UNPUBLISHED SPEECHES

JUSTICE KATHRYN MICKLE WERDEGAR

REGARDING *CONSERVATORSHIP OF WENDLAND*

KATHRYN MICKLE WERDEGAR*

OPENING REMARKS:

Thank you, Professor Winslade. I appreciate the opportunity to attend this very interesting and important symposium, and I thank you for inviting me. The appropriate care of the minimally conscious patient is certainly an area where medicine and law intersect, and one that evades definitive answers. I found Dr. Fins' presentation this morning fascinating.

As Professor Winslade mentioned, my purpose here today is to share with you some of the background and implications of the California Supreme Court case of *Conservatorship of Wendland,* decided in 2001.[1] My plan is first to discuss the factual background of the case and its legal history as it wound its way through the courts. I'll next discuss the proceedings in the trial court, including the evidence presented to the court of Robert's condition and of his wishes, and I'll share with you some of the

* Associate Justice, California Supreme Court, 1994–2017. Remarks delivered at the symposium, "Minimally Conscious: Grey Matters in Medicine, Law and Ethics," presented by the University of Houston Law Alumni Association Moot Court Committee and the Blakely Advocacy Institute, Houston, January 28, 2010 (with William J. Winslade, Ph.D., J.D.; and Joseph J. Fins, M.D., F.A.C.P.).

[1] Conservatorship of Wendland, 26 Cal.4th 519 (2001).

trial court's written opinion. After that I'll talk about the case in our court, why we took it, the background of the law concerning treatment decisions, and what we held. Finally, I'll mention some of the criticisms of our opinion. I anticipate my remarks will take about 30 to 40 minutes and then, as Professor Winslade indicated, he and I will entertain questions.

Wendland was the first case in California to concern end of life decisions for a minimally conscious patient, and only the second case in the United States. (The first was *In re Martin,* in Michigan, decided in 1995.[2]) Courts are often called upon to decide issues that challenge our society and divide us as a people. We don't necessarily welcome this, but it's our responsibility, and so it was with the *Wendland* case.

THE CASE:

As mentioned, *Wendland* involved a minimally conscious, severely disabled patient. He was not terminally ill, nor was he comatose or in a persistent vegetative state, and he had not left instructions for health care. His wife petitioned the court to be his conservator and asked the court for permission to authorize the hospital to withhold life-sustaining hydration and nutrition from him. His mother and sister objected. California, like most states, has a statute authorizing a conservator to make medical decisions for an incompetent conservatee.

The legal question for the court was what showing, under the California Health Care Decisions Law,[3] must the conservator of a minimally conscious individual make, to convince a court that her decision to withhold life-sustaining treatment is in accordance with the conservatee's own wishes or, failing that, is in his best interests.

Now let me turn to the factual background and the history of the case.

FACTS AND HISTORY OF THE CASE:

On September 29, 1993, 42-year-old Robert Wendland rolled his truck at high speed in a solo accident while driving under the influence of alcohol. The accident injured Robert's brain, leaving him severely disabled. For

[2] 450 Mich. 204.

[3] Cal. Prob. Code § 2355.

several months he lay in a coma, totally unresponsive. During this time, his wife, Rose, visited him daily and authorized treatment as necessary to maintain his health.

Approximately 16 months later (in January 1995) Robert regained consciousness and intensive physical therapy was initiated. But despite some improvements made in therapy, Robert remained severely disabled, both mentally and physically, and dependent on artificial nutrition and hydration. After Robert regained consciousness and while he was undergoing therapy, Rose authorized surgery three times to replace dislodged feeding tubes, which were inserted through his abdominal wall and stapled or sewn to the inside of his small intestine. When physicians sought her permission a fourth time, in July 1995, she refused. She concluded that Robert would not want to go through the procedure again, even if necessary to sustain his life, nor would he want to continue living in his current state. With the agreement of Robert's daughter, his brother, and the hospital, she decided to withhold treatment. Learning of this decision, Robert's mother Florence obtained a temporary restraining order. (In the meantime, Robert's doctor had inserted a nasogastric feeding tube to maintain the status quo.) Rose immediately petitioned the court for appointment as Robert's conservator and requested authority to withdraw his life-sustaining treatment. Florence and Robert's sister opposed the petition.

So here you have a clear family conflict: wife, child and brother in opposition to mother and sister.

California's Health Care Decisions Law authorizes the court to appoint a conservator for an incompetent conservatee, and authorizes the conservator to require or to withhold treatment, as she in good faith, based on medical advice, decides is in the conservatee's best interests.

Pursuant to the statute, the court appointed Rose as conservator and granted her permission to authorize a "Do Not Resuscitate Order" for Robert, but it reserved judgment on her request for authority to remove Robert's reinstated feeding tube. The court ordered Rose to continue the program of physical therapy for 60 days and then report back to the court. During this 60-day period the court itself visited Robert in the hospital.

After the 60 days elapsed with no significant improvement on Robert's part, Rose renewed her request for authority to remove Robert's feeding tube.

Then came a nine-month hiatus during which Florence asked the trial court for appointment of independent counsel for Robert; the trial court refused, reasoning that both sides of the question — whether to maintain life or allow death — were already represented by Florence and Rose; the Court of Appeal summarily denied Florence's petition for writ of mandate; our court granted review and transferred the case back to the Court of Appeal to reconsider its denial; and the Court of Appeal, on reconsideration, directed the trial court to appoint counsel for Robert. In its opinion, the Court of Appeal stated: "The trial court said independent counsel would not be helpful or necessary because Robert's interests were adequately represented by his mother and sister. However, a person facing the final accounting of death should not be required to rely on the uncertain beneficence of relatives. . . . Because Robert's very life is at stake, he is entitled to counsel to represent his interests, *whatever* those interests might be."[4]

Back in the trial court, appointed counsel supported Rose's decision. The trial court, however, denied Rose's request. The court first determined that Rose bore the burden of producing evidence and the burden of persuasion concerning Robert's wishes. Rose would be required to show by clear and convincing evidence that Robert would wish to have his treatment terminated. "'[F]inding itself in uncharted territory,'" the court reasoned that "'[w]hen a situation arises where it is proposed to terminate the life of a conscious but severely cognitively impaired person, it seems more rational . . . to ask *"why?"* of the party proposing the act rather than *"why not?"* of the party challenging it.'"[5]

The court then heard evidence concerning Robert's condition and his previous expressions of his wishes. On conclusion of the trial, the court held that, although Rose had acted in good faith, she had not met her burden to show by clear and convincing evidence that Robert would under the circumstances want to die.

EVIDENCE BEFORE THE COURT:

As indicated, the court had before it evidence of Robert's condition and evidence of his wishes.

---

[4] Wendland v. Superior Court, 49 Cal. App. 4th 44, 52 (1996).

[5] 26 Cal.4th at 527 (emphasis added) (quoting from the trial court decision).

(1) *The evidence of Robert's condition* included video recordings of Robert in therapy over a period of approximately two years (from 1995 to 1997), as well as contemporaneous medical reports and the testimony of treating physicians. The medical reports stated that after several months of therapy, Robert improved to where he was inconsistently interacting with his environment in response to simple commands. At his highest level of function between February and July 1995, the videos showed he was able to do such things as throw and catch a ball, operate an electric wheelchair with assistance, choose a requested color block, and set a peg in a pegboard. However, no consistent means of communication had been established, either by eye blinking or by use of an augmented communication device — a so-called "yes/no board."

Despite improvements made in therapy, Robert remained severely disabled, both mentally and physically. A medical report summarized his continuing impairments, in part, as follows: " 'severe cognitive impairment with concurrent motor and communication impairments . . .'; 'maladaptive behavior characterized by agitation, aggressiveness and non-compliance'; 'severe paralysis on the right and moderate paralysis on the left'; . . . 'severe swallowing dysfunction, . . .'; 'incontinence . . .'; 'moderate spasticity'; . . . 'general dysphoria'; [and] 'recurrent medical illnesses . . . .' "[6] The testifying physicians agreed that Robert would never be able to make medical treatment decisions, walk, talk, feed himself, eat, drink, or control his bodily functions.

Also in evidence was the testimony of Robert's physician concerning an exchange he had with Robert on April 29, 1997, eight months before the trial court's decision. The physician asked Robert a series of questions, which Robert, using the "yes/no board," appeared to answer correctly most of the time. " 'Do you have pain? Yes. Do your legs hurt? No. . . . Do you want us to leave you alone? Yes. Do you want more therapy? No. Do you want to get into the chair? Yes. Do you want to go back to bed? No. Do you want to die? No answer. Are you angry? Yes. At somebody? No.' "[7] However, Robert's physician testified he did not think Robert understood

[6] *Id*. at 525.

[7] *Id*. at 528.

all the questions, and his therapist testified that he had never used the yes/no board consistently.

(2) *As evidence of Robert's wishes,* Robert's wife, brother, and daughter recounted pre-accident statements Robert had made about his attitude toward life-sustaining health care. On one occasion, when Rose had to decide whether to turn off a respirator sustaining her father's life, Robert said: "'I would never want to live like that,' . . . 'wouldn't want to live like a vegetable' . . . [or] 'in a comatose state.'"[8] On another occasion, when his brother was warning him that his heavy drinking and driving would cause him to be in a terrible accident and end up in the hospital like a vegetable, he told his brother: "'[W]hatever you do[,] don't let that happen. Don't let them do that to me.'"[9]

Rose appealed to the Court of Appeal, which reversed. Contrary to the trial court, the Court of Appeal believed that under the statute, the trial court was required to determine only whether the conservator was acting in good faith, based on medical advice, and was not to determine whether there was clear and convincing evidence that the decision was what the conservatee would have wanted. The court observed that the statute had no such limitation, and it found no constitutionally significant difference between a PVS patient (as in *Drabick*[10]) and a minimally conscious one in this context.

Florence petitioned the California Supreme Court for review, and in June 2000, five years after Rose's first request to withdraw treatment, we granted review.

So, at that point, Robert had been alive five years after Rose first sought to withdraw treatment, seven years after his accident. The case started in the trial court in August 1995 with Rose's petition, went up to the Court of Appeal and then to our court and back to the Court of Appeal on Florence's request that an attorney be appointed to represent Robert, was returned to the trial court for decision on Rose's petition, was appealed by Rose to the Court of Appeal when her petition was denied, and finally came to us on Florence's petition for review of the Court of Appeal's decision.

---

[8] *Id.*

[9] *Id.* at 529.

[10] Conservatorship of Drabick, 200 Cal. App. 3d 185 (1988).

The case, as you may know, attracted national media attention, both on television and in magazines and newspapers. It's been described as one of the top news stories of 2001. The parties before us were of course Florence, seeking to reverse the Court of Appeal, and Rose seeking to uphold it. But in cases of such importance we often get briefs from amicus curiae, that is "friends of the court," interested groups or individuals who weigh in on the issues. In this case we received numerous such briefs. *On behalf of Rose, arguing for deference to the conservator's decision,* were, among others, the Alliance of Catholic Health Care and other healthcare entities, the California Medical Association, the American Civil Liberties Union, and various Bioethics Committees and Associations; *On behalf of Florence, arguing in support of the trial court's clear and convincing evidence standard,* were the Coalition of Concerned Medical Professionals, the Ethics and Advocacy Task Force of the Nursing Home Action Group, the National Legal Center for the Medically Dependent and Disabled, the Brain Injury Association, the Disability Rights Center, the National Council on Independent Living, and more. As you can see, the amici were divided between those who were concerned that an individual's autonomy be respected and he be accorded his right to choose to die, and those who were seeking to protect the sanctity of life and the individual's right to choose to live.

In addition to all the briefs, the evidence before our court was the same as that before the trial court three years earlier, in 1997, including six hours of video tape. We took no additional evidence of Robert's condition. I watched an edited version of the videos and my staff attorney watched the entire six hours. Other members of the court and staff may have done the same.

Now to our decision.

(1) We first recognized that the common law and the California constitutional right to privacy gives a competent individual the right to consent or withhold consent to medical treatment, including the right to refuse treatment, even when necessary to sustain life.

(2) We next recognized that this right of a competent individual to choose survives incapacity, so long as the law of the jurisdiction gives such a choice lasting validity. The California Health Care Decisions Law (fashioned after the Uniform Health-Care Decisions Act of 1993) does give competent adults the power to leave formal directions or to authorize an agent

to speak for the individual when he or she is no longer able to make health care decisions. In thus giving lasting effect to the decision of a competent person, these laws foster self-determination and respect for an individual's autonomy.

(3) We then noted that decisions made by a conservator, in contrast, derive their authority not from the patient, but from the *parens patriae* power of the state to protect incompetent persons, that is, the state's power to care for those who cannot care for themselves. As the United States Supreme Court said in the *Cruzan* case: "[A]n incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right. Such a 'right' must be exercised for her, if at all, by some sort of surrogate."[11]

With this background, we turned to the California Health Care Decisions Law. This is what it says:

> If the conservatee has been adjudicated to lack the capacity to make health care decisions, the conservator has the exclusive authority to make health care decisions for the conservatee that the conservator in good faith based on medical advice determines to be necessary. The conservator shall make health care decisions for the conservatee in accordance with the conservatee's individual health care instructions, if any, and other wishes to the extent known to the conservator. Otherwise, the conservator shall make the decision in accordance with the conservator's determination of the conservatee's best interest. In determining the conservatee's best interest, the conservator shall consider the conservatee's personal values to the extent known to the conservator. The conservator may require the conservatee to receive the health care, whether or not the conservatee objects.[12]

In *Drabick*, the Court of Appeal had before them the 1981 version, but the statute was later amended to include the part about abiding by the conservatee's wishes, if known, and that's the statute we construed. The statute makes no mention of any burden of proof. The Law Review Commission comment to the statute suggested that preponderance of the evidence

---

[11] Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 280 (1990).

[12] Cal. Prob. Code § 2355 subd. (a).

would suffice; but they did not put that in the actual statute. We rejected that standard. In a unanimous opinion, we held that a conservator may not withhold artificial nutrition and hydration from a conscious conservatee absent *clear and convincing evidence* that the conservator's decision is in accordance with either the conservatee's own wishes or his or her best interest.

Now what is "clear and convincing evidence?" There are three levels of evidence — preponderance, clear and convincing, and proof beyond a reasonable doubt. Proof beyond a reasonable doubt is the highest standard and applies only in criminal cases. The preponderance of evidence standard — the weight of evidence — is the lowest standard and the one that applies to most civil cases. But when the interests at stake in a civil case are particularly significant and the consequences grave, the courts will require the intermediate standard of clear and convincing evidence to support the decision. California courts have done so in cases involving sterilization of a developmentally disabled conservatee, termination of parental rights, and administering electroconvulsive therapy to an individual incompetent to consent. The clear and convincing evidence test requires — I quote — "a finding of high probability, based on evidence '"'so clear as to leave no substantial doubt' [and] 'sufficiently strong to command the unhesitating assent of every reasonable mind.'"'"[13]

Although we did not say what *would* constitute clear and convincing evidence, we agreed with the trial court that Rose's evidence did not meet that standard. We also agreed that the evidence did not support a finding that termination of life support would be in Robert's best interests.

It bears repeating that we were interpreting a statute, Probate Code section 2355, a statute that speaks to the powers of a conservator to authorize or withhold medical treatment for a conservatee, but makes no mention of a burden or standard of proof. Our task, then, was to supply a standard that would be appropriate to justify withdrawing life support from a conscious individual who well might perceive the consequences of the decision, and whose wishes were not known and could not be known. A lower standard, we believed, could infringe on the conscious individual's constitutional right to life.

---

[13] 26 Cal.4th at 552 (citations omitted).

LIMITATIONS OF OUR HOLDING:

(1) If a conservatorship is not involved, *Wendland* and its burden of proof do not govern the case. Even if a conservatorship *is* involved, the conservator does not have to petition the court for permission to make a life-terminating decision. The issue comes to court only if there is a conflict, or if the conservator seeks guidance. Otherwise, the law does not require judicial involvement in a decision to forgo medical treatment.

(2) Our decision does not affect any other health care decisions a conservator might need to make, only the decision to withhold life-sustaining treatment.

(3) The decision speaks only to a minimally conscious individual who is not terminally ill, and again, only one for whom a conservator has been appointed. It says nothing about decisions concerning patients who are terminally ill, or in a vegetative or comatose state.

I quote from our opinion: "[O]ur decision today affects only a narrow class of persons: conscious conservatees who have not left formal directions for health care and whose conservators propose to withhold lifesustaining treatment for the purpose of causing their conservatees' deaths. Our conclusion does not affect permanently unconscious patients, including those who are comatose and in a persistent vegetative state, persons who have left legally cognizable instructions for health care, persons who have designated agents or other surrogates for health care, or conservatees for whom conservators have made medical decisions other than those intended to bring about the death of a conscious conservatee."[14]

HOW TO AVOID JUDICIAL INVOLVEMENT:

The hope, of course, is that these difficult and sensitive decisions never come to the court. The courts do not want these cases, they are not well equipped to decide them, and the issues are not best decided by way of litigation. Think of the years of agony for Robert Wendland's family.

The whole body of law concerning end-of-life decisions involves *avoiding* conflicts and *resolving* conflicts when they arise. If there is no conflict, there is no problem.

---

[14] *Id*. at 555 (internal citations omitted).

Most cases, happily, do not end up in court. In the absence of a conflict, either between family members or between a family member and the hospital, these cases are resolved informally, based on the good faith judgment of close family members together with the advice of the treating physician and the approval of the hospital's ethics committee. Had Florence not objected, Robert's treatment would have been withdrawn in July 1995.

To be sure no conflict will arise and that your wishes are honored, an individual can do several things: leave a written health care directive, appoint a surrogate or agent, or execute a medical power of attorney.

The Health Care Decisions Law in California is very flexible. A person can leave a formal health care directive, which can be as specific or as general as the individual wishes, and can say what should happen if the instructions given don't cover the situation that arises. Instead of a directive, or in addition to one, you can appoint an attorney for medical care or a surrogate. You can also make an oral appointment or give oral instructions, although these last only so long as you are in the hospital or being treated for the precipitating condition.

There have been some criticisms of the *Wendland* opinion. Happily, I'm not aware of all of them!

Most of the criticisms I do know of relate to the high burden of proof we imposed to show that a minimally conscious conservatee would want to die. It's argued that in imposing such a high standard, the court gave more weight to the state's interest in preserving life than to the conservatee's autonomy and right to choose to die. *Response:* The short answer is that the patient's autonomy is not in issue in these cases. We don't know what the patient wants. With Robert, a minimally conscious patient, we could be fairly sure he did have a preference, but we couldn't tell what it was. Had he left directions or named a surrogate, his autonomy would be honored by following the directive or allowing the surrogate to decide. Since he did not, the interest of the state, in its role as *parens patriae,* was that an *appropriate* decision be made; thus, the trial court required clear and convincing evidence that Robert would want treatment terminated, before it would authorize withdrawal of life support.

Secondly, it's argued that although we stated our decision affected only a narrow class of persons — conscious conservatees — it will actually have a wide impact; this is because a persistent vegetative state — to which the

opinion does not apply — is rare, and most patients in these situations are minimally conscious. In addition, it's argued, many patients with dementia, as to whom questions of life-sustaining treatment have arisen, retain some level of cognitive functioning before they are deemed terminally ill. *Response:* In those cases, as in *Wendland,* I submit the higher standard of proof concerning their wishes is appropriate. It is not a *given* that such individuals would want to die.

Finally, it's argued that the young and the poor are not likely to have appointed a surrogate or executed a directive. Hence, by imposing such a high standard of proof, the opinion deprives these individuals of their fundamental right to refuse life-sustaining treatment. *Response:* But if there is no conservator, *Wendland* has no application. The family of such persons and the hospital together can reach an appropriate decision.

In closing, I'll say that since some burden of proof had to be chosen, it was thought better to choose one that weighs in favor of life, which is the status quo, rather than one that would allow an irreversible decision to end life. Every court that I'm aware of has imposed the same burden of clear and convincing evidence in the circumstances. As the United States Supreme Court stated in the *Cruzan* case, responding to the equal protection argument that a high standard of proof deprives an incompetent individual of equal protection since no such burden is required to effectuate the choice of competent persons, "the differences between the choice made *by* a competent person to refuse medical treatment and the choice made *for* an incompetent person by someone else to refuse medical treatment are so obviously different that the State is warranted in establishing rigorous procedures for the latter class of cases which do not apply to the former class."[15]

Let me read from our *Wendland* opinion: "In this case the importance of the ultimate decision and the risk of error are manifest. . . . But the decision to treat is reversible. The decision to withdraw treatment is not. The role of a high evidentiary standard in such a case is to adjust the risk of error to favor the less perilous result."[16]

---

15 497 U.S. at 287 n.12 (emphasis added).

16 26 Cal.4th at 547.

SUBSEQUENT DECISIONS:

Kentucky in 2004 issued an opinion that purported to rely on *Wendland*,[17] but it extended the requirement of clear and convincing evidence to withdrawal of treatment from a patient in a persistent vegetative state or permanently unconscious. I believe that only Kentucky and Missouri (*Cruzan*) have gone so far.

* * *

[17] Woods v. Commonwealth of Kentucky, 142 S.W.3d 24 (Ky. 2004).

ON BEING HONORED BY THE AMERICAN JEWISH COMMITTEE

KATHRYN MICKLE WERDEGAR*

I. THE JUDGE LEARNED HAND HUMAN RELATIONS AWARD[1]

Thank you, Jerry,[2] for your generous comments. And Justice [Joseph] Grodin, thank you for your kind remarks. I am truly honored to receive the Judge Learned Hand Award of the American Jewish Committee. I am also deeply gratified to be placed in the company of the distinguished individuals who have received it in the past.

I thank all of you for attending the ceremony this evening. I'd like particularly to acknowledge my colleagues from the Supreme Court, Justice Marvin Baxter and his wife Jane, Justice Ming Chin and his wife Carol, and also my classmate and friend Judge Thelton Henderson. And my family — David, Maurice and Helen, and Matthew and Monique.

Learned Hand is recognized as one of the country's great judges. He is often described as the greatest judge "*never* to be appointed to the U.S.

---

* Associate Justice, California Supreme Court, 1994–2017.

[1] Presented by the San Francisco Bay Area Region of the American Jewish Committee, May 22, 2008.

[2] Jerome Falk, San Francisco attorney.

Supreme Court." How did it happen that the highest judicial office eluded him? The answer is found in time, place, and politics. According to the story, in the *1920s* his appointment was blocked by then Chief Justice William Howard Taft. Gerald Gunther, in his wonderful biography of Hand, writes that Taft strongly urged President Harding not to nominate him, and offered a decisive political argument: "Hand," he said, "had turned out to be a wild Roosevelt man and a Progressive" — that would be Teddy Roosevelt — and "[i]f promoted to our bench, he would most certainly herd with Brandeis and be a dissenter."[3] Twenty years later, in the *1940s,* Justice Felix Frankfurter, a longtime supporter of Hand's, wrote President Franklin Roosevelt that Hand is "the one choice who will arouse universal acclaim in the press. . . . I never was more sure of anything."[4] Frankfurter even drafted a press release for FDR to announce Hand's nomination. It was not to be. Roosevelt reportedly wanted a younger man and appointed Wiley Rutledge.

Your choosing to honor me this evening prompted me to reflect on my career path, and how I came to be in a position to receive this honor. What I soon realized is that my career in the law, like that of Judge Hand, has been impacted by time and place — and, yes, perhaps politics as well. What I have also come to realize is that my personal journey is reflective of this country's journey over the past half century, as it endeavored to respond to the newly insistent demands of its African-American citizens and women for equal rights and opportunities. For the next few moments I would like to trace this history and then suggest what relevance it might have for us today.

When I attended UC Berkeley so many years ago, women had few career options; those who aspired to a career most often trained to be a teacher, nurse, or secretary. These were the women's occupations.

Typical of many, I graduated with a general liberal arts degree, having no defined career goals. I entered the workplace and ultimately accepted employment at the UC San Francisco Medical Center as a ward clerk. There I met three physicians who you might say changed my life.

The first two were women. Seeing them at work was a revelation. Until then I had no idea that a woman could pursue what I had always thought to be a man's profession. The realization that a woman could do something

---

[3] Gerald Gunther, Learned Hand: The Man and the Judge 234 (2d ed. 2011).

[4] *Id*. at 476-77.

so out of the ordinary inspired me to raise my horizons and consider what I might do. Since medicine was clearly not for me, I pondered other possibilities and soon settled on the law. I had never heard of a woman lawyer; neither had anyone I knew. Nevertheless, I applied to law school and in the fall of 1959 entered UC Berkeley, Boalt Hall, as a member of the class of 1962. In our entering class there were four women; two of us graduated.

Now, I mentioned three physicians; the third, of course, was my husband David. We married at the end of my second year of law school and moved to Washington, D.C., where David was assigned to Walter Reed Army Hospital, and I transferred to George Washington University to complete my studies.

When I embarked on my pathway in the law, this country was on the cusp of radical social change. The civil rights movement was gathering force. Martin Luther King, Jr., had emerged on the national scene as its leader. The feminist movement was soon to follow. Betty Friedan had just published *The Feminine Mystique*. For women of my era, the book was a revelation. It espoused dramatic new views about the role of women and opened up whole new possibilities. I had a sense of the world changing. With a newly minted law degree and living in the nation's capital, I was in a position to be part of that change.

After graduation, I took a position with the civil rights division of the United States Department of Justice. I joined the Appeals and Research Section under Harold Greene. Robert Kennedy was attorney general, Nicholas Katzenbach was deputy attorney general, and Burke Marshall was assistant attorney general for civil rights. I can recall only one other woman in the Justice Department.

It was a momentous period. In the South, segregation was still the rule — bus stations, restaurants, lunch counters, lodgings and schools were separated into "colored" and "white." Marches and sit-ins were taking place in Selma, and in Birmingham. All of us are familiar with the incredible history of Judge Thelton Henderson, who as a brand-new lawyer, was dispatched to the South by the Justice Department to be an observer for the federal government.

Our task in the Appeals and Research Section of the Civil Rights Division was to enforce, strengthen, and, indeed, develop the civil rights law of the land. (By that I mean we were making it up as we went along.)

When James Meredith integrated the university of Mississippi as its first black student, he was accompanied by Civil Rights Division attorneys. When Martin Luther King, Jr., was in jail, we drafted amicus briefs to secure his release. When the Southern governors of the day — Ross Barnett of Mississippi and George Wallace of Alabama, "stood in the school house door" — as they liked to boast — to bar black students from entering, we researched federal powers of contempt to move them aside. And when the administration wanted to assure equal access to public accommodations and the voting booth, we drafted early legislative proposals that ultimately led to the landmark Public Accommodations Act and Voting Rights Bill of the early 1960s.

My last day in Washington was August 28, 1963. Leaving David to supervise the movers, I joined in the "March on Washington for Jobs and Freedom," and with thousands of others, I listened to the Reverend Martin Luther King, Jr., as he so eloquently told us, "I have a dream."

When I returned to California, I was hoping to find work that would allow me to continue to participate in significant issues of the day. I interviewed with the California state attorney general's office; I applied for a clerkship with the California Supreme Court; I applied for federal clerkships; I applied to legal-service nonprofits. No offers were forthcoming.

Women attorneys were few in those days, almost invisible. I was later told that the only women in the attorney general's office at the time were the ones left over from being hired during World War II. Boalt called to tell me a prominent San Francisco firm was considering hiring its first woman, if they could persuade the senior partner. Would I be interested?

Although some members of the firm took me to lunch, I was not destined to be that woman. In short, I did not find employment.

Ultimately, and with Boalt's help, during these early years in San Francisco I found work doing research and writing. One project of particular interest was with Boalt Professor Frank Newman — later Supreme Court Justice Newman. The idea was to investigate what would the Bill of Rights look like if the solicitor general of the United States had *won* all his arguments before the Supreme Court.[5] Later, the California College of Trial

[5] *See* Kathryn Mickle Werdegar, *The Solicitor General and Administrative Due Process: A Quarter-Century of Advocacy*, 36 Geo. Wash. L. Rev. 481 (1967–1968).

Judges (now the Center for Judicial Education and Research) recruited me to write a criminal procedure benchbook for trial judges — actually, one of the first benchbooks published in California.[6] Some time after that, came work with California Continuing Education of the Bar.

During this period of my career and the ensuing years, our society was engaged in addressing the issues of equal rights and opportunity for African Americans and women. Significant changes occurred. Discrimination was no longer tolerated. Through political will, and judicial decision, equal treatment and equal opportunity became an increasing reality. Diversity became a byword. The numbers of women entering law schools swelled.

These changes in our society impacted me. What initially had been a barrier, a disadvantage to me — my gender — now had become a benefit. Entities and institutions were looking for qualified women. In 1991, Governor Pete Wilson made me his first judicial appointment when he appointed me to the First District Court of Appeal. I thus took my place as the only woman among the nineteen justices of that court, and only the second woman in its entire history. Three years later the governor elevated me to the California Supreme Court, thereby making history by *doubling* the number of women on the court from one to *two.*

Today, the appointment of a woman to the bench is no longer remarkable. In most law schools, women comprise more than half of the class and now make up 40 percent of the bar. Women fill every conceivable position in the law. And today, as we are so much aware, the Democratic Party has vying for its nomination for the presidency of the United States a woman and an African American. That one of these two individuals will be a major party's candidate to be our next president speaks volumes about how far this country has come these past fifty years and how much we have changed.

What does the history I've described say about today? Are there lessons to be learned? I would say "yes." The paramount lesson is that without the support of our judicial system — without the integrity of an independent judiciary — these strides could not have been made. We rely on our courts to enforce the principles of our Constitution and the laws of our land. The role of the judiciary is to uphold the law for all, safeguarding the rights of

[6] Kathryn Mickle Werdegar, California Misdemeanor Procedure Benchbook (1971; rev'd ed., 1975).

individuals and minorities against the will of the majority. In recognizing and enforcing the legal and constitutional rights of African Americans and women, the courts fulfilled that role.

Today, other minorities are making their voices heard. With the California Supreme Court's decision last week [legalizing same-sex marriage],[7] foremost in our awareness this evening likely are gays and lesbians.

We can't, of course, know how that particular issue will be fully resolved. Nor can we anticipate what issues will confront future generations. But what we can do — what we must do — is commit ourselves to assuring that the courts maintain the independence to fairly address the issues they are called upon to decide, so that through the rule of law, courts are able to assist our society — when necessary — in making whatever changes our Constitution and democratic principles require.

Let me conclude with the observations of two eminent jurists, one of the United States Supreme Court and the other of the California Supreme Court. The first is Oliver Wendall Holmes. Like Judge Hand, Holmes believed in judicial restraint. Nevertheless, he famously said the following, that it was the court's duty "to learn to transcend our own convictions, and to leave room for much that we hold dear to be done away with . . . *by the orderly change of law.*"[8]

The other is Roger Traynor. Sixty years ago, Chief Justice Traynor authored the opinion in *Perez v. Sharp,* the first decision in the country to strike as unconstitutional a ban on interracial marriage. Inscribed on a wall at Boalt Hall are these words of Traynor's: "The law will never be built in a day, and with luck *it will never be finished*."[9]

In its long history, the American Jewish Committee has had a steadfast dedication to law and equality, and has been a stalwart defender of our independent courts. We are all grateful for that.

And I personally am grateful for the honor you have paid me this evening. Thank you.

* * *

[7] In re Marriage Cases, 43 Cal.4th 757 (2008).

[8] Address to the Harvard Law Association of New York, February 15, 1913 (emphasis added).

[9] Roger J. Traynor, *La Rude Vita, La Dolce Giustizia; Or Hard Cases Can Make Good Law*, 29 U. Chi. L. Rev. 223, 236 (1962) (emphasis added).

II. THE LEGACY OF JUSTICE AWARD — AND THE ARC OF PROGRESS[10]

Thank you, Art,[11] for your very kind remarks. And given your international responsibilities, I am grateful you could be here this evening.

I am truly honored to receive the Legacy of Justice Award and to be in the company of my fellow honorees this evening. I want to thank Joe Cotchett for suggesting that I receive this award, and congratulate him for receiving the Judge Learned Hand Award, recognizing his stature as a champion of worthy causes. And my congratulations on receiving the Pursuit of Justice Award to Nancy O'Malley, whom I came to know and admire during our work together on the statewide judicial education program, *How the Courts Failed Germany: Law, Justice, and the Holocaust.*

The Legacy of Justice Award marks the conclusion of my twenty-six years as a judge, twenty-three of them on the California Supreme Court, and it coincides with the fifty-fifth anniversary of my graduation from law school. As I prepare to step down from the bench, my thoughts have turned to the societal changes that have occurred over the course of my career. Today we are in challenging times. But my thesis is hopeful — that over time, progress prevails. Thus, I have chosen to frame my reflections as the *Arc of Progress.*

When I graduated from law school, nationwide only 1 percent of attorneys were women; in California it was 3 percent. In my law school class four of us started and two of us graduated. Law firms could refuse to hire women and did so with impunity. Today, law school classes are more than 50 percent women and Title VII prohibits employment discrimination. Women attorneys hold every conceivable position in the law — including, yes — judges and chief justices.

When I took my first job in the Civil Rights Division of the United States Department of Justice in 1962, in parts of the South facilities and public accommodations were still segregated, black and white — bus stations, drinking fountains, restaurants, restrooms, motels. Governors in Mississippi and Alabama would "stand in the schoolhouse door" as they liked to boast, to block school integration. Federal marshals and Department of Justice attorneys had

[10] Presented by the San Francisco Bay Area Region of the American Jewish Committee, June 1, 2017.

[11] Arthur Shartsis, San Francisco attorney.

to accompany James Meredith — the first black student to enroll in the University of Mississippi — to his dorm and his classes for his safety. Federal troops were on standby to forestall a riot. Those days are over.

When, nine years ago, I had the honor of speaking to this group, the right of same-sex couples to marry was in dispute across the land. My court had just declared a California constitutional right, but the voters in Proposition 8 quickly rejected it. Federal litigation ensued. Then, two years ago, in 2015, the issue was resolved. Today the right of same-sex couples to marry is firmly rooted in the United States Constitution.

But none of these achievements could have occurred without the vigilance and contribution of organizations like the American Jewish Committee, steadfastly dedicated to law and equality. Nor could they have occurred without the effort and dedication of lawyers, such as our attorney honorees this evening. And most emphatically, they could not have succeeded without the integrity and courage of judges. In that connection, I will close with reflections on the court I have known these past twenty-three years.

Although we are always *The Court,* changes in our composition and personality do occur. I have had the privilege of serving with three outstanding Chief Justices — Malcolm Lucas, Ron George, and Chief Justice Tani Cantil-Sakauye. Each has met the challenges of his or her time with strength, dedication, and vision. I also have had the pleasure of serving with eleven different associate justices — starting with the venerable Stanley Mosk, to our newest member Leondra Kruger, appointed just two and a half years ago — a kaleidoscope of different backgrounds and experiences, different personalities, philosophies and approaches to the law, but always One Court.

In addition to our chief justice, two of my colleagues are here this evening and I would like to recognize them — Justice Ming Chin, a previous recipient of the Judge Learned Hand Award, and Justice Goodwin Liu.

It has been my privilege over these past twenty-three years to work together with all of my colleagues to uphold and advance justice for all Californians to the best of our ability. I will miss them all and I wish them well. Again, I thank the AJC for awarding me the Legacy of Justice award.

Thank you.

★ ★ ★