

INTERVIEW 7 (APRIL 16, 2015)

MCCREERY: We spoke last time about the transition period when you were appointed to and took your seat on the Supreme Court. But you've thought of something we spoke of last time that you'd like to return to on the Court of Appeal. What was that?

WERDEGAR: Thank you, Laura. It's nice to see you again on this bright, sunny day. My recollection is that last time we touched on the jurisprudence of the so-called Lucas Court with respect to harmless error. It has been remarked that the court perhaps, in the eyes of some observers, never finds that the error is harmful.

I can't join that observation, but I will say on the Court of Appeal — I think you might have asked me or I volunteered — that there was a case that I remember where I found the error was not harmless, and I reversed. This had to do with a prosecution for a prisoner having possession of a razor blade — not an earth-shaking case, but he was tried for that. He pled not guilty, and when we got the transcript on the appeal, in the Court of Appeal, it developed that the trial court, contrary to what is usual procedure and necessary procedure, had failed to instruct the jury as they went in to deliberate that the prosecution's burden was proof beyond a reasonable doubt.

I reversed that. I found that it was not harmless, that that was critical to disposition of a criminal case. In my opinion — and I'm looking now at something that quotes me — I said, "If any phrase should be ringing in the jurors' ears as they leave the courtroom to begin deliberations, it is 'proof beyond a reasonable doubt.'"

I wanted to bring that up again today because this same article that was discussing that case tells me on retrial the defendant was acquitted. So presumably on retrial the jury was properly instructed about "proof beyond a reasonable doubt." The evidence was circumstantial. I can't be sure, but I thought that was an interesting conclusion to my reversal of a criminal conviction so I did want to bring that up.

As you say, we were talking about many things that were pertinent when I became a new member of this court. I think I didn't speak to you about the plaques that every justice's chambers have. The plaques on the wall — they're brass plaques, and I'd be happy to show you mine — show

the succession of justices that the current justice has joined. In my case, as we've referenced, I succeeded Justice Panelli. I'd like to say that when I was on the Court of Appeal Justice Panelli had a retirement party, and I was invited to be the lone speaker to bid him farewell into his retirement. So I think it's a nice poetic circle that I was then appointed to have my name affixed below his on the plaques. We can go over and look at the plaques, if you like.

I came across a letter from Justice Raymond Sullivan, one of the great luminaries of this court, whom I had met at a function in 1995. It's dated. He is in my line of succession, and I must have shared with him my great pleasure in that — not that it reflects on me in any way, but I was just delighted that he was there.

So he wrote me a letter, and among things he tells me about — with respect to the plaque in my chambers, he kindly says, "I see that I now have another distinguished successor as well as notable predecessors," which was very gracious of him. But he tells us how these plaques came to be. I'm quoting Justice Sullivan now:

"I have talked with Ed Panelli about the plaques. The idea for them originated with Chief Justice Donald Wright and was implemented by Bill Sullivan, former clerk of the court and now deceased. Bill came to the court in the early 1920s and at one time shared a room with Boalt graduate Ray Peters, the only two law clerks on the court."

I'm inferring from this that in the 1920s, Ray Peters and the subsequent clerk Bill Sullivan shared a room, and they were clerking for the court at that time.

"Bill," — that's Bill Sullivan, "had a detailed memory of all the occupants of the various chambers."

So we have to credit Bill Sullivan and be grateful to Raymond Sullivan for sharing that with me.

MCCREERY: Is it easy enough to read the names from the plaque?

WERDEGAR: Very, but we can't move it. We have to go look at it. It's affixed to the wall so I can't bring it to our place in the room. Do you want to go read them?

MCCREERY: Sure [and both go to look at the plaque].

WERDEGAR: As we were saying looking at that plaque, I noted that I was the 108th justice appointed to the California Supreme Court and the third woman and the first mother and grandmother ever. [Laughter]

MCCREERY: Thank you very much for showing me that. We looked as far back as William P. Lawlor at the top of the plaque, who held the seat from 1923 to 1926. Then you were the tenth of the names on the plaque, right after Justice Panelli. I thank you for showing that to me and for sharing Justice Sullivan's letter.

WERDEGAR: Yes. I was happy to come across that.

MCCREERY: What other interaction did you have with him after this, if any?

WERDEGAR: Justice Sullivan? In those days, when Malcolm Lucas was chief — we still have Christmas parties but they have evolved into very different styles and types. All these years we've been working it out. What's best for the whole court and for the staff?

In Justice Lucas's day we had more formal parties. I think they were held at a hotel one time, and the justices were at one table and the staff were at other tables. Justice Sullivan, and Bernie Witkin, as well, used to come. That's when I became acquainted with him, and I would only see him on those occasions.

But also as a staff attorney on the Supreme Court I decided I needed an education on writs, which are a very specialized part of our practice and part of our concerns. Justice Sullivan was teaching a class on writs at Hastings, which he allowed me to audit. That was a great delight, to see him as a teacher.

On the Court of Appeal, where I'd also been a staff attorney, we had writ attorneys. Up here there was no such specialized staff individual. That's when I went over and took a class on writs from Justice Sullivan.

MCCREERY: What was his style as an instructor?

WERDEGAR: Just gracious and engaging.

MCCREERY: Thank you again, and perhaps that letter can end up where others can see it in the future.

WERDEGAR: There's another letter I didn't keep, and I don't know if I mentioned it, in connection with my appointment to this court. But it

came to me, and I think it's worth noting. I have no idea who sent it now. I'm not even sure there was a return address. I would say there probably wasn't a return address.

I open the envelope, and inside is a sheet of white paper. On it is a drawing of a baby, a pot, and an ironing board. I think the message was pretty clear. [Laughter] That's the way it was.

MCCREERY: My goodness.

WERDEGAR: Somebody had an attitude about my appointment. [Laughter]

MCCREERY: Thank you for telling me, in any event. Unless there's anything further that you'd like to say about our topics from last time — and feel free to bring up any further that come to mind — let's move on to our



WITH FAMILY IN HAWAII — JUSTICE KATHRYN MICKLE WERDEGAR AND HUSBAND DAVID WERDEGAR, M.D. (THIRD AND FOURTH FROM LEFT) WITH SONS (L.-R.) MATTHEW AND MAURICE AND FAMILY, DECEMBER 2013.

planned subjects for today. We want to begin talking about some of the opinions you authored as a justice of the Supreme Court. We've mentioned ahead of time a couple that we intend to look at. But let me ask you first, generally, what you recall about the process of starting to write opinions and the significance of that as it may have differed from the Court of Appeal?

WERDEGAR: The process of writing opinions. If an opinion was assigned to me, the first thing — I at this point now had a staff of five attorneys — was to determine which attorney would be having the opinion. I had a staff in transition when I first came. Three of the staff that are with me to this day were with me when I started, day one. Two of them had been Justice Panelli's. One I brought from the Court of Appeal. I feel really fortunate that they're still with me. I guess it's been working well.

But I had two open slots, and there was some impermanence in how those were filled. But as time moved on, my staff would take whatever cases were assigned to me. If they're free and they need a case, they'll go take a case. It's never been a problem.

Over the years, certain members of the staff have become extremely well informed on certain discrete areas of the law, such as — well, right now CEQA, the California Environmental Quality Act. I have an attorney who's an expert on antitrust and at least two attorneys who are experts — they don't even need, hardly, to look at the books — on criminal law and death-penalty law. But it doesn't mean they always have those cases.

I would let my staff — I would ask my staff — to take the briefs and assess the case and decide how they feel it has to go. If they were unsure, if it could readily go either way, they would come and talk to me. But they knew me as a judge who did not have a particular predilection, that what I wanted is, "Just tell me where the chips fall." By and large, maybe with one exception, I've had a staff that has no agenda, and they know that I don't, so that's worked very well. As everybody knows, by the time you get to the California Supreme Court your staff is drafting the opinions or what first are "calendar memos" and then later shaped into opinions. Each justice edits them as little or as much as he or she feels they need or want to.

MCCREERY: Backing up to the actual part about assigning the opinion, how did Chief Justice Lucas, in this case, use his power as chief to mete out those assignments?

WERDEGAR: Who knows? I mean, these decisions are not in any handbook. With Justice Lucas, the belief was, the rumor was, that he had a staff attorney who did it. With Justice George, I think he made the decision but also worked with his principal attorney.

It would never become an issue unless people felt the assignments were unfair. And sometimes there would be a little grouching, not from myself but some other judges might feel they weren't getting enough "high-profile" cases. That's the only complaint I've ever heard. It's never been my complaint. I think in my case it's been fair. And as we'll see, I got a couple of high-profile ones early on when I joined the court. [Laughter]

How each chief justice did it? I imagine they looked at the workload of individual justices. If a justice produced fewer opinions than others that might be taken into consideration in not assigning fresh cases, but I don't know. You could look at that as a reason not to, but you could also say, "A judge shouldn't have their load diminished because they're not producing their cases." But you don't want the litigants to wait more than they have to, and of course the process up here is very lengthy for the poor litigants. So you probably look at how many cases the judge has.

Certainly the chief looks at who he thinks might get a majority, and the chief would in many cases discern that from comments made at conference when we granted the case. If one judge said, "I think the C.A. is right, but we probably should write on it," or another judge said, "I think this is really wrong," the chief would assess those comments and certainly want to assign the case to somebody who's going to get a majority. Otherwise it's a waste of time. You can't always tell, but I know that would come into it.

MCCREERY: Thank you. Before we discuss a specific case, let me ask whether your very first opinion stands out in any way?

WERDEGAR: Yes. [Laughter] Did you know that?

MCCREERY: I might have guessed. [Laughter]

WERDEGAR: My very first opinion was a welfare search for a mentally disabled lady living by herself. I forget why it came before the courts, but the social worker went into her home and found whatever she found that brought the case to the attention of the courts, so it was a so-called welfare search.

I had on loan at that time a very capable staff attorney from the central staff, and she drafted for me an opinion that concluded that that search was illegal. Whatever they had found that brought the case before the courts I don't know. I thought about it, and I decided that yes, probably it was illegal.

As we do, we circulate our calendars around, and nobody agreed with me. So I rethought it. You have a choice when you don't gain the concurrence of your colleagues. Your choice is to give the case up because you simply cannot fathom writing something contrary to what you stated first, or you rethink it and you come to see the wisdom of your disagreeing colleagues.

In that case I came to see the wisdom of my disagreeing colleagues, and so I came around and decided that under the circumstances — this not being a criminal entrance or anything to do with criminal law — that perhaps, whatever it was, a warrant or probable cause wasn't necessary. I do remember it because my first case went nowhere and came back to me, and I rethought it. [Laughter]

MCCREERY: What do you recall about actually speaking with your colleagues about the case, if anything?

WERDEGAR: At that time, and throughout most of my time on the court, there wasn't a practice of justices wandering around talking to each other about cases. It was in writing. That differs according to personal preference. Maybe some judges walk around and talk. I know when I was a staff attorney here, Justice Grodin would wander the halls and talk to everybody, staff and judges, about cases and exchange ideas.

At the time that I was here that was not occurring at all, and there are a couple of reasons. One is the personality, perhaps, of the judges. But another is, if a colleague is just really deep into one case but you're working on three other cases, to have that person come in and want to discuss that case with you is very disruptive — just because it's front and center on his mind. Also, the issues are sufficiently complex that unless the discussion is very focused not much is to be gained by kicking it around.

But mostly, it's the nature of the work. I should note there's more individual discussion going on now. Anytime somebody wants to talk to me about a case that's of paramount importance to them, I will. But I have to put aside whatever it is I'm working on.

Then, once we reconfigured the court when we came back after the earthquake, as I think I mentioned in an earlier interview, that diminished the casual opportunities of speaking.

As I might have referenced, people who have children know that if you sit down and say, “How was school today? Anything happen?”

“No. Nothing.”

But if you’re driving a carpool or you’re walking with the child, you’ll hear all sorts of things in a more natural, unstructured way.

I think the physical setup of the court is not conducive to casual exchanges. We did make the decision, as I said, to have these pods where our staffs are readily accessible, but the other justices may not be so. So it’s a combination of factors, and personality certainly is a part of it.

MCCREERY: Thank you. We mentioned a couple of specific cases in which you wrote the majority opinion that we might touch on today, the first being from your first year on the court, 1994, and that’s titled *Advanced Micro Devices v. Intel*.¹⁷ What do you recall about the significance of that?

WERDEGAR: There were several opinions in 1994 that we’ll be talking about and some that we won’t, but that was one of the important cases. This was 1994, and the case was one of the early cases where this court was developing its jurisprudence relating to arbitration. Arbitration at that time was emerging as a “more important than it had been” dispute resolution resource.

In a case that preceded *Advanced Micro Devices* before I was on the court, called *Moncharsh v. Heily & Blase*,¹⁸ the court had reviewed an arbitrator’s award where the allegation was the arbitrator had made an error of fact, or perhaps it was an error of law. Under the statute governing arbitration awards in this state, judicial review is very limited, and it is limited to an arbitrator exceeding his powers, acting in excess of his powers.

The court, before I joined it, decided that an error of law or fact is not an act in excess of the arbitrator’s powers and it’s not cause for judicial review to correct or vacate the award. The reason given was that parties, private parties who have sought to resolve their dispute through private arbitration, have done so because it’s less expensive and it’s much quicker

¹⁷ 9 Cal.4th 362 (1994).

¹⁸ 3 Cal.4th 1 (1992).

and that, in agreeing to do that, they contemplated that the arbitrator's award would be final and there wouldn't be judicial review — the thinking being that if you get into layers of judicial review you're defeating the purpose of this commercially beneficial quick process of alternative dispute resolution.

In *Advanced Micro Devices* the issue was not that the arbitrator had allegedly made an error of law or fact. It was that the arbitrator, in fashioning his remedy for the breach of contract he had found between Advanced Micro Devices and Intel — he found that Intel had breached the covenant of good faith and fair dealing — the arbitrator fashioned a remedy that was more in the nature of an equitable remedy and one that, had the case been brought in court, the trial court could not have done. And it was not one that the parties had agreed to in their contract agreement. So did the arbitrator exceed his powers, permitting judicial review?

This was a significant case because we held that an arbitrator has more flexibility than a court to fashion a remedy so long as that remedy is drawn from “the essence” of the contract and is reasonably fashioned and related to the nature of the breach. So that was important.

After that case I was invited to speak before the American Arbitration Association on arbitration, which I did. I went back to my speech, and I want to say that the difference in the landscape, with respect to arbitration, twenty years ago and today is quite marked. The theme of my speech was mutual benefit — the title of it was “The Courts and Private ADR: partners in serving justice.”¹⁹

My thesis was that for commercial interests and private parties of equal strength to agree to have private arbitration could be a beneficial supplement to judicial processes, and that maybe the courts could learn something from the streamlined nature of arbitration. Arbitration would always need the courts, I said, because we establish the law that is going to govern the arbitration proceedings, and we also are there to oversee that no egregious violation of rights or such occurs.

That speech was in the context of the premise being that these are private individuals of equal bargaining strength. Today, of course, mandatory arbitration has come into the picture. Any commercial entity or any

¹⁹ January 12, 1996.

product or service that you choose to purchase or avail yourself of usually has a mandatory arbitration contract, whether it's your telephone bill or your credit card or your health care provider, and it's not parties of equal bargaining strength. It's serving a completely different purpose.

Also, apart from that circumstance, there also is some concern that, even with private arbitration involving corporations and so on, the more cases that go to arbitration the less opportunity the courts have to establish the law, so it becomes very ad hoc. Often people go to arbitration because they want to keep the resolution secret, so there are problems today that one could not foresee twenty years ago.

In the course of my speech I mentioned that the court had before it a high-profile case called *Engalla v. Kaiser Permanente*.²⁰ After my speech Justice Mosk, for the court, wrote an opinion in *Engalla v. Kaiser Permanente* that I think came as a surprise to many, saying that the Kaiser health care system, which requires its subscribers to go to arbitration for medical malpractice allegations, was not — contrary to its assertions and contrary to its representations to its subscribers — was not fair or prompt, that there were inordinate delays.

I think the patient that was suing had died. Now, that could happen if the illness is very severe and grave, but in this case it had stretched on and on and on. The assertion was that the arbitrators are not necessarily unbiased.

Out of that, Kaiser said, "Oh, we had no idea."

Kaiser appointed a blue-ribbon committee to examine their procedures and suggest how they might remedy this. The blue-ribbon commission suggested that Kaiser have an independent arbitration-oversight board, statewide, to look at its procedures, make suggestions, and monitor these arbitrations.

I mention it because, ironically enough, my husband was recruited to be the first chair of this Kaiser statewide arbitration-oversight board. He had the responsibility of selecting the statewide members — diverse in ethnicity and background and geography — except for the few that Kaiser Hospital gets to appoint. He had responsibility for setting up all the procedures — and he still serves today — and setting the agenda.

²⁰ 15 Cal.4th 951 (1997).

To report on what he says, Kaiser today has a very fair arbitration system, neutral arbitrators. The background of the arbitrators and how they've ruled is fully disclosed to the patients. So that's been an interesting evolution and, I thought, a curious coming-around of the connection.

MCCREERY: To what extent could this Kaiser model be used elsewhere, if you know?

WERDEGAR: I don't know, but I do know that the Legislature has looked at arbitration and there are certain regulations about — I'm not an expert on this legislation, but — I think it's required that the background of arbitrators be disclosed. But don't hold me to the particulars.

There was another arbitration case much later in my career where, after our decision, in which I dissented — I hope we can come to that — there was a legislative hearing about how to make disclosure about the arbitrators more widespread, more available. In a lot of arbitrations the parties get to each choose their own arbitrator and then agree on a neutral. As far as I know that works fine.

MCCREERY: You mentioned the two concerns in the broad picture of private arbitration not only keeping the courts from advancing the law in California but also allowing the parties to hide the results from public knowledge and action. What sense do you have about how real those concerns are?

WERDEGAR: That's part of the world outside this building. Really, I don't know. I think they are real insofar — from my perspective — our job is to set the standards of law so that these decisions are not ad hoc, and I'm concerned that if these large cases — these are not the consumer mandatory arbitration cases, but the large cases — are not brought before us, the law doesn't have the opportunity to develop or embrace new conditions. We are left static, in a way. But it's just a general concern. I have no practical knowledge about how it's playing out.

MCCREERY: Thank you for mentioning your speech to the American Arbitration Association back then and for noting that things have changed radically in this realm.

WERDEGAR: Strikingly so. Mine was this optimistic “partners in serving justice,” and “we'll work together in harmony,” and “it's good for the courts, and it's good for arbitration.” That could be, in a perfect world, the case.

MCCREERY: But we've seen great consolidation of corporate entities, among other things, which, as you say, often have these arbitration issues built in for all users.

WERDEGAR: But also, everywhere people go now, whether it's employment or a product defect or anything, it's mandatory arbitration, which means — scholars and observers of this have been very concerned that we are minimizing the constitutional right to trial by jury by enforcing the mandatory arbitration. We have to distinguish mandatory arbitration from consensual, equal-bargaining-power private arbitration. They're two different experiences.

MCCREERY: Thank you. We'll try to come back to the later arbitration-related case on another day, if you're willing. We also thought we might touch upon a case called — if I have this correct — *Lisa M. v. Henry Mayo Newhall Memorial Hospital*,²¹ which you released in 1995.

WERDEGAR: I did, yes. In that case, the factual circumstance was that a young woman who had had a fall, a pregnant young woman, went to the hospital to be examined, to see if her fetus had been damaged. She was in the examining room alone with a male technician who was doing an ultrasound in the lower abdominal and pelvic area. He persuaded her that he needed to insert the device into her. She later came to know that this was not appropriate and it was a sexual assault, so she sued.

The issue in the case was whether the hospital could be held liable under a doctrine known as *respondeat superior*, which means that an employer is responsible for the torts of an employee that are committed “within the scope of the employment” — that's the critical phrase.

The majority held that this technician's assault was not within the scope of his employment because nothing in the employment — unlike injuries during fights that the court had addressed in earlier cases, where the nature of the interaction of the people in the employment had led to the fight — there was nothing related to the employment that would have promoted this. His desire, his emotional motivation, was strictly of his own design, and it could not have been anticipated.

²¹ 12 Cal.4th 29 (1995).

Going back, I'm heartened to see on her behalf, that we allowed her to go back to the trial court and continue her cause of action for negligence on the hospital's part. If the hospital were negligent in screening this employee or training this employee or negligent in not having a second person in the examination room, she still had the opportunity to show that. But we held that the hospital was not liable under the doctrine of *respondeat superior*. It was not within the scope of the employment.

MCCREERY: This opinion got a lot of attention when it was released, and people expressed surprise, somehow, at the way it came out.

WERDEGAR: Not having their comments in front of me, I can't really respond to why they were surprised. I did come across something that said it was not well received. I did see that the press reported the opinion "infuriated some liberals and annoyed others." Well, they wanted the hospital to be liable, but that's not my concern.

I've thought about that opinion a lot because it had to have been a close case. But I'm unaware of any law that has deviated from it or has rejected it or that it has created any precedent that deprives people of legitimate recourse. That's all I can say. People are often going to be disappointed by opinions. Some will celebrate, and others will berate.

MCCREERY: Certainly, in any case that is so.

WERDEGAR: Absolutely.

MCCREERY: But that's an important piece of information, that — as you say — as time went on nothing came around that suggested it played a larger role in other —

WERDEGAR: Not that I'm aware. And, you see, if the hospital had been negligent in some way, at fault in some way, she had the opportunity to show that on remand. But they're not strictly liable. If the hospital were strictly liable, there wouldn't be any question of what motivated this technician and whether his actions were foreseeable.

The next one, were it to happen again, I guess the argument could be made, "It *is* foreseeable." But the employment has to have some connection. It could be argued that they were negligent in allowing a male to examine a female without a second person present.

So I have thought about it, but I think I landed in the right place.

MCCREERY: The next opinion we thought we might touch on today came in April of 1996, titled *Smith v. Fair Employment and Housing Commission*.²² Please talk to me about this, which was a landlord case.

WERDEGAR: We call this the religious landlady case. This was back in 1996, and again it's interesting to look back because the mores and expectations of the time are so different now. But Mrs. Smith was a landlady. I don't believe she lived on the premises, but she rented apartments. A couple came and represented to her that they were married because she said she wouldn't rent to unmarried. But they weren't, and when she discovered this she refused to honor the contract to rent, her point being that cohabitation — unmarried sex and cohabiting together — was in violation of her religious beliefs.

The couple brought a complaint before the Fair Employment and Housing agency, which sustained their complaint. The fair employment and housing laws prevent discrimination on the basis of marital status. The first legal issue was, is living together unmarried “marital status” or does “marital status” just mean divorced or widowed or single? But the Fair Employment and Housing Commission said marital status embraces your lifestyle of living together unmarried, and they said that her refusal to rent to them did violate the Fair Housing Act.

She sued. The Court of Appeal agreed with her that she didn't have to do this. It was in violation of her religious liberties. This court, in an opinion written by me — I was assigned the case — held that she did have to abide by a civil law of general application that was not targeted to discriminate against religion. We went on to say that her religion did not require her to invest in rental units, and this law didn't burden her financially because she could use her capital to invest in something else. That was the upshot of the case.

MCCREERY: How difficult was it to reach the conclusion that you did?

WERDEGAR: Legally it had some nuances because we had to deal with the federal Religious Freedom Restoration Act, and we dealt with that. We were trying to avoid constitutional issues, which is a guiding principle of all of us when we take cases. If we can decide the case on non-constitutional

²² 12 Cal.4th 1143 (1996).

grounds, we try to do so because dealing with the Constitution becomes a much more weighty and portentous — if that's the word — matter.

We held that the law didn't substantially — this is federal law language — didn't substantially burden her religion because her religion didn't require her to rent and she had other options to invest her capital. So she could continue to have her religious beliefs. Again, a general law, a civil law, of general applicability that isn't targeting religions is valid. We have to live that way. Otherwise everybody would be opting out of laws.

MCCREERY: Where did that go after your opinion came out?

WERDEGAR: I think it stopped there. I don't think it went on, if that's what you're asking, to the United States Supreme Court.

MCCREERY: Oh, no. I simply mean, how was that issue addressed again in subsequent times?

WERDEGAR: It's a pretty fundamental issue, actually. I can't remember other cases. Of course nationally, today, there's much going on about that but we're not talking about that. It's pretty standard that general laws — civil laws of general application that don't target religions — if you're going to engage in commerce in the marketplace, is the idea, then you have to abide by laws of general applicability.

There is an interesting aftermath to that case. Not long after, I was invited by a women's group — lay women, not attorneys — to speak.²³ It might have been a Republican women's group. So I agreed to do so, and I gave them a general speech about the courts, the hierarchy of the courts, the difference between the trial court, where you have witnesses and juries and you find facts, and the Courts of Appeal, where you accept the facts that the jury found but you look at errors of law, and the Supreme Court, and how we take cases where there's a conflict or that require a statement by the highest court.

Then I took questions. A woman in the audience raised her hand to ask me a question. I had noticed her before. She was, I believe, wearing red, and she had a heavy chain with a large cross hanging on it. She raised her hand, and the question came to, "How can you deprive me of my right to rent units when it's in violation of my religious belief?"

²³ California Federation of Republican Women, March 20, 1998.

It turns out the lady asking me the question was Mrs. Smith. [Laughter] You can imagine how I felt. There I was in this auditorium, speaking to people. So I told her what I've told you, that under our law, a law of general application that doesn't target religion and doesn't unduly burden the individual has to be abided by all who enter the marketplace.

After the speech and some other questions, as I was leaving, Mrs. Smith came up to me. She had a copy of my opinion, and she asked me to autograph it. I didn't know what to do. I didn't know what her frame of mind was. I mean, obviously it wasn't happy about the decision. I did ultimately sign it, but I was very uncomfortable doing it. [Laughter] So that was an aftermath of that case.

MCCREERY: Earlier in the process of this coming to you at the Supreme Court — because it involved this state act and the state housing department and so on — Attorney General Dan Lungren had been a part of this and had been asked to defend the department of fair housing, and so on.

WERDEGAR: Presumably.

MCCREERY: Yet he, I think, as a devout religious person, was not interested in doing so. Did you have any interaction with him at any time in all this?

WERDEGAR: No, but I'm not — you've evidently done some research on the point. Did he decline to defend the department? No, of course I didn't. I hadn't had any interaction with him since my confirmation.

Sometimes the attorney general is put in a difficult position. I know our current attorney general has had some issues thrown her way that, whereas as state attorney general it would normally be her duty to defend an action, but personally she doesn't want to. So he probably appointed or asked another attorney in another agency. I don't know the details of that.

MCCREERY: What else might you recall about how this opinion was received? As we've mentioned, it got a lot of attention from various parties.

WERDEGAR: I have no recollection. That was twenty years ago. You move on. You have so many cases coming. There are certain ones I remember how they were received, but this one — I think our court was divided. Our court was divided. It was 4–3, so obviously it was a touchy issue. But our job is to decide them as best we know how and move on. I know it was a

high-profile case, but I don't recall a huge press reaction or a huge public reaction, not like some decisions that we've had.

MCCREERY: But it did go down in the record as an important decision.

WERDEGAR: It was very important, but I think it was pretty mainstream in its jurisprudence.

MCCREERY: Are there other opinions of those first couple of years that we didn't identify ahead of time that you want to bring up before we move on into the Three Strikes case?

WERDEGAR: No. I'd be happy to go on to the other high-profile case.

MCCREERY: All right. The matter of the Three Strikes case, as we refer to it, had actually started in 1994 when Governor Wilson approved an Assembly bill that would institute a "Three strikes and you're out" aspect to California's felony sentencing. That fall the voters approved Proposition 184 at a high rate, 72 percent, as I read it, requiring a twenty-five-years-to-life sentence after a third felony conviction. This, of course, came after the events of the Polly Klaas case and the public's familiarity with that case and with the perpetrator, so that was some of the context of that time. Talk to me, if you would, first of all about how exactly the case was assigned to you to write.

WERDEGAR: I have no idea, and I've never known. I was the newest member of the court. But it must have been a good assignment because we came out with a unanimous opinion, and I think externally that was a great surprise to the public and to court watchers.

It was an initiative and, as you mentioned, the legislation. They were parallel. They covered the same subject, minor differences. Every Court of Appeal in which a challenge to the law had been brought had said the law was fine. Then one lone Court of Appeal — and I don't today know who it was but I congratulate them on their fortitude, because — for two reasons — you're so busy on the Court of Appeal that if every other court has said it's okay you move it on. Also, as you implied, it was a very high-profile issue. But one Court of Appeal said, "No. This is not a valid law." So we then had to take review of it because now we had a major clash, a major conflict, on an important issue.

As you say, it was in the aftermath of the notorious and tragic Polly Klaas kidnapping. The defendant who had done that heinous crime had many felonies, and so it seemed logical: If they've had three felonies, shut them up for life. We looked at the law, and the law deprived judges, trial court judges, of the discretion to strike one of the defendant's priors.

This was in contravention of a previous broadly applicable statute that gave trial courts discretion to dismiss cases and within the power to dismiss — in the interests of justice — within the power to dismiss is the power to dismiss a prior for sentencing purposes. So we looked at it, and we came to the conclusion that the law did not supersede that statute of discretion, didn't abrogate it, and we harmonized the two statutes.

Our approach was one of avoiding the constitutional issue because once you have the executive hamstringing the judiciary, you're involved in some separation-of-powers issues. Judges have sentencing discretion within the confines of the law. So we interpreted it to maintain its constitutionality and never had to get to whether it was unconstitutional. We held that, contrary to what the voter pamphlet might have suggested to the voters, trial courts still had discretion, in the interests of justice, when appropriate, to strike one of a defendant's priors so that defendant would not be subject to the "Three strikes and you're out" law.²⁴

MCCREERY: What inkling did you have going into this just how high-profile it would be?

WERDEGAR: We had to know it was high-profile because the governor at that time and his predecessor both were very much tough-on-crime public figures, and it was an era when crime was in the front of many people's minds, certainly politicians' minds. Much talk about "tough on crime." So I guess we had to know it was kind of a hot potato, but I don't dwell on these things.

I circulated my draft, and everybody agreed. That included the Deukmejian appointees. That's who the court was then, Deukmejian appointees and myself.

MCCREERY: You found quite a level of agreement at that draft stage, did you?

²⁴ *People v. Superior Court (Romero)* 13 Cal.4th 497 (1996).

WERDEGAR: I don't remember the stages it went through, but the end result was the end result. The law still allowed the trial court to exercise its discretion.

We had a subsequent case — I can't tell you the name — maybe some years later, assigned to somebody else, where we then talked about what would be within the judge's discretion and we outlined what the trial court, in exercising its discretion, had to look at. I have not looked at this case in preparation for this interview, but I think its main theme was that you don't have unbounded discretion. It has to be within the spirit of the Three Strikes law. So we narrowly circumscribed it.

Oh, I do want to say that the next morning — you asked me was I prepared — no, not in any way. I knew it was a high-profile case, but I had no idea what was coming. The next day the case was on the front page, I believe, of every newspaper in the state, many of them accompanying it with my photograph. [Laughter] Lots of them named me as author, which was unusual in the general press. They usually just say, "The court did this," if the case is at all of any interest. So many of our cases, most of them, don't get into the general press.

So I wasn't prepared for that. Driving to work I turned on the radio, and I happened to turn on KGO, Ronn Owens. He's a talk show host. Talk shows — their whole *raison d'être* is to get their listeners energized and work over a subject. Well, my goodness. That morning they were working over this opinion, and of course everybody — the host, Ronn Owens, and the callers — they were just feeding on each other's outrage. I mean, it was "outrageous."

That was the reaction of the newspapers. The governor was quoted by one paper as saying, "This is violating the will of the people," because it had been an initiative, and that he was going to see that legislation was introduced to overturn it. The *L.A. Times* headline announced, "Reserved Justice Finds Self at Eye of '3 Strikes' Storm." [Laughter]

I was not prepared for that. There was nothing I could do about it.

Interestingly, legislation was introduced, and the Legislature didn't do anything about what the court had done.

I feel there's a lesson. Just as things have changed with respect to arbitration, things have changed in the ensuing almost twenty years with respect to "tough on crime." As time passed, various observers began to

believe that the law was too harsh, the Three Strikes law, and that it was leading to an unjustifiable overcrowding of prisons. Certain interests began to think that perhaps it should be modified, but because — it was an initiative as well as legislation — but because it was an initiative measure they had to get the public to pass an initiative modifying it.

There was an effort — certainly one, maybe two — that did not succeed. But in 2012 an initiative was on the ballot that modified the Three Strikes law to require — which the law had not previously done — that the third felony be a serious or violent felony, and that law passed. Some of the criticisms of the law — I mean, the stories you would read — were that somebody would be put away for life because he stole a bag of golf balls or something.

That makes for very dramatic storytelling, and perhaps in some cases it occurred. But what the public wouldn't generally know is that often these people didn't just have Three Strikes. They might have had eight or ten strikes, so they weren't being sent off to life for a package of chewing gum or whatever. They were really being sentenced under the law for their entire history. Nevertheless, it did seem — the voters came to believe — that the third strike that triggers this long sentence should be one that, itself, also is violent or serious, and those terms — “violent” and “serious” are defined in the penal code. Not every felony is defined as a “serious” felony.

MCCREERY: And as you say, that made a difference in the 2012 ballot measure over the earlier attempts to modify the law?

WERDEGAR: Yes. That was the amelioration of it. So what twenty years ago was very contentious now evokes little controversy.

MCCREERY: Say more about this principle of judicial discretion and why that's important.

WERDEGAR: You mean at the trial court level? That's just the way our system is. It allows the judge who is observing the defendant, hearing the facts, hearing the case, to tailor the penalty within the constraints of the Legislature. Judges are guided by legislative sentences, but they usually have flexibility. It just allows us to personalize our penalties.

MCCREERY: How deeply held was that principle on your own part?

WERDEGAR: I think it's important. It's a difficult line to walk because you don't want unfettered discretion. You want guided discretion. You want comparability among defendants. But you have a crime that may be the same, but the individual defendant may differ. It's one of those things that you have to walk a fine line.

The Legislature has itself gone different directions. We've had determinate sentences and we've had indeterminate sentences. Neither one is viewed as being perfect, and the pendulum swings. We're constantly trying to refine our approach to what's an appropriate disposition of an individual who has transgressed society's norms.

MCCREERY: It's always interesting to me that these efforts were put forth using this baseball metaphor of "Three strikes and you're out."

WERDEGAR: It was very catchy. It grabbed the public's attention. Yes. And they wanted it, as I say, in the backdrop of this multiple felon doing this unimaginable crime. I can't actually imagine, literally, how he took poor Polly Klaas out of her bedroom through the window. I've never heard how that happened. But I can understand why the public responded.

And the title of the initiative — in fact, titles are a big part of initiatives to get the public's attention. Initiatives are often — not this one, but often — very, very complicated. You get a good title, and you've got the public's attention.

MCCREERY: Did you have occasion to write, yourself, on "Three Strikes" after that 1996 opinion?

WERDEGAR: On Three Strikes? No, I don't think so. I think the only case we had after that was defining what we meant by — in the context of the Three Strikes law — "judicial discretion," what parameters that would have. I don't recall any other issue related to the Three Strikes law coming before us, unless it was something that was factually particular to whether the felony qualified. I have no recollection of it ever again being a big issue. We established the parameters. Maybe we had to do some fine-tuning along the way, but I don't remember.

MCCREERY: Just in this last fall's election, November 2014, there was the Proposition 47 that reduced penalties for some crimes, which was thought to be something of a follow-on, also passed by the voters.

WERDEGAR: Yes, and the court right now is dealing with, “Who benefits from that? What are the procedures below?” We have multiple cases in front of us now where we will have to sort that out.

MCCREERY: Taking the broad look, how do you personally assess the Three Strikes law and its effectiveness?

WERDEGAR: I don’t think that’s my role. I mean, I’m not an expert on what works in criminal deterrence or criminal justice.

MCCREERY: But you were certainly said to show quite a skill in crafting this unanimous opinion and putting it out in that particular time.

WERDEGAR: Oh, that’s a different skill, a different background.

MCCREERY: So that’s a distinction you’re making?

WERDEGAR: Oh, I absolutely am. I’m not one to assess the benefits or the wisdom of these laws, which is just as well because that’s not our role. Our role is to see what the Legislature has done and deal with it as we have to under the Constitution and other laws.

MCCREERY: It’s fascinating, though, to see how much of an effect it has, the various propositions that come forward — whether or not the court’s asked to interpret them — prison overcrowding and all of these issues the state faces. There really are huge effects.

WERDEGAR: Oh, yes. No question about it.

MCCREERY: Any particular lessons learned from your process in the Three Strikes case?

WERDEGAR: Yes. I think I’ve referenced one, which is: With the passage of time, yesterday’s horrendous, outrageous, huge issue — life moves on and circumstances change. One cannot, in this role of a judge making decisions that impact citizens and impact the Legislature, one can’t be unduly concerned about the reaction if you’ve done the best you can to decide the law according to the law.

That is a lesson. Really, what outrages and upsets people today is likely or can often be gone tomorrow. We can’t sway with the winds. That’s more for politicians, if they choose to do that.

MCCREERY: Speaking of politicians, your opinion in this case did draw the ire of your nominating governor.

WERDEGAR: So I read in the paper. He never spoke to me about it, of course. That would be totally inappropriate. On the occasions that we did speak after I was appointed we never talked about anything that was going on at the court, which is as it should be.

MCCREERY: And as you have said before today, as well. Shall we turn to another high-profile opinion, as they're called? — this one written by Chief Justice George, the re-hearing of *American Academy of Pediatrics v. Lungren*.²⁵

WERDEGAR: Yes, certainly. I'd like to give a little background about that. At issue in *American Academy of Pediatrics v. Lungren* was the constitutionality of a statute that required a minor, which would be any female, be she twelve or seventeen-and-a-half, requiring any female under eighteen, before obtaining an abortion, to get the consent of one of her parents or, if she couldn't do that, judicial authorization.

This statute had been enacted in 1987. It had never been enforced. The lower courts had enjoined its operation. It had overturned or abrogated an earlier statute in this state, which allowed a minor to have any services related to pregnancy that an adult could have.

What's interesting to note as I looked back at this is those services, at that time, were circumscribed. The right to an abortion for an adult was pretty limited. But anyway, a minor could do whatever an adult could do with respect to treatment of her pregnancy. In 1987 the Legislature reversed that and required parental consent or prior judicial authorization. The law had been enjoined, but before I came on the court, I believe, for reasons I can't recall, the court voted to grant review in a case that was challenging the non-enforcement of this. I think the court in earlier times had declined to review it, and I'm told that Justice Kennard was the critical vote this time to have the court take it up. So the court did.

I joined the court after review had been granted, and in April 1996 the first opinion was filed, authored by Justice Mosk. It was 4–3 upholding the law that a minor had to obtain parental consent or prior judicial authorization. Justice Mosk wrote the opinion, and he was joined by Chief Justice Lucas and Justices Baxter and Arabian. Justice Kennard, Justice George, and I dissented. I believe we all wrote separate dissents. We didn't join each other's.

²⁵ 16 Cal.4th 307 (1997).

After the opinion was filed — these things happened in close sequence — Chief Justice Lucas and Justice Arabian left the court, and Justice Chin and Justice Brown joined the court.

Now came the petition for rehearing, and who voted to grant? Let's see. The three dissenters — that was Justices Kennard, George, and Werdegar — George was now chief justice — plus our two new members, Justices Chin and Brown, voted to grant rehearing.

This was the first rehearing — of course I was brand-new — the first rehearing petition that I had encountered. But because of the timing, you rarely encounter one in the circumstances where the membership of the court has significantly changed. My thinking was that the court that's going to be in place is the court that should make this momentous decision, not the court that's going out the door as it upholds this law that had been enjoined for so many years. So that was my motivation.

MCCREERY: I can guess, but say more about why you think that.

WERDEGAR: The decision was not final. It was a divided decision. Two of the justices in the majority were gone. It would be like the dead hand of the law. It's different than overruling an opinion. When you overrule an opinion it's been in place, and you never do that lightly. You don't grant rehearings, usually, either, but neither do you usually have justices in the majority disappear and impose their will on their way out. That's how it felt.

After the case was reheard a year later, the court, in an opinion authored by our new chief justice, Ron George, held that the requirement was invasive of a minor's state constitutional right to privacy. It was too intrusive. It was George's opinion, writing for the majority, joined by myself, Justice Kennard, and Justice Chin. It was 4–3. Of course, the two remaining of the earlier majority, Justices Mosk and Baxter, dissented. But the surprise was that our new colleague who had voted in favor of rehearing dissented.

MCCREERY: Justice Brown.

WERDEGAR: She did dissent. I don't know why she voted to grant, but she may have felt, as I did, that the court going forward should look at this. I don't know. She wasn't the swing vote in the petition for rehearing, so it has no consequence that she voted to grant the petition but dissented in the new decision. That was the outcome of that, and it did attract quite a bit

of attention. Again, another issue that the public feels deeply about and is deeply divided about. Everybody I know — personal friends, had different opinions.

MCCREERY: As you mentioned the rehearing occurred about a year later. The actual decision to rehear was only a very short time after the first opinion.

WERDEGAR: The first opinion was April 1996, and we have to decide a petition for rehearing — I think it's within thirty days or — a short period of time after; none of our opinions becomes final until thirty days unless by special order we make them final immediately. During that period, the parties petition for rehearing and the opinion isn't in effect.

MCCREERY: The timing is extraordinary, though, because, as you say, the members of the court left in that time.

WERDEGAR: Yes. We have the same situation now with a number of cases where prior members of the court were on a case. But they're not final, and petitions for rehearing are before us. We granted one recently, but we have others coming.

MCCREERY: This, though, was extraordinary in a number of ways. The earlier opinion, as you say, authored by Justice Mosk, was the source of surprise to some. He attracted a bloc of colleagues who didn't quite as often vote with him on such things. As I recall, he was making a distinction between privacy rights of a minor versus those of an adult.

WERDEGAR: Oh, yes, of course. I can't speak to whether this was out of character for him or not. People think of Justice Mosk as a "liberal," and they assume that from that would follow liberality in what a minor can do. I don't think that did follow at all. People's views on that and how they felt about it probably could be untethered from the label as liberal or conservative.

MCCREERY: To those of you who tided over between the first decision and the second, how unexpected was it to decide to rehear?

WERDEGAR: You mean, did we anticipate how the votes would go?

MCCREERY: Not necessarily. I just wonder —

WERDEGAR: A petition would be expected, and the result — I can't speak to whether our deciding to do so was unexpected to me. Is that what you're asking?

MCCREERY: Or just that it was an unusual development.

WERDEGAR: It was an unusual development for the reasons that we've touched on, that it's very unusual to have members of the court depart while a case is not final and to have it be a case of such high interest — although we are living through some of that right now. But it's very unusual. Turnover on the court is very unusual.

To have a high-profile case not final when you have new members — a lot has to happen all at once for that to be the case. It was fast, that Chief Justice Lucas and Justice Arabian left and Justices Brown and Chin came on. That's very unusual, and it hasn't occurred since until now. So that's been about eighteen years.

MCCREERY: That just reminds us that the period over which Chief Justice Lucas presided was a period of great turnover, not only just at that moment but earlier, throughout his tenure. There's been quite a period of more consistency since then.

WERDEGAR: Oh, it absolutely was. Yes. That was before my involvement and probably not relevant to my history, but I was a staff attorney on the court. Governor Deukmejian, I think, campaigned on his disapproval of what the so-called Bird Court was doing, and I think he made it a priority to put in place individuals that would moderate that.

I can't speak for the governor, but this is somewhat commonly perceived, and the court proceeded to do that. I read in a clipping, going back, that from the perceived "extremely liberal" — I'm putting quote marks around that — Bird Court, Governor Deukmejian put in a very "conservative court" that was the exact mirror-image of the Bird Court.

Many individuals on that court who came in at that time didn't stay a long time. I think it was understood they were here to do what they could to straighten things out, in their view, and not as a long-term commitment. Many of them were at the end of what might be a normal career span. I'm speculating on all this, but I don't think I'm saying anything that hasn't been said and understood to be the fact.

MCCREERY: But a period of high turnover, repeatedly, has some effect on the court's work.

WERDEGAR: Yes. They granted rehearing in every case they could. There was one case where the Bird Court had overturned a death penalty. They granted rehearing and imposed the death penalty. That's pretty dramatic.

MCCREERY: Returning to *American Academy of Pediatrics*, how significant is it, as you look back, that the new opinion centered on the constitutional right to privacy?

WERDEGAR: It's very significant. That was where it had to go. Chief Justice George, I think, did a beautiful job of tracing other circumstances where the right to privacy had been implicated and implemented. It was controversial. There's a difference between a seventeen-and-a-half-year-old and a twelve-year-old, and I think if the law had been tailored, had been more refined, perhaps the result would have been different.

MCCREERY: And of course one area where the Constitution of California differs a bit from the federal Constitution is this very matter of privacy.

WERDEGAR: That's right. We do have this expressly stated right to privacy, which has been litigated as to what it was intended to do and what it means. But we do have that.

MCCREERY: As a general matter, how often does that particular right of the California Constitution come up for you?

WERDEGAR: Around the time — if you go back to Ron George's opinion — there were many cases that he cited that involved that. We have had it come before us. I'm not at the moment able to cite cases. Of course, it came up in the *Marriage Cases*.

MCCREERY: Sure, later on. Yes. That [*American Academy of Pediatrics*] case did get an awful lot of attention, and it was something of a dividing line, as it turned out, between the court managed by Chief Justice Lucas and that managed by Chief Justice George. That, again, is a matter of timing. But let's use this as an opportunity to reflect a bit more on the time that you did work with Chief Justice Lucas, knowing he didn't stay a great long time after you arrived.

WERDEGAR: I didn't have a lot of personal contact with him. I found him delightful. He did, I've said, have a wry sense of humor. At the time — I think I've mentioned this — he was fairly recently newly married to Fiorenza, who lived in L.A. During my time here, Malcolm Lucas would be here for a conference and then — I mean, he didn't give me his travel schedule, but I know my first couple of weeks I was acting chief, and I had a stack of orders this high to sign because he would be back in L.A. His heart was down there.

MCCREERY: What can you observe, if anything, about his larger role as chief vis-à-vis the other branches of government?

WERDEGAR: Again, this was before my time. But I think after an opinion on the term limits initiative, where this court before my time upheld it, I think he after that had a rocky relationship with the Legislature. These are commonly-known stories.

Something in the opinion, I think, was approving of this. It wasn't just a neutral opinion saying, "The voters have the right to do this, and it's constitutional." I think there was something in the opinion that approved of it as a good idea, and the Legislature didn't take kindly to that.

The story is — I wasn't here — but that Chief Justice Lucas was not thereafter invited to give the annual State of the Judiciary address to the Legislature. They took offense at this approval of limiting their term of service.

MCCREERY: What did you note, if anything, about his relations with the media, and how did he counsel you to handle such things?

WERDEGAR: He had had his difficulties with the media, and he counseled me to be careful. I do know he felt that perhaps he, or no one, would be fairly treated by the media. He did advise me just to be careful.

He said, "The press is not your friends."

And they're not. They're not your friends. They are there to do a job, to take a perspective, to make a story. He was right on that.

MCCREERY: What is your own approach to working with media and their requests?

WERDEGAR: I grant any interview request. I'm always a little apprehensive because they do need an angle, and you're helpless as to what that angle is going to be. But I'm accessible to the press.

When I first came on a reporter called and wanted to do a picture of Justice Kennard and myself — it was a big thing that there were two women on the court — and do a little article. I said fine, but Justice Kennard didn't agree to it.

MCCREERY: What reason did she give, if any?

WERDEGAR: She didn't give me any reason.

MCCREERY: As we've touched upon in discussing the *American Academy of Pediatrics* case, you had two new colleagues on the court at about this time, first of all Justice Chin, who arrived in March of 1996, and then, shortly after, Justice Janice Rogers Brown in May of 1996. Talk a little bit about that transition of Chief Justice Lucas and Justice Arabian electing to retire and then those two new coming on at the appointment of Governor Wilson.

WERDEGAR: Yes, that was dramatic. I'll back up a little bit to say when I came on the court, replacing Justice Panelli, Stanley Mosk said to me, "Any new member of the court makes for an entirely different court."

That's actually a truism, depending on the personality and views of who's left and who's come in. But when you have more than one it was a major change. As one article that I came across related, we were moving away from what would be the Deukmejian Court to what was going to be the Wilson Court.

The press was looking — as they do, that's their job — looking closely at every nuance of everything we did. I think the granting of a rehearing in the *American Academy of Pediatrics* case, to the press, was a signal that this was going to be a significant change.

MCCREERY: What do you think?

WERDEGAR: It was. But I don't think it was that dramatic. I think we were more — these words I find not necessarily accurate — conservative, liberal, moderate — but I do think we moved from what was generally recognized to be a very conservative court to a more moderate court. That's what the press thought, whatever that means.

MCCREERY: How about the announcement that Governor Wilson was elevating Justice Chin? Talk about that particular transition, if you would.

WERDEGAR: I had worked with Ming Chin on the Court of Appeal for three years. When the governor selected me to be elevated, it was public that Ming Chin was another possible, and Janice Brown was also another possible. You might have even told me about a couple of others. Art Scotland was, and there may have been one or two more. But it was no surprise to me that Justice Chin was elevated.

MCCREERY: Justice Brown, as we know, had worked in Governor Wilson's administration. What did you know of her beforehand?

WERDEGAR: Not much except that the governor greatly admired her.

MCCREERY: One feature of her review and appointment that has been given a lot of attention was that she was given a rating of unqualified by the Commission on Judicial Nominees Evaluation.

WERDEGAR: The Jenny Commission, yes.

MCCREERY: And yet Governor Wilson made the choice to bring her in anyway. Was that detail of great note to any of you as her new colleagues?

WERDEGAR: Yes. But it was one of those things where the governor just didn't respect the commission. I cannot speak for what he felt, but he certainly didn't respect their evaluation.

He had worked closely with Justice Brown and felt he knew her capabilities, her intellect, and so on. So let the commission do what it liked. It didn't concern him.

MCCREERY: Now, then, within about five years Governor Wilson had brought on four new members to this court so, as you say, it was now the Wilson-nominated court in majority. Talk about how this reconfigured panel worked together and interacted, if you would.

WERDEGAR: All seven of us, how we worked together?

MCCREERY: I guess you might characterize what the two new members brought that hadn't been there before. What departed and what came in?

WERDEGAR: Going back to Justice Mosk's statement that any new member of the court makes a different court, how different depends on the personality and perhaps the objective of the new justices. Some justices come and they are cautious. They might hew close to the center of gravity. Others might come and want to shake things up and are going to assert themselves

early on. Some of that may be appropriate because it has to be congruent with what your views are as a judge, and some of it is personality.

I would say that Justice Chin came in, and he fit right in. I don't mean that we all are in lockstep, although actually a little-known fact is this court during those years had a high rate of unanimity. But as somebody said, "The ones you dissent in are the ones that are important." But anyway, Justice Chin, I think, hewed to the center of gravity.

Justice Brown was different. She very early on distinguished herself by flamboyant dissents and colorful writing and standing out in that way. Very distinctive.

MCCREERY: In terms of voting blocs, which of course the court watchers identify after the fact, both Justices Chin and Brown were seen to be in fairly frequent agreement with Justice Baxter.

WERDEGAR: I've read articles that said that. These are little snapshots that I wouldn't presume to comment on. I think the cases and the record speak for themselves.

I know when I came on I hewed to the center of gravity. It's been said, and I think accurately, that we have a center of gravity that was moderate on civil issues and maybe more conservative on criminal. It seems that I've dissented on a number of criminal cases.

Emily Green²⁶ pointed out when she interviewed me not too long ago that I sometimes would differ from my colleagues in not upholding what the police had done. I can't answer why. I just look at the merits of the case and decide it as I see appropriate for that case. But Janice Brown distinguished herself by her provocative writing style.

MCCREERY: Provocative in what way?

WERDEGAR: Her first dissent was to one of my opinions. She tended to start out by criticizing the motive of the majority. It was part of her style that, "We can't be all things to all people. We are not philosopher kings." — that kind of rhetoric. But she had a flair for writing, and she expressed it most colorfully in her dissents. The press loved it.

MCCREERY: It strikes me, just upon hearing your description, that's a very different writing style from your own.

²⁶ Legal reporter for the *San Francisco Daily Journal*.

WERDEGAR: It is. I don't have a lot of flair in my writing.

MCCREERY: And yet you are getting promptly to the matter at hand, and that's a difference, too?

WERDEGAR: Yes. I feel that's my role. Justice Arabian used to have what you might call flair. It's congruent, I guess, with his personality. But Janice Brown's writing was not congruent with her persona. Her persona was generally mild, but her writing could be acerbic.

MCCREERY: You mentioned the matter of dissents. I wonder how you characterize the situation that would cause you, personally, to write a dissent, which you tended to do a bit less frequently than some of the others, as I saw it in review.

WERDEGAR: I never looked to write a dissent. Some justices want to write separately. They want to project distinctiveness. That's never been my objective. I will write a dissent only when I can't get others to agree with me *and* I can't agree with where the majority is going and I feel what I have to say is right and is important.

MCCREERY: What are the pros and cons of wanting to be so distinctive, as you've described it?

WERDEGAR: I can't comment on that because it's not my style.

MCCREERY: I just mean in terms of the court's work and how you see it pan out. Anything there?

WERDEGAR: I think separate opinions can be useful in pointing out to the reader issues that weren't addressed, perhaps, or clarifying. I've sometimes written concurrences clarifying something that I think is a little muddy in the majority opinion and either endorsing it or distancing myself from it. Any separate opinion has a different purpose. Often Justice Kennard would write to say that she had previously advanced this position, or something to point out the evolution of her jurisprudence.

MCCREERY: Again, that's a bit of a different style, isn't it?

WERDEGAR: It is a bit of a different style. Generally, all of us want to avoid being like what you see in the United States Supreme Court opinions. The United States Supreme Court is characterized as having all these fractured opinions, where you have to go to subdivision (b)(2) and see that

three other judges agree with that. We are not admirers of the caricature or the character, whichever is accurate, of the United States Supreme Court opinions that are so fractured. Maybe they're not all fractured, but any law student and toiler in the field of law knows there are so many United States Supreme Court opinions that we have to count, who's agreeing with what?

MCCREERY: You mentioned earlier that the media was interested in photographing you and Justice Kennard together when you were the two women justices, and she refused.

WERDEGAR: She declined, yes.

MCCREERY: She declined. Okay. In other matters where you were asked to do things together as a group or in smaller groups, what sort of colleague was she?

WERDEGAR: She had a theatrical side. She was a great favorite of women's groups and would speak to them. I know when she first came on, before she had a second female as a colleague, she would in her speeches make it a point to say that she wasn't just one of the boys and that she was going to bring a fresh independent look.

That reminds me. An article written about the court, maybe within my first year or two, mentioned Justice Kennard as the only woman on the court. I was surprised to read that. Some Court of Appeal judge wrote to me something about, "If belonging means being one of the boys, you've arrived." [Laughter]

MCCREERY: [Laughter] I don't mean to place too much emphasis on the women of the court, but it is of interest. And now, with Justice Brown coming in there were three of you, and I wonder —

WERDEGAR: That's right. Yes. Let me say, at that time it *was* of interest. After Rose Bird was thrown out, it returned to an all-male court. Political history tells that Governor Deukmejian was very interested in getting a woman. He did, but for a time there was an all-male court. Then it was Justice Kennard. So when I came on as a second woman, it was a big news item at that time.

Speaking of the paucity of women, there's an anecdote I want to tell you. Early on, maybe my second or third year — I don't know — the court went for oral argument in the morning. On one of the cases there were two

women arguing — a woman, a female, on either side of the case. Again, going back to 1996, 1995, 1997, women attorneys arguing before our court were unusual, very unusual.

That morning there were two. We got off the bench, and after we exited the courtroom Justice Mosk said, “Quite a morning for broads!”

He did! [Laughter] I thought “what?” — I want to say he generally was delightful. I probably have spoken about him before. He had such a long arc of participation in the political life of the state, and he had a lot of charm. But shrewd. To walk the line that he did and accomplish and experience all that he did, as revealed in his biography, tells you he was astute, very astute.

MCCREERY: What’s an example of his shrewdness, as you personally experienced it?

WERDEGAR: One example that’s probably known is when the campaign not to retain the Bird Court was blossoming. He just didn’t announce whether he was going to stand for retention until the very last day.

By then the campaign was totally focused on Chief Justice Bird — and Justices Reynoso and Grodin in a lesser way. But that trio. I consider that pretty shrewd. Nobody paid any attention to him.

MCCREERY: How did that manifest itself here, behind these walls?

WERDEGAR: I was a staff attorney at the time.

MCCREERY: No, I’m thinking once you became his colleague here. His shrewdness? Later, when you were a colleague of Justice Mosk, I wonder —

WERDEGAR: No, it’s just an overview of what I know about the man and his history.

MCCREERY: When Justice Brown arrived, you described, she had a more flamboyant style in writing and so on and so forth. What about her presence here as a colleague? What do you recall about that in the early times?

WERDEGAR: I anticipated that we would get along, as I knew the governor thought so well of her. But we had a few encounters about cases such that I came to the conclusion that she wasn’t one who wanted to discuss something that was controversial in her view, that I wasn’t welcome to speak with her about a particular case. I don’t think she was happy here. I don’t know if it was the aftermath of her confirmation hearing, which had to have been uncomfortable. I just don’t think she was happy. People didn’t

agree with some of her perspectives, and I don't know how prepared for that she was.

MCCREERY: From the outside world taking an interest in this court, now that there were three women how much attention did that get and did the three of you get?

WERDEGAR: I don't remember that, actually. That certainly was a change. That was a step forward. We were creeping along the bench more and more, but unlike when I became the second one, I don't remember. I'm sure it was noticed. We might have had more women than most other state supreme courts, but I don't recall anything in particular.

MCCREERY: As you moved into several years now in this position, how did you find your own methods and approaches evolving or changing, if they did at all?

WERDEGAR: They didn't that I can identify.

MCCREERY: Say a few words, if you would, about the elevation of Chief Justice George to lead the court and what you saw as his style of leadership — again, in those early years.

WERDEGAR: It was anticipated that he would be a chief. He was made to be chief in the sense that he had such a terrific background and personality and high energy. Because Chief Justice Lucas, in his later years when I was here, the focus of his attention was more down in Los Angeles — whereas Ron George was right here on the premises — of course things changed. He was around more, and he was more — I read — open and accessible to the outside, to the press, and to the Legislature. They restored their invitation for the chief justice to give the State of the Judiciary message.

MCCREERY: In terms of running the weekly conferences and those sorts of gatherings, how did he lead in that regard?

WERDEGAR: I do have this memory of him — the conference would start at 9:15 — coming down the hall with his suitcase on wheels with his materials, coattails flying, just under the wire.

He was just a most engaging person. He had the quality that every chief I've experienced has, which is not manifesting any particular affinity or lack of affinity with any member of the court. Being evenhanded. You'd

never know what their private reservations or thoughts might be. He was a good chief, energetic and involved.

MCCREERY: Once these two newest members arrived, Justices Chin and Brown, how did those weekly gatherings change, first of all, in physical configuration and in character?

WERDEGAR: I don't have a deep memory of what the conferences were like when I first joined the court and I was the last person, except for the chief, to speak. I can't remember that, but I do remember that with the new members — and it lasted that way for a long time — let's see. Mosk would speak first, then Kennard. This is order of seniority. I couldn't have been next, could I, at that point?

MCCREERY: Justice Baxter.

WERDEGAR: Justice Baxter, then myself, and around the table Justice Chin and Brown. I'm leaving somebody out. The conferences — I don't recall any big differences. It wasn't dramatic that I can remember.

MCCREERY: I was only thinking back to Justice Mosk's earlier comment to you about how a single new member really changes things.

WERDEGAR: I'm experiencing a real difference now — we'll get to that later in my history — with two brand-new appointees, and also Justice Liu, who's fairly new. There's a real difference.

But I don't recall such a major difference then. I can understand why you'd think there might be. We have a new chief justice and we have two new justices.

Stanley Mosk was always good to listen to. Stanley Mosk, Joyce Kennard, Marvin Baxter. They all had distinctive personalities that they manifested. Justice Chin and myself were not dramatically altering the dynamic. Janice Brown did alter the dynamic on occasion.

MCCREERY: Finally, Chief Justice George's methods in assigning cases. Again, is there any window into that or any difference that you noticed?

WERDEGAR: There was a difference. We have these conference memos, and if a member of the court writes a supplemental to one of the conference memos to suggest we grant when the memo suggested we deny or to make an additional point, in Justice Lucas' time it was understood that if you wrote a supplemental memo you would automatically be assigned the

case. It was thought that maybe sometimes people wrote supplementals just to get the case, which was to be frowned on.

Chief Justice George changed that. It no longer became a beneficial tactical maneuver to write a supplemental memo. Again, I think you just wondered if the assignments were fair, and I don't think anybody thought they were not fair under Chief Justice George. I think the feeling became that you couldn't manipulate the process, perhaps.

MCCREERY: How often, if at all, had you done a supplemental yourself?

WERDEGAR: For that purpose? I never did it for that purpose, and if I ever wrote a supplemental it was because I felt the case should be granted and the recommendation was "deny."

MCCREERY: I take it you were enjoying your work by this time and finding great fulfillment in it.

WERDEGAR: Oh, yes.

MCCREERY: Were there any surprises, as you got farther into the work, from what you expected?

WERDEGAR: I can't think of any surprises. No.

MCCREERY: The realm was certainly a familiar one to you by then.

WERDEGAR: It was a very familiar realm, and I had a stable staff. The beauty of this work and the privilege of it for those who love the law is that every case is something fresh and new. If you like it, it's really wonderful. It's a continuing education.

MCCREERY: Justice Werdegar, thank you so much. Let's stop there for today.

WERDEGAR: Thank you.

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