

# JUSTICE KATHRYN MICKLE WERDEGAR

## *A Staff Attorney's Memoir*

GREG CURTIS\*

When Justice Kathryn Mickle Werdegar took the oath of office as an associate justice of the California Supreme Court on June 3, 1994, the state was likely curious about what sort of jurist she would be. Justice Werdegar had served three years on the First District Court of Appeal — barely long enough to have made a ripple on the ocean of California law. Few then were aware of her historic achievements as a woman in law school, her early work in civil rights law at the United States Department of Justice, or her teaching career at the University of San Francisco School of Law. Some at the Supreme Court had known Kay Werdegar as a senior attorney for Justice Edward Panelli during the court's turbulent years under Chief Justice Rose Bird. Those former colleagues remembered her as brilliant but quiet and disinclined to share her personal views. She was taking retired Justice Panelli's seat on the court. Would she also assume his role in the emerging majority led by Chief Justice Malcolm Lucas, as some hoped? Or would she have a “personal epiphany” that led her in a

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\* Head of chambers (1994–2017) to Associate Justice Kathryn M. Werdegar (retired) and chief of staff (1993–1994) and staff attorney (1989–1993) to Associate Justice Edward A. Panelli (retired).

different direction, as Justice Robert Puglia had sharply inquired during her confirmation hearing?

As citizens of the state, the Supreme Court's legal staff shared this general curiosity about the newest justice. As students of California law, some of whom had served the court under four chief justices, staff attorneys were also eager to learn how Justice Werdegar would approach the issues that were demanding the court's attention. For example, how did she stand on the perennial debate, then quite heated, over the role of the state Constitution as a source of fundamental law independent of the federal charter? Staff also wondered how Justice Werdegar's unique familiarity with the court's internal processes would affect her work. What sort of people would she hire to staff her chambers, and how would she interact with them?

Justice Werdegar may have inspired erroneous speculation about how she viewed her new role by hiring three attorneys who had worked for retired Justice Panelli in addition to one who had served with her on the Court of Appeal.<sup>1</sup> People unfamiliar with the inner workings of the Supreme Court sometimes assume that staff attorneys tend to mirror their justices' views and that the justices even prefer such people. Justice Werdegar herself mirrored no one's views and kept would-be sycophants at a polite distance. Instead, she was anxious to make sound and supportable decisions and grasped the need to understand all sides of a problem before resolving a case. Accordingly, she made her chambers a place in which reasoning and conclusions were rigorously subjected to every fair criticism. Only Justice Werdegar's implicit expectation of courtesy and civility allowed this idealistic venture to proceed without rancor. Her chambers were not a place to raise one's voice, but neither were they a place to keep good ideas to oneself.

Answers to questions about what sort of jurist Justice Werdegar would be were not long in coming. She quickly claimed her place on the court as a strong, independent thinker willing to follow the law where it led. Take for example the year 1996, two years after she assumed office. In that year alone, Justice Werdegar dissented from, and provided a fourth vote to rehear, a decision upholding a law requiring parental consent for a minor's

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<sup>1</sup> Justice Werdegar later added at various times a former annual clerk for Justice Panelli, an attorney for retired Justice William Stein of the First District Court of Appeal, and a former attorney for retired Chief Justice Lucas.

abortion.<sup>2</sup> Justice Werdegar also wrote the lead opinion in a case<sup>3</sup> rejecting a landlord's claim that her religious beliefs permitted her to refuse to rent to an unmarried couple, despite the California Fair Employment and Housing Act's prohibition of discrimination based on marital status.<sup>4</sup> And she wrote a majority opinion,<sup>5</sup> unanimous on the dispositive point,<sup>6</sup> concluding that the 1994 draconian sentencing laws known as "Three Strikes and You're Out"<sup>7</sup> did not prevent judges from granting leniency by dismissing prior-conviction allegations in the furtherance of justice.

To have looked for a political or ideological pattern in these early opinions would have been a mistake. Their unmistakable significance, rather, was to identify Justice Werdegar to scholars of California law as a preeminent member of their community, one who thought deeply about the issues and whose opinions reflected careful reasoning and integrity.

For example, Justice Werdegar's 1996 dissenting opinion in *American Academy of Pediatrics v. Lungren*,<sup>8</sup> highlighted one of the central theoretical problems of state privacy law: how does a court identify the rights protected by the state Constitution's privacy clause?<sup>9</sup> The majority had upheld a former statute barring a minor from consenting to an abortion without a parent's consent. The challenged law did not implicate a social norm protected by the privacy clause, the majority had concluded, because "the Legislature has in numerous areas curtailed an unemancipated minor's ability to make choices implicating privacy."<sup>10</sup> Justice Werdegar, in contrast, argued that the voters who had approved the 1972

<sup>2</sup> *American Academy of Pediatrics v. Lungren* (1996) 912 P.2d 1148, 1197 (dis. opn. of Werdegar, J.), reh'g. granted May 22, 1996, and superseded by (1997) 16 Cal.4th 307.

<sup>3</sup> *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1150 (plur. opn. of Werdegar, J.).

<sup>4</sup> Gov. Code, § 12955, subd. (a).

<sup>5</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

<sup>6</sup> See *id.* at p. 533 (conc. opn. of Chin, J.).

<sup>7</sup> Prop. 184, approved by voters, Gen. Elec. (Nov. 8, 1994), and Stats. 1994, ch. 12, § 1 [codified as Pen. Code, former § 667, subds. (b)–(i), as subsequently amended].

<sup>8</sup> *Supra*, 912 P.2d 1148, 1197 (dis. opn. of Werdegar, J.). See *ante*, fn. 3.

<sup>9</sup> Cal. Const., art. I, § 1 ["All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*." Italics added.].

<sup>10</sup> *American Academy of Pediatrics v. Lungren, supra*, 912 P.2d at p. 1025.

privacy initiative<sup>11</sup> probably did not have “in mind a narrow right circularly defined by reference to statutory law.”<sup>12</sup> Justice Werdegar’s dissent influenced the court’s decision on rehearing to invalidate the parental consent law.<sup>13</sup>

In her lead opinion in *Smith v. Fair Employment & Housing Com.*,<sup>14</sup> Justice Werdegar addressed a claim under the state Constitution’s distinctly worded free exercise clause<sup>15</sup> at a particularly challenging time. A few years earlier, the United States Supreme Court had clarified that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability’” on the ground of religious compulsion.<sup>16</sup> Congress had reacted by requiring religious exemptions from state laws in a statute then being challenged in the federal high court as unconstitutional.<sup>17</sup> Justice Werdegar declined all suggestions to interpret the state free exercise clause by reference to federal law. Instead, she examined the challenged housing discrimination law under the test most protective of religious exercise (i.e., strict scrutiny), assuming its applicability merely for the sake of argument.<sup>18</sup> This cautious approach preserved the court’s ability in a future case to articulate “an as-yet unidentified rule that more precisely reflects the language and history of the

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<sup>11</sup> Prop. 11, approved by voters, Gen. Elec. (Nov. 7, 1972).

<sup>12</sup> *American Academy of Pediatrics v. Lungren*, *supra*, 912 P.2d at p. 1197 (dis. opn. of Werdegar, J.). See *ante*, fn. 2.

<sup>13</sup> See *American Academy of Pediatrics v. Lungren*, *supra*, 16 Cal.4th 307, 339 [“[I]t plainly would defeat the voters’ fundamental purpose in establishing a constitutional right of privacy if a defendant could defeat a constitutional claim simply by maintaining that statutory provisions or past practices that are inconsistent with the constitutionally protected right eliminate any ‘reasonable expectation of privacy’ with regard to the constitutionally protected right.”].

<sup>14</sup> *Supra*, 12 Cal.4th 1143, 1150 (plur. opn. of Werdegar, J.).

<sup>15</sup> “Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State.” (Cal. Const., art. I, § 4.)

<sup>16</sup> *Employment Div. Ore. Dept. of Human Res. v. Smith* (1990) 494 U.S. 872, 879.

<sup>17</sup> The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141 (Nov. 16, 1993), 107 Stat. 1489, codified as 42 U.S.C. § 2000bb et seq. and subsequently amended (RFRA). See *City of Boerne v. Flores* (1997) 521 U.S. 507 [holding RFRA unconstitutional in part].

<sup>18</sup> *Smith v. Fair Employment & Housing Com.*, *supra*, 12 Cal.4th at p. 1179 (plur. opn. of Werdegar, J.).

California Constitution and our own understanding of its import.”<sup>19</sup> The court followed the same approach in a later majority opinion by Justice Werdegar upholding a state law mandating that employer-sponsored pharmaceutical insurance plans include coverage for contraceptives.<sup>20</sup>

In the last of the three notable opinions from 1996, *People v. Superior Court (Romero)*,<sup>21</sup> Justice Werdegar invoked the state Constitution’s separation of powers clause<sup>22</sup> to conclude that a sentencing judge could properly dismiss prior-conviction allegations in a Three Strikes case over the prosecutor’s objection.<sup>23</sup> “[T]o require the prosecutor’s consent to the disposition of a criminal charge pending before the court,” she explained, “unacceptably compromises judicial independence.”<sup>24</sup> Justice Werdegar also employed the meticulous statutory analysis that would become a hallmark of her opinions to convince the entire court that neither the voters nor the Legislature had actually intended their respective versions of the statute to limit judicial power.<sup>25</sup> The overwhelming majority of the lower courts had reached the opposite conclusion.

These opinions brought Justice Werdegar more public attention than she probably expected or desired. But the care with which they were expressed won her deep respect within the court. This esteem increased over time as Justice Werdegar displayed the ability to find consensus in hard cases. For example, she wrote unanimous opinions addressing end-of-life decisions for gravely disabled, conscious conservatees,<sup>26</sup> deciding questions about wage and hour claims that had long eluded resolution,<sup>27</sup> and articulating rules to curb abusive practices associated with habeas corpus petitions in capital cases.<sup>28</sup> Justice Werdegar also became known for identifying instances in which the court’s decisions seemed to be departing from the requirements of federal law. Opinions by the United

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<sup>19</sup> *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 562.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Supra*, 13 Cal.4th 497.

<sup>22</sup> Cal. Const., art. III, § 3.

<sup>23</sup> *People v. Superior Court (Romero)*, *supra*, at pp. 509–518.

<sup>24</sup> *Id.* at p. 512.

<sup>25</sup> *Id.* at pp. 517–530. See *id.*, at p. 533 (conc. opn. of Chin, J.).

<sup>26</sup> *Conservatorship of Wendland* (2001) 26 Cal.4th 519.

<sup>27</sup> *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.

<sup>28</sup> *In re Reno* (2012) 55 Cal.4th 428.

States Supreme Court ultimately vindicated her dissents to decisions upholding warrantless searches of data in cell phones;<sup>29</sup> exercising specific jurisdiction in California over nonresident consumers’ product-liability claims unrelated to the defendant’s contacts with the state;<sup>30</sup> and permitting warrantless, nonconsensual blood testing on the theory that the need to preserve evidence in cases of driving under the influence constituted an exigent circumstance.<sup>31</sup>

Throughout her career, Justice Werdegar continued to devote particular care to cases implicating the California Constitution. One additional example deserves mention. In *Golden Gateway Center v. Golden Gateway Tenants Assn.*,<sup>32</sup> Justice Werdegar dissented<sup>33</sup> from a plurality opinion concluding that the state Constitution’s free speech clause<sup>34</sup> “only protects against state action.”<sup>35</sup> Six years later, a majority of the court moved closer to Justice Werdegar’s view by holding that a privately owned shopping mall could not constitutionally enforce its policy banning expressive activity by a labor union, without attributing any significance to the apparent absence of state action.<sup>36</sup>

The Supreme Court is a busy place with an unrelenting demand for legal writing. People new to the court can be dismayed by the workload of petitions for review, granted cases awaiting decision, petitions for habeas corpus, and automatic appeals in death penalty cases, and by the number of detailed memoranda that must be prepared to allow the court to address these matters fairly. Each justice must find a way to carry a share of this burden. Justice Werdegar asked of her staff only that their written work be fully researched, tightly and transparently reasoned, fair to both sides, and clearly expressed. For a staff attorney, no more challenging or rewarding environment can be imagined.

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<sup>29</sup> *People v. Diaz* (2011) 51 Cal.4th 84, 103 (dis. opn. of Werdegar, J.). See *Riley v. California* (2014) 573 U.S. \_\_\_ [134 S.Ct. 2473, 2481, 2493–2495] [effectively overruling *Diaz*].

<sup>30</sup> *Bristol-Myers Squibb Co. v. Superior Court* (2016) 1 Cal.5th 783, 813 (dis. opn. of Werdegar, J.), revd. (2017) \_\_\_ U.S. \_\_\_ [137 S.Ct. 1773].

<sup>31</sup> *People v. Thompson* (2006) 38 Cal.4th 811, 831–837 (dis. opn. of Werdegar, J.). See *Missouri v. McNeely* (2013) 569 U.S. 141 [effectively overruling *Thompson*].

<sup>32</sup> (2001) 26 Cal.4th 1013.

<sup>33</sup> *Id.* at pp. 1046–1049 (dis. opn. of Werdegar, J.).

<sup>34</sup> Cal. Const., art. I, § 2, subd. (a).

<sup>35</sup> *Golden Gateway Center v. Golden Gateway Tenants Assn.*, *supra*, 26 Cal.4th at p. 1031 (plur. opn. of Brown, J.).

<sup>36</sup> *Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850.

Justice Werdegar wrote extraordinarily well, as her opinions show. She was also a perceptive editor. She preferred to present her revisions in person, sitting side-by-side with a staff attorney at the work table in her chambers. Even the best attorneys sometimes employ rhetorical skill to conceal logical gaps in argument, or research that could be pursued further. At such times, the Judge (as her staff knew her) would typically have identified on her marked-up draft the precise sentence or phrase on which a difficult argument pivoted, and have circled the words that seemed to oversimplify a problem or evade a legitimate objection to the proposed conclusion. Pulling one frayed thread of argument in this manner could unravel pages of reasoning and days of work. Sometimes the Judge would leave her staff to struggle with the remnants as he or she saw fit. At other times the Judge might suggest an elegant solution with a sentence or two in fine cursive. Having corrected problems of substance, the Judge sometimes concluded an editing session by deleting anything the author could not show to be essential, whole paragraphs at a time. Among the staff attorneys who regularly shared this experience, the practice evolved of seeking one's colleagues' critical input before submitting written work, a collaboration for which the Judge often expressed gratitude.

When Justice Werdegar was not prepared to accept the analysis or conclusions in a staff memorandum, she would typically invite the author to attempt to persuade her. Her patience undoubtedly reflected the former staff attorney's respect for and appreciation of staff work. But the Judge also understood that to give someone time to defend an honestly held position, whether or not ultimately tenable, can be a powerful tool for reaching consensus. In this and other ways, the Judge's interaction with her colleagues and subordinates at the court seemed to reflect the assumption that people who are trained in the law, fully prepared through diligent study to address the case at hand, and free of obvious bias, should more often than not be able to agree on what the law requires. The assumption may be more aspirational than predictive. But there is no finer starting point for collegial work in a court. This is the example Justice Werdegar set for us.