

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, depublication, 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* case⁵¹ — 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.”

⁵¹ 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?⁵²

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

⁵² 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.⁵³ 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.

⁵³ 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*,⁵⁴ 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.

⁵⁴ 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*,⁵⁵ 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*.⁵⁶ 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.

⁵⁵ 573 U.S. ___ (2014).

⁵⁶ 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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