

## INTERVIEW 11 (NOVEMBER 24, 2015)

MCCREERY: Good afternoon, Justice Werdegar. We've been talking over our last several oral history interviews about a variety of specific cases in which you authored an opinion or had some other key role. Continuing in that vein today, would you be kind enough to start us off with the case on the American Nurses Association that you brought to my attention?

WERDEGAR: I will. Hello, Laura. Very nice to see you again.

The *American Nurses* case involved whether trained volunteers, with the approval of the relevant physician, could administer insulin to school children, many of whom, it turns out, are diabetic and have to have the administration of insulin during the school day.<sup>57</sup>

This was a question of statutory interpretation, but if the statutes had been clear the case wouldn't be before us. The case touched a lot of families with diabetic children since most schools today, regrettably, don't have full-time nurses — or maybe any nurses ever. If it were held as the Nurses Association argued, that only trained nurses could administer insulin, it would have — and had in the interim — imposed a great burden on families. A parent would have to be available or the child would have to be home-schooled.

The opinion, which I recall was unanimous, held that it would be appropriate for, that the statutes allowed, trained volunteers with physician approval and parental consent to administer insulin to public-school students. I do believe the opinion was gratefully received by all, except perhaps the union.

MCCREERY: What sort of voice was the union in this whole matter, as you recall it now?

WERDEGAR: You're meaning — what sort of voice? They argued against this. They were the plaintiffs, saying that this was an improper procedure, to allow laypersons to administer insulin.

MCCREERY: I'm just wondering about the union representation of that side of the question?

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<sup>57</sup> *American Nurses Ass'n v. Torlakson*, 57 Cal.4th 570 (2013).

WERDEGAR: In oral argument? Of course, they were vigorous advocates, vigorous for their point of view. But it ultimately didn't prevail with the members of the court.

MCCREERY: Why was the matter of volunteer nurses in the school setting so controversial?

WERDEGAR: Volunteer people. These people weren't nurses. They would train members of the teaching staff. It was controversial only to the nurses. I can only assume that they wanted to protect what they believed were their prerogatives. They did not, of course, say that. They argued that the safety and well-being of children mandated that only certified nurses administer insulin.

Of course, some children are able to administer it themselves, and parents at home who have diabetic children, as I understand, administer the insulin. But the basis of their argument throughout was that, for the health and well-being of the children, it should be only members of their association.

MCCREERY: You indicated this was a matter of statutory interpretation. What was the specific weakness in the statute, as written?

WERDEGAR: I can't say unless I have the book open in front of me because these things are very complex — so I can't tell you. But it did involve reconciling at least two and maybe more statutes relating to what certified professionals can do and what persons who aren't certified can't do. It was a very fine harmonizing of statutes that really were not drafted to speak to this particular issue.

MCCREERY: Thank you. Shall we move on to another case we thought we might talk about today, and that is titled *People v. Robinson*,<sup>58</sup> an opinion of 2010 written by Justice Chin, in this case, and having to do with arrest warrants using DNA?

WERDEGAR: Yes. By this, does that mean that you're moving on to the C-and-D's [concurring and dissenting opinions] and we've stopped on my significant opinions? Because I do have some I'd like to mention, but I'm happy to talk about *Robinson*, where I joined Justice Moreno's C-and-D.

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<sup>58</sup> 47 Cal.4th 1104.

MCCREERY: Maybe we can put that down. It has to do with where I listed them on my page here.

WERDEGAR: You did want to talk about *Coral Construction*?<sup>59</sup>

MCCREERY: I did indeed. Let's do that.

WERDEGAR: This case, as often occurs with our work [Laughter] — this opinion attracted a lot of attention. It was politically charged.

San Francisco had passed an ordinance requiring preferential treatment for women and minorities in the awarding of city contracts, otherwise known as affirmative action. The complaint was that in so doing it was in violation of the California Constitution.

Our Constitution, I think, was amended by way of an initiative measure. It contains a provision that forbids a public entity in awarding public contracts to discriminate. It forbids a public entity to discriminate or grant preferential treatment based on race or gender. There you have it. Yet this ordinance required public contractors to do just that.

There were some subtle constitutional arguments involving the federal Constitution with respect to this, but the bottom line was the California constitutional provision prevailed, and that provision did not violate federal constitutional equal-protection jurisprudence. It was truly a straightforward application of state constitutional law, with a little side note about, was that congruent with federal law, and it was.

But again, it's one of these opinions that impacted the community, and people had very strong feelings about it. I've been questioned about it quite a bit. "How could you do that?"

Perhaps the perception being that I wouldn't want to preclude affirmative action. But that's what the law required, and I believe it was unanimous. No, it was a six-person majority. I don't recall who dissented, but it was a six-person majority.

MCCREERY: As you say, that was a matter arising out of the affirmative action ban that voters passed by initiative way back — I had to look this up, it's been so long — way back in 1996 as Proposition 209. By the time you ruled on it in this opinion, it had already survived multiple challenges.

WERDEGAR: A federal challenge, I believe.

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<sup>59</sup> *Coral Construction v. San Francisco*, 50 Cal.4th 315 (2010).

MCCREERY: Both federal and some in state court as well.

WERDEGAR: Yes. So you're telling me that the initiative that brought that provision to our Constitution was Prop. 209?

MCCREERY: Yes. But it appears that when challenged on constitutional grounds it has survived each and every time.

WERDEGAR: It has.

MCCREERY: I gather the City of San Francisco was trying to say that, owing to the record of events in the city itself, there was reason to think the contracting process was causing a problem. They ended up with an avenue to come back and revisit this again.

WERDEGAR: Oh, that's right. They did. They were very concerned that there had been proven exclusion.

MCCREERY: In terms of the constitutionality, you indicated it was a very clear-cut — ?

WERDEGAR: No. It was clear cut with respect to the California Constitution, but there was an argument that I don't have complete recall of that was a very sophisticated argument about how it was contrary to some federal jurisprudence on the right of minorities to advance their interests. At this point I can't take that farther.

I would like to speak to you about a case you may not be aware of, but it was a major endeavor on my part and on the court's part. *In re Reno*. Do you have that one?

MCCREERY: I saw a reference to it, but no.

WERDEGAR: That's 55 Cal.4th 428. In the case of *In re Reno*, this chambers really did the court's work. This relates to capital case litigation. As is widely known, capital cases, death-penalty cases, in this court — the litigation just goes on and on. After this court has dealt with the automatic appeal and, let's say, affirmed it, then comes the whole habeas corpus process.

First, the petitioner, the defendant, has to come to this court with habeas corpus issues. These are issues that are not reflected on the written record. They're outside the record. That's why we do it by way of habeas corpus.

After they do it here multiple times, then they move over to the federal courts and raise their habeas corpus issues there. The fact is, we get

petitions that run hundreds of pages long that are repetitive and duplicative. We have rules for denying a petition on grounds that the issue was raised and rejected before or the issue could have been raised on appeal and could have been resolved on appeal but it wasn't.

Finally, in *In re Reno*, in this comprehensive opinion, writing for the majority I tried to set out limits on abusive petitions for habeas corpus in capital cases, *abusive* meaning repetitive claims, claims raised and resolved before, excessive pages in briefs.

We tried, and it's too soon to say how well it has succeeded. But it was an effort to bring some order to this process so that what should be happening — getting straight to the point and resolving the claim and resolving it finally — should occur.

So that was really an administrative opinion for the benefit of the court.

MCCREERY: When you say limiting the abuse of repetitive claims and so on, as a practical matter how can one set those limits in terms of —

WERDEGAR: Just by identifying them and saying they will not be tolerated. [Laughter] I'd have to have a case in front of me to see how it actually works. We also put page limits on a repetitive or second habeas petition and a requirement that if they are addressing an issue that's been previously addressed, they explain why. As I say, I think we've seen some adherence to our stated rules and preferences, but it's too soon to say what impact it will have.

MCCREERY: How widely known and understood is this ruling in the community?

WERDEGAR: In the bar that practices death penalty jurisprudence it's widely known. It's universally known.

MCCREERY: As a matter of interest, you said this was a significant work for your chambers to undertake.

WERDEGAR: Oh, yes.

MCCREERY: How did you and your staff go about doing the research and thinking about how this could be written in a way that would have a useful effect?

WERDEGAR: My staff — and it's the case with career staff on the court, certain of the attorneys, on my staff I would say all — but certain of the

attorneys are extremely familiar with all the nuances of capital case litigation. They can do it from the top of their head, and they experience all the abuses as petitions come, and so forth.

So it wasn't a challenge in that regard. The challenge, I guess, would have been to write a clear, comprehensive opinion setting out what the limits will be. But the research was no problem at all. Example after example.

And the court, before this, had rules that if something had been raised below and disposed of you couldn't raise it here. But it never stopped the attorneys. The rules were disregarded. The advocates are strong advocates and dedicated advocates representing death row inmates.

MCCREERY: In general, to what extent were your colleagues on the bench eager to see such an opinion come to fruition?

WERDEGAR: The most experienced ones were extremely supportive. This does not advance the cause of justice to be churning a lot of paper. Everybody had input in the opinion and what we should address, and for our newest member at that time, Justice Liu, he would say it was a real education because the opinion set out what our rules are about habeas petitions and how they've been abused and how they can be abused. It was a comprehensive presentation for anybody who was new to the issue, so very helpful in that way.

But the opinion was impacted by the input of all the chambers. This was authored by me and concurred in by everybody, but the final product was assisted by every chambers.

MCCREERY: What sort of position was expressed against making these kinds of changes and by whom?

WERDEGAR: The defense bar that represents capital defendants would claim that these abuses were not abuses and that they needed to do everything that they possibly could to advance the interests of their clients, and so forth.

MCCREERY: That's very much an expected line of reasoning, and so on. Was there anything that you didn't anticipate in that regard?

WERDEGAR: No.

MCCREERY: Are there other attempts that you know of coming forward or things on the horizon that might also be ways to streamline the capital process?

WERDEGAR: There's an initiative that they're trying to circulate that would abolish capital sentences in this state. Such an initiative was on the ballot four years ago and I believe was favored by 48 percent. This one is a little different, but I'm not conversant with what the differences are that would curtail the process.

There's a competing initiative that is seeking to be qualified. By the time anybody reads these remarks this will be known, which prevailed. The competing initiative, which I just read in yesterday's newspaper has not yet been approved by the attorney general, would impose strict time limits on when this court can resolve a case and other constraints in the effort to quicken the process. So there are going to be competing initiatives on the ballot, presumably.

MCCREERY: It's new territory, isn't it, to try to place restrictions and time limits on these matters?

WERDEGAR: It is discussed and has been discussed for a great deal of time in the past. I don't believe anything quite like that has been placed before the voters before. They might think it's a wonderful idea, if they favor the death penalty. Whether it's practical or could even be adhered to would be a question if the initiative passed.

The competing proposed initiative would also mandate that attorneys take these cases. Attorneys who otherwise represent criminal defendants or are on panels of volunteer attorneys for criminal defendants, as I understand it from the newspaper, would be required to take death penalty cases as well. A lot of attorneys don't want to.

MCCREERY: That might conceivably have a significant effect on the bar overall?

WERDEGAR: Yes. But this is all hypothetical and may never be cause to consider.

MCCREERY: Since we're touching on the death penalty aspect of the court's work, perhaps I'll turn very briefly to something I mentioned that I wanted to ask you about today, sort of a postscript to our discussion on another day about the court's process in the capital cases. I read about two cases where it appeared that something rather rare had happened. Let me ask you if, in fact, that is so.

Both of these were this year, in 2015, by the way. One was the court's granting of a rehearing in a capital case, this one titled *People v. Grimes*.<sup>60</sup> First of all, how rare is it to grant a rehearing in a capital case?

WERDEGAR: This goes back to the change in the composition of the court. There were two new members of the court replacing the most conservative member, Justice Baxter, and replacing Justice Kennard.

I dissented in the *Grimes* case. It's not unusual for parties to seek a rehearing before the opinion is final if the composition of the court has changed. I dissented, and I believe Justice Liu agreed with me on my dissent, so the thought was maybe Justices Cuéllar and Kruger, the new members of the court, would agree the case warranted a fresh look.

That was the first petition for rehearing of cases that were not yet final that came before us with the two new members, and the vote was 4–3 to grant a rehearing, including the new justices and, of course, myself because I had dissented, and Justice Liu. After that there were two other cases at least where I had dissented, and maybe I was joined by another justice — I possibly was — where also petitions for rehearing were filed but there was not a majority to grant rehearing.

But the most famous, before that, rehearing situation was many years ago, the parental consent case where the composition of the court changed. The first opinion said that parental consent could be required, and we granted rehearing. With Justice Chin joining the court we had a new majority to say it was not required. That was the most high-profile, with lots of lingering effects as the court went forward.

MCCREERY: But as you say, also at a time when the court's own membership turned over.

WERDEGAR: That's the major hope in a petition for rehearing. Usually when a petition for rehearing is filed — we have these on conference, and maybe somebody who dissented would vote for the rehearing but they've lost the argument before. If the petition for rehearing raises something the court already considered, it's very unlikely the court would grant rehearing. We've thought about it, and we've resolved it. Often a petition for

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<sup>60</sup> 60 Cal.4th 729 (2015); 1 Cal.5th 698 (2016).



rehearing will pick up on something a dissent said, but the majority will say, “We know what the dissent said, and we don’t agree.”

I can’t remember a time when we’ve granted rehearing when there wasn’t a change in the composition of the court. There may be a time when the petition pointed out some egregious error, in which case we would grant a petition for rehearing. But they are rarely granted, for reasons you can understand. We’ve done our work once, and unless there’s something new and critical that’s brought to our attention, a petition for rehearing is not going to succeed.

MCCREERY: What is the significance of having this happen in a capital case, if any, over and above the significance in any case?

WERDEGAR: That’s a philosophical question. In this case, the error that I observed in my dissent was strictly a failure of evidence — it had to do with not letting the penalty jury be aware of something. It was a one-case-only incident. It will have almost no impact, except perhaps to the defendant and to educate future courts and litigants that you should allow in the evidence that I thought was prejudicially omitted.

As I recall, a confederate of the defendant had said the defendant had no part in the murder. I thought that if the penalty jury had heard that — of course, there was evidence that he did have a role in the murder, but I thought that evidence from a confederate that he didn’t could really have made a difference to the penalty jury. That particular circumstance is not likely to happen again, it’s factually unique, so in the event that the court reaches a new result and says that it was error to exclude that evidence, it will only impact this defendant.

The other two cases where I voted to grant a petition for rehearing involved the application of generally applicable law. One had to do with a homosexual oral copulation crime, whether the law discriminated against homosexuals, and at this point I can’t remember what the other was. The petitions were denied. So it’s interesting that a case that is of limited general applicability, although it affects the defendant, was granted and one that impacts a large group of people was denied.

MCCREERY: No development of the law in a general sense?

WERDEGAR: No development of the law.

MCCREERY: The other thing that was noted in public accounts having to do with a capital case decided this year was titled *People v. Scott*.<sup>61</sup> The matter of interest was the use of a per curiam opinion.

WERDEGAR: I'm happy to discuss how that came about, but I'm not sure I'm going to be accurate. What probably happened is that the actual author, the chambers that worked it up and was assigned the case and wrote the draft opinion, to which I think everybody ascribed — perhaps that was an author who had left the court, and it wouldn't be appropriate to have a judge who really hadn't done the initial work and written the opinion to claim authorship. I think that's probably what happened.

MCCREERY: But as far as you know, there would be no particular significance of choosing per curiam as a vehicle?

WERDEGAR: No, no. There was no desire for anonymity or no concern that any particular possible author wanted to be shielded from the fruits of his or her labor. [Laughter] No. I think it was an efficiency.

And it's not the first time, although the press — we don't do it often, of course. We usually have an author in place. I think my memory is correct that the case was reassigned after somebody left. It was the view of the court, but there was no individual in place who had written every word to claim responsibility or attribution.

MCCREERY: So in concept the same thing might happen in a non-capital case for the same reason?

WERDEGAR: That's an interesting question. I've been here twenty-one years now. I've never seen it happen in a non-capital case, so I don't know.

MCCREERY: Thank you for reflecting on that. As you might imagine, these are things that, as we say, the media might seize upon or notice, and the legal communities might be wondering, "Why did this happen?" So it's a bit of public education you're engaging in here. [Laughter]

WERDEGAR: That's right, and I can understand that; however, at the time that the news article came out saying that "this has never happened," — reporters have to write what they write, but internally it was

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<sup>61</sup> 61 Cal.4th 363 (2015).

brought out through the research of some of the attorneys that this was not unprecedented. Obviously, it's unusual. But it wasn't unprecedented. We internally didn't feel it justified the cries of surprise and, perhaps, alarm.

MCCREERY: Perhaps we'll return to a number of significant cases that you authored, and again I invite you to add to this list as we go. But we had identified one from 2011 called *California Redevelopment Association v. Matosantos*<sup>62</sup> having to do with California's redevelopment agencies and the major shift statewide in that regard. What was the significance of this?

WERDEGAR: This was a very politically sensitive case. Legislation had been enacted that called for the dissolution of redevelopment agencies. I'm speculating here. I'm not fresh with the background of the case. I guess the thinking was that the money that went to redevelopment agencies could be used by the Legislature in its budget in some other way.

We upheld that, but there were two parts to the opinion. There was additional legislation that conditioned further redevelopment agency operations on certain payments by the agency's community sponsors to state funds benefiting schools.

Now, this is politics and this is budget. This is not our domain. Our domain is, "Is this legislation valid?"

We upheld the legislation, and I wrote that opinion, a carefully reasoned, detailed opinion, saying that the Legislature, having created the redevelopment agencies, could dissolve them. That was the bottom line. But we struck down the legislation that conditioned further operations on payment for a certain purpose.

An interesting aspect of that was the chief justice dissented on that second point about the conditioning of further redevelopment agency operations on additional payments to state funds benefiting schools. I mention that only because it was a very rare dissent by the chief, and it could be — I'm not an expert on her dissents, but it could be her only dissent in a published opinion. She did dissent in another matter that was a petition for a writ of mandate.

But otherwise it was 6–1. It was like *Coral Construction* in the sense that this is dealing with political matters that the courts are called upon to referee, but our job is not to weigh in on what we think the wisdom of

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<sup>62</sup> 53 Cal.4th 231 (2011).

any particular legislation would be or to bring our private judgments to the fore but to just analyze it according to the principles of analysis.

MCCREERY: What follow-up has there been to that, if any, in the Supreme Court's own work?

WERDEGAR: In the Supreme Court's own work, to my knowledge, there's been nothing. In the Legislature, once in a while I'll read in the newspaper something touching on this. But that's not our concern. At the time that we were considering the case, of course, it was brought to our attention that these redevelopment funds had done all sorts of beneficial projects up and down the state. That may be true, but it's not what resolves the legal question as to the Legislature's authority.

MCCREERY: Sometimes these types of entities or setups come to outlive their original purpose in some way, and people do think they need to be replaced. But it's interesting that the interpretation for the court was a pretty straightforward matter.

WERDEGAR: "Did the Legislature have the authority to do this?" Not, "Should it have — ?"

MCCREERY: There again, the difference between the judicial branch and the legislative branch. [Laughter]

WERDEGAR: If only that were well understood. [Laughter]

MCCREERY: Thank you. Perhaps now we'll turn to what I think of as a very interesting opinion in an interesting area, a wage-and-hour employment case called *Brinker v. Superior Court* (2012).<sup>63</sup> Walk me through that one, if you would.

WERDEGAR: This case was a class action dealing with a restaurant company's alleged failure to provide employees meal and rest breaks. We have labor laws and regulations that mandate and govern a very interesting field, employees' rights with respect to wages and hours and breaks.

The case involved multiple, multiple issues and it included whether, as to these different claims — there were rest breaks and there were meal breaks — as to whether there were sufficient commonalities among the

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<sup>63</sup> 53 Cal.4th 1004.

putative class. They wanted it to be a class action. Were there sufficient commonalities among the plaintiff workers to allow for class certification?

Class certification is a very big issue because if a defendant is faced with a class lawsuit, the potential liability, of course, is much larger. One of the issues was, was class certification as to each of these issues appropriate? And what is required of an employer with respect to meal and rest breaks? And how could the employer fulfill its obligations?

Again, this is a matter of statutory and labor code interpretation, but these regulations and codes don't always answer the particulars and they could be ambiguous. It was very complex and very contentious figuring out what the law did require of the employer. It was one of the most contentious cases internally that I can remember in my twenty-one years.

MCCREERY: Why? Do you know?

WERDEGAR: The discussions at conference could become very heated. In the end, the opinion benefited from a lot of input from the various members of the court. What I first tentatively put out there was not what finally was the opinion. It benefited, and it was extremely gratifying to read in the legal journal the day after the opinion was final, top of the fold, the headline, "Plaintiffs and defendants both claim victory." That's probably explained by the multiple moving parts of the case and explained by the input, collaboration, of everybody on the court.

Why was it so contentious? I think because the issues are complicated; because different people brought different inclinations to the discussion of what the employer should be doing, concerns that the employer not be hamstrung and concerns that the employees receive their due. It was just a complicated and deeply felt case, also a very important case. It certainly didn't put to rest the issues, but it was a foundation for cases that were litigated afterwards. But the role of our courts is such that, unlike legislation, which tries to comprehensively resolve every question — it never does, but it tries — we just address the case before us and so we can't answer every question that might come up down the road.

MCCREERY: Coming in 2012, I take it this was late enough that, just for example, Justice Liu could participate as a new member of the court?

WERDEGAR: Yes, Justice Liu did.

MCCREERY: I wonder, just in terms of the court's own takes on the various aspects and its own deliberations, what effect it might have had to have a new member?

WERDEGAR: In this instance I can't remember except that Justice Liu was overtly supportive of the — how can I say it? He saw the case the way I saw it, which was very nice, to get some support. [Laughter] He did not engage, as I recall, in the very strong oral discussions at conference that we had.

They were strong, in my view, because they were critical of some of what I had suggested or the approach I was taking. But I want to be clear that the ultimate opinion, I think, was a fine product of seven people thinking hard and deeply about a case that was not an easy case and had important ramifications.

MCCREERY: How far would you say you ended up from where you started?

WERDEGAR: At this point I can't actually really say. After a case we move on. We have so many cases coming through here that if you asked me what I did last week or two weeks ago at oral argument in Sacramento, I'd have to step back and get a little help. [Laughter]

MCCREERY: Fair enough. But this does seem that it's important in advancing the law in a broader sense.

WERDEGAR: We had to take it. That's what we do. And the hope was that it would give guidance to future cases. That brings me to my separate concurrence, to my own opinion, which is not a common thing but it's not unheard of either. In that instance, I wanted to clarify certain aspects of the opinion relating to class certification for the Court of Appeal on remand.

I wanted to be of assistance to the Court of Appeal, but the clarification that I offered in my concurring opinion evidently was clarification at this time that other members of the court didn't want to endorse.

It raises the question, if you write a concurrence — you agree, sign the majority, but you write a concurrence — does the failure of the rest of the court to join you mean they reject it, or does it mean that they're not ready and they don't feel the opinion needs to go that far?

Speaking with my staff attorney on this very point this morning — he follows these wage-and-hour cases post-*Brinker* closely — he said courts have explored that in the *Brinker* case, does what my concurrence says

about class certification — is that helpful? Or because the rest of the court didn't join, was it rejected? My staff attorney tells me that subsequent courts have taken both views, as they try to deal with the law.

MCCREERY: But you were setting out to offer some guidance for the future?

WERDEGAR: We were. We were, yes, and Justice Liu signed that.

MCCREERY: To clarify, may I ask what the sequence was and how that piece of it ended up in a separate concurrence?

WERDEGAR: Probably — well, I can't recall. I can only tell you that it was something that I felt was important and relevant to say and perhaps to get as many signatures — it was unanimous — on the main opinion, I chose to carve it out of the main opinion.

MCCREERY: You say your staff attorney indicates other courts —

WERDEGAR: Have read it both ways, that the failure of the majority to sign it means it would not be approved by our court; or that that separate opinion gives excellent guidance, and “we'll follow it.”

MCCREERY: Do you have anything to add?

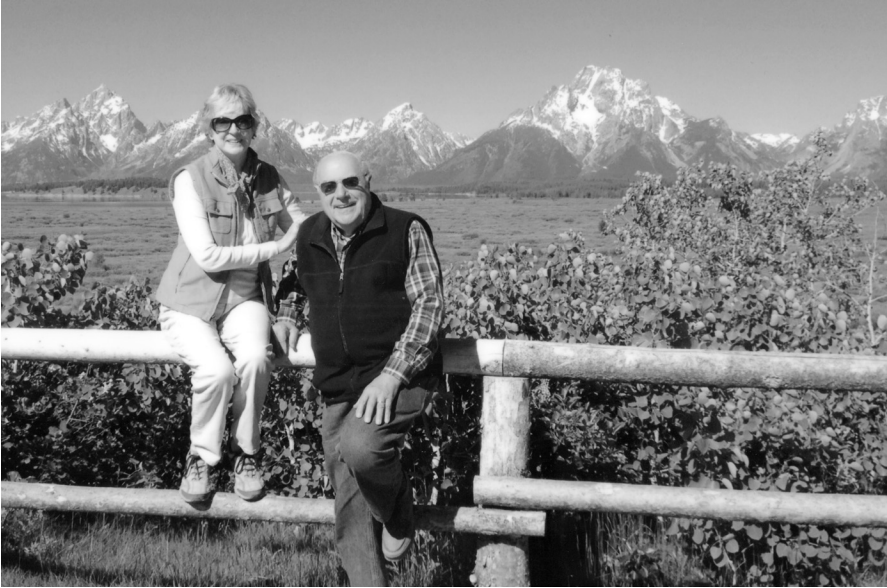
WERDEGAR: No. I think when whatever the issue that I wrote on comes before us again, we'll see whether the court agrees with me and that opinion has been extremely helpful, or whether that's not the view of a majority of the court.

MCCREERY: Perhaps this would be a good time to turn to the matter of the cases related to the California Environmental Quality Act, or CEQA, if you would be ready to do that?

WERDEGAR: CEQA is an ongoing issue, and it will be with us forever. The CEQA law, I think, is a well-intentioned law. It tries to accommodate the inevitable, necessary development in this state with the long-term protection of the environment. But no law can comprehensively cover every situation, and the nuances and the interstices of the law are left for the courts.

In the beginning — it's a fairly new law. I can't tell you when it was written but there's so much. Every project is different, and there's so much to be experienced under the application of the law. I just attended an appellate justices' institute last week, and the experts who were speaking on





VACATIONING IN THE TETONS — JUSTICE KATHRYN MICKLER  
WERDEGAR AND HUSBAND DAVID WERDEGAR, M.D., CA. 2007.

the panel identified a case called *Save Tara*, which I was assigned and authored, as one of the early cases.<sup>64</sup>

Tara was a building, a historic building. I love the name, *Save Tara*. It was a building, but the most recent case we had was a 20,000-person project. It was going to be the largest land development in the history of the state of California. So CEQA can impact the small and the large. In fact, we recently — not my case — I think I joined Justice Liu's concurrence or dissent — the Berkeley hillside case, a major mega- mega-home in a Berkeley residential area. So CEQA can touch on all projects that require public agency approval.

And the issues. There are so many issues. What is a project? That has a technical definition. What is a significant environmental impact? That has a technical definition. And if it doesn't have one, when can you file a negative declaration, meaning nothing applies? But if it has potentially a significant environmental impact you have to file an EIR, an environmental impact report.

<sup>64</sup> *Save Tara v. City of West Hollywood*, 45 Cal.4th 116 (2008).



What's the baseline against which you're going to measure whether the impact is going to be significant? Is it how the land is used now? How the land could be used now but hasn't been?

Another very interesting issue, which I did write about in the *Vineyard* case, was how far ahead into the future when you're talking about a large project — this was going to be some development outside of Sacramento — how far into the future do you have to look at the environmental impact? I don't have the citation before me, but in that case, interestingly, given the situation of water in California today, one of the issues was, how far down the road did the proponents have to show that there would be water, that the river that they were counting on would be flowing? Or whatever it was at that time. These are all CEQA issues.

New in the mix and related to this case, the Newhall case that has been argued before us, *Center for Biological Diversity v. Cal. Dept. Fish & Wildlife*,<sup>65</sup> is that we now have statewide goals for reduction of greenhouse gas emissions. So you have your CEQA environmental impact, and that usually goes to trees and land and animals and fish. Now we have also a statewide greenhouse gas emission target.

How does that play into CEQA? These are the issues, and we have a lot of CEQA cases pending before us, as you can understand. I will say, this court — I said it at the appellate justice institute, too — we just try to do the best we can. Periodically there are efforts to amend or fine-tune CEQA, to clarify it, simplify it or address an issue that hasn't been covered. That doesn't concern us until it comes to us to be interpreted. But we do have a lot of CEQA cases.

MCCREERY: As you say the new statewide targets, fairly new, to reduce greenhouse gases have become a significant element of this question, "Should CEQA law be revised and updated?" Indeed, Governor Brown has been quite vocal on this. He is so closely tied to the greenhouse gas targets and has called, I think, the revision of the CEQA law "the Lord's work." In other words, it's something important that needs to be done.

WERDEGAR: I was not aware of that. Calling it the Lord's work? Some revision of it?

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<sup>65</sup> 62 Cal.4th 204 (2015).

MCCREERY: I think the idea being that the kinds of delays that tend to be caused by these multiple levels of challenges and EIR requirements and so on have the effect of the law keeping projects from happening over a period of many, many years.

WERDEGAR: That's true. That is true or it can be true. What was his take on that, that it shouldn't be so?

MCCREERY: That perhaps there are flaws in the law itself that would help resolve —

WERDEGAR: Yes. That is a complaint of proponents. This, again, goes to the political, not our domain. But politically it's claimed that the law is used and abused to delay projects people don't want. The other point of view is that the law is there to preserve and protect our environment, and if you can't show mitigation — say your project is going to harm the environment — you have the opportunity to explain that you can't and why the project is still valuable and worthwhile.

MCCREERY: As you say, the built-in process of getting environmental impact reports where needed and requirements of the law itself tend to take several years' time, and then there's the chance that a series of lawsuits will delay it a great deal further.

WERDEGAR: Oh, yes. Yes. But those aspects are the political aspects.

MCCREERY: I wonder if you might take me through an example of a CEQA case in which you've authored an opinion as a way of looking at how this works? Is there something that you'd like to expand on a bit?

WERDEGAR: No, I'd have to go back to a particular case. How it works is: somewhere along the CEQA process there's an objection that the agency that approved the project did so inappropriately or invalidly. Whatever the challenge is to the whole lengthy CEQA process, somebody sues, a ruling is made below, it comes to the Court of Appeal, we take it, and we analyze.

I think I've mentioned some of the particular aspects of any given project. Maybe the issue is that they didn't analyze sufficiently — I mentioned water — but transportation, the impact on transportation. So what we look at is, did the analysis fulfill the requirements of CEQA? Or maybe a project

will have submitted a negative declaration, meaning it's not going to have an impact, and it's challenged in that regard.

The briefs, of course, focus the issue for us. The opinion in the Court of Appeal focuses the issue and has a result. The loser petitions to us, so we're focusing on what they're complaining about in the Court of Appeal. Then we look at the briefs, and we do the best we can.

MCCREERY: As it happens your chambers has been assigned a fair number of these cases. How does that play out within your overall workload?

WERDEGAR: It's true. Actually, if you are assigned — nobody specializes. We always say that about the Supreme Court. If you come here with a specialty, don't expect that you're going to be the specialist.

But sometimes the chief, who does make the assignments — the previous chief and this chief, every chief, I suppose — will assign a sequence of cases to a particular chambers. But we have cases in front of us now relating to CEQA. I've been assigned one. Other chambers have been assigned different ones. So it's not that it always comes to me.

But it actually makes it easier for a while because you've been forced to immerse yourself in this law, and before you can get to the actual heart of the issue you have to understand the whole law, [Laughter] so that it works well, actually.

And of course, everybody weighs in. Our preliminary response procedure here is thoughtful and comprehensive. It's well known that, before we set a case for oral argument, everybody on the court has looked carefully at it and has contributed their disagreements or their improvements.

MCCREERY: Then within your own chambers is there a temptation to have your staff specialize in such matters, given that it is such a complicated area?

WERDEGAR: Yes, I think that's true but not exclusively. In my particular chambers, I'd say — I can't speak for others — my five attorneys cross-fertilize with each other a lot. Just because it's somebody else's case they've been assigned to work up for me doesn't mean that other attorneys aren't asked for their view or don't volunteer their view. But I do have a couple of attorneys who have done the spadework on the CEQA cases and done it very well, I would say. But there is cross-fertilization in my chambers.

MCCREERY: As you say, there has been quite a tide of CEQA cases flowing through the court. Will that abate anytime soon, absent any change in the law itself?

WERDEGAR: I don't think so, but these things do come in bunches. But because the law is so important and impacts so much of what goes on in the state of California, unless we somehow manage to resolve every issue, which is very unlikely — and if the Legislature makes some changes that will probably come to us, too. I'm not sure. But cases do seem to come in bunches.

Another area where I was initially assigned a lot of the cases was the SLAPP law, Strategic Lawsuit Against Public Participation. That was a fairly new law, and people would bring the case up to us. We did resolve some of the issues.

We even had a couple of SLAPP cases on conference this week, whether to grant or deny, so some of these issues continue. There's always a new permutation or a new application. That's what's fun about the law for those of us who practice it in the circumstance that I do. In the law there's always going to be something.

MCCREERY: And as you say, if it's a statutory matter there's always something that nobody anticipated when writing the statute.

WERDEGAR: Yes.

MCCREERY: Are there other majority opinions you've authored that you'd particularly like to add to our discussion?

WERDEGAR: Thank you for asking that. I think over our many comprehensive sessions we've touched on most of them. If the time comes when you ask me what some of the themes of my jurisprudence are, I might mention some cases that we haven't focused on before. But for current purposes —

You did want to ask me, I think, about some of my concurrences.

MCCREERY: Yes, please. The one we mentioned a few moments ago was *People v. Robinson*. But there may also be others.

WERDEGAR: No, there I joined Justice Moreno's. It was interesting to revisit that. There's a statute of limitations on most every crime except murder, and in rape cases there is a statute of limitations. The statute of limitations is stopped by the filing of a complaint and the issue of an arrest

warrant, and the arrest warrant has to describe with particularity the individual who you're hoping to arrest.

In that case, the question was whether an arrest warrant that described the individual to be arrested — they had a DNA sample, so it described the individual in this rape case as a black male with a DNA of “blah,” and then it goes on for letters and numbers and symbols, however you describe a DNA profile. The question was whether that was a sufficient description. The statute of limitations was going to run in three days, but they had no match.

They had this person's DNA profile. So the question was, is that sufficient to stop the statute of limitations from running, to issue a John Doe complaint — that means you don't know who it is — with an arrest warrant describing him as a black male, with an attachment setting out this paragraph-long DNA profile? The majority said the DNA described the defendant with particularity. After all, nobody else has that DNA. They may also have said it reasonably gave that defendant notice he was being prosecuted.

Justice Moreno, whose opinion I signed, said the arrest warrant was not a real arrest warrant. It was merely a placeholder because it, “didn't authorize the arrest of any individual and it didn't describe anyone at all . . .” I'm quoting the dissent that I signed, “because it gave no means for a peace officer to recognize the defendant and make an arrest.”

The concern expressed in Justice Moreno's concurrence and dissent was that this would allow circumvention of legislatively established statutes of limitation. It's not for us to say we don't like the statute of limitation. However, in my view — and that's why I signed the dissent — the majority holding was contrary to the law of arrest warrants and contrary to common sense.

MCCREERY: How so?

WERDEGAR: By what I've just said. A paragraph-long DNA profile, symbols and numbers and letters, doesn't tell anybody anything; however, that view has not carried the day. Most courts take the same view as the majority, probably for practical reasons. It was a different lens looking at the same situation. However, the statutes of limitations for sex crimes have been extended, and I understand that greater databases now result in more cold-case hits. So with extended statutes of limitations in these rape cases and

more cold-case hits, there isn't so much of a problem with DNA warrants. If you get a hit, then you have a person.

Not long after this, what at the time I thought was a deficient-arrest warrant issue, there was a cold-case hit on this particular defendant. And of course nobody wants a rapist, an accused rapist, to escape justice. So that was that case.

MCCREERY: How far does the matter of common sense go in convincing others that there's a problem?

WERDEGAR: Here I can't say. Obviously, it didn't. I can't speculate on what the motivation, if any, was but I think one might reasonably believe the majority opinion was motivated by practicality. Superficially it makes sense. If you have a very precise DNA description, one person out of a billion has this, that's very particular. One reason for upholding the warrant might be just a practical wish to allow prosecution should a match come up of somebody who committed a heinous crime.

MCCREERY: By what length was the statute of limitations — ?

WERDEGAR: I can't say.

MCCREERY: I'm wondering how significant a change that was.

WERDEGAR: I don't know. I'm just told that that (extending the statute) might ameliorate some of the — make this kind of an arrest warrant less necessary or less frequent.

MCCREERY: Any idea how common those types of arrest warrants are?

WERDEGAR: Across the country — again, I've just been told because I asked that they are upheld across the country. Numbers, compared to warrants in rape cases that name the defendant? I have no idea.

MCCREERY: We wanted to talk more broadly about the instances where you do author a concurring opinion. Perhaps just in principle you can talk about the causes and instances of doing that?

WERDEGAR: I will, yes. We're speaking now about a concurrence, which means I'm not writing a dissent. Some concurrences you can sign the majority and write separately. Other concurrences you don't sign the majority. You start your concurrence by saying, "I concur in the result that A, B, C. I write separately for the following reason."

In *Brinker* as we discussed, I signed, of course, my own opinion but I wanted to clarify an issue that the majority cared not to clarify. Other concurrences, it can be because I disagree with the majority's reasoning, and I want to highlight the deficiencies of its reasoning for the benefit of future cases.

An example of that is a case called *Verdugo v. Target*, which you might have on your list, (2014) 59 Cal.4th 312. It's an interesting case. The plaintiff in this case, while shopping at Target, suffered a heart attack and collapsed. By the time paramedics arrived she had died.

The question was whether the common-law duty of reasonable care that a retailer has toward its customers, whether that common-law duty of reasonable care included an obligation to have available on the premises an automatic external defibrillator for use in a medical emergency.

I agreed with the majority that Target didn't have such a duty. It's an interesting opinion in that case. One of the reasons was there are statutory obligations to have such a defibrillator in certain circumstances, not including this circumstance, and various other reasons that were given. But I wrote separately because I disagreed with the majority's analysis and reasoning, and I was concerned that reasoning could impact future cases in an unfortunate way.

I do believe, in recollection, that the majority had analogized it to a retailer's duty to protect a customer from a criminal act, and I just did not think those two were analogous and, as the law developed, perhaps that reasoning would not be the one I would want to pursue in the next case. That's another reason for writing a concurrence. I agree with the result, but I'm concerned that the reasoning might have future unfortunate implications.

Now, another reason is when I think a majority opinion is so poorly written and so poorly reasoned that I agree with the result, but I cannot bring myself to put my name on the opinion. That doesn't happen often. It has over the years, but I don't even remember a case so I'm not going to be able to give you one. But where you just cannot bring yourself to sign it.

Perhaps you've spoken with the author and that person is unwilling to make the adjustments. Or maybe the changes you personally think are required are so comprehensive that it would never happen. In that case you concur, and you find a reason to concur. You can't just say "I concur"

without signing it, so you find some reason to write a short concurrence, and you're not signing something that you just can't put your name to. As I said, very infrequently but that's one of the reasons.

MCCREERY: It points up an interesting question of different — not only writing styles among the justices, but different modes of reasoning.

WERDEGAR: It does.

MCCREERY: Without naming any specifics, do you have an awareness of instances where others have felt a similar need to — ?

WERDEGAR: I can't speak about others, but I will say we are a court of seven members, and somebody is assigned to write the majority opinion.

There's a line between what is a question of style, where you think perhaps something is imprecise or not well expressed but that's just the author's style — which you would not distance yourself from unless it was so egregious [laughter] — and substance, reasoning.

It's a fine line, and the reasoning — that goes back to the earlier example that I did give, that I was concerned that the reasoning was not what I felt should have been used. It's a fine line. Our cases are a collaborative product to a certain extent. I have put in certain of my opinions language someone wanted or taken out language that I was happy with. But to get the signature of a colleague I would make that adjustment.

Colleagues are always asking people to put in something, take out something else. We do if it doesn't seem significant or critical because the more we can speak with a single voice the more persuasive our opinions are. I think we all compromise to an extent, and it's a personal judgment as to that extent.

MCCREERY: Looking at the big picture, the court is duty-bound to offer guidance in these areas. I might say when the guidance is clear and “of a voice” —

WERDEGAR: Yes. Well, it can be “of a voice” and not clear. [Laughter] That's why you might want to write a separate opinion clarifying.

MCCREERY: But there is an underlying matter of being helpful to the law in the future. But thank you for distinguishing between writing as a matter of style and writing that really is poor for some other reason that might make all the difference.



WERDEGAR: Yes, and that's a judgment call according to each justice.

MCCREERY: In the matter of deciding whether to write a concurring opinion, whether or not you've joined the majority opinion, how often would you say it's for the reason of focusing on a particular issue that did not survive the process of getting into the majority opinion?

WERDEGAR: I would say rarely. In fact, I'm not really in favor of concurring opinions. I'm not.

MCCREERY: Can you expand a little bit on that?

WERDEGAR: I don't know how helpful they are generally, except when you're trying to give guidance, as in *Brinker*. No, I don't think they're that helpful really. People want to know what the law is. The advocates in the very next case might find something in a concurring opinion that is useful to them as they bring the next case forward.

But I'm not one that seeks to write separately at all. A dissent, it's very clear why a person writes. But a concurrence — I definitely try to keep those to a minimum. I just don't think it's that helpful unless you intend it to be helpful, as I've said.

MCCREERY: Thank you for looking at the question of concurrences. Again, are there other cases you'd especially like to mention over and above our more thematic — ?

WERDEGAR: I do. I want to talk about some concurring and dissenting opinions. That is where you do agree, like Justice Moreno's C and D in the case we just spoke of, or you agree with some but you don't agree with the other.

The first one is a case we've talked about, perhaps, before, *Lockyer v. City and County of San Francisco*. That involved then-Mayor Newsom's ordering registrars to issue same-sex marriage licenses. Our court held that the mayor of San Francisco violated state law by licensing same-sex marriages.

I agreed with that, but I dissented from the majority's ruling that the marriages that had taken place under that direction were void, as opposed to voidable. Void means they were of no effect and never would be and never could spring to life again.

My point was that we should postpone ruling on the validity of the marriages because the underlying issue — did same-sex couples have a constitutional right to marry? — had not been resolved. Were it, down the road, to be resolved in their favor, their marriages would date back from the time that they took place.

That didn't prevail. But of course ultimately, we know that same-sex marriage was upheld, finally. But it was a long path.

Another one is the *Naegele v. R. J. Reynolds Tobacco Co.* case — do you have that? That's (2002) 28 Cal.4th 856. This, too, was a statutory case that involved the tobacco companies' statutory immunity from liability for personal injury. It's like gun manufacturers' liability. They had statutory immunity from liability for personal injury caused by the inherent dangers of smoking tobacco.

I agreed that the tobacco company had immunity for personal injury caused by the dangers of smoking tobacco. But I dissented, I disagreed, that they also had immunity based on claims that they deliberately increased the nicotine content of cigarettes and that they lied about tobacco's addictive properties. I saw nothing in the statute that granted immunity for those causes of action. That was a dissent.

And *Iskanian*. Have we talked about that?

MCCREERY: We did talk briefly about that. Please say more, if you like.

WERDEGAR: I will in the sense — if we've covered it, we have, but I agreed with the majority that the employee-plaintiffs could bring what we call a private attorney general action for civil penalties for violation of wage and hour laws. I agreed that they could do that.

The majority's preceding holding was that they couldn't bring a class-action arbitration, and I disagreed that the Federal Arbitration Act preempted our state rules invalidating class-action waivers. Under state law, class waivers are invalid, but the United States Supreme Court has — or at least our court came to the conclusion that the Federal Arbitration Act preempted our state laws.

This issue is in discussion nationally now. In fact, the Ninth Circuit, I read in the paper yesterday, has cases addressing the very point of my dissent, which is that the Federal Arbitration Act did not abrogate other federal law that guarantees workers the right to collective action, such as the Norris-LaGuardia Act and the National Labor Relations Act, the

Wagner Act. When you have somewhat competing or conflicting laws on the same subject you try to harmonize them, and the point of my extensive dissent was that the Federal Arbitration Act — and this is all analyzed — was not intended to trump earlier laws allowing collective action.

Where this will land I don't know. It will probably go ultimately — not from my opinion, but it's in dispute across the country — it will go to the United States Supreme Court, and what they say will be what it is.

But I was hoping that my opinion, which was quite extensive, will contribute to the conversation. And I'm hoping that the Ninth Circuit, which is looking at this in a different case right now, will feel that it benefits from my dissent, that it will know about it and will read it and perhaps agree.

MCCREERY: What knowledge do you have of whether your dissent is being used in these various pending actions?

WERDEGAR: You'd never know. You have to assume that it is, not just mine but all the case law. As I say, this is an issue that's very much alive nationally across the courts, federal and state. But you would never know unless they cite you.

That brings me to *People v. Diaz*, the cell phone search case. I think this was a straight dissent, which we've talked about. I disagreed with the majority that it was a valid search incident to arrest to seize an arrestee's cell phone and later search its contents. I thought the law of search incident to arrest needed to adapt to the new reality that a person's smart phone contains extensive personal and private information.

The United States Supreme Court later issued an opinion, not *Diaz* but out of another case that agreed with me. But I hope they read my opinion. The case that they did grant was a Court of Appeal California case, but I have no idea if they read my dissent. They didn't cite it.

Here's another one, *People v. Wells*, (2006) 38 Cal.4th 1078. I dissented from the majority's holding that the Fourth Amendment, that's search and seizure — no search and seizure without reasonable cause except in certain cases, here exigency — that the Fourth Amendment permits the police to enter a home on the grounds of emergency and take a blood sample from an allegedly intoxicated driver who had been observed driving allegedly under the influence.

I believe the United States Supreme Court in a different case, but subsequently, agreed that that was not a sufficient exigency to enter the home without a warrant, following a suspected drunk driver into his home.

The reason I felt it wasn't an exigency is: scientists commonly estimate the blood-alcohol level with the passage of time. It's easily calculated, and also you can get a telephone warrant and so forth. As I say, I don't know if my opinion played any role in that, but ultimately they agreed with me.

MCCREERY: One of the benefits of having your position for a long time is that you do eventually get to trace the effects of some of your own opinions.

WERDEGAR: Yes, you do. You do, and they're not always what you would want. But sometimes they are, and when they are you think that's wonderful. And if it's the United States Supreme Court that agrees with you, you think they're terrific, and when they don't, you think, "Well, that's just the United States Supreme Court." [Laughter] That's how it is.

MCCREERY: That leads me to ask, how do you think back on your body of work?

WERDEGAR: That is a little too broad for me to — how do I think back on it?

MCCREERY: Perhaps another way to think about it would be, in reviewing a number of things that you've worked on over a period of time, how do you characterize what you notice about your body of work?

WERDEGAR: That helps me. That was part of your question. I would say that because this oral history has been the occasion to do this, I've reflected on the body of my work and whether certain themes have emerged. I would be willing to speak about that if you think that would be good.

MCCREERY: Yes, please.

WERDEGAR: All right. I have looked, because this has given me the occasion, on some of the themes. I would say that there are a number of cases that would permit me to say that I have a sensitivity to civil liberties and equal protection. And commentators have remarked on this.

First, addressing cases relating to gays and lesbians, one we haven't talked about was *Koebke v. Bernardo Heights Country Club*, (2005) 36 Cal.4th 824. I dissented in that case, a case under the Unruh Civil Rights Act where I dissented from the majority opinion.

The majority held that a country club — this goes back to 2005 — the world has changed rapidly with respect to same-sex couples. But at that time I dissented from the majority opinion holding that a country club had a legitimate business interest justifying discrimination against registered domestic partners.

MCCREERY: What was your thinking?

WERDEGAR: My thinking was that there was no legitimate business interest to allow them to distinguish between registered domestic partners and married couples. Maybe the issue was one partner comes in on the membership of the other. I just thought there was no legitimate business interest. I'm sure if one went to the majority opinion you'd find some offered business interest, but I didn't think so.

Another one, again relating to a sensitivity to civil liberties and equal protection, was the Berkeley Sea Scout case upholding Berkeley's refusal to subsidize a youth group's use of the city marina unless the group provided assurance it would not discriminate against homosexuals or atheists.

I think we spoke about *Sharon S.*, holding that a birth parent — these were two lesbians — who consents to the adoption of her child by a domestic partner didn't have to surrender her parental rights. This was statutory interpretation, but interpreting a statute that never contemplated this situation. And again the *Lockyer* case, where I felt the marriages shouldn't be held void right at that moment.

Another one is *Galanty v. Paul Revere Life Insurance*, (2000) 23 Cal.4th 368. This goes back to the era when HIV was still widespread and without a good prognosis. But there I held that the incontestability clause in a disability insurance policy — it had an incontestability clause — barred the insurer from canceling the policy because of a subsequently positive HIV test, so that the individual still was covered by insurance.

I feel that those cases do reflect a sensitivity to individual liberties and a sensitivity to gays and lesbians, not that at the time I was writing the opinions I was motivated to do that, but that's how my analysis of the case and the merits on either side came out.

Then, an interest in individual rights of personal autonomy. In the *Smith* case on behalf of the court I wrote an opinion that the landlord's religious views did not permit her to refuse to rent to unmarried couples

in violation of the FEHA. Mind you, in that case it was unmarried couples, but her religious views, were we to have held the other way, could have permitted her to refuse to rent to all sorts of individuals from different groups that her religious views did not endorse or embrace.

*Conservatorship of Wendland*, where it had to do with who would speak and what did you need to know for a gravely disabled conservatee to terminate life support? There we held that you needed clear and convincing evidence. That spoke to the autonomy of the individual.

*Catholic Charities of Sacramento*, where we held that a church-affiliated health care organization had to comply with general laws in administering its employer-provided prescription drug insurance that included coverage for contraceptives.

Then I would say that, if you want to group them this way, as some commentators have done, cases show a sensitivity to women's issues and family issues. That takes me back to *Sharon S.*, the same-sex adoption, and the women's issue takes me back to the cosmetic surgery arbitrator case, where he had been — in a published opinion by this court — he had been reprimanded for his disrespect for women.

And the *Saelzler v. Advance Group* case, the female UPS driver who was attacked in an attempted rape while delivering to this crime-ridden project where they knew — they never denied, they admitted — that it was crime-ridden and that gangs were there and that they escorted their woman manager to her car. But the reason the plaintiff lost was she couldn't prove that all of that — they didn't know who the perpetrators were, so she couldn't prove causation, that all of that was a cause of why she was attacked. And again going to family issues, the *American Nurses* cases allowing authorized school personnel to administer insulin to students.

And I would say some sensitivity to discrimination. Did we speak about the *In re M.S.* case where the court rejected constitutional attacks to California's hate-crime statute? It was an early case in, I'm not sure, 1995 possibly. That's 10 Cal.4th 698. There are enhanced punishments if the crime is denoted a hate crime. This is now common, but at the time it must have been early in the life of the statute. I authored for the court an opinion that said that this was constitutional, to enhance punishment for hate crimes, meaning that the crime was motivated by hate of a particularly protected group, whether it's gays or black or other ethnicities.

Then I would add workers' issues. I've been assigned over the years as these cases come along innumerable cases relating to workers: *Brinker*, we've talked about; my dissent in *Iskanian*.

Hate speech in the workplace — that's *In re M.S.* — the case I've just mentioned where the reason it was not a violation of freedom of speech is it was happening in the workplace. The individual employee could not escape this. It was not in the public exchange of ideas. It was confined. And we held that the statute could enhance punishment.

*Sullivan v. Oracle Corporation* (2011) 51 Cal.4th 1191, which held that California's overtime law applied to non-resident employees sent here from out of state while working in California.

There's a case called *Lazar* — I don't have the cite — which held that a former employee in this state who had been enticed to come here by his employer but was subsequently fired, that he could state a cause of action for fraudulent inducement of employment contract based on his employer's false representations concerning his job security.<sup>66</sup> Of course, the case describes what all those representations were, and to his detriment the employee uprooted himself and came here. In his pleading he alleged that none of that was true and he had been fraudulently induced to come here.

Here's a dissent, *State Building and Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, where I dissented from the majority's holding that the state prevailing wage law — there is a state prevailing wage law — does not apply to public works in charter cities. The issue there was, what about a charter city as opposed to some other kind of city? Now, that's one where if the Legislature felt the majority was wrong and the dissent was right, they could correct it. If that has happened I'm unaware of it, but I felt they were wrong.

And *California Grocers Association v. City of Los Angeles* — that's 2011 — I don't have the cite — holding that a city workers retention ordinance — Los Angeles had a retention ordinance — which limited the ability of certain employers to replace the workforce when they acquire a business, and this was a grocery business, that that retention ordinance did not violate the Equal Protection Clause.<sup>67</sup>

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<sup>66</sup> *Lazar v. Superior Court*, 12 Cal.4th 631 (1996).

<sup>67</sup> 52 Cal.4th 177

So those are cases that touched on workers, and in the ones that I mentioned the opinion, or the dissent in one case, was protective of the workers' rights under the law as interpreted.

MCCREERY: A picture emerges of you as a strong civil libertarian voice over time. How else would you characterize these themes? What does it tell you about the path you've traveled here?

WERDEGAR: Really, it's for observers to say. I do have letters and articles about me that have characterized me in various ways, but for me to characterize myself — I don't think that's for me to do. But I've been written up quite a bit, and I have been characterized.

MCCREERY: Fair enough. Yes. I only wonder what stands out to you or might be some sort of revelation as you review such a long history?

WERDEGAR: A revelation you mean, are there themes in my jurisprudence? I would not want to suggest that when I approach a new case that I have a bias to express a certain sensitivity or preference. I think every judge would say that he or she is objective and takes the case as it comes.

But because the cases that come to us have no clear answer and that's why we have to take them, I do think one's sensibilities inform one's approach to the law. Anybody who says otherwise has not been a judge. You can't help it.

As a woman — certainly it's been described that I have a sensitivity to family issues and to the human aspect of the law. I'd be happy, on a later occasion, to read you excerpts from all the articles that have been written about me that might endorse that.

MCCREERY: I'm more interested in your own reflection on the subject, but thank you.

WERDEGAR: I guess in retrospect I do have a sensibility or a sensitivity to individual liberties and the circumstance of individual people. Not every case presents that, but when they do I think it factors in. But if the law demands that I go in a different direction, I think it's fair to say I take that direction if that's where I have to go.

MCCREERY: Recognizing that you have no say in which cases come to you at this level, are there glaring areas of law that you think need to be addressed in California that are causing problems in individual cases that could be dealt with on a broader scale?



WERDEGAR: The glaring areas of law that need to be dealt with in California, we rely on litigants to bring them to us, and they usually do. I don't know if that answers your question.

If you mean what is coming or what should be coming to us, certainly we've touched on CEQA and wage-and-hour cases, water law, privacy cases with the new technology. And we're still wrestling with the tension between California's view about arbitration and the United States Supreme Court's view. That will be resolved, ultimately, by the United States Supreme Court.

MCCREERY: We did have a chance to talk a bit about arbitration on other days, but I don't think we touched on the fact that the U.S. Supreme Court has issued some significant arbitration decisions.

WERDEGAR: Oh, yes. And they've reversed us, and they've narrowed us. As we probably spoke of, initially, years ago, decades ago, arbitration was supposed to be an avenue for business interests to resolve their differences and get on with what they do best, their business. It was parties with equal bargaining power agreeing to resolve this way.

It's gone so far beyond that now. These are contracts of attrition. Any product that you buy or service that you have or your doctor, any dispute, you agree to have it arbitrated.

Employees, that's where it's difficult. An individual employee, who might have an actual legitimate complaint or grievance, has agreed to arbitrate. Rare is the individual employee, without a class having common claims, able to do that. And if they do, arbitrations are not public. If corporations lose, it's not precedent for anything else. The same is true if they win.

But there's a deeper concern by, I think, people concerned with the law about the whittling away of the right to a jury trial in civil cases. But that's beyond our conversation today.

MCCREERY: Shall we pause for just a moment?

WERDEGAR: Yes, let's pause for a moment.