

## INTERVIEW 5 (FEBRUARY 25, 2015)

MCCREERY: Good afternoon, Justice Werdegar. We were speaking at our last interview about the time that you served as a staff attorney to Justice Panelli, first while he was on the Court of Appeal and then, of course, on the Supreme Court.

We wanted to remind ourselves of the panel that he served with in his brief time on the Court of Appeal. That was serving with Justice Caldecott, who was then the presiding justice, and also Justices Rattigan and Poché. Could you say a few words about each of them, as you knew them in that capacity, as a staff attorney?

WERDEGAR: I would be happy to. As a staff attorney, of course, you don't have the relationship you do as a peer. Justice Caldecott I don't recall too much about, but I was interested to learn later that the Caldecott Tunnel going out to Orinda and Lafayette and so on, if not named after him it's named after some ancestor or predecessor of him. Do you know if it was after him, *per se*? But there's the Caldecott Tunnel.

Justice Rattigan was a true gentleman, and he took the time on occasion to take me aside and point out these minute ways I could improve the strength of my writing. He really did it — I think my writing, and I think *he* thought my writing, was perfectly fine — but he really did it as a gift. He just took that extra time, and time is a real factor on the Court of Appeal, which I'll speak to when I get to my time on the Court of Appeal. Cases just move through like this [snapping the fingers]. Most of them are unpublished. So it was a very gracious thing he did. I can't remember other specifics, but I do remember that he was most gracious.

He was on the committee that was assessing my application to join as a staff attorney on the First District Court of Appeal, and I think he promoted me. He didn't know me, but I think on the basis of my interview and my résumé he went to bat for me against criticisms that have come up occasionally throughout my progress through the system, that I hadn't had boots-on-the-ground trial experience. I think he saw my résumé as one that transcended that and that I would be capable of doing the job, which of course I think he agreed I was, later. So Justice Rattigan was a very nice person.

Justice Poché had been a year ahead of me at Boalt. I perhaps have mentioned that before. His hallmark is giving to people and helping people and paying attention to people and seeing them as individuals and promoting their talent. That's just how he was and is. He knew me from Boalt. I mentioned earlier that Joanne Garvey, I read, was a swing vote to give me the position of editor-in-chief of the law review. I don't know how the votes divided, but I know that Marc Poché was on the side promoting me to be the editor-in-chief.

Going back in time — and this will come up when I'm a judge on the Court of Appeal — you just have to remember all this was unusual. This woman thing, doing these things, was unusual in that time. So you had to have people of flexibility and generosity and vision to assist changes that were happening and see what I hoped they perceived as quality was quality.

And of course Justice Panelli. I can only smile anytime I talk about Justice Panelli. I think I was fortunate to be working in that division.

MCCREERY: Which of these individuals, if any, did you consider a mentor of sorts?

WERDEGAR: It would have to be Justice Poché. But *mentor* — I don't know that I've ever had a mentor. But Marc Poché has always been a champion of mine when he could. And Justice Panelli.

MCCREERY: Thank you for reflecting on them. Similarly, is there anyone who was serving as a justice on the California Supreme Court when you were there in the employ of Justice Panelli who you made particular observations about or particularly got to know?

WERDEGAR: No. In the earlier court, before they were not retained — it was a retention election where, I think for the first time in California history — I hope the only time — justices were not retained. In the earlier court, Joe Grodin just had a personality where he would walk down the halls with a bowl of popcorn and stop and talk to anybody about ideas that were on his mind. It didn't matter if you were a staff attorney or another judge. That's just how Justice Grodin was as a justice. Otherwise no. They were fine, but as a staff attorney I had no special interaction.

MCCREERY: As we know in 1991 your life changed significantly in the form of a chance to be appointed to the Court of Appeal yourself. Your

appointing governor, of course, you had known since law school, Pete Wilson. I wonder if you could start this part of our conversation by reflecting back on what interaction or contact you might have had with him in those intervening years?

WERDEGAR: We got out of law school. I left, as you and our readers, listeners, know, law school in 1961 and took my last year at George Washington. Pete Wilson and I had been friends, but I now was married, and I was living elsewhere.

I went back to a fifth class reunion and saw him there. That would have been 1967, I guess. After that our lives just went separate ways. I was living in Marin and San Francisco. He was down in San Diego. I was aware, and I wrote him a letter of congratulations, when he became elected mayor, which as we now know was just the beginning of a very outstanding political career.

But we didn't cross paths again until he ran for the first time for governor in 1980. He came up on the radar again, and as he traveled the state he stopped at some event in Marin. I saw that this was coming in the newspaper, so David and I went. It was in Tiburon, and that's the first time I had seen him in about thirteen years. It was a nice reacquaintance, and I can't recall other events for that race, in which he did not prevail. What was it, for the Republican nomination for governor? Yes. He didn't get the nomination.

Then two years later he ran for the U.S. Senate. He was going to run for the governorship, but then an opening — I don't follow these things, but then an opening occurred for the Senate seat. And was he opposed by Jerry Brown at that time? Yes. All right. So he put aside his wish, at that moment, to be governor and ran for the Senate, and he prevailed. He won over Jerry Brown, and he went off to Washington.

But during his Senate campaign we would go to the fundraisers that we could. I would do everything I could which was, believe me, very modest [laughter] to support this wonderful person that had been a friend in law school. We would give what you had to give to go to an event, although it was never a great deal. First of all, in those days what a politician would ask would be less than it is today. Secondly, we didn't have the wherewithal to be major donors. But we did attend some fundraisers.

Then in Marin I worked for him in a very modest way. Actually his campaign chairman out here, Sally Rakow, lived down the street from us. Do you know the name Sally Rakow? She became his representative in the San Francisco area. I point over there to the federal building. What her function was at the time that he was running for the Senate I don't know, but I connected with her. She was a neighbor, and I think her daughter had babysat for our children at one point.

I did some trivial but I hoped useful work in highlighting and gathering information about issues in Marin. I'm more sophisticated now, and I realize that a campaign doesn't rise or fall on knowing what the issues are in Marin. [Laughter] But anyway, I was doing my bit so if he were ever to come to Marin again he could speak to — don't ask me what the issues were. But I would do clippings from the *Independent Journal* and so forth, and that was my bit.

He did get elected and he went to Washington, and we didn't see him during that time, which was six years. Then he came back to run for governor, and once again David and I did our bit. How often do you have a former friend/classmate running for an important office? You do what you can, which — as I say, as I've become more sophisticated in politics I realize that our little part was not that much. But we had occasion to see him. He knew David.

Then he was elected governor. That's all I can tell you about the trajectory or how it was and why it happened. But it turns out he was a gifted politician.

MCCREERY: What particular memories do you have of the 1990 gubernatorial campaign, in which he beat the former San Francisco mayor, Dianne Feinstein?

WERDEGAR: Oh, actually none. I don't remember. Dianne Feinstein, of course, my husband ultimately worked with her, and I think she is outstanding. I am glad that she has served in the Senate as well as she has. I don't remember what the back and forth was between them.

MCCREERY: But your husband had a role in her mayorship of San Francisco?

WERDEGAR: Yes, he did. That's right. She enlisted David as health director.

And I think after Pete Wilson was governor and she was senator they were allies and friends, even though of a different party. They were both out here looking at San Francisco General Hospital for something at the time that David was still health director. They did cooperate on issues, and I think they respected each other.

MCCREERY: It was not long after he became governor in January of 1991 that he had occasion to reach out to you. What was the first inkling you had?

WERDEGAR: What do you mean had occasion to reach out to me?

MCCREERY: To make an appointment to the Court of Appeal.

WERDEGAR: Oh, well, I had to apply. I did. But the first reaching out, and that's what stopped me, was to my husband. Within a couple of weeks of his election, he called our home.

I answered, "Yes?" [Laughter]

"Is David there?"

He asked David if he'd be willing to serve as director of the statewide department of health policy planning in Sacramento. He said to David, "I was thinking about you as director of the office of health policy planning," which is not a high-profile — the governor didn't say this, I'm saying this — not a high-profile office, but in fact it's very important, as its name bespeaks.

David agreed to do that. I can't remember what he was doing at the time that he had to give up. I can't remember. That will have to be his oral history.

So he accepted that. That was the first outreach. But I did think that this would be a propitious time to pursue my own aspirations. What had it been, ten years or more, since I had considered applying for a trial court position, had been interviewed by the appointments secretary, Marv Baxter, and as far as I could tell at the time had a promising opportunity. That's when Justice Panelli, as you know, instead asked me to come, and I decided, "This is where I want to be, staff attorney of the California Supreme Court."

Now time has passed, and the world has changed as well. It's been thirty years now since I graduated from law school, and truly what had been a disadvantage, my gender or sex, was now a potential advantage. It was becoming conspicuous that there were no women, or very few women, doing anything.

The women's movement had ripened. Women were presenting themselves, and personalities in authority in power were looking for qualified women. So I thought, "Everything's coming together very nicely. I will apply."

The governor did not invite me to apply. I applied, hoping I had a good chance, one difference being not only the change in time but also this governor knew me and knew that I had a record that was notable, so it wasn't a strange thing to him.

I applied to the First District Court of Appeal. The first thing that happens if you're going to be successful is your name is sent out to the "Jenny" Commission, which is the Judicial Nominees Evaluation committee of the State Bar. So my name went out. That's thrilling because it means you're on a track. But of course they can send out several names, and sometimes they do. Often they do.

I got a call to be evaluated. A nice note is that the chair of this three-person — they split into groups of three to interview Court of Appeal justices — was Ann Ravel. Ann Ravel at that time was city attorney of San Jose. I did not know her, but everybody has come to know her, which I will explain. She later became chair of the statewide Fair Political Practices Commission, and she's now chair of the Federal Elections Commission. She's had an incredibly wonderful career, and deservedly so.

But that was my good fortune, Ann Ravel, and I think there were two other people present. I don't remember who. You are interviewed and you are told what negative comments they've received — because they've solicited all the names you asked them to solicit but also just random practitioners and professors and judges.

The committee ultimately came out and gave me a "well qualified" rating. But it was a challenge for them because, as you will hear me say more than once, perhaps, the classic model then was you've been a trial judge. And if you've been a trial judge, to achieve that the classic model is you've been a D.A. or a litigator. So Ann and her committee had to think outside of the box, as people say today.

I also was invited by the San Francisco Bar Association to be interviewed so they could send their evaluation to the governor. I accepted that invitation, and I went down to the San Francisco Bar Association offices. There was one restroom there, and on the door of the restroom on a plaque was "Men." Tacked underneath it with a thumbtack on a piece of

cardboard was a hand-lettered sign saying, “Women.” I assumed that was in my honor. [Laughter] There were no women there, so they had thought ahead, which was very considerate of them.

I went into a room with an oval table and, of course, was the only woman in the room and was interviewed by people who didn’t know me at all, and I didn’t know who they were. I can’t remember what they asked me and I can’t remember, I have no idea, what came out of that interview. But that was an interesting — I remember the hand-lettered sign.

There was a question. What was it that you were asking me?

MCCREERY: We were just looking at the process of you being rated well qualified by the JNE Commission.

WERDEGAR: I want to say that, obviously, I was a different kind of candidate. To contrast 1990 with today, it’s evolved, not all at once. Now every kind of legal experience is considered a legitimate background to seek a judicial appointment. That includes transactional attorneys, academics. It’s not all about having been a litigator, which is good because litigation is shrinking. But in any case, the perspective has changed, and I would say recently so, not right away. But I was an unusual candidate, and a lot of people along the way had to stretch or make adjustments or not make adjustments.

Out came the evaluation, and Governor Wilson ultimately appointed me to the First District Court of Appeal as his first judicial appointment. I think he wanted to make a statement. He was always supportive of women, and over time his administration had a significant number of women holding high responsible positions. I think he was proud of that, as he should be.

MCCREERY: How did you learn the news?

WERDEGAR: Oh, how I learned the news? I honestly can’t remember. I remember about the Supreme Court but not the Court of Appeal.

MCCREERY: What did this appointment represent to you in terms of the advancement of your own career? Clearly, you had thought about it for some time, applying and then waiting to hear. Now that you had the news, what did you think?

WERDEGAR: I was excited and eager to do it and thrilled that this had come my way.

MCCREERY: Any hesitation?

WERDEGAR: No. No. Of course, I didn't know what was going to await me when I joined the court or what have you, and I had things to think about, staff and getting acquainted with my division and what have you. But no.

MCCREERY: Congratulations. That's very exciting. Talk a little more about the process of being confirmed officially and what else had to happen.

WERDEGAR: Thank you for asking that. I now have a DVD, which in those days was a video. They take a video of your confirmation hearing.

I had asked people, one person from CEB, an assistant director of CEB, where I had worked for many years, to speak for me, and a personal friend who was an attorney, a woman who was an attorney with Neilson Merksamer. I had known her when she was working her way through USF Law School when I was associate dean there. And a lovely woman who had been an annual for Justice Panelli when I was on his staff who was a pioneer and turned out to be a pioneer in mediation and for many years — I don't know about now — taught at Stanford, mediation. Those were three, and then Justice Panelli.

The commission was comprised of the chief justice, Malcolm Lucas, and of the attorney general, Dan Lungren, and of the presiding judge of the division I was going to join, which was Clint White.

I just looked at the DVD. I just have to go back and thank them all again. They were wonderful, working with what they had and pointing out — you see, all of this is against the background that I am not a typical candidate. There are certain gaps in my background that would be a problem if somebody was concerned. They all spoke for me, and Justice Panelli made the comment that he felt I was more than capable of assuming the position, and that the Court of Appeal's gain would be his great loss, and so on. One of the panel asked him, "What about her lack of trial court experience?"

MCCREERY: Can you say which panel member that was?

WERDEGAR: Only that it could have been any one of them. No, it wasn't Justice Lucas. It might have been Dan Lungren, and it could have been Clint White.



I think Dan Lungren asked Justice Panelli about my lack of trial experience, and he said that he saw no problem whatsoever, and I was familiar with court transcripts, and I was perfectly capable of whatever I needed to ground myself in that regard of getting the assistance that would be so readily available. It was to him a non-issue.

Ann Ravel spoke last. Clint White said to her, because she reports on the comments that the commission has received, he said, “Were there any comments that she hasn’t had trial court experience?”

Ann Ravel said, “Yes. But in conversations with her we are confident that that’s not going to be a detriment.” That was that.

Then I speak. I said I had no prepared remarks, but I was available for questioning. Dan Lungren did question me about my lack of experience, and he did make the comment that — or maybe he made this with Justice Panelli — and it’s important because it was how it was viewed — “To move from a staff attorney to a justice is quite a reach.”

Then Justice White, my future colleague, asked me about how was I going to handle my lack of trial experience. Justice Panelli had made the point that although this seemed unusual, in the course of California history this was not so unusual. I can’t name the justices, but there had been distinguished justices of this court, at least maybe two, who never had trial court experience.

MCCREERY: Justice Frank Newman.

WERDEGAR: Oh, yes, but there were others as well. Then Justice Panelli said, not to mention the United States Supreme Court, where some think perhaps they should have a bit more boots on the ground. But he didn’t put it that way.

I responded that whatever assistance — oh, Justice White asked, “How are you going to hold up — .” He did it in a friendly way. He did. It wasn’t hostile. It was a legitimate, “How are you going to hold up — ? You have — .”

My colleagues were going to be Ming Chin and Bob Merrill and Clint White, and they’d all been trial judges. How was I going to handle that?

I answered something along the lines that, “That would be wonderful, and maybe the division — ” that now had an African American and an Asian and a white male, but I didn’t say that. “Maybe the division could use another kind of diversity.”

Everybody laughed because I was going to be the only woman on the Court of Appeal in San Francisco. It was all in good humor, that part of it. So that was it.

MCCREERY: What did you learn later, if anything, about the goings on within the Wilson administration leading to your appointment? He knew you so well personally, of course.

WERDEGAR: I really can't say. He never told me. I think his appointments secretary at the time was Chuck Poochigian.

MCCREERY: He also had Janice Rogers Brown?

WERDEGAR: That was later. She wasn't an appointments secretary. Janice was legal affairs.

MCCREERY: Yes, legal affairs. Pardon me. You're right.

WERDEGAR: No, I'm sorry. It wasn't Chuck Poochigian. It was Bob White. Bob White somehow played into it. He was Pete Wilson's right-hand man and good friend. What I discerned from some conversation with him or somebody is that the governor was going to take care of this one himself, and nobody had to worry about it. But of course I wouldn't have known that at the time. And I'm not sure it was true. I have not heard that from the governor.

MCCREERY: What else transpired in the course of your confirmation hearing?

WERDEGAR: Nothing. We went up, and there was a reception that was put on in the Court of Appeal by, I guess — somebody has to pull it together and pay for it — by my division. Justices passed through and congratulated me, and my family was there. Then you go to work.

MCCREERY: As we know, that was in late August of 1991. Your induction ceremony?

WERDEGAR: No, that was it.

MCCREERY: Swearing in?

WERDEGAR: Oh, I was sworn in. Justice Panelli swore me in after the hearing. I think I was wearing his robe. You don't have a robe when you're first appointed as a judge.

Justice Kruger is using my spare robe, and you're always pleased when somebody uses your robe, if you like that person.

Yes, I was sworn in by Justice Panelli in the courtroom after the commission — the commission did not leave the bench. This is in contrast to my next hearing at the Supreme Court, where they left the bench. Justice Lucas said, "Are we ready to vote? Are we ready to vote?" That's how it usually goes.



CELEBRATION AFTER COURT OF APPEAL INVESTITURE —  
JUSTICE KATHRYN MICKLE WERDEGAR WITH HUSBAND DAVID  
AND SONS MATTHEW (LEFT) AND MAURICE, SEPTEMBER 23, 1991.

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I was sworn in and then went up to some area, the library I guess, of the south of Market Second Street temporary court. That was probably the end of it, and then I probably reported to work — I don't know what day of the week that was, but the next working day.

I had to pull my staff together. Lee Johns was the principal attorney on the First District Court of Appeal, who had actually had a hand in picking my résumé out when I applied to be staff attorney, and he assisted me.

There was a little shuffling. The governor took Gary Strankman out of Division Three and put him in Division One as P.J., where the actual vacancy had occurred, and I can't tell you who it was. Now I'm in Division Three. I'm Division Three, and I had to have a staff.

Harry Low had retired recently in some other division. The First District has five divisions. One of his staff attorneys applied to me, and that's Jason Marks, who is with me to this day.

Then Gretchen Strain. She was awaiting a new judge and applied to me. So I had Gretchen and Jason as my staff. In those days every justice had two staff attorneys.

Gretchen, not long after, within the first year or so, moved to the Court of Appeal in San Jose, which was closer to her home. So I had a vacancy, and applications came in — tons. It is no fun to go through these, but again Lee Johns — they had to do a writing sample. Somebody's application came in a little late, but Lee Johns picked this application out and said, "This one's good." I interviewed Hannah Rabkin and took her on.

Hannah had only been there a few months when she came to me and said, "I'm so embarrassed, but I'm pregnant." She had left a big firm and come to the court, no doubt appropriately, thinking this would be a better place if you're hoping to start a family.

Then Maureen Dear came. And how did I know Maureen, who now is a good friend? How I first knew her I'm not sure. She could probably tell you. She came to serve, and then when Hannah came back Maureen, whom people call Mo, and Hannah job-shared. So I had Jason and this job share. Again, this was very unusual, a job share.

Justice Merrill had a job share as well, but this part of our division was extremely unusual. He was the father of daughters, young women, and he was very sympathetic to women trying to do what women still try to do, balance their career and the contributions they have to make in

the workplace with their mothering and their home responsibilities and so forth.

MCCREERY: About a month passed from when Governor Wilson first appointed you to when you were reviewed and confirmed and sworn in, in the summer of 1991.

WERDEGAR: You mean from when he first nominated me? Or appointed? Yes, between that and the hearing.

MCCREERY: Yes, nominated, thank you. I wonder, given that we've just been talking about how unusual an appointment it was at that time, what response did the news of your nomination get in the wider legal community?

WERDEGAR: I don't remember. I have such a vivid memory of when I was appointed to the Supreme Court. I don't really recall at all. Between my appointment and my taking my position I really wouldn't have known because I wasn't plugged in to the legal community.

MCCREERY: And in the popular media was there particular coverage?

WERDEGAR: Oh, I doubt it. I don't remember that, which as I say is going to be quite different when we talk about the Supreme Court.

MCCREERY: Thank you. You were talking about the staff that you hired, including the two women who shared a job, and that Justice Merrill had a similar arrangement in his chambers. Let's begin to talk about your justice colleagues on this new configuration of the panel.

WERDEGAR: All right. Let me step back about staff attorneys. It probably relates to a question you asked me earlier. I was concerned how I would be received by staff attorneys. I *was* a staff attorney. Not only was I a woman, which many staff attorneys are, but I was a staff attorney who had been appointed to the court. That was not the first time in the history of California, but it might have been the second time. That was very unusual.

I was concerned that people that I had previously worked with would be resentful or be unable to relate to me in a completely dramatically different position. But it turned out I had no cause for concern. Staff attorneys were actually very pleased and welcoming.

One reason why — and the governor acknowledged this in some conversation with me — that my appointment brought a new stature to staff attorneys. It brought to the attention, to the forefront, the excellent

professionals they are and the significance of their work. Afterwards, over a period of years, to be a staff attorney was a legitimate position from which to apply for a judgeship — I wouldn't say to the Court of Appeal — some may have tried, none have succeeded since to my knowledge. But as the pool for trial court judges, the acceptable pool, expanded there was an occasional staff attorney who would apply. I can't tell you how many were accepted, but it gave them a new stature.

So that concern of mine didn't bear fruit, I'm happy to say.

MCCREERY: That is a very telling detail, isn't it, that it added stature to a profession that all of you had shared for so long?

WERDEGAR: It is, yes, and the governor, when I mentioned this to him in some context, said, "They deserve it."

Staff attorneys. There was an article written in some legal publication, bar journal, years and years ago when I was a staff attorney. It was about attorneys without ego, and it was about these people who toil and *never* — nor did they seek — *never* get any attention. They know what opinions they've steered and what opinions they've drafted, as we say. They know but they are 100 percent discreet. Attorneys without ego.

MCCREERY: Some people who write about the courts are fond of pointing out that perhaps those staff attorneys have too much power, even though they aren't the ones wearing the robes.

WERDEGAR: I understand that comment. I do. And that would very much depend on who the judge was. But others have responded to that comment by saying the staff typically stays on when judges move out.

We have that even now. A staff attorney who might write for a notably conservative judge can write for someone whose legal philosophy is entirely different. They may not choose to, depending how invested they are in the direction that the other judge was going, but I think all of them pride themselves on being able to do it whatever way their judge wants them to do it.

When I was a staff attorney I took pride in being able to write the majority or the dissent, whatever Justice Panelli wished, after we'd talked about it. It's part of the pleasure of your craft that you can do that either way. I think those who say they have too much power are those who have

not served in that position and haven't been behind the closed conference doors or chambers doors.

MCCREERY: What style did you adopt in serving as the leader for your small group of clerks?

WERDEGAR: One of the major adjustments I had to make as a new judge was relinquishing to my staff what I used to do, which is most of the research and a great deal of the writing. Of course, judges vary widely in how much writing their staff does. Most staff does the first draft, and after that judges vary widely in how much they work with it and change it. But that was a big adjustment for me because I knew, I felt, that I had been terrific in this, and it was very hard to let go and think that others could do as well as I had hoped and felt that I had done.

In fact, it was pretty easy. [Laughter] It didn't take long. You come to trust your staff's work, and if you don't trust it that person doesn't stay on your staff because you cannot be checking what they do with respect to assertions made in a draft opinion supported by authority.

Or, often with externs — which we reviewed when I was a staff attorney for Justice Panelli — you'd find them taking some authority out of context. You'd go back to the case and you'd find that they hadn't read the whole body of the opinion. They had just extracted this one helpful sentence, not to find that two pages later the court had said, "and we disagree with that." Something like that.

So I was able to trust my staff. I've been blessed with an excellent staff to this moment, and I did let go.

I want to go back and say, with respect to my confirmation hearing where I said with a twinkle to Presiding Justice White that maybe a little diversity, not just a lack of trial experience but a different kind of diversity might be welcome, the comment fit so well because our division was unusual. I think he was the only African-American appellate justice, maybe in the state. Ming Chin was one of the very few, maybe the only, Asian judge. And here come I. At that time I think there were 110 Court of Appeal justices, and I think there were 10 women and none on the First District. So we were a very interesting division.

In the way that we worked together, the cases are, from the clerk's office, sent out to the division. I don't know how they were assigned within

the division, probably randomly from the same source. Not all Courts of Appeal have random assignments, which is not a good thing. I'm not privy to how they work, but in some of them that don't have divisions it's not entirely random, I'm told, which is not a good thing. But definitely with our division in our court it was all random.

We would confer once a week, the division justices, about cases that were next up for each of us to work up, and we would discuss them. We'd get a sense of what we each thought. If I were the presenter, I'd tell what it was about, and I would state where I thought this case was going to go and how I was going to write it, and people would say fine. If somebody disagreed, they would disagree. If they were alone they would become a dissenter.

Then I would go back and assign whatever cases we had discussed to a particular staff attorney. By the time of oral argument on that case we would have a draft opinion in front of us, and that's not unusual on the Court of Appeal. We'd take the bench. We'd hear the argument, and the arguments would be — unlike the Supreme Court where they're half an hour each side — they would be shorter. How that worked I can't remember.

Today, I'm told, some divisions will tell counsel, "We'll give you ten minutes." Or will say to counsel, "Unless you affirmatively ask for oral argument, we're prepared to decide the case." There are all sorts of ways. There are too many cases, and oral argument usually does not add much. But I don't know how the different divisions work it. I think they're always experimenting with how to get it right.

In any case we would hear oral argument, and then we'd get into the elevator to go back to our chambers and somebody would say, "Anything different?"

"No. Nothing different."

"No."

If you made any changes in the draft opinion, which would be unusual, you'd pass it along with the check sheet, and the next judge would check an ok with it. Then the third judge might say, "I'm dissenting," so you'd wait for the dissent.

I want to say that, at that time, I would be the only woman in the courtroom, period. The attorneys weren't, and certainly on the bench that was it.



MCCREERY: We will come back to that. To continue for just a moment about oral argument, you're describing a process that typically didn't add too much to the outcome, or change the outcome much. What were the pros and cons of going ahead and having oral argument as part of this?

WERDEGAR: The parties have the right to oral argument. I haven't researched it constitutionally, but it's presumed the litigants have the right to oral argument. That's why different divisions are experimenting constantly with different ways of handling it. Give them a time limit? Tell them no argument unless they ask for it? There's one division that gives them the draft opinion and says, "That's how it's going to go. If you have anything against that, come in and tell us."

MCCREERY: What was your own style in this setting in terms of participating in oral argument, questioning and following up?

WERDEGAR: I can't remember. Mostly we just want to keep it short. I really can't remember how much involved I was in questioning — or any of us.

MCCREERY: Say more about how your staff attorneys would help you prepare the written draft.

WERDEGAR: I would assign them the case, and I would say, "This is what the group has decided, how it should come out. Please write it that way, and if you find out that's not possible — to write it that way with integrity, that the law doesn't go that way — please come back and tell me."

You have to remember that most Court of Appeal cases are very routine, and every criminal conviction anywhere can be appealed to the Court of Appeal. So many of them are, and the issues are often — not always, by any means, but — are often just so routine. That's why only about 10 percent of my opinions and most appellate court opinions are published. The rest are just routine. Civil cases, of course, have the right of appeal but there's sometimes a financial disincentive.

MCCREERY: Give me an idea of the overall volume in this Court of Appeal setting, how many petitions and how many did you accept —

WERDEGAR: It's not a question of accepting. You take every appeal. There's no discretion. That's the difference. At the Supreme Court, it's

discretion. You might get 7,000 petitions and take 3 to 5 percent. At the Court of Appeal the cases come in.

MCCREERY: And everyone has the right to appeal.

WERDEGAR: They have the right to appeal, yes. I think you were supposed to have a quota. You were supposed to keep these cases moving, and we were supposed to, each judge, I think, write, ten opinions a month. That's a lot.

Then you'd be concurring or dissenting — usually concurring but sometimes dissenting — on another twenty or thirty from your colleagues every month. So the paper moving around, moving through, was a lot.

Of course, the Courts of Appeal sometimes get very complicated cases. That's how they get here, at the Supreme Court. They have to go through the Court of Appeal, and I want to be clear that this court relies on what the Court of Appeal does. We count on them in the very difficult cases so that we have at least their input. It's not inconsequential, their contribution to the law. In fact, it's very, very consequential. They get some extremely complicated cases, but if they do they're not moving ten out that month.

MCCREERY: In general, what would it take for you to write in dissent?

WERDEGAR: If I disagreed. I can't remember any huge issue where I felt I had to make a stand. If I thought it was wrong I'd write a dissent. I couldn't tell you how often I dissented. Sometimes Justice White would dissent. He felt he was sitting with a bunch of Republicans.

It was really interesting to be with him. It reminds me so much of Sandra Day O'Connor's comment about Justice Thurgood Marshall. She made the comment, just by way of analogy, that, "The life experience that Thurgood Marshall would bring to our discussions was a rich gift to all of us." That's not an exact quote.

At the time we knew Justice White it was toward the end of his career. But he would sometimes tell us stories — don't ask me what. I won't be able to tell you. But just bringing a from-the-street perspective on something. He had a very nice, rich voice and manner.

He was very gracious to me. I think it was very hard for him to accept me. I was this white woman that didn't — I'm only surmising. But I hadn't been a trial attorney, and I might have appeared to him to be something that I actually wasn't.

MCCREERY: To back up a minute about Presiding Justice White, in general how did he accept you into the panel?

WERDEGAR: I'm saying he did. He was very gracious at the confirmation hearing. He said, "She's already charmed me." He could be a very gracious man, and when I was appointed here he called me and said very, very complimentary things.

He didn't interact with the rest of us as much. He pretty much kept to himself. We would conference cases with him when we had to, but after conference the other members of the division would, as a matter of tradition, go out to lunch. So that would be all of us that I've named. But Clint White elected not to.

MCCREERY: What differences did you note in his work with you as compared to his work with the other two colleagues?

WERDEGAR: None. Nothing like that. No.

MCCREERY: Say a little about each of them, if you would.

WERDEGAR: Bob Merrill is universally — *was*, unfortunately, universally, he's gone — recognized as a gentleman. He just was. I'm told he was a wonderful trial judge. Ming Chin was an accomplished attorney, and we've traveled similar paths. He's very outgoing.

MCCREERY: What did the three of you talk about over lunch?

WERDEGAR: I can't remember. That was the only time I went to lunch. The rest of them — you haven't asked how I was received by the court in general.

MCCREERY: No. Let me give you a chance to speak about that now.

WERDEGAR: The court had an adjustment to make, really, because as I've said I was the only woman. They didn't know me before. There was nothing about me they could relate to. I hadn't practiced what was considered the practice of law, hadn't been in the military, hadn't been on the trial court. I was a woman, and that was unusual. Their wives, if they worked, weren't working in a professional capacity.

It was truly another generation. It was an old boys' club. That was exactly what it was. Most of them — probably all of them now — have retired. It was just that generation before the new generation, which understands

having a woman among them is good. They're welcoming, and their wives, perhaps, are doing this or something comparable. But that was an old boys' club. One or two were gracious, but basically I was on my own entirely.

MCCREERY: You made earlier mention of Betty Barry Deal, who presumably had been the first woman ever appointed to the First District Court of Appeal?

WERDEGAR: Oh, she was. Yes.

MCCREERY: What chance did you ever have at that time or earlier, later, to speak with her about that?

WERDEGAR: I know her, and she's wonderful. But I never discussed this with her. Her experience might have been different. She did come out of private practice, at least. I don't know if she had been a trial judge.

She was gone. It's not like I took her seat. Ming Chin took her seat. She's wonderful, and I'm appreciative of her having preceded me. But I don't recall ever talking about this with her. Recently, however, I've come across some notes of a conversation we had when I was appointed, and she advised me not to expect anyone to ask me out to lunch, that I had to take the initiative.

MCCREERY: But clearly you were alone in the time period that you were there. To what extent did the difficulty accepting you rise to a level of creating difficulty for you?

WERDEGAR: All I had to do was my cases and work with my panel, and there was no problem working with my panel. We were congenial. I was fortunate to have Bob Merrill.

But we would once in a while have court-wide meetings, and that brings to mind this *New Yorker* cartoon, classic Punch. It has these figures drawn around a conference table and a woman with an upswept hairdo and a prominent nose. There are five men, and there's the Chair saying — the woman is looking alert, and he's responding to her, the Chair, and there are other men around the table, balding.

The Chair says to her, and her name is Miss Triggs — this is a cartoon that I think a lot of people know now. "That's an excellent suggestion, Miss Triggs. Perhaps one of the men would like to make it."

When I saw that cartoon, I knew that was my experience. I was gratified, years after that having been my experience at the Court of Appeal, to read that Ruth Bader Ginsburg — this woman who was powerful and had been a litigator and had won critical cases in the jurisprudence of the United States — she said that when she would be with a — I don't know at what point of her career — I think pretty much along the way — that when she would be with a group of men she would say something and no note would be taken of it. Later a man would say the exact same thing, and it's taken up as a great idea.

I had that experience at these court-wide meetings. We'd go to these, nineteen people and I'm the only woman at a court-wide meeting, and there would be some issue and we'd speak. I remember distinctly one time when I made a comment, and they moved on. And really, three or four people later, the exact same comment was made and it was taken up as this great idea.

I was so gratified to hear that it wasn't just that I was invisible, that this is a phenomenon. Basically, though, I was happy to do my work. I was never asked out to lunch, but I'm not a go-to-lunch person. I had family I wanted to get home to. Going out to lunch to me, even now, takes a lot of time. But it's a nice visit with your colleagues. It is nice to do, but that's how it was.

MCCREERY: What about changes in the makeup of the First District while you were there? I know it was only a few years. Did anything change that you're describing?

WERDEGAR: No. Nothing that I would remember. One thing I will tell you that perhaps you haven't anticipated asking about, but speeches. Because there were so few women — you asked if there were publicity. I don't know if there was publicity, but women's groups took note. There's a group in San Francisco called Queen's Bench, and Queen's Bench called me. I'd been maybe on the bench — I don't know how long, not too long but it might have been a year.

Anyway, I got a call one day from one of the board members of the Queen's Bench, a nice woman, saying, "Justice Werdegar, we would love to have you be our keynote speaker at the annual Queen's Bench judges' dinner. It's a banquet that all the judges are comped, as we say, and it's for

all the judges in the area. Could you be our keynote speaker? The dinner is in three weeks.”<sup>12</sup>

I had never given a public speech in my life. I had taught classes, but I had never had occasion to give a public speech. Not to mention giving the speech, but what are you going to talk about? You have to have a subject. So I hemmed and hawed, and I said, “I think I can’t. It’s just too short notice.” I forget what I said.

I got off the phone, and I went into Bob Merrill’s office, right next to mine, and I said, “Bob, Queen’s Bench just called me and wanted me to give this speech, and I said no.”

He shook his head. He said, “You have to give that speech.”

I said, “I do?”

And he said, “Yes. You have to do that.” I forget his reasons, but one can imagine what his reasons were, that, “This is important for you to do this.”

She explained why the delay. This was part of the phone call. She said, “I realize this is short notice, but months ago we asked Hillary Clinton, and we’ve been waiting for her to reply and she hasn’t responded. My board said to me, ‘We’d better get a backup.’” [Laughter]

It is funny. “Oh.” That probably went into my saying, “I don’t think I can do it.”

But that was her excuse and her apology for — you never ask somebody three weeks — I mean, they were waiting for Hillary. You’d think they would have guessed. Hillary had not responded one way or the other, but they finally inferred that maybe the acceptance wasn’t forthcoming.

So anyway, Bob Merrill — and I remember this very fondly about him — shook his head and said, “You have to do that.”

That was my first public speech. The banquet room was packed. I had never given a speech before, but I’ve come to learn that *giving* the speeches is no problem, although if you’re not accustomed to public speaking it can be. We don’t have these panels up there, with the text, that are invisible.

But finding a subject. What was I going to talk about? The subject I came upon, and the title, which I later had occasion to give many times, was “Why a woman on the bench?” Meaning, is this important? What does it mean? Does it matter? With the help of my staff attorney, Hannah

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<sup>12</sup> September 29, 1994.

Rabkin, we did some research. I pulled together a speech which, over time, I honed and sharpened.

People were very kind and said it was good. But my first speech. I don't recall during those brief three years on the Court of Appeal having other speech requests, unlike when anybody arrives at the Supreme Court and you're drowning in speech requests. I did want to mention that.

MCCREERY: Were there other public appearances of a different kind?

WERDEGAR: No; however, I did feel it was my obligation to go to every woman's group that would invite judges.

I want to say that the speech I settled on was prompted by a comment I came across that Sandra Day O'Connor had made ten years before, when she was the first woman to be appointed to the United States Supreme Court. I'm a creature of my time. I was as astonished as anybody else when she was appointed. When I grew up judges were men. Certainly United States Supreme Court judges were men and *old* men. That's how it was. So when she was appointed I was as surprised and, of course, pleased, as so many people were.

She was quoted as saying, "The important thing about my appointment is not that a woman will be deciding cases. The important thing about my appointment is that a woman *gets* to decide cases."

I took that to mean what it did mean, that equal capability will now have equal opportunity to aspire to the highest court in the land or to aspire to other things. That's what she said.

Later I read a quote of hers that I think she had taken from a Canadian female Supreme Court justice. It's been often quoted, and I think it did originate with a justice of the Canadian Supreme Court. "A wise old man and wise old woman will reach the same result."

That one gave me pause, and I started thinking about that. That was the impetus for wondering "Is that true?" Again, nationally there were so few women judges. Women scholars were trying to extract what information they could from the few women around the country. "Do women decide cases differently? Or are they the same? Is there a woman's voice?"

All of this you're probably familiar with, as a lot of academic books and articles and studies have since been written. At the time that I'm speaking of there was very little material to go on, so everything that Justice

O'Connor did — and then when Justice Ginsburg some years later joined her, the two of them together, was subject to scrutiny. It was interesting. I myself was reflecting on that, since I was now a woman justice. Is there a different voice, and so forth? That's what gave me material for a speech.

MCCREERY: How have your own views of the answer to that question changed over the years?

WERDEGAR: I think, based both on empirical studies — if you follow how some of the sex harassment cases and so on developed in the United States Supreme Court — I think studies have shown that O'Connor and Ginsburg, although of different political persuasions, would end up seeing the case differently than their male counterparts if it's a sex discrimination or harassment case. I think they landed on the same side.

And I do think that would be true — and it goes to the whole point of diversity on the bench — your life experiences are brought to bear. You can't change the law but you can perceive the facts through a different lens if you have had a different experience. Women have had different experiences, either themselves being discriminated against or they've been wives or mothers. But so, too, people like Clint White who have grown up as an African American in a white society. It goes to the whole point of diversity of experience that does bring a different lens to the facts.

I do think a woman's input can make a difference. Studies have shown — and again I think the material is not vast — but that women on a panel — this would be a study of federal judges, as I recall — will bring a different result on that panel in a particular *kind* of case than if there were no women.

On the broad kinds of cases that don't involve life experience, I don't think that a woman or anybody else's perspective matters. It's just how you view the law and what conclusion you come to, not based on life experience but maybe based on how you read the law or your general legal philosophy.

It's an interesting question, but I want to land on the point, as I have in my speeches, that diversity is really important for that reason. Whether you're a farmer, like Justice Baxter was, or you've been a D.A., like Justice Corrigan has, or you've been whatever, differences in legal background are important. You don't want everybody cookie cutter. You don't want all D.A.'s and you don't want all professors. A mix is a very good thing. The same, too, with life experience and ethnicity and so forth.



MCCREERY: You mentioned the phrase judicial philosophy a moment ago. I wonder, as you were making this very interesting transition from research attorney to justice yourself, how did you find your judicial views evolving?

WERDEGAR: I only had one judicial view, frankly, and that was to find where the law takes you. I *mean* that, even if it wasn't going to be popular or politically popular or congenial to my appointing authority or the temper of the times. I never had any problem going with what I thought precedent required. That's on the Court of Appeal, where that's your job. If the question were an open one, I would have to land somewhere. My staff has always been terrific. Not just their research and writing, but their objectivity.

MCCREERY: When it came to your beginning to develop a body of opinions that you'd written, of course outsiders were very eager to characterize you as one sort of judge or the other or try to guess who your influences were or who you would be like. Did you note particular differences yourself in where you tended to come on civil cases versus criminal matters?

WERDEGAR: Different what — from others or from my own approach? No.

MCCREERY: Or just how you would tend to decide in those broad areas?

WERDEGAR: No. Let me say that I don't recall having a great deal of attention put on me as a Court of Appeal judge, unlike the Supreme Court, where every hiccup they try to extract where you're going to go. As I mentioned, we processed a tremendous number of cases, only a small percentage of which are published.

I had one case — thinking about this in anticipation of this interview and speaking to previous staff — really so few stand out, and that's not unusual on the Court of Appeal. I had one case that really stood out. This was called *People v. Mouton*.<sup>13</sup> It was a criminal case, and the defendant was a young African American who had shown up, I think at a housing project, with a rifle or a gun of some sort with his friend. His friend, whose name was Jackson, had gone to that project to get even with somebody there. There was going to be some kind of a confrontation. Mr. Mouton, our defendant, had gone to back him up.

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<sup>13</sup> 15 Cal. App. 4th 1313 (1993).

Things escalated, and somebody was killed. Mr. Jackson, who had actually pulled the trigger — there was no dispute about that — was tried in a different court by a different jury. They were not tried together. Mr. Mouton was the defendant that was in our case, and he was convicted of second-degree murder. There is a legal doctrine that an aider or abettor, and he was the aider and abettor, is guilty of the same offense as the principal whom he's assisting. If the natural and probable consequences of that offense is killing, he's guilty of that. The law holds you responsible for assisting and helping to put in motion something that ends up with death.

Mr. Mouton was convicted of second-degree murder. It came to us. I authored the opinion, and we affirmed it under this doctrine that I have said to you. Meanwhile, I don't know if it was later or before — probably a little bit later — Mr. Jackson, in this separate trial, was acquitted. Don't ask me how or why. Different jury. Never before us. He was acquitted.

The defense attorney representing Mr. Mouton, after our opinion came out — which was correct on the law — how can I put this? He started a whole public relations campaign, and he enlisted professors and other defense attorneys. The outrage that the actual perpetrator would go free, and this individual was held for second-degree murder — he *blasted* the opinion, and the papers picked it up.

On the front page of the *Recorder* newspaper was this article by a woman journalist who at the time nobody had heard of before. They didn't know her, and they didn't hear much about her after. But she wrote a complete hit piece on this opinion, enlisting the comments of academics who I seriously doubt ever read the opinion.

I realize, however, the attorney had a lot going on his side because it does seem wrong that the perpetrator has gone free. But the district attorney's response is, "There's no accounting for juries. The jury that heard this case had 'beyond a reasonable doubt' under the law as they were instructed. They found this fellow guilty," and on the Court of Appeal we affirmed it.

I remember the day that paper came out I was just in anguish. It was miserable.

Mr. Mouton's attorney petitioned for rehearing on the grounds that this was unconscionable. I don't know if it was unconscionable or not. The case was right on the law, but I was in a real state from this public attention,

all negative. It's not the kind of thing you can explain to the layman, why, even though it was two different juries.

I was concerned, because I understood, not the defense attorney, who was a very aggressive defense attorney in defense of his clients, but just generally how it didn't seem quite right. What we did is we granted the petition for rehearing but not on the grounds that they were asserting. I wouldn't give them that because the law was right. In fact, I couldn't. We didn't do anything wrong. But we found another reason that this defendant would be entitled to another jury trial, and it was related to the instructions that the jury had been given.

He was retried, and I never saw the case again but I have researched it. The second jury, under the instructions that we said were required, hung, and the district attorney declined to re-try him. I think the defendant, Mr. Mouton, entered a plea to something much lesser. He had been in jail for eight months, and with time served he was gone.

I also found it interesting, as my staff attorney did some research, that the perpetrator, who walked free, eight months later was behind bars for robbery. In jail he was also charged with assault for pouring acid on his cell mate.

That case was memorable for the unwelcome publicity. As a judge you don't often get that kind of blast. As I say, it wasn't just the defense attorney. He enlisted scholars, professors, defense bar. It was all just strategy. You know, I think things ended up as they were supposed to in that case. But as a judge you have to withstand that when it comes.

MCCREERY: How unusual is it to grant a rehearing?

WERDEGAR: Unusual.

MCCREERY: Did you have any other instances of that while you were on that court?

WERDEGAR: No. No. There was another decision that I did, and after this I can't remember any that are worth mentioning. But my staff attorney reminded me of this one called *People v. Santamaria*.<sup>14</sup> The issue in this case was collateral estoppel in a criminal case. In the defendant's first trial, he had been acquitted of possession of a knife but the jury had hung on

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<sup>14</sup> 8 Cal.4th 903 (1994).

the manslaughter or murder charges. The district attorney could retry him when you have a hung jury, but the question that came to us — he could be retried on those charges, but the knife acquittal. In a fresh trial, does that previous acquittal collaterally estop the D.A. from once again charging him with knife possession?

I wrote an opinion saying, yes, that bars the D.A. I was reversed by the California Supreme Court. The reason I mention it, though, is Stanley Mosk in that Supreme Court opinion dissented from the reversal, and he did something that was extremely unusual. He appended to his dissent my Court of Appeal opinion. As someone said to me, “That may have been your first Supreme Court opinion.” I wasn’t in touch with Stanley Mosk, but it was a gracious thing for him to do. That almost never happens.

MCCREERY: And the fact that he saw fit to dissent from — ?

WERDEGAR: He was persuaded, as was I, by whatever the law was, but to give that to a Court of Appeal justice is really a great gift. Of course, it was a dissent, but to recognize a Court of Appeal justice. Once in a while our court, very rarely, but will say, “We can’t say it better than the Court of Appeal, and we adopt their opinion.” But that’s extremely unusual. Again, in this case the majority reversed me, but Justice Mosk saw the merit in my view. [Laughter]

MCCREERY: What inkling did you have, if any at all, that either of these cases would take on a future life after your opinion?

WERDEGAR: Oh, none. That *Mouton* — I’d never experienced anything like it, nor had anybody else. That doesn’t happen.

MCCREERY: Your panel of three agreed at the time of the first opinion.

WERDEGAR: Yes. This attorney whipped up — I mean, he’s a real strategist. Some have called him a street fighter. But he’s good for his clients. You would want him, perhaps, if you were in serious trouble. But he just whipped up this campaign. As I say, I’m not sure how many people actually read the opinion. But anybody can be outraged when you hear that the perpetrator has gone free and the aider and abettor is serving time behind bars.

No, unprecedented. I wasn’t prepared for it. Were it to happen again, I understand you just have to put up with that.

MCCREERY: What other cases stand out to you from that period?

WERDEGAR: There was one called *Kwan v. Mercedes-Benz*<sup>15</sup> where it involved California's lemon law, the Beverly Song Act. It involved the car dealership, and the lemon law imposes a penalty for willful violations of the act. In the law so many statutes use the language "willful," and what it means is just a mystery. It means something different in each statute. In this case we had to decide what willful meant in the context of that act.

The reason it's memorable is that we did come to a conclusion on an extremely complex, subtle question, and it became part of the standard jury instructions. So I guess we can take a little pride in working that through. That's what you want the Courts of Appeal to do, to grapple with these things. Then if they're wrong, the Supreme Court can take it up and tell them they're wrong.

MCCREERY: Were there other instances of your opinions being challenged to the Supreme Court?

WERDEGAR: Probably, but I have no memory of it. On the Court of Appeal things move so fast, you may or may not be even aware that a party is petitioning. If the Supreme Court reverses you, that would come to your attention because — I just think it would. But otherwise a party might petition and the court will deny review, probably.

There was one opinion of mine — I have no idea what it was about — that the Supreme Court depublished. The court at that time would depublish a lot of opinions, which became a subject of real criticism, and under Ron George that diminished almost to de minimus. But under the Lucas Court they were shaping the law that way — and it was roundly criticized — making cases disappear, and then leaving standing the ones that they liked and not taking on the issue. We still depublish occasionally and there are reasons, but they were depublishing lots.

Anyway, one of my cases was depublished, and somehow that came to my attention, and I thought, "Well, why?" So when I was appointed to the Supreme Court I went straight to the files to see what was wrong with that opinion. I read the conference memo, and I disagreed with it. [Laughter] But too late. I felt that the staff attorney that had written the memo was off base. That's just a funny sideline. I disagreed but couldn't do anything about it. I couldn't retroactively have it put back in the books.

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<sup>15</sup> 23 Cal. App. 4th 174 (1994).

MCCREERY: Depublication is an interesting feature of our system, though, in California. How well do you think it was working overall as a way to —

WERDEGAR: Let me say — you may not know this, but — up on this court, somewhere along my tenure I was made chair of the publication committee because — you may want to get into it later or you may want to get into it now, but — there was a lot of unhappiness and vociferous objection to depublication.

There was a lot of criticism of that, burying law. So Ron George appointed me as the chair of the publication committee, not exactly a welcome position. There were two brothers, the Schmier brothers, who really had a bee in their bonnet about depublication, and they would not let the subject go.

I think one of them perhaps had had a divorce or a business dispute. I'm not sure what I'm saying is accurate, but one of them had had an opinion depublished. There was a personal reason why these brothers were so adamant, and they would write about it. They would never let go, and if you met them at an event at which they made it a point to show up, they would corner you. They really had a grievance.

But generally speaking it was not good. This court before my time was depublishing, oh, scores and scores of Court of Appeal opinions. You don't publish that many in the first place. That's another part of the problem, or another part of the subject. But the view was the court was just cherry-picking cases to depublish.

Once I was on the committee, I know the defense attorneys — and I think justifiably — were saying that an appeal that reversed their client's conviction would not be published or would be depublished, so it left them — you can't cite an opinion that's not published — it would leave them knowing — or in *any* field of law — knowing that there's a case out there, because you paid attention, that was good for you. You can't cite it. That doesn't seem right.

This court came to the conclusion that that's not the way to shape the law. This committee, which involved all sorts of staff work — I mean AOC [Administrative Office of the Courts] staff — getting statistics, and charts, and questionnaires to Court of Appeal judges, and a mix of a committee of practitioners and every kind and level of judges.

We met for a year or two. We did something that really, I think, helped change things a little bit. I don't have the rule in front of me, but the rule initially was — we changed the presumption from *not* publishing to *publishing*.

We also made it clear that if the case — the criteria are: Does it announce a new principle of law? Does it apply an established principle of law to a new set of facts that are meaningful? Does it synthesize a whole body of law? Or does it address some old law in a new way? These are the reasons that publication is appropriate.

The conclusion of the committee was that Courts of Appeal should be paying more attention and publishing more cases. Now, speaking as a Supreme Court justice who has conference memos about petitions each week — oh, it used to be also that if the opinion was not published, one of the reasons for not granting review was, “It's not published.”

That's not true anymore, nor should it be. But when I see an opinion that was not published and that should have been, it really does annoy me. It doesn't happen all that often, but when it does I think, “What was that Court of Appeal thinking when they announced some new principle of law and they don't publish?”

I almost want to — we don't have the authority to do that — send it back to them and say, “Publish this.”

But most opinions are not worthy of it. Of course, they're now available online, but parties still cannot cite opinions that don't appear in the official reports, and it truly would clog the reports if you think of the thousands of appellate decisions that are issued every year, most of which add nothing to the law. They're important to the parties, but they add nothing to the law.

MCCREERY: What were the criteria applied at the time you were sitting on the Court of Appeal about deciding to publish?

WERDEGAR: The same criteria. I think the presumption was just different. And of course, every division is different, but in order to publish each division has its own rules.

So how does a group of judges decide if this opinion is going to be published? I can't remember what our rules were, and that's another thing that the committee addressed. The rules vary. The approach varies in each district or division, and I can't at this moment survey for you what those rules are. But there's a lot to think about in that regard.

MCCREERY: I wonder, too, how much your division leadership had a say in that matter or put a stamp on that?

WERDEGAR: Perhaps I could find out for you, speaking to others, but I can't remember what the procedure was about publication. But I do think that one judge could veto it.

MCCREERY: Returning to just the general matter of opinions, not specifically about depublication, you would sit in panels of three to decide individual matters. How important, or what emphasis was there, on all three of you coming to agreement. Was that considered important?

WERDEGAR: No, but we usually did except maybe Justice White would dissent.

MCCREERY: What makes you say that?

WERDEGAR: He had a completely different view of the world, a different life experience, a different view of the law.

One time he dissented to one of my opinions. I had come to the Court of Appeal having the experience of being a staff attorney up here — that being the Supreme Court — if a dissent is written, the majority, if they choose to, responds, in other words shows why what the dissent is saying is of no consequence or is wrong. We'd go through this, and we're going through it a lot now. So to me that was natural.

His dissent said something, and it was natural for me to modify my opinion and explain why what the dissent said was of no account. Perhaps that was not usual in the Court of Appeal. I don't know. But I came from this background where it's routine at the court here.

After I made my changes Justice White took the opinion, and he wouldn't circulate it. In other words, the case sat in his drawer for an inordinate amount of time, and I had no way of getting him to release it so we could release it.

I spoke to some people, and they said, "Speak to the presiding judge." The presiding judge was the one that was sitting on the case. [Laughter]

Again, I don't think it was because I was inexperienced. I think this had never happened, and I don't know what anybody would do. But finally, with the support of whoever else was on my case — maybe it was Bob



Merrill, maybe it was Ming Chin — the solution was reached to just file the majority opinion.

But that didn't happen. When we came to that Justice White released his dissent, and the three judges' opinion was released.

MCCREERY: What was he getting at?

WERDEGAR: I don't know. Maybe what I did wasn't that usual on the Court of Appeal. That I can't say. But it irked him.

MCCREERY: You've described working closely with your law clerks — your staff attorneys, I should say — on your own caseload. To what extent was there informal exchange among the justices about the details of cases?

WERDEGAR: Very little, as far as I'm aware. We would have this weekly conference as to what result seemed right, and the assigned author would write the opinion. There was very little.

There had to be some. There was one — Ming Chin was assigned a DNA case, and this goes back to when DNA evidence was really new. This was one of the major cases that came to our division, and I remember the staff attorney at the time got deeply into DNA, and Ming Chin, who has since become noted for his interest in technology and so forth — I think it started there. To try and get on top of that case as a judge and the intricacies of this — the labs and the courts and the individuals didn't have all the experience we now have.

It was just so new, and I cannot tell you more about the details of the case. But I do remember we spent a lot of time, Ming Chin and I and I don't know who else was on the case, and his responsible staff attorney working through whatever the issue was that related to DNA. It was brand new. It's interesting to reflect on — fast forward, and now it's very routine.

But otherwise there wasn't — maybe when we went to lunch we'd talk about a few cases, or maybe we'd just gossip or talk sports. My husband used to say — I didn't appreciate it — that he knew when I was going to lunch because I'd look at the sports page.

MCCREERY: And you did that in order to — ?

WERDEGAR: Participate. Be conversant.

MCCREERY: What other developing areas of the law stood out at that time, other than the DNA-related technology?

WERDEGAR: I have no recollection that there were any.

MCCREERY: What view did you take of the matter of prejudicial error and to what extent that would indicate a need to reverse?

WERDEGAR: Given the attention to that with respect to the California Supreme Court it's a fair question, but I have no recollection of that. There are certain standards, and I think I doubtless applied the standards as I understood them, the Watson standard versus the Chapman standard. So many errors — and of course the stakes weren't so high.

Up here it's the death penalty cases, and that's where so much attention has been drawn to the California Supreme Court's finding errors but finding them "harmless." Most errors *are* harmless. They really are. And it's a cliché to say there's no perfect trial. There's a case in dispute right now where some justices feel the error was not harmless, and some feel it was completely harmless. So we do, up here, get involved in that discussion. But down there, not having death cases —

Actually, I did — it's interesting you mention that. I did write an opinion reversing a criminal conviction because I decided that the error was not harmless. *People v. Elguera* or something.<sup>16</sup> I can find you the name if you need it. It was a small, little case. It was a prisoner at Pelican Bay who was charged with having a razor blade. It was found in the cafeteria in proximity to him. I think it was wrapped with tape or something. He was convicted of having whatever it would have been, a weapon, in prison.

It came to the Court of Appeal, and the error that was alleged was that the trial judge at the conclusion of the trial — juries are instructed at the beginning of the trial and at the conclusion of the trial — at the conclusion of the trial, the trial judge neglected to instruct the jury on the burden of proof, "proof beyond a reasonable doubt." The defense appealed and said that's error. I wrote that it was error, something to the effect that, "The words that should be ringing in the ears of the jury as they retire to deliberate should be, 'the burden of proof beyond a reasonable doubt.'" My opinion said that the fact the trial judge told the jury when they first were starting, before they'd heard the evidence, was not sufficient.

MCCREERY: What response did you get to that opinion?

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<sup>16</sup> *People v. Elguera*, 8 Cal. App. 4th 1214 (1992).

WERDEGAR: Oh, I don't know. You have to understand, at the Court of Appeal you don't get many responses to opinions. Did the defense attorney become a fan? I don't know. [Laughter]

MCCREERY: Occasionally they do draw outside attention.

WERDEGAR: *Mouton* did. [Laughter] No, something like that, perhaps it would draw attention that it was reversed. But the legal papers don't pay a lot of attention to these opinions that just process through the Court of Appeal. But I reversed it. I can't remember if it was unanimous or I had a dissent, and I don't know who was on the panel. But I could find out if you care.

MCCREERY: After sitting with your fellow justices for a few years, to what extent could you predict how they would come down on one matter or another?

WERDEGAR: Pretty much. I can't be specific, but yes, pretty much.

MCCREERY: What patterns might they have expected from you?

WERDEGAR: I can't say what patterns they expected from me. That was the big mystery when I came on. What would it be? But we worked well together, and whatever cases during that period of time came to us were not, evidently — I don't recall big controversies. There may be other divisions where the personalities are different and every case has a dissent, but I don't recall that ours was. I think we worked together smoothly and saw the law similarly. Bob Merrill was a wonderful influence on all of us.

MCCREERY: He served as the acting presiding justice for a time?

WERDEGAR: I can't say. Clint White was the presiding justice the whole time I was there.

When Clint left I don't know, in connection with Bob Merrill becoming acting. He certainly would be a terrific presiding justice. You know, the governor appoints a presiding justice, and they don't rotate. You are presiding justice forever, until you leave.

MCCREERY: Justice Kline is a good example of that, having held the job for a very long time in his division.

I wonder how your own judicial voice, shall we call it, might have evolved over those years. Did you note any development in your methods, your process?

WERDEGAR: No. Going back to all the experience I had had and all the writing I had done, I think my voice, such as there is a voice, is pretty straightforward. I don't know what you mean exactly by a judicial voice. I've never written with great flair or drama. Pretty straightforward, I think.

MCCREERY: What about the length of your opinions vis-à-vis those of your colleagues?

WERDEGAR: I can't remember. No. This was more than twenty years ago, and I've had so many Supreme Court concerns since then. We gave the cases the treatment they deserved.

MCCREERY: How good a fit was the job for you?

WERDEGAR: Wonderful, I thought. It would be for others to say what they thought. [Laughter] I mean, it was difficult being so alone and not having the collegiality that most have and others coming on after me have had. That was hard, but I've been used to that my whole career.

MCCREERY: What women colleagues did you have outside the First District in the wider Court of Appeal?

WERDEGAR: None. I did go to some conferences, but mind you there were only ten women Court of Appeal justices in the state at that time.

MCCREERY: Just quickly, what other interaction did you have with the Supreme Court during your time on the appellate court, other than something around an opinion?

WERDEGAR: I can't remember any. I don't exactly know what you mean. Socially or going to events?

MCCREERY: Or just having a different window on that court's work than when you had been there as a staff attorney?

WERDEGAR: I can't remember what changes, if any, occurred on the Supreme Court while I was on the Court of Appeal. Perhaps your research would reveal that.

MCCREERY: I'm sure you had your hands full.

WERDEGAR: Well, yes, and I don't know how we would interact, unless you're talking about being on committees, which I wasn't, or knowing each other previously and socializing, which hadn't been the case for me. No.

MCCREERY: Thinking back now, how do you evaluate your several years on the Court of Appeal, as a justice, as a stepping stone in your career? What did that bring to you?

WERDEGAR: It allowed me to be appointed to the Supreme Court. [Laughter] Certainly I'm glad I had that background. Reflecting on how things have changed, as I've mentioned, at that time a litigator became a trial court judge, and any appellate judge had been a trial court judge. Now we have three appointees who have never been either litigators or judges, and all mostly professors. It's a very different perspective on the part of the appointing authority.

I think there is a lesson there. George Deukmejian had this view. Pete Wilson was a bit more flexible, but he didn't throw all this to the winds. A bit more flexible, and certainly in my case he was flexible. Jerry Brown, obviously, has just spoken as to what he's looking for.

I do think having been on a court before you come here is helpful, and I think having served here as a staff attorney was as helpful as having been on a trial court for arriving at the Supreme Court. I really do. There's much that you learn about procedures, and history, and approaches, and balance. My background, to me, was essential.

I would have benefited from more background. I would have benefited from being a trial court judge. I probably would have benefited from being in a law firm or a litigator. That didn't come to me. I'm glad that that lack did not preclude me from having the career that I've had.

MCCREERY: Speaking of Governor Wilson, just briefly, what view did you take of his governorship as it went on?

WERDEGAR: I thought he was a terrific governor. We saw some of him — well, once I was on the Supreme Court and Ron George was here and he was around, we would see him occasionally. But he was a wonderful governor, and I think it's a shame he imposed term limits on himself.

MCCREERY: That did all come during his time, didn't it?

WERDEGAR: He promoted that. He was a good governor. I don't even think that's particularly controversial. As always there were certain issues that divided the populace, but I think he really was a good governor.

MCCREERY: You got to have a family connection to his administration, as it turned out. How did that go?

WERDEGAR: That's right. He appointed David as director of health policy planning. I guess that's one reason we saw a bit of him. David enjoyed his work, did a good job. He was well suited for it, having been health director of San Francisco and having started the family practice department at UC.

MCCREERY: Thank you, Justice Werdegar, and I look forward to getting you onto the Supreme Court next time.

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