

## KAY WERDEGAR'S ENDURING LEGACY

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Berkeley, 1960. That's what students read about in history books. Am I making an assumption here? Do students even have history books, or any books? And what about reading? I'm informed that students read, in a manner of speaking, what appears on screens on their "devices." And if we are going to quibble about what "read" means these days, I have been told by reliable sources, that they watch "stuff" on devices, like what things were like at Berkeley in the '60s.

I mention Berkeley in the '60s because that was when I became aware of Kay Werdegar, except then she was Kay Mickle. Mind you, I didn't know her. To repeat, I was aware of her. I and everyone else. I bet you already know why. But, first, getting back to the place. I already mentioned, "Berkeley." I don't suppose it is necessary to add "California." But to be more specific, it was Boalt Hall, the law school at the University of California. It is hard to believe, they (whoever "they" are) changed the name of the law school from the imposing Boalt Hall to the uninspiring University of California, Berkeley School of Law. Remind me to ask Justice Werdegar her views on this subject.

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But getting back to Kay. No disrespect, but that is how she was known then, and that is how she prefers to be addressed by friends when not in court. The attentive reader will have noted I refer to “Kay” and “Justice Werdegar” in the preceding paragraph. This practice will continue throughout, depending on context and my mood. Apologies to the editor.

But getting back to Kay. She was known to everyone or, to be more precise, she was held in awe by everyone, because she was . . . number one in the class. And, of course, a woman. The percentage of women in law school in the early '60s was . . . well, are you good at fractions? And without even consulting the historical record, we know how many women or minorities were on the Supreme Court. I checked with friends in advanced mathematics and am informed that I may refer to “zero” as a number.

Before her retirement from the California Supreme Court as one of its most distinguished and revered justices, a majority of the justices were, speaking of justice, women. After serving for a brief stint on the Court of Appeal, Justice Werdegar was the third woman appointed to our high court where she served with distinction for twenty-three productive years.

When Kay arrived at Boalt Hall in 1959, one year ahead of me, she was one of four women in that entering class. One woman from that group was a truck driver and another a philosophy major. The truck driver drove away after the first semester, and the philosophy major fled, perhaps to Plato's cave after the first year. Not sure what happened to the other one. The women had a “small, shabby” lounge. The men, in contrast, had a large, well-appointed lounge. I recall that card games and other distractions reigned supreme in the men's lounge. I was not aware of coeducational study groups in or out of the men's lounge.

The professors were all men, until Professor Herma Hill Kay arrived to teach in the second year. Years later Professor Kay compared Justice Werdegar to our judiciary's towering intellect, Chief Justice Roger Traynor.

The dean of Boalt Hall then was William Prosser of “Prosser on Torts” fame. New students met the imposing dean on the first day of law school. Kay, no doubt, experienced the same degree of fear and trembling I did my first morning. As we all sat at our alphabetically assigned spots at the extended semi-circular desks arranged in elevated tiers like an amphitheater, Dean Prosser paced back and forth in front of us. He then stopped and greeted us with these encouraging words of welcome, “Look to the

right, look to the left. One of those people will not be here at the end of the semester.” I heard about a law student who looked to the right, then to the left, and passed out. He was sitting on the aisle.

Kay remembers how Dean Prosser would call on her, the only woman in her section, with questions about salacious tort problems. Or was it salacious questions about tort problems? No matter. In those days, there were few women lawyers, and the dean was concerned that a woman would not be taking a seat that should have gone to a man who would have to support a family. Kay answered his questions “blushing mightily.” She answered all his questions with a significant response at the end of the year. It was a shot heard round the halls of Boalt: first in her class! And she was the first woman elected editor-in-chief of the California Law Review.

Her marriage to Dr. David Werdegar necessitated a transfer to George Washington University School of Law in Washington, D.C. Guess what? Easy guess. There too she was first in the class. Ho-hum. After graduation she distinguished herself as a lawyer with the Civil Rights Division of the Department of Justice, became a law professor, and a staff attorney at the Court of Appeal and the state Supreme Court. It was obvious to prescient Governor Wilson that the citizens of California deserved an appellate justice of Kay’s talents. No sooner had she unpacked her bags after being appointed to the First District Court of Appeal, he appointed her to the California Supreme Court on the retirement of Justice Edward Panelli, the justice for whom she had been a senior staff attorney.

Justice Werdegar’s opinions are noteworthy for their craftsmanship. She is scrupulous in rendering an accurate and precise reference to precedent, whether writing a majority opinion, or a dissent. And her dissents are noteworthy. She says she does not look to write a dissent “to project distinctiveness.” She writes them when she simply believes the majority is wrong.

In *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, a gunman, using semi-automatic assault pistols, killed and wounded several people in a high-rise office building. Plaintiffs, who were survivors and injured victims, sued the gun manufacturer for negligence on the theory that defendant negligently marketed and distributed to the public weapons suited for mass killing. The majority affirmed the trial court’s grant of summary judgment for the manufacturer on the theory the action was essentially a products liability action, involving a risk-benefit weighing analysis. It concluded that

plaintiffs' action was barred because the Civil Code provides that firearms are not deemed defective in design on the basis that the benefits do not outweigh the risk of injury. Justice Werdegar's meticulous dissent reasons that the majority was wrong in concluding that defendant's negligent marketing is barred by the design defect statute. She posits that the significant issue in the case was the triable issue concerning the manufacturer's negligence in marketing an assault weapon to the general public as opposed to police and military users.

Justice Werdegar wrote this dissent when she was up for reelection in 2002. Her courageous dissent calls to mind the late Justice Otto Kaus, who said the threat of being voted off the bench because of an unpopular ruling was like having a "crocodile in your bathtub." Justice Werdegar noted, "[G]un promoters and advocates are very jealous of their rights and assertive and so on. But there it was. That's what I did. I'm proud of it. It's gone nowhere except into the hearts of people who would like very much to put some limits on the misuse of firepower in our society."

In 2006, in a judicial profile of Justice Werdegar in *The Recorder*, Mike McGee wrote, "After nearly a dozen years on the California Supreme Court, it's apparent to those in the know that Justice Kathryn Mickle Werdegar has what the Scarecrow and the Tin Man lacked in the Wizard of Oz — both a brain and a heart."

Here are just a few cases that prove the point.

*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763. A Fed Ex employee was assaulted while delivering a package in an apartment complex known to be dangerous. In a four-to-three decision upholding summary judgment in favor of the apartment owners, the majority held that even if the apartment owners were negligent in keeping the premises safe, plaintiff could not establish a triable issue of fact to establish liability without proving the identity of her assailants.

In her well-reasoned dissent, Justice Werdegar, speaking for her like-minded dissenters, got assistance from the redoubtable Dean Prosser, whom she quoted in a case that causation cannot and need not be proved with certainty.

In *People v. Diaz* (2011) 51 Cal.4th 84, Justice Werdegar concluded in her dissent that the contents of an arrested person's mobile phone could not be searched without a warrant. She received vindication when the

United States Supreme Court in *Riley v. California* (2014) 134 S.Ct. 2473 came to the same conclusion.

In *Bristol-Meyers Squibb Co. v. Superior Court* (2017) 137 S.Ct. 1773, nonresidents of California joined residents of California in a class action suit involving the drug Plavix. Even though the nonresidents neither bought the drug in California, nor were they injured in California, the California Supreme Court held that the nonresidents could sue Bristol-Meyers in California. California had jurisdiction over the nonresidents. Justice Werdegar dissented and reasoned that the absence of a relationship between Bristol-Meyers' activities in California and the nonresidents deprived California of jurisdiction. In a condescending majority opinion, the United States Supreme Court agreed with Justice Werdegar and reversed the California Supreme Court. That hoary precedent from law school days, *International Shoe Co. v. Washington* (1945) 326 U.S. 310 came up for a renewed interpretation.

Justice Werdegar's legacy will endure for decades to come. There are legions of cases that make this prediction a certainty. To name a few: *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. A trial court may sua sponte strike prior felony convictions in furtherance of justice in three strike cases. *Catholic Charities of Sacramento v. Superior Court (Department of Managed Health Care)* (2004) 32 Cal.4th 527. A religious social service agency may not evade the statutory requirement that it provide contraceptive coverage for its employees on the ground it violates constitutional freedom of religion grounds.

*Evans v. City of Berkeley* (2006) 38 Cal.4th 1. The city did not violate the Sea Scout's constitutional rights by requiring the organization to comply with the city's anti-discrimination policies as a condition of obtaining free slips in the city's marina.

One of Justice Werdegar's most important and enduring contributions to our jurisprudence is her opinion in *Conservatorship of Wendland* (2001) 26 Cal.4th 519, a case that decides the agonizing question of what degree of proof is required of a conservator who wishes to withdraw life-sustaining treatment to a conscious, but severely impaired, conservatee who is incapable of giving consent. In a unanimous opinion, written with meticulous care and sensitivity, Justice Werdegar concludes that in the limited circumstance where the conservatee has left no formal directions for health

care, the conservator must prove by clear and convincing evidence either that the conservatee wished to refuse life-sustaining treatment or that to withhold such treatment would be in the conservatee's best interest.

Times have changed from Kay's first stressful year in law school. But in many significant ways, Kay has remained the same. Throughout the years her resolve and fierce determination to do the best did not change. Kay is a role model for women and men. Her commitment to justice and her unshakable integrity is a constant that is manifest in her opinions, articles, and speeches. And she still blushes . . . when receiving praise. She is warm and engaging and genuinely modest despite her monumental achievements.

In her retirement Kay intends, among other things, to hike three times a week, instead of two. She also expects to spend more time practicing the piano. Drawing from my own experience at the piano, this endeavor bears a disquieting similarity to judging. After an hour or so of practicing, the lone participant may feel compelled to register a dissent.

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