to write for him, how to represent him?

WERDEGAR: I recall none. I guess there may have been, but I recall none. He would select — and surely his own speechwriters would have a strong hand in it.

Other things we did: A significant part of our work was writing *amicus curiae* briefs seeking to hold in contempt recalcitrant Southern governors who would not accede to federal orders to desegregate their schools. The famous phrase of the day was articulated by Governor George Wallace of Alabama. These people are unbelievable. George Wallace of Alabama, who would “stand in the schoolhouse door” and not let it happen. And Ross Barnett of Mississippi. It was a very strong segregationist South, and these people did it for their political benefit.

MCCREERY: What sorts of strategies was this Civil Rights Division employing to try to effect these major changes?

WERDEGAR: It would be driven by the attorney general, but the service that we provided was — it would be an *amicus curiae* brief, which means “friend of the court.” We would draft the briefs that we were told to draft, and we also became experts in contempt of court for these governors. They were in contempt of court. They were not obeying court orders. I do remember researching this wholly new area of law, contempt of court. It was very exciting.

We would also write *amicus* briefs to get Martin Luther King, Jr., out of jail when he was arrested. In this context *amicus*, friend of the court, really makes sense because we wouldn't be a party. It would be a state entity that would have arrested him and put him in jail. I think as a political effort to show solidarity with Martin Luther King and the black community, the federal government decided to submit briefs as friend of the court, urging the court to release him. Going back to the violation of federal court orders, we must have been writing briefs as a party.

James Meredith — you might remember the name — was chosen, or chose himself actually, to desegregate Ole Miss, the University of Mississippi. Of course, Mississippi put up a battle, and Ross Barnett, the governor, wasn't going to have any part of it. But in 1962 he entered the University of

Mississippi, and he was accompanied by U.S. marshals. There were riots. It was terrible. But he was accompanied by U.S. marshals and a Department of Justice attorney, John Doar.

John Doar was assistant — I'm not clear on these titles — assistant deputy or something for civil rights, and he was a giant of a man. He was tall in stature, and he was large in spirit and intelligence and courage. There are photographs that you can see. This is such a central part of the history of civil rights. He went on this campus with the United States marshals, and I've read that there were federal troops available.

He took James Meredith onto the campus, and he lived with him for some extended period of time. The joke at the time in the department was that if it had been Joanie Meredith, I might have been sent down to accompany her to Old Miss. [Laughter] Just a joke, I think. I don't think anybody would have thought I was physically suited to do that. But that was quite a dramatic event.

Living in Washington and working in the Justice Department at this time was so exciting. These were the news events of the day. I would go home and turn on the television, and I would see events that peripherally if not directly were what I was working with.

A lesser thing that we did, but important to the people involved, was respond — not always as promptly as we should — to pro per habeas corpus petitions by federal prisoners. So we drafted legislation, we wrote briefs on behalf of the government in civil right cases, we wrote amicus curiae briefs seeking, as I say, to get Martin Luther King, Jr., out of jail but also seeking to have Southern governors who deserved it to be held in contempt. It was quite thrilling.

**MCCREERY:** Say a bit more about the amicus curiae brief on behalf of Martin Luther King, Jr. What became of that particular effort, and how was it used?

**WERDEGAR:** That's a fair question, but I don't know. It starts in our division. I have a copy of one of the briefs I had a hand in at home, but I haven't revisited it. It doubtless explained why the incarceration was invalid, a violation of freedom of speech and freedom to petition the government.

Speaking of that, and speaking of being involved in the events of the day, on television you'd go home and you'd see what was happening in

Birmingham, Alabama. You'd see, I think it was, Sheriff Bull Connor with the attack dogs on leashes and these fire hoses blasting these peaceful well-dressed absolutely civilly disobedient people. It really aroused the American public, it really did once this was televised, the extreme measures of what some Southern officials were doing.

MCCREERY: You're describing quite a range of responsibilities of your division in these various important areas, all very timely, as you say, with current events. How large a staff were you, and how were you organized?

WERDEGAR: We were a small staff. I think we were five. This was new, brand-new, and the need for attention to the particular issues that I've mentioned arose, really, with the new administration. The Civil Rights Division was established, I'm told historically, in 1957. What happened with it between 1957 and the Kennedy administration, I don't know.

I did read a quote by Harold Greene much later in life where he said, "In our day we didn't have issues like affirmative action and some of the other issues that certain people feel are complicated and nuanced." He said, "It was very clear what was right and what was wrong."

MCCREERY: What was Mr. Greene's personal style in working with you as a staff?

WERDEGAR: Supportive, genial, free-rein. Just easygoing.

Again, I read a quote from him on his life, where he said, "It was one of those things where you never knew what was coming your way," meaning his section, the appeals and research section. "The attorney general would call me up at midnight and say, 'We're going to take James Meredith into the University of Mississippi tomorrow. If they block this or don't allow it to happen, what are our legal options?'"

I'm quoting Harold Greene. So he had to scramble and figure that out. I was not responsible for that. [Laughter]

I was so sorry to leave, actually — I would have stayed in Washington. My husband knew that he wanted to live in California, and he was right because Washington, it turns out, is really a town often of transients, people who come with one administration and go back to where they came from. So the friendships that are strong and the bonds that are there — it passes with time.

He knew he wanted to live in California, and I might interject here — not to mention the weather. In Washington it would snow every year. I don't think this was a surprise. But they acted, every time it snowed, like they'd never seen snow before. [Laughter] Government offices would close. Schools would be discharged. People would try to slog their way on foot home. I'm told it's not much different today.

I digressed. Oh, yes. What a gentleman Harold Greene was. He secured for me a photograph I have here of Attorney General Bobby Kennedy, signed: "To Kay Werdegar with great appreciation. Bobby Kennedy." Bobby Kennedy I don't think ever met me personally, but apart from Harold Greene some of his lieutenants did. And he gave me a clock that I still have somewhere, inscribing it: "With great appreciation."

We were, as I say, a small division, and we were close. We were all so energized and inspired, and most of us, I would say, were very capable. It was the cream of the crop. I was accepted to the Department of Justice as an honors attorney, as a GS-9, and my salary was \$6,400 a year.

**MCCREERY:** Who were your fellow employees there, and what became of them?

**WERDEGAR:** One of them, Allen Mayer, came back to California, and we stayed in touch for a while. I liked him a lot, but we've lost touch. There was another attorney in the Civil Rights Division, but he wasn't in the appeals and research section, from Boalt. There were four or five people from Boalt — and I'm counting myself among them now even though I graduated from George Washington — who did go to Washington and work in some aspect of civil rights in the department.

Brian Landsberg was one. He's now a professor, unless he's retired, at the law school in Davis, not UC Davis Law School, but — I'll have to think of it [McGeorge School of Law]. And Bert Danziger worked in the voting rights section. He was a good friend of mine, if I didn't mention him, from Boalt, a really nice guy, kind of a street fighter kind of a guy. "Justice!" He was going to fight for it.

But after that we were small. I knew one woman in the Department of Justice, and we became social friends, couples. We enjoyed each other a lot, but we lost touch. She's the only woman I'm aware of. She was in the civil division, not civil rights, but we did become socially acquainted. It was a

lot of fun. Young, newly married, newly engaged in dynamic, important issues. It was a very exciting time.

MCCREERY: What exposure did you have to other parts of the Civil Rights Division, the full department?

WERDEGAR: None, really.

Speaking of being in Washington at an exciting time, I'd like to speak about the Cuban Missile Crisis. That was October of 1962. Evidently the government had determined, perhaps through U2 flights — in any case, they had determined that Cuba — or as former President Kennedy would say, “Cuber,” — he had a wonderful Massachusetts-Boston accent — had missile sites. It already had some missiles, and they were pointed toward us. Our intelligence also discovered that Russian ships were steaming toward Cuba carrying additional nuclear-tipped missiles. This was a real crisis. You remember this was the Cold War, and it was cold.

The president initially at some point shared this information with the public, so we were aware that this was going on. David had had surgery and was home during this time. I think history will say the “crisis” lasted thirteen days. I'm simply quoting history. I'm not here to say I knew that or know it.

David was home recovering from surgery, and he had the radio on. He would report to me at night that the radio would be telling us that these Russian ships were steaming toward Cuba. They were steaming and steaming, and I'm not exaggerating, “Steaming.” [Laughter] We used to laugh a little bit, like, “Are they going backwards?” They kept “steaming” toward Cuba, and the issue seemed to be, were we going to have a preemptive strike on Cuba? Were we going to impose a blockade on these ships?

David and I drove past the executive office buildings one time at night, and the lights were ablaze like they would never be, which bespoke to us that the administration was working late into the night.

I remember being in this intimate group of appeals and research attorneys, and we were talking about what was happening. We really felt that war was imminent, and that Washington would be one of the first targets. We really felt there was a serious possibility we were going to die.

I remember discussing with a Catholic office mate of mine and saying to him, “It must be wonderful, as a Catholic, to know what happens to you

after you die.” Because I assumed that was a correct interpretation of the faith. But we had these discussions.

History has later said it’s the closest we ever came to nuclear war, and it was the scariest moment of the Cold War. I think being in Washington we felt it particularly. Happily, Kennedy and Khrushchev resolved it through negotiation, and history tells us that it was Bobby Kennedy and Jack Kennedy together who managed to resist a more confrontational approach that was being advanced by maybe some of the military officers and averted what might have been a cataclysmic confrontation. So that, too, was enhanced by being right there in the nation’s capital.

MCCREERY: How do you evaluate your time as part of President Kennedy’s “New Frontier,” as you look back on it now?

WERDEGAR: At the time and for a long time after, I said it was the best job anybody ever could have had. As a young attorney, it was unbelievable. I didn’t dream I’d ever have anything that exciting. Of course, now that I’m a justice of the California Supreme Court I have to include this position as one of the two most thrilling of a career. I was just fortunate that I was in that place at that time. That was just good fortune. I was surrounded — looking back, I didn’t necessarily appreciate the stature of the people I was working with at the time, but they’ve come to be known as just giants of the era.

I mentioned Harold Greene and John Doar, but there were others in the Department of Justice: Nicholas Katzenbach and Burke Marshall. They all were men of great courage, and they were heroes in the civil rights movement. Just through good fortune of time and place, I at least breathed their same air. Difficult, challenging times produce, for some, greatness. A lot of these people that I’ve mentioned rose to that occasion and were able to use to the benefit of the country their extraordinary talents.

MCCREERY: Yes. Mr. Katzenbach, for example, went on to be attorney general himself, and as you say many other illustrious positions came out of this group.

WERDEGAR: Yes, he did. I’d like to speak about going to work in the Justice Department building, actually. I would take a bus. I think I would walk down to Wisconsin Avenue, even in the snow, and catch a bus on



Wisconsin Avenue. I think it would take me down to Pennsylvania Avenue, where the Department of Justice building was.

At that time the building was known as the FBI building, so I worked in the FBI building, so-called because the FBI's offices were there. Tourists would be streaming into the building to go tour the FBI offices and, I think, also to see target demonstrations by FBI officers. I'm not sure because I never took the tour, which seems strange at this time. But I was always so proud to walk into that building as a young attorney.

I also recall that in front of the building there would be Black Muslims known as Nation of Islam hawking their publication called *Muhammed Speaks*. I can't be sure, but I think even Malcolm X himself might have been there at some point. So every aspect of it was dramatic.

I would have stayed, as I mentioned, in Washington because all I saw was what was the now, not what the future was. Of course, it couldn't possibly have continued to be the same once we had children and life moved on. David had a position at UC Medical Center waiting for him, so we packed up and left.

MCCREERY: But as your first professional position as a new attorney, how good a match was that for you at that time?

WERDEGAR: Whether it was a good match you'd have to ask Harold Greene. But in my mind it was fabulous because I was engaged in something that I was passionate about. Our tasks were research and writing, which it turns out have been my path and my strength my whole career.

MCCREERY: What influence do you think that year had upon you later on? Is that something you can put into words?

WERDEGAR: When I came back to California the immediate influence was that I found that I was put in the position socially of being a spokesperson for the civil rights movement. Again, California was still a bit of a backwater. This was all news, and people didn't quite understand what the issues were. I was invited — I was put on the spot a lot, or you might say "had the opportunity" a lot to talk about it.

It was just a continuation of my natural — unexamined, but my natural affinity for what I perceived to be justice and my natural lack of any prejudice against groups that might have been disfavored at the time. It seemed just natural.

MCCREERY: Before we leave Washington entirely, what did you learn from John Niles about his experience clerking for Chief Justice Warren?

WERDEGAR: I wish I had asked him. We did socialize. That would have been fifty years ago, and whatever he might have said didn't stay with me. I'm sure it was a sensational experience. He later went on to take a position in New York that had been waiting for him whether he got that clerkship or didn't get it. I think for John, he probably found that year one of the most satisfying of his life. But it was a brilliant progression in his career, which — I'm so happy for him.

I wish I had remembered what he might have said and what cases he might have worked on. But I don't know.

MCCREERY: But you knew this would be a one-year assignment for you and that you'd be returning to California to a job awaiting Dr. Werdegar?

WERDEGAR: Yes, because that was David's service obligation, and he had discharged it — and in a most agreeable way for both of us, really. For me, a Californian — of course, I had been to Wellesley, which took me out of the usual right there. But I was ready for this experience and didn't know what California was going to hold for me. Of course, I was looking to starting a family.

Our last day was August 28th, 1963. Does that date mean anything to you?

MCCREERY: Why don't you tell me what happened. [Laughter]

WERDEGAR: I would say, fittingly that was our last day because that was the day that was proclaimed to be the March on Washington for Jobs and Freedom. We had movers coming, and David agreed that he would stay at the house and deal with the movers, and I could go to the march. I went with my friend Judy Norrell, the one I met in law school whose mother was the congresswoman from Arkansas.

We walked down 16th Street to the Mall, and we were a little apprehensive and a little wary because the administration was concerned there was going to be real violence. There were contingency plans, which I can't say I knew at the time but I've since read, of federal troops. There were a lot of police present, mounted police and foot police. So we didn't know what we'd be getting into.

We were some of the very few white people. It has since been estimated that there were about 250,000 people, 75 to 80 percent of which were black. Blacks had been bused in or taken trains, airplanes, driven themselves in from the South and from New York, had been marshaling the day or two before. So there we were.

MCCREERY: What was the atmosphere out in the crowd there?

WERDEGAR: As it happened — as I say, we were self-conscious and concerned — as it happened the atmosphere was friendly, relaxed, peaceful. It was like a Sunday picnic. People were in a good mood. They were all nicely dressed, like they were going to a Sunday social. Judy and I felt ultimately perfectly at home there. Some people climbed into trees to get a better view. It was an enormous crowd. You've probably seen pictures. They were passing out placards. Some placards said, "We shall overcome." Others had other slogans or affiliations on them.

I picked up a button, which I have hanging right here in my office and I looked at yesterday. It's a white hand clasping a black hand. It's a white button, round, and on top it says, "March for Jobs and Freedom." On the bottom it has the date, August 28th, 1963. In the middle it has, let's see, in small print beneath the clasped hands, it has "AFL-CIO Local 64." I've never noticed that, actually, before. Underneath that in very small print it said, "Union made."

I kept that button. I picked it up somewhere. There must have been other options in the buttons or the placards. Some of the placards declared what church the person was with or what union the person was in or what advocacy group.

My friend Judy said that, coming from the South, she had never seen such a mingling of black and white. There were plenty of whites and plenty of blacks in the South, but the two never intermingled in a natural way. It was a marvelous feeling. I remember that Marian Anderson sang and Joan Baez sang. We were way back.

There were other speakers, and then there was Martin Luther King, Jr. Shall I talk about his speech? We couldn't really hear all his words. What you couldn't miss — and this was new to me — was the cadence, the rising, and the *swelling* and the diminishing, and the *swelling* and the diminishing, and the building up. Judy said that it reminded her of a Baptist

cadence, a Southern Bible-belt cadence that she grew up with. Of course, I had never heard anything like it. It was a day where you felt hopeful, happy to have been present.

We could not have known, however, that it would become the iconic speech that it did. Many, many years later — many years later — when my older son was in college and he had a seminar on the 1960s, I went for the one and only time in my life to a college class of one of my children. I walked in the classroom, and unexpectedly they were discussing that march. They had a recording of Martin Luther King, Jr.'s speech. That's when I realized it was history. I was there, and it was history. When you're living what you're living or where you are, you don't realize, at least I certainly didn't — I don't think most of us do — this is history. But it was.

MCCREERY: What do you think was the effect of the March on Washington?

WERDEGAR: I have to leave that to experts to say. I will say that, at the same time — and I'm glad this came up — the women's movement was emerging on the tails of the civil rights movement. I do want to speak about Betty Friedan's book *The Feminine Mystique*.

During my year in Washington — the book came out in 1963, so it must have been my year working in the Justice Department — Betty Friedan's book *The Feminine Mystique* was published. I read it, and it was a revelation. This book was speaking to matters that I had not articulated but I felt and was validating the path that I was taking.

I would like to read from Gail Collins' book — *When Everything Changed: The Amazing Journey of American Women from 1960 to the Present*, her book — on the impact of Betty Friedan's book. Betty Friedan conducted interviews of married women and so forth, and the material that she compiled formed the basis of *The Feminine Mystique*.

"*The Feminine Mystique*," I'm quoting Gail Collins, "was like an earthquake." Her thesis was that housekeeping just simply was not an appropriate full-time job for American women. American women had been — I don't know if she used the word "brainwashed," but had been persuaded that the shiny kitchen floor and the clean, freshly pressed laundry, and the perfectly well-scrubbed children were her destiny and her pride and joy.

Betty Friedan's book just blew the whistle on that. She didn't denigrate that. But she said it's just not true that that makes a life and that the talent and energy and gifts that women could bring to other endeavors in addition were being completely wasted.

"The power of Friedan's writing," I'm quoting again, "made *The Feminine Mystique* a sensation when it was published in 1963. Some of the women," I'm quoting, "were outraged that *The Feminine Mystique* had placed their choices into question and others," and I'm quoting, "like myself, felt at last they had been understood."

It was a validation for women who had chosen for whatever reason an unconventional path and were uncertain and felt they had to explain themselves and had to not inconvenience anybody. I certainly had those attitudes.

Later on in my life, when my husband's family would come to visit, I would stop work. My education and accomplishment as a lawyer was not something admired. It was something *not* to talk about in the eyes of his family.

*The Feminine Mystique* started, marked, I think, the beginning of the women's movement. You asked me what do I think the impact of the March on Washington was. I'm not a social scientist or a historian. I've read that the women's movement in the end, although still in progress, had perhaps achieved more of what it hoped for than the march.

But the march did prompt — after Jack Kennedy tragically was killed that following winter — what a shock that was — Lyndon Johnson came into office and was a true believer of civil rights. He signed the Civil Rights Act of 1964. The march definitely, I think, made that a necessity politically. But it's also been said that in doing that the Democrats lost the South. In my growing-up period and that time in Washington — and my friend Judy, who was an expert on the subject, being a Southerner, agrees — the South was solid Democrat. Once a Southern president signed the civil rights law, he lost the South. We now know, for whatever reason, the South is not solidly Democrat. It's just all a bit of fascinating history.

MCCREERY: How did you come personally to read Betty Friedan's book?

WERDEGAR: I don't know. It was out there, and I was intellectually curious. The mystique, I understand, is the mystique that a woman's role is to

serve her family and have a perfect home and the perfect roast and everything would be wonderful.

I actually lived that even as I pursued my career, as might develop when we talk about subsequent events. It would have been an obvious thing to come to my attention, and it was marvelous.

MCCREERY: Who could you talk to about these ideas?

WERDEGAR: I don't remember. Maybe my friend Judy Norrell. She has continued to be intellectually stimulating and of wide-ranging interests. She herself didn't marry.

But I don't think I needed to talk to others. When you say, "Who could I talk to?" do you mean to support my views or to exclaim how challenging and energizing this was? There have been few of my contemporaries who have been on the path that I've been on, when you start looking at that path to how far you carry it. So maybe that woman who was in the civil division of the Department of Justice — we've lost touch. Otherwise I can't in particular remember anybody. I didn't need to. There it was in the book.

MCCREERY: You mentioned the assassination of President Kennedy, which occurred only a few months after you left. Knowing that you were part of his administration, would you be willing to talk about how you learned the news and what went through your mind?

WERDEGAR: I think it's like 9/11. You never forget where you were when you heard it. I was home in our apartment in Sausalito, and I heard it from the radio. You just couldn't believe it. You just couldn't believe it. The shock and the pain of it on every level, for the country, for his family, for those who cared about what we thought were his ideals.

Then, of course, what followed was endless watching of television about the funeral, and about Jack Ruby, and catching Oswald, and the reruns of the car ride through Texas and the photographs, and Oswald being shot by Ruby, and Jackie Kennedy, who comported herself unbelievably for the benefit of the nation in preparing the funeral and having her children — nobody has that control over their children — having her children be adorable and behave superbly. It was just sickening. It was just a painful shock.

Then you'll remember, moving forward, that — I don't have the dates in mind, but — it wasn't that long afterwards that Martin Luther King

was killed. It may have been longer than I think, but it wasn't — and then Bobby Kennedy was killed.

MCCREERY: 1968, both of those.

WERDEGAR: That was several years. It seemed one hard upon the other. You just wondered what was going on in our country.

MCCREERY: You mentioned Mrs. Kennedy. I wonder what sort of role model she was to you and other young women in Washington at the time, if you thought of her as such?

WERDEGAR: I didn't think of her as a role model. I think I marveled at her. She was, what? Thirty, thirty-one, thirty-two? She was multi-lingual. Again, this was part of the new Kennedy administration. She was young, thought to be extremely attractive, stylish. She had an interest in fashion, in the arts, in classical music, and in French cooking. The White House had hired a French chef. This was just such a new thing.

Washington did not have many interesting restaurants at all. I'm not sure they do now, but they didn't then. But there was a restaurant called the Sans Souci near the White House that was very popular. All things French — and that goes back to the French market, where Pierre Salinger and my husband shopped — became quite fashionable because Jackie Kennedy favored them.

To live in Washington and to be young and to be in sync with the administration — I don't know what it was like for people who found this administration uncongenial to them — but at that time we were in sync with the administration. The Kennedys were in the news all the time.

I want to back up and say that one event, again, being in Washington, was going to the Supreme Court — I think it's the only time I heard oral argument at the Supreme Court — and hearing Bobby Kennedy give his first and I think only oral argument before a court. In a moment I'll get you the name of the case.

MCCREERY: Did you go as a class, or were you there on your own?

WERDEGAR: Oh, no, no. I was there on my own. I was probably working in the Justice Department. How I got a seat I'm not sure because the courtroom was packed. The entire Kennedy clan was there. To those of us at that time, this was something. There was Jackie Kennedy and Ethel

Kennedy and Joan Kennedy, who was Ted Kennedy's wife. Before the argument, Teddy Kennedy was sworn in as member of Supreme Court bar on the same day that his brother was making his oral argument.

As a matter of history, I'd like to give you the name of the case. It was called *Gray v. Sanders*.<sup>6</sup> It was argued January 17, 1963, and it was a voting rights case that had to do with the government challenging Georgia's county unit system that it used as a basis for counting votes in the Democratic primary for the nomination of a senator and other statewide offices.

This was an important case because what followed it was something known as the "apportionment cases" examining the system of various states and how they apportioned their geographical units and the weight they would give them.

MCCREERY: Yes. One of the major areas of the Warren court, looking back.

WERDEGAR: Yes. Thank you. That's true. Bobby Kennedy had elected to argue the case himself, and I don't know how it was that I had a seat because the courtroom was packed. I was thrilled to be there. All the Kennedys and me. [Laughter]

The Kennedys set a tone of style and flair and sophistication, and while it lasted I think Jackie Kennedy was viewed widely as representing our country well. We all know — or those of us who were around remember — she was a sensation when they traveled to France. Jack Kennedy, who had a delightful sense of humor, said, "I'm the man who accompanied Jackie Kennedy to France."

He used television, it's been recognized, in a way that it had never been used before. He had a quick wit, a lively intelligence.

MCCREERY: And certainly the Kennedy–Nixon debates in 1960.

WERDEGAR: That changed the course of history, yes. The Kennedy administration was short and brief. How it would have played out is not for me to say. Historians can't figure that out either, but I think anytime you serve in government in Washington it has to be an exciting time because it's the heart of our government. That time for me, as a young person, was just magical.

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<sup>6</sup> 372 US 368.



MCCREERY: As an aside, much was made at the time that President Kennedy was a candidate of the fact that he was a Catholic. We were talking earlier today about various religions and how those sometimes cause a lot of conflict for people personally. In your memory how big an issue was that at the time that he was running?

WERDEGAR: Do you mean to me personally or to the country?

MCCREERY: To the country, as you recall it.

WERDEGAR: It seemed to be a very big deal, and of course Jack Kennedy was a little-known individual as well. It just shows you how things evolve. I don't think we've had a Catholic subsequently, but I don't think it would be an issue if we did. But at the time it was this purported concern that the president would respond to the wishes of the Vatican and not his own conscience. Today I don't think that claim would ever be made.

MCCREERY: Had you attended oral argument before, or did you say this was your only time?

WERDEGAR: No. This was my only time.

MCCREERY: What do you recall of the oral argument process, if anything?

WERDEGAR: I don't. I don't.

MCCREERY: Not knowing then that you would subsequently engage in such a thing yourself in great detail.

WERDEGAR: No.

MCCREERY: Finally, you mentioned earlier Byron White, who shortly became a Supreme Court justice. Then President Kennedy had the other appointment in Arthur Goldberg. Did that make much of an impression on you and yours at the time?

WERDEGAR: No, it didn't. No.

MCCREERY: Your whole path into the judicial career sounds fairly unanticipated. Had you thought about any such thing at an early stage like that?

WERDEGAR: [Laughter] I've had externs that serve here, and we meet with them for lunch — it's supposed to be one of the perks of being an extern at the California Supreme Court — ask me that question. I just have to laugh.

Think back to the times that I'm speaking about. I've never heard of a woman judge. I hadn't heard of a woman lawyer, and I certainly didn't know where my career was going to take me as I tried, down the road, to accommodate having a family and being the wife of a very busy professor of medicine at an academic institution. It never crossed my mind until way later, and I assume we'll get to that later. No. I was putting one foot in front of the other and seeing where it would take me, and it took me to some very nice places.

MCCREERY: Thank you so much. Is there anything you'd like to add about your time in Washington?

WERDEGAR: No. It's a special place and I think for anybody, especially people trained in the law who have the opportunity, at least for a short time, to live and work there, it's a wonderful experience. I'm just so grateful that circumstances — my husband's military obligation — took us there.

Thank you, Laura.

MCCREERY: Thank you so much, Justice Werdegar.

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## INTERVIEW 4 (JANUARY 21, 2015)

MCCREERY: Good afternoon and happy new year, Justice Werdegar. We talked at great length last time about your time living in Washington, D.C. in the early 1960s. What would you like to add to that account before we get you back to California?

WERDEGAR: Thank you, Laura. Reflecting on our last conversation I realized that in discussing the employment offers that I had in response to my applications, the Commission on Civil Rights did offer me a position and of course the Civil Rights Division of the Department of Justice, which I accepted.

But I wanted to mention that a law firm also — I think it's the only law firm in my history that offered me a position, and that's Covington & Burling, which is the same firm that — the year before when I was still at Boalt — when they interviewed me they had offered me a summer position, which I declined because I was going to be going to Washington after marriage, in any case. But on the completion of my law studies they again offered me a position, which I appreciated then and I appreciate now. I am sorry that I didn't have that experience, so I just wanted to add that.

MCCREERY: To what extent did you seek out further talks with Covington & Burling?

WERDEGAR: I wrote to them as I was completing my studies, and I explained that we likely were only going to be in Washington another year, given my husband's expectation of returning to California, but would they consider me? I got a most cordial letter saying yes, they would. I appreciate that.

MCCREERY: You described last time that your last day in Washington was August 28th, 1963, and that you were able to attend the March on Washington that very day. What transpired next?

WERDEGAR: Next my husband and I took a delayed honeymoon, so to speak. We took a month off before he assumed his responsibilities at UC San Francisco to go to Europe. We rented a little Volkswagen and had a marvelous time. Looking back on it, we think we should have stayed longer. Those times in your life when you can do something like that are so rare.

We came back to California, and David did assume his calling and responsibility as a professor at UC San Francisco. We took an apartment in Sausalito, and I began to consider what I was going to do in my career and what direction was that going to take.

I should interject that barely one month or a little more than one month after we'd been here, in November of 1963, President Kennedy was assassinated. I can't overstate — of course, for the country, but for us personally — what a shock that was. Having just returned from Washington, especially having worked in his administration and having been a deep admirer of his charm and his wit and what we thought he was trying to do for the country, it was just devastating.

We were riveted to the television, the filming of his funeral procession. It wasn't long after that there was a video of Jack Ruby shooting Harvey Oswald, who was the presumed assassin. The shock from both events and the grief over the Kennedy assassination was tremendous.

Soon after we returned, I enrolled in a bar review course — I had to take the California bar — and that was the Wick's bar review course, which at the time was the only bar review course around. Since then it's become, of course, a big business.

I also at that time was thinking about, as I said, what I wanted to do with my career. I first applied — I was armed with letters of reference and recommendations from the Justice Department — to the state attorney general's office, hoping to work in their constitutional rights section. I made some inquiries about clerking for a particular federal district court judge, and I also made some inquiries about clerking for one of the justices of the California Supreme Court.

Meanwhile, I was taking Wick's bar review course, and I'll mention that — I don't know how many students there were — it was for the February bar, which is a lesser bar than the fall bar. But there must have been 100 or 150 people. I remember only one other woman — there may have been two others — which wasn't surprising because at that time in California only 3 percent of attorneys were women. At that time in the United States, only 1 percent of attorneys were women. So as you will see, the world changed dramatically and rapidly in the years still to come.

MCCREERY: Which of the justices on the California Supreme Court did you apply to?

WERDEGAR: I'd prefer not to say. Just leave it that way. But going back to my applications, I was interviewed by the assistant attorney general in the Department of Justice. I was a little surprised that I was also interviewed at the same time by his wife, who I later came to understand was his executive assistant.

Then Boalt called during this time. No offers were forthcoming from the other applications. It did not occur to me, but the natural question today is, "Oh, were you discriminated against?" It did not occur to me that I was. It's fair to assume that there were other candidates that better suited what the office was looking for.

MCCREERY: What did you know about California's attorney general office?

WERDEGAR: I didn't know anything about it except that when I was back in Washington certain officials in the Department of Justice suggested it might be a good fit. People there knew people here, and I think that's probably why I was given an interview.

MCCREERY: You had identified this constitutional rights section?

WERDEGAR: Oh, yes, because now, having started out in civil rights, that was now my interest. But, in that connection, I will say Boalt called me and said there was a firm in San Francisco that was thinking of taking its first woman if they could persuade the senior partner to do this, and would I interview? Which I did. They took me to lunch.

It may not have been the best interview. I remember asking them about their pro bono opportunities, and maybe that's not where their mind was at that time. In any case, nothing came of that.

MCCREERY: Can you say which firm it was?

WERDEGAR: No. But at that time — it's my understanding — this is 1963, 1964 — there were no women in any large law firms in San Francisco. Women were perhaps practicing law, but if so they were sole practitioners or maybe practicing with a husband or a father. This is my understanding.

You should know that there was no law against discrimination in employment at that time. The Civil Rights Act of 1964, which prohibited discrimination in employment, was passed some months later in July of 1964. Joanne Garvey, whom I've referenced before, who was a year ahead of me — and she was my adviser on law review — she had to go to Santa Barbara

to get her first law job. She later came back and became a major tax attorney with two different law firms, the first woman president of the San Francisco Bar Association, and first female member of the State Bar Board of Governors.

That's how it was. Many, many years later I was told that the attorney general's office at that time did not hire women, that the only women in the office were those who had been hired in the years of World War II when there were no men.

This is hearsay, but I also was told that the attorney general at that time, Stanley Mosk — later my colleague on the California Supreme Court — did not begin to hire women until one of two things happened and maybe both. The first part of the story is, “until Boalt Hall,” my alma mater, “let it be known to the attorney general they would stop sending applicants there unless he started considering women.”

The other related story is that he stopped his practice of not employing women when he was considering running for the U.S. Senate in 1964, and the women in the office — the ones that had been hired during World War II — threatened to go public unless he changed his ways. I can't say, but that was the understanding that was conveyed to me.

**MCCREERY:** Given that you went as far as an interview with that office, how was it conveyed to you that you would not be offered a position?

**WERDEGAR:** Oh, it was conveyed by a letter that there wasn't an opening that would fit my wishes, my qualifications. They didn't have an opening, which could very well have been the case.

**MCCREERY:** Did you happen to try other law firms in addition to the one that you mentioned?

**WERDEGAR:** No. I did not. I didn't do that. At the same time that I was studying for the bar and I had had these interviews, I was deeply interested in starting my family. David and I moved from our apartment in Sausalito to our home in the late spring of 1964. Not long after that, I did discover that I was pregnant and I'd be having a baby in January of 1965.

Meanwhile I did obtain temporary employment with the California state Study Commission on Mental Retardation, which — today the term would be on developmental disability, I believe. They needed someone to research the laws affecting the mentally retarded in California.

MCCREERY: I'm going to interrupt you here because I found a copy of this study, published in book form, in UC Berkeley's library, and I've brought it today to give you a look.

WERDEGAR: I have not seen it since that time. [Laughter] Later on I would like to look at this. This is my product. It says: compiled by Kay Werdegar for the state Study Commission on Mental Retardation.

MCCREERY: May I just read one other brief thing from the foreword? This just describes your role. "The work of researching the statutes and compiling this volume was done by Mrs. Kay Werdegar, an attorney, of Ross, California. Although the Study Commission is the sponsor and publisher of this report, and the work was done under the general supervision of the chairman, the selection of material was by Mrs. Werdegar, who is also responsible for the interpretive comments."<sup>7</sup>

WERDEGAR: That's a disclaimer or a credit, depending on how you want to look at it. [Laughter] I'm really pleased to see that. I don't know that I've ever had a copy in my hands, or if I did, it has gone by the wayside.

MCCREERY: Without delving further into those pages right now, what else can you tell me about how you got that assignment and what it involved?

WERDEGAR: I think I got that assignment — I asked my husband about that the other evening. I think as a professor at the medical center he was involved in some kind of project relating to mental disability. That being the case, he may have been acquainted with someone — I think the man's name was Littlefield, Mr. Littlefield — who was doing this project. One thing led to another, and I was the choice to help him do the research and the writing. That's the best I can say. I don't really know.

But it was a good thing for me because it filled that time from when we came back until the late spring of 1964. As I was saying, I then realized that I was pregnant. My concern then was — I was thrilled, but I was concerned that if I didn't have a job waiting for me after the baby was born, I would never go back to work. I don't think this is unusual for women who begin to start their family. Having experienced it, I'll tell you it's a reality.

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<sup>7</sup> From the Foreword, *MENTAL RETARDATION AND THE LAW: A SURVEY OF CALIFORNIA LAWS AFFECTING THE MENTALLY RETARDED* ("compiled by Kay Werdegar for the Study Commission on Mental Retardation," State of California, 1964).

Someone told me that over at Boalt the dean at the time, Frank Newman — later a member of this court, but not one that I served with — was doing a special project on the Department of Justice in Washington and the development of civil liberties. I thought I might be a pretty good match for that, having just come from the Civil Rights Division of the Department of Justice and also being a Boalt student — not yet a Boalt graduate, but — [Laughter]

In my pregnancy I went over and spoke with Frank Newman. He very graciously agreed to take me on to the project, and it was understood that I would start after my baby was born. He secured an appointment for me at the Center for the Study of Law and Society at Berkeley, a think tank.

For the next two or three years I worked on a subset of his larger project, which was the role of the solicitor general of the United States in the development of administrative due process, looking at the attorney general's briefs in cases over a twenty-five-year period involving prosecutions under the Loyalty Oath Act. In other words, this was the McCarthy era, the post-World War II communist concern era, where the federal government had passed a loyalty and security act. Federal employees had to take a loyalty oath, and some of that filtered down to universities as well. What he wanted to see in the direction of the project was, what were the arguments that the solicitor general made in these cases? And what would the Bill of Rights have looked like if the solicitor general had won his cases?

MCCREERY: How did you go about doing the research?

WERDEGAR: I would go over to the center. It was a part-time project, which was marvelous for me. And I would read the briefs of the attorney general in these cases — it was very interesting — and from that extract what their position was and how they were proposing to interpret concepts of due process in these administrative hearings.

It culminated in a law review article called, "The Solicitor General and Administrative Due Process: A Quarter-Century of Advocacy," which the George Washington University Law School published.<sup>8</sup> It's been cited in other studies looking at the role of the solicitor general, which you would know, perhaps. It's a dual role. The solicitor general has a client, which is an agency of the government of the United States. But the solicitor general is also charged

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<sup>8</sup> *The Solicitor General and Administrative Due Process: A Quarter-Century of Advocacy*, 36 GEO. WASH. L. REV. 481 (1967-1968).



with preserving our liberties and our constitutional rights. There can be tension between those two roles, and I think some of that tension manifested in the solicitor general's briefs during that twenty-five-year period.

MCCREERY: Since you were examining such a long period of time, you were doubtless looking at several different individuals who served in that role.

WERDEGAR: It was a twenty-five-year period, and there were doubtless — and I can't tell you now who they were — I would be happy to research it, but there were doubtless more than one — two or three solicitors general, at least. You might know the solicitor general is often described as the tenth member of the United States Supreme Court because that individual appears more frequently than any other party, and the court — when the case comes to the United States Supreme Court — expects more of the solicitor general. They do expect a broader perspective and a more trustworthy, broader look at the shaping of the law. But I imagine the tension continues between representing a client and representing the larger view of the Constitution.

MCCREERY: You mentioned that this project culminated in a law review article. In brief, what sorts of results came out of your work?

WERDEGAR: The results, as I've perhaps indicated, came out that there was a tension, and perhaps had the solicitor general's position prevailed in every case we wouldn't be seeing the concept of due process as it has continued to be. It would have been a less favorable concept for an individual who was under scrutiny.

MCCREERY: What knowledge do you have of how the article and these results were received and any work that might have come later?

WERDEGAR: I know that it's been cited. One can Google it — well, maybe not Google it but you can research it. It's been cited as a study. There was an ABA newsletter that my father, who was an attorney, seems to have had possession of. He sent me, soon after it was published, an ABA newsletter just describing what the work had been, and that it was a scholarly work, and that it was something to consider. I haven't spent any time trying to pursue it further. But I do know it's been cited as an early source work on this subject, which other academicians have on occasion pursued. [The ABA review is reproduced on the following two pages.]

ABA JOURNAL, FEBRUARY 1969

REACTIONS TO CURRENT LEGAL LITERATURE\*

**THE SOLICITOR GENERAL:** The influence of the Solicitor General of the United States on the development of the law of procedural due process is examined by Kathryn Mickle Werdegar in “The Solicitor General and Administrative Due Process: A Quarter-Century of Advocacy,” 36 *George Washington Law Review* 481 (1968).

The Solicitor General is viewed as filling a complex and unique role vastly different from that of the private advocate. The “permanency” of the Government’s relation to the Supreme Court, requiring consistency in argument from case to case, and the Solicitor General’s position as representative not only of the particular agency in the case but also of the citizenry as a whole should imbue his advocacy with a measure of judiciousness foreign to the private practitioner. In addition to his obligation to represent the United States in a given case, the Solicitor General bears a responsibility to the Court and to the public to foster the orderly development of the law and to establish justice.

The responsibility of the Solicitor General in formulating the Government’s position is particularly heavy in procedural cases, since the answer is rarely clear-cut and necessarily involves a balancing of competing interests. Therefore, Miss Werdegar utilizes the administrative due process cases to analyze the Solicitor General’s potential influence on the law and the extent to which it has been realized. She points up the nature of his responsibility by broadly characterizing the issue in these cases as a balancing of the interest in effective preservation of our national security and “the interest in the integrity of our concepts of fair play, concepts which form the basis of our ‘scheme of ordered liberty’ and give us reasonable assurance that truth and thus justice will be achieved.” With the issue thus viewed, the Government, as much as the individual, has an immediate and vital interest in abiding by our traditional concepts of fair play.

Analysis of administrative law cases demonstrates that the Solicitor General has failed to press for expansions of procedural rights in cases

\* Reprinted by permission of the American Bar Association from 55 *ABA JOURNAL* 189 (February 1969).

in which the executive interest is not clearly established and that he has been willing to justify even the more spurious government claims once the question of national security has been raised. As a result, confusing principles often have emerged. Instead of advancing the public's interest in fair hearings, the Solicitor General has viewed the competing interest narrowly, concentrating on the legal nature of the interest rather than the practical effect of the challenged procedure on the individual. Only when a person possessed a legally recognized substantive interest that could be characterized as more than a mere privilege was he entitled to due process before being deprived of that interest.

When he has recognized that due process is constitutionally required, the Solicitor General has argued that due process is not a rigid concept, but that it varies considerably according to the circumstances of the case and the nature of the conflicting interests involved. Thus, when the informed judgment of the executive concerning the best means of safeguarding the national security has been involved, or when Congress in authorizing a procedure was exercising a "sovereign" power, he has argued that the authorized procedures satisfy the requirements of the Fifth Amendment.

Although the Solicitor General doubtless recognizes that the protection of procedural rights is a positive good for both the Government and the individual and that his position is likely to have a direct influence on the development of procedural law, he is restrained by his role as an advocate in our adversary system, which presupposes that both sides will be heard. Therefore, the interest in procedural fairness often has been submerged unnecessarily in the executive's view of what is required for efficient implementation of agency programs. Since the Solicitor General is called on only after an established procedure has been challenged, his freedom to advance arguments designed to mold a procedural system consistent with his view of a "scheme of ordered liberty" is limited.

Miss Werdegarr concludes that the law cannot benefit from the Solicitor General's breadth of view, leaving the ideals of his office unfulfilled, as long as he is not cast in the role of statesman but continues as defender of the judgment of administrators concerned with the achievement of their immediate ends.

MCCREERY: I wonder whether your experiences in Washington played any role in your ability to carry this out. What help was it to have been there yourself, if any?

WERDEGAR: I do remember in the Department of Justice a plaque over the door of either the attorney general himself or the solicitor general, I think the solicitor general, that, “The United States wins its case when justice is done.” So I shared Dean Frank Newman’s — later Justice Frank Newman’s — interest in the subject because I could visualize the office and I had worked in civil rights. It just seemed a natural and a very enjoyable outgrowth of my background.

MCCREERY: What other assignments did Dean Newman have for you?

WERDEGAR: He was most generous in allowing this law review article to be mine alone. A little footnote says it’s part of his larger project. He was a very, very nice man. But when we completed our project, that was the completion of our relationship. He didn’t have anything else for me.

At this time, I think there was another interim project I had. I was employed as a special legislative consultant to the Bureau of Planning at the state Department of Mental Hygiene. I cannot tell you what that involved. It may have been an outgrowth of the connection I had with the individual in doing the laws affecting the mentally retarded.

MCCREERY: Do you remember who you might have worked with on that or any other detail?

WERDEGAR: No. With all apologies to the individual who made that happen for me, I don’t.

I want to say that after going over to see Frank Newman my baby was born, a boy, Maurice, and he was one or two and three years old during these years. After that I didn’t actively seek employment. I was now home in the suburbs with a preschooler. About four-and-a-half years later I had a second baby, another son, Matthew.

But in 1969 Boalt called — perhaps that was an outgrowth of their continuing awareness of me, given my working with Dean Newman — to say that the California College of Trial Judges, which is now CJER, Center for Judicial Education & Research, was planning to write the first statewide benchbook for judicial officers. This benchbook would be on misdemeanor

procedure, and would I be interested in assisting them in that under the guidance of a committee of judges?

I was delighted to do that. So once again I undertook part-time employment, writing and research, and I produced — under their auspices, but I wrote the entirety of it — the first statewide benchbook.<sup>9</sup> There had been local Los Angeles superior court benchbooks, but this was published statewide by the College of Trial Judges on misdemeanor procedure.

MCCREERY: You mentioned that L.A. had its own local —

WERDEGAR: I think it probably did.

MCCREERY: What other models did you have to draw from, if any?

WERDEGAR: There were none. I did it in its entirety. The judges' committee — and I remember some of them, Claude Owens and Manny Kugler from Southern California — they were so gracious and nice to me. They would oversee what I was doing, and how much input they had in the format and the topics I really can't tell you. That was so long ago. But that's what I did, and I was very grateful for that opportunity.

As I say, I had a second son at that time. I was working part time. In our community, as far as I knew, I was the only wife and mother working. None of my children's friends' mothers were working. None of the wives we knew were working. The attitude of the times — this is an era thing — was — I may have mentioned one of our social friends, a man, one evening said to me, "It's so nice that David lets you work."

I thought it was, too. David was unusual in that he had encouraged me, first, to go to graduate school and, then, to work. But my work was not to inconvenience anybody, and part-time worked very well in that regard. When his family came to visit I would stop work, and I would entertain them and take care of them. In their view this career was a negative. This was not something to be proud of. Perhaps because of their era or their background the idea was that if the wife was working it was a reflection on the husband's ability to support the wife.

MCCREERY: As you say, the other young mothers in the area where you lived were not working. We're talking about you taking part-time work,

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<sup>9</sup> CALIFORNIA MISDEMEANOR PROCEDURE BENCHBOOK (California College of Trial Judges, California Continuing Education of the Bar, 1971; rev'd ed. 1975).

which sounds like a limited responsibility, and yet what a feat of juggling, really. How did you manage these various pieces of your life at that period?

WERDEGAR: Thank you for that. First of all, as I might have observed in some other interview elsewhere, all I did was work and take care of my family. There was no tennis playing, no lunches out with women, no anything for myself, nothing. No exercise. Nothing. But I didn't question that. That was it, and I was really thrilled to be — I enjoyed the work I was doing. My career had now definitely evolved into research and writing, which in the end was so congenial to me. I loved it.

But that's how it was. I had a babysitter when the children were home, and when I came home she left. When I was home, there was nobody there but me. I did do it all. But I took that in stride. It seemed natural. We were a very conventional marriage and family for the time except that three days a week I went over to Berkeley.

Sometimes I worried that I was perhaps not giving my children all that other children were getting in their home, but I made my peace with that.

MCCREERY: Certainly there were others who would plant those doubts now and then?

WERDEGAR: I can't remember anybody doing it deliberately except, as I say, with my in-laws. For them this was not something to be proud of. This was something to overlook — which was such a different time.

MCCREERY: Given that your responsibilities at Berkeley over these couple of different projects spanned a number of years, what do you think you took away from that experience of doing these independent research projects, essentially, and then presenting the results? How did that develop your ideas about who you were as an attorney?

WERDEGAR: It was congenial to me, although in many ways I wish I had had the experience of working in a law firm. I do think that circumstances took me to a path that was my path. I had aspired to be a judicial clerk. I had hoped to be a law teacher. These were academic pursuits, academic and reflective, and that's the path that came my way. Looking back, I think that's the path that I was meant to have.

You had mentioned that my work was part time and so on. I want to mention a family incident. As I earlier described it, my work was low-key.

I think my boys hardly noticed that I was working. Their father was a big professor of medicine. He had a very demanding career.

One night when my second son was four years old — this was in the seventies — we were sitting around the dinner table. He said to me, “Mommy, can boys grow up to be lawyers, too?” [Laughter]

We were floored. We were floored because it just shows you what environment will do. There were no other women attorneys. He’d never known one. But he thought, I don’t know — and I wasn’t a high-profile practitioner even at that time. So at age four he asked, “Mommy, can boys grow up to be lawyers, too?” I told him yes, they could. Many, many years later — and now he is a lawyer. It was so funny. We thought we should send it in to [columnist] Herb Caen because at the time it would have been hilarious.

MCCREERY: Yes. Thank you. Say a bit more about the California College of Trial Judges as it existed then. What did you learn about that operation and its overall mission?

WERDEGAR: Not much. These judges, two of whose names I remember, were enterprising and concerned about improving the education of the judiciary and the caliber of judges. They were forward-thinking. I’d meet with them once in a while. During that time I might have been working in the facilities, the physical plant, of CEB, which is California Continuing Education of the Bar.

MCCREERY: Which was located where then?

WERDEGAR: That was located in Berkeley. That may be where I used to go to work. When the benchbook was published, as I mentioned earlier, I stopped looking for a job. But projects came to me, and CEB asked me to join them, which again I was happy to do. They had maybe four women attorneys on the staff, which at the time was unusual.

MCCREERY: What was the leadership then, do you recall?

WERDEGAR: Bill Carroll was the director of CEB, and Curt Karplus was one of the assistant directors. He was a family friend from my husband’s college days. He now himself works for CJER. After having retired from CEB, he now edits books for CJER.

What CEB’s charge was — it was affiliated with the University of California and the State Bar of California — was to write practice books for

attorneys and put on programs. There, once again, I would be editing practice books for attorneys. You solicit input from practicing attorneys. On occasion I would write a chapter on my own and have practicing attorneys review it. A lot of what I did was in the criminal law area.

MCCREERY: Did you develop particular interests in certain areas of the law that you were working on?

WERDEGAR: Having worked on the misdemeanor procedure benchbook and having been responsible for some of the CEB criminal law books, I think my expertise began to focus there. But I also wrote a chapter in a discovery book.<sup>10</sup> You were a Jack or Jill of all trades there, and it was practice law so your product was always reviewed and input was given by practicing attorneys.

CEB was, again, a pioneer in the country in practice guides for attorneys. Rutter Group has come along since then. But CEB was the absolute pioneer and always of a very high quality and standard.

MCCREERY: What do you recall about the others on the staff with you at that time?

WERDEGAR: I made some acquaintances that I enjoyed, but mostly the work was solitary. You'd go to your office. You have your things that you have to do, and you do them.

MCCREERY: I'm curious whether you had any role in the review of these projects by practicing attorneys, which you said was so much a feature of it. What exposure did you get to the practicing attorneys?

WERDEGAR: In person probably very little, but certainly I would receive their comments and be grateful for them and adjust the product accordingly. Judges would weigh in as well, so there was definitely a cross-fertilization that way. But I wouldn't be having that many in-person meetings with practicing attorneys.

MCCREERY: In time you took on some greater role in the criminal law division?

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<sup>10</sup> [coeditor with Manuel E. Nestle] JAMES R. JENNER, *DISCOVERY* [California Criminal Law Practice Series] (California Continuing Education of the Bar, 1978).



WERDEGAR: They gave me the title of Director of the Criminal Law Division, which may have consisted of myself. [Laughter]

MCCREERY: I hope you weren't too tough on yourself. [Laughter]

WERDEGAR: I should interject here that this was in the early seventies. I was commuting from Marin County to Berkeley. Actually, part of that time we came to the gas crisis. Do you remember that? I would drive to Richmond and take BART from Richmond to Berkeley. It made that much difference about the gas that you were using. In those days, during the gas crisis — it was the Carter administration — your life revolved around how you were going to get gas. You would plan to line up at eight-thirty or at five o'clock at a particular gas station. It's interesting to remember those things.

But the world was changing, outside of my vision, but I think it's worth mentioning that in 1974 in the Doonesbury cartoon, he had his character Joanie Caucus — who I believe was a middle-aged housewife — apply to law school, and she applied to Boalt Hall. I think that's an interesting historical note. Boalt accepted her, and from what I read they kept a file on her. She must have passed her courses because she graduated from Boalt in 1977, and Doonesbury — what's his first name?

MCCREERY: Mike Doonesbury? Or are you talking about Garry Trudeau, the cartoonist?

WERDEGAR: Trudeau. Garry Trudeau was the commencement speaker. This is not part of my history, but it reflects how the world was changing.

Out in the suburbs I knew so many women who were college educated and intelligent and who had not gone on to do different things because of the time. It just wasn't happening. I felt for them because now they were beginning to realize, as Betty Friedan in *The Feminine Mystique* anticipated, that there was life beyond being a perfect hostess and wife and mother and a good cook, which is not to disparage those roles at all. But I think that had to be a little unsettling, and I was always so grateful that I had done something out of time.

MCCREERY: How were you received by your women friends who were not pursuing careers?

WERDEGAR: Women friends. I didn't have that many. I had some college friends, and I still do. They had gone off in the other direction. And

the mothers of my sons' classmates — I would see them on occasion. We had some social life and very nice neighbors, but I didn't have time to get involved in all the things that perhaps they were doing that would form bonds and social relationships with them.

While I was working at CEB — to go back to my theme that I never applied for another job — I had been there about six or seven years, and one day I got a phone call from Paul McCaskill, who was the dean of University of San Francisco Law School. He asked me if I would like to come and interview to teach at USF and to be an associate dean there.

MCCREERY: How do you think he came to telephone you?

WERDEGAR: I don't know what motivated him, but how he came to know me, I subsequently learned, was there was on the faculty a Professor Mike Hone. Actually, Paul and Mike Hone had been the year behind me at Boalt, and they knew me. I did not know them, but they knew me. If you're one of the few women in a law school and you're number one in your class, you are more widely known than you know the others. You're more conspicuous. Why Paul chose to reach out to me I don't know, but that's how he knew me.

I did interview, and I was absolutely thrilled to be offered a position and to leave CEB, which had treated me very well. But I had been there close to seven years, and I was now ready for a change. So I went over to USF and took the position of associate dean for academic and student affairs and also was required or permitted to teach. But I was not on the tenure track.

MCCREERY: That's quite a title. What did Dean McCaskill have in mind for you in that role?

WERDEGAR: It's very interesting that you say that. The dean for academic affairs is the dean that's responsible for maintaining the ABA requirements for accreditation and for maintaining the academic standards of the school. The dean for student affairs, as it was practiced at USF, was responsible for counseling students in academic difficulty, for allowing or disallowing their excuses for — whether it was missing a final or needing to take it over or whatever lapses had occurred in their academic life.

I will say with some conviction, the two jobs were in irreconcilable conflict. On the one hand I would be counseling with empathy and concern

students who were on the verge of flunking out and always wanted to stay — and your heart goes out to them — and on the other hand presiding over the academic standards meeting where these students would petition to stay and the committee had to decide.

USF at that time, which is about 1978 to 1981, was a very divided faculty on the subject of affirmative action and academic standards and assisting minority students and carrying them along and giving them an opportunity and, on the other hand, maintaining academic standards.

Because it was a private school — at that time it made a difference — now the tuition at the so-called public schools — I say this with some feeling — and the private schools is not that different, but then the tuition was considerably different. These students, with loans and grants but also working to pay their way — it was an ethical dilemma whether you allowed them — the committee — it wasn't up to me personally, but — allowed them to continue — and of course another semester of their life, another semester of payment — when the odds of a particular individual succeeding seemed dim.

I can only say, I think having the two positions in one individual was not a good idea, and I hope it hasn't been perpetuated.

Paul McCaskill was a delightful fellow, wonderful to work with and just a marvelous, in my judgment, dean. But there were a lot of faculty politics that I was *completely* unaware of. I was naïve. It was an eye-opener.

I taught criminal procedure, and I taught a seminar on children and the law. I was thrilled. I had always hoped to be a professor, along with some other things I'd always hoped. But as you hear me you see it was mostly in the academic realm.

MCCREERY: I wonder to what extent this job, this associate dean job, had existed in that format before you took it?

WERDEGAR: It had, and the individual who held the job seemed to have no problem with it. It continued after I left, and the individual who had the job seemed to have no problem with it. [Laughter] I don't know. I used to have nightmares about these students, my concern for them and my dilemma as the chair of the academic standards committee and the counselor to the individual.

MCCREERY: You mentioned it being a divided faculty. First of all, how large was the faculty and where did you see the division, as you observed it?

WERDEGAR: I can't remember how large the faculty was. I really don't know. I would be guessing. They had a lot of adjunct faculty, too, which means practitioners who will come in and teach a course. But I don't think they had a role in this internal division. It was just the very liberal, affirmative-action minded, "give a handout," "help people along" side and the more standards-oriented, concerned for the standing of the school —

MCCREERY: These were very much issues of great currency at that time.

WERDEGAR: They absolutely were.

MCCREERY: Affirmative action. I'm thinking *Bakke v. University of California* was decided somewhere around 1973. I'm not sure exactly.<sup>11</sup>

WERDEGAR: Yes, that's true. And this being a private school, it could do whatever it wanted insofar as how it managed its admissions process. USF, to its great credit, had a lot of academic support systems. To this day it prides itself, I think justifiably, on having a very diverse student body and giving opportunity to students and giving them a chance. But there's always the end of the road where some will make it and will thrive and others won't.

MCCREERY: Who else was in the higher structure of the law school administration besides you and Dean McCaskill?

WERDEGAR: There was another associate dean, and her name was April Cassou. She had been a graduate of USF. So it was Paul McCaskill and then April and myself. April was a godsend. She had graduated first in her class from USF. I had graduated first in my class from whatever law school you want to call it, and Paul was very proud that he brought in these academic stars, thinking that the faculty could not complain about that. April and I and Paul formed the hierarchy. There were other individuals whose names I'd love to give you, but I can't at the moment. I have to look back at that.

MCCREERY: How was Dean McCaskill as a leader in these areas where you struggled?

WERDEGAR: I think Paul was a very moderate individual, and I think that he was under — I didn't know that — he was under some faculty pressure when I came on. He retired or stepped down from the deanship three

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<sup>11</sup> 18 Cal.3d 34 (1976).

years later. He had served for a long time. I remember when he interviewed me, since I was serving at his sufferance and I wasn't going to be a tenured faculty member, I said, "How long do you think you'll stay?"

He said, "I've been here five years and I've already served longer than most deans of law schools. But my future is open-ended." But actually — well, he did serve a good long time, and he served well. He stepped down and he continued to teach for many, many years. I think he was a much beloved professor.

MCCREERY: Say a bit more about your own teaching, starting with criminal procedure.

WERDEGAR: I had never taught, so you have to put a course together. That's a bit of a challenge. You have a casebook, and you prepare your lectures. Given my personality they were always prepared down to the nth-degree. I remember my first day walking into a classroom, knowing that I had to put one foot in front of the other and get up on that podium, which I did.

I enjoyed it. I was very surprised, having been away from law school for a good fifteen, sixteen, seventeen years, to find that at the end of the term not only did I grade the students, but the students graded the professors. This came as a great surprise to me. [Laughter]

Speaking of my grading the students, I was extremely conscientious about that because I knew that to them, to each individual student, every little grade point could make a big difference. I'm not sure it's still that way. Boalt has gone to top quintile, middle, bottom — high honors, honors, pass. That might be more humane. When I was at Boalt every decimal point counted, and I think it did at USF.

You also had to grade on the curve. You had to have a certain percentage that got A's. You had to. And you had to have a certain percentage that got lower than C. I would make these charts at home, and I would have these piles, and I would go over it. It was very stressful for me in an effort to do right by the students. But then I would get my packet of reviews. The registrar, Judy Miner, would put them together. She was a wonderful woman who later became dean of a two-year college down on the peninsula, Foothill–De Anza. The good ones would be on the top [Laughter], and then you'd go down and they'd be less favorable. That was my experience.

MCCREERY: In the area of criminal procedure how did you approach that, if you remember?

WERDEGAR: There was certain material in the casebook that you chose that would guide you, and then you would make your own lecture notes. I would try to bring real life into it by picking things out of contemporary newspapers or legal papers, things that would make these facts come to life. I got pretty good reviews.

MCCREERY: How did you like teaching that subject matter?

WERDEGAR: Oh, I did. Then I had this seminar on children and the law, which was a smaller group and they had to write papers. The thrust of that seminar was, who decides for a child when it comes to health issues or emancipation? If your parents want you to give your kidney to your ailing sibling, who makes that decision for the child? Or do the parents have autonomy and an absolute right? Should the child be able to speak for herself and at what age? It was very interesting.

MCCREERY: Had USF had such a course before you taught it?

WERDEGAR: I don't think so, no. I modeled it after a Professor Robert Mnookian at Stanford. He had a casebook, I believe.

MCCREERY: Say a bit more about your students, if you would, and what you observed in them.

WERDEGAR: The students ran the gamut. There were some that were struggling, and the top students — Paul McCaskill used to say, and I would agree with him, that the top 5 percent at any law school, in his judgment, were comparable. But at a second-tier school, which I think USF can fairly be described as, the drop-off happens quite a bit. On the other hand, USF has a wonderful history and presence in San Francisco. At one point — I can't speak for today, but — so many of the judges were USF law graduates.

It's a Catholic school. I've never been on a Catholic campus before, and there were statues of the virgin on the main campus. You would call various administrative personnel "Father." That was a first for me, not being of the Catholic faith. But it had a wonderful feeling. There was a warmth, apart from the divisions in the faculty that I'm speaking of. I think at USF generally there was a wonderful, warm feeling and a caring for students.

MCCREERY: How did your own relationships with your fellow faculty members proceed? Is there anything at all? You're indicating you don't want to talk about that?

WERDEGAR: I think it's best not.

MCCREERY: Were there other women teaching?

WERDEGAR: Yes. April and I were a wonderful support for each other. I can only repeat that the faculty was very divided, and part of the faculty was very aggressive in its agenda as to what they thought USF should be doing.

MCCREERY: What comparisons could you make to other comparable law schools, if any? Was there any way to measure your experience against those of others?

WERDEGAR: No, in the sense that I'd never been in a comparable position. Of course, I'd been at two other law schools. They were much bigger. Someone once quoted to me an adage that politics in a faculty — I'm not getting the quote right, but — faculties can be very political. I definitely experienced it, and I definitely had no idea that that's what could be. But that's what was.

MCCREERY: May I ask how you managed what sounds like a very big job vis-à-vis your family life?

WERDEGAR: My family life took a bit of a back seat during that time, but my boys were in junior high and high school. I was there for three years, and they seem to have survived. There are stresses in life as you go through, but with the passage of time they become less memorable.

MCCREERY: You mentioned that Dean McCaskill stepped down in 1981. What effect did that have on you?

WERDEGAR: That brings me forward in my career. Once he announced his stepping down, I anticipated that I would not be retained at USF. I was not on the tenure track. They were searching for a new dean, and I did contemplate, "What next?"

One day I was xeroxing an article out of the legal newspaper for my criminal law class, and on the back of the page was this advertisement of a judicial staff attorney position. I completed xeroxing the article, but I retained the announcement about judicial staff attorney. It was for the First

District Court of Appeal in San Francisco, and I applied to fill the judicial staff attorney position. They took my application. I was applying the last day or something very close to the deadline. I didn't hear for a very long time.

MCCREERY: Pardon me. May I ask what other options you might have considered when you were looking for something new at that time?

WERDEGAR: I was thinking that I should look, and I saw the article at that stage. I was still at USF and not actively looking. The new dean had not been recruited and had not come. I was thinking ahead to what was probably going to happen.

Meanwhile, USF did bring on a new dean. He came from Denver. He interviewed April Cassou and myself and the other administrative people and it seemed clear, although he was not that obvious about it, that he would be bringing in his own people.

But sadly for USF, that dean recruit went down in flames because, after he was selected but hadn't yet assumed the position, he was arrested in Denver for soliciting a homosexual act. Poor USF. Before he came on board but while he was the one they had chosen they had introduced him around. They cut that short. I think they had an acting dean after that. They recovered beautifully. It was actually a near-miss for USF.

Meanwhile, finally Lee Johns, who was the principal attorney on the Court of Appeal, called me for an interview. I was interviewed by a judges' committee at the First District Court of Appeal, and then the wait was very, very long. I mean, weeks stretched on.

MCCREERY: What do you remember about that judges' committee?

WERDEGAR: There was a Justice Rattigan on it, and I can't remember who else was on it. Ultimately the call came, and I was going to be hired to be on the central staff of the First District Court of Appeal.

MCCREERY: What were the pros and cons for you personally of such a step?

WERDEGAR: There were no cons. It was all pros. I was thrilled. I guess I've said that about many of the jobs along the way. I was fortunate that what came my way was so agreeable to me. I'd always wanted to work for a court.

I should mention that, in the interim from when I graduated — when a judicial clerkship was an annual situation and then you'd go on to a law firm



— in California it had become a career position. This was brand new, that you would have a career as a judicial staff attorney, at least in the state court.

I accepted the position and started on the central staff, which is a staff that's not attached to an individual, not attached to any particular judge, but that works for a number of different judges. At that time there was only one woman on the court, and that was Betty Barry Deal. The rest were men.

I was on central staff, but then Justice Ed Panelli was appointed to the First District Court of Appeal and I was assigned to work for him personally.

MCCREERY: That happened right away, more or less?

WERDEGAR: No. I'd say a year or two later he came and I was assigned to him.

MCCREERY: Can I stop you and ask you to talk a little about what you did on central staff?

WERDEGAR: We got miscellaneous projects. We would be assigned random cases. I don't know that there was any particular division between what would be assigned to a personal staff attorney and what would be assigned to a central staff attorney.

MCCREERY: What kinds of cases did you note, realizing there's a whole range coming at you?

WERDEGAR: Oh, yes. Everything. Workers compensation. Civil cases. Criminal cases. You would work with different judges, which was interesting because they were different, of course, as you would expect, in judicial philosophy, political persuasion, and so forth. But at the time I was in the First District, Division Four, and the justices were Thomas Caldecott, Winslow Christian, Marc Poché, and Joseph Rattigan. They were all, in their way, fine justices and a pleasure to work with. Then came Justice Panelli.

MCCREERY: How did you come to be hired onto his own staff?

WERDEGAR: I must have been assigned to him. Lee Johns was the principal attorney. Lee Johns thought very highly of me, and he might have assigned me to Justice Panelli. At that time, I think each justice had one attorney, or perhaps one personal attorney and one from Central Staff.

MCCREERY: What was your introduction to Justice Panelli himself?

WERDEGAR: After he had been sworn in, I saw him walking down the hall. I hadn't met him then. I didn't know him, but I saw him walking down the First District hall. He was so elated. He was *so elated*. That's what I remember about Justice Panelli. [Laughter] Then we were introduced afterwards.

MCCREERY: It was an exciting step in his own career.

WERDEGAR: It was.

MCCREERY: What did you know about him beforehand, if anything?

WERDEGAR: I knew nothing about him, nothing.

MCCREERY: What was he like personally, at those early times?

WERDEGAR: At *any* time he was just such a human being, such a warm, down-to-earth, personable person and a pleasure to work with. I had no trouble working with him. The cases at the Court of Appeal were largely routine. There would always be exceptions, but unlike the cases that come to the Supreme Court that are usually exceptional — so I think the way it went is we would just work up the cases and present it to the judge, talk about it if the judge had any concerns, and move on to the next case.

MCCREERY: What was the composition of his division at that time?

WERDEGAR: That's a good question, and I would have to go back and look in the front pages of our reports.

MCCREERY: We can look it up, but I'm just wondering what you might recall about his immediate colleagues.

WERDEGAR: I should have looked at that. If you or I look it up, then we can talk about them. Right now I can't remember. He was only there for a couple of years when they established a new Court of Appeal division, the Sixth, in San Jose, and that's where he wanted to be.

MCCREERY: Before we go there, may I ask what you might have noted about Justice Panelli's own progression in this job? He was moving up from the superior court and, as you say, was elated to be there. How did you see him go into this job and learn it?

WERDEGAR: He was a very smart man. He was number one in his class, too. I, after all, was the staff attorney so I was not judging how he was

adjusting to his job. I think he came to it beautifully and took it on easily and, as I say, was so happy to be there.

MCCREERY: Describe your working relationship with him, if you could.

WERDEGAR: I could do more of that when it comes to the Supreme Court, where there was more occasion for interaction and so on. Here I would produce the draft opinion, and he would accept it. As I say, the cases were not as challenging, perhaps, or as controversial or as prone to provoking division as on the Supreme Court. I can't remember anything exceptional except that I loved working with him and he liked my work. It was just a very good working relationship.

As far as I can recall his relationship with his colleagues on his division, which we're going to look up, was cordial as well. As I say, he was only there for, I believe, a couple of years before the San Jose court opened up and I was relegated back to central staff.

MCCREERY: Say a bit about your staff attorney colleagues as you got to know them over these several years.

WERDEGAR: They were all bright and enjoyed their work. Lee Johns. I liked him very much. A fine person. Once again, it wasn't a very social experience. You have to remember, I went to work and I went home. But I have very agreeable memories of the people I worked with. We were all cordial, but I didn't interact with them a great deal.

MCCREERY: The job did give you a different angle on the law in California and the judicial branch.

WERDEGAR: It did.

MCCREERY: What were you noticing there that you hadn't known before?

WERDEGAR: At one time when I was working for Division Four, there were some sharp divisions among the justices. I do know that I was perceived as someone who could write something that would not divide them, that could bring them together.

One of the justices was Marc Poché, who had been a year ahead of me at Boalt and was a fine human being, just really a fine human being. But he would occasionally — I might say more than that — be at odds with his colleagues. It just depends who's in a division at a particular time, and this can happen in any court, any division.

Marc Poché liked my work, and he also had been on law review when I was elected to the law review at Boalt before I left. He was one of the ones who fought for me to get the appointment. He suggested that I apply for a judgeship. Yes. I was very surprised, but he admired me and he perhaps anticipated that at this time — now Governor Deukmejian — might be looking for a woman.

I allowed him to persuade me, but I had to be persuaded. Governor Deukmejian, as I say, was the governor, and his philosophy about judges was that they should start at the bottom and work their way up. At that time the bottom meant the municipal court. Then if you proved yourself you might have a chance to be appointed to superior court. If you proved yourself there, you might be a candidate to be elevated to the Court of Appeal. That's what he insisted on.

So I did submit an application to be appointed to the municipal court, not because I thought I would be well suited to the municipal court but because at that time that was where you had to start.

MCCREERY: Which county did you apply in?

WERDEGAR: That's an interesting question because I lived in Marin and I worked in San Francisco, and I was known to neither bar. I think I allowed as how I would be happy to serve in either county. Interestingly, Marvin Baxter was the appointments secretary, and he did interview me in Sacramento.

At the same time there came a vacancy on the California Supreme Court, and Ed Panelli's name was bandied about as a potential candidate for that. I think Otto Kaus had retired. So I had two potentialities. It was clear that, given our past relationship, if Ed Panelli were appointed to the Supreme Court he would ask me to come on board as his staff attorney.

Meanwhile, I don't how it would have gone, but I had been interviewed by Marvin Baxter for the municipal court. I had these two opportunities potentially pending.

MCCREERY: Take me through your own mental process about this.

WERDEGAR: I will. I wanted both. But it came to pass that Justice Panelli was named, and he told me later that after calling his wife — the governor called him, and after calling his wife — he called me. I had a decision to make. Of course, I was deeply flattered and very happy for

him. But was I going to go with Justice Edward Panelli and serve as a staff attorney on the highest court in the state, or was I going to, if the chance came my way, accept a position at a lower trial court and be a judge in my own right?

It was a very difficult decision. I ultimately decided that I would be better suited and probably much happier serving as a staff attorney on the California Supreme Court rather than being on the muni court, which I visited in San Francisco, and handling the kinds of issues and cases that come there.

MCCREERY: Why did you think you were better suited, specifically?

WERDEGAR: For all the reasons that my earlier background would suggest. I'm more of an academician. Research, writing, analyzing issues. That's not what you do on the muni court. You have cases. You have to decide them. They're a whole variety of types of misdemeanors and domestic issues, and so forth. I decided to accept Justice Panelli and felt that in doing so I had put behind me any hope of a judicial career in my own right.

MCCREERY: Who else did you consult about your decision, if anyone?

WERDEGAR: My husband. Oh, and a friend of his. Well, Justice Poché had urged me to do this because he felt that I would be a good judge. I can't say that people naturally thought I would be a terrific muni court judge. I don't know. But I consulted my husband, and we talked about it. I lived with what my feelings were, and I landed where I should have, which was the right thing.

MCCREERY: You say you talked with a friend of his, as well?

WERDEGAR: Yes, who worked in the health department over here (in San Francisco). He said of the muni court, "I don't think so." [Laughter] He was just being friendly.

MCCREERY: What do you remember about the moment when Justice Panelli called you right after calling his wife?

WERDEGAR: I was exhilarated. I was just ecstatic because I had my own doubts about the muni court before that. Having applied and having been interviewed, I felt that were it to come my way I almost was obliged to accept. Now I had a choice.

MCCREERY: Realizing that you had been at the First District Court of Appeal now for several years and located here in the city in proximity, what view and inside information, if you will, did you have about the California Supreme Court? What had you observed about that body?

WERDEGAR: I don't think I paid too much attention.

Rose Bird was chief, and I wasn't too aware of the other justices. They might be surprised, but I'm not surprised now that people aren't all that aware of us. [Laughter] I was looking forward to being in these hallowed halls and becoming, in a remote sort of way, more acquainted with the justices. But as I say, Rose Bird was chief, and it was only about a year later that she was recalled.

I do remember meeting her. She had a reception in her — the building was configured differently — it was before the earthquake of 1989, and judges' offices were together and staff was positioned up on different floors in different corners of the building. But she had a reception for Justice Panelli, and he told me, "Come on along." You know how he would.

So I did, and he introduced me to her, and she said to me, "You dated Pete Wilson."

And I said, "Yes."

It was a very political time. Deukmejian was governor, and I think he had campaigned, and maybe Wilson — I don't know what political office he had at that time — but the Republicans were outspoken about their disagreement with the direction of what would be called the Rose Bird Court.

I was very surprised by that comment, and afterwards I reflected. She was a Boalt graduate, and she did live at International House, as did I my first year. I thought maybe we overlapped. But I checked the dates. We did not overlap.

I could only surmise that she had done research on me, which Rose Bird was known to do. I guess she was so sensitive to political movements against her in some way that maybe she was concerned that Justice Panelli had brought on an attorney who was going to be political. That's all I can surmise. We did not overlap, and it was a strange comment to make to a staff attorney.

MCCREERY: Upon first meeting?

WERDEGAR: On any meeting, since I'd been married for twenty-five years or whatever it was. Yes.

MCCREERY: What other interaction did you ever have with Chief Justice Bird?

WERDEGAR: I didn't, nor would I as a staff attorney necessarily have any interaction with any judge. But Chief Justice Bird at the time was known to keep her door closed and to come up the back stairs and go into her office. I think it's a little different now. I think staff attorneys have more exposure to judges. Then I didn't. It was just Justice Panelli.

MCCREERY: We know Justice Panelli assumed that office in December of 1985. What do you recall about the very beginning of you and he getting started together on this court?

WERDEGAR: At that time Justice Kaus had had two attorneys, Alice Shore and Barbara Spencer. Justice Panelli kept them on. I joined them, and we would work on the cases. He had annuals. The court at that time would have — each justice would have — two annuals, so these bright young people, fresh graduates, would come and serve for a year and then leave and move on, and he would bring on two more. They were always very nice people.

Justice Panelli would assign the cases. The distinctive quality about Justice Panelli as a judge was that the direction definitely came from the top. He had a feel, and it's one of his strong qualities. That's probably why he's a superb mediator. He had a feel for what, in his mind — how a case should go, so he would tell us. This might be an overstatement, but he would say, "This result looks right. Take care of it. Write it for me." He would discuss the merits or which way a case should go.

The staff attorney would come back to him if, as we say in that line of work, it doesn't write: "I understand that this is the result you think might be desirable, but — ." I'll say, parenthetically, nothing is done until you can "write it" with integrity.

But otherwise he had a feeling for how the case should go, and we would know what that feeling was, and we would do it that way. The court at that time wasn't as structured as it is now. Now we have cases assigned to a judge, a draft calendar memo is circulated, other chambers respond in

writing to what they think about that draft calendar memo and whether they agree or disagree. It was more informal then.

MCCREERY: How so?

WERDEGAR: You didn't have this formal preliminary response where everything was in writing. I think maybe the judges talked about it more informally. Not having been a judge at that time I can't be sure, but I think things have become more structured.

MCCREERY: What cause did you have to interact with the other staff attorneys?

WERDEGAR: On Justice Panelli's staff? We did. We did a little bit.

MCCREERY: But you typically would have individual assignments of cases?

WERDEGAR: We would definitely have individual assignment of cases. Having been with Justice Panelli before, I think he trusted me a lot.

MCCREERY: What about the staff attorneys for other justices? How well did you get to know them and work with them?

WERDEGAR: Let me think. I'm trying to think who was here. I don't think there was that much interaction. I think there's a lot more now, a lot more of staff attorney-to-staff attorney, much more than there was at that time.

MCCREERY: But as you say, if there was less a formal process of getting other justices' response to a proposed opinion, how was that done in those days? Was that Justice Panelli working justice-to-justice?

WERDEGAR: I think the justices talked a lot more then. The physical setup of the court really encouraged it. If somebody's right next door, you might actually go into their office and ask what they were thinking about a particular case.

After the earthquake, when the building was — of course, I was on the court after the earthquake — but there was a discussion, "Do you want a cluster of chambers, the judge and the judge's staff, or do you want judges, as before, having proximity?" There are advantages both ways, and the court chose to have clusters. This way, I just cross the hall, and there's my attorney I want to speak to.

Part of it is personality, too. Some judges, even today, will pop into your office and talk to you. Others don't want to talk to you. They want



everything in writing. Others don't want to talk to you anyway. I've known judges who are happy to talk about cases and judges whom you are not welcome to talk about cases with.

MCCREERY: What did you observe about Justice Panelli establishing relationships among his own peers on the court, knowing that you were a staff attorney?

WERDEGAR: It's not for me to say, but I think he did easily. Let's see. Who was on the court? At the time when we first came it was Justices Reynoso, Grodin. They and Chief Justice Bird were the ones that were not retained. Then came Eagleson and Kaufman and Arguelles. Kennard came later.

MCCREERY: You had Justice Broussard.

WERDEGAR: Oh, yes. Justice Broussard. I think he was — these are just a staff attorney's impressions — I think he was a very warm, cordial man, as was Justice Panelli. My expectation would be that he got along with everybody. Whatever his private thoughts were I wouldn't have known. Perhaps you know now that you've done his history. [Laughter]

MCCREERY: Justice Mosk was here as well, and of course your only direct knowledge of him was via his role as state attorney general. What can you say about him as you observed him in this period?

WERDEGAR: Justice Mosk. What was notable during this first period was that this campaign against these judges was happening. Justice Mosk, who was also on the ballot — some of this is hindsight and what's been said — but he was very, very late to declare that he was going to be on the ballot, until the last moment. People, given his age at the time, incorrectly assumed that he maybe wouldn't stand for retention.

Meanwhile, the campaign was building against Chief Justice Bird and Justices Reynoso and Grodin, who were perceived by the individuals who were criticizing them as being, I guess, too liberal. The campaign focused on the death penalty, but we know historically that it was financed by defense attorney groups who felt that the court was leaning too much in favor of plaintiffs, perhaps. I'm not an expert on this.

MCCREERY: What did you think personally, if I may ask?

WERDEGAR: I did not have a personal view. I was here to do what my judge wanted me to do. But when the election came back and they were not

retained, I think everybody in the building was stunned. This had never happened before, and it was really a stunning event. My feeling was, just on the principle of it, that the court should be draped in black because it bespoke a political response to judging which, in my life that far, hadn't been part of the California judiciary. But it was an earthquake then.

I know a lot more about it now than I did at the time, but it was history and California has moved on. Governor Deukmejian appointed people that he thought would be solid judges. They came on, and we continued about our work.

MCCREERY: What do you recall of the transition period when, I gather, Justice Broussard assumed some leading role just in the interim?

WERDEGAR: Laura, I don't know. My perspective was limited to — I don't remember having a large overview. I just did my job. [Laughter]

MCCREERY: As you say, the effects of that election were such that three justices did not retain their jobs. Justice Mosk, as we know, managed to escape that fate. Do you have any further thoughts about how he did that?

WERDEGAR: Justice Mosk, I'm not the first to say, had a lot of charm. His life reflected that. The word I would use — he was very astute, very shrewd. He knew how to move through life and have it work for him. You add that to his charm, and from an outsider's point of view he just moved on and did what he did. I was delighted to know him, especially when I knew him as a colleague later. We'll get to that later.

MCCREERY: As we know, Governor Deukmejian elevated Justice Malcolm Lucas, who was already here.

WERDEGAR: He was already here, yes.

MCCREERY: Into the role of chief justice. What did you think of that news at the time?

WERDEGAR: It wasn't for me to be thinking about what Governor Deukmejian was doing with the court. It would be different if I were a judge on the court. Malcolm Lucas seemed like a very appropriate — and I came to serve with him later, too, which is all lots of fun to think about. It seemed like an obvious choice once the former chief was gone. It seemed like it was injecting a new stability into the court and that he was certainly one well qualified to carry it forward in tumultuous times.

MCCREERY: How well did you know Justice Lucas at that point?

WERDEGAR: At that point not at all. No. The only judge I knew was my brief encounter with the chief justice, former Chief Bird, and Justice Panelli. I would see another justice, like Justice Broussard, at the elevator and had a very warm impression of him. I would draw some impressions of the other judges, but they were just a staff attorney's impressions, nothing profound.

MCCREERY: As you indicated, Governor Deukmejian brought in three new justices in fairly quick order, Justices Arguelles, Eagleson, and Kaufman. How did they change the mix, as you saw it?

WERDEGAR: I think — I'm not sure. Maybe being on the more conservative side, maybe the cases were resolved in a way that was more congenial to the judge I was working for. But I can't say. That would be for him to say. It was a new order. It was a Deukmejian order. We know that politics does that. The appointing authority has the privilege of appointing people that are more, potentially, in line with the thinking of the appointing authority.

MCCREERY: I understand your point that your job was in no way a political one.

WERDEGAR: Not at all.

MCCREERY: But I wonder, knowing of your background and your having worked in the Kennedy administration during this very exciting time of civil rights laws being enacted and so on, what were your own politics at this point?

WERDEGAR: I'm not a strongly political person. I have my private views, but I'm not politically astute with respect to internal politics. I didn't see the job as a political one. Whatever private thoughts I had about what happened were my private thoughts.

The pleasure of being a staff attorney — and I think the pride of any staff attorney in the building — is that you can write an opinion any way. That's your skill. As I say, on occasion if it wouldn't write, for the good of your judge you would go and say, "This doesn't work," and we would talk about it. But staff attorneys are craftspeople, and you have a talent in working with the law. That's the attitude I had.

MCCREERY: How did your writing skills develop as you — ?

WERDEGAR: Justice Panelli always liked them. [Laughter] He did. He liked the way I wrote, and I'm grateful for that. Having been a staff attorney, when it came my turn to have a staff attorney it was a big leap for me to think that I could *delegate* to *anybody* what I had been doing.

But that's for another day, and I think we've come to a close, except I'll mention that Justice Panelli always had a lot of externs. Often, we had to manage. One time there were five externs that would be working up conference memos for the petition conference. That was a lot of work, but it was also a fun diversity of individuals. He always had very agreeable annuals, as I mentioned.

MCCREERY: How good a fit was this job for you at that stage of your career?

WERDEGAR: Perfect. That's the irony of my career, that doors that didn't open — as a consequence of that — it sent me on a path that really was a wonderful path for me. Later, when another governor came into office and I applied to be an appellate court judge, I think my path served me well as the future governor considered what he wanted in a judge. But we're not going to go there today.

MCCREERY: We won't, but thank you so much. Let's stop there.

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## INTERVIEW 5 (FEBRUARY 25, 2015)

MCCREERY: Good afternoon, Justice Werdegar. We were speaking at our last interview about the time that you served as a staff attorney to Justice Panelli, first while he was on the Court of Appeal and then, of course, on the Supreme Court.

We wanted to remind ourselves of the panel that he served with in his brief time on the Court of Appeal. That was serving with Justice Caldecott, who was then the presiding justice, and also Justices Rattigan and Poché. Could you say a few words about each of them, as you knew them in that capacity, as a staff attorney?

WERDEGAR: I would be happy to. As a staff attorney, of course, you don't have the relationship you do as a peer. Justice Caldecott I don't recall too much about, but I was interested to learn later that the Caldecott Tunnel going out to Orinda and Lafayette and so on, if not named after him it's named after some ancestor or predecessor of him. Do you know if it was after him, *per se*? But there's the Caldecott Tunnel.

Justice Rattigan was a true gentleman, and he took the time on occasion to take me aside and point out these minute ways I could improve the strength of my writing. He really did it — I think my writing, and I think *he* thought my writing, was perfectly fine — but he really did it as a gift. He just took that extra time, and time is a real factor on the Court of Appeal, which I'll speak to when I get to my time on the Court of Appeal. Cases just move through like this [snapping the fingers]. Most of them are unpublished. So it was a very gracious thing he did. I can't remember other specifics, but I do remember that he was most gracious.

He was on the committee that was assessing my application to join as a staff attorney on the First District Court of Appeal, and I think he promoted me. He didn't know me, but I think on the basis of my interview and my résumé he went to bat for me against criticisms that have come up occasionally throughout my progress through the system, that I hadn't had boots-on-the-ground trial experience. I think he saw my résumé as one that transcended that and that I would be capable of doing the job, which of course I think he agreed I was, later. So Justice Rattigan was a very nice person.

Justice Poché had been a year ahead of me at Boalt. I perhaps have mentioned that before. His hallmark is giving to people and helping people and paying attention to people and seeing them as individuals and promoting their talent. That's just how he was and is. He knew me from Boalt. I mentioned earlier that Joanne Garvey, I read, was a swing vote to give me the position of editor-in-chief of the law review. I don't know how the votes divided, but I know that Marc Poché was on the side promoting me to be the editor-in-chief.

Going back in time — and this will come up when I'm a judge on the Court of Appeal — you just have to remember all this was unusual. This woman thing, doing these things, was unusual in that time. So you had to have people of flexibility and generosity and vision to assist changes that were happening and see what I hoped they perceived as quality was quality.

And of course Justice Panelli. I can only smile anytime I talk about Justice Panelli. I think I was fortunate to be working in that division.

MCCREERY: Which of these individuals, if any, did you consider a mentor of sorts?

WERDEGAR: It would have to be Justice Poché. But *mentor* — I don't know that I've ever had a mentor. But Marc Poché has always been a champion of mine when he could. And Justice Panelli.

MCCREERY: Thank you for reflecting on them. Similarly, is there anyone who was serving as a justice on the California Supreme Court when you were there in the employ of Justice Panelli who you made particular observations about or particularly got to know?

WERDEGAR: No. In the earlier court, before they were not retained — it was a retention election where, I think for the first time in California history — I hope the only time — justices were not retained. In the earlier court, Joe Grodin just had a personality where he would walk down the halls with a bowl of popcorn and stop and talk to anybody about ideas that were on his mind. It didn't matter if you were a staff attorney or another judge. That's just how Justice Grodin was as a justice. Otherwise no. They were fine, but as a staff attorney I had no special interaction.

MCCREERY: As we know in 1991 your life changed significantly in the form of a chance to be appointed to the Court of Appeal yourself. Your

appointing governor, of course, you had known since law school, Pete Wilson. I wonder if you could start this part of our conversation by reflecting back on what interaction or contact you might have had with him in those intervening years?

WERDEGAR: We got out of law school. I left, as you and our readers, listeners, know, law school in 1961 and took my last year at George Washington. Pete Wilson and I had been friends, but I now was married, and I was living elsewhere.

I went back to a fifth class reunion and saw him there. That would have been 1967, I guess. After that our lives just went separate ways. I was living in Marin and San Francisco. He was down in San Diego. I was aware, and I wrote him a letter of congratulations, when he became elected mayor, which as we now know was just the beginning of a very outstanding political career.

But we didn't cross paths again until he ran for the first time for governor in 1980. He came up on the radar again, and as he traveled the state he stopped at some event in Marin. I saw that this was coming in the newspaper, so David and I went. It was in Tiburon, and that's the first time I had seen him in about thirteen years. It was a nice reacquaintance, and I can't recall other events for that race, in which he did not prevail. What was it, for the Republican nomination for governor? Yes. He didn't get the nomination.

Then two years later he ran for the U.S. Senate. He was going to run for the governorship, but then an opening — I don't follow these things, but then an opening occurred for the Senate seat. And was he opposed by Jerry Brown at that time? Yes. All right. So he put aside his wish, at that moment, to be governor and ran for the Senate, and he prevailed. He won over Jerry Brown, and he went off to Washington.

But during his Senate campaign we would go to the fundraisers that we could. I would do everything I could which was, believe me, very modest [laughter] to support this wonderful person that had been a friend in law school. We would give what you had to give to go to an event, although it was never a great deal. First of all, in those days what a politician would ask would be less than it is today. Secondly, we didn't have the wherewithal to be major donors. But we did attend some fundraisers.

Then in Marin I worked for him in a very modest way. Actually his campaign chairman out here, Sally Rakow, lived down the street from us. Do you know the name Sally Rakow? She became his representative in the San Francisco area. I point over there to the federal building. What her function was at the time that he was running for the Senate I don't know, but I connected with her. She was a neighbor, and I think her daughter had babysat for our children at one point.

I did some trivial but I hoped useful work in highlighting and gathering information about issues in Marin. I'm more sophisticated now, and I realize that a campaign doesn't rise or fall on knowing what the issues are in Marin. [Laughter] But anyway, I was doing my bit so if he were ever to come to Marin again he could speak to — don't ask me what the issues were. But I would do clippings from the *Independent Journal* and so forth, and that was my bit.

He did get elected and he went to Washington, and we didn't see him during that time, which was six years. Then he came back to run for governor, and once again David and I did our bit. How often do you have a former friend/classmate running for an important office? You do what you can, which — as I say, as I've become more sophisticated in politics I realize that our little part was not that much. But we had occasion to see him. He knew David.

Then he was elected governor. That's all I can tell you about the trajectory or how it was and why it happened. But it turns out he was a gifted politician.

MCCREERY: What particular memories do you have of the 1990 gubernatorial campaign, in which he beat the former San Francisco mayor, Dianne Feinstein?

WERDEGAR: Oh, actually none. I don't remember. Dianne Feinstein, of course, my husband ultimately worked with her, and I think she is outstanding. I am glad that she has served in the Senate as well as she has. I don't remember what the back and forth was between them.

MCCREERY: But your husband had a role in her mayorship of San Francisco?

WERDEGAR: Yes, he did. That's right. She enlisted David as health director.



And I think after Pete Wilson was governor and she was senator they were allies and friends, even though of a different party. They were both out here looking at San Francisco General Hospital for something at the time that David was still health director. They did cooperate on issues, and I think they respected each other.

MCCREERY: It was not long after he became governor in January of 1991 that he had occasion to reach out to you. What was the first inkling you had?

WERDEGAR: What do you mean had occasion to reach out to me?

MCCREERY: To make an appointment to the Court of Appeal.

WERDEGAR: Oh, well, I had to apply. I did. But the first reaching out, and that's what stopped me, was to my husband. Within a couple of weeks of his election, he called our home.

I answered, "Yes?" [Laughter]

"Is David there?"

He asked David if he'd be willing to serve as director of the statewide department of health policy planning in Sacramento. He said to David, "I was thinking about you as director of the office of health policy planning," which is not a high-profile — the governor didn't say this, I'm saying this — not a high-profile office, but in fact it's very important, as its name bespeaks.

David agreed to do that. I can't remember what he was doing at the time that he had to give up. I can't remember. That will have to be his oral history.

So he accepted that. That was the first outreach. But I did think that this would be a propitious time to pursue my own aspirations. What had it been, ten years or more, since I had considered applying for a trial court position, had been interviewed by the appointments secretary, Marv Baxter, and as far as I could tell at the time had a promising opportunity. That's when Justice Panelli, as you know, instead asked me to come, and I decided, "This is where I want to be, staff attorney of the California Supreme Court."

Now time has passed, and the world has changed as well. It's been thirty years now since I graduated from law school, and truly what had been a disadvantage, my gender or sex, was now a potential advantage. It was becoming conspicuous that there were no women, or very few women, doing anything.

The women's movement had ripened. Women were presenting themselves, and personalities in authority in power were looking for qualified women. So I thought, "Everything's coming together very nicely. I will apply."

The governor did not invite me to apply. I applied, hoping I had a good chance, one difference being not only the change in time but also this governor knew me and knew that I had a record that was notable, so it wasn't a strange thing to him.

I applied to the First District Court of Appeal. The first thing that happens if you're going to be successful is your name is sent out to the "Jenny" Commission, which is the Judicial Nominees Evaluation committee of the State Bar. So my name went out. That's thrilling because it means you're on a track. But of course they can send out several names, and sometimes they do. Often they do.

I got a call to be evaluated. A nice note is that the chair of this three-person — they split into groups of three to interview Court of Appeal justices — was Ann Ravel. Ann Ravel at that time was city attorney of San Jose. I did not know her, but everybody has come to know her, which I will explain. She later became chair of the statewide Fair Political Practices Commission, and she's now chair of the Federal Elections Commission. She's had an incredibly wonderful career, and deservedly so.

But that was my good fortune, Ann Ravel, and I think there were two other people present. I don't remember who. You are interviewed and you are told what negative comments they've received — because they've solicited all the names you asked them to solicit but also just random practitioners and professors and judges.

The committee ultimately came out and gave me a "well qualified" rating. But it was a challenge for them because, as you will hear me say more than once, perhaps, the classic model then was you've been a trial judge. And if you've been a trial judge, to achieve that the classic model is you've been a D.A. or a litigator. So Ann and her committee had to think outside of the box, as people say today.

I also was invited by the San Francisco Bar Association to be interviewed so they could send their evaluation to the governor. I accepted that invitation, and I went down to the San Francisco Bar Association offices. There was one restroom there, and on the door of the restroom on a plaque was "Men." Tacked underneath it with a thumbtack on a piece of

cardboard was a hand-lettered sign saying, “Women.” I assumed that was in my honor. [Laughter] There were no women there, so they had thought ahead, which was very considerate of them.

I went into a room with an oval table and, of course, was the only woman in the room and was interviewed by people who didn’t know me at all, and I didn’t know who they were. I can’t remember what they asked me and I can’t remember, I have no idea, what came out of that interview. But that was an interesting — I remember the hand-lettered sign.

There was a question. What was it that you were asking me?

MCCREERY: We were just looking at the process of you being rated well qualified by the JNE Commission.

WERDEGAR: I want to say that, obviously, I was a different kind of candidate. To contrast 1990 with today, it’s evolved, not all at once. Now every kind of legal experience is considered a legitimate background to seek a judicial appointment. That includes transactional attorneys, academics. It’s not all about having been a litigator, which is good because litigation is shrinking. But in any case, the perspective has changed, and I would say recently so, not right away. But I was an unusual candidate, and a lot of people along the way had to stretch or make adjustments or not make adjustments.

Out came the evaluation, and Governor Wilson ultimately appointed me to the First District Court of Appeal as his first judicial appointment. I think he wanted to make a statement. He was always supportive of women, and over time his administration had a significant number of women holding high responsible positions. I think he was proud of that, as he should be.

MCCREERY: How did you learn the news?

WERDEGAR: Oh, how I learned the news? I honestly can’t remember. I remember about the Supreme Court but not the Court of Appeal.

MCCREERY: What did this appointment represent to you in terms of the advancement of your own career? Clearly, you had thought about it for some time, applying and then waiting to hear. Now that you had the news, what did you think?

WERDEGAR: I was excited and eager to do it and thrilled that this had come my way.

MCCREERY: Any hesitation?

WERDEGAR: No. No. Of course, I didn't know what was going to await me when I joined the court or what have you, and I had things to think about, staff and getting acquainted with my division and what have you. But no.

MCCREERY: Congratulations. That's very exciting. Talk a little more about the process of being confirmed officially and what else had to happen.

WERDEGAR: Thank you for asking that. I now have a DVD, which in those days was a video. They take a video of your confirmation hearing.

I had asked people, one person from CEB, an assistant director of CEB, where I had worked for many years, to speak for me, and a personal friend who was an attorney, a woman who was an attorney with Neilson Merksamer. I had known her when she was working her way through USF Law School when I was associate dean there. And a lovely woman who had been an annual for Justice Panelli when I was on his staff who was a pioneer and turned out to be a pioneer in mediation and for many years — I don't know about now — taught at Stanford, mediation. Those were three, and then Justice Panelli.

The commission was comprised of the chief justice, Malcolm Lucas, and of the attorney general, Dan Lungren, and of the presiding judge of the division I was going to join, which was Clint White.

I just looked at the DVD. I just have to go back and thank them all again. They were wonderful, working with what they had and pointing out — you see, all of this is against the background that I am not a typical candidate. There are certain gaps in my background that would be a problem if somebody was concerned. They all spoke for me, and Justice Panelli made the comment that he felt I was more than capable of assuming the position, and that the Court of Appeal's gain would be his great loss, and so on. One of the panel asked him, "What about her lack of trial court experience?"

MCCREERY: Can you say which panel member that was?

WERDEGAR: Only that it could have been any one of them. No, it wasn't Justice Lucas. It might have been Dan Lungren, and it could have been Clint White.

I think Dan Lungren asked Justice Panelli about my lack of trial experience, and he said that he saw no problem whatsoever, and I was familiar with court transcripts, and I was perfectly capable of whatever I needed to ground myself in that regard of getting the assistance that would be so readily available. It was to him a non-issue.

Ann Ravel spoke last. Clint White said to her, because she reports on the comments that the commission has received, he said, “Were there any comments that she hasn’t had trial court experience?”

Ann Ravel said, “Yes. But in conversations with her we are confident that that’s not going to be a detriment.” That was that.

Then I speak. I said I had no prepared remarks, but I was available for questioning. Dan Lungren did question me about my lack of experience, and he did make the comment that — or maybe he made this with Justice Panelli — and it’s important because it was how it was viewed — “To move from a staff attorney to a justice is quite a reach.”

Then Justice White, my future colleague, asked me about how was I going to handle my lack of trial experience. Justice Panelli had made the point that although this seemed unusual, in the course of California history this was not so unusual. I can’t name the justices, but there had been distinguished justices of this court, at least maybe two, who never had trial court experience.

MCCREERY: Justice Frank Newman.

WERDEGAR: Oh, yes, but there were others as well. Then Justice Panelli said, not to mention the United States Supreme Court, where some think perhaps they should have a bit more boots on the ground. But he didn’t put it that way.

I responded that whatever assistance — oh, Justice White asked, “How are you going to hold up — .” He did it in a friendly way. He did. It wasn’t hostile. It was a legitimate, “How are you going to hold up — ? You have — .”

My colleagues were going to be Ming Chin and Bob Merrill and Clint White, and they’d all been trial judges. How was I going to handle that?

I answered something along the lines that, “That would be wonderful, and maybe the division — ” that now had an African American and an Asian and a white male, but I didn’t say that. “Maybe the division could use another kind of diversity.”

Everybody laughed because I was going to be the only woman on the Court of Appeal in San Francisco. It was all in good humor, that part of it. So that was it.

MCCREERY: What did you learn later, if anything, about the goings on within the Wilson administration leading to your appointment? He knew you so well personally, of course.

WERDEGAR: I really can't say. He never told me. I think his appointments secretary at the time was Chuck Poochigian.

MCCREERY: He also had Janice Rogers Brown?

WERDEGAR: That was later. She wasn't an appointments secretary. Janice was legal affairs.

MCCREERY: Yes, legal affairs. Pardon me. You're right.

WERDEGAR: No, I'm sorry. It wasn't Chuck Poochigian. It was Bob White. Bob White somehow played into it. He was Pete Wilson's right-hand man and good friend. What I discerned from some conversation with him or somebody is that the governor was going to take care of this one himself, and nobody had to worry about it. But of course I wouldn't have known that at the time. And I'm not sure it was true. I have not heard that from the governor.

MCCREERY: What else transpired in the course of your confirmation hearing?

WERDEGAR: Nothing. We went up, and there was a reception that was put on in the Court of Appeal by, I guess — somebody has to pull it together and pay for it — by my division. Justices passed through and congratulated me, and my family was there. Then you go to work.

MCCREERY: As we know, that was in late August of 1991. Your induction ceremony?

WERDEGAR: No, that was it.

MCCREERY: Swearing in?

WERDEGAR: Oh, I was sworn in. Justice Panelli swore me in after the hearing. I think I was wearing his robe. You don't have a robe when you're first appointed as a judge.

Justice Kruger is using my spare robe, and you're always pleased when somebody uses your robe, if you like that person.

Yes, I was sworn in by Justice Panelli in the courtroom after the commission — the commission did not leave the bench. This is in contrast to my next hearing at the Supreme Court, where they left the bench. Justice Lucas said, "Are we ready to vote? Are we ready to vote?" That's how it usually goes.



CELEBRATION AFTER COURT OF APPEAL INVESTITURE —  
JUSTICE KATHRYN MICKLE WERDEGAR WITH HUSBAND DAVID  
AND SONS MATTHEW (LEFT) AND MAURICE, SEPTEMBER 23, 1991.

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I was sworn in and then went up to some area, the library I guess, of the south of Market Second Street temporary court. That was probably the end of it, and then I probably reported to work — I don't know what day of the week that was, but the next working day.

I had to pull my staff together. Lee Johns was the principal attorney on the First District Court of Appeal, who had actually had a hand in picking my résumé out when I applied to be staff attorney, and he assisted me.

There was a little shuffling. The governor took Gary Strankman out of Division Three and put him in Division One as P.J., where the actual vacancy had occurred, and I can't tell you who it was. Now I'm in Division Three. I'm Division Three, and I had to have a staff.

Harry Low had retired recently in some other division. The First District has five divisions. One of his staff attorneys applied to me, and that's Jason Marks, who is with me to this day.

Then Gretchen Strain. She was awaiting a new judge and applied to me. So I had Gretchen and Jason as my staff. In those days every justice had two staff attorneys.

Gretchen, not long after, within the first year or so, moved to the Court of Appeal in San Jose, which was closer to her home. So I had a vacancy, and applications came in — tons. It is no fun to go through these, but again Lee Johns — they had to do a writing sample. Somebody's application came in a little late, but Lee Johns picked this application out and said, "This one's good." I interviewed Hannah Rabkin and took her on.

Hannah had only been there a few months when she came to me and said, "I'm so embarrassed, but I'm pregnant." She had left a big firm and come to the court, no doubt appropriately, thinking this would be a better place if you're hoping to start a family.

Then Maureen Dear came. And how did I know Maureen, who now is a good friend? How I first knew her I'm not sure. She could probably tell you. She came to serve, and then when Hannah came back Maureen, whom people call Mo, and Hannah job-shared. So I had Jason and this job share. Again, this was very unusual, a job share.

Justice Merrill had a job share as well, but this part of our division was extremely unusual. He was the father of daughters, young women, and he was very sympathetic to women trying to do what women still try to do, balance their career and the contributions they have to make in



the workplace with their mothering and their home responsibilities and so forth.

MCCREERY: About a month passed from when Governor Wilson first appointed you to when you were reviewed and confirmed and sworn in, in the summer of 1991.

WERDEGAR: You mean from when he first nominated me? Or appointed? Yes, between that and the hearing.

MCCREERY: Yes, nominated, thank you. I wonder, given that we've just been talking about how unusual an appointment it was at that time, what response did the news of your nomination get in the wider legal community?

WERDEGAR: I don't remember. I have such a vivid memory of when I was appointed to the Supreme Court. I don't really recall at all. Between my appointment and my taking my position I really wouldn't have known because I wasn't plugged in to the legal community.

MCCREERY: And in the popular media was there particular coverage?

WERDEGAR: Oh, I doubt it. I don't remember that, which as I say is going to be quite different when we talk about the Supreme Court.

MCCREERY: Thank you. You were talking about the staff that you hired, including the two women who shared a job, and that Justice Merrill had a similar arrangement in his chambers. Let's begin to talk about your justice colleagues on this new configuration of the panel.

WERDEGAR: All right. Let me step back about staff attorneys. It probably relates to a question you asked me earlier. I was concerned how I would be received by staff attorneys. I *was* a staff attorney. Not only was I a woman, which many staff attorneys are, but I was a staff attorney who had been appointed to the court. That was not the first time in the history of California, but it might have been the second time. That was very unusual.

I was concerned that people that I had previously worked with would be resentful or be unable to relate to me in a completely dramatically different position. But it turned out I had no cause for concern. Staff attorneys were actually very pleased and welcoming.

One reason why — and the governor acknowledged this in some conversation with me — that my appointment brought a new stature to staff attorneys. It brought to the attention, to the forefront, the excellent

professionals they are and the significance of their work. Afterwards, over a period of years, to be a staff attorney was a legitimate position from which to apply for a judgeship — I wouldn't say to the Court of Appeal — some may have tried, none have succeeded since to my knowledge. But as the pool for trial court judges, the acceptable pool, expanded there was an occasional staff attorney who would apply. I can't tell you how many were accepted, but it gave them a new stature.

So that concern of mine didn't bear fruit, I'm happy to say.

MCCREERY: That is a very telling detail, isn't it, that it added stature to a profession that all of you had shared for so long?

WERDEGAR: It is, yes, and the governor, when I mentioned this to him in some context, said, "They deserve it."

Staff attorneys. There was an article written in some legal publication, bar journal, years and years ago when I was a staff attorney. It was about attorneys without ego, and it was about these people who toil and *never* — nor did they seek — *never* get any attention. They know what opinions they've steered and what opinions they've drafted, as we say. They know but they are 100 percent discreet. Attorneys without ego.

MCCREERY: Some people who write about the courts are fond of pointing out that perhaps those staff attorneys have too much power, even though they aren't the ones wearing the robes.

WERDEGAR: I understand that comment. I do. And that would very much depend on who the judge was. But others have responded to that comment by saying the staff typically stays on when judges move out.

We have that even now. A staff attorney who might write for a notably conservative judge can write for someone whose legal philosophy is entirely different. They may not choose to, depending how invested they are in the direction that the other judge was going, but I think all of them pride themselves on being able to do it whatever way their judge wants them to do it.

When I was a staff attorney I took pride in being able to write the majority or the dissent, whatever Justice Panelli wished, after we'd talked about it. It's part of the pleasure of your craft that you can do that either way. I think those who say they have too much power are those who have

not served in that position and haven't been behind the closed conference doors or chambers doors.

MCCREERY: What style did you adopt in serving as the leader for your small group of clerks?

WERDEGAR: One of the major adjustments I had to make as a new judge was relinquishing to my staff what I used to do, which is most of the research and a great deal of the writing. Of course, judges vary widely in how much writing their staff does. Most staff does the first draft, and after that judges vary widely in how much they work with it and change it. But that was a big adjustment for me because I knew, I felt, that I had been terrific in this, and it was very hard to let go and think that others could do as well as I had hoped and felt that I had done.

In fact, it was pretty easy. [Laughter] It didn't take long. You come to trust your staff's work, and if you don't trust it that person doesn't stay on your staff because you cannot be checking what they do with respect to assertions made in a draft opinion supported by authority.

Or, often with externs — which we reviewed when I was a staff attorney for Justice Panelli — you'd find them taking some authority out of context. You'd go back to the case and you'd find that they hadn't read the whole body of the opinion. They had just extracted this one helpful sentence, not to find that two pages later the court had said, "and we disagree with that." Something like that.

So I was able to trust my staff. I've been blessed with an excellent staff to this moment, and I did let go.

I want to go back and say, with respect to my confirmation hearing where I said with a twinkle to Presiding Justice White that maybe a little diversity, not just a lack of trial experience but a different kind of diversity might be welcome, the comment fit so well because our division was unusual. I think he was the only African-American appellate justice, maybe in the state. Ming Chin was one of the very few, maybe the only, Asian judge. And here come I. At that time I think there were 110 Court of Appeal justices, and I think there were 10 women and none on the First District. So we were a very interesting division.

In the way that we worked together, the cases are, from the clerk's office, sent out to the division. I don't know how they were assigned within

the division, probably randomly from the same source. Not all Courts of Appeal have random assignments, which is not a good thing. I'm not privy to how they work, but in some of them that don't have divisions it's not entirely random, I'm told, which is not a good thing. But definitely with our division in our court it was all random.

We would confer once a week, the division justices, about cases that were next up for each of us to work up, and we would discuss them. We'd get a sense of what we each thought. If I were the presenter, I'd tell what it was about, and I would state where I thought this case was going to go and how I was going to write it, and people would say fine. If somebody disagreed, they would disagree. If they were alone they would become a dissenter.

Then I would go back and assign whatever cases we had discussed to a particular staff attorney. By the time of oral argument on that case we would have a draft opinion in front of us, and that's not unusual on the Court of Appeal. We'd take the bench. We'd hear the argument, and the arguments would be — unlike the Supreme Court where they're half an hour each side — they would be shorter. How that worked I can't remember.

Today, I'm told, some divisions will tell counsel, "We'll give you ten minutes." Or will say to counsel, "Unless you affirmatively ask for oral argument, we're prepared to decide the case." There are all sorts of ways. There are too many cases, and oral argument usually does not add much. But I don't know how the different divisions work it. I think they're always experimenting with how to get it right.

In any case we would hear oral argument, and then we'd get into the elevator to go back to our chambers and somebody would say, "Anything different?"

"No. Nothing different."

"No."

If you made any changes in the draft opinion, which would be unusual, you'd pass it along with the check sheet, and the next judge would check an ok with it. Then the third judge might say, "I'm dissenting," so you'd wait for the dissent.

I want to say that, at that time, I would be the only woman in the courtroom, period. The attorneys weren't, and certainly on the bench that was it.

MCCREERY: We will come back to that. To continue for just a moment about oral argument, you're describing a process that typically didn't add too much to the outcome, or change the outcome much. What were the pros and cons of going ahead and having oral argument as part of this?

WERDEGAR: The parties have the right to oral argument. I haven't researched it constitutionally, but it's presumed the litigants have the right to oral argument. That's why different divisions are experimenting constantly with different ways of handling it. Give them a time limit? Tell them no argument unless they ask for it? There's one division that gives them the draft opinion and says, "That's how it's going to go. If you have anything against that, come in and tell us."

MCCREERY: What was your own style in this setting in terms of participating in oral argument, questioning and following up?

WERDEGAR: I can't remember. Mostly we just want to keep it short. I really can't remember how much involved I was in questioning — or any of us.

MCCREERY: Say more about how your staff attorneys would help you prepare the written draft.

WERDEGAR: I would assign them the case, and I would say, "This is what the group has decided, how it should come out. Please write it that way, and if you find out that's not possible — to write it that way with integrity, that the law doesn't go that way — please come back and tell me."

You have to remember that most Court of Appeal cases are very routine, and every criminal conviction anywhere can be appealed to the Court of Appeal. So many of them are, and the issues are often — not always, by any means, but — are often just so routine. That's why only about 10 percent of my opinions and most appellate court opinions are published. The rest are just routine. Civil cases, of course, have the right of appeal but there's sometimes a financial disincentive.

MCCREERY: Give me an idea of the overall volume in this Court of Appeal setting, how many petitions and how many did you accept —

WERDEGAR: It's not a question of accepting. You take every appeal. There's no discretion. That's the difference. At the Supreme Court, it's

discretion. You might get 7,000 petitions and take 3 to 5 percent. At the Court of Appeal the cases come in.

MCCREERY: And everyone has the right to appeal.

WERDEGAR: They have the right to appeal, yes. I think you were supposed to have a quota. You were supposed to keep these cases moving, and we were supposed to, each judge, I think, write, ten opinions a month. That's a lot.

Then you'd be concurring or dissenting — usually concurring but sometimes dissenting — on another twenty or thirty from your colleagues every month. So the paper moving around, moving through, was a lot.

Of course, the Courts of Appeal sometimes get very complicated cases. That's how they get here, at the Supreme Court. They have to go through the Court of Appeal, and I want to be clear that this court relies on what the Court of Appeal does. We count on them in the very difficult cases so that we have at least their input. It's not inconsequential, their contribution to the law. In fact, it's very, very consequential. They get some extremely complicated cases, but if they do they're not moving ten out that month.

MCCREERY: In general, what would it take for you to write in dissent?

WERDEGAR: If I disagreed. I can't remember any huge issue where I felt I had to make a stand. If I thought it was wrong I'd write a dissent. I couldn't tell you how often I dissented. Sometimes Justice White would dissent. He felt he was sitting with a bunch of Republicans.

It was really interesting to be with him. It reminds me so much of Sandra Day O'Connor's comment about Justice Thurgood Marshall. She made the comment, just by way of analogy, that, "The life experience that Thurgood Marshall would bring to our discussions was a rich gift to all of us." That's not an exact quote.

At the time we knew Justice White it was toward the end of his career. But he would sometimes tell us stories — don't ask me what. I won't be able to tell you. But just bringing a from-the-street perspective on something. He had a very nice, rich voice and manner.

He was very gracious to me. I think it was very hard for him to accept me. I was this white woman that didn't — I'm only surmising. But I hadn't been a trial attorney, and I might have appeared to him to be something that I actually wasn't.

MCCREERY: To back up a minute about Presiding Justice White, in general how did he accept you into the panel?

WERDEGAR: I'm saying he did. He was very gracious at the confirmation hearing. He said, "She's already charmed me." He could be a very gracious man, and when I was appointed here he called me and said very, very complimentary things.

He didn't interact with the rest of us as much. He pretty much kept to himself. We would conference cases with him when we had to, but after conference the other members of the division would, as a matter of tradition, go out to lunch. So that would be all of us that I've named. But Clint White elected not to.

MCCREERY: What differences did you note in his work with you as compared to his work with the other two colleagues?

WERDEGAR: None. Nothing like that. No.

MCCREERY: Say a little about each of them, if you would.

WERDEGAR: Bob Merrill is universally — *was*, unfortunately, universally, he's gone — recognized as a gentleman. He just was. I'm told he was a wonderful trial judge. Ming Chin was an accomplished attorney, and we've traveled similar paths. He's very outgoing.

MCCREERY: What did the three of you talk about over lunch?

WERDEGAR: I can't remember. That was the only time I went to lunch. The rest of them — you haven't asked how I was received by the court in general.

MCCREERY: No. Let me give you a chance to speak about that now.

WERDEGAR: The court had an adjustment to make, really, because as I've said I was the only woman. They didn't know me before. There was nothing about me they could relate to. I hadn't practiced what was considered the practice of law, hadn't been in the military, hadn't been on the trial court. I was a woman, and that was unusual. Their wives, if they worked, weren't working in a professional capacity.

It was truly another generation. It was an old boys' club. That was exactly what it was. Most of them — probably all of them now — have retired. It was just that generation before the new generation, which understands

having a woman among them is good. They're welcoming, and their wives, perhaps, are doing this or something comparable. But that was an old boys' club. One or two were gracious, but basically I was on my own entirely.

MCCREERY: You made earlier mention of Betty Barry Deal, who presumably had been the first woman ever appointed to the First District Court of Appeal?

WERDEGAR: Oh, she was. Yes.

MCCREERY: What chance did you ever have at that time or earlier, later, to speak with her about that?

WERDEGAR: I know her, and she's wonderful. But I never discussed this with her. Her experience might have been different. She did come out of private practice, at least. I don't know if she had been a trial judge.

She was gone. It's not like I took her seat. Ming Chin took her seat. She's wonderful, and I'm appreciative of her having preceded me. But I don't recall ever talking about this with her. Recently, however, I've come across some notes of a conversation we had when I was appointed, and she advised me not to expect anyone to ask me out to lunch, that I had to take the initiative.

MCCREERY: But clearly you were alone in the time period that you were there. To what extent did the difficulty accepting you rise to a level of creating difficulty for you?

WERDEGAR: All I had to do was my cases and work with my panel, and there was no problem working with my panel. We were congenial. I was fortunate to have Bob Merrill.

But we would once in a while have court-wide meetings, and that brings to mind this *New Yorker* cartoon, classic Punch. It has these figures drawn around a conference table and a woman with an upswept hairdo and a prominent nose. There are five men, and there's the Chair saying — the woman is looking alert, and he's responding to her, the Chair, and there are other men around the table, balding.

The Chair says to her, and her name is Miss Triggs — this is a cartoon that I think a lot of people know now. "That's an excellent suggestion, Miss Triggs. Perhaps one of the men would like to make it."



When I saw that cartoon, I knew that was my experience. I was gratified, years after that having been my experience at the Court of Appeal, to read that Ruth Bader Ginsburg — this woman who was powerful and had been a litigator and had won critical cases in the jurisprudence of the United States — she said that when she would be with a — I don't know at what point of her career — I think pretty much along the way — that when she would be with a group of men she would say something and no note would be taken of it. Later a man would say the exact same thing, and it's taken up as a great idea.

I had that experience at these court-wide meetings. We'd go to these, nineteen people and I'm the only woman at a court-wide meeting, and there would be some issue and we'd speak. I remember distinctly one time when I made a comment, and they moved on. And really, three or four people later, the exact same comment was made and it was taken up as this great idea.

I was so gratified to hear that it wasn't just that I was invisible, that this is a phenomenon. Basically, though, I was happy to do my work. I was never asked out to lunch, but I'm not a go-to-lunch person. I had family I wanted to get home to. Going out to lunch to me, even now, takes a lot of time. But it's a nice visit with your colleagues. It is nice to do, but that's how it was.

MCCREERY: What about changes in the makeup of the First District while you were there? I know it was only a few years. Did anything change that you're describing?

WERDEGAR: No. Nothing that I would remember. One thing I will tell you that perhaps you haven't anticipated asking about, but speeches. Because there were so few women — you asked if there were publicity. I don't know if there was publicity, but women's groups took note. There's a group in San Francisco called Queen's Bench, and Queen's Bench called me. I'd been maybe on the bench — I don't know how long, not too long but it might have been a year.

Anyway, I got a call one day from one of the board members of the Queen's Bench, a nice woman, saying, "Justice Werdegar, we would love to have you be our keynote speaker at the annual Queen's Bench judges' dinner. It's a banquet that all the judges are comped, as we say, and it's for

all the judges in the area. Could you be our keynote speaker? The dinner is in three weeks.”<sup>12</sup>

I had never given a public speech in my life. I had taught classes, but I had never had occasion to give a public speech. Not to mention giving the speech, but what are you going to talk about? You have to have a subject. So I hemmed and hawed, and I said, “I think I can’t. It’s just too short notice.” I forget what I said.

I got off the phone, and I went into Bob Merrill’s office, right next to mine, and I said, “Bob, Queen’s Bench just called me and wanted me to give this speech, and I said no.”

He shook his head. He said, “You have to give that speech.”

I said, “I do?”

And he said, “Yes. You have to do that.” I forget his reasons, but one can imagine what his reasons were, that, “This is important for you to do this.”

She explained why the delay. This was part of the phone call. She said, “I realize this is short notice, but months ago we asked Hillary Clinton, and we’ve been waiting for her to reply and she hasn’t responded. My board said to me, ‘We’d better get a backup.’” [Laughter]

It is funny. “Oh.” That probably went into my saying, “I don’t think I can do it.”

But that was her excuse and her apology for — you never ask somebody three weeks — I mean, they were waiting for Hillary. You’d think they would have guessed. Hillary had not responded one way or the other, but they finally inferred that maybe the acceptance wasn’t forthcoming.

So anyway, Bob Merrill — and I remember this very fondly about him — shook his head and said, “You have to do that.”

That was my first public speech. The banquet room was packed. I had never given a speech before, but I’ve come to learn that *giving* the speeches is no problem, although if you’re not accustomed to public speaking it can be. We don’t have these panels up there, with the text, that are invisible.

But finding a subject. What was I going to talk about? The subject I came upon, and the title, which I later had occasion to give many times, was “Why a woman on the bench?” Meaning, is this important? What does it mean? Does it matter? With the help of my staff attorney, Hannah

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<sup>12</sup> September 29, 1994.

Rabkin, we did some research. I pulled together a speech which, over time, I honed and sharpened.

People were very kind and said it was good. But my first speech. I don't recall during those brief three years on the Court of Appeal having other speech requests, unlike when anybody arrives at the Supreme Court and you're drowning in speech requests. I did want to mention that.

MCCREERY: Were there other public appearances of a different kind?

WERDEGAR: No; however, I did feel it was my obligation to go to every woman's group that would invite judges.

I want to say that the speech I settled on was prompted by a comment I came across that Sandra Day O'Connor had made ten years before, when she was the first woman to be appointed to the United States Supreme Court. I'm a creature of my time. I was as astonished as anybody else when she was appointed. When I grew up judges were men. Certainly United States Supreme Court judges were men and *old* men. That's how it was. So when she was appointed I was as surprised and, of course, pleased, as so many people were.

She was quoted as saying, "The important thing about my appointment is not that a woman will be deciding cases. The important thing about my appointment is that a woman *gets* to decide cases."

I took that to mean what it did mean, that equal capability will now have equal opportunity to aspire to the highest court in the land or to aspire to other things. That's what she said.

Later I read a quote of hers that I think she had taken from a Canadian female Supreme Court justice. It's been often quoted, and I think it did originate with a justice of the Canadian Supreme Court. "A wise old man and wise old woman will reach the same result."

That one gave me pause, and I started thinking about that. That was the impetus for wondering "Is that true?" Again, nationally there were so few women judges. Women scholars were trying to extract what information they could from the few women around the country. "Do women decide cases differently? Or are they the same? Is there a woman's voice?"

All of this you're probably familiar with, as a lot of academic books and articles and studies have since been written. At the time that I'm speaking of there was very little material to go on, so everything that Justice

O'Connor did — and then when Justice Ginsburg some years later joined her, the two of them together, was subject to scrutiny. It was interesting. I myself was reflecting on that, since I was now a woman justice. Is there a different voice, and so forth? That's what gave me material for a speech.

MCCREERY: How have your own views of the answer to that question changed over the years?

WERDEGAR: I think, based both on empirical studies — if you follow how some of the sex harassment cases and so on developed in the United States Supreme Court — I think studies have shown that O'Connor and Ginsburg, although of different political persuasions, would end up seeing the case differently than their male counterparts if it's a sex discrimination or harassment case. I think they landed on the same side.

And I do think that would be true — and it goes to the whole point of diversity on the bench — your life experiences are brought to bear. You can't change the law but you can perceive the facts through a different lens if you have had a different experience. Women have had different experiences, either themselves being discriminated against or they've been wives or mothers. But so, too, people like Clint White who have grown up as an African American in a white society. It goes to the whole point of diversity of experience that does bring a different lens to the facts.

I do think a woman's input can make a difference. Studies have shown — and again I think the material is not vast — but that women on a panel — this would be a study of federal judges, as I recall — will bring a different result on that panel in a particular *kind* of case than if there were no women.

On the broad kinds of cases that don't involve life experience, I don't think that a woman or anybody else's perspective matters. It's just how you view the law and what conclusion you come to, not based on life experience but maybe based on how you read the law or your general legal philosophy.

It's an interesting question, but I want to land on the point, as I have in my speeches, that diversity is really important for that reason. Whether you're a farmer, like Justice Baxter was, or you've been a D.A., like Justice Corrigan has, or you've been whatever, differences in legal background are important. You don't want everybody cookie cutter. You don't want all D.A.'s and you don't want all professors. A mix is a very good thing. The same, too, with life experience and ethnicity and so forth.

MCCREERY: You mentioned the phrase judicial philosophy a moment ago. I wonder, as you were making this very interesting transition from research attorney to justice yourself, how did you find your judicial views evolving?

WERDEGAR: I only had one judicial view, frankly, and that was to find where the law takes you. I *mean* that, even if it wasn't going to be popular or politically popular or congenial to my appointing authority or the temper of the times. I never had any problem going with what I thought precedent required. That's on the Court of Appeal, where that's your job. If the question were an open one, I would have to land somewhere. My staff has always been terrific. Not just their research and writing, but their objectivity.

MCCREERY: When it came to your beginning to develop a body of opinions that you'd written, of course outsiders were very eager to characterize you as one sort of judge or the other or try to guess who your influences were or who you would be like. Did you note particular differences yourself in where you tended to come on civil cases versus criminal matters?

WERDEGAR: Different what — from others or from my own approach? No.

MCCREERY: Or just how you would tend to decide in those broad areas?

WERDEGAR: No. Let me say that I don't recall having a great deal of attention put on me as a Court of Appeal judge, unlike the Supreme Court, where every hiccup they try to extract where you're going to go. As I mentioned, we processed a tremendous number of cases, only a small percentage of which are published.

I had one case — thinking about this in anticipation of this interview and speaking to previous staff — really so few stand out, and that's not unusual on the Court of Appeal. I had one case that really stood out. This was called *People v. Mouton*.<sup>13</sup> It was a criminal case, and the defendant was a young African American who had shown up, I think at a housing project, with a rifle or a gun of some sort with his friend. His friend, whose name was Jackson, had gone to that project to get even with somebody there. There was going to be some kind of a confrontation. Mr. Mouton, our defendant, had gone to back him up.

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<sup>13</sup> 15 Cal. App. 4th 1313 (1993).

Things escalated, and somebody was killed. Mr. Jackson, who had actually pulled the trigger — there was no dispute about that — was tried in a different court by a different jury. They were not tried together. Mr. Mouton was the defendant that was in our case, and he was convicted of second-degree murder. There is a legal doctrine that an aider or abettor, and he was the aider and abettor, is guilty of the same offense as the principal whom he's assisting. If the natural and probable consequences of that offense is killing, he's guilty of that. The law holds you responsible for assisting and helping to put in motion something that ends up with death.

Mr. Mouton was convicted of second-degree murder. It came to us. I authored the opinion, and we affirmed it under this doctrine that I have said to you. Meanwhile, I don't know if it was later or before — probably a little bit later — Mr. Jackson, in this separate trial, was acquitted. Don't ask me how or why. Different jury. Never before us. He was acquitted.

The defense attorney representing Mr. Mouton, after our opinion came out — which was correct on the law — how can I put this? He started a whole public relations campaign, and he enlisted professors and other defense attorneys. The outrage that the actual perpetrator would go free, and this individual was held for second-degree murder — he *blasted* the opinion, and the papers picked it up.

On the front page of the *Recorder* newspaper was this article by a woman journalist who at the time nobody had heard of before. They didn't know her, and they didn't hear much about her after. But she wrote a complete hit piece on this opinion, enlisting the comments of academics who I seriously doubt ever read the opinion.

I realize, however, the attorney had a lot going on his side because it does seem wrong that the perpetrator has gone free. But the district attorney's response is, "There's no accounting for juries. The jury that heard this case had 'beyond a reasonable doubt' under the law as they were instructed. They found this fellow guilty," and on the Court of Appeal we affirmed it.

I remember the day that paper came out I was just in anguish. It was miserable.

Mr. Mouton's attorney petitioned for rehearing on the grounds that this was unconscionable. I don't know if it was unconscionable or not. The case was right on the law, but I was in a real state from this public attention,

all negative. It's not the kind of thing you can explain to the layman, why, even though it was two different juries.

I was concerned, because I understood, not the defense attorney, who was a very aggressive defense attorney in defense of his clients, but just generally how it didn't seem quite right. What we did is we granted the petition for rehearing but not on the grounds that they were asserting. I wouldn't give them that because the law was right. In fact, I couldn't. We didn't do anything wrong. But we found another reason that this defendant would be entitled to another jury trial, and it was related to the instructions that the jury had been given.

He was retried, and I never saw the case again but I have researched it. The second jury, under the instructions that we said were required, hung, and the district attorney declined to re-try him. I think the defendant, Mr. Mouton, entered a plea to something much lesser. He had been in jail for eight months, and with time served he was gone.

I also found it interesting, as my staff attorney did some research, that the perpetrator, who walked free, eight months later was behind bars for robbery. In jail he was also charged with assault for pouring acid on his cell mate.

That case was memorable for the unwelcome publicity. As a judge you don't often get that kind of blast. As I say, it wasn't just the defense attorney. He enlisted scholars, professors, defense bar. It was all just strategy. You know, I think things ended up as they were supposed to in that case. But as a judge you have to withstand that when it comes.

MCCREERY: How unusual is it to grant a rehearing?

WERDEGAR: Unusual.

MCCREERY: Did you have any other instances of that while you were on that court?

WERDEGAR: No. No. There was another decision that I did, and after this I can't remember any that are worth mentioning. But my staff attorney reminded me of this one called *People v. Santamaria*.<sup>14</sup> The issue in this case was collateral estoppel in a criminal case. In the defendant's first trial, he had been acquitted of possession of a knife but the jury had hung on

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<sup>14</sup> 8 Cal.4th 903 (1994).

the manslaughter or murder charges. The district attorney could retry him when you have a hung jury, but the question that came to us — he could be retried on those charges, but the knife acquittal. In a fresh trial, does that previous acquittal collaterally estop the D.A. from once again charging him with knife possession?

I wrote an opinion saying, yes, that bars the D.A. I was reversed by the California Supreme Court. The reason I mention it, though, is Stanley Mosk in that Supreme Court opinion dissented from the reversal, and he did something that was extremely unusual. He appended to his dissent my Court of Appeal opinion. As someone said to me, “That may have been your first Supreme Court opinion.” I wasn’t in touch with Stanley Mosk, but it was a gracious thing for him to do. That almost never happens.

MCCREERY: And the fact that he saw fit to dissent from — ?

WERDEGAR: He was persuaded, as was I, by whatever the law was, but to give that to a Court of Appeal justice is really a great gift. Of course, it was a dissent, but to recognize a Court of Appeal justice. Once in a while our court, very rarely, but will say, “We can’t say it better than the Court of Appeal, and we adopt their opinion.” But that’s extremely unusual. Again, in this case the majority reversed me, but Justice Mosk saw the merit in my view. [Laughter]

MCCREERY: What inkling did you have, if any at all, that either of these cases would take on a future life after your opinion?

WERDEGAR: Oh, none. That *Mouton* — I’d never experienced anything like it, nor had anybody else. That doesn’t happen.

MCCREERY: Your panel of three agreed at the time of the first opinion.

WERDEGAR: Yes. This attorney whipped up — I mean, he’s a real strategist. Some have called him a street fighter. But he’s good for his clients. You would want him, perhaps, if you were in serious trouble. But he just whipped up this campaign. As I say, I’m not sure how many people actually read the opinion. But anybody can be outraged when you hear that the perpetrator has gone free and the aider and abettor is serving time behind bars.

No, unprecedented. I wasn’t prepared for it. Were it to happen again, I understand you just have to put up with that.

MCCREERY: What other cases stand out to you from that period?



WERDEGAR: There was one called *Kwan v. Mercedes-Benz*<sup>15</sup> where it involved California's lemon law, the Beverly Song Act. It involved the car dealership, and the lemon law imposes a penalty for willful violations of the act. In the law so many statutes use the language "willful," and what it means is just a mystery. It means something different in each statute. In this case we had to decide what willful meant in the context of that act.

The reason it's memorable is that we did come to a conclusion on an extremely complex, subtle question, and it became part of the standard jury instructions. So I guess we can take a little pride in working that through. That's what you want the Courts of Appeal to do, to grapple with these things. Then if they're wrong, the Supreme Court can take it up and tell them they're wrong.

MCCREERY: Were there other instances of your opinions being challenged to the Supreme Court?

WERDEGAR: Probably, but I have no memory of it. On the Court of Appeal things move so fast, you may or may not be even aware that a party is petitioning. If the Supreme Court reverses you, that would come to your attention because — I just think it would. But otherwise a party might petition and the court will deny review, probably.

There was one opinion of mine — I have no idea what it was about — that the Supreme Court depublished. The court at that time would depublish a lot of opinions, which became a subject of real criticism, and under Ron George that diminished almost to de minimus. But under the Lucas Court they were shaping the law that way — and it was roundly criticized — making cases disappear, and then leaving standing the ones that they liked and not taking on the issue. We still depublish occasionally and there are reasons, but they were depublishing lots.

Anyway, one of my cases was depublished, and somehow that came to my attention, and I thought, "Well, why?" So when I was appointed to the Supreme Court I went straight to the files to see what was wrong with that opinion. I read the conference memo, and I disagreed with it. [Laughter] But too late. I felt that the staff attorney that had written the memo was off base. That's just a funny sideline. I disagreed but couldn't do anything about it. I couldn't retroactively have it put back in the books.

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<sup>15</sup> 23 Cal. App. 4th 174 (1994).

MCCREERY: Depublication is an interesting feature of our system, though, in California. How well do you think it was working overall as a way to —

WERDEGAR: Let me say — you may not know this, but — up on this court, somewhere along my tenure I was made chair of the publication committee because — you may want to get into it later or you may want to get into it now, but — there was a lot of unhappiness and vociferous objection to depublication.

There was a lot of criticism of that, burying law. So Ron George appointed me as the chair of the publication committee, not exactly a welcome position. There were two brothers, the Schmier brothers, who really had a bee in their bonnet about depublication, and they would not let the subject go.

I think one of them perhaps had had a divorce or a business dispute. I'm not sure what I'm saying is accurate, but one of them had had an opinion depublished. There was a personal reason why these brothers were so adamant, and they would write about it. They would never let go, and if you met them at an event at which they made it a point to show up, they would corner you. They really had a grievance.

But generally speaking it was not good. This court before my time was depublishing, oh, scores and scores of Court of Appeal opinions. You don't publish that many in the first place. That's another part of the problem, or another part of the subject. But the view was the court was just cherry-picking cases to depublish.

Once I was on the committee, I know the defense attorneys — and I think justifiably — were saying that an appeal that reversed their client's conviction would not be published or would be depublished, so it left them — you can't cite an opinion that's not published — it would leave them knowing — or in *any* field of law — knowing that there's a case out there, because you paid attention, that was good for you. You can't cite it. That doesn't seem right.

This court came to the conclusion that that's not the way to shape the law. This committee, which involved all sorts of staff work — I mean AOC [Administrative Office of the Courts] staff — getting statistics, and charts, and questionnaires to Court of Appeal judges, and a mix of a committee of practitioners and every kind and level of judges.

We met for a year or two. We did something that really, I think, helped change things a little bit. I don't have the rule in front of me, but the rule initially was — we changed the presumption from *not* publishing to *publishing*.

We also made it clear that if the case — the criteria are: Does it announce a new principle of law? Does it apply an established principle of law to a new set of facts that are meaningful? Does it synthesize a whole body of law? Or does it address some old law in a new way? These are the reasons that publication is appropriate.

The conclusion of the committee was that Courts of Appeal should be paying more attention and publishing more cases. Now, speaking as a Supreme Court justice who has conference memos about petitions each week — oh, it used to be also that if the opinion was not published, one of the reasons for not granting review was, "It's not published."

That's not true anymore, nor should it be. But when I see an opinion that was not published and that should have been, it really does annoy me. It doesn't happen all that often, but when it does I think, "What was that Court of Appeal thinking when they announced some new principle of law and they don't publish?"

I almost want to — we don't have the authority to do that — send it back to them and say, "Publish this."

But most opinions are not worthy of it. Of course, they're now available online, but parties still cannot cite opinions that don't appear in the official reports, and it truly would clog the reports if you think of the thousands of appellate decisions that are issued every year, most of which add nothing to the law. They're important to the parties, but they add nothing to the law.

MCCREERY: What were the criteria applied at the time you were sitting on the Court of Appeal about deciding to publish?

WERDEGAR: The same criteria. I think the presumption was just different. And of course, every division is different, but in order to publish each division has its own rules.

So how does a group of judges decide if this opinion is going to be published? I can't remember what our rules were, and that's another thing that the committee addressed. The rules vary. The approach varies in each district or division, and I can't at this moment survey for you what those rules are. But there's a lot to think about in that regard.

MCCREERY: I wonder, too, how much your division leadership had a say in that matter or put a stamp on that?

WERDEGAR: Perhaps I could find out for you, speaking to others, but I can't remember what the procedure was about publication. But I do think that one judge could veto it.

MCCREERY: Returning to just the general matter of opinions, not specifically about depublication, you would sit in panels of three to decide individual matters. How important, or what emphasis was there, on all three of you coming to agreement. Was that considered important?

WERDEGAR: No, but we usually did except maybe Justice White would dissent.

MCCREERY: What makes you say that?

WERDEGAR: He had a completely different view of the world, a different life experience, a different view of the law.

One time he dissented to one of my opinions. I had come to the Court of Appeal having the experience of being a staff attorney up here — that being the Supreme Court — if a dissent is written, the majority, if they choose to, responds, in other words shows why what the dissent is saying is of no consequence or is wrong. We'd go through this, and we're going through it a lot now. So to me that was natural.

His dissent said something, and it was natural for me to modify my opinion and explain why what the dissent said was of no account. Perhaps that was not usual in the Court of Appeal. I don't know. But I came from this background where it's routine at the court here.

After I made my changes Justice White took the opinion, and he wouldn't circulate it. In other words, the case sat in his drawer for an inordinate amount of time, and I had no way of getting him to release it so we could release it.

I spoke to some people, and they said, "Speak to the presiding judge." The presiding judge was the one that was sitting on the case. [Laughter]

Again, I don't think it was because I was inexperienced. I think this had never happened, and I don't know what anybody would do. But finally, with the support of whoever else was on my case — maybe it was Bob

Merrill, maybe it was Ming Chin — the solution was reached to just file the majority opinion.

But that didn't happen. When we came to that Justice White released his dissent, and the three judges' opinion was released.

MCCREERY: What was he getting at?

WERDEGAR: I don't know. Maybe what I did wasn't that usual on the Court of Appeal. That I can't say. But it irked him.

MCCREERY: You've described working closely with your law clerks — your staff attorneys, I should say — on your own caseload. To what extent was there informal exchange among the justices about the details of cases?

WERDEGAR: Very little, as far as I'm aware. We would have this weekly conference as to what result seemed right, and the assigned author would write the opinion. There was very little.

There had to be some. There was one — Ming Chin was assigned a DNA case, and this goes back to when DNA evidence was really new. This was one of the major cases that came to our division, and I remember the staff attorney at the time got deeply into DNA, and Ming Chin, who has since become noted for his interest in technology and so forth — I think it started there. To try and get on top of that case as a judge and the intricacies of this — the labs and the courts and the individuals didn't have all the experience we now have.

It was just so new, and I cannot tell you more about the details of the case. But I do remember we spent a lot of time, Ming Chin and I and I don't know who else was on the case, and his responsible staff attorney working through whatever the issue was that related to DNA. It was brand new. It's interesting to reflect on — fast forward, and now it's very routine.

But otherwise there wasn't — maybe when we went to lunch we'd talk about a few cases, or maybe we'd just gossip or talk sports. My husband used to say — I didn't appreciate it — that he knew when I was going to lunch because I'd look at the sports page.

MCCREERY: And you did that in order to — ?

WERDEGAR: Participate. Be conversant.

MCCREERY: What other developing areas of the law stood out at that time, other than the DNA-related technology?

WERDEGAR: I have no recollection that there were any.

MCCREERY: What view did you take of the matter of prejudicial error and to what extent that would indicate a need to reverse?

WERDEGAR: Given the attention to that with respect to the California Supreme Court it's a fair question, but I have no recollection of that. There are certain standards, and I think I doubtless applied the standards as I understood them, the Watson standard versus the Chapman standard. So many errors — and of course the stakes weren't so high.

Up here it's the death penalty cases, and that's where so much attention has been drawn to the California Supreme Court's finding errors but finding them "harmless." Most errors *are* harmless. They really are. And it's a cliché to say there's no perfect trial. There's a case in dispute right now where some justices feel the error was not harmless, and some feel it was completely harmless. So we do, up here, get involved in that discussion. But down there, not having death cases —

Actually, I did — it's interesting you mention that. I did write an opinion reversing a criminal conviction because I decided that the error was not harmless. *People v. Elguera* or something.<sup>16</sup> I can find you the name if you need it. It was a small, little case. It was a prisoner at Pelican Bay who was charged with having a razor blade. It was found in the cafeteria in proximity to him. I think it was wrapped with tape or something. He was convicted of having whatever it would have been, a weapon, in prison.

It came to the Court of Appeal, and the error that was alleged was that the trial judge at the conclusion of the trial — juries are instructed at the beginning of the trial and at the conclusion of the trial — at the conclusion of the trial, the trial judge neglected to instruct the jury on the burden of proof, "proof beyond a reasonable doubt." The defense appealed and said that's error. I wrote that it was error, something to the effect that, "The words that should be ringing in the ears of the jury as they retire to deliberate should be, 'the burden of proof beyond a reasonable doubt.'" My opinion said that the fact the trial judge told the jury when they first were starting, before they'd heard the evidence, was not sufficient.

MCCREERY: What response did you get to that opinion?

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<sup>16</sup> *People v. Elguera*, 8 Cal. App. 4th 1214 (1992).

WERDEGAR: Oh, I don't know. You have to understand, at the Court of Appeal you don't get many responses to opinions. Did the defense attorney become a fan? I don't know. [Laughter]

MCCREERY: Occasionally they do draw outside attention.

WERDEGAR: *Mouton* did. [Laughter] No, something like that, perhaps it would draw attention that it was reversed. But the legal papers don't pay a lot of attention to these opinions that just process through the Court of Appeal. But I reversed it. I can't remember if it was unanimous or I had a dissent, and I don't know who was on the panel. But I could find out if you care.

MCCREERY: After sitting with your fellow justices for a few years, to what extent could you predict how they would come down on one matter or another?

WERDEGAR: Pretty much. I can't be specific, but yes, pretty much.

MCCREERY: What patterns might they have expected from you?

WERDEGAR: I can't say what patterns they expected from me. That was the big mystery when I came on. What would it be? But we worked well together, and whatever cases during that period of time came to us were not, evidently — I don't recall big controversies. There may be other divisions where the personalities are different and every case has a dissent, but I don't recall that ours was. I think we worked together smoothly and saw the law similarly. Bob Merrill was a wonderful influence on all of us.

MCCREERY: He served as the acting presiding justice for a time?

WERDEGAR: I can't say. Clint White was the presiding justice the whole time I was there.

When Clint left I don't know, in connection with Bob Merrill becoming acting. He certainly would be a terrific presiding justice. You know, the governor appoints a presiding justice, and they don't rotate. You are presiding justice forever, until you leave.

MCCREERY: Justice Kline is a good example of that, having held the job for a very long time in his division.

I wonder how your own judicial voice, shall we call it, might have evolved over those years. Did you note any development in your methods, your process?

WERDEGAR: No. Going back to all the experience I had had and all the writing I had done, I think my voice, such as there is a voice, is pretty straightforward. I don't know what you mean exactly by a judicial voice. I've never written with great flair or drama. Pretty straightforward, I think.

MCCREERY: What about the length of your opinions vis-à-vis those of your colleagues?

WERDEGAR: I can't remember. No. This was more than twenty years ago, and I've had so many Supreme Court concerns since then. We gave the cases the treatment they deserved.

MCCREERY: How good a fit was the job for you?

WERDEGAR: Wonderful, I thought. It would be for others to say what they thought. [Laughter] I mean, it was difficult being so alone and not having the collegiality that most have and others coming on after me have had. That was hard, but I've been used to that my whole career.

MCCREERY: What women colleagues did you have outside the First District in the wider Court of Appeal?

WERDEGAR: None. I did go to some conferences, but mind you there were only ten women Court of Appeal justices in the state at that time.

MCCREERY: Just quickly, what other interaction did you have with the Supreme Court during your time on the appellate court, other than something around an opinion?

WERDEGAR: I can't remember any. I don't exactly know what you mean. Socially or going to events?

MCCREERY: Or just having a different window on that court's work than when you had been there as a staff attorney?

WERDEGAR: I can't remember what changes, if any, occurred on the Supreme Court while I was on the Court of Appeal. Perhaps your research would reveal that.

MCCREERY: I'm sure you had your hands full.

WERDEGAR: Well, yes, and I don't know how we would interact, unless you're talking about being on committees, which I wasn't, or knowing each other previously and socializing, which hadn't been the case for me. No.



MCCREERY: Thinking back now, how do you evaluate your several years on the Court of Appeal, as a justice, as a stepping stone in your career? What did that bring to you?

WERDEGAR: It allowed me to be appointed to the Supreme Court. [Laughter] Certainly I'm glad I had that background. Reflecting on how things have changed, as I've mentioned, at that time a litigator became a trial court judge, and any appellate judge had been a trial court judge. Now we have three appointees who have never been either litigators or judges, and all mostly professors. It's a very different perspective on the part of the appointing authority.

I think there is a lesson there. George Deukmejian had this view. Pete Wilson was a bit more flexible, but he didn't throw all this to the winds. A bit more flexible, and certainly in my case he was flexible. Jerry Brown, obviously, has just spoken as to what he's looking for.

I do think having been on a court before you come here is helpful, and I think having served here as a staff attorney was as helpful as having been on a trial court for arriving at the Supreme Court. I really do. There's much that you learn about procedures, and history, and approaches, and balance. My background, to me, was essential.

I would have benefited from more background. I would have benefited from being a trial court judge. I probably would have benefited from being in a law firm or a litigator. That didn't come to me. I'm glad that that lack did not preclude me from having the career that I've had.

MCCREERY: Speaking of Governor Wilson, just briefly, what view did you take of his governorship as it went on?

WERDEGAR: I thought he was a terrific governor. We saw some of him — well, once I was on the Supreme Court and Ron George was here and he was around, we would see him occasionally. But he was a wonderful governor, and I think it's a shame he imposed term limits on himself.

MCCREERY: That did all come during his time, didn't it?

WERDEGAR: He promoted that. He was a good governor. I don't even think that's particularly controversial. As always there were certain issues that divided the populace, but I think he really was a good governor.

MCCREERY: You got to have a family connection to his administration, as it turned out. How did that go?

WERDEGAR: That's right. He appointed David as director of health policy planning. I guess that's one reason we saw a bit of him. David enjoyed his work, did a good job. He was well suited for it, having been health director of San Francisco and having started the family practice department at UC.

MCCREERY: Thank you, Justice Werdegar, and I look forward to getting you onto the Supreme Court next time.

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## INTERVIEW 6 (MARCH 19, 2015)

MCCREERY: We spent our last oral history interview session talking about your career as a justice of the California Court of Appeal. I believe you've uncovered some things from that time and others that you'd like to bring up before we get onto other things today. What were those?

WERDEGAR: Thank you for giving me the opportunity to cycle back a little bit. Going way back, I mentioned with respect to my studies at George Washington University some of the professors I remembered. I did mention Monroe Freedman, and I think I mentioned that he was a guru in ethics. I didn't study ethics from him.

Regrettably, in the meantime since we spoke, he passed away. I saw this obituary in the *New York Times* on March 4, 2015, and I realized from what they wrote about him what an incredible man he was. Of course, as a student — he was my law review adviser/professor — I didn't have the full benefit of all that he was, nor could I have appreciated it at that time. But I'll just give you a flavor. This obituary says:

Monroe Freedman, a dominant figure in legal ethics, whose work helped chart the course of lawyers' behavior in the late twentieth century and beyond, passed on. His book, *Understanding Lawyers' Ethics*, is assigned in law schools throughout the country.

"He invented legal ethics as a serious academic subject," said Alan Dershowitz, the Harvard Law School professor. "He was a gleeful jurisprudential provocateur — ."

And so it goes, and there's a photograph of him. So I wanted to expand a little bit on my privilege in having known him and my regret that I didn't experience the fullness of all that he was.

The other thing I wanted to go back to: As I had mentioned, an important part of my background is that I did author the *California Misdemeanor Procedure Benchbook* published by the California Continuing Education of the Bar, and I did this under the auspices of what was then the California College of Trial Judges.

Let's see, how many pages do we have here? It's about 400 pages, indexed and subheaded, about how to try a misdemeanor case. At that time, by the way, there were municipal courts, and misdemeanors were tried

in municipal courts. This book was on the desk of every municipal court judge in the state at that time.

What I want to add to that is I came across this beautiful leather-bound book entitled, *Appellate Court Opinions, a Syllabus*, prepared by B. E. Witkin of the San Francisco Bar. Engraved in gold on the leather cover is my name at the bottom, Kathryn Mickle Werdegar.

Why is this significant? It is significant because when I turn the couple of pages in the beginning I find this absolutely delightful inscription: “To Kay, from another law writer. Bernie Witkin.” Of course, I treasure that, and how generous he was. But it is an item of historic interest. That was my return to matters we’d spoken about earlier.

MCCREERY: How well did you know Professor Witkin?

WERDEGAR: We were socially acquainted. Perhaps I mentioned it earlier. I had encountered him when I was working for the California College of Trial Judges writing the misdemeanor procedure benchbook. We were, in a collegial way, affable acquaintances.

My husband had a bachelor brother, a psychiatrist, at that time. Bernie Witkin’s wife at that time — I don’t believe it was Alba — had a single daughter, and so we were invited to dinner at their home, my husband and I and my husband’s brother and the particular young lady. Yes, we saw Bernie in his home, and we became of course more acquainted then.

He opened the door to this room. I don’t think it was a vault, but he showed me where he had all his three-by-five cards, way before computers, everything that he would put in his book and organize and categorize. It was in file drawers on three-by-five cards.

Bernie Witkin was known to be a cut-up, if you will, amusing. We did have the pleasure of seeing him put something on his head and balance it and walk around. He had a great personality, and they were very hospitable.

After that, I don’t think any romance was forthcoming from the dinner. [Laughter] But after that I would see him at professional functions. He was just a very gregarious, outgoing man and, of course, brilliant. I think it’s true that he did not graduate from law school. I think it’s possible that he went to Boalt Hall, now Berkeley Law, but didn’t finish. But perhaps you’ll fact-check me on that. I think it’s an interesting fact if it’s true.

MCCREERY: How usual was it for a leather-bound compendium of appellate court opinions to be prepared?

WERDEGAR: I think not at all, and to have my name on it. I've never heard of another. He doesn't actually have opinions in here. It's about writing, and preparing for the oral argument, and questioning by counsel, and how justices operate, and what came out of certain appellate justice seminars, and mechanics of drafting. And what about concurring and dissenting opinions. So it wasn't actual opinions. It was on how to do it or how it is done.

MCCREERY: Thank you. Anything else that you'd like to add?

WERDEGAR: No.

MCCREERY: Unless there's anything further you'd like to say about your years as a justice of the Court of Appeal, perhaps we'll think about moving into the transition period. Anything to add there?

WERDEGAR: Did I mention that when I was on the Court of Appeal and my colleagues were Justice Ming Chin and Bob Merrill — that we had one of the first DNA cases? It was assigned to Justice Chin. And to think back, how we were trying to figure out what DNA was in the sense of evidence in trials and how it could be accurately analyzed. Was it usable validly as evidence? It would be new scientific evidence.

We used to have long meetings, and with staff people, to try to get ourselves up to speed. I think I mentioned earlier that we all got educated on the subject, but Justice Chin has continued to be a scientifically knowledgeable and interested justice. No, there's nothing else I care to add.

MCCREERY: That reminds me, though, to ask you what sort of presence Justice Chin was on your panel? What style did he display, as you recall it now?

WERDEGAR: He was who he is. Agreeable and engaged and so on. And Justice Merrill, who spoke at my hearing that I'll be telling you about, was a real gentleman.

Justice Clint White, I think I described, could be very big-hearted and a fine person, but he also could be totally distracted, maybe not even knowing who was the plaintiff or the defendant arguing before us, I think because he just wasn't paying attention. I think I mentioned I was probably a challenge to him for the reasons of how I present and who I am. But he

was good-natured, and I'm glad I had the opportunity to serve with him. Again, I might have mentioned that in his day he was supposed to be a superb trial attorney.

MCCREERY: How did you learn that Justice Panelli would soon retire from the California Supreme Court?

WERDEGAR: I actually don't remember. I don't remember if he told me personally or if it was announced in the paper.

MCCREERY: Did you speak to him personally about it at some other time?

WERDEGAR: No, I can't remember that I did. I have no memory of that.

MCCREERY: But somehow you learned that news.

WERDEGAR: Oh, of course. That's always big news, when a justice retires.

MCCREERY: What was the first you heard from the governor?

WERDEGAR: When it came time, when Justice Panelli stepped down, we could very well have had conversations, but I have no memory of that. You don't apply to the Supreme Court. But I was invited to apply, as were some others.

MCCREERY: What form did that invitation take?

WERDEGAR: I don't remember. It's so long ago. Maybe one of Governor Wilson's staff people called, or maybe somebody from his administration asked somebody close to me to tell me to apply. I don't know how it was done.

MCCREERY: What was your response upon getting that invitation?

WERDEGAR: I was thrilled, of course. It's a lot of work, these applications, but you're motivated to do it. You have to supply fifty — or you have the opportunity to supply — something like fifty references, and I believe you have to list all the cases — depending on where you're coming from when you're invited — but in my case probably a list of Court of Appeal cases that I had authored. That's what I recall.

MCCREERY: After you prepared the application materials and submitted them, what happened next?

WERDEGAR: You wait. [Laughter] There were other candidates. At that time — every time is different — certainly recent history is different — but at that time it was published, the governor's office, I guess, chose to publish

who the governor was considering, and there were four of us. It was myself and Art Scotland and Ming Chin and Janice Brown.

Art Scotland was on the Third District Court of Appeal. Ming Chin was my colleague on the First District, Division Three, and Janice Brown had been legal affairs secretary, and was I think at that time, to Governor Wilson.

MCCREERY: Actually, the news accounts of the time mention two other candidates.

WERDEGAR: Oh. Who were they?

MCCREERY: Reuben Ortega of the Court of Appeal in Los Angeles and then Patricia Bamattre-Manoukian from San Jose.

WERDEGAR: Oh, well. That part of it I don't remember. They published quite a lot, it seems. So there you are, out there with all these people and everybody discussing what your chances might be. Other times, most recently, the governor just puts out a name and the commission evaluates them and it happens.

But for whatever reasons — either that's how it was done or maybe a particular governor wants to showcase who he's thinking about. Even though only one of those people is going to get it, maybe politically the governor, any governor, thinks, "I'm looking at all these people."

MCCREERY: Since you've mentioned that all the names were out there, what sort of response did you get from your own circle and beyond on being named as a candidate?

WERDEGAR: It's always a privilege to be named as a candidate, and I was thrilled. I don't remember any particular — of course, people close to me that liked me or admired me would be hoping that it would happen. That's all I remember.

MCCREERY: How long did the waiting endure?

WERDEGAR: It seemed like forever, and I can't tell you in detail. I don't know when the names went out. If you have news clippings on that, that would show that date, and I think the call came maybe a month before the hearing.

MCCREERY: In early May you were selected, early May of 1994.

WERDEGAR: Oh, I was? After the governor selects his candidate, then the “Jenny” Commission, which you heard about for the Court of Appeal, Judicial Nominees Evaluation committee of the State Bar, does its investigation, and that takes a lot of time. They send out these forms, and the candidate has to meet with them and be interviewed. You say I was named in May? And I was confirmed June 4, 1994.

MCCREERY: So it was about one month between the two.

WERDEGAR: Yes. I do remember when I got the call. I was in my office, and I received a message from the governor’s office to please call the governor. Of course, I didn’t know if the governor was going to say he was sorry or he was going to say congratulations.

But I had an appointment to meet a young friend of my son for lunch who wanted to talk to me about law school. So I had to go to lunch. I couldn’t return the call immediately. I suffered through that lunch knowing there was a call that I had to make when I got back.

I did make the call, and the governor was put on the line. He said, “It’s been a difficult decision, but I’m very happy to say” — this is a paraphrase, of course — “to say that I am nominating you to serve on the California Supreme Court.”

MCCREERY: What other interaction had you had with him on the subject, if any, up until that call?

WERDEGAR: Oh, I was interviewed by him. He was in San Francisco and doing some other things, and we had an appointment. Although we knew each other, at the interview you would never know that. It was a very formal interview.

MCCREERY: Who else was present, do you recall?

WERDEGAR: Nobody. I forget the questions. Whatever the answers were, it must have satisfied him.

MCCREERY: What were your first moves after getting that phone call affirming that you were the selection?

WERDEGAR: I probably told Justice Panelli. I certainly told my husband, and I probably told Justice Panelli. Then you just try to settle down.



Oh, and I think I couldn't make it public. I had to keep it a secret. But there was some preparation I had to do that was secret that I had to enlist the confidence and assistance of my judicial assistant at the time, Pam Hitchcock. But these details after twenty years are not as fresh as they would have been at the time.

MCCREERY: The accounts of that time do say that it did take Governor Wilson a while to make his selection. Justice Panelli had announced the previous September that he would leave, and then he did leave the end of January so there was quite a gap in there.

WERDEGAR: Oh, is that right?

MCCREERY: He was running for reelection, though, in this year that we're talking about now, 1994.

WERDEGAR: I guess it did take a long time.

MCCREERY: He was describing you in public at that time as being a brilliant legal scholar, but he also emphasized that he viewed you as someone who had the ability to build consensus and to play in some sense a conciliatory role.

WERDEGAR: Is this before I was appointed? Oh.

MCCREERY: I wonder how you thought about the way that he was characterizing you?

WERDEGAR: I had to be deeply grateful and hopeful. I don't know the circumstances that you're referring to that, before I was nominated, he had occasion to speak about me. I have no recollection of that.

MCCREERY: I'm sorry. Let me clarify. After he had made public that he had chosen you. "Here's why I chose her." That sort of thing.

WERDEGAR: Oh, well yes. How generous of him. But of course he wanted to support his chosen candidate, and I had to be only grateful.

MCCREERY: I'm interested in the "conciliatory" characterization, and so on.

WERDEGAR: That's his characterization. I think he was extrapolating from what he knew about my personality. I'm not a confrontational, aggressive person.

MCCREERY: You mentioned the Commission on Judicial Nominees Evaluation. What were the next steps in your process?

WERDEGAR: Waiting. [Laughter]

MCCREERY: Yet again! [Laughter]

WERDEGAR: The commission interviews you. They send out their letters. They interview you. I have no recollection of how that went. I don't even know if they tell you what evaluation they're giving the governor.

So you wait, and once all that information came to the governor he made his announcement.

MCCREERY: And their evaluation was — ?

WERDEGAR: "Well qualified."

MCCREERY: As it had been for the Court of Appeal, if I recall correctly.

WERDEGAR: I think so. Let me say that, for the commission at that time this was a growth experience because, as I mentioned in reference to my Court of Appeal appointment, I was not in any way the traditional candidate for any of these positions. The traditional candidate, of course, would be a male, and it would be a male who had most typically certainly sat on a Court of Appeal, but had been a litigating attorney, perhaps a D.A.

I mentioned previously, in more recent times the bar and the executive office has acknowledged that there are many other paths to follow in the law. But at that time they'd never seen a candidate like me for a number of different reasons. So for the Jenny Commission to give me in both instances a "well qualified" ranking was — I don't want to say generous of them because I think I deserved it, but it showed flexibility and appreciation on their part of something that they hadn't seen before but they could recognize the potential and the worthiness.

MCCREERY: On the previous appointment, the Court of Appeal, you learned later about the role of a woman in making some recognition of the fact that you had taken a different path.

WERDEGAR: You mean a member of the commission? The chair of the three-person commission was Ann Ravel, and she was most supportive and most approving and enthusiastic about the appointment. But I wouldn't say that it was she alone.

The head of my next commission, the one we're talking about, was Ron Albers. I believe he's a superior court judge now. He was, I believe, a public defender at the time.

MCCREERY: Who else did you have this time?

WERDEGAR: I don't remember.

MCCREERY: How did it go from there?

WERDEGAR: Then came my confirmation hearing. But I want to say that when Governor Wilson did appoint me, and ultimately I was confirmed, I became the 108th justice of the California Supreme Court, the third woman to be appointed to the court. Rose Bird had been the first, and Justice Joyce Kennard, who was on the court appointed by Governor Deukmejian, was the second.

I also — I love this bit of history — became the first staff attorney to be appointed to the seat of the Supreme Court justice she had served. Justice Panelli's name is on the plaque, and right under it is my name. I love that bit of history.

A final bit of history is I was the first daughter of a former Supreme Court clerk to be appointed to the Supreme Court. I would say daughter or son. My father, unfortunately, didn't live to see me be any kind of a judge, but he knew that I had excelled in law school and was doing legal matters.

MCCREERY: That's a few firsts — or seconds or thirds, certainly. But it makes the point that it was not a common thing.

WERDEGAR: No. Then came my confirmation hearing.

MCCREERY: Let me ask you to describe that in some detail, if you would be so kind.

WERDEGAR: Thank you, Laura. The Commission on Judicial Appointments, of course, is always comprised of the chief justice, who was Malcolm Lucas, who presides, and the attorney general, who once again was Dan Lungren, and then the senior-most presiding justice of the Court of Appeal in the state, and that was Robert Puglia from Sacramento.

The persons I had speak on my behalf were Professor Jesse Choper, former dean of Boalt Hall; and Chief Judge of the Northern District of California Thelton Henderson, my former classmate; and attorney Vicki De Goff, who was a past president of the appellate judges institute of the

state; Roger Poore, an attorney and a neighbor; and Justice Robert Merrill, who was my colleague on the First District, Division Three.

Three themes were sounded at this hearing, and I want to speak about them because they are a true reflection of the times. From my chosen speakers, the ones I've just named, the themes were my excellent academic record and my varied experience in the law; the fact that I was a woman, which was news in those days; and that I had successfully balanced family and career. Those were their themes. From the two judicial appointment commissioners who spoke, Attorney General Lungren and Justice Puglia, the theme was the death penalty. I'd like to expand on this. This was 1994, and a woman achieving high-profile success in the law was unusual, not unprecedented but certainly unusual. A woman doing so who was also married and had raised a family was very unusual at that time.

Vicki De Goff, who — everybody spoke first about my qualifications, but I want to quote what some of them said on some of these points. Vicki De Goff said that my confirmation “would send a message to all disadvantaged groups that with hard work and perseverance excellence can prevail,” and that my confirmation “is important to continue to shatter the glass ceiling that has prevented qualified women from rising to the highest levels.” She went on to say that I had “managed a balance between personal and professional roles that many women strive to achieve.”

Then Judge Thelton Henderson, my law school classmate, related that, as both of us were minorities in our law school class — he was one of two African Americans — what a class for Boalt — and I was one of two women — that later when we compared notes about law school, he said, “We often had similar perceptions of the law school experience and our place in it.”

He didn't specify what those perceptions are, but it was a perception of an outsider and that others were somehow smarter and knew more than we did. It was a wonderful experience, as we spoke about it to each other in these after years, “Oh, that's how I felt.” For different reasons, but the same result.

He also repeated a favorite saying of his that he graciously has said many times, something that was current at the time that we were in law school. “The number one man in the class is a woman.” Does that not tell you about the times?

Roger Poore, our neighbor and an attorney, sounded the theme of my being a supportive wife and a devoted mother, and present at the soccer games, and home to cook dinner, and a good neighbor and, according to Roger, seemingly effortlessly. It wasn't, but nevertheless continuing to have a professional life.

Robert Merrill, who was my colleague on the First District, Division Three, is a widely admired and really kind man, a true gentleman. He first was extremely generous about my service with him as a colleague. I just reviewed the videotape of this confirmation hearing, and I was really touched — Bob Merrill is not with us anymore — by how generous he was.

He said, "When you are a colleague on a court, you know you have no place to hide. Everyone knows what your capabilities are and if you're carrying your weight." He was extremely generous.

But on the point that I'm developing now, I want to quote to you what he said. After he'd commented generously on my judicial abilities, he turned to the personal aspect, and I want to quote him.

He said, "Something very significant is taking place here today. Over the years, Justice Werdegar has moved forward to this pinnacle of achievement while she has been deeply involved as a wife and mother. She has set a tremendous example to young women who desire to pursue a legal career and also to raise a family." From Bob Merrill that was extremely kind. He was the father of daughters, and I think he had a particular sensitivity.

Later the president of California Women Lawyers was quoted in the same vein. She said, "Werdegar's career trajectory provides hope to many young women lawyers struggling with motherhood and careers. We were intrigued — " I think she means the women lawyers organization, " — by the fact that she managed to reach the pinnacle of her profession with a husband and children. She appears to be a great role model because she's been able to balance a very successful career with family and raising children."

I think it was maybe Roger who referenced that family. My husband might have been health director of San Francisco at — no, he was up in Governor Wilson's office, but he had previously been health director of San Francisco. Our two sons were Stanford graduates, and one was just finishing up a Marshall scholarship at the University of London. That was one of the themes, two of them, my capability and my balance.

MCCREERY: It does sound as if the family connection was a very strong theme, mentioned by several people.

WERDEGAR: Oh, it was.

MCCREERY: How did you feel upon hearing that?

WERDEGAR: I appreciated it because, as I've told you earlier, as I pursued my career, following a path open to me, not the classic downtown law firm path, it was always my intention and effort that my family wouldn't suffer in any way, wouldn't be disadvantaged. That was those days. I was the only mother that I was aware of working, and my husband had many demands on him so a great deal of my energy was put to not inconveniencing my family.

I was gratified that people appreciated that. They remarked on it because at that time it was extremely unusual. Yes. So I appreciated it.

MCCREERY: But then, you're saying, the tone of the hearing changed a bit when others spoke?

WERDEGAR: Then came the time for the commission. The candidate makes a little statement. It was, "I'm privileged, and I appreciate this, and I'd be happy to answer any questions the commission has."

Attorney General Lungren spoke first. To set, again, the historical framework here, this was a time when "tough on crime" was the political slogan for success and the concern of the populace. This was June. In November the Three Strikes law would be enacted by initiative measure.

Only eight or seven years before, what's known as the Rose Bird Court had been ousted by the voters in that they didn't retain Chief Justice Rose Bird, Justice Grodin, and Justice Reynoso. Why? Because the public that voted was of the impression that those judges, who were on the ballot, would never enforce the death penalty.

It was a new death penalty, fairly new. It had been reenacted in 1977. I can't say — I wasn't among them. But the law had many aspects that a court has to sort out, whatever. But the perception was that they just would not enforce the death penalty. And they didn't affirm, they reversed, almost every death judgment that came before them.

MCCREERY: Pardon me. When you say you can't say, you were not among them, I'm not sure what you mean.

WERDEGAR: I mean I don't know what the reasoning of the court at that time was. That's what I meant. I wasn't here, but the bottom line was that they were reversing every penalty that came their way. Or if there are some exceptions, they would have been few. So they were not retained, and it was after a very — this is unusual in our judicial and political system, for judges to be attacked, and they were. So everybody knew at that time who Rose Bird was, and they voted "no" on her retention.

That sets the stage for eight years later when I am at the podium hoping to be confirmed to be a justice of the California Supreme Court. Attorney General Lungren started by stating, which is true, "The public has no understanding of why our capital cases take so long."

He asked me what I thought about delays caused in capital cases from pre-trial writs, and what did I think about the undue length of capital case briefs. Of course, on the Court of Appeal we didn't deal with capital cases, but I had been a Supreme Court staff attorney for six years, and I was well acquainted with them. So I responded, as to pre-trial writs, that they might actually save time, in that if there's some error that the writ brings to the attention of the court, it might save a later reversal, and I wasn't aware, actually, that they were a big factor. And insofar as capital case briefs, I certainly wished they were shorter, and maybe somebody would like to put a limit on them? [Laughter] He was finished then.

Justice Puglia started by saying that, although he had sat on many confirmation hearings — because he would be the senior judge for the Third District Court of Appeal — he thought it was fair to say that this was his "maiden voyage." Next he observed that this was the only part of the process of appointing and selecting Supreme Court justices that was open to the public, and for that reason he wanted to ask me about the death penalty.

He made reference to recent history, about which he "need say no more." Of course, he was speaking of Rose Bird and the others who the voters had failed to retain. Then he spent a full ten minutes asking me again and again if I appreciated that the death penalty was the law of the land. Did I think a different standard of review, a higher standard, applied to death penalty cases than to other cases? And what would I do if I had an epiphany that led me to believe imposition of the death penalty was contrary to my conscience?

“Will you be bound by the Constitution and not by your conscience?” he asked. “Can you now say publicly to the people of California that you will be bound by the sovereign will of the people?”

He referenced United States Supreme Court Justice Blackmun, who just that year had written that he “would no longer tinker with the machinery of death,” and henceforth would not uphold the death penalty. And he remarked, “This Supreme Court justice so said, even though no law had changed since he took his seat on the court.”

The hearing concluded. I, of course, responded to those questions.

MCCREERY: May I ask how you did respond to those?

WERDEGAR: It would be interesting to see the video. Of course, I had no idea it was coming my way. Those kinds of questions in that kind of hearing was unprecedented. Usually it’s a love feast.

I said that I fully understood the import of the United States Constitution and the Constitution of the State of California and my obligation to abide by the law.

He kept saying, “What if you have an epiphany?”

I said, “I can’t imagine that circumstance, and I fully understand that my obligation is to abide by the law of California as it has been definitively interpreted.” In different ways, I affirmed that I understood my obligation.

It’s interesting, afterwards either Attorney General Lungren or Justice Puglia — but it must have been Justice Puglia given the intensity of his questioning to me — who said, “You’re a tough nut to crack.”

By the way, a headline in the *San Francisco Chronicle* said, “Close friend of governor grilled on the death penalty.” Justice Puglia was concerned, I can only infer, that I was going to be another Rose Bird or Justice Blackmun.

That was my confirmation hearing. It does tell what the issues of the day were, what the sociology of the time was — woman, mother, wife — and the politics of the time, death penalty.

MCCREERY: That’s right. I seem to recall that right around that time there were national polls, even, describing support for the death penalty by the public being at an all-time high, more or less.

WERDEGAR: Oh. In California it’s always been steady. It has diminished a little bit on this last initiative, when the emphasis was on the economics



of it rather than the morality, but I think in California — it has diminished nationwide, but in California I think it's pretty firm.

MCCREERY: Given that the handling of the death penalty cases is a significant difference on the Supreme Court, as opposed to the Court of Appeal, how appropriate is it to bring these things up to you or any candidate?

WERDEGAR: It's a fine line. Of course, we don't handle them on the Court of Appeal at all. He wasn't directly asking me how would I rule on a death case, but he certainly didn't want to see any epiphany, any change of conscience that would lead me to distance myself from applying the death penalty.

That is sort of a fine line. I didn't actually look at it that way, but it was. But we got through it.

MCCREERY: What acquaintance did you have with Justice Puglia before this time?

WERDEGAR: None. Some after, but none. So then Governor Wilson swore me in.

MCCREERY: Can you describe the vote by the panel?

WERDEGAR: Justice Lucas, who is a great poker face, didn't say a word. "Any more questions?" My recollection is that they left the bench to confer privately. When they returned Attorney General Lungren, before they voted, said, "I would just like to add one thing." He leaned forward, and he said, "Any concerns that we had at your last hearing that your lack of trial court experience would be an impediment to your service has been fully dispelled by your service these last three years." That was nice. I guess he wanted to end on a high note.

Then Chief Justice Lucas said, "Are we ready to vote? All those in favor?"

"Aye."

"Aye."

It was done.

MCCREERY: And it was unanimous?

WERDEGAR: I think so. Nobody said no. Let's put it that way.

MCCREERY: You've quoted extensively from the others who spoke there. May I ask you to reflect a little bit more on your own thoughts and experience of that hearing? What a roller coaster it was, in a sense.

WERDEGAR: It was. Looking back, I was extremely grateful to the articulate and generous, supportive and perceptive people who spoke on my behalf. At the time I felt that I had been singled out for a hearing that was, let me say, unique. But it was a happy day. It was a great celebration. And I was now a member of the California Supreme Court. I was grilled by Robert Puglia, who was perceived to be a fine fellow. But that day he had that concern.

MCCREERY: Luckily you were "a tough nut to crack." [Laughter]

WERDEGAR: Can you imagine? I thought, "What are you saying? Are you trying to crack me?"

MCCREERY: What a thing to say. Let's get on to the swearing in and the celebration aspects, please.

WERDEGAR: Governor Wilson, who had not been present at the hearing — he later said he wished he had been, but they were touring him through the court, somehow, so he didn't experience this — but he came and he gave a speech on how pleased and proud he was of his nominee. Then he repeated something, a statement of his that has become quite well known.

In fact, if people that have been with me in my various career steps remember nothing else, they remember Governor Wilson's statement that, "Kay stood out in our class. At the beginning of law school everybody wanted to carry her books. After the grades came out, everybody wanted to copy her notes." [Laughter]

It's a cute statement, and he just made it up on his way to my first confirmation, and people remember that.

MCCREERY: It's true it has appeared in print many times since then.

WERDEGAR: Yes. Well, he's got a clever way about him, and a wit. We celebrated that night with the governor and his wife and a few close friends, and that was the completion of that. The next Monday found me on an airplane to oral argument in Los Angeles.



WITH GOVERNOR PETE WILSON — JUSTICE KATHRYN MICKLE WERDEGAR SIGNING THE OATH OF OFFICE FOR THE CALIFORNIA SUPREME COURT, JUNE 3, 1994.

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MCCREERY: You must have known something about that schedule being in place, but it really is no time at all. What preparation did you have to even look at case materials for that, first of all, before you left home? Anything at all?

WERDEGAR: None. You don't get them until you're sworn in. Actually, I think this time, after one of our new justices was nominated but not the confirmation hearing, I think that justice was given all sorts of materials.



CONGRATULATIONS AFTER SIGNING THE OATH — JUSTICE  
KATHRYN MICKLER WERDEGAR WITH (L.-R.) GOVERNOR PETE  
WILSON, HUSBAND DAVID WERDEGAR, M.D., AND SONS  
MAURICE AND MATTHEW, JUNE 3, 1994.

But not in my case. So you've been sworn in. This is one of the highlights of your life. It's a Friday. Then I get these two massive what we call benchbooks with all the case materials and background materials. I don't think I settled down much that weekend, but I carried these enormous benchbooks with me on the plane to Los Angeles.

We have two days, so there would have been twelve cases. As you know, each one is an hour or, if it's — in those days — if it was a death penalty it would be an hour and a half. The attorneys argued. "Cause submitted." The next case comes up. "Cause submitted." The next case. It's exhausting, even now, the constant —

But I must have had a lot of adrenalin working because I stayed up. I thought that I was supposed to be on top of this. Of course, that's ridiculous. But that's what I thought, and so I stayed up every night and I went through these materials. I actually, when we took the bench on Tuesday and Wednesday —

Reading a newspaper report recently, it said, “Werdegar looks like a veteran in first high court appearance.” It went on to say in quotes some of the questions I had asked, and I thought, “Oh, well.” I must have prepared. But adrenalin —

MCCREERY: Will do that, yes.

WERDEGAR: Scott Graham, who was the reporter, wrote, “The idea that the new Justice Werdegar may not be assertive enough for the high court,” an idea he admitted that he himself had advanced, “may be way off the mark.” So I did get off to a strong start.

MCCREERY: I’d like to go through that first oral argument week in more detail. Just to follow up, though, on the festivities of Friday and so on, this is a much more visible type of appointment, shall we say, than that to the Court of Appeal.

WERDEGAR: Oh, yes.

MCCREERY: So there was, of course, a lot of attention in the press. And did you not participate in a press conference at some point in all of that? Do you recall much about appearing yourself?

WERDEGAR: When the governor named me, now that you mention it, I was in Sacramento and we went — I think he announced the nomination to the press and I was there. I had to take the podium in the press room of the governor’s office. I didn’t make a speech, but I think I answered questions or thanked him. The question was, how long would I serve? There were probably many questions. I expressed an intention, which I have fulfilled, to serve for a very good long time. [Laughter] That’s all. I wasn’t interviewed or anything after that. Of course, the press was full of it.

And there was — I don’t know when it appeared, but — Belva Davis has a Friday program, “This Week in Northern California.” It couldn’t have been that Friday. I don’t think so. But I have a tape of it, when she had her roundtable. I happen now to know Belva Davis, and my husband knows her very well, but at the time I didn’t know her at all.

She’s sitting there, and she’s interviewing all these people. “Who is this Kathryn Werdegar? How do you think she’ll be?” It was the topic of the day.

MCCREERY: People were very curious, weren’t they? Who is Justice Werdegar?

WERDEGAR: I've told my new colleagues, every twitch of your eyebrow or any sneeze, and they're trying to discern: How are you going to be? Where are you going to land? That's what they do.

Yes, people were interested. In my case, perhaps more because I had no public profile at all. As you say, the Court of Appeal is much lower key and I just had not been in any way involved in politics or in political organizations. I had been a housewife in Marin raising my family, keeping my head down and trying to do my work. People, understandably, just couldn't figure out who I was or how I would be. A lot of curiosity.

MCCREERY: As you say, you had essentially no break at all. You spent your weekend studying. And as it happened, the first oral argument week of this newly constituted court was in Los Angeles, one of the few times a year you're away from San Francisco.

WERDEGAR: Yes. And of course I had never been in the Los Angeles courthouse, which is in the Ronald Reagan building, where the Second District Court of Appeal sits. There's a wing for the Supreme Court. Each justice has an office, just a normal office. We're in a wing separate from the Second District Court of Appeal justices — which has many divisions. I think it's eight.

But it's around a corridor, and there are a lot of gray doors there. Some went to the restroom, which, by the way, did not say women or men. They were coeducational. There were two of them. Much later in my tenure, when I think we had three women, I said, "Isn't it time to put a label on men and women?"

Here comes the first oral argument, and I'm brand new. On the Court of Appeal when our division was going to take the bench, we had bailiffs, and a bailiff — it was a nice tradition — would come and collect us and walk us to the courtroom. A nice tradition.

Now I'm on the Supreme Court in a building I've never been in before. I've only been sworn in three days before. I have my robe on. I'm waiting to be collected. I wait, and all of a sudden I realize it's very quiet. I step out of my office. Nobody's there, so it dawns on me that, oh, everybody must have gone to court. Where's court?

There was a bridge from our wing that went across an atrium to an area more adjacent to one of the Second District divisions, and there was the

elevator. I got into the elevator and pushed a button. Remember, I'd never been there before in my life. The elevator goes down and the door opens, and I'm looking at an enormous warehouse room of boxes and files.

At that moment comes forward, I don't know why but thank goodness, a justice of the Court of Appeal. He looks at me, and he looks at me again. He says, "You're lost."

I was so embarrassed. He escorted me to the appropriate floor for my first oral argument.

MCCREERY: How common was it for new justices to be left on their own in these new settings? Do you know?

WERDEGAR: I don't know, but I think not at all. But not a justice came to my hearing either.

MCCREERY: Once you found the correct location, what transpired in that room? Paint a picture of it, if you can remember.

WERDEGAR: We stand outside the courtroom in an anteroom. We gather, and then we're all there. Of course, you have to learn where you sit because, just as at conference, you sit in order. But because we sit in three different courtrooms, a given judge might be on the right or on the left as you enter. But I was doubtless told where I sat.

We entered, and oral argument proceeded. As I recall and as the paper reported, I must have — I was very energized and believing that I had to be on top of everything, and I guess I was.

MCCREERY: You participated actively?

WERDEGAR: So they tell me. I had prepared. I don't remember it being as active as that paper reported, but it sounds right.

MCCREERY: What stood out to you, if anything at all, about the quality of the advocacy or the types of cases? In other words, what difference were you seeing from what you were accustomed to on the Court of Appeal?

WERDEGAR: One major difference, of course, is the duration of the argument. On the Court of Appeal, I think it varies case to case, but you never hear a case as long as an hour. You might give each side ten or fifteen minutes. And on the Court of Appeal you never sit for two straight days, three hours in the morning and three hours in the afternoon, and then the next morning three hours and three hours.

One thing I remember is — it's still the case, and it was the case then — you get up from the bench after your morning argument, and you go back to the conference room, and you conference on the cases you've heard. There's no postponing a conference. So you go around the table and the presumptive authoring judge speaks of what his position is. People agree or don't agree or you discuss the issues. You take as long as it takes, and then you speak to the next case.

In those days and for a long time, we'd get off the bench at twelve. Oral argument would resume at one-thirty. We're in Los Angeles. In those days after you finish the conference, it was up to you to go get lunch. You'd scramble down to the cafeteria, if you could find it — which, of course, it was through one of those gray doors and down steps — and you'd try to grab some yogurt or jello and race back up, and you'd sit down for argument at one-thirty.

We actually used to do that in this building as well, although since we live here you could anticipate it and maybe bring a yogurt from home or something. But that was just bizarre, and we did it in Sacramento, too. But this gets ahead of my story.

And these gray doors. I did not have a minder. I did not have someone who was holding my hand and saying, "This is where we go. Come." So I'd try to find the cafeteria and then try to find my way back. You'd be gobbling. I do remember that.

MCCREERY: Then you would resume for the afternoon, and then?

WERDEGAR: You'd conference again, and then you would be on your own. You'd go back to your hotel, which I always did, or if you had acquaintances or events down there you would attend to them. Most of us do not like to have events at night if we have oral argument the next day, even though there are still some organizations that invite us. But it's just very tiring, and you have to concentrate and be alert. You're alert on one case, and you may not even be finished in your own mind dealing with the issues that come up, and [clap!] you're onto the next case and you have to switch.

Sometimes I'll go to an event, a bar event of some kind, and I'm asked, "What arguments did you hear today?"

"I don't know." [Laughter] Of course I knew at the time, but it just becomes a blur — that's an exaggeration but it's sort of like that.



MCCREERY: One unusual feature of your start was also that you went to Los Angeles for an oral argument week as the very first thing. In other words, you did not meet as a group with your fellow panel members before that. Given that, and given as you've just said that none of them other than Chief Justice Lucas in his official role had attended your confirmation hearing, what do you recall about interactions with them during that week, off the bench?

WERDEGAR: There were none. Of course, there were at conference, but there was no opportunity at all. You get up. It's nine o'clock on the bench, in conference, grab a bite to eat, and you're on the bench again, and you go back to your hotel. It would be my first interaction at conference.

MCCREERY: What else do you recall about that first week down there? Anything to add?

WERDEGAR: It was awkward. The physical arrangements for the judges have so improved. Then we had bailiffs. Speaking for myself, if I had to fly down — I can't remember the details, but — I would be accompanied by a bailiff, but I was carrying my own benchbooks as well as my suitcase.

We'd get to L.A., this particular bailiff and I — an endearing chap, but then we would climb, the bailiff and I, onto a shuttle bus that would take us to the rental car. Then I'd stand there while he got the rental car. Then he would drive me to my hotel.

Some time after I was on the court, I think under Ronald George, the CHP made a proposal to assume these kinds of responsibilities for the Supreme Court. It's much more professional.

But I do remember. And my particular bailiff had a bad back, so I'm putting my benchbooks up in the overhead bin, and I'm trying to keep everything together. [Laughter] These benchbooks are huge. But that's how it was. It's so much more professional now. I mean, really. Getting off the plane dragging your suitcase and holding your benchbooks, waiting for the shuttle bus to get to the rental car.

MCCREERY: Yet another challenge of trial by fire, shall we say? [Laughter]

WERDEGAR: That's all I knew. You go with all that you know. No lunch. [Laughter]

MCCREERY: Describe, if you would, coming back to San Francisco. You had a chambers to set up, you had staff needs, you had colleagues to meet and get to know. How do you remember those initial times, once you were back in town?

WERDEGAR: Let me first tell you, remind us, where we were. We were at Marathon Plaza. As a bit of history if I haven't mentioned it before, after the 1989 Loma Prieta earthquake when I was a staff attorney here, down at the end of this fourth-floor corridor in a little sunny room, after that earthquake the staff was allowed fifteen minutes the next day to come in and get their things, and that was the end of it.

The court had to find a place to move, and a committee of the court — I think Justice Panelli was a part of that — chose Marathon Plaza, I believe it was 303 Marathon Plaza.

One of my staff attorneys reminded me that when the court moved from this building in 1989, and I was a staff attorney at that time, to Marathon Plaza, the culture of the court changed because previously, in this building, staffs were not clustered among their own. They were intermingled. Justices were side by side, and there was a lot of informal exchange.

When we went to Marathon Plaza, the way it was configured was kind of a pod situation where the judge would have his attorneys in the same geographic space, and then there would be another, seven times.

When we came back, which — I'm getting ahead of my story because I started out at Marathon Plaza, but when we came back there was a decision to be made. Do we want the more free-flowing, free exchange "proximity with your colleagues" model? Or do we want the cluster model, which provides the justice easy access to her staff and privacy as you discuss matters, as well?

The court decided on what we have now, which is the more pod configuration. I love it in the sense that I have my staff nearby. I'm always walking out to talk to my staff, and they're all clustered there. Formerly, before the Marathon Plaza move, your staff would be scattered all over but that also meant they were scattered among each other. There really were advantages to that, but the advantages to this system are obvious as well.

You speak of my first settling in. Justice Panelli had three attorneys when he left, and two of them are with me to this day. That's Greg Curtis and Kaye Reeves. The other young woman I would have kept, but Justice

Paul Haerle had been appointed to the Court of Appeal and she had worked with Justice Haerle in private practice.

When I came on I told her that if she wanted to apply to Justice Haerle I would certainly understand. She said, “No, no, no.” But in short order she realized — he was brand new at the Court of Appeal then — that she wanted to, and I fully understood that.

I took on a former annual of Justice Panelli’s that I had known when I was his staff attorney and I had supervised. Then I had some central staff people cycle in.

Oh, I brought on my Court of Appeal attorney, Jason Marks. He’s been with me since I was first appointed to the Court of Appeal. I had no staff, of course, when I was appointed to the Court of Appeal. In those days Court of Appeal justices had two attorneys. His judge had just retired. It was Harry Low.

The principal attorney, Lee Johns, of the Court of Appeal at that time, who was very kind to me, suggested to Jason that he might want to apply to this new judge, this unknown person. Jason had been looking into maybe going on now to private appellate practice, but he said to Lee Johns, “I don’t want to go to another judge who’s just going to retire in a few years.” [Laughter]

I interviewed Jason. I was so fortunate to have him. I said, “I understand you’re interested in perhaps pursuing private practice, and if something works for you there that’s fine. If it doesn’t, I want you to know that I’d like to bring you on.” Jason came on, and so it’s been twenty-three years with Jason. He’s a Boalt graduate and has a good sense of humor. Most of my staff have a good sense of humor in different ways. It’s wonderful.

So that was Jason, Kaye, Greg. Paul Lufkin, who was the annual from Justice Panelli. It’s very stressful choosing your staff because it’s so important. It’s all very well to say, “This is probationary.” But once you’ve taken someone on, it’s very hard.

I can’t remember who my initial fifth was. But I now have Jason, Kaye, Greg. Paul works now for civil central staff. I have Larry Lee, who had worked for Chief Justice Lucas, and Keith Evans-Orville, who had been a staff attorney on the Court of Appeal. I say without reservation they are as smart a staff — probably the best staff altogether — but as smart as any staff



WITH CHAMBERS STAFF — (L.-R.) GREG CURTIS, JUSTICE KATHRYN MICKLE WERDEGAR, KEITH EVANS-ORVILLE, KAYE REEVES, LARRY LEE, JASON MARKS, PAULINE STAFNE, AND JULIE PARTRIDGE — AT RETIREMENT RECEPTION FOR JUSTICE WERDEGAR, CALIFORNIA SUPREME COURT, AUGUST 2, 2017.

on this court. And people, I think, largely agree that I have a terrific staff. That's what makes your work possible.

MCCREERY: In general, what were you looking for in hiring these people or bringing them from elsewhere?

WERDEGAR: I do believe that people who have excelled in law school — that it tells. And of course if they'd had prior clerkship experience. The ideal candidate to me would be someone who was very high in their law school class and who had done other clerkships so that they had an idea — whatever kind of clerkships — and ideally had had some private practice experience. Not every one of my attorneys has that private practice experience, but most of them have some outside experience.

That's it for me. Of course, you hope their personality will be a good fit, and you insist that they don't have any agenda or any philosophical bent — at least I do. Maybe in some other instances justices want people who are in sync with their view of the world, but that wasn't the case with me and it's all worked out exactly that way. Objective, smart, amusing, hardworking. They have to be self-motivators. They absolutely have to be.

MCCREERY: How did you think about assigning work to them and dividing up the duties among a larger staff, as you now had?

WERDEGAR: Greg Curtis was Justice Panelli's head of chambers. Of course, he had to adjust. I'm so different than Justice Panelli, and a superb staff attorney will adjust. So Greg was in place, and an experienced head of chambers is invaluable because they know so much insofar as procedures and how things work and the history of the court and where things are and what the rules are.

Insofar as distributing work, my staff does it themselves. They take the cases they want. There are so many CEQA cases in front of the court now — do you know what that is, the California Environmental Quality Act? — that if maybe one of my attorneys has gone through two or three of those he either might say, "I'm tired," or he might say, "I have a head start on this because I've just recently worked on a related issue."

It's entirely up to them. On occasion, rarely — I've been here twenty years — I will ask a particular attorney to handle a particular case. But usually they'll just take them right in order. I don't think there's any sense that someone is not carrying their load or is cherry-picking cases. I could not stay here for a great length of time if staff wasn't fair and diligent and open-minded and capable.

MCCREERY: Thinking back, then, to that very initial time when you made your selection of staff, what else was there about the actual physical arrangement at Marathon Plaza that's worth noting?

WERDEGAR: I can't remember. They made a courtroom there. I remember my chambers.

But when we came back here, as we were planning to come back here, this building was more of a shell. They hadn't filled in the rooms, and they hadn't assigned the rooms. I do remember coming to look at this building and its shell, and you were able to pick your chambers in order of seniority.

At that time, the chief took his office up on the fifth floor, and Stanley Mosk got second choice. He went way down to the other end, which was as big as the chief's. Then Justice Kennard and Justice Baxter took the other two offices, so that was the so-called corridor of power.

Then I had the next choice, so I had first choice on this floor. I was tempted to take the chambers way down at the other end which, when I

was a staff attorney here, had encompassed the little office where I had been a staff attorney. [Laughter] I liked the idea that I would now be in a chambers there. But the architect persuaded me that this had the best view. It has a beautiful view of City Hall and Civic Center Plaza. So I chose this.

MCCREERY: May I ask your own views on the pros and cons of the pods, where the justice is with the staff, versus justices being near one another to invite interaction there?

WERDEGAR: It's a tradeoff. It really is. Now, upstairs, we have the chief still, the new chief — new compared to Ron George — and we have the younger members of the court. Justice Liu took Stanley Mosk's. Once you have your office you don't want to change. I've had opportunities to change, but it's just too — at least none of us has to this point.

So now it's Justices Liu, Cuéllar, and Kruger so it's not the so-called corridor of power, it's the junior corridor. I wish that I were up there and I could stroll around and talk to other judges. There is a real tradeoff. On the other hand, if I've got something on my mind I don't want to go upstairs and down a corridor to find the staff attorney that I want to talk to.

So it's a real tradeoff. And some judges are more amenable to talking to each other than others.

MCCREERY: You've kindly mentioned the names of your new colleagues here in passing, as we're talking about office locations. But let's speak more about this group you were joining. First of all, how were you received?

WERDEGAR: I would say that I was mostly greeted cordially, not entirely by everybody, but mostly greeted cordially. My assessment: I felt they were more welcoming, mostly, than the Court of Appeal had been, and I felt that they had prepared themselves, that they saw it coming. Besides, it's a smaller group.

When I say they'd seen it coming, it takes me back to the time it was. I was Governor Wilson's appointment to the Court of Appeal. He was still the governor. They anticipated, perhaps, that it would be another woman and that I would be the appointee. This was the first time in the history of the California Supreme Court there would be two women. At that time I don't think other courts had that many women. In the intervening twenty years it's a totally different story.

So I think they were prepared. And they were cordial.

MCCREERY: You had, of course, worked here at the Supreme Court as a staff attorney yourself, and you described that you didn't have particular strong interactions with those who were justices at that time. Let me ask you which of them you had any personal acquaintance or friendship or committee assignments with? Whom among them did you know?

WERDEGAR: Stepping back to having been a staff attorney, staff attorneys usually do not interact with the other justices. But Ron George was on the court at that time, and he and I became very well acquainted when he was appointed as an associate justice of this court and very soon around that time I had been appointed to the Court of Appeal. He was wonderfully welcoming, as he is, open and helpful.

MCCREERY: He was, of course, the other appointee of Governor Wilson at that time.

WERDEGAR: Yes, of course. That was a big help, and we were friends. The other judges were — I didn't have personal interactions with them. Because you're appointed to the same court doesn't mean that you all see each other otherwise. And I came to a court where people did know each other. Chief Justice Lucas, Justice Arabian, Justice Baxter, and some others who had left, Justice Eagleson, Justice Kaufman. They all had a pre-existing relationship through the Deukmejian administration. They all knew each other. Justice Kennard also was a Deukmejian appointee. I was apart from that.

MCCREERY: Since you've mentioned Justice Kennard, you've just pointed out that it was the first time this court had had two women at one time. She, as you say, had been appointed by Governor Deukmejian. So of course it's natural to wonder: How were the two women interacting?

WERDEGAR: I think Justice Kennard had been accustomed to being the only woman on the court, so in that regard maybe it was more of an adjustment for her, I can't really say. Justice Kennard had been widely celebrated when she was appointed, as after Rose Bird was gone there were some years where there wasn't a woman on the court.

MCCREERY: You did mention that she was accustomed to being the only woman, and clearly this was a big change just by that simple fact. What chance did you have to become simply acquainted with her, if any?

WERDEGAR: We were on different floors. Like all the justices on the court, we would experience each other at conference and on the bench.

MCCREERY: Let's move on to some of your other colleagues. You've talked about Justice George, as he was then. I must ask you to perhaps say a little bit more about Chief Justice Lucas.

WERDEGAR: I'd be happy to. I'm not the first to say that he was right out of central casting. [Laughter]

MCCREERY: You are not the first. [Laughter]

WERDEGAR: I am not, but that's because it's so true. He was tall and had a full head of white hair and a resonant voice, and he had both a poker face and a very dry sense of humor. When I came to the court, I believe he either had been or soon would be newly remarried. His wife, gracious Fiorenza, was situated in Los Angeles, so I think at that time Justice Lucas spent, perhaps, more time in Los Angeles than he had before, when he didn't have his new bride down there.

I will say one thing. The court is invited to lunches, bar lunches and dinners, and we go. What happened to me that nobody had prepared me for — and I was certainly unprepared — we would go to, say, a bar luncheon in Los Angeles or up here or in Sacramento, and the chief always, of course, is making some comments. What Justice Lucas did is he would say, "And now Justice Werdegarr would like to say a few words."

What could I do? I was completely inexperienced and unaccustomed to any kind of public speaking, much less extemporaneous. Unprepared. So I'd go up, just trying to get through it and say something.

After about three times, I started to prepare myself to have some few inconsequential remarks. I've never seen that occur with any of the justices that came after me. Some like to say, "Well, yes, it was a tradition." But I would not say that's the case. Of course, you're going to ask me, "Did you ever ask him?" No. I did not ask him. I didn't.

MCCREERY: One does wonder about traditions for giving new justices a little —

WERDEGAR: Maybe that was it. Maybe he thought that it would be good for me. But insofar as it being something that occurs with new justices, I can't say that I ever saw that again. I think it happened a number of times.



Maybe I was a little slow in picking up that I'd better be prepared. It was probably good for me.

MCCREERY: Were there other things that you later learned *were* traditions for new justices, paces they put you through to get you started?

WERDEGAR: There is one. When we go to the Sacramento courthouse, on the ceiling there they have these little recessed impressions, and they all have a little round flower in the middle of them, rosettes, except there's one that doesn't.

The tradition that occurs is every new justice is challenged when we take the bench in Sacramento, to find the one little square that's missing its little flower in the center. So during oral argument there's the new justice with his or her head swiveling to look on the ceiling, but the twist is that where the newest justice sits is the one seat where you can't see it. [Laughter] Everybody else can see it, but not the newest justice.

And so you get off the bench. "Did you find it? Did you find it?" No. Because it's impossible.

MCCREERY: Is that still done today?

WERDEGAR: Yes. But as I say, it's funny because that's the one seat where you can't see that one. It's blocked out by a light or something.

MCCREERY: Let me bring you back to Chief Justice Lucas and the requests for extemporaneous speaking. What else stands out to you about how he brought you into the fold, as it were?

WERDEGAR: There was no formal bringing me into the fold. Every court is different. Every personality is different. At my time, you're here so get on with it.

But Ron George was a big help.

MCCREERY: What did you observe very early on about Chief Justice Lucas as a leader of the panel, in other words his role as the head of the court itself? What style did he display?

WERDEGAR: This was toward the end of his time. I don't recall anything distinctive except that he had a presence. There weren't a lot of occasions to see his leadership in the administrative way. But he looked the part, and he was a very charming man.

MCCREERY: How did he conduct the Wednesday conferences, for example?

WERDEGAR: There's not much to conduct. I happen to have been acting chief justice yesterday and a few other times. We rotate it. It's not because I'm most senior. In fact, I was acting chief justice within the first two weeks of my appointment to the Supreme Court. They rotate it. Now we would rotate it so that the newest judge would not be at that place in the roster.

What it meant then is signing scores and scores of orders every day. The chief justice, all of them so far, have chosen not to have a signature machine, so if Malcolm Lucas is in Los Angeles you'll get this stack of very routine orders that you don't discretionarily review for their merit and make a substantive decision. They just require the chief's signature, so you would sign as acting chief.

But otherwise, presiding at the Wednesday morning petition conferences, what a chief does — I just did it Wednesday — you have this binder, and you vote on petitions, and you pass the signature page of the orders around, and then you put that in the binder, and you flip through to the next one.

MCCREERY: You were, of course, quite familiar with the process of how the cases moved through the system from working here as a research attorney to Justice Panelli. What can you tell me about how Chief Justice Lucas managed that aspect of it?

WERDEGAR: I don't know that the chief justice has much influence on how cases move. But some time before, perhaps earlier in Chief Justice Lucas' tenure or more likely in Rose Bird's, the court had been sued for not abiding by the ninety-day rule, the rule that you can't get paid if the causes that had been submitted to you had not been disposed of within ninety days.

Evidently the way they handled it — this is hearsay on my part — was that after argument they wouldn't say "cause submitted," because then the clock would start running. They had a system — this is hearsay, again, but well known — where a case that you had to sign off on or vote on or write a separate opinion on would be in a box, and the box would go from one judge's chambers to another in order of, I think, seniority. It didn't move quickly.

Somebody sued the California Supreme Court for violating the ninety-day rule, and as a consequence, in the aftermath of that, a commission was appointed to come up with some resolution to this violation of the rule. This was new. When I was working with Justice Panelli we didn't have this elaborate preliminary response system. But what came out of the commission, I gather, so that cases would be resolved and filed within ninety days of oral argument, was what we now have, the preliminary response system.

I think Justice Panelli in something I read recently has been quoted as saying, "If you go on the bench and you haven't had an up-front analysis and interchange about the case that's going to be argued, it's almost impossible to get a final opinion and all the separate opinions done in ninety days. Because you're not just working on that case, you're working on dozens."

The commission came up with the idea of what is now called front-loading. We are known and sometimes criticized for it, although I support the system. We don't set a case for oral argument until the assigned chambers has circulated a calendar memorandum that lays out the contentions, the issues, and the analysis that the assigned judge intends to adopt if he gets a majority.

Every other justice has to submit, in writing, a preliminary response. That preliminary response can be a straight "concur," it can be "concur with reservations," and you state what the reservations are. It can be a "doubtful." You explain what the doubts are. It can be a "disagree, I will write a dissent."

When you have at least three justices that agree with the author you can set the case, but the better practice is to have everybody — some people are slow in getting their preliminary responses in, but it's better to have everybody's preliminary response in. That became, therefore, a more formalized procedure at the same time that we returned here and had our cluster/pod arrangement for justices and their attorneys.

You were asking, "How did Justice Lucas deal with processing of the cases?" That commission introduced that procedure, and there's a deadline supposedly for getting your preliminary responses in. I don't think he — it's been said that a chief is a chief, but every single judge is an independent operator, and the chief really has no influence on any other judge, which is an interesting fact. None. The power of persuasion, maybe. Maybe a little

ostracization. But really the chief has no authority to modify a justice's behavior in any way.

MCCREERY: How does that align with your view of how things should be?

WERDEGAR: I didn't really have a contrary view as to how things should be. Each justice is a constitutional officer appointed for the term that's provided by law. I would hope that we would all cooperate to the same end insofar as administrative matters, and as far as my experience has been we largely do. We share a concern for keeping things moving, for improving our processing of cases, improving the promptness of our responses. But I don't see how it could be otherwise. We are each separately appointed constitutional officers.

MCCREERY: Returning, if we might, to your colleagues, let me ask you to speak for a moment about Justice Mosk, whom you had encountered, or not encountered, a little bit very early in your career. [Laughter]

WERDEGAR: Oh, yes. I'm very happy I had the opportunity to serve with Justice Stanley Mosk. He's a legend in California political history of a certain era, and he certainly brought that to the court. We are not political, supposedly, but it's good to have a little knowledge of history and what went before and a real-world political sense. He was a force on the court, very independent minded, and he had a sense of humor. But a great repository of court history and California political history and had a great deal of charm. I will say, after I was sworn in he came to my chambers to congratulate me.

I said, "Were you there?"

He said, "No, but I want to congratulate you." So that was nice.

MCCREERY: Again focusing on the very early times after your arrival, what opportunity might you take, if any, to seek out a Justice Mosk or someone on any particular matter?

WERDEGAR: Ron George and I talked a couple times. I went to him one time when he was circulating a case.

MCCREERY: Justice George, you mean?

WERDEGAR: Yes. Something was coming along, and I just felt I had to tell him personally that I couldn't agree. So we would interact, but not much really. You're pretty much on your own, at least in my experience. I know

there have been justices during my time here who confer closely with each other, but I've never been in that situation.

MCCREERY: May I ask who you're thinking of?

WERDEGAR: It doesn't really matter.

MCCREERY: All right. Moving on to finish out that original panel as you encountered it, Justice Arabian, who had been appointed of course by Governor Deukmejian also?

WERDEGAR: Yes. Justice Arabian was a large figure. I don't mean in physical size, but he had a big personality and a big presence, and he didn't mind a bit being out there. He was very friendly to me and very nice. He wasn't here all that long when I was here because he and Justice Lucas retired about the same time. He had a flamboyant, large personality and could be very prominent at oral argument.

Some people are more reticent, and others are more front and center. Some talk a lot, and some talk seldom. You do get to know your colleagues' styles on the bench, and everybody definitely has a style. I enjoyed him.

MCCREERY: Since you've mentioned it, what was your style on the bench in those early years?

WERDEGAR: Or what is it? I'd have to have somebody else tell me. It's been reported by observers — but I can only tell you I don't know how I'm perceived — but that I ask direct questions that seek to elicit information, that I seem to be seeking to solve the case, seeking to get information that I need to make up my mind. Really, you'll have to read what people say about what my style is. It certainly isn't front and center and dominating the argument, but it's not total silence either.

MCCREERY: Let me ask you to speak about Justice Baxter, whom you had met in the connection of being an —

WERDEGAR: Yes. He was very welcoming and very cordial.

MCCREERY: How well did you get to know these colleagues in the early years?

WERDEGAR: Again, there are some justices who are close friends, socialize, talk to each other all the time, maybe because they had a preexisting relationship. And maybe there are people, others, who are extremely

outgoing. In my case, I just came to know them through doing my work. You do get to know each other through conference, or maybe you will speak to a judge about a case or work on a committee with a judge. You get to know each other that way.

MCCREERY: And as you've pointed out, there may be quite different styles in oral argument, which are of course very public displays and reported afterwards in the media.

WERDEGAR: Oh, yes. Yes.

MCCREERY: So certainly people develop reputations. Justice Kennard, for example, has been mentioned many times as quite talkative in oral argument. What's the effect of that on others?

WERDEGAR: I can't speak about others.

MCCREERY: Let me just say, "the effect on you, as one of the others." Thank you.

WERDEGAR: Justice Kennard did become known for starting the oral argument questions and, at length, expressing what she knew or believed the case was about. That was the style that she had. It was unique to her.

MCCREERY: In terms of overall time, what effect did that have on the participation of others, if I may ask?

WERDEGAR: It had to take a lot of the time from the attorneys. It helped her reach whatever resolution she was going to be reaching. If others wanted to speak they might have become a little impatient — I don't think judges are shy about intervening, but — it was a characteristic.

MCCREERY: Is there anything else that you could bring forth about oral argument as you experienced it here in the early times on the Supreme Court? Again, I'm thinking now more of the longer lengths of arguments, as you pointed out, and the kind of advocacy you saw from counsel.

WERDEGAR: Oh, yes. The longer argument, of course, is notable. I don't know if it's a carryover from the marines or what, but — you're on the bench for three hours, and nobody's going to be the weak one that says, "Can we take a break?" It's physically demanding.

MCCREERY: Is that cruel and unusual? [Laughter]

WERDEGAR: The quality of the advocacy is by and large very high, I would say. Again, when I was starting out in the law I wanted to — I talked or thought about joining somebody who was already an appellate attorney. I don't remember his name, but he was a true pioneer. He was the only one that specialized in appellate argument.

And of course now it's not a complete specialty, but the attorneys that are before us are the appellate branch of their firm or they have a completely appellate practice. We benefit from that. We can tell. We'll sometimes get off the bench and say, "Oh! It must have been the trial attorney." [Laughter]

MCCREERY: And it reflects a reality that it's a very different kind of advocacy at the appellate level.

WERDEGAR: Oh, yes. I remember one attorney who I happened to be acquainted with. He was a remote friend, a nice fellow. He was arguing to us. It was clear that he thought he was arguing to the jury, you know? [Laughter] That's what a trial attorney does, so the specialty of appellate practice has benefited us a great deal.

MCCREERY: Thank you. I can't help noticing that you took your seat in the month of June of 1994, and in November you had to stand for a confirmation election. Talk about that for a moment.

WERDEGAR: It's sort of strange. That's what happens. Let's see, you mean Justice Panelli — I was in a new term?

MCCREERY: It was fulfilling eight years of his previous term, but you still had to stand for confirmation that very same year.

WERDEGAR: All right. It was my first confirmation, and there I was on the ballot. Of course, it's a little ludicrous because nobody's ever heard of you. But I was confirmed by a substantial number. I can't remember. I blessed the public who votes in faith because all they have to do is "yes," "no," or nothing, and you have to hope that, just out of faith or good citizenship, they'll make the effort to say yes. It's kind of precarious. This is before they know anything about you, and there was nobody talking about you.

I believe my next one is the one where there had been some resistance to confirming me, and we will get to that later. But when they don't know anything about you, you just hope for the best and the best occurred.

There was one where I got the highest number of votes in the United States. But how did that happen? It wasn't a presidential election year. I'm in the largest state, and I'm unopposed, so there's no other comparable situation. The governor would have been opposed, and the votes would be divided. No other state having any unopposed election has as many people, so maybe — I didn't go back to look, but maybe that was the election where I got the most votes of any candidate in the United States. I think it was 2002.

MCCREERY: That is an honor of some sort, for certain. [Laughter] As we said, Governor Wilson was reelected for his second term at that same time, in 1994, and you've pointed out that there was quite an emphasis in the public's mind on being tough on crime at that time.

WERDEGAR: Oh, yes.

MCCREERY: He rode the wave of that, certainly, into office that second time. It was also the election at which Propositions 184 and 187 were passed, one on the Three Strikes law, which we can get into next time when we have more time, but also one on denying public services to "illegal aliens." I wonder to what extent the major public issues of that time stand out to you now as you recall standing for your first confirmation?

WERDEGAR: You mean at the time that I did? Oh, not really. The only time that the high-profile charged political issues of the day impacted me is when I was assigned the case related to the Three Strikes law, and then I had to deal with something that the outside world had strong views about.

MCCREERY: Maybe given our length today we will take that up next time. But may I ask whether you were able to help Governor Wilson again this time around or anything like that, given that you were on the bench as his appointee?

WERDEGAR: Oh, no. Help him in what way?

MCCREERY: I just mean in terms of his —

WERDEGAR: Not at all. No. In fact we would, if ever we saw each other, and it wasn't that often but *never* would we get into politics. It wouldn't be appropriate.

MCCREERY: His opponent this time, of course, was Kathleen Brown, the sister of the current and former governor, so it was a very interesting time.



WERDEGAR: Yes, yes, it really was.

MCCREERY: Have you anything to add about being confirmed or any of the more procedural things of your early appointment times?

WERDEGAR: No. I'll just say that, although I had served — I was really in a way *very* qualified because I had worked here for six years, knew all the internal workings, knew how to write the opinions and do all that, but of course come to the conclusion that Justice Panelli was wanting. And then I had been a judge for three years on the Court of Appeal.

I knew a lot when I came here, but what I didn't know were some of the internal procedures among the justices. I remember a conference, and it must have been a very early conference. I don't know if it was a post-oral argument conference or a petition conference, but I was speaking up. I spoke up twice.

Finally Justice Kennard said, "Chief, are we adhering to procedures?"

I thought, "What procedures?"

That's how I learned — nobody had told me — that you speak in order of seniority. The junior justice speaks last, except the chief has the final word. That's one thing Ron George had neglected to tell me, and I was just chiming in. [Laughter] Now we tell people these things.

MCCREERY: Let's stop there for today, and perhaps next time we can take up your assignment for the Three Strikes case.

WERDEGAR: Yes, 1996 was that case, and that was a year of some — certainly Three Strikes, but there were some other high-profile cases that year.

MCCREERY: I look forward to it. Thank you so much.

WERDEGAR: Thank you.

## INTERVIEW 7 (APRIL 16, 2015)

MCCREERY: We spoke last time about the transition period when you were appointed to and took your seat on the Supreme Court. But you've thought of something we spoke of last time that you'd like to return to on the Court of Appeal. What was that?

WERDEGAR: Thank you, Laura. It's nice to see you again on this bright, sunny day. My recollection is that last time we touched on the jurisprudence of the so-called Lucas Court with respect to harmless error. It has been remarked that the court perhaps, in the eyes of some observers, never finds that the error is harmful.

I can't join that observation, but I will say on the Court of Appeal — I think you might have asked me or I volunteered — that there was a case that I remember where I found the error was not harmless, and I reversed. This had to do with a prosecution for a prisoner having possession of a razor blade — not an earth-shaking case, but he was tried for that. He pled not guilty, and when we got the transcript on the appeal, in the Court of Appeal, it developed that the trial court, contrary to what is usual procedure and necessary procedure, had failed to instruct the jury as they went in to deliberate that the prosecution's burden was proof beyond a reasonable doubt.

I reversed that. I found that it was not harmless, that that was critical to disposition of a criminal case. In my opinion — and I'm looking now at something that quotes me — I said, "If any phrase should be ringing in the jurors' ears as they leave the courtroom to begin deliberations, it is 'proof beyond a reasonable doubt.'"

I wanted to bring that up again today because this same article that was discussing that case tells me on retrial the defendant was acquitted. So presumably on retrial the jury was properly instructed about "proof beyond a reasonable doubt." The evidence was circumstantial. I can't be sure, but I thought that was an interesting conclusion to my reversal of a criminal conviction so I did want to bring that up.

As you say, we were talking about many things that were pertinent when I became a new member of this court. I think I didn't speak to you about the plaques that every justice's chambers have. The plaques on the wall — they're brass plaques, and I'd be happy to show you mine — show

the succession of justices that the current justice has joined. In my case, as we've referenced, I succeeded Justice Panelli. I'd like to say that when I was on the Court of Appeal Justice Panelli had a retirement party, and I was invited to be the lone speaker to bid him farewell into his retirement. So I think it's a nice poetic circle that I was then appointed to have my name affixed below his on the plaques. We can go over and look at the plaques, if you like.

I came across a letter from Justice Raymond Sullivan, one of the great luminaries of this court, whom I had met at a function in 1995. It's dated. He is in my line of succession, and I must have shared with him my great pleasure in that — not that it reflects on me in any way, but I was just delighted that he was there.

So he wrote me a letter, and among things he tells me about — with respect to the plaque in my chambers, he kindly says, "I see that I now have another distinguished successor as well as notable predecessors," which was very gracious of him. But he tells us how these plaques came to be. I'm quoting Justice Sullivan now:

"I have talked with Ed Panelli about the plaques. The idea for them originated with Chief Justice Donald Wright and was implemented by Bill Sullivan, former clerk of the court and now deceased. Bill came to the court in the early 1920s and at one time shared a room with Boalt graduate Ray Peters, the only two law clerks on the court."

I'm inferring from this that in the 1920s, Ray Peters and the subsequent clerk Bill Sullivan shared a room, and they were clerking for the court at that time.

"Bill," — that's Bill Sullivan, "had a detailed memory of all the occupants of the various chambers."

So we have to credit Bill Sullivan and be grateful to Raymond Sullivan for sharing that with me.

MCCREERY: Is it easy enough to read the names from the plaque?

WERDEGAR: Very, but we can't move it. We have to go look at it. It's affixed to the wall so I can't bring it to our place in the room. Do you want to go read them?

MCCREERY: Sure [and both go to look at the plaque].

WERDEGAR: As we were saying looking at that plaque, I noted that I was the 108th justice appointed to the California Supreme Court and the third woman and the first mother and grandmother ever. [Laughter]

MCCREERY: Thank you very much for showing me that. We looked as far back as William P. Lawlor at the top of the plaque, who held the seat from 1923 to 1926. Then you were the tenth of the names on the plaque, right after Justice Panelli. I thank you for showing that to me and for sharing Justice Sullivan's letter.

WERDEGAR: Yes. I was happy to come across that.

MCCREERY: What other interaction did you have with him after this, if any?

WERDEGAR: Justice Sullivan? In those days, when Malcolm Lucas was chief — we still have Christmas parties but they have evolved into very different styles and types. All these years we've been working it out. What's best for the whole court and for the staff?

In Justice Lucas's day we had more formal parties. I think they were held at a hotel one time, and the justices were at one table and the staff were at other tables. Justice Sullivan, and Bernie Witkin, as well, used to come. That's when I became acquainted with him, and I would only see him on those occasions.

But also as a staff attorney on the Supreme Court I decided I needed an education on writs, which are a very specialized part of our practice and part of our concerns. Justice Sullivan was teaching a class on writs at Hastings, which he allowed me to audit. That was a great delight, to see him as a teacher.

On the Court of Appeal, where I'd also been a staff attorney, we had writ attorneys. Up here there was no such specialized staff individual. That's when I went over and took a class on writs from Justice Sullivan.

MCCREERY: What was his style as an instructor?

WERDEGAR: Just gracious and engaging.

MCCREERY: Thank you again, and perhaps that letter can end up where others can see it in the future.

WERDEGAR: There's another letter I didn't keep, and I don't know if I mentioned it, in connection with my appointment to this court. But it

came to me, and I think it's worth noting. I have no idea who sent it now. I'm not even sure there was a return address. I would say there probably wasn't a return address.

I open the envelope, and inside is a sheet of white paper. On it is a drawing of a baby, a pot, and an ironing board. I think the message was pretty clear. [Laughter] That's the way it was.

MCCREERY: My goodness.

WERDEGAR: Somebody had an attitude about my appointment. [Laughter]

MCCREERY: Thank you for telling me, in any event. Unless there's anything further that you'd like to say about our topics from last time — and feel free to bring up any further that come to mind — let's move on to our



WITH FAMILY IN HAWAII — JUSTICE KATHRYN MICKLE WERDEGAR AND HUSBAND DAVID WERDEGAR, M.D. (THIRD AND FOURTH FROM LEFT) WITH SONS (L.-R.) MATTHEW AND MAURICE AND FAMILY, DECEMBER 2013.

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planned subjects for today. We want to begin talking about some of the opinions you authored as a justice of the Supreme Court. We've mentioned ahead of time a couple that we intend to look at. But let me ask you first, generally, what you recall about the process of starting to write opinions and the significance of that as it may have differed from the Court of Appeal?

WERDEGAR: The process of writing opinions. If an opinion was assigned to me, the first thing — I at this point now had a staff of five attorneys — was to determine which attorney would be having the opinion. I had a staff in transition when I first came. Three of the staff that are with me to this day were with me when I started, day one. Two of them had been Justice Panelli's. One I brought from the Court of Appeal. I feel really fortunate that they're still with me. I guess it's been working well.

But I had two open slots, and there was some impermanence in how those were filled. But as time moved on, my staff would take whatever cases were assigned to me. If they're free and they need a case, they'll go take a case. It's never been a problem.

Over the years, certain members of the staff have become extremely well informed on certain discrete areas of the law, such as — well, right now CEQA, the California Environmental Quality Act. I have an attorney who's an expert on antitrust and at least two attorneys who are experts — they don't even need, hardly, to look at the books — on criminal law and death-penalty law. But it doesn't mean they always have those cases.

I would let my staff — I would ask my staff — to take the briefs and assess the case and decide how they feel it has to go. If they were unsure, if it could readily go either way, they would come and talk to me. But they knew me as a judge who did not have a particular predilection, that what I wanted is, "Just tell me where the chips fall." By and large, maybe with one exception, I've had a staff that has no agenda, and they know that I don't, so that's worked very well. As everybody knows, by the time you get to the California Supreme Court your staff is drafting the opinions or what first are "calendar memos" and then later shaped into opinions. Each justice edits them as little or as much as he or she feels they need or want to.

MCCREERY: Backing up to the actual part about assigning the opinion, how did Chief Justice Lucas, in this case, use his power as chief to mete out those assignments?

WERDEGAR: Who knows? I mean, these decisions are not in any handbook. With Justice Lucas, the belief was, the rumor was, that he had a staff attorney who did it. With Justice George, I think he made the decision but also worked with his principal attorney.

It would never become an issue unless people felt the assignments were unfair. And sometimes there would be a little grouching, not from myself but some other judges might feel they weren't getting enough "high-profile" cases. That's the only complaint I've ever heard. It's never been my complaint. I think in my case it's been fair. And as we'll see, I got a couple of high-profile ones early on when I joined the court. [Laughter]

How each chief justice did it? I imagine they looked at the workload of individual justices. If a justice produced fewer opinions than others that might be taken into consideration in not assigning fresh cases, but I don't know. You could look at that as a reason not to, but you could also say, "A judge shouldn't have their load diminished because they're not producing their cases." But you don't want the litigants to wait more than they have to, and of course the process up here is very lengthy for the poor litigants. So you probably look at how many cases the judge has.

Certainly the chief looks at who he thinks might get a majority, and the chief would in many cases discern that from comments made at conference when we granted the case. If one judge said, "I think the C.A. is right, but we probably should write on it," or another judge said, "I think this is really wrong," the chief would assess those comments and certainly want to assign the case to somebody who's going to get a majority. Otherwise it's a waste of time. You can't always tell, but I know that would come into it.

MCCREERY: Thank you. Before we discuss a specific case, let me ask whether your very first opinion stands out in any way?

WERDEGAR: Yes. [Laughter] Did you know that?

MCCREERY: I might have guessed. [Laughter]

WERDEGAR: My very first opinion was a welfare search for a mentally disabled lady living by herself. I forget why it came before the courts, but the social worker went into her home and found whatever she found that brought the case to the attention of the courts, so it was a so-called welfare search.

I had on loan at that time a very capable staff attorney from the central staff, and she drafted for me an opinion that concluded that that search was illegal. Whatever they had found that brought the case before the courts I don't know. I thought about it, and I decided that yes, probably it was illegal.

As we do, we circulate our calendars around, and nobody agreed with me. So I rethought it. You have a choice when you don't gain the concurrence of your colleagues. Your choice is to give the case up because you simply cannot fathom writing something contrary to what you stated first, or you rethink it and you come to see the wisdom of your disagreeing colleagues.

In that case I came to see the wisdom of my disagreeing colleagues, and so I came around and decided that under the circumstances — this not being a criminal entrance or anything to do with criminal law — that perhaps, whatever it was, a warrant or probable cause wasn't necessary. I do remember it because my first case went nowhere and came back to me, and I rethought it. [Laughter]

**MCCREERY:** What do you recall about actually speaking with your colleagues about the case, if anything?

**WERDEGAR:** At that time, and throughout most of my time on the court, there wasn't a practice of justices wandering around talking to each other about cases. It was in writing. That differs according to personal preference. Maybe some judges walk around and talk. I know when I was a staff attorney here, Justice Grodin would wander the halls and talk to everybody, staff and judges, about cases and exchange ideas.

At the time that I was here that was not occurring at all, and there are a couple of reasons. One is the personality, perhaps, of the judges. But another is, if a colleague is just really deep into one case but you're working on three other cases, to have that person come in and want to discuss that case with you is very disruptive — just because it's front and center on his mind. Also, the issues are sufficiently complex that unless the discussion is very focused not much is to be gained by kicking it around.

But mostly, it's the nature of the work. I should note there's more individual discussion going on now. Anytime somebody wants to talk to me about a case that's of paramount importance to them, I will. But I have to put aside whatever it is I'm working on.



Then, once we reconfigured the court when we came back after the earthquake, as I think I mentioned in an earlier interview, that diminished the casual opportunities of speaking.

As I might have referenced, people who have children know that if you sit down and say, “How was school today? Anything happen?”

“No. Nothing.”

But if you’re driving a carpool or you’re walking with the child, you’ll hear all sorts of things in a more natural, unstructured way.

I think the physical setup of the court is not conducive to casual exchanges. We did make the decision, as I said, to have these pods where our staffs are readily accessible, but the other justices may not be so. So it’s a combination of factors, and personality certainly is a part of it.

MCCREERY: Thank you. We mentioned a couple of specific cases in which you wrote the majority opinion that we might touch on today, the first being from your first year on the court, 1994, and that’s titled *Advanced Micro Devices v. Intel*.<sup>17</sup> What do you recall about the significance of that?

WERDEGAR: There were several opinions in 1994 that we’ll be talking about and some that we won’t, but that was one of the important cases. This was 1994, and the case was one of the early cases where this court was developing its jurisprudence relating to arbitration. Arbitration at that time was emerging as a “more important than it had been” dispute resolution resource.

In a case that preceded *Advanced Micro Devices* before I was on the court, called *Moncharsh v. Heily & Blase*,<sup>18</sup> the court had reviewed an arbitrator’s award where the allegation was the arbitrator had made an error of fact, or perhaps it was an error of law. Under the statute governing arbitration awards in this state, judicial review is very limited, and it is limited to an arbitrator exceeding his powers, acting in excess of his powers.

The court, before I joined it, decided that an error of law or fact is not an act in excess of the arbitrator’s powers and it’s not cause for judicial review to correct or vacate the award. The reason given was that parties, private parties who have sought to resolve their dispute through private arbitration, have done so because it’s less expensive and it’s much quicker

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<sup>17</sup> 9 Cal.4th 362 (1994).

<sup>18</sup> 3 Cal.4th 1 (1992).

and that, in agreeing to do that, they contemplated that the arbitrator's award would be final and there wouldn't be judicial review — the thinking being that if you get into layers of judicial review you're defeating the purpose of this commercially beneficial quick process of alternative dispute resolution.

In *Advanced Micro Devices* the issue was not that the arbitrator had allegedly made an error of law or fact. It was that the arbitrator, in fashioning his remedy for the breach of contract he had found between Advanced Micro Devices and Intel — he found that Intel had breached the covenant of good faith and fair dealing — the arbitrator fashioned a remedy that was more in the nature of an equitable remedy and one that, had the case been brought in court, the trial court could not have done. And it was not one that the parties had agreed to in their contract agreement. So did the arbitrator exceed his powers, permitting judicial review?

This was a significant case because we held that an arbitrator has more flexibility than a court to fashion a remedy so long as that remedy is drawn from “the essence” of the contract and is reasonably fashioned and related to the nature of the breach. So that was important.

After that case I was invited to speak before the American Arbitration Association on arbitration, which I did. I went back to my speech, and I want to say that the difference in the landscape, with respect to arbitration, twenty years ago and today is quite marked. The theme of my speech was mutual benefit — the title of it was “The Courts and Private ADR: partners in serving justice.”<sup>19</sup>

My thesis was that for commercial interests and private parties of equal strength to agree to have private arbitration could be a beneficial supplement to judicial processes, and that maybe the courts could learn something from the streamlined nature of arbitration. Arbitration would always need the courts, I said, because we establish the law that is going to govern the arbitration proceedings, and we also are there to oversee that no egregious violation of rights or such occurs.

That speech was in the context of the premise being that these are private individuals of equal bargaining strength. Today, of course, mandatory arbitration has come into the picture. Any commercial entity or any

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<sup>19</sup> January 12, 1996.

product or service that you choose to purchase or avail yourself of usually has a mandatory arbitration contract, whether it's your telephone bill or your credit card or your health care provider, and it's not parties of equal bargaining strength. It's serving a completely different purpose.

Also, apart from that circumstance, there also is some concern that, even with private arbitration involving corporations and so on, the more cases that go to arbitration the less opportunity the courts have to establish the law, so it becomes very ad hoc. Often people go to arbitration because they want to keep the resolution secret, so there are problems today that one could not foresee twenty years ago.

In the course of my speech I mentioned that the court had before it a high-profile case called *Engalla v. Kaiser Permanente*.<sup>20</sup> After my speech Justice Mosk, for the court, wrote an opinion in *Engalla v. Kaiser Permanente* that I think came as a surprise to many, saying that the Kaiser health care system, which requires its subscribers to go to arbitration for medical malpractice allegations, was not — contrary to its assertions and contrary to its representations to its subscribers — was not fair or prompt, that there were inordinate delays.

I think the patient that was suing had died. Now, that could happen if the illness is very severe and grave, but in this case it had stretched on and on and on. The assertion was that the arbitrators are not necessarily unbiased.

Out of that, Kaiser said, "Oh, we had no idea."

Kaiser appointed a blue-ribbon committee to examine their procedures and suggest how they might remedy this. The blue-ribbon commission suggested that Kaiser have an independent arbitration-oversight board, statewide, to look at its procedures, make suggestions, and monitor these arbitrations.

I mention it because, ironically enough, my husband was recruited to be the first chair of this Kaiser statewide arbitration-oversight board. He had the responsibility of selecting the statewide members — diverse in ethnicity and background and geography — except for the few that Kaiser Hospital gets to appoint. He had responsibility for setting up all the procedures — and he still serves today — and setting the agenda.

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<sup>20</sup> 15 Cal.4th 951 (1997).

To report on what he says, Kaiser today has a very fair arbitration system, neutral arbitrators. The background of the arbitrators and how they've ruled is fully disclosed to the patients. So that's been an interesting evolution and, I thought, a curious coming-around of the connection.

MCCREERY: To what extent could this Kaiser model be used elsewhere, if you know?

WERDEGAR: I don't know, but I do know that the Legislature has looked at arbitration and there are certain regulations about — I'm not an expert on this legislation, but — I think it's required that the background of arbitrators be disclosed. But don't hold me to the particulars.

There was another arbitration case much later in my career where, after our decision, in which I dissented — I hope we can come to that — there was a legislative hearing about how to make disclosure about the arbitrators more widespread, more available. In a lot of arbitrations the parties get to each choose their own arbitrator and then agree on a neutral. As far as I know that works fine.

MCCREERY: You mentioned the two concerns in the broad picture of private arbitration not only keeping the courts from advancing the law in California but also allowing the parties to hide the results from public knowledge and action. What sense do you have about how real those concerns are?

WERDEGAR: That's part of the world outside this building. Really, I don't know. I think they are real insofar — from my perspective — our job is to set the standards of law so that these decisions are not ad hoc, and I'm concerned that if these large cases — these are not the consumer mandatory arbitration cases, but the large cases — are not brought before us, the law doesn't have the opportunity to develop or embrace new conditions. We are left static, in a way. But it's just a general concern. I have no practical knowledge about how it's playing out.

MCCREERY: Thank you for mentioning your speech to the American Arbitration Association back then and for noting that things have changed radically in this realm.

WERDEGAR: Strikingly so. Mine was this optimistic “partners in serving justice,” and “we'll work together in harmony,” and “it's good for the courts, and it's good for arbitration.” That could be, in a perfect world, the case.

MCCREERY: But we've seen great consolidation of corporate entities, among other things, which, as you say, often have these arbitration issues built in for all users.

WERDEGAR: But also, everywhere people go now, whether it's employment or a product defect or anything, it's mandatory arbitration, which means — scholars and observers of this have been very concerned that we are minimizing the constitutional right to trial by jury by enforcing the mandatory arbitration. We have to distinguish mandatory arbitration from consensual, equal-bargaining-power private arbitration. They're two different experiences.

MCCREERY: Thank you. We'll try to come back to the later arbitration-related case on another day, if you're willing. We also thought we might touch upon a case called — if I have this correct — *Lisa M. v. Henry Mayo Newhall Memorial Hospital*,<sup>21</sup> which you released in 1995.

WERDEGAR: I did, yes. In that case, the factual circumstance was that a young woman who had had a fall, a pregnant young woman, went to the hospital to be examined, to see if her fetus had been damaged. She was in the examining room alone with a male technician who was doing an ultrasound in the lower abdominal and pelvic area. He persuaded her that he needed to insert the device into her. She later came to know that this was not appropriate and it was a sexual assault, so she sued.

The issue in the case was whether the hospital could be held liable under a doctrine known as *respondeat superior*, which means that an employer is responsible for the torts of an employee that are committed “within the scope of the employment” — that's the critical phrase.

The majority held that this technician's assault was not within the scope of his employment because nothing in the employment — unlike injuries during fights that the court had addressed in earlier cases, where the nature of the interaction of the people in the employment had led to the fight — there was nothing related to the employment that would have promoted this. His desire, his emotional motivation, was strictly of his own design, and it could not have been anticipated.

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<sup>21</sup> 12 Cal.4th 29 (1995).

Going back, I'm heartened to see on her behalf, that we allowed her to go back to the trial court and continue her cause of action for negligence on the hospital's part. If the hospital were negligent in screening this employee or training this employee or negligent in not having a second person in the examination room, she still had the opportunity to show that. But we held that the hospital was not liable under the doctrine of *respondeat superior*. It was not within the scope of the employment.

MCCREERY: This opinion got a lot of attention when it was released, and people expressed surprise, somehow, at the way it came out.

WERDEGAR: Not having their comments in front of me, I can't really respond to why they were surprised. I did come across something that said it was not well received. I did see that the press reported the opinion "infuriated some liberals and annoyed others." Well, they wanted the hospital to be liable, but that's not my concern.

I've thought about that opinion a lot because it had to have been a close case. But I'm unaware of any law that has deviated from it or has rejected it or that it has created any precedent that deprives people of legitimate recourse. That's all I can say. People are often going to be disappointed by opinions. Some will celebrate, and others will berate.

MCCREERY: Certainly, in any case that is so.

WERDEGAR: Absolutely.

MCCREERY: But that's an important piece of information, that — as you say — as time went on nothing came around that suggested it played a larger role in other —

WERDEGAR: Not that I'm aware. And, you see, if the hospital had been negligent in some way, at fault in some way, she had the opportunity to show that on remand. But they're not strictly liable. If the hospital were strictly liable, there wouldn't be any question of what motivated this technician and whether his actions were foreseeable.

The next one, were it to happen again, I guess the argument could be made, "It *is* foreseeable." But the employment has to have some connection. It could be argued that they were negligent in allowing a male to examine a female without a second person present.

So I have thought about it, but I think I landed in the right place.

MCCREERY: The next opinion we thought we might touch on today came in April of 1996, titled *Smith v. Fair Employment and Housing Commission*.<sup>22</sup> Please talk to me about this, which was a landlord case.

WERDEGAR: We call this the religious landlady case. This was back in 1996, and again it's interesting to look back because the mores and expectations of the time are so different now. But Mrs. Smith was a landlady. I don't believe she lived on the premises, but she rented apartments. A couple came and represented to her that they were married because she said she wouldn't rent to unmarried. But they weren't, and when she discovered this she refused to honor the contract to rent, her point being that cohabitation — unmarried sex and cohabiting together — was in violation of her religious beliefs.

The couple brought a complaint before the Fair Employment and Housing agency, which sustained their complaint. The fair employment and housing laws prevent discrimination on the basis of marital status. The first legal issue was, is living together unmarried “marital status” or does “marital status” just mean divorced or widowed or single? But the Fair Employment and Housing Commission said marital status embraces your lifestyle of living together unmarried, and they said that her refusal to rent to them did violate the Fair Housing Act.

She sued. The Court of Appeal agreed with her that she didn't have to do this. It was in violation of her religious liberties. This court, in an opinion written by me — I was assigned the case — held that she did have to abide by a civil law of general application that was not targeted to discriminate against religion. We went on to say that her religion did not require her to invest in rental units, and this law didn't burden her financially because she could use her capital to invest in something else. That was the upshot of the case.

MCCREERY: How difficult was it to reach the conclusion that you did?

WERDEGAR: Legally it had some nuances because we had to deal with the federal Religious Freedom Restoration Act, and we dealt with that. We were trying to avoid constitutional issues, which is a guiding principle of all of us when we take cases. If we can decide the case on non-constitutional

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<sup>22</sup> 12 Cal.4th 1143 (1996).

grounds, we try to do so because dealing with the Constitution becomes a much more weighty and portentous — if that's the word — matter.

We held that the law didn't substantially — this is federal law language — didn't substantially burden her religion because her religion didn't require her to rent and she had other options to invest her capital. So she could continue to have her religious beliefs. Again, a general law, a civil law, of general applicability that isn't targeting religions is valid. We have to live that way. Otherwise everybody would be opting out of laws.

MCCREERY: Where did that go after your opinion came out?

WERDEGAR: I think it stopped there. I don't think it went on, if that's what you're asking, to the United States Supreme Court.

MCCREERY: Oh, no. I simply mean, how was that issue addressed again in subsequent times?

WERDEGAR: It's a pretty fundamental issue, actually. I can't remember other cases. Of course nationally, today, there's much going on about that but we're not talking about that. It's pretty standard that general laws — civil laws of general application that don't target religions — if you're going to engage in commerce in the marketplace, is the idea, then you have to abide by laws of general applicability.

There is an interesting aftermath to that case. Not long after, I was invited by a women's group — lay women, not attorneys — to speak.<sup>23</sup> It might have been a Republican women's group. So I agreed to do so, and I gave them a general speech about the courts, the hierarchy of the courts, the difference between the trial court, where you have witnesses and juries and you find facts, and the Courts of Appeal, where you accept the facts that the jury found but you look at errors of law, and the Supreme Court, and how we take cases where there's a conflict or that require a statement by the highest court.

Then I took questions. A woman in the audience raised her hand to ask me a question. I had noticed her before. She was, I believe, wearing red, and she had a heavy chain with a large cross hanging on it. She raised her hand, and the question came to, "How can you deprive me of my right to rent units when it's in violation of my religious belief?"

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<sup>23</sup> California Federation of Republican Women, March 20, 1998.



It turns out the lady asking me the question was Mrs. Smith. [Laughter] You can imagine how I felt. There I was in this auditorium, speaking to people. So I told her what I've told you, that under our law, a law of general application that doesn't target religion and doesn't unduly burden the individual has to be abided by all who enter the marketplace.

After the speech and some other questions, as I was leaving, Mrs. Smith came up to me. She had a copy of my opinion, and she asked me to autograph it. I didn't know what to do. I didn't know what her frame of mind was. I mean, obviously it wasn't happy about the decision. I did ultimately sign it, but I was very uncomfortable doing it. [Laughter] So that was an aftermath of that case.

MCCREERY: Earlier in the process of this coming to you at the Supreme Court — because it involved this state act and the state housing department and so on — Attorney General Dan Lungren had been a part of this and had been asked to defend the department of fair housing, and so on.

WERDEGAR: Presumably.

MCCREERY: Yet he, I think, as a devout religious person, was not interested in doing so. Did you have any interaction with him at any time in all this?

WERDEGAR: No, but I'm not — you've evidently done some research on the point. Did he decline to defend the department? No, of course I didn't. I hadn't had any interaction with him since my confirmation.

Sometimes the attorney general is put in a difficult position. I know our current attorney general has had some issues thrown her way that, whereas as state attorney general it would normally be her duty to defend an action, but personally she doesn't want to. So he probably appointed or asked another attorney in another agency. I don't know the details of that.

MCCREERY: What else might you recall about how this opinion was received? As we've mentioned, it got a lot of attention from various parties.

WERDEGAR: I have no recollection. That was twenty years ago. You move on. You have so many cases coming. There are certain ones I remember how they were received, but this one — I think our court was divided. Our court was divided. It was 4–3, so obviously it was a touchy issue. But our job is to decide them as best we know how and move on. I know it was a

high-profile case, but I don't recall a huge press reaction or a huge public reaction, not like some decisions that we've had.

MCCREERY: But it did go down in the record as an important decision.

WERDEGAR: It was very important, but I think it was pretty mainstream in its jurisprudence.

MCCREERY: Are there other opinions of those first couple of years that we didn't identify ahead of time that you want to bring up before we move on into the Three Strikes case?

WERDEGAR: No. I'd be happy to go on to the other high-profile case.

MCCREERY: All right. The matter of the Three Strikes case, as we refer to it, had actually started in 1994 when Governor Wilson approved an Assembly bill that would institute a "Three strikes and you're out" aspect to California's felony sentencing. That fall the voters approved Proposition 184 at a high rate, 72 percent, as I read it, requiring a twenty-five-years-to-life sentence after a third felony conviction. This, of course, came after the events of the Polly Klaas case and the public's familiarity with that case and with the perpetrator, so that was some of the context of that time. Talk to me, if you would, first of all about how exactly the case was assigned to you to write.

WERDEGAR: I have no idea, and I've never known. I was the newest member of the court. But it must have been a good assignment because we came out with a unanimous opinion, and I think externally that was a great surprise to the public and to court watchers.

It was an initiative and, as you mentioned, the legislation. They were parallel. They covered the same subject, minor differences. Every Court of Appeal in which a challenge to the law had been brought had said the law was fine. Then one lone Court of Appeal — and I don't today know who it was but I congratulate them on their fortitude, because — for two reasons — you're so busy on the Court of Appeal that if every other court has said it's okay you move it on. Also, as you implied, it was a very high-profile issue. But one Court of Appeal said, "No. This is not a valid law." So we then had to take review of it because now we had a major clash, a major conflict, on an important issue.

As you say, it was in the aftermath of the notorious and tragic Polly Klaas kidnapping. The defendant who had done that heinous crime had many felonies, and so it seemed logical: If they've had three felonies, shut them up for life. We looked at the law, and the law deprived judges, trial court judges, of the discretion to strike one of the defendant's priors.

This was in contravention of a previous broadly applicable statute that gave trial courts discretion to dismiss cases and within the power to dismiss — in the interests of justice — within the power to dismiss is the power to dismiss a prior for sentencing purposes. So we looked at it, and we came to the conclusion that the law did not supersede that statute of discretion, didn't abrogate it, and we harmonized the two statutes.

Our approach was one of avoiding the constitutional issue because once you have the executive hamstringing the judiciary, you're involved in some separation-of-powers issues. Judges have sentencing discretion within the confines of the law. So we interpreted it to maintain its constitutionality and never had to get to whether it was unconstitutional. We held that, contrary to what the voter pamphlet might have suggested to the voters, trial courts still had discretion, in the interests of justice, when appropriate, to strike one of a defendant's priors so that defendant would not be subject to the "Three strikes and you're out" law.<sup>24</sup>

MCCREERY: What inkling did you have going into this just how high-profile it would be?

WERDEGAR: We had to know it was high-profile because the governor at that time and his predecessor both were very much tough-on-crime public figures, and it was an era when crime was in the front of many people's minds, certainly politicians' minds. Much talk about "tough on crime." So I guess we had to know it was kind of a hot potato, but I don't dwell on these things.

I circulated my draft, and everybody agreed. That included the Deukmejian appointees. That's who the court was then, Deukmejian appointees and myself.

MCCREERY: You found quite a level of agreement at that draft stage, did you?

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<sup>24</sup> *People v. Superior Court (Romero)* 13 Cal.4th 497 (1996).

WERDEGAR: I don't remember the stages it went through, but the end result was the end result. The law still allowed the trial court to exercise its discretion.

We had a subsequent case — I can't tell you the name — maybe some years later, assigned to somebody else, where we then talked about what would be within the judge's discretion and we outlined what the trial court, in exercising its discretion, had to look at. I have not looked at this case in preparation for this interview, but I think its main theme was that you don't have unbounded discretion. It has to be within the spirit of the Three Strikes law. So we narrowly circumscribed it.

Oh, I do want to say that the next morning — you asked me was I prepared — no, not in any way. I knew it was a high-profile case, but I had no idea what was coming. The next day the case was on the front page, I believe, of every newspaper in the state, many of them accompanying it with my photograph. [Laughter] Lots of them named me as author, which was unusual in the general press. They usually just say, "The court did this," if the case is at all of any interest. So many of our cases, most of them, don't get into the general press.

So I wasn't prepared for that. Driving to work I turned on the radio, and I happened to turn on KGO, Ronn Owens. He's a talk show host. Talk shows — their whole *raison d'être* is to get their listeners energized and work over a subject. Well, my goodness. That morning they were working over this opinion, and of course everybody — the host, Ronn Owens, and the callers — they were just feeding on each other's outrage. I mean, it was "outrageous."

That was the reaction of the newspapers. The governor was quoted by one paper as saying, "This is violating the will of the people," because it had been an initiative, and that he was going to see that legislation was introduced to overturn it. The *L.A. Times* headline announced, "Reserved Justice Finds Self at Eye of '3 Strikes' Storm." [Laughter]

I was not prepared for that. There was nothing I could do about it.

Interestingly, legislation was introduced, and the Legislature didn't do anything about what the court had done.

I feel there's a lesson. Just as things have changed with respect to arbitration, things have changed in the ensuing almost twenty years with respect to "tough on crime." As time passed, various observers began to

believe that the law was too harsh, the Three Strikes law, and that it was leading to an unjustifiable overcrowding of prisons. Certain interests began to think that perhaps it should be modified, but because — it was an initiative as well as legislation — but because it was an initiative measure they had to get the public to pass an initiative modifying it.

There was an effort — certainly one, maybe two — that did not succeed. But in 2012 an initiative was on the ballot that modified the Three Strikes law to require — which the law had not previously done — that the third felony be a serious or violent felony, and that law passed. Some of the criticisms of the law — I mean, the stories you would read — were that somebody would be put away for life because he stole a bag of golf balls or something.

That makes for very dramatic storytelling, and perhaps in some cases it occurred. But what the public wouldn't generally know is that often these people didn't just have Three Strikes. They might have had eight or ten strikes, so they weren't being sent off to life for a package of chewing gum or whatever. They were really being sentenced under the law for their entire history. Nevertheless, it did seem — the voters came to believe — that the third strike that triggers this long sentence should be one that, itself, also is violent or serious, and those terms — “violent” and “serious” are defined in the penal code. Not every felony is defined as a “serious” felony.

MCCREERY: And as you say, that made a difference in the 2012 ballot measure over the earlier attempts to modify the law?

WERDEGAR: Yes. That was the amelioration of it. So what twenty years ago was very contentious now evokes little controversy.

MCCREERY: Say more about this principle of judicial discretion and why that's important.

WERDEGAR: You mean at the trial court level? That's just the way our system is. It allows the judge who is observing the defendant, hearing the facts, hearing the case, to tailor the penalty within the constraints of the Legislature. Judges are guided by legislative sentences, but they usually have flexibility. It just allows us to personalize our penalties.

MCCREERY: How deeply held was that principle on your own part?

WERDEGAR: I think it's important. It's a difficult line to walk because you don't want unfettered discretion. You want guided discretion. You want comparability among defendants. But you have a crime that may be the same, but the individual defendant may differ. It's one of those things that you have to walk a fine line.

The Legislature has itself gone different directions. We've had determinate sentences and we've had indeterminate sentences. Neither one is viewed as being perfect, and the pendulum swings. We're constantly trying to refine our approach to what's an appropriate disposition of an individual who has transgressed society's norms.

MCCREERY: It's always interesting to me that these efforts were put forth using this baseball metaphor of "Three strikes and you're out."

WERDEGAR: It was very catchy. It grabbed the public's attention. Yes. And they wanted it, as I say, in the backdrop of this multiple felon doing this unimaginable crime. I can't actually imagine, literally, how he took poor Polly Klaas out of her bedroom through the window. I've never heard how that happened. But I can understand why the public responded.

And the title of the initiative — in fact, titles are a big part of initiatives to get the public's attention. Initiatives are often — not this one, but often — very, very complicated. You get a good title, and you've got the public's attention.

MCCREERY: Did you have occasion to write, yourself, on "Three Strikes" after that 1996 opinion?

WERDEGAR: On Three Strikes? No, I don't think so. I think the only case we had after that was defining what we meant by — in the context of the Three Strikes law — "judicial discretion," what parameters that would have. I don't recall any other issue related to the Three Strikes law coming before us, unless it was something that was factually particular to whether the felony qualified. I have no recollection of it ever again being a big issue. We established the parameters. Maybe we had to do some fine-tuning along the way, but I don't remember.

MCCREERY: Just in this last fall's election, November 2014, there was the Proposition 47 that reduced penalties for some crimes, which was thought to be something of a follow-on, also passed by the voters.

WERDEGAR: Yes, and the court right now is dealing with, “Who benefits from that? What are the procedures below?” We have multiple cases in front of us now where we will have to sort that out.

MCCREERY: Taking the broad look, how do you personally assess the Three Strikes law and its effectiveness?

WERDEGAR: I don’t think that’s my role. I mean, I’m not an expert on what works in criminal deterrence or criminal justice.

MCCREERY: But you were certainly said to show quite a skill in crafting this unanimous opinion and putting it out in that particular time.

WERDEGAR: Oh, that’s a different skill, a different background.

MCCREERY: So that’s a distinction you’re making?

WERDEGAR: Oh, I absolutely am. I’m not one to assess the benefits or the wisdom of these laws, which is just as well because that’s not our role. Our role is to see what the Legislature has done and deal with it as we have to under the Constitution and other laws.

MCCREERY: It’s fascinating, though, to see how much of an effect it has, the various propositions that come forward — whether or not the court’s asked to interpret them — prison overcrowding and all of these issues the state faces. There really are huge effects.

WERDEGAR: Oh, yes. No question about it.

MCCREERY: Any particular lessons learned from your process in the Three Strikes case?

WERDEGAR: Yes. I think I’ve referenced one, which is: With the passage of time, yesterday’s horrendous, outrageous, huge issue — life moves on and circumstances change. One cannot, in this role of a judge making decisions that impact citizens and impact the Legislature, one can’t be unduly concerned about the reaction if you’ve done the best you can to decide the law according to the law.

That is a lesson. Really, what outrages and upsets people today is likely or can often be gone tomorrow. We can’t sway with the winds. That’s more for politicians, if they choose to do that.

MCCREERY: Speaking of politicians, your opinion in this case did draw the ire of your nominating governor.

WERDEGAR: So I read in the paper. He never spoke to me about it, of course. That would be totally inappropriate. On the occasions that we did speak after I was appointed we never talked about anything that was going on at the court, which is as it should be.

MCCREERY: And as you have said before today, as well. Shall we turn to another high-profile opinion, as they're called? — this one written by Chief Justice George, the re-hearing of *American Academy of Pediatrics v. Lungren*.<sup>25</sup>

WERDEGAR: Yes, certainly. I'd like to give a little background about that. At issue in *American Academy of Pediatrics v. Lungren* was the constitutionality of a statute that required a minor, which would be any female, be she twelve or seventeen-and-a-half, requiring any female under eighteen, before obtaining an abortion, to get the consent of one of her parents or, if she couldn't do that, judicial authorization.

This statute had been enacted in 1987. It had never been enforced. The lower courts had enjoined its operation. It had overturned or abrogated an earlier statute in this state, which allowed a minor to have any services related to pregnancy that an adult could have.

What's interesting to note as I looked back at this is those services, at that time, were circumscribed. The right to an abortion for an adult was pretty limited. But anyway, a minor could do whatever an adult could do with respect to treatment of her pregnancy. In 1987 the Legislature reversed that and required parental consent or prior judicial authorization. The law had been enjoined, but before I came on the court, I believe, for reasons I can't recall, the court voted to grant review in a case that was challenging the non-enforcement of this. I think the court in earlier times had declined to review it, and I'm told that Justice Kennard was the critical vote this time to have the court take it up. So the court did.

I joined the court after review had been granted, and in April 1996 the first opinion was filed, authored by Justice Mosk. It was 4–3 upholding the law that a minor had to obtain parental consent or prior judicial authorization. Justice Mosk wrote the opinion, and he was joined by Chief Justice Lucas and Justices Baxter and Arabian. Justice Kennard, Justice George, and I dissented. I believe we all wrote separate dissents. We didn't join each other's.

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<sup>25</sup> 16 Cal.4th 307 (1997).



After the opinion was filed — these things happened in close sequence — Chief Justice Lucas and Justice Arabian left the court, and Justice Chin and Justice Brown joined the court.

Now came the petition for rehearing, and who voted to grant? Let's see. The three dissenters — that was Justices Kennard, George, and Werdegarr — George was now chief justice — plus our two new members, Justices Chin and Brown, voted to grant rehearing.

This was the first rehearing — of course I was brand-new — the first rehearing petition that I had encountered. But because of the timing, you rarely encounter one in the circumstances where the membership of the court has significantly changed. My thinking was that the court that's going to be in place is the court that should make this momentous decision, not the court that's going out the door as it upholds this law that had been enjoined for so many years. So that was my motivation.

MCCREERY: I can guess, but say more about why you think that.

WERDEGAR: The decision was not final. It was a divided decision. Two of the justices in the majority were gone. It would be like the dead hand of the law. It's different than overruling an opinion. When you overrule an opinion it's been in place, and you never do that lightly. You don't grant rehearings, usually, either, but neither do you usually have justices in the majority disappear and impose their will on their way out. That's how it felt.

After the case was reheard a year later, the court, in an opinion authored by our new chief justice, Ron George, held that the requirement was invasive of a minor's state constitutional right to privacy. It was too intrusive. It was George's opinion, writing for the majority, joined by myself, Justice Kennard, and Justice Chin. It was 4–3. Of course, the two remaining of the earlier majority, Justices Mosk and Baxter, dissented. But the surprise was that our new colleague who had voted in favor of rehearing dissented.

MCCREERY: Justice Brown.

WERDEGAR: She did dissent. I don't know why she voted to grant, but she may have felt, as I did, that the court going forward should look at this. I don't know. She wasn't the swing vote in the petition for rehearing, so it has no consequence that she voted to grant the petition but dissented in the new decision. That was the outcome of that, and it did attract quite a bit

of attention. Again, another issue that the public feels deeply about and is deeply divided about. Everybody I know — personal friends, had different opinions.

MCCREERY: As you mentioned the rehearing occurred about a year later. The actual decision to rehear was only a very short time after the first opinion.

WERDEGAR: The first opinion was April 1996, and we have to decide a petition for rehearing — I think it's within thirty days or — a short period of time after; none of our opinions becomes final until thirty days unless by special order we make them final immediately. During that period, the parties petition for rehearing and the opinion isn't in effect.

MCCREERY: The timing is extraordinary, though, because, as you say, the members of the court left in that time.

WERDEGAR: Yes. We have the same situation now with a number of cases where prior members of the court were on a case. But they're not final, and petitions for rehearing are before us. We granted one recently, but we have others coming.

MCCREERY: This, though, was extraordinary in a number of ways. The earlier opinion, as you say, authored by Justice Mosk, was the source of surprise to some. He attracted a bloc of colleagues who didn't quite as often vote with him on such things. As I recall, he was making a distinction between privacy rights of a minor versus those of an adult.

WERDEGAR: Oh, yes, of course. I can't speak to whether this was out of character for him or not. People think of Justice Mosk as a "liberal," and they assume that from that would follow liberality in what a minor can do. I don't think that did follow at all. People's views on that and how they felt about it probably could be untethered from the label as liberal or conservative.

MCCREERY: To those of you who tided over between the first decision and the second, how unexpected was it to decide to rehear?

WERDEGAR: You mean, did we anticipate how the votes would go?

MCCREERY: Not necessarily. I just wonder —

WERDEGAR: A petition would be expected, and the result — I can't speak to whether our deciding to do so was unexpected to me. Is that what you're asking?

MCCREERY: Or just that it was an unusual development.

WERDEGAR: It was an unusual development for the reasons that we've touched on, that it's very unusual to have members of the court depart while a case is not final and to have it be a case of such high interest — although we are living through some of that right now. But it's very unusual. Turnover on the court is very unusual.

To have a high-profile case not final when you have new members — a lot has to happen all at once for that to be the case. It was fast, that Chief Justice Lucas and Justice Arabian left and Justices Brown and Chin came on. That's very unusual, and it hasn't occurred since until now. So that's been about eighteen years.

MCCREERY: That just reminds us that the period over which Chief Justice Lucas presided was a period of great turnover, not only just at that moment but earlier, throughout his tenure. There's been quite a period of more consistency since then.

WERDEGAR: Oh, it absolutely was. Yes. That was before my involvement and probably not relevant to my history, but I was a staff attorney on the court. Governor Deukmejian, I think, campaigned on his disapproval of what the so-called Bird Court was doing, and I think he made it a priority to put in place individuals that would moderate that.

I can't speak for the governor, but this is somewhat commonly perceived, and the court proceeded to do that. I read in a clipping, going back, that from the perceived "extremely liberal" — I'm putting quote marks around that — Bird Court, Governor Deukmejian put in a very "conservative court" that was the exact mirror-image of the Bird Court.

Many individuals on that court who came in at that time didn't stay a long time. I think it was understood they were here to do what they could to straighten things out, in their view, and not as a long-term commitment. Many of them were at the end of what might be a normal career span. I'm speculating on all this, but I don't think I'm saying anything that hasn't been said and understood to be the fact.

MCCREERY: But a period of high turnover, repeatedly, has some effect on the court's work.

WERDEGAR: Yes. They granted rehearing in every case they could. There was one case where the Bird Court had overturned a death penalty. They granted rehearing and imposed the death penalty. That's pretty dramatic.

MCCREERY: Returning to *American Academy of Pediatrics*, how significant is it, as you look back, that the new opinion centered on the constitutional right to privacy?

WERDEGAR: It's very significant. That was where it had to go. Chief Justice George, I think, did a beautiful job of tracing other circumstances where the right to privacy had been implicated and implemented. It was controversial. There's a difference between a seventeen-and-a-half-year-old and a twelve-year-old, and I think if the law had been tailored, had been more refined, perhaps the result would have been different.

MCCREERY: And of course one area where the Constitution of California differs a bit from the federal Constitution is this very matter of privacy.

WERDEGAR: That's right. We do have this expressly stated right to privacy, which has been litigated as to what it was intended to do and what it means. But we do have that.

MCCREERY: As a general matter, how often does that particular right of the California Constitution come up for you?

WERDEGAR: Around the time — if you go back to Ron George's opinion — there were many cases that he cited that involved that. We have had it come before us. I'm not at the moment able to cite cases. Of course, it came up in the *Marriage Cases*.

MCCREERY: Sure, later on. Yes. That [*American Academy of Pediatrics*] case did get an awful lot of attention, and it was something of a dividing line, as it turned out, between the court managed by Chief Justice Lucas and that managed by Chief Justice George. That, again, is a matter of timing. But let's use this as an opportunity to reflect a bit more on the time that you did work with Chief Justice Lucas, knowing he didn't stay a great long time after you arrived.

WERDEGAR: I didn't have a lot of personal contact with him. I found him delightful. He did, I've said, have a wry sense of humor. At the time — I think I've mentioned this — he was fairly recently newly married to Fiorenza, who lived in L.A. During my time here, Malcolm Lucas would be here for a conference and then — I mean, he didn't give me his travel schedule, but I know my first couple of weeks I was acting chief, and I had a stack of orders this high to sign because he would be back in L.A. His heart was down there.

MCCREERY: What can you observe, if anything, about his larger role as chief vis-à-vis the other branches of government?

WERDEGAR: Again, this was before my time. But I think after an opinion on the term limits initiative, where this court before my time upheld it, I think he after that had a rocky relationship with the Legislature. These are commonly-known stories.

Something in the opinion, I think, was approving of this. It wasn't just a neutral opinion saying, "The voters have the right to do this, and it's constitutional." I think there was something in the opinion that approved of it as a good idea, and the Legislature didn't take kindly to that.

The story is — I wasn't here — but that Chief Justice Lucas was not thereafter invited to give the annual State of the Judiciary address to the Legislature. They took offense at this approval of limiting their term of service.

MCCREERY: What did you note, if anything, about his relations with the media, and how did he counsel you to handle such things?

WERDEGAR: He had had his difficulties with the media, and he counseled me to be careful. I do know he felt that perhaps he, or no one, would be fairly treated by the media. He did advise me just to be careful.

He said, "The press is not your friends."

And they're not. They're not your friends. They are there to do a job, to take a perspective, to make a story. He was right on that.

MCCREERY: What is your own approach to working with media and their requests?

WERDEGAR: I grant any interview request. I'm always a little apprehensive because they do need an angle, and you're helpless as to what that angle is going to be. But I'm accessible to the press.

When I first came on a reporter called and wanted to do a picture of Justice Kennard and myself — it was a big thing that there were two women on the court — and do a little article. I said fine, but Justice Kennard didn't agree to it.

MCCREERY: What reason did she give, if any?

WERDEGAR: She didn't give me any reason.

MCCREERY: As we've touched upon in discussing the *American Academy of Pediatrics* case, you had two new colleagues on the court at about this time, first of all Justice Chin, who arrived in March of 1996, and then, shortly after, Justice Janice Rogers Brown in May of 1996. Talk a little bit about that transition of Chief Justice Lucas and Justice Arabian electing to retire and then those two new coming on at the appointment of Governor Wilson.

WERDEGAR: Yes, that was dramatic. I'll back up a little bit to say when I came on the court, replacing Justice Panelli, Stanley Mosk said to me, "Any new member of the court makes for an entirely different court."

That's actually a truism, depending on the personality and views of who's left and who's come in. But when you have more than one it was a major change. As one article that I came across related, we were moving away from what would be the Deukmejian Court to what was going to be the Wilson Court.

The press was looking — as they do, that's their job — looking closely at every nuance of everything we did. I think the granting of a rehearing in the *American Academy of Pediatrics* case, to the press, was a signal that this was going to be a significant change.

MCCREERY: What do you think?

WERDEGAR: It was. But I don't think it was that dramatic. I think we were more — these words I find not necessarily accurate — conservative, liberal, moderate — but I do think we moved from what was generally recognized to be a very conservative court to a more moderate court. That's what the press thought, whatever that means.

MCCREERY: How about the announcement that Governor Wilson was elevating Justice Chin? Talk about that particular transition, if you would.

WERDEGAR: I had worked with Ming Chin on the Court of Appeal for three years. When the governor selected me to be elevated, it was public that Ming Chin was another possible, and Janice Brown was also another possible. You might have even told me about a couple of others. Art Scotland was, and there may have been one or two more. But it was no surprise to me that Justice Chin was elevated.

MCCREERY: Justice Brown, as we know, had worked in Governor Wilson's administration. What did you know of her beforehand?

WERDEGAR: Not much except that the governor greatly admired her.

MCCREERY: One feature of her review and appointment that has been given a lot of attention was that she was given a rating of unqualified by the Commission on Judicial Nominees Evaluation.

WERDEGAR: The Jenny Commission, yes.

MCCREERY: And yet Governor Wilson made the choice to bring her in anyway. Was that detail of great note to any of you as her new colleagues?

WERDEGAR: Yes. But it was one of those things where the governor just didn't respect the commission. I cannot speak for what he felt, but he certainly didn't respect their evaluation.

He had worked closely with Justice Brown and felt he knew her capabilities, her intellect, and so on. So let the commission do what it liked. It didn't concern him.

MCCREERY: Now, then, within about five years Governor Wilson had brought on four new members to this court so, as you say, it was now the Wilson-nominated court in majority. Talk about how this reconfigured panel worked together and interacted, if you would.

WERDEGAR: All seven of us, how we worked together?

MCCREERY: I guess you might characterize what the two new members brought that hadn't been there before. What departed and what came in?

WERDEGAR: Going back to Justice Mosk's statement that any new member of the court makes a different court, how different depends on the personality and perhaps the objective of the new justices. Some justices come and they are cautious. They might hew close to the center of gravity. Others might come and want to shake things up and are going to assert themselves

early on. Some of that may be appropriate because it has to be congruent with what your views are as a judge, and some of it is personality.

I would say that Justice Chin came in, and he fit right in. I don't mean that we all are in lockstep, although actually a little-known fact is this court during those years had a high rate of unanimity. But as somebody said, "The ones you dissent in are the ones that are important." But anyway, Justice Chin, I think, hewed to the center of gravity.

Justice Brown was different. She very early on distinguished herself by flamboyant dissents and colorful writing and standing out in that way. Very distinctive.

MCCREERY: In terms of voting blocs, which of course the court watchers identify after the fact, both Justices Chin and Brown were seen to be in fairly frequent agreement with Justice Baxter.

WERDEGAR: I've read articles that said that. These are little snapshots that I wouldn't presume to comment on. I think the cases and the record speak for themselves.

I know when I came on I hewed to the center of gravity. It's been said, and I think accurately, that we have a center of gravity that was moderate on civil issues and maybe more conservative on criminal. It seems that I've dissented on a number of criminal cases.

Emily Green<sup>26</sup> pointed out when she interviewed me not too long ago that I sometimes would differ from my colleagues in not upholding what the police had done. I can't answer why. I just look at the merits of the case and decide it as I see appropriate for that case. But Janice Brown distinguished herself by her provocative writing style.

MCCREERY: Provocative in what way?

WERDEGAR: Her first dissent was to one of my opinions. She tended to start out by criticizing the motive of the majority. It was part of her style that, "We can't be all things to all people. We are not philosopher kings." — that kind of rhetoric. But she had a flair for writing, and she expressed it most colorfully in her dissents. The press loved it.

MCCREERY: It strikes me, just upon hearing your description, that's a very different writing style from your own.

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<sup>26</sup> Legal reporter for the *San Francisco Daily Journal*.



WERDEGAR: It is. I don't have a lot of flair in my writing.

MCCREERY: And yet you are getting promptly to the matter at hand, and that's a difference, too?

WERDEGAR: Yes. I feel that's my role. Justice Arabian used to have what you might call flair. It's congruent, I guess, with his personality. But Janice Brown's writing was not congruent with her persona. Her persona was generally mild, but her writing could be acerbic.

MCCREERY: You mentioned the matter of dissents. I wonder how you characterize the situation that would cause you, personally, to write a dissent, which you tended to do a bit less frequently than some of the others, as I saw it in review.

WERDEGAR: I never looked to write a dissent. Some justices want to write separately. They want to project distinctiveness. That's never been my objective. I will write a dissent only when I can't get others to agree with me *and* I can't agree with where the majority is going and I feel what I have to say is right and is important.

MCCREERY: What are the pros and cons of wanting to be so distinctive, as you've described it?

WERDEGAR: I can't comment on that because it's not my style.

MCCREERY: I just mean in terms of the court's work and how you see it pan out. Anything there?

WERDEGAR: I think separate opinions can be useful in pointing out to the reader issues that weren't addressed, perhaps, or clarifying. I've sometimes written concurrences clarifying something that I think is a little muddy in the majority opinion and either endorsing it or distancing myself from it. Any separate opinion has a different purpose. Often Justice Kennard would write to say that she had previously advanced this position, or something to point out the evolution of her jurisprudence.

MCCREERY: Again, that's a bit of a different style, isn't it?

WERDEGAR: It is a bit of a different style. Generally, all of us want to avoid being like what you see in the United States Supreme Court opinions. The United States Supreme Court is characterized as having all these fractured opinions, where you have to go to subdivision (b)(2) and see that

three other judges agree with that. We are not admirers of the caricature or the character, whichever is accurate, of the United States Supreme Court opinions that are so fractured. Maybe they're not all fractured, but any law student and toiler in the field of law knows there are so many United States Supreme Court opinions that we have to count, who's agreeing with what?

MCCREERY: You mentioned earlier that the media was interested in photographing you and Justice Kennard together when you were the two women justices, and she refused.

WERDEGAR: She declined, yes.

MCCREERY: She declined. Okay. In other matters where you were asked to do things together as a group or in smaller groups, what sort of colleague was she?

WERDEGAR: She had a theatrical side. She was a great favorite of women's groups and would speak to them. I know when she first came on, before she had a second female as a colleague, she would in her speeches make it a point to say that she wasn't just one of the boys and that she was going to bring a fresh independent look.

That reminds me. An article written about the court, maybe within my first year or two, mentioned Justice Kennard as the only woman on the court. I was surprised to read that. Some Court of Appeal judge wrote to me something about, "If belonging means being one of the boys, you've arrived." [Laughter]

MCCREERY: [Laughter] I don't mean to place too much emphasis on the women of the court, but it is of interest. And now, with Justice Brown coming in there were three of you, and I wonder —

WERDEGAR: That's right. Yes. Let me say, at that time it *was* of interest. After Rose Bird was thrown out, it returned to an all-male court. Political history tells that Governor Deukmejian was very interested in getting a woman. He did, but for a time there was an all-male court. Then it was Justice Kennard. So when I came on as a second woman, it was a big news item at that time.

Speaking of the paucity of women, there's an anecdote I want to tell you. Early on, maybe my second or third year — I don't know — the court went for oral argument in the morning. On one of the cases there were two

women arguing — a woman, a female, on either side of the case. Again, going back to 1996, 1995, 1997, women attorneys arguing before our court were unusual, very unusual.

That morning there were two. We got off the bench, and after we exited the courtroom Justice Mosk said, “Quite a morning for broads!”

He did! [Laughter] I thought “what?” — I want to say he generally was delightful. I probably have spoken about him before. He had such a long arc of participation in the political life of the state, and he had a lot of charm. But shrewd. To walk the line that he did and accomplish and experience all that he did, as revealed in his biography, tells you he was astute, very astute.

MCCREERY: What’s an example of his shrewdness, as you personally experienced it?

WERDEGAR: One example that’s probably known is when the campaign not to retain the Bird Court was blossoming. He just didn’t announce whether he was going to stand for retention until the very last day.

By then the campaign was totally focused on Chief Justice Bird — and Justices Reynoso and Grodin in a lesser way. But that trio. I consider that pretty shrewd. Nobody paid any attention to him.

MCCREERY: How did that manifest itself here, behind these walls?

WERDEGAR: I was a staff attorney at the time.

MCCREERY: No, I’m thinking once you became his colleague here. His shrewdness? Later, when you were a colleague of Justice Mosk, I wonder —

WERDEGAR: No, it’s just an overview of what I know about the man and his history.

MCCREERY: When Justice Brown arrived, you described, she had a more flamboyant style in writing and so on and so forth. What about her presence here as a colleague? What do you recall about that in the early times?

WERDEGAR: I anticipated that we would get along, as I knew the governor thought so well of her. But we had a few encounters about cases such that I came to the conclusion that she wasn’t one who wanted to discuss something that was controversial in her view, that I wasn’t welcome to speak with her about a particular case. I don’t think she was happy here. I don’t know if it was the aftermath of her confirmation hearing, which had to have been uncomfortable. I just don’t think she was happy. People didn’t

agree with some of her perspectives, and I don't know how prepared for that she was.

MCCREERY: From the outside world taking an interest in this court, now that there were three women how much attention did that get and did the three of you get?

WERDEGAR: I don't remember that, actually. That certainly was a change. That was a step forward. We were creeping along the bench more and more, but unlike when I became the second one, I don't remember. I'm sure it was noticed. We might have had more women than most other state supreme courts, but I don't recall anything in particular.

MCCREERY: As you moved into several years now in this position, how did you find your own methods and approaches evolving or changing, if they did at all?

WERDEGAR: They didn't that I can identify.

MCCREERY: Say a few words, if you would, about the elevation of Chief Justice George to lead the court and what you saw as his style of leadership — again, in those early years.

WERDEGAR: It was anticipated that he would be a chief. He was made to be chief in the sense that he had such a terrific background and personality and high energy. Because Chief Justice Lucas, in his later years when I was here, the focus of his attention was more down in Los Angeles — whereas Ron George was right here on the premises — of course things changed. He was around more, and he was more — I read — open and accessible to the outside, to the press, and to the Legislature. They restored their invitation for the chief justice to give the State of the Judiciary message.

MCCREERY: In terms of running the weekly conferences and those sorts of gatherings, how did he lead in that regard?

WERDEGAR: I do have this memory of him — the conference would start at 9:15 — coming down the hall with his suitcase on wheels with his materials, coattails flying, just under the wire.

He was just a most engaging person. He had the quality that every chief I've experienced has, which is not manifesting any particular affinity or lack of affinity with any member of the court. Being evenhanded. You'd

never know what their private reservations or thoughts might be. He was a good chief, energetic and involved.

MCCREERY: Once these two newest members arrived, Justices Chin and Brown, how did those weekly gatherings change, first of all, in physical configuration and in character?

WERDEGAR: I don't have a deep memory of what the conferences were like when I first joined the court and I was the last person, except for the chief, to speak. I can't remember that, but I do remember that with the new members — and it lasted that way for a long time — let's see. Mosk would speak first, then Kennard. This is order of seniority. I couldn't have been next, could I, at that point?

MCCREERY: Justice Baxter.

WERDEGAR: Justice Baxter, then myself, and around the table Justice Chin and Brown. I'm leaving somebody out. The conferences — I don't recall any big differences. It wasn't dramatic that I can remember.

MCCREERY: I was only thinking back to Justice Mosk's earlier comment to you about how a single new member really changes things.

WERDEGAR: I'm experiencing a real difference now — we'll get to that later in my history — with two brand-new appointees, and also Justice Liu, who's fairly new. There's a real difference.

But I don't recall such a major difference then. I can understand why you'd think there might be. We have a new chief justice and we have two new justices.

Stanley Mosk was always good to listen to. Stanley Mosk, Joyce Kennard, Marvin Baxter. They all had distinctive personalities that they manifested. Justice Chin and myself were not dramatically altering the dynamic. Janice Brown did alter the dynamic on occasion.

MCCREERY: Finally, Chief Justice George's methods in assigning cases. Again, is there any window into that or any difference that you noticed?

WERDEGAR: There was a difference. We have these conference memos, and if a member of the court writes a supplemental to one of the conference memos to suggest we grant when the memo suggested we deny or to make an additional point, in Justice Lucas' time it was understood that if you wrote a supplemental memo you would automatically be assigned the

case. It was thought that maybe sometimes people wrote supplementals just to get the case, which was to be frowned on.

Chief Justice George changed that. It no longer became a beneficial tactical maneuver to write a supplemental memo. Again, I think you just wondered if the assignments were fair, and I don't think anybody thought they were not fair under Chief Justice George. I think the feeling became that you couldn't manipulate the process, perhaps.

MCCREERY: How often, if at all, had you done a supplemental yourself?

WERDEGAR: For that purpose? I never did it for that purpose, and if I ever wrote a supplemental it was because I felt the case should be granted and the recommendation was "deny."

MCCREERY: I take it you were enjoying your work by this time and finding great fulfillment in it.

WERDEGAR: Oh, yes.

MCCREERY: Were there any surprises, as you got farther into the work, from what you expected?

WERDEGAR: I can't think of any surprises. No.

MCCREERY: The realm was certainly a familiar one to you by then.

WERDEGAR: It was a very familiar realm, and I had a stable staff. The beauty of this work and the privilege of it for those who love the law is that every case is something fresh and new. If you like it, it's really wonderful. It's a continuing education.

MCCREERY: Justice Werdegar, thank you so much. Let's stop there for today.

WERDEGAR: Thank you.

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## INTERVIEW 8 (JUNE 18, 2015)

MCCREERY: We thought we might start off talking today about the fact that your court is asked oftentimes to review ballot initiatives that are going to appear before the voters of California and specifically that, by law, these initiatives are intended to be limited to a single subject per initiative. How did this matter first come up in your own work on the court when you were serving at any level, do you recall?

WERDEGAR: Could I step back a bit? Because, as it happened, in 2012 I was invited to give the Jefferson Memorial Lecture at UC, the annual lecture, which is a series that's devoted to democratic government and matters of politics and government. 2012 was the hundredth anniversary of the initiative and referendum in the State of California.

I chose as my topic, and here comes the title: "Living with Direct Democracy: The California Supreme Court and the Initiative Power — 100 Years of Accommodation."<sup>27</sup> It gave me the opportunity to explore the history of the initiative and how the court has had to deal with it when challenges have come before us.

As you know, the initiative was enacted as part of a populist movement that swept the country. California was not the first. Its purpose was to circumvent the railroad interests that had a stranglehold on the Legislature. It's direct democracy. It enables the citizens to directly propose legislation and put it before the electoral body.

Let me say, parenthetically, the irony is that in the ensuing 100 years the initiative has become an implement of the very kind of special interests that it was intended to circumvent, one reason being the enormous expense in our very, very populous state of circulating and qualifying an initiative petition. Most citizen groups don't have that kind of funding.

There are, as you suggest, certain limitations on the initiative process. To back up, one is that you cannot use an initiative to revise our state Constitution. You can amend the Constitution, one particular piece of it. I don't have the date, but the limitation of the single subject, I believe, *was* an amendment to the Constitution after there had been on the ballot something called the Ham and Eggs Initiative, which replaced everything from

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<sup>27</sup> 7 CAL. LEGAL HIST. 143 (2012); March 20, 2012.

post office to fishing rights to everything under the Constitution. That just wouldn't do.

So we have a provision that an initiative can address only a single subject. The question is, why? The answer is you want to avoid what's called logrolling. Proponents could put on the ballot — and they have done so, and I'll give you an example — an initiative that might have two parts. To the proponents, there's one part that they really are interested in. But as bait to the electorate, they'll put in another part that they think will capture the attention and the approval of the body politic.

One example was in — let me see, I don't find the date here, but the two provisions were, one, limits on the salary of state legislators, and the other provision had to do with taking reapportionment from the Legislature and putting it in the domain of the California Supreme Court.

MCCREERY: Yes, both good recent examples.

WERDEGAR: The idea, I'm told, was that limiting legislators' salaries would be of great interest to the public, which seems chronically to be somewhat disdainful of legislators, but that reapportionment was what the proponents really wanted. I don't know what party was in power at the time, but whatever party wasn't didn't want the Legislature doing reapportionment.

This court, in a case called *Senate v. Jones*,<sup>28</sup> held that that violated the single-subject rule. When you have two different parts in an initiative, you don't know — the public can be confused. They might like one and not the other, and they don't know what to do. So the idea is to avoid logrolling and to avoid confusion for the electorate.

MCCREERY: But it seems the Constitution doesn't actually define what makes a single subject. It refers to the idea of it but doesn't actually tell you how to interpret that.

WERDEGAR: The test as to whether an initiative passes the single-subject rule is whether, quoting, "all its parts are reasonably germane to a common subject or purpose." Our court has rather broadly applied that. The initiative that we did declare in violation was called, "Let the Voters Decide."

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<sup>28</sup> 21 Cal.4th 1142 (1999).



The proponents tried to put an umbrella title on it and put together two different parts.

It's up to the court to apply this rule of whether all parts are reasonably germane. And we have, on occasion, found that a number of separate parts — safe schools and crime victims' rights for example — were germane to the single subject of public safety.

There was another initiative — I can't give you the name — where we found that the common purpose was overruling various opinions of our court that the public didn't like. [Laughter]

MCCREERY: Do you happen to recall when this first came up in your own work, perhaps as far back as when you were assisting other judges?

WERDEGAR: No. The only time I had anything to do with it as a jurist was in 1999, the Proposition 24, "Let the Voters Decide." I was a member of the court, and I can't remember if the court was divided on this but the majority — perhaps all of the members — held that that violated the single-subject rule. That was my only introduction to that issue.

MCCREERY: Is it useful to think about the leadership of the court at that particular time, in this case Chief Justice George, and what difference that may have made in how the members talked about and decided upon such a matter?

WERDEGAR: Not in my memory. We are each independent, and the leadership that any given chief justice gives in the decision of cases is — there are exceptions, but it's no greater than another justice who might have a strong power of persuasion. Chief Justice George certainly had strong leadership talents, but I have no recollection that in this particular regard he played a role different from any other justice.

In the *Marriage Cases*, which he assigned to himself — and Chief Justice George's view, as he articulated it, was always to assign something that might be very controversial to himself. He felt that he should have the "broad shoulders." And as we'll get to, later, this impacted his retention election.

So in that case, he did in a way have leadership because he left it to the members of the court. Instead of circulating a calendar memo with a conclusion, as we usually do and then other justices weigh in, he circulated two opposing points of view to give the other members of the court every

side of the issue. Of course, the briefs did that as well, but to lay it out as a proposed draft opinion, both ways, and then see where the court landed. The court as it turned out was equally divided, and at that point Justice George weighed in on the way it ultimately came out.

MCCREERY: The swing vote, as it were.

WERDEGAR: Yes. He was his own swing vote.

MCCREERY: Thank you. Just to return to the broader picture, when a question of whether something meets the single-subject test of reasonably germane — when such a question comes to your court — is there any difference in the way that it's treated from any other matter that comes before you in terms of how you discuss or consider it? Or is the process of discussing and writing very much similar to other matters?

WERDEGAR: In this monograph that published my speech, I do make reference to the fact that there are two schools of thought about how we should treat initiatives. One is that, since we are the only check on the initiative legislation or constitutional amendment, we should view them more stringently and with more particularity to whatever limits there might be. The other point of view is that we should be more hands off because it's the *vox populi*, the voice of the public.

I maintained in my speech and in this monograph that we do neither. We treat them just the same as we do other legislation. That is, we purport to do that. Others, outside viewers, might question that, but that's where I stand. We try to. We are aware. We're sensitive to the fact that this is direct democracy.

Some have dubbed the initiative process the fourth branch of government. There's the executive, the legislative, the judicial, and the initiative. We're never eager to overturn an initiative because the public then declares that we are thwarting the will of the people, which of course courts do. Indeed, they're supposed to if they have to, if something is in violation of the Constitution.

In California, if we declare that an initiative violates the California Constitution, as we did in the *Marriage Cases* — well, in the *Marriage Cases* it wasn't an initiative, it was a law restricting marriage to a man and a woman, and we said that violated the California Constitution. What did the voters do? They amended the California Constitution to eliminate our holding.

As I referenced, they have done that before, when this court — long before my time — declared the death penalty “cruel and unusual punishment,” the voters passed an initiative saying the death penalty of the State of California shall never be determined to be cruel and unusual punishment.

Before my time, of course, when this court determined that busing would be necessary in the realm of school attendance to address segregation, the voters passed an initiative saying busing shall never be required to address school segregation except as required by the United States Supreme Court. The federal Constitution, of course, always trumps our Constitution. So those are some examples.

MCCREERY: Speaking of the Constitution, that’s a great segue into something else we wanted to bring up today, which is just a bit more about how our state Constitution is distinct from the U.S. Constitution. You’ve mentioned the issues that arose in the *Marriage Cases*, and we also had it come up in our discussion of the *American Academy of Pediatrics v. Lungren* and the emphasis on the state constitution’s specificity on a citizen’s right to privacy. I just wonder what other distinctions between the two constitutions might have been central to the work of this court, as you’ve experienced them?

WERDEGAR: To back up, our Article I of the California Constitution, the declaration of rights, historically was not based on the United States Constitution Bill of Rights. Until the Warren era, the fifties and sixties of Earl Warren’s court, those provisions were not thought to restrict state action against the citizens of a state.

Indeed in 1974, by voter initiative, our Constitution was amended to provide that rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution. So the two rights that we upheld that you referenced — the right to marry was based on the California Constitution as it then stood, and the parental consent case where we invalidated — as in violation of a minor’s privacy right — the requirement that she obtain the consent of her parent or a judicial order to get an abortion was, again, based on the express privacy provision of our Constitution, thereby giving broader privacy rights to a minor than the United States Constitution offers, because parental consent has been upheld under the federal Constitution.

The California, or any state, Constitution can provide its citizens greater rights. The United States Constitution is a floor. Justice Grodin, when he was here and as a scholar, has been a strong proponent of our looking to our own Constitution. There has been a trend, on occasion, to interpret our unreasonable search-and-seizure provision and our free speech provision in tandem with or identical to how the federal provision is interpreted. But that's really not — certainly not necessary and some would say not appropriate because our declaration of rights has independent origins. It was based largely on the New York Constitution. So we have afforded, under these somewhat differing provisions, we have afforded individuals greater rights.

I could give you an example where I relied on the state Constitution in dissent. This was the *Golden Gateway Center v. Golden Gateway Tenants Association* in 2001.<sup>29</sup> In that case the tenants association had been distributing pamphlets to the residents of the Golden Gateway Center on issues relating to the management of the center. The Golden Gateway Center management sued them to enjoin that, stating that it was against their rules and regulations, it created litter, and it was an intrusion on the residents and so forth.

The case came to us, and the majority — not garnering four votes for any particular view, and I forget how they went because I wrote the dissent — but the majority said that there was no free speech right for the tenants in that context because there was no state action involved. I took the position that our state Constitution was broader in its protection of speech rights than the federal Constitution, and I'll tell you why.

The federal Constitution says there shall be — the First Amendment — there shall be no law abridging the right of free speech. The California Constitution prohibits a law restraining or abridging liberty of speech or press, but it goes on to say, "Every person may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of that right." It doesn't say anything about "no law," and I took it to grant free speech against private entities as well as state law, that our right runs against the world. Now, the majority was divided in their opinion, so maybe the court one day will have an opportunity to revisit that issue.

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<sup>29</sup> 26 Cal.4th 1013.

MCCREERY: To what extent had that line of reasoning that you employed been used before?

WERDEGAR: I think — now, I could be wrong, but — there was an earlier case called the *Pruneyard* case, *Robins v. Pruneyard Shopping Center*,<sup>30</sup> where students were at a large shopping mall — restaurants, parking lots, stores, pathways, parks — endeavoring to distribute literature protesting a United Nations resolution against Zionism. The shopping center ejected them and said this was against their rules and regulations.

This court, long before my time, held that under the California Constitution they had the right of free speech within the shopping center, even though the shopping center was not state action. It was private action. So that preceded my dissent. Why it didn't persuade the majority I can't remember. I would have to research it. If you're interested you could look at it, but under our state Constitution the court held the students had the right to distribute their literature.

MCCREERY: Since you authored the dissent, do you happen to recall whether this has come up again in any fashion?

WERDEGAR: I don't think it has.

MCCREERY: But as you say, there may be an opportunity in the future.

WERDEGAR: Oh, yes. Issues of free speech always emerge.

MCCREERY: Thank you for bringing up the question of independent and adequate state grounds doctrine. I do recall that Justice Grodin showed quite an interest in that, and perhaps Justice Mosk as well at some points along the way.

WERDEGAR: I think Justice Mosk did, and let me say there was a debate. Sometimes this court will decide a case — I can't give you particular examples — under both constitutions. If we decided under the federal Constitution, that lends itself to our being overruled by the United States Constitution. If we decided under our Constitution, the United States Supreme Court has nothing to say about that. We're assuming we're giving greater rights, not restricting rights. But the electorate, of course, can come back and say, "To the contrary," if that's what they feel.

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<sup>30</sup> 23 Cal.3d 899 (1979).

MCCREERY: What example comes to mind of when that choice has come up, if any?

WERDEGAR: There's a whole body of case law that I'm not aware of at the moment, that I can't cite you at the moment.

MCCREERY: Which other individuals have shown any personal interest in this question of state constitutionalism, perhaps even promoting it or favoring it in some way?

WERDEGAR: You've mentioned Justice Mosk, and you're right, and Justice Grodin — in my experience. Historically, I'm not sure. I think it's an area that is ripe for further exploration as we go forward.

MCCREERY: You also happened to touch a few minutes ago on the possibility of amending the California Constitution. That's another big distinction from our federal Constitution. California's can be amended more easily, and it's done much more often. [Laughter]

WERDEGAR: It's a dramatic difference. Ron George has spoken to this, and I will echo what he said. The United States Constitution has been amended twenty-seven times. The California Constitution has been amended more than 500 times.

I might say, parenthetically, this doesn't seem like a good idea. When you have a fundamental document governing the structure of our government, I don't think it should be so easily amended by, as is the case in California, a majority of the voters by process of initiative. I think to amend your fundamental governmental document should require greater study and reflection and expert opinions and so forth.

Of course, the federal Constitution is almost impossible to amend. Some think it should be a little easier in light of some United States Supreme Court decisions that have disrupted aspects of political experience in the state. Is that obscure enough? [Laughter]

MCCREERY: No, it's lovely. [Laughter]

As a practical matter, how does this ability to amend our state Constitution bear upon your work on this court?

WERDEGAR: I think I've mentioned, historically the voters have not been loath to overturn decisions that they come to believe are contrary to the will of the people. It can be very political, because the issues I mentioned

— school busing — did I mention the death penalty? Yes, I did. The death penalty. These are highly divisive issues. Single-sex marriage. And maybe that's what democracy is about. So we do what we do, and the initiative process does what it does.

MCCREERY: It is an interesting outside force, though, isn't it, on the development of the law in our state over time? It's certainly not a linear development in that sense.

WERDEGAR: That's true. And if I might go to some of the initiatives, I don't know if we spoke about this earlier but one problem — there are several, I would say, problems with the initiative process — but one is that anything passed by initiative can only be modified or amended by initiative. There have been amendments to improve the process, just this last year. But previously, initiatives drafted by some partisan individuals who think they have a good idea and slap it on the ballot — no screening, no hearing, no refinements — and if in practice it turns out to have flaws or impediments or difficulties, you have to put another initiative on the ballot. The term limits and the Three Strikes laws are two examples of that.

Term limits, a very popular idea, swept the country at one point and became the law in our state: two terms for the governor and maybe it was three for the Assembly and two for the Senate. But over time, through experience or change of public perceptions of the impact, that was thought too stringent. So they wanted to tweak it, modify it, change it a little bit. I think there were a couple of unsuccessful efforts until 2014, perhaps, when there was a modification of the term limit law passed by initiative in California so that now legislators can serve a total of twelve years, divided between either house.

The Three Strikes law was another one. It seemed like a very good idea to the public at the time, and it's in the aftermath of just a horrendous crime, the Polly Klaas killing by somebody who had certainly more than Three Strikes. The public was outraged, and so they decided: Two violent or serious felonies? If you do a third felony of any kind, you're behind bars for life.

Over time the press picked up on instances where somebody supposedly stole some golf clubs — that would be a felony — and was put behind bars for life. They focused on the last crime, and I can't cite to you

all the crimes that seemed minor compared to a life sentence. However, parenthetically, often although the third crime might be stealing some golf clubs, these individuals often had far more than two violent and serious felonies in their background. But the cases came out, and it seemed outrageous to the public, and there were efforts to modify the Three Strikes law. Once again, after more than one effort, this last election cycle, 2014, the Three Strikes law was amended to require that, like the first two strikes, the third strike also had to be violent or serious.

But that is one of the limitations of the initiative process. I think we spoke earlier that legislation was passed now where a proposed initiative has to be presented to the Legislature, maybe for some fine tuning — not that the proponents have to accept that. It also has to be posted online for a period of time so that members of the public who are interested can look at it and maybe give their input. And I think one of the most important aspects is people who are financially backing the initiative to some extent have to be disclosed.

**MCCREERY:** There certainly are a lot of ongoing efforts to “fix the initiative process” in some of the ways you’ve just described.

**WERDEGAR:** Yes. The initiative process is here to stay. Going back to the court’s response to it, the court, in its opinions, has repeatedly stated that the power of the initiative must be liberally construed to promote the democratic process and has described — this is from some of our cases — the initiative power as being, “one of the most precious rights of our democratic process.”

That’s why my speech, part of its long title, was “one hundred years of accommodation.” It really is a dance. We are the only check on the initiative power, so of course if it’s patently unconstitutional under the federal Constitution we have no choice. We have to strike it down.

**MCCREERY:** It is likely here to stay, as you say.

**WERDEGAR:** Absolutely.

**MCCREERY:** From where you sit on our highest court, what thoughts do you have about a way that it might be implemented and carried out more effectively, just at any step in the process? Has anything occurred to you?



WERDEGAR: Yes. I mean, it's not original, but I think some of the reforms that were just made will be very helpful. I don't know if this is part of the recent reform package. I think proponents being required once they've drafted the initiative to give the Legislature the opportunity to pass the law first, certainly to have some refinement of it by the Legislature, people who might know on the face of it that the court is going to be required to say that there are certain invalid portions.

I think that would be very important. Give the Legislature the opportunity. "Oh, you're interested in this? Let us look at it." And if the Legislature refuses to do so, all right. Let it be an initiative. I certainly think disclosure of who's behind it is extremely important because the titles can be very confusing and very misleading.

MCCREERY: The other thing that has arisen quite recently is the influence of out-of-state persons and money on our state initiative process.

WERDEGAR: Yes. That was evidently — my job is just to rule on these things and not to be engaged in the political aspects of it — but it was publicly disclosed widely that our Proposition 8 that said marriage is only between a man and a woman had a lot of outside money and interests from other states coming into the state of California to enact that.

MCCREERY: As we say, and as has been one of your themes, it's a different world today even than when you started on this court twenty years ago. There's another example of that. Thank you.

We thought we might also talk today a bit more about the matter of retention elections for Supreme Court justices, which we touched on a little bit on another day. But I wanted to give you the chance to talk about that whole part of your role as you've experienced it over these years and over three different elections, starting in 1994 when you had to face the voters immediately after being appointed and sworn in.

WERDEGAR: Yes. As we may have mentioned, when you are appointed to this court and confirmed by the Commission on Judicial Appointments, you must stand for retention at the first general election after your appointment. In my case, I was appointed in June of 1994, and the first general election thereafter was November. So I had been on the court a bare five months when the people of the state of California were called upon to say whether they wanted me retained or not.

Historically in these retention elections the public has voted yes. All of us who were ever on the ballot get really nervous because why would they vote yes? They certainly didn't know who I was, and they don't know who most of the appellate justices are in the state, including the Supreme Court justices. So you hold your breath. Some people, not knowing who a justice is, will leave it blank. Others, being raised, "If you don't know, just vote no." I guess we rely on editorial endorsements and so forth. It has mostly worked out.

When I was on the ballot for the first time, I did receive 61 percent of the vote. I was filling Justice Panelli's term, of which eight years remained, so eight years down the road I had to stand for retention again. That was in 2002.

MCCREERY: How did that one go by comparison?

WERDEGAR: That was different. In the interim, this court had decided the parental consent case *American Academy of Pediatrics v. Lungren*. Ron George and Ming Chin, who had voted in the majority in that case striking down the law requiring parental consent for a minor — that opinion, which was 4–3, aroused a lot of controversy and a lot of resentment by various segments of the population.

It was very clear that there was going to be an effort to see that those two justices, who happened to be on the ballot, would not be retained. This hadn't been the case since 1986, when it was the retention election for Rose Bird, Joe Grodin, Cruz Reynoso, and Stanley Mosk. Of which three out of the four were not retained. Generally, we thought maybe that was an aberration and would never happen again. But it looked like it was going to be the case for Chief Justice George and Justice Ming Chin.

Ron George, true to his style, got out his little black book, engaged campaign consultants and fundraisers, and waged a vigorous and aggressive campaign. Ming Chin, as well, mounted a campaign, and they were both retained. That was 2000.

In 2002, two years later, four years after our opinion in that controversial case, I was on the ballot. Things had seemed to settle down, but I was advised by people in Governor Wilson's administration that I would be well advised to mount some kind of a campaign, the idea being that — and I had also written a very high-profile dissent in the 101 California shootout

case, *Merrill v. Navegar*,<sup>31</sup> which aroused the ire of gun rights individuals. The idea was that you want to make sure you avoid what's called the snake in the grass, that is, people who are opposed to you but are quietly marshaling their forces to come out against you, to become visible only late in the game, in September, when the poor benighted justice is caught flat-footed and has no opportunity to respond.

This had happened not so long before in Tennessee when Supreme Court Justice Penny White, who was up for retention, had typically — as individuals did in that era — just done nothing, paid her filing fee.

Just before her election there was a strong victims' rights campaign against her. She had voted — not even written the majority opinion — I believe she had just been a member of the court that had reversed a death penalty. She was not retained. That was alarming to those of us who were up for retention.

So I took that advice and had to hire a campaign consultant and a professional fundraiser and a political law firm that sees to it that you don't transgress any ethical provisions, don't get yourself in trouble in any way. We did have a campaign.

MCCREERY: Who could help you select these individuals to bring in?

WERDEGAR: People in the Wilson administration did. I also consulted with Justice George. You can be sure this was so out of the realm of anything I had ever been exposed to or ever intended or anticipated I would ever be exposed to. It was educational because it compelled me to go out and speak to people that would invite me to speak and to have a more public face than I ever sought. But it was extremely painful, I mean, to raise money.

MCCREERY: How did it go, as the campaign went on?

WERDEGAR: The campaign consultant did the work of securing for me what he could in the way of endorsements. And the fundraiser, the professional fundraiser, did what she could to get organizations or individuals to write letters on my behalf or to invite me to speak, and I did have to speak. What can you talk about? At the time, judicial ethics precluded any judge running for election or retention to commit to any position on any issue that might come before them.

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<sup>31</sup> 26 Cal.4th 465 (2001).

Right about that time, 2002, the United States Supreme Court came down with this — talk about a controversial opinion — *Minnesota v. White*,<sup>32</sup> which held that if justices are going to be on the ballot to be voted on, yes or no or a contested election, you can't constrain their free speech rights. The United States Supreme Court invalidated the Minnesota law that had precluded judges from announcing their position on issues.

This did come down about the time — I can't be clear about the timing, but I adhered to what had been the California code of ethics, and I used it as a shield. I had questionnaires sent to me by activist groups who wanted to know where I stood on various things. One donor, potentially a large donor, called me personally, and the questions were, "How did I feel about affirmative action, about legalization of certain drugs, about civil liberties for homosexuals, about religion in the schools?"

My refrain was, "It's unethical for me to speak to an issue that might come before the court."

His frustrated response was, "Everything might come before the court!"

He's right, and I understand. I understand exactly how he felt. But I was so grateful for the shield that we had at that time. In case you're wondering, I have no idea at this time if this individual saw fit to contribute to my campaign or not.

MCCREERY: Other than being called upon to give speeches, what was your own role in the campaign?

WERDEGAR: That was it. I mean, I had friends who came forward. Lawyers, of course, are the ones that you hope will because they're the ones that understand. They also have an interest in an independent judiciary. But on the other hand, certain aspects of the bar have an interest in how a particular justice will rule on cases. Justice Grodin, in his book, *In Pursuit of Justice*, spoke to that about his campaign. He used the phrase — certain parts of the bar will have an interest in a judge's opinions, and he said they might even have a stake in it.

So it's all very awkward. Of course, you're recused for a certain amount of time after — assuming you are retained — you're recused from hearing any case that has as a party or an attorney — anybody who gave money to your campaign.

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<sup>32</sup> Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

Certain women's groups mounted — well, gave me the opportunity to speak at fundraisers or would endorse me, and certain lawyers would. All I did was write thank-you notes.

MCCREERY: Given what you saw go on around you as the election date approached, what was your level of concern that you really wouldn't pass through this time?

WERDEGAR: Even if there's no campaign against you, you really don't know and you're always nervous for the reasons I mentioned earlier. Unless there's a negative campaign against you, people don't know who you are. I had my concerns.

Oh, I want to tell you one thing about money that came my way. This is an article from *The Recorder*, and don't hold me responsible for what it says, the title, all right? But it says, "Lawyers can be both blonde and brilliant." The point was that my campaign received a contribution from the woman who was the author of the book that became the movie *Legally Blonde*. That was really cute. If somebody picked up on that I wouldn't have known, but she gave something to my campaign. [Laughter] So that was kind of a cute article.

Ron George. I don't know how much he raised. In Justice Grodin's book, he mentioned that he raised — or the three of them — Justice Mosk didn't participate in this — but the three of them raised maybe \$4 million. But the opposition raised \$7 million. That is a lot of money, and I've read that as big money starts paying attention to who's on the supreme courts of the states, something like \$45 million has been spent in national judicial elections.

Most of the money goes to television, which of course — I certainly have no money for television. The money that we used was to preemptively buy a place on slate mailers. Slate mailers are these cards or pamphlets that go to households telling them how to vote. They have titles such as Citizens for Responsible Government and Voters for Integrity and so on, and it's for sale.

We bought it preemptively so that people against me, groups against me, wouldn't pay for "Vote no on Werdegar." They wouldn't buy that slot on that slate. Once the slate has taken my money, they can't take it. That's what the money is about. There was a question somewhere. [Laughter]

MCCREERY: Just how worried were you about the outcome?

WERDEGAR: You have to be anxious. But in the end — in the end it turned out — and we might have touched upon this, but — this particular retention I received 74.2 percent of the votes cast, which was the largest number of votes cast for any candidate in the United States of America, which was very gratifying.

But the reason was, apart from the voters' approval of whatever they thought they knew or didn't know, that there was no national election that year. We, being the most populous state in the union, and I, being unopposed, that's how it played out. But given that it was a year that I did have to mount a modest campaign, it was very gratifying.

MCCREERY: Especially since you were singled out among the three who were up for retention at that time. Justices Baxter and Moreno also.

WERDEGAR: Yes, I was vulnerable because Justice Baxter had — I don't enjoy using the word "voted" with respect to what justices do, but that's how we're perceived and that's in the end what we do — we end up landing 4-to-3 on something — Justice Baxter had been on the other side of the parental consent issue, and he didn't have to concern himself in any way. And in the end maybe I didn't have to, but we had to make this decision in February, when all was silent, to avoid this "snake in the grass" or "coming out of the weeds" are the expressions that are used.

MCCREERY: Justice Moreno, whom we'll talk about a bit more later on, was really facing his first retention election and hadn't been there that long.

WERDEGAR: I think that's the answer. He hadn't attracted attention.

MCCREERY: But it's interesting that your yes vote percentage was higher than either of them got by a few points.

WERDEGAR: Yes, and that brings us once again to the subject of why, not in this particular election but generally why. One justice on the California Court of Appeal did a study, and maybe others have done studies, as to what is it? Why do voters vote yes or no? One thesis was the name. It's well known now that when Armand Arabian was on the ballot, he got considerably fewer votes in retention than others who were on because his name, perhaps, struck voters as something that they didn't want to endorse.

I was told not to use my middle name — that would be Kathryn Mickle Werdegar — because highlighting what we call my maiden name might

strike some voters as being too independent, too forward — I'm just quoting! I was also told to be sure to be Kathryn rather than Kay, that Kathryn was a friendly-sounding name. Anybody listening or reading this should consider, how do they vote for judges?

What we judges would tell people who ask us is generally vote yes unless you have reason to know that the individual has done something unethical or really out of line. Editorial boards usually will say, "Vote yes on judges."

So I had my apprehensions, but it all came to a happy resolution. I would never, ever go through a campaign again, but as I started out saying it had its benefits. It forced me to be more forward and outgoing and engaged with members of the public, attorney members of the public. But there were some people who gave me fundraisers where their guests were simply members of the public, and there's never any harm when a justice has to explain to the general public what the courts do and how we're supposed to be above the political fray.

Regrettably, though, being above the political fray is a luxury that may be diminishing, as you look nationally at these contested partisan elections with money from outside the state and a push from certain political elements to fashion the judiciary of the states in their vision of what they think justices should be doing. It's troubling.

**MCCREERY:** It is, and you had mentioned the matter of judicial independence. We're seeing some dangers to that independence in various state elections and at the national level. How have your views of that come along over time?

**WERDEGAR:** The cause for alarm has increased over time. Early on I didn't have any particular views, but if I did it would be the view that I have today that California has the best system. We largely have avoided being perceived as political or being politicized.

I think our system of our governor in power nominating an individual who has already been screened by the State Bar committee to find anything in that individual's background that would be cause for ethical concern or be an embarrassment to the governor; having that individual nominated; having the statewide commission — the attorney general, the chief justice of the state, and the senior-most presiding justice of the Court of Appeal in the state — review and get public commentary and speakers present their

views at the hearing; and then you have a term, but you have to be retained; and then you have another where you have to be retained. You have a safety valve if the public perceives a jurist to be completely out of line, the safety valve of recall or failure to retain.

Contested elections are just a disaster, but the public wants them, actually. The public feels they have a right to vote on people who are going to be “voting” on issues. I don’t favor life terms, as the federal bench has. I know former Chief Justice Ron George suggested a term of years. He might have said fifteen years. I think that’s a possible path to go. As someone who was retained after my first eight years and retained again after my subsequent twelve years, I would just have to think about how I feel. [Laughter] That’s my little joke, really, about how I feel about a fixed term.

But I would not ever favor contested elections. It’s a disaster, politicizing the judiciary. It just diminishes it in the eye of the public. You become nothing more than a legislator, who is supposed to vote the will of his constituents. Judges are supposed to vote where their training and their best judgment and their integrity takes them, which is different than legislators.

MCCREERY: What other improvements to our system would you like to suggest?

WERDEGAR: I think we’ve pretty much covered it.

MCCREERY: Is there anything else you’d like to add about the matter of judicial independence as it’s playing out across the nation?

WERDEGAR: We have an independent United States Supreme Court, and we had an independent Warren Court. People today, some, are very disturbed by some of the opinions of the United States Supreme Court. There were huge segments of the population that were deeply disturbed by what the Warren Court advanced. It’s an ongoing philosophical issue in our government about the role of the judiciary, but I’ll stand firm on the idea that electing judges in partisan contested elections, which is, I think, happening in more states than not — I think it’s just a shame.

I’ll go back. California’s system, I think, has served us well by and large, given the other choices.

MCCREERY: To finish off, maybe you could say a couple words about your most recent retention election, which was just last fall, 2014.



WERDEGAR: Yes. Well, I was very clear that, even if there had been some whisper of a need, I was never going to run a campaign again. But I was retained, this time by 71 percent of the vote and happy to be so.

MCCREERY: It gives you another long chunk ahead, of time, if you care to take it.

WERDEGAR: “Should you care to take it,” yes. [Laughter]

MCCREERY: We made mention a moment ago of Justice Carlos Moreno. But let’s back up a bit and talk about the circumstances under which he joined this court as your colleague in 2001, precipitated by the death of Justice Stanley Mosk.

WERDEGAR: Have we spoken as to the composition of the court when I arrived?

MCCREERY: We have somewhat, yes.

WERDEGAR: I’ll repeat that for the moment. When I arrived in 1994, replacing Justice Panelli — who of course is irreplaceable, but there you have it — he retired — the other members of the court were Chief Justice Lucas, Justice Stanley Mosk, Justice Joyce Kennard, Justice Armand Arabian, Justice Marvin Baxter, and Justice George.

Then Chief Justice Lucas and Justice Arabian retired and were replaced by Justices Chin and Brown. After Justice Mosk’s death in 2001, as you said, Governor Davis appointed Carlos Moreno.

If I haven’t said so before, I’d like to say I really, and I think everyone, keenly missed Justice Stanley Mosk. He was unique. He had a great depth of knowledge about California history and politics and the law and about the personalities that moved those elements of our society. He had a sense of humor, and he had strongly held views. He was a strong personality. He could be charming. He was a big presence. But his depth of history about the court and the politics and having been, as they say colloquially, “a player” in so much of that; he was a wonderful resource.

Justice Moreno was a wonderful replacement.

MCCREERY: Pardon me for interrupting. I wonder if you can just talk about whether you had any inkling that Justice Mosk was unwell, or how much of a surprise it was when he passed away rather suddenly?

WERDEGAR: It was a huge surprise. Of course, I don't actually remember how old he was. Do you?

MCCREERY: In his eighties.

WERDEGAR: In any case, a person gets to a certain age and the denouement is no mystery. But in his case, he seemed fine. He did not seem frail. He did not seem disengaged, unengaged. The story is well known. Privately he had told, I believe — he had told the governor and maybe our chief at that time, Ron George, that he was going to retire and had written his letter.

He went home for a doctor's appointment, took a nap, and never woke up. I probably mentioned earlier, what a gift. He was fortunate in almost every aspect of his life. Given his years, one would assume that he would retire at some point. But it was a surprise and a shock, yes.

MCCREERY: What do you recall of the transition time before a replacement for him was named?

WERDEGAR: I have no recollection. It probably was one of those times where we had pro tems come and sit. I don't think — you might know — I don't think there was a great length of time before a replacement was appointed.

Justice Moreno was most welcome. It was interesting to us. It was the first time, at least in my memory, where someone had been taken from the federal bench, district court, life tenure, to come up to our court — actually, I think, a very wise move. I would much rather be a justice of the California Supreme Court than a federal life-term judge. The issues are different, and so on.

But the court generally, insofar as we spoke among ourselves about it, was very excited to have him come, delighted that he was Hispanic and would add some diversity. He, in turn, turned out to be affable and accessible and agreeable and a delightful person that everybody, I think, liked and I certainly liked. I missed him very much when he left, as a friend and a personality.

MCCREERY: You mention friendship, and I wonder what sort of way you could work with him that might have differed from your other colleagues?

WERDEGAR: He was outgoing, and he was inclusive. When we'd be traveling, say to Sacramento, he and I would have occasion to spend some time

at dinner together or in other ways. He was just a very friendly person and friendly to me.

MCCREERY: As you say, the federal court experience is an interesting background, and he had, of course, earlier served in the state system as a trial judge in Los Angeles County. But having done both, I wonder what you might have noted about the effect of the federal experience on his approaches and his jurisprudence? Does anything rise to the top there?

WERDEGAR: I have no memory of that at all. Surely some of it came to the fore, but our issues are very different. What you do as a trial judge, whether it's a federal court or the superior court of the state, is so different than what we do here.

Have we spoken about — before we move forward with other — well, maybe when we get to my newest colleagues we'll speak about the difference in appointment between the court I joined, which is the Deukmejian court, and Wilson's appointment of me, and the court I'm now a part of — that is, Jerry Brown's court — have we talked about that?

MCCREERY: We haven't yet, no. We've been really focusing on that earlier period that you're describing. I don't know to what extent you might consider Justice Moreno as any kind of dividing point or transition point?

WERDEGAR: His background was unlike others, and I do think it's valuable to have a trial court experience, which, of course, some of my colleagues did. When Deukmejian made his judicial appointments, it was mandatory that you start in a trial court. I should remind us that in those days that meant the muni court.

I did apply for a Deukmejian appointment, and that was for the muni court, which it didn't seem would suit me all that well. Justice Panelli calling me to serve him on the Supreme Court eliminated that as an option. But it had to be muni court, then superior court. Maybe if you were lucky you'd go to the appellate court.

So when Wilson appointed me directly to the Court of Appeal, that was a notable deviation from what was *de rigueur*, and it points up how times change and what's perceived as appropriate changes.

After me, appointed to this court was Justice Chin, who had the appropriate background. He had the trial court, the D.A. That's right — I forgot the D.A. part — D.A., trial court, Court of Appeal. I was very unusual, and

much attention was paid to that at the time, positive and negative, bringing us to today, when it's so different.

But Justice Moreno, by anybody's lights, had a fine background.

MCCREERY: How did you come to think of his jurisprudence?

WERDEGAR: How did I come to think of it? If there were to be divisions on the court, sometimes he and I would agree in opposition to others. As I've mentioned before, when there are divisions there are real divisions, but our court often enough would be unanimous.

MCCREERY: Do you make any distinction between criminal matters and civil ones in thinking about that?

WERDEGAR: Possibly so. I think your career experience and your inclinations to have a certain career path — say, if you are a district attorney or a public defender — I don't think we've had any public defenders — or you're an academic — you do have, maybe, an implicit different view of what should transpire in a case. But I can't recall if he would dissent in criminal matters or not. Certainly, I have on occasion when others have not. He and I might have joined. I can't remember.

MCCREERY: But certainly it was a period of change. Then, a few years later, Justice Janice Rogers Brown was tapped by President George W. Bush to —

WERDEGAR: Right, yes. Who did she replace on the court when she came?

MCCREERY: When Justice George was elevated to chief she actually, technically, replaced him.

WERDEGAR: Right. Then she was nominated to the federal court. True.

MCCREERY: I just wonder about how you recall that transition. How did you learn about it, and what was the effect during the time before she left your company?

WERDEGAR: I was surprised when I first became aware that she was being considered for a federal appointment. But these are not things that are usually on my radar. What else would you be asking me?

MCCREERY: I just wondered how the news was delivered to you as her colleagues and the transition of acknowledging her service and saying goodbye and that sort of thing.

WERDEGAR: Oh, I see. You've probably explored this in other oral histories. I can't remember when the news came, but I do remember that the chief at the time, Ron George, offered to give her, as is traditional, some kind of a farewell at the court, and she declined. I don't think Justice Brown ever felt really a part of this court.

She early on was ahead of her time in choosing to work up outside of Sacramento, or in Sacramento maybe, which had been her previous office as a state appellate judge. Now it's more common, although most people do try to be here. But our current chief spends a lot of time in her former chambers near her home in Sacramento. Justice Brown did that earlier, so she was a pioneer in doing that.

But she wasn't around a lot, and I don't think she felt all that comfortable here. I think coming from a political background — and of course she was an appellate judge after the political background — but perhaps she expected to be able to influence the court in some of our jurisprudence more easily than any individual really can.

So she declined a farewell party, and she left.

MCCREERY: Then, as we know, Justice Carol Corrigan was selected to replace her. Talk about how you learned that news and what you might have known of Justice Corrigan before she came.

WERDEGAR: Justice Corrigan was appointed to fill my vacancy when I left the Court of Appeal. I can't remember how I heard it. Of course, we're always very excited and interested to know who is coming. It was Governor Schwarzenegger who appointed her. Yes.

She brought her own strengths of trial court judge, D.A. She had served on the First District Court of Appeal, Division Three, with Justice Chin, who had been my colleague there. She brought who she is, as every judge does, and she has a lot to offer. She has a great sense of humor.

MCCREERY: How did you see the panel itself changing in terms of your meetings together and that sort of thing now that the membership was shifting a bit? Any thoughts there?

WERDEGAR: She and Justice Chin, from the very beginning and throughout, have had a very close affinity, along with Justice Baxter. They all tended to see the world the same way, so that was a grouping that perhaps was more distinct than some others. I like former Chief Justice Ron George's

description of us as a square dance. Your partner now may be the opposing dancer later, and so on. We all are moving parts. But those three justices, I think, if one were to examine their views, were closely aligned most of the time.

MCCREERY: Speaking of Chief Justice George, his court — that is, the George Court, which, of course, did shift a bit over time — was said to have more of a center than the Lucas Court had had. Your thoughts?

WERDEGAR: That's what they say. The Lucas Court — I'm quoting what history has told us, these are not original thoughts — was put in place by Governor George Deukmejian, who campaigned on changing what had been known as the Bird Court, and he succeeded. And yes, that court — which I was not really a part of until much toward the end — that court's inclination was to rein in the direction that the Bird Court would seem to go.

But then you bring in new people who have different aspects to them, appointed by different governors, and I think it's fair to say, although I resist labels, I think moderate is how the George court was described and I think appropriately so. If you were to ask me to define moderate, I'd be hard-pressed to do it in the context of how they decided cases, but people seem to feel they know it when they see it. They seem to feel they know these labels when they see them.

Ron George, as is well known, restored some interaction and relationship with the Legislature, which — it had been unfortunate — before my time somehow had been severed with Chief Justice Lucas. Ron came to the court, famously, to reach out and be known and visit every county in the state and meet with the Legislature. I think he did a splendid job in doing that.

We've been lucky with our chiefs. Ron George was just dynamite: energy, open, collegial, neutral — you'd never know he had any private preferences about anything. And our current chief has that same quality. It's a wonderful quality, and I think we've been very fortunate.

MCCREERY: Is there anything you'd like to add about the center of the George Court or about anything to do with that period of time in the mid-2000s and your colleagues?

WERDEGAR: Not that I can remember. Who was it then? It was Ron George and Stanley Mosk and Marvin Baxter and then it was I. Oh, and

Justice Kennard. Kennard came before Baxter in seniority. I mention this because it's the order in which you speak.

I've always in recent times — not when I was the last to speak — I didn't relish that — but speaking in the middle I always enjoyed, because then you have the benefit of your more senior colleagues, and you can decide what you're going to offer or where you're going to land. Mosk always had something wonderful to say. Baxter always had a very clear point of view. But again, Justice Kennard was more senior to him, so she would speak, and then I would speak after Justice Baxter. It was a good place to be.

MCCREERY: Then with the addition later of Justices Moreno and then Corrigan?

WERDEGAR: I would move up. For many, many years it would be Justice Kennard, Justice Baxter, and myself. If there were going to be differences in a case, which there aren't always, if there were going to be I would have heard the differences by the time I had to speak.

MCCREERY: Thank you. I appreciate your reflecting on that. Let us turn then, if we might, to the matter of capital punishment and the actual administration in our state of the death penalty. Knowing you had been exposed to this part of the Supreme Court's work from an early stage of your career as a research attorney, talk a little bit about your orientation to what portion of the court's workload it is and how it's handled, if you would.

WERDEGAR: In any given year the court might, of its cases that it files, there might be one-quarter to one-third capital cases, but that doesn't speak to the impact on our workload of these capital cases, which — the impact is horrendous. Over time, and I think it was during Ron George's tenure, the Legislature funded for us a capital central staff in the hopes that we could move the cases along.

The burden of the capital cases is enormous. Justice Mosk was the last jurist after I joined the court to keep annuals on his staff. We're coming back to that, by the way, which is interesting. But he finally gave it up because the capital cases you cannot give to an annual attorney. They have a life way beyond a year. And if you're not giving them to one of your attorneys, it's not fair to give the extra burden to your other attorneys. So he finally saw the light on that and had a permanent staff.

As I say, the newer judges are going back to the annual attorney model. We'll see if they continue to do that or if they're burdened by the capital cases.

Working on a capital case, I certainly did as a staff attorney. But the briefing runs hundreds and hundreds of pages, and the time it takes to write a calendar memo to circulate among the court takes weeks if not months. Then the rest of the court weighs in and you set it for oral argument.

Then after the case is decided, that's just the beginning. Then the defendant petitions this court for habeas corpus. That briefing can run hundreds of pages and multiple, multiple issues. And preparing the conference memo as to whether we should deny the petition or grant it or issue an order to show cause can take hundreds of pages. It's just a very, very lengthy, lengthy process.

Of course, the capital cases come directly to us from the death judgment. There's no intermediate court. There's no filtering of issues. Any and every issue that any defense attorney thinks worthy of mentioning we have to resolve, which is very different from other cases where we select only the issues that are needing our attention as being in conflict or unresolved.

Then, of course, this takes several years. Then after we've resolved it they go over to the federal court, and the federal court tells the defendant, "You haven't — " and I put quotes on this, "You haven't 'exhausted' this issue in state court." They come back and they brief it in state court, and a given defendant might file multiple successive petitions here. It's a very lengthy process.

**MCCREERY:** I was recalling from our earlier conversation that at the time of your confirmation hearing to become a Supreme Court justice, you were questioned by some of your panelists about your views and your plan for carrying out this portion of your role. We talked about that in some detail but I wonder, when you entered the job and this began to come up in reality, what did you find was the actual challenge of working this into your overall workload?

**WERDEGAR:** You do it as it comes along. It is part of our work, and as I say in any given year capital cases comprised one-quarter to one-third of our opinions. I would do my share. Now that we have a capital central staff, some of each chambers' cases are assigned to the capital central staff,



but your chambers has to carefully review it and approve it and edit it and change anything, and so on.

I do feel that in many ways I was very prepared to come to this court in a way that I didn't publicly express when I was appointed, because I had done all this as a staff person. There was so much I knew that I didn't have to learn, but of course my judgment now was of significance as the actual judge.

But we did have executions. There were eleven after I was appointed, and that was a whole new dimension.

MCCREERY: As you say, it had already resumed before you arrived but not terribly long before.

WERDEGAR: Yes. There were two executions before I came on, and then we had eleven executions. We haven't had one since 2006 because a federal district court declared our three-drug execution protocol unconstitutional, I believe as cruel and unusual under the federal Constitution. There has been effectively a moratorium while California seeks to devise some other protocol.

You might be aware that within the last month or two Governor Brown settled a lawsuit that was brought to require the state to put forth a new protocol to implement the death penalty. I only know what I read in the newspaper, which was that that case was settled and it was determined that the state would propose a new protocol. When that occurs that will have to go through administrative hearings, and there will be a time lapse before it's implemented, if it ever is.

There have been initiatives on the ballot to abolish the death penalty. That last one, maybe it was 2014, sought to emphasize the fiscal cost of the penalty, which is enormous, and it failed but I think it came closer to passing than some previous ones have. And I'm told, by way of hearsay, I think there's going to be a couple of initiatives on the ballot again relating to the death penalty — this is all hearsay — one to abolish it and one to speed it along, what we call competing initiatives. You might ask me, if they both pass what do we do?

MCCREERY: What if they both pass? What do we do? [Laughter]

WERDEGAR: [Laughter] I knew you wanted to ask that. Well, I think you can imagine the answer also. The one that passes with the highest amount of votes would prevail.

MCCREERY: You may not have seen the last of that aspect either. But in any event, as you mention, the state is struggling with the matter of the implementation by drugs, and that matter is being taken up elsewhere presently.

WERDEGAR: Yes. We have nothing to say about that. There is so much related to the death penalty that this court has nothing to say about.

MCCREERY: Let me ask you, if you would, to describe your own experience of your role requiring you to be a part of an actual execution taking place. I gather the first one you were in on was in early 1996, so you had been on the court since mid-1994. What do you recall about that, and what exactly was your role?

WERDEGAR: Yes. I don't have a distinct memory of that first one except that it's a solemn experience. It's an uncomfortable experience. There was a tradition, under Ron George certainly — first of all, all the justices have to be available on execution day in case there's a last-minute petition relating to halting the execution. If such a petition comes in, the staff has to hastily read the petition, read the opposition, work up a memorandum for the members of the court. Each justice's attorney would advise the justice, the justice would consider it herself, and we vote on it.

That may have happened once or twice in those eleven. I can't remember. I'm sure it did at least once. Frantic dealing with last-minute papers. So the justices have to be available, and we didn't use to have cell phones so everybody would be in the building or maybe available by telephone, but mostly in the building.

On the day or evening of the execution — because they were usually scheduled around midnight — and again, hearsay only — I was told that this was to avoid facilitating demonstrations outside San Quentin. I don't know if that's true. But we would gather in the chief justice's chambers, sit around the conference table.

The chief would open a line to San Quentin, a phone line. We would be asked, as the execution was about to be put in process, we would be asked, "Is there anything pending before the court?"

That was the critical question. And the chief would respond, "No, there is not."

That line would stay open, and someone in the area where the execution was going to take place would announce to us what was happening, such as, “The IV has been placed.” This and that. We would stay around the table until whoever was responsible at San Quentin would announce that the individual was declared dead. So it would make an impression on one.

I would reflect on the fact that it was not this court that pronounced the death judgment. It was the jury who had heard the case and had decided that, under the laws of the State of California, this was going to be the judgment and then we, in the intervening time — which, given the delays, could be many, many years — had done our job by reviewing the record and the arguments of the defense counsel as to the validity of this judgment and had determined that it was valid. But it was a somber and solemn experience.

MCCREERY: May I ask what effect it might have had on your views of this as a penalty that is one of several available to juries?

WERDEGAR: You may ask, but I won’t respond. My job is to uphold it if it’s a constitutionally valid judgment. My personal views, whether with respect to any particular case or the death penalty in general, are not something that I bring to my work.

Going back to your opening observation that I was questioned at length — one might say I was grilled — on my views of the death penalty or whether I would uphold it, anything that I might privately believe or feel is not relevant to what I do as a judge reviewing these cases.

MCCREERY: You mentioned a few minutes ago the economic aspects of having a death penalty in this state and of administering it, and that’s an argument that’s being made to voters in these initiatives, as you pointed out. Certainly, it’s a study in contrasts, the two options of life in prison without possibility of parole versus a judgment of death. From the economic perspective, what are your thoughts on our system?

WERDEGAR: I’m hardly an expert. But you can’t be around here without hearing comments about the cost of the death penalty. I’m not the one to say definitively. I think life in prison without the possibility of parole costs the state much less than the death penalty.

First of all, so many of the prisoners are — it’s not as if the judgment’s pronounced and they are executed. They are spending their life, many,

many years of it, in special facilities apart from the general prison population. And the resources that are devoted to appealing and reviewing and sending over to the federal courts their cases are enormous. Studies have been done, and I can't quote them, but they're readily available to anyone who is interested as to the actual fiscal impact. Life in prison without parole probably costs the state too, but these are judgments for our politicians and our voters to assess and to resolve.

**MCCREERY:** In terms of how juries are instructed to consider these options, as far as you know without having been directly involved in that process, are we well enough set up to make the options and the distinctions and the responsibilities of the jury clear to them in trials?

**WERDEGAR:** They are given the choice — well, first of all, before they are even chosen for the jury it's described to them that, should it come to a penalty phase, they will have this sentencing choice of execution — capital punishment — or life in prison without the possibility of parole. They're deeply examined as to whether, whatever private reservations or biases they might have about the penalty, can they put those aside and based on the instructions given them by the court consider the evidence and the aggravating and mitigating evidence, should it come to a penalty phase, and decide the penalty according to how they are instructed?

There's much back and forth during voir dire by the attorneys as they interview each juror. We have a lot of cases about whether a juror should have been disqualified from serving on the jury because of her responses during this voir dire. But the United States constitutional law is that, because a juror personally doesn't favor the death penalty, that's not grounds for disqualifying that juror if the juror attests that she can put aside her personal views, listen to the evidence, and follow the instructions of the court.

So they get that during voir dire, and then after the case if they do determine that the defendant is guilty of these capital crimes, they hear mitigating evidence. That's when the trial turns to the background, history, whatever good deeds the defendant might have done, mitigating evidence, and the aggravating evidence, other crimes and so forth. They are instructed that, if they find that aggravating outweighs mitigating it's their responsibility to impose the ultimate punishment. But if they find that there's more mitigation than aggravation, they can leave it with life without parole.

MCCREERY: As you say, the juror's role is quite different. But it has this same aspect of their being asked to separate the personal view from the role of the juror, just as you're suggesting you separate your personal view from your role as a justice.

WERDEGAR: Whatever it might be, yes. We haven't spoken to what it actually is. I'm just feeling it's inappropriate for me to get into that.

MCCREERY: I only wanted to give you the chance to do so if you care to.

WERDEGAR: Yes. Thank you.

MCCREERY: It is a solemn duty, and just lastly, I wonder if participating in the way that your role requires changes you in any way over time?

WERDEGAR: The death cases generally have changed me. First of all, the crimes where the jury has imposed capital punishment, there's a wide spectrum. But some of them are so heinous, so depraved, so beyond your worst imagining, that it's a revelation that people that have not been exposed to the facts and the knowledge of these crimes just can't imagine that humans can engage in. So it's widened my awareness in that very unpleasant way.

When you get to the background of some of the defendants that have inflicted these crimes on other humans, again, if you haven't been exposed to it you just could not imagine how some human beings are, to use the word, "raised," treated as they are growing up.

Now, this is not every case and every defendant, but the aspects of human life that you learn on both sides of the ledger — if you haven't been involved in working over the years, as I have, as a staff attorney and a Supreme Court justice, on these death cases, it would go beyond your imagining. I wouldn't wish it on anybody. It's a dark, dark side of life and humanity.

Some of the crimes are beyond belief, the callousness, the horrific nature of them. Again — and I'm not a juror sitting and evaluating mitigation, but I'm talking about the facts, the lives that these cases expose you to are horrible — not every case, of course.

You're saying did it change me? Yes, just the awareness that nobody would seek to have, frankly. The awareness that most people wouldn't have, it's not a welcome awareness. But that has certainly changed me.

MCCREERY: Our system is such that the governor has a role or a possible role to play, too, and is often asked to grant clemency and so on. As a matter of interest, when the executions in California were resumed before you joined the court in Governor Wilson's time, he continued as governor during a number of these executions.

WERDEGAR: I think two. Two before I joined the court.

MCCREERY: Several overall. Exactly. Then there were a number of others while Governor Davis was in office and then finally a few when Governor Schwarzenegger was in office.

WERDEGAR: Oh, really?

MCCREERY: I'm only wondering if, from where you sat, it made any difference who was in that office at the time in terms of how things played out?

WERDEGAR: Not at all that I can remember. You mentioned clemency, and I will speak to that. If a clemency petition is presented to the governor, if the individual who's seeking clemency has two felonies before this capital crime I think the Constitution or the law requires that the governor present the petition to the court for its evaluation.

I can only remember — I could be wrong because I didn't research this, but I can remember only one time when — and I don't know who the governor was — when we were asked as a court to advise the governor of our view of whether clemency was justified. Speaking with my staff attorney some time back about this in connection with the whole capital-case procedures, on that occasion we did have a clemency staff attorney who would look at the petition, look at the opposition, explore the laws pertaining thereto, and so forth, and recommend to the court.

The court, on the only occasion that I'm aware of, recommended that the governor refuse clemency. I'm not here to say that the governor is bound by that, but clemency was not granted. It might be that in the circumstance where the individual has two felonies ahead of time that we *are* determinative. I'm not sure. And of course it's been almost ten years since we had an execution.

Effectively we don't have — it's been said — we really don't except in the books have a death penalty, since 2006 anyway. All the avenues and recourse that a condemned individual has to pursue: our appellate process,

our habeas process, the federal court habeas process, back to us for exhaustion, back to the federal habeas, back to us for exhaustion — it's more of an abstract. Of course, not for those who did experience it. But given these few that have been executed as against the 700 who are on death row, it's an unlikely outcome.

You may be aware that a federal district court judge has declared our death penalty unconstitutional. Because of that delay, I believe that the federal district court declared our death penalty arbitrary, unconstitutionally arbitrary. That opinion is on appeal to the Ninth Circuit, and that's just a matter of interest, what a federal district court judge says. It doesn't necessarily have an effect, except by the force of its reasoning. It has no binding effect on us. But it's something that, when the issue comes to our court, we would certainly look at the reasoning. But it has no impact on the California Supreme Court, nor would the Ninth Circuit either way, except to be something for this court to give serious consideration to the reasoning.

MCCREERY: Just to wrap up with a couple of practical matters of your process here, you touched earlier on the fact that there's now a capital central staff specifically to handle this large caseload. Talk about the adding of that special staff and how well it's worked out over time.

WERDEGAR: Certainly it has relieved the individual chambers of some of the workload. There are seven capital central staff attorneys. So I say it's worked out well, but if people are hoping that we're just going to move these cases along, there seem so many steps along the way including, initially, appointment of counsel, and correction of the record, and briefing by counsel, and response to briefing. It's been a help, but anybody who is hoping that the death penalty cases will accelerate — it's hard to see it happening.

It's very frustrating to people who are favoring the death penalty. As I say, I've heard there's going to be some initiative on the ballot forcing the state to do something. Part of it would be funding, funding for more attorneys, which is totally out of our control.

MCCREERY: Any other thoughts about streamlining the process or anything?

WERDEGAR: No. People have studied this, have debated it. Apart from more money for more attorneys, we have tried in our jurisprudence to streamline this habeas corpus procedure back and forth.

I authored an opinion called *In re Reno* for a unanimous court that tried to set out the limits on how many times a defendant can come back to us again and again and again raising really the same issues time and time again.<sup>33</sup> Their attorneys, of course, are dedicated to any possible impediment available to them, devoted to their client.

We, in our jurisprudence, have tried to impose discipline and reasonableness on these multiple petitions that come back to the court. The court did, in that *In re Reno* opinion, try to strictly enforce a prohibition on repetitive and duplicative issues that counsel will raise time and time and time again. And in an earlier opinion, maybe more than twenty years ago, *In re Clark*,<sup>34</sup> I believe, this court set out bars to these habeas corpus petitions, procedural bars. “You raised it in the trial court. You raised it on appeal. So you can’t raise it now.” Or, “You had the knowledge before, so you can’t raise it on this petition.”

It’s a difficult task to try to streamline the jurisprudence of the death cases. Some reforms maybe have been suggested, that these cases go first to the Court of Appeal and we then, like every other case, just take the issues that require resolution because they’re unresolved or there’s a conflict.

No steps that I’m aware of have been taken to implement that. And there are arguments against it, being that we, at least, have an expertise in the issues of death penalty cases, whereas a Court of Appeal panel might see one in a year and have no overview. In addition to which, the resources needed for *them* in staffing to go through — I mean, some of the records can be a thousand pages.

MCCREERY: It’s a different line of work for them, in a sense?

WERDEGAR: It is, definitely.

MCCREERY: Thank you for reflecting on that. But I’m curious what sort of support you had from your colleagues on *In re Reno* and the thoughts you were putting forth there?

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<sup>33</sup> 55 Cal.4th 428 (2012).

<sup>34</sup> 5 Cal.4th 750 (1993).



WERDEGAR: I think everybody appreciated the tremendous amount of work that this chambers put into that case, and everybody, I think, of any persuasion about the death penalty in general understood that the process of these habeas petitions was being abused. Since that opinion we have seen more discipline with respect to some of the habeas petitions that have come back to us for exhaustion from the federal courts.

MCCREERY: That's on an individual basis, I take it, the restrictions?

WERDEGAR: Yes. There was an experiment when Ron George was chief. We get these enormous first habeas petitions, enormous, and the staff work that goes into writing up a memo addressing each of the multiple habeas issues can run 150 pages.

But the order that is issued if we don't grant the petition is a denial order. It might say, "Argument 1.3.4 denied," and cite a case that had disposed of the issue, or "denied because the questions were dealt with on appeal." So it would be a very short order denying and citing a governing case.

Then the case goes to the federal courts, and they have no idea the substance of what went into these denials. So we had an experiment — short-lived — to write not the full 120-page memo that the court used in its denial but some kind of a succinct statement but more than just citing a case to tell the federal court we had looked at this in depth, and this is what we considered, and this is what we saw.

It didn't work. We couldn't agree among all seven of us what should be in that. Justice A might deny that claim for reason #1, and Justice B might deny it for reason #6, and it just didn't work. But it was an effort to tell the federal courts, who after us have to look at these cases, that we truly had looked at it, and this is what we were looking at, and this is why we came to this conclusion, and help them. But the experiment didn't work.

MCCREERY: What would you like to add to our discussion of capital punishment and execution?

WERDEGAR: I think I've spoken to it all, the solemnity and reflection when an execution does occur; the cumbersomeness of the process and, so far, frustrated efforts to make it work; the resources that it consumes.

I would like to repeat that so many of these issues are political. The court just tries to do its work, which is, with integrity, review these judgments and, lacking a constitutional violation or the unusual circumstance

where there's not enough evidence, to sustain the conviction; reviewing them for fairness and validity. That's our job, and we all try to do it very conscientiously.

MCCREERY: Thank you, Justice Werdegar. Let's stop there for today.

WERDEGAR: Okay. Thank you.

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## INTERVIEW 9 (AUGUST 20, 2015)

MCCREERY: Good afternoon, Justice Werdegar. We thought we might spend a few moments today reflecting on Chief Justice Ron George's leadership in his time, starting when he took over from Chief Justice Lucas but continuing on until his retirement at the beginning of 2011. As you think back, how do you see that period of the court's history?

WERDEGAR: I was still a fairly new justice. I had served, I think, a couple of years under Chief Justice Malcolm Lucas, who — I have said earlier in this history and others have said *ad nauseam* — was a central casting chief justice and, in my experience, a delightful man with a wonderful sense of humor. The perception was that he had somewhat disengaged himself from the administrative side of the court. He was recently married and returning to Los Angeles for most of the week, so his presence wasn't as apparent as it had been, perhaps, earlier in his time when I wasn't here.

Ron George was appointed, as everybody knows, by Pete Wilson, first as an associate justice. When Malcolm Lucas departed, Ron was the natural and totally expected heir apparent and assumed the leadership of the court as chief justice. He came to us with high energy and enthusiasm and, I think, a real vision of what he wanted to do with the judicial system, the statewide judiciary.

He used to say, perhaps in his own oral history, that what he loved most — and he would point to his judicial robe hanging on a stand in his office and say, "That's what I love most." But I think for a chief justice, like it or not, you are forced to engage in administration, and he did so with, again, energy and enthusiasm.

It was noted that soon after he took office he made it a mission to visit the courts in every county in the state, and he did this after he had broken his hip — I think it was waterskiing. Probably this appears in his oral history. But I think that sent a message to the statewide judiciary that we had an engaged, concerned leader. I think he reported that he learned a lot about the facilities, and certainly it's good to know the personalities.

So that was his message: "I'm going to take charge. I'm going to be engaged."

He did reengage with the Legislature. During Chief Justice Lucas's time there had been a breach of collegiality between the Legislature and Chief

Justice Lucas, I think as a consequence of some comment in a case before my time having to do with limits on legislators' terms — something that probably should have been edited out of the opinion but escaped the blue pencil.

But evidently, after that opinion was issued no further invitations to the chief justice of California to give a State of the Judiciary speech were forthcoming. Ron George, I'm sure, reached out to the Legislature, and the invitation was again resumed. We would go up and hear his State of the Judiciary speeches, as we do to this day with our current chief justice.

Some of his signature accomplishments — and I'm not one who is particularly interested in administration, but these were widely reported. He promoted and supported unification of the trial courts, which was effectuated by an initiative that was proposed by the Legislature.

I'm not one to pass judgment on this, but at the time there was some concern about the fallout of that. One concern was that people who may have been elected or appointed to the municipal court are not people that would, in their own right, be appointed to the superior court. But here they were going to become superior court judges.

Another concern was that attorneys of experience and stature and capability would not be willing to accept superior court trial court appointments when they could be assigned to the misdemeanor calendar or some lesser legal issues that the muni court used to handle. These were comments that were made. How it has played out I don't know. It has been a fact for, what, fifteen or twenty years? So any concerns people had, they've been absorbed into the system and the courts are functioning. That was one of his strong initiatives.

He also encouraged, promoted, the Legislature to achieve state trial court funding. That was certainly a major initiative. The third one was the transfer of individual court facilities to the state.

Apart from that, and more generally speaking, he was very supportive of improving access to justice. During his tenure I think it was the AOC that established the Center for Families, Children and the Courts and focused on giving assistance to pro se litigants and developed specialized courts, which I think are very interesting, to deal with particular problems, such as drug courts.

And I don't know if this occurred in his time, but I understand they're talking about or they have established courts for veterans. I would like to

know, but I think these specialized courts are beneficial. Intuitively, to me, it sounds like an excellent idea.

He encouraged pro bono services and self-help centers, so I think a lot of progress was made with respect to access to justice by the general public. Those were, in my mind, some of his leadership accomplishments.

MCCREERY: You mentioned a couple of times relations with the Legislature as a whole and with individual legislators. To what extent did that whole arena touch those of you who were his colleagues here?

WERDEGAR: Touch us? Impact our work? Myself personally — I felt no impact except we would go up to Sacramento, which I think is a good thing, and listen to the State of the Judiciary message and mingle with legislators. Members of the judicial council would be there as well.

Some of my more politically affiliated colleagues would personally know a number of the legislators and stay for the reception. I think just opening communication — I think it's important for the legislators to see, literally, who we are, the faces on this group of seven people.

Today one might say it impacts the budget. In Ron George's time, I don't think we were having the budget constraints that we do now. So for the actual work of the court, as far as I'm concerned, it had almost nothing to do. But it's always better to work in an atmosphere where you feel there's collegiality with other branches of government.

MCCREERY: In the same vein, I wonder what view you might have had or what you might have noticed about Chief Justice George's relations with the various individuals serving as governor during his time — and the executive branch as a whole?

WERDEGAR: I can only speak to governor. I met Ron George through the appointing governor, who was Pete Wilson at that time. They had a good, cordial, friendly relationship that was a social relationship as well. Let's see. After Pete Wilson came — ?

MCCREERY: Governor Davis.

WERDEGAR: I really don't know. Certainly, it wasn't a personal relationship. They didn't know each other, I don't think, before, except maybe just officially. And then came Governor Schwarzenegger. Gray Davis wasn't in office all that long. How long was he in?

MCCREERY: It was five years, as it turned out.

WERDEGAR: Time goes quickly. [Laughter] I do recall Ron George going up and meeting with Governor Schwarzenegger on a number of issues, and he probably did the same with Gray Davis.

There was that infamous cartoon in the newspaper — I don't know what the occasion was, but there were seven justices on the bench that looked like clones of Gray Davis, and the caption said, "I expect judges to implement my vision," or something like that. Do you think I got that right?

MCCREERY: I do.

WERDEGAR: I don't even know what generated that, but it was pretty amusing. [Laughter]

MCCREERY: You mentioned also several initiatives having to do with providing access to justice to the citizens of the state. I wonder to what extent you or others on the panel were called upon or invited to participate in those efforts over time?

WERDEGAR: I was not, and if other members of the court were, it was because they were on some committee.

MCCREERY: Unless it was a particular outreach session of the court itself or something like that, you were not personally involved?

WERDEGAR: I'm glad you mentioned the outreach sessions. I may have said earlier that it was during his time that we did start to do outreach. The way it came about was, after September 11th, 2001, one of us who lives up here said, "Can we reduce our airplane travel?"

It was decided that we could. We eliminated a Los Angeles session. We used to have four in Los Angeles. But what happened out of that was, "Yes. We won't go to Los Angeles. We'll go to other places in the state." It turned out to be a good thing. Some Courts of Appeal — I think Sacramento — had already been doing what they characterized as outreach by hearing oral argument in sites other than their courthouse.

We proceeded to have outreach, and I really thought it was a wonderful thing. It got us to see different communities, and as has been reported it brought students in, widened the awareness that they have of the Supreme Court and who we are. We had some wonderful experiences in different communities.

MCCREERY: Which of those stand out to you now?

WERDEGAR: All of them were wonderful, and one reason is the local community, the judges and lawyers and teachers, knocked themselves out in the beginning to welcome us and to have functions. It became apparent to me after several of these that it was a tremendous imposition on the local communities — the work in receptions and busing in students and getting the materials out to the schools. I began to think, “Lucky you. The California Supreme Court is coming to town.” [Laughter]

In the beginning the enthusiasm on the part of the communities — San Jose, Fresno, Redding — all the communities acquitted themselves absolutely marvelously. You ask which stands out. One that was tremendous fun is we took the train down to Fresno. I happen to like the train anyway. We all met, I think it was in Emeryville, and boarded the train. When we got off the train, the mayor was there to greet us. I think there was a little band. It was part serious and part over-the-top, but the receptions and the — I don’t want to say parties, but the dinners and receptions —

But the real point of it was to get into the classrooms and engage attorneys to get into the classrooms and explain cases. Students would physically come to our courthouse, to where we were sitting. For others, I think there was video in the classrooms. It all sounds marvelous, but tremendous work for the local communities.

When we went up to Redding, that got me to a part of California that I probably hadn’t been to. Every community has some wonderful, local feature that you’re happy to see. But they bused students in, bused them in because I guess it’s a widespread area and not concentrated like maybe San Jose.

We continued to do that, but with the budget I think we’ve dampened it a little bit. We “outreach” at Berkeley. And we had a session at Hastings, where they were dedicating or showing off the Marvin and Jane Baxter Appellate Center at Hastings. We are supposed to go someplace south a year from this fall, I think.

I think with the increasing use of video and the continuing budget constraints, this exuberant traveling all over the state of California might be modified a bit.

MCCREERY: But the concept does represent real outreach to citizens that might otherwise never have a chance to see you or meet you or learn about the courts. It really is a civics education, isn't it?

WERDEGAR: Yes. I read just yesterday — maybe you saw it, I think in the *Chronicle* — of individuals under thirty-five, I think 20 percent could name a United States Supreme Court justice. That's probably an improvement. I don't know.

MCCREERY: How was it for you to experience these rooms of young students and their questions?

WERDEGAR: It was wonderful. Questions would be submitted, and the chief and his staff would edit them, and then the chief would assign them. In Santa Barbara, randomly, one of the questions that was assigned to me was, "How has being a Supreme Court justice changed your life, or has it?"

I enjoyed the answer that I gave. I said, "Yes, actually, it has. I get a whole lot more respect at home." [Laughter]

Which is very funny and also true. I've been on the bench twenty-one years now. But when it first happened — if you have children, you're just Mom. And if you've been the supportive wife, and your husband is the main breadwinner and the main career, then all of a sudden, "What? Mom?" So I enjoyed that answer.

Another one that I enjoyed very much — and again it was a random assignment of the question to me. We were up in Santa Rosa, which is in Sonoma County, and the question to me was, "What kind of an education do you need to be a Supreme Court justice?"

I loved having that question. My answer was, "In my case, I attended a one-room school with eight grades in Healdsburg called Sotoyome. But that's not required." [Laughter] It was a sensation, because who would think — the California Supreme Court coming to Santa Rosa and one of the justices went to Sotoyome School, one room, eight grades, one teacher?

It made the local paper. I don't know if I've told you this before. The fellow whose family my brother and I were living with at the time said, "I know her. I haven't seen her in sixty-five years." That was tremendous fun.

MCCREERY: And you later had a reunion, did you not?



WERDEGAR: We had a written reunion, yes. It was very meaningful too because I was six when I was living with this family.

MCCREERY: Thank you. Returning to the subject of Chief Justice George's era and his various liaison activities with the outside world, what did you note about his relations with the media and those whose job it is to communicate with the public about what you're doing here?

WERDEGAR: He definitely was open to the media. He definitely believed in communication, bringing them in, trying to let them know what's going on, trying to answer questions.

I know when I came on the court — of course, people always want to interview a new justice. I would get so nervous, because you never know what tack they're going to take. In my day I was an oddity, I was unusual, and they were looking for an angle. What is she like? Is she going to be this, or is she going to be that?

Chief Justice Lucas, appropriately I came to learn, told me, "Just remember, the press are not your friends." And that's really true. They're there to tell the story, and you may or may not become the story, and you may or may not become the story you want to become.

He had occasion over his time, I think, to become wary of the press. I think there was a perception, and I think perhaps justified, that at certain times the coverage of him or the court had been less than fair. So he was right.

I had some interviews that I feel — I had some reportage of my work that was extremely kind and very generous, and I appreciated it. But I had some where there was an attitude that I felt was, perhaps, unwarranted. But you can't do anything about it. So Ron George understood that. You just do what you do, and let the ink flow where it's going to flow.

MCCREERY: Another area that may have involved the rest of you a bit less directly but nevertheless was part of life was the relations elsewhere in the judicial branch, for example with the Administrative Office of the Courts, the Judicial Council, and so on.

WERDEGAR: I'm happy to say I had nothing to do with any of that.

MCCREERY: [Laughter] Happy to say so, and why is that?

WERDEGAR: I'm not a fan of administration. I would find it challenging to sit through long meetings and deal with administrative matters and all the diplomacy and give-and-take and compromises and concerns that involves. It's not my inclination, and I wasn't called upon to do it. I had some committee memberships that we perhaps have mentioned, but to be on the Judicial Council — it's important, and I used to say to Justice Baxter that he was doing a tremendous service. He served a long time and served well, I'm sure, on the Judicial Council.

Insofar as the AOC, I admired Bill Vickrey, and I think I'm so removed from this that anything I have to say is not authoritative. I think he came here with energy and vision, and it's not a secret that by the time he had served — and I think he served for twenty years or so — it was thought that the AOC had gotten a little out of control. I couldn't comment on the merits of that.

MCCREERY: Yes, there is the whole question of how one structures a statewide judicial branch that is as large and complex as this one. Perhaps there's no peer elsewhere in the country?

WERDEGAR: Let me say, as a matter of history — and if I said it many sessions ago, forgive me — I may be the only person around that knew the actual first administrator, Ralph Kleps. Ralph Kleps had a shared background with my husband from this little college in the Owens Valley called Deep Springs. Ralph Kleps was older than my husband, but because of that I met Ralph Kleps when I was just out of law school and in fact I interviewed, when we came back from Washington, to work with what became or what was the AOC. I think he had six attorneys.

Ralph Kleps was a national pioneer. This goes back to the late sixties, mid-sixties. I don't think there was another Administrative Office of the Courts in any state. Ralph Kleps, who was an admirable and visionary individual, started it. So as I said, I may be one of the few people around who knew Ralph Kleps.

Then we come to an AOC that has how many employees, 800 or something? I don't know. The arc of growth.

MCCREERY: Did you stay in touch with Mr. Kleps as time went on, you and your husband?

WERDEGAR: Yes, through the Deep Springs connection. My husband and I would, on occasion, go to a Deep Springs reunion out in the Owens Valley east of Bishop, and on one or two occasions Ralph Kleps would be there as well.

MCCREERY: Moving on to other liaisons, to what extent are those of you on the panel called upon to have any official relationship with the State Bar and their activities?

WERDEGAR: We have an administrative person who is the liaison. None of us deals directly. Maybe the chief does, but as you well know it was Beth Jay for a very long time. But the justices not at all, except we have an annual dinner with the State Bar Board of Governors which is supposed to facilitate acquaintanceship, collegiality.

MCCREERY: May I ask, because you've been affiliated with this court over so many, many years, even long before you were a justice, if you have a particular view of the establishment of the State Bar court and how well that has worked out over time?

WERDEGAR: Yes. That's interesting. Before I was an actual judge, or maybe just when I came on, they still were reviewing every State Bar discipline. I remember when I worked with Justice Panelli the court's oral argument week would go for four days, maybe five, and a lot of them were State Bar cases. I would hear the comment that, "We spend as much time deciding whether this attorney should get six months' probation or thirty days' probation as we do deciding cases." It seemed very inefficient.

So that was the impetus for the State Bar court, to take this away from us, which was truly not the highest and best use of our time, and put it in a court that was devoted to that. At the beginning, I think — and this is again, hearsay — I was not intimately involved — I think at the beginning the State Bar court was a little rocky. I think our initial individual who was supposed to be in charge of it — she had no model, and it was up to her to structure it and what have you. I don't know how long she continued. But she left, and then they had another structure, and it continues to this day.

We do get some review of what the State Bar court has done, but not routinely. I think our central staff has an awareness of whether the disciplines or suspensions that are imposed are even and comparable so that there's a basic standard or fairness. But we only see an occasional case,

sometimes when an attorney is petitioning to avoid the discipline or disbarment that's imposed.

There was one case where the attorney was dissatisfied with and felt unwarranted the discipline imposed. He petitioned us. We ended up disbarring him. So there is a petition for review that he might have regretted. We thought they had been too lenient.

MCCREERY: But it does sound as if it served its purpose to relieve this court of a huge workload?

WERDEGAR: It did. Yes.

MCCREERY: Any improvements to suggest in that regard?

WERDEGAR: I think this is an ongoing aspect of State Bar responsibility that the court is continuing to monitor and sometimes be concerned about and other times to say it's going well.

MCCREERY: Thank you. Perhaps we'll turn today to some of the cases you authored or other important cases you participated in, continuing earlier discussions we've had about this. We're flexible as to the order, of course, but we had looked at a somewhat chronological treatment for the moment. If it's okay, we could pick up with a case in 2000, *Galanty v. Paul Revere Life Insurance*?<sup>35</sup>

WERDEGAR: Preliminarily, let me say that since, during my now twenty-one years here, I've authored and participated in so many cases, they're not immediately familiar to me. But it has been really gratifying to look back on the cases that you suggested we talk about because it reminds me of what I've done and participated in while I've been here.

Starting with *Galanty*, as you say it was 2000, and in these cases it's important to know the time in which the opinion is being worked out. This is important because at that time it was the effort of a disability insurance company to deny disability insurance coverage to a policyholder who had AIDS. Why were they seeking to do that? It turns out that the policy, on its face, declined coverage for any pre-existing condition. This policyholder, in fact, had been HIV-positive when he took out the policy, but he was not disabled. So more than two years after he took out the policy he became

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<sup>35</sup> 23 Cal.4th 368.

disabled, and they were denying coverage because he had the pre-existing condition.

Why was this even before us? It was before us because there was a conflict between the policy's denial of coverage for a pre-existing condition and a non-contestability provision after two years, and two years had passed. So this court, in a unanimous opinion that I authored, held that he could get coverage.

Why was this significant? I think it attracted special interest because it dealt with an insured who was HIV-positive, and at that time there were multitudes, perhaps, of insureds who were. It was an era where AIDS was still in the forefront of the news, and there was a lot of discrimination against HIV-positive individuals. We didn't leave the insurance company in the future without recourse. They could have required a test, or they could have expressly excluded HIV. But given the conflict between their provisions of "no pre-existing condition" and noncontestability, the insured prevailed.

MCCREERY: Had this court been required to consider anything similar to that, to your knowledge, beforehand?

WERDEGAR: No, I don't think so. I'm sure we've had a number of insurance policy cases and interpretation of conflicting provisions, but I can't think of any in particular. I think that's why this attracted attention.

MCCREERY: And as you say, the AIDS epidemic was at a particular moment, and perhaps there were —

WERDEGAR: Potential coverage for a lot of people that perhaps the insurance companies had not intended to cover or didn't want to cover.

MCCREERY: As has not been true before or since, perhaps?

WERDEGAR: I can happily say, it has not been true today. The world has changed in that regard.

MCCREERY: What do you recall about any indications you might have had from colleagues about different reasoning on this case?

WERDEGAR: I don't recall. It was unanimous, and like any other case — and on this one, because it was high-profile for the reason you suggest — we probably had discussions, but at this point I can't recall. But I'm happy it was unanimous. That's always a good thing.

MCCREERY: We thought we might look at the *Conservatorship of Wendland* as well today.<sup>36</sup> I gather this had to do with a question of withholding life support from a seriously disabled person. How do you characterize the issue before you?

WERDEGAR: This case, I think, was a case of, what we say in the law, “first impression,” not only in California, but nationally, about removing life support from a semiconscious individual who couldn’t communicate.

I’d like to give you a little background. The case attracted national attention, and Robert Wendland, the subject of this case, a video of him actually was aired on TV. Of course, by its very nature it would be an important case, but it was in an era, if you recall, of the Terri Schiavo case. Terri Schiavo was in Florida, and she was in what medical people call a persistent vegetative state. Robert Wendland was not and I’ll get to that, but Terri Schiavo was.

In that case, her husband, after allowing her to be cared for for an extended period of time decided that Terri Schiavo would not want to live this way. As I speak to you, I can see pictures of her and she would not, I’m sure. So he asked for the hospital to stop treating her. I think her mother, her parents, resisted, and the matter went to the trial court. The trial court agreed with the husband that it was appropriate to stop treatment.

The case became inappropriately and tremendously political. The governor of the State of Florida, who was Jeb Bush at the time, and the Legislature of the State of Florida, and the president of the United States, who was George H. W. Bush, all sought to stop the withdrawal of care for Terri Schiavo. Over a period of years this was litigated. It was in a way, I think — for a private grief and a private situation I think it was unfortunate that it was political. It was a political battle between proponents of the right to die, individual autonomy and dignity and right to die, and the proponents of preservation of life and right to live.

So we come back to Robert Wendland, who unlike Terri Schiavo was not in a persistent vegetative state. He was in a state of semi-consciousness. He had progressively gotten worse. He had been in a solo car drunk-driving crash and was severely disabled. But he couldn’t speak, he couldn’t feed himself, he couldn’t care for himself at all, and he couldn’t communicate.

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<sup>36</sup> 26 Cal.4th 519 (2001).

His wife, who had visited him for some time and so on, was appointed conservator, and she decided it was time, that Robert would not want to live this way. She went to the trial court, and she related conversations that they'd had where he said, about somebody else, "Don't ever let me be in that condition."

The moral here is, have an advance directive as to — it's hard to be complete in these directives, but of what your wishes would be as to how you would like to be maintained if you can't speak for yourself. Robert didn't have that, so the legal issue is, "What is the burden of proof of an individual who wants to withdraw life support from someone on the grounds that that's what the person would want?"

What we decided is that the burden of proof — there are three levels, as you know. One is the preponderance of evidence. That's the usual civil burden. The next is clear and convincing evidence. That's the middle level. And the final one is proof beyond a reasonable doubt, and that's the criminal burden.

We decided that the wife had to prove by clear and convincing evidence, the middle burden, that this is what Robert would have wanted. We reasoned that a decision to withhold life support is irrevocable, and you have to have a higher burden of proof. In Robert's case it was moot, because during the pendency of this — the litigation, starting in the trial courts, went on for some years — he died before she had to go back to court.

Interestingly to me, the decision was controversial. There were those who felt that the burden was too high, and we were depriving individuals such as Robert of the release from the imprisonment of a horrific condition. I don't know. But our feeling was that it's so irrevocable and it's such a horrendous thing that the burden of proof has to be higher. But again, the real message is have a written directive or have a health-care surrogate, that, "This person is going to speak for me if I can't speak for myself." Then the courts never get into it.

MCCREERY: As an aside, we're having a tremendous amount of public attention right now on some right-to-die questions and issues here in California, and the Legislature is tangling with it as we speak, pretty much. I wonder how you might have noticed these kinds of issues since the time that you wrote *Wendland*?

WERDEGAR: Now, of course, we've all become aware of Brittany Maynard going to Oregon because she couldn't effectuate her wishes as to how she wanted to die in this state. But in the interim after *Wendland* — I don't recall the date — I was invited to go to Texas and speak at a conference,<sup>37</sup> which I did, with legal and medical ethicists and doctors and lawyers about how to handle patients. And I'll repeat: there's a difference between a persistent vegetative state and somebody who is semi-comatose and has been for a long time. It was a very interesting conference. And how often do people come out of what is perceived by outsiders to be a flat-lining?

But until the Brittany Maynard case, and now the legislative inquiry in California, I can't recall that it was on the forefront of the news.

MCCREERY: I wonder if you could say just a bit more about that conference and what you got out of it?

WERDEGAR: What I got out of it? I just found it fascinating. One aspect I got out of it is there were cases of people who, to all intents and purposes, seemed to be gone that would come back, but they were very rare. Again, a persistent vegetative state is different than a minimally conscious or semi-comatose patient. I'm sure the medical world has ways of monitoring and measuring. I just feel for the families who have to face this.

MCCREERY: As you say, particularly in an instance where it becomes politicized.

WERDEGAR: That was an unfortunate circumstance. It was so blatantly political.

MCCREERY: Anything you'd like to add on that one?

WERDEGAR: No.

MCCREERY: Again, we can alter the order as you see fit. But shall we move on to *San Remo Hotel v. City and County of San Francisco*?<sup>38</sup> This was converting residential units in some fashion?

WERDEGAR: Yes, long-term single-room occupancies converted into tourist hotels. Each of these cases that you have come across, as I've looked

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<sup>37</sup> *Regarding Conservatorship of Wendland*, 12 CAL. LEGAL HIST. 487 (2017); January 28, 2010.

<sup>38</sup> 27 Cal.4th 643 (2002).



at them, I realize looking back why they were considered significant at the time. In this *San Remo* case, in order for the owners of the San Remo Hotel to convert their long-term occupancy residences to tourist hotels, the City of San Francisco gave them a conditional use permit. The condition was that they provide replacement housing to long-term residents or an “in lieu fee,” pay something so the city could provide replacement.

The complaint by the plaintiffs was, this was a taking of private property in violation of the Constitution. You can't take private property without just compensation. So we had to decide if this constituted what's known technically as a “taking” or was it a reasonable regulation? We held — it was not a unanimous opinion — I don't recall who dissented, but it was not — we held that it was not a taking in the constitutional sense, which requires an invasion of property or a physical deprivation of its use.

It's significant in that this question involves interpreting the Takings Clause of the United States Constitution. There's always this tension between the private property owner and government seeking to regulate or grant access.

That's why that case was important, and it set certain parameters as to what is a regulation as opposed to what is an actual taking. That issue is ongoing because every case has a different factual situation.

MCCREERY: How much previous law did you have to go on, if you recall?

WERDEGAR: Oh, there's lots of law. [Laughter] There's lots of law. As I say, I think each case is — there are certain rules that are articulated that you try to apply, and we articulated some rules in this case that subsequent cases have tried to apply. But it's always a factually specific issue.

MCCREERY: We've certainly, just anecdotally, heard so much about housing in San Francisco and the difficulty of there being enough housing, no matter what angle you're looking at it from.

WERDEGAR: It comes up here. We had a case recently — I think the opinion is filed — down south, where they were developing new residences, and the jurisdiction was requiring the developer to set aside certain affordable housing. So that's another situation. Is that a taking of the developer's property interest if he or she or the company is mandated to provide subsidized housing, so to speak? The issue continues and will continue.

MCCREERY: Yes, the whole question of what responsibility a government entity has to provide affordable housing, however one wants to define it.

WERDEGAR: Or what power it has to impose it on private property owners. Yes.

MCCREERY: That must have been fascinating to look back at that, as you say, after all this time. Would you be kind enough to address this group of three cases on California's anti-SLAPP statute? I'll let you name them off as you see fit here.

WERDEGAR: I don't have that in front of me, but I will say I was assigned a number of anti-SLAPP cases. I became known by I forget what group as the "Queen of SLAPP." It's always a question of trying to figure out who's slapping who. But what the law is, if you are sued you can file a motion saying that it was a Strategic Lawsuit Against Public Participation.

For instance — this doesn't relate to my cases, but I think a classic context is if someone is exercising what they perceive to be their First Amendment rights — it might have arisen in the case of tree climbers who were trying to preserve redwoods or something — and then they're sued for trespass.

The legislation will allow the defendant to move to dismiss the case on the grounds that it's really a strategic lawsuit against exercise of their free expression and public participation rights. Then the trial court has to balance: one, is that true? And two, that doesn't mean they can't sue, but the plaintiff has to come back showing that the plaintiff is likely to prevail.

I don't have the cases that you're speaking of in front of me, but it's always a question of whether those elements of the statutory scheme are met. Is the lawsuit designed to quash free expression or public participation? If it is, is the plaintiff apt to prevail? And if at another time you want me to speak of my specific cases, I'll try to do that.

MCCREERY: We can certainly just keep it a broad brush for the moment.

WERDEGAR: Yes. I do recall some trial court judges being appreciative of the court setting out the parameters and what has to be shown — we really have to think about the trial court judges who have to rule on these different issues. The clearer we can be, the easier their task is as to what the motion has to say, what the opposition has to say, and give them some guidance.

MCCREERY: Given that you had a number of these cases over time, how did that progression help you develop a certain — ?

WERDEGAR: I think it did, as each case presents — speaking generally — a different permutation of the legal problem, so you end up with having addressed the parameters of the rule of law in the area.

MCCREERY: It's a bit of expertise over time. That leads me to ask a general question about the value of having justices specialize in certain areas. What's your view of that?

WERDEGAR: I think that's a good question because the answer depends. I think you don't want one judge to have a monopoly on a subject area. Of course, one judge can't if you have six colleagues that weigh in. But I do think there's a value, and we'll perhaps get to it later.

I've been assigned a number of CEQA cases, and I think it's perceived that I, my chambers, have a handle on the complexities of CEQA. I think, given that so many of the opinions have prevailed, that we have an expertise and a balance in addressing the very, very complex issue of CEQA.<sup>39</sup>

I don't know how our current chief or our former chief did their assignments. Looking at CEQA, I see that I continue to be assigned some, but I see that other judges are assigned some. I think it's a good balance. But certainly, as with SLAPP — I didn't get all the SLAPP cases — it's good to have some continuity in the development of the law.

And as I say, you don't write alone. Your six colleagues weigh in. But you might start with a depth of understanding that someone newly assigned to it wouldn't. But just because you practiced — let's take a random example — labor law doesn't mean you'd get assigned the labor law cases.

I think Justice Grodin was quoted as saying — because he certainly was and continues to be an expert in labor law — that that didn't mean he was going to be assigned all the labor cases. That's good too.

MCCREERY: What other sub-specialties have you noted — not officially speaking, of course — but, let's say, on DNA testing or other broad areas that come before you frequently?

WERDEGAR: That I have had?

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<sup>39</sup> *The California Environmental Quality Act at 40*, 13 CAL. LEGAL HIST. 3 (2018).



HIKING IN YOSEMITE —  
JUSTICE KATHRYN MICKLE WERDEGAR, CA. 1989.

MCCREERY: No, just any you have seen among your colleagues?

WERDEGAR: Again, wage and hour. But I got a lot of those, too, and we'll get to that. Frankly, I'm only cognizant of the ones that seem to have clustered in my chambers. If you're asking if other justices had a concentration, at the moment nothing comes to mind.

MCCREERY: As you say, there's a balance between it being a valuable thing and, perhaps, a monopoly if one goes too far?

WERDEGAR: It's never exclusive. That's right.

MCCREERY: Finally, as the Queen of SLAPP, how have your views of that law changed?

WERDEGAR: [Laughter] I try not to think about it unless it's assigned to me. I think the law — this is a political thing — had its purpose, and the Legislature over time has tinkered with it. We just try to set out how it's supposed to work under the law, as written.

MCCREERY: You get a chance to see how well the law is written in a lot of instances.

WERDEGAR: Well, that's a whole other subject, how well a law is written. We have not had any SLAPP cases for a long time, so things must be going smoothly.

MCCREERY: Thank you. Here's a case from 2003. *Intel v. Hamidi*.<sup>40</sup>

WERDEGAR: Yes. This was not unanimous, and I do believe there was a vigorous dissent, which anybody who's interested can research. In this case, we held that a disgruntled ex-employee's mass mailings to a company employee email list didn't constitute a trespass to chattels.

It's a cutting-edge question relating to electronic communication, and it was an effort to analogize unwanted use of an email system to invasion of a tangible property interest. A trespass to chattels, classically — you learn in torts — is damaging your neighbor's property or going on physically to your neighbor's property. There was no tort that fit this situation.

MCCREERY: The electronic world as we now know it?

WERDEGAR: That's right. So the question was, did these emails, which were massive and were critical of the employer, but didn't damage the computer system and didn't impair the functioning of the computer system, were they a trespass to chattels. Writing for the majority, I held that trespass to chattels requires interference with the possessor's use or possession of personal property. I haven't heard anything about this problem since then, but it was a divided court. I don't know by what number, but I do know there was a very vigorous dissent, I believe by Justice Brown. Technology and electronic communication at that time — this was 2003 — had just emerged, and so many issues in today's modern world get out in front of the courts. And the Legislature. If the Legislature had addressed it, that would be the end of it.

MCCREERY: It got out in front of government in general.

WERDEGAR: Yes. We are called upon to resolve issues just the best we can. We'll get into that with some other cases that you're going to ask about.

MCCREERY: What do you recall about your own reasoning in this one?

WERDEGAR: I had to consider both sides. It's not as if I immediately know exactly how I believe a case should go. It's well briefed on both sides.

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<sup>40</sup> 30 Cal.4th 1342.

There are arguments on both sides. But ultimately in almost every case, but not every, in my career, by the time I have landed on one side or another it's because I've thought about it carefully and I'm comfortable with the result. I've considered the input of my colleagues who agree but offer something additional and of my colleagues who disagree.

Looking back on this case, at the time it seemed very difficult. But basically, I'm confident we were right. It didn't fit into any category, annoying as this individual might have been to his employer. There was an argument that he was interfering with the employees' service to the employer by distracting them with these emails. Since then maybe there's been some legislation, or with technology today maybe employers can avoid that kind of intrusion. It was interesting.

MCCREERY: What comes to mind in the way of other cases like this, where you're forging into new electronic areas that didn't exist not so long ago? I just wonder if anything rises to the top in your thinking.

WERDEGAR: They will come. But nothing comes to mind right now. Truly, technology is moving so quickly. We've had other areas, of course, a different kind of technology, medical technology, where advancements are so far ahead of the law, such as artificial reproduction with surrogate mothers. I have not had such a case. I think Justice Panelli had to deal with such a case. If the surrogate is employed to carry the fetus and the baby and they have a contract, and the surrogate decides that she wants to keep the baby, can a baby have two mothers? That kind of thing. If you want to ask me about *Sharon S.*, that does involve that peripherally.

MCCREERY: Yes, please do.

WERDEGAR: *Sharon S.* also was a divided opinion.<sup>41</sup> In this case, the significance was — and the lesbian community thought it was highly significant — this is 2003, again, a lifetime ago in the development of the law about lesbians and reproductive technology — but there we legalized a second-parent adoption for the non-birth-parent partner of a lesbian.

But the background is that Sharon S. and her partner Annette were domestic partners at that time, I believe, and Sharon S. was the biological mother of the baby. She signed a form consenting to Annette's adoption

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<sup>41</sup> *Sharon S. v. Superior Court*, 31 Cal.4th 417 (2003).

of this baby. This couple had done that with a previous child, so they had a child under these circumstances. But after the birth of the second child they broke up, and Sharon S. tried to withdraw her consent and Annette petitioned the court to be the adoptive parent.

It was like a Solomon's decision. We ruled that Annette could proceed with what we call a private second-parent adoption and could be the co-parent of this baby and that Sharon S.'s consent, as stated in the form, was irrevocable. In these situations, of course, the individual who wants to disavow says, "I didn't read it." We see it in contracts all the time.

The little twist here was that the second-parent adoption statutes really were not drafted with this contemplated at all because they were really meant for, say, when a mother remarries and her husband wants to adopt the child. The other parent has to relinquish all control. That's what a second-parent adoption is, if your step-parent adopts you and your parent is still living.

Here, Sharon S. wasn't going to relinquish all her parental rights. We just simply tried to adapt the statute to the circumstances and say that giving up of parental rights could be waived. She would continue to be the parent, but Annette got to be the second parent by way of adoption.

The courtroom was packed. The lesbian community, in the aftermath, was very divided. There were those who felt that Sharon, the biological birth mother, now that they had broken up shouldn't be bound to have her former partner involved in the raising of her child. There were those who felt that Annette, who had fulfilled this role with their previous child — and maybe there was something about who was the caretaker and who was the breadwinner — that she had the right to have this be her child, too. There was no happy solution. It was the first case to give a lesbian partner legal second-parent status.

MCCREERY: The first case anywhere, as far as you know?

WERDEGAR: We were dealing with the California statute, so I can't say. But it certainly was in California.

MCCREERY: How has this issue come forward since then?

WERDEGAR: I was thinking about that. I don't really know. If I don't see it in the newspaper or see it in petitions for review here, I don't know. I think no news is good news. Maybe people are working it out.

MCCREERY: You mentioned that the lesbian community was divided in its own view of this, which is fascinating. As you say, it's long enough ago that a lot of things have changed since then in the broader realm. But I wonder to what extent you had direct communication from that community after this came out? What did you hear?

WERDEGAR: I didn't. I just knew by the briefs and the amicus briefs and the two women attorneys arguing the case on different sides. It was apparent that they were divided. How it was greeted afterwards to the press? I don't recall, frankly, how it was. Interesting.

MCCREERY: But a poignant situation for any family member, when you think about it.

WERDEGAR: Yes. We have had other cases, but what the other issues were I can't remember.

MCCREERY: It's a fascinating arm of family law.

WERDEGAR: Really. Yes.

MCCREERY: Shall we move on to *Catholic Charities of Sacramento v. Superior Court*,<sup>42</sup> which had to do, I gather, with the state Department of Managed Health Care in some way?

WERDEGAR: It did have to do with a state law, the Women's Contraception Equity Act, and maybe that's where the Department of Managed Care came in. Catholic Charities is a religiously-affiliated social service organization that opposes contraception on religious grounds. They sought exemption from the state's Women's Contraception Equity Act, which required certain health and disability contracts to cover prescription contraceptives, on grounds of freedom of religion.

MCCREERY: This was for employees of Catholic Charities?

WERDEGAR: Yes. That's a pertinent question because we determined that Catholic Charities, the entity, did not qualify under the state's statutes as a religious employer. And they actually did not claim that they did qualify. They agreed. We determined that they did not because they didn't employ exclusively adherents, and they offered services to the general public. So

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<sup>42</sup> 32 Cal.4th 527 (2004).



they were not a religious employer. It's important to know that, and they didn't dispute that. But they nevertheless claimed that it violated their corporate religious beliefs to require them to provide contraception.

We held that with respect to a generally applicable law, that they could not be exempt because they were not a religious employer. As I needn't tell you, this issue is very alive today. The question whether non-religious entities — notwithstanding the name Catholic Charities they were serving the public generally, all to their credit, of course, and employing people of all faiths, is my understanding — but the question of whether non-religious entities can seek religious exemption from generally applicable civil laws which they contend offend their religious beliefs — as I say it remains very much alive.

The most recent statement on that subject from the United States Supreme Court, whose rulings, of course, govern, was the *Hobby Lobby* case,<sup>43</sup> where they held that a so-called closely held corporation could assert, I believe, a First Amendment right to preclude them from providing contraceptive care to their employees.

Since the gay marriage cases that have legitimized and legalized gay marriage have occurred, in the paper every day are articles on whether proprietors or employees of secular businesses, on the basis of the individual employees' personal beliefs, can refuse to serve gay couples. Even a civil servant in one state, whose job is to issue marriage licenses, has asserted a religious right to refuse to do so. This issue is very much alive, and we'll see how it goes.

MCCREERY: Given that you had had the case of a religious viewpoint come up so early on in that matter with the Sacramento landlady — early in your career — I wonder what view you took of the matter of being required to do something that a personal or corporate religious view might preclude?

WERDEGAR: Based on both *Catholic Charities* and *Smith v. Fair Employment and Housing Commission*, my views are that if you engage in civil activities, civic activities, public commerce, you have to abide by civil law. But the United States Supreme Court is going to be the final arbiter of that. Whatever they come down with will determine what California has to say about it. I don't like the direction that *Hobby Lobby* went.

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<sup>43</sup> *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. \_\_\_\_ (2014).

MCCREERY: Can you say why?

WERDEGAR: Yes. You're imputing personal beliefs to a corporation. If we allow individuals to interact in society according to their individual personal beliefs, we would have a very disorganized and unpredictable and non-functional society — if you allow that. Think of the different religions in this country and the different beliefs that each might hold. I think your private beliefs and what you adhere to and your tenets and so forth are fine, but if you're going to engage in this civil public world by and large, unless it's discriminating against *you*, I think you have to adhere to the general civil law. But we'll see.

MCCREERY: Here's a case on the amount of punitive damages called *Johnson v. Ford Motor*. This is from 2005?<sup>44</sup>

WERDEGAR: Yes. Again, I don't know how the law has evolved, but this case was notable for involving this court's effort to apply United States Supreme Court precedent in assessing the due-process validity of the amount of punitive damages. You can sue for your compensatory damages, which means the actual loss you have suffered, whether it's damage to your car or whatever — but punitive damages are a tool to punish, as the name suggests, the wrongdoer beyond what damage it might have done to you.

The United States Supreme Court has spoken in broad terms to how large a punitive damage award can be without violating the due process of law. It has recited certain factors, such as the repetitiveness of the conduct, the amount of compensatory damages — the actual harm to the plaintiff — the profit flowing to the defendant, et cetera. In this case, Mr. Johnson sued this car dealership for violating the lemon law. He alleged that it had a pattern and practice of violating the mandatory re-purchase provision of the law by instead issuing customers of defective cars an owner-appreciation certificate.

So he sued, and his actual damage, as the jury found, was \$17, 811. That was Mr. Johnson's damages. But the jury was persuaded that the behavior of the defendant car dealership was egregious, and they awarded Mr. Johnson \$10 million in punitive damages.

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<sup>44</sup> 35 Cal.4th 1191 (2005).

Now, there are some who say that punitive damages shouldn't go exclusively to the individual plaintiff. They should go to some kind of a fund. But that's not the law.

Of course, the car dealership appealed. The Court of Appeal reduced the punitives to \$53,000. So it comes to us. It's like a Ouija board: \$53,000? \$10 million? What are you going to do?

In our opinion, we tried to address all the permissible considerations, including the state's interest in deterrence. If it's just a slap on the hand — you do hear about, parenthetically, auto manufacturers who think it's just cheaper to let the defect be out there rather than recall the automobiles. This is some of the allegations. So we tried to address all the considerations, including deterrence, and we remanded it to the Court of Appeal to look at our opinion and do it again.

I don't know what they did, but the companion case, or one that came later, was *Simon v. San Paolo U.S. Holding Co.*<sup>45</sup> Here, too, I was assigned this case, again involving punitive damages.

In this case, it was a breach of contract for the sale of an office building. The plaintiff's compensatory damages, according to the jury, for the loss of the bargain, were \$5,000. But they imposed \$1.7 million in punitives because, I guess, they felt that the behavior of the defendants who breached the contract was reprehensible.

The C.A. affirmed this award, but we remanded, directing the C.A. to modify the punitive damages from the \$1.7 million to \$50,000. And what did we say? We said the \$1.7 million was defective under the Due Process Clause and that the seller — it wasn't like an organization that repeatedly did this — the seller's conduct was not all that reprehensible, et cetera.

Together these two cases — I think we said in that case, and maybe we were quoting the United States Supreme Court, that a ratio of 9-to-1 is the outer limit. But this is so imprecise, and we're just trying to implement what guidance we have received in a very murky area from the United States Supreme Court because it's a due process question. We haven't, as far as I know, heard about punitive damages for a long time, so they must be figuring it out.

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<sup>45</sup> 35 Cal.4th 1159 (2005).

MCCREERY: But the idea behind this particular one was that the punitives should be no more than nine times? Do you remember how the nine was arrived at by chance?

WERDEGAR: Maybe we got that guidance from the United States Supreme Court. I don't recall. But this was not an exercise in precision. But together, we felt, maybe the two cases would give some helpful guidance.

MCCREERY: And perhaps they have.

WERDEGAR: I think so. We haven't heard since then.

MCCREERY: But as you say, seeing in the *Johnson* case the amount go from \$17,000 to \$10 million — that's a big swing in the pendulum there. [Laughter]

WERDEGAR: Yes. But the allegation was that they did this repeatedly, whereas in the second case it was just a plaintiff versus a defendant. Allegedly this car dealership had been getting away with this and, of course, saving itself millions of dollars for a long time.

MCCREERY: You raised the idea that such a large award shouldn't go to any one individual but perhaps should go to a fund or something. Do you have any knowledge of whether that has been considered?

WERDEGAR: No. I do think it would be, possibly, a legislative issue. It makes sense, doesn't it? Certainly, give the plaintiff who undertook the effort to bring the lawsuit something, but I think the enormity — well, it would still be a due process question, but I think there would be some benefit in having the Legislature look at whether, depending on the size of the punitives, if some of it shouldn't go to a pertinent common fund. But I don't know anything about that being pursued.

MCCREERY: The *Johnson* case and the *Simon* case were both 2005. I'm only curious as to —

WERDEGAR: For *Johnson* I have 2004, but within a year.

MCCREERY: Oh, 2004. Sorry. But they did come forward separately, but close enough that one could have bearing on the other?

WERDEGAR: Yes. In fact, sometimes that's why we will grant review. Courts can only work incrementally, really. We take a case that comes to us, and we resolve the issues that case presents. We are ill-advised to and

we are not supposed to speak globally, like the Legislature can. That's one of our limits that the public doesn't often understand. We're constrained by what comes to us and what we're asked to decide. So I guess in a situation like this, if this case were petitioned, this second one, we'd say, "Yes. That would be an opportunity to shape what we were trying to articulate earlier."

MCCREERY: But as you say, you are acting through specific cases with specific issues, and it is a vast difference from the legislative branch.

WERDEGAR: We are, and people don't realize that.

MCCREERY: Say more about that, if you could.

WERDEGAR: Now, sometimes if we get a case that is in an area, we might ask the parties to address additional issues. So there's a little reaching out there, but it has to be pertinent to their case. That's all I can say. It's a little-understood fact that the courts cannot be proactive, except insofar as at the highest level, our level, we select what we take. But we cannot reach out.

One of the criticisms of the United States Supreme Court's *Citizens United* case is — that's the case that is widely known to have unleashed Super PACs that can give unlimited amounts of money to candidates — not to candidates but in support of candidates — that the case didn't necessarily present that question, and that the court solicited supplemental briefing. There was an allegation that they reached out to decide a question that they didn't have to address in that case. They asked the parties.

MCCREERY: What do you think of that, in principle?

WERDEGAR: In that case I think it was very unfortunate. In principle, it depends. If the issue really is not involved in the case, then I don't think we should. But if some permutation of the issue or aspect of the issue can be clarified or better defined — these are all vague terms, you have to look at the circumstances — then I think it is appropriate.

MCCREERY: Does an example come to mind from this court?

WERDEGAR: We do occasionally ask for supplemental briefing. For instance, there's a criminal case that's pending that we are wrestling with. We're not changing the issues. We have an issue we have to decide, but we're asking the parties to brief a statute that they didn't brief before that

might allow us to resolve the issue. So we're not creating a new issue. We're looking for a solution, and we're asking the parties, "You didn't mention this statute. Might it resolve this question?"

MCCREERY: But it's such a fascinating role, to have a responsibility to develop the law and resolve conflicts but to be able to do so only within what comes to you and works its way up to this level. It really is a fascinating and fundamental question, isn't it?

WERDEGAR: Yes, it is. Thank you for pointing that out.

MCCREERY: Perhaps we'll talk more on another day about the U.S. Supreme Court. But there have been some fascinating decisions that have gotten a lot of public attention. Certainly, *Citizens United* is one of them.

If you don't mind a bit more today, here is *Evans v. the City of Berkeley*, from 2006.<sup>46</sup>

WERDEGAR: No, I'm happy to because, as I say, reviewing at your request some of these cases reminds me of the journey I've had and the court has had and how the world, as it always will, has evolved since we were concerned with the issues some of these cases present. *Evans* is another example. There the City of Berkeley decided to withdraw its subsidy for the Sea Scouts in using Berkeley sailboat berths. The Sea Scouts sued, saying the withdrawal of the subsidy was a violation of their free association beliefs.

And why did Berkeley withdraw it? Because the national Sea Scouts — I don't think they were alleging that the locals had acted on this, but national Sea Scouts at that time discriminated against gays and against atheists. The question was, was withdrawing the municipal subsidy an infringement of their associational rights? We held no, the city's refusal to subsidize discriminatory activities didn't infringe on the Sea Scouts' exercise of speech or association. They could continue to speak and associate as they chose, but the city was not required to subsidize it.

Again, this case was significant — it was very important at the time — in that it upheld the right of a public body to withhold benefits from groups that discriminate. Of course, on the national and state level the issue has continued over all these years playing out in the context of the

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<sup>46</sup> 38 Cal.4th 1.

Boy Scouts. After many years of resistance, the Boy Scouts a couple of years back, declared that homosexual boys could be members, but just this year, I guess yielding to various pressures and constraints, withdrew the prohibition on gay men being leaders. So any local chapter, I gather, can have a gay Boy Scout leader. That's a huge change. I don't know what the Sea Scouts are doing, but the Boy Scouts — it's been in the press — have done that.

MCCREERY: As you say, that's a huge arc of change over a relatively short time, less than fifteen years.

WERDEGAR: Yes. And if you want to continue on that theme as to how, if you live these years, how society changes, even though at times it seems that we don't, there's the same-sex marriage cases — what a history there.

MCCREERY: Isn't it, though? Before we turn to that, what else do you recall about working on the *Sea Scouts* cases that stands out as you think back on it?

WERDEGAR: It was unanimous. At the time, again, just like the *Catholic Charities* or some of these other cases we've mentioned, these were big deals. *Sharon S.*, the second-parent adoption. As I think back I realize these were complicated, difficult. They were going to be highly publicized when the opinions came down. Ten years and more have passed, and there's no question about the rightness of the opinions or the underlying issues. So society does change, and I think in many ways, certainly as we speak to the same-sex marriage cases, but in many ways in this area of gays and lesbians it has moved very quickly.

MCCREERY: Hasn't it, though, I think even to the surprise of those in that community who are working on it this whole time? I've heard individuals say, "I never dreamed it would come so fast, in my lifetime," shall we say.

WERDEGAR: Yes. It's interesting.

MCCREERY: So this, as you say, is a major development in our national civil rights, and it is a fascinating moment to reflect on the various cases this court has considered relating to same-sex marriage. Let me ask you to start from the beginning, as it were, of that one, not only in the order of these cases, but how it came to your attention that these issues were going to be on your list, just how you recall it.

WERDEGAR: I remember, and I don't know the year — I hope maybe you could find it out — when domestic partnerships were going to be the resolution of equity for same-sex couples.<sup>47</sup> That was legislation, and it seemed right. It gave a legitimacy and a status and a legal relationship, which was beneficial to individuals living as same-sex couples. At that time, whatever the year was, the idea of gay marriage was off my radar. I just couldn't contemplate it. I had nothing against it. I just couldn't imagine it was ever going to happen. And as we now know, it has.

Bringing it locally and more to the present, there was a state statute that a marriage is between a man and a woman. I don't know what the impetus for him was, but our former [San Francisco] mayor Gavin Newsom declared that statute unconstitutional and directed the registrar of marriages, or whoever issues licenses in San Francisco, to issue marriage licenses to same-sex couples. I don't have this in front of me, but I think hundreds of couples got married. Then there was a petition to stop it; I don't know who brought the petition, but it was stopped. There might have been an injunction stopping it, pending resolution by the courts. There were multiple couples that had gotten married. The case finally made its way to our court, and the case there — perhaps you have the cite — *Lockyer*?

MCCREERY: *Lockyer v. City and County of San Francisco* (2004).<sup>48</sup>

WERDEGAR: Yes. That question was twofold. Did the mayor have the authority unilaterally, without going through the courts, to declare a state law unconstitutional? That's a very, very interesting question. The majority held that he did not. That is, though, a very profound question. Since every officer is sworn to uphold the constitutions of the state and the United States, does that mean only as interpreted by the highest judicial authority? Maybe. But anyway, the court held that the registrars of marriage should not issue these licenses.

The court declared all the marriages that had taken place to be void, and that's where I differed with the majority, because at the time we issued our opinion the constitutionality of the statute defining marriage as being between a man and a woman was in litigation in a separate case. It was in

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<sup>47</sup> The Legislature enacted California's registry in 1999, the first of its kind in the nation.

<sup>48</sup> 33 Cal.4th 1055.



the courts. So my view was, “Don’t be in such a hurry to invalidate these marriages. Keep the status quo. Later will be soon enough to invalidate them if necessary, but maybe it will turn out that the statute that’s under attack will be declared unconstitutional, and if you invalidate these marriages now these people won’t have the benefit of all that time when they were married and of the rights that are pertinent to a legal marriage.”

I also made the point that it’s really a denial of due process to these couples to declare their marriages void when they’re not in court to argue the question. You’re taking away from them this interest they have without their being heard. Well, I didn’t prevail. But it turned out that I should have, because later on same-sex marriage was declared to be legal.

MCCREERY: You mentioned that the litigation was going on by then, and you came forth with the idea of, “Why be in such a hurry until that’s resolved?” Do you recall, though, other than the presence of the litigation, what made you think of that approach?

WERDEGAR: It was just a legal thought. It didn’t seem right to me. The individuals who were impacted were not being heard and, as I’ve said, what if it turns out that there is actually the constitutional right to be married? Have we taken it away from them prematurely? Time enough if — it was just a legal question.

MCCREERY: What response did you get from colleagues on that point?

WERDEGAR: I’d have to read the majority opinion again.

MCCREERY: I just wonder if it comes to mind as you think about it?

WERDEGAR: After I circulated my opinion, Justice Kennard decided to write on that point as well. Being senior to me at that time, her opinion appeared first, so people would read her opinion before they would read mine. Now, if I write separately, Werdegar’s opinion is first. [Laughter]

MCCREERY: That seniority has come to you, hasn’t it, meanwhile? [Laughter] It is such an interesting question when it is a major high-profile civil rights issue like that. Does your process as a panel of seven differ in any way at all in how these matters are discussed or considered?

WERDEGAR: No. You have the presumptive majority opinion circulated and then, maybe even before oral argument, a separate point of view has been articulated. Let’s say that it has. All the justices have weighed in

before you go into oral argument. The argument might address these different points of view, and you conference afterwards. In this case I cannot remember when my point of view came to the fore publicly among the court. Whether it was a preliminary response stage or after oral argument I can't say. But certainly in written form, all the members are aware of everybody's point of view.

After argument we will orally, in conference, discuss these different points of view. But once people have tentatively landed where they're going to land on a case, any further discussion is usually in writing: memos, cross-memos. The majority certainly addressed that point in the majority opinion and rejected it; they didn't let it pass. They looked at it and disagreed.

MCCREERY: But as you say, those couples who did undertake a marriage when it was possible were not getting an automatic consideration if that was suddenly revoked some months later.

WERDEGAR: Do you want to talk about the rest of the *Marriage Cases*?

MCCREERY: Sure, I do. Just to finish about *Lockyer*, I gather Chief Justice George offered the opinion and had the concurrence of Justices Baxter, Chin, Brown, and Moreno, with a concurring opinion by Justice Moreno and then concurring and dissenting opinions by yourself and Justice Kennard. So it's an interesting grouping in this case.

WERDEGAR: I don't think it's an unusual grouping. If you were going to have a dissent during that period of the court, it likely would be by Justice Kennard or by Justice Moreno or by myself or, depending on how the case went, by Justice Brown. Did you mention Justice Brown? She would definitely be a dissenter in other kinds of cases.

MCCREERY: We did talk about that, I think last time, that she was a frequent dissenter and so on. Thank you. That clarifies for me. Yes, let's do go on.

WERDEGAR: All right. You have the names of the cases, but I'll tell you my memory. Next came to our court *In re Marriage Cases*, where the issue was, "What about the constitutionality of restricting marriage to a man and a woman?"

In an extremely erudite and lengthy opinion — and a closely divided opinion, which I joined — Chief Justice George wrote that it violates the

Equal Protection Clause of the California Constitution. The litigants, I'm told, were strategically very careful to litigate it only with respect to the California Constitution because they did not want it to go to the United States Supreme Court, perhaps with some apprehension as to how the court at that time would rule.

There were dissents, I think three. It must have been 4–3. Justices Corrigan, Baxter, and who was the third dissenter? I don't believe Justice Brown was on the court at the time.

MCCREERY: Let's see. Justice Corrigan, concurring and dissenting, I gather.

WERDEGAR: Yes, Justice Baxter. Did Justice Chin dissent?

MCCREERY: Yes, with Justice Baxter.

WERDEGAR: Yes. So that was that.

MCCREERY: That, of course, was all coming to voters passing Proposition 8.

WERDEGAR: Then they passed Proposition 8 because, faced with the California Supreme Court decision that lesbians and gays can marry, an initiative was put on the ballot and voters, as they can — we spoke earlier — amended the California Constitution to say, "No. Under the California Constitution gays and lesbians cannot marry." Our next case was, what about this proposition? Can they do that? What's the name of the case?

MCCREERY: *Strauss v. Horton*,<sup>49</sup> the consolidation of several cases, actually.

WERDEGAR: Yes. And there we all got an education on the initiative process of the State of California and how many hundreds of times the Constitution has been amended and that a mere majority vote can change the Constitution by enacting something — it wasn't the first time — that our court had declared to be unconstitutional. Long ago this court had done it on the death penalty. The voters came back and said, "We disagree. Our Constitution allows the death penalty. We disagree. Our Constitution restricts marriage. It doesn't permit it between gays and lesbians." So that was that case and, again, a very interesting opinion.

Justice Moreno dissented on a very interesting point, as I recall, because the voters cannot change the structure of our Constitution. And I

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<sup>49</sup> 46 Cal.4th 364 (2009).

think Justice Moreno took the view that, even though only a few words, the change in the rights of the individuals was a structural change under our Constitution. I wrote separately to say it could be, but in this case it wasn't. Putting aside the subject matter of gay and lesbian same-sex marriage, the consideration of what is just an amendment of our Constitution and what's a structural change is a very interesting one legally.

MCCREERY: How else has that come to you?

WERDEGAR: It hasn't; however, in my discussion of the initiative process and my speech on the subject, I tried to describe what a structural change would be, and I gave some illustrations of what this court historically had called a structural change and therefore invalid by initiative.

MCCREERY: I do remember our talking about that speech and what a fascinating process that was for you to prepare it. Just to return to *Strauss v. Horton*, the third of these cases, as it happened it stood for a time and then the U.S. Supreme Court took up a case that ended up —

WERDEGAR: What actually happened before that — it left us. We're done. But then a couple did sue in federal court, and by way of hearsay, because I'm certainly not involved, there was some concern among the affected community that this wasn't a good idea because of some apprehension, uncertainty, as to if it ever got to the United States Supreme Court, what would they do?

Judge Vaughn Walker held a trial, had testimony, and ruled that it was a violation of federal equal protection to deny this right. After that I think the federal Court of Appeals affirmed that and the United States Supreme Court did not take review or held the question was not properly before them. There was some question as to what did it mean? This was one couple and one federal district that — at least their marriage was good. But how far did it apply?

MCCREERY: But to what extent would it apply elsewhere?

WERDEGAR: Yes. But soon after, another case, not this party's case, was brought up to the United States Supreme Court.

MCCREERY: *Hollingsworth v. Perry* was the one they ruled on in 2013.

WERDEGAR: Yes. But ultimately they later declared that same-sex marriage was valid.

There was a conflict among circuits. And they resolved that conflict.

MCCREERY: As you're suggesting, there was a great amount of tactical maneuvering on the part of the various interests in terms of when should the concept be brought forward again and under circumstances in which case.

WERDEGAR: Is it wise to? That's true. That's a real strategy. That couple persisted, and they prevailed.

MCCREERY: And having it turn into a federal trial case and then move its way up to the U.S. Supreme Court. That was a vast change. As you say, there's been more since then. Only this June the U.S. Supreme Court gave a ruling that settles the matter for the country in terms of same-sex marriage.

WERDEGAR: It did.<sup>50</sup>

MCCREERY: But anyway, it took some time for those events to transpire but now, in 2015, we look back at San Francisco conducting same-sex marriages in 2004, and it's an astonishing journey over a relatively short time. I wonder what you might recall personally about the kinds of responses you saw out there in the world as this court was looking at these three cases that came here?

WERDEGAR: I do remember after our first opinion, *In re Marriage Cases*. As you can see, my chambers has a window on city hall, a box seat. I expect there was great fanfare outside our building when the opinion was issued. I don't know if I spoke of this earlier, but soon after couples in wedding regalia — white suits, white dresses, dresses *and* suits, however people cared to turn themselves out for the ceremony — were lined up around the block to get married. Looking out my window, I just had to reflect on the swift movement of events.

And of course, that was not the end of the story. We learned later that was just a stopping point because Proposition 8 was passed after those marriages. But looking at all the couples around the block in wedding finery to get married after we had declared that under the California Constitution they had that right, that was memorable.

MCCREERY: Yes. That moment of announcing the decision on *In re Marriage Cases*, 2008 — really, it rang out as history in the making. Do you recall exactly where you were when it was announced to the public?

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<sup>50</sup> The case recognizing the right to same-sex marriage is *Obergefell v. Hodges*, 576 US \_\_\_ (2015).

WERDEGAR: I was probably in my chambers doing my work. We finalize our opinion, we vote, the opinions circulate. We know it's going to happen. Then on particular days, I think it's Mondays and Thursdays, the opinions are issued.

So it's not as if I was getting the news somewhere. I knew the news, and I can't remember what I heard about the reaction at that time. I'm sure there was great media attention, but I don't recall that.

MCCREERY: What are your thoughts broadly about the development of this as a civil rights issue and what it means for our society? How do you see it?

WERDEGAR: I really would not care to comment. We did what we did under the law as we saw it, and there is all sorts of discussion as to what the ramifications of that will be with respect to other forms of union. There's a great deal of resistance in certain quarters, and despair. I just played my role, and it seemed right to me.

I think that's about all I should say about it because there's still so much going on, such as, I mentioned one case that's pending: Can a cake baker refuse to bake a cake? Can a civil servant in some town, not in California, refuse to issue the license because it offends her religious conscience?

MCCREERY: But as you pointed out earlier today, if people are deciding when and where to draw those lines for themselves, it's a chaotic society.

WERDEGAR: Oh, well, that's definitely my view. Ultimately the United States Supreme Court will speak to it. And when they do, whatever they say, we're all supposed to adhere to it.

MCCREERY: Would you reflect for just one more moment about the experience of looking back on these cases, as you say, in preparation for our conversations and what it's like — in the cases specifically relating to same-sex marriage — what is it like to look back and see how things have changed in a short time?

WERDEGAR: I can say in this case, as you and I have mentioned, it's happened quickly. But because this oral history has required me to look back over my history, my role on this court, how I was perceived, whatever issue it was when I was appointed — whoa! You go twenty years forward, and we

have our three new judges, none of whom has sat on a trial court. We have four women on the court. That has been a *dramatic* change.

Bringing it home to my personal history — one of two women in my class at Berkeley; now more than a majority of the students are women. Now having a woman on the bench is of no novelty whatsoever. And having no judicial experience is the mode of the appointments — no trial practice experience — times have changed. It also depends on the appointing authority, and we spoke about that. With Governor Deukmejian, he had one idea of what he wanted. Governor Jerry Brown has a *completely* different idea of what he wants.

Reading this book, *Judging Judges*, recently, which I mentioned to you at one time, by Preble Stolz, which reviewed the public hearings of the Bird Court, whether they had withheld a case to avoid it being issued before Chief Justice Bird's retention election — that's what the book is about. But I see that in that book — how many years ago? Thirty years? Forty? [1981] Governor Jerry Brown, the previous Governor Jerry Brown [Laughter] — it was commented on that the judges he had appointed had had no judicial experience. [Laughter] That's what he did then, and that's what he is doing today. That's the way he perceives what he wants. So this whole business of reflecting over time — I'm grateful that my oral history has given me the opportunity to do that in a structured way. Big changes.

MCCREERY: Thank you. You've developed such a great amount of seniority, certainly by today. But even in the time period we've talked about in reference to these cases you were —

WERDEGAR: Not really. Justice Kennard was the most senior. Justice Baxter was next. And I guess I was next. I liked that. I think I've told you I liked hearing Justice Kennard at conference and hearing Justice Baxter at conference because if different perspectives were going to come to bear I might have heard those different perspectives by the time it got to me. So that was kind of nice.

MCCREERY: Anything you'd like to add about the cases we've discussed today?

WERDEGAR: No, except that *Sharon S.* and *Evans* at the time — you said you'd read the press — the perception was that I had an open mind if not a

positive attitude toward gays at a time when that was an issue. Again, this has dissipated, at least in California, as far as I know, by and large.

MCCREERY: But you had the experience of looking into the — ?

WERDEGAR: That I had a civil libertarian point of view, basically, I think. I think *Catholic Charities* picks that up as well, speaking of the perception of people who do look at what the court does.

MCCREERY: Do you agree?

WERDEGAR: Yes, I do.

MCCREERY: Let's stop there for today, and thank you so very much.

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## INTERVIEW 10 (OCTOBER 22, 2015)

MCCREERY: Good morning, Justice Werdegar. We are going to cover several subjects today, the first of which I hope will be some recent changes in the membership of the California Supreme Court. I think a good place to start is the time when Chief Justice Ronald George announced in July 2010 that he intended to retire as of the following January. How did the news come to you, as you call it now?

WERDEGAR: Hello, Laura. It's nice to see you again. The way the news came to us is we were at conference. We had completed the business of granting or denying petitions and whatever other business was at hand that day.

The chief, Ron George, said, "Oh, I have one more thing to say to you."

We had been gathering up our papers, and we settled back. He said, "I am going to be stepping down."

If you step down as chief you can't continue as a member of the court, which I think is unfortunate. I think it's unfortunate that if someone of capability and talent is appointed chief justice, they are either chief justice or they are not a justice. Other systems have rotations or elections, whatever they have. But you can be a justice of the court at some point, even if you've served as chief. If you don't want to be chief anymore in California, you have to leave. Now, in his case he was probably ready to leave on all counts.

But we were *stunned* because Ron George had said many times that he loved his work, and he had given every indication that he was here indefinitely. I don't know how long he actually did serve. Do you?

MCCREERY: It was close to fifteen years in the chief's role.

WERDEGAR: That's a good solid chunk, not compared to my twenty-one, but — [Laughter]

MCCREERY: Plus the several years as associate justice.

WERDEGAR: But we were stunned. We were stunned, and actually tears came to my eyes. I think he remarked that it was going to be his seventieth birthday and that he had talked it over with his family, and he wanted the freedom, as so many people say, to travel. That's how the information came to us.



RETIREMENT DINNER FOR CHIEF JUSTICE RONALD M. GEORGE (SEATED) — ASSOCIATE JUSTICES JOYCE L. KENNARD (SEATED) AND (L.-R.) CAROL A. CORRIGAN, CARLOS R. MORENO, KATHRYN MICKLE WERDEGAR, MARVIN R. BAXTER, AND MING CHIN, ST. FRANCIS YACHT CLUB, NOVEMBER 17, 2010.

MCCREERY: What was the process then, as you observed it from where you sat, in terms of learning about who would be appointed to replace him?

WERDEGAR: I think Ron George had laid the groundwork. He had some people in mind, and I think that he presented a list of these people to Governor Schwarzenegger and probably commented on his view of each of them. Ultimately, as we now know, Governor Schwarzenegger chose Tani Cantil-Sakauye, who has been our chief now for five years.

MCCREERY: What knowledge did you have of her, or acquaintance with her, before you learned this?

WERDEGAR: None. But we became acquainted with her. There were so many events at which she was presented and announced and honored and so forth. If you want my first impression, it was that she was remarkably poised, remarkably articulate — and privately I would say very brave to accept this challenge but presumably ready for it and honored to have it.

MCCREERY: Did other members of your court know her at all, as far as you can tell?

WERDEGAR: I can't say. Ron George had seen her in action on the Judicial Council, and I infer that he saw her leadership capabilities and her poise and her articulateness and felt that she would be a very, very worthy successor. There were others on the list, but Governor Schwarzenegger, after weighing the factors, chose her.

MCCREERY: I would like, of course, to talk about her coming and her leadership. But first let me give you a chance to reflect on Chief Justice George's time and what sort of significance it was that he retired at the time he did.

WERDEGAR: Have we not discussed his leadership before? I'm happy to talk about it. In my judgment he was a superb leader, high-energy, ready to take on adversaries — if you consider persons of different views about the judiciary as adversaries. During his time, I think issues about the courts changed, and this group known as the Alliance of California Judges emerged. This was certainly new to me, that within the judicial branch there would be factions.

I was, and continue to be, completely removed from their issues or their programs or interferences with the agenda of a given chief. But they have a very high profile, and it was known to us that all of a sudden that — maybe not all of a sudden, but it seemed like it — that there was this group that disapproved of what Ron George's leadership had been with respect, perhaps, to centralizing government of the trial courts. Maybe some of this related to how the AOC had grown and grown during the period of Ron George's leadership. And as I say, there was centralization.

So this group emerged, and Ron George took them on or at least resisted or countered what their concerns were. I think they had the ear of some legislators, and Ron George had to counter that and advance his ideas.

Some of the signal achievements of his era were to centralize the financing of the local courts — and this is all hearsay because I haven't lived or experienced any of it, and it's his history. But I think in Los Angeles, in particular, they had a rugged individualism and more control over their budgets, and I guess their budgets were more generous, perhaps, than proportionately they might have been.

Then, during Ron George's tenure as well, he promoted the elimination of the municipal courts. That came about by initiative, I believe. That was controversial in some quarters. It's now accepted. We have young students who don't even know there were municipal courts. Parenthetically, there used to be justice courts and on down the line. Every institution evolves and changes. That occurred under Ron George.

Internally I found him engaging, fair, efficient, a wonderful sense of humor, and I considered him a personal friend. So with all of that and not knowing what the future held, I was quite sorry to hear that he wasn't going to be with us anymore because he had always projected the idea that he loved it and was here for the long haul.

**MCCREERY:** As you say, Governor Schwarzenegger selected Justice Tani Cantil-Sakauye from the Sacramento Court of Appeal, where she had served most recently after being a trial judge in that area. She had some twenty years of judicial experience. When she arrived and actually began carrying out her duties, what did you note about your new chief?

**WERDEGAR:** Let me step back a bit. What I noted about that time is there were a great many farewells to the present chief and celebrations of the arrival of the new chief, far more than when Ron George replaced Malcolm Lucas. It wasn't just that we all had a gathering. Of course, different venues would want to say goodbye to Chief Justice Ron George. There were events in Sacramento, both for the coming and the going, and each separate. And there were events in San Francisco and questions and answers and interviews with Ron George. His leaving was remarked and honored multiple, multiple times. We attended all of these. [Laughter]

And Tani Cantil-Sakauye's coming was — we were up at Sacramento for that swearing-in and down here for this swearing-in and a Q&A someplace else and the videotape of something else — much more than when Ron George himself came on. It's a major event in the life of the Supreme Court, of course.

These comings and goings of the new and former chiefs were remarkably noted and celebrated. We were sorry to see him go, and delighted at the governor's choice of successor. But for a very long time it seemed to me as a member of the court, there were a great many events marking these comings and goings.

MCCREERY: Why do you think this transition was marked so differently from the last?

WERDEGAR: I really can't say. But we've all settled down, and it's been five years now of Chief Justice Tani Cantil-Sakauye. And as far as I know, former Chief Justice Ron George is remaining active in his way on various committees and enjoying post-court life as he had envisioned it.

MCCREERY: Since she was the first justice at any level of the court to join since Justice Corrigan had come in 2006, what change did that signify in the makeup of the panel?

WERDEGAR: I'd like to step back and speak, since there have been many changes. In fact, in five years a majority of the court left and a new majority came on. We didn't know that when our new chief came. She came, and she assumed her responsibilities of position, I would say, very gracefully. She's a very, very capable person.

Speaking only of that particular change, except that it was one person and not another, I would say there was real continuity there. Continuity in policies, continuity in jurisprudence. I think her leadership outside the court, bringing to it her own charm and personality — I think she continued along the lines that Ron George had started.

But she inherited some of the problems that were just coming to a head, certainly the budget problems. In a way, when Ron George left the writing was on the wall that there were going to be budget issues, both because of the economy and perhaps a new attitude in the Legislature toward the courts. But after he left it crescendoed and peaked, and she very soon had to handle that.

These are not matters that I'm closely conversant with, but I'm sufficiently aware that she was faced with uncertainty and perhaps difficulty concerning the branch's relationship with the Legislature that had not been the case under Ron George. So there was continuity and continuation of policies but also she had to, as a brand-new chief, very quickly face some very serious budget issues and attitudes in the Legislature.

MCCREERY: There were those writing in the popular press who remarked along the lines of the idea that she didn't even have a honeymoon period to get settled. How did you see it?

WERDEGAR: She had no honeymoon period. In retrospect, it's a fact. She had no honeymoon period. Again, this is not my realm, the political aspects of why the Legislature is, perhaps, a little disgruntled with the court or wants to manage the court a bit more, or why the Alliance of California Judges is so annoyed. It's just not things that I'm called upon to be intimately familiar with. But you can't avoid knowing that they're happening.

She just showed right away how together and poised and capable she is in a public way. How she handles it privately, none of us could know. But she's terrific.

MCCREERY: You mentioned continuity. Why is that important in this particular context?

WERDEGAR: It happened as a fact. "Important" is a value judgment. I think it is important if you agree that where we were before is the right path to be on. As far as I'm concerned it was. [Laughter]

She and the previous chief were here to protect the prerogatives of the court, but of course any institution, including us I suppose, can be improved, and there has been criticism. I think it goes to the AOC, a lot of criticism about its budget, its personnel. I'm not in a position to pass judgment on that, but I'm also not here to say that all the criticism has been unwarranted. Streamlining, perhaps, was appropriate.

MCCREERY: Say a few words about the new chief justice as a judicial colleague, if you would.

WERDEGAR: The same traits that I mentioned earlier come to bear, and in this regard she's very much like Ron George. She's collegial. Whatever private reservations she might have about any one of us as colleagues, you

never know. She treats everybody equally and equally warmly. It's a real skill. [Laughter]

She never seems to have her temperature rise in a way that is displayed to us. It's excellent leadership. And if there are little potential fires, you cannot be a body of justices deciding complex, difficult issues and not have differences arise among the colleagues. Sometimes those differences get, among some, for some, a little heated, a little personal, maybe. She's wonderful, as was Ron George, in just calming the waters if she becomes a part of it, perhaps suggesting alternate paths that would be less contentious.

MCCREERY: That is a skill.

WERDEGAR: It's a real skill not to get embroiled in emotionalism. Mind you, these are all my outside observations. I'm not privy to how she handles the tensions, the pressures privately. But in her capacity as being our chief, she handles them well.

MCCREERY: What about the settings to which you are privy, that is, the court conferences and the settings in which you interact as judicial colleagues?

WERDEGAR: Let's step back. Every time I see her speak — and all of us marvel at this — she never has a note. This is extraordinary. I think it's something based on her history — I've heard this — that she was trained to do. She took public speaking. She must be naturally gifted too. But everybody, bar groups, everybody remarks on this. She gets up and speaks cogently, sequentially, articulately. From start to finish, it all comes together. Not a note. [Laughter] It's really phenomenal. I've never seen anybody else do it.

The question had to do with how I interacted? It's at conference, where she hears everybody out. She never — even things that you know have to annoy her — you never hear it in her voice.

MCCREERY: What about the power the chief has to assign opinions, for example? What do you note there?

WERDEGAR: The chief does have that power, and both with Ron George and this chief I note nothing except that cases get assigned. I never have any indication on my part that they're assigned in any way but fairly.

In times past, way back, I think in the Lucas years it was thought people would maneuver to get a particular case assigned to them. If there was a petition for review on conference and a particular chambers really wanted that case, they would write a supplemental memo making some point, and they would be automatically assigned that case.

We still have supplemental memos, and people who write them most often are assigned the case because they've shown an interest or a special perspective. I don't think it's used as a contrivance now to get the case. I think everybody feels the assignment is fair. But neither chief has ever put out in writing as to what criteria they use.

Common sense says the first criterion has to be, will the justice to whom it's assigned be able to able to garner a majority? Sometimes if a justice has spoken out about a case — "I think the Court of Appeal was really wrong," — that justice could be assigned the case, but maybe not if it wasn't clear that's why we took review. If somebody has a clearly stated preliminary view and the chief suspects that view may not carry the day, or on the other hand if that view seems to be a consensus view, that person might get the case.

When we grant petitions, we don't always express our view on the merits of the case. Some cases are obvious grants. There is a conflict between the Courts of Appeal. Grant. Other cases we might discuss why we are granting, and from that the chief would extract an individual's position on the case and discern whether that would be a good assignment. The chief has to consider what the caseload is, what's in that justice's box. And if that justice has a large list of briefed cases that haven't been circulated with a calendar memo, she might be less willing to assign the case to that person.

Nobody has a lock on any subject matter. But sometimes an individual will get assigned a series of cases in the same area. That happened to me in the SLAPP area, Strategic Lawsuit Against Public Participation, and in the CEQA area, California Environmental Quality Act — not exclusively to me, but for a while I got quite a few of them, which makes sense. But nobody has a lock on a subject. Nobody is an expert over and above their colleagues on any subject of the law, no matter what they did their previous life.

**MCCREERY:** As time went on, how did you see Chief Justice Cantil-Sakauye changing or adjusting her leadership style, if at all?



WERDEGAR: I didn't. She manifested confidence and poise and capability from the beginning. Again, this is an outside observer's view. People who work intimately with her, like her staff or her family, would perceive changes, perhaps.

One thing that she has taken on — there's so much a chief has to do — but in the outside world, apart from trying to negotiate and deal with and educate the Legislature about the court, she has taken a leadership position in promoting civics education and supporting and promoting diversity in the legal profession. I think those have been two of her signature extracurricular endeavors. She speaks to a lot of schoolchildren.

MCCREERY: That's admirable that she's thinking to inspire others to —

WERDEGAR: And she is, you see, the perfect one to do that, if you know her background, the perfect one to inspire others.

MCCREERY: Thank you so much. As we know, not too much later, a little bit later, Justice Carlos Moreno also elected to retire — in fact, very quick on the heels, as I think about it, of Chief Justice George leaving. [Laughter] He decided to return to the private arena and continue his career there. We did touch on Justice Moreno a bit before, and you talked about how you were able to get to know him. But I wonder if you could reflect for a few minutes on your friendship and on his jurisprudence, as you saw it?

WERDEGAR: He was an extremely affable, cordial person. I know that Chief Justice George, when there was a vacancy that ultimately Carlos Moreno was appointed to fill, Chief Justice George spoke to the governor at the time — was that Gray Davis? — and said, "Please give us someone who can be collegial and can get along."

Carlos Moreno was that person. He was just the most affable, low-key individual, a pleasure to have around. Also, it was interesting to us, his background. He came from a life-tenure federal district court judgeship. That was new. That was new, that somebody would leave — there's so much emphasis on life tenure — but would leave that and come to us. I think he was motivated — well, I can't speak for why he was motivated, but certainly our cases are more interesting. We're at a different level.

I have a friend who chose not to be elevated to an appellate court. He really liked the federal trial court. He had the opportunity to be elevated, and he decided he really liked that trial-court work. I'm sure Justice

Moreno was terrific at it. But Ron George, who went through the whole system — and I myself — I love the appellate work. So Carlos Moreno had that unusual background.

He was very congenial. His jurisprudence: I did notice, going through some of my dissents, that if nobody else joined me, he might have. We do, ironically — I don't know how it works so well, but we really do reflect our appointing authority, even though they cannot pin us down; they cannot predict how individuals will act. But I think I did reflect Wilson's anticipation and hope that I would be a moderate justice — I wouldn't have an agenda — and I couldn't be pegged as really conservative or really liberal, whatever those terms mean, and I find the terms annoying, but I think the justices that George Deukmejian appointed tended to be — again, using terms that I resist, but — more conservative.

Gray Davis. I really can't characterize what he was like, but Gray Davis was a Democrat, and I think Carlos Moreno at that time was the only Democrat on the court. [Laughter] And he was more to the liberal side. But when I would dissent, I would sometimes have his concurrence in that dissent. Not always. And I didn't always agree with him. That's about all I can say.

**MCCREERY:** Say a bit more about the collegiality and why that's important in terms of establishing working relationships.

**WERDEGAR:** There are working relationships and there are personal relationships. Because you're all on the same court doesn't mean you're going to be personal friends. In fact some courts around the country are notorious in not only not being friends but suing each other and assaulting each other. [Laughter] Those are extreme examples.

On this court most of us make an effort to be collegial, which means respectful and cordial, disagree but not be unpleasant. There have been exceptions in my experience, but not many.

Some come from the same background, like Justices Corrigan and Chin. They were both Alameda D.A.'s. They were both Alameda trial court judges. They were both First District Court of Appeal colleagues, same division. So they come with a different relationship. Others of us come as total strangers to each other. But in engaging in discussion about cases, we try to be collegial.

Carlos Moreno I had the opportunity to get to know more personally because when we'd travel my husband wasn't with me and his wife wasn't with him. And we weren't part of any group or pair that would go off, and so we would share a meal or something. As I say, he was just a very easy person to engage with, nice to everybody. There's something so relaxed about his personality that everybody would find engaging.

MCCREERY: Have you been able to stay in touch with him, now that he's serving as U.S. ambassador to Belize?

WERDEGAR: Many of us joked about, "Our next trip will be to Belize." I'm sure he would welcome any one of us. But no, I haven't had that opportunity. I did see him, before he went to Belize, at some functions.

MCCREERY: As an aside, in 2009 when President Obama had the chance to make his first appointment to the U.S. Supreme Court, there was much talk that Justice Moreno was on a short list to be considered. May I ask what you know of that?

WERDEGAR: I know it's a fact because he said so. That's all I can tell you. He wasn't withholding the fact that he had been approached, and he had gotten pretty far along on the process. That's all I know. But it is a fact. They were considering him at some level, and it wasn't just gossip in the bar. I think some people related to the White House actually spoke to him.

MCCREERY: It's always a matter of great interest when a Californian is on the list, isn't it?

WERDEGAR: Yes. I think that members of our current court, every single one of our new members, depending on the politics and on who the party is — the politics and timing — I think any one of the new ones people would look at for all the obvious reasons.

MCCREERY: That leads us perfectly into the subject of Justice Goodwin Liu, who as we know Governor Jerry Brown selected to succeed Justice Moreno. Actually, since we're speaking of federal courts, that was after Justice Liu's nomination to the Ninth Circuit.

WERDEGAR: Prolonged, yes. Of course, I didn't know anything about him before that, but the known history now is — I don't know how long he was stalled as being considered, and he finally withdrew. What was it, about a year?

MCCREERY: It was perhaps even a bit more. It was a long time.

WERDEGAR: Yes. And the story is — this is hearsay, but the story is that when he withdrew somebody immediately called Governor Brown and said, “You should look at this individual,” which Governor Brown did immediately. They met, and Governor Brown had found his person and named him.

MCCREERY: How did the news come to you on the court? Do you recall?

WERDEGAR: No. I actually do not recall how that news came, and I certainly knew nothing about Goodwin Liu before.

MCCREERY: When he arrived, what did you learn?

WERDEGAR: Having been with him, I learned that he’s very bright. And we do share the Berkeley Law, formerly Boalt Hall, relationship. That’s one of my alma maters, and it was where he was teaching and involved in the administration. I had heard that they were hoping he would stay on and perhaps take a leadership position, maybe a future dean or something. He has tremendous talent and energy and capability.

We became acquainted working on cases. There was a time when he came on — I can’t remember the cases, but there were a number of cases, more than usual, in which I was not seeing it the way the majority was, nor was he, and so we had the opportunity to talk to each other and get more quickly acquainted.

He was brand new. He didn’t know the personalities. He didn’t know the predilections. He didn’t know, perhaps, the jurisprudence or the tendencies of various members of the court. I think because of the Berkeley Law connection, and also we were differing with some of the majority views that were going around at the court then, we had occasion to become acquainted on a more personal level.

MCCREERY: You’re saying your consideration of cases and your positions might be done in personal conversation, rather than through more formal channels?

WERDEGAR: That’s right. We would talk to each other. Given the factors I mentioned, he and I had more of a personal interaction than had been my experience on the court.

MCCREERY: This is an interesting development for you to have new colleagues coming in, in more recent years, with whom you are establishing a different kind of relationship.

WERDEGAR: Yes, you mentioned Goodwin Liu, and that's how that came to pass. Soon after there were — he was here three years, was he not, before the final two? So to repeat, in five years we lost a majority of the court and we got a new majority. Of course, the chief preceded — thank goodness. You don't want a lot of change at once.

MCCREERY: Let's move into that more recent period of change because, as you say, wrapped together it amounts to something of a turnover.

WERDEGAR: Absolutely.

MCCREERY: As we know, in 2014 Justice Joyce Kennard elected to retire after twenty-five years on this court. This gave Governor Jerry Brown another opportunity.

WERDEGAR: Let me say, I was surprised. I think many of us were very surprised that Justice Kennard decided that she wanted to step down. We felt that she was engaged in her work, and we weren't aware that she had many things pulling her away. But she did, so that was a surprise.

MCCREERY: She elected to stay precisely twenty-five years, if I recall correctly.

WERDEGAR: Maybe in her own mind it wasn't a surprise at all. Is that right? It was precisely? Maybe she had been planning this, looking ahead. But I'm not aware that anybody expected that or was aware of it.

MCCREERY: More surprises is what it amounts to, in terms of announced retirements. [Laughter]

WERDEGAR: Yes. Actually, when Justice Moreno — you didn't ask me how that happened. We're at conference and we're about ready to leave, and Justice Moreno says, "Oh, I have one thing to say to you." He said, "You know, when Ron George stepped down I thought, 'Maybe I could do that.'" He said something like that. That was his way of presenting it. [Laughter]

"Oh!"

And I think with Joyce Kennard, too. [Laughter] So we're wary of these conferences when somebody says, "I have one more thing."

I remember Carlos' perfectly. I think with Justice Kennard it might have been the same. "Colleagues, there's something I have to tell you."

MCCREERY: But in any event, a surprise to you.

WERDEGAR: It was a surprise to me, and I think it was a surprise to many others, if not all. I don't know who she had taken into her confidence.

MCCREERY: That gave Governor Jerry Brown a second opportunity to select someone for this court, and again it was a professor from a local university, Stanford.

WERDEGAR: There again, just as with Goodwin Liu, the governor waited a very, very, very long time. I don't know who he was considering, but once he heard about Goodwin Liu he jumped on it.

So with the vacancy created by Joyce Kennard, I don't know how many months went by. But the rumors were that the governor was looking for a Hispanic, and so — these poor individuals whose names are thrown around that might have filled that bill — their names were in the press and so on. But I don't know how Justice Cuéllar came to his attention. But he was not one of the names that was bandied around, which shows you how useless all the speculation is. And he was a professor, yes, and very active, many responsibilities.

MCCREERY: I take it you didn't know Justice Cuéllar personally in any way beforehand?

WERDEGAR: No.

MCCREERY: Talk a little bit about his coming and what kind of a colleague he is.

WERDEGAR: At that point we had been without a judge — how soon after Justice Kennard did Justice Baxter step down? We were having pro tems come up during these vacancies, and that's an important part of this story. The court is really handicapped when it's lacking a member. Our cases don't move. It slows things down.

MCCREERY: The two new ones to replace both Justice Kennard and Justice Baxter didn't start until the beginning of this calendar year, 2015.

WERDEGAR: Yes. So we had many months with one vacancy.

MCCREERY: You had some eight months or something after Justice Kennard left. And then Justice Baxter did serve until the beginning of the year.

WERDEGAR: So during those eight months we're working on cases, and we don't have a court member. The chief assigns pro tems. The system that Ron George devised, she continued. But if these cases are going to be very divisive, one point of view is that you don't want a pro tem to be the swing vote.

That point of view has been criticized, as anything having to do with the judiciary could be criticized, on grounds that, "We purport to say that when the Court of Appeal pro tem is sitting here it's just like any other judge. But we don't really," I'm quoting, "We don't really act that way because we try to avoid moving ahead on cases that are going to deeply divide the court."

MCCREERY: It speaks to the concept that any turnover, much less a great deal of turnover, is somewhat disruptive.

WERDEGAR: It is disruptive, and it has been. But that's humanity. These individuals have chosen for their personal reasons to retire, and that's how it came. We were, during the George Court, described as a "long court," which I came to know meant stable, lots of stability. And now we're in a new period, very new. I'm giving it stability. I'm here. [Laughter]

MCCREERY: You are doing your part. [Laughter]

WERDEGAR: I'm doing my part.

MCCREERY: Say a few words about Justice Mariano-Florentino Cuéllar, if you would.

WERDEGAR: First of all, I saw his picture and his name in the paper. No, I didn't see his picture. I thought it was a woman. Mariano. I'm not Spanish-speaking, and I thought, "Oh, Mariano." [Laughter] And then, as I had with Chief Justice Cantil-Sakauye, I practiced Mariano-Florentino Cuéllar's name. These are beautiful names.

He was distinctive in coming around and interviewing anybody who would have him about, what is it like? What advice do we have? What are the procedures? What are our observations?

He's known for carrying with him a notebook. He writes everything down, not just when he's talking about matters that he might want to

remember that somebody said about the court. But I think — when you interview him, when his time comes, you can ask him — but I think he keeps a daily journal of everything that transpires during his day.

Anyway, he was very eager to speak to former justices, current justices, anybody that would be willing to speak to him before he actually assumed his seat. So that was very nice because I got a little bit acquainted with him. And I met Justice Liu beforehand also. He met with members of the court before he came on.

MCCREERY: What did Justice Cuéllar want to talk with you about, if you remember?

WERDEGAR: I actually don't remember, but common sense would suggest, what advice do I have? How do things work? Anything he could find out from me he would have asked. He's a very engaging person, as you probably know, and high-energy, too.

MCCREERY: As we touched on in passing, Justice Marvin Baxter also stepped down. Now I must ask you how you learned that news?

WERDEGAR: I do not remember. Very likely it was the same. How else, come to think of it, would a judge tell his colleagues or her colleagues that he was going to retire? So he probably did.

MCCREERY: To what extent were you surprised, if at all?

WERDEGAR: Justice Baxter had served so long and so well, and not just as a member of the court doing his work jurisprudentially, but he was on the Judicial Council, which I gather is a tremendous amount of additional work and very, very important. So his workload — he was loyal and capable. I think Ron George put him on the Judicial Council. That's just so much work.

I had been with him and his wife, and I had said to him once — he was lamenting a little bit about how busy he was, and I had said to him, “Marv, you can step down from the Judicial Council.”

He said, “Oh, thank you Kay!” [Laughter]

It's so much work. How long was he on the court? Twenty years? I think the question was, was I surprised?

MCCREERY: Yes. To be more exact here, since January 1991, so twenty-four years.



WERDEGAR: Twenty-four. I think Marv Baxter felt that he was needed, as he was, not only on the Judicial Council but I think he felt he was needed to keep us all steady and true. [Laughter]

MCCREERY: Can you expand on that? [Laughter]

WERDEGAR: He had tremendous government experience, which we don't have now. Maybe the chief does, having — the chief might, herself. Stanley Mosk had it, lots of political common sense.

Marv Baxter had a lot of political common sense. He knew how institutions would react. He knew how things worked. You can bring more to being a judge than just deciding cases appropriately. You don't want everybody to have been through the political mill, but he was experienced, having served in the Deukmejian administration.

I think he felt a real responsibility to keep us steady and on track and to share his wisdom through his years in government. But there comes a time when there was so much else that he wanted to do. And your spouse. If one spouse is tied to the job and working all the time, the other spouse suffers and is deprived of life together.

He was well celebrated on his retirement. Everybody went down to this extravaganza in Fresno, hundreds of people. I remember the court went, and you stay overnight in a hotel. He is Fresno's golden boy, hometown hero. They love him. We all went down and celebrated there.

Of course, the court has for its retiring members a private party. We have a private dinner. We've done that for each — or a lunch — each one of the justices that has retired. Then various bar groups that have the Supreme Court to lunch when we're in L.A. or something. They honor the retiring justice. Then many other events, I'm sure, that perhaps I didn't attend.

Marv Baxter's leaving the court made a big difference, I would say.

MCCREERY: You mentioned that he thought of himself as needed for some of the expertise he brought.

WERDEGAR: I'm speculating.

MCCREERY: I understand that. You're just characterizing. But I wonder to what extent that extended to his own jurisprudence in the sense of his representing a different viewpoint or that sort of thing?

WERDEGAR: I think I have to leave that to people who analyze our cases, but he was an influential member of the court and a very persuasive member of the court, definitely.

MCCREERY: And an experienced member.

WERDEGAR: Absolutely.

MCCREERY: As we know, his departure gave Governor Jerry Brown a third opportunity.

WERDEGAR: [Laughter] You know, Jerry Brown had that opportunity in his first incarnation as governor. Who would dream that he would, in a second lifetime, have the chance once more to appoint three members of the court? I don't know if he had more than three in his first — did he have more than three?

MCCREERY: He had seven.

WERDEGAR: Really? Well. So here he has the chance once again to appoint a number of justices and to people that he — to apply his standards and his values. So yes, along comes the third.

MCCREERY: As we know, he looked to the U.S. Department of Justice for this third appointment and selected Justice Leandra Kruger.

WERDEGAR: Yes. Actually, I don't know that he *looked* — she came from the U.S. Department of Justice, but where he *looked* is a question. I don't know how he found Justice Kruger. He clearly was delighted when he did, but I don't know if he found her through Yale. All of my new colleagues are Yale graduates, as is the governor.

I don't know how he found her. He did want an African American, just as he had hoped to have — his first time out he wanted a woman, he wanted a Hispanic, and he wanted an African American. This time, I think his wish was also to bring to the court that kind of diversity of ethnicity.

And again, I feel sorry for these people whose names are bandied about as potentials because they fulfill at least that aspect of what it's presumed the governor was looking for. Certain names were thrown around. Again, it's hard for the person who is being speculated about.

Somehow, he came to Justice Kruger, and she had to move very quickly. She was living elsewhere, in Washington. She was in the Department

of Justice. She had to move here. She has a two-year-old, probably a three-year-old child now. And her husband had to agree to move and find lodging, which we know is not easy in the Bay Area. She came to court, knew nothing about the California Supreme Court — a big adjustment for her.

MCCREERY: As you point out, she was not the sort of person on these lists of names that were being bandied about, and I think it was something of a surprise in many quarters when she was named.

WERDEGAR: Yes. She wasn't a Californian at that time, although she has the California bar. She was born and raised, I think, in Southern California. But yes, of course. And, of course, I think Governor Brown *loves* to surprise people.

MCCREERY: Doesn't he, though?

WERDEGAR: Yes.

MCCREERY: Justice Kruger also was notable for being just thirty-eight years old at that time of her appointment.

WERDEGAR: Indeed. But then, Jerry Brown was thirty-eight when he was governor, wasn't he. [Laughter]

MCCREERY: Yes. And yet she had racked up an impressive career to that point, very much so.

WERDEGAR: Very impressive. Argued a number of cases from the Solicitor General's Office in Washington before the United States Supreme Court. And rumor has it that the governor checked with certain justices of the United States Supreme Court to get their impression of this advocate and heard what he wanted to hear. Good things.

MCCREERY: She certainly had been tested, just in a different realm from judicial service.

WERDEGAR: Oh, yes. Definitely.

MCCREERY: Say a few words, if you would, about Justice Kruger, now that she is here for a little time. What does she bring and add to the panel?

WERDEGAR: It's too soon. She strikes me as very thoughtful and diligent, articulate, which you would expect. But it's way too soon. I think she's authored one opinion. It takes real time to get assigned a case, get the briefing

on the case, get the case worked up, get it circulated, get it set for argument. But at our conferences and all, she contributes a good deal. She contributes, as do all my colleagues.

Actually, conferences are more — the change — people seem more engaged, and there are more questions being asked. When you've worked with the same group for years and years and years, perhaps there isn't a motivation to have so much discussion. Now we are all new personalities interacting, and I would say there's a fresh energy.

MCCREERY: In the realm of oral argument, when all of you sit and interact directly with advocates from the outside and are there for members of the public to see, what do you note about the new members in terms of their style in that setting?

WERDEGAR: The ones that left us certainly had a style, but those styles have gone. [Laughter] Justice Liu is — well, they're active, they're engaged. They're certainly prepared. But all of us are. Some people like to talk more than others. That's a style. I think Justices Cuéllar and Liu, perhaps reflecting their professorial background, like to engage a lot.

MCCREERY: It's interesting to have a couple of academics come in. You had spent some time in that realm yourself, in both teaching and research roles. What do you think that kind of background adds that might not have been here before? Any thoughts about that?

WERDEGAR: The question has many layers. What does it add? If you come from an exclusively professorial background, you do tend to look at things differently. You're inquiring. You're pushing. You're perhaps going in tangential directions, which is very different than, I think, somebody who has come from being on the bench. You're not as interested in the intellectual, academic, hypothetical, theoretical. But some of it is a personal style, too.

I think the diversity that I'm interested in, in addition to ethnic diversity, is diversity of background. I think sometimes that's overlooked. You want people who have had solid litigation experience in civil law, which we don't have a lot of. You want people who are familiar with the criminal courts, which we do have. You want academicians. You want people who have worked in different subject areas.

We only have seven justices so we can't have every kind of diversity all the time that we want. [Laughter] But you do want a diversity of

background in the field of law. You don't want all professors, and you don't want all D.A.'s, and you hope for a mix. It ebbs and flows with different personnel.

MCCREERY: I was recalling that in some of the past appointments, including yours, there was much made of the fact that you had not served as a trial court judge. Now you find yourself on a panel where fewer and fewer of the members fit that bill.

WERDEGAR: This goes back to the advantages of longevity. As you suggest, when I was appointed there was so much I — quote — “hadn't” done and certainly that I hadn't been “a trial court judge,” and before that I “hadn't been a D.A.” This was the Deukmejian era where that was the standard. The muni court existed then. You had to start at the muni court. This is what he wanted in a judge: very practical, very experienced, very hands-on.

My background, through both circumstances of the era and my personal path along the way, was so different. It was so widely questioned and perhaps implicitly criticized. Then again, I was a woman, which was so new. So now, as you say, we have three who have never really practiced law and never been any kind of a judge and aren't even that acquainted with California law, and that's fine. It's just to show that time and priorities, attitudes, change, and it's been very interesting to me.

MCCREERY: Which of your new colleagues have you gotten to know well in a more personal way or have found an affinity with?

WERDEGAR: Certainly Justice Liu, as we discussed. But it's too soon to say. They're very new. Justice Cuéllar is the most outgoing, high-energy, affable, sociable person you would ever want to meet. He's remarkable in his affability and his upbeat temperament and his engaging with people.

I offered Justice Cuéllar coffee one morning at conference. Some of us have coffee. He said, “No, I already have enough stimulant in my own system.” [Laughter]

MCCREERY: Thank you. We can return to the subject of your colleagues at any time. But perhaps for today we'll move on to talking a bit about the body of work you've produced in dissent over time.

WERDEGAR: All right.

MCCREERY: Would you like first to talk about the committee assignments?

WERDEGAR: We might interject about the library committee, for instance, which doesn't sound all that exciting.

The court, as you will recall, had to leave the Civic Center chambers immediately after the earthquake, which was 1989. I was a staff attorney at the time. The earthquake occurred after five o'clock, and I wasn't in the building. The whole building trembled, I guess. I wasn't in the building, but that's historically true. We were allowed to come back for fifteen minutes to go into our, in my case, little cubicle as a staff attorney, and that was it.

Then we moved into the Golden Gate side of this building, which hadn't been impacted. Different foundations. We were there for some period of time while the judges looked for alternate headquarters. It had to be a challenging task. They found Marathon Plaza, 303 Second Street, I think, south of Market. We moved. There we were for how many years? Maybe three or four.

I went over there as a staff attorney to Justice Panelli, and while I was there I was appointed to the Court of Appeal, which was in that same building, they too having to vacate this building. Then we came back. Oh, and after that — I was in the Court of Appeal — I must have been elevated to the Supreme Court while we were there as well because we came back and we got to choose our chambers. Have we gone into that?

MCCREERY: A little bit. Go ahead.

WERDEGAR: Yes. I was going to choose down at that end, the eastern end of this floor, because that's where my little cubbyhole had been and I thought I would now replicate that. But they persuaded me this had the better view. We chose in order of seniority.

The question with respect to the library was, "We have this huge building. There's going to be a Supreme Court library. Is it really efficient, justifiable, to have the Court of Appeal have a duplicate separate library?"

So they appointed a library committee, and I was appointed chair. We had representatives from the Court of Appeal and the staff and the librarian to debate whether we could consolidate. Now, this sounds pretty obvious, but actually there were many deep concerns. The concern at the time was confidentiality. If you have Supreme Court staff leaving their papers

in the library, could some Court of Appeal person come and see what they were working on?

I say it with a certain tone of voice because I think it was not really an issue. But it was a very big decision that we would not have two separate libraries. We would have one library that would be accessible to the Court of Appeal. Their key cards would get into the library, but their key cards wouldn't allow them to continue in — part of the Supreme Court is on the fourth floor, where the library is — get into our quarters and our chambers. That was a major issue at the time.

I continued as chair of the library committee. We had some difficulty finding a librarian. It's really a huge job. We did hire someone who had worked for a large law firm, and I think after a week she reconsidered and withdrew. So we had another search, and we did choose our current librarian, Fran Jones, who has been with us for quite a bit of time.

I don't go to the library except rarely, and my impression is that not many people do. You know why. It's all desktop-technology access. We do have wonderful research staff. Any question you want, they can pull it up for you and research it. So that's very good.

That's my experience with the library. I served for a very long time, and there were issues that at the time were contentious and divisive. I presided during that time, and finally I said to Ron George that it might be time for a change. He said, "You're not sentenced for life." [Laughter]

We had a perfect new chair, which was our new justice, Carol Corrigan, whose mother had been a librarian. Her father was a newspaperman. She came on, and as it happens with time, the issues that were so divisive and concerning — they abate, and you move forward, and there are no issues anymore. So that's that.

MCCREERY: We also touched, when talking about your time on the Court of Appeal, on this matter of publication. You described chairing a publication committee to look at the whole matter of publication, depublishation, and so on. Would you just review that conceptually for a moment?

WERDEGAR: Yes. I'd like to give a little background. In California all opinions of the Supreme Court are published, but only those Court of Appeal opinions that are certified for publication are published. California is, I think, unique or one of the very few states whose constitution requires

that all appellate opinions be “in writing with reasons stated.” That’s not true everywhere, but we have that.

We also have the largest judiciary, as Ron George used to say, in the Western world. Our Courts of Appeal probably produce thousands of opinions a year, not all of which are noteworthy, most of which are not. You have to remember that every criminal judgment can be appealed because indigents or people who can’t afford it are assigned an attorney. There’s no disincentive, if you’ve been convicted of a crime, to appeal, so we have a lot of routine, maybe two-and-a-half page, not noteworthy opinions that are addressed only to the parties. You can see the books in my room and in the library. Only about 8 percent of the Court of Appeal opinions are published, and there are rules that guide the decision to publish or not.

We do have a court rule that sets up the criteria for publication, and what the rule was at the time that this committee was appointed was an opinion should not be published unless it establishes a new rule of law, creates a conflict in the law, or applies an existing rule of law to a significantly different set of facts or criticizes or modifies an existing rule. Those opinions that fulfill that criteria are noteworthy.

Why is there any issue at all? If an opinion is not published in our hardbound reporters, an attorney is not allowed to cite it as authority to the court. This restriction can be very frustrating to attorneys who are aware of a case that’s exactly on point, but it wasn’t published so they can’t bring it to the court’s attention.

It can also be frustrating to someone who has lost their case in the Court of Appeal and the Court of Appeal’s opinion was not published. They still are free to petition the Supreme Court for review, but the perception — and it was somewhat accurate for a long time — was, if the opinion was not published the Supreme Court would say, “It’s not published. We don’t have to take review.”

There are some brothers, the Schmier brothers, who have made it a cause célèbre and a crusade of theirs to have all opinions published. The speculation is, and it’s purely speculation because nobody I know knows these individuals personally, that perhaps in some case that affected them personally there was an unpublished opinion that they thought was absolutely wrong. The speculation is that they felt that hampered them or precluded them from seeking review or whatever. But they have been — and



to this day because this issue is reemerging as we speak — on a crusade to require every Court of Appeal opinion to be published.

There's much to be said about improving the publication rules, and with this pressure, back in 2004 I think it was, these individuals and some others in the bar were going to take it to the Legislature. We don't have as many attorneys, if any, in the Legislature as we used to, and in addition this is the kind of issue that legislators really couldn't possibly — we should be taking care of it.

Ron George appointed a committee on publication rules and appointed me as chair. This committee, our charge, was to reexamine the publication rule and determine if a change or modification would be appropriate. This was the California Supreme Court Advisory Committee on Rules for Publication. The committee was comprised of attorneys from every kind of discipline and some Court of Appeal justices, and we had a very, very competent hard-working staff person from the AOC, the Administrative Office of the Courts.

They did a thorough job of sending out surveys to practitioners about their experiences or how they felt the rule should be changed, surveying each division of each Court of Appeal in the state as to how they were implementing the publication rule and compiling statistics. Were there some divisions who never published and some who published a lot? Were civil cases published more than criminal cases? Were the procedures within a division for choosing to publish — in some divisions it was majority rule. In others it would be anybody who wants it published. In others it would be the author who governed.

This went on for at least two years, and in the end a very hard-working committee of these practicing appellate attorneys and Court of Appeal judges — we came down and recommended some changes. Now, I want to say, parenthetically, with technology now all opinions are online for anybody to read, and they're online for, I think, thirty or ninety days. I'm not sure which. But even if you find a case that you want to cite, if it's not officially published you can't use it.

Further, the belief that we won't grant review of opinions that are unpublished no longer has the credence that it once did. Often enough, on our petition conference, we'll see that an opinion is unpublished but there is a trend of appellate opinions that are conflicting with a published opinion,

so we will grant the petition. If the Courts of Appeal think they can hide their disagreement with published law by not publishing, that's no longer true. We will take it.

MCCREERY: What's an example of that, just in terms of subject matter?

WERDEGAR: I can't say. I can't say not because I won't, but it comes up randomly. If it appears that the Courts of Appeal are misapplying the law or issuing opinions in conflict with some established law, we will grant. But the upshot of our very thorough process was to recommend changes.

The first recommendation was that the presumption *against* publication — the earlier rule that an opinion should *not* be published unless those factors I mentioned existed — we switched that, and people felt this was important, to a presumption *in favor of* publication. An opinion *should* be published if it establishes a new rule of law, creates a conflict, and the other criteria I mentioned.

Then we went on to say that an opinion *should* be published if accompanied by a dissent on a legal issue — not a dissent that assesses the facts going to probable cause differently — that's of no use to a future case — but if a dissent differs on a legal point.

That was a big change because in some divisions the lone dissenter might want it published but the majority might not and it wouldn't be published, so that dissent wouldn't see the light of day. I feel that was a very, very important change in the rule, as well as the presumption in favor of publishing.

There was another one, newly stated factors that you can't consider, and one would be workload, because an opinion that is written just to be unpublished and given to the parties is quite different than an opinion that's going to be published and have headnotes and so forth, the polish and the way it's written. It takes a lot more time. Court of Appeal justices process cases very quickly. They really do. I think when I was on the Court of Appeal each justice, the hope was, would have authored ten opinions in a month, not to mention considering your colleagues' opinions.

The final newly stated factor that you couldn't consider was "embarrassment for a litigant, a lawyer, or a trial judge." Sometimes if the Court of Appeal was criticizing the trial judge — not for a mistake of law, but — well, maybe for a mistake of law — but was particularly critical, naming

the trial judge, they wouldn't publish it. Or if a lawyer was called out in some judgmental way, they wouldn't publish it. This was a new factor that you weren't supposed to consider.

The reporter of decisions at that time — we have a new reporter now, but about two or three years later the reporter of decisions did a survey to see if this had impacted the publication rate. At that time it had. Now, we're not talking major impact because maybe it was 8 percent overall publication, and maybe it rose to 10 percent or 11 percent. But it seemed that people were taking the new rules to heart.

It has just come to my attention this week that there is a renewed interest, a renewed, perhaps, possibility, that interested individuals will bring to the Legislature's attention this issue of publication.

MCCREERY: Is it the same individuals you were describing, or do you know?

WERDEGAR: [Laughter] This is such third-hand news. I spoke to a high aide to the chief this morning. She speculated it was the same individuals, but there could be a larger body of individuals interested than just these brothers.

I should say, if I haven't earlier, one concern of criminal attorneys at the time of our committee was that if a Court of Appeal reversed a criminal conviction, they would not publish their opinion. So for criminal defense attorneys, there were cases on point where the issue had resulted in a reversal. There was nothing that they could cite. Anybody could understand that concern.

I don't know what the renewed interest is, but that's what I've heard. There is going to be an appellate justice institute in November. We have these annually. The chief and I were talking, and she's going to suggest that the appellate justices be reminded that this whole business of when they're supposed to publish should be brought to the forefront again and emphasized.

There were some issues that my committee said we should look at again, look at in the future. I don't have the report in front of me to remember what they are, but I think this will be a time when those issues — there will be a fresh committee to look at these issues, survey attorneys, see what their concerns are about publication.

If the proponents of greater citability prevail, they wouldn't care if it was published in a bound volume or not. If the case existed, presumably

they would be able to cite it. I hope that doesn't happen. The expense to attorneys to research every available case — and the waste of time for the courts — would be considerable. I think the rule as we amended it really covered any justification for publishing that would be useful to an attorney, if people adhere to the rule.

MCCREERY: You mentioned a slight increase in the overall number of publications.

WERDEGAR: In the percentage, yes.

MCCREERY: But I wonder, as you look back generally, how well the changes of your committee accomplished what they were intended to accomplish?

WERDEGAR: I don't know. That's what this statistical survey was to ascertain in a general way. I do occasionally on our conference look at a petition for a case where I'll see that it's unpublished, and I will say out loud, "This should have been published." [Laughter]

It makes me cross because I think the reasons for publication are valid, and also we worked very hard to bring those reasons to the attention of the Courts of Appeal. That's not the usual, but it happens maybe once every three or four petition conferences. But I'll repeat, the lack of publication does not shield a Court of Appeal from having its opinion reviewed by us if there's justification.

MCCREERY: And it does happen now and then?

WERDEGAR: Sometimes we won't grant review. There may be an issue in which the unpublished Court of Appeal opinion is in conflict with another case or was wrong, but if in the overall case even if we reverse that aspect of the Court of Appeal opinion the bottom line will be the same, we won't grant review. There's not much use to take that case. You don't want to go on and on about the law and say, "But here it made no difference."

MCCREERY: As you say, the issue is emerging quite recently and may again go to the Legislature in some form?

WERDEGAR: Yes. So I learned. We don't want it to go to the Legislature because it's easy to see that it's really not something that they would have the expertise and resources and judgment to fully address, with their other concerns.

MCCREERY: You did touch on the fact that there are fewer attorneys serving in the Legislature now, even on the judiciary committees. What is the effect, knowing you're at a remove from that? But what is the effect on the system?

WERDEGAR: I can only quote what others have said and seems quite true to me: Less understanding of the judicial branch and perhaps less inclination to be a supporter or a spokesperson on behalf of the judicial branch.

This may have come up earlier, and maybe Ron George in his memoir said it. But amusing as he was, he would tell us that he'd go up to talk to the new legislators and speak to them about the court, and he'd have to explain to them that we are not the DMV, that we are a co-equal independent branch of government. [Laughter] Our independence is a little bit compromised because they do have the power of the purse over this branch of government.

MCCREERY: And there's a long history there which we don't need to repeat, but the interplay among the branches is very much a factor.

WERDEGAR: It's always been that way with the judiciary, and I think the federal judiciary too. It's an interesting branch. We are not democratically elected. A lot of people think we should be, and then those who are of another view think that would be just absolutely the wrong thing. We were never intended to respond to popular will. But that's an education that has to continue and continue and continue.

I'll repeat what I might have said earlier. I think California's retention election system is the best. You don't want contested elections. But I wouldn't vote in favor of life tenure either.

And Ron George did suggest, what, one twelve-year term? No, one twenty-year term? I forget.

MCCREERY: Fifteen.

WERDEGAR: Fifteen years. Although I would have exceeded my tenure, I would be willing to think about that as a safety valve. Or the retention election. And I have been retained now three times.

MCCREERY: Thank you. Let's turn, if we might, to the third committee that you served on as part of this court.

WERDEGAR: Oh, all right. Yes. Thank you, Laura. This was a little different. We do have statewide judicial education. That came to pass a long time ago, and it's a very good thing. I think California was one of the pioneers in having judicial education and the requirement of education hours. Just like people, to retain their license for the bar, have to have continuing legal education, we have to have continuing judicial education. In 2008 I was appointed to chair the statewide planning committee for a judicial education program on the Holocaust.

MCCREERY: Do you know the genesis of wanting such a committee?

WERDEGAR: No, I don't. But there was a program that we built off of in Washington, D.C., in connection with the Holocaust Museum there, that had a film that, as part of the museum's charge, I think, it was offering to states. It was trying to outreach across the country, to encourage states to avail ourselves of their resources and their expertise. It's marvelous.

This program was, "How the Courts Failed Germany: Law, Justice, and the Holocaust." The program was put on in cooperation with the Washington, D.C. Holocaust Museum, and ultimately it was presented in three locations statewide: Irvine, San Francisco, and Sacramento. Then I think we had a fourth program in this building for staff and people that worked for the courts in this building.

The justices that attended said it was powerful, and I'll tell you more about it. The attendees said it was the most important thing they had ever attended. I was chair of getting this all together at the different locations, which was a privilege for me. But at each location we had a panel chair and we had speakers who were survivors of the Holocaust. So these people were old.

I pause because it brings tears to my eyes. They were so powerful. There was a background film provided by the Washington, D.C. museum on the rise of Nazism in Germany. This is real film footage, so you see your Stormtroopers and your Blackshirts, and you see Hitler, and Hitler energizing the crowds, and you see Jews with yellow stars, and you see judges — and it's going to come down to judges.

There was a background film on the rise of Nazism in Germany and a description of the judicial system under the Weimar Republic and how Hitler, when he came into power, coopted the judiciary.

There were these judges, and as these more restrictive laws were passed by, presumably, Hitler's legislature, — and this was the point of discussion for all of us who are judges — there were those judges who stayed on, who didn't resign in protest, and did their job.

They did the job as they saw it, which was to adhere to the law. This was the law. It had been enacted. They abided by the law, and I think, as I recall, there was only one judge who resigned and said that he would not do so. The rest continued in office, justifying their cooperation on the ground that they were following the law in implementing the erosion of civil rights and Hitler's anti-Semitic Nuremberg laws, which ultimately led to the Holocaust.

We would see the film, and there were other panelists too — I can't do them justice right now — besides our moderators that were different at each location, wonderful people. It was wonderful to get to know them. There was one Davis woman professor who had studied and written about the Holocaust. And we had a D.A. from Alameda County, Nancy O'Malley.

We had different perspectives on the panel, and we had these survivors who would talk about their experience, whether their experience had been that they had hidden from the Nazis or that they had survived a camp. It was powerful. These are treasures that we're losing because of time and aging.

The judges would then break into discussion groups, and we would have problems presented to us, issues, questions, and how would *we* respond? It's so easy for all of us today to look at this and be horrified, think it's so obvious that it was wrong, horrible. But it's like the frog in the boiling pot. The water gets hotter and hotter and hotter. When does the frog know that he's going to die?

So you're in this system. It's gradual. You want to speak out, but nobody else is speaking out. It's not as clear in contemporary times. You might have analogies today, not quite that drastic, as to when you would be the one to depart from what the law seems to say is what should happen, and you say, "That's an injustice, and I can't go along."

In our discussion groups the judges would discuss what the German judges did, what each of us might have done, or how would we react in contemporary circumstances. That's where it gets uncomfortable. We discussed at length, "What is the role of a judge, to follow the law or to follow her conscience and break the law in the name of justice?"

As I say, it was powerful, and there were so many comments afterwards that the attendees described the program as the most important one they ever attended. Reviewing it for this oral history brings it home to me again, and you just hope that we carry this forward. I was privileged to be chair of that program, and the AOC is to be congratulated for taking the reins and providing it up and down the state.

MCCREERY: It's an interesting feature of it that the attending judges were asked to consider hypothetical situations and, really, what would *they* do were they in the shoes of these other judges?

WERDEGAR: Oh, yes. How would they be today? Because of course everybody would say, "Looking back it was just horrible."

MCCREERY: What do you think surprised the participants about considering it at that level?

WERDEGAR: You use the word *surprised*. I don't know about — oh, their own reaction?

MCCREERY: Or what impressed them, perhaps?

WERDEGAR: Impressed them? You see, first of all, few of us have the opportunity as judges to step back and reflect on the larger philosophical question of the role of a judge in society. The role of a trial court judge might be different than an appellate judge, and so on, or a supreme court judge. I wish we had more time to really engage in that philosophically.

This program required that. It also brought home that, although it's so easy in the context of the Holocaust — all of us would be appalled at the judges' cooperating — when you bring it to the issues of today, like — I don't even want to list issues, but maybe the death penalty or immigration, high-profile hot-button issues in our society, perhaps it's not so easy.

MCCREERY: Difficult issues of our time.

WERDEGAR: Difficult, contentious, divisive issues, where one judge's conscience might say, "Irrespective of what the legislation says, I feel this," or whatever. There's no answer, but it was — there's never an answer, really, because it has to be a particular circumstance. But it required and gave us all the opportunity to think a little more deeply and more sensitively about what is our particular personal view of being a judge.



MCCREERY: I can't even imagine the effect of having Holocaust survivors in the room telling in their own words what happened to them.

WERDEGAR: Judge Fybel, he's in the Second District. He teaches a course on the Holocaust and the law. It would be a privilege to be one of his students. He was a memorable participant on these panels, and he was acquainted with survivors. Maybe I can do some research before we speak again to remember what the particular stories were. They were all different. It wasn't that they all went to Auschwitz. They were all impacted in different ways but at tremendous risk. I think a pair of girl twins was hidden in some home, and so on.

MCCREERY: Thank you so much.

WERDEGAR: These issues are here today, not in the state courts, but if you think about all the high-profile issues now about our government and detainees and national security and privacy.

MCCREERY: And they're taking twists and turns that we might not have imagined a decade or two ago.

WERDEGAR: Yes.

MCCREERY: Thank you. Would you like to get into the dissents today for a few minutes? Okay. We can perhaps start off by just setting the stage a little bit, if you would be kind enough, and I'll ask you to talk about what it is in general that would cause you to take the step of writing a dissent. Can you generalize in that way?

WERDEGAR: I can. I don't profess to be unique in this. I don't profess to be unique when I say that what prompts me to write a dissent is that I think the majority is wrong. [Laughter] I guess any person who dissents would think that.

But I do not seek to have a separate voice. We have had judges who — it's patent from their body of work that they enjoy having a separate voice. But I dissent only if I feel that the majority is wrong.

And I love my dissents. I've had occasion to look back on a few of them now, and I'm glad I dissented because I feel the majority was wrong. Have I advanced the discussion any with that? [Laughter]

My favorite dissent and my most deeply felt loss was in the *Merrill v. Navegar* case<sup>51</sup> — I don't know if we've touched on that — the 101 California shootout.

MCCREERY: Only in the briefest passing. We have not talked about the case at all, so please set the stage.

WERDEGAR: In July 1993, the defendant, a disgruntled client of a law firm in the 101 California Street building, entered the building, took the elevator to the thirty-fourth floor, where the firm had its offices, and started shooting, killing eight people and wounding six. In doing this, he used two Tec-9 weapons — I'm not familiar with these weapons — that he had brought with him.

The survivors sued the gun manufacturer for negligence. This is my favorite dissent, but it's also very close to home here in San Francisco and to the legal community. A lot of people have lost people whom they knew well. But I would have decided it no matter where it happened the way I ultimately decided it.

The case came to our court, and a majority of the court held that the manufacturer was immune from liability. They were trying to sue the manufacturer for — I forget what their cause of action was. Oh, I think perhaps a concept called “design defect,” maybe the way these guns fire or their ease of firing. But a majority held that the manufacturer was immune because we have statutes — the Legislature had enacted a statute — stating as a matter of public policy, not as a matter of fact, but as a matter of public policy gun manufacturers cannot be held liable for the design of their weapons.

The case was assigned to me. There's a history to this case. It was assigned to me. I actually agreed that this statute precluded this cause of action for design defect. We were bound by the Legislature. I wrote a draft opinion, a calendar memo, and circulated it. Everybody agreed. We had oral argument, conferenced after oral argument. Everybody agreed.

I came back to my chambers and my staff attorney — this is previously not known, of course — said, “Judge, listening to oral argument, I have a possible alternate theory about this case.”

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<sup>51</sup> 26 Cal.4th 465 (2001).

We discussed the alternate theory, and I decided that it really had some merit. This is very late in the game. So what I did is I wrote two complete opinions, one that everybody had agreed with because I had a responsibility to do that — it was very late in the game — and one that was my new idea that, “Yes, the statute precludes liability for design defect but I have this other theory that I will get to.” And I expressed it in a full-length draft opinion and circulated both and hoped that I would persuade members of the court to agree with this.

I did not. [Laughter] So the case was reassigned to somebody else, and they went the direction that everybody had anticipated they would go. But my dissent: I agreed, as I say, that there was legislation barring holding the manufacturer liable for design defect, but there was another tort, and that’s negligent marketing. That’s a legitimate tort action.

My point was that Navegar marketed this weapon to civilians, not just to law enforcement or military, who might have legitimate use of it. It advertised it in civilian magazines — I think there was one called *Soldier of Fortune* and the like — that would appeal to citizens, and it touted its portability, its easy assembly and disassembly, its rapid fire-power, its resistance to fingerprints, the ease of attaching a silencer, and its affordability.

There was evidence that law enforcement statistics showed — maybe it was national statistics — that this particular weapon was one of the most frequently used weapons in crime. So under this new theory, which the parties, I believe, had pled in the trial court but got lost along the wayside, the manufacturer had a responsibility not to promote this weapon to the criminal element of our society, which they were on notice, according to my view — this would have to go to trial but it never did, of course — was being misused by civilians. What civilian needs rapid firepower, easily eliminated fingerprints, easy attachment of a silencer?

MCCREERY: It gets to the presumed use of such a weapon? What would it be manufactured for?

WERDEGAR: Yes. Certainly not for protecting yourself in your home against an intruder. It was an assault weapon, a criminally used weapon. That was my dissent. It received a lot of attention nationally, favorable. I heard from the people who wished that the law were so.

Interestingly, our state legislature — I'm not saying because of this opinion, but — a year or two later, some time later, they repealed or allowed to lapse this design immunity statute.

My understanding is that today there's a federal statute that might have the same result. I'm not sure. This was about the time I was going to be on the retention ballot. I can't tell you the exact lapse of two years or what have you. What was the date of this?

MCCREERY: The opinion came in 2001, and you were up for retention in late 2002.

WERDEGAR: Right, yes. So I had that on my record, and as you know gun promoters and advocates are very jealous of their rights and assertive. But there it was. That's what I did. I'm proud of it. It's gone nowhere except into the hearts of people who would like very much to put some limits on the misuse of firepower in our society.

MCCREERY: And of course since that time we've only had many, many more examples of such weapons.

WERDEGAR: That's a whole other subject. Yes.

MCCREERY: But it's an interesting transformation that you personally went through, from agreeing that the statute —

WERDEGAR: That's why it's interesting. I was bound by the law as I was aware of the law that existed. It wasn't a happy thing, but that's the way I was going to go.

This other theory, which of course I had to think about and develop, was a theory that had potential and that could legitimately have been in the case. It would have had to go to trial, the facts and the knowledge and the intention of the manufacturer and all of that, but it never got that far.

MCCREERY: But you said this idea was presented in some form —

WERDEGAR: My memory is that at the trial court level it definitely had been, and it got — I'm hoping I'm accurate — that it got overwhelmed by the other aspect of the case.

MCCREERY: How long a period of time did you have available to you to make this change?

WERDEGAR: Well, you don't have much after the case is submitted at oral argument. We have ninety days to file our opinion. Before you file it you have to write it and you have to have your colleagues consider it.

If I had gone along with what they were anticipating before argument, as we do usually, it would be no problem. But this was a major change. We had to write a new, alternative opinion.

I don't know how long that took, but we had to do it fairly quickly to give my colleagues the opportunity to consider this completely unexpected new theory. We did, and nobody agreed.

MCCREERY: Yes, you clearly stated that nobody agreed. I wondered what sort of discussion or interaction it might have generated, given that you were offering a —

WERDEGAR: We didn't have any group discussion on it at all. It was all paper. The different chambers had in front of them two complete views of the case. Maybe if it had come earlier it would have had some impact. I don't actually believe that. But that's how it was. So that was most interesting in the history of the case, which I've never spoken of before, of course.

MCCREERY: I'm so grateful to get a little of that in the record now.

WERDEGAR: Yes. It's close to my heart now, too, because I think it was right. At least right that it should have an opportunity to go to trial.

But there was a suggestion in the materials that this manufacturer was aware, and the government was aware, that this was a weapon that was a favorite of criminal elements.

MCCREERY: We'll just have to leave the subject of all the other events that have happened since then, but there have been these various attempts — the federal assault weapons ban, which Senator Feinstein put in place and then it expired, and the very many episodes of mass killings like this one. But it's interesting that it comes down to what you think is right, at some level?

WERDEGAR: Yes. But there what I thought was right was fitting into a theory of the case, a legal theory of the case. I had initially gone with what it appeared the law mandated. That was interesting.

MCCREERY: Thank you. In your other dissents, I wonder if you could say a few words about a couple of them. We talked on an earlier day about

*Golden Gateway Center v. Golden Gateway Tenants Association*, which I guess dealt with the free-speech right of tenants in this association.

I think we can consider that one covered, but would you say a few words about this case of an attempted rape of a FedEx employee, the case called *Saelzler v. Advance Group 400* of 2001?<sup>52</sup>

WERDEGAR: I will. This case involved the attempted rape of a female Federal Express employee who was delivering a package to a housing project that was known for its criminal activity and for which they had endeavored to have some security measures. I think they had supposedly locks on some gates, and they had security guards employed at night. So this was known, that this was a dangerous area. I think employees were escorted to their cars when they were leaving.

The female Federal Express employee delivers a package, and as she's leaving, I believe, she was raped. She sued the housing project owner. It was acknowledged that the landlord had been negligent in failing to secure gates or employ guards on the premises during the day. It was acknowledged that more security should have been in place. That wasn't the issue.

The issue was, could the plaintiff connect that negligent failure to secure individuals' coming and going — could she show that was the cause of her rape? Just because you're negligent, you're not liable. There has to be a causal connection. At trial there were experts who testified that it was more than likely, given the circumstances and the situation, that this rape had been occasioned by intruders, given the history of the place. I can't detail what evidence went in.

The majority felt that she had failed to prove causation. I dissented. They don't know who raped her. They never caught who raped her. They said it could just as well have been somebody who lived in the project, so all the security in the world wouldn't have prevented it.

I dissented on grounds that she didn't have to prove *who* assaulted her. Indeed, imagine the double insult. They haven't caught the guy, *and* she can't recover civil damages because they haven't caught the guy. I said all she had to prove was that it was more likely than not that it was an intruder.

That was a 4-to-3 decision. I was not the lone dissenter there. I said she had put on enough evidence for the jury to take the view that it was likely an

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<sup>52</sup> 25 Cal.4th 763.

intruder, and this evidence came out from the circumstances and how that place was situated, its history. It had a lot of history of criminal activity.

So I felt sorry for that female FedEx employee, and I did feel that she had shown her case because, again, the negligence, the failure to do what they acknowledged they were supposed to have done in this very dangerous environment — that was a given.

MCCREERY: Why is that distinction important in the law?

WERDEGAR: It was important because if they were protesting that they had done everything they had to do — there are two different issues. You have to prove different elements of your case.

It was unusual that the defendant admitted that it had not done the right thing. “But too bad because you can’t show that our failure is what caused you harm.” And I guess that’s fair. If I’m negligent and somebody is injured but my negligence has nothing to do with how they hurt themselves, I shouldn’t be liable.

But she had a lot of testimony that, under the circumstances of that project and that location and the history of that location, that it was highly probable that it was an intruder. And the time of day — everything that they put into the case. I felt it should have gone to the jury. Let the jury decide if the project’s negligence was the cause of her injuries.

MCCREERY: I suppose one could ask the question as to whether she was being victimized more than once?

WERDEGAR: I actually felt that. I did. I think my final sentence in the opinion, which I don’t have in front of me, was, “It’s ironic that their very failure to catch the culprit is what has caused her inability to have some recompense by way of damages.” I think I concluded my opinion with that. Victimized twice.

MCCREERY: Thank you so much. You’ve had a number of other notable dissents. Just to pause for a moment, there was mention — again, in the popular press, as I’m just reviewing this after the fact — that after Justice Mosk died you were seen — or perhaps by the numbers — a leading dissenter on the court, somewhat filling his shoes, I think the person said. [Laughter]

In other words, there was a sense that you were doing so more frequently or with some regularity, in any event. Your thoughts?

WERDEGAR: I would always be pleased to be compared with the great Justice Mosk. But I have to smile at these kinds of comments or assessments that the press gives us. First of all, they usually are looking at a very finite period of time.

What a given justice does in the finite year or period of time depends on what cases were in front of the court. I would never seek to change my jurisprudence to take the place of someone who's gone, so I find the assessments amusing. If I am, in a given court year, a major dissenter, I don't think of myself as the dissenting voice of the court. It could be the mix of cases that came that year. But I don't mind if they say that.

MCCREERY: But your point is well taken that you're not setting out to be a dissenter.

WERDEGAR: Absolutely not. I think I prefaced our comments by saying that it's not — I *am* a conservative person and a conservative jurist in the sense that I don't reach out to bring issues to the fore that we don't need to decide, and I don't pride myself on speaking with a separate voice. But as you're learning, I do speak with a separate voice when I feel I have to.

And since we're on the subject of women, there's a case that may not have come to your attention, but this is *Haworth v. Superior Court*. Are you familiar with that case? Would you like me to give you the citation? It's (2010) 50 Cal.4th 372. My dissent is at page 395.

It was the aftermath of an arbitration, and in this case the plaintiff had sued her cosmetic surgeon for negligence. It was decided by an arbitrator, and the arbitrator was a former judge. He ruled in favor of the surgeon.

She later determined that the arbitrator, while a judge, had been publicly censured in a published opinion by this court, the Supreme Court, for making repeated, overt, vulgar, and demeaning sexual comments to his female staff members. In the opinion, I as a dissenter and not the majority, quote from this court's opinion censuring him. She learned this after the arbitration.

There is a rule that an arbitrator is required to disclose facts to the parties. The standard for disclosure is whether a person aware of the facts



could reasonably entertain a doubt, just entertain a doubt, that the proposed neutral arbitrator could be impartial. Might a reasonable person think?

My view was that a judge who had been publicly censured, which is extraordinary, for demeaning, vulgar, sexual comments repeatedly to female staff members while he was a judge, in ruling on a sensitive case having to do with a woman's appearance — cosmetic surgery where she feels that it had been botched — I might have a doubt as to whether he could view her case impartially because his history showed a disrespect for women.

But I was alone in that. I dissented.

MCCREERY: But you were quite alone?

WERDEGAR: Yes. Quite alone. My colleagues took the view that his remarks hadn't occurred in court and other reasons that persuaded them that he did not have the duty to disclose.

MCCREERY: It's fascinating that this party is himself a judge.

WERDEGAR: He was. He was not at that time.

MCCREERY: Speaking of arbitration, I noted that in 2014 there was an opinion written by Justice Liu in *Iskanian v. CLS Transportation* and that you concurred in part but also dissented in that.<sup>53</sup> That was an employment arbitration case, as I understand it. Could you say a few words about that one and your thinking there?

WERDEGAR: I will speak more broadly about that. As is well known in the legal community, the tendency seems to be to require individuals, employees, consumers, to arbitrate. There is the Federal Arbitration Act, and the United States Supreme Court — these cases are very ongoing and continuing — has interpreted the Federal Arbitration Act very broadly, that it means what it says, and that issues are supposed to be arbitrated if they come under the act.

In California our jurisprudence started in a different direction, and we have been — the state court has been — in tension with the United States Supreme Court about the continuing limitation of the right of individuals to go to court or what issues they could bring to arbitration. Class action, for instance. I think we said that you could have class action arbitrations.

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<sup>53</sup> 59 Cal.4th 348.

There have been a lot of issues where we are still trying to maintain independent California standards, and we keep getting reversed by the United States Supreme Court.

So along came *Iskanian*, and the majority concluded under the terms of the Federal Arbitration Act as interpreted by the United States Supreme Court that courts were required in this state to enforce class-action waivers in employment arbitration agreements.

I concurred in part, but I took a different tack. I dissented in part. I said that there was other federal legislation that allowed employees to act collectively, to collectively bargain, and that the requirement of the Federal Arbitration Act — that you could be required to waive your right to a class action — couldn't trump other federal legislation — that would be the Norris-LaGuardia Act and the Wagner Act — which expressly reserved the right of collective action to employees.

My dissent is of interest because it's a piece of an ongoing national discussion at different levels of courts and in law review articles on this point. This point will ultimately be resolved by the United States Supreme Court. I was really, in my view, just contributing to the national discussion — state courts, federal lower courts — as to the interaction between two kinds of federal legislation.

I personally will be very interested to see how it plays out. It was a lengthy dissent. It was sort of like a law review article, but it was intended to advance the discussion on this issue, for other courts to look at that dissent and, hopefully, accept my view. I don't believe the majority really joined issue on this. I don't think that they specifically disagreed. They really were focused on what the Federal Arbitration Act does.

But I would have to look back at the opinion to see if we joined issue on that. Again, my intent was really to advance the discussion nationally and see what the United States Supreme Court ultimately says.

MCCREERY: Time will tell. We had talked on an earlier day about the rise of these blanket arbitration requirements in the private sector but also in public utilities — and just the way this scene is changing so much. So here's yet another piece of that.

WERDEGAR: Oh, absolutely.

MCCREERY: You were saying it has changed quite a bit, just since you've been on this court?

WERDEGAR: Oh, yes. We did speak about a speech that I gave on the courts and arbitration together advancing the administration of justice and how, in twenty years or a little bit less, how dramatically the scene has changed.

MCCREERY: To again look at your dissents, maybe I'll ask you to speak about another one. In 2011, *People v. Diaz*,<sup>54</sup> another opinion by Justice Chin, as were the *Merrill v. Navegar* and the *Saelzler v. Advance Group 400*, but in this case centering on searching cell phones without a warrant.

WERDEGAR: The rule is that a search incident to arrest is valid. You don't need a warrant. Normally for any search you need a warrant, probable cause to believe that there will be evidence or something dangerous would be found. But one clear exception is search incident to arrest. So that exists.

In this case, the fellow was arrested and they seized his cell phone and took it away. Later — some time had elapsed, maybe two hours — they decided to look into his cell phone and see what was there, and they found incriminating phone numbers or text messages or something.

It came to our court, and a majority decided this was a valid search incident to arrest. Precedents had established that if I was arrested they could search my purse, they could search my briefcase, they could search my address book, all on my person. They could search my clothes, even if they had taken my clothes and held them for a little while, it could still be a search incident to arrest.

So the majority adhered to this law, and I dissented on the grounds that we were talking about something entirely different now, that in a so-called smart phone, a cell phone, a hand-held computer, an individual is carrying all the aspects of his or her life: personal information, business information, photographs, documents. Who knows? Text messages. I didn't go into all that, but it's entirely different.

I felt that therefore this did not fall under the paradigm of the classic search incident to arrest. It especially didn't because they had taken the cell phone — they didn't look at it right away to see who he might have been in touch with or who his last call was. They had held it.

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<sup>54</sup> 51 Cal.4th 84.

I said they should have gotten a warrant showing probable cause to believe that there was evidence of criminal activity in the phone.

I don't know if I was alone then, but I was vindicated because four years later the United States Supreme Court, in a case called *Riley v. California*,<sup>55</sup> effectively agreed with me. They did not cite our court, *People v. Diaz*, but they took review, interestingly, in a California Court of Appeal opinion that must have agreed with our majority. Anyway, it was a California case that had relied on the *Diaz* case. I think it was even an unpublished case.

But they took it, and they agreed that cell phones are a whole new subject matter, and they cannot be searched without a warrant, the contents.

MCCREERY: So here's the changing technology developing the law in new ways.

WERDEGAR: The changing technology, yes. Of course, California cannot suppress evidence from any search that would be good under federal law, so we can't have more restrictive search conditions. We passed an initiative that requires that nothing can be suppressed under California law that wouldn't be suppressed under federal law.

But Governor Brown, somebody told me, just passed a bill, called the Technology Privacy Act or something, relating to, I believe, cell phones but also cell tower information and so on. So I ultimately was ahead of the curve there, I guess.

There's another case, too, that I don't think you have on your list called *People v. Thompson*.<sup>56</sup> Do you have that?

MCCREERY: No.

WERDEGAR: Do you want the citation?

MCCREERY: Or you can just talk about it, and I can look it up.

WERDEGAR: Okay. That case was also a criminal case.

A fellow had been observed driving under the influence, or a car had been observed, and it was parked in front of a house. The individual went into the house. The police went into the house without a warrant and arrested him.

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<sup>55</sup> 573 U.S. \_\_\_ (2014).

<sup>56</sup> 38 Cal.4th 811 (2006).

Now, mind you, the house is the sanctified place that the Fourth Amendment is quintessentially supposed to protect, but they entered his home without a warrant and arrested him. The majority upheld that on grounds of exigent circumstances, the exigency purportedly being that evidence of his intoxication would dissipate. His blood alcohol level would drop.

I disagreed. I said there were not sufficient exigent circumstances. Blood alcohol level always drops. We have ways of calculating that — scientists do it all the time — and they had plenty of time to get a warrant — even, I think you have telephonic warrants. They had time to get a warrant and they had no right to enter the house.

I lost. The United States Supreme Court, not in my case but in another case, later agreed that it's not an exigency that somebody's blood alcohol level is going to dissipate.

MCCREERY: This whole matter of the need for a warrant or not is a fascinating part of the criminal law.

WERDEGAR: Oh, absolutely. It's so fundamental. And there are exceptions, well-established exceptions, exigency, search incident to arrest, consent.

MCCREERY: What view do you take of dissenting in a criminal case — I'm losing my train of thought here. [Laughter] This was *People v. Thompson*. What are other examples of things where the evidence might dissipate? Is that a whole established area?

WERDEGAR: Yes. Dissipate is one circumstance. But destruction of evidence. If they're going to flush it down the toilet, which in drug cases is so often the case.

MCCREERY: It's more than dissipating. [Laughter]

WERDEGAR: Yes. I can't at the moment think of other examples. That's one of the justifications for search incident to arrest, that there might be evidence of the crime that is on the individual's person or within that person's reach. But dissipation is probably unique to something that can degrade or gradually disappear, like blood alcohol level.

MCCREERY: Thinking about the dissents you've written over the years — realizing that you do so in each case because of the details of that case — has

your approach changed in any way in terms of your willingness to dissent or how large an issue you have to identify to feel that step is warranted?

WERDEGAR: How large an issue. That's an interesting point. That's a judgment call each time, and it goes back to whether one — how eager one is to stand alone or expend the resources, actually, to dissent.

Occasionally I'll write a concurring opinion that agrees with the bottom line but I cannot sign off on the path the majority took to get there, that I feel there's something mischievous or wrong in the reasoning or the law that is advanced to support the result. I don't do that too often, but if you don't agree with fundamental legal principles in an opinion, you really shouldn't sign it because you'll be held to it the next time. But I don't do that too often.

MCCREERY: Any other dissents that you would especially like to bring up today? I know you had a list.

WERDEGAR: No, those are the ones that stand out.

MCCREERY: You can have a chance to add to those next time if you wish. We'll stop there for today. Thank you so much, Justice Werdegar.

WERDEGAR: Thank you.

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## INTERVIEW 11 (NOVEMBER 24, 2015)

MCCREERY: Good afternoon, Justice Werdegar. We've been talking over our last several oral history interviews about a variety of specific cases in which you authored an opinion or had some other key role. Continuing in that vein today, would you be kind enough to start us off with the case on the American Nurses Association that you brought to my attention?

WERDEGAR: I will. Hello, Laura. Very nice to see you again.

The *American Nurses* case involved whether trained volunteers, with the approval of the relevant physician, could administer insulin to school children, many of whom, it turns out, are diabetic and have to have the administration of insulin during the school day.<sup>57</sup>

This was a question of statutory interpretation, but if the statutes had been clear the case wouldn't be before us. The case touched a lot of families with diabetic children since most schools today, regrettably, don't have full-time nurses — or maybe any nurses ever. If it were held as the Nurses Association argued, that only trained nurses could administer insulin, it would have — and had in the interim — imposed a great burden on families. A parent would have to be available or the child would have to be home-schooled.

The opinion, which I recall was unanimous, held that it would be appropriate for, that the statutes allowed, trained volunteers with physician approval and parental consent to administer insulin to public-school students. I do believe the opinion was gratefully received by all, except perhaps the union.

MCCREERY: What sort of voice was the union in this whole matter, as you recall it now?

WERDEGAR: You're meaning — what sort of voice? They argued against this. They were the plaintiffs, saying that this was an improper procedure, to allow laypersons to administer insulin.

MCCREERY: I'm just wondering about the union representation of that side of the question?

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<sup>57</sup> *American Nurses Ass'n v. Torlakson*, 57 Cal.4th 570 (2013).

WERDEGAR: In oral argument? Of course, they were vigorous advocates, vigorous for their point of view. But it ultimately didn't prevail with the members of the court.

MCCREERY: Why was the matter of volunteer nurses in the school setting so controversial?

WERDEGAR: Volunteer people. These people weren't nurses. They would train members of the teaching staff. It was controversial only to the nurses. I can only assume that they wanted to protect what they believed were their prerogatives. They did not, of course, say that. They argued that the safety and well-being of children mandated that only certified nurses administer insulin.

Of course, some children are able to administer it themselves, and parents at home who have diabetic children, as I understand, administer the insulin. But the basis of their argument throughout was that, for the health and well-being of the children, it should be only members of their association.

MCCREERY: You indicated this was a matter of statutory interpretation. What was the specific weakness in the statute, as written?

WERDEGAR: I can't say unless I have the book open in front of me because these things are very complex — so I can't tell you. But it did involve reconciling at least two and maybe more statutes relating to what certified professionals can do and what persons who aren't certified can't do. It was a very fine harmonizing of statutes that really were not drafted to speak to this particular issue.

MCCREERY: Thank you. Shall we move on to another case we thought we might talk about today, and that is titled *People v. Robinson*,<sup>58</sup> an opinion of 2010 written by Justice Chin, in this case, and having to do with arrest warrants using DNA?

WERDEGAR: Yes. By this, does that mean that you're moving on to the C-and-D's [concurring and dissenting opinions] and we've stopped on my significant opinions? Because I do have some I'd like to mention, but I'm happy to talk about *Robinson*, where I joined Justice Moreno's C-and-D.

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<sup>58</sup> 47 Cal.4th 1104.



MCCREERY: Maybe we can put that down. It has to do with where I listed them on my page here.

WERDEGAR: You did want to talk about *Coral Construction*?<sup>59</sup>

MCCREERY: I did indeed. Let's do that.

WERDEGAR: This case, as often occurs with our work [Laughter] — this opinion attracted a lot of attention. It was politically charged.

San Francisco had passed an ordinance requiring preferential treatment for women and minorities in the awarding of city contracts, otherwise known as affirmative action. The complaint was that in so doing it was in violation of the California Constitution.

Our Constitution, I think, was amended by way of an initiative measure. It contains a provision that forbids a public entity in awarding public contracts to discriminate. It forbids a public entity to discriminate or grant preferential treatment based on race or gender. There you have it. Yet this ordinance required public contractors to do just that.

There were some subtle constitutional arguments involving the federal Constitution with respect to this, but the bottom line was the California constitutional provision prevailed, and that provision did not violate federal constitutional equal-protection jurisprudence. It was truly a straightforward application of state constitutional law, with a little side note about, was that congruent with federal law, and it was.

But again, it's one of these opinions that impacted the community, and people had very strong feelings about it. I've been questioned about it quite a bit. "How could you do that?"

Perhaps the perception being that I wouldn't want to preclude affirmative action. But that's what the law required, and I believe it was unanimous. No, it was a six-person majority. I don't recall who dissented, but it was a six-person majority.

MCCREERY: As you say, that was a matter arising out of the affirmative action ban that voters passed by initiative way back — I had to look this up, it's been so long — way back in 1996 as Proposition 209. By the time you ruled on it in this opinion, it had already survived multiple challenges.

WERDEGAR: A federal challenge, I believe.

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<sup>59</sup> *Coral Construction v. San Francisco*, 50 Cal.4th 315 (2010).

MCCREERY: Both federal and some in state court as well.

WERDEGAR: Yes. So you're telling me that the initiative that brought that provision to our Constitution was Prop. 209?

MCCREERY: Yes. But it appears that when challenged on constitutional grounds it has survived each and every time.

WERDEGAR: It has.

MCCREERY: I gather the City of San Francisco was trying to say that, owing to the record of events in the city itself, there was reason to think the contracting process was causing a problem. They ended up with an avenue to come back and revisit this again.

WERDEGAR: Oh, that's right. They did. They were very concerned that there had been proven exclusion.

MCCREERY: In terms of the constitutionality, you indicated it was a very clear-cut — ?

WERDEGAR: No. It was clear cut with respect to the California Constitution, but there was an argument that I don't have complete recall of that was a very sophisticated argument about how it was contrary to some federal jurisprudence on the right of minorities to advance their interests. At this point I can't take that farther.

I would like to speak to you about a case you may not be aware of, but it was a major endeavor on my part and on the court's part. *In re Reno*. Do you have that one?

MCCREERY: I saw a reference to it, but no.

WERDEGAR: That's 55 Cal.4th 428. In the case of *In re Reno*, this chambers really did the court's work. This relates to capital case litigation. As is widely known, capital cases, death-penalty cases, in this court — the litigation just goes on and on. After this court has dealt with the automatic appeal and, let's say, affirmed it, then comes the whole habeas corpus process.

First, the petitioner, the defendant, has to come to this court with habeas corpus issues. These are issues that are not reflected on the written record. They're outside the record. That's why we do it by way of habeas corpus.

After they do it here multiple times, then they move over to the federal courts and raise their habeas corpus issues there. The fact is, we get

petitions that run hundreds of pages long that are repetitive and duplicative. We have rules for denying a petition on grounds that the issue was raised and rejected before or the issue could have been raised on appeal and could have been resolved on appeal but it wasn't.

Finally, in *In re Reno*, in this comprehensive opinion, writing for the majority I tried to set out limits on abusive petitions for habeas corpus in capital cases, *abusive* meaning repetitive claims, claims raised and resolved before, excessive pages in briefs.

We tried, and it's too soon to say how well it has succeeded. But it was an effort to bring some order to this process so that what should be happening — getting straight to the point and resolving the claim and resolving it finally — should occur.

So that was really an administrative opinion for the benefit of the court.

MCCREERY: When you say limiting the abuse of repetitive claims and so on, as a practical matter how can one set those limits in terms of —

WERDEGAR: Just by identifying them and saying they will not be tolerated. [Laughter] I'd have to have a case in front of me to see how it actually works. We also put page limits on a repetitive or second habeas petition and a requirement that if they are addressing an issue that's been previously addressed, they explain why. As I say, I think we've seen some adherence to our stated rules and preferences, but it's too soon to say what impact it will have.

MCCREERY: How widely known and understood is this ruling in the community?

WERDEGAR: In the bar that practices death penalty jurisprudence it's widely known. It's universally known.

MCCREERY: As a matter of interest, you said this was a significant work for your chambers to undertake.

WERDEGAR: Oh, yes.

MCCREERY: How did you and your staff go about doing the research and thinking about how this could be written in a way that would have a useful effect?

WERDEGAR: My staff — and it's the case with career staff on the court, certain of the attorneys, on my staff I would say all — but certain of the

attorneys are extremely familiar with all the nuances of capital case litigation. They can do it from the top of their head, and they experience all the abuses as petitions come, and so forth.

So it wasn't a challenge in that regard. The challenge, I guess, would have been to write a clear, comprehensive opinion setting out what the limits will be. But the research was no problem at all. Example after example.

And the court, before this, had rules that if something had been raised below and disposed of you couldn't raise it here. But it never stopped the attorneys. The rules were disregarded. The advocates are strong advocates and dedicated advocates representing death row inmates.

MCCREERY: In general, to what extent were your colleagues on the bench eager to see such an opinion come to fruition?

WERDEGAR: The most experienced ones were extremely supportive. This does not advance the cause of justice to be churning a lot of paper. Everybody had input in the opinion and what we should address, and for our newest member at that time, Justice Liu, he would say it was a real education because the opinion set out what our rules are about habeas petitions and how they've been abused and how they can be abused. It was a comprehensive presentation for anybody who was new to the issue, so very helpful in that way.

But the opinion was impacted by the input of all the chambers. This was authored by me and concurred in by everybody, but the final product was assisted by every chambers.

MCCREERY: What sort of position was expressed against making these kinds of changes and by whom?

WERDEGAR: The defense bar that represents capital defendants would claim that these abuses were not abuses and that they needed to do everything that they possibly could to advance the interests of their clients, and so forth.

MCCREERY: That's very much an expected line of reasoning, and so on. Was there anything that you didn't anticipate in that regard?

WERDEGAR: No.

MCCREERY: Are there other attempts that you know of coming forward or things on the horizon that might also be ways to streamline the capital process?

WERDEGAR: There's an initiative that they're trying to circulate that would abolish capital sentences in this state. Such an initiative was on the ballot four years ago and I believe was favored by 48 percent. This one is a little different, but I'm not conversant with what the differences are that would curtail the process.

There's a competing initiative that is seeking to be qualified. By the time anybody reads these remarks this will be known, which prevailed. The competing initiative, which I just read in yesterday's newspaper has not yet been approved by the attorney general, would impose strict time limits on when this court can resolve a case and other constraints in the effort to quicken the process. So there are going to be competing initiatives on the ballot, presumably.

MCCREERY: It's new territory, isn't it, to try to place restrictions and time limits on these matters?

WERDEGAR: It is discussed and has been discussed for a great deal of time in the past. I don't believe anything quite like that has been placed before the voters before. They might think it's a wonderful idea, if they favor the death penalty. Whether it's practical or could even be adhered to would be a question if the initiative passed.

The competing proposed initiative would also mandate that attorneys take these cases. Attorneys who otherwise represent criminal defendants or are on panels of volunteer attorneys for criminal defendants, as I understand it from the newspaper, would be required to take death penalty cases as well. A lot of attorneys don't want to.

MCCREERY: That might conceivably have a significant effect on the bar overall?

WERDEGAR: Yes. But this is all hypothetical and may never be cause to consider.

MCCREERY: Since we're touching on the death penalty aspect of the court's work, perhaps I'll turn very briefly to something I mentioned that I wanted to ask you about today, sort of a postscript to our discussion on another day about the court's process in the capital cases. I read about two cases where it appeared that something rather rare had happened. Let me ask you if, in fact, that is so.

Both of these were this year, in 2015, by the way. One was the court's granting of a rehearing in a capital case, this one titled *People v. Grimes*.<sup>60</sup> First of all, how rare is it to grant a rehearing in a capital case?

WERDEGAR: This goes back to the change in the composition of the court. There were two new members of the court replacing the most conservative member, Justice Baxter, and replacing Justice Kennard.

I dissented in the *Grimes* case. It's not unusual for parties to seek a rehearing before the opinion is final if the composition of the court has changed. I dissented, and I believe Justice Liu agreed with me on my dissent, so the thought was maybe Justices Cuéllar and Kruger, the new members of the court, would agree the case warranted a fresh look.

That was the first petition for rehearing of cases that were not yet final that came before us with the two new members, and the vote was 4–3 to grant a rehearing, including the new justices and, of course, myself because I had dissented, and Justice Liu. After that there were two other cases at least where I had dissented, and maybe I was joined by another justice — I possibly was — where also petitions for rehearing were filed but there was not a majority to grant rehearing.

But the most famous, before that, rehearing situation was many years ago, the parental consent case where the composition of the court changed. The first opinion said that parental consent could be required, and we granted rehearing. With Justice Chin joining the court we had a new majority to say it was not required. That was the most high-profile, with lots of lingering effects as the court went forward.

MCCREERY: But as you say, also at a time when the court's own membership turned over.

WERDEGAR: That's the major hope in a petition for rehearing. Usually when a petition for rehearing is filed — we have these on conference, and maybe somebody who dissented would vote for the rehearing but they've lost the argument before. If the petition for rehearing raises something the court already considered, it's very unlikely the court would grant rehearing. We've thought about it, and we've resolved it. Often a petition for

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<sup>60</sup> 60 Cal.4th 729 (2015); 1 Cal.5th 698 (2016).

rehearing will pick up on something a dissent said, but the majority will say, “We know what the dissent said, and we don’t agree.”

I can’t remember a time when we’ve granted rehearing when there wasn’t a change in the composition of the court. There may be a time when the petition pointed out some egregious error, in which case we would grant a petition for rehearing. But they are rarely granted, for reasons you can understand. We’ve done our work once, and unless there’s something new and critical that’s brought to our attention, a petition for rehearing is not going to succeed.

MCCREERY: What is the significance of having this happen in a capital case, if any, over and above the significance in any case?

WERDEGAR: That’s a philosophical question. In this case, the error that I observed in my dissent was strictly a failure of evidence — it had to do with not letting the penalty jury be aware of something. It was a one-case-only incident. It will have almost no impact, except perhaps to the defendant and to educate future courts and litigants that you should allow in the evidence that I thought was prejudicially omitted.

As I recall, a confederate of the defendant had said the defendant had no part in the murder. I thought that if the penalty jury had heard that — of course, there was evidence that he did have a role in the murder, but I thought that evidence from a confederate that he didn’t could really have made a difference to the penalty jury. That particular circumstance is not likely to happen again, it’s factually unique, so in the event that the court reaches a new result and says that it was error to exclude that evidence, it will only impact this defendant.

The other two cases where I voted to grant a petition for rehearing involved the application of generally applicable law. One had to do with a homosexual oral copulation crime, whether the law discriminated against homosexuals, and at this point I can’t remember what the other was. The petitions were denied. So it’s interesting that a case that is of limited general applicability, although it affects the defendant, was granted and one that impacts a large group of people was denied.

MCCREERY: No development of the law in a general sense?

WERDEGAR: No development of the law.

MCCREERY: The other thing that was noted in public accounts having to do with a capital case decided this year was titled *People v. Scott*.<sup>61</sup> The matter of interest was the use of a per curiam opinion.

WERDEGAR: I'm happy to discuss how that came about, but I'm not sure I'm going to be accurate. What probably happened is that the actual author, the chambers that worked it up and was assigned the case and wrote the draft opinion, to which I think everybody ascribed — perhaps that was an author who had left the court, and it wouldn't be appropriate to have a judge who really hadn't done the initial work and written the opinion to claim authorship. I think that's probably what happened.

MCCREERY: But as far as you know, there would be no particular significance of choosing per curiam as a vehicle?

WERDEGAR: No, no. There was no desire for anonymity or no concern that any particular possible author wanted to be shielded from the fruits of his or her labor. [Laughter] No. I think it was an efficiency.

And it's not the first time, although the press — we don't do it often, of course. We usually have an author in place. I think my memory is correct that the case was reassigned after somebody left. It was the view of the court, but there was no individual in place who had written every word to claim responsibility or attribution.

MCCREERY: So in concept the same thing might happen in a non-capital case for the same reason?

WERDEGAR: That's an interesting question. I've been here twenty-one years now. I've never seen it happen in a non-capital case, so I don't know.

MCCREERY: Thank you for reflecting on that. As you might imagine, these are things that, as we say, the media might seize upon or notice, and the legal communities might be wondering, "Why did this happen?" So it's a bit of public education you're engaging in here. [Laughter]

WERDEGAR: That's right, and I can understand that; however, at the time that the news article came out saying that "this has never happened," — reporters have to write what they write, but internally it was

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<sup>61</sup> 61 Cal.4th 363 (2015).



brought out through the research of some of the attorneys that this was not unprecedented. Obviously, it's unusual. But it wasn't unprecedented. We internally didn't feel it justified the cries of surprise and, perhaps, alarm.

MCCREERY: Perhaps we'll return to a number of significant cases that you authored, and again I invite you to add to this list as we go. But we had identified one from 2011 called *California Redevelopment Association v. Matosantos*<sup>62</sup> having to do with California's redevelopment agencies and the major shift statewide in that regard. What was the significance of this?

WERDEGAR: This was a very politically sensitive case. Legislation had been enacted that called for the dissolution of redevelopment agencies. I'm speculating here. I'm not fresh with the background of the case. I guess the thinking was that the money that went to redevelopment agencies could be used by the Legislature in its budget in some other way.

We upheld that, but there were two parts to the opinion. There was additional legislation that conditioned further redevelopment agency operations on certain payments by the agency's community sponsors to state funds benefiting schools.

Now, this is politics and this is budget. This is not our domain. Our domain is, "Is this legislation valid?"

We upheld the legislation, and I wrote that opinion, a carefully reasoned, detailed opinion, saying that the Legislature, having created the redevelopment agencies, could dissolve them. That was the bottom line. But we struck down the legislation that conditioned further operations on payment for a certain purpose.

An interesting aspect of that was the chief justice dissented on that second point about the conditioning of further redevelopment agency operations on additional payments to state funds benefiting schools. I mention that only because it was a very rare dissent by the chief, and it could be — I'm not an expert on her dissents, but it could be her only dissent in a published opinion. She did dissent in another matter that was a petition for a writ of mandate.

But otherwise it was 6–1. It was like *Coral Construction* in the sense that this is dealing with political matters that the courts are called upon to referee, but our job is not to weigh in on what we think the wisdom of

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<sup>62</sup> 53 Cal.4th 231 (2011).

any particular legislation would be or to bring our private judgments to the fore but to just analyze it according to the principles of analysis.

MCCREERY: What follow-up has there been to that, if any, in the Supreme Court's own work?

WERDEGAR: In the Supreme Court's own work, to my knowledge, there's been nothing. In the Legislature, once in a while I'll read in the newspaper something touching on this. But that's not our concern. At the time that we were considering the case, of course, it was brought to our attention that these redevelopment funds had done all sorts of beneficial projects up and down the state. That may be true, but it's not what resolves the legal question as to the Legislature's authority.

MCCREERY: Sometimes these types of entities or setups come to outlive their original purpose in some way, and people do think they need to be replaced. But it's interesting that the interpretation for the court was a pretty straightforward matter.

WERDEGAR: "Did the Legislature have the authority to do this?" Not, "Should it have — ?"

MCCREERY: There again, the difference between the judicial branch and the legislative branch. [Laughter]

WERDEGAR: If only that were well understood. [Laughter]

MCCREERY: Thank you. Perhaps now we'll turn to what I think of as a very interesting opinion in an interesting area, a wage-and-hour employment case called *Brinker v. Superior Court* (2012).<sup>63</sup> Walk me through that one, if you would.

WERDEGAR: This case was a class action dealing with a restaurant company's alleged failure to provide employees meal and rest breaks. We have labor laws and regulations that mandate and govern a very interesting field, employees' rights with respect to wages and hours and breaks.

The case involved multiple, multiple issues and it included whether, as to these different claims — there were rest breaks and there were meal breaks — as to whether there were sufficient commonalities among the

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<sup>63</sup> 53 Cal.4th 1004.

putative class. They wanted it to be a class action. Were there sufficient commonalities among the plaintiff workers to allow for class certification?

Class certification is a very big issue because if a defendant is faced with a class lawsuit, the potential liability, of course, is much larger. One of the issues was, was class certification as to each of these issues appropriate? And what is required of an employer with respect to meal and rest breaks? And how could the employer fulfill its obligations?

Again, this is a matter of statutory and labor code interpretation, but these regulations and codes don't always answer the particulars and they could be ambiguous. It was very complex and very contentious figuring out what the law did require of the employer. It was one of the most contentious cases internally that I can remember in my twenty-one years.

MCCREERY: Why? Do you know?

WERDEGAR: The discussions at conference could become very heated. In the end, the opinion benefited from a lot of input from the various members of the court. What I first tentatively put out there was not what finally was the opinion. It benefited, and it was extremely gratifying to read in the legal journal the day after the opinion was final, top of the fold, the headline, "Plaintiffs and defendants both claim victory." That's probably explained by the multiple moving parts of the case and explained by the input, collaboration, of everybody on the court.

Why was it so contentious? I think because the issues are complicated; because different people brought different inclinations to the discussion of what the employer should be doing, concerns that the employer not be hamstrung and concerns that the employees receive their due. It was just a complicated and deeply felt case, also a very important case. It certainly didn't put to rest the issues, but it was a foundation for cases that were litigated afterwards. But the role of our courts is such that, unlike legislation, which tries to comprehensively resolve every question — it never does, but it tries — we just address the case before us and so we can't answer every question that might come up down the road.

MCCREERY: Coming in 2012, I take it this was late enough that, just for example, Justice Liu could participate as a new member of the court?

WERDEGAR: Yes, Justice Liu did.

MCCREERY: I wonder, just in terms of the court's own takes on the various aspects and its own deliberations, what effect it might have had to have a new member?

WERDEGAR: In this instance I can't remember except that Justice Liu was overtly supportive of the — how can I say it? He saw the case the way I saw it, which was very nice, to get some support. [Laughter] He did not engage, as I recall, in the very strong oral discussions at conference that we had.

They were strong, in my view, because they were critical of some of what I had suggested or the approach I was taking. But I want to be clear that the ultimate opinion, I think, was a fine product of seven people thinking hard and deeply about a case that was not an easy case and had important ramifications.

MCCREERY: How far would you say you ended up from where you started?

WERDEGAR: At this point I can't actually really say. After a case we move on. We have so many cases coming through here that if you asked me what I did last week or two weeks ago at oral argument in Sacramento, I'd have to step back and get a little help. [Laughter]

MCCREERY: Fair enough. But this does seem that it's important in advancing the law in a broader sense.

WERDEGAR: We had to take it. That's what we do. And the hope was that it would give guidance to future cases. That brings me to my separate concurrence, to my own opinion, which is not a common thing but it's not unheard of either. In that instance, I wanted to clarify certain aspects of the opinion relating to class certification for the Court of Appeal on remand.

I wanted to be of assistance to the Court of Appeal, but the clarification that I offered in my concurring opinion evidently was clarification at this time that other members of the court didn't want to endorse.

It raises the question, if you write a concurrence — you agree, sign the majority, but you write a concurrence — does the failure of the rest of the court to join you mean they reject it, or does it mean that they're not ready and they don't feel the opinion needs to go that far?

Speaking with my staff attorney on this very point this morning — he follows these wage-and-hour cases post-*Brinker* closely — he said courts have explored that in the *Brinker* case, does what my concurrence says

about class certification — is that helpful? Or because the rest of the court didn't join, was it rejected? My staff attorney tells me that subsequent courts have taken both views, as they try to deal with the law.

MCCREERY: But you were setting out to offer some guidance for the future?

WERDEGAR: We were. We were, yes, and Justice Liu signed that.

MCCREERY: To clarify, may I ask what the sequence was and how that piece of it ended up in a separate concurrence?

WERDEGAR: Probably — well, I can't recall. I can only tell you that it was something that I felt was important and relevant to say and perhaps to get as many signatures — it was unanimous — on the main opinion, I chose to carve it out of the main opinion.

MCCREERY: You say your staff attorney indicates other courts —

WERDEGAR: Have read it both ways, that the failure of the majority to sign it means it would not be approved by our court; or that that separate opinion gives excellent guidance, and “we'll follow it.”

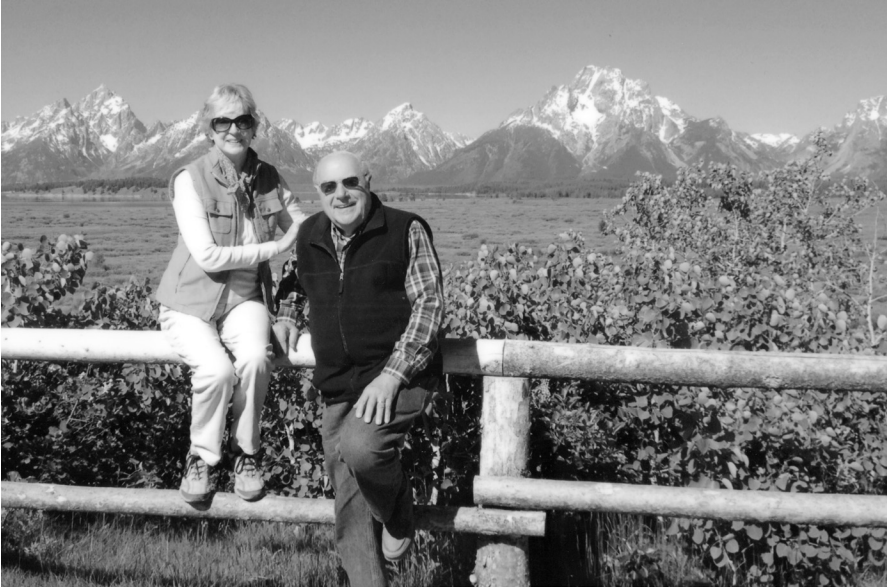
MCCREERY: Do you have anything to add?

WERDEGAR: No. I think when whatever the issue that I wrote on comes before us again, we'll see whether the court agrees with me and that opinion has been extremely helpful, or whether that's not the view of a majority of the court.

MCCREERY: Perhaps this would be a good time to turn to the matter of the cases related to the California Environmental Quality Act, or CEQA, if you would be ready to do that?

WERDEGAR: CEQA is an ongoing issue, and it will be with us forever. The CEQA law, I think, is a well-intentioned law. It tries to accommodate the inevitable, necessary development in this state with the long-term protection of the environment. But no law can comprehensively cover every situation, and the nuances and the interstices of the law are left for the courts.

In the beginning — it's a fairly new law. I can't tell you when it was written but there's so much. Every project is different, and there's so much to be experienced under the application of the law. I just attended an appellate justices' institute last week, and the experts who were speaking on



VACATIONING IN THE TETONS — JUSTICE KATHRYN MICKLER  
WERDEGAR AND HUSBAND DAVID WERDEGAR, M.D., CA. 2007.

the panel identified a case called *Save Tara*, which I was assigned and authored, as one of the early cases.<sup>64</sup>

Tara was a building, a historic building. I love the name, *Save Tara*. It was a building, but the most recent case we had was a 20,000-person project. It was going to be the largest land development in the history of the state of California. So CEQA can impact the small and the large. In fact, we recently — not my case — I think I joined Justice Liu's concurrence or dissent — the Berkeley hillside case, a major mega- mega-home in a Berkeley residential area. So CEQA can touch on all projects that require public agency approval.

And the issues. There are so many issues. What is a project? That has a technical definition. What is a significant environmental impact? That has a technical definition. And if it doesn't have one, when can you file a negative declaration, meaning nothing applies? But if it has potentially a significant environmental impact you have to file an EIR, an environmental impact report.

<sup>64</sup> *Save Tara v. City of West Hollywood*, 45 Cal.4th 116 (2008).

What's the baseline against which you're going to measure whether the impact is going to be significant? Is it how the land is used now? How the land could be used now but hasn't been?

Another very interesting issue, which I did write about in the *Vineyard* case, was how far ahead into the future when you're talking about a large project — this was going to be some development outside of Sacramento — how far into the future do you have to look at the environmental impact? I don't have the citation before me, but in that case, interestingly, given the situation of water in California today, one of the issues was, how far down the road did the proponents have to show that there would be water, that the river that they were counting on would be flowing? Or whatever it was at that time. These are all CEQA issues.

New in the mix and related to this case, the Newhall case that has been argued before us, *Center for Biological Diversity v. Cal. Dept. Fish & Wildlife*,<sup>65</sup> is that we now have statewide goals for reduction of greenhouse gas emissions. So you have your CEQA environmental impact, and that usually goes to trees and land and animals and fish. Now we have also a statewide greenhouse gas emission target.

How does that play into CEQA? These are the issues, and we have a lot of CEQA cases pending before us, as you can understand. I will say, this court — I said it at the appellate justice institute, too — we just try to do the best we can. Periodically there are efforts to amend or fine-tune CEQA, to clarify it, simplify it or address an issue that hasn't been covered. That doesn't concern us until it comes to us to be interpreted. But we do have a lot of CEQA cases.

MCCREERY: As you say the new statewide targets, fairly new, to reduce greenhouse gases have become a significant element of this question, "Should CEQA law be revised and updated?" Indeed, Governor Brown has been quite vocal on this. He is so closely tied to the greenhouse gas targets and has called, I think, the revision of the CEQA law "the Lord's work." In other words, it's something important that needs to be done.

WERDEGAR: I was not aware of that. Calling it the Lord's work? Some revision of it?

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<sup>65</sup> 62 Cal.4th 204 (2015).

MCCREERY: I think the idea being that the kinds of delays that tend to be caused by these multiple levels of challenges and EIR requirements and so on have the effect of the law keeping projects from happening over a period of many, many years.

WERDEGAR: That's true. That is true or it can be true. What was his take on that, that it shouldn't be so?

MCCREERY: That perhaps there are flaws in the law itself that would help resolve —

WERDEGAR: Yes. That is a complaint of proponents. This, again, goes to the political, not our domain. But politically it's claimed that the law is used and abused to delay projects people don't want. The other point of view is that the law is there to preserve and protect our environment, and if you can't show mitigation — say your project is going to harm the environment — you have the opportunity to explain that you can't and why the project is still valuable and worthwhile.

MCCREERY: As you say, the built-in process of getting environmental impact reports where needed and requirements of the law itself tend to take several years' time, and then there's the chance that a series of lawsuits will delay it a great deal further.

WERDEGAR: Oh, yes. Yes. But those aspects are the political aspects.

MCCREERY: I wonder if you might take me through an example of a CEQA case in which you've authored an opinion as a way of looking at how this works? Is there something that you'd like to expand on a bit?

WERDEGAR: No, I'd have to go back to a particular case. How it works is: somewhere along the CEQA process there's an objection that the agency that approved the project did so inappropriately or invalidly. Whatever the challenge is to the whole lengthy CEQA process, somebody sues, a ruling is made below, it comes to the Court of Appeal, we take it, and we analyze.

I think I've mentioned some of the particular aspects of any given project. Maybe the issue is that they didn't analyze sufficiently — I mentioned water — but transportation, the impact on transportation. So what we look at is, did the analysis fulfill the requirements of CEQA? Or maybe a project



will have submitted a negative declaration, meaning it's not going to have an impact, and it's challenged in that regard.

The briefs, of course, focus the issue for us. The opinion in the Court of Appeal focuses the issue and has a result. The loser petitions to us, so we're focusing on what they're complaining about in the Court of Appeal. Then we look at the briefs, and we do the best we can.

MCCREERY: As it happens your chambers has been assigned a fair number of these cases. How does that play out within your overall workload?

WERDEGAR: It's true. Actually, if you are assigned — nobody specializes. We always say that about the Supreme Court. If you come here with a specialty, don't expect that you're going to be the specialist.

But sometimes the chief, who does make the assignments — the previous chief and this chief, every chief, I suppose — will assign a sequence of cases to a particular chambers. But we have cases in front of us now relating to CEQA. I've been assigned one. Other chambers have been assigned different ones. So it's not that it always comes to me.

But it actually makes it easier for a while because you've been forced to immerse yourself in this law, and before you can get to the actual heart of the issue you have to understand the whole law, [Laughter] so that it works well, actually.

And of course, everybody weighs in. Our preliminary response procedure here is thoughtful and comprehensive. It's well known that, before we set a case for oral argument, everybody on the court has looked carefully at it and has contributed their disagreements or their improvements.

MCCREERY: Then within your own chambers is there a temptation to have your staff specialize in such matters, given that it is such a complicated area?

WERDEGAR: Yes, I think that's true but not exclusively. In my particular chambers, I'd say — I can't speak for others — my five attorneys cross-fertilize with each other a lot. Just because it's somebody else's case they've been assigned to work up for me doesn't mean that other attorneys aren't asked for their view or don't volunteer their view. But I do have a couple of attorneys who have done the spadework on the CEQA cases and done it very well, I would say. But there is cross-fertilization in my chambers.

MCCREERY: As you say, there has been quite a tide of CEQA cases flowing through the court. Will that abate anytime soon, absent any change in the law itself?

WERDEGAR: I don't think so, but these things do come in bunches. But because the law is so important and impacts so much of what goes on in the state of California, unless we somehow manage to resolve every issue, which is very unlikely — and if the Legislature makes some changes that will probably come to us, too. I'm not sure. But cases do seem to come in bunches.

Another area where I was initially assigned a lot of the cases was the SLAPP law, Strategic Lawsuit Against Public Participation. That was a fairly new law, and people would bring the case up to us. We did resolve some of the issues.

We even had a couple of SLAPP cases on conference this week, whether to grant or deny, so some of these issues continue. There's always a new permutation or a new application. That's what's fun about the law for those of us who practice it in the circumstance that I do. In the law there's always going to be something.

MCCREERY: And as you say, if it's a statutory matter there's always something that nobody anticipated when writing the statute.

WERDEGAR: Yes.

MCCREERY: Are there other majority opinions you've authored that you'd particularly like to add to our discussion?

WERDEGAR: Thank you for asking that. I think over our many comprehensive sessions we've touched on most of them. If the time comes when you ask me what some of the themes of my jurisprudence are, I might mention some cases that we haven't focused on before. But for current purposes —

You did want to ask me, I think, about some of my concurrences.

MCCREERY: Yes, please. The one we mentioned a few moments ago was *People v. Robinson*. But there may also be others.

WERDEGAR: No, there I joined Justice Moreno's. It was interesting to revisit that. There's a statute of limitations on most every crime except murder, and in rape cases there is a statute of limitations. The statute of limitations is stopped by the filing of a complaint and the issue of an arrest

warrant, and the arrest warrant has to describe with particularity the individual who you're hoping to arrest.

In that case, the question was whether an arrest warrant that described the individual to be arrested — they had a DNA sample, so it described the individual in this rape case as a black male with a DNA of “blah,” and then it goes on for letters and numbers and symbols, however you describe a DNA profile. The question was whether that was a sufficient description. The statute of limitations was going to run in three days, but they had no match.

They had this person's DNA profile. So the question was, is that sufficient to stop the statute of limitations from running, to issue a John Doe complaint — that means you don't know who it is — with an arrest warrant describing him as a black male, with an attachment setting out this paragraph-long DNA profile? The majority said the DNA described the defendant with particularity. After all, nobody else has that DNA. They may also have said it reasonably gave that defendant notice he was being prosecuted.

Justice Moreno, whose opinion I signed, said the arrest warrant was not a real arrest warrant. It was merely a placeholder because it, “didn't authorize the arrest of any individual and it didn't describe anyone at all . . .” I'm quoting the dissent that I signed, “because it gave no means for a peace officer to recognize the defendant and make an arrest.”

The concern expressed in Justice Moreno's concurrence and dissent was that this would allow circumvention of legislatively established statutes of limitation. It's not for us to say we don't like the statute of limitation. However, in my view — and that's why I signed the dissent — the majority holding was contrary to the law of arrest warrants and contrary to common sense.

MCCREERY: How so?

WERDEGAR: By what I've just said. A paragraph-long DNA profile, symbols and numbers and letters, doesn't tell anybody anything; however, that view has not carried the day. Most courts take the same view as the majority, probably for practical reasons. It was a different lens looking at the same situation. However, the statutes of limitations for sex crimes have been extended, and I understand that greater databases now result in more cold-case hits. So with extended statutes of limitations in these rape cases and

more cold-case hits, there isn't so much of a problem with DNA warrants. If you get a hit, then you have a person.

Not long after this, what at the time I thought was a deficient-arrest warrant issue, there was a cold-case hit on this particular defendant. And of course nobody wants a rapist, an accused rapist, to escape justice. So that was that case.

MCCREERY: How far does the matter of common sense go in convincing others that there's a problem?

WERDEGAR: Here I can't say. Obviously, it didn't. I can't speculate on what the motivation, if any, was but I think one might reasonably believe the majority opinion was motivated by practicality. Superficially it makes sense. If you have a very precise DNA description, one person out of a billion has this, that's very particular. One reason for upholding the warrant might be just a practical wish to allow prosecution should a match come up of somebody who committed a heinous crime.

MCCREERY: By what length was the statute of limitations — ?

WERDEGAR: I can't say.

MCCREERY: I'm wondering how significant a change that was.

WERDEGAR: I don't know. I'm just told that that (extending the statute) might ameliorate some of the — make this kind of an arrest warrant less necessary or less frequent.

MCCREERY: Any idea how common those types of arrest warrants are?

WERDEGAR: Across the country — again, I've just been told because I asked that they are upheld across the country. Numbers, compared to warrants in rape cases that name the defendant? I have no idea.

MCCREERY: We wanted to talk more broadly about the instances where you do author a concurring opinion. Perhaps just in principle you can talk about the causes and instances of doing that?

WERDEGAR: I will, yes. We're speaking now about a concurrence, which means I'm not writing a dissent. Some concurrences you can sign the majority and write separately. Other concurrences you don't sign the majority. You start your concurrence by saying, "I concur in the result that A, B, C. I write separately for the following reason."

In *Brinker* as we discussed, I signed, of course, my own opinion but I wanted to clarify an issue that the majority cared not to clarify. Other concurrences, it can be because I disagree with the majority's reasoning, and I want to highlight the deficiencies of its reasoning for the benefit of future cases.

An example of that is a case called *Verdugo v. Target*, which you might have on your list, (2014) 59 Cal.4th 312. It's an interesting case. The plaintiff in this case, while shopping at Target, suffered a heart attack and collapsed. By the time paramedics arrived she had died.

The question was whether the common-law duty of reasonable care that a retailer has toward its customers, whether that common-law duty of reasonable care included an obligation to have available on the premises an automatic external defibrillator for use in a medical emergency.

I agreed with the majority that Target didn't have such a duty. It's an interesting opinion in that case. One of the reasons was there are statutory obligations to have such a defibrillator in certain circumstances, not including this circumstance, and various other reasons that were given. But I wrote separately because I disagreed with the majority's analysis and reasoning, and I was concerned that reasoning could impact future cases in an unfortunate way.

I do believe, in recollection, that the majority had analogized it to a retailer's duty to protect a customer from a criminal act, and I just did not think those two were analogous and, as the law developed, perhaps that reasoning would not be the one I would want to pursue in the next case. That's another reason for writing a concurrence. I agree with the result, but I'm concerned that the reasoning might have future unfortunate implications.

Now, another reason is when I think a majority opinion is so poorly written and so poorly reasoned that I agree with the result, but I cannot bring myself to put my name on the opinion. That doesn't happen often. It has over the years, but I don't even remember a case so I'm not going to be able to give you one. But where you just cannot bring yourself to sign it.

Perhaps you've spoken with the author and that person is unwilling to make the adjustments. Or maybe the changes you personally think are required are so comprehensive that it would never happen. In that case you concur, and you find a reason to concur. You can't just say "I concur"

without signing it, so you find some reason to write a short concurrence, and you're not signing something that you just can't put your name to. As I said, very infrequently but that's one of the reasons.

MCCREERY: It points up an interesting question of different — not only writing styles among the justices, but different modes of reasoning.

WERDEGAR: It does.

MCCREERY: Without naming any specifics, do you have an awareness of instances where others have felt a similar need to — ?

WERDEGAR: I can't speak about others, but I will say we are a court of seven members, and somebody is assigned to write the majority opinion.

There's a line between what is a question of style, where you think perhaps something is imprecise or not well expressed but that's just the author's style — which you would not distance yourself from unless it was so egregious [laughter] — and substance, reasoning.

It's a fine line, and the reasoning — that goes back to the earlier example that I did give, that I was concerned that the reasoning was not what I felt should have been used. It's a fine line. Our cases are a collaborative product to a certain extent. I have put in certain of my opinions language someone wanted or taken out language that I was happy with. But to get the signature of a colleague I would make that adjustment.

Colleagues are always asking people to put in something, take out something else. We do if it doesn't seem significant or critical because the more we can speak with a single voice the more persuasive our opinions are. I think we all compromise to an extent, and it's a personal judgment as to that extent.

MCCREERY: Looking at the big picture, the court is duty-bound to offer guidance in these areas. I might say when the guidance is clear and “of a voice” —

WERDEGAR: Yes. Well, it can be “of a voice” and not clear. [Laughter] That's why you might want to write a separate opinion clarifying.

MCCREERY: But there is an underlying matter of being helpful to the law in the future. But thank you for distinguishing between writing as a matter of style and writing that really is poor for some other reason that might make all the difference.

WERDEGAR: Yes, and that's a judgment call according to each justice.

MCCREERY: In the matter of deciding whether to write a concurring opinion, whether or not you've joined the majority opinion, how often would you say it's for the reason of focusing on a particular issue that did not survive the process of getting into the majority opinion?

WERDEGAR: I would say rarely. In fact, I'm not really in favor of concurring opinions. I'm not.

MCCREERY: Can you expand a little bit on that?

WERDEGAR: I don't know how helpful they are generally, except when you're trying to give guidance, as in *Brinker*. No, I don't think they're that helpful really. People want to know what the law is. The advocates in the very next case might find something in a concurring opinion that is useful to them as they bring the next case forward.

But I'm not one that seeks to write separately at all. A dissent, it's very clear why a person writes. But a concurrence — I definitely try to keep those to a minimum. I just don't think it's that helpful unless you intend it to be helpful, as I've said.

MCCREERY: Thank you for looking at the question of concurrences. Again, are there other cases you'd especially like to mention over and above our more thematic — ?

WERDEGAR: I do. I want to talk about some concurring and dissenting opinions. That is where you do agree, like Justice Moreno's C and D in the case we just spoke of, or you agree with some but you don't agree with the other.

The first one is a case we've talked about, perhaps, before, *Lockyer v. City and County of San Francisco*. That involved then-Mayor Newsom's ordering registrars to issue same-sex marriage licenses. Our court held that the mayor of San Francisco violated state law by licensing same-sex marriages.

I agreed with that, but I dissented from the majority's ruling that the marriages that had taken place under that direction were void, as opposed to voidable. Void means they were of no effect and never would be and never could spring to life again.

My point was that we should postpone ruling on the validity of the marriages because the underlying issue — did same-sex couples have a constitutional right to marry? — had not been resolved. Were it, down the road, to be resolved in their favor, their marriages would date back from the time that they took place.

That didn't prevail. But of course ultimately, we know that same-sex marriage was upheld, finally. But it was a long path.

Another one is the *Naegele v. R. J. Reynolds Tobacco Co.* case — do you have that? That's (2002) 28 Cal.4th 856. This, too, was a statutory case that involved the tobacco companies' statutory immunity from liability for personal injury. It's like gun manufacturers' liability. They had statutory immunity from liability for personal injury caused by the inherent dangers of smoking tobacco.

I agreed that the tobacco company had immunity for personal injury caused by the dangers of smoking tobacco. But I dissented, I disagreed, that they also had immunity based on claims that they deliberately increased the nicotine content of cigarettes and that they lied about tobacco's addictive properties. I saw nothing in the statute that granted immunity for those causes of action. That was a dissent.

And *Iskanian*. Have we talked about that?

MCCREERY: We did talk briefly about that. Please say more, if you like.

WERDEGAR: I will in the sense — if we've covered it, we have, but I agreed with the majority that the employee-plaintiffs could bring what we call a private attorney general action for civil penalties for violation of wage and hour laws. I agreed that they could do that.

The majority's preceding holding was that they couldn't bring a class-action arbitration, and I disagreed that the Federal Arbitration Act preempted our state rules invalidating class-action waivers. Under state law, class waivers are invalid, but the United States Supreme Court has — or at least our court came to the conclusion that the Federal Arbitration Act preempted our state laws.

This issue is in discussion nationally now. In fact, the Ninth Circuit, I read in the paper yesterday, has cases addressing the very point of my dissent, which is that the Federal Arbitration Act did not abrogate other federal law that guarantees workers the right to collective action, such as the Norris-LaGuardia Act and the National Labor Relations Act, the



Wagner Act. When you have somewhat competing or conflicting laws on the same subject you try to harmonize them, and the point of my extensive dissent was that the Federal Arbitration Act — and this is all analyzed — was not intended to trump earlier laws allowing collective action.

Where this will land I don't know. It will probably go ultimately — not from my opinion, but it's in dispute across the country — it will go to the United States Supreme Court, and what they say will be what it is.

But I was hoping that my opinion, which was quite extensive, will contribute to the conversation. And I'm hoping that the Ninth Circuit, which is looking at this in a different case right now, will feel that it benefits from my dissent, that it will know about it and will read it and perhaps agree.

MCCREERY: What knowledge do you have of whether your dissent is being used in these various pending actions?

WERDEGAR: You'd never know. You have to assume that it is, not just mine but all the case law. As I say, this is an issue that's very much alive nationally across the courts, federal and state. But you would never know unless they cite you.

That brings me to *People v. Diaz*, the cell phone search case. I think this was a straight dissent, which we've talked about. I disagreed with the majority that it was a valid search incident to arrest to seize an arrestee's cell phone and later search its contents. I thought the law of search incident to arrest needed to adapt to the new reality that a person's smart phone contains extensive personal and private information.

The United States Supreme Court later issued an opinion, not *Diaz* but out of another case that agreed with me. But I hope they read my opinion. The case that they did grant was a Court of Appeal California case, but I have no idea if they read my dissent. They didn't cite it.

Here's another one, *People v. Wells*, (2006) 38 Cal.4th 1078. I dissented from the majority's holding that the Fourth Amendment, that's search and seizure — no search and seizure without reasonable cause except in certain cases, here exigency — that the Fourth Amendment permits the police to enter a home on the grounds of emergency and take a blood sample from an allegedly intoxicated driver who had been observed driving allegedly under the influence.

I believe the United States Supreme Court in a different case, but subsequently, agreed that that was not a sufficient exigency to enter the home without a warrant, following a suspected drunk driver into his home.

The reason I felt it wasn't an exigency is: scientists commonly estimate the blood-alcohol level with the passage of time. It's easily calculated, and also you can get a telephone warrant and so forth. As I say, I don't know if my opinion played any role in that, but ultimately they agreed with me.

MCCREERY: One of the benefits of having your position for a long time is that you do eventually get to trace the effects of some of your own opinions.

WERDEGAR: Yes, you do. You do, and they're not always what you would want. But sometimes they are, and when they are you think that's wonderful. And if it's the United States Supreme Court that agrees with you, you think they're terrific, and when they don't, you think, "Well, that's just the United States Supreme Court." [Laughter] That's how it is.

MCCREERY: That leads me to ask, how do you think back on your body of work?

WERDEGAR: That is a little too broad for me to — how do I think back on it?

MCCREERY: Perhaps another way to think about it would be, in reviewing a number of things that you've worked on over a period of time, how do you characterize what you notice about your body of work?

WERDEGAR: That helps me. That was part of your question. I would say that because this oral history has been the occasion to do this, I've reflected on the body of my work and whether certain themes have emerged. I would be willing to speak about that if you think that would be good.

MCCREERY: Yes, please.

WERDEGAR: All right. I have looked, because this has given me the occasion, on some of the themes. I would say that there are a number of cases that would permit me to say that I have a sensitivity to civil liberties and equal protection. And commentators have remarked on this.

First, addressing cases relating to gays and lesbians, one we haven't talked about was *Koebke v. Bernardo Heights Country Club*, (2005) 36 Cal.4th 824. I dissented in that case, a case under the Unruh Civil Rights Act where I dissented from the majority opinion.

The majority held that a country club — this goes back to 2005 — the world has changed rapidly with respect to same-sex couples. But at that time I dissented from the majority opinion holding that a country club had a legitimate business interest justifying discrimination against registered domestic partners.

MCCREERY: What was your thinking?

WERDEGAR: My thinking was that there was no legitimate business interest to allow them to distinguish between registered domestic partners and married couples. Maybe the issue was one partner comes in on the membership of the other. I just thought there was no legitimate business interest. I'm sure if one went to the majority opinion you'd find some offered business interest, but I didn't think so.

Another one, again relating to a sensitivity to civil liberties and equal protection, was the Berkeley Sea Scout case upholding Berkeley's refusal to subsidize a youth group's use of the city marina unless the group provided assurance it would not discriminate against homosexuals or atheists.

I think we spoke about *Sharon S.*, holding that a birth parent — these were two lesbians — who consents to the adoption of her child by a domestic partner didn't have to surrender her parental rights. This was statutory interpretation, but interpreting a statute that never contemplated this situation. And again the *Lockyer* case, where I felt the marriages shouldn't be held void right at that moment.

Another one is *Galanty v. Paul Revere Life Insurance*, (2000) 23 Cal.4th 368. This goes back to the era when HIV was still widespread and without a good prognosis. But there I held that the incontestability clause in a disability insurance policy — it had an incontestability clause — barred the insurer from canceling the policy because of a subsequently positive HIV test, so that the individual still was covered by insurance.

I feel that those cases do reflect a sensitivity to individual liberties and a sensitivity to gays and lesbians, not that at the time I was writing the opinions I was motivated to do that, but that's how my analysis of the case and the merits on either side came out.

Then, an interest in individual rights of personal autonomy. In the *Smith* case on behalf of the court I wrote an opinion that the landlord's religious views did not permit her to refuse to rent to unmarried couples

in violation of the FEHA. Mind you, in that case it was unmarried couples, but her religious views, were we to have held the other way, could have permitted her to refuse to rent to all sorts of individuals from different groups that her religious views did not endorse or embrace.

*Conservatorship of Wendland*, where it had to do with who would speak and what did you need to know for a gravely disabled conservatee to terminate life support? There we held that you needed clear and convincing evidence. That spoke to the autonomy of the individual.

*Catholic Charities of Sacramento*, where we held that a church-affiliated health care organization had to comply with general laws in administering its employer-provided prescription drug insurance that included coverage for contraceptives.

Then I would say that, if you want to group them this way, as some commentators have done, cases show a sensitivity to women's issues and family issues. That takes me back to *Sharon S.*, the same-sex adoption, and the women's issue takes me back to the cosmetic surgery arbitrator case, where he had been — in a published opinion by this court — he had been reprimanded for his disrespect for women.

And the *Saelzler v. Advance Group* case, the female UPS driver who was attacked in an attempted rape while delivering to this crime-ridden project where they knew — they never denied, they admitted — that it was crime-ridden and that gangs were there and that they escorted their woman manager to her car. But the reason the plaintiff lost was she couldn't prove that all of that — they didn't know who the perpetrators were, so she couldn't prove causation, that all of that was a cause of why she was attacked. And again going to family issues, the *American Nurses* cases allowing authorized school personnel to administer insulin to students.

And I would say some sensitivity to discrimination. Did we speak about the *In re M.S.* case where the court rejected constitutional attacks to California's hate-crime statute? It was an early case in, I'm not sure, 1995 possibly. That's 10 Cal.4th 698. There are enhanced punishments if the crime is denoted a hate crime. This is now common, but at the time it must have been early in the life of the statute. I authored for the court an opinion that said that this was constitutional, to enhance punishment for hate crimes, meaning that the crime was motivated by hate of a particularly protected group, whether it's gays or black or other ethnicities.

Then I would add workers' issues. I've been assigned over the years as these cases come along innumerable cases relating to workers: *Brinker*, we've talked about; my dissent in *Iskanian*.

Hate speech in the workplace — that's *In re M.S.* — the case I've just mentioned where the reason it was not a violation of freedom of speech is it was happening in the workplace. The individual employee could not escape this. It was not in the public exchange of ideas. It was confined. And we held that the statute could enhance punishment.

*Sullivan v. Oracle Corporation* (2011) 51 Cal.4th 1191, which held that California's overtime law applied to non-resident employees sent here from out of state while working in California.

There's a case called *Lazar* — I don't have the cite — which held that a former employee in this state who had been enticed to come here by his employer but was subsequently fired, that he could state a cause of action for fraudulent inducement of employment contract based on his employer's false representations concerning his job security.<sup>66</sup> Of course, the case describes what all those representations were, and to his detriment the employee uprooted himself and came here. In his pleading he alleged that none of that was true and he had been fraudulently induced to come here.

Here's a dissent, *State Building and Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, where I dissented from the majority's holding that the state prevailing wage law — there is a state prevailing wage law — does not apply to public works in charter cities. The issue there was, what about a charter city as opposed to some other kind of city? Now, that's one where if the Legislature felt the majority was wrong and the dissent was right, they could correct it. If that has happened I'm unaware of it, but I felt they were wrong.

And *California Grocers Association v. City of Los Angeles* — that's 2011 — I don't have the cite — holding that a city workers retention ordinance — Los Angeles had a retention ordinance — which limited the ability of certain employers to replace the workforce when they acquire a business, and this was a grocery business, that that retention ordinance did not violate the Equal Protection Clause.<sup>67</sup>

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<sup>66</sup> *Lazar v. Superior Court*, 12 Cal.4th 631 (1996).

<sup>67</sup> 52 Cal.4th 177

So those are cases that touched on workers, and in the ones that I mentioned the opinion, or the dissent in one case, was protective of the workers' rights under the law as interpreted.

MCCREERY: A picture emerges of you as a strong civil libertarian voice over time. How else would you characterize these themes? What does it tell you about the path you've traveled here?

WERDEGAR: Really, it's for observers to say. I do have letters and articles about me that have characterized me in various ways, but for me to characterize myself — I don't think that's for me to do. But I've been written up quite a bit, and I have been characterized.

MCCREERY: Fair enough. Yes. I only wonder what stands out to you or might be some sort of revelation as you review such a long history?

WERDEGAR: A revelation you mean, are there themes in my jurisprudence? I would not want to suggest that when I approach a new case that I have a bias to express a certain sensitivity or preference. I think every judge would say that he or she is objective and takes the case as it comes.

But because the cases that come to us have no clear answer and that's why we have to take them, I do think one's sensibilities inform one's approach to the law. Anybody who says otherwise has not been a judge. You can't help it.

As a woman — certainly it's been described that I have a sensitivity to family issues and to the human aspect of the law. I'd be happy, on a later occasion, to read you excerpts from all the articles that have been written about me that might endorse that.

MCCREERY: I'm more interested in your own reflection on the subject, but thank you.

WERDEGAR: I guess in retrospect I do have a sensibility or a sensitivity to individual liberties and the circumstance of individual people. Not every case presents that, but when they do I think it factors in. But if the law demands that I go in a different direction, I think it's fair to say I take that direction if that's where I have to go.

MCCREERY: Recognizing that you have no say in which cases come to you at this level, are there glaring areas of law that you think need to be addressed in California that are causing problems in individual cases that could be dealt with on a broader scale?

WERDEGAR: The glaring areas of law that need to be dealt with in California, we rely on litigants to bring them to us, and they usually do. I don't know if that answers your question.

If you mean what is coming or what should be coming to us, certainly we've touched on CEQA and wage-and-hour cases, water law, privacy cases with the new technology. And we're still wrestling with the tension between California's view about arbitration and the United States Supreme Court's view. That will be resolved, ultimately, by the United States Supreme Court.

MCCREERY: We did have a chance to talk a bit about arbitration on other days, but I don't think we touched on the fact that the U.S. Supreme Court has issued some significant arbitration decisions.

WERDEGAR: Oh, yes. And they've reversed us, and they've narrowed us. As we probably spoke of, initially, years ago, decades ago, arbitration was supposed to be an avenue for business interests to resolve their differences and get on with what they do best, their business. It was parties with equal bargaining power agreeing to resolve this way.

It's gone so far beyond that now. These are contracts of attrition. Any product that you buy or service that you have or your doctor, any dispute, you agree to have it arbitrated.

Employees, that's where it's difficult. An individual employee, who might have an actual legitimate complaint or grievance, has agreed to arbitrate. Rare is the individual employee, without a class having common claims, able to do that. And if they do, arbitrations are not public. If corporations lose, it's not precedent for anything else. The same is true if they win.

But there's a deeper concern by, I think, people concerned with the law about the whittling away of the right to a jury trial in civil cases. But that's beyond our conversation today.

MCCREERY: Shall we pause for just a moment?

WERDEGAR: Yes, let's pause for a moment.

## INTERVIEW 12 (DECEMBER 7, 2015)

MCCREERY: Good afternoon, Justice Werdegar.

WERDEGAR: Hello again, Laura. Nice to see you.

MCCREERY: We left off last time talking about which areas of the law you think may need this court's attention, coming up, in order to resolve issues or further develop the law. You had talked about alternative dispute resolution as an example of one of those areas. What else do you see ahead in that regard?

WERDEGAR: I think that CEQA, California Environmental Quality Act, cases will be with us indefinitely. I don't know if I earlier mentioned, but CEQA's a very complex law designed to preserve the environment as best we can while understanding that there is a need for development. CEQA cases. We have several this term, and I think they will continue to come to us. Water cases. I needn't tell our readers that water is a high-priority issue in California.

In the criminal law realm, we are guided by what the United States Supreme Court tells us with respect to the peremptory discharge of jurors of a particular ethnicity or discernible class, so-called Batson-Wheeler issues. It's very difficult to apply the Batson-Wheeler requirements, especially on review. We have those issues all the time. Did the trial court properly allow the excusal of a particular juror or not?

Looking down the road, I expect that we'll be seeing more privacy cases.

MCCREERY: What leads you to say that?

WERDEGAR: The metastasization of technology. There's even a question philosophically if we have any privacy anymore. But definitely those.

And I think we'll see more equal protection issues as new classes of protected individuals are identified. In our *Marriage Cases*, we identified same-sex individuals who wanted to marry another of the same sex as a protected class. That was a rather new concept, and other groups of people are emerging as well. One example in that realm is transgender people, very much in the forefront now demanding equal rights and other amenities of civil life.

Those are what come to my mind now.



MCCREERY: Are there particular cases coming forward that you think might be of special interest in one of these areas?

WERDEGAR: In CEQA I'm sure there are. [Laughter] I'm sure we have some on our docket, but the particular issues I can't say now. With respect to the new classes of protected individuals, no. I am looking to the future. The same with privacy.

MCCREERY: Are there other areas in which you would like to see the law further developed for any particular reason?

WERDEGAR: In which I would like to see the law further developed? I can't necessarily say that. We will always have some kind of employment issues. That's one of the wonders of the law and the challenges and pleasures of being a justice. [Laughter] There are always issues, ones you can't anticipate.

MCCREERY: We wanted to spend the bulk of our time today in something of a summary mode, having worked together on these oral history sessions over the course of more than a year. I wonder if you could offer some general reflections as you think back on twenty-one years on this court and how you view it all as you look back now?

WERDEGAR: Thank you. I appreciate that question because it allows me to set the stage to what the world was like at the time of my appointment. I have a very vivid memory of the Friday evening "This Week in Northern California" program on PBS, presided over by Belva Davis, that followed my naming as a new justice of the California Supreme Court. I just recently watched the video of it, and it brought to mind how dramatic my appointment was.

First of all, Belva Davis remarked as follows — this is her statement — that, "The court is in the firm control of conservatives, and it's been dominated by conservatives ever since Rose Bird and two colleagues were thrown out by the voters." She went on to say, "It used to be five conservatives, but with Werdegar's appointment it's likely to be four conservatives."

Then the panel and she went on to say it was remarkable that I was a woman and I was a native San Franciscan. To that point the court had been dominated by Southern California justices. She made reference to the fact that I was appointed to the Court of Appeal from serving as a staff attorney

for Justice Panelli. She made reference, and the panel did, to my “unusual background,” and supposedly I had been discriminated against, and I had no trial court experience, and I was only the third woman appointed to the court. And with my appointment, for the first time, there would be two women serving on the court.

A review of that program does put in historical context how things were then. Reflecting on that, it comes to mind the perceived need to justify my appointment. My service as an attorney in the United States Department of Justice; my authoring of a benchbook for statewide trial court judges; my working as an editor at Continuing Education of the Bar; teaching and serving as a dean at University of San Francisco Law School; and my judicial clerkship on the Supreme Court for many years seemingly counted for nothing. The emphasis was that I had not served on the trial bench, and neither had I been an actual litigator.

This was on the heels of the George Deukmejian administration, where it was mandatory that you start on the municipal court bench, as it then existed, and move on from there if you could. Also, it was desirable, of course, if you had had litigation experience, very often that of a prosecutor. So Wilson’s appointment of me was a big change.

**MCCREERY:** What do you suppose prompted Ms. Davis to describe you as someone who would change the conservative majority?

**WERDEGAR:** That’s an interesting question. I had not been in positions where any judicial philosophy or political philosophy would be manifest that they could discern that, except perhaps my service in the Civil Rights Division of the Department of Justice in the Kennedy administration.

I know one reporter, whom I won’t name, from Sacramento, who called me when I was nominated. When she heard that background, she said, “You’ll never get it.” [Laughter] I thought to myself, “I beg your pardon?” I can’t say. I really don’t know.

**MCCREERY:** But as you say, it’s a window on how such an appointment was perceived at the time.

**WERDEGAR:** It was. All the things that were different. The background was dramatically different. The gender, if you will, was quite different.

MCCREERY: As a point of interest, Belva Davis herself had come along as a woman reporter and achieved heights that, perhaps, few had at that time.

WERDEGAR: Oh! She is remarkable. I don't know if you've had the opportunity to read her book telling her story. A remarkable woman. I'm happy to say that I know her through my husband's work with her on the — maybe it's the Kaiser oversight board that my husband chairs, arbitration oversight board.

MCCREERY: That's going back to the time of your appointment —

WERDEGAR: Let me correct that. I don't think Belva Davis is on the Kaiser arbitration oversight board. She might have been on some board related to the Institute on Aging. My husband has served in many positions.

MCCREERY: In any event, she's had a chance to follow your career in the intervening years.

WERDEGAR: And I to become acquainted with her.

MCCREERY: What else in the way of general reflections stand out to you at this time?

WERDEGAR: Going back to my service on the Court of Appeal, where I was Governor Wilson's first judicial appointment, and I was the only woman among nineteen justices and, as we've just touched on, my unconventional background that I think my fellow male judges had difficulty relating positively to. I felt very isolated, the only woman.

Then, coming to the California Supreme Court I was one of two women. But I had a staff attorney, a mature individual who had clerked for justices on the Court of Appeal and served as my staff attorney for a period of time who, when I asked her to reflect on some cases that she had worked on for me, in preparation for my oral history, she did, and then she offered me some of her observations as to what it was like working for me as a female judge. And they were some of the most touching things I have heard. I'd like to share some of them, quoting her, if I might because it touched me a great deal.

I'm now going to quote my former staff attorney: "My extreme respect for your ability to remain civil and feminine in the man's world of court politics. You are a wife. You support and supported your husband. You raised children. You never pretended you were not a woman, a wife, or a mother. Without leaving any of that behind, and without suggesting that

it deserved special praise or treatment, you forced those around you to accept your mind and your ability. It must have been extremely hard, but I don't see that you ever compromised."

Skipping — very, very sweet — skipping. Quoting: "And that leads me to another favorite memory, which is you presiding over our conferences. There you were in charge of all these men. I haven't seen much of that. I think you were the first woman I've known in a position of authority who was simply herself and, by being herself, demanded that the men adjust to you."

I was very touched by that. So that was the experience. Her comments reflect the era in which she came of age as an attorney. It illustrates the time in which I served. Men were the norm, and that's very different today. Today I know that the women, of which there are so many, on the Court of Appeal are congenial and supportive of each other, and I suspect that they're not treated or perceived any different than male judges. It's just a new and different generation.

**MCCREERY:** Likely there are many more women on the staff of attorneys assisting the justices, and so perhaps throughout all levels of the system?

**WERDEGAR:** That's very interesting because, actually, I think even when I was a staff attorney and when I was appointed to the Court of Appeal, there were plenty of women serving as staff attorneys. This is because — probably several reasons. One, they're good. But two, it's a position that they could perhaps use their professional skills and still maintain a life balance. I don't think there was any discrimination against women there.

When I was appointed to the Court of Appeal, I think I earlier mentioned in this history, I think the women staff attorneys actually welcomed it as a recognition that a staff attorney, of which many were female, could aspire and be appropriately elevated to the position of justice.

**MCCREERY:** It's a validation of their own role, in a sense.

**WERDEGAR:** It was. Of course, it's so different today. The California Supreme Court has had six women justices, now four serving all together. The three most recent Governor Brown appointees had no judicial experience. I don't believe they've had any litigation experience with the exception of Justice Kruger, who has argued admirably from the Solicitor General's Office before the United States Supreme Court.

These points simply illustrate that times change, and they illustrate the different philosophies of the appointing governors. The aftermath also illustrates how the press and political responses differ as well. I've been privileged to serve and live long enough to see that times change.

In the early days of my tenure, when I was this singular female, law review articles, usually written by women professors, used to reflect on feminist jurisprudence and explore whether women think differently. I read a lot of those law review articles.

In my early speeches — once you're appointed, people, especially in those circumstances women's groups, wanted to hear from me. My early speeches were focused on the question, "Why a woman on the bench? What does this serve? Why do we care? What value does that bring?" I suspect that's not a big topic now, with so many women on the bench.

Do women think differently? Over the years I have sat with five women on the Supreme Court, and I've not noticed that we have anything in common that can be referred to our gender, if you will. I think we don't agree with each other or disagree with each other any more than any one of us would with any male colleague. So that's my personal sample.

Nevertheless, I still do believe that women on the bench are very important as role models and for many other reasons. But jurisprudentially, my one experience and the particular women I've served with, I don't see that we coalesce any more than we would with other judges.

However, studies have been made of Justices Ginsberg in times past and O'Connor, and they have extracted some cases where being a woman made a difference. On today's United States Supreme Court perhaps scholars are looking at that. I look forward to reading it if they are because, what do we have? We have three women, Kagan, Sotomayor, and Ginsberg.

MCCREERY: And as you say, here on the California Supreme Court there is now a majority of women. Extending the question to the collective sense, how much difference does it make, if any, to have a majority of women justices?

WERDEGAR: I think it makes none.

MCCREERY: Your answer is the same?

WERDEGAR: Yes. And that answer would follow from what I said before because we are as alike or as different as any two random judges of any

gender appointed by different governors. You do see differences in who appointed a judge. You do. The justices in our system do reflect what a given governor is looking for, and they're not all looking for the same thing.

MCCREERY: By extension, what changes or differences might you note, if any, in terms of the informal parts of your communication process with other justices, informal interactions, things that happen between individuals to talk something over or explore some idea? Any differences there?

WERDEGAR: Does this relate to the fact that they're women or to the new court? With respect to the fact that they're women, I see no difference.

MCCREERY: At some point maybe we can extend that question to the new court, as well, when you're ready.

WERDEGAR: I'd be happy to.

MCCREERY: Let me ask you to lay out some of the most memorable events of your tenure.

WERDEGAR: All right. Before we leave that earlier one, my reflections, I do want to speak — I've touched on it before, but about the arc of time. As we all know, I've had the opportunity to experience a good part of the arc. What I've observed is that, as I mentioned, how things change with time and a change in the political environment.

I would mention the role of women; the attitude toward criminal punishment and the Three Strikes concept; the role of arbitration; same-sex marriage; the status of gays and lesbians. Now the issues revolve around transgenders, "queers," which is a word that is being used to identify a subset of — of what? — transgenders or of individuals who question conventional concepts of gender identity. But it's not a pejorative term, I gather. It's a term that's now used as an identifying word, I think. And bisexuals; and the concept of what constitutes diversity.

MCCREERY: Yes, that is a concept that's come a long way, shall we say?

WERDEGAR: It really has. So that was my concluding reflection, what happens over the arc of time.

MCCREERY: What are the memorable events, as you think back on your tenure?

WERDEGAR: I do have some. Of course, my first oral argument was in Los Angeles, and it was this unfamiliar courtroom with a series of gray doors with no labels on them and so on. And getting lost trying to find my way to the courtroom, which was on a different floor, of which I had no knowledge, from the floor where our chambers were. There was nobody to collect me, no colleagues, no signs, and I ended up in a storage room. [Laughter] That was memorable. My first conference, where I seemingly interjected my ideas, not understanding that there were protocols, and I was called on that. [Laughter]

More seriously, the reaction to that *Romero* opinion, where the court held that the Three Strikes initiative still left discretion to the trial judges. That was memorable. I had been on the court only two years, and as we've spoken of, the public and political reaction was quite vociferous. It was an early introduction to the political and public reaction to our opinions. Happily, they're not all responded to that way. In fact, I don't think that outcry has been matched since.

Certainly, the gay marriage cases. There was a response, and that's one of my memorable moments, was the argument in the gay marriage cases. It was dynamic. The courtroom was packed. There was overflow. It was vigorously argued, especially by the proponents.

Then, when our opinion was issued, the shouts outside this building. And later from my office window, which you can see, watching the couples in their wedding finery lining up around the block to get married. Later the letters I received, very moving letters of appreciation for my participating in that decision. That was memorable indeed.

Going back to the gender issues, it was a memorable morning when the court was sitting in San Francisco and for the first time — this is amazing that it was the first time — there were two women attorneys arguing the case, one on either side. As we left the bench, Justice Mosk said, "Quite a morning for broads!" [Laughter] Which only highlights how remarkable it was at that time.

Related to that is the first time the court walked into the courtroom and there were four female permanent members of the bench. We might have had a pro tem on some occasion that temporarily gave us four. At that time it was our Chief Justice Cantil-Sakauye, Justice Kennard, Justice Corrigan, and myself. And with Justice Kennard's retirement we have another woman, Justice Kruger.

The 1988 Marin County “meet the judges” night, when one of the Schmier brothers who, as I’ve mentioned, were fixated on the publication of Court of Appeal opinions, was taken away in handcuffs because he persisted in trying to ask me a question, which I would have answered. But the presiding judge had declared questions closed, and the ensuing *Independent Journal* editorial headed, “Meet a judge, go to jail.” That’s a memory that stays with me.

My second retention election, where I actually ran a campaign. That was in November 2002. That was the aftermath of the parental consent case, where two years earlier Chief Justice George and Justice Ming Chin had mounted aggressive campaigns out of concern that their retention was in question.

Although a little bit of time had passed, I was advised that I would be wise to do the same. There’s a concept of the snake in the grass — perhaps we mentioned that earlier — where you think nothing’s happening. Then come September, all of a sudden there’s this whole concerted campaign against you, and you can’t defend yourself at that late date.

So I ran a campaign. You have to raise money, and you give speeches, and you hope that as a consequence of your speeches people will be motivated to give to the campaign. What can you talk about? The independence of the judiciary is not a big seller.

Incidentally, at an appellate justices’ institute that was held in San Francisco a couple of weeks ago, I was educated to the fact that the preferred concept now is not “independence of the judiciary” but “fair and impartial courts,” which is thought to convey more accurately and less provocatively the concept that we all hope to preserve.

One bright spot in my retention election campaign was I received a campaign donation from the author of *Legally Blonde*. Nobody knows how she knew about it. I probably shouldn’t have cashed the check. I should have kept it. [Laughter] That was a bright spot.

MCCREERY: I’m glad you mentioned this change of preferred terminology to “fair and impartial courts” rather than “independence of the judiciary.” It’s a subtle difference, but it does place a bit of a different emphasis.

WERDEGAR: Yes.

MCCREERY: What do you think of it?



WERDEGAR: I think it's excellent. Until it was brought home to me in past years, the independence, the electorate — they don't like that idea. We're a democracy. You don't want somebody being independent, disregarding what the general public might want, as we sometimes have to do. Fair and impartial is what you want.

MCCREERY: It also removes the emphasis from individuals serving as judges and places it on the court system in describing "fair and impartial."

WERDEGAR: Yes. And if independence suggests — picking up on what you just said, Laura — that we can disregard what the public wants, as perhaps we did with a segment of the public in the parental consent law, as we did in the Three Strikes case, as we occasionally do. Whereas "fair and impartial" conveys the idea that if you come into court you're going to get a fair hearing. The judges are going to be impartial. You may not win, but you've been heard by an unbiased body.

MCCREERY: That ties so well with the idea of your constitutional right to have trial by a jury of your peers and those kinds of ideas that may be more familiar to the public.

WERDEGAR: Yes. I think it's a good change.

There's one other memorable moment, which is a little broader. But because of the title that I've held and I do hold as an associate justice of the California Supreme Court, I've been invited to, and I've had the opportunity to give speeches honoring individuals who, it turns out, have been instrumental in my career, supportive of me, or whom I've greatly admired. That's really been a privilege. Again, I think it's because I bring to these speeches the office that I hold, but I'd like to mention some of them.

The first is Justice Panelli. I think it might have been one of my first public speeches — it wasn't the first public speech.<sup>68</sup> It was when I was on the Court of Appeal. It was his retirement speech. I remember I worked hard to get the proper Italian phrase to close it with, and I'm very proud of that.

But after that, there are two people who were at Boalt Hall with me but a year ahead of me, and they were on law review. I've mentioned them earlier. One was Joanne Garvey, a pioneer of women's everything. And the other was Marc Poché, later a Court of Appeal judge in the First District.

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<sup>68</sup> January 19, 1994.

For each of them I was invited and gave a speech on the occasion of their receiving the Boalt Hall distinguished service award.<sup>69</sup> Then Herma Hill Kay, who was the only active female professor when I was at Boalt. I was able to speak for her on her receipt of the Rutter teaching award.<sup>70</sup>

Most recently, Hastings was celebrating former Justice Joseph Grodin's eighty-fifth birthday, and I was solicited to appear on the video that was honoring him and to write a piece for the California Supreme Court Historical Society journal about him.<sup>71</sup>

And just a few weeks ago I was invited to speak on the retirement of former dean and professor of Boalt, Jesse Choper, who will be remembered in this saga as the individual who saw to it that I got a J.D. from Boalt Hall twenty-eight years after I received my LL.B. from George Washington University.<sup>72</sup>

I'd like to point out that, unlike Justice Ginsberg, who was offered — I don't know if she accepted it — an honorary degree from Harvard — who wouldn't earlier have given her her J.D. when she transferred — this was an actual J.D. I was a member of the Class of 1990. [Laughter] It says so on my certificate, although they claim me as a member of the Class of 1962.

I mention that because these individuals mean a lot to me.

MCCREERY: It's nice to get a chance to say a few words in their behalf.

WERDEGAR: Oh, absolutely. Every one of them is an outstanding person, human being, and supported me and had a lifetime pattern of supporting individuals. Wonderful people.

MCCREERY: Thank you for mentioning those individuals. Are there particular turning points in your time on the state's highest court that you want to mention, aside from these other ways we've been looking at them?

WERDEGAR: Thank you for that question. When I was interviewed two years ago by the *Daily Journal*, the reporter asked me, "When did you come into your own on the court?" My answer to her would be my answer here. I am who I've always been, and my jurisprudence — I don't see that it has evolved. So there was no turning point.

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<sup>69</sup> March 23, 1995; May 11, 1995.

<sup>70</sup> April 11, 2005.

<sup>71</sup> *A Tribute to Justice Joe Grodin*, 10 CAL. LEGAL HIST. 8 (2015).

<sup>72</sup> November 7, 2015.

I've experienced many different relationships over these years. Some have been more gratifying and helpful than others, but a turning point? No. It's been a wonderful experience to serve with so many judges. The court that I came to had many personalities that I greatly enjoyed. You will be able to recite them better than I. Justices Arabian, of course Stanley Mosk; and Malcolm Lucas, and Ron George, and Joyce Kennard. Myself. Who am I forgetting?

MCCREERY: Justice Baxter.

WERDEGAR: Oh, Justice Baxter. Of course. But I'm not forgetting him because he continued along with me and is certainly a wonderful individual to serve with. Each of them brought something different, and when each of them — not just those, but later on, as Justice Moreno came and went and Justice Baxter left us and Justice Kennard. It's very interesting. Each one has contributed something or left a particular imprint on the court, and when they go that is gone. Their replacement brings something else. So that's been fun and very interesting to experience.

MCCREERY: With so many new members just quite recently, what do you think is the overall effect on the court's work?

WERDEGAR: Before, I would say that — I've thought about this. We have three, of course, in the last three years. We've talked about this. Justice Liu, I think it's been three years. Justices Cuéllar and Kruger, it's been a full one year now. But if you fold in our chief, who came to us five years ago, we really do have what they call a new court.

Before that we had what they called a "long court." Justice Baxter and I and Justice Kennard and Justice George had been on it for a long time, unlike what we call the Deukmejian Court, where they stayed two or three years and went.

This court now, if I might call it, let's call it, a new court, particularly the ones appointed by Governor Jerry Brown — that would be Goodwin Liu, Tino Cuéllar, and Leondra Kruger. What was the question? What do I see as different?

MCCREERY: Yes.

WERDEGAR: It's very different. There's no question that the court is, I think, newly energized at conference. If you've served with somebody a

very long time, we each become somewhat predictable. You can kind of anticipate where they're going to stand on something or how they're going to approach something, and they probably feel they can predict how I will, rightly or wrongly. But now we're all learning about each other, and we're learning about the dynamics, and we're learning who is apt to persuade whom, and who is persuadable, and how do people approach and how do they do their work.

One of the new justices, in a public forum, indicated that that justice came to conclusions by writing it out. And not until that individual had written it out were they sure where they stood. That's not how I do it. I think that was interesting. So you learn these different attributes. They bring a new energy and certainly fresh perspectives. They question a lot of things that we've taken for granted, all of which is good.

On the other hand, the longer serving members, among which I count myself [laughter] and others, we have a sense of why certain procedures are in place, even though we understand it's good to question. We have a sense of the history of the court, which is completely lacking. We're more grounded in what the law in different areas is in the state of California.

The new justices are favoring the model of having rotating annual clerks. That's a major difference, and it has its good points, which are to expand the body of bright young attorneys who are going to be advocates for and supporters of and understanding the California Supreme Court. That's all good. And who are exceptionally bright. Credentials that are remarkable.

On the other hand, it makes for more work because they're new. They mostly are not grounded in California law. The more permanent staffs, which is mine and others, have to help them out a lot in getting them grounded in the fundamentals and so forth. So it's a balance.

**MCCREERY:** As you point out, you're now a senior member with a great deal of experience and a great knowledge of the history of why things are the way they are. What is the experience for you of being the long-term knowledgeable member rather than the newer one?

**WERDEGAR:** It's interesting. I didn't anticipate this. It comes to you to be the senior one, and I try to rise to the occasion. [Laughter] I have some

support from my other longer-serving colleagues, such as Justices Chin and Corrigan.

The history of this court, *per se*, going back to the turmoil of the Rose Bird Court — I don't think some of these people were born. Is that possible? Yes? No? Maybe it's not quite possible.

MCCREERY: They were quite young, let's just say. [Laughter]

WERDEGAR: [Laughter] And so what does it matter? It doesn't really. It doesn't impact how you would approach a case in any way. But I think you want a continuity as well as freshness, and right now that's what we have.

MCCREERY: What are the kinds of things a newer colleague might ask you about or might explore with you just to take advantage of your knowledge and experience?

WERDEGAR: Or what is a new thing — I might rephrase that — a new colleague might propose that we haven't done? And why have we not done it? Is there a justification? We are exploring new procedural things. One that recently came up was when we have petition conference, and if a given judge votes to grant when the majority votes to deny, some of us, and I am among those, if I wanted to grant and it's not granted, I'll say, "I'd like to be noted."

One of the new judges asked me some time back, "What does that do?"

And I said, "I think the hope is or the thought is that it speaks to the bar." I don't know how closely people read our minutes, but if you're interested in the case and the issue, you do. "That there is some interest on the court, and maybe try again to bring this issue before us." That's established, but recently we denied a petition for review, and it was 4–3.

One of the justices on the denial side felt very strongly and wrote a very, very lengthy dissenting, "I would grant for the following reasons." It was almost like an opinion, and so the question was, "Is that published, or is that just in the minutes?" That particular one was not published. It happened at the very last minute. We had no procedures in place, and so on.

That will be an issue coming before us. I read in the paper this weekend — a legal paper, I think — maybe the general press — that in a case that the United States Supreme Court denied certiorari, two of the justices wrote an opinion as to why they would grant. So it's a United States Supreme Court model that perhaps one or more of the new justices would

like to introduce here, that if you vote to grant and the court denies, you can write a statement why you would grant, setting forth your views of the case. That's one kind of thing that we've never quite looked at.

MCCREERY: In the example you just gave, how was that document received by the rest of you?

WERDEGAR: With surprise. Surprise! More discussion would have occurred, but the way things timed out in that particular petition — we have a deadline by which we have to act, so it all happened rather hurriedly. We were surprised. It's in the minutes, but we're open to discussing, going forward, whether it should be in the published reports. So that's just one example of a new procedure. There are others, but I don't have them in mind at the moment.

MCCREERY: It's an example of, as you say, fresh thinking.

WERDEGAR: Yes. Different backgrounds.

MCCREERY: Backgrounds, right, that allowed exposure to different ideas.

WERDEGAR: Absolutely. If I could think of others, I would. I know there are others, but right now I can't.

MCCREERY: While we're reviewing your various colleagues over the years, what stands out to you about the eras of leadership of this panel? In other words, you served for a little while under Chief Justice Lucas, then under Chief Justice George for a long time, and now, of course, Chief Justice Cantil-Sakauye. You've talked about each of them in turn, but in terms of looking at their eras, what features stand out to you?

WERDEGAR: In their style of leadership. Of course, they each — this is the way of the world — were confronted with different challenges, shall I say? As I've mentioned earlier, I found Chief Justice Lucas delightful. When I came on, as it turned out, he was toward the end of his service time.

Ron George came in and took firm hold of administration and had plans that he felt should be implemented for the benefit of the judiciary, consolidation of the muni court and the superior court and, I think, centralization of the funding for the trial courts. He had high energy, and his ideas were certainly a change, not necessarily well received throughout the judiciary but I never concerned myself with that.

He reinstated the engagement of the chief justice with the Legislature, which had collapsed under Malcolm Lucas. He was famous for, after his appointment, visiting every county in the state even though he had broken his hip. High energy, high humor, and plans. Under him the Administrative Office of the Courts, under Bill Vickrey, expanded greatly. Over time, I gather, some people felt perhaps it expanded too much.

Our current chief justice faced a new set of problems that Ron George did not face. They may have been on the horizon when he stepped down, but some division among the judiciary. There's this Alliance of California Judges that is opposed to perhaps some of the chief justice's and the Administrative Office of the Courts' programs. Chief Justice Cantil-Sakauye was faced with the need and the desirability politically and perhaps practically of paring down the Administrative Office of the Courts, which had come to be resented by local trial courts. This is not an area that I have deeply concerned myself with, but if you sit on this court you can't avoid being aware of some of it.

And she, of course, has been faced with a real economic downturn in California, budget cuts that — perhaps some were appropriate and needed and some were devastating to the local courts and access to justice. Her style, I would say, is similar to Ron George's in that she's engaging, she's even-tempered, she's outgoing, she's energetic. I marvel at all that she does, and I probably don't know half of what she does. So I think we've had some terrific chief justices, but each has to face the problem of his or her time.

MCCREERY: Just to speak about her a moment longer, she also has the power to assign opinions to the rest of you and to lead the group in the actual legal work.

WERDEGAR: Yes, she does, and on the assignment of opinions, hearsay told me that under Malcolm Lucas individual chambers perhaps had the opportunity to try to get a particular opinion. I'm not sure about this, but with Ron George and with this current chief, I don't know how they do it but I've never heard any complaints. My guess is they look at the caseload of individual judges, but that can't be determinative. Some of us have more of a backlog than others, but I don't think that means you're precluded from being assigned a case.

They have to look at who they think will get a majority. How would they surmise that? Comments made at conference. If somebody says, “I think they’re clearly wrong,” and others don’t. The chief has to pick that up. Or maybe positions they’ve taken on related cases. Certainly, the idea is to get somebody to write it that might get a majority.

And then subject matter. That can work both ways. For a time, I got so many CEQA cases, but now more recently — although one of mine was recently just issued — others in the court have CEQA cases. I don’t know. It’s a balance, and it’s a balance that I think has been achieved. I’ve never heard a complaint.

But if you want a case, that doesn’t mean you’re going to get it. I would think it’s inappropriate for you to even indicate that you might want a case.

MCCREERY: You mentioned backlog, and of course one thing that court watchers and others often focus on is the overall productivity of the Supreme Court over time: How many opinions were issued in a given year? How many actions taken? What are the factors and the realities that go into the caseload that the public may not be fully aware of?

WERDEGAR: [Laughter] “May not be fully aware of?” Has no awareness of! Yes. When I came on in 1994, our caseload on any given oral argument was much, much higher than it is now. I’m trying to remember if we then still took bar cases. I know with Justice Panelli they would have the State Bar cases argued before there was a State Bar review court. That increased the numbers tremendously, but as Justice Panelli used to say, “We’re arguing over whether suspension for fifteen days or three months,” and so on.

But my first oral argument in Los Angeles. I think we were down there hearing cases for four days or maybe three full days. Now if we have a day and a half, some of my new colleagues will say, “Oh, that was exhausting!” [Laughter]

Under Ron George we tended to issue about 110 or 112 opinions a year. I never was one who felt that that number meant anything or was important to maintain. But some did because I guess the public’s view is that’s a measure of how hard we’re working. We are working hard, but I don’t think that’s the measure of it.

With all these new judges and pro tems and so forth, our caseload has definitely dropped to what? Eighty? Whether that will continue I’m not



sure. I have a slight suspicion it might because that's where it was when these new justices entered, and I don't think that there's any ethos or idea that it's important that we get our numbers up. I'm not one who does think it's important. We are working hard.

Ron George used to always compare us, with seven judges, to the United States Supreme Court, who had nine judges. They're not concerned about their so-called productivity, and they take the summer off. [Laughter] However, the cases they grant they I think, by and large, decide that same year. We have a completely different system, but I do think that rushes some of their opinions as well. Sometimes the most controversial and difficult ones are put off to the very end, and so on.

So we'll see where our productivity is, once we all settle down, productivity in the sense of numbers. Petitions are down. That's because of the budget cuts in the trial courts and the alternative dispute resolution that's taking cases out of the public courts. So our petitions for review are down.

We do try to keep our capital cases moving. Every year I think about maybe a third of our case output is capital cases.

MCCREERY: So strict productivity in numbers isn't always, perhaps, the most useful way to look at it?

WERDEGAR: I would say not. If I might quote Ron George. It's probably in his memoirs. "We are not making widgets."

MCCREERY: [Laughter] I wonder if we can reflect for a moment on the challenges of serving as an appellate justice in the twenty-first century. There are things in society changing so rapidly. All kinds of issues come forth that never used to. How do you think about the challenges of this particular era, if there's anything we haven't mentioned already?

WERDEGAR: I think your statement, your observation just now, is accurate, that new issues come forward that we haven't had before, and the courts are called upon to resolve them, and we do the best we can. In former times, for instance, the question of paternity and surrogacy and same-sex marriage and so on, or use of — Justice Panelli had a major case — use of stem cells, where you would take a patient's tissue and patent it. He had that case in front of him. Who had these issues before?

So the courts are always challenged. It's either the courts or the Legislature, and the courts are challenged without the assistance of legislation.

Then, if legislation comes, often enough it's ambiguous. Or new situations arise that weren't contemplated, and we have to fill in the interstices. Always challenging.

Our role, of course, is to do the best we can, resolve the cases that come to us. We can't say, "Oh, this is hard. We don't know the answer." On most things if we're wrong the Legislature can change it, or the voters in this state by initiative can unless it's a constitutional — well, if it's a constitutional question in California, the voters can change the Constitution too. But our challenge, our task, is to decide the cases that come before us that need to be decided, without respect to political fallout or public opinion.

Now, the political fallout could relate to the budget. We are a co-equal third branch of government, but we are beholden to the Legislature for our funding, and that's what our current chief justice, most especially, has been dealing with.

We get politically sensitive issues, such as the validity of an initiative or how to interpret an initiative, and we might interpret it in a way that the electorate didn't anticipate or didn't like. We have pending before us now a question about the Legislature's power to put on the ballot a particular initiative, an advisory question. These are politically fraught cases, and our responsibility is to decide them.

The challenges are to keep the courts open, and another challenge that is presenting, I think, difficulties is: so many things are not coming to the public judicial system. We've spoken on arbitration and how businesses and consumer contracts are all being done in private arbitration.

The resolutions usually cannot be appealed, so who's making the law that governs these arbitrations? And who's coming to court? Criminal cases do, but it's important that the courts handle civil cases as well so that the public is aware of the issues, civil issues, and so that law is made that guides what arbitrations occur.

**MCCREERY:** You also spoke briefly last time about the effect of those trends on the occurrence of ordinary jury trials, which is a guaranteed constitutional right.

**WERDEGAR:** Yes, it is. It's a guaranteed constitutional right. I don't know how that's going to be resolved. The United States Supreme Court has had no problem resolving it, and we are bound by what the United States

Supreme Court says federal law requires on that, the Federal Arbitration Act. What direction that will continue to take, I don't know.

Oh, and the other challenges, which are terrible, are these politicization of judicial races across the country. California so far, notwithstanding some of us who mounted a retention campaign, so far we've been immune from the highly politicized out-of-state money which tries to put in place members of the state's highest court that will presumably look favorably on special interests' cases.

It's not for me to say in this oral history particular instances, but it's well known that that is happening across the country. Outside money, millions and millions of dollars, more money spent this year on state supreme court elections than ever before. And it has touched some retention-election states as well.

I fear that that's coming to California. I have no reason to think it is, but why wouldn't it? Because it's outside forces, and they want to influence the judiciary of the jurisdiction when a case touching them would be tried there. We certainly have a lot of cases of great significance tried in this state.

MCCREERY: And as you say, the funding behind those efforts often comes from some other state entirely.

WERDEGAR: Oh, absolutely. Absolutely. And not always fully disclosed as to what are the interests behind it. That's a real threat to the independence of the judiciary, the fair and impartial administration of justice.

MCCREERY: I know Chief Justice Cantil-Sakauye is very interested in civics education and helping people understand our judiciary. What thoughts do you have about the best way to educate and illuminate the public?

WERDEGAR: I think it's in very good hands with Chief Justice Cantil-Sakauye and Justice Sandra Day O'Connor, powerful minds with tremendous resources trying to bring this about by various educational programs. There's a school curriculum, but there are online programs, too, I think, that Sandra Day O'Connor had a role in instigating and implementing.

We need attorneys to support fair and impartial courts. That brings up another subject. I read — I wouldn't know, but I read — that the profession of attorney is losing its appeal in this technological world. The world is changing, and I'm hopeful that we'll meet the challenges as they arise.

MCCREERY: You say we need attorneys to — ?

WERDEGAR: To speak for the courts and to be champions of the courts, as they by and large have been. But they play a very important role because they are integrated throughout society, and they're knowledgeable, and they have a vested interest, I would hope.

MCCREERY: Perhaps they have an ability to translate what happens in the court for a general audience?

WERDEGAR: That's an excellent point.

MCCREERY: What else about the workings of the court itself would you like to bring up in our summary mode?

WERDEGAR: I think we've covered it all. I think the court has wonderfully talented — speaking from the clerk's office and the calendar coordination office, which processes our cases, and the staff that I've known on the court — very, very dedicated caring people who do care about the court as an institution. So I have nothing further to say that I can think of at this moment.

But it's been a wonderful experience to work here with talented people. I have an extremely bright staff, permanent staff.

MCCREERY: Many of whom have stayed with you for a long, long time.

WERDEGAR: That was the tradition. Of course, it's a gift to me that they do. But they are so knowledgeable, very smart, and loyal to the court, to the court as an institution.

MCCREERY: The fair and impartial court? [Laughter]

WERDEGAR: Yes.

MCCREERY: Would you be kind enough to mention some of the many, many awards and honors you've received, recognitions, in the sense of drawing out the ones that are somehow most meaningful to you?

WERDEGAR: Thank you for giving me that opportunity. When you are a Supreme Court justice, you are going to receive awards. Nevertheless, it's not a given that you'll receive any particular award. I will mention the ones that are most meaningful to me, and I'll start with the Boalt Hall, now Berkeley Law, Citation Award. That is the highest honor that Boalt can bestow, and for reasons of my history that we're now well familiar with, I was deeply touched to be named for the Boalt Hall Citation Award.

Another one related in that way is the *California Law Review* alum of the year award. Since I had served on the law review and I had been elected editor-in-chief and I had then left, therefore not serving out my full term as editor-in-chief, it was a deeply rewarding award, and I was deeply touched and very much enjoyed the evening that I spoke to the current members of the law review.

George Washington, who always treated me well by allowing me to transfer and allowing me to be named their Glover Award recipient and number one in their class, treated me well again when they bestowed on me the George Washington University Alumna of the Year J. William Fulbright Public Service Award. That's the name. It's very long.

But my goodness, Fulbright in his time was a senator of great stature, and this friend that I made at George Washington University, Judy Norrell, whom I spoke of, I believe, it turned out — no relation to my getting the award — but that he was her godfather. She came from Arkansas, and he came from Arkansas. But that's neither here nor there about the award. I was very pleased, out here in California, to be remembered by George Washington and receive their award.

At Berkeley there's another award that is very meaningful, and that's the University of California, Berkeley School of Law Judge D. Lowell and Barbara Jensen Public Service Award. Judge Jensen is admired by all. My son had the good fortune to clerk for him. To receive that public service award meant a great deal to me, and Judge Jensen was there when I had the opportunity to accept it and give a little speech.

The American Jewish Committee Judge Learned Hand Award. Learned Hand was a marvelous judge, and to receive any award bearing his name and from a group that honors advocates and judges who do advance individual liberties and equality was meaningful for me. That night was soon after our gay marriage cases, and I was able to talk about my beginning in the law in the civil rights era and my coming to that moment when we had just acknowledged the right of same-sex couples to marry. That was very meaningful.<sup>73</sup>

I should also mention that Temple Sherith Israel in San Francisco, on the occasion of its 150th anniversary celebration, bestowed on me an award honoring me for my “devotion to the law.” Although my husband and I

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<sup>73</sup> *On Being Honored by the American Jewish Committee*, 12 CAL. LEGAL HIST. 500 (2017); May 22, 2008.

have been members of the temple, I am not Jewish and therefore felt especially honored that the temple would recognize me in connection with its 150th anniversary. Sherith Israel has a special history in San Francisco in that it was, I believe, the city's first Jewish congregation, having been founded in 1850, and it served as San Francisco's city hall after the great earthquake and fire of 1906.

Queen's Bench, the venerable San Francisco women attorneys' organization, gave me their Lifetime Achievement Award. To be recognized by the premier organization of women attorneys and judges in San Francisco was meaningful.

Finally, particularly meaningful to me, as you can imagine, is the Italian American Lawyers Association "Honorable Edward A. Panelli Outstanding Justice Award," presented to me in 2012. I was the first recipient of the Panelli Award, and I'm unaware there's been another since.

As you noted, I've received other awards, and I appreciate them, consumer attorney awards and so on. The ones I've mentioned are especially meaningful to me.

MCCREERY: We've also talked about your various many invitations to speak or lecture, and I know we touched, on some other day, on the fact that you delivered the Jefferson Memorial Lecture, also at Berkeley, a few years ago.

WERDEGAR: Oh, yes. [Professor] Harry Scheiber got me into that. [Laughter]

MCCREERY: Which of those invitations to speak stand out to you?

WERDEGAR: That one does. Thank you, Laura. Yes, that was the Jefferson Memorial Lecture. When Harry Scheiber, who knows me from the Supreme Court Historical Society board, invited me and I saw who had spoken before me, I was joining a very impressive roster of people, and so on. Who could say no to Harry? It was the centennial, the year I was asked, of the initiative process in California, so it gave me the opportunity to speak on a subject that has always interested me.

I did a tremendous amount of research and did ultimately give a talk on the subject. Of course, I've sat on many cases, and I'm familiar with this court's jurisprudence when initiatives come before it, so it gave me the opportunity to write a piece entitled "Living with Direct Democracy: The California Supreme Court and the Initiative Power — 100 Years of Accom-



JUSTICE KATHRYN MICKLE WERDEGAR (LEFT) WITH SELMA MOIDEL SMITH, EDITOR-IN-CHIEF OF *CALIFORNIA LEGAL HISTORY*, CALIFORNIA STATE BAR ANNUAL MEETING, ANAHEIM, SEPTEMBER 27, 2007.

modation.” That’s a three-part title, and nobody likes that, but I liked it. [Laughter] I have a monograph, if you’d like me to give it to you.

It was a good speech, and it spoke of how the court deals with initiatives. We are unelected, we are not part of the democratic process, but we are a part of the checks and balances. It described the whole populist movement that introduced the initiative, and how, if we ever declare — yes, we have — if we invalidate an initiative, how it’s claimed we’re “thwarting the will of the people,” and how we have, as they say, threaded that needle.

So that’s the speech that I gave, and the California Supreme Court Historical Society journal published the monograph that I wrote.<sup>74</sup> That was one important speech.

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<sup>74</sup> *Living with Direct Democracy: The California Supreme Court and the Initiative Power — 100 Years of Accommodation* 7 CAL. LEGAL HIST. 143 (2012); Jefferson Memorial Lecture, UC Berkeley, March 20, 2012.

MCCREERY: Are there others you'd like to mention?

WERDEGAR: Over the years, especially when you're new, everybody — you're a fresh face, and they want to know who you are. As I mentioned earlier, I gave so many speeches. You really don't have to, but as a new judge you may not appreciate that you don't have to and you think you do.

My topic in the early days, as I mentioned earlier, was: why a woman on the bench? This was prompted by Justice O'Connor's often-quoted statement — actually, she was quoting another judge, but it's attributed to her — “in the end, a wise old man and a wise old woman will reach the same result.” I thought that was very provocative and interesting. As these scholars that I referenced earlier, feminist scholars did, I too questioned, “Why a woman?”

I suggested it might impact jurisprudence because scholars were showing that with Justices Ginsberg and O'Connor, in cases touching employment discrimination and some other cases, they came together even though they were most often on other sides of a case. But I concluded that it was especially important for role models — absolutely — role models are so important — and for the perception that someone whose life is being touched by the law is being heard by someone they could relate to — superficially, because not all women are the same.

So those speeches all come together, and I gave many of them. Over the years I've given so many speeches. I did vary my topic, and that's why it becomes a burden. I didn't have a stock speech. I tried to tailor it to the group that was inviting me.

The American Jewish Committee was a big speech, as I mentioned, and the Boalt Citation Award acceptance, and the Jefferson. But I've given, I might say, 100 or maybe more, and I write them all myself. I absolutely write every single word myself. And in that monograph on the initiative somebody said to me, “You mean you didn't have your staff do the footnotes?” No. My staff never even saw it, so it's work.

MCCREERY: That's a very telling detail, that those personal invitations are something that you carry out completely on your own.

WERDEGAR: Absolutely. Yes. I can't imagine doing it any other way. In the beginning I was paralyzed. I think I told you, on the Court of Appeal



when Queen's Bench asked me to speak, they had been waiting for Hillary Clinton and they finally decided they'd better have a fallback. [Laughter]

I declined, and I told Justice Bob Merrill I declined. He said, "You've got to do it." So I did. Why did I mention that? That was memorable. [Laughter] My first big debut.

I think the point I was going to make is I'm not the least bit nervous speaking now. It's not about getting up there and speaking. It's about knowing what you're going to say. If you have something to say, then there's no problem giving a speech.

My speeches are a nice review of my career in a slightly different way. I'll speak to diverse groups. I've spoken to defense attorneys. I've spoken to attorneys general. I've spoken to the Federalist Society. I'll usually speak to anyone who asks me, but less so more recently.

MCCREERY: And indeed you've spoken to student groups on occasion. I wonder what sorts of feedback and questions you might get from those kinds of audiences?

WERDEGAR: Over at Berkeley there was a time we were having an outreach session, I guess, and I was asked to speak, with Jesse Choper interviewing me, to the students that chose to come and others. [Laughter] This is not a direct answer to your question, but Jesse Choper asked me a question. "Is there ever a case that you really regret the decision?"

I said, "Yes, but it's not an opinion that I wrote. It's an opinion I dissented in. I regret the majority opinion." Everybody laughed.

He said, "No, but really?"

Because he was remembering some United States Supreme Court justice, perhaps — I can't remember now, but there was — who said if he had it to do over again he would change something or other.

What kind of questions from the students? We have these outreach sessions, the whole court does, and we get random questions assigned to us. One in Santa Barbara. This was a question from a student from the audience. "Has being a justice changed your life in any way?"

I said, "Yes, it absolutely has. I get more respect at home." [Laughter] They thought that was very funny.

Then the one in Sonoma, where I was assigned the question, "What kind of education do you have to have to be a justice?"

That was random, but there we were in Sonoma. I think I told you about this. I said, “In my case, I went to a one-room school in Healdsburg with eight grades and one teacher. But that’s not required.” [Laughter]

I like to speak to students. I remember so well what it’s like when you are a student. They’re so bright now, though. The externs that I’ve had and that I meet through the other judges, that they have, they’re just so bright.

MCCREERY: Let me draw you back to Dean Choper’s question. Any regrets in the opinions you yourself have authored?

WERDEGAR: No. Actually, not. That doesn’t mean I think I’ve always been right. But I’m not aware of anything where I’m deeply concerned that I was wrong. First of all, I’ve been here so long. You put your opinion out there, and you just have to move on, so you can’t agonize too much.

At this moment — if you want another session, maybe I could research the cases I regret! [Laughter] At this moment I can’t think of any that I think I went astray. I cannot, but that doesn’t mean there aren’t.

But Jesse Choper asked me the question, and at the time nothing came to mind. As I say, it doesn’t mean I think I’m always right. But I do think that whatever I did was supportable and reasonable and done with integrity in the sense that it’s what it seemed to require at the time.

MCCREERY: Thank you. Let me give you a chance to summarize your personal journey in the law. I know we’ve woven that theme throughout all of our conversations.

WERDEGAR: We have, yes. I appreciate the opportunity to do this. In fact, I appreciate that the historical society has given me the opportunity to have you take my oral history. It’s a privilege to be able to reflect on one’s life, and that’s what this has given me.

I’ll start by saying my personal journey has been completely unpredictable. I had no early aspirations to be a lawyer, and when I went to law school I had no idea where my education was going to take me or how I would use it. I had never heard of a female lawyer, so I thought I would just take it as it comes.

Although many doors were closed to me, as we’ve spoken of, in time others were opened. Fortuitously, it turned out the paths that were open to me, research, writing, teaching, were the ones that best suited me anyway.

I should mention again that I had many letters of rejection. There was this “Aha!” moment in, I think, the late 1970s, where I was going through my file of letters of rejection. The world had changed a little bit then, and I thought, “Wait. Maybe some of this was discrimination.” But at the time when I was not chosen for things that I applied for, I didn’t at all consider that it was discrimination. I had no reason to think so.

I did receive a letter of rejection which probably is an historical artifact now from Chief Justice Earl Warren, to whom I applied after I graduated first in my class at George Washington University. Historically, he never did take a woman. I can’t say whether he discriminated or not; however, at this recent event at Boalt Hall, the retirement of Jesse Choper, I met Chief Justice Earl Warren’s grandson, and I mentioned to him that I had applied to clerk and that I didn’t —

And he said, “He never took a woman.”

I said, “I don’t know if he was discriminating or not.”

We have to remember that they only have a few slots, and the best and the brightest in the country apply. So you cannot infer that because he never took a woman, he discriminated; however, his grandson had no problem saying, “I know Pops would never have taken a woman.” [Laughter]

Evidently, the view at that time was that the culture of the law clerks wouldn’t easily accommodate a female. That’s not right, but I understand it. That’s how it was. The culture. The culture of the Marines. The culture of the Army. The culture of law school. [Laughter] That’s how it was. Now, I don’t know what those male clerks were doing that a woman would put a damper on, but that was interesting to me.

In any case, my first position after graduation with the Civil Rights Division of the Department of Justice under Bobby Kennedy was a marvelous experience, just as exciting as could be. That administration was exciting, those times were exciting and, to a Californian, Washington, D.C. for all reasons was terribly exciting.

Returning to California I did make some applications, and I didn’t receive offers. The turning point was when the College of Trial Judges, referred to me by Boalt Hall, who did look out for me, I must say — they were aware I was here, and they were aware that I had a credible record, so they did. The College of Trial Judges invited me to be their scribe, to write

this misdemeanor procedure benchbook, which I did, the first statewide benchbook of any kind.

After that, one thing led to another. CEB, California Continuing Education of the Bar, asked me to join them. By the way, after those early rejections I didn't apply for a job again. The College of Trial Judges came to me. CEB came to me. And I was with CEB for about seven years.

But then I was ready to make a change and I did — no, I didn't apply to USF. The dean at that time, Paul McCaskill, called me up at CEB one day and asked if I would like to interview to be associate dean. I was thrilled. I had always wanted to be in academia. Paul was a delightful fellow. He had been a year behind me at Boalt, and one of the professors at USF, Mike Hone, had also been a year behind me at Boalt. I didn't know them, but they knew me because there were so few of me.

I went to be associate dean and teach at USF. When Paul retired and a new dean came in and cleaned house, I did then apply — because I saw an ad in the newspaper — for a position I didn't know existed, and that was a career staff attorney. That was a new position that had developed since I graduated. I was accepted to the First District Court of Appeal and assigned to Justice Ed Panelli when he was appointed to that court. When Justice Ed Panelli was elevated to the Supreme Court he brought me along.

After serving with him for some years and Governor Pete Wilson was elected, I was invited — I was not invited by him, I was urged by some supportive judges to apply for a judicial appointment of my own, which I got. Then I was elevated to the Supreme Court by Governor Wilson.

An unpredictable path that, looking back on it, was a marvelous path. But going forward you don't know your path is going to be a marvelous path. I think that's an important point. Historically, I was the third woman appointed to the Supreme Court, the first in the history of the state to fill her former justice's seat. I loved that. I loved succeeding Justice Panelli.

During this journey, which we've spoken of, the world changed dramatically. The role of women changed, in the law as elsewhere. Whereas only two of us in my Berkeley class graduated, now most law schools are more than 50 percent women. Women attorneys hold every conceivable position in the law: attorneys general, deans, general counsels, high-powered litigants. The world has changed.

Problems still exist with managing motherhood and your career. But I think law firms are becoming more sensitive to it. And also the role of men has changed. I think the modern married man is much more open to assisting with the domestic life than, certainly, in my generation.

So that has been my journey. I'm looking forward to continuing that journey with what we've identified as a new court.

MCCREERY: You've touched on how much the times have changed and the thinking of the people in power has changed. How has your own thinking evolved along this path?

WERDEGAR: In what regard?

MCCREERY: Just in terms of how you view your career in the larger context of the legal world. You're not an anomaly any longer.

WERDEGAR: No. It has dawned on me gradually that I am, as you sit here, history. [Laughter]

I've been fortunate to have this path. As I say, going forward it looked a little different than it does looking back. I marvel at the changes that I've seen, but I've come to realize that change is ever going to be with us. I can't anticipate what it will be in the future.

MCCREERY: Have your methods or your approach to the law evolved in some identifiable way?

WERDEGAR: Actually not. I take every case as it comes, and I try to come to the conclusion that seems required based on the briefing and the projection of what *stare decisis* says as we go forward. I have not changed that I'm aware of.

I don't seek to write separate opinions, whether it's a concurrence or a dissent, but I do so if I can't with integrity go along with the majority. I prefer to be in the majority, but I will dissent if I have to. I am deeply grateful for my staff, who I've spoken of earlier as being very talented, loyal to the court, and long-serving with me.

MCCREERY: You're painting very much a picture of continuity, really, in spite of the changes in our society. You come from a strong research background, very much grounded in examining existing law before going ahead. What effect do you think that has on your methods?

WERDEGAR: You have to start there because the stability of the law, as formulated by the courts, requires that you start with what is in place and not venture beyond more than is necessary. This is not new for me. It's how I've always approached it, that you don't reach out to make new pronouncements before they're necessary. The courts have to provide what stability they can.

But referring back to what we said earlier, we are often enough brought cases that are unprecedented. There's no background to fall back on. Maybe extrapolation or analogies with what came before.

MCCREERY: May I ask what advice you might offer to others coming along in a legal path and perhaps even a judicial one, young people of today who aspire to have a career somewhat like yours?

WERDEGAR: It's hard to give advice. I'm heartened by, as I mentioned, how bright the young attorneys that we see here are, including the women. They seem so grounded. They have challenges that I didn't have because in today's world, in a way, they are putting on themselves the expectation, or perhaps an external expectation, that they can do it all, managing their home and their children and have their career. I had no expectations like that. Anything I did was unusual and exceptional. Nobody was expecting anything of me.

In the past I have stated that, as a woman, you can have it all but you can't have it all at the same time. With women particularly, notwithstanding that young men today assume a great deal more of a partnership in the domestic responsibilities, women do — they are mothers and they are daughters — and they have personal responsibilities that can intrude on their professional lives.

I've said to them, "If you have to stop out, if the stress is too much, then do it. I'm optimistic that circumstances will change, and you'll have other opportunities to reenter your career and maybe find a path that's more suitable to the totality of your life."

I would tell them to: "Excel in what you do, because that's what carries you forward to other opportunities. Be true to yourself. Always have integrity. But be patient with yourself as well. And I'm here to say that life is longer than you might think, and there will be opportunities, ultimately, to have it all."

How practical that advice is, I don't know. But it's an expression of how my path has unfolded.

MCCREERY: As we look ahead, what role do you foresee for yourself? What visions do you have for how the coming time on the California Supreme Court might play out?

WERDEGAR: I do very much look forward to continue working with my new colleagues. They are energizing and refreshing and open to exchange of ideas. And I feel that I have a responsibility — it surprises me to say this, but it touches on what we said before — to maintain some continuity on the court and to share what knowledge I might have of history and traditions and things that have come before.

So I hope to continue to fulfill that role and to engage with the other members of the court. We are a collegial court, and there is a lot of — I would say more than in the past — personal interchange.

MCCREERY: When it comes to the jurisprudence itself, some have noted that the current makeup of the court might suggest that you could have quite a role as a swing vote for contests that come down to that.

WERDEGAR: There was that speculation, and it's purely speculation. I would say definitely it's too soon to know. I don't see our new justices as all being of a singular voice at all, nor are those of us who remain on the court of a singular voice. So I think that remains to be seen. Reporters and commentators love to speculate on things like that. We'll see.

MCCREERY: One can't help thinking of Justice Anthony Kennedy on the U.S. Supreme Court, which, as you pointed out earlier today, has different processes and different procedures for doing its work. But he has ended up having quite a role as that swing vote, and so I suppose it's natural to see those kinds of speculations.

WERDEGAR: It should be remembered that our court seldom is divided 4–3. That's where a swing vote would come in. I haven't done a statistical analysis, but I think the 4–3 decisions are few, a small percentage.

MCCREERY: Certainly fewer than in the U.S. Supreme Court.

WERDEGAR: Yes. Yes, fewer than the United States Supreme Court. So we'll see, and we'll have to have an addendum to this oral history.



RETIREMENT RECEPTION FOR JUSTICE KATHRYN MICKLE  
WERDEGAR (CENTER) — WITH CHIEF JUSTICE TANI  
CANTIL-SAKAUYE (LEFT) AND HUSBAND DAVID WERDEGAR, M.D.,  
CALIFORNIA SUPREME COURT, AUGUST 2, 2017.

MCCREERY: I wonder if there's any subject we've talked about that you would like to say more on before we close?

WERDEGAR: At this moment I would say no, and I would thank you for your gracious interviewing and your patience with what it has taken to bring me to the table. [Laughter] And thank the historical society for giving me this opportunity.

MCCREERY: You're quite welcome. Finally, is there anything I should have asked you but didn't?



WERDEGAR: That would be related to — not that I can think of. Maybe when I edit this, but at this point I think it's been fairly comprehensive.

MCCREERY: It has. And let me thank you so much, Justice Werdegar, for your grace and your time put towards this project. It is of great historical value, and it's been my pleasure.

WERDEGAR: Thank you. And I think everybody should be a member of the California Supreme Court Historical Society, which works to preserve the history of the members of our court and has done so with several before me and will continue to do so. Thank you, Laura.

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UNPUBLISHED SPEECHES

JUSTICE KATHRYN  
MICKLE WERDEGAR



# REGARDING CONSERVATORSHIP OF WENDLAND

KATHRYN MICKLE WERDEGAR\*

## OPENING REMARKS:

Thank you, Professor Winslade. I appreciate the opportunity to attend this very interesting and important symposium, and I thank you for inviting me. The appropriate care of the minimally conscious patient is certainly an area where medicine and law intersect, and one that evades definitive answers. I found Dr. Fins' presentation this morning fascinating.

As Professor Winslade mentioned, my purpose here today is to share with you some of the background and implications of the California Supreme Court case of *Conservatorship of Wendland*, decided in 2001.<sup>1</sup> My plan is first to discuss the factual background of the case and its legal history as it wound its way through the courts. I'll next discuss the proceedings in the trial court, including the evidence presented to the court of Robert's condition and of his wishes, and I'll share with you some of the

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\* Associate Justice, California Supreme Court, 1994–2017. Remarks delivered at the symposium, “Minimally Conscious: Grey Matters in Medicine, Law and Ethics,” presented by the University of Houston Law Alumni Association Moot Court Committee and the Blakely Advocacy Institute, Houston, January 28, 2010 (with William J. Winslade, Ph.D., J.D.; and Joseph J. Fins, M.D., F.A.C.P.).

<sup>1</sup> *Conservatorship of Wendland*, 26 Cal.4th 519 (2001).

trial court's written opinion. After that I'll talk about the case in our court, why we took it, the background of the law concerning treatment decisions, and what we held. Finally, I'll mention some of the criticisms of our opinion. I anticipate my remarks will take about 30 to 40 minutes and then, as Professor Winslade indicated, he and I will entertain questions.

*Wendland* was the first case in California to concern end of life decisions for a minimally conscious patient, and only the second case in the United States. (The first was *In re Martin*, in Michigan, decided in 1995.<sup>2</sup>) Courts are often called upon to decide issues that challenge our society and divide us as a people. We don't necessarily welcome this, but it's our responsibility, and so it was with the *Wendland* case.

## THE CASE:

As mentioned, *Wendland* involved a minimally conscious, severely disabled patient. He was not terminally ill, nor was he comatose or in a persistent vegetative state, and he had not left instructions for health care. His wife petitioned the court to be his conservator and asked the court for permission to authorize the hospital to withhold life-sustaining hydration and nutrition from him. His mother and sister objected. California, like most states, has a statute authorizing a conservator to make medical decisions for an incompetent conservatee.

The legal question for the court was what showing, under the California Health Care Decisions Law,<sup>3</sup> must the conservator of a minimally conscious individual make, to convince a court that her decision to withhold life-sustaining treatment is in accordance with the conservatee's own wishes or, failing that, is in his best interests.

Now let me turn to the factual background and the history of the case.

## FACTS AND HISTORY OF THE CASE:

On September 29, 1993, 42-year-old Robert Wendland rolled his truck at high speed in a solo accident while driving under the influence of alcohol. The accident injured Robert's brain, leaving him severely disabled. For

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<sup>2</sup> 450 Mich. 204.

<sup>3</sup> CAL. PROB. CODE § 2355.



several months he lay in a coma, totally unresponsive. During this time, his wife, Rose, visited him daily and authorized treatment as necessary to maintain his health.

Approximately 16 months later (in January 1995) Robert regained consciousness and intensive physical therapy was initiated. But despite some improvements made in therapy, Robert remained severely disabled, both mentally and physically, and dependent on artificial nutrition and hydration. After Robert regained consciousness and while he was undergoing therapy, Rose authorized surgery three times to replace dislodged feeding tubes, which were inserted through his abdominal wall and stapled or sewn to the inside of his small intestine. When physicians sought her permission a fourth time, in July 1995, she refused. She concluded that Robert would not want to go through the procedure again, even if necessary to sustain his life, nor would he want to continue living in his current state. With the agreement of Robert's daughter, his brother, and the hospital, she decided to withhold treatment. Learning of this decision, Robert's mother Florence obtained a temporary restraining order. (In the meantime, Robert's doctor had inserted a nasogastric feeding tube to maintain the status quo.) Rose immediately petitioned the court for appointment as Robert's conservator and requested authority to withdraw his life-sustaining treatment. Florence and Robert's sister opposed the petition.

So here you have a clear family conflict: wife, child and brother in opposition to mother and sister.

California's Health Care Decisions Law authorizes the court to appoint a conservator for an incompetent conservatee, and authorizes the conservator to require or to withhold treatment, as she in good faith, based on medical advice, decides is in the conservatee's best interests.

Pursuant to the statute, the court appointed Rose as conservator and granted her permission to authorize a "Do Not Resuscitate Order" for Robert, but it reserved judgment on her request for authority to remove Robert's reinstated feeding tube. The court ordered Rose to continue the program of physical therapy for 60 days and then report back to the court. During this 60-day period the court itself visited Robert in the hospital.

After the 60 days elapsed with no significant improvement on Robert's part, Rose renewed her request for authority to remove Robert's feeding tube.

Then came a nine-month hiatus during which Florence asked the trial court for appointment of independent counsel for Robert; the trial court refused, reasoning that both sides of the question — whether to maintain life or allow death — were already represented by Florence and Rose; the Court of Appeal summarily denied Florence’s petition for writ of mandate; our court granted review and transferred the case back to the Court of Appeal to reconsider its denial; and the Court of Appeal, on reconsideration, directed the trial court to appoint counsel for Robert. In its opinion, the Court of Appeal stated: “The trial court said independent counsel would not be helpful or necessary because Robert’s interests were adequately represented by his mother and sister. However, a person facing the final accounting of death should not be required to rely on the uncertain beneficence of relatives. . . . Because Robert’s very life is at stake, he is entitled to counsel to represent his interests, *whatever* those interests might be.”<sup>4</sup>

Back in the trial court, appointed counsel supported Rose’s decision. The trial court, however, denied Rose’s request. The court first determined that Rose bore the burden of producing evidence and the burden of persuasion concerning Robert’s wishes. Rose would be required to show by clear and convincing evidence that Robert would wish to have his treatment terminated. “[F]inding itself in uncharted territory,” the court reasoned that “[w]hen a situation arises where it is proposed to terminate the life of a conscious but severely cognitively impaired person, it seems more rational . . . to ask “*why?*” of the party proposing the act rather than “*why not?*” of the party challenging it.”<sup>5</sup>

The court then heard evidence concerning Robert’s condition and his previous expressions of his wishes. On conclusion of the trial, the court held that, although Rose had acted in good faith, she had not met her burden to show by clear and convincing evidence that Robert would under the circumstances want to die.

## EVIDENCE BEFORE THE COURT:

As indicated, the court had before it evidence of Robert’s condition and evidence of his wishes.

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<sup>4</sup> *Wendland v. Superior Court*, 49 Cal. App. 4th 44, 52 (1996).

<sup>5</sup> 26 Cal.4th at 527 (emphasis added) (quoting from the trial court decision).

(1) *The evidence of Robert's condition* included video recordings of Robert in therapy over a period of approximately two years (from 1995 to 1997), as well as contemporaneous medical reports and the testimony of treating physicians. The medical reports stated that after several months of therapy, Robert improved to where he was inconsistently interacting with his environment in response to simple commands. At his highest level of function between February and July 1995, the videos showed he was able to do such things as throw and catch a ball, operate an electric wheelchair with assistance, choose a requested color block, and set a peg in a pegboard. However, no consistent means of communication had been established, either by eye blinking or by use of an augmented communication device — a so-called “yes/no board.”

Despite improvements made in therapy, Robert remained severely disabled, both mentally and physically. A medical report summarized his continuing impairments, in part, as follows: “severe cognitive impairment with concurrent motor and communication impairments . . . ; ‘maladaptive behavior characterized by agitation, aggressiveness and non-compliance’; ‘severe paralysis on the right and moderate paralysis on the left’; . . . ‘severe swallowing dysfunction, . . . ; ‘incontinence . . . ; ‘moderate spasticity’; . . . ‘general dysphoria’; [and] ‘recurrent medical illnesses . . . .’”<sup>6</sup> The testifying physicians agreed that Robert would never be able to make medical treatment decisions, walk, talk, feed himself, eat, drink, or control his bodily functions.

Also in evidence was the testimony of Robert's physician concerning an exchange he had with Robert on April 29, 1997, eight months before the trial court's decision. The physician asked Robert a series of questions, which Robert, using the “yes/no board,” appeared to answer correctly most of the time. “Do you have pain? Yes. Do your legs hurt? No. . . . Do you want us to leave you alone? Yes. Do you want more therapy? No. Do you want to get into the chair? Yes. Do you want to go back to bed? No. Do you want to die? No answer. Are you angry? Yes. At somebody? No.”<sup>7</sup> However, Robert's physician testified he did not think Robert understood

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<sup>6</sup> *Id.* at 525.

<sup>7</sup> *Id.* at 528.

all the questions, and his therapist testified that he had never used the yes/no board consistently.

(2) *As evidence of Robert's wishes*, Robert's wife, brother, and daughter recounted pre-accident statements Robert had made about his attitude toward life-sustaining health care. On one occasion, when Rose had to decide whether to turn off a respirator sustaining her father's life, Robert said: "I would never want to live like that,' . . . 'wouldn't want to live like a vegetable' . . . [or] 'in a comatose state.'"<sup>8</sup> On another occasion, when his brother was warning him that his heavy drinking and driving would cause him to be in a terrible accident and end up in the hospital like a vegetable, he told his brother: "'[W]hatever you do[,] don't let that happen. Don't let them do that to me.'"<sup>9</sup>

Rose appealed to the Court of Appeal, which reversed. Contrary to the trial court, the Court of Appeal believed that under the statute, the trial court was required to determine only whether the conservator was acting in good faith, based on medical advice, and was not to determine whether there was clear and convincing evidence that the decision was what the conservatee would have wanted. The court observed that the statute had no such limitation, and it found no constitutionally significant difference between a PVS patient (as in *Drabick*<sup>10</sup>) and a minimally conscious one in this context.

Florence petitioned the California Supreme Court for review, and in June 2000, five years after Rose's first request to withdraw treatment, we granted review.

So, at that point, Robert had been alive five years after Rose first sought to withdraw treatment, seven years after his accident. The case started in the trial court in August 1995 with Rose's petition, went up to the Court of Appeal and then to our court and back to the Court of Appeal on Florence's request that an attorney be appointed to represent Robert, was returned to the trial court for decision on Rose's petition, was appealed by Rose to the Court of Appeal when her petition was denied, and finally came to us on Florence's petition for review of the Court of Appeal's decision.

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 529.

<sup>10</sup> *Conservatorship of Drabick*, 200 Cal. App. 3d 185 (1988).

The case, as you may know, attracted national media attention, both on television and in magazines and newspapers. It's been described as one of the top news stories of 2001. The parties before us were of course Florence, seeking to reverse the Court of Appeal, and Rose seeking to uphold it. But in cases of such importance we often get briefs from amicus curiae, that is "friends of the court," interested groups or individuals who weigh in on the issues. In this case we received numerous such briefs. *On behalf of Rose, arguing for deference to the conservator's decision*, were, among others, the Alliance of Catholic Health Care and other healthcare entities, the California Medical Association, the American Civil Liberties Union, and various Bioethics Committees and Associations; *On behalf of Florence, arguing in support of the trial court's clear and convincing evidence standard*, were the Coalition of Concerned Medical Professionals, the Ethics and Advocacy Task Force of the Nursing Home Action Group, the National Legal Center for the Medically Dependent and Disabled, the Brain Injury Association, the Disability Rights Center, the National Council on Independent Living, and more. As you can see, the amici were divided between those who were concerned that an individual's autonomy be respected and he be accorded his right to choose to die, and those who were seeking to protect the sanctity of life and the individual's right to choose to live.

In addition to all the briefs, the evidence before our court was the same as that before the trial court three years earlier, in 1997, including six hours of video tape. We took no additional evidence of Robert's condition. I watched an edited version of the videos and my staff attorney watched the entire six hours. Other members of the court and staff may have done the same.

Now to our decision.

(1) We first recognized that the common law and the California constitutional right to privacy gives a competent individual the right to consent or withhold consent to medical treatment, including the right to refuse treatment, even when necessary to sustain life.

(2) We next recognized that this right of a competent individual to choose survives incapacity, so long as the law of the jurisdiction gives such a choice lasting validity. The California Health Care Decisions Law (fashioned after the Uniform Health-Care Decisions Act of 1993) does give competent adults the power to leave formal directions or to authorize an agent

to speak for the individual when he or she is no longer able to make health care decisions. In thus giving lasting effect to the decision of a competent person, these laws foster self-determination and respect for an individual's autonomy.

(3) We then noted that decisions made by a conservator, in contrast, derive their authority not from the patient, but from the *parens patriae* power of the state to protect incompetent persons, that is, the state's power to care for those who cannot care for themselves. As the United States Supreme Court said in the *Cruzan* case: "[A]n incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right. Such a 'right' must be exercised for her, if at all, by some sort of surrogate."<sup>11</sup>

With this background, we turned to the California Health Care Decisions Law. This is what it says:

If the conservatee has been adjudicated to lack the capacity to make health care decisions, the conservator has the exclusive authority to make health care decisions for the conservatee that the conservator in good faith based on medical advice determines to be necessary. The conservator shall make health care decisions for the conservatee in accordance with the conservatee's individual health care instructions, if any, and other wishes to the extent known to the conservator. Otherwise, the conservator shall make the decision in accordance with the conservator's determination of the conservatee's best interest. In determining the conservatee's best interest, the conservator shall consider the conservatee's personal values to the extent known to the conservator. The conservator may require the conservatee to receive the health care, whether or not the conservatee objects.<sup>12</sup>

In *Drabick*, the Court of Appeal had before them the 1981 version, but the statute was later amended to include the part about abiding by the conservatee's wishes, if known, and that's the statute we construed. The statute makes no mention of any burden of proof. The Law Review Commission comment to the statute suggested that preponderance of the evidence

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<sup>11</sup> *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 280 (1990).

<sup>12</sup> CAL. PROB. CODE § 2355 subd. (a).



## LIMITATIONS OF OUR HOLDING:

(1) If a conservatorship is not involved, *Wendland* and its burden of proof do not govern the case. Even if a conservatorship *is* involved, the conservator does not have to petition the court for permission to make a life-terminating decision. The issue comes to court only if there is a conflict, or if the conservator seeks guidance. Otherwise, the law does not require judicial involvement in a decision to forgo medical treatment.

(2) Our decision does not affect any other health care decisions a conservator might need to make, only the decision to withhold life-sustaining treatment.

(3) The decision speaks only to a minimally conscious individual who is not terminally ill, and again, only one for whom a conservator has been appointed. It says nothing about decisions concerning patients who are terminally ill, or in a vegetative or comatose state.

I quote from our opinion: “[O]ur decision today affects only a narrow class of persons: conscious conservatees who have not left formal directions for health care and whose conservators propose to withhold lifesustaining treatment for the purpose of causing their conservatees’ deaths. Our conclusion does not affect permanently unconscious patients, including those who are comatose and in a persistent vegetative state, persons who have left legally cognizable instructions for health care, persons who have designated agents or other surrogates for health care, or conservatees for whom conservators have made medical decisions other than those intended to bring about the death of a conscious conservatee.”<sup>14</sup>

## HOW TO AVOID JUDICIAL INVOLVEMENT:

The hope, of course, is that these difficult and sensitive decisions never come to the court. The courts do not want these cases, they are not well equipped to decide them, and the issues are not best decided by way of litigation. Think of the years of agony for Robert Wendland’s family.

The whole body of law concerning end-of-life decisions involves *avoiding* conflicts and *resolving* conflicts when they arise. If there is no conflict, there is no problem.

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<sup>14</sup> *Id.* at 555 (internal citations omitted).



Most cases, happily, do not end up in court. In the absence of a conflict, either between family members or between a family member and the hospital, these cases are resolved informally, based on the good faith judgment of close family members together with the advice of the treating physician and the approval of the hospital's ethics committee. Had Florence not objected, Robert's treatment would have been withdrawn in July 1995.

To be sure no conflict will arise and that your wishes are honored, an individual can do several things: leave a written health care directive, appoint a surrogate or agent, or execute a medical power of attorney.

The Health Care Decisions Law in California is very flexible. A person can leave a formal health care directive, which can be as specific or as general as the individual wishes, and can say what should happen if the instructions given don't cover the situation that arises. Instead of a directive, or in addition to one, you can appoint an attorney for medical care or a surrogate. You can also make an oral appointment or give oral instructions, although these last only so long as you are in the hospital or being treated for the precipitating condition.

There have been some criticisms of the *Wendland* opinion. Happily, I'm not aware of all of them!

Most of the criticisms I do know of relate to the high burden of proof we imposed to show that a minimally conscious conservatee would want to die. It's argued that in imposing such a high standard, the court gave more weight to the state's interest in preserving life than to the conservatee's autonomy and right to choose to die. *Response:* The short answer is that the patient's autonomy is not in issue in these cases. We don't know what the patient wants. With Robert, a minimally conscious patient, we could be fairly sure he did have a preference, but we couldn't tell what it was. Had he left directions or named a surrogate, his autonomy would be honored by following the directive or allowing the surrogate to decide. Since he did not, the interest of the state, in its role as *parens patriae*, was that an *appropriate* decision be made; thus, the trial court required clear and convincing evidence that Robert would want treatment terminated, before it would authorize withdrawal of life support.

Secondly, it's argued that although we stated our decision affected only a narrow class of persons — conscious conservatees — it will actually have a wide impact; this is because a persistent vegetative state — to which the

opinion does not apply — is rare, and most patients in these situations are minimally conscious. In addition, it's argued, many patients with dementia, as to whom questions of life-sustaining treatment have arisen, retain some level of cognitive functioning before they are deemed terminally ill. *Response:* In those cases, as in *Wendland*, I submit the higher standard of proof concerning their wishes is appropriate. It is not a *given* that such individuals would want to die.

Finally, it's argued that the young and the poor are not likely to have appointed a surrogate or executed a directive. Hence, by imposing such a high standard of proof, the opinion deprives these individuals of their fundamental right to refuse life-sustaining treatment. *Response:* But if there is no conservator, *Wendland* has no application. The family of such persons and the hospital together can reach an appropriate decision.

In closing, I'll say that since some burden of proof had to be chosen, it was thought better to choose one that weighs in favor of life, which is the status quo, rather than one that would allow an irreversible decision to end life. Every court that I'm aware of has imposed the same burden of clear and convincing evidence in the circumstances. As the United States Supreme Court stated in the *Cruzan* case, responding to the equal protection argument that a high standard of proof deprives an incompetent individual of equal protection since no such burden is required to effectuate the choice of competent persons, "the differences between the choice made *by* a competent person to refuse medical treatment and the choice made *for* an incompetent person by someone else to refuse medical treatment are so obviously different that the State is warranted in establishing rigorous procedures for the latter class of cases which do not apply to the former class."<sup>15</sup>

Let me read from our *Wendland* opinion: "In this case the importance of the ultimate decision and the risk of error are manifest. . . . But the decision to treat is reversible. The decision to withdraw treatment is not. The role of a high evidentiary standard in such a case is to adjust the risk of error to favor the less perilous result."<sup>16</sup>

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<sup>15</sup> 497 U.S. at 287 n.12 (emphasis added).

<sup>16</sup> 26 Cal.4th at 547.

## SUBSEQUENT DECISIONS:

Kentucky in 2004 issued an opinion that purported to rely on *Wendland*,<sup>17</sup> but it extended the requirement of clear and convincing evidence to withdrawal of treatment from a patient in a persistent vegetative state or permanently unconscious. I believe that only Kentucky and Missouri (*Cruzan*) have gone so far.

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<sup>17</sup> *Woods v. Commonwealth of Kentucky*, 142 S.W.3d 24 (Ky. 2004).

# ON BEING HONORED BY THE AMERICAN JEWISH COMMITTEE

KATHRYN MICKLE WERDEGAR\*

## I. THE JUDGE LEARNED HAND HUMAN RELATIONS AWARD<sup>1</sup>

**T**hank you, Jerry,<sup>2</sup> for your generous comments. And Justice [Joseph] Grodin, thank you for your kind remarks. I am truly honored to receive the Judge Learned Hand Award of the American Jewish Committee. I am also deeply gratified to be placed in the company of the distinguished individuals who have received it in the past.

I thank all of you for attending the ceremony this evening. I'd like particularly to acknowledge my colleagues from the Supreme Court, Justice Marvin Baxter and his wife Jane, Justice Ming Chin and his wife Carol, and also my classmate and friend Judge Thelton Henderson. And my family — David, Maurice and Helen, and Matthew and Monique.

Learned Hand is recognized as one of the country's great judges. He is often described as the greatest judge "*never* to be appointed to the U.S.

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\* Associate Justice, California Supreme Court, 1994–2017.

<sup>1</sup> Presented by the San Francisco Bay Area Region of the American Jewish Committee, May 22, 2008.

<sup>2</sup> Jerome Falk, San Francisco attorney.

Supreme Court.” How did it happen that the highest judicial office eluded him? The answer is found in time, place, and politics. According to the story, in the 1920s his appointment was blocked by then Chief Justice William Howard Taft. Gerald Gunther, in his wonderful biography of Hand, writes that Taft strongly urged President Harding not to nominate him, and offered a decisive political argument: “Hand,” he said, “had turned out to be a wild Roosevelt man and a Progressive” — that would be Teddy Roosevelt — and “[i]f promoted to our bench, he would most certainly herd with Brandeis and be a dissenter.”<sup>3</sup> Twenty years later, in the 1940s, Justice Felix Frankfurter, a longtime supporter of Hand’s, wrote President Franklin Roosevelt that Hand is “the one choice who will arouse universal acclaim in the press. . . . I never was more sure of anything.”<sup>4</sup> Frankfurter even drafted a press release for FDR to announce Hand’s nomination. It was not to be. Roosevelt reportedly wanted a younger man and appointed Wiley Rutledge.

Your choosing to honor me this evening prompted me to reflect on my career path, and how I came to be in a position to receive this honor. What I soon realized is that my career in the law, like that of Judge Hand, has been impacted by time and place — and, yes, perhaps politics as well. What I have also come to realize is that my personal journey is reflective of this country’s journey over the past half century, as it endeavored to respond to the newly insistent demands of its African-American citizens and women for equal rights and opportunities. For the next few moments I would like to trace this history and then suggest what relevance it might have for us today.

When I attended UC Berkeley so many years ago, women had few career options; those who aspired to a career most often trained to be a teacher, nurse, or secretary. These were the women’s occupations.

Typical of many, I graduated with a general liberal arts degree, having no defined career goals. I entered the workplace and ultimately accepted employment at the UC San Francisco Medical Center as a ward clerk. There I met three physicians who you might say changed my life.

The first two were women. Seeing them at work was a revelation. Until then I had no idea that a woman could pursue what I had always thought to be a man’s profession. The realization that a woman could do something

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<sup>3</sup> GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 234 (2d ed. 2011).

<sup>4</sup> *Id.* at 476-77.

so out of the ordinary inspired me to raise my horizons and consider what I might do. Since medicine was clearly not for me, I pondered other possibilities and soon settled on the law. I had never heard of a woman lawyer; neither had anyone I knew. Nevertheless, I applied to law school and in the fall of 1959 entered UC Berkeley, Boalt Hall, as a member of the class of 1962. In our entering class there were four women; two of us graduated.

Now, I mentioned three physicians; the third, of course, was my husband David. We married at the end of my second year of law school and moved to Washington, D.C., where David was assigned to Walter Reed Army Hospital, and I transferred to George Washington University to complete my studies.

When I embarked on my pathway in the law, this country was on the cusp of radical social change. The civil rights movement was gathering force. Martin Luther King, Jr., had emerged on the national scene as its leader. The feminist movement was soon to follow. Betty Friedan had just published *The Feminine Mystique*. For women of my era, the book was a revelation. It espoused dramatic new views about the role of women and opened up whole new possibilities. I had a sense of the world changing. With a newly minted law degree and living in the nation's capital, I was in a position to be part of that change.

After graduation, I took a position with the civil rights division of the United States Department of Justice. I joined the Appeals and Research Section under Harold Greene. Robert Kennedy was attorney general, Nicholas Katzenbach was deputy attorney general, and Burke Marshall was assistant attorney general for civil rights. I can recall only one other woman in the Justice Department.

It was a momentous period. In the South, segregation was still the rule — bus stations, restaurants, lunch counters, lodgings and schools were separated into “colored” and “white.” Marches and sit-ins were taking place in Selma, and in Birmingham. All of us are familiar with the incredible history of Judge Thelton Henderson, who as a brand-new lawyer, was dispatched to the South by the Justice Department to be an observer for the federal government.

Our task in the Appeals and Research Section of the Civil Rights Division was to enforce, strengthen, and, indeed, develop the civil rights law of the land. (By that I mean we were making it up as we went along.)

When James Meredith integrated the university of Mississippi as its first black student, he was accompanied by Civil Rights Division attorneys. When Martin Luther King, Jr., was in jail, we drafted amicus briefs to secure his release. When the Southern governors of the day — Ross Barnett of Mississippi and George Wallace of Alabama, “stood in the school house door” — as they liked to boast — to bar black students from entering, we researched federal powers of contempt to move them aside. And when the administration wanted to assure equal access to public accommodations and the voting booth, we drafted early legislative proposals that ultimately led to the landmark Public Accommodations Act and Voting Rights Bill of the early 1960s.

My last day in Washington was August 28, 1963. Leaving David to supervise the movers, I joined in the “March on Washington for Jobs and Freedom,” and with thousands of others, I listened to the Reverend Martin Luther King, Jr., as he so eloquently told us, “I have a dream.”

When I returned to California, I was hoping to find work that would allow me to continue to participate in significant issues of the day. I interviewed with the California state attorney general’s office; I applied for a clerkship with the California Supreme Court; I applied for federal clerkships; I applied to legal-service nonprofits. No offers were forthcoming.

Women attorneys were few in those days, almost invisible. I was later told that the only women in the attorney general’s office at the time were the ones left over from being hired during World War II. Boalt called to tell me a prominent San Francisco firm was considering hiring its first woman, if they could persuade the senior partner. Would I be interested?

Although some members of the firm took me to lunch, I was not destined to be that woman. In short, I did not find employment.

Ultimately, and with Boalt’s help, during these early years in San Francisco I found work doing research and writing. One project of particular interest was with Boalt Professor Frank Newman — later Supreme Court Justice Newman. The idea was to investigate what would the Bill of Rights look like if the solicitor general of the United States had *won* all his arguments before the Supreme Court.<sup>5</sup> Later, the California College of Trial

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<sup>5</sup> See Kathryn Mickle Werdegar, *The Solicitor General and Administrative Due Process: A Quarter-Century of Advocacy*, 36 GEO. WASH. L. REV. 481 (1967–1968).

Judges (now the Center for Judicial Education and Research) recruited me to write a criminal procedure benchbook for trial judges — actually, one of the first benchbooks published in California.<sup>6</sup> Some time after that, I came to work with California Continuing Education of the Bar.

During this period of my career and the ensuing years, our society was engaged in addressing the issues of equal rights and opportunity for African Americans and women. Significant changes occurred. Discrimination was no longer tolerated. Through political will, and judicial decision, equal treatment and equal opportunity became an increasing reality. Diversity became a byword. The numbers of women entering law schools swelled.

These changes in our society impacted me. What initially had been a barrier, a disadvantage to me — my gender — now had become a benefit. Entities and institutions were looking for qualified women. In 1991, Governor Pete Wilson made me his first judicial appointment when he appointed me to the First District Court of Appeal. I thus took my place as the only woman among the nineteen justices of that court, and only the second woman in its entire history. Three years later the governor elevated me to the California Supreme Court, thereby making history by *doubling* the number of women on the court from one to *two*.

Today, the appointment of a woman to the bench is no longer remarkable. In most law schools, women comprise more than half of the class and now make up 40 percent of the bar. Women fill every conceivable position in the law. And today, as we are so much aware, the Democratic Party has vying for its nomination for the presidency of the United States a woman and an African American. That one of these two individuals will be a major party's candidate to be our next president speaks volumes about how far this country has come these past fifty years and how much we have changed.

What does the history I've described say about today? Are there lessons to be learned? I would say "yes." The paramount lesson is that without the support of our judicial system — without the integrity of an independent judiciary — these strides could not have been made. We rely on our courts to enforce the principles of our Constitution and the laws of our land. The role of the judiciary is to uphold the law for all, safeguarding the rights of

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<sup>6</sup> KATHRYN MICKLE WERDEGAR, CALIFORNIA MISDEMEANOR PROCEDURE BENCHBOOK (1971; rev'd ed., 1975).



individuals and minorities against the will of the majority. In recognizing and enforcing the legal and constitutional rights of African Americans and women, the courts fulfilled that role.

Today, other minorities are making their voices heard. With the California Supreme Court's decision last week [legalizing same-sex marriage],<sup>7</sup> foremost in our awareness this evening likely are gays and lesbians.

We can't, of course, know how that particular issue will be fully resolved. Nor can we anticipate what issues will confront future generations. But what we can do — what we must do — is commit ourselves to assuring that the courts maintain the independence to fairly address the issues they are called upon to decide, so that through the rule of law, courts are able to assist our society — when necessary — in making whatever changes our Constitution and democratic principles require.

Let me conclude with the observations of two eminent jurists, one of the United States Supreme Court and the other of the California Supreme Court. The first is Oliver Wendall Holmes. Like Judge Hand, Holmes believed in judicial restraint. Nevertheless, he famously said the following, that it was the court's duty “to learn to transcend our own convictions, and to leave room for much that we hold dear to be done away with . . . *by the orderly change of law.*”<sup>8</sup>

The other is Roger Traynor. Sixty years ago, Chief Justice Traynor authored the opinion in *Perez v. Sharp*, the first decision in the country to strike as unconstitutional a ban on interracial marriage. Inscribed on a wall at Boalt Hall are these words of Traynor's: “The law will never be built in a day, and with luck *it will never be finished.*”<sup>9</sup>

In its long history, the American Jewish Committee has had a steadfast dedication to law and equality, and has been a stalwart defender of our independent courts. We are all grateful for that.

And I personally am grateful for the honor you have paid me this evening. Thank you.

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<sup>7</sup> In re Marriage Cases, 43 Cal.4th 757 (2008).

<sup>8</sup> Address to the Harvard Law Association of New York, February 15, 1913 (emphasis added).

<sup>9</sup> Roger J. Traynor, *La Rude Vita, La Dolce Giustizia; Or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223, 236 (1962) (emphasis added).

## II. THE LEGACY OF JUSTICE AWARD — AND THE ARC OF PROGRESS<sup>10</sup>

Thank you, Art,<sup>11</sup> for your very kind remarks. And given your international responsibilities, I am grateful you could be here this evening.

I am truly honored to receive the Legacy of Justice Award and to be in the company of my fellow honorees this evening. I want to thank Joe Cotchett for suggesting that I receive this award, and congratulate him for receiving the Judge Learned Hand Award, recognizing his stature as a champion of worthy causes. And my congratulations on receiving the Pursuit of Justice Award to Nancy O'Malley, whom I came to know and admire during our work together on the statewide judicial education program, *How the Courts Failed Germany: Law, Justice, and the Holocaust*.

The Legacy of Justice Award marks the conclusion of my twenty-six years as a judge, twenty-three of them on the California Supreme Court, and it coincides with the fifty-fifth anniversary of my graduation from law school. As I prepare to step down from the bench, my thoughts have turned to the societal changes that have occurred over the course of my career. Today we are in challenging times. But my thesis is hopeful — that over time, progress prevails. Thus, I have chosen to frame my reflections as the *Arc of Progress*.

When I graduated from law school, nationwide only 1 percent of attorneys were women; in California it was 3 percent. In my law school class four of us started and two of us graduated. Law firms could refuse to hire women and did so with impunity. Today, law school classes are more than 50 percent women and Title VII prohibits employment discrimination. Women attorneys hold every conceivable position in the law — including, yes — judges and chief justices.

When I took my first job in the Civil Rights Division of the United States Department of Justice in 1962, in parts of the South facilities and public accommodations were still segregated, black and white — bus stations, drinking fountains, restaurants, restrooms, motels. Governors in Mississippi and Alabama would “stand in the schoolhouse door” as they liked to boast, to block school integration. Federal marshals and Department of Justice attorneys had

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<sup>10</sup> Presented by the San Francisco Bay Area Region of the American Jewish Committee, June 1, 2017.

<sup>11</sup> Arthur Shartsis, San Francisco attorney.

to accompany James Meredith — the first black student to enroll in the University of Mississippi — to his dorm and his classes for his safety. Federal troops were on standby to forestall a riot. Those days are over.

When, nine years ago, I had the honor of speaking to this group, the right of same-sex couples to marry was in dispute across the land. My court had just declared a California constitutional right, but the voters in Proposition 8 quickly rejected it. Federal litigation ensued. Then, two years ago, in 2015, the issue was resolved. Today the right of same-sex couples to marry is firmly rooted in the United States Constitution.

But none of these achievements could have occurred without the vigilance and contribution of organizations like the American Jewish Committee, steadfastly dedicated to law and equality. Nor could they have occurred without the effort and dedication of lawyers, such as our attorney honorees this evening. And most emphatically, they could not have succeeded without the integrity and courage of judges. In that connection, I will close with reflections on the court I have known these past twenty-three years.

Although we are always *The Court*, changes in our composition and personality do occur. I have had the privilege of serving with three outstanding Chief Justices — Malcolm Lucas, Ron George, and Chief Justice Tani Cantil-Sakauye. Each has met the challenges of his or her time with strength, dedication, and vision. I also have had the pleasure of serving with eleven different associate justices — starting with the venerable Stanley Mosk, to our newest member Leondra Kruger, appointed just two and a half years ago — a kaleidoscope of different backgrounds and experiences, different personalities, philosophies and approaches to the law, but always One Court.

In addition to our chief justice, two of my colleagues are here this evening and I would like to recognize them — Justice Ming Chin, a previous recipient of the Judge Learned Hand Award, and Justice Goodwin Liu.

It has been my privilege over these past twenty-three years to work together with all of my colleagues to uphold and advance justice for all Californians to the best of our ability. I will miss them all and I wish them well. Again, I thank the AJC for awarding me the Legacy of Justice award.

Thank you.





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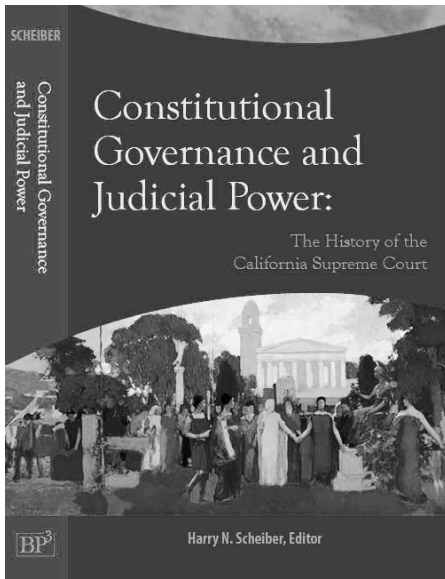
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