

INSIDE THE COURT AND OUT:

California Supreme Court Justice Kathryn Mickle Werdegar

EDITOR'S NOTE:

After twenty-three years of service on the California Supreme Court, Justice Kathryn Mickle Werdegar retired on August 31, 2017. To give increased exposure to her distinguished career, the California Supreme Court Historical Society organized a public program in her honor. She was interviewed about her experiences on and off the bench by journalist/biographer Jim Newton at the Los Angeles Central Library's Mark Taper Auditorium on November 7, 2018. The following is a complete transcript of the interview, lightly edited for publication, including the addition of footnotes.

—SELMA MOIDEL SMITH

JOHN SZABO: Good evening, everyone. Thank you all so much for coming this evening. We are delighted you're here, and welcome to the magnificent Central Library, here in downtown Los Angeles. My name is John Szabo. I'm city librarian of Los Angeles, head of the L.A. Public Library. We are so delighted and honored to host the California Supreme Court Historical Society event this evening, "Inside the Court and Out." This is the iconic flagship of the L.A. Public Library. This building, along with seventy-two branches, serve the people of L.A. every single day. We are a very, very busy place, more dynamic and relevant than ever.

We recently celebrated the twenty-fifth anniversary of the reopening of this building. Some of you may remember that. It followed the devastating fire that occurred in 1986, and then there were a few years of construction, and then this library reopened. We're in the Tom Bradley Wing now, which was, of course, added on to the Bertram Goodhew-designed original Central Library, which this year turned ninety-two years old. It is a much-loved building as you all know, here in the City of L.A., and we have about 5,500 people a day that come into this building for coding classes, robotics, checking out thousands and thousands of books — of course, continues to be still a big part of what we do — incredible exhibits. It is a very, very wonderful and busy place. Also, if you're interested in the story, a fascinating story of the fire, there is a book that's currently on *The New York Times* Best Seller list, number one on the *Los Angeles Times* Bestseller list, called *The Library Book* by Susan Orlean. It is a story of the fire and of the wonderful rebirth of the building and the great success of public libraries in the U.S. So I encourage you to check it out or buy it in the library store at the Central Library.

I'm very proud to highlight two or three programs that we have here at the library that I think might resonate with you. We have a "Lawyers in the Library" program that provides free legal help twice a month with attorneys from Public Counsel at our Benjamin Franklin Branch Library in Boyle Heights and also at the beautiful Vermont Square Branch Library, which is one of three surviving Carnegie Library buildings — over a hundred years old — in our system. We also have a great partnership with the LA Law Library, where we provide remote access to databases for legal research, briefs, and information. And, our award-winning New Americans Initiative which provides immigration and citizenship services through

partnerships with nonprofit legal counsel providers and also community-based agencies, as well as library staff who have received certification to provide assistance on immigration issues. We started this program back in 2012 with the United States Immigration and Naturalization Service providing little spaces in all of our libraries with information on the naturalization process, and it has been replicated at libraries all across the country. Then we recently expanded it and rebranded it as the New Americans Initiative, and, of course, it's an incredibly successful and important program here in Los Angeles.

I'd also like to thank Linda Rudell-Betts, senior librarian on our staff, as well as Lisa Schloss, a social sciences librarian for their work in coordinating tonight's event. We have an amazing team at all of our libraries at L.A. Public Library. Again, thank you very much for joining us this evening. You may not have the time this evening because the library will be closing, but please do come back if you have not explored this amazing building. There are incredible collections, public art, great docent tours, an amazing exhibit on the second floor off of the rotunda that features some of Tom Hanks' typewriters that he has loaned us for the exhibit; he is a total typewriter geek and a collector, as well as a life-size walnut-covered elephant. I guarantee you have never seen a life-size walnut-covered elephant, and why it's there you have to go to the exhibit to see. Again, thank you all so much for being here. We appreciate it.

GEORGE ABELE: Thank you, John. Thank you very much for coming. My name is George Abele. I'm the president of the California Supreme Court Historical Society. We at the Society are very excited for tonight's program. Justice Werdegar has been a member of our Board of Directors for many, many years, and we are looking forward to the conversation with her tonight. We, on behalf of the Society, wanted to thank the library — John — very much for providing the venue and all the support for our program tonight. As you can see, this is a terrific venue. The reception was beautiful, and we couldn't have done it without their assistance. John mentioned Linda Rudell-Betts — Joyce Cooper — there are literally dozens of people I could name who have really helped out and got our program under way, and I'd like to thank all of them — in addition to Bob Wolfe, a member of our Board of Directors. Bob put a lot of time and effort into getting this together, and Francine Sheldon from our office at Paul Hastings helped

out tremendously as well. One other thank-you that I'd like to make is for Public Counsel; they are cosponsoring this program with us and helped to provide the MCLE for those of you who are interested in obtaining MCLE credit, so we thank them for that. If you are seeking MCLE credit, please do remember to turn in your evaluation forms at the end of the program. There's a box out front for that purpose.

I'll finish with one further introduction before we get to our speakers, and that also relates to Public Counsel. Margaret Morrow, you may know, is the president and CEO of Public Counsel, and she is here with us tonight. Public Counsel serves over 19,000 children, families, veterans, consumers, immigrants, and community organizations every year. The policy advocacy and the impact litigation that Public Counsel is involved in affects thousands of more folks who live in poverty, and the work they do is just tremendous, so we're honored to have Margaret Morrow with us. Prior to joining Public Counsel, she was a judge for eighteen years, and she has just done tremendous things for the city of Los Angeles, so please join me in welcoming Margaret Morrow.

MARGARET MORROW: Good evening, everybody. I have the distinct honor of introducing the individuals who will be participating in this evening's conversation, Justice Kathryn Mickle Werdegar and Jim Newton.

Justice Werdegar is a California native, born in San Francisco. After earning her bachelor's degree with honors from the University of California at Berkeley, began her law studies at Boalt Hall, where she was first in her class and the first woman ever elected to be editor-in-chief of the *California Law Review*. She completed her J.D. degree at George Washington University, where she graduated — you guessed it — first in her class. After serving with distinction in the Civil Rights Division of the United States Department of Justice in Washington, D.C. under then-Attorney General Robert Kennedy, Justice Werdegar was appointed professor and associate dean for academic and student affairs at the University of San Francisco School of Law. Following her stint in academia, she became a research attorney for the state Court of Appeal in 1981 and ultimately for Justice Edward Panelli on the California Supreme Court. In 1991, she was appointed by Governor Pete Wilson to the First District Court of Appeal in San Francisco. Her appointment to Justice Panelli's seat on the California Supreme Court followed shortly, in 1994. Justice Werdegar served

with great distinction on the Supreme Court for twenty-three years until her retirement in 2017. During her time on the bench, Justice Werdegar was known as a rigorous and thoughtful legal scholar, a consensus builder, and as someone who always placed the rights of people above politics and ideology. Throughout her tenure on the Supreme Court, and even today, Justice Werdegar has been an enthusiastic supporter of, and contributor to, the California Supreme Court Historical Society.

Joining Justice Werdegar on stage tonight is acclaimed journalist and author Jim Newton. Jim is a Dartmouth College graduate who began his career as a clerk for *New York Times* columnist James Reston. After working as a reporter at the *Atlanta Journal-Constitution*, he spent twenty-five years with the *Los Angeles Times* as a reporter, bureau chief, columnist, and editor. He was part of the teams of *Times* reporters who won Pulitzer Prizes for their coverage of the disturbances in Los Angeles in 1992 and the Northridge earthquake in 1994. He's the author of three bestselling, critically acclaimed books: *Justice for All: Earl Warren and the Nation He Made*; *Eisenhower: The White House Years*; *Worthy Fights: A Memoir of War and Peace* with Leon Panetta. In 2015, Jim joined the UCLA Luskin School of Public Affairs where he teaches communications studies and public policy and is the editor of *Blueprint*, a magazine that addresses the policy challenges facing Los Angeles and California. He's at work on a fourth book, who's working title is *Jerry Brown and the Creation of Modern California*. So Jim and Justice Werdegar, if you'll please come out. [applause] I'm going to turn this over to you, Jim.

JIM NEWTON: Thank you very much, Judge Morrow. More important than all her other accomplishments, Judge Morrow is also my friend and neighbor, so it's nice to have you here. Thank you.

Thank you all for being here tonight, for joining us for this evening. It's really a pleasure and honor to share the stage with you, Justice Werdegar. We're going to talk a little bit about the court tonight as you might expect, also California life and politics. First, though, we have to get the elephant out of the room, which is to say the events of today and yesterday. I know you come from the least political of our branches of government, but I wouldn't be an interviewer if I didn't ask for your thoughts on yesterday's midterms. Any reflections on what happened to the country?



JOURNALIST JIM NEWTON AND RETIRED JUSTICE
KATHRYN MICKLE WERDEGAR.

Photo: Greg Verville/GV Photography

KATHRYN WERDEGAR: Well, you said “the elephant out of the room” — *the elephant and the donkey* out of the room, right?

NEWTON: [laughter] Very good.

WERDEGAR: It seems that each side, in some regard, is able to claim victory. That’s what I’m hearing, and it makes sense to me. And how the new balance will play out remains to be seen, but holding on to the Senate strongly is no small accomplishment for the Republicans; taking over the House is a great achievement for the Democrats, and we’ll just see. Another observation I’d make is that it’s been said, and we know it’s true, that this morning started the campaign for 2020, so if we think we’re finished with the election because we cast our ballot and we got the result — no.

NEWTON: Well, you take a deep breath, probably. Okay, enough of that. Let’s back up. We heard a little about your background from Judge Morrow. I wonder if you could talk a little bit about coming up as a law student and lawyer here in California, particularly at a time when there were not many women in your profession.

WERDEGAR: There decidedly were not women. When I went to law school, it was my understanding that in the United States 1 percent of attorneys were women. California, progressive as always, had 3 percent. It didn't dawn on me that this was going to be an issue or a problem. This was just an education that I felt would take me, I didn't know where, and I was happy to have the education. What was it like? When I came back from Washington — of course, the federal government does not discriminate, and it didn't at that time; I was hired in the Justice Department in the Civil Rights Division after graduation — but I came back to California, and the non-discrimination law hadn't been passed yet. Firms could actually say — they didn't to me, to my face — but they *could* say they weren't going to take a woman: The clients wouldn't like it; the senior partner wouldn't like it. Berkeley Law sent me over to one firm — they looked out for me a little bit, even though I had gone on to George Washington — and said there was one firm in San Francisco, a prominent firm, that was thinking of taking its first woman if the others could persuade the senior partner, and I had a lunch with them, but I just don't think I was the best interview. In any case, the senior partner wasn't persuaded. But I was mostly oblivious, Jim. It did not cross my mind about discrimination to be honest. I was very naïve, and maybe it wasn't discrimination. You don't know. You can't go into every situation thinking that's discrimination. They might have had another candidate.

NEWTON: And what about in school, Governor Wilson — later, Governor Wilson, your law school classmate, famous for having said that when he and his classmates started, they wanted to carry your books and ended by wanting to copy your notes? It may say more about Governor Wilson than it does about you [laughing] —

WERDEGAR: I appreciate that —

NEWTON: Does that indicate an attitude that you experienced at Boalt?

WERDEGAR: Again, I think I was oblivious, truly. I didn't sense any unwelcomeness, except from famous Dean Prosser who was on record as not wanting women. A woman of that era — you have to really go back — was thought to be taking a man's seat, a man who would need that seat, and the woman would not need it; it was frivolous. No, I think I was accepted by professors and students. It's only looking back that I realize how unusual my presence might have been.

NEWTON: You mention in your oral history, which I read with interest, different rooms. There was a room, a very small room —

WERDEGAR: The lounges.

NEWTON: Lounge, that's right.

WERDEGAR: Yes, there were two, the men's lounge, and the women's lounge, and you know, 98 percent of the individuals were hanging out in the men's lounge. We did have some women getting their master's in law, beyond what at that time was the LL.B. Yes, so when I'd go to my reunions, which I've only gone to a couple of times, but the *guys* would talk about this-and-that that they did in the lounge, and playing bridge and doing whatever — Oh! I had no idea. And going back to *The Paper Chase*, which came out afterwards — study groups. If they were having study groups, I didn't know about it. There was so much that perhaps was taking place that I was unaware of.

NEWTON: Do you feel like you missed something?

WERDEGAR: No. Well, I mean — no.

NEWTON: Let me ask you a question again that comes up in your oral history that I thought was provocatively referenced in here, which is to ask about the value of diversity on the bench, to ask it this way: would a smart, experienced woman decide a case any differently than a smart, experienced man?

WERDEGAR: Perhaps you're aware of Sandra Day O'Connor's comment. When I was appointed to the Court of Appeal in San Francisco, it was a nineteen-judge court, and at that time I was the only woman, among those eighteen males, and it came to my attention that Sandra Day O'Connor had said — her appointment was so historic — she had said, "A wise old man and a wise old woman will come to the same conclusion." And I thought, "Really, is this true?" A lot of women academics at that time were trying to discern if there were "a woman's voice." There were so few women on the bench, maybe a few more on the federal bench than on the state benches, so they were analyzing this minute material that they had to work with. So, I myself thought about that. Fast forward, I have now, on the Supreme Court, sat with five different women judges, over time, and I would say to you that we are as alike, or as different, as any two random judges of any sex.

NEWTON: The court that you left was a majority of women, was it not?

WERDEGAR: The court that I left, when I left, had had a majority, and now it's balanced, and we just don't know what's coming.¹ Yes, that was quite something, and when I joined the Supreme Court, I was the second woman, but as you say, we've had for many years a majority, including our chief justice.

NEWTON: How do you think it's appropriate to value prior judicial experience in evaluating the credentials or the qualifications of a nominee to the Supreme Court, either California or federal?

WERDEGAR: When you speak of judicial experience, are you thinking about the trial court, or any court, the Court of Appeal?

NEWTON: Well, I'd leave it to you to answer any way you want, but I guess I was thinking about either or both.

WERDEGAR: Of course, the appellate courts are so different from the trial court. But each governor has had a very different approach to this. Governor Deukmejian — preferably you'd been a D.A. before, and then you started in the Muni Court, and if you acquitted yourself all right there you'd be elevated to the Superior Court, and maybe if lightning struck you'd get up to the Court of Appeal, and there it went — that was his vision. When Wilson came along, I was his first judicial appointment — that was to the Court of Appeal — and he was breaking the mold there. When he appointed me to the Supreme Court, although I had sat on the Court of Appeal, I hadn't done all those boots-on-the-ground other things, I hadn't been a DA, I hadn't sat on the trial court. We all know that our current and former governor, Jerry Brown, has a very different attitude. Three of my new colleagues, by his appointment — he has a fourth coming up — three have never been on any court and are academics, really.

What do I think? I think you need it all, frankly. Most of our issues — except maybe in criminal law when you're dealing with a Batson-Wheeler motion (was there discrimination in a jury selection?), when having been in the court itself, you might have a feel for how those things go — otherwise, most of our issues don't deal so much with trial court procedure. Those

¹ A week later, on November 14, 2018, Governor Jerry Brown appointed Joshua Groban to fill the vacancy created by Justice Werdegar's retirement.

cases stop at the Court of Appeal. As all of you in this room I think know, we have discretionary review, and out of all the thousands of petitions for review that come to us, we might take 3 to 5 percent. Our issues are more philosophical, constitutional, policy. So professors have a lot to say about that. You want a complete mix, and with seven positions, you just can't have every ethnic and background mix that you would want. You want experience like — Marvin Baxter had a background in farming, and that was good, he brought that. He also had political experience. I sat with Stanley Mosk, which was great fun. He had a lot of political experience, you know, common sense. I don't think there's any clear answer, but you don't want all the same. You don't want all D.A.'s, and you don't want all professors.

NEWTON: Are other members of the judiciary resentful that Jerry Brown has not put experienced judges on the court?

WERDEGAR: I wouldn't know. But as I mentioned, in the Deukmejian days, you had a stepping stone, so that if you distinguished yourself as a judge in the lower courts, then if there were an opening on the Supreme Court, and you had some connections — the governor has to know something about you — you might have a hope that with all your hard work and your service you would have a shot, so in that sense, it's not speaking to what I know about people's attitudes, but it's natural they'd think, "Wait, we've been serving here for twenty-five years, and you pluck somebody out of some old law school!"

NEWTON: I would think! California has an unusual system for appointing and, of course, for retaining justices. We've just been through a round yesterday [in the confirmation hearings for the appointment of Brett Kavanaugh to the U.S. Supreme Court]. What is your assessment of the way California handles the retention, or deals with that as part of the judicial process?

WERDEGAR: I have said often, I think California has the best system. The judges at the appellate level are nonpartisan. They cannot run with any party affiliation or backing. They're nominated by the governor. They're reviewed by something called the Judicial Nomination Evaluation Committee, which is an arm of the State Bar, and if they pass all that, and the governor chooses to appoint them, there's a commission that reviews the nomination comprised of the Chief Justice of the state, and of the attorney general of the moment, and the most senior presiding judge of the Court

of Appeal. And, as you referenced, once appointed we are *retained* by the voters. It's not contested. If we're not retained, as happened many years ago historically — three justices in the Rose Bird era were not retained — nobody takes their place until the governor appoints someone. It's not a contested election. I've thought our system was excellent, actually.

NEWTON: Compare it, or contrast it, to lifetime appointment.

WERDEGAR: I don't think lifetime is good. I think as somebody has pointed out, when the United States Constitution established lifetime appointments for the United States Supreme Court, life expectancy was very different, and they didn't anticipate that anybody would be sitting for thirty-forty years. That's not going to change because it takes a federal constitutional amendment. Most of us here understand that's a most arduous process, and on this issue it would become very problematic and contentious, so it's not likely to happen. With respect to the states, the nightmare is contested elections, and you're probably aware that some states have that, and it's very political. It's terrible. We're supposed to be a sort of independent, neutral branch. I know that in various quarters across the country, it's moving away from that in the perception of the public. California, even though each governor appoints people that they hope will advance their policy — there was once a cartoon, did you see it?, I don't know what he did to deserve this, but it was a political cartoon and there were seven faces in black robes on the bench. They were all [Governor] Gray Davis's face, and the caption said, "I want my judges to reflect my vision," or something like that — so, the appointing authority hopes that you'll be in tune with their philosophy and their view of the world, but they don't have a lock on you, and we're free to do as our instincts and best judgment dictate.

NEWTON: You referenced the Rose Bird retention election, and the other two justices as well. Do you worry at all that that was an example of — are justices influenced by that case and the fear that they're not going to be retained?

WERDEGAR: Well, when it happened — I don't think it had ever happened in California history before — I was a staff attorney at that time on the court, and irrespective of your politics or your views of the court, those of us who were professional and worked there, I felt black bunting should be wrapped around the building. It was *shocking*. Maybe we were naïve. I think certain special interests will occasionally try to remove judges. As

you might know, that campaign I'm told was based on the Bird Court's alleged failure to affirm any death penalty judgments. It was a new death penalty law, and you could say they had to work through the nuances — whatever. But they reversed and reversed. It was pitched to the public that the court won't enforce the death penalty, which Californians at that time and maybe to this day still favor. But the *money* behind it came from business interests that didn't like the tort judgments that that court was advancing. So it was a very dark period in our history. Some years back, when Ron George was chief, he and Ming Chin who were on the ballot that year, did mount a retention campaign because there were certain interests that were threatening to throw them out based on their vote on the parental consent case, where the Supreme Court at that time said that the state law that required a minor to get parental consent or a judicial permission to have an abortion, that that law was an invasion of the minor's right to privacy — a very, very divisive issue, and it got a lot of people up in arms.² So Ron George and Ming Chin got campaign consultants and raised money, and they won, they were retained. It's not a perfect system. The role of the judiciary in our society is very complicated.

NEWTON: Point taken. Another quirk of California politics, the initiative. I know you've talked and thought a lot about the initiative process. How well is the initiative process wearing on California?

WERDEGAR: Well, you all voted. How did you like all those initiatives? [laughing] Shall we abolish Daylight Saving Time, shall we extend rent control, shall the dialysis centers be restricted — you know, I voted on these, and afterwards I read what they were supposedly about. The initiative, as we all know — it was a reform measure more than a hundred years ago, to go around the stranglehold on the state legislature that the railroad interests had. It was a populist move to give the people a voice. So it's direct democracy. You don't go through the Legislature to pass legislation; you do it yourself. As time has advanced, our state has grown — we're so much larger — and there are those who would say that the initiative process has been highjacked by the very special interests that it was intended to get around. Initiatives now are put on the ballot to advance certain special interests, and of course it takes a lot of money to get an initiative on the ballot now.

² American Academy of Pediatrics v. Lundgren, 16 Cal. 4th 307 (1997).

For legislation you have to get signatures of I think 5 percent of the people who voted in the previous general election, for a constitutional amendment, 8 percent, something like that. We're a huge state, and so you have to pay people to get those signatures. Good citizen groups, whatever they may be, don't have that money. It's complicated, and then people don't understand the initiatives. I often feel we're asked to vote on things we shouldn't have to be thinking about. That's what we have our legislators to think about.

One real difficulty with the initiative is, if in practice it turns out not to be working well, how can you amend it? Legislation — legislators can get together and amend the law. Initiatives — you have to pass another initiative, go through the whole process. The Three-Strikes initiative, which was extremely popular in its time, over the years people, entities, the public, began to feel it was too severe because a third strike — you'd read these stories of somebody who stole some golf clubs and it's his third felony, and he's behind bars for twenty-five years. In any case, reformers tried three times to ameliorate it, to modify the Three Strikes Law. It took three times. On the third time, the law was modified to say that the third strike can't be just a felony, it has to be a violent and serious felony. There are differences. The same with term limits. That was put in by initiative. People loved that at first, and then over time people began to feel this is too restrictive, too much revolving door. We want to modify that. They had to do it by initiative, and I think that took a couple initiative cycles. On the other hand, California has reapportionment by citizen committee. That was an initiative measure. In other states, the legislature, that's the legislature in power, does the reapportionment. You weren't going to get that reform through the legislature, so the initiative worked very well in that regard.

NEWTON: There's something I think that many people — certainly I — find uncomfortable about the initiative, particularly when it comes to criminal justice. There seems to be something sort of crude about it. I mean, if baseball had four strikes, would we have Four Strikes in California? There seems to be something that seems populist and kind of blunt-instrumenty about it, when it comes to something as delicate as sentencing.

WERDEGAR: There's no question about that. You're absolutely right. Again, these measures are broadly written, often by special interests, and often with the intention, I'm told, of getting certain segments of the

electorate to the ballot box — if you can get their blood up and get them interested in an issue, they’ll vote, so it’s a manipulative tool. Yes, for the general public to be dealing with matters of criminal punishments that require sophisticated insights, it’s questionable.

NEWTON: Are there ways, do you think, that we could amend the initiative process that would preserve some of the benefits you’re discussing while ameliorating some of the difficulties?

WERDEGAR: I’m not an expert on this, but there is an entity — one at least — called the Think Long Committee. Perhaps you’ve heard of it. And I understand the committee did recommend some reforms which I think are very good. One reform was that any proponent of an initiative would have to present it to the Legislature before it could go on the ballot, to see if the Legislature would respond, “Oh, you’re interested; then we’ll look at this issue,” because they have hearings and they have experts, and would also to have put that proposed initiative online so citizens could comment. I think that has been implemented, but how it’s worked out with any given initiative I don’t know. The other reform, which I think is very helpful, is that the proponents would have to disclose the top — I don’t know how many — several contributors, because who’s behind an initiative often tells you what it’s really about. The initiatives are very confusing, and the titles — now take initiative Prop 6. You all know what Prop 6 is? This was the gas tax. Well, the proponents wanted it to be called “Repeal Taxes.” The opponents — this was going to repeal certain taxes that are imposed at the pump to build our roads and so forth — the opponents, and it’s they who prevailed, and it’s the attorney general who decides, wanted to call it “Eliminates Money for Road Repairs.” [laughing] So you have, you know, “Repeals Taxes” or “Leaves Your Roads Rutted.” And what’s the public to do? It didn’t pass, by the way.

NEWTON: I want to shift for a little bit and talk about life on the court. As a starting place, I wonder if you could talk a little bit about — you served with three different chief justices, right?

WERDEGAR: I did.

NEWTON: Will you take a moment and talk about the role of the chief justice and how those different chief justices managed the business of the court and the life of the court differently?

WERDEGAR: Thank you. The role of the chief justice is really administrative. And Ron George used to point to his robe hanging on a hanger back in his chambers and say, “That’s the part of the job I love.” But their role is administrative, going up to Sacramento and persuading the legislators to give us a proper share of the budget, for example. We are at the mercy of the legislators in our budget, and Ron used to say — you know there are fewer and fewer lawyers in the Legislature than there used to be traditionally — that some of them wouldn’t know the difference between the judiciary and the DMV [Department of Motor Vehicles]. That was kind of a struggle for him. With respect to the interior workings of the court, well, the chief justice does assign cases, once we grant a case. And that assignment, you might think is somewhat of a power. But the chief’s real hope is they will assign the case to somebody who can get a majority, who can write a decent opinion. Apart from that, the chief justice has no greater influence than anyone else on any given judge, no matter what. If somebody’s obstreperous, if somebody’s not producing their opinions — the chief has no special recourse. It’s interesting — each judge is a constitutional, independent officer. The personalities: I came late in Chief Justice Lucas’s career. I won’t be the first to say he was right out of central casting, I mean tall, shock of white hair, ramrod, and poker face, but a very wry sense of humor, true gentleman, and just a delightful fellow was my experience with him. When Ron George came in, he came in just raring to go, high energy, a vision for the courts. He wanted to assure that the courts maintained, or re-achieved, their position as a coequal branch of government, and he was behind the consolidation — it was an initiative, I think — of the Municipal Court — remember Municipal Court? — and the Superior Court, and statewide funding for the courts, so he had an administrator’s vision for the good of the courts. As a person, he was absolutely delightful. He, too, had a great sense of humor, and high energy, and he had a talent that our current chief also has: We can be kind of annoying, we members of the court. You know, the cases are contentious and certain issues come up, and we’re not all buddies necessarily. He had a way, and our current chief does as well, of just this very neutral, cordial way of treating all of us. Something will happen in conference that you know has to be extremely irritating, but with neither of these chiefs would you ever know it. So Ron George was great at doing what he did. When he left, the Administrative Office of the

Courts, which is our administrative body, had about 800 people, and that had grown considerably under his tutelage. I will say that I happen to have known the very first ever administrator of the courts, Ralph Kleps. Do you know the name?

NEWTON: I know the name, sure.

WERDEGAR: In fact, our Administrative Office of the Courts, I think, was the first in the country. Ralph Kleps did start it, and when I knew him, he had a staff of about six attorneys. Well, fast forward, I'm still in the law, and Ron George is chief, and there are 800 employees, so there was a little feeling about that, that it had grown too much. He left that to our current chief. When Justice Tani Cantil-Sakauye came on, the state budget was in bad shape and the courts began to suffer fiscally, and that was a real problem that she couldn't have anticipated she was going to have to face, a very difficult problem. And also, a splinter group of judges came out called the Alliance for Judges that were in opposition to what Ron had been doing, or the Administration of the Courts was doing. This was new to me, that judges would have internal fighting, so she had to face that. As you all probably know, if you've ever heard her speak, she's gracious, she's articulate, she's poised, and I just think she's marvelous, admirably marvelous. And again, you know certain things happen in conference, or certain people say things, but to look at these chiefs you'd never know that they were flapped. I would say that California has been very fortunate. Each of those chiefs has been outstanding and very good for the time they served.

NEWTON: Yes, Justice Cantil-Sakauye was, I thought, very persuasive on the budget issues. I remember when she came through, when I was at the *Times* still, as a very effective lobbyist in the grandest sense of that.

WERDEGAR: She had no honeymoon period at all. She was appointed — it was very exciting — her appointment, but she really had to hit the ground running on fiscal issues.

NEWTON: Let me ask you about a couple of cases. You took, I think it's safe to say, a novel position in *Merrill versus Navegar*.³ We talked about this a little bit. For those of you who don't know, it was a gun case, growing out of a 1993 shooting at a law firm in San Francisco that left eight people

³ 26 Cal. 4th 465 (2001).

dead and six wounded. You dissented in that case, and you argued that Navegar, which was a gun manufacturer, had acted negligently — pardon me if I summarize this incorrectly — by marketing a military weapon to civilian purchasers — right? — not that the guns were faulty but that they were distributed negligently. I suspect a lot of people would find that argument quite compelling today. I had two questions from that. First, would your reasoning in that dissent stand the test later created by the *Heller* case,⁴ federally, that concluded that individuals had a right to bear arms, an individual right to bear arms, and more generally, I guess I was curious whether you believe that the U.S. Supreme Court has left sufficient room for state and local governments to improvise in this area and to regulate weapons.

WERDEGAR: There's a lot in that question. Let me start with the last part — do I believe the Supreme Court has left enough room? That remains to be seen. There has to be a will in the individual states to do it, but whether there's room, I don't know. I think my argument, which addressed this just a little bit in the *Merrill versus Navegar* case — yes, still stands. What happened in the case was California had a statute that said gun manufacturers cannot be held liable for harm done by their product because of the way they designed it, you can't sue for design defect. Now that's a statute. There's an interesting history to this case, which was: We granted review, and the case was assigned to me. The statute said what it said, and I wrote a draft opinion saying there's no liability; that's the statute; we have no power to go beyond the statute. That circulated, everybody agreed, we had oral argument, we came off the bench, and my staff attorney came to me and said, "I heard something in argument, judge, that I want to discuss with you." What came out of it was: At the trial court level, the plaintiffs, who were the survivors or the loved ones left behind by this massacre, had at the trial court level advanced the theory — it had never been tried; it had been thrown out of court — that the manufacturer was negligent for the *marketing* tactics. These weapons were advertised in these gun-enthusiast magazines — *Soldier of Fortune*, what have you — as rapid-fire, fingerprint-proof, easy assembly, easy attachment of a silencer, and low cost. There's no place for weapons like that in civilian life — there isn't — maybe

⁴ District of Columbia v. *Heller*, 554 U.S. 570 (2008)

in the military, maybe in law enforcement, but we don't need fingerprint-resistant, rapid-fire, rapidly reloading, attachable silencer weapons. This theory came to my attention, and I had the responsibility to write the opinion — the clock runs after oral argument — the case had been assigned to me, everybody agreed with the opinion that they expected I was going to do, so I wrote two opinions. One was my new theory, "Look, we didn't really get into this. These people should have the opportunity to go to trial on the issue." I didn't say that the manufacturer *could* or *would* be liable, but the plaintiffs ought to be able to have a trial on the question. So I circulated these two opinions, and *nobody* agreed with me. So the case was reassigned, and my second opinion became my dissent. That's how that case evolved. I think that theory of negligent marketing — I don't know what marketing is going on now — but there were written articles that that weapon was the most widely used by the criminal element. The manufacturers who are marketing this to the public are charged with knowledge of that. We have more guns in this country than we do people, I believe. I just read that. So I don't know where gun regulation is going to go. And what elasticity there is? I'm hopeful there might be some.

NEWTON: Completely different area of the law — same-sex marriage — you joined the majority that upheld same-sex marriage in California.

WERDEGAR: I did.

NEWTON: Have you been surprised by the speed with which that issue has evolved?

WERDEGAR: Definitely. Who hasn't? When I heard about domestic partnership, I thought, "Oh that's good; that's a really good idea; that works." And gay marriage — marriage? But it happened. It evolved so quickly, and it came to our court — I don't think we were the first — but Ron George's opinion in the *Marriage Cases*⁵ came out saying — he did the same thing [that I did] in different circumstances: one opinion saying you can't have gay marriage, one opinion saying you can — circulating it. It's in his oral history. He wanted to give everybody the chance to consider both sides — but he turned out to be the swing vote because it was four-to-three. I was very surprised how rapidly thinking and awareness evolved, and then, of

⁵ In re Marriage Cases 43 Cal. 4th 757 (2008).

course, talk about the initiative: In California, a bare majority of voters can overturn every constitutional decision of the California Supreme Court, so that went on the ballot, and the voters said, “No, a marriage is between a man and a woman.”

NEWTON: Same ballot that Barack Obama was elected on, in fact.

WERDEGAR: So that was gone, but then it went through the federal courts and ultimately the United States Supreme Court held that there is, what, an Equal Protection right to same-sex marriage.⁶ I was very surprised.

NEWTON: Do you approach, or did you approach writing dissents differently than majority opinions? You just described two with sort of unusual histories.

WERDEGAR: Very unusual.

NEWTON: In more normal cases, I’ve heard it said that sometimes a dissent is a more liberating act of writing. You don’t have to worry about majorities. I’m curious.

WERDEGAR: Well, you’re right about that because when you’re writing what you hope’s going to be a majority opinion you want to bring in as many people as you can, and when you’re doing that you might leave out something that you personally want in there, but it’s not critical, so that you’ll get somebody’s vote. Or you might put in different language just so somebody is more comfortable. Yes, you’re free with a dissent. I don’t use dissents to excoriate my colleagues or chastise them, but I’m very fond of my dissents. [laughing] I am, because you don’t write a dissent unless you feel strongly about the subject. You don’t have the time or the inclination, and so if you’re writing a dissent, you’re really invested in that point of view.

NEWTON: If you were to read back over your opinions over the years, would your dissents be the way to gain insights into your judging?

WERDEGAR: I think so, yes. Well, it would be one way. My majority opinions would be another way.

NEWTON: [laughing] Okay, note to historians! What are some of the areas of the law that you see developing in California today? I know you’ve

⁶ Obergefell v. Hodges, 576 U.S. 644 (2015).

written a lot on environmental law, CEQA, maybe that's one? Or others? What's in play right now?

WERDEGAR: CEQA [California Environmental Quality Act] will be with us forever. It's such a complicated law. It's never going to stop because it's development versus the environment, and California is interested in both, and we have a law addressing how that's balanced. Privacy, water. Certainly, privacy is an area. California has a state constitutional provision guaranteeing privacy, so we can develop our law a little differently. But with all the electronics and so on, you wonder, do we have any expectation of privacy at all now? Water law will always be here.

NEWTON: Can I stop you here — I hate to interrupt, but back to privacy — what are your thoughts on that, when you say, the question of whether we enjoy any privacy at all?

WERDEGAR: Well, I've pondered the question. The issue when we were in law school was so simple; [laughing] I think the test in criminal law for an unreasonable, unlawful search, is whether you had a reasonable expectation of privacy, and the question now just philosophically is, who does? But, of course, we still pretend that we do. It's a brave new world.

NEWTON: And you mentioned water. I'm sorry to interrupt.

WERDEGAR: Of course, water is such a critical issue. There might even have been something in the initiative this time about —

NEWTON: Yes, water bond, one or two, I think —

WERDEGAR: Yes, and the courts will be called upon to resolve conflicting claims and so on.

NEWTON: Is that one where you see California really setting a standard for the country?

WERDEGAR: Well, we have particular water problems, indeed we do, so I don't know about setting a standard for the country.

NEWTON: Back to CEQA for a moment. Sorry to jump around, but overall, has CEQA been beneficial to California?

WERDEGAR: I'm not one to say. There are those who say it's a really obstructionist piece of legislation that people abuse by stalling projects they don't want, and I expect there's truth in that. But, on the other hand, it is

designed to have thoughtful, considered development with the least negative impact on our environment as possible. CEQA has a broad reach, and I want to explain this. One of my early cases was called *Save Tara versus the City of West Hollywood*.⁷ “Tara” was a historical building in West Hollywood, and the city had, I think, voted to demolish it. The preservationists felt that was the wrong thing to do, so they sued the city for preparing an inadequate Environmental Impact Report. Every “project” has to have an Environmental Impact Report. It came to us, and our court said that the city had not properly addressed the environmental impact. That’s all we said. It turns out, though, I recently read that Tara was saved. I love that name, Tara, and it’s in a public park in West Hollywood.

One of the last cases I had involved what’s been described as the largest land-use project in the history of California, where there was proposed a city of 20,000 people. Can you imagine the environmental impact issues in a project of that size? And, of course, litigation about it has been ongoing for years. So it finally came to us. It’s very, very complicated, and not a unanimous opinion but a majority — more than a necessary majority — held that there were still inadequacies in the environmental impact report.⁸ You have to consider the impact on water, the impact on traffic, the impact on wildlife, and now we have greenhouse gas emissions that have to be considered — I don’t know how scientists project all this — but these reports have to consider those things. CEQA is beneficial because if the report is inadequate it goes back to the responsible entity to rethink it, and they can suggest additional mitigation. It’s not that a project is stopped. Proponents are supposed to be as thoughtful as they can about mitigating environmental impacts. I had one case where the concern was the stickleback fish. Now I’d never heard of a stickleback fish — maybe some of you know what it is — but a staff attorney got me a picture of this little fish with little spines [gesturing]. They were moving it from its normal environment to another to do a project. Was this adequate mitigation of the impact on the little fish? So CEQA’s complicated. The Legislature can modify it. It has done some modifications.

⁷ 45 Cal. 4th 116 (2008).

⁸ Center for Biological Diversity v. Department of Fish & Wildlife, 62 Cal. 4th 204 (2015).

NEWTON: There are those who make the argument that it discourages businesses from moving here because it's so complicated.

WERDEGAR: I think that's probably true. That's one of the balances, and that's up to the Legislature. We need development in California; we can't stop it. Those kinds of issues are for the Legislature.

NEWTON: One other broad area that, obviously, confronts the court, confronts all of us really, is technology and science. And the court, I assume, everything from policing the Internet to climate change — these things must come up regularly. Is the court well equipped to handle a highly technical, scientific question?

WERDEGAR: Probably not. I mean, we certainly don't have any expertise that way. We get briefing and amicus briefs and so forth. You can't call up your science professor. I've often thought on the court, it would be so nice if I could call up somebody who really knows something besides the parties, but you can't. A lot of these issues belong more appropriately in the Legislature, and they're probably not equipped either, but they can get witnesses, they can do research. So science gets ahead of us. Technologically, as an institution, I think we've been a little slow, but I'm not the person to criticize because I'm a little slow. On the issues, for instance, here's an issue: how many mothers do you think a baby can have today? It can have at least three mothers: the egg donor, the surrogate mother who carries the baby to birth, and the woman who with her husband contracted to have that baby born. If the agreement falls apart, who's the mother? That's the kind of question the court's asked to decide. And stem cells. There's a case many years ago: you go in for surgery and tissue is removed, and you're healed and you go home. But the hospital retains, unbeknownst to you, your tissue and extracts certain cells from it and processes it, and all of a sudden they have an industry based on your biological material. Well, who owns that? Do you have a right to own it? Other technologies. I mean, these cell towers that tell everybody where you've been. Is that an invasion of your privacy? Does that require a search warrant to use it? There was a search-and-seizure case that I happened to author a dissent: you know, when you're arrested with a "search incident to arrest," they can take your wallet, your pocketbook, your address book. In this instance they took the individual's cellphone and held on to it for several hours, and then decided

they'd go plowing through it. So the case came to us.⁹ Was that a search incident to arrest (and so always legal)? Well, the court held it was, but I dissented and I said, in this new technological era, this is not like your wallet, you're going into photographs, bank accounts, contacts — of course, that's what they wanted — and I lost, *but* the United States Supreme Court took the issue up later and they went the way that dissent went.¹⁰ They said that your computer or your cellphone, smart phones, are different than your wallet.

NEWTON: It's an encyclopedia of your life, really.

WERDEGAR: It is. So the courts do the best they can — my colleagues who said it was fine, they were analogizing to, as I say, wallets and address books, or the drugs or the cigarette box that was in your pocket.

NEWTON: The reasoning by analogy is difficult in these technical cases.

WERDEGAR: It really is. I had a case where some disgruntled employee left the firm he was working at and inundated it with emails. The firm was very annoyed, and they sued for trespass to chattels. Chattels are things. An inundation of emails is not the same as damaging somebody's physical property, which is trespass to chattels, and we had to decide that.¹¹

NEWTON: I know we want to leave time for you to sign some books outside, but let me ask you just a couple more. A lot of talk in Sacramento today, and probably more starting tomorrow, about California serving as some sort of base of resistance to Washington, particularly — obviously — in areas like climate change and immigration, where California seems to have a different set of policy perspectives than the Trump Administration, anyway. Is there room, legally, for California to chart an independent course from Washington in these areas?

WERDEGAR: Well, insofar as your question relates to political issues, I have no idea. But insofar as civil liberties, we do to an extent, because we have our own state constitution. And the California State Constitution has its own "Bill of Rights," and we tend nowadays to be more protective of individual liberties than some other states or maybe the national

⁹ *People v. Diaz*, 51 Cal. 4th 84 (2011).

¹⁰ *Riley v. California*, 573 U.S. 373 (2014).

¹¹ *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342 (2003).

government. In the past, we have been the first. We were the first to strike down laws against miscegenation (racial intermarriage),¹² long before the United States Supreme Court did it. Our Supreme Court was the first to apply the exclusionary rule to illegally seized evidence — that you couldn't put it in court.¹³ We were one of the early ones to recognize gay marriage; we weren't the first. Of course, the voters threw that out. There's some room in that regard for California to be a leader. I can't speak about how it's going to go or what the policies are going to be about immigration. I'd like to say something about immigration. I think all of us, and certainly students, could benefit if we knew what the laws on immigration actually are. I mean, how many can tell us how a person can legally immigrate, how the process goes, who gets to do it — I can't, and I really intend to study it, so we know what all the hue and cry is about.

NEWTON: I suspect that the president probably can't answer some of those questions. Anyway, I won't make you answer that. Sorry. Two final questions, one obligatory and one, I hope, is more hopeful. First, and I apologize for feeling I need to ask you this, but I do. What do you think about the confirmation hearings for Judge Kavanaugh?

WERDEGAR: I thought they were terrible, painful to watch. Well, you might say, "In what way is it painful?"

NEWTON: Unfortunately, that's exactly what I was going to say. [both laughing]

WERDEGAR: I don't know where to start. It's a question as to — starting out at the beginning — whom do you believe? And people across the country had different takes on that. But moving then to his response, I think his response was very disturbing in the sense that it was so immoderate, intemperate, and when a nominee to the highest court in the land, retorts to a senator without answering the senator's question, asking the senator about her drinking habits, or her preferences, it's discouraging. I don't think the United States Supreme Court in the beginning was supposed to be so politicized, and I think politicized is a fair word. However, this is not new. When I was a little girl, there was the Earl Warren Court,

¹² *Perez v. Sharp*, 32 Cal. 2d 711 (1948).

¹³ *People v. Brisendine*, 13 Cal. 3d 528 (1975).

and there were signs that said “Impeach Earl Warren,” and there are people to this day who resent and think it’s wrong, and illegal, what the Warren Court did with various criminal rights and civil liberties. So it’s really not new. The court has really been political. When somebody takes the bench, do they change, do they take on a greater sense of responsibility as to the power they have? With any given judge, we look to see that.

NEWTON: Did you feel that, in your own work, in your own experience once you were on the bench? Did you feel differently about it?

WERDEGAR: Well, I certainly felt a responsibility, but I didn’t come with anything that I had to put aside that would impede my being an objective judge. Judge Kavanaugh will have to. I mean, he made it very plain where he stands on many issues, and the question is, will he recuse himself? You know, you’re not supposed to say how you feel, and he has on many things. We’ll see how he comports himself on the bench.

NEWTON: It’s hard to imagine, for me anyway, handling a case for a liberal civil rights organization, now that he’s said so clearly that he’s been the victim of those organizations.

WERDEGAR: We’ll see. It’s up to any given judge on the United States Supreme Court whether they choose to recuse.

NEWTON: Finally, and more hopefully, I believe my god daughter is somewhere in the audience here, and I imagine her sitting in your seat someday. She’s a young lawyer here in Los Angeles. What advice or thoughts do you have for young lawyers, particularly young women, who are entering the profession now and want an illustrious career such as you’ve lived?

WERDEGAR: That’s a broad question, but I would say, for someone who aspires to be a judge, well, where do I start? Can I talk about women?

NEWTON: You can talk about anything you want.

WERDEGAR: I think it’s always best that you find a field of the law that you’re passionate about, and you excel and you do the best you can. Now we’re talking about aspiring to the bench. Please find a field that you love — if you don’t love what you’re doing, find another one — truly, because law can be marvelous. Some people hate it, and some of us just love it. So if you’re not liking it, please find something you do like. For women, it is a challenge because even though younger men are much more egalitarian in

the home and so forth, women still tend to carry the burden of childcare or the ailing parent and so on, Ruth Ginsburg excepted. [laughing] She said, “This child has two parents, you know.” She’s quoted as saying that when the school would call her. And her husband Marty was just marvelous, did all the cooking and so on, but usually it’s not the case. I would say, just carry on as best you can, keep your hand in the law, do what you love, and hope for the best. If you want to be appointed to the court, you have to be brought to the attention of somebody, the local bar groups, your activity in your community, someone politically influential. You have to do something beyond just handle your cases, I think. And there’s a large element of luck. But I would say to any aspiring young lawyer, I hope you love it. I love it, and it’s just a wonderful career. You can have such an impact on people’s lives, really. When people need a lawyer, they really want a lawyer, and various causes need lawyers to advance them, too. The head of Public Counsel introduced us. [gesturing] Organizations like that can have such a wonderful impact. It’s a wonderful profession.

NEWTON: Before we go, before I release you, a few thanks — to Public Counsel for cohosting tonight’s event and for making Los Angeles safer and a more welcoming place; to the California Supreme Court Historical Society and yourself for cohosting and for preserving the history of this institution and state; all of you for making it out here after a historic and somewhat exhausting election; and finally, and most importantly, to you Justice, for being with us this evening, but far more importantly for dedicating your life to the service of the state and country. We’re all in your debt.

WERDEGAR: Thank you very much.

NEWTON: I want to remind all of you that there are copies of the Society’s history of the court that are available just outside this room that Justice Werdegar has agreed to sign. You’ll also find copies of *Blueprint* magazine that I edit at UCLA. They’re free, and I hope you’ll take a copy and enjoy it. With that, I thank you all for coming. I appreciate your being here.

WERDEGAR: Thank you so much. [audience applause]