

INTERVIEW 9 (AUGUST 20, 2015)

MCCREERY: Good afternoon, Justice Werdegar. We thought we might spend a few moments today reflecting on Chief Justice Ron George's leadership in his time, starting when he took over from Chief Justice Lucas but continuing on until his retirement at the beginning of 2011. As you think back, how do you see that period of the court's history?

WERDEGAR: I was still a fairly new justice. I had served, I think, a couple of years under Chief Justice Malcolm Lucas, who — I have said earlier in this history and others have said *ad nauseam* — was a central casting chief justice and, in my experience, a delightful man with a wonderful sense of humor. The perception was that he had somewhat disengaged himself from the administrative side of the court. He was recently married and returning to Los Angeles for most of the week, so his presence wasn't as apparent as it had been, perhaps, earlier in his time when I wasn't here.

Ron George was appointed, as everybody knows, by Pete Wilson, first as an associate justice. When Malcolm Lucas departed, Ron was the natural and totally expected heir apparent and assumed the leadership of the court as chief justice. He came to us with high energy and enthusiasm and, I think, a real vision of what he wanted to do with the judicial system, the statewide judiciary.

He used to say, perhaps in his own oral history, that what he loved most — and he would point to his judicial robe hanging on a stand in his office and say, "That's what I love most." But I think for a chief justice, like it or not, you are forced to engage in administration, and he did so with, again, energy and enthusiasm.

It was noted that soon after he took office he made it a mission to visit the courts in every county in the state, and he did this after he had broken his hip — I think it was waterskiing. Probably this appears in his oral history. But I think that sent a message to the statewide judiciary that we had an engaged, concerned leader. I think he reported that he learned a lot about the facilities, and certainly it's good to know the personalities.

So that was his message: "I'm going to take charge. I'm going to be engaged."

He did reengage with the Legislature. During Chief Justice Lucas's time there had been a breach of collegiality between the Legislature and Chief

Justice Lucas, I think as a consequence of some comment in a case before my time having to do with limits on legislators' terms — something that probably should have been edited out of the opinion but escaped the blue pencil.

But evidently, after that opinion was issued no further invitations to the chief justice of California to give a State of the Judiciary speech were forthcoming. Ron George, I'm sure, reached out to the Legislature, and the invitation was again resumed. We would go up and hear his State of the Judiciary speeches, as we do to this day with our current chief justice.

Some of his signature accomplishments — and I'm not one who is particularly interested in administration, but these were widely reported. He promoted and supported unification of the trial courts, which was effectuated by an initiative that was proposed by the Legislature.

I'm not one to pass judgment on this, but at the time there was some concern about the fallout of that. One concern was that people who may have been elected or appointed to the municipal court are not people that would, in their own right, be appointed to the superior court. But here they were going to become superior court judges.

Another concern was that attorneys of experience and stature and capability would not be willing to accept superior court trial court appointments when they could be assigned to the misdemeanor calendar or some lesser legal issues that the muni court used to handle. These were comments that were made. How it has played out I don't know. It has been a fact for, what, fifteen or twenty years? So any concerns people had, they've been absorbed into the system and the courts are functioning. That was one of his strong initiatives.

He also encouraged, promoted, the Legislature to achieve state trial court funding. That was certainly a major initiative. The third one was the transfer of individual court facilities to the state.

Apart from that, and more generally speaking, he was very supportive of improving access to justice. During his tenure I think it was the AOC that established the Center for Families, Children and the Courts and focused on giving assistance to pro se litigants and developed specialized courts, which I think are very interesting, to deal with particular problems, such as drug courts.

And I don't know if this occurred in his time, but I understand they're talking about or they have established courts for veterans. I would like to

know, but I think these specialized courts are beneficial. Intuitively, to me, it sounds like an excellent idea.

He encouraged pro bono services and self-help centers, so I think a lot of progress was made with respect to access to justice by the general public. Those were, in my mind, some of his leadership accomplishments.

MCCREERY: You mentioned a couple of times relations with the Legislature as a whole and with individual legislators. To what extent did that whole arena touch those of you who were his colleagues here?

WERDEGAR: Touch us? Impact our work? Myself personally — I felt no impact except we would go up to Sacramento, which I think is a good thing, and listen to the State of the Judiciary message and mingle with legislators. Members of the judicial council would be there as well.

Some of my more politically affiliated colleagues would personally know a number of the legislators and stay for the reception. I think just opening communication — I think it's important for the legislators to see, literally, who we are, the faces on this group of seven people.

Today one might say it impacts the budget. In Ron George's time, I don't think we were having the budget constraints that we do now. So for the actual work of the court, as far as I'm concerned, it had almost nothing to do. But it's always better to work in an atmosphere where you feel there's collegiality with other branches of government.

MCCREERY: In the same vein, I wonder what view you might have had or what you might have noticed about Chief Justice George's relations with the various individuals serving as governor during his time — and the executive branch as a whole?

WERDEGAR: I can only speak to governor. I met Ron George through the appointing governor, who was Pete Wilson at that time. They had a good, cordial, friendly relationship that was a social relationship as well. Let's see. After Pete Wilson came — ?

MCCREERY: Governor Davis.

WERDEGAR: I really don't know. Certainly, it wasn't a personal relationship. They didn't know each other, I don't think, before, except maybe just officially. And then came Governor Schwarzenegger. Gray Davis wasn't in office all that long. How long was he in?

MCCREERY: It was five years, as it turned out.

WERDEGAR: Time goes quickly. [Laughter] I do recall Ron George going up and meeting with Governor Schwarzenegger on a number of issues, and he probably did the same with Gray Davis.

There was that infamous cartoon in the newspaper — I don't know what the occasion was, but there were seven justices on the bench that looked like clones of Gray Davis, and the caption said, "I expect judges to implement my vision," or something like that. Do you think I got that right?

MCCREERY: I do.

WERDEGAR: I don't even know what generated that, but it was pretty amusing. [Laughter]

MCCREERY: You mentioned also several initiatives having to do with providing access to justice to the citizens of the state. I wonder to what extent you or others on the panel were called upon or invited to participate in those efforts over time?

WERDEGAR: I was not, and if other members of the court were, it was because they were on some committee.

MCCREERY: Unless it was a particular outreach session of the court itself or something like that, you were not personally involved?

WERDEGAR: I'm glad you mentioned the outreach sessions. I may have said earlier that it was during his time that we did start to do outreach. The way it came about was, after September 11th, 2001, one of us who lives up here said, "Can we reduce our airplane travel?"

It was decided that we could. We eliminated a Los Angeles session. We used to have four in Los Angeles. But what happened out of that was, "Yes. We won't go to Los Angeles. We'll go to other places in the state." It turned out to be a good thing. Some Courts of Appeal — I think Sacramento — had already been doing what they characterized as outreach by hearing oral argument in sites other than their courthouse.

We proceeded to have outreach, and I really thought it was a wonderful thing. It got us to see different communities, and as has been reported it brought students in, widened the awareness that they have of the Supreme Court and who we are. We had some wonderful experiences in different communities.

MCCREERY: Which of those stand out to you now?

WERDEGAR: All of them were wonderful, and one reason is the local community, the judges and lawyers and teachers, knocked themselves out in the beginning to welcome us and to have functions. It became apparent to me after several of these that it was a tremendous imposition on the local communities — the work in receptions and busing in students and getting the materials out to the schools. I began to think, “Lucky you. The California Supreme Court is coming to town.” [Laughter]

In the beginning the enthusiasm on the part of the communities — San Jose, Fresno, Redding — all the communities acquitted themselves absolutely marvelously. You ask which stands out. One that was tremendous fun is we took the train down to Fresno. I happen to like the train anyway. We all met, I think it was in Emeryville, and boarded the train. When we got off the train, the mayor was there to greet us. I think there was a little band. It was part serious and part over-the-top, but the receptions and the — I don’t want to say parties, but the dinners and receptions —

But the real point of it was to get into the classrooms and engage attorneys to get into the classrooms and explain cases. Students would physically come to our courthouse, to where we were sitting. For others, I think there was video in the classrooms. It all sounds marvelous, but tremendous work for the local communities.

When we went up to Redding, that got me to a part of California that I probably hadn’t been to. Every community has some wonderful, local feature that you’re happy to see. But they bused students in, bused them in because I guess it’s a widespread area and not concentrated like maybe San Jose.

We continued to do that, but with the budget I think we’ve dampened it a little bit. We “outreach” at Berkeley. And we had a session at Hastings, where they were dedicating or showing off the Marvin and Jane Baxter Appellate Center at Hastings. We are supposed to go someplace south a year from this fall, I think.

I think with the increasing use of video and the continuing budget constraints, this exuberant traveling all over the state of California might be modified a bit.

MCCREERY: But the concept does represent real outreach to citizens that might otherwise never have a chance to see you or meet you or learn about the courts. It really is a civics education, isn't it?

WERDEGAR: Yes. I read just yesterday — maybe you saw it, I think in the *Chronicle* — of individuals under thirty-five, I think 20 percent could name a United States Supreme Court justice. That's probably an improvement. I don't know.

MCCREERY: How was it for you to experience these rooms of young students and their questions?

WERDEGAR: It was wonderful. Questions would be submitted, and the chief and his staff would edit them, and then the chief would assign them. In Santa Barbara, randomly, one of the questions that was assigned to me was, "How has being a Supreme Court justice changed your life, or has it?"

I enjoyed the answer that I gave. I said, "Yes, actually, it has. I get a whole lot more respect at home." [Laughter]

Which is very funny and also true. I've been on the bench twenty-one years now. But when it first happened — if you have children, you're just Mom. And if you've been the supportive wife, and your husband is the main breadwinner and the main career, then all of a sudden, "What? Mom?" So I enjoyed that answer.

Another one that I enjoyed very much — and again it was a random assignment of the question to me. We were up in Santa Rosa, which is in Sonoma County, and the question to me was, "What kind of an education do you need to be a Supreme Court justice?"

I loved having that question. My answer was, "In my case, I attended a one-room school with eight grades in Healdsburg called Sotoyome. But that's not required." [Laughter] It was a sensation, because who would think — the California Supreme Court coming to Santa Rosa and one of the justices went to Sotoyome School, one room, eight grades, one teacher?

It made the local paper. I don't know if I've told you this before. The fellow whose family my brother and I were living with at the time said, "I know her. I haven't seen her in sixty-five years." That was tremendous fun.

MCCREERY: And you later had a reunion, did you not?

WERDEGAR: We had a written reunion, yes. It was very meaningful too because I was six when I was living with this family.

MCCREERY: Thank you. Returning to the subject of Chief Justice George's era and his various liaison activities with the outside world, what did you note about his relations with the media and those whose job it is to communicate with the public about what you're doing here?

WERDEGAR: He definitely was open to the media. He definitely believed in communication, bringing them in, trying to let them know what's going on, trying to answer questions.

I know when I came on the court — of course, people always want to interview a new justice. I would get so nervous, because you never know what tack they're going to take. In my day I was an oddity, I was unusual, and they were looking for an angle. What is she like? Is she going to be this, or is she going to be that?

Chief Justice Lucas, appropriately I came to learn, told me, "Just remember, the press are not your friends." And that's really true. They're there to tell the story, and you may or may not become the story, and you may or may not become the story you want to become.

He had occasion over his time, I think, to become wary of the press. I think there was a perception, and I think perhaps justified, that at certain times the coverage of him or the court had been less than fair. So he was right.

I had some interviews that I feel — I had some reportage of my work that was extremely kind and very generous, and I appreciated it. But I had some where there was an attitude that I felt was, perhaps, unwarranted. But you can't do anything about it. So Ron George understood that. You just do what you do, and let the ink flow where it's going to flow.

MCCREERY: Another area that may have involved the rest of you a bit less directly but nevertheless was part of life was the relations elsewhere in the judicial branch, for example with the Administrative Office of the Courts, the Judicial Council, and so on.

WERDEGAR: I'm happy to say I had nothing to do with any of that.

MCCREERY: [Laughter] Happy to say so, and why is that?

WERDEGAR: I'm not a fan of administration. I would find it challenging to sit through long meetings and deal with administrative matters and all the diplomacy and give-and-take and compromises and concerns that involves. It's not my inclination, and I wasn't called upon to do it. I had some committee memberships that we perhaps have mentioned, but to be on the Judicial Council — it's important, and I used to say to Justice Baxter that he was doing a tremendous service. He served a long time and served well, I'm sure, on the Judicial Council.

Insofar as the AOC, I admired Bill Vickrey, and I think I'm so removed from this that anything I have to say is not authoritative. I think he came here with energy and vision, and it's not a secret that by the time he had served — and I think he served for twenty years or so — it was thought that the AOC had gotten a little out of control. I couldn't comment on the merits of that.

MCCREERY: Yes, there is the whole question of how one structures a statewide judicial branch that is as large and complex as this one. Perhaps there's no peer elsewhere in the country?

WERDEGAR: Let me say, as a matter of history — and if I said it many sessions ago, forgive me — I may be the only person around that knew the actual first administrator, Ralph Kleps. Ralph Kleps had a shared background with my husband from this little college in the Owens Valley called Deep Springs. Ralph Kleps was older than my husband, but because of that I met Ralph Kleps when I was just out of law school and in fact I interviewed, when we came back from Washington, to work with what became or what was the AOC. I think he had six attorneys.

Ralph Kleps was a national pioneer. This goes back to the late sixties, mid-sixties. I don't think there was another Administrative Office of the Courts in any state. Ralph Kleps, who was an admirable and visionary individual, started it. So as I said, I may be one of the few people around who knew Ralph Kleps.

Then we come to an AOC that has how many employees, 800 or something? I don't know. The arc of growth.

MCCREERY: Did you stay in touch with Mr. Kleps as time went on, you and your husband?

WERDEGAR: Yes, through the Deep Springs connection. My husband and I would, on occasion, go to a Deep Springs reunion out in the Owens Valley east of Bishop, and on one or two occasions Ralph Kleps would be there as well.

MCCREERY: Moving on to other liaisons, to what extent are those of you on the panel called upon to have any official relationship with the State Bar and their activities?

WERDEGAR: We have an administrative person who is the liaison. None of us deals directly. Maybe the chief does, but as you well know it was Beth Jay for a very long time. But the justices not at all, except we have an annual dinner with the State Bar Board of Governors which is supposed to facilitate acquaintanceship, collegiality.

MCCREERY: May I ask, because you've been affiliated with this court over so many, many years, even long before you were a justice, if you have a particular view of the establishment of the State Bar court and how well that has worked out over time?

WERDEGAR: Yes. That's interesting. Before I was an actual judge, or maybe just when I came on, they still were reviewing every State Bar discipline. I remember when I worked with Justice Panelli the court's oral argument week would go for four days, maybe five, and a lot of them were State Bar cases. I would hear the comment that, "We spend as much time deciding whether this attorney should get six months' probation or thirty days' probation as we do deciding cases." It seemed very inefficient.

So that was the impetus for the State Bar court, to take this away from us, which was truly not the highest and best use of our time, and put it in a court that was devoted to that. At the beginning, I think — and this is again, hearsay — I was not intimately involved — I think at the beginning the State Bar court was a little rocky. I think our initial individual who was supposed to be in charge of it — she had no model, and it was up to her to structure it and what have you. I don't know how long she continued. But she left, and then they had another structure, and it continues to this day.

We do get some review of what the State Bar court has done, but not routinely. I think our central staff has an awareness of whether the disciplines or suspensions that are imposed are even and comparable so that there's a basic standard or fairness. But we only see an occasional case,

sometimes when an attorney is petitioning to avoid the discipline or disbarment that's imposed.

There was one case where the attorney was dissatisfied with and felt unwarranted the discipline imposed. He petitioned us. We ended up disbarring him. So there is a petition for review that he might have regretted. We thought they had been too lenient.

MCCREERY: But it does sound as if it served its purpose to relieve this court of a huge workload?

WERDEGAR: It did. Yes.

MCCREERY: Any improvements to suggest in that regard?

WERDEGAR: I think this is an ongoing aspect of State Bar responsibility that the court is continuing to monitor and sometimes be concerned about and other times to say it's going well.

MCCREERY: Thank you. Perhaps we'll turn today to some of the cases you authored or other important cases you participated in, continuing earlier discussions we've had about this. We're flexible as to the order, of course, but we had looked at a somewhat chronological treatment for the moment. If it's okay, we could pick up with a case in 2000, *Galanty v. Paul Revere Life Insurance*?³⁵

WERDEGAR: Preliminarily, let me say that since, during my now twenty-one years here, I've authored and participated in so many cases, they're not immediately familiar to me. But it has been really gratifying to look back on the cases that you suggested we talk about because it reminds me of what I've done and participated in while I've been here.

Starting with *Galanty*, as you say it was 2000, and in these cases it's important to know the time in which the opinion is being worked out. This is important because at that time it was the effort of a disability insurance company to deny disability insurance coverage to a policyholder who had AIDS. Why were they seeking to do that? It turns out that the policy, on its face, declined coverage for any pre-existing condition. This policyholder, in fact, had been HIV-positive when he took out the policy, but he was not disabled. So more than two years after he took out the policy he became

³⁵ 23 Cal.4th 368.

disabled, and they were denying coverage because he had the pre-existing condition.

Why was this even before us? It was before us because there was a conflict between the policy's denial of coverage for a pre-existing condition and a non-contestability provision after two years, and two years had passed. So this court, in a unanimous opinion that I authored, held that he could get coverage.

Why was this significant? I think it attracted special interest because it dealt with an insured who was HIV-positive, and at that time there were multitudes, perhaps, of insureds who were. It was an era where AIDS was still in the forefront of the news, and there was a lot of discrimination against HIV-positive individuals. We didn't leave the insurance company in the future without recourse. They could have required a test, or they could have expressly excluded HIV. But given the conflict between their provisions of "no pre-existing condition" and noncontestability, the insured prevailed.

MCCREERY: Had this court been required to consider anything similar to that, to your knowledge, beforehand?

WERDEGAR: No, I don't think so. I'm sure we've had a number of insurance policy cases and interpretation of conflicting provisions, but I can't think of any in particular. I think that's why this attracted attention.

MCCREERY: And as you say, the AIDS epidemic was at a particular moment, and perhaps there were —

WERDEGAR: Potential coverage for a lot of people that perhaps the insurance companies had not intended to cover or didn't want to cover.

MCCREERY: As has not been true before or since, perhaps?

WERDEGAR: I can happily say, it has not been true today. The world has changed in that regard.

MCCREERY: What do you recall about any indications you might have had from colleagues about different reasoning on this case?

WERDEGAR: I don't recall. It was unanimous, and like any other case — and on this one, because it was high-profile for the reason you suggest — we probably had discussions, but at this point I can't recall. But I'm happy it was unanimous. That's always a good thing.

MCCREERY: We thought we might look at the *Conservatorship of Wendland* as well today.³⁶ I gather this had to do with a question of withholding life support from a seriously disabled person. How do you characterize the issue before you?

WERDEGAR: This case, I think, was a case of, what we say in the law, “first impression,” not only in California, but nationally, about removing life support from a semiconscious individual who couldn’t communicate.

I’d like to give you a little background. The case attracted national attention, and Robert Wendland, the subject of this case, a video of him actually was aired on TV. Of course, by its very nature it would be an important case, but it was in an era, if you recall, of the Terri Schiavo case. Terri Schiavo was in Florida, and she was in what medical people call a persistent vegetative state. Robert Wendland was not and I’ll get to that, but Terri Schiavo was.

In that case, her husband, after allowing her to be cared for for an extended period of time decided that Terri Schiavo would not want to live this way. As I speak to you, I can see pictures of her and she would not, I’m sure. So he asked for the hospital to stop treating her. I think her mother, her parents, resisted, and the matter went to the trial court. The trial court agreed with the husband that it was appropriate to stop treatment.

The case became inappropriately and tremendously political. The governor of the State of Florida, who was Jeb Bush at the time, and the Legislature of the State of Florida, and the president of the United States, who was George H. W. Bush, all sought to stop the withdrawal of care for Terri Schiavo. Over a period of years this was litigated. It was in a way, I think — for a private grief and a private situation I think it was unfortunate that it was political. It was a political battle between proponents of the right to die, individual autonomy and dignity and right to die, and the proponents of preservation of life and right to live.

So we come back to Robert Wendland, who unlike Terri Schiavo was not in a persistent vegetative state. He was in a state of semi-consciousness. He had progressively gotten worse. He had been in a solo car drunk-driving crash and was severely disabled. But he couldn’t speak, he couldn’t feed himself, he couldn’t care for himself at all, and he couldn’t communicate.

³⁶ 26 Cal.4th 519 (2001).

His wife, who had visited him for some time and so on, was appointed conservator, and she decided it was time, that Robert would not want to live this way. She went to the trial court, and she related conversations that they'd had where he said, about somebody else, "Don't ever let me be in that condition."

The moral here is, have an advance directive as to — it's hard to be complete in these directives, but of what your wishes would be as to how you would like to be maintained if you can't speak for yourself. Robert didn't have that, so the legal issue is, "What is the burden of proof of an individual who wants to withdraw life support from someone on the grounds that that's what the person would want?"

What we decided is that the burden of proof — there are three levels, as you know. One is the preponderance of evidence. That's the usual civil burden. The next is clear and convincing evidence. That's the middle level. And the final one is proof beyond a reasonable doubt, and that's the criminal burden.

We decided that the wife had to prove by clear and convincing evidence, the middle burden, that this is what Robert would have wanted. We reasoned that a decision to withhold life support is irrevocable, and you have to have a higher burden of proof. In Robert's case it was moot, because during the pendency of this — the litigation, starting in the trial courts, went on for some years — he died before she had to go back to court.

Interestingly to me, the decision was controversial. There were those who felt that the burden was too high, and we were depriving individuals such as Robert of the release from the imprisonment of a horrific condition. I don't know. But our feeling was that it's so irrevocable and it's such a horrendous thing that the burden of proof has to be higher. But again, the real message is have a written directive or have a health-care surrogate, that, "This person is going to speak for me if I can't speak for myself." Then the courts never get into it.

MCCREERY: As an aside, we're having a tremendous amount of public attention right now on some right-to-die questions and issues here in California, and the Legislature is tangling with it as we speak, pretty much. I wonder how you might have noticed these kinds of issues since the time that you wrote *Wendland*?

WERDEGAR: Now, of course, we've all become aware of Brittany Maynard going to Oregon because she couldn't effectuate her wishes as to how she wanted to die in this state. But in the interim after *Wendland* — I don't recall the date — I was invited to go to Texas and speak at a conference,³⁷ which I did, with legal and medical ethicists and doctors and lawyers about how to handle patients. And I'll repeat: there's a difference between a persistent vegetative state and somebody who is semi-comatose and has been for a long time. It was a very interesting conference. And how often do people come out of what is perceived by outsiders to be a flat-lining?

But until the Brittany Maynard case, and now the legislative inquiry in California, I can't recall that it was on the forefront of the news.

MCCREERY: I wonder if you could say just a bit more about that conference and what you got out of it?

WERDEGAR: What I got out of it? I just found it fascinating. One aspect I got out of it is there were cases of people who, to all intents and purposes, seemed to be gone that would come back, but they were very rare. Again, a persistent vegetative state is different than a minimally conscious or semi-comatose patient. I'm sure the medical world has ways of monitoring and measuring. I just feel for the families who have to face this.

MCCREERY: As you say, particularly in an instance where it becomes politicized.

WERDEGAR: That was an unfortunate circumstance. It was so blatantly political.

MCCREERY: Anything you'd like to add on that one?

WERDEGAR: No.

MCCREERY: Again, we can alter the order as you see fit. But shall we move on to *San Remo Hotel v. City and County of San Francisco*?³⁸ This was converting residential units in some fashion?

WERDEGAR: Yes, long-term single-room occupancies converted into tourist hotels. Each of these cases that you have come across, as I've looked

³⁷ *Regarding Conservatorship of Wendland*, 12 CAL. LEGAL HIST. 487 (2017); January 28, 2010.

³⁸ 27 Cal.4th 643 (2002).

at them, I realize looking back why they were considered significant at the time. In this *San Remo* case, in order for the owners of the San Remo Hotel to convert their long-term occupancy residences to tourist hotels, the City of San Francisco gave them a conditional use permit. The condition was that they provide replacement housing to long-term residents or an “in lieu fee,” pay something so the city could provide replacement.

The complaint by the plaintiffs was, this was a taking of private property in violation of the Constitution. You can't take private property without just compensation. So we had to decide if this constituted what's known technically as a “taking” or was it a reasonable regulation? We held — it was not a unanimous opinion — I don't recall who dissented, but it was not — we held that it was not a taking in the constitutional sense, which requires an invasion of property or a physical deprivation of its use.

It's significant in that this question involves interpreting the Takings Clause of the United States Constitution. There's always this tension between the private property owner and government seeking to regulate or grant access.

That's why that case was important, and it set certain parameters as to what is a regulation as opposed to what is an actual taking. That issue is ongoing because every case has a different factual situation.

MCCREERY: How much previous law did you have to go on, if you recall?

WERDEGAR: Oh, there's lots of law. [Laughter] There's lots of law. As I say, I think each case is — there are certain rules that are articulated that you try to apply, and we articulated some rules in this case that subsequent cases have tried to apply. But it's always a factually specific issue.

MCCREERY: We've certainly, just anecdotally, heard so much about housing in San Francisco and the difficulty of there being enough housing, no matter what angle you're looking at it from.

WERDEGAR: It comes up here. We had a case recently — I think the opinion is filed — down south, where they were developing new residences, and the jurisdiction was requiring the developer to set aside certain affordable housing. So that's another situation. Is that a taking of the developer's property interest if he or she or the company is mandated to provide subsidized housing, so to speak? The issue continues and will continue.

MCCREERY: Yes, the whole question of what responsibility a government entity has to provide affordable housing, however one wants to define it.

WERDEGAR: Or what power it has to impose it on private property owners. Yes.

MCCREERY: That must have been fascinating to look back at that, as you say, after all this time. Would you be kind enough to address this group of three cases on California's anti-SLAPP statute? I'll let you name them off as you see fit here.

WERDEGAR: I don't have that in front of me, but I will say I was assigned a number of anti-SLAPP cases. I became known by I forget what group as the "Queen of SLAPP." It's always a question of trying to figure out who's slapping who. But what the law is, if you are sued you can file a motion saying that it was a Strategic Lawsuit Against Public Participation.

For instance — this doesn't relate to my cases, but I think a classic context is if someone is exercising what they perceive to be their First Amendment rights — it might have arisen in the case of tree climbers who were trying to preserve redwoods or something — and then they're sued for trespass.

The legislation will allow the defendant to move to dismiss the case on the grounds that it's really a strategic lawsuit against exercise of their free expression and public participation rights. Then the trial court has to balance: one, is that true? And two, that doesn't mean they can't sue, but the plaintiff has to come back showing that the plaintiff is likely to prevail.

I don't have the cases that you're speaking of in front of me, but it's always a question of whether those elements of the statutory scheme are met. Is the lawsuit designed to quash free expression or public participation? If it is, is the plaintiff apt to prevail? And if at another time you want me to speak of my specific cases, I'll try to do that.

MCCREERY: We can certainly just keep it a broad brush for the moment.

WERDEGAR: Yes. I do recall some trial court judges being appreciative of the court setting out the parameters and what has to be shown — we really have to think about the trial court judges who have to rule on these different issues. The clearer we can be, the easier their task is as to what the motion has to say, what the opposition has to say, and give them some guidance.

MCCREERY: Given that you had a number of these cases over time, how did that progression help you develop a certain — ?

WERDEGAR: I think it did, as each case presents — speaking generally — a different permutation of the legal problem, so you end up with having addressed the parameters of the rule of law in the area.

MCCREERY: It's a bit of expertise over time. That leads me to ask a general question about the value of having justices specialize in certain areas. What's your view of that?

WERDEGAR: I think that's a good question because the answer depends. I think you don't want one judge to have a monopoly on a subject area. Of course, one judge can't if you have six colleagues that weigh in. But I do think there's a value, and we'll perhaps get to it later.

I've been assigned a number of CEQA cases, and I think it's perceived that I, my chambers, have a handle on the complexities of CEQA. I think, given that so many of the opinions have prevailed, that we have an expertise and a balance in addressing the very, very complex issue of CEQA.³⁹

I don't know how our current chief or our former chief did their assignments. Looking at CEQA, I see that I continue to be assigned some, but I see that other judges are assigned some. I think it's a good balance. But certainly, as with SLAPP — I didn't get all the SLAPP cases — it's good to have some continuity in the development of the law.

And as I say, you don't write alone. Your six colleagues weigh in. But you might start with a depth of understanding that someone newly assigned to it wouldn't. But just because you practiced — let's take a random example — labor law doesn't mean you'd get assigned the labor law cases.

I think Justice Grodin was quoted as saying — because he certainly was and continues to be an expert in labor law — that that didn't mean he was going to be assigned all the labor cases. That's good too.

MCCREERY: What other sub-specialties have you noted — not officially speaking, of course — but, let's say, on DNA testing or other broad areas that come before you frequently?

WERDEGAR: That I have had?

³⁹ *The California Environmental Quality Act at 40*, 13 CAL. LEGAL HIST. 3 (2018).



HIKING IN YOSEMITE —
JUSTICE KATHRYN MICKLE WERDEGAR, CA. 1989.

MCCREERY: No, just any you have seen among your colleagues?

WERDEGAR: Again, wage and hour. But I got a lot of those, too, and we'll get to that. Frankly, I'm only cognizant of the ones that seem to have clustered in my chambers. If you're asking if other justices had a concentration, at the moment nothing comes to mind.

MCCREERY: As you say, there's a balance between it being a valuable thing and, perhaps, a monopoly if one goes too far?

WERDEGAR: It's never exclusive. That's right.

MCCREERY: Finally, as the Queen of SLAPP, how have your views of that law changed?

WERDEGAR: [Laughter] I try not to think about it unless it's assigned to me. I think the law — this is a political thing — had its purpose, and the Legislature over time has tinkered with it. We just try to set out how it's supposed to work under the law, as written.

MCCREERY: You get a chance to see how well the law is written in a lot of instances.

WERDEGAR: Well, that's a whole other subject, how well a law is written. We have not had any SLAPP cases for a long time, so things must be going smoothly.

MCCREERY: Thank you. Here's a case from 2003. *Intel v. Hamidi*.⁴⁰

WERDEGAR: Yes. This was not unanimous, and I do believe there was a vigorous dissent, which anybody who's interested can research. In this case, we held that a disgruntled ex-employee's mass mailings to a company employee email list didn't constitute a trespass to chattels.

It's a cutting-edge question relating to electronic communication, and it was an effort to analogize unwanted use of an email system to invasion of a tangible property interest. A trespass to chattels, classically — you learn in torts — is damaging your neighbor's property or going on physically to your neighbor's property. There was no tort that fit this situation.

MCCREERY: The electronic world as we now know it?

WERDEGAR: That's right. So the question was, did these emails, which were massive and were critical of the employer, but didn't damage the computer system and didn't impair the functioning of the computer system, were they a trespass to chattels. Writing for the majority, I held that trespass to chattels requires interference with the possessor's use or possession of personal property. I haven't heard anything about this problem since then, but it was a divided court. I don't know by what number, but I do know there was a very vigorous dissent, I believe by Justice Brown. Technology and electronic communication at that time — this was 2003 — had just emerged, and so many issues in today's modern world get out in front of the courts. And the Legislature. If the Legislature had addressed it, that would be the end of it.

MCCREERY: It got out in front of government in general.

WERDEGAR: Yes. We are called upon to resolve issues just the best we can. We'll get into that with some other cases that you're going to ask about.

MCCREERY: What do you recall about your own reasoning in this one?

WERDEGAR: I had to consider both sides. It's not as if I immediately know exactly how I believe a case should go. It's well briefed on both sides.

⁴⁰ 30 Cal.4th 1342.

There are arguments on both sides. But ultimately in almost every case, but not every, in my career, by the time I have landed on one side or another it's because I've thought about it carefully and I'm comfortable with the result. I've considered the input of my colleagues who agree but offer something additional and of my colleagues who disagree.

Looking back on this case, at the time it seemed very difficult. But basically, I'm confident we were right. It didn't fit into any category, annoying as this individual might have been to his employer. There was an argument that he was interfering with the employees' service to the employer by distracting them with these emails. Since then maybe there's been some legislation, or with technology today maybe employers can avoid that kind of intrusion. It was interesting.

MCCREERY: What comes to mind in the way of other cases like this, where you're forging into new electronic areas that didn't exist not so long ago? I just wonder if anything rises to the top in your thinking.

WERDEGAR: They will come. But nothing comes to mind right now. Truly, technology is moving so quickly. We've had other areas, of course, a different kind of technology, medical technology, where advancements are so far ahead of the law, such as artificial reproduction with surrogate mothers. I have not had such a case. I think Justice Panelli had to deal with such a case. If the surrogate is employed to carry the fetus and the baby and they have a contract, and the surrogate decides that she wants to keep the baby, can a baby have two mothers? That kind of thing. If you want to ask me about *Sharon S.*, that does involve that peripherally.

MCCREERY: Yes, please do.

WERDEGAR: *Sharon S.* also was a divided opinion.⁴¹ In this case, the significance was — and the lesbian community thought it was highly significant — this is 2003, again, a lifetime ago in the development of the law about lesbians and reproductive technology — but there we legalized a second-parent adoption for the non-birth-parent partner of a lesbian.

But the background is that Sharon S. and her partner Annette were domestic partners at that time, I believe, and Sharon S. was the biological mother of the baby. She signed a form consenting to Annette's adoption

⁴¹ *Sharon S. v. Superior Court*, 31 Cal.4th 417 (2003).

of this baby. This couple had done that with a previous child, so they had a child under these circumstances. But after the birth of the second child they broke up, and Sharon S. tried to withdraw her consent and Annette petitioned the court to be the adoptive parent.

It was like a Solomon's decision. We ruled that Annette could proceed with what we call a private second-parent adoption and could be the co-parent of this baby and that Sharon S.'s consent, as stated in the form, was irrevocable. In these situations, of course, the individual who wants to disavow says, "I didn't read it." We see it in contracts all the time.

The little twist here was that the second-parent adoption statutes really were not drafted with this contemplated at all because they were really meant for, say, when a mother remarries and her husband wants to adopt the child. The other parent has to relinquish all control. That's what a second-parent adoption is, if your step-parent adopts you and your parent is still living.

Here, Sharon S. wasn't going to relinquish all her parental rights. We just simply tried to adapt the statute to the circumstances and say that giving up of parental rights could be waived. She would continue to be the parent, but Annette got to be the second parent by way of adoption.

The courtroom was packed. The lesbian community, in the aftermath, was very divided. There were those who felt that Sharon, the biological birth mother, now that they had broken up shouldn't be bound to have her former partner involved in the raising of her child. There were those who felt that Annette, who had fulfilled this role with their previous child — and maybe there was something about who was the caretaker and who was the breadwinner — that she had the right to have this be her child, too. There was no happy solution. It was the first case to give a lesbian partner legal second-parent status.

MCCREERY: The first case anywhere, as far as you know?

WERDEGAR: We were dealing with the California statute, so I can't say. But it certainly was in California.

MCCREERY: How has this issue come forward since then?

WERDEGAR: I was thinking about that. I don't really know. If I don't see it in the newspaper or see it in petitions for review here, I don't know. I think no news is good news. Maybe people are working it out.

MCCREERY: You mentioned that the lesbian community was divided in its own view of this, which is fascinating. As you say, it's long enough ago that a lot of things have changed since then in the broader realm. But I wonder to what extent you had direct communication from that community after this came out? What did you hear?

WERDEGAR: I didn't. I just knew by the briefs and the amicus briefs and the two women attorneys arguing the case on different sides. It was apparent that they were divided. How it was greeted afterwards to the press? I don't recall, frankly, how it was. Interesting.

MCCREERY: But a poignant situation for any family member, when you think about it.

WERDEGAR: Yes. We have had other cases, but what the other issues were I can't remember.

MCCREERY: It's a fascinating arm of family law.

WERDEGAR: Really. Yes.

MCCREERY: Shall we move on to *Catholic Charities of Sacramento v. Superior Court*,⁴² which had to do, I gather, with the state Department of Managed Health Care in some way?

WERDEGAR: It did have to do with a state law, the Women's Contraception Equity Act, and maybe that's where the Department of Managed Care came in. Catholic Charities is a religiously-affiliated social service organization that opposes contraception on religious grounds. They sought exemption from the state's Women's Contraception Equity Act, which required certain health and disability contracts to cover prescription contraceptives, on grounds of freedom of religion.

MCCREERY: This was for employees of Catholic Charities?

WERDEGAR: Yes. That's a pertinent question because we determined that Catholic Charities, the entity, did not qualify under the state's statutes as a religious employer. And they actually did not claim that they did qualify. They agreed. We determined that they did not because they didn't employ exclusively adherents, and they offered services to the general public. So

⁴² 32 Cal.4th 527 (2004).

they were not a religious employer. It's important to know that, and they didn't dispute that. But they nevertheless claimed that it violated their corporate religious beliefs to require them to provide contraception.

We held that with respect to a generally applicable law, that they could not be exempt because they were not a religious employer. As I needn't tell you, this issue is very alive today. The question whether non-religious entities — notwithstanding the name Catholic Charities they were serving the public generally, all to their credit, of course, and employing people of all faiths, is my understanding — but the question of whether non-religious entities can seek religious exemption from generally applicable civil laws which they contend offend their religious beliefs — as I say it remains very much alive.

The most recent statement on that subject from the United States Supreme Court, whose rulings, of course, govern, was the *Hobby Lobby* case,⁴³ where they held that a so-called closely held corporation could assert, I believe, a First Amendment right to preclude them from providing contraceptive care to their employees.

Since the gay marriage cases that have legitimized and legalized gay marriage have occurred, in the paper every day are articles on whether proprietors or employees of secular businesses, on the basis of the individual employees' personal beliefs, can refuse to serve gay couples. Even a civil servant in one state, whose job is to issue marriage licenses, has asserted a religious right to refuse to do so. This issue is very much alive, and we'll see how it goes.

MCCREERY: Given that you had had the case of a religious viewpoint come up so early on in that matter with the Sacramento landlady — early in your career — I wonder what view you took of the matter of being required to do something that a personal or corporate religious view might preclude?

WERDEGAR: Based on both *Catholic Charities* and *Smith v. Fair Employment and Housing Commission*, my views are that if you engage in civil activities, civic activities, public commerce, you have to abide by civil law. But the United States Supreme Court is going to be the final arbiter of that. Whatever they come down with will determine what California has to say about it. I don't like the direction that *Hobby Lobby* went.

⁴³ *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. ____ (2014).

MCCREERY: Can you say why?

WERDEGAR: Yes. You're imputing personal beliefs to a corporation. If we allow individuals to interact in society according to their individual personal beliefs, we would have a very disorganized and unpredictable and non-functional society — if you allow that. Think of the different religions in this country and the different beliefs that each might hold. I think your private beliefs and what you adhere to and your tenets and so forth are fine, but if you're going to engage in this civil public world by and large, unless it's discriminating against *you*, I think you have to adhere to the general civil law. But we'll see.

MCCREERY: Here's a case on the amount of punitive damages called *Johnson v. Ford Motor*. This is from 2005?⁴⁴

WERDEGAR: Yes. Again, I don't know how the law has evolved, but this case was notable for involving this court's effort to apply United States Supreme Court precedent in assessing the due-process validity of the amount of punitive damages. You can sue for your compensatory damages, which means the actual loss you have suffered, whether it's damage to your car or whatever — but punitive damages are a tool to punish, as the name suggests, the wrongdoer beyond what damage it might have done to you.

The United States Supreme Court has spoken in broad terms to how large a punitive damage award can be without violating the due process of law. It has recited certain factors, such as the repetitiveness of the conduct, the amount of compensatory damages — the actual harm to the plaintiff — the profit flowing to the defendant, et cetera. In this case, Mr. Johnson sued this car dealership for violating the lemon law. He alleged that it had a pattern and practice of violating the mandatory re-purchase provision of the law by instead issuing customers of defective cars an owner-appreciation certificate.

So he sued, and his actual damage, as the jury found, was \$17, 811. That was Mr. Johnson's damages. But the jury was persuaded that the behavior of the defendant car dealership was egregious, and they awarded Mr. Johnson \$10 million in punitive damages.

⁴⁴ 35 Cal.4th 1191 (2005).

Now, there are some who say that punitive damages shouldn't go exclusively to the individual plaintiff. They should go to some kind of a fund. But that's not the law.

Of course, the car dealership appealed. The Court of Appeal reduced the punitives to \$53,000. So it comes to us. It's like a Ouija board: \$53,000? \$10 million? What are you going to do?

In our opinion, we tried to address all the permissible considerations, including the state's interest in deterrence. If it's just a slap on the hand — you do hear about, parenthetically, auto manufacturers who think it's just cheaper to let the defect be out there rather than recall the automobiles. This is some of the allegations. So we tried to address all the considerations, including deterrence, and we remanded it to the Court of Appeal to look at our opinion and do it again.

I don't know what they did, but the companion case, or one that came later, was *Simon v. San Paolo U.S. Holding Co.*⁴⁵ Here, too, I was assigned this case, again involving punitive damages.

In this case, it was a breach of contract for the sale of an office building. The plaintiff's compensatory damages, according to the jury, for the loss of the bargain, were \$5,000. But they imposed \$1.7 million in punitives because, I guess, they felt that the behavior of the defendants who breached the contract was reprehensible.

The C.A. affirmed this award, but we remanded, directing the C.A. to modify the punitive damages from the \$1.7 million to \$50,000. And what did we say? We said the \$1.7 million was defective under the Due Process Clause and that the seller — it wasn't like an organization that repeatedly did this — the seller's conduct was not all that reprehensible, et cetera.

Together these two cases — I think we said in that case, and maybe we were quoting the United States Supreme Court, that a ratio of 9-to-1 is the outer limit. But this is so imprecise, and we're just trying to implement what guidance we have received in a very murky area from the United States Supreme Court because it's a due process question. We haven't, as far as I know, heard about punitive damages for a long time, so they must be figuring it out.

⁴⁵ 35 Cal.4th 1159 (2005).

MCCREERY: But the idea behind this particular one was that the punitives should be no more than nine times? Do you remember how the nine was arrived at by chance?

WERDEGAR: Maybe we got that guidance from the United States Supreme Court. I don't recall. But this was not an exercise in precision. But together, we felt, maybe the two cases would give some helpful guidance.

MCCREERY: And perhaps they have.

WERDEGAR: I think so. We haven't heard since then.

MCCREERY: But as you say, seeing in the *Johnson* case the amount go from \$17,000 to \$10 million — that's a big swing in the pendulum there. [Laughter]

WERDEGAR: Yes. But the allegation was that they did this repeatedly, whereas in the second case it was just a plaintiff versus a defendant. Allegedly this car dealership had been getting away with this and, of course, saving itself millions of dollars for a long time.

MCCREERY: You raised the idea that such a large award shouldn't go to any one individual but perhaps should go to a fund or something. Do you have any knowledge of whether that has been considered?

WERDEGAR: No. I do think it would be, possibly, a legislative issue. It makes sense, doesn't it? Certainly, give the plaintiff who undertook the effort to bring the lawsuit something, but I think the enormity — well, it would still be a due process question, but I think there would be some benefit in having the Legislature look at whether, depending on the size of the punitives, if some of it shouldn't go to a pertinent common fund. But I don't know anything about that being pursued.

MCCREERY: The *Johnson* case and the *Simon* case were both 2005. I'm only curious as to —

WERDEGAR: For *Johnson* I have 2004, but within a year.

MCCREERY: Oh, 2004. Sorry. But they did come forward separately, but close enough that one could have bearing on the other?

WERDEGAR: Yes. In fact, sometimes that's why we will grant review. Courts can only work incrementally, really. We take a case that comes to us, and we resolve the issues that case presents. We are ill-advised to and

we are not supposed to speak globally, like the Legislature can. That's one of our limits that the public doesn't often understand. We're constrained by what comes to us and what we're asked to decide. So I guess in a situation like this, if this case were petitioned, this second one, we'd say, "Yes. That would be an opportunity to shape what we were trying to articulate earlier."

MCCREERY: But as you say, you are acting through specific cases with specific issues, and it is a vast difference from the legislative branch.

WERDEGAR: We are, and people don't realize that.

MCCREERY: Say more about that, if you could.

WERDEGAR: Now, sometimes if we get a case that is in an area, we might ask the parties to address additional issues. So there's a little reaching out there, but it has to be pertinent to their case. That's all I can say. It's a little-understood fact that the courts cannot be proactive, except insofar as at the highest level, our level, we select what we take. But we cannot reach out.

One of the criticisms of the United States Supreme Court's *Citizens United* case is — that's the case that is widely known to have unleashed Super PACs that can give unlimited amounts of money to candidates — not to candidates but in support of candidates — that the case didn't necessarily present that question, and that the court solicited supplemental briefing. There was an allegation that they reached out to decide a question that they didn't have to address in that case. They asked the parties.

MCCREERY: What do you think of that, in principle?

WERDEGAR: In that case I think it was very unfortunate. In principle, it depends. If the issue really is not involved in the case, then I don't think we should. But if some permutation of the issue or aspect of the issue can be clarified or better defined — these are all vague terms, you have to look at the circumstances — then I think it is appropriate.

MCCREERY: Does an example come to mind from this court?

WERDEGAR: We do occasionally ask for supplemental briefing. For instance, there's a criminal case that's pending that we are wrestling with. We're not changing the issues. We have an issue we have to decide, but we're asking the parties to brief a statute that they didn't brief before that

might allow us to resolve the issue. So we're not creating a new issue. We're looking for a solution, and we're asking the parties, "You didn't mention this statute. Might it resolve this question?"

MCCREERY: But it's such a fascinating role, to have a responsibility to develop the law and resolve conflicts but to be able to do so only within what comes to you and works its way up to this level. It really is a fascinating and fundamental question, isn't it?

WERDEGAR: Yes, it is. Thank you for pointing that out.

MCCREERY: Perhaps we'll talk more on another day about the U.S. Supreme Court. But there have been some fascinating decisions that have gotten a lot of public attention. Certainly, *Citizens United* is one of them.

If you don't mind a bit more today, here is *Evans v. the City of Berkeley*, from 2006.⁴⁶

WERDEGAR: No, I'm happy to because, as I say, reviewing at your request some of these cases reminds me of the journey I've had and the court has had and how the world, as it always will, has evolved since we were concerned with the issues some of these cases present. *Evans* is another example. There the City of Berkeley decided to withdraw its subsidy for the Sea Scouts in using Berkeley sailboat berths. The Sea Scouts sued, saying the withdrawal of the subsidy was a violation of their free association beliefs.

And why did Berkeley withdraw it? Because the national Sea Scouts — I don't think they were alleging that the locals had acted on this, but national Sea Scouts at that time discriminated against gays and against atheists. The question was, was withdrawing the municipal subsidy an infringement of their associational rights? We held no, the city's refusal to subsidize discriminatory activities didn't infringe on the Sea Scouts' exercise of speech or association. They could continue to speak and associate as they chose, but the city was not required to subsidize it.

Again, this case was significant — it was very important at the time — in that it upheld the right of a public body to withhold benefits from groups that discriminate. Of course, on the national and state level the issue has continued over all these years playing out in the context of the

⁴⁶ 38 Cal.4th 1.

Boy Scouts. After many years of resistance, the Boy Scouts a couple of years back, declared that homosexual boys could be members, but just this year, I guess yielding to various pressures and constraints, withdrew the prohibition on gay men being leaders. So any local chapter, I gather, can have a gay Boy Scout leader. That's a huge change. I don't know what the Sea Scouts are doing, but the Boy Scouts — it's been in the press — have done that.

MCCREERY: As you say, that's a huge arc of change over a relatively short time, less than fifteen years.

WERDEGAR: Yes. And if you want to continue on that theme as to how, if you live these years, how society changes, even though at times it seems that we don't, there's the same-sex marriage cases — what a history there.

MCCREERY: Isn't it, though? Before we turn to that, what else do you recall about working on the *Sea Scouts* cases that stands out as you think back on it?

WERDEGAR: It was unanimous. At the time, again, just like the *Catholic Charities* or some of these other cases we've mentioned, these were big deals. *Sharon S.*, the second-parent adoption. As I think back I realize these were complicated, difficult. They were going to be highly publicized when the opinions came down. Ten years and more have passed, and there's no question about the rightness of the opinions or the underlying issues. So society does change, and I think in many ways, certainly as we speak to the same-sex marriage cases, but in many ways in this area of gays and lesbians it has moved very quickly.

MCCREERY: Hasn't it, though, I think even to the surprise of those in that community who are working on it this whole time? I've heard individuals say, "I never dreamed it would come so fast, in my lifetime," shall we say.

WERDEGAR: Yes. It's interesting.

MCCREERY: So this, as you say, is a major development in our national civil rights, and it is a fascinating moment to reflect on the various cases this court has considered relating to same-sex marriage. Let me ask you to start from the beginning, as it were, of that one, not only in the order of these cases, but how it came to your attention that these issues were going to be on your list, just how you recall it.

WERDEGAR: I remember, and I don't know the year — I hope maybe you could find it out — when domestic partnerships were going to be the resolution of equity for same-sex couples.⁴⁷ That was legislation, and it seemed right. It gave a legitimacy and a status and a legal relationship, which was beneficial to individuals living as same-sex couples. At that time, whatever the year was, the idea of gay marriage was off my radar. I just couldn't contemplate it. I had nothing against it. I just couldn't imagine it was ever going to happen. And as we now know, it has.

Bringing it locally and more to the present, there was a state statute that a marriage is between a man and a woman. I don't know what the impetus for him was, but our former [San Francisco] mayor Gavin Newsom declared that statute unconstitutional and directed the registrar of marriages, or whoever issues licenses in San Francisco, to issue marriage licenses to same-sex couples. I don't have this in front of me, but I think hundreds of couples got married. Then there was a petition to stop it; I don't know who brought the petition, but it was stopped. There might have been an injunction stopping it, pending resolution by the courts. There were multiple couples that had gotten married. The case finally made its way to our court, and the case there — perhaps you have the cite — *Lockyer*?

MCCREERY: *Lockyer v. City and County of San Francisco* (2004).⁴⁸

WERDEGAR: Yes. That question was twofold. Did the mayor have the authority unilaterally, without going through the courts, to declare a state law unconstitutional? That's a very, very interesting question. The majority held that he did not. That is, though, a very profound question. Since every officer is sworn to uphold the constitutions of the state and the United States, does that mean only as interpreted by the highest judicial authority? Maybe. But anyway, the court held that the registrars of marriage should not issue these licenses.

The court declared all the marriages that had taken place to be void, and that's where I differed with the majority, because at the time we issued our opinion the constitutionality of the statute defining marriage as being between a man and a woman was in litigation in a separate case. It was in

⁴⁷ The Legislature enacted California's registry in 1999, the first of its kind in the nation.

⁴⁸ 33 Cal.4th 1055.

the courts. So my view was, “Don’t be in such a hurry to invalidate these marriages. Keep the status quo. Later will be soon enough to invalidate them if necessary, but maybe it will turn out that the statute that’s under attack will be declared unconstitutional, and if you invalidate these marriages now these people won’t have the benefit of all that time when they were married and of the rights that are pertinent to a legal marriage.”

I also made the point that it’s really a denial of due process to these couples to declare their marriages void when they’re not in court to argue the question. You’re taking away from them this interest they have without their being heard. Well, I didn’t prevail. But it turned out that I should have, because later on same-sex marriage was declared to be legal.

MCCREERY: You mentioned that the litigation was going on by then, and you came forth with the idea of, “Why be in such a hurry until that’s resolved?” Do you recall, though, other than the presence of the litigation, what made you think of that approach?

WERDEGAR: It was just a legal thought. It didn’t seem right to me. The individuals who were impacted were not being heard and, as I’ve said, what if it turns out that there is actually the constitutional right to be married? Have we taken it away from them prematurely? Time enough if — it was just a legal question.

MCCREERY: What response did you get from colleagues on that point?

WERDEGAR: I’d have to read the majority opinion again.

MCCREERY: I just wonder if it comes to mind as you think about it?

WERDEGAR: After I circulated my opinion, Justice Kennard decided to write on that point as well. Being senior to me at that time, her opinion appeared first, so people would read her opinion before they would read mine. Now, if I write separately, Werdegar’s opinion is first. [Laughter]

MCCREERY: That seniority has come to you, hasn’t it, meanwhile? [Laughter] It is such an interesting question when it is a major high-profile civil rights issue like that. Does your process as a panel of seven differ in any way at all in how these matters are discussed or considered?

WERDEGAR: No. You have the presumptive majority opinion circulated and then, maybe even before oral argument, a separate point of view has been articulated. Let’s say that it has. All the justices have weighed in

before you go into oral argument. The argument might address these different points of view, and you conference afterwards. In this case I cannot remember when my point of view came to the fore publicly among the court. Whether it was a preliminary response stage or after oral argument I can't say. But certainly in written form, all the members are aware of everybody's point of view.

After argument we will orally, in conference, discuss these different points of view. But once people have tentatively landed where they're going to land on a case, any further discussion is usually in writing: memos, cross-memos. The majority certainly addressed that point in the majority opinion and rejected it; they didn't let it pass. They looked at it and disagreed.

MCCREERY: But as you say, those couples who did undertake a marriage when it was possible were not getting an automatic consideration if that was suddenly revoked some months later.

WERDEGAR: Do you want to talk about the rest of the *Marriage Cases*?

MCCREERY: Sure, I do. Just to finish about *Lockyer*, I gather Chief Justice George offered the opinion and had the concurrence of Justices Baxter, Chin, Brown, and Moreno, with a concurring opinion by Justice Moreno and then concurring and dissenting opinions by yourself and Justice Kennard. So it's an interesting grouping in this case.

WERDEGAR: I don't think it's an unusual grouping. If you were going to have a dissent during that period of the court, it likely would be by Justice Kennard or by Justice Moreno or by myself or, depending on how the case went, by Justice Brown. Did you mention Justice Brown? She would definitely be a dissenter in other kinds of cases.

MCCREERY: We did talk about that, I think last time, that she was a frequent dissenter and so on. Thank you. That clarifies for me. Yes, let's do go on.

WERDEGAR: All right. You have the names of the cases, but I'll tell you my memory. Next came to our court *In re Marriage Cases*, where the issue was, "What about the constitutionality of restricting marriage to a man and a woman?"

In an extremely erudite and lengthy opinion — and a closely divided opinion, which I joined — Chief Justice George wrote that it violates the

Equal Protection Clause of the California Constitution. The litigants, I'm told, were strategically very careful to litigate it only with respect to the California Constitution because they did not want it to go to the United States Supreme Court, perhaps with some apprehension as to how the court at that time would rule.

There were dissents, I think three. It must have been 4–3. Justices Corrigan, Baxter, and who was the third dissenter? I don't believe Justice Brown was on the court at the time.

MCCREERY: Let's see. Justice Corrigan, concurring and dissenting, I gather.

WERDEGAR: Yes, Justice Baxter. Did Justice Chin dissent?

MCCREERY: Yes, with Justice Baxter.

WERDEGAR: Yes. So that was that.

MCCREERY: That, of course, was all coming to voters passing Proposition 8.

WERDEGAR: Then they passed Proposition 8 because, faced with the California Supreme Court decision that lesbians and gays can marry, an initiative was put on the ballot and voters, as they can — we spoke earlier — amended the California Constitution to say, “No. Under the California Constitution gays and lesbians cannot marry.” Our next case was, what about this proposition? Can they do that? What's the name of the case?

MCCREERY: *Strauss v. Horton*,⁴⁹ the consolidation of several cases, actually.

WERDEGAR: Yes. And there we all got an education on the initiative process of the State of California and how many hundreds of times the Constitution has been amended and that a mere majority vote can change the Constitution by enacting something — it wasn't the first time — that our court had declared to be unconstitutional. Long ago this court had done it on the death penalty. The voters came back and said, “We disagree. Our Constitution allows the death penalty. We disagree. Our Constitution restricts marriage. It doesn't permit it between gays and lesbians.” So that was that case and, again, a very interesting opinion.

Justice Moreno dissented on a very interesting point, as I recall, because the voters cannot change the structure of our Constitution. And I

⁴⁹ 46 Cal.4th 364 (2009).

think Justice Moreno took the view that, even though only a few words, the change in the rights of the individuals was a structural change under our Constitution. I wrote separately to say it could be, but in this case it wasn't. Putting aside the subject matter of gay and lesbian same-sex marriage, the consideration of what is just an amendment of our Constitution and what's a structural change is a very interesting one legally.

MCCREERY: How else has that come to you?

WERDEGAR: It hasn't; however, in my discussion of the initiative process and my speech on the subject, I tried to describe what a structural change would be, and I gave some illustrations of what this court historically had called a structural change and therefore invalid by initiative.

MCCREERY: I do remember our talking about that speech and what a fascinating process that was for you to prepare it. Just to return to *Strauss v. Horton*, the third of these cases, as it happened it stood for a time and then the U.S. Supreme Court took up a case that ended up —

WERDEGAR: What actually happened before that — it left us. We're done. But then a couple did sue in federal court, and by way of hearsay, because I'm certainly not involved, there was some concern among the affected community that this wasn't a good idea because of some apprehension, uncertainty, as to if it ever got to the United States Supreme Court, what would they do?

Judge Vaughn Walker held a trial, had testimony, and ruled that it was a violation of federal equal protection to deny this right. After that I think the federal Court of Appeals affirmed that and the United States Supreme Court did not take review or held the question was not properly before them. There was some question as to what did it mean? This was one couple and one federal district that — at least their marriage was good. But how far did it apply?

MCCREERY: But to what extent would it apply elsewhere?

WERDEGAR: Yes. But soon after, another case, not this party's case, was brought up to the United States Supreme Court.

MCCREERY: *Hollingsworth v. Perry* was the one they ruled on in 2013.

WERDEGAR: Yes. But ultimately they later declared that same-sex marriage was valid.

There was a conflict among circuits. And they resolved that conflict.

MCCREERY: As you're suggesting, there was a great amount of tactical maneuvering on the part of the various interests in terms of when should the concept be brought forward again and under circumstances in which case.

WERDEGAR: Is it wise to? That's true. That's a real strategy. That couple persisted, and they prevailed.

MCCREERY: And having it turn into a federal trial case and then move its way up to the U.S. Supreme Court. That was a vast change. As you say, there's been more since then. Only this June the U.S. Supreme Court gave a ruling that settles the matter for the country in terms of same-sex marriage.

WERDEGAR: It did.⁵⁰

MCCREERY: But anyway, it took some time for those events to transpire but now, in 2015, we look back at San Francisco conducting same-sex marriages in 2004, and it's an astonishing journey over a relatively short time. I wonder what you might recall personally about the kinds of responses you saw out there in the world as this court was looking at these three cases that came here?

WERDEGAR: I do remember after our first opinion, *In re Marriage Cases*. As you can see, my chambers has a window on city hall, a box seat. I expect there was great fanfare outside our building when the opinion was issued. I don't know if I spoke of this earlier, but soon after couples in wedding regalia — white suits, white dresses, dresses *and* suits, however people cared to turn themselves out for the ceremony — were lined up around the block to get married. Looking out my window, I just had to reflect on the swift movement of events.

And of course, that was not the end of the story. We learned later that was just a stopping point because Proposition 8 was passed after those marriages. But looking at all the couples around the block in wedding finery to get married after we had declared that under the California Constitution they had that right, that was memorable.

MCCREERY: Yes. That moment of announcing the decision on *In re Marriage Cases*, 2008 — really, it rang out as history in the making. Do you recall exactly where you were when it was announced to the public?

⁵⁰ The case recognizing the right to same-sex marriage is *Obergefell v. Hodges*, 576 US ___ (2015).

WERDEGAR: I was probably in my chambers doing my work. We finalize our opinion, we vote, the opinions circulate. We know it's going to happen. Then on particular days, I think it's Mondays and Thursdays, the opinions are issued.

So it's not as if I was getting the news somewhere. I knew the news, and I can't remember what I heard about the reaction at that time. I'm sure there was great media attention, but I don't recall that.

MCCREERY: What are your thoughts broadly about the development of this as a civil rights issue and what it means for our society? How do you see it?

WERDEGAR: I really would not care to comment. We did what we did under the law as we saw it, and there is all sorts of discussion as to what the ramifications of that will be with respect to other forms of union. There's a great deal of resistance in certain quarters, and despair. I just played my role, and it seemed right to me.

I think that's about all I should say about it because there's still so much going on, such as, I mentioned one case that's pending: Can a cake baker refuse to bake a cake? Can a civil servant in some town, not in California, refuse to issue the license because it offends her religious conscience?

MCCREERY: But as you pointed out earlier today, if people are deciding when and where to draw those lines for themselves, it's a chaotic society.

WERDEGAR: Oh, well, that's definitely my view. Ultimately the United States Supreme Court will speak to it. And when they do, whatever they say, we're all supposed to adhere to it.

MCCREERY: Would you reflect for just one more moment about the experience of looking back on these cases, as you say, in preparation for our conversations and what it's like — in the cases specifically relating to same-sex marriage — what is it like to look back and see how things have changed in a short time?

WERDEGAR: I can say in this case, as you and I have mentioned, it's happened quickly. But because this oral history has required me to look back over my history, my role on this court, how I was perceived, whatever issue it was when I was appointed — whoa! You go twenty years forward, and we

have our three new judges, none of whom has sat on a trial court. We have four women on the court. That has been a *dramatic* change.

Bringing it home to my personal history — one of two women in my class at Berkeley; now more than a majority of the students are women. Now having a woman on the bench is of no novelty whatsoever. And having no judicial experience is the mode of the appointments — no trial practice experience — times have changed. It also depends on the appointing authority, and we spoke about that. With Governor Deukmejian, he had one idea of what he wanted. Governor Jerry Brown has a *completely* different idea of what he wants.

Reading this book, *Judging Judges*, recently, which I mentioned to you at one time, by Preble Stolz, which reviewed the public hearings of the Bird Court, whether they had withheld a case to avoid it being issued before Chief Justice Bird's retention election — that's what the book is about. But I see that in that book — how many years ago? Thirty years? Forty? [1981] Governor Jerry Brown, the previous Governor Jerry Brown [Laughter] — it was commented on that the judges he had appointed had had no judicial experience. [Laughter] That's what he did then, and that's what he is doing today. That's the way he perceives what he wants. So this whole business of reflecting over time — I'm grateful that my oral history has given me the opportunity to do that in a structured way. Big changes.

MCCREERY: Thank you. You've developed such a great amount of seniority, certainly by today. But even in the time period we've talked about in reference to these cases you were —

WERDEGAR: Not really. Justice Kennard was the most senior. Justice Baxter was next. And I guess I was next. I liked that. I think I've told you I liked hearing Justice Kennard at conference and hearing Justice Baxter at conference because if different perspectives were going to come to bear I might have heard those different perspectives by the time it got to me. So that was kind of nice.

MCCREERY: Anything you'd like to add about the cases we've discussed today?

WERDEGAR: No, except that *Sharon S.* and *Evans* at the time — you said you'd read the press — the perception was that I had an open mind if not a

positive attitude toward gays at a time when that was an issue. Again, this has dissipated, at least in California, as far as I know, by and large.

MCCREERY: But you had the experience of looking into the — ?

WERDEGAR: That I had a civil libertarian point of view, basically, I think. I think *Catholic Charities* picks that up as well, speaking of the perception of people who do look at what the court does.

MCCREERY: Do you agree?

WERDEGAR: Yes, I do.

MCCREERY: Let's stop there for today, and thank you so very much.

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