

## INTERVIEW 12 (DECEMBER 7, 2015)

MCCREERY: Good afternoon, Justice Werdegar.

WERDEGAR: Hello again, Laura. Nice to see you.

MCCREERY: We left off last time talking about which areas of the law you think may need this court's attention, coming up, in order to resolve issues or further develop the law. You had talked about alternative dispute resolution as an example of one of those areas. What else do you see ahead in that regard?

WERDEGAR: I think that CEQA, California Environmental Quality Act, cases will be with us indefinitely. I don't know if I earlier mentioned, but CEQA's a very complex law designed to preserve the environment as best we can while understanding that there is a need for development. CEQA cases. We have several this term, and I think they will continue to come to us. Water cases. I needn't tell our readers that water is a high-priority issue in California.

In the criminal law realm, we are guided by what the United States Supreme Court tells us with respect to the peremptory discharge of jurors of a particular ethnicity or discernible class, so-called Batson-Wheeler issues. It's very difficult to apply the Batson-Wheeler requirements, especially on review. We have those issues all the time. Did the trial court properly allow the excusal of a particular juror or not?

Looking down the road, I expect that we'll be seeing more privacy cases.

MCCREERY: What leads you to say that?

WERDEGAR: The metastasization of technology. There's even a question philosophically if we have any privacy anymore. But definitely those.

And I think we'll see more equal protection issues as new classes of protected individuals are identified. In our *Marriage Cases*, we identified same-sex individuals who wanted to marry another of the same sex as a protected class. That was a rather new concept, and other groups of people are emerging as well. One example in that realm is transgender people, very much in the forefront now demanding equal rights and other amenities of civil life.

Those are what come to my mind now.

MCCREERY: Are there particular cases coming forward that you think might be of special interest in one of these areas?

WERDEGAR: In CEQA I'm sure there are. [Laughter] I'm sure we have some on our docket, but the particular issues I can't say now. With respect to the new classes of protected individuals, no. I am looking to the future. The same with privacy.

MCCREERY: Are there other areas in which you would like to see the law further developed for any particular reason?

WERDEGAR: In which I would like to see the law further developed? I can't necessarily say that. We will always have some kind of employment issues. That's one of the wonders of the law and the challenges and pleasures of being a justice. [Laughter] There are always issues, ones you can't anticipate.

MCCREERY: We wanted to spend the bulk of our time today in something of a summary mode, having worked together on these oral history sessions over the course of more than a year. I wonder if you could offer some general reflections as you think back on twenty-one years on this court and how you view it all as you look back now?

WERDEGAR: Thank you. I appreciate that question because it allows me to set the stage to what the world was like at the time of my appointment. I have a very vivid memory of the Friday evening "This Week in Northern California" program on PBS, presided over by Belva Davis, that followed my naming as a new justice of the California Supreme Court. I just recently watched the video of it, and it brought to mind how dramatic my appointment was.

First of all, Belva Davis remarked as follows — this is her statement — that, "The court is in the firm control of conservatives, and it's been dominated by conservatives ever since Rose Bird and two colleagues were thrown out by the voters." She went on to say, "It used to be five conservatives, but with Werdegar's appointment it's likely to be four conservatives."

Then the panel and she went on to say it was remarkable that I was a woman and I was a native San Franciscan. To that point the court had been dominated by Southern California justices. She made reference to the fact that I was appointed to the Court of Appeal from serving as a staff attorney

for Justice Panelli. She made reference, and the panel did, to my “unusual background,” and supposedly I had been discriminated against, and I had no trial court experience, and I was only the third woman appointed to the court. And with my appointment, for the first time, there would be two women serving on the court.

A review of that program does put in historical context how things were then. Reflecting on that, it comes to mind the perceived need to justify my appointment. My service as an attorney in the United States Department of Justice; my authoring of a benchbook for statewide trial court judges; my working as an editor at Continuing Education of the Bar; teaching and serving as a dean at University of San Francisco Law School; and my judicial clerkship on the Supreme Court for many years seemingly counted for nothing. The emphasis was that I had not served on the trial bench, and neither had I been an actual litigator.

This was on the heels of the George Deukmejian administration, where it was mandatory that you start on the municipal court bench, as it then existed, and move on from there if you could. Also, it was desirable, of course, if you had had litigation experience, very often that of a prosecutor. So Wilson’s appointment of me was a big change.

**MCCREERY:** What do you suppose prompted Ms. Davis to describe you as someone who would change the conservative majority?

**WERDEGAR:** That’s an interesting question. I had not been in positions where any judicial philosophy or political philosophy would be manifest that they could discern that, except perhaps my service in the Civil Rights Division of the Department of Justice in the Kennedy administration.

I know one reporter, whom I won’t name, from Sacramento, who called me when I was nominated. When she heard that background, she said, “You’ll never get it.” [Laughter] I thought to myself, “I beg your pardon?” I can’t say. I really don’t know.

**MCCREERY:** But as you say, it’s a window on how such an appointment was perceived at the time.

**WERDEGAR:** It was. All the things that were different. The background was dramatically different. The gender, if you will, was quite different.

MCCREERY: As a point of interest, Belva Davis herself had come along as a woman reporter and achieved heights that, perhaps, few had at that time.

WERDEGAR: Oh! She is remarkable. I don't know if you've had the opportunity to read her book telling her story. A remarkable woman. I'm happy to say that I know her through my husband's work with her on the — maybe it's the Kaiser oversight board that my husband chairs, arbitration oversight board.

MCCREERY: That's going back to the time of your appointment —

WERDEGAR: Let me correct that. I don't think Belva Davis is on the Kaiser arbitration oversight board. She might have been on some board related to the Institute on Aging. My husband has served in many positions.

MCCREERY: In any event, she's had a chance to follow your career in the intervening years.

WERDEGAR: And I to become acquainted with her.

MCCREERY: What else in the way of general reflections stand out to you at this time?

WERDEGAR: Going back to my service on the Court of Appeal, where I was Governor Wilson's first judicial appointment, and I was the only woman among nineteen justices and, as we've just touched on, my unconventional background that I think my fellow male judges had difficulty relating positively to. I felt very isolated, the only woman.

Then, coming to the California Supreme Court I was one of two women. But I had a staff attorney, a mature individual who had clerked for justices on the Court of Appeal and served as my staff attorney for a period of time who, when I asked her to reflect on some cases that she had worked on for me, in preparation for my oral history, she did, and then she offered me some of her observations as to what it was like working for me as a female judge. And they were some of the most touching things I have heard. I'd like to share some of them, quoting her, if I might because it touched me a great deal.

I'm now going to quote my former staff attorney: "My extreme respect for your ability to remain civil and feminine in the man's world of court politics. You are a wife. You support and supported your husband. You raised children. You never pretended you were not a woman, a wife, or a mother. Without leaving any of that behind, and without suggesting that

it deserved special praise or treatment, you forced those around you to accept your mind and your ability. It must have been extremely hard, but I don't see that you ever compromised."

Skipping — very, very sweet — skipping. Quoting: "And that leads me to another favorite memory, which is you presiding over our conferences. There you were in charge of all these men. I haven't seen much of that. I think you were the first woman I've known in a position of authority who was simply herself and, by being herself, demanded that the men adjust to you."

I was very touched by that. So that was the experience. Her comments reflect the era in which she came of age as an attorney. It illustrates the time in which I served. Men were the norm, and that's very different today. Today I know that the women, of which there are so many, on the Court of Appeal are congenial and supportive of each other, and I suspect that they're not treated or perceived any different than male judges. It's just a new and different generation.

**MCCREERY:** Likely there are many more women on the staff of attorneys assisting the justices, and so perhaps throughout all levels of the system?

**WERDEGAR:** That's very interesting because, actually, I think even when I was a staff attorney and when I was appointed to the Court of Appeal, there were plenty of women serving as staff attorneys. This is because — probably several reasons. One, they're good. But two, it's a position that they could perhaps use their professional skills and still maintain a life balance. I don't think there was any discrimination against women there.

When I was appointed to the Court of Appeal, I think I earlier mentioned in this history, I think the women staff attorneys actually welcomed it as a recognition that a staff attorney, of which many were female, could aspire and be appropriately elevated to the position of justice.

**MCCREERY:** It's a validation of their own role, in a sense.

**WERDEGAR:** It was. Of course, it's so different today. The California Supreme Court has had six women justices, now four serving all together. The three most recent Governor Brown appointees had no judicial experience. I don't believe they've had any litigation experience with the exception of Justice Kruger, who has argued admirably from the Solicitor General's Office before the United States Supreme Court.

These points simply illustrate that times change, and they illustrate the different philosophies of the appointing governors. The aftermath also illustrates how the press and political responses differ as well. I've been privileged to serve and live long enough to see that times change.

In the early days of my tenure, when I was this singular female, law review articles, usually written by women professors, used to reflect on feminist jurisprudence and explore whether women think differently. I read a lot of those law review articles.

In my early speeches — once you're appointed, people, especially in those circumstances women's groups, wanted to hear from me. My early speeches were focused on the question, "Why a woman on the bench? What does this serve? Why do we care? What value does that bring?" I suspect that's not a big topic now, with so many women on the bench.

Do women think differently? Over the years I have sat with five women on the Supreme Court, and I've not noticed that we have anything in common that can be referred to our gender, if you will. I think we don't agree with each other or disagree with each other any more than any one of us would with any male colleague. So that's my personal sample.

Nevertheless, I still do believe that women on the bench are very important as role models and for many other reasons. But jurisprudentially, my one experience and the particular women I've served with, I don't see that we coalesce any more than we would with other judges.

However, studies have been made of Justices Ginsberg in times past and O'Connor, and they have extracted some cases where being a woman made a difference. On today's United States Supreme Court perhaps scholars are looking at that. I look forward to reading it if they are because, what do we have? We have three women, Kagan, Sotomayor, and Ginsberg.

MCCREERY: And as you say, here on the California Supreme Court there is now a majority of women. Extending the question to the collective sense, how much difference does it make, if any, to have a majority of women justices?

WERDEGAR: I think it makes none.

MCCREERY: Your answer is the same?

WERDEGAR: Yes. And that answer would follow from what I said before because we are as alike or as different as any two random judges of any

gender appointed by different governors. You do see differences in who appointed a judge. You do. The justices in our system do reflect what a given governor is looking for, and they're not all looking for the same thing.

MCCREERY: By extension, what changes or differences might you note, if any, in terms of the informal parts of your communication process with other justices, informal interactions, things that happen between individuals to talk something over or explore some idea? Any differences there?

WERDEGAR: Does this relate to the fact that they're women or to the new court? With respect to the fact that they're women, I see no difference.

MCCREERY: At some point maybe we can extend that question to the new court, as well, when you're ready.

WERDEGAR: I'd be happy to.

MCCREERY: Let me ask you to lay out some of the most memorable events of your tenure.

WERDEGAR: All right. Before we leave that earlier one, my reflections, I do want to speak — I've touched on it before, but about the arc of time. As we all know, I've had the opportunity to experience a good part of the arc. What I've observed is that, as I mentioned, how things change with time and a change in the political environment.

I would mention the role of women; the attitude toward criminal punishment and the Three Strikes concept; the role of arbitration; same-sex marriage; the status of gays and lesbians. Now the issues revolve around transgenders, "queers," which is a word that is being used to identify a subset of — of what? — transgenders or of individuals who question conventional concepts of gender identity. But it's not a pejorative term, I gather. It's a term that's now used as an identifying word, I think. And bisexuals; and the concept of what constitutes diversity.

MCCREERY: Yes, that is a concept that's come a long way, shall we say?

WERDEGAR: It really has. So that was my concluding reflection, what happens over the arc of time.

MCCREERY: What are the memorable events, as you think back on your tenure?

WERDEGAR: I do have some. Of course, my first oral argument was in Los Angeles, and it was this unfamiliar courtroom with a series of gray doors with no labels on them and so on. And getting lost trying to find my way to the courtroom, which was on a different floor, of which I had no knowledge, from the floor where our chambers were. There was nobody to collect me, no colleagues, no signs, and I ended up in a storage room. [Laughter] That was memorable. My first conference, where I seemingly interjected my ideas, not understanding that there were protocols, and I was called on that. [Laughter]

More seriously, the reaction to that *Romero* opinion, where the court held that the Three Strikes initiative still left discretion to the trial judges. That was memorable. I had been on the court only two years, and as we've spoken of, the public and political reaction was quite vociferous. It was an early introduction to the political and public reaction to our opinions. Happily, they're not all responded to that way. In fact, I don't think that outcry has been matched since.

Certainly, the gay marriage cases. There was a response, and that's one of my memorable moments, was the argument in the gay marriage cases. It was dynamic. The courtroom was packed. There was overflow. It was vigorously argued, especially by the proponents.

Then, when our opinion was issued, the shouts outside this building. And later from my office window, which you can see, watching the couples in their wedding finery lining up around the block to get married. Later the letters I received, very moving letters of appreciation for my participating in that decision. That was memorable indeed.

Going back to the gender issues, it was a memorable morning when the court was sitting in San Francisco and for the first time — this is amazing that it was the first time — there were two women attorneys arguing the case, one on either side. As we left the bench, Justice Mosk said, "Quite a morning for broads!" [Laughter] Which only highlights how remarkable it was at that time.

Related to that is the first time the court walked into the courtroom and there were four female permanent members of the bench. We might have had a pro tem on some occasion that temporarily gave us four. At that time it was our Chief Justice Cantil-Sakauye, Justice Kennard, Justice Corrigan, and myself. And with Justice Kennard's retirement we have another woman, Justice Kruger.

The 1988 Marin County “meet the judges” night, when one of the Schmier brothers who, as I’ve mentioned, were fixated on the publication of Court of Appeal opinions, was taken away in handcuffs because he persisted in trying to ask me a question, which I would have answered. But the presiding judge had declared questions closed, and the ensuing *Independent Journal* editorial headed, “Meet a judge, go to jail.” That’s a memory that stays with me.

My second retention election, where I actually ran a campaign. That was in November 2002. That was the aftermath of the parental consent case, where two years earlier Chief Justice George and Justice Ming Chin had mounted aggressive campaigns out of concern that their retention was in question.

Although a little bit of time had passed, I was advised that I would be wise to do the same. There’s a concept of the snake in the grass — perhaps we mentioned that earlier — where you think nothing’s happening. Then come September, all of a sudden there’s this whole concerted campaign against you, and you can’t defend yourself at that late date.

So I ran a campaign. You have to raise money, and you give speeches, and you hope that as a consequence of your speeches people will be motivated to give to the campaign. What can you talk about? The independence of the judiciary is not a big seller.

Incidentally, at an appellate justices’ institute that was held in San Francisco a couple of weeks ago, I was educated to the fact that the preferred concept now is not “independence of the judiciary” but “fair and impartial courts,” which is thought to convey more accurately and less provocatively the concept that we all hope to preserve.

One bright spot in my retention election campaign was I received a campaign donation from the author of *Legally Blonde*. Nobody knows how she knew about it. I probably shouldn’t have cashed the check. I should have kept it. [Laughter] That was a bright spot.

MCCREERY: I’m glad you mentioned this change of preferred terminology to “fair and impartial courts” rather than “independence of the judiciary.” It’s a subtle difference, but it does place a bit of a different emphasis.

WERDEGAR: Yes.

MCCREERY: What do you think of it?

WERDEGAR: I think it's excellent. Until it was brought home to me in past years, the independence, the electorate — they don't like that idea. We're a democracy. You don't want somebody being independent, disregarding what the general public might want, as we sometimes have to do. Fair and impartial is what you want.

MCCREERY: It also removes the emphasis from individuals serving as judges and places it on the court system in describing "fair and impartial."

WERDEGAR: Yes. And if independence suggests — picking up on what you just said, Laura — that we can disregard what the public wants, as perhaps we did with a segment of the public in the parental consent law, as we did in the Three Strikes case, as we occasionally do. Whereas "fair and impartial" conveys the idea that if you come into court you're going to get a fair hearing. The judges are going to be impartial. You may not win, but you've been heard by an unbiased body.

MCCREERY: That ties so well with the idea of your constitutional right to have trial by a jury of your peers and those kinds of ideas that may be more familiar to the public.

WERDEGAR: Yes. I think it's a good change.

There's one other memorable moment, which is a little broader. But because of the title that I've held and I do hold as an associate justice of the California Supreme Court, I've been invited to, and I've had the opportunity to give speeches honoring individuals who, it turns out, have been instrumental in my career, supportive of me, or whom I've greatly admired. That's really been a privilege. Again, I think it's because I bring to these speeches the office that I hold, but I'd like to mention some of them.

The first is Justice Panelli. I think it might have been one of my first public speeches — it wasn't the first public speech.<sup>68</sup> It was when I was on the Court of Appeal. It was his retirement speech. I remember I worked hard to get the proper Italian phrase to close it with, and I'm very proud of that.

But after that, there are two people who were at Boalt Hall with me but a year ahead of me, and they were on law review. I've mentioned them earlier. One was Joanne Garvey, a pioneer of women's everything. And the other was Marc Poché, later a Court of Appeal judge in the First District.

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<sup>68</sup> January 19, 1994.

For each of them I was invited and gave a speech on the occasion of their receiving the Boalt Hall distinguished service award.<sup>69</sup> Then Herma Hill Kay, who was the only active female professor when I was at Boalt. I was able to speak for her on her receipt of the Rutter teaching award.<sup>70</sup>

Most recently, Hastings was celebrating former Justice Joseph Grodin's eighty-fifth birthday, and I was solicited to appear on the video that was honoring him and to write a piece for the California Supreme Court Historical Society journal about him.<sup>71</sup>

And just a few weeks ago I was invited to speak on the retirement of former dean and professor of Boalt, Jesse Choper, who will be remembered in this saga as the individual who saw to it that I got a J.D. from Boalt Hall twenty-eight years after I received my LL.B. from George Washington University.<sup>72</sup>

I'd like to point out that, unlike Justice Ginsberg, who was offered — I don't know if she accepted it — an honorary degree from Harvard — who wouldn't earlier have given her her J.D. when she transferred — this was an actual J.D. I was a member of the Class of 1990. [Laughter] It says so on my certificate, although they claim me as a member of the Class of 1962.

I mention that because these individuals mean a lot to me.

MCCREERY: It's nice to get a chance to say a few words in their behalf.

WERDEGAR: Oh, absolutely. Every one of them is an outstanding person, human being, and supported me and had a lifetime pattern of supporting individuals. Wonderful people.

MCCREERY: Thank you for mentioning those individuals. Are there particular turning points in your time on the state's highest court that you want to mention, aside from these other ways we've been looking at them?

WERDEGAR: Thank you for that question. When I was interviewed two years ago by the *Daily Journal*, the reporter asked me, "When did you come into your own on the court?" My answer to her would be my answer here. I am who I've always been, and my jurisprudence — I don't see that it has evolved. So there was no turning point.

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<sup>69</sup> March 23, 1995; May 11, 1995.

<sup>70</sup> April 11, 2005.

<sup>71</sup> *A Tribute to Justice Joe Grodin*, 10 CAL. LEGAL HIST. 8 (2015).

<sup>72</sup> November 7, 2015.

I've experienced many different relationships over these years. Some have been more gratifying and helpful than others, but a turning point? No. It's been a wonderful experience to serve with so many judges. The court that I came to had many personalities that I greatly enjoyed. You will be able to recite them better than I. Justices Arabian, of course Stanley Mosk; and Malcolm Lucas, and Ron George, and Joyce Kennard. Myself. Who am I forgetting?

MCCREERY: Justice Baxter.

WERDEGAR: Oh, Justice Baxter. Of course. But I'm not forgetting him because he continued along with me and is certainly a wonderful individual to serve with. Each of them brought something different, and when each of them — not just those, but later on, as Justice Moreno came and went and Justice Baxter left us and Justice Kennard. It's very interesting. Each one has contributed something or left a particular imprint on the court, and when they go that is gone. Their replacement brings something else. So that's been fun and very interesting to experience.

MCCREERY: With so many new members just quite recently, what do you think is the overall effect on the court's work?

WERDEGAR: Before, I would say that — I've thought about this. We have three, of course, in the last three years. We've talked about this. Justice Liu, I think it's been three years. Justices Cuéllar and Kruger, it's been a full one year now. But if you fold in our chief, who came to us five years ago, we really do have what they call a new court.

Before that we had what they called a "long court." Justice Baxter and I and Justice Kennard and Justice George had been on it for a long time, unlike what we call the Deukmejian Court, where they stayed two or three years and went.

This court now, if I might call it, let's call it, a new court, particularly the ones appointed by Governor Jerry Brown — that would be Goodwin Liu, Tino Cuéllar, and Leondra Kruger. What was the question? What do I see as different?

MCCREERY: Yes.

WERDEGAR: It's very different. There's no question that the court is, I think, newly energized at conference. If you've served with somebody a

very long time, we each become somewhat predictable. You can kind of anticipate where they're going to stand on something or how they're going to approach something, and they probably feel they can predict how I will, rightly or wrongly. But now we're all learning about each other, and we're learning about the dynamics, and we're learning who is apt to persuade whom, and who is persuadable, and how do people approach and how do they do their work.

One of the new justices, in a public forum, indicated that that justice came to conclusions by writing it out. And not until that individual had written it out were they sure where they stood. That's not how I do it. I think that was interesting. So you learn these different attributes. They bring a new energy and certainly fresh perspectives. They question a lot of things that we've taken for granted, all of which is good.

On the other hand, the longer serving members, among which I count myself [laughter] and others, we have a sense of why certain procedures are in place, even though we understand it's good to question. We have a sense of the history of the court, which is completely lacking. We're more grounded in what the law in different areas is in the state of California.

The new justices are favoring the model of having rotating annual clerks. That's a major difference, and it has its good points, which are to expand the body of bright young attorneys who are going to be advocates for and supporters of and understanding the California Supreme Court. That's all good. And who are exceptionally bright. Credentials that are remarkable.

On the other hand, it makes for more work because they're new. They mostly are not grounded in California law. The more permanent staffs, which is mine and others, have to help them out a lot in getting them grounded in the fundamentals and so forth. So it's a balance.

**MCCREERY:** As you point out, you're now a senior member with a great deal of experience and a great knowledge of the history of why things are the way they are. What is the experience for you of being the long-term knowledgeable member rather than the newer one?

**WERDEGAR:** It's interesting. I didn't anticipate this. It comes to you to be the senior one, and I try to rise to the occasion. [Laughter] I have some

support from my other longer-serving colleagues, such as Justices Chin and Corrigan.

The history of this court, *per se*, going back to the turmoil of the Rose Bird Court — I don't think some of these people were born. Is that possible? Yes? No? Maybe it's not quite possible.

MCCREERY: They were quite young, let's just say. [Laughter]

WERDEGAR: [Laughter] And so what does it matter? It doesn't really. It doesn't impact how you would approach a case in any way. But I think you want a continuity as well as freshness, and right now that's what we have.

MCCREERY: What are the kinds of things a newer colleague might ask you about or might explore with you just to take advantage of your knowledge and experience?

WERDEGAR: Or what is a new thing — I might rephrase that — a new colleague might propose that we haven't done? And why have we not done it? Is there a justification? We are exploring new procedural things. One that recently came up was when we have petition conference, and if a given judge votes to grant when the majority votes to deny, some of us, and I am among those, if I wanted to grant and it's not granted, I'll say, "I'd like to be noted."

One of the new judges asked me some time back, "What does that do?"

And I said, "I think the hope is or the thought is that it speaks to the bar." I don't know how closely people read our minutes, but if you're interested in the case and the issue, you do. "That there is some interest on the court, and maybe try again to bring this issue before us." That's established, but recently we denied a petition for review, and it was 4-3.

One of the justices on the denial side felt very strongly and wrote a very, very lengthy dissenting, "I would grant for the following reasons." It was almost like an opinion, and so the question was, "Is that published, or is that just in the minutes?" That particular one was not published. It happened at the very last minute. We had no procedures in place, and so on.

That will be an issue coming before us. I read in the paper this weekend — a legal paper, I think — maybe the general press — that in a case that the United States Supreme Court denied certiorari, two of the justices wrote an opinion as to why they would grant. So it's a United States Supreme Court model that perhaps one or more of the new justices would

like to introduce here, that if you vote to grant and the court denies, you can write a statement why you would grant, setting forth your views of the case. That's one kind of thing that we've never quite looked at.

MCCREERY: In the example you just gave, how was that document received by the rest of you?

WERDEGAR: With surprise. Surprise! More discussion would have occurred, but the way things timed out in that particular petition — we have a deadline by which we have to act, so it all happened rather hurriedly. We were surprised. It's in the minutes, but we're open to discussing, going forward, whether it should be in the published reports. So that's just one example of a new procedure. There are others, but I don't have them in mind at the moment.

MCCREERY: It's an example of, as you say, fresh thinking.

WERDEGAR: Yes. Different backgrounds.

MCCREERY: Backgrounds, right, that allowed exposure to different ideas.

WERDEGAR: Absolutely. If I could think of others, I would. I know there are others, but right now I can't.

MCCREERY: While we're reviewing your various colleagues over the years, what stands out to you about the eras of leadership of this panel? In other words, you served for a little while under Chief Justice Lucas, then under Chief Justice George for a long time, and now, of course, Chief Justice Cantil-Sakauye. You've talked about each of them in turn, but in terms of looking at their eras, what features stand out to you?

WERDEGAR: In their style of leadership. Of course, they each — this is the way of the world — were confronted with different challenges, shall I say? As I've mentioned earlier, I found Chief Justice Lucas delightful. When I came on, as it turned out, he was toward the end of his service time.

Ron George came in and took firm hold of administration and had plans that he felt should be implemented for the benefit of the judiciary, consolidation of the muni court and the superior court and, I think, centralization of the funding for the trial courts. He had high energy, and his ideas were certainly a change, not necessarily well received throughout the judiciary but I never concerned myself with that.

He reinstated the engagement of the chief justice with the Legislature, which had collapsed under Malcolm Lucas. He was famous for, after his appointment, visiting every county in the state even though he had broken his hip. High energy, high humor, and plans. Under him the Administrative Office of the Courts, under Bill Vickrey, expanded greatly. Over time, I gather, some people felt perhaps it expanded too much.

Our current chief justice faced a new set of problems that Ron George did not face. They may have been on the horizon when he stepped down, but some division among the judiciary. There's this Alliance of California Judges that is opposed to perhaps some of the chief justice's and the Administrative Office of the Courts' programs. Chief Justice Cantil-Sakauye was faced with the need and the desirability politically and perhaps practically of paring down the Administrative Office of the Courts, which had come to be resented by local trial courts. This is not an area that I have deeply concerned myself with, but if you sit on this court you can't avoid being aware of some of it.

And she, of course, has been faced with a real economic downturn in California, budget cuts that — perhaps some were appropriate and needed and some were devastating to the local courts and access to justice. Her style, I would say, is similar to Ron George's in that she's engaging, she's even-tempered, she's outgoing, she's energetic. I marvel at all that she does, and I probably don't know half of what she does. So I think we've had some terrific chief justices, but each has to face the problem of his or her time.

MCCREERY: Just to speak about her a moment longer, she also has the power to assign opinions to the rest of you and to lead the group in the actual legal work.

WERDEGAR: Yes, she does, and on the assignment of opinions, hearsay told me that under Malcolm Lucas individual chambers perhaps had the opportunity to try to get a particular opinion. I'm not sure about this, but with Ron George and with this current chief, I don't know how they do it but I've never heard any complaints. My guess is they look at the caseload of individual judges, but that can't be determinative. Some of us have more of a backlog than others, but I don't think that means you're precluded from being assigned a case.

They have to look at who they think will get a majority. How would they surmise that? Comments made at conference. If somebody says, “I think they’re clearly wrong,” and others don’t. The chief has to pick that up. Or maybe positions they’ve taken on related cases. Certainly, the idea is to get somebody to write it that might get a majority.

And then subject matter. That can work both ways. For a time, I got so many CEQA cases, but now more recently — although one of mine was recently just issued — others in the court have CEQA cases. I don’t know. It’s a balance, and it’s a balance that I think has been achieved. I’ve never heard a complaint.

But if you want a case, that doesn’t mean you’re going to get it. I would think it’s inappropriate for you to even indicate that you might want a case.

MCCREERY: You mentioned backlog, and of course one thing that court watchers and others often focus on is the overall productivity of the Supreme Court over time: How many opinions were issued in a given year? How many actions taken? What are the factors and the realities that go into the caseload that the public may not be fully aware of?

WERDEGAR: [Laughter] “May not be fully aware of?” Has no awareness of! Yes. When I came on in 1994, our caseload on any given oral argument was much, much higher than it is now. I’m trying to remember if we then still took bar cases. I know with Justice Panelli they would have the State Bar cases argued before there was a State Bar review court. That increased the numbers tremendously, but as Justice Panelli used to say, “We’re arguing over whether suspension for fifteen days or three months,” and so on.

But my first oral argument in Los Angeles. I think we were down there hearing cases for four days or maybe three full days. Now if we have a day and a half, some of my new colleagues will say, “Oh, that was exhausting!” [Laughter]

Under Ron George we tended to issue about 110 or 112 opinions a year. I never was one who felt that that number meant anything or was important to maintain. But some did because I guess the public’s view is that’s a measure of how hard we’re working. We are working hard, but I don’t think that’s the measure of it.

With all these new judges and pro tems and so forth, our caseload has definitely dropped to what? Eighty? Whether that will continue I’m not

sure. I have a slight suspicion it might because that's where it was when these new justices entered, and I don't think that there's any ethos or idea that it's important that we get our numbers up. I'm not one who does think it's important. We are working hard.

Ron George used to always compare us, with seven judges, to the United States Supreme Court, who had nine judges. They're not concerned about their so-called productivity, and they take the summer off. [Laughter] However, the cases they grant they I think, by and large, decide that same year. We have a completely different system, but I do think that rushes some of their opinions as well. Sometimes the most controversial and difficult ones are put off to the very end, and so on.

So we'll see where our productivity is, once we all settle down, productivity in the sense of numbers. Petitions are down. That's because of the budget cuts in the trial courts and the alternative dispute resolution that's taking cases out of the public courts. So our petitions for review are down.

We do try to keep our capital cases moving. Every year I think about maybe a third of our case output is capital cases.

MCCREERY: So strict productivity in numbers isn't always, perhaps, the most useful way to look at it?

WERDEGAR: I would say not. If I might quote Ron George. It's probably in his memoirs. "We are not making widgets."

MCCREERY: [Laughter] I wonder if we can reflect for a moment on the challenges of serving as an appellate justice in the twenty-first century. There are things in society changing so rapidly. All kinds of issues come forth that never used to. How do you think about the challenges of this particular era, if there's anything we haven't mentioned already?

WERDEGAR: I think your statement, your observation just now, is accurate, that new issues come forward that we haven't had before, and the courts are called upon to resolve them, and we do the best we can. In former times, for instance, the question of paternity and surrogacy and same-sex marriage and so on, or use of — Justice Panelli had a major case — use of stem cells, where you would take a patient's tissue and patent it. He had that case in front of him. Who had these issues before?

So the courts are always challenged. It's either the courts or the Legislature, and the courts are challenged without the assistance of legislation.

Then, if legislation comes, often enough it's ambiguous. Or new situations arise that weren't contemplated, and we have to fill in the interstices. Always challenging.

Our role, of course, is to do the best we can, resolve the cases that come to us. We can't say, "Oh, this is hard. We don't know the answer." On most things if we're wrong the Legislature can change it, or the voters in this state by initiative can unless it's a constitutional — well, if it's a constitutional question in California, the voters can change the Constitution too. But our challenge, our task, is to decide the cases that come before us that need to be decided, without respect to political fallout or public opinion.

Now, the political fallout could relate to the budget. We are a co-equal third branch of government, but we are beholden to the Legislature for our funding, and that's what our current chief justice, most especially, has been dealing with.

We get politically sensitive issues, such as the validity of an initiative or how to interpret an initiative, and we might interpret it in a way that the electorate didn't anticipate or didn't like. We have pending before us now a question about the Legislature's power to put on the ballot a particular initiative, an advisory question. These are politically fraught cases, and our responsibility is to decide them.

The challenges are to keep the courts open, and another challenge that is presenting, I think, difficulties is: so many things are not coming to the public judicial system. We've spoken on arbitration and how businesses and consumer contracts are all being done in private arbitration.

The resolutions usually cannot be appealed, so who's making the law that governs these arbitrations? And who's coming to court? Criminal cases do, but it's important that the courts handle civil cases as well so that the public is aware of the issues, civil issues, and so that law is made that guides what arbitrations occur.

**MCCREERY:** You also spoke briefly last time about the effect of those trends on the occurrence of ordinary jury trials, which is a guaranteed constitutional right.

**WERDEGAR:** Yes, it is. It's a guaranteed constitutional right. I don't know how that's going to be resolved. The United States Supreme Court has had no problem resolving it, and we are bound by what the United States

Supreme Court says federal law requires on that, the Federal Arbitration Act. What direction that will continue to take, I don't know.

Oh, and the other challenges, which are terrible, are these politicization of judicial races across the country. California so far, notwithstanding some of us who mounted a retention campaign, so far we've been immune from the highly politicized out-of-state money which tries to put in place members of the state's highest court that will presumably look favorably on special interests' cases.

It's not for me to say in this oral history particular instances, but it's well known that that is happening across the country. Outside money, millions and millions of dollars, more money spent this year on state supreme court elections than ever before. And it has touched some retention-election states as well.

I fear that that's coming to California. I have no reason to think it is, but why wouldn't it? Because it's outside forces, and they want to influence the judiciary of the jurisdiction when a case touching them would be tried there. We certainly have a lot of cases of great significance tried in this state.

MCCREERY: And as you say, the funding behind those efforts often comes from some other state entirely.

WERDEGAR: Oh, absolutely. Absolutely. And not always fully disclosed as to what are the interests behind it. That's a real threat to the independence of the judiciary, the fair and impartial administration of justice.

MCCREERY: I know Chief Justice Cantil-Sakauye is very interested in civics education and helping people understand our judiciary. What thoughts do you have about the best way to educate and illuminate the public?

WERDEGAR: I think it's in very good hands with Chief Justice Cantil-Sakauye and Justice Sandra Day O'Connor, powerful minds with tremendous resources trying to bring this about by various educational programs. There's a school curriculum, but there are online programs, too, I think, that Sandra Day O'Connor had a role in instigating and implementing.

We need attorneys to support fair and impartial courts. That brings up another subject. I read — I wouldn't know, but I read — that the profession of attorney is losing its appeal in this technological world. The world is changing, and I'm hopeful that we'll meet the challenges as they arise.

MCCREERY: You say we need attorneys to — ?

WERDEGAR: To speak for the courts and to be champions of the courts, as they by and large have been. But they play a very important role because they are integrated throughout society, and they're knowledgeable, and they have a vested interest, I would hope.

MCCREERY: Perhaps they have an ability to translate what happens in the court for a general audience?

WERDEGAR: That's an excellent point.

MCCREERY: What else about the workings of the court itself would you like to bring up in our summary mode?

WERDEGAR: I think we've covered it all. I think the court has wonderfully talented — speaking from the clerk's office and the calendar coordination office, which processes our cases, and the staff that I've known on the court — very, very dedicated caring people who do care about the court as an institution. So I have nothing further to say that I can think of at this moment.

But it's been a wonderful experience to work here with talented people. I have an extremely bright staff, permanent staff.

MCCREERY: Many of whom have stayed with you for a long, long time.

WERDEGAR: That was the tradition. Of course, it's a gift to me that they do. But they are so knowledgeable, very smart, and loyal to the court, to the court as an institution.

MCCREERY: The fair and impartial court? [Laughter]

WERDEGAR: Yes.

MCCREERY: Would you be kind enough to mention some of the many, many awards and honors you've received, recognitions, in the sense of drawing out the ones that are somehow most meaningful to you?

WERDEGAR: Thank you for giving me that opportunity. When you are a Supreme Court justice, you are going to receive awards. Nevertheless, it's not a given that you'll receive any particular award. I will mention the ones that are most meaningful to me, and I'll start with the Boalt Hall, now Berkeley Law, Citation Award. That is the highest honor that Boalt can bestow, and for reasons of my history that we're now well familiar with, I was deeply touched to be named for the Boalt Hall Citation Award.

Another one related in that way is the *California Law Review* alum of the year award. Since I had served on the law review and I had been elected editor-in-chief and I had then left, therefore not serving out my full term as editor-in-chief, it was a deeply rewarding award, and I was deeply touched and very much enjoyed the evening that I spoke to the current members of the law review.

George Washington, who always treated me well by allowing me to transfer and allowing me to be named their Glover Award recipient and number one in their class, treated me well again when they bestowed on me the George Washington University Alumna of the Year J. William Fulbright Public Service Award. That's the name. It's very long.

But my goodness, Fulbright in his time was a senator of great stature, and this friend that I made at George Washington University, Judy Norrell, whom I spoke of, I believe, it turned out — no relation to my getting the award — but that he was her godfather. She came from Arkansas, and he came from Arkansas. But that's neither here nor there about the award. I was very pleased, out here in California, to be remembered by George Washington and receive their award.

At Berkeley there's another award that is very meaningful, and that's the University of California, Berkeley School of Law Judge D. Lowell and Barbara Jensen Public Service Award. Judge Jensen is admired by all. My son had the good fortune to clerk for him. To receive that public service award meant a great deal to me, and Judge Jensen was there when I had the opportunity to accept it and give a little speech.

The American Jewish Committee Judge Learned Hand Award. Learned Hand was a marvelous judge, and to receive any award bearing his name and from a group that honors advocates and judges who do advance individual liberties and equality was meaningful for me. That night was soon after our gay marriage cases, and I was able to talk about my beginning in the law in the civil rights era and my coming to that moment when we had just acknowledged the right of same-sex couples to marry. That was very meaningful.<sup>73</sup>

I should also mention that Temple Sherith Israel in San Francisco, on the occasion of its 150th anniversary celebration, bestowed on me an award honoring me for my “devotion to the law.” Although my husband and I

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<sup>73</sup> *On Being Honored by the American Jewish Committee*, 12 CAL. LEGAL HIST. 500 (2017); May 22, 2008.

have been members of the temple, I am not Jewish and therefore felt especially honored that the temple would recognize me in connection with its 150th anniversary. Sherith Israel has a special history in San Francisco in that it was, I believe, the city's first Jewish congregation, having been founded in 1850, and it served as San Francisco's city hall after the great earthquake and fire of 1906.

Queen's Bench, the venerable San Francisco women attorneys' organization, gave me their Lifetime Achievement Award. To be recognized by the premier organization of women attorneys and judges in San Francisco was meaningful.

Finally, particularly meaningful to me, as you can imagine, is the Italian American Lawyers Association "Honorable Edward A. Panelli Outstanding Justice Award," presented to me in 2012. I was the first recipient of the Panelli Award, and I'm unaware there's been another since.

As you noted, I've received other awards, and I appreciate them, consumer attorney awards and so on. The ones I've mentioned are especially meaningful to me.

MCCREERY: We've also talked about your various many invitations to speak or lecture, and I know we touched, on some other day, on the fact that you delivered the Jefferson Memorial Lecture, also at Berkeley, a few years ago.

WERDEGAR: Oh, yes. [Professor] Harry Scheiber got me into that. [Laughter]

MCCREERY: Which of those invitations to speak stand out to you?

WERDEGAR: That one does. Thank you, Laura. Yes, that was the Jefferson Memorial Lecture. When Harry Scheiber, who knows me from the Supreme Court Historical Society board, invited me and I saw who had spoken before me, I was joining a very impressive roster of people, and so on. Who could say no to Harry? It was the centennial, the year I was asked, of the initiative process in California, so it gave me the opportunity to speak on a subject that has always interested me.

I did a tremendous amount of research and did ultimately give a talk on the subject. Of course, I've sat on many cases, and I'm familiar with this court's jurisprudence when initiatives come before it, so it gave me the opportunity to write a piece entitled "Living with Direct Democracy: The California Supreme Court and the Initiative Power — 100 Years of Accom-



JUSTICE KATHRYN MICKLE WERDEGAR (LEFT) WITH  
SELMA MOIDEL SMITH, EDITOR-IN-CHIEF OF *CALIFORNIA  
LEGAL HISTORY*, CALIFORNIA STATE BAR ANNUAL MEETING,  
ANAHEIM, SEPTEMBER 27, 2007.

modation.” That’s a three-part title, and nobody likes that, but I liked it. [Laughter] I have a monograph, if you’d like me to give it to you.

It was a good speech, and it spoke of how the court deals with initiatives. We are unelected, we are not part of the democratic process, but we are a part of the checks and balances. It described the whole populist movement that introduced the initiative, and how, if we ever declare — yes, we have — if we invalidate an initiative, how it’s claimed we’re “thwarting the will of the people,” and how we have, as they say, threaded that needle.

So that’s the speech that I gave, and the California Supreme Court Historical Society journal published the monograph that I wrote.<sup>74</sup> That was one important speech.

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<sup>74</sup> *Living with Direct Democracy: The California Supreme Court and the Initiative Power — 100 Years of Accommodation* 7 CAL. LEGAL HIST. 143 (2012); Jefferson Memorial Lecture, UC Berkeley, March 20, 2012.

MCCREERY: Are there others you'd like to mention?

WERDEGAR: Over the years, especially when you're new, everybody — you're a fresh face, and they want to know who you are. As I mentioned earlier, I gave so many speeches. You really don't have to, but as a new judge you may not appreciate that you don't have to and you think you do.

My topic in the early days, as I mentioned earlier, was: why a woman on the bench? This was prompted by Justice O'Connor's often-quoted statement — actually, she was quoting another judge, but it's attributed to her — “in the end, a wise old man and a wise old woman will reach the same result.” I thought that was very provocative and interesting. As these scholars that I referenced earlier, feminist scholars did, I too questioned, “Why a woman?”

I suggested it might impact jurisprudence because scholars were showing that with Justices Ginsberg and O'Connor, in cases touching employment discrimination and some other cases, they came together even though they were most often on other sides of a case. But I concluded that it was especially important for role models — absolutely — role models are so important — and for the perception that someone whose life is being touched by the law is being heard by someone they could relate to — superficially, because not all women are the same.

So those speeches all come together, and I gave many of them. Over the years I've given so many speeches. I did vary my topic, and that's why it becomes a burden. I didn't have a stock speech. I tried to tailor it to the group that was inviting me.

The American Jewish Committee was a big speech, as I mentioned, and the Boalt Citation Award acceptance, and the Jefferson. But I've given, I might say, 100 or maybe more, and I write them all myself. I absolutely write every single word myself. And in that monograph on the initiative somebody said to me, “You mean you didn't have your staff do the footnotes?” No. My staff never even saw it, so it's work.

MCCREERY: That's a very telling detail, that those personal invitations are something that you carry out completely on your own.

WERDEGAR: Absolutely. Yes. I can't imagine doing it any other way. In the beginning I was paralyzed. I think I told you, on the Court of Appeal

when Queen's Bench asked me to speak, they had been waiting for Hillary Clinton and they finally decided they'd better have a fallback. [Laughter]

I declined, and I told Justice Bob Merrill I declined. He said, "You've got to do it." So I did. Why did I mention that? That was memorable. [Laughter] My first big debut.

I think the point I was going to make is I'm not the least bit nervous speaking now. It's not about getting up there and speaking. It's about knowing what you're going to say. If you have something to say, then there's no problem giving a speech.

My speeches are a nice review of my career in a slightly different way. I'll speak to diverse groups. I've spoken to defense attorneys. I've spoken to attorneys general. I've spoken to the Federalist Society. I'll usually speak to anyone who asks me, but less so more recently.

MCCREERY: And indeed you've spoken to student groups on occasion. I wonder what sorts of feedback and questions you might get from those kinds of audiences?

WERDEGAR: Over at Berkeley there was a time we were having an outreach session, I guess, and I was asked to speak, with Jesse Choper interviewing me, to the students that chose to come and others. [Laughter] This is not a direct answer to your question, but Jesse Choper asked me a question. "Is there ever a case that you really regret the decision?"

I said, "Yes, but it's not an opinion that I wrote. It's an opinion I dissented in. I regret the majority opinion." Everybody laughed.

He said, "No, but really?"

Because he was remembering some United States Supreme Court justice, perhaps — I can't remember now, but there was — who said if he had it to do over again he would change something or other.

What kind of questions from the students? We have these outreach sessions, the whole court does, and we get random questions assigned to us. One in Santa Barbara. This was a question from a student from the audience. "Has being a justice changed your life in any way?"

I said, "Yes, it absolutely has. I get more respect at home." [Laughter] They thought that was very funny.

Then the one in Sonoma, where I was assigned the question, "What kind of education do you have to have to be a justice?"

That was random, but there we were in Sonoma. I think I told you about this. I said, “In my case, I went to a one-room school in Healdsburg with eight grades and one teacher. But that’s not required.” [Laughter]

I like to speak to students. I remember so well what it’s like when you are a student. They’re so bright now, though. The externs that I’ve had and that I meet through the other judges, that they have, they’re just so bright.

MCCREERY: Let me draw you back to Dean Choper’s question. Any regrets in the opinions you yourself have authored?

WERDEGAR: No. Actually, not. That doesn’t mean I think I’ve always been right. But I’m not aware of anything where I’m deeply concerned that I was wrong. First of all, I’ve been here so long. You put your opinion out there, and you just have to move on, so you can’t agonize too much.

At this moment — if you want another session, maybe I could research the cases I regret! [Laughter] At this moment I can’t think of any that I think I went astray. I cannot, but that doesn’t mean there aren’t.

But Jesse Choper asked me the question, and at the time nothing came to mind. As I say, it doesn’t mean I think I’m always right. But I do think that whatever I did was supportable and reasonable and done with integrity in the sense that it’s what it seemed to require at the time.

MCCREERY: Thank you. Let me give you a chance to summarize your personal journey in the law. I know we’ve woven that theme throughout all of our conversations.

WERDEGAR: We have, yes. I appreciate the opportunity to do this. In fact, I appreciate that the historical society has given me the opportunity to have you take my oral history. It’s a privilege to be able to reflect on one’s life, and that’s what this has given me.

I’ll start by saying my personal journey has been completely unpredictable. I had no early aspirations to be a lawyer, and when I went to law school I had no idea where my education was going to take me or how I would use it. I had never heard of a female lawyer, so I thought I would just take it as it comes.

Although many doors were closed to me, as we’ve spoken of, in time others were opened. Fortuitously, it turned out the paths that were open to me, research, writing, teaching, were the ones that best suited me anyway.

I should mention again that I had many letters of rejection. There was this “Aha!” moment in, I think, the late 1970s, where I was going through my file of letters of rejection. The world had changed a little bit then, and I thought, “Wait. Maybe some of this was discrimination.” But at the time when I was not chosen for things that I applied for, I didn’t at all consider that it was discrimination. I had no reason to think so.

I did receive a letter of rejection which probably is an historical artifact now from Chief Justice Earl Warren, to whom I applied after I graduated first in my class at George Washington University. Historically, he never did take a woman. I can’t say whether he discriminated or not; however, at this recent event at Boalt Hall, the retirement of Jesse Choper, I met Chief Justice Earl Warren’s grandson, and I mentioned to him that I had applied to clerk and that I didn’t —

And he said, “He never took a woman.”

I said, “I don’t know if he was discriminating or not.”

We have to remember that they only have a few slots, and the best and the brightest in the country apply. So you cannot infer that because he never took a woman, he discriminated; however, his grandson had no problem saying, “I know Pops would never have taken a woman.” [Laughter]

Evidently, the view at that time was that the culture of the law clerks wouldn’t easily accommodate a female. That’s not right, but I understand it. That’s how it was. The culture. The culture of the Marines. The culture of the Army. The culture of law school. [Laughter] That’s how it was. Now, I don’t know what those male clerks were doing that a woman would put a damper on, but that was interesting to me.

In any case, my first position after graduation with the Civil Rights Division of the Department of Justice under Bobby Kennedy was a marvelous experience, just as exciting as could be. That administration was exciting, those times were exciting and, to a Californian, Washington, D.C. for all reasons was terribly exciting.

Returning to California I did make some applications, and I didn’t receive offers. The turning point was when the College of Trial Judges, referred to me by Boalt Hall, who did look out for me, I must say — they were aware I was here, and they were aware that I had a credible record, so they did. The College of Trial Judges invited me to be their scribe, to write

this misdemeanor procedure benchbook, which I did, the first statewide benchbook of any kind.

After that, one thing led to another. CEB, California Continuing Education of the Bar, asked me to join them. By the way, after those early rejections I didn't apply for a job again. The College of Trial Judges came to me. CEB came to me. And I was with CEB for about seven years.

But then I was ready to make a change and I did — no, I didn't apply to USF. The dean at that time, Paul McCaskill, called me up at CEB one day and asked if I would like to interview to be associate dean. I was thrilled. I had always wanted to be in academia. Paul was a delightful fellow. He had been a year behind me at Boalt, and one of the professors at USF, Mike Hone, had also been a year behind me at Boalt. I didn't know them, but they knew me because there were so few of me.

I went to be associate dean and teach at USF. When Paul retired and a new dean came in and cleaned house, I did then apply — because I saw an ad in the newspaper — for a position I didn't know existed, and that was a career staff attorney. That was a new position that had developed since I graduated. I was accepted to the First District Court of Appeal and assigned to Justice Ed Panelli when he was appointed to that court. When Justice Ed Panelli was elevated to the Supreme Court he brought me along.

After serving with him for some years and Governor Pete Wilson was elected, I was invited — I was not invited by him, I was urged by some supportive judges to apply for a judicial appointment of my own, which I got. Then I was elevated to the Supreme Court by Governor Wilson.

An unpredictable path that, looking back on it, was a marvelous path. But going forward you don't know your path is going to be a marvelous path. I think that's an important point. Historically, I was the third woman appointed to the Supreme Court, the first in the history of the state to fill her former justice's seat. I loved that. I loved succeeding Justice Panelli.

During this journey, which we've spoken of, the world changed dramatically. The role of women changed, in the law as elsewhere. Whereas only two of us in my Berkeley class graduated, now most law schools are more than 50 percent women. Women attorneys hold every conceivable position in the law: attorneys general, deans, general counsels, high-powered litigants. The world has changed.

Problems still exist with managing motherhood and your career. But I think law firms are becoming more sensitive to it. And also the role of men has changed. I think the modern married man is much more open to assisting with the domestic life than, certainly, in my generation.

So that has been my journey. I'm looking forward to continuing that journey with what we've identified as a new court.

MCCREERY: You've touched on how much the times have changed and the thinking of the people in power has changed. How has your own thinking evolved along this path?

WERDEGAR: In what regard?

MCCREERY: Just in terms of how you view your career in the larger context of the legal world. You're not an anomaly any longer.

WERDEGAR: No. It has dawned on me gradually that I am, as you sit here, history. [Laughter]

I've been fortunate to have this path. As I say, going forward it looked a little different than it does looking back. I marvel at the changes that I've seen, but I've come to realize that change is ever going to be with us. I can't anticipate what it will be in the future.

MCCREERY: Have your methods or your approach to the law evolved in some identifiable way?

WERDEGAR: Actually not. I take every case as it comes, and I try to come to the conclusion that seems required based on the briefing and the projection of what *stare decisis* says as we go forward. I have not changed that I'm aware of.

I don't seek to write separate opinions, whether it's a concurrence or a dissent, but I do so if I can't with integrity go along with the majority. I prefer to be in the majority, but I will dissent if I have to. I am deeply grateful for my staff, who I've spoken of earlier as being very talented, loyal to the court, and long-serving with me.

MCCREERY: You're painting very much a picture of continuity, really, in spite of the changes in our society. You come from a strong research background, very much grounded in examining existing law before going ahead. What effect do you think that has on your methods?

WERDEGAR: You have to start there because the stability of the law, as formulated by the courts, requires that you start with what is in place and not venture beyond more than is necessary. This is not new for me. It's how I've always approached it, that you don't reach out to make new pronouncements before they're necessary. The courts have to provide what stability they can.

But referring back to what we said earlier, we are often enough brought cases that are unprecedented. There's no background to fall back on. Maybe extrapolation or analogies with what came before.

MCCREERY: May I ask what advice you might offer to others coming along in a legal path and perhaps even a judicial one, young people of today who aspire to have a career somewhat like yours?

WERDEGAR: It's hard to give advice. I'm heartened by, as I mentioned, how bright the young attorneys that we see here are, including the women. They seem so grounded. They have challenges that I didn't have because in today's world, in a way, they are putting on themselves the expectation, or perhaps an external expectation, that they can do it all, managing their home and their children and have their career. I had no expectations like that. Anything I did was unusual and exceptional. Nobody was expecting anything of me.

In the past I have stated that, as a woman, you can have it all but you can't have it all at the same time. With women particularly, notwithstanding that young men today assume a great deal more of a partnership in the domestic responsibilities, women do — they are mothers and they are daughters — and they have personal responsibilities that can intrude on their professional lives.

I've said to them, "If you have to stop out, if the stress is too much, then do it. I'm optimistic that circumstances will change, and you'll have other opportunities to reenter your career and maybe find a path that's more suitable to the totality of your life."

I would tell them to: "Excel in what you do, because that's what carries you forward to other opportunities. Be true to yourself. Always have integrity. But be patient with yourself as well. And I'm here to say that life is longer than you might think, and there will be opportunities, ultimately, to have it all."

How practical that advice is, I don't know. But it's an expression of how my path has unfolded.

MCCREERY: As we look ahead, what role do you foresee for yourself? What visions do you have for how the coming time on the California Supreme Court might play out?

WERDEGAR: I do very much look forward to continue working with my new colleagues. They are energizing and refreshing and open to exchange of ideas. And I feel that I have a responsibility — it surprises me to say this, but it touches on what we said before — to maintain some continuity on the court and to share what knowledge I might have of history and traditions and things that have come before.

So I hope to continue to fulfill that role and to engage with the other members of the court. We are a collegial court, and there is a lot of — I would say more than in the past — personal interchange.

MCCREERY: When it comes to the jurisprudence itself, some have noted that the current makeup of the court might suggest that you could have quite a role as a swing vote for contests that come down to that.

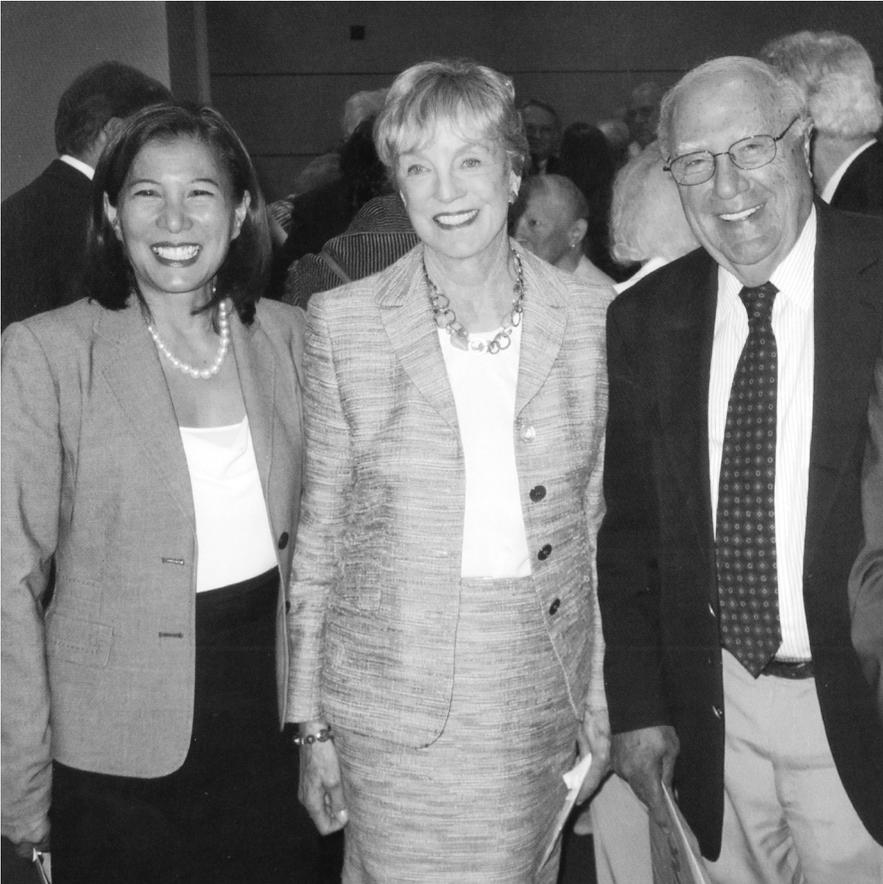
WERDEGAR: There was that speculation, and it's purely speculation. I would say definitely it's too soon to know. I don't see our new justices as all being of a singular voice at all, nor are those of us who remain on the court of a singular voice. So I think that remains to be seen. Reporters and commentators love to speculate on things like that. We'll see.

MCCREERY: One can't help thinking of Justice Anthony Kennedy on the U.S. Supreme Court, which, as you pointed out earlier today, has different processes and different procedures for doing its work. But he has ended up having quite a role as that swing vote, and so I suppose it's natural to see those kinds of speculations.

WERDEGAR: It should be remembered that our court seldom is divided 4–3. That's where a swing vote would come in. I haven't done a statistical analysis, but I think the 4–3 decisions are few, a small percentage.

MCCREERY: Certainly fewer than in the U.S. Supreme Court.

WERDEGAR: Yes. Yes, fewer than the United States Supreme Court. So we'll see, and we'll have to have an addendum to this oral history.



RETIREMENT RECEPTION FOR JUSTICE KATHRYN MICKLE  
WERDEGAR (CENTER) — WITH CHIEF JUSTICE TANI  
CANTIL-SAKAUYE (LEFT) AND HUSBAND DAVID WERDEGAR, M.D.,  
CALIFORNIA SUPREME COURT, AUGUST 2, 2017.

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MCCREERY: I wonder if there's any subject we've talked about that you would like to say more on before we close?

WERDEGAR: At this moment I would say no, and I would thank you for your gracious interviewing and your patience with what it has taken to bring me to the table. [Laughter] And thank the historical society for giving me this opportunity.

MCCREERY: You're quite welcome. Finally, is there anything I should have asked you but didn't?

WERDEGAR: That would be related to — not that I can think of. Maybe when I edit this, but at this point I think it's been fairly comprehensive.

MCCREERY: It has. And let me thank you so much, Justice Werdegar, for your grace and your time put towards this project. It is of great historical value, and it's been my pleasure.

WERDEGAR: Thank you. And I think everybody should be a member of the California Supreme Court Historical Society, which works to preserve the history of the members of our court and has done so with several before me and will continue to do so. Thank you, Laura.

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