

ORAL HISTORY  
HERMA HILL KAY



HERMA HILL KAY  
DEAN, BOALT HALL SCHOOL OF LAW, UC BERKELEY, 1992-2000

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*Oral History of*

# HERMA HILL KAY

ELEANOR SWIFT\*

## INTRODUCTION

Professor and former Dean Herma Hill Kay was celebrated a few years ago for completing her fiftieth year of teaching at Boalt Hall, the School of Law at UC Berkeley. Her commitment to our law school, and to legal academia, is remarkable. She was selected by the faculty, and appointed by the chancellor, to be the school's first woman dean; she has served on boards and committees for almost every significant legal academic institution in the country; and she has been honored many times for her many contributions.

Herma's commitment to Boalt continues to this day — in the classroom, at faculty meetings, and in her office, where she is finishing a book on the first fourteen women law professors in the U.S. and is still mentoring our junior faculty members.

What has struck me about Herma in the thirty-four years I have been her colleague at Boalt is her remarkable generosity of spirit. This generosity has inspired her, throughout her career, to create opportunities for others, especially for women, to thrive in legal academia and beyond. The creation of these opportunities for others is, I think, one of her most significant and

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\* Professor of Law, School of Law, UC Berkeley.

enduring contributions to the law and to legal education. I want to describe briefly only four examples.

First, as chronicled in her oral history (pages 83–93), Herma was an active participant in the substantive revolution in women's rights that swept through California and the nation in the late 1960s and 1970s. Based on her stated conviction that "women ought to be free and conscious actors . . . [who] ought to determine their own role in this world," she engaged in both academic and political work to promote women's opportunities for self-realization. She participated in the enactment of no-fault divorce laws through her appointment to Governor Pat Brown's Commission on the Family. The commission's report paved the way for California's adoption of a no-fault divorce statute in 1969, which in turn prompted Herma's appointment as co-reporter of the Uniform Marriage and Divorce Act, a law reform project which had nation-wide impact. Women's equality was then addressed directly by the American Law Institute's Family Dissolution Project, for which Herma served on the Advisory Group, to ensure that upon divorce women would get equitable support and property awards. She also testified in favor of California's ratification of the Equal Rights Amendment by the California Legislature.

Second, through her inspiration, active encouragement and concrete support, Herma generated opportunities for generations of Boalt graduates, men as well as women, to engage in legal activism on behalf of women and other underrepresented groups. Throughout her oral history, the names of Herma's former law students appear consistently, as academics, judges, public servants and public interest lawyers.

Just before joining the Boalt faculty in 1979, I attended a national conference on Women and the Law. It was an exciting venture for me, as I was introduced there to many women law professors and legal activists engaged with the legal issues outlined above. At the conference, Herma was often surrounded by friends and admirers. I met many former students of hers who spoke warmly of the inspiration and encouragement she had given them.

My third example is an opportunity that Herma opened to me personally, and to future generations of Boalt students. In 1992, when Herma became dean at the law school, she asked me to take the leadership role in formulating a proposal to bring live client clinical education into the halls of Boalt. At that time, Steve Sugarman and I were co-teaching a class for students engaged in clinical work at the Berkeley Community Law Center,

which had been founded by Boalt students in 1988. I was more than thrilled to have this chance to put into practice one of my principal motivations for entering law teaching — to support students interested in public interest legal work. Clinics in the law school would give all students, and those interested in public interest careers in particular, the opportunity to work with real clients, under the supervision of clinical faculty. Such clinical work would train them to reflect on the skills they developed and the insights they gained about the role of law in promoting social justice.

The plan put forward by the Clinical Committee that I chaired, fully endorsed and supported by Herma (pages 137–141), was gradually approved by the faculty over the course of more than ten years. The live client clinics, the field placement program, and a full professional skills curriculum now flourish at Boalt. There is no doubt that this success was grounded on Herma's own commitment to develop these important clinical opportunities for our students.

Finally, I want to celebrate the special generosity with which Herma has embraced two of our younger law faculty colleagues who teach and write in her own fields of specialization — family law and conflict of laws. Some of Herma's work in the family law field is discussed above, and her introduction to, and abiding interest in, conflict of laws is described in the oral history (pages 43–57). These colleagues describe their ongoing relationship with Herma:

Herma invited me to sit in on her Conflicts class when I arrived last fall and invited me to guest lecture twice. We've also had lunch many times, and she's allowed me to pick her brain on issues large and small. She's been unfailingly encouraging of my work and teaching, and she's steered me back to the right track in my research when I have been discouraged. Perhaps most importantly, she's made me feel like my ideas are interesting and worthwhile, and that is invaluable coming from someone who has played such a large role in the development of the field.

Since I came to Berkeley, Herma has been my stalwart champion and mentor, relentlessly encouraging and extraordinarily generous. She has shepherded me through to tenure, insisting that she would not retire until I received tenure (though she warned me not to take too long in going about it!). I am enormously grateful for her kindness, friendship, and example.

Of course such interest in, and mentorship of, one's very own successors in teaching and research should be the norm for law faculty, but I fear it is not. This aspect of Herma's character, and of her commitment to the future of our law school, deserves to be celebrated and emulated.

One explanation of Herma's ongoing commitment to creating opportunities for others — for her students, her colleagues, and the less powerful who seek justice through law — may be the mentoring she herself received at home from her father (page 38), in college (pages 28–34), in law school (pages 43–48) and, in her career, from California Supreme Court Justice Roger Traynor (pages 60–61) and Professor Barbara Armstrong (pages 67–68). She appreciated the riches she received, and she has devoted much of her career to passing these riches on to others.

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## EDITOR'S NOTE

The oral history of Professor and former Dean Herma Hill Kay was recorded in eight interviews by Germaine LaBerge, senior interviewer of the Regional Oral History Office at UC Berkeley, from June to September 2003. It is presented here in its entirety and has received minor copyediting for publication. Insertions in square brackets were added by Professor Kay shortly after the interviews concluded. She has generously assisted the present publication by reviewing the text and providing illustrations from her personal scrapbooks. Additional illustrations appear by courtesy of the UC Berkeley Law Library and the efforts of Archivist William Benemann.

The oral history is reprinted by permission of The Bancroft Library at UC Berkeley. The sound recording may be accessed at the Library, and the original transcription may be viewed at the Library and at the UCLA Department of Special Collections or online at [http://digitalassets.lib.berkeley.edu/roho/ucb/text/kay\\_herma\\_hill.pdf](http://digitalassets.lib.berkeley.edu/roho/ucb/text/kay_herma_hill.pdf).

In LaBerge's introduction to the original transcription, she acknowledged the assistance of four professors in providing background information for the interviews: Eleanor Swift, Jesse Choper, Earl F. Cheit, and Robert H. Cole.

The Curriculum Vitae and Bibliography following the oral history have been updated to late 2013 by Professor Kay for publication in this volume.

— SELMA MOIDEL SMITH

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**HERMA HILL KAY**

INTERVIEW 1: JUNE 2, 2003

LABERGE: I'm in Professor Herma Hill Kay's office at Boalt [Hall]. It's June 2, 2003, and this is our first interview. We always like to start at the beginning, so why don't you tell me the circumstances of your birth that you have been told.

KAY: You don't think I remember?

LABERGE: I doubt it. [laughs]

KAY: Well, I'm told that I was born on the eighteenth of August, 1934, and that my father, who was a Methodist minister but also an avid sportsman and deer hunter, was terribly nervous because the deer hunting season had opened on the fifteenth of August, and here he was hanging around waiting for me to be born.

LABERGE: [laughs] And this is in South Carolina?

KAY: South Carolina.

LABERGE: Okay.

KAY: So finally I appeared, and he went off to his deer hunt. That is all I have been told about the surroundings of my birth.

LABERGE: Do you have siblings?

KAY: No, I'm the only child. My father, whose name is Charles Esdorn Hill, had twelve people in his family — brothers and sisters — and my mother, Herma Lee Crawford, had ten in her family. I can only assume that they decided that was too many on both sides. [laughs]

LABERGE: What do you know about your grandparents on either side?

KAY: I actually only knew one on each side. The other on both sides had died before I was born. I knew my mother's mother, whose name was Molly Crawford. I think her true birth name was Margaret Lee Fraser; they called her Molly. My grandfather Benjamin Hawkins Crawford, my mother's father, died the year I was born, in 1934, but Grandmother Molly made a habit after her husband died of visiting all her many children, and she would come and spend three/four weeks a month at everybody's house. So I got to know her quite well. My father's father, whose first name I do not remember, I only called him Grandfather Hill — I can probably find that out from one of my many cousins — was a farmer in the lower part of South Carolina. His wife had died before I was born, and he was living with a companion who we all called Miss Minnie. I had no idea what Miss Minnie's last name was.

LABERGE: Do you know your grandmother's name on that side?

KAY: No.

LABERGE: Okay. How far away from you did either of your grandparents live?

KAY: We lived in various places because my dad was a Methodist preacher, and in South Carolina in those days you — what they called "rode circuit" — you had four churches at a time. You preached at two of them every Sunday, and you lived in wherever the main parsonage was and you just went to the other churches. We moved every four years — at least that's the way they did it. But we stayed in South Carolina except when he became a chaplain in World War II, and then Mother and I went with him to Texas where he was stationed. That would have been roughly between 1942–1945, somewhere around there. After he was discharged we came back to South Carolina and resumed all this again. And everybody else was in

South Carolina except for a few of Dad's relatives who lived in Georgia not too far away from the South Carolina line.

LABERGE: So there wasn't one main city you grew up in really?

KAY: Oh no, I was in thirteen schools by the time I graduated from high school.

LABERGE: Even that in itself says something about your adaptability. They do say that about children who move and have to make new friends. Tell me if there was some kind of contact with your extended family — you mentioned cousins. What kind of family outings and contact?



HERMA HILL AT THE  
AGE OF FOUR, 1938

KAY: We always went usually to my dad's home where Granddaddy Hill was — went there every Christmas. Everybody came there and sort of brought food and so on. My mother's family didn't have that kind of reunions. Mostly individual members would visit. In fact, we had the first Crawford family reunion in 1990 put together by one of my cousins — first and only, I should say.

LABERGE: So it was more yearly — it wasn't things like family dinners on Sundays, things like that?

KAY: No, we didn't live that close to any of them to do that. Given that you were in a Methodist minister's family, you had Sunday what they called "dinner," which was the middle of the day meal in South Carolina. You had breakfast, dinner, and supper in South Carolina. You had Sunday dinner with one or another of the parishioners.

LABERGE: Meaning they'd come to your house?

KAY: No, you'd come to their house after church. You'd go to their house and be fed, and usually they'd invite some of their family and friends, and so on. It was part of Daddy's job; it wasn't as though it was sort of a family social . . .

LABERGE: Yes, but you were part of that.

KAY: Yes, because Mother and I went to church twice a Sunday.

LABERGE: Right. Since we brought that up, tell me about that part of your background and how it's influenced you — and more about what that was like even during the week.

KAY: In the rural towns where we lived there were not very many people who had education past high school — not all of them had education to high school. My mom and dad were usually the only two people that you knew had college degrees. I think the fact that I was the “preacher’s daughter” sort of set me apart and meant that there was a kind of a social distance between me and the other children. But, you know, I sort of organized games and plays and little skits that we all put on together, stories and things like that.

LABERGE: And you were going to the local schools? Tell me about one

of the — your experience at school. From what you said, I assume you were a leader and probably the smartest girl in the class.

KAY: Not always, because a lot of the kids there were very smart — they just didn’t have a lot of the cultural surroundings that you would have if you were in the city. Can I start with my formative childhood experience? It happened when I was four years old.

LABERGE: Oh please, yes.

KAY: I told you my dad was a deer hunter. This was when the deer jumped in our window. [looking at album] This is the house where we lived,



4. Rev. and Mrs. Hill and their little daughter were sitting in this room reading the evening paper when the peace of the home and neighborhood was alarmed by the confusion caused when this beautiful beast crashed through the window and made repeated attempts to jump the wall of the room in the corner where he was felled.

FROM THE HILL FAMILY  
SCRAPBOOK, OCTOBER 30, 1938

and that's the window that the deer jumped through, and here is — my dad had to kill it inside the dining room, and here he is with his shotgun over the deer. That's the shot of the window, and you see it was covered with all sorts of newspapers, and here I am at the age of four.

LABERGE: Did your father do these captions or your mother or . . .

KAY: I don't know who did this . . .

LABERGE: I mean, it's so dear! I want to just say for the tape, it says: "The little daughter is shown here in her father's arms."

KAY: I have no idea who put this together.

LABERGE: Oh, that's quite something — this was not Mr. Hill's first deer hunt. [laughs]

KAY: No, it certainly was not! There are all sorts of pictures of where it was, and the cutest part of it is that there are all these letters from his friends wishing him well from all over: "Do not shoot over quota before the next hunt." [laughs] I remember it quite well. And that, I think, gave me a sense of, shall I say, the fragility of life.

LABERGE: Oh, that is wonderful. Some of those things said "Orangeburg" — is that the biggest city around?



HERMA HILL WITH HER FATHER  
IN THE FRONT YARD OF THE  
FAMILY HOME, CAMERON, SOUTH  
CAROLINA, EARLY NOVEMBER 1938

KAY: Orangeburg was near where Cameron is [we lived in Cameron at the time], and it was Orangeburg where I was born.

LABERGE: Tell me a little bit about your parents' background — for instance, where they went to school, what you know about their family backgrounds, from which country they came, their education, how they met.

KAY: Well, my mother went to a women's college in South Carolina called Winthrop College. She and one of her sisters both went there and they both became schoolteachers. My mother graduated — let's see, I think I figured out where she was born and what year she was born. She was born in 1905 and she graduated from Winthrop in 1928. And my father was born, I believe, in 1902 and he went to college at Wofford College, where he got his training as a minister. And they, after they graduated, were sent to the same town for their first jobs. They had of course not met each other, but there she was — the new, unmarried teacher in town — and there he was — the young, unmarried minister in town — and I guess things came naturally. This was a town called Cottageville, South Carolina. They were married in 1930 and I was born in 1934. She stopped teaching when I was born. She taught third grade, and when I went to grammar school, which would have been in 1940, she started teaching again, which was quite unusual in those days.

LABERGE: Yes, unusual even for a woman to have a college degree.

KAY: The family, my father's family were from South Carolina — as far back as anybody knows. My mother's family were — her mother came from Tennessee and her father, Benjamin Hawkins Crawford, owned a blacksmith shop in Union, South Carolina, which is where their home was and where all of her brothers and sisters, except for the two older, were born. I don't think my grandmother had any formal education. I don't think anybody before my — no, none of them had any college education before my mother and father and some of their brothers and sisters. I have no idea what country they came from. The family legend on both sides is that they were a mixture of Scotch-Irish and English, but I don't think anybody really knows. There's no story of the immigrant coming over in the family, so I think they must have been around for a while.



LABERGE: Tell me about the schools you went to and what your experience was.

KAY: Mostly they were one-room schools — when the cotton crop was ready to be picked they closed the schools and you went out and helped pick the cotton.

LABERGE: And did you help pick the cotton?

KAY: Oh, everybody helped. Then there were, you know, usually one teacher with several grades of students — they didn't really differentiate the grades in those schools. When my mother taught she usually would drive to the nearest town where there were "real schools," as she called them. I don't think she ever taught in any of the country schools where I went until finally, as I was in high school, she decided that I needed to have a better high school than the one that was out where we were living. So she did arrange for me to get transferred, and then we did go in together, but of course she was teaching third grade and I was in high school. We weren't really in the same area. That prevented me from playing basketball, because they wouldn't let me have a waiver to play basketball outside of my district. I was not able to do that anymore.

LABERGE: That was something you liked?

KAY: Well, it was fun — we played the split court rules, those were the "girls' rules" in those days, but they didn't seem to care that I continued to compete in the high school debate tournaments. That didn't bother them, so I was able to do that.

LABERGE: Always different rules for sports it seems. [laughs]

KAY: That's right, absolutely. But the schools were — you would be surprised that you had any kind of education really, because they were not very good, they weren't very advanced.

LABERGE: Did you know that then or do you know it in retrospect?

KAY: I think I know it in retrospect. I think my mother knew it because she knew what I should be learning — and she was always very helpful with the homework and taught me the things that she was worried that I wasn't getting. [laughs]

LABERGE: Yes, yes. Did you like school?

KAY: I did, yes. I thought school was fun. I loved debating — that was great fun.

LABERGE: You started debating before high school?

KAY: No — well actually, the story that's been published all over is about my sixth grade teacher, and by that time we had been to Texas and back so this would have been roughly 1946 or so. My teacher, who taught this course that we called "Civics" in those days, decided that we ought to have some debate experience, and she decided we were going to debate the question "Resolved: the South should have won the Civil War." I decided to take the negative of that question. I figured I had history on my side. Nobody else was willing to take the negative, and so we had this debate in front of the class, which I won hands down, and then she said to me — I remember this quite clearly — she said, "If you were my daughter, I'd send you to law school." So I went running home to Mother and said, "Guess what! Miss" — whoever she was; I don't even remember her name — "thinks I should go to law school." And my mother was utterly firm about this. She said, "Don't be silly." She said, "You can't make a living as a lawyer. You will get an elementary education degree just like I did, and then," she said, "you will be able to support yourself." I mean she was — she did not joke around about that at all. She was very clear about it.

LABERGE: Is it because a woman lawyer couldn't make a living?

KAY: Oh, I'm sure that's what she meant and what she understood. There were no lawyers in our family, so I think this was just on the basis of her general impressions — and who knows, she may have had some problems doing what she wanted to do in school, education, and so on. Although she never had any trouble getting jobs teaching the third grade. But I think she had a sense of what the world was like for professional women.

LABERGE: As you went along in your life, how did both of those reactions influence you?

KAY: When you would go around the room at wherever you were going around the room, and people would say, "Tell us what you want to be when you grow up," I always would say, "I'm going to law school." Everybody would say, "Don't be silly, you're going to get married and have babies." "No, I'm going to law school." I did ultimately go to law school, but before that — in college — to satisfy my mother, I did start out with a major in

elementary education, which I dropped after the first semester because I was also taking things like philosophy and English literature, which was my love. And to go from those courses to the elementary education courses was just more than I could bear. So I said, "I'm sorry, I'm dropping this," and at that point she stopped complaining about it.

LABERGE: That's so interesting. So, debate in sixth grade. What else in elementary school? Outside activities, and by that I mean also things like picking cotton, which I wouldn't have thought of.

KAY: Well, I didn't do it that much. [laughs]

LABERGE: Right, but if everybody did . . .

KAY: Everybody did, yes. The things that we did — and again, this was sort of an outgrowth of my father's profession. In the summertime, the religious groups — I don't think this was just the Methodists, I think other denominations were all involved in it — would go to a sort of organized camp where you — they would have what they called a camp meeting, and it went on for a week or so. There would be little wooden shelters where you and your family could bring little cots and whatever. There were open fires where you could cook, and so on. People would preach all through the day, and people would come and bring their families, and then there would be campfires at night. So, that was a big thing. In the summer, we always went to the beach, usually at the Edisto or to Folly, and we would rent places to stay — I don't know whose idea that was. It may have been my mother's idea. She always enjoyed going to the beach so we always spent two weeks in the summer at the beach — that was our vacation.

LABERGE: Not with family members?

KAY: No, although I think occasionally there were people who were friends who would go down with us, but I don't have a clear memory. I don't remember it just being Mother and Dad and me. I have the sense that there were more people in the house, so I think there probably were other folks who went, too.

LABERGE: It sounds like your father's profession really did dominate — more than some other families, maybe — what you were doing.

KAY: Oh, I think so. The life of a minister in the rural South had a lot of aspects — you know, it was counseling, it was teaching, it was preaching,

it was giving advice, it was just doing a lot of things that probably nobody does anymore. But he also liked gardening. What he called a garden was like an acre or so of vegetables. He used to do it with a hand plow, and we had corn and beans and tomatoes and carrots and all those kinds of things. My mother used to can all of these things, and I got in on the act too. I developed a sort of a penchant for making pickles — those things they called bread and butter pickles.

LABERGE: Yes, I do know those.

KAY: And usually in the summertime after church, there would frequently be special Sundays when people would bring food, and they would have these big wooden tables out under the trees, where people would eat things. And there was a — I haven't thought about this for years — there was a man who had not married. He was relatively well off for that community, so everybody was waiting to see who he would finally marry. One day he announced, after having eaten some of my pickles, that he was going to marry whoever had made these pickles, and when my mother trotted me out — I think I was about seven at the time — he decided he would have to wait for a very long time. [laughter]

LABERGE: Oh dear! You're painting a very wonderful picture of — this is rural South Carolina. When you went to Texas, what was that like, what do you remember about that?

KAY: Then, my dad was a chaplain in the army, so we lived either on the army base in housing for families of the service people or we may have occasionally, I think, had apartments near the base. Then, you didn't have the community connection, right? Then, he had his office on the base and we had — I remember once I had a birthday party and I wanted to invite some of the people who worked at his office, and my mother had to explain to me that there was this non-fraternization policy. He was a captain and I couldn't invite these privates. [laughs] So I had two parties — one for the privates and one for the other folks.

LABERGE: Where in Texas was this, do you know?

KAY: I was trying to remember yesterday the names of these — because I don't remember, but it would have been an army base in Texas. I don't



HERMA HILL'S FATHER, CHARLES ESDORN HILL, RECEIVING  
AN AWARD DURING HIS SERVICE AS A METHODIST CHAPLAIN IN  
THE U.S. ARMY DURING WORLD WAR II

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remember the names of them, but the towns we lived in: one was called Elgin and one was called Paris, Texas.

LABERGE: What do you remember about the war in general?

KAY: Nothing, except that my dad had to go over there.

LABERGE: He did?

KAY: Oh yes, he went. My mom and I went with him for about three or four months to New Jersey, which is where he embarked to go to — he was in Germany, and he wrote letters. We then went back to live in a house that had been Mother's family home in Union, South Carolina, and we

lived there while he was overseas. Then he came back and we went back to wherever his next church was, I think a little place called Nichols, South Carolina. That wouldn't have been right after he came back, but that was where we were living when I was in high school. And the high school, you know — that's where I played basketball in the little rural areas. You didn't have a one-room school any more, but it was not really very advanced. And I think it was at that point that my mother decided that I needed to go to the high school in Lancaster, South Carolina, which is where I finished high school.

LABERGE: And where she was teaching.

KAY: Where she was teaching, yes — in the grammar school.

LABERGE: So tell me a little bit about the high school — what the courses were like and how that change was for you.

KAY: It didn't give me any problem, I don't think. I don't really remember high school terribly well. I think I was president of one of those classes. I remember having to put on a class prom sort of thing.

LABERGE: What about classes? For instance, did you have science and language?

KAY: We had a French teacher who was absolutely taken aback by our accent. She had just started and she was, I think, not prepared for the students she was going to have. I remember her saying to me one day, when she was trying to get me to sound a French vowel, "How do you pronounce the word if you were going to put this book here?" And I said, "I would say I put the book 'own' [meaning "on"] the table." And she said, "And what would you say if I asked you to tell me about something that's yours?" I said, "I would say I 'own' the bracelet." And she said, "How can I teach you French? You don't speak English." [laughs] So, I never did well at languages. I think I convinced myself that I had no facility for languages, but I've never spoken anything but English.

LABERGE: But it was offered and everyone took — yes?

KAY: It wasn't mandatory, and we never had — my husband took Latin in high school. I don't think anybody ever thought of that in my high school, but I think you could do German or French. I don't think they even offered anything comparable to Spanish. I got through my one year of French and

promptly forgot everything I may or may not have learned. I loved English because I love to read. My biggest extracurricular activity was reading, and my father used to say to me every time we would drive back and forth from Texas to attend these Christmas family gatherings, “Why don’t you look out the window? You always have your nose in a book.” Which is true. I took the books with me that I was going to read while I was being exiled back to these places, and I read. That was, I think, what stimulated my imagination — what certainly led me to major in English when I got to college.

LABERGE: What did you like to read?

KAY: Oh, I loved the Nancy Drew books. I’ve read all the Nancy Drew books. Here was a woman who could do something, right? My granddaughter is now reading the Nancy Drew books and she’s utterly astonished to think that her grandmother read them. [laughs] She loves them too.

LABERGE: Yes, yes — but it’s true, and her father was the lawyer in town and she was helping.

KAY: Yes, yes, that’s right. Absolutely, absolutely — and she didn’t have a mother.

LABERGE: No.

KAY: She did not. [laughs]

LABERGE: I did too. I used to read those under the covers. That’s great. And what about debate in high school?

KAY: I was in the debating society and also — I was trying to think what year this was. I’ve got this thing somewhere at home — God knows where it is. There was a sort of oratorical contest that was sponsored by some conservative group. I think it was called the Freedoms Foundation at Valley Forge. Anyway, it was a national thing for high school students, and you would write your ten-minute oration and then you would deliver it. Mine was entitled [said in a Southern accent] “Our Constitution: Worth Havin’, Worth Defendin’.”

LABERGE: Just with that exact spelling, too?

KAY: That's right. [laughter] That's right, and I won the South Carolina contest. Then in the regional contest I lost to another girl — from Virginia — and she won the national. It was one of the first years a girl — high school girl — had won this thing. So, that was a sort of high point in my development. I've still got that speech somewhere — I don't know where it is.

LABERGE: Oh, that's wonderful! And the fact that you picked out the Constitution. You can clearly see how you got to law school, if we trace it all the way back. [laughs]

KAY: It was that sixth grade teacher — she certainly lit something in my imagination.

LABERGE: And what about — you don't have an accent.

KAY: I deliberately tried not to have an accent, because when I went to college we were debating, and that year the national question had something to do with racial discrimination. One of the examples everybody was using was segregated facilities, like theatres, movies, restrooms and so on, and water fountains. You had separate water fountains for blacks and whites in the South. And I would call them "wah-tuh fountains," and my debate coach said, "No, you can't do this. You have to learn how to speak English." So I did — I worked very hard . . .

LABERGE: By yourself or did you have a coach?

KAY: He was the debate coach, so he helped. I learned how to add my "i-n-g's," and how to try and not make two words out of any word that had a vowel in it. It was deliberately done.

LABERGE: It must have taken longer than a year.

KAY: It took a while, it did. But by the time I got to law school I don't think there was a problem. I think people weren't then saying, "Oh, she must be from the South."

LABERGE: Well, bringing up discrimination — what do you remember of growing up in the South and discrimination and segregation?

KAY: I remember very clearly — the separate seating facilities in the movies, where you had the black balcony. I talk a little bit about that in that piece I did on the attack on diversity in legal education. Did I give you that?

LABERGE: No.



KAY: I'll give you that because it does have some of the stuff — [stops and looks for paper] — it starts with some of the recollections there . . .

LABERGE: Wonderful. Maybe it's just as well I didn't read it, because this is all new to me, what you're telling me.

KAY: Yes. So I definitely had the sense that something wasn't right — that this was not the way people ought to be treated. As I point out in there, it really gave me a sense of how wrong the law was on this point.

LABERGE: Did you get that sense at home too, or was it just something in you?

KAY: No, I think it was my own experience. I don't remember ever having discussed this with my mom and dad, although I do remember that when my mom came out to live with me in college after my dad died, I introduced her to one of my friends who was black, and I think she was in shock. She didn't say anything about it, but I think she was a little shocked.

LABERGE: Yes. Continuing on that vein about your parents, what about politics? Is that something that was discussed at home?

KAY: Oh no. In South Carolina everybody was a Democrat. In fact, I remember once — it may have even been in the same civics class — we were talking about some election or another that was coming up, and my teacher said, "How do you vote?" And I said, "Well, you go down and you get a Democratic ballot and a Republican ballot, and you decide what you want." And she said, "Oh, you do?" I said, "I think so." She said, "Why don't you bring us back a Republican ballot." So of course I went down to city hall and there was no such thing as a Republican ballot. She was making a point of it. Of course, that was all before the South decided they were going to become Republicans. But there was no talk about politics — it was all cut and dried.

LABERGE: Obviously, you didn't go to school with black children or . . .

KAY: No, no. Not until I got to college.

LABERGE: But what kind of relationships did you have with black people, if at all?

KAY: There were children, occasionally, who were the kids of the people who were sharecroppers or the domestic servants, and so on. I say in my

article that, except for the black ministers who occasionally met with my father — he used to preach at some of the black churches as an invited guest from time to time — I never saw a black man in a shirt and tie. There were black undertakers. There were black ministers who — the Methodist Episcopal church was segregated and it had black churches and white churches. It's a while before that, after the integration was successful. In fact my father once — I guess this comes under politics, this one, because this affected what he did. He once preached a sermon saying that he thought this was wrong, that there should be integration between the churches. We were all children of God — there should be no distinction. That afternoon, people — I thought they were Ku Klux Klan; they may have been — drove up and down the road outside our house honking their horns and yelling out things. My father sat there all afternoon, that shotgun you saw in the picture across his lap, reading his Bible. After a while they stopped driving past. It was not a popular thing to do.

LABERGE: Yes — and obviously you remember that afternoon.

KAY: Oh yes. That was pretty impressive.

LABERGE: Yes. Any more anecdotes? Anything you wanted to add about school time or jobs — besides picking cotton?

KAY: I didn't have any jobs — no paying jobs. I used to teach Sunday School, but that was not a paying job.

LABERGE: You started teaching early on in your life?

KAY: Well, you know, everybody took turns teaching Sunday School. I probably did it more than most because I was the preacher's daughter. There is this nice story about when — we were in Texas. I don't quite remember why this happened, but it may have been that there was a Christmas when my dad couldn't go, or was stationed somewhere else and couldn't get away. [He may have been overseas.] My mother and I drove to South Carolina to this family Christmas thing. I remember on the way back — it was on New Year's Day — she had car trouble, and she had to be back in school the next day because her classes started the day after New Year's. She didn't know what to do, because everything was closed, right? So she drives into this filling station which was open, and they looked at her car and they said, "Well, there won't be anybody here until tomorrow. The mechanic will be

here but nothing can be done today.” My mother — who was not a helpless woman, my mother — sank down on this chair in the garage, and she looked at the man and she said [in Southern accent], “I just don’t know what I’m gonna do. I just have to be home tomorrow.” She didn’t say a word about being a teacher. “I have to be home tomorrow.” I want to tell you, a mechanic was there in about half an hour and fixed her car, and we went on to Texas. And I thought, you know, there’s something to this business about throwing yourself upon somebody’s mercy. It’s not all bad.

LABERGE: With a Southern belle accent kind of thing?

KAY: Yes. I mean, batting the eyes comes in handy occasionally. [laughs]

LABERGE: Yes. All these various things are things that you’ve learned or picked up without anyone saying, “This is how you act, this is how . . .” Isn’t that something? Also, it does sound like your mother was not at all helpless. She was quite a woman for her time.

KAY: She was. Yes, she certainly was.

LABERGE: What influences — besides your parents, obviously — do you think were the biggest ones as you grew up?

KAY: There was that sixth grade teacher.

LABERGE: Whose name you don’t remember?

KAY: Whose name I don’t remember, yes. Well, I have a letter somewhere, because the *New York Times* printed that story when I became dean here, and I got a letter from one of my classmates telling me that this woman had died. She was really sorry that she didn’t know that I was telling the story, and she mentioned her name. I think I’ve got that letter somewhere — I don’t know where I put it.

LABERGE: That’s also quite wonderful that one of your classmates saw the story, particularly if you were going from school to school. You probably didn’t have this bulk of kids you grew up with.

KAY: I guess people pick up stories that appear in the national press that has some local connection to it.

LABERGE: Yes, they reprint it.

KAY: Yes, that’s probably why.

LABERGE: It sounds like all along you had intended to go to college and your parents intended for you to go.

KAY: Oh yes. They definitely did, yes. This is another of my mother's strengths: there was this young tobacco farmer when I was in high school that I really didn't want to leave when we went to — I guess we went to Lancaster. It must have been when I was in the eighth or ninth grade or something like that. He had been my boyfriend and I didn't want to go, and so I said to my mother, "I'm not going, I'm staying here." "Well," she said, "what are you going to do?" "We'll get married," I said. Mother says, "That's wonderful. Now, of course, you can't go to college. You'll be raising tobacco all your life, probably have lots of children, but you can't go to college." Well, that was goodbye to the boyfriend. [laughs]

LABERGE: How smart of her to handle it that way.

KAY: After we moved, he and his friend got their car and they came up and visited us once. At that point, I couldn't figure out why. [laughs]

LABERGE: That's very interesting. How did you choose SMU [Southern Methodist University]?

KAY: My dad wanted me to go to a Methodist school, and I was deciding between Duke and SMU. Exercising very bad judgment, I chose SMU because it was not as close to home as Duke was. And because I remembered Texas and I thought I would enjoy going back there again. So I traipsed off to Dallas and started school at SMU.

LABERGE: You said that you were starting off doing elementary education.

KAY: I started off majoring in it . . .

LABERGE: Majoring in it, then changing to English soon thereafter?

KAY: Yes. I think I took elementary education courses, certainly for — I don't think I took them immediately. I think the first year was relatively sort of set up. It was at that point that I realized that there were more verbs than I thought ever existed, [laughs] realizing my education had not been quite as good as I thought it might have been. So I really did a lot of work there, getting myself up to speed with people who — even though SMU had a justifiable reputation as being a party school, there were still people who had been to high schools in places like Dallas and other places around

that were much better. So I had to do some work to get caught up. I think it probably wasn't until my second year that I started taking these elementary education courses, and then I decided I just couldn't do it.

LABERGE: What kind of work did you do to catch up? Was it like after school remedial classes or just extra studying?

KAY: Right, just focusing.

LABERGE: Tell me what kind of a school it was. What were your activities? And what the living conditions were — things like that.

KAY: Well, I spent the first year in the dorm. My father died the first semester I was in school, and my mother came out the second year and she and I lived together in Texas for the three years that I was in college. Then she died, just the summer before I went to law school. So I lived in an apartment with her for three years. The first year, I lived in the dormitory and it was there that I met a woman who was in my class. She was not my roommate, but she was in the same wing of the same floor. Her name was Rikki [Frederika] Amsler and her mother, Margaret Amsler, is one of the women that I'm writing about. She's one of the fourteen early women law professors. Rikki took me home with her for Thanksgiving the first semester we were there, and I told her mother that I wanted to go to law school. Her



HERMA HILL'S MOTHER,  
HERMA LEE (CRAWFORD) HILL, IN  
DALLAS, TEXAS, WHILE HERMA WAS  
A STUDENT AT SOUTHERN METHODIST  
UNIVERSITY, EARLY 1950S

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mother thought it was a perfectly wonderful idea, [laughs] so she really encouraged me.

LABERGE: And she was teaching law then?

KAY: She was teaching law at Baylor.

LABERGE: Okay.

KAY: She had married one of her classmates and they practiced law together — she and Sam. She was teaching and practicing at the same time. She was clearly all for it. That just sort of solidified this notion that I had, and emboldened me — once I got into these elementary education courses — to say I just can't do this. So I got out of that, and then did a major in English with a minor in philosophy.

SMU was a very conservative place. The first year that we were there, they had this big flap with the religion department. We were required to take religion because it was a Methodist school, and they had gotten a fairly decent number of young people, professors, in that department who wanted to teach religion as — I don't think they quite dared go so far as to teach it as fiction, but they wanted to teach it as history, not as belief systems. The school let go a fair number of them, and a group of us got involved in supporting them. But many ultimately did leave. But then SMU was never able to go back to doing what they had been doing before, so the religion department really did become more of a historical approach to religion rather than a "this is the way it really is" kind of thing.

I think I must have caught the attention of some faculty members — there was a man who was in the English department who taught poetry, whose name was Lawrence Perrine. He wrote a book called *Sense and Sensibility* about poetry. He was really one of my mentors encouraging me to — he thought that I would teach English, but I explained to him that I was really going to go to law school. [laughs] He was very, very good and very helpful. There were some other — I don't have any women role model teachers. In fact, I don't really remember women teaching. I'm sure they were. Certainly there were women in the elementary education department. I don't remember any women teachers in other areas that I had there. And I was active in debate, I was active in a lot of extracurricular activities, and I was a — are you ready for this? I was a cheerleader. [laughs]

LABERGE: For the football games and the basketball games . . .

KAY: Of course — naturally, yes. I don't think I did that for very long — I did it for maybe a year.

LABERGE: Sororities?

KAY: Oh yes. SMU, as I said, was a real party school. I hadn't really planned to do this — and I got there, I guess, about a week early, and there we were camped out in the dorms and all this rush stuff was going on. You would see mothers whose daughters were going through rush, and the mothers wanted the daughters to pledge the sororities that the mothers had pledged. And if they didn't get invited, they yanked the daughter out and went to another college so they could do it again. This was the most important thing, right? The right sorority. So I and some other folks then got picked up in this post-rush week, where they sort of swept in people who had somehow not been part of it for one reason or another. I was invited to join a very non-socially . . .

LABERGE: Prominent? [laughs]

KAY: Respectable—prominent [laughs], that's right. In Texas it was more or less respectability that — it was called Sigma Kappa. There is actually a chapter of it here at Berkeley. Years and years ago, when they found out — I guess, from reading one of these little profiles of me — that I was a Sigma Kappa, they invited me over to the house to talk at dinner. Which I did, and they have never had any further contact with me. But I did spend three years at SMU as a Sigma Kappa, so that took a lot of activity. And I was active in other kinds of student organizations.

LABERGE: Here we go. Okay, you were just telling me about being in the sorority and then other activities.

KAY: The debating took a lot of time. There were lots of tournaments, and I actually was on the boys' team. I didn't debate with the girls.

LABERGE: How did that come about?

KAY: Well, because I was one of their top debaters and they wanted me on that team. They didn't have any rules at that point that said you couldn't do it, so I debated with the boys.

LABERGE: What were some of the topics? Do you remember?

KAY: I don't really remember. They were mostly whatever was politically hot that they thought would attract people's attention. I don't remember that we did anything, you know, like "peace and war" or stuff like that. It was more like things that were a little bit less polarizing and that let you do some investigation. Arguments on either side, I think, is what they tried to have when they picked those things. And I was Phi Beta Kappa, my junior year — departmental distinction in English.

LABERGE: So it wasn't a party school for you. [laughs]

KAY: No. [laughs] I played a lot of bridge — the sorority played a lot of bridge.

LABERGE: Okay — and I think that was a time when people did play bridge. If you walked into a dorm here I don't think people are playing bridge any more.

KAY: Probably not, no. Are they playing any kind of cards now?

LABERGE: I don't know. I don't think so.

KAY: When I started teaching here, there were a group of the guys who used to play bridge every lunchtime. My class started right after the lunch hour, and so they would always dash in at the very last second. They'd crowd in as much of that bridge as they could. I think that didn't last here very long.

LABERGE: That must have been a different experience also to be living with your mother during college, which isn't what everybody experiences.

KAY: No, and she was teaching. She had a teaching job, and so it wasn't as though she was there during the day when I was gone. We would catch up with each other in the afternoon or the evening. She kept going back to those family Christmas things, I guess because she thought I wanted to, and so we did that.

LABERGE: I'm just thinking of national events and everything — this was sort of pre-civil rights, except it's when *Brown v. Board of Education* came in.

KAY: That happened when I was in college.

LABERGE: What do you remember about that? You wrote about it?



KAY: Yes, I wrote about it.

LABERGE: Tell me a little . . .

KAY: I remembered what I had experienced in the South, and I thought that it was quite an important decision that would really change a lot of things. And I thought that it was long overdue.

LABERGE: So interesting too that it was Earl Warren, and probably little did you think that . . .

KAY: I say that: little did I think that I would someday be dean at “his” law school.

LABERGE: Other than that, were students involved politically or no?

KAY: Not very much, no. They really did not. Dallas, Texas, was not Berkeley, California.

LABERGE: Exactly, exactly. Other than cheerleading, were there other kinds of athletics for women?

KAY: I didn’t go out for sports. I really didn’t have the time, and my not having been able to play basketball for the last couple of years I was in high school sort of soured my interest in it. And the debating was really an . . .

LABERGE: Encompassing . . . ?

KAY: Yes.

LABERGE: Do you have any more anecdotes about college or other influences besides the one professor? And your friend’s mother, Margaret Amsler?

KAY: I would visit them from time to time. She was always very, very gracious and very hospitable and very, very supportive. She was wonderful. Her daughter, Rikki, was not the slightest bit interested in law school.

LABERGE: What kind of advice did she give you?

KAY: Oh, she didn’t really have to give me so much advice. It was the fact that she didn’t think this was a crazy idea.

LABERGE: Yes, and it was possible to do it.

KAY: Yes, that’s right — it was possible to do it, and it did not seem at all out of the ordinary to her. Which was really, I think, what I needed because

my mother was so — really convinced. My father kept saying, “Oh, she can do whatever she wants,” but my mother really was worried about it. And I remember at one of my fundraising speeches that I used to make after I became dean, I said, “My mother said to me that if I became an elementary education schoolteacher I would be self-supporting and I would never have to ask a man for money. You know, I think she would be turning over in her grave if she knew how many men I am now asking for money.” [laughs] But of course I ask women for money too. [laughs]

LABERGE: Yes, yes! What other law schools did you apply to, and how did you decide on Chicago?

KAY: That was an interesting story. It was totally by accident that I got to Chicago. I took my college transcript when I was in my fall semester — my senior year — and I made an appointment to go over and see the dean of admissions at the SMU Law School. I was going to say, “Can I come here?” In fact, I did say, can I come here, and I had an appointment with him about one-thirty in the afternoon. Little did I know that he had just had lunch with the dean of admissions from the University of Chicago Law School.

In those days, Chicago had these full honor scholarships that they gave to colleges around the country because they wanted to attract a geographically diverse group of students. They were really at that point more or less a regional Midwestern school. They wanted to become a national school. I later learned that the substance of this luncheon discussion had been, “We’ve been giving you guys at SMU scholarships that you’ve been awarding for the last three or four years and you’ve never sent us anybody who distinguished themselves as students — can’t you do better?” So one-thirty comes, I’m walking into this man’s office and I hand him what was a pretty decent transcript, and said, “Can I come to law school here at SMU?” Like what I have since learned would be a typical reaction by an overworked administrator with a new problem — he looked at my transcript and said, “Well, of course you can come here, but wouldn’t you like to go to Chicago? I can get you a full scholarship.” Solving his problem, right? I was taken aback — I literally looked at him and said, “Where’s Chicago?” He said, “Very good law school. Go there; it won’t cost you a penny.” So I went to Chicago.

LABERGE: You still had to go through an application process, or was it a done deal?

KAY: It was a done deal. I mean, it was clear. We didn't have — we didn't take LSATs at that point. Oh yeah, it was definitely a done deal.

LABERGE: And you didn't know what a reputation Chicago had?

KAY: I had no idea, no — I mean it was just a total fluke. Looking back on it, in my conversations with women law students over the years, it's perfectly clear that if I had gone to SMU nobody would ever have heard of me again. Because at that point, to get into a school like Boalt as a teacher, you had to have graduated from a very well-known law school.

LABERGE: In some of your articles you called them the "feeder" schools.

KAY: Yes, that's right. It was, I think, probably the single thing that was the most transformative event that enabled me to do what I later did. It was all because of one lunch appointment, right?

LABERGE: Right. What was this man's name?

KAY: The dean of admissions at SMU?

LABERGE: Yes.

KAY: Well, let's see, this would have been 1956 or '55, I guess. The dean of admissions might be listed — those books are all downstairs.

LABERGE: You can fill this in, in the transcript when you see it. [SMU did not identify anyone as the dean of admissions in 1955–56.]

KAY: I gave you the name of the one from Chicago. His name was Jo Desha Lucas, and he told me the story after I got to Chicago.

LABERGE: So that's how you found out the story — not from your own dean?

KAY: That's how I found out — yes. No, he never told me about his lunch with Lucas, but I was certainly grateful to him.

LABERGE: You had a three-year scholarship?

KAY: A full scholarship.

LABERGE: Including room and board?

KAY: No, they didn't pay room and board. I rented an apartment. Now, did I have a housing allowance? I'm not sure if I had a housing allowance or not, but they didn't really have a dorm. I guess they did, but the law students by and large didn't live in dorms, so I rented an apartment on Sixty-first Street, which was across the Midway from the old law school, if you know Chicago.

LABERGE: I do.

KAY: Wind used to howl down the Midway in the wintertime — it was freezing there.

LABERGE: Now, at this point your mother was still alive.

KAY: My mother was alive when I got the acceptance, and so she knew that I was going to be able to afford to go to law school. I don't think she thought I'd last — I think she thought I'd drop out, but I didn't.

LABERGE: But she didn't go with — I mean she died in . . .

KAY: She died in Texas, yes. She died just before I was about to go — maybe a month or so before.

LABERGE: Which is also hard. I mean, you were young to have lost both your parents so early, and to go on and fend for yourself.

KAY: Yes, that's right. I've already lived longer than either of them. She died at fifty-one and my father died at fifty. [Anecdote deleted that appears again in next interview.]

LABERGE: How about jobs in the summers, or what did you do in the summers during college?

KAY: I read.

LABERGE: Stayed in Dallas or did you go back to South Carolina?

KAY: No, because Mother was in Dallas at that time, so we stayed in Dallas. Did we go to the beach? I don't think we went to the beach after Dad died. I think we just stayed in Texas.

LABERGE: And any traveling?

KAY: No. I had not been out of the country until after I graduated from law school.

LABERGE: Okay. And you'd never been to the North, obviously.

KAY: No.

LABERGE: What was that trip like? Tell me about your reactions.

KAY: I drove from Dallas to Chicago. At that point, I guess, I had not totally lost my Southern accent, because I was trying to find an apartment, and I was going through the ads. I would call up asking to be able to come and see anything that was close to the university, and people would say, "Sorry, it's been rented," or "It's not available." I was saying something to a friend of mine who lived in Chicago; I said, "Everything seems to be rented so fast." "Oh no," she said, "they think you're black." It's because they heard my voice. She said, "You go there in person and ask to see an apartment." So the next day I started doing that and it worked like a charm. It was really astonishing. We later learned — we didn't know it then, but a lot of that property that was there on Sixty-first Street and around the university was owned by the University of Chicago. But their ownership was disguised through land trusts. It was later, when they broke those trusts, that they'd learned that a lot of that property was owned by the university and they refused to rent to blacks. It was a real embarrassment for them when it became known.

LABERGE: Yes. When you got to Chicago who did you know?

KAY: I didn't know a soul.

LABERGE: You didn't know a soul, so you landed and . . .

KAY: Got this apartment — a third-floor walk-up — and I had not been there more than a couple of hours when there's this heavy knock on the door. I go outside and say, "Who's there?" Here are these two men who can only be described as goons, and they say, "You new here?" I said yes; they said, "You registered Democrat?" I said yes; "You need anything, you let us know." That was the [Mayor Richard] Daley machine. [laughs]

LABERGE: Oh, my gosh!

KAY: I used to watch the open-bed trucks being driven up and down the streets, to bring people out to the polls. And it was when I learned the meaning of the term "vote early and often" — in Chicago. [laughs]

## INTERVIEW 2: JUNE 24, 2003

LABERGE: Last time, we ended with you getting to the University of Chicago, and getting your housing and having trouble with that. But I thought, before we start in on that, we could just pick up a little more on your childhood. We talked about your mother's influence on you but we didn't talk so much about your father's. We talked about what he did, but not — for instance, you brought up, as we were finishing, that you went hunting with him but we don't have that on tape. We didn't really bring up what that church influence — or other influences he had — that may have impacted how you've lived your life.

KAY: I think the most important thing was that he had placed utterly no restrictions on my aspirations. He was always of the view that I could do whatever I wanted to do — not nearly as practical as Mother, who understood what the limitations and obstacles might be. Dad just seemed to think, "She wants to be a lawyer, fine." [laughs]

LABERGE: You never heard anything from him — don't go that route?

KAY: No, nothing at all. And, of course, he was an inspiration in the sense of his oratory. Having listened to him preach twice a Sunday for all of my life, I did get a sense of — his sense of integrity and the honor and candor. I never really thought he was a deeply religious person. I had the sense that he was more — it was a job to him, and I didn't get the sense of any kind of burning commitment. I got more the sense of a person who could come into a new community and understand what the needs were. I may have mentioned that he was very good at building new churches. I think they always sent him places where at least one of his four churches was falling down so that he would raise the money and get it built, and then he would go on to do it again. They really appreciated his organization and ability to get people united and doing that kind of a project. But in terms of saving souls — that didn't come across clearly to me.

LABERGE: Even at that young age, you could realize that?

KAY: I don't know when I realized it, but I had the sense that this was a job.

LABERGE: Has any of that impacted you in your — either spirituality or choice of religion or anything like that?

KAY: Not particularly.

LABERGE: Any other activities, things that you did with him besides, for instance, going hunting? Most girls growing up don't do that, I would think.

KAY: He had no sons — poor man. [laughs] No, I don't think we did anything else together other than that.

LABERGE: Let's go to the University of Chicago. It's 1956, and we have you in your house —

KAY: In my apartment . . .

LABERGE: In your apartment, rather. Before you even started classes, what did you envision yourself doing as a lawyer?

KAY: Oh, I guess I thought I was going to get a job in a law firm. I don't think I thought about teaching when I first went there. I got the sense of teaching while I was there and once I realized that I was pretty good at doing whatever it was you were supposed to be doing as a law student. Because my grades were high. And I saw — this is jumping ahead a little bit — but I saw Soia Mentschikoff. I never had any courses from her other than her participation in [Karl] Llewellyn's first-year course, where she came in and gave a lecture one day. But I had a sense, from seeing her and feeling her presence in the school, that this was something that could be done. And, of course, I had had that meeting with Margaret Amsler from Baylor sort of tucked away in my head, so I got the clear view that this was something that wasn't off limits. But it wasn't what I first started out trying to do. I first started out trying to get a job in a law firm.

LABERGE: With any specialty in mind?

KAY: No.

LABERGE: And what about courtroom work? Did you think of doing that too?

KAY: I don't think I ever thought of that — no. That somehow did not appeal to me.

LABERGE: Tell me what the first year was like, or what your impressions were.

KAY: It was, of course, a relatively small school — it still is. Chicago and Yale, I think, are the smallest of the top ten schools. I think we had

something like 110 in our class, which was relatively large for them, and it stayed about that size. By comparison, we have 270 here at Boalt in the first-year class and I think Harvard has something like 500, so it's really a difference in scale. The curriculum was all arranged in the first year so you didn't have to worry about making any choices. We were small enough so that we didn't have sections — we all had the same classes together. They didn't have small sections in those days, so there was not a smaller group of people that you got to know more than the others. And I think it was just more kind of feeling your way around people that you — we did have a study group and I know that was about four or five of us who met and studied together.

LABERGE: There were only four women, is that right?

KAY: Yes, there were four women. I pulled out the list of my class. There was only going to be three of us originally. One was a woman who practices now in Sacramento. Her name is Gloria Martinez. She was from a large family, as I remember, in Texas. She had something like five or six brothers, all of whom were lawyers, and so she decided she wanted to be a lawyer, too. She was in our class, and then the woman that I was closest friends with — whose name was, at that point, Amy Scupi — she and her husband Richard Scupi were both in the first-year class together. They've since gotten divorced but she and I have kept up with each other over the years. [Her name is now Amy Loeserman Kline.] We were all on the [*University of Chicago*] *Law Review* together — Amy and Richard and I.

The other woman was not planning to come to law school. Her name is Pauline Corthell. Her husband, who was admitted to the class, had been working in the steel mills in Chicago to earn some money during the summer, and he had this terrible accident and lost his vision just before he was about to enter school. So she came with him as a member of the class and read all his cases to him and helped him. He had to learn how to use Braille or whatever, and so they went through together and then they practiced law together after they graduated, for a while.

LABERGE: So she came sort of by default? She was in the classes anyway and . . .

KAY: She came by default. That's right, she wasn't planning on coming, and I guess it must have been something that occurred to them that might



be a way that they could do this, and so she came. So those were the four women who were in that class.

LABERGE: So it was like being in a boys' school, really.

KAY: Well, yes. Legal education was like that in those days. Chicago was very unusual in having a woman on the faculty. So Amy and I and Dick were a group that palled around together. We had made friends with a student whose name was Rufus Cook. Rufus was an African American from Alabama, and he had applied to law school at the University of Alabama. They of course, did not want him anywhere near their law school. So they said to him, "Get yourself admitted to any law school you want to go to and we'll pay your full expenses." His wife was also getting a Ph.D., and they paid her expenses too. So he went to law school at Chicago; she entered the Ph.D. program at Northwestern. Rufus was wonderful — every time the check was a little late he would write them a letter telling them how homesick he was. [laughs] So, he was a fun guy and he was part of our study group, too. It was all very interesting, and I think we had a very good faculty there.

I was particularly impressed with the professor of Contracts, Malcolm Sharp. Of course, Karl Llewellyn was the sort of "great man." Karl Llewellyn was Soia Mentschikoff's husband. He's the one who drafted the Uniform Commercial Code, and there's a famous story about them, about how they got to Chicago. Ed[ward H.] Levi, who was later U.S. attorney general, was the dean there, and when he became dean at Chicago — this is the story that he told me but it's been told lots of other places, too. He said to the faculty, "Who do you want? If you could have anybody you want, who would you like to have for this faculty?" They said, "We want Karl Llewellyn." So he did a little sleuthing around and discovered that Karl had a wife who was working with him on the commercial code. She was actually one of the first woman partners on Wall Street. Ed invited the two of them out to Chicago — Karl at that point was on the faculty at Columbia — to give lectures on the Uniform Commercial Code. While Soia was giving her lecture — he and she and Karl and [Edward H.] Levi were all sitting on the stage together — Levi passed a note to Llewellyn saying, "Are you interested in coming to Chicago and joining the faculty?" Llewellyn

passed back the same note with a little question written on it saying, “One or two?” And Levi said, “Two.”

So then they had the nepotism problem. He managed to persuade Chicago to hire Karl as the professor and to hire Soia as a professorial lecturer. She finally got faculty rank after Karl retired, but during that time she functioned as a full member of the faculty and nobody ever thought she wasn’t. I’ve gone through her archives at Miami because she’s one of the early women law professors that I am working on, and I can tell you that she never signed her name “Professorial Lecturer.” She always signed her name “Professor of Law” during that whole period. I’m sure they thought that this was just some kind of thing they had to do for Chicago’s purposes, but she was certainly treated as a full member of the faculty — so that was very impressive.

Llewellyn and I, though, got off on the wrong foot. He taught a first-year course called Elements of Law, which he created, and he used as the material for it these two books that he had written. One was a book that he’d written in 1941 with E. Adamson Hoebel, the anthropologist, called *The Cheyenne Way*. They had gone out and done field research on the Cheyenne, and this was about their legal system. The other book that Llewellyn used was his book, *The Bramble Bush*, first printed in 1930, and finally in 1951. His final exam in this course was a series of true/false and multiple choice questions in the form: “LL” — standing for Llewellyn — “LL thinks . . .” and these multiple choice questions that you could answer. My view of this matter was that whatever LL thought he thought now was not the same thing as what he thought when he was writing those books. [laughs] And I just did an abominable job in this test — which, fortunately, at Chicago was the first quarter and the first quarter grades didn’t count. You got a final grade in the next quarter of the course.

But Llewellyn was sufficiently displeased by my performance that he called me into his office, and he said, “You know, Miss Hill, you did a very bad job on my exam.” I said, “Yes, I know, Professor Llewellyn.” He said, “It’s very difficult for a woman to succeed in law. You can’t take Miss Mentschikoff as an example. Miss Mentschikoff is exceptional.” [chuckles] He said, “Now, I know that you may think this is just a test, but this is really an indicator of your ability to think like a lawyer. You’re obviously a very bright young woman or you wouldn’t have gotten the scholarship here.” So,

he'd obviously checked my records. He said, "I think you should withdraw; it would not be disgraceful. I'm sure you could do something else, but you shouldn't really waste any more of your time here. You're obviously not well-suited for the law."

I was so *shocked*. I mean, I didn't know what to say. I think I just sat there in my chair. He gave me this peering look — he had great bushy eyebrows — and he said, "Well, I can see that you don't understand or you don't believe what I'm saying. I'll prove it to you. The Property grades were posted this morning, tell me what you got in Property." I said, "Well, Professor Llewellyn, I got the highest grade in the class in Property." "Oh you did, did you?" he said. "You obviously aren't working for me the way you're working for Allison Dunham!" — who was the Property professor. "Now, you go out there — " Gone was all this "You can't make it in law school." It was, "You're not paying attention to *me*." [laughs] Years later I told Soia that story and she laughed and laughed, and she said, "You know, I could never pass his test either." I guess in a way it was too bad, because he and Mentschikoff had this evening once a week at their home when they invited students to come over. [She had been his student at Columbia.] People really kind of worshipped the two of them and spent a lot of time with them, and it must have been quite a wonderful sort of relationship to have, but I never dared set foot in their house after that.

LABERGE: That is too bad, but what a thing for him to say. Did it influence you then to want to do even better, or how did it make you act?

KAY: I felt as though I had gotten a reprieve. I managed to get past his exam the next time — I'm not quite sure why or how. It didn't hurt my GPA after I overcame that first bad showing.

LABERGE: And did he teach other classes that you took later?

KAY: No, I never took anything else from him. I never took any of Mentschikoff's courses either, because she was teaching Commercial Law and I was not really interested in that subject. Instead, my closest mentor in law school was Brainerd Currie who taught Conflicts.

LABERGE: Why don't you talk about him a little bit — how did he become your mentor and how did you come to like Conflicts?

KAY: He asked me to be his research assistant.

LABERGE: After having seen you in class or just out of the blue?

KAY: No, after having seen me in class. I'm trying to remember what else he taught. I remember taking Conflicts from him. He didn't teach — I didn't take Civil Procedure from him, I'm sure. I may not have taken anything else from him, so it may have been that I became his research assistant after I'd already taken the course — which would make sense, because then I would have known something about the subject matter. He's listed as having taught Admiralty — I never took his Admiralty course, and I didn't take Civil Procedure from him; I took it from somebody else — and Conflicts. So I think it must have been after I took the Conflicts course that he asked me to be his research assistant. He was working then on this new theory of his on governmental interest analysis, and he said, "I think there's some constitutional problems with this. Why don't you go out and do some research on the Equal Protection Clause and the Privileges and Immunities Clause." We wrote two articles together based essentially on drafts that I had done that he then took over. We worked together on these two projects and they were both published. It was really quite an experience, you know, writing an article with him — writing two articles with him — and working on the theory that he was espousing. He was a Southerner like me — I think he was from Georgia.

LABERGE: And did he have an accent?

KAY: Yes, he did. He had gone to school at Mercer [University], which is very proud of their famous graduate, and he went back there for a few years before he died, after he retired from Chicago. He was just a very gentle man. Very low-key and not at all rambunctious. He and Llewellyn were about as far apart as you can imagine anybody being. So, that was a wonderful experience. And he was great friends with Roger Traynor, who was also interested in the conflict of laws, and it was Currie who sent me to Traynor for the clerkship with Traynor.

LABERGE: I read that article,<sup>1</sup> not word for word, but some of it was based on one of Roger Traynor's decisions, so I wondered how that all — how they got to know each other and how that came about.

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<sup>1</sup> Herma Hill Kay, "A Defense of Currie's Governmental Interest Analysis" 215 *Recueil des Cours* II (Hague Academy of International Law, 1989 – III).

KAY: I don't know how they met. I'm just not positive — whether they met at one of these conferences that everybody was going to. I don't think they had met before Traynor went on the bench, but I'm not sure about that. I did this little piece about Traynor and Currie,<sup>2</sup> sort of an intellectual history of their work together and the way they influenced each other, because Traynor was one of the first judges actually to adopt Currie's theory, and used it in California. Then Currie modified his theory in response to an opinion that Traynor published. So he would come out — come to think of it, he was out here when Barbara Armstrong and Kathryn Gehrels, who's a graduate of our school, were working in the Office of Price Administration during the war. Currie came out to take over that regional office and worked directly with Kathryn. Kathryn and Barbara were very close friends, and Barbara and the Traynors were very close friends, so it may be that that's the genesis of it. But I couldn't say for sure about that. Did you ever do an oral history of Traynor?

LABERGE: No.

KAY: Too bad.

LABERGE: I know — it's really too bad.

KAY: But anyway, Currie was just a wonderful mentor and, of course, I did become interested in conflicts. Then, when I came out here to interview for the teaching job, that was one of the courses I wanted to teach. They hired me to replace Barbara, as I said, but they also were willing to let me teach Conflicts. So I started teaching that as well.

LABERGE: It must have looked awfully good that you had written the articles with him.

KAY: Well, yeah, it was fun, you know. I don't know how this fits with your plan — you've got a different point for talking about my beginning days at Boalt, but I remember . . .

LABERGE: Right, but just go on with whatever you were going to say.

KAY: When I was being interviewed for the job — Albert Ehrenzweig, who was the great professor of Conflicts here at Boalt at that point — and when he was interviewing me he said, "I see on your résumé that you say you

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<sup>2</sup> Herma Hill Kay, "Chief Justice Traynor and Choice of Law Theory," 35 *Hastings Law Journal* 747 (1984).

have written these two articles with Currie, but,” he said, “I must have missed them. Did he give you a recognition in the footnote?” And I said, “Oh no, but of course I had a different name then.” [My name on the law school record was “Hill,” but the article was published under the name “Schreter.”] [laughs] So he said, “Oh!” Then he realized that I was a full co-author and not just someone Currie had thanked in a footnote. Albert Ehrenzweig did not at all agree with Currie and so I think it must have been a kind of blow to him when I was hired to teach alongside of him in the same subject matter.

LABERGE: Because you would have this totally different take?

KAY: Yes, yes.

LABERGE: I wonder, what is it now? Is that the main theory now, the governmental interest or not?

KAY: Everybody has adopted parts of it. It has seeped into the learning in the field. Almost nobody, not even California, now follows it the way Currie set it forth. Of course, he died so soon after he had first announced it that then he wasn’t really able to adapt it and change it in response to criticisms. I and others have done that in the intervening years. But no, he certainly introduced a method of policy-oriented analysis that has definitely become now the major starting point of analysis in the field.

LABERGE: What was Ehrenzweig’s theory?

KAY: Ehrenzweig had this notion of the proper law in the proper forum, and he wanted to do everything jurisdictionally. He wanted to take this — in civil procedure, we have this way of allowing a court that has jurisdiction but that doesn’t think it’s the best court to exercise jurisdiction, to decline to exercise its jurisdiction. And have the parties stipulate or submit to jurisdiction somewhere else. We call that “forum non conveniens,” meaning “inconvenient forum.” Albert wanted to turn that around, what he would call “forum conveniens,” and say you would look at the proper court on jurisdictional principles. One of the things that would make it the proper court would be that it could then apply its own law. So it was really kind of a local law theory. He then went on to try and suggest an evolution of common law kinds of principles that he called “true rules.” These were rules that forums had adopted by looking at the different principles and

accepting some and rejecting others. He saw these rules as evolving over time. He was revered as a conflicts scholar on the Continent. He was never really accepted quite that well in the United States.

LABERGE: I noticed you pointed that out that there was a difference from the international conflict of laws and their take on it, than American.

KAY: Yes.

LABERGE: What else did you take from Currie, or maybe you didn't — maybe, was that it?

KAY: That was the main thing. I mean, you know, I never became friendly with the family or anything — it was really entirely a professional relationship. I got to know his son later, David Currie, because David was — he and Roger Cramton, who had just started teaching at Chicago when I was there, had done the first edition of their casebook on the conflict of laws. They invited me to come in as a co-author on the second edition. So I worked with David after I graduated, but I never knew David when I was in law school.

LABERGE: Since we're talking about Brainerd Currie, why don't we just go on with this, how he introduced you to Roger Traynor, and then we'll come back and do more about law school.

KAY: By that time I had gotten the sense that teaching might be really nice, and since there was so few women in teaching, he said — and this was the common path. He said, "You know, you ought to get a clerkship with the Supreme Court, but it's hard to do that unless you've had a clerkship with another judge. I can probably get Roger Traynor to take you." I thought, "Wonderful!" Because, of course, I had read Traynor's opinions in the conflicts field and in lots of other fields, too. In those days, Traynor was considered the best state court judge in the country, and the California Supreme Court and New York Court of Appeals were right up there as the two best state courts in the country. So it would have been just an enormous honor to clerk for Traynor. I never saw Traynor. He never interviewed me for the job, but Currie said take her, and so . . .

LABERGE: And you never came to California to look/see?

KAY: Interview? No, not at all. Traynor made me this offer — and at that point, I had gone down to New York to interview for jobs in law firms. There were some law firms — I mean, most of them shut their doors in my face, of

course, but that's a story for another time. But at least one of them, when the interviewing partner heard that I had this offer from Traynor, thought, "Oh, well!" All of a sudden I could see that his interest in me had gone up. [chuckles] So there was some question about whether they were willing to hold up their offer — if they were going to make one — for me to go out to California. I remember coming back and talking to Currie about this, and Currie had said, "Well, you know, you probably ought to do some practice but we can't play footsie with Traynor. You have to let him know whether you're going to do this or not." I remember that very well: "can't play footsie with Traynor."

So I said, "If you think it's the right thing to do, I would certainly like to clerk for Traynor." And so it was arranged. I drove out from Chicago to California after I graduated and started working for Traynor and worked for him for the normal clerkship period of one year. Then Traynor tried very hard to get [Earl] Warren to take me as a clerk on the U.S. Supreme Court and Warren didn't do it. At that point I got the offer from Boalt, who'd found me in Traynor's office. I never did try anymore to clerk for the U.S. Supreme Court and started teaching here after having spent a year with Traynor.

LABERGE: Let's go back to law school — what were some of your favorite classes and any other memorable professors?

KAY: Conflicts was by far my favorite class. I saw you had on your little list a question about family law and Max Rheinstein.

LABERGE: Yes. I don't know where I read that.

KAY: I don't know either, but Rheinstein taught Family Law and he also taught Decedents' Estates and Trusts. He was not my cup of tea. He was very Germanic — he had a conventional attitude about the family, that the husband is the head of the family, and all this. I kind of sat there and thought, I don't think this is quite the way [laughs] we want family law to develop. So I was never close to him. Mary Ann Glendon was the one who became his disciple, and she took his comparative law course and spent some time in Germany, I think, with his mentorship, and of course went into comparative family law, which was his strength.

LABERGE: Did you have an interest in family law when you were doing that course?



KAY: Not really. You have to understand in those days, and to some extent even now, if you look at people who are coming into teaching fresh out of law school and a clerkship, it's not as though you've specialized in anything. You start teaching, and if you like what you're teaching, then you tend to go into that subject as your scholarly project. It was Barbara's courses that I was taking over — these were Family Law and California Marital Property — and then I did Conflicts because that was what I asked for, and I did a seminar. Those were my scheduled courses. I mean, those are still the courses that I'm teaching now, except that I added Sex-Based Discrimination because of the book that Ruth and Ken and I wrote in 1974. [Kenneth M. Davidson, Ruth Bader Ginsburg and Herma Hill Kay, *Sex-Based Discrimination: Text, Cases and Materials*, St. Paul, Minnesota:



HERMA HILL KAY WITH JUSTICE RUTH BADER GINSBURG  
AT THE UNVEILING OF GINSBURG'S PORTRAIT BY THE D.C.  
CIRCUIT COURT OF APPEALS, SEPTEMBER 9, 1999

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West Publishing Co., 1974] So those have been the courses that I've taught ever since I started teaching in 1960. And of course there was plenty of work to do in family law. [laughs] There was no doubt about that, but you wouldn't have known it from taking the course from Rheinstein.

LABERGE: That's interesting that it came about because that was the course you were teaching, too. It wasn't that you had this burning interest to do that.

KAY: No, no.

LABERGE: Tell me more if you can about, for instance, your study group or just that process of both learning the law and how the teaching was done, whether it was Socratic or . . .

KAY: It varied. We had people who did the Socratic method. I guess I got well known among my fellow students because I would take all these notes in class and then I would make outlines. I remember at one point when we were all taking — I believe it was Federal Courts — from Phil Kurland. He said at the beginning of the class that he always gave his students, at the beginning of the class, the choice of whether they wanted to have an open book or a closed book exam. It didn't matter to him, because people did it both ways at Chicago. My classmates all looked around the room and focused on me and said, "Closed book." They didn't want me to have my outline! [laughter]

It was very hard-working; it was a very serious place. It was not one of these party type schools and it didn't have — I don't remember much of a social life other than people going to places with each other, having dinner at each other's houses, and so on. When I joined the *Law Review* — Amy and I were both on the *Law Review* and it used to have these little parties, and so on. That became a small group of where we all worked together, and, of course, that was quite an honor. I was made book review editor of the *Law Review* and at that point I was second in the class. It was all done by grades. And then we had a transfer student who came in from another school who edged me out, so I wound up graduating third in the class. But Amy and I, I think, really kind of made a bond around the *Law Review* experience, and so on. We were all, of course, smoking cigarettes in those days — it was before the surgeon general's report came out — and I remember at one point during this *Law Review* party, where people had brought their spouses and significant others, Amy looked at me and said,

“Herma, do you realize that you and I are the only two women in the room who are lighting our own cigarettes?” I said, “No, I hadn’t really noticed that, Amy.” She said, “Well, we are!” [laughs]

LABERGE: [laughs] That is telling, both of the times and something about chivalry.

KAY: Yes, yes.

LABERGE: And that was third year, the *Law Review*?

KAY: No, second and third. You came in, you did your student note the second year, and then you became an editor, or whatever job you had in the third year. And in those days you typically had only one law review in the school. At Berkeley now we have nine student-edited journals, but in those days the *Law Review* was the major thing and it was where you really learned how to write — your writing got edited several times. It was a really wonderful experience.

LABERGE: Who edited it? Professors or other students?

KAY: No, no — other students. The third-year editors would edit the student work of the second years, and whether or not you got your note published depended on how well you had gone through that process. No, the faculty had nothing to do with it — that’s the wonderful thing about the student-edited law journals. It’s a phenomenal training experience, but the rest of the university can’t quite understand why you have student-edited journals as your peer review journals. [laughs] They do it quite differently — they have the faculty edit the journals.

LABERGE: You were a member of the Order of the Coif.

KAY: Yes. Oh well, that’s just purely grades, the top 10 percent of the class.

LABERGE: Okay. What other professors might’ve been influential or memorable?

KAY: I liked Malcolm Sharp, he was the Contracts professor. I enjoyed Harry Kalven, who taught Torts, and he and Sharp were both involved with the sociologist Hans Zeisel — Kalven primarily — on that study of the jury that came out of Chicago. It was a big scandal, because they were taping the jury proceedings with the consent of the judge but without the knowledge of the jurors. This created all kinds of — I think they were investigated by

congressional committees, and Sharp, who was quite liberal, was accused of being a Communist and all this, you know. There were all kinds of flaps going on around there.

I enjoyed taking Antitrust from the dean, who taught it along with his brother-in-law who was in the Department of Economics, Aaron Director.

LABERGE: The dean was Ed Levi then?

KAY: Yes, it was Ed Levi. Nobody was taking that course except the members of the *Law Review*, so it was a very high-powered course. I remember we all had great problems with Professor Director, who was sort of a dyed-in-the-wool member of the Chicago School of Economics. We had this one pitched battle with him over child labor laws, which he was repudiating and we were defending. Things got so far out of hand that Levi came in the next class session and lectured us severely and told us that none of us knew anything about economics and certainly not enough to dispute with Professor Director, and could we please just shut up and take notes. [laughs] I think that turned me off law and economics forever.

LABERGE: [laughs] I am taking it from all this, that you did answer in class, you didn't shy away from answering.

KAY: Oh no, not at all. Walter Blum was a tax professor, and Blum was wonderful. This was in the Corporations Tax class. He announced at the beginning of the class that Miss Mentschikoff had made it clear to him that he needed to treat women the same way he treated men because this was a professional school. Therefore he had decided that he was going to call on a man and he was going to call on a woman, then he was going to call on a man then he was going to call on a woman. And that was just fine except that I was the only woman [laughs], so I learned more about corporate tax than I ever wanted to know. He never stopped doing it — he did it from the beginning to the end, and that was quite an experience. But he was a very nice man and he still thinks that's funny. [laughs]

LABERGE: Did you have Nicholas Katzenbach?

KAY: I don't think so, no. He was fond of hanging around the lunch room and socializing with the students so we used to talk to him a lot, but I don't think I took anything from him. I also enjoyed Francis Allen who did Criminal Law. He was a marvelous classroom teacher. I think if I hadn't

gone into family law I probably could have gone into criminal law because he really gave you a sense of the theory of the criminal law. But just looking down this list: Allison Dunham — the property teacher who recognized my talents and was also in commercial law — he and Llewellyn had worked together on the commercial code. That was about it.

LABERGE: What about the bar exam — did you take it in Illinois, did you take it in California?

KAY: No, I never took the Illinois bar; I took the California bar because I knew I wasn't going back to Illinois. My only possibilities were — I thought I would probably go back to Wall Street, because I thought that I would have to practice for a couple of years before anybody would be interested in giving me a teaching job, which by that point I wanted to do. But then, when I got the faculty offer here, I . . .

LABERGE: The California bar was enough.

KAY: Yes. Well, I took the California bar before I started teaching here. I took it the year I was clerking for Traynor. I didn't get out here in time to meet the residency requirement for the August bar, so I took the spring bar — I think it was in February. That was a whole different experience because the February bar was — and still is to some extent — a bar that's taken primarily by people who didn't pass the first time around.

LABERGE: Exactly, yes. But you passed the first time around in February, right?

KAY: I did, yes. But I went and sat down in this room — we were taking it over at Hastings [College of the Law], which was where they used to give it in those days. I'm sitting there waiting to get the exam passed out, and these two men were sitting behind me and one says to the other one, "Hmm, they've really changed the procedure over the last five years." I thought, Oh, my God! [laughs] What is this?

LABERGE: [laughs] Did you take a bar review class when you came out, or did you learn community property?

KAY: No. I rented the outlines, because they were doing the bar review course at a time that I couldn't really do it given the work I was doing with Traynor. So I just studied the outlines and didn't seem to have a lot of problems with it.

LABERGE: Including learning community property?

KAY: Yes. Community property was required at that point, but it wasn't that — it's not analytically that difficult; the devil is in the details.

LABERGE: Looking back — now that you have been a teacher — at your education, how has it changed and what did you see about the value of it?

KAY: I think law schools are quite conservative still in the way they go about doing their teaching mission. The bulk of classroom teaching is done using the casebook method, which was invented by [Christopher Columbus] Langdell at Harvard, and then you'll see minor variations. I mean, our casebook on sex-based discrimination was one of the few that used a lot of textual material and essays on related fields of the law to frame the issues of sex discrimination. But many of the early family law books tried to get away from just cases and cases by adding social science literature — they used to refer to “materials,” which meant non-legal materials.

People used a lot of problems as a basis for class discussion. Barbara [Armstrong] used to use problems, both in Marital Property and in Family Law. I never liked problems very much myself. I liked more the analytical challenge of fitting the cases together and trying to see how they played off against each other. But by and large, I don't think there are very many people now who use the Socratic method in its strict, rigorous way, where the professor never says anything except ask questions. I think, by and large now, people tend to do more lecturing and more discussion, rather than just the questioning. We haven't really gotten away as much as you would think we might.

The big innovation, of course, was the clinical education movement, which didn't affect Berkeley in a major way until I became dean, but it got started at other schools much earlier than that. And that really was a more hands-on method of teaching students by doing, and then you had a sort of dichotomy between the skills instruction and the live client instruction, which is what we do here. We do some of both, but what I wanted to bring in was the live client instruction. I think that is very important. That, more than anything else, gives the student the chance to have some sense of what the practice of law is going to be like — and therefore what his or her role is going to be as a lawyer — while there's still time to bring that back into the

classroom instruction, which I think is really where you get the richness that the clinical method can bring in.

LABERGE: Did you ever practice law?

KAY: No, I never did.

LABERGE: But you still understand the importance of all that.

KAY: Yes. Well, I am a member of the California Bar, but I have never done full-time private practice. I've done a few cases here and there, but not very many.

LABERGE: Before we move on to California, what about social life? You talked about everybody eating in the dining commons, or whatever. And your own personal life — because you mentioned that your name was different when you came out here than when you were writing with Professor Currie.

KAY: I had married Jean Paul Schreter during law school. He was an artist, and he was from New York. We got married, and then he came with me to California.

LABERGE: Did you do things in Chicago? Did you get into the jazz scene or anything else?

KAY: No, no, we didn't. I took a job during the summer of my first year working for a law firm downtown as a secretary, and just as luck would have it, I worked for one of the few women partners, whose name was Lillian Kubicek. She was another dynamic person who was interesting to watch. She took me to a few corporate closings so I had some sense of what these people were doing sitting around these huge tables — every time somebody changed something, having to re-type the whole document because, of course, you didn't have word processors at that point. [laughs] And God forbid you should add a footnote — we numbered them all by hand. That was an interesting experience and gave me some sense of what life was like in a big firm. In the summer between my second and third year I was working at the *Law Review* so I didn't have time for anything else. Then, of course, I came out to California. But it was mainly just going out with your friends and those *Law Review* parties that I remember. Other than that, I don't remember — well, we went to museums a lot because Jean wanted to see what the shows were and all that. He spent his time painting.

LABERGE: Did you go through graduation ceremonies at Chicago?

KAY: No, because the timing was such that . . .

LABERGE: You just packed up and . . .

KAY: Packed up and left, yes.

LABERGE: Well, what were your first impressions of California?

KAY: Oh, I fell in love with San Francisco. We lived in San Francisco because the California Supreme Court was not housed in Sacramento. It sat there once or twice a year for hearings but it never had its offices there. So we lived in San Francisco, way out in the Richmond District. It was just cold and foggy and I didn't care — I thought it was wonderful. I used to take the bus down to the Court. Then, when I got this job in Berkeley, the question was, well, are we going to move to Berkeley? Jean wanted to stay in the city because that's where the art community was that he was involved in, and I didn't much want to move to Berkeley anyway because it was kind of staid and dull. [laughs] So we continued to live in San Francisco. Even after he and I separated and got divorced I never moved to Berkeley — so I've never lived in Berkeley.

LABERGE: What was your introduction like at the Supreme Court — who met you, who taught you?

KAY: Traynor met me. That was the reason for getting out there so quickly — because he was about to go away. I forget what he was doing. He used to go and visit at various places during the summer. He would go and participate in judicial conferences, and so on, in Europe. He was about to leave, I think the day after I got there, so that was a meeting that I never would forget. I was on board, right, so we're sitting like you and I are sitting now in chairs facing each other, and he said, "You know, I wrote this dissenting opinion and I wonder what you think of it." It was in a community property conflicts case, and I said, "Justice Traynor, you wrote that opinion over ten years ago." He said, "I know when I wrote it; do you think it was right?" [laughs] I later wrote something about that case and said that I thought he was right.<sup>3</sup>

LABERGE: What opinion was it?

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<sup>3</sup> Herma Hill Kay, "Conflict of Laws: Foreign Law as Datum," 53 *California Law Review* 47 (1965).



KAY: It was his dissent in *Estate of Perkins*, 21 Cal. 2d 561 [*California Reports*, Second Series] (1943). It was an opinion where he wasn't sure he had come to the right result, and it was just so impressive to me that even all those many years later, he still was turning over that problem in his mind as to whether he really had done the right thing. Of course I fell in love with him on the spot. He was just such a wonderful man to work for, and he was so careful not to offend his clerks. He had two clerks. He was not chief justice then, he was an associate justice, and the justices were allowed one, what they call annual clerk, and then they had one permanent clerk and a secretary. His permanent clerk was a graduate of Boalt Hall whose name was Don Barrett, who was an utterly marvelous man — he died not too long ago. Traynor never had a full-time secretary. He traded off with somebody else so that he would have two clerks, right? So he had me and he had another clerk, and we did totally separate things.

Traynor would assign each of us an opinion to work on, a draft opinion. I remember he used to give me the conflicts-family law opinions to work on. I remember coming into him with a draft of this one case, and he read the draft that I had done and he really — I could tell that he wasn't really sure that the way I had used a particular case was right. And he said, "Would you bring me the case, I just want to be sure the citation is correct." So I went and got the case and brought it to him. Of course, it wasn't the citation he wanted to look at; it was the holding. When he saw that what I'd said about it was right and that it could be used to build a particular kind of argument, which was an argument he wanted to make, he called Don Barrett in. He said, "Don, look at this!" It was such fun.

He was just so wonderful to work for. He was just really great. It was the only nine-to-five job I ever had. It was really nine to five. The California Supreme Court did not have that large a caseload. There was just all this luxury, spending all the time writing these cases. Traynor's opinions were cited in all the casebooks, and one of the reasons they were cited is because he used to make a practice of — when he was deciding a common law case — he would cite all the cases from around the country that were on point. Now, when you didn't have Lexis and Westlaw, you had to find all those cases by hand, and it was his clerks who did that. So it was a real challenge to do an opinion that he was willing to let go out with even *some* of your work still intact. It was just a real honor to do that. You had all this time to

work on it and to perfect it the way he wanted it perfected, and it was just wonderful.

LABERGE: When he was assigned an opinion, would you then have meetings and you would discuss . . . ?

KAY: No, he would tell you.

LABERGE: He would just hand it to you? With a direction?

KAY: No. "You do a draft." Now, I don't know whether he did that with all his clerks but he did that with me, and primarily I think — I mean I didn't ever do any of the criminal cases. My co-clerk did the criminal cases. I did primarily the family law—conflicts cases. Those were the days when the California Supreme Court had a more varied calendar, rather than primarily a criminal law calendar, which is essentially what it's got now. But no, he didn't talk about the case at all. There was a bench memo that was circulated before oral argument. So the Court's practice was to tentatively assign the opinion by assigning to a judge the bench memo to prepare. Then, if the bench memo was the way in which the Court was tentatively prepared to go, the judge who had done the bench memo would prepare a draft of the majority opinion, which may have become unanimous. If it didn't find favor with enough justices, then it might become a dissent — if you were going to do a dissent. So, to that extent there was direction, in that the bench memo provided a line of argument, but I don't remember being told how to do the bench memo either. And we used to do bench memos for all the cases that were on the calendar to decide whether or not the Court was going to grant hearings. A lot of them were never granted. But he wouldn't really talk to you about it until you brought in the draft. Then he would go over it line by line, and would tell you that he liked this or he didn't like that, or tell you to start over again, or tell you he wanted to look at this aspect of it or that. But it was very undirected, I thought. It was really quite challenging.

LABERGE: What about the other justices and the other clerks — did you get to know them?

KAY: Yes. One of the clerks was a graduate of this law school whose name was Sandra Shapiro, and she and I became quite good friends. We have not seen each other for many, many years now — almost since I became dean

— but we were very good friends. Ollie Marie-Victoire was there when I was; she later became a judge. She clerked, I think, for Justice Schauer. My colleague at Boalt, Professor Bobbie [Babette] Barton was there before I was there — she had been a clerk for Chief Justice Phil Gibson. Traynor lived in Berkeley, and he and Don Barrett would drive in every morning together from Berkeley. Some of the clerks who lived in Berkeley used to drive in with them, so they had an opportunity to talk with him that I didn't have since I lived in the city, but he always took us to lunch. He liked to go to lunch . . .

LABERGE: You mean every day?

KAY: Every day, yes, unless he had something else to do. He always took us to lunch and we went to this place called May's Oyster House, which is still there on Polk Street but it's no longer May's Oyster House — you can still see its sign. It was a fish restaurant that was on the order of Sam's or Tadich's in the old days. He would go and he would have a salad and fish and coffee and dessert. I couldn't stand it — I would go, I would eat this lunch, and when we got back to the office, I would go to sleep.

LABERGE: Because it's like a dinner.

KAY: Yes! I wasn't used to eating in the middle of the day, and I think that was the source of my habit — I mean I haven't eaten lunch since. [laughs] I never eat lunch. People laugh at Jesse Choper and me — we neither of us eat lunch. Everyone says not eating lunch is one of the requirements for being dean at Boalt.

LABERGE: He told me that — he said he never goes to the Faculty Club.

KAY: Yes, we never eat lunch. But that was a very nice informal way, and he never talked, of course, about the work at that point. He would talk about whatever was of interest, politics, the world at large, things about the law, people he had known. It was just fascinating to listen to him.

LABERGE: What kind of advice or mentoring did he give you for the future? Did he encourage you to teach?

KAY: Yes, he did. As I say, he tried to place me with Warren, and Warren wouldn't — I think it was at that point he didn't really want to have women clerks, he didn't take this request very seriously. Then, the Faculty Appointments Committee always looked to see who was clerking for Traynor. He

never told me this story, but the chair of the Appointments Committee told this story — whose name was Rex Collings. He was a faculty member here. He taught Marital Property; he was one of Barbara's protégés. Rex called Traynor and said, "Justice Traynor, do you have any good men clerking for you who want to go into teaching this year?" And Traynor said, "No, I don't have any men who want to go into teaching, but I have a woman who is as good as any man I've ever had. Would you like to interview her?" [laughs] So I got shipped over to Berkeley to interview.

LABERGE: And they didn't say "forget it"?

KAY: Oh no, they would never say "forget it" to Traynor. He had been their faculty colleague before he was appointed to the court.

LABERGE: That is really wonderful.

KAY: Yes, isn't that marvelous?

LABERGE: Yes. Did he tell you this many years later?

KAY: He never told me this. Rex Collings told me this.

LABERGE: But did Rex tell you many years later rather than right then?

KAY: Yes, he didn't tell me then; he told me many years later.

LABERGE: After he tried you out. [laughs]

KAY: Yes. [laughs]

LABERGE: Do you have other anecdotes about this Supreme Court, or should we go on to Boalt?

KAY: No. I mean, it was just a really — in retrospect I think of it, as I say, as the softest job I ever had in terms of time. You went there in the morning, you never took any work home, and you did your work there, and your evenings and weekends were free. That hasn't happened to me before or since. [laughs]

LABERGE: And you were really there at the start of the height of the Supreme Court's prestige and influence.

KAY: I think it became more influential after Traynor became chief justice and that, of course, was after I had left the Court. And when Ray Peters joined the Court — but no, they really maintained their reputation until after Traynor retired. They had in those days a terribly regressive retirement

system. You weren't compelled to retire based on your age, but every year you stayed past — and I can't remember whether it was sixty-seven or seventy, but every year you stayed past a certain cut-off point, they reduced your retirement pay. Traynor was not a wealthy man — as I said, he'd been a law teacher before he went to the Court — and he couldn't afford it, so he had to retire. Justice Marshall McComb, who was independently wealthy, never retired.

LABERGE: Tell me about your interview with — did you have the interview with Rex Collings, or who did you interview with? Is this the hat story?

KAY: This is the hat story, yes. [laughs] In those days I owned by actual count twenty-eight hats. I loved hats.

LABERGE: That's when women wore hats.

KAY: Oh yeah, they did. They wore hats, they wore gloves — that's right. I came over to Berkeley for this interview, and except that there was no "job talk," it was done the same way it's done now. You were taken around to interview with faculty in their offices. Sometimes it was one-on-one; sometimes it was two or three. And they took you to lunch, and then you had like a little — I don't remember having dinner, but I think there was a little reception or something. But anyway, I was wearing my hat. The hat that I had chosen to wear was one that had sort of a brim, and it had sort of a . . .

LABERGE: A veil?

KAY: No it wasn't a veil, it was like a brim. The hat was velvet, sort of a crushed velvet, and it was light beige. It was terribly elegant, very elegant. But in those days I had shoulder-length hair, and it was in the spring and it was rather warm in Berkeley. The hat came down right to the top of my forehead, and my hair was plastered under it. So, at the end of the day, I'm having tea with Barbara in her office . . .

LABERGE: Had you ever met her before?

KAY: Never. I'm having tea with Barbara in her office — and this was about three or four o'clock, just before there was going to be a reception — and we're sitting in her office and the phone is ringing. Barbara picks up the phone and says, "Yes, yes, I know." Slams the phone down. Then it would ring again. "Yes, yes, of course!" Puts the phone down. "Yes, I know. I'll tell her." Puts the phone down, and she looks at me across the desk and she

says, "You're going to have to take your hat off. The men want to see what you look like." I said "Well, Professor Armstrong, you know, I can't take my hat off." She said, "Why not?" Barbara was not one to be bluffed easily. I said, "Well, because my hair . . .," I said, "If they want to hire me, they're just going to have to hire me with my hat on." Barbara gave me a hard look. Then she said, "All right. Perhaps when you come back for your second day of interviews, you could wear a smaller hat." "Oh yes, Professor Armstrong, of course," I said, "but I didn't know there was going to be a second day of interviews." And she looked at me and she said, "There will be now." So the next week I came back for a second day of interviews. I wore a little pillbox. Everybody could see what I looked like, and I was hired.

LABERGE: That is so funny. I wonder if you would have been able to tell a male professor that and they would have "got" it.

KAY: I don't think a male professor would have told me to take off my hat. [laughs]

LABERGE: Probably not. And did you wear gloves also?

KAY: Of course. I did take my gloves off, but I didn't take my hat off.

LABERGE: Who do you remember meeting besides . . .

KAY: I remember meeting Adrian Kragen. Adrian — I asked him about this; he claims not to have remembered this at all. He remembers the interview but he does not remember what he said to me. He said, "Mrs. Armstrong is the only woman who's ever been on this faculty, and," he said, "she has all the men terrified." I mean, she was a faculty member when Adrian was a student here. That oral history you have from him has this wonderful story about how he got admitted. Barbara and Traynor went out to convince the dean to admit him as a student. He took classes from her, so he knew what she was like. He said, "She's the only woman faculty member we've ever had." And he said, "You know, she's got all the men terrified of her. What I want to know from you," he says, "is can you fight your way out of a paper bag?" I thought, What? [laughs] What is this man talking about? I said, "Well, you know, I've never been asked about anything like that, but I assume — if you mean, can I hold my own — I probably can." Adrian absolutely denies saying that, but I remember it very well.

And, of course, there was that interview with Ehrenzweig, who asked me about the articles I co-authored with Currie. Then he explained to me that he had a set of materials that he used to teach the Conflicts course and that I would be expected to use them. I said, "All right." I walked out of his office, and I then went to be interviewed by Professor Sho Sato, who was the first Japanese American, I believe, ever to teach at the university. He said, "Who have you talked to?" I said, "I just came from Professor Ehrenzweig's office, and he said that I was required to use his teaching materials." Sho looked at me and said, "That's absolutely not the case. You can use whatever you like." "Well," I said, "I'm glad to know that, because I don't think I'd want to use Professor Ehrenzweig's material." Albert, I think, was determined to put his finger on me right away.

Let's see, who else do I remember interviewing?

LABERGE: Frank Newman?

KAY: I don't remember. [William] Prosser was dean at that point and hired me. Prosser left the year after he hired me, and Newman became dean in 1961. Yes, I must have met Frank. I don't remember. I remember Collings, of course, and Albert. The four H's had come the year before I came — Halbach, Hetland, Henke, and Heyman were all there. I met them, but they were really my fellow juniors. I remember Arthur Sherry, who was teaching Evidence — very nice gentleman. Nick Johnson was hired the same year I was hired, so we both came together. I think that's about everyone I remember from that first round of interviews.

LABERGE: So you met absolutely everybody on the faculty.

KAY: Practically everybody on the faculty, yes.

LABERGE: Which probably today is not the case?

KAY: No, well, we have a larger faculty now. But we try to see to it that as many faculty members as possible either have office interviews or — of course, the tradition of giving job talks didn't exist in those years, but now everybody gives job talks. So we try to get the faculty to go and listen at least to the job talk if they're not able to interview the person in their office.

LABERGE: Do you want to stop here and pick up — is that a good place?

KAY: That's fine.

## INTERVIEW 3: JULY 7, 2003

LABERGE: I'm with Professor Herma Hill Kay and it's July 7, 2003. Last time when we ended, we ended with you just being hired and going through your interview process with Barbara Armstrong and all of the others. But before we start you wanted to amend or change something you'd said the last time.

KAY: When I was talking about Ehrenzweig's approach to choice of law I had said that it was called the "better law theory," which it was not. It was instead called "the true rule." The "better law theory" is attributed to Professor Robert A. Leflar from Arkansas, but we can get into that later. [I made this change in the transcript.]

LABERGE: Let's go back to 1960. We did the interview — I don't think we did the offer, what you were offered and what your first day was like and things like that. Who made the offer to you to come on the faculty?

KAY: People elsewhere in the university, I think, don't understand how law schools do things. I mean, law schools do not make written offers. Law schools just hire you. [laughs]

LABERGE: Even today?

KAY: Even today there's no such thing as a written offer. The dean usually does it. The dean was William Lloyd Prosser, who came to us from Minnesota, who is the last external dean we've had. He hired me in the summer — well actually, it would have been in the spring of 1960 to start in the fall of 1960. Did I tell you the story about the question he asked me about whether I could sing?

LABERGE: No. [laughs]

KAY: I didn't understand why he asked me this question until later, but I later learned that it had to do with the skits at the meetings of the Association of American Law Schools [AALS] — which happened every year, at that point; between Christmas and New Year's — in Chicago. The attendance was, at that point, of course, virtually all white men. And Prosser would take the lead in putting on a skit, a musical performance that they called the "extravaganza." I think it started the first time or one of the early times when they met in San Francisco, and Prosser, who was a great fan



of Gilbert and Sullivan, would stage these things. The association has published a little booklet of his songs and things, and skits. He didn't have any women to play any of these roles, so after he hired me he said, "Can you sing?" I said, "Dean Prosser, I can't carry a tune." He says, "Oh, that's too bad. If you have to hire a woman, you at least ought to get a leading lady."

LABERGE: [laughs] What a great line, but I'm sure you didn't feel so great about it.

KAY: It was totally lost on me. It was not until after I asked Barbara what he was talking about that I learned about the skits. She said, "Not to worry — I don't sing either and I never go to Chicago." [laughs] The poor man — here he had two women on his faculty, but neither one of them could be a leading lady.

LABERGE: And did you go to those meetings?

KAY: I did — I didn't go terribly early. I remember going to one of them and seeing the great Soia Mentschikoff sort of holding court in the hall at Chicago. It used to be at a place, which I think no longer exists, called the Edgewater Beach Hotel. In fact it was Soia who, when she became the first woman president of the association, changed the meeting times so that instead of being between Christmas and New Year's, it was after New Year's, which is when it now is. She also separated the hiring function from the program function, both of which were great accomplishments. It was always my view that the men wanted to get out of the house between Christmas and New Year's to get away from all the visiting family and kids, [laughs] so they went off to Chicago and had this wonderful meeting for themselves. Then, when women started joining the faculties, it became pretty obvious that this was not a great time to leave home and have professional meetings. I think Soia had that in mind when she got the date changed.

LABERGE: That's a wonderful little fact, too, of how that happened. Because you brought that up, maybe we could talk about camaraderie in the law school. I know about the Faculty Club dinner and party now, and many law professors are the ones who are the singers and the writers, but did it start here at the law school?

KAY: No, I think it started at the AALS meetings, in the “extravaganzas.” It was Jim Hill, who graduated from Berkeley — he was in the class of 1961, and I had him in class . . .

LABERGE: Although he was much older.

KAY: Yes. A lot of those men had been in the war and come back, and all that. Jim was in the class, took Conflicts from me, and he’s the one who took over writing the skits after Prosser retired. He used to do the one for the Faculty Club, and he would do the skits that the law faculty put on in response to the student roast at Christmas. That went on for years and years and years. It got to be so professional, we had a group of students who were into film and they — I wonder if anybody still has a copy of that thing? I think some of the members of that class do. It was called *The Little Red Wagon* — have you ever heard about that in interviewing?

LABERGE: I haven’t, no.

KAY: I think it was called *The Little Red Wagon* and the theme was this poor bewildered law student who dragged his books around in this little red wagon. He goes through his law appointments at the school, and in the process satirizes the professors, and all that. It was so well done that after a while the class kind of lost their interest in it. They couldn’t top it so they sort of stopped doing it for a while, and then later it came back. Now it’s more in the form of a talent show rather than a roast of the faculty. But Prosser used to take the faculty to lunch at the old Trader Vic’s in Oakland, not the one in Emeryville — this was much earlier. We’d all have lunch and then we’d go together to watch the student skit. Then there would be this response that Prosser would put on, and which we all participated in . . .

LABERGE: Including you?

KAY: Yes, except I never sang. I just stood there [laughs] and mouthed the words. After Prosser heard me try, he understood why I had demurred.

I was living in San Francisco at the time, and his wife, Eleanor, tried to persuade me to move to Berkeley. She did all the wonderful things that dean’s wives used to do — she would invite the faculty to dinner and to parties, and she would make cookies and she would bring them around on Saturday morning. I remember Eleanor saying to me, “If you live in San Francisco, I won’t be able to bring you cookies.” It’s true! She was never

able to bring me cookies because I never moved to Berkeley. There was a lot of visiting back and forth — lots of dinner parties that people had, and people actually came over and had dinner with us in San Francisco. It wasn't as far as they thought. But at that point I don't think anybody was living in San Francisco — almost everybody was living in Berkeley or over the East Bay hills.

LABERGE: So does the law faculty still put something on today?

KAY: No, not formally.

LABERGE: They've all moved over to the Faculty Club party, I guess.

KAY: Yes, right.

LABERGE: Okay. Maybe you could talk a little bit more about that camaraderie. Or how about, maybe, one of the first faculty meetings you went to. How you were welcomed and how you became known.

KAY: Well, Barbara was there of course. If it hadn't been for Barbara I think it would have been much more difficult, but she was utterly marvelous. She had the faculty in to tea. Not all of them, but she had her friends. Frank Newman was one of them who always came to have tea with Barbara, and I always was invited to have tea. It was just a little very informal kind of — she didn't drink coffee so she didn't go to the lounge where the men were. They usually came at ten in the morning and she didn't do that. She liked her tea in the afternoon, and so it became quite a congenial place to be.

LABERGE: Is this once a week?

KAY: No, I think it was every afternoon. She always had tea, and people who wanted to drop in for tea — I don't remember doing it every day, but I remember doing it occasionally. So she was there, very supportive. The faculty meetings — Prosser ran the faculty kind of like an iron hand. It was not until he went to Hastings — which he did about 1961, 1962, I think, because Newman became dean almost immediately. I remember Newman having faculty meetings at the Faculty Club. We'd all go there and have lunch, and sit around this table. They were pretty formal affairs. We didn't start having faculty meetings in the law school — oh goodness, let's see. [Sandy] Kadish had faculty meetings in the law school. [Ed] Halbach, I think, also had faculty meetings in the law school. Yes, I think that's right.

LABERGE: He followed . . . ?

KAY: He followed Newman. So I think Newman may have been the only one who had the meetings over at the Faculty Club.

LABERGE: What kind of restrictions were there on women going to the Faculty Club?

KAY: Oh, the only restrictions were if you wanted to go to the main hall. That was what you couldn't go to, and you couldn't walk through the main hall to get to the meeting rooms behind it, which was Barbara's problem. She had to be lifted over the railing in order to get to committee meetings that were held back there.

LABERGE: But that never happened to you?

KAY: Never happened to me, no. For a long time there was a lunchroom in that building across the street, which is now the Bancroft Hotel. It's next to Strada, the coffee house. The building used to be owned — or occupied; I'm not sure they owned it — by the Association of University Women, and they had a little lunchroom downstairs. As you walk down Bancroft Way past it, you'll still see a little flight of stairs going down. The little flight of stairs going down three or four steps led to a lunchroom. There was a round table in the middle of the room that was the law school's lunch table, and anybody who didn't have anything to do for lunch would go over there and would have lunch with anyone who was there. After my afternoon drowsiness in Traynor's office that I told you about last time, I stopped eating lunch so I didn't go very often. But people came by, and I thought, Well, you know, it's probably a good thing to do. So I would go and drink my coffee or something while they were having lunch. But I don't remember Barbara going to lunch on a regular basis. I don't remember being taken to lunch by her on a regular basis. I remember seeing her mostly at her teas, and of course when I was teaching the Marital Property course, I would go and have a special tea with her before I went to class to go over what I was going to talk about that day. I told you that story. I don't know how I would have gotten through that course without Barbara, in effect, teaching it to me as I went along.

I used to drive from San Francisco to Berkeley and there was a little parking lot out in front of Boalt Hall, because College Avenue came

through the campus. College dead-ends now into the campus. Well, College used to go into the campus and, in fact, I think those two buildings that are parallel to us right here and are now being used for other programs still have College Avenue addresses. You might check that. But College used to go through and there was a little parking area there, where you could park straight in — not parallel to the street but angle parking. There was a little hedge where you would walk through to get to the law school, and that's where I parked every morning — wore my hat, my gloves, took them off when I got to my office — and drove back in the afternoon. I did it every year until the 1989 earthquake, when we lost the use of the Bay Bridge for six weeks, at which point I started taking BART [Bay Area Rapid Transit]. I've been taking BART ever since, but I used to drive every day. So, because of that geographical separation, I wasn't around in the evening — and, of course, I was married at the time — so I didn't do the sort of pick-up stuff that a lot of the other faculty did. If they were working, they'd go out and have something and come back and work some more. I would go home and then would not come back over to Berkeley in the evening unless we had been invited to have dinner or something special was happening, so it was more of a separation for me between Berkeley and San Francisco.

LABERGE: That says something about you too, that you still made your mark and became an integral part of the law school even though you didn't do those evening things. It might've been a detriment, but it wasn't.

KAY: I suppose it could — it didn't seem to be. [laughs]

LABERGE: No. Tell me about your other courses besides California Marital Property, and how you handled those.

KAY: That was the first one. We had a practice of having new faculty members teach only one course in the first semester, so I taught only Marital Property in the fall of 1960. In the spring of '61, I did Conflicts and Family Law. Those were my three courses, and then I did a seminar — usually in Family Law — for my fourth course. Those were the courses that I taught until I started doing the Sex Discrimination course in 1973–74 as the book was coming out.

LABERGE: And the Family Law had also been Barbara's class?

KAY: Yes, Barbara had taught Family Law and Marital Property, and Conflicts was Albert's course — Ehrenzweig's course. They just divided that into two sections, because it was on the bar exam. Family Law was never on the bar exam. Marital Property was on the bar exam, and it was Rex Collings who taught the other section of Marital Property until he died. Then, I think, Justin Sweet may have taught it a year or so, but I was the primary one who taught it after Rex died. Now I'm the only one who teaches it, because, even though it's still on the bar, people tend to think that they could pick it up by taking the bar review course, so we don't need more than one section.

LABERGE: Yes. When would you do your writing, and what did you do in summers?

KAY: I would write in the summers and do what writing one could in between classes. Classes took up a great deal of time at first but they didn't take up that much more, and I was promoted to full professor in 1963, which is very fast.

LABERGE: What did you have to produce for that?

KAY: I produced my tenure article, which was on marital property and the conflict of laws.<sup>4</sup> It was about this new statute that had just been enacted in California — the “quasi-community property statute,” as it was called. Then I had a couple of book reviews — I think I had done that book review of Rheinstein's book by then. This was Newman's idea. I mean, Newman wanted to put Boalt on what he thought was the Harvard plan, which was that you would be appointed as a tenure track faculty member and then after three years you would be given tenure as a full professor or you would be let go. I think I was the first one who actually did that. It was never a formal university procedure, but it was something that the law school did. Later on, when we had a couple of tenure battles and people couldn't meet that schedule, we went back to doing what everybody else did. Then we adopted the mid-career reviews — we did that when I was on the Budget Committee — and then we became sort of like everybody else.

LABERGE: Do you mean everybody else on campus or other law schools?

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<sup>4</sup> Herma Hill Schreter, “‘Quasi-Community Property’ in the Conflict of Laws,” 50 *California Law Review* 206 (1962).

KAY: Other departments on campus, yes.

LABERGE: When you came in, in 1960, who else came with you? Who were the new professors?

KAY: Nicholas Johnson came and he left after a couple of years and went back to Washington, D.C. And then, as I said, the Four H's came just before me. Then Nick and I came, and Preble Stolz — who had also been to Chicago — came soon thereafter. Bobbie Barton went full time soon thereafter.

LABERGE: I was wondering if they also got tenure in three years or was there — how did that work?

KAY: I'd have to check that — I don't remember.

LABERGE: There wasn't an issue, in any case?

KAY: I don't think so, I mean we didn't really start having tenure issues until sometime later.

LABERGE: In the seventies?

KAY: Yeah.

LABERGE: Barbara Armstrong retired when?

KAY: She had retired formally before I came. Yes, she was teaching as an emeritus recall. In fact, she didn't really like this notion. She thought that when you retire you should retire [laughs] and let other people teach. But then Frank, again, got me this year down at Palo Alto with the Center for the Advanced Study in the Behavioral Sciences where Laura Nader and I were working together on law and anthropology, and that was in '63-'64. So Barbara was recalled as an emeritus that year to teach, and she understood that she had to come back and teach her courses — which had become my courses — because I was going to be given the year off, and that was fine. But then I think she didn't teach after that. She kept her office in the building and was working on the updated version of her two-volume treatise on California family law, but she didn't teach regularly as an emeritus.

LABERGE: Tell me about the year that you took in Palo Alto.

KAY: That was really nice. They always had individual people who applied, and then they had groups who were working together. Laura and I weren't

really a group but we were there together, and we put on a little conference on law and anthropology. Later, we participated in a conference sponsored by the Wenner-Gren Foundation. It was held at Burg Wartenstein, in Gloggnitz, Austria, in 1966. It was quite a spiffy place. I think it was that piece in the *American Anthropologist* that I was working on while we were there. It then became part of that volume on law and anthropology that she edited.<sup>5</sup>

LABERGE: How did you get interested in anthropology and how did you learn about it?

KAY: It may have come from Llewellyn because Llewellyn had worked with Hoebel on *The Cheyenne Way*. I had never taken courses in anthropology but I thought it was really kind of interesting, more interesting than sociology, because it really allowed you to look at individual cultures as a whole rather than trends and so on, which the sociologists did. Then I think my interest was sparked when Laura Nader and I met each other at that first tea that the president's wife gave for faculty women and the wives of faculty members. She used to have that over at the Women's Faculty Club. I think that was the only year I ever went. The purpose of it was to get the faculty wives to join in the section clubs — I'm sure you've heard people talk about those. It wasn't really what you wanted to spend your time doing if you were a junior member of the faculty, and neither Laura nor I did that. But there we were, both having been invited and we happened to — somebody introduced us and it may even have been Mrs. Sproul, I'm not sure who. But anyhow we did meet, and we started talking, and she was interested in doing village law and I was interested in anthropology.

So we taught a joint seminar in law and anthropology. I want to say it might have been even as early as '62. I think we did it before I went to Palo Alto. We had students from the anthropology department and we had students from the law school, and Dean Prosser thought it was an abomination. In fact, he wrote an article in 1966 called "The Decline and Fall of the Institute" — the theme of which was, What is legal education coming to? — in which he refers disparagingly to courses on legal anthropology. (The article was ostensibly about medical education.) Prosser really couldn't understand what this was all about. We taught it off and on for several

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<sup>5</sup> Herma Hill Kay, "The Offer of a Free Home: A Case Study in the Family Law of the Poor," in (Laura Nader, Ed.) *Law in Culture and Society* 304–326 (1969).



more years because Laura would send several of her Ph.D. students down to Mexico, which is where she did her field work and where I went with her and spent about six weeks there one summer. They all went through this course and it was really great fun. I enjoyed it quite a bit.

LABERGE: Well, as far as getting the course approved, how were you able to teach it if your dean didn't approve? Did it go through some other Committee on Courses?

KAY: Oh no, we still are not subject to the Committee on Courses.

LABERGE: Oh, you mean the law school isn't?

KAY: The law school isn't, no. But the trouble we had — it was wonderful. How things have changed! The trouble we had was Laura wanted to list our course in the Department of Anthropology, I wanted to list it in the law school, and we wanted to use the same course number. At that point, although the Committee on Courses didn't have any jurisdiction over me, they had jurisdiction over her. They said to us, "But if you have the same course number in these two different schools, people will think it's the same course," and Laura said, "*It is the same course.*" [laughs] They just couldn't relate to that, so I think we had to add an A or a B or something to the number in one of the schools. It was really unheard of to do this.

LABERGE: But you didn't need to get permission to teach it?

KAY: I'm sure if Prosser had said, "You can't do it," there would have been a problem. But Prosser wasn't dean anymore after that. Newman was dean.

LABERGE: He was just commencing.

KAY: He was just commencing, yes. Newman thought it was great. [laughs]

LABERGE: Yes. Now, back to the tea with Mrs. Sproul: were you invited because it was your first year so it was just the new women? I was wondering if it was also Laura Nader's first year.

KAY: Yes, it was her first year. We both came at the same time. I don't remember now whether it was only for the new people or whether it was for — I mean if it had been for all the faculty wives, it would have been huge. I think maybe it was for the new people — the new men faculty's wives and the new women faculty, when they started getting women faculty.

LABERGE: Because I wonder how else you got to know women faculty.

KAY: Well, not well, and there weren't that many. There was a point when — now I'd really have to go back and dig up names for this. I did talk about this. You went to a memorial service this morning [for Assistant President, Emeritus, Dorothy Everett]. There was a woman — I don't think she was a faculty member; I think she was in administration — and she had called together a meeting of women faculty to talk about issues that she thought were of common concern. I think it may have had something to do with child care or maternity leave or insurance coverage — something like that. She may even have been from the Office of the President — I'm not positive, but anyway the message that several of us got was that we ought to go back to our departments and start meeting with our women graduate students. Well, we didn't have any women graduate students at the law school. I think I still have a copy of that memo somewhere. It was addressed to "Dear Boalt Hall Girl" [laughs] inviting them to join in a meeting to be held in the student lounge — the women's lounge, which had been liberated by a couple of the women students — to sort of talk about how they should get together and start meeting. People, later, came to see that as the organizational meeting of the Boalt Hall Women Law Students Association.

That would have been in the early seventies, because Nancy Davis — who was my research assistant when we were working on the casebook, which came out in 1974 in the first edition — was at that meeting. And it was Nancy and a few of her classmates who started — got the dean to support them in publishing these little pamphlets that they sent to college counselors who were counseling people what to do after they graduated. They were called "Wanted by the Law: Women," and they were a definite effort to encourage women to come to law school. It really had quite an impact on boosting our enrollment of women in the early seventies. I spoke about this at the reunion of Boalt Hall Women held in spring, 1998. It all went back to whoever that woman was who called the meeting.

KAY: This is the second letter. It refers to a meeting in April, 1969.

LABERGE: And we're talking just about Boalt students?

KAY: That's right. Boalt women students is what we're talking about. [looking at files]



PROFESSOR HERMA HILL KAY, BOALT HALL  
SCHOOL OF LAW, 1969

LABERGE: It's wonderful that you still have all those files in there. Some of them are mimeographed and . . .

KAY: I don't see the one that I'm looking for — I hope I didn't put it somewhere. I pulled a lot of this stuff out when I was writing that article on UC women faculty and I may not have put it all back in the same folder. Oh, here it is — April 28, 1969.

LABERGE: Shall we read this out loud or should we . . .

KAY: I can read it. I was just looking to see whether in the notes behind it, I mention the name of that woman — I don't think I did. Now this was dated April 28, 1969: "Dear Boalt Hall Girl: This letter is written to inform you of the recent formation by a majority of the women faculty on the Berkeley campus of a new organization called the Berkeley Faculty Women's Group. We are interested generally in the status of women on the Berkeley campus. Our immediate concerns include the problems of recruitment and advancement of women faculty members and the admission of women

students to graduate schools. It was suggested at a recent meeting of the Faculty Women's Group that each woman faculty member inform the women graduate students in her department of the group's existence and schedule a meeting with the female grad students in her department to discuss the students' immediate concerns. In my view, all women students at Boalt Hall are graduate students and I have accordingly sent this letter to all the Boalt Hall girls. I have reserved the small women's lounge for a meeting on Wednesday, May 7, at twelve noon. I realize that there is a conflict with Mr. Buxbaum's section of Corporations but it appears impossible not to conflict with any class and still meet at a fairly convenient hour. I hope you will come on May 7 to this working meeting. If you are not able to come, however, please let me know what you think can be done to improve the status of women at Boalt Hall. Yours sincerely, Herma H. Kay," and it's signed — title, "Herma H. Kay, Professor of Law, Vice Chairman of the Berkeley Women's Faculty Group."

LABERGE: Okay, well now we need to know about that faculty group. [laughs]

KAY: That's right. Now, let's see — these are notes on the meeting with the women students. [looking at files] These are later statements about admitting women to Boalt Hall, but I don't know that I have anything else in here that would give the name of that woman. [looking at files] Signature list of students who were there — copies of student newspaper . . .

LABERGE: What's the name of the student newspaper?

KAY: The name changed from year to year. This one was called *The Writ*. This is the women's issue. [looking at files] Betty Neely.

LABERGE: Oh, Betty Neely. She was in the Berkeley campus administration. She had something to do with the Disabled Students Program, I know that. She worked in the dean's office.

KAY: Here's a little memo from her dated March 16, 1970, attaching something — "thought you would be interested in this to see East Coast action." I don't know whether she was the one. I mean the name sounds very familiar.

LABERGE: She worked with [Dean of Students] Arleigh Williams.

KAY: I do seem to think of her as being more — I think she was not faculty . . .

LABERGE: I don't think so either . . .

KAY: No, but I mean I think the woman who convened that meeting was not a member of the faculty. I think she was an administrator. She may have been Betty Neely. [looking at files] Now here's a follow-up letter, June 20, 1969, addressed to "Dear Boalt Hall Women: As you requested at our meeting in April, I have reserved the small women's lounge for a meeting of Boalt Hall women students on Thursday, July 10, 1969, at twelve noon. The two items on the agenda are discussion of participation in orientation week to make the first-year girls feel welcome here, and a discussion of interviewing experiences by graduating third-year girls and any other girls who have been looking for summer jobs. I hope that as many of you will come as possible. Sincerely, Herma H. Kay." And then for many years, the Boalt Hall Women's Association, which was the group formed as a result of these original meetings, would have a reception for the first-year women. Bobbie and I used to go to it — we'd tell the same war stories year after year. Sandra Epstein mentions the formation of the Boalt Hall Women's Association.

LABERGE: In her book *Law at Berkeley*?<sup>6</sup>

KAY: Her book *Law at Berkeley*, yes, that's right.

LABERGE: I think there may be a chapter anyway.

KAY: Yes, she has a section on "Women at Boalt Hall" in Chapter 9. She talked to me about some of this. She does not have any of those names in there.

LABERGE: What do you remember about just that Berkeley women's faculty group and who else was involved?

KAY: I don't remember that it lasted very long. If Neely was the one I'm thinking of, I think she originally had this idea of benefits — which would tie in with the job you said she had. When the faculty people got together and started talking about it, it was more graduate students, admission, and

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<sup>6</sup> Sandra P. Epstein, *Law at Berkeley: The History of Boalt Hall*, p. 321 (Berkeley: Institute of Governmental Studies Press, 1997).

faculty women status that we were interested in. So my impression is that it didn't last very long — maybe a year or so, not much more than that I don't think — a few sporadic meetings.

LABERGE: And was Bobbie Barton the only other . . .

KAY: She was the only other faculty woman at the law school at that point.

LABERGE: Okay. I found a name of another group which I think must have come from that — the Association of Academic Women.

KAY: Yes, yes.

LABERGE: That was an outgrowth of that original one?

KAY: I think it was, yes, but I have a very hazy recollection of what that was and what, if anything, I had to do with it.

LABERGE: We're still talking just in the early sixties, seventies — your women students and how you mentored them besides starting this group.

KAY: Some of them have written a little bit about this. When I was looking in that file drawer, I was looking for an article by Lujana Treadwell, who was a graduate in the class of 1977. She later came back to Boalt to be one of my assistant deans, in charge of public relations and publicity. You know the comic strip *Doonesbury*?

LABERGE: Oh yes.

KAY: She was in Joanie Caucus' class.

LABERGE: Oh okay, all right. [laughs]

KAY: That was the class of '77. Anyway, she wrote a wonderful piece about her class, and I think she mentioned some of these things.

LABERGE: Some of your students formed a law firm.

KAY: Yes, Equal Rights Advocates — that's right. That was Mary Dunlap and Nancy Davis and Wendy Webster Williams, who's now on the faculty at Georgetown. And Nancy has just been appointed to the bench, and Mary, unfortunately, has died. But yes, they were all my students and they formed Equal Rights Advocates. We'll want to talk about that at greater length.

LABERGE: Okay, we'll come back to that then.

KAY: Yes. But just in terms of — I mean, I always had women research assistants and . . .

LABERGE: On purpose or . . .

KAY: Well, I was working on women's legal issues, and it just seemed to work out that way. I have had some men research assistants. One of my men research assistants is now in the philosophy department at Princeton, Mark Greenberg. They were quite a wonderful group of young women who worked with me over the years — a lot of them worked on this women law professors' project, putting in the data and helping to get that all set up. Obviously, when people started getting jobs you would write letters of recommendation for them, and the women who had been in my classes tended to come to me. Some of them went to other — male — members of the faculty as well when they were looking for jobs and clerkships and things like that.

LABERGE: Maybe we'll switch gears and go to how it came about that you wrote the no-fault divorce law, starting with — you testified before, I think, the Assembly or the Legislature on family law and then were appointed to a governor's commission. How did that all occur?

KAY: Well, most of that's written about.

LABERGE: Okay.

KAY: The question is, where did I write about it most fully? I think the fullest account of that is in my article in the *University of Cincinnati Law Review*.<sup>7</sup>

LABERGE: I wonder if this is one of the ones you already gave me. I'm not sure.

KAY: Probably. I gave you the overview article that I did, in which I summarized a lot of the story. This one probably has more of the details in it. Yes, this has a lot of details in it so I don't know how much of this you want.

LABERGE: Just off the top of your head, who asked you to be on the governor's commission?

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<sup>7</sup> Herma Hill Kay, "Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath," 56 *University of Cincinnati Law Review* 1 (1987).

KAY: It started as an inquiry by the Assembly and in those days California used to have — the Legislature met, as I remember, in alternate years. Is that right?

LABERGE: Yes.

KAY: They would establish temporary committees to hold interim hearings during the year they were not in session, and then they would come back with legislation that they were planning to propose. The Assembly began in 1963 to look at the implementation of the grounds for divorce and whether or not the grounds were being applied uniformly, particularly whether there should be standards to guide judges in setting alimony and support awards, determining child custody, and if so, the content of those standards. The Assembly committee held four hearings. The committee held its first meeting, I think, in January. I was invited. There must have been somebody who was working with the committee who put together a witness list, and then they had invited witnesses and then they had other witnesses that would then be permitted to testify, sign up to testify. This was written up by Howard Krom.<sup>8</sup> [looking through files again]

Now I think that he went through all of these hearings. “Assemblyman Pearce Young started a movement to initiate a study to identify the problem areas and gather information with a view towards developing a legislative program to strengthen family relations.” So then they had a resolution which set up this interim committee, “gave the committee authority to invite experts in the field for the purpose of research and analysis.”

LABERGE: Okay, so that’s why you were invited.

KAY: That’s why I was invited, yes. The interim committee was created in 1963 and Governor Edmund G. Brown sent a statement to the Assembly Judiciary Committee on January 8, 1964. I think that was the first hearing — let’s just see if he says that later on. “He planned to follow the hearings closely with the view to asking that the committee expand the study to include the citizens advisory committee composed of judges, lawyers, clergymen, sociologists and psychologists. The first of the hearings was held in Los Angeles on January 8 and 9, 1964.” That was the one that Brown sent

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<sup>8</sup> Howard Krom, “California’s Divorce Law Reform: An Historical Analysis,” 1 *Pacific Law Journal* 156 (1970).



the statement to. It was held in Los Angeles because that's where the court of conciliation was. That was the one that Judge Roger Pfaff, who was the presiding judge of the Consolidated Conciliation and Domestic Relations Court of Los Angeles County, was in charge of. His big interest was in reconciling people who wanted to get divorced, and he testified that his court, using its reconciliation facilities, was able to persuade sixty-four out of one hundred of these couples to reconcile. A year later, three out of four were still together. There was some suggestion that when he sent out the postcards to ask how many of them were still together, he didn't count the ones who didn't answer. So this three out of four number was a little suspicious, but he was all in favor of reconciliation.

LABERGE: Before this ever happened, did you have in your mind this was something that ought to be done?

KAY: I was interested in the substantive law of divorce, and interested in working towards a no-fault divorce law, away from divorces based on fault. That was what I was testifying to when I was invited to give this testimony in 1963 — the first one in 1964. Here in this article, this Cincinnati article of mine which was published in 1987, after mentioning Pfaff, I said, "Several other witnesses were less concerned about patching up existing flaws than with achieving structural change in the divorce law itself. Two of these witnesses were law professors who later became members of the Governor's Commission on the Family." Now the governor's commission was appointed in 1966 after the assembly had finished doing what it was going to do. I was referring to my testimony and also the testimony of Professor Aidan Gough of the University of Santa Clara School of Law. It was Aidan and I who sort of worked behind the scenes to get this governor's commission appointed.

LABERGE: Okay. How would you work behind the scenes?

KAY: One of our graduates was, at that point, working in Sacramento in the governor's office and he was able to arrange a meeting with Winslow Christian who later became a judge and who was then working for the governor. We had a meeting with him and were able to tell him what we thought needed to be done, and he recommended that the governor do this and the governor did it.

LABERGE: Who was your student, do you remember?

KAY: Yes, his name was Bill Honig. He graduated in 1963.

LABERGE: Who was then State Superintendent of Education?

KAY: Yes, that's right. He later was elected to that office.

LABERGE: He has an oral history, by the way.

KAY: Does he?

LABERGE: Yes. I can't remember if he talked about this.

KAY: He may have forgotten it. It may have been a small thing to him.

LABERGE: But it was a big thing, I mean, it's those kinds of things that aren't written down — those kinds of meetings you get.

KAY: That's right. That is certainly the case.

LABERGE: And still Pat Brown was the governor.

KAY: Oh yes. We thought we were going to have several years to work on this project. But when Reagan was elected governor in 1966, it became pretty clear that we'd have to finish it earlier. A little known fact about Ronald Reagan's political history is that he signed the first no-fault divorce law in the country.

LABERGE: Yes. Well, what did you have to do with other people being appointed to that commission?

KAY: Aidan Gough was hired as the executive secretary of the governor's commission. This is the Report of the Governor's Commission on the Family. It came out in December of 1966. Aidan was named the executive director. Pearce Young, who had been the assemblyman who got this started, was named as co-chairman along with Richard Dinkelspiel, who was a lawyer in San Francisco — not a divorce lawyer but a general lawyer who was Catholic. It has always been my view that, because of him, and also because of our wanting to establish this family court, we got the support of the Catholic Church. In New York, of course, where they were trying to reform New York divorce law about the same time, the Catholic Church was one of the strongest opponents to no-fault divorce. It wasn't even no-fault at that point; it was just to expand the New York divorce law beyond adultery. But we had the support of the Catholics in California.

LABERGE: And also Pat Brown was Catholic.

KAY: He was, yes, that's right. So we had the members of this committee — and there's the roster — do you want that?

LABERGE: Sure. And if you have any anecdotes about how they were appointed or what you knew about them. You know, we could just copy that or refer people to that report.

KAY: I think the report is now out of print. [laughs] But we can make a copy of this page if you want to append it. Maybe we'd better do this at the next session.

LABERGE: Oh fine, that's okay. That's good.

KAY: Yes, I think that would be better.

LABERGE: It's amazing. You were not very old, you weren't many years out of law school, and you were the expert.

KAY: I don't think I talked much to Barbara about this, but to read the family law doctrines and cases as it existed in the early sixties was to want to do something more sensible about it. Fortunately, we had this opportunity which just sort of came out of nowhere because of the Assembly interim committee's hearings that we were then able to get involved in and be active in, and to help turn into something that turned out to be quite important. But I think probably that I ought to review this again.

LABERGE: Okay, so maybe next time we'll start with that.

KAY: Yes, I think that would be better.

#### INTERVIEW 4: JULY 9, 2003

LABERGE: Today is July 9, 2003, and this is interview number four with Herma Hill Kay. Do you have anything you'd like to say before I preface this? You've thought of something?

KAY: Yes, I have thought of a question. This is probably one of the few items about which this will happen in the course of these interviews, but because I spent so much time — literally from 1963 to 2001, or maybe 2002 — working on divorce law reform, and because, in the course of all that time, I have written so much about it, a great deal of the detail of what was

being attempted and what was accomplished and at what point, is all in writing. So it does not seem sensible for me to try to reproduce in this oral history what is in the written record. I gather that what you really are after is more the kind of personal side of what went on?

LABERGE: Exactly, exactly — just right on target. You could work there [the Regional Oral History Office]! [laughs]

KAY: [laughs] It finally occurred to me what you were after.

LABERGE: We can refer people to the various reports and publications.

KAY: And I think that would be helpful.

LABERGE: Yes.

KAY: Okay. Well then, just to do an overview of what's referred to now as the divorce law reform movement or the divorce revolution, depending on whose language you want to borrow, it really started in California in the early sixties. And it went, in California, from 1963 — when the Legislature began hearings on the subject of divorce without any thought towards this broader agenda — to 1969 when the California Family Law Act was enacted into law, becoming effective on January 1, 1970. Then it moved to the national arena, in part because I was appointed as co-reporter of the Uniform Marriage and Divorce Act, a project that had been undertaken by the National Conference of Commissioners on Uniform State Laws, otherwise referred to as NCCUSL.

That project had been begun by Professor Robert Levy, who was the family law professor at the University of Minnesota as the reporter, and Bob and I worked together on that project until the commissioners completed it in 1970. There were a couple of years' negotiation period because NCCUSL liked to have its uniform acts approved by the ABA [American Bar Association]. It took a couple of years for the ABA to get comfortable with what it was willing to approve, and that happened in 1973. Then there was a long period of time when legislatures around the country considered what they wanted to do with their divorce laws, and at that point there were three versions of no-fault laws that they could look at in addition to the California law. There was the original draft of the Uniform Act, which had a 1970 date on it; there was the Uniform Act with amendments, which came out in 1971; and then there was the final promulgated official version in 1973. I was

a little astonished as I re-read my Cincinnati article this morning, coming over on BART, how much detail went into that effort. There was a period of time when the state legislatures around the country were looking at it, and I cite there the legislation from all the states, cases interpreting it from many states, and by 1985 every single state had enacted some form of no-fault divorce. There were only fourteen states that had really done what California had done, which was to abolish all the fault grounds for divorce and enact what I referred to as, what I call a true no-fault law. And those states are still a minority — most states just have added “irreconcilable differences” to their list of fault grounds, like adultery, desertion, and so on.

But after 1985, it became pretty clear that something had happened to the bargaining position between husbands and wives at divorce that made it more difficult for wives to get the kind of support that they needed, and — in states that didn’t have an equal property division, like California did — the kind of property awards that they should have. So in 1989, the American Law Institute [ALI] decided to revisit the earlier divorce reform effort, to accept as established the no-fault ground for divorce but to look at the financial aspects of family dissolution and the aspects dealing with child custody. That was American Law Institute’s project on the law of family dissolution, which just was published last summer — the summer of 2002. That now is available for either adoption by the states or for use by judges in looking at principles and best practices, and so on. In contrast, the Uniform Marriage and Divorce Act was a little tiny, thin pamphlet, while the ALI project is that great big green book over there, so it’s enormously detailed and has a wealth of supporting scholarship and so on. It is now the final word in this divorce reform effort, which — depending on your point of view — has been either successful or has destroyed the American family.

LABERGE: When I read your chapter in this — *Divorce Reform at the Crossroads*<sup>9</sup> — you cited Lenore Weitzman. The gist I got from it is that she was criticizing.

KAY: She wasn’t criticizing the no-fault ground. She was arguing that there were unintended consequences that had arisen from the new law. She had come out with a startling finding, which later proved to be inaccurate —

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<sup>9</sup> Stephen D. Sugarman and Herma Hill Kay, ed., *Divorce Reform at the Crossroads* (New Haven: Yale University Press, 1991).

and she even had to admit that her numbers were not accurate. She had come out with a finding in her book<sup>10</sup> in which she said that one year after legal divorce, men's standard of living had gone up by 43 percent and women's standard of living had gone down by 73 percent. Some sociologists doubted the accuracy of that finding, which made front page news all over the country, and when Lenore's book came out, *The Divorce Revolution*, she was doing interviews around the country about this. The sociologists said this is the most widely cited sociological finding of the century and it has to be wrong. Finally, somebody did a re-analysis of her own data and couldn't come up with the conclusion that she had reached. She then went back and looked at it again and said that there had been an error, and the disparity was not as great as she had thought it was but there was still a disparity and that, of course, was still important. But the wind was a little out of the sails from that side, and that's what the ALI undertook to fix. What they did was to change alimony from being a discretionary allowance granted by judges to an entitlement that would be granted based on certain factors that occurred during the marriage. If the wife had given up career opportunities in order to take care of children or take care of elderly parents or so on, she would be compensated for her loss incurred by virtue of having done these things during the marriage and for the marriage enterprise. If that provision is widely enacted, it will be really significant and will go very far towards answering Weitzman's objection.

The other thing that was done, and this came from Congress, was the creation of federal guidelines for child support awards. The federal government undertook to do that because of our total inability to enforce child support. There are millions of dollars every year of outstanding child support awards that can't be enforced. So what the federal government did was, first, to be sure that there were guidelines for the minimum amount that has to be awarded, and then to say that there will be a federal mechanism for locating and trying to enforce awards against parents who are not paying. Now, of course, if the parent ordered to pay doesn't have the funds to pay, there's nothing anybody can do about that, but at least the federal guidelines have taken a lot of the uncertainty out of those awards.

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<sup>10</sup> Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (Free Press, 1985).

The other thing that the ALI project did was to recommend that marital property be divided equally at divorce. Many of the common law states have adopted what they call “equitable distribution,” a concept that came from the original Uniform Act that NCCUSL had promulgated. Several court opinions reasoned that an equitable division *prima facie* starts with an equal division, and it would be up to the person asking for an unequal division to show why an equal division was unfair. So that now, even though we still have only a few states that require an equal division, we have a lot more states that, at the time of divorce, will undertake as an initial matter to divide property equally even though it’s not equally held during the marriage.

The most recent development is a kind of backlash against no-fault divorce that’s been gaining some interest in state legislatures in the last four or five years called a “covenant marriage.” The covenant marriage proposal was drafted by a friend of mine who’s on the law faculty at Louisiana State University, Katherine Shaw Spaht. She’s written articles in which she says that since no-fault divorce very nearly destroyed the family, what we ought to do is now to provide an alternative model for lifelong marriage that people getting married can elect to choose, and she called it covenant marriage. Covenant marriage has three characteristics. First, the couple must have a specified amount of premarital counseling; second, they must sign an agreement that they intend their marriage to be lifelong; and third, if difficulties arise during the marriage they agree to undergo marriage counseling. Now, divorce is allowed in covenant marriage, but it’s back to the fault-based grounds again — adultery, desertion, et cetera. And there is a two-year waiting period before the divorce can be granted, and during that waiting period, support orders can be entered. There are some aspects of the plan that allow punitive awards for breach of contract because, after all, the person who is breaking up the marriage has violated his or her promise, right?

Covenant marriage has so far been accepted only in three states: Louisiana, where it began, Arizona, and Arkansas. In all three of those states virtually nobody is opting for it. The people who tend to opt for it, as you might expect, are fairly conservative religious couples. So it is the one kind of counterattack to no-fault divorce that has emerged but it has not so far been, as a practical matter, very significant.

That’s the overview.

LABERGE: Great.

KAY: Now, to go back to the California effort, it really was a tug of war between opposing concepts in northern California and southern California. It was represented by the difference in point of view between a group of us in northern California — law professors; mental health practitioners, mainly psychiatrists; and divorce lawyers; mainly matrimonial specialists — and the people in Los Angeles, who were affiliated with the so-called “court of conciliation” headed by Judge Roger Pfaff. Judge Pfaff’s view was basically that nothing needed to be done. Maybe a few things could be done to make it more effective to get couples to reconcile, but what you want to do about divorce was to try and talk people out of getting divorced when they got to court, if nobody had talked them out of it before they got to court.

The idea that those of us in northern California were advancing was that you shouldn’t hold marriage over the heads of people as a punishment. If the marriage had broken down in fact, it ought to be ended in law; you ought not to force people to make showings that usually were trumped up showings about adultery or cruelty. You ought simply to say this marriage is broken down in fact and therefore it should be ended in law. The notion was that you would signal that symbolically by, instead of naming the court proceeding *Jones v. Jones*, it would be called *In re the Marriage of Jones*. It would not be an adversarial proceeding, it would be a fact-based inquiry into the status of the marriage. There would be a specialist judge of the family court, and there would be a mental health staff attached to the court, and they would provide counseling to the parties. There would be an intake counseling session for everybody who filed for divorce. After that, the couple could opt for conciliation counseling if they wanted to try and reconcile. If they didn’t want to try to reconcile, they could opt for divorce counseling, in which the effort would be to get each of them to understand what life was going to be like after the divorce: what the financial problems will be, the problems with custody of the children, problems of getting a job if a spouse hadn’t worked outside the home — all that kind of thing.

Judge Pfaff was adamantly opposed to that, and during this whole period what he wanted was essentially to kill this approach if possible. He succeeded in killing the family court. He did not succeed in killing no-fault divorce. That’s the bottom line, the short version of what happened.



LABERGE: So, still in California we don't have the family court?

KAY: We do now. We don't have a statewide family court, which is what the governor's commission proposed, but some years after all this happened, the Family Code was amended to provide that counties could, at their option, establish courts of this kind to be funded by the counties. San Francisco has one that was started by one of our graduates, a former student of mine, Judge Donna Jean Hitchens, who was the presiding judge of the [Unified] Family Court and is now the presiding judge of the Superior Court for the City and County of San Francisco. There was for a time — I'm not sure there still is — one in operation in Alameda County. But Los Angeles has still clung to the court of conciliation. There are a lot of people down there who still follow in Pfaff's footsteps, although I think that they're not quite as adamant as he was that reconciliation is the only possible avenue.

But that's how it shaped up, and all of the detail of the hearings and what went on in the legislature is set out in my Cincinnati article. Now, after the Legislature was unable to get very far, Governor Brown did appoint his Governor's Commission on the Family, and I told you before about how that got done. The membership of that governor's commission included the people who had been working on divorce reform in northern California. It included people from southern California who had been active and testified before the Legislature. It included judges from both north and south. Judge Pfaff was named a member of it, but by that time he had gotten ill and was unable to attend any of the sessions. When the draft report was finally circulated, he wrote a letter to Richard Dinkelspiel, the co-chairman, saying he didn't agree with any of it. But by that time, he was not an active force on the governor's commission. Now do you want me to go through the names of the members?

LABERGE: Sure, you may have something to say about them, how influential — were there mental health professionals on that list too?

KAY: Mm-hmm. Let me start by identifying the ones who were the central players. They were primarily from the northern California group. This statute was drafted during meetings held in a motel at the San Francisco Airport which is still there. We used to reserve a meeting room, and the people from southern California would fly up and the people from San

Francisco and the valley would drive out. Then we'd spend all day working on drafts, and so on. So the people from northern California who were the central players in this were Professor Aidan Gough, he was from Santa Clara Law School, taught family law, and he was named executive director of the governor's commission.

LABERGE: Did that make a difference that that was a Catholic school also?

KAY: Probably so. Yes, I think it did, because he had great connections, of course, with the church. He and I divided the work between us. I did almost all of the drafting of the statute and Aidan did almost all of the writing of the report.

LABERGE: How did that occur?

KAY: I was into legislative drafting, I guess.

LABERGE: And offered or . . . ?

KAY: I think he and I just sort of divided it up. I had been drafting some provisions that we presented to the legislative hearings and he was more interested in writing the analysis and the story about how this happened. The report runs to page 59, and then there is the act with the commentary and the proposed statutory language, and that runs from page 60–117. Then there are footnotes, and the list of members, and footnotes and references. So he and I were the ones who did that.

There were two attorneys from northern California who were quite active in the drafting effort and they were Kurt Melchior, who's still in practice in San Francisco, and Kathryn Gehrels, who has died. She was at the time the chair of the Committee on Family Law of the State Bar. She was a graduate of this law school, a very close friend of Barbara Armstrong, and had taken me under her wing when I took over Barbara's family law course and taught me about the practical side of family law. The chair, Richard Dinkelspiel, was very faithful about coming to all these meetings as co-chairman. He died recently. The other co-chairman, the legislator Pearce Young, didn't come to hardly any of the sessions but he was kept informed of what was going on.

The people who were active from the mental health side were primarily Dr. Irving Phillips, who was professor of psychiatry with a specialty in child psychiatry over at UCSF at Langley Porter. He also has died now.

He was a very close friend of mine — not at the time, but later became a very close friend of mine. He and I taught a seminar on family law jointly together off and on for several years. Then there was Dr. Don Jackson, who was the director of the mental research institute in Palo Alto. He was a psychiatrist. Dr. Albert Long, who was from San Francisco Presbyterian Medical Center Department of Obstetrics and Gynecology, was also a clinical professor at Stanford and at the University of California. Those were the mental health and medical people who were active. That was really the working group.

The people from southern California who were most actively involved, in the sense that they would comment on drafts, and try to come to all the meetings, were two practicing lawyers. Harry Fain, who was the vice chairman of the Family Law Section of the American Bar Association, also was involved with the NCCUSL Uniform Act contemporaneously with our finishing the California project. Dorothy Davis, who was the immediate past chairman of the Committee on Family Law of the State Bar of California, was a matrimonial law specialist from Los Angeles.

Then there were judges from both northern and southern California. Judge Pfaff, of course, was from southern California, and from northern California there were two judges, Joe Babich from Sacramento and Robert Bostick from Oakland. Neither of them was terribly active, but they would come and talk about what could and couldn't be done with the courts, and were helpful in lending that kind of insight into what was going on.

The governor appointed one member of the clergy, Reverend Booker T. Anderson, an African-American minister from Richmond, California. He attended only one or two sessions. Let's see, who haven't I mentioned in here? Marcia Greenberg, who was a member of the state social welfare board, was there as a resource person on how the various proposals would affect families who were living in poverty. Dr. Edward Stainbrook, who was chief of psychiatry at the USC medical school, came only to a few meetings. Judge Richard Vaughn from San Diego also came to very few meetings. An attorney from southern California named Stuart Walzer, who was the vice chairman of the Committee on Family Law of the State Bar of California, was very active. He and Dorothy Davis and Harry Fain were the three attorneys from southern California who tried to keep an eye on what was

going on. Harry Fain was the one who was the most faithful in attending meetings.

Then there were members of the Legislature who would be able to introduce the draft into the Legislature. There was Don Grunsky, from Watsonville, who was a member of the Senate, and Pearce Young, the co-chairman, who was from the Assembly, and there was also a senator named Stephen Teale . . .

LABERGE: Who was a doctor, was that — maybe not. I'm not sure.

KAY: Well, I don't know. It just says "Honorable Stephen P. Teale, Member of the Senate." He was from West Point, California. I have no idea whether he was a doctor or not — doesn't say M.D. after his name.

LABERGE: Okay.

KAY: I don't think I hardly ever saw him. And then, Winfield Shoemaker from Santa Barbara was the other legislative member of the commission.

LABERGE: Who was the mastermind to put this group together? It wasn't really the governor, I'm assuming.

KAY: No. The core northern California group — essentially it was Aidan Gough and me together with Kathryn Gehrels, Irving Phillips, Kurt Melchior, and Richard Dinkelspiel — we were the six people who got together after the legislative study had ended and said somebody needs to pick up the ball. That's when, through Bill Honig, we got an audience with Winslow Christian, and the governor agreed to appoint his Governor's Commission on the Family, which he did about six months before he went down to defeat at the hands of Ronald Reagan. Most of the names came from those who had participated in the legislative hearings. The governor's office suggested the others. So, when we realized what was happening, we focused on the divorce parts and let everything else go by the wayside. Brown was able to receive the report before he left office, and Reagan signed the bill once it was enacted.

Grunsky then introduced a bill, and it was at that point — and this is also all in my Cincinnati article — that a southern California legislator, at the instigation of the conciliation court group and Pfaff, introduced a rival bill that left out the family court and monkeyed around with the language so that they made the no-fault ground much less clean than it had been

when we drafted it. In fact, it may even have been in that article that you read in the book where I was quoted as saying, “What divorce law reform?” because it had been really so watered down. But the shift from fault to no-fault was so dramatic and the judges knew what was intended by it, so it became fairly clear after some years that even with the absence of the safeguards that we thought a family court would have brought, it really became unilateral divorce. Somebody at one point said if somebody says the marriage is broken down irretrievably and the other person denies it, that in itself is evidence that the marriage is broken down. [laughs] So, you really couldn’t get anybody to deny the divorce.

So then the next question was, “All right, what are you going to do about the property and the children?” The one thing that I thought was really harmful that the Legislature did over our objections was that, although they excluded testimony about fault from the grounds for divorce and the award of alimony, they did not exclude it from the award of child custody. So that if a husband had a judge he thought would be influenced on the financial awards by his wife’s extramarital affairs, he would bring in the evidence to show that she was an unfit mother and shouldn’t have custody of the children — even though he didn’t want the children himself. Finally, in 1994, the Legislature took that out of the statute so that fault is no longer admissible on the issue of child custody in California.

So that was the California story. Then when we shifted to the national scene, you had the Commissioners on Uniform State Laws — in effect, picking up from California — carrying out some of those initiatives in a much cleaner way, but then having to battle with the Family Law Section of the ABA, which was worried about destroying the American family. But finally they went along with most of it. By and large, it was a social movement whose time had come. People didn’t really think that you ought to have to spend your life in a marriage that was no longer functioning as a marriage, and that it was better to get it legally over with so that you could go on with your life.

In fact, one of the most amusing things, that I recounted recently in a paper I presented last year at Hofstra [University] on family law, was that at that very first hearing in January of 1964, when they were talking about trying to avoid divorce, the representative of the Department of Social Welfare, a man named Hazen Matthews, said, “We’ve got about 700

families that we're working with who are living outside of marriage because they can't afford to get divorced from their spouses, many of whom they haven't seen in years, and what we would like is for the Legislature to fund somebody who could get these people divorced so they can marry the people they're living with and legitimate their children." [laughs]

LABERGE: Yes. [laughs]

KAY: I always thought that was the funniest thing.

LABERGE: That you were actually helping the family.

KAY: Exactly! I mean, which family do you want to save? The one that is no longer active, or the one that has replaced it in fact? [laughs]

LABERGE: Right, yes. How much involvement did you have then in writing the Uniform Act?

KAY: Bob Levy and I divided up drafting the provisions. There's a marriage section that nobody, I think, ever enacted, that he drafted. I drafted the divorce sections and the property division sections. He drafted the alimony, child support, and child custody sections. That's how we divided the work up between us.

LABERGE: For non-lawyers who are going to read this, could you say a little bit about what the Uniform Act means? It's not law in the United States, but who looks to it and what do they use it for?

KAY: This all goes back to divorce actually, and I mentioned that in that overview article that I published in the *California Law Review* that I gave to you.<sup>11</sup> Way back in 1869, President Theodore Woolsey of Yale University published a book arguing that some states were getting way too liberal in allowing divorces to be granted, and what was needed was to set up a federal law so that marriage would be uniform across the United States. They, of course, thought they could get a uniform law that would be supportive of marriage and very strict as to divorce. They tried to get a group of states to call for Congress to enact a marriage and divorce law, but that never worked. So then what they did was to try and establish national law reform

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<sup>11</sup> Herma Hill Kay, "From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States during the Twentieth Century," 88 *California Law Review* 2017 (December 2000).

groups, and the group they got started was the National Conference of Commissioners on Uniform State Laws. It was supposed to prepare laws that would be adopted in every state and provide a uniform law by acting together.

The first thing they tried to do was to draft divorce law, which was an utter failure because they couldn't get anybody to agree on what it should be, so they just abandoned the effort. They then took up business law and they drafted the Uniform Commercial Code, which was a great success, and it was adopted in all the states. So when NCCUSL came back to doing divorce reform in the end of the sixties, they were really returning to a project they'd started in the late 1880s and had never been able to accomplish. The idea was that you would have these model laws drafted and states would be able to adopt them as legislation and that's how they would become uniform law. The American Law Institute, on the other hand, started out by drafting what they called Restatements of the law so that you would have this volume, sometimes two and three volumes — Restatement of Contracts, Restatement of Torts, Restatement of Property, Restatement of whatever common law subject you wanted to have restated. Common law is law that was created by the courts' case-by-case decisions in each state. They would identify what the trends were and they'd say this is the majority view, that's the minority view, here is how the law — we think — this is our restatement of what the law is. The Restatements were enormously influential, particularly in Europe, where people treated them as being the last word on what American law was, when in fact a Restatement had no legally binding effect of its own except insofar as courts would say, "We're about to change the law of negligence and we think that we ought to follow section x, y and z of the Restatement of Torts." Then it would become law in that state, and then, of course, NCCUSL would prepare subsequent editions in which they would say "and the Restatement has been adopted by —" listing the states where it had been adopted. Both of these organizations are still in operation and they're still working along both of these separate two lines.

What the ALI did on the family law project is really quite different from a restatement — it is not intended as a restatement. It is intended as a statement of the principles of family dissolution. So the idea is that parts of it or all of it, although I can't imagine any state adopting all of it, could

be enacted by the legislature — they could repeal all their current laws on marriage and divorce and enact this. Or they could be adopted by state courts, in terms of their making decisions and following the principles. The really new part, in terms of coverage, of the ALI project is that it also covers dissolution of families where there was never a valid marriage in the first place. It applies to people, men and women, living in what we call non-marital cohabitation outside of marriage, and it also applies to same-sex couples. It's now being used as a model in some other countries but also in some states where gay and lesbian couples are coming forward to try and get, primarily, child custody issues resolved in the courts. Because you have people who have not been married and so if one of them, in the case of a lesbian couple, one of them has given birth to a child, she is the legal mother — the other partner has no legal standing at all in most states. Some states allow adoptions by what they call the "second parent" of the same sex, but that's still pretty rare. So this will fill a real void if it's picked up and used as a model by courts and legislatures.

My involvement in that is that I'm a member of the ALI and I'm a member of the ALI Council, which is its governing group. The council appoints some of its members to serve on the advisory group to each of its projects, and I was a member of the advisory group to the Family Dissolution Project. So was Bob Levy, although he was not a member of the council. The advisory group is larger than just the council. In fact, there are usually only one or two people from the council, which is about a sixty-member group, on each of these projects, and the other advisors are ALI members. [Professor Susan Appleton of Washington University in St. Louis law school and a former student of mine was also a council member who was an advisor to the project.] The actual work was done by several people, but the three co-reporters who were there when it was finished were Professor Ira Mark Ellman, who's at Arizona; Dean Kate Bartlett, who's now the dean at Duke Law School and was a faculty member there; and the third member was Professor Grace Blumberg, who's at UCLA. Ira and Kate were students of mine.

LABERGE: Just on a personal note, the fact that you're a woman and feminism was being enunciated then, what effect did that have on your approach to this or your interest in doing it? I know that you started family



law just because that was what you were given, it wasn't that you said, "I want to do this."

KAY: No, that's right, but as I point out in the Cincinnati piece, nobody was trying to make men and women equal at the time we were drafting these early divorce reform laws. We were mainly trying to keep people from engaging in blackmail and chicanery and all that. It was not really until the very end of the process that the legislator from southern California, Assemblyman James A. Hayes, wrote a legislative statement about unequal distribution that we later learned he wanted to use in his own divorce in order to get more property than his wife. He wrote this statement of legislative intent after the bill had already been passed and signed by the governor, in order to provide some guidance to judges who read this substantially equal division exception as meaning that, if necessary, you had to sell the family home in order to equalize the division.

He wanted to get them away from that, but in writing that legislative statement he also called attention to the increasing numbers of "working married women" and referred to their approaching equality with men. I'll read you this because it's so much fun. It says, "When our divorce law was originally drawn, women's role in society was almost totally that of mother and homemaker. She could not even vote. Today, increasing numbers of married women are employed, even in the professions. In addition, they have long been accorded full civil rights. Their approaching equality with the male should be reflected in the law governing marriage dissolution and in the decision of courts with respect to matters incident to dissolution."

Now that passage was taken by many judges as sort of an open invitation to deny alimony, which is no doubt how he intended it, but it certainly was nothing that a feminist would ever have said. It was after that happened that there was some suggestion we ought to look at how property settlement agreements could be enforced and handled to put some limits on that. People began looking seriously at what it would really mean, and what was being sought then were provisions changing the law of marriage to provide for equal management of community property by women. Until 1951, women in California had no power even to manage their earnings if they were community property, because the husband was the head of the household, and he managed everything. It was not really

until 1991 — when you got stringent provisions enforcing a fiduciary duty of the spouse managing the property to account to the other spouse, and to be responsible for decisions affecting the property — that women really were protected against men who were using the property however they saw fit. So, that was where the movement for equality came from, not from these divorce statutes. [Judge Isabella Grant of San Francisco called for reform in the laws governing property management, and Professor Carol Bruch of the UC Davis Law School (also one of my students) was active in drafting them.]

LABERGE: Right.

KAY: But as I also point out in that article, just because of the timing when the Uniform Act was promulgated — the first one, the NCCUSL version in 1970, then 1971, 1972 — that was when the Equal Rights Amendment was also up for ratification, and also a lot of the abortion laws were being debated in the states. This was before the Supreme Court decision in 1973, *Roe v. Wade*.<sup>12</sup> So you had a lot of state legislatures that were looking at no-fault divorce, the Equal Rights Amendment, and abortion — all of them issues profoundly affecting the status of women — at the same time. So, obviously, people's attitudes about women and their proper role in society became very crucial in a lot of the debate over this matter.

LABERGE: And for yourself, you were a professional woman and you have great empathy for women who weren't. I wonder where that came from — it wasn't just from reading the casebooks.

KAY: Oh, it was probably from my growing up as a preacher's kid, don't you think? [laughs]

LABERGE: Or something your mother said about you don't want to be dependent on a man — who knows? But do you know anything about just your own consciousness growing?

KAY: No, except that I guess I've always felt very strongly — and this came from my father — that women ought to be free and conscious actors. They ought to determine their own role in this world. So I was very opposed to anything that would stand in the way of their self-realization. I feel the

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<sup>12</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

same way about racial equality. There shouldn't be any barriers placed in front of anybody to do what that person wants to do and is able to do.

LABERGE: Yet you have done it in a way that's not strident, if that's the right word. You're not a Kate Millet. I'm not exactly sure if that's how you — do you know what I mean? Somehow you've learned a way to do it that's been very effective and you've gotten things done, but not offending certain people who would just take up the banner just because of that.

KAY: I have always thought that you ought to try and make things effective, and that usually meant working within the system. I've not been one to pound on the barricades, but then I was accepted inside, too. I didn't have to pound on barricades.

LABERGE: In this later book that's talking about the divorce reform, it talked about in the eighties, the California Legislature also re-looking at this. What part did you have in that?

KAY: I just gave some testimony. I was not very active in it.

LABERGE: So have you passed the torch to somebody else?

KAY: Our graduate and my former student, Professor Carol Bruch, who just recently retired from the law faculty at UC Davis, really has been the one. She was the guiding force behind the management and control provisions and also behind the enforcement provisions, the fiduciary obligation and all that. She's been very active over the years in working with the Legislature and making changes in the community property laws, also in the child custody laws. Now that she's retired — fortunately she hasn't stopped working on these issues yet, but I'm not quite sure who's going to take up the torch. I think Grace Blumberg has done a fair amount of that from UCLA because of her activity in the ALI project.

LABERGE: What about the Equal Rights Amendment and/or abortion, did you have any involvement with those?

KAY: I was active in both of those. I was asked to testify in the California Legislature when we adopted our therapeutic abortion law. We were one of the first three states to adopt the therapeutic abortion law in 1961, and I testified at the legislative hearings. I didn't have any hand in drafting — I mean, there was really almost nothing to draft. What you wanted to do was repeal! [laughs] The drafting of that was done by some lawyers from

southern California. I just testified — did a lot of speech-making, supported it around the state. After *Roe v. Wade*, I had very little involvement in that. Although, before that happened, there was a lot of work to be done in California. The ob/gyn department out at UCSF Mount Zion put on a program — it was in January 2003, the thirtieth anniversary of *Roe* — in which they honored the pioneers, including me, because I was one of the lawyers who represented the San Francisco doctors whose licenses were threatened because they performed abortions for German measles when that wasn't permitted.

LABERGE: So you represented them in court?

KAY: Yes. Well, I really just went on the brief, but yes, I was listed as one of the co-counsel in that case. Then Maggie Crosby, who's at the ACLU, did a lot of the litigation involving minors' rights to abortion. She and I were both honored. It was a very nice event. They published quite a nice book with pictures going back to the early days of what was done to women when they had miscarriages, and all of this. The doctors were really quite heroic, because they were risking a lot to do what they did. They were what was standing between women and the back-alley abortionist in those days. The Shively Seven, that's what they were called, after Dr. Shively, who was the first of the named defendants in that case where they were going to pull their licenses.

Now, on the Equal Rights Amendment, I didn't do much more than just testify on that. I was not active making speeches about the ERA and things like that.

LABERGE: Testifying before the California Legislature or Congress?

KAY: No, the California Legislature, for ratification.

LABERGE: When this bill passed — the Family Act in 1970 — were there any stories about getting people's votes, calling people? How that came about, particularly because it was now Governor Reagan.

KAY: No, no — actually there was no opposition to it.

LABERGE: Really?

KAY: The only opposition was the battle I've described between the northern California folks and the southern California folks on whose vision was going to be enacted. The only opposition — and I say this in the Cincinnati

piece too — the only vocal opposition came from a group of divorced men who thought that they paid too much alimony and they didn't see their children enough. They were the ones who ultimately were behind the later California proposal for joint custody. That was their idea, their notion. They picked up on the equality theme. They argued that the fathers weren't being treated equally because mothers always got custody of the children. So they got the joint custody legislation through, which I always thought was a bad idea. It hasn't really panned out very well, because, even when you grant joint legal custody, it usually winds up with the mother having sole physical custody as a matter of practice, regardless of what the order says. But they were the only ones who were opposed to it, and they were opposed to it because they thought it was going to help women get more alimony. Which they didn't want.

LABERGE: You brought up teaching the class with Dr. [Irving] Phillips. If you could talk about that, but also, when you were writing this, for instance, how did you know to bring in mental health professionals? Or was that just part of the package and you kind of learned along the way? Because you were still a young woman.

KAY: Well, there were expert witnesses. They were brought in most significantly on child custody matters, but there were people in the field. There were psychiatrists on law faculties — the first one was at Pennsylvania; Dr. Andy Watson — who wrote about family law issues and also criminal law issues and also incidentally about how law professors went about brutalizing law students to teach them somehow to “think like lawyers” by their over-zealous use of the Socratic method.

LABERGE: [laughs]

KAY: He had some really pungent things to say about how much some of his colleagues seemed to enjoy humiliating these first-year law students. So he was at Penn, and then there was a psychiatrist on the faculty at Harvard. He wasn't so interested in family law, but occasionally he would say some things about it. Then there were the folks at Yale who were working with Anna Freud. They came out with this book — three of them finally, but the first one was called *Beyond the Best Interests of the Child*. This was [Joseph] Goldstein, Anna Freud, and Albert J. Solnit. Goldstein was the law professor and Solnit was a psychoanalyst. They would provide expert

testimony at these big child custody battles. In those days you had to prove what was in the best interests of the child and it was a future determination and nobody knew how to do it, so you'd have psychiatrists on both sides, and you'd have psychologists, and you'd have the home study done, and all that. It just went on and on forever, so I don't think I thought of it — it was there.

LABERGE: It was just there.

KAY: Yes.

LABERGE: And the class that you taught?

KAY: That was a class, we called it The [Seminar on] Law and Psychiatry, and we used to pick a subject — sometimes it was custody, sometimes it was divorce — and we had students from the law school and the medical school. It was kind of like the thing that Laura Nader and I did with the law and anthropology course: students came from both departments. We had law students and we had psychiatric residents from Langley Porter, and we would meet mostly here at Boalt. But I remember one year the law students were really shocked when Dr. Phillips said, "All right, we're going over to Langley Porter and I'm going to show you how to interview a psychiatric patient, and show you something about transference and counter-transference," and all this. He picked out one of the many patients who thought he was Jesus Christ. He interviewed "Jesus Christ" — the law students couldn't believe it, [laughs] but they got an eyeful.

Looking back, I think probably the model for my interest in this kind of joint teaching came from a course I took at Chicago taught by a Torts professor, Harry Kalven, that he taught jointly with a faculty member from the divinity school. It was called a Seminar on Righteousness and Justice. We had students in the law school and students from the divinity school. Again, it was like a clash of cultures. I don't quite remember what religion these folks were from the divinity school there, but they really believed in casting out devils. I remember one session, they couldn't understand why the law wanted to go through all this involved criminal process — you know, why didn't the lawyers and the judge just pray for the defendant's soul. [laughs] What did it matter whether he did it or not? We thought, "Wow! There's some fundamental ground here that separates these two callings."

I think the idea of having people who are being trained for these quite different professions but who still, obviously, focus on common issues — of bringing them together while they are being trained is quite attractive. Irving Phillips died some years ago and I haven't offered an entire course with anyone else. Now I invite Dr. John Sikorski, who's a clinical professor of psychiatry at UCSF. John is quite well known as a psychiatrist who does child custody evaluations. He's a certified court evaluator in these matters. John comes over every year, either to my family law course or to my family law seminar and talks about psychiatric and other mental health evaluations of children in the divorce process. [He also teaches a course at UCSF on Forensic Psychiatry.] Students always relate quite well to him because he's very effective and obviously quite good at what he does.

## INTERVIEW 5: JULY 30, 2003

LABERGE: Today is July 30, 2003, and this is interview five with Herma Hill Kay. Unless you have something — a pick-up something from last time — we'll go on to the university committees.

KAY: Sure.

LABERGE: Okay. I have here with me a report of the Academic Senate on the status of women in 1970.

KAY: Yes.

LABERGE: It's so interesting — what they notice is that, "at this time, no woman has ever been elected to the Committee on Committees, the Committee on Educational Policy, or the Committee on Academic Planning," and it looks like you were the first woman.

KAY: I was the first of two women. There were two of us, but can I see the date of that?

LABERGE: Were you looking for this?

KAY: Yes. I've got a copy of that report somewhere. That was the Report of the Committee on Senate Policy, and that was one of the first committees I was on. Let's see if he listed members of the committee here in the back. Usually they do somewhere, but I'm not sure he did in this one.

LABERGE: I'm not sure if they did.

KAY: Appendices. Conclusions. [looking at report] Let's see. It looks like a very short report for that particular — here it is. Okay. “Respectfully submitted” — oh, maybe this is the subcommittee. I guess that's a subcommittee. Yes — “appointed to subcommittee.” Okay, all right. So he doesn't list the names of the people who were on the Senate Policy Committee, but I was on that committee. He was chair. In fact, I had a lot to do with getting the committee to prepare this report.

LABERGE: Oh good. Well, let's talk about that. When you say “he,” is it [Frank] Newman?

KAY: No, Sandy Kadish. Kadish was the chair of the Committee on Senate Policy. I was trying to start from the beginning of my career, and I was remembering the first Academic Senate committee that I was appointed to. This was because of Newman's deanship. Newman came in as dean in 1961 after Prosser left. Now, interestingly Newman said in that interview you gave me to read, that he thinks he was dean when I was hired. He was not dean when I was hired. Prosser was dean when I was hired. But when Frank came in as dean in 1961 — because he had been so active in the Academic Senate — he tried to get the younger faculty members to be active in the Academic Senate. And because it was a moment when there were not that many faculty women in the university, I was very welcome on any committee that he wanted to get me involved in.

So the first committee that I served on was the Academic Senate Committee on Teaching. That was in 1964–68. I was later chairperson of that committee, in 1984–85. It was the first Academic Senate committee I ever served on, and I believe that what we did was to recommend to the division that it establish the teaching award. Again, I was one of the first people — [Chancellor] Chang-Lin Tien and I were among the first people to get that Academic Senate Teaching Award. Although, when the award was first established, only one award was granted every year. Then, because there were so many people nominated, we started to give several honorable mentions. Some years later, whoever was on the committee decided that they would do away with all the honorable mentions and just list everybody as recipients who either got it or who was honorably mentioned. Now, of course, they give the award to five or six people every year. So my



name is still listed every time they print a list of people who have gotten the distinguished teaching award; and I always say, well, it was really only an honorable mention, but they have swept it all in together now. So that was the first committee I served on.

After that, Mike Heyman — and I don't know what position he held at that point; he might've been on the Committee on Committees — was talking to me about what committee I would serve on next. He suggested Academic Freedom; for some reason I couldn't do what they needed to be done. He suggested some other committee, I forget which, but it also didn't work, and then he said, "What about the Senate Policy Committee?" Well, the Senate Policy Committee was a fairly new committee at that point, and it was created to be an advisor to the chair of the division and to recommend things that they thought the chair ought to look into or that ought to be recommended to the division or maybe sent to other committees for study. So I said, "Yeah, I can do that." So he appointed — whoever it was who appointed me, because the members of the Senate Policy Committee were appointed by the Committee on Committees. You did not run like you ran to be elected to the Committee on Committees, right? So I was appointed to it in 1968 and I know that Kadish was the chair at some point. Here he's signing as chair of the subcommittee report in 1970. I served on that committee from 1968–70.

This study was done because we were getting very concerned about the women who were or were not being promoted and hired as they should. My résumé shows that I was chairperson of the Berkeley Women's Faculty Group in '69–'70, while I was still a member of Senate Policy. That group was self-organized and I don't remember if I was the first chair of it or not, but we were trying to get some data gathered about women faculty: how they came to Berkeley, where they were, how long they stayed, and all that. That was what the Senate Policy Subcommittee was supposed to do. This was the first report on the status of women that the campus ever issued. So those were two committees I was on.

After that, I think, Professor Patricia St. Lawrence, from the genetics department, and I were the first women who were elected to the Committee on Committees [in 1971]. We had never met each other. I'd never heard of her; I think she'd heard of me. We wound up being elected the same year

and we served on the committee together. I think we were both grateful to find each other there.

LABERGE: Tell me a little bit about running and what you had to do.

KAY: It's the same thing that happens now. Everybody who's a member of the division gets a form that comes in the mail and says, would you like to nominate somebody or you can self-nominate if you want to be elected as — and I think there are elections for divisional representatives as well as to some specific committees. The Committee on Committees is one of them. I think there are other committees — I think there are more in the college than there are among the professional schools — that people are elected to. Somebody from the law school — it must have been, probably even Mike or Frank or somebody — nominated me to run. Then your name goes on a ballot, along with the names of the people who nominated you. Then members of the division get a ballot to vote for these people, and Pat and I were elected.

The Committee on Committees appoints the members of the other committees who are not elected, so you get to know a lot of people around the campus and what they do when serving on that committee. You always send out a form to everybody who's a member of the Academic Senate during the spring semester saying, "The Committee on Committees is about to appoint members to Senate committees; would you like to volunteer for any committees." Sometimes that's helpful and sometimes it isn't because often the people that you really want to serve never volunteer and the people who volunteer aren't the ones you want to serve. [laughs] But anyhow, that information goes to the Committee on Committees, and then each member of the committee is supposed to talk to people in his or her field or department, and come up with nominations for particular committees.

Of course, the law school is always a very popular source of committee members for things like Privilege and Tenure, and Academic Freedom, and some of these policy committees. Newman, Kadish, and Heyman had great traditions of service, and so the law school viewed this as something that we were supposed to do. It wasn't enough just to serve on internal law school committees, you were supposed to make yourself available to the campus as well.

LABERGE: How many people on the Committee on Committees?

KAY: I don't remember, I would guess . . .

LABERGE: About ten-ish?

KAY: Something like that.

LABERGE: So you and Pat St. Lawrence were the first two women ever on it.

KAY: That's right, and she has died now. I don't remember when she died but I think it was maybe half a dozen years ago, something like that. So we were on that committee. Now, if you notice, I become chairperson of the Berkeley Division as of January 1, 1973, and I had been on the Committee on Committees. We had had just a terrible time getting somebody to serve as the chairperson of the division. Nobody wanted to do it, and finally — I was in England at the time visiting in Manchester, the faculty of law there — and I get this call from Berkeley saying, "Well, we've found a chairperson," and I said, "Who?" They said, "It's going to be you." [laughs] I said, "What do you mean, it's going to be me?"

They talked me into doing it. I really served, not for a full term — because a full term would have been for two years and I served essentially for a year and a half.

LABERGE: Who called you and talked you into it?

KAY: Whoever was the chair of the committee. It may have been Milton Chernin. Milton was a great guy. I always thought he was fabulous. He was the dean of the School of Social Welfare for years and years, and he was secretary of the division for years and years. His picture is there hanging over the fireplace in the Men's Faculty Club.

LABERGE: Oh, okay. I didn't know who that was.

KAY: That's Milton Chernin. Great man.

LABERGE: So then you're the first woman chair also?

KAY: I was the first woman chair of the Academic Senate, that's right, and because I was chair of the Academic Senate, I was then ex officio a member of the statewide Academic Council and Representative Assembly, and that is where Karl Pister and I met Sally Sperling.

LABERGE: He was chair of the Academic Council. I can't quite remember if it's that year but he was chair of the Academic Council.

KAY: Sally at one point was chair of the Academic Council.

LABERGE: Maybe they served together — one was a vice chair and one was chair or something like that.

KAY: Yes, maybe so.

LABERGE: Well, tell me what that entails. When you're chair of the Academic Senate, do you still teach? Do you have time?

KAY: Yes.

LABERGE: Oh, you do. How much time does it take to do?

KAY: The only committee in those years that you got any release time at all for serving on was the Budget Committee. So everything else you just fit in. At least, at the law school you didn't have to serve on any law school committees while you were doing it, but it was not a release time kind of position at all.

I'm trying to trace these years back here. I was on the Academic Council and I'm positive that Sally was the chair of it when I was on it in 1973–74, because it was utterly astonishing how she mobilized the group. She was on it because she was the chair of the Academic Senate from Riverside, which is where she was a faculty member. But she may have been elected. I think the chair was elected, because I remember they tried to get me to be chair years later and I didn't want to do that. So that's where I met her, and she was just terrific. She was a professor of psychology at Riverside and she really had a vision of how to make that group influential. Before that, it had really just been a sounding board for the UC president — he was forced to consult with the council, but he just came by. And that was when [Charles J.] Hitch was president.

Hitch was president, and he and Sally formed a really nice working relationship. Sally really made us, on the committee, do our homework — to serve not just as somebody who said, "Yes, thank you, Mr. Hitch," and then went back home, but who really took an interest in the issues that were facing the university and tried to get the campuses to take positions on it. Coming from somebody from a campus like Riverside, I think that made more sense because that made the council a group that would be representative of the entire university. People from other places — particularly Berkeley, but also UCSF and Los Angeles — were not so crazy about that,

because their view was that there were essentially only three campuses and the rest of them were kind of [laughs] there as hangers-on. But she did really a terrific job of building up the influence of the Academic Council.

LABERGE: What issues do you recall that you dealt with?

KAY: I don't recall anything very specific. I think the process was more important than the substance. It was significant that Sally created an expectation of meaningful consultation.

LABERGE: I was trying to find out — one thing might have been separate salary scales for professional schools. Does that ring a bell or not?

KAY: Well, I know, from the law school's perspective, we were working on that, but whether that came to the Academic Council, I don't remember.

LABERGE: Okay, because I know both engineering and business — there was one other maybe — who didn't have a separate salary scale although the law school did.

KAY: Well, the law school and the medical school were the schools that first had separate salary scales, and then the others . . .

LABERGE: But in any event, it was after the Free Speech Movement and after the bulk of the protests.

KAY: That's right.

LABERGE: Before that — you wrote that wonderful piece about Richard Jennings when he was chair. Were you going to meetings?

KAY: Yes. The meetings were — I mean there were meetings of the division and everybody could go to those. They usually had one in spring and one in the fall, and then there were meetings of the Representative Assembly. When I was chair, the Representative Assembly had just, I think, then formed. I see I'm listed as a member at large of the Berkeley Representative Assembly for '74-'76. That was after I stopped being the chairperson of the division, and I think that I was motivated to do that — I was not the law school's representative; I was a member at large — because I thought nobody wanted to do it, and you just had this terrible problem with quorums.

We'd formed the Representative Assembly because we couldn't get a quorum of the division except when you had things like the crises Richard was dealing with, in the Free Speech Movement, where you couldn't get a

room large enough to hold everybody who wanted to come. But in normal times, everybody was happy to just let what they referred to as the “old Senate hands” take care of everything. Unless there was some crisis, they didn’t bother to come, so you could never do anything, parliamentarily, because you couldn’t get a quorum. I started saying, “All right, we’re going to pass this motion subject to a mail ballot.” We did that a couple of times, which worked, but it was costly. Then I would say, “We’re going to pass this, subject to its being ratified at the next meeting in which we have a quorum.” [laughs] Probably it was pushing the law a bit, but you got so frustrated because you had to carry on these activities and there were things that the Senate was charged with doing that it couldn’t do if it didn’t have a body large enough to do its business.

So, when we formed this Representative Assembly, my recollection is that it was done primarily to solve that problem. You would get a smaller group that would have the authority to act in between meetings of the general division meetings, and you would get people who were sufficiently dedicated so that they would show up. As you see, I stuck with it for a couple of years after that as a member-at-large for a two-year term. But my recollection is that we started having trouble getting quorums even at the Representative Assembly, which was really, I thought, distressing. I don’t know what it’s like now. I haven’t been to a division meeting in years. [laughs] I’ve gotten just as bad as everybody else now.

LABERGE: But you were a little busy also. [laughs]

KAY: Just a little. Okay, so that was the Representative Assembly. Then there seems to be a two-year hiatus, then I was appointed to the Academic Senate/Administration Committee on Faculty Retirement Policy, and then to membership in the university-wide committee — no, that was later. We’ve got this a little bit out of order here.

I was appointed to the Budget Committee in 1979, which was the year after I got off the Committee on Faculty Retirement Policy. The Budget Committee really is the committee that has the most authority on the Berkeley campus. It’s a committee that other campuses — every campus has a variation on this. This is why I was a member of the university-wide Committee on Academic Personnel. That was similar to my being on the Academic Council when I was chair of the division. Both the Academic

Council and CAP [the Committee on Academic Personnel] are committees that are made up of people who are the chairs of their respective divisions of division committees. On all the other campuses, they call this the CAP. At Berkeley it's called the Budget Committee — it had utterly nothing to do with the budget at the time, but it was called the Budget Committee. [laughs]

LABERGE: Yes. So, for researchers in the future, tell me what the Budget Committee does.

KAY: It varies among the campuses. Its core function is to offer advice to the chief campus officer, the chancellor, or the chancellor's designee, on academic personnel actions. Now, at Berkeley, when I served on it and I think it's still true almost to this day, the Berkeley committee acted on every single academic personnel action affecting anybody who was an academic appointee anywhere on the campus. That included initial appointments at non-tenure or tenure ranks, merit increases, appointments to tenure, promotions to tenure, promotions above scale, retirements, recalls from retirements to do emeritus teaching, lecturers, lecturers with security of employment — I mean anything you could imagine, this committee did.

Now at UCLA, for example, by contrast, Chancellor [Charles] Young, who was chancellor there for I think over twenty years, delegated an enormous amount of this responsibility to the deans. He even delegated authority over initial non-tenure appointments. The UCLA CAP people didn't pick up until the question was raised of whether you're going to give this person a permanent position. I don't think that committee ever did anything with merit increases, certainly not at the lower stages. So the deans and department chairs had much more authority at UCLA than they did at Berkeley, but the lore at Berkeley was that it was the Budget Committee that maintained the quality of the campus faculty. If it were not for the Budget Committee's insistence on uniform high standards, Berkeley would slide from its position of preeminence. There were these wonderful sorts of tales, stories that kind of epitomize — a lot of them I think were apocryphal, but there's a story about this one up-and-coming young scientist who was appointed at Berkeley, who did not get tenure and who left and went somewhere else. Some years later he was awarded the Nobel Prize, and the reaction at Berkeley was, well the Nobel Prize committee has

lowered its standards — if he couldn't get tenure at Berkeley, obviously he shouldn't deserve the Nobel Prize. [laughs]

The year I was chair of this committee there were a few battles. Departments would sometimes dig their heels in. They absolutely had to have this person; if they couldn't have this person it was going to be terrible. So they would go and try to get the chancellor to intercede. Well, we had no legal authority. We only recommended to the chancellor. The chancellor was free to disregard our recommendations, but the chancellor almost never disregarded our recommendations, and he certainly never did it without paying a call to the committee, either in person or by sending a vice chancellor or provost when he was away from the campus. I remember one case in which the department really, really, really wanted this person and we really, really, really didn't think this person should be hired — this was a hire at a tenure rank, not an entry-level hire. We kept recommending no and the chancellor kept wanting to think about it. The department said to the candidate, "Oh well, it'll happen eventually, so why don't you just come and we'll make you a visiting professor," which they could do without anybody's approval. So the man sold his house and came out to Berkeley, and the chancellor went along with our recommendation, refused to hire him, so here he was, without a permanent appointment.

LABERGE: Chancellor being [Albert] Bowker then? Or Heyman?

KAY: No, it wasn't — this was not Heyman. I mean Heyman did become chancellor while I was in the committee, but I think it may have been Bowker at the beginning.

LABERGE: Do you want to say what department or not?

KAY: No, and in truth and in fact I've forgotten. [laughs]

LABERGE: [laughs] Okay, that's all right.

KAY: But I do remember that finally, I mean he stayed — he was allowed to stay on a second year as a visiting professor, and I think during that year — the problem was his scholarship, I remember that. During that year he published something that convinced the Budget Committee that maybe he was probably okay after all. But that gives you some idea of — here the man had sold his house, for heaven sakes! So I think that there was a sense there in that committee that it was really charged with doing more than



just the ministerial function, that it was charged really with maintaining the academic quality of the campus. The same thing would happen on requests for salary increases to meet competing offers, and that's why it was so important to maintain control over the approval of the merit increases. Because once you've got people who were being sought competitively by other schools, if the departments had the authority over how high they could set the salaries without any review, then you would have an uneven salary schedule across the campus. Now I must say that I thought that was a great idea when I was chairing the committee. When I became dean, I could see that it was not such a great idea, but that there are really two sides of the argument.

LABERGE: Was Bob [Robert] Brentano in that committee with you?

KAY: He was, yes, for two years, and Alan Searcy was the chair of the Budget Committee in 1979–80 when I first went on. The other members were Neil Bartlett, Burton Benedict, George Leitmann, Robert Mortimer and Cal . . .

LABERGE: Moore.

KAY: Yes, Cal [Calvin] Moore. Cal and I prepared an internal report that the Budget Committee did on women faculty's salaries when the question arose of whether women were being paid the same as men, whether they were being treated the same. Somebody said it would be too hard to get that done because you'd have to have comparables from all the departments and everything. Well, in those days the committee was smaller than it is now and we met in this little room over in California Hall there on the first floor, and the room, all around the walls, was lined with filing cabinets. In the filing cabinets were the academic personnel files of everybody who was then currently on the campus. I said, "Why is this a problem? We have the files here, all we have to do is read them." So the chair said, "Well, Herma, do you want to do that?" I said, "Sure." Cal Moore said, "Herma shouldn't have to do this by herself, I'll help her." [laughs]

So Cal and I went through, and we literally picked somebody who was comparable to each of the women and we read every single one of those files. And we reported to the committee and there was — in fact, I got the committee to send me a copy of the report because it's in the division records. The committee reported that there had been a certain number of

cases and it had reviewed them, and it thought that some women had not been put forward for merit increases as often as they should have, compared to men in their departments. Rather than trying to do anything on a universal scale, we sent the findings back to the department and said to the chair, “When you put this person up for a merit increase the next time take this into account, and you can ask for an extra amount for salary equity.” And that’s what happened. There were about fifteen or sixteen cases I think that actually were upgraded like that around the campus.

I mention this report in my UC Davis article that you have on UC women’s law faculty, because Martha West, who’s my co-author on the sex discrimination book, was the person who was behind the effort at UC Davis to get the Davis division to approve a salary study of women. It was just a huge fiasco there. I mean the people — the men on the committee considered that they were being attacked personally, because if women weren’t being paid fairly then it was because they hadn’t treated them fairly, because they were the ones at Davis who were doing this. They had to have mail ballots to get the study approved, and there were attacks in the press — it was just horrible. Martha’s written an article outlining this which I cite there, and she was just astonished to realize that we had done this so easily at Berkeley, but of course it came internally from the committee itself. It didn’t cause any problem at all, because we had done it, we had made the recommendations, and it was just done. She was just astonished that anything like that could’ve happened.

LABERGE: This particular year, how much relief time did you get from your classes to be able to do that?

KAY: I had half time off from teaching.

LABERGE: Half time, but still that’s a lot of work.

KAY: One course a semester. When I was chair of the committee, I believe I’d — no, I think it was still half time. We had just started this as I was going off the committee. Now the committee does in fact review the budgetary allocations among the departments across the campus, so it’s a much larger job now than it was at that point. So now if you’re to chair the Budget Committee, you do get full-time teaching relief for doing that.

LABERGE: But that must have taken how much time?

KAY: It took an enormous amount of time because you'd have to go over to California Hall to do it. You couldn't work on it — I mean you couldn't take the files out of the office, so you'd have to go over there and sit in that office, work on it and everything. That's when I came to know and love Cam Rutter.

LABERGE: Someone in the chancellor's office?

KAY: No, she was staff to the Budget Committee. She's actually working at the law school now on a volunteer basis. She retired in 2001. She's utterly wonderful. The Budget Committee had one chief staff person, called a manager, then I think one or possibly two others to deal with the paperwork. Valorie Dawson was the top person when I came on, but she retired. Neil Bartlett, who was the chair the year Val retired, and I hired Cam to take over as manager, and she did a terrific job. She's really, really nice, a nice person. So I appreciated her. One of the first things that I did — this was so funny because nobody had ever thought to do this before.

When I became chair of the Budget Committee in 1982–1983, I realized that the staff people who worked on the files didn't know each other. We would write the report [called a "minute"] and it would go to the chancellor's office. The chancellor had a whole set of people who were the academic personnel people who did all these cases for him and sent them down to us, and the staff of the Budget Committee and the staff in the chancellor's office had never met each other. They talked on the phone, they saw each other's names, but they had never met. So I had a lunch for all of them at the Faculty Club. [laughs] It was ludicrous, I mean the notion that they were only separated by a floor in the same building, but they had never seen each other. I think, after I started it, they kept up doing the lunch, but it was just so funny that it never happened before.

LABERGE: We could never tell, but the fact that you were on the committee at that year — this may not have ever happened if you hadn't been on that committee as a woman who had an interest and said, "I'll do it," when everybody said, "Oh, no one could possibly do that."

KAY: Oh, well. It's very likely. But, you see, because I had been on the policy committee before and we had done that report on the status of women, I had the sense that there was something that ought to be done. Because nobody can look at the Budget Committee's records except the Budget

Committee members, so it had to be done internally — there was no other way it could be done. Now, the chancellor had records in his office, but I don't think even the chancellor keeps duplicate records of everything that's in the Budget Committee files.

LABERGE: Yes. How were you appointed to the Budget Committee? Do you know?

KAY: By the Committee on Committees.

LABERGE: But did you apply or say you were interested?

KAY: I never applied for anything. I never volunteered for anything. [laughs]

LABERGE: But whenever you were asked, you . . .

KAY: Well, yes, but I mean there were so few women. You have to understand the context. [laughs]

LABERGE: How much did you feel a responsibility because of that?

KAY: Well, it was also my field. I mean, in the seventies Title VII [of the Civil Rights Act of 1964] was being implemented and I was working on the sex discrimination casebook, so I had a keen sense of what needed to be done. I think I felt that I was in the right place at the right time and so I should do what I could.

Okay, so that's the Budget Committee. Then, after I got off the Budget Committee, I chaired the Academic Senate Committee on Teaching, and that's where I came across this utterly wonderful woman, Barbara Davis. Barbara was, at the time, the chief staff person of the Committee on Teaching. She is an utter wiz and wonder. She has since, of course, become high in the administration, the nonacademic administration. She is utterly fabulous.

LABERGE: So all of these committees have a staff, which I think people don't know how much . . .

KAY: Oh yes, they all do — absolutely they all have staffs. So then, after that, I spent a year as a member of the Academic Senate Committee on Privilege and Tenure, then one year as chair of that committee.

LABERGE: How is that different from the Budget Committee's recommendations?

KAY: Privilege and Tenure is a committee that's there to see to it — well, it's really there to hear grievances by faculty members. So a faculty member who feels that he isn't being treated properly in terms of teaching or scholarship or perks or whatever will complain to Privilege and Tenure. Privilege and Tenure is empowered to hold hearings, which we did several times, and the chancellor's office usually is represented at those hearings by somebody from the general counsel's office who is assigned to the Berkeley campus to do these things. Frequently, in cases in which there has been a denial of tenure, the faculty member may file a complaint with the Committee on Privilege and Tenure.

Privilege and Tenure is empowered only to look at the procedural aspects of the case, not the merits of the case. We did several of those cases, those tenure problems that were around the campus in those days, and we made recommendations sometimes that the department ought to take it back and look at it again because certain evidence had not been properly assessed or hadn't been put in, and evidence that was referred to shouldn't have been — things of that kind. Eleanor Swift's case, although that happened after I had left the committee, went that route. She filed a grievance with the Committee on Privilege and Tenure, and that committee made a finding that she had made out a *prima facie* case of discrimination. The chancellor then appointed, at the committee's recommendation, an external committee to look at her case, and it was that committee that recommended that she be given tenure, and the chancellor gave her tenure. So that's what that committee does.

LABERGE: Any women's cases while you were on it?

KAY: Oh yes, several of them. Some of them in which, at least one of them in which — one of the early stages in which the woman ultimately prevailed. That was really the last standing Academic Senate committee I served on before I became dean of the law school. There were several search committees that I was on. Then, of course, I became dean in '92, and the last committee I served on before that was the search committee for the Berkeley chancellor. That was in '89-'90.

LABERGE: Choosing Chancellor Tien.

KAY: Choosing Tien, that's right. Then I became dean. I didn't serve, of course, on any Academic Senate committees while I was dean, and then

I've just recently — I just put this in today as I was updating my résumé, I've just been appointed to be on the Committee on Academic Freedom beginning this year. That's one of the few committees I've never served on.

Now, the other thing I wanted to point out to you is this university-wide Academic Planning and Program Review Board. That, I think, came and went. Who was the president who preceded David Saxon — was that Hitch?

LABERGE: Hitch, it was Hitch.

KAY: Yes. So maybe Hitch knew me from the Academic Council. He had taken to having budget hearings with chancellors from all the campuses, and they would last for a full day. The chancellors would make presentations as to the funding that they needed. A lot of it went by formula, had to do with the number of faculty positions they had, and so on, but some of it was discretionary. What Hitch had done was to create this Academic Planning and Program Review Board, which was composed primarily of middle management folks from the Office of the President, and I was the only faculty member on it. I served on that from 1975 to 1977, and it was an absolutely eye-opening experience. Among the other things that I learned was that the San Diego campus had the thirteenth largest navy in the world because of the La Jolla [Laboratory] and the Scripps Institut[ion of Oceanography]. [laughs] David Saxon was the chancellor, I guess it must have been in San Diego . . .

LABERGE: He was at UCLA.

KAY: Oh, that's right, UCLA.

LABERGE: He may have been vice chancellor, I'm not sure. Who was it at San Diego?

KAY: No, the one who's at San Diego who then became president was [Richard C.] Atkinson. Well, now [David P.] Gardner was what . . .

LABERGE: He was a vice president here and then went to be president at Utah.

KAY: He was never chancellor?

LABERGE: No.

KAY: Really? Where am I remembering Gardner from?

LABERGE: Maybe he was vice president when you were there. He was vice president for the extended university or some such thing.

KAY: I think I met him.

LABERGE: He may have well been — had something to do with this.

KAY: Yes, I think he might have had something to do with this because I seem to remember him from that context. But Saxon I remember as — I think he must have done the presentations for UCLA.

LABERGE: He may have, as vice chancellor or something.

KAY: Yes, I think he probably did. Because I don't remember seeing Chuck Young appear in person, or at least not doing much of the actual presentation. But you did get a sense of how the university operated at the Office of the President's level and how the interaction went with the chancellors. Now, whether they had at that point or not, they must've — I can't believe there was a time when they did not have a Council of Chancellors, but I don't remember how, if they had a group like that, how, if at all, that interacted with this group. I think this group no longer exists, but we can check that, obviously.

LABERGE: Is it the group that works on the Academic Personnel manual?

KAY: No. This really did have to do with money — almost nothing else except money.

LABERGE: Who did you work with? Well, you were the only faculty person.

KAY: I was the only faculty member on it.

LABERGE: Do you remember some of the people you worked with?

KAY: I remember David Saxon. I remember, obviously, President Hitch. And Gardner, I seem to recall.

LABERGE: Kleingartner? Archie Kleingartner?

KAY: He was more with the Legislature. I ran across him when I was a dean and we were all trying to figure out what to do with the Governor Wilson's sudden decision that he wanted to privatize one of the law schools. [laughs] That's a different story.

LABERGE: Okay. [laughs]

KAY: But that's when I met him. I'm trying to remember who I first met. The man who was the general counsel for the regents, who represented the university in the *Bakke* case, and who was very helpful to Boalt when the regents' resolution and Proposition 209 was in the mill.

LABERGE: Not Jim Holst?

KAY: No, Jim was prior to the man I'm thinking of.

LABERGE: Rom Portwood?

KAY: No. We'll find him, because I believe he was the general counsel for the regents for a while. I know he's retired, but he was really very helpful. I somehow seem to recall that he had something to do with this board. He may have been there as a resource for any legal issues that might've come up, I'm just not sure about that. [Gary Morrison]

Okay, so let's see — are there any committees here we haven't — we talked about the Teaching, we talked about the Senate Policy, Committee on Committees, Budget, Academic Senate . . .

LABERGE: How is the law school viewed vis-à-vis the Academic Senate? Do law faculty still get as involved as in the beginning when Frank Newman and Mike Heyman were involved, or is it more separate?

KAY: I don't think we've had a chair of the Academic Senate, maybe not even since me. I followed [Richard] Jennings, and we'd have to just look at a list of who the later chairs were . . .

LABERGE: Yes, isn't that interesting?

KAY: We've pretty consistently had members of the law faculty on the Budget Committee and frequently they've chaired the Budget Committee. Robert Post chaired the Budget Committee after me. John Dwyer chaired the Budget Committee after Post. Pam Samuelson either has just chaired it or is about to chair it. Steve Sugarman was on it — I don't think he chaired it. Paul Mishkin was on it — I don't think he chaired it. My impression is that we haven't really been pushing people the way that Frank did to really get involved at the campus-wide level. There's a lot of committee work now has to be done internally [at the law school]. I mean, the Appointments Committee is a huge time-consuming job. As I say, I don't show that on my résumé but I chaired the Appointments Committee here and served on



it for many years. I'm actually on it again — I was on it last year and I'll be on it again this year.

LABERGE: And that entails hiring?

KAY: Yes.

LABERGE: So it comes before, then it goes to the Budget Committee.

KAY: That's right, it goes from the Appointments Committee to the law faculty to the Budget Committee to the provost and chancellor. That's how that works. But faculty were involved when we were redoing the building — and then, of course, we've had so much more in the way of fundraising. But that does not involve that many members of the faculty except when they come and join the dean at some of the alumni luncheons and events and dinners, and so on. But the faculty itself, I think, has really done more of its committee work internally at the law school rather than externally for the university. Steve Sugarman has done a fair amount of it, but I think there have not been a lot of other people who have done much more of it recently. A lot of our faculty, of course — as I was, myself — are involved in serving on governing boards of the national organizations, and so that is another level of committee service that we get involved in pretty frequently. Although I don't think — we haven't had a chairperson of the Association of American Law Schools [AALS] since I was chair, from this law school.

LABERGE: Do you have any reflections just from all of this — both on the campus and university-wide — on shared governance? The University of California versus any other place?

KAY: It's really ludicrous. I remember explaining the Berkeley system to somebody who was about to become a dean at a very elite private law school in the East. He said, "I can't imagine being a dean in a place like that." [laughs] He said he wouldn't be able to do anything. It certainly became clear to me after I became the dean — I think the law school has a little more autonomy than a lot of other campus units because we have a fairly decent fundraising record, so we've got some degree of independence.

Although the business school has just been — to hear them tell it, they've been killed by it, because — unlike us — they try to compete with industry for their professors, particularly for people in finance and accounting. And you can't persuade a professor of humanities that anybody has ever written

anything creative in accounting or finance. [laughs] So, there's always been a negative attitude towards paying those folks huge amounts of money. That idea has never been very popular. The school has really suffered from that and they have had to undertake a lot of fundraising to try and compensate for it. But, you know, you could raise all the money in the world but you can't pay people three times as much as anybody else is paid without the permission of the Budget Committee. And the Budget Committee isn't going to let you do that, so it gets to be very frustrating, I'm sure, for them. We've never had that problem at the law school because we've never tried to compete with people who make millions of dollars in the world of legal practice. We've really set our marks of comparison more towards people in government service or people in the judiciary, not people in law firms, because there's just no way you can do that.

So I really do think that shared governance is better than the alternative, which is to have the administration run the place without any kind of faculty oversight or input. As I said in the end of that article about Richard Jennings, as long as you have people of his caliber who are willing to serve, then it works. If you don't [laughs], then it doesn't.

LABERGE: Yes. You're a good advertisement to anybody to serve. They should have you up there giving a little talk to all the new faculty.

KAY: [laughs] Well, they used to do that.

LABERGE: Did they?

KAY: Oh yes, they did. Every year they would have a meeting of the new faculty and also the new department chairs and it would be a daylong meeting. It was a retreat, and it was held in the fall. The Budget Committee would come and would talk to the new department chairs, the chairman of the division would come and talk to the new chairs, and there'd be a reception for the new faculty. It was an effort to try and inculcate the ethos of the place. I'm sure that still goes on.

LABERGE: What about, even though we don't have them written down, some of your other committees for the law school besides the Appointments Committee?

KAY: The first committee I ever served on was the Committee on Faculty-Student Cooperation. [laughs]

LABERGE: So this was in the sixties?

KAY: Yes. It was the first law school committee to have students on it. Now all the committees have students on them except the Appointments Committee, and there is a student liaison committee for that. There's been a total change in the law school culture about student participation in governance. A lot of it had to do with what I did as dean. I was very much in favor of bringing students into the consultative loop. Yes, there was a period there where the elected chair of the Boalt Hall Students Association was really somebody who had a political axe to grind. And most of the faculty thought that — because few of the students actually vote in the BHSA elections — they thought Boalt Hall Students Association was just a political front for some of the left-wing students, and shouldn't be taken seriously.

My view is that the BHSA president is the elected counterpart from the student body to the dean, and the dean ought to meet with the student leadership, and so I met with them. I set a time for a meeting every week with the BHSA president. Either he or I, or she or I didn't always make it, but there was a set-aside time for us to meet and see what was going on and try to figure out what was coming up. I think by and large that was a help. But in the beginning, the students were the students and the faculty were the faculty and never the twain should meet, [laughs] except in class. This Faculty-Student Cooperation Committee was there to make recommendations and to give the students a kind of avenue to have whatever they found not to their liking transmitted to the faculty. We did that. Then after that, I don't remember what . . .

LABERGE: Is there a curriculum committee?

KAY: There isn't really a curriculum committee. People in various subject matter areas get together and talk to each other. But the law school is not subject to the Committee on Courses.

LABERGE: So that's a difference too.

KAY: Oh, a big difference, yes. That's written into the Standing Orders of the Regents that the schools that offer instruction at the graduate level only are not subject to the Committee on Courses. I think that may have applied only to law schools. There used to be a first-year curriculum committee, and there was a lot of discussion about that. We really never had required

courses at the law school. The first-year curriculum was required but the upper-level curriculum was not required. Students took whatever was on the bar exam and whatever else they needed to fill out their schedules. Those were the big enrollment courses, and then after Watergate the ABA mandated that all law schools had to offer a course on professional responsibility — which everybody hates, both to take and to teach, as far as I can tell. [laughs] But other than that we have no required courses, and so there's always this issue of, "Well, what's going to be in the first-year curriculum?" We've revised the first-year curriculum more times than I care to remember. We've also revised the grading scale more times than I care to remember. I think I was on ad hoc committees on the grading scale at several points.

LABERGE: And that would be separate from the rest of the campus also?

KAY: Yes. I was on the Admissions Committee. I served on the Admissions Committee several times. That's a very time-consuming committee, and it's obviously getting more time-consuming as the applications increase. Applications rise and fall for people to go to law schools, but I don't think we've — last year, I think we had something like 7,000 applications for the 270 places in our first-year class. The year I became dean, I think we had over 5,000. Then there was a period when it began slipping a little as people stopped coming to law schools, but I don't think we ever went lower than 4,000. We always read all the files, so that takes a lot of time.

LABERGE: Weren't you on the review of CEB [Continuing Education of the Bar]? And I believe it's when the recommendation was to sell it. Tell me about that.

KAY: Yes, that was the Cheit Committee. That's right. Well, they had appointed Budd [Earl F.] Cheit to chair this committee and it was at a time when the place was losing money hand over fist. The question put to the committee was, what is the university doing participating in running CEB and should the university stay in this, and how does it relate to the State Bar, how does it relate to the law schools, and all that. Budd conducted the committee in the most wonderfully efficient way possible, and so we did some research and we met with some people. We talked to various and sundry folks, and we decided that there was no reason for the university to be doing this and that if it was possible to sell it we should sell it. The two

people who were there as interim directors, Pam Jester and a man whose name I forget, were named co-directors — I think it was not possible to find somebody right away. This all happened after the committee disbanded so I'm not clear on it exactly, but the notion was that they would try to see what they could do about getting out of the red and into the black. And that, they did. They did quite a good job at that, so that the place — at least in the last year or so — has not been losing money. It has not been making a lot of money but it hasn't been losing money.

So then I was asked by [Provost and Senior Vice President Judson] Jud King to serve on the search committee for the new director, and we just finished doing that. They have named Pam Jester, who was the former interim director and who's been there I think for quite a long while. So she's taking it over and it remains to be seen whether she'll be able to give it any sort of secure position. But the university has abandoned, I think, any talk of selling it now.

LABERGE: What connection, if any, to any of the law schools?

KAY: None.

LABERGE: None. Not even advising on faculty or . . .

KAY: Well, no. Rex Perschbacher, who's a graduate of ours and who is the current dean of the Davis law school, is currently on their board. I don't think Susan Prager was ever on their board. I certainly wasn't. I don't think anybody else from here was on their board.

LABERGE: And did you ever teach any classes?

KAY: No, I mean, that's part of the problem. The books that they published are service-oriented books, they're how-to-do-it manuals for the bar. You don't get points for publishing work like that at a school like the law schools of the University of California, and so it doesn't advantage the faculty to write those books. They don't pay anybody. They really would be in the red if they had to pay anybody. They depend entirely on volunteers, both for teaching their courses and for preparing their materials. A lot of the more successful ones are done by judges, right? There's just nothing there that would attract a member of a law faculty either to teach or to write for them. In addition to that, the books that they prepare are not books that teach law students what they need to know. And when they get out into practice,

the question is how does CEB market its books to the law students — the new graduates? Obviously, Bernie [Bernard] Witkin succeeded; [laughs] but how well, how successfully they're going to be able to carry on the Witkin books after his death is going to be interesting to see. I get the sense that they haven't kept up with the competition very well, which is of course one of the problems. But Pam thinks she can turn that around, and if she can that would be great. I wish her every success.

LABERGE: What about any of the other search committees? Is there something that stands out either in looking for a new chancellor or . . .

KAY: The search committee for the dean of the Haas School of Business was kind of a kick. I mean, coming up with [former U.S. Congressman] Tom Campbell — that man is amazing. I certainly hope he's able to put that school where it ought to be.

LABERGE: How much time do you spend on something like that?

KAY: Not a lot. The committees at that stage all have staff. I've never been on, I don't think, a search committee for the law school dean, even though up until this search we always had internal searches. Obviously, I chose not to take any part in the one that chose my successor. Obviously I wasn't on the committee that chose me. The one before that I was considered a rival candidate to Jesse Choper, and the one before that I was, I guess too junior — that was for Sandy Kadish. Those are huge jobs, those search committees for law school deans, because you have to do all the work. You have no staff essentially; you could use a secretary to help out a little bit. But this business about the search committee for the chancellor, again that was — you really just reviewed applications and nominations. I don't remember if we had a search firm for that. We did have a search firm for the Haas school, so they did a lot of the paperwork. There was also a search firm for the CEB director.

LABERGE: Okay.

KAY: In terms of the law school committees, as I said earlier, I did serve on the Admissions Committee for several years and also on the Faculty Appointments Committee. Those are the two major committees that I remember having served on internally.

LABERGE: And the Admissions was all before affirmative action?

KAY: No, it was with affirmative action. It was before the regents' resolution, because I was dean when that happened. No, we were very much using affirmative action when I was on the committee, and a good thing, too. We would never have achieved as much diversity in the class without it.

LABERGE: Yes. Well, do you think we've covered that enough?

KAY: Yes, I think so.

[The following material was added by Herma Hill Kay during the editing process:

In January 2004, I was appointed to the Committee to Advise the President on the selection of the chancellor of the Berkeley campus. I was named chairperson of the Faculty Subcommittee. The Faculty Subcommittee was composed of five faculty members — three from the Berkeley campus (Catherine Gallagher, of the English Department; William A. Lester, Jr., of the Department of Chemistry and LBL [Lawrence Berkeley Laboratory]; and myself); one from UC Davis, Alexandra Navrotsky of Chemical Engineering and Materials Science; and Dr. Lawrence Pitts of UCSF, who is the current chair of the Academic Council.

President Robert Dynes was the chair of the full committee, which had six regents and representatives from the staff, the students, the alumni, and the Foundation.

The full committee held an open meeting on January 28, 2004, and then the Faculty Subcommittee — which acted as a screening committee — met several times with the search firm executive, Mr. Albert Pimentel, of A.J. Kearney. The full committee interviewed the final candidates on May 21, and the new chancellor — President Robert Birgeneau of the University of Toronto — was announced on July 27, 2004.]

## INTERVIEW 6: AUGUST 4, 2003

LABERGE: This is August 4, 2003, and this is interview number six with Herma Hill Kay. You have some things to add from our last interview.

KAY: As we left each other, I walked down the hall and happened to notice that Sandy Kadish's door was open. Since he had been chair of that Senate Policy Committee that sponsored the women's equity study that you had a copy of, I just stopped in and said, "Do you remember exactly when I joined

that committee when you were chair?” He couldn’t quite remember the exact date, but he did say about the report — and this is what I wanted to tell you — he credits this with having been my idea because he remembers quite clearly that I said, “Why don’t you guys do something about women faculty?” Sandy said that this was the first time he had ever thought of discrimination against women as being an important civil right, like discrimination against minorities and religious minorities, too. So I thought that was a revealing statement that we ought to include.

LABERGE: Yes. This was 1970?

KAY: Yes, right.

LABERGE: Right after the Civil Rights Act.

KAY: Yes. The Civil Rights Act had passed in 1964, but it was not until 1972 that it was extended to university employees, so that may be what he was thinking of, because he was speaking in the context of discrimination against academic women.

LABERGE: That’s a great little addition, so if you have others — you’ll probably think of things through the year as you meet people. Today we were going to talk about the deanship. I was thinking maybe we could set it in context so that we talk about what the law school looked like when you became dean. What changes did you see from the time you came till the time you became dean — for instance, in relationships among the faculty, growth of the school? I know a couple of people said there used to be quite a social aspect in the law faculty that went by the wayside as either issues flared up because of affirmative action or because of the Free Speech Movement or civil rights — who knows what. Some of that ended.

KAY: I think it had nothing to do with substance. [laughs] And I think it wasn’t limited to Berkeley. In my interviews around the country about early women law professors, particularly the men will all say the same thing, that we used to entertain each other in our homes and that stopped because the younger faculty had working spouses. There were men with working wives, or women, obviously, with working husbands and nobody had time to entertain anymore at home. When we went out together we went to restaurants or we had school events and so on, and that kind of visiting-around aspect of the social life really sort of ended. That’s certainly true of Boalt.



When I joined the faculty in 1960, the faculty used to entertain exclusively in their homes and the dean's wife always had parties. Sandy Kadish and June Kadish did this even though she was working in her antique shop that she still runs, I guess. I think she's still there a few days a week. Jan Halbach had Christmas parties and beginning-of-school parties. We had this big barbecue picnic that some members of the faculty put together and that was always held — well, first it was held in a winery, it used to be a wine picnic and it was at the opening of school. Then it was moved when the wineries needed the customers less so they didn't give us free wine anymore. We now have this annual event up at Tilden Park and we're still holding that. It takes place just after classes start. We now also have an end-of-term party that faculty come to. [Robert H.] Bob Cole started this during the years he was my associate dean. At first I paid for that and then we decided that probably wasn't essential, and so the faculty were then billed for it. When I was dean, I had several open houses. I used to have one a year at my home in San Francisco, but the dinner parties at each other's houses, I think, is what fell away over the years. [Occasionally, I had catered parties in Berkeley. I had one each August for the law school staff at the Berkeley City Club — it was a luncheon on the Terrace.]

LABERGE: What's interesting to hear from your perspective too is that some of it has to do with women's roles changing.

KAY: I think it definitely does, and as I say, I've heard this from other people at other law schools as well.

LABERGE: Before you became dean you were candidate for dean one other time, so what do you remember about that?

KAY: It was really kind of — I thought it was kind of informal. I had been approached by some members of the faculty and some students who said that they thought there ought to be a choice between [Jesse] Choper and somebody else. Now, I didn't really think there was much chance that anybody but Choper was going to be dean, but I said, "Oh, all right. I'm willing to be considered." Clearly enough, Choper became dean and, as I said, there was that little comment that he made. In fact he may even have — no, I think it was in his — the first year he became dean, there's a little something in the Boalt *Transcript* from him about my deanship as well. But he

said one of the things he was proudest of was that he beat me out for the deanship.

LABERGE: Yes.

KAY: So, the reason I was trying to get a copy of this *Boalt Hall Transcript* (Summer 1992) that came out after I became dean, was that in there is the article that I had delivered first as a talk to the faculty about my aspirations for being dean. It's in there, and it says what I was hoping to accomplish and it points out some of the things that I thought that the school needed to work on over the next several years in order to maintain its excellence and to expand into new opportunities. I don't know whether you want to get into that right away or whether you want to talk more about context before we do that.

LABERGE: That was one of the questions that I had. As part of that, what did you find when you came in as dean? Including what kind of an orientation did you get, either in the law school or from the university, as to what a dean does?

KAY: Oh, there was utterly nothing of that sort at all.

LABERGE: Nothing — not even from the university, new department chairs/new dean things?

KAY: Oh, they have — let's see, did they have it when I came in? If they didn't have it when I came in, they certainly started doing it later. Carol Christ, I know, began it. I don't remember whether anybody had it before her or not, but there was like a weekend retreat for new department chairs. The dean of the law school is also the chair of the department of law, so I went to that. But that really was more to acquaint people to university processes and procedures.

Law school deans and medical school deans, I think, really are a different category than department chairs. There's a wider constituency that one is responsible for, in terms of holding that kind of position. But I think that everybody assumes that when you have been a legal academic, you have some idea of what the job is about. If you look back at the opening paragraph in that piece I just published on women law school deans, you'll see that it's my impression that across the country almost none of the new law school deans — deans who come from the law faculties — almost none

of them has any notion of what the day-to-day operation of the job is going to be like. The ones who have been associate deans probably have a better idea than the others, but I had never been an associate dean. Neither had Jesse, nor Sandy. John Dwyer had been my associate dean — he was my first associate dean. But other than that you are expected to understand what this is all about. So, no, I never had any orientation.



NEWLY APPOINTED DEAN HERMA  
HILL KAY, ON THE COVER OF THE  
*BOALT HALL TRANSCRIPT*,  
SUMMER 1992

LABERGE: Okay. And before you even had your aspirations, why does someone want to be dean?

KAY: That's a very good question. [laughs]

LABERGE: Because Karl Pister said that when he said yes to his deanship [of engineering], George Maslach got on the ground and genuflected to him, like, "Oh, thank you, thank you" for somebody taking this job.

KAY: [laughs] Again, I think that people in the law school world think that there is more control in the operation than there really is, and I think thirty years ago, certainly prewar, there was. I mean, you had deans like Erwin Griswold at Harvard who really — I mean, he *was* the institution. He repeats in his memoirs a wonderful story that he was fond of telling. He said that the Harvard Board of Overseers had offered him a five-year term as dean and he had turned it down. When they said, "Why?" he said, "If I have a five-year term I will be nothing except a messenger boy for the faculty." So they then offered him an unlimited term as dean, which he accepted. I think he was there for nearly twenty-five years.

Bill Prosser also had a long term. He was dean from 1948–1961 at Berkeley. You had a tradition of people who really *ran* the institution, and it wasn't really until two things happened — one, the faculty movement for shared governance and, second, the obligation to raise money became critical — that the dean really had the organizational control weakened in the face of those competing demands. The student demand for participation came later but it also was a powerful influence. So I think that law school deans are now getting to be more like department chairs than they were before. I think medical school deans by and large still have more of a kind of exalted position; at least, they're seen that way by faculty and medical schools.

LABERGE: Are you saying, then, one might want to become dean because it looks like you might have some control and can put forth an agenda and do it?

KAY: It looks like that — yes, that's right, exactly. Now, I think you need to understand that this is a shared enterprise. The school is a place — I said this in my remarks — a place that's made up of faculty, staff, students, alumni, and nobody can do anything alone. You have to have a vision; you have to enlist everybody in the community in working with you to achieve that vision. If you lose that cooperation, you may be able to face down one element of the mix if they're being unreasonable and you have support from the others, but if nobody is supporting you then you have to quit [laughs] because you have no further legitimacy.

LABERGE: What did you find when you came in, and what were your aspirations?

KAY: I found a really first-class public law school which I thought should be maintained and nurtured. The capacity to have a law school of this caliber in a public university is very rare, and given what's happening to the budget now it is going to be much harder to sustain than it ever has been before. We certainly had a wonderful faculty. We had the most diverse student body in the country. We had a proven record in attracting young faculty. We had innovative programs. The two things that I focused on most in that talk I gave were the need for — what I saw as the need for — a clinical program and, secondly, the need to build a new building. Although I didn't spend much time in the speech talking about that, it certainly occupied a lot of my waking moments after I took over the job.

LABERGE: How much did you realize about the fundraising?

KAY: I knew intellectually that it had to be done. I don't think that I had any idea of the scale that was going to be necessary and, of course, the scale became greater as time passed. The years of my deanship were critical ones in terms of what was happening to the state Legislature and to the state budget. As I think I said to you last time, I'm kind of amused that everybody is saying, "Oh, how terrible! Here it is August and we didn't have a budget until the governor signed it." We didn't have a budget in 1992 until the end of September. As those days wore on, and as I became aware that there was no such thing anywhere in the building as a set of financial account books saying what came in or what went out or how they'd match together, I realized that it was going to be utterly necessary to have as large a private endowment as you could raise, to protect the school against the Legislature's vicissitudes. So I set about trying to do that.

We continued to work on the endowment. We had already a fair amount of endowed chairs. Endowed chairs, of course, at a public university are nothing like the magnitude of endowed chairs at private universities. Because, in public universities — at least I think they're all this way; certainly California is — they don't pay the salary of the holder, they only pay for extra support, summer support, and so on. So you can have a chair — I think at that moment you could have chairs endowed with \$300,000, whereas in a private school it would be closer to three million in order to produce the income to support the holder, and then pay, in addition, for support and travel and research and secretarial assistance and all that. So I made efforts to raise the level of endowed chairs for us to \$500,000. And then we created, along with the campus, the distinguished professorship — which was a million dollars — of which we've got now several in the law school. So that was one aspect.

In addition to endowment, what we needed was money coming in to pay the expenses. The university has a formula arrangement of how much you get for general support per faculty member, but it was nowhere close enough to pay for the operation — certainly not to pay for the secretarial support, probably not even enough to pay for the paper and pencils. It was really, really meager. So we worked very hard on the general fund and that began to respond. And we made a great effort to try and attract younger donors, new donors, people who had not realized that the university was



DEAN HERMA HILL KAY,  
WITH HARDHAT IN HAND, ON  
THE COVER OF THE *BOALT HALL*  
*TRANSCRIPT*, FALL 1995

not being supported by the Legislature and didn't understand what the level of need was. All of that took a great deal of time. The development staff expanded accordingly and I had some very good people there; we still do. The woman that I hired as development director is still here.

LABERGE: Is this Louise Epstein?

KAY: This is Louise, yes. She's now the assistant dean for development. That was just a major, major effort to get that redone. And then the other thing that I hadn't really anticipated need-

ing to do was this whole business of getting a handle on the financial operations of the school. Sue Ann Schiff, who was my assistant dean for budget and institutional planning, worked with a group of people in the organization just to try and identify what the sources of money were, and how you could track them, and how you knew when they were here, and how you determined what they were spent for, and what kind of control the dean could assert over spending. It took about three or four years before we had anything remotely approaching something that you could show the faculty and the alumni and say this is what the overall operation looks like financially.

LABERGE: How did you get a handle on it? What did you do?

KAY: We just went around and tried to collect information from the various units. The school is so dispersed. The library was a realm unto itself, in

part because of the Robbins Collection, which funded the Canon and Civil Law Collection, and also — to the extent possible — funded the general library operation to the extent that it housed the Robbins Collection and they catalogued it, and so on. Nobody knew what that was, really. Also, nobody quite knew how the various organized research units, of which we had two, were really run. The Jurisprudence and Social Policy Program [JSP] is yet another separate program.

LABERGE: What are the other organized research units?

KAY: The organized research units are the Earl Warren Legal Institute and the Center for Law and Society which is housed in the JSP. We now have a great many research projects that are called “centers” that are not formal organized research units. The organized research units report to the Graduate Division. The projects report to the dean, and are just called centers. [laughs]

LABERGE: You brought in Louise. Did you also bring in Sue Ann?

KAY: No, Sue Ann was already here. Sue Ann and Leslie Oster, both graduates of the school, had been hired when Jesse was dean and they both stayed. Sue Ann left just about a couple years before I left, Leslie left earlier and that’s when we hired Viki Ortiz to become dean of students, who’s still here and is doing a fantastic job. She’s also a lawyer.

LABERGE: Tell me a little bit more about the staff. The staff is huge. You have a dean of students, you have a development director . . .

KAY: Actually, we have fewer assistant deans than a lot of other major law schools. Harvard has a zillion assistant deans. We had, let’s see — I believe I had two associate deans and three assistant deans. The two associate deans were both faculty, and they are what are called “academic deans” at other places. They are — one for the professional JD law program, the other for the JSP program, and those were essentially half-time jobs, by which I meant you got teaching release time for half of your teaching load to do those jobs. My policy was that I didn’t want anybody to serve in those positions more than two years because, first, I wanted to rotate it and, secondly, I didn’t want to burden anybody unduly. For the first couple of years that worked fine. John Dwyer stayed for two years, then Steve Bundy took over. His period was interrupted by a visit to Stanford and then when he



came back he really took over as the point person for the building, which was then in full swing. So then Eric Rakowski came in and spent only a year. Jim Crawford spent only a year, and then Bob Cole spent a year. Then Eleanor Swift spent two years, so it sort of came and went like that.

Then the assistant deans were the assistant dean for students, which was Leslie Oster; the assistant dean for budget and institutional planning, which was Sue Ann; and the assistant dean for publicity and public relations, which was Lujana Treadwell.

LABERGE: For admissions? Or isn't that an assistant dean?

KAY: No, that was a director's position. And the development director was also a director's position, and the director of the law library was a member of the faculty. Let me just take a look at this list over here. John Dwyer made the development director's position an assistant dean position.

LABERGE: Okay.

KAY: All three of my assistant deans were graduates of Boalt and all were women. I had worked with Lujana when she was a student. She'd taken several classes from me, and then, when I was president of the Association of American Law Schools, Lujana was the executive director for the National Association of Law Placement, a position that she held for some years. When I became dean she was about ready to give up the NALP job, and I asked her to come back as my assistant dean for publicity and public relations and she agreed to do that. She left shortly before I did. I'm not sure that that position is still an assistant dean position. Let's see — [looking at notes] — this is just the telephone book that I'm looking at, this is not an organizational chart, but I don't believe that that position is any longer an assistant dean position. No, it isn't — they have a director now in that position. So they still have three assistant deans but one of them is now in charge of alumni and development.

LABERGE: As far as directors, you had an admissions director . . .

KAY: There was a director of admissions, there was a director of development, a director of career placement. I think those were the only three.

LABERGE: And for the most part, you kept three?

KAY: Sue Ann was there and Leslie was there, and I brought in Lujana. My two associate deans, I named, but the positions had been there.



LABERGE: Okay. How much did you look for women in particular?

KAY: All the assistant deans are women. I think I asked practically every woman faculty member in the building to be my associate dean at one time or another and until Eleanor Swift accepted they all turned me down. [laughs] I don't think they had any problem, but at any given moment everybody always has something more important to do than being associate dean. It's very hard to get people to do that job.

LABERGE: Shall we talk about, then, your aspirations and then what you accomplished? For instance, the clinical program. How did you get that going?

KAY: I got Eleanor Swift, who had been very interested in having a clinical program to study the possibilities. I should say as background, by the time I became dean, every other major law school in the country had a clinical program that was more organized and prominent as part of the school's curriculum than we did. I think probably Harvard may have been the last holdout. There had been a kind of — let's see, I have to look at this little footnote here to be accurate about this because I did check this out. The clinical legal education movement, I think, grew out of the War on Poverty. That's my recollection of this.

LABERGE: Which was [President Lyndon B.] Johnson's.

KAY: "The beginning of clinical legal education is commonly dated to 1967. With the creation of the Council on Legal Education for Professional Responsibility, otherwise known as CLEPR." Now, CLEPR was a Ford Foundation-funded clinical education program. So schools were able to apply to Ford for help to do that. UCLA was the first of the UC law schools, and one of the first nationally, to grant clinical faculty full faculty status. This was always the bone of contention — who was going to teach these programs? Were they going to be regular members of the faculty? If so, they wouldn't have had much practice experience, in the normal situation. Would they be practitioners? If so, were they going to be full time or part time? This was all the kind of argument that was carried on here.

The programs were really begun in the late sixties and early seventies, and while this was all going on we didn't have an in-house clinical program. We had programs where people did externships. Our students

actually founded what was called the Berkeley Community Law Clinic; it's now called the East Bay Community Law Clinic. That was an off-site location in east Oakland, and they had raised the money to hire their own full-time director. We had never looked for in-house hands-on live client clinical education. Northwestern was one of the schools that really pioneered it and really did the most. They were one of the leading examples of doing that.

I talked to a few people and was convinced that live client clinical education is what you really wanted, because it was the contact between the student and a client whose case the student was responsible for that, I thought, was going to create the spark of interest in professionalism and also make the theoretical learning that was going on in the classroom come home to the student, so the student would know what it meant to fulfill the role of the lawyer. While you could do some of that with simulation and skills training, my view was that it was not the same thing. It didn't have the same emotional impact. Eleanor Swift shared that view; I gave her, again, half-release teaching time. She spent a couple of years going around visiting other law schools talking to people who ran these programs, and putting together a report that was circulated to the faculty that said this is what other schools are doing and this is what we think Boalt ought to consider doing.

Now, the other part of this is that as all this was happening, the clinicians and their allies were also importuning the ABA Section on Legal Education, of which I was a member — which accredits law schools — to require that the law schools offer at least some live client experience and that faculty members be directly responsible for the education that students were getting if they were being given external clinics. This effort had begun before I became dean, and Berkeley was on probation with the ABA for years and years because we did not have a regular member of the faculty who was in charge of our clinical program. It was not until the faculty finally adopted the clinical program that I proposed, that we were able to get the law school removed from that probation status.

There was also pressure from the students. There was pressure from the ABA Section on Legal Education, the organization that accredits law schools, which was looking over our shoulder. Besides, I thought it was the right thing to do, and there was a lot of support from the alumni. We

got some money from some of the law firms who wanted to fulfill their pro bono responsibilities by investing in our clinical program and working with our students. That turned out to be a great idea; it worked quite well. Then we finally managed to hire a regular member of the faculty, who was brought here to implement and to develop from scratch an in-house live client clinical program. This was Charles Weisselberg, who had been running the program at USC, and had worked there with Denny Curtis, who was one of the people that I talked to when I was first thinking about this. Denny and his wife, Professor Judith Resnik, went off to Yale and Chuck was about to replace Denny as the director when we lured him to Berkeley. I think he was really attracted by the fact that here was one of the nation's best law schools, a public law school and a place where he could really start with a blank slate, and create this program. It was just wonderful that we were able to get him to come, because he's just been absolutely fabulous and has put this program together in ways that now everybody thinks is just terrific.

LABERGE: What kind of opposition did you have to overcome?

KAY: Mostly tradition. Before I became dean, the clinical program was not a high priority. It was not seen as sufficiently intellectual for a major law school to do. The time that a student's going to law school is limited to three years. Most of the faculty thought that this shouldn't be one of the school's priorities. They thought the students could pick up skills training after graduation. Well, our students had to do that because they didn't get it anywhere else; but that, to my mind, was not the ideal way to train professionals.

LABERGE: Is that how you answered that objection from them or anybody else?

KAY: Yes. It seemed to me that our classroom courses would benefit from the experience students had in the clinics. For example, we have several clinics that are part of this clinical program. One of them is an Immigration Clinic and the related asylum practice that they have undertaken. These students really go around the world looking at cases and working with people in other countries. The Human Rights Clinic, which has taken over that part of the practice now, has had some smashing victories in terms of achieving cutting-edge decisions. The Death Penalty Clinic is

something that's not only very important, but also really teaches students how to deal with the issues that are literally life and death issues.

The other kinds of projects that we've begun are the Intellectual Property Clinic, which was funded by our faculty member Pam Samuelson and her husband. It deals with issues of access to information policy. Mark Lemley, a faculty member, wrote an amicus brief in the Intel case that the California Supreme Court just decided. In fact, that opinion was authored by our graduate Justice [Kathryn] Werdegar. It has a fascinating section dealing with the academic debate over whether you should or shouldn't control what was going on in that case. She cites Mark Lemley from our school, she cites a professor from Stanford, she disagrees with Richard Epstein of Chicago. [laughs] So I disagree with the notion that this isn't intellectual. Of course, somebody on the other side could say, "Well, yeah, but the fact that all of those people were associated with clinics isn't what made it vitally important intellectually. It was the debate among these three professors, which they could have, and in fact did, carry out in law reviews." Well, yes. That's true, but I think the debate is also informed by the involvement with the cases these faculty have as they are being developed. The students allowed to participate in that get a much more hands-on and inspiring sense of what the law is and what it can accomplish.

LABERGE: What about outside the legal community, for instance on campus, how is that looked at intellectually as far as scholarship and tenure cases, and things like that?

KAY: We brought Chuck Weisselberg here as a tenured member of the faculty. He had tenure at USC. He is so far the only member of that program who has regular tenure. In this footnote in the article there that I was referring to, I talk about the other appointment options. The ABA now has this status for clinicians that can be satisfied by saying they're given positions that are similar to tenure but they don't have to actually be tenure. We have created a clinical professorship track here at Berkeley that's been approved by the campus administration and the people who have been brought in to act as directors of these new clinics reporting to Weisselberg have that clinical faculty status. That's been done at several of the other law schools. UCLA, as I started to read from that footnote, has now given all of its clinicians full faculty status, so they have to satisfy both the writing and the

teaching and service aspects. The other UC schools have variations on that theme.

LABERGE: Was there resistance in the rest of the campus? For instance, last week we were talking about the Budget Committee and Privilege and Tenure Committee — is there resistance to that because it's a professional school or because that's not looked on as scholarship by them?

KAY: In a way, I guess, we haven't seen the test of that yet because we haven't proposed anybody as a regular member of the faculty after Weisselberg, and we've used this clinical faculty status. I don't think there's been any move to extend that more generally. But the people who are appointed as clinical faculty members are required to write. They're not required to write as much or as frequently as the regular members of the faculty are, but they're reviewed internally and recommendations are passed on to the Budget Committee and they're reviewed there, but they're reviewed in a different context.

LABERGE: Going back to the fundraising, how did you learn how to fundraise, and what did you do? Because you hadn't done that before.

KAY: I don't think I learned. I think I just did it. [laughs]

LABERGE: For instance, what would have been one of the first functions you went to or who did you go speak to?

KAY: When I started working on this clinical program, I went to see Bernie Witkin. He had for years tried to persuade the school to have what he considered a clinical program. He was not interested in a live client program. He was interested in more skills training kinds of things, but I took my then director of development — this is before Louise, this was Davida Hartman — Davida and I had an afternoon meeting with Bernie and Alba and I told them what I wanted to do. By then he had seen my mission statement in the *Transcript*, and I said, "I'd like your help." He said, "Well, what do you want?" And I said, "A couple of hundred thousand dollars." He said, "Fine." [laughs] That was my first attempt at fundraising.

LABERGE: Quite a success! [laughs]

KAY: They weren't *all* that easy. [laughs] But I really spent a lot of time, as practically everybody does, going around the country and having luncheons and receptions and dinners with Boalt's alums in various parts of

the country. The message at first — because I was then trying to get the annual fund revived — was “consistent giving.” I remember this wonderful conversation that I had with Kathleen Tuttle from southern California, at her fifteenth class reunion in 1993. I gave a speech in which I said, “You understand that our graduates think that the law school is supported by the Legislature. Well, I have to tell you that’s not quite true — we really need your help. So I’m offering this course on remedial legal writing and here’s how it goes: you take out your checkbook and on the top line you write ‘The Boalt Hall Fund’ and in the middle line you write ‘one hundred dollars,’ and you sign your name. And you send me your check and then you do it again and again and again.” [laughs] So after this was all over, Kathleen came up to me and said, “You really want a hundred dollars, Herma?” I said, “Yes, I really want a hundred dollars.” She not only gave me a hundred dollars herself, she called a dozen or so of her classmates, all of whom wrote checks for a hundred dollars and Kathleen presented it to me in a little gift box. [laughs] It was just delightful. It was just starting at that kind of level to get people to think in their minds, “Yes!” I still have the box.

The context is so important. I made that speech also to a reunion of the class of, I don’t know, ’34 or ’36 — one of the older classes — and I was sitting next to this very nice man who loved the school, went to all the events, had never given us a dime. I gave him this pitch. He looks at me and says, “You really want a hundred dollars?” I said, “Sure.” So he sent me a check for a hundred dollars. I thought, jeepers maybe I should . . . [laughs]

LABERGE: Maybe you should have asked him for more.

KAY: I should have asked him for more, yes. It was really almost a personal thing because, at one point, we started sending out holiday cards. I didn’t like the idea of sending Christmas cards, because not everybody celebrates Christmas, so we started sending Thanksgiving cards. I had to attend a couple of professional organization meetings in New York just around the time when you would want to get these things in the mail. So I used to get on the nonstop flight carrying a huge stack of cards, which I would sign on the airplane since I didn’t eat breakfast or lunch. [laughs] I’d just sign these cards, and the stewardesses thought this was the funniest thing. They thought they were Christmas cards and I was just being very disciplined

and organized and getting them done early. But, oh no, they were Thanksgiving cards. Then when I got to New York, I would ship them back here by overnight mail and they would put them in the envelopes and get them out.

One of the meetings that I went to was a meeting of the Foundation Press editorial board, of which Bob Clark, the dean at Harvard, was also a member. Bob saw me carrying these big bags, because I had another batch waiting in New York to sign on the way back. He said, "Herma, what are you carrying?" I said, "Bob, let me ask you a question. How many cards do you send out to your alums that you write personal notes on and sign your name to?" "Oh, Herma," he said, "maybe half a dozen or so." I said, "At what level of donors do you do that?" "Oh," he said, "usually people who give about five million dollars." I thought, there's a different scale [laughs] to his operation. But that's what I started doing.

Then, of course, as Louise began to get involved in the major fundraising, she worked with an advisory committee at which we ranked people as to their ability to give and we made one-on-one calls and tried to get larger contributions. Jesse was also enormously helpful because he was extremely popular with the alums. He had raised fourteen million for the building; it turned out, of course, that we needed more money for the building and so he went back to some of his major donors and got more money from them for the building. So, you know, between us we sort of got it done.

LABERGE: How much of your time would you say you spent on the fundraising aspect?

KAY: Oh, easily a third.

LABERGE: A third, wow. And you are very successful at it.

KAY: I raised forty million dollars. That's the rough number that Louise added up. We're going to need to raise more than that. Harvard's campaign — while I was raising forty million over eight years, Harvard raised, I think, \$1.25 billion in five years, the largest amount ever raised by a law school, and they are now starting another campaign. I saw the notice in the paper that Harvard's first woman dean is going to take office in October and she's going to be heading a new fundraiser drive.

LABERGE: To get the clinical program off the ground too, you needed to get enough funding for that?

KAY: I did, yes, because one of the promises I made to the faculty is that this would not be paid for out of the operating budget of the school. And we were able to do that.

LABERGE: Who, besides Bernie Witkin?

KAY: The International Human Rights Law Clinic opened in 1998. It was funded by the Sandler Family Foundation. They had funded the Human Rights Center on campus as well. The Death Penalty Clinic was funded in large part by Nick McKeown and Peter Davies. They gave a little over one million in December 2000–January 2001. And, as I said, Pam Samuelson and her husband funded the Law, Technology and Public Policy Clinic. People have been given opportunities as to what they wanted to give their money for. You see all these signs around the building with the names of people who made donations to the building fund — and people had also made donations for the clinical program and for endowed chairs and things like that. [Start-up funding for the Center for Clinical Education came from the Koret Foundation and the law firm of Brobeck, Phleger and Harrison.]

LABERGE: Do you have any more anecdotes, like your meeting the Harvard dean, or about some unusual donor?

KAY: One of the things that Louise wanted to do was to create the Herma Hill Kay distinguished professorship, which would take one million dollars. We had decided that we ought to ask Elizabeth Cabraser to make the lead gift for that. Elizabeth is a graduate of ours who's one of the country's leading class action plaintiffs lawyers. She represented plaintiffs in the breast implant cases and in the tobacco cases, and has done remarkably well at it. Louise said, "Herma, I think *you* have to ask her for this money." So I said, "Fine!" The people who were advising us on this said, "Are you hesitant to do that?" I said, "Well, it's not for me. I'm not going to hold the Herma Hill Kay chair." [laughs] Elizabeth came to the meeting because she was on this advisory group, and I asked her to stay afterwards and she did. She said, "What do you want to see me about?" I said, "I want a million dollars." And she said, "Okay. What for?" I nearly fell out of my chair. [laughs]

LABERGE: Oh, my!



KAY: So I told her — after I picked myself up — what I wanted it for. She said she'd be delighted. And she said, "How soon would you like the check?"

LABERGE: Isn't that amazing? I have heard from other people that sometimes people just need to be asked.

KAY: Yes, I think that's right. Then what Louise decided to do was to use her gift as a matching gift to try and get yet more money — to see if other people would donate to this Herma Hill Kay Distinguished Professorship. If so, that would free up part of Elizabeth's million dollars to be used for other things that I was interested in. But I think that people, once they knew that she had actually committed that kind of money, were willing to do other things. But the matching part, I'm not sure even now how much they actually got on the matching part. We did get the chair. Kathryn Abrams now holds the Herma Hill Kay [Distinguished Professor of Law] chair. She works in feminist jurisprudence and is just a great addition to this faculty.

LABERGE: And you got her from the outside?

KAY: We did, yes. We got her from Cornell Law School. Elizabeth, by the way, is a partner in Lief Cabraser Heimann and Bernstein in San Francisco.

LABERGE: One of the things I was reading about being a dean is that you both have your internal group you are working with and then you've got your outside group. What about the faculty? How did you go about leading the faculty, and what does that entail as dean?

KAY: I think it entails trying to keep the lines of communication open to all segments of the faculty. We had a salary problem that I think a lot of other departments on this campus have had — and partly, I think, it was due to Chancellor Tien's view that he did not want to lose Berkeley's faculty to raiding attempts by other schools. It became clear that the chancellor would respond to external offers by trying to match those offers. Now, this creates an enormous morale problem at a place like Berkeley since your best faculty can generate offers by lifting their eyebrows and looking interested, and the people who are not your best faculty can't do that but they may still be working quite productively and are great assets to the school. Some people who fall into the first category don't really want to put their

friends at other places to the effort of trying to generate an offer which they are going to turn down once it's matched. So that created problems.

The other problem that was created was the lack of competitive salaries to be used to attract the best entry-level faculty. This is particularly true when you are competing with schools that have a great deal of money and are trying to build their reputations very quickly, by which I mean NYU. We had real problems in trying to work with the existing salary scale, which had not been increased for some years. So one of my major efforts was to increase the faculty salary scale — which I saw as a solution to both of those problems. We finally did manage to do that, although it did not really become effective until the year I stepped down, but it did become effective in 2000. It was implemented by John Dwyer when he came in. But it was a major, major victory in trying to help both raise the morale of the faculty, and, secondly, to enable us to be successful in our competition, to attract new faculty from other schools.

LABERGE: You needed money in order to do that. Was it from the chancellor or was it from some of this fundraising?

KAY: No. The Legislature provides the salary money. We had been handicapped before, and this was a deal that the chancellor tried offering — I shouldn't say the chancellor, I think it was the vice chancellor who was in charge of working out these programs, I'm sure with the chancellor's approval. The deal was, if we get the salary scale raised, the people who were on scale will be paid by the Legislature, but the people who were off scale and the people who were above scale ought to be paid by private funds. That was a deal that we had trouble doing because we had enough difficulty getting private money to pay for our summer stipends, which came entirely from private money, without also trying to pay the increased salary — particularly because we've got a large number of faculty at above scale rates. Our salary scale is higher than any other salary scale on the campus since we don't have a medical school. I want to tell you there were nights when I prayed that we had a medical school. [laughs]

LABERGE: So that you wouldn't be the bad guys?

KAY: You're right. But that was not given to us. So we had to try and raise private money to do this. The chairs helped and the chairs could — to the extent they produced sufficient income, which helped if they were bigger in

their endowments — produce funds to pay for the above scale part of the salary. But that, I think, has still not been adequately resolved, and it probably is going to be even worse now with the budgetary cuts. I don't know where the cuts are going to be, but it would be my guess that the cuts are in areas where the campus hopes that the various schools are going to be able to get private funding.

One of the things that we were able to do, again with the support of the campus and the university-wide system generally, was to impose the professional degree fee, which came in while I was dean. It was first imposed on law students, medical students, and engineering students and then it was spread to some of the other professional schools as well. It was designed initially to be a sum of money that would come exclusively to the school. It would not go to the central administration and be re-delegated. It was to come entirely to us, and it was because of that element that we supported it. The students at first were not keen on it but we had the good sense not to make it effective until after they'd all graduated. [laughs] It really saved our lives in the early years when it became effective. We set aside, as the university requires of all costs charged to students, a third for scholarships. At the law school we initially used our one third for people who wanted to go into public interest law to support their plans.

But then I learned — I guess, this fall actually, when Bob Berring became interim dean and was having some informal consultations with the former deans who were still in the building, and he was talking about this. He said something, just in the course of another question, that led me to wonder what was happening with the professional degree fee. It turns out that the university has now seized the professional degree fee and it's now going to be allocated to them, not to us. It's not any longer going to come — I mean, the original increment of the fee which was imposed when I was dean still comes to the schools but any increment above that, including the one that was just imposed, is not going to come directly to us anymore. So the whole contractual basis on which that fund was imposed has now been destroyed by this assertion of central authority.

LABERGE: Yes. [laughs]

KAY: So the competitive edge that we at one point had over our private school local competition — like Stanford primarily but also USC to some

extent — where we had lower fees for in-state residents, is still true but it's getting closer. The margin's getting closer, and for nonresidents there's almost no margin at all by the time they pay a nonresident fee — which we don't get, the university gets — and then they pay this professional degree fee over and above that. It's getting harder and harder for deans of Boalt Hall to say to their young graduates, "Ask the Stanford person sitting next to you at your fancy law firm how much educational loans he or she is paying off."

LABERGE: What about university-wide? Did you have some agreement with, for instance, UCLA or Davis? Or was there some law school deans' group where you would meet with the university administration and all have the same plan as far as the salary scale, or something like that?

KAY: This was uniform throughout. Some of us would have been happy not to have it uniform throughout but it was uniform throughout.

LABERGE: And did it have to be?

KAY: Yes, the president's office really insists on that. They are unwilling to let Berkeley and UCLA and UCSF do things differently than at the other campuses. All the law deans were supportive of this even though — what happened was that you were authorized to charge up to a maximum. You didn't have to charge that much if you didn't want to, or you could give more of it back in scholarships than you otherwise would, but you could charge to the maximum. You were authorized to. UCLA and we were as one on this, and Hastings was not really within the UC system anyway, so they could do what they liked. The dean at Davis was a graduate of ours and was very supportive of what we were trying to do.

LABERGE: What other ways did you use to keep communications open?

KAY: In terms of committee service, I met on a regular basis with the chairs of the standing committees to talk to them about policy issues that were coming up before the school. I met once a month with the staff supervisors and heard what problems they were having and talked to them about issues that were coming down the road. I met every Monday morning with my own staff in the dean's office — the associate deans, the assistant deans, the directors — to map out what was going to happen during that week. I had scheduled meetings with the president of the student body, and I had

appointments with people who wanted to see me. Of course, my interaction with alumni was in the hands of the alumni and development director who planned all the travel schedules and events, and things like that.

LABERGE: Planned it for you, and would give you a schedule?

KAY: Right, yes. They consulted with me first. [laughs] But they were the ones who did it.

LABERGE: Right. And was any of this an innovation — for instance, the meeting with the student body president or meetings with students?

KAY: Yes, I was the first dean who did all that.

LABERGE: It hadn't happened before.

KAY: It did not happen before. And I don't think the meetings with the staff have happened before or since. Maybe Bob Berring has started doing it again, but I understand that John Dwyer discontinued the practice immediately.

LABERGE: I had a chance to see the review of the law school that came just when you were a new dean in 1993, both from the outside group — and one of the things they talked about was that you came in and immediately there was a different attitude among the students, that morale went up. You must have realized this as you walked in, that something needed to be done.

KAY: The students had literally hounded Jesse out of office by pounding on him about the diversity themes, and they saw me as being supportive of their goals, which I was. I took care to try and meet with them on a regular basis and to be as responsive as I could be to their requests, many of which I thought were legitimate. And also, as I think I mentioned to you last time, I appointed students to virtually all the faculty committees, which also gave them a sense of participation in the process.

LABERGE: And what about the faculty committees, how else did people get involved in the committees? Did you appoint all of them or did people volunteer?

KAY: Some of them volunteered and, obviously, before I made anybody a chair of a committee I went around to see that that was okay with them. And I did this with my two associate deans. We all sat down, sometime usually in late July, and went over the list of committees and who was going to be in the building and not on leave or something. And we went down and put together

a draft list, and then we talked to people and got their approval, and then had that circulated at the beginning of the school year so everybody knew. Now, the students took a while longer to get all that done, but usually by the time they got back in late August and they got themselves organized — they used to post a list of committees and they would interview students who wanted to volunteer for the committees. Then they would propose a list of names to us. Sometimes this didn't happen until practically Thanksgiving and I kept saying to them, "Look, you guys! [laughs] The faculty is not going to wait for you to get these committees appointed." So they finally began to hold some of these interviews in the spring. Then the first-year students who wanted to serve on committees would have a special opportunity to add themselves in, but at least they could get a little bit of a head start on it.

LABERGE: What are some of the most important or powerful committees, or influential?

KAY: The Faculty Appointments Committee, on which the students do not sit.

LABERGE: That's right, and you were on that before.

KAY: Yes. And the Curriculum Committee is important. The students do have a voice in that. They were not on salary committees. There aren't really any salary committees any longer, anyway. But I mean that was not a question on which you needed much advice. On questions of promotion and advancement, students were involved only to the extent that the teaching evaluations were a part of the process and, of course, those came from students. Sometimes students would write letters if they thought there was a problem. We had a couple of them. The major tenure fights we had were before I became dean so we didn't have that kind of a polarizing situation.

LABERGE: Should we launch into the affirmative action issues? I think that's a whole other issue.

KAY: Yes, let's save that till next week.

LABERGE: Some of the things you've already talked about — issues that the review brought up. One was clinical education and one was keeping bright young faculty, both attracting them and . . .

KAY: Yes, right, retaining them.

LABERGE: What are other ways you did that? Were you one of the ones who went out and talked to people or met with young faculty to lure them here, or how does that happen?

KAY: No. The Faculty Appointments Committee does that. Once they come here for interviews, obviously, and once the faculty approves an offer, then the dean makes the contact and carries on all the negotiations as to salary and teaching loads — not teaching loads, everybody has the same teaching load — but subject matter assignments, and so on. I did all that with both new faculty and senior faculty that we were trying to attract from other law schools. Of course, a senior person already has well-established fields. It's the younger people who are more pliable in terms of that aspect. The dean does all that.

The other thing — there's just an oblique reference to it, that you'll see in my *Transcript* article — is the relations between the law school and the central campus. The law school had not been as punctual as it should have been in terms of complying with the deadlines the campus set, both for submitting personnel actions and also for participating in the planning process. I remember that, shortly after the announcement that I had become dean had been made, Provost [Jud] King, who was then the provost of professional schools and colleges, invited me to lunch. We were talking about various things and towards the end of the lunch he said to me, "You know, you might want to check and see — I don't believe I've seen the law school's five-year academic plan." "Oh," I said, never having heard of a five-year academic plan, "when is it due?" He looked at me and said, "Aujourd'hui."

LABERGE: [laughs]

KAY: I said, "Oh, all right." [laughs] "Well, I'll get back to you on that." So I came back over to Boalt and made some inquiries, and found out that it had not been done. So I telephoned Provost King's office and I said, "Well yes, you're right, it has not been prepared. Can I have an extension?" "Of course," he said, "what would you like?" I said, "A couple of weeks." He said, "Fine." So I did it myself.

LABERGE: In a couple of weeks?

KAY: In a couple of weeks, yes. After that it became clear to me that the law school had some fence-mending to do with the campus. After all, I had chaired the Budget Committee and I knew the importance of deadlines. So I saw to it that the memos were done on time. There was a wonderful compliment that I got from Vice Chancellor John Heilbrun. After I had been dean for a couple of years he saw me at some gathering at the chancellor's office and he said, "I was wondering whether you would like to be the dean of the School of Architecture." I said, "What do you mean? You're joking surely." He said, "Well, after you became dean of the law school the red lights went out on my board of trouble spots on the campus, and the red lights are still flashing in architecture. I thought maybe you might like to take that on." [laughs] Of course he was joking, but it was quite a nice compliment.

LABERGE: Yes, that you got things done. On that note, there was something about the law school didn't have a mission statement. It needed to have one, so what did you do about that?

KAY: That came from the ABA accreditation process. The AALS and the ABA both put great store by mission statements, which are supposed to detail your school's distinctive aspirations. The mission statement of the Harvard law school is to be the best law school in any English-speaking country. In my view, if that's good enough for Harvard, that's good enough for us. [laughs] I think we finally managed to do something to satisfy the site evaluation team. To this day, if we have a mission statement, I couldn't tell you where it is. [laughs] But that's not on the same level as complying with the campus administration's and the Budget Committee's deadlines, in my view.

LABERGE: Anything else about relationships with the central campus or how they view the law school?

KAY: Going back to that lunch with Provost King, I learned that he rarely met with his deans. He had one formal meeting with all the deans in his office in the fall and another formal meeting in the spring, and other than that he had nothing, so I started inviting him to lunch once a month.

LABERGE: So you do have lunch sometimes.

KAY: I didn't eat lunch.

LABERGE: You went to lunch.





DEAN HERMA HILL KAY  
AT A BOALT HALL GRADUATION, 1990S

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KAY: I went to lunch. In fact, that became a great joke between us. After the first time — because I'd invited him I paid; that was fine. The next time he said, "Okay, now it's my turn." "Fine." So then he noticed that I hadn't eaten anything — I think he hadn't noticed it the first time. Then he said, "You know, this isn't quite reciprocal!" And I said, "Well, we can split it [laughs] — you pay yours, I'll pay mine." "All right," he said, so we did that.

I grew quite fond of him as an administrator and he and I, I thought, worked quite well together. After he went to the Office of the President and when Carol Christ came in, she started having twice-a-month deans' meetings in the afternoon from one-thirty to three-thirty on Tuesdays. She had become both the provost and the vice chancellor so there was no longer two provosts. Tien did away with the dual provost system. There were a lot of people around the table who didn't know each other, and she had to work really hard to try and get us to look at things from a campus perspective. I think she was extraordinarily effective, and I think she's just

a very talented administrator. She and I, I think, understood each other. I felt able to work very effectively with her, and she was extremely helpful to the law school on many, many issues. Not that Jud was unhelpful — on the contrary, he was also extremely helpful, I just was able to relate to Carol more easily. I never had to take her to lunch. [laughs]

LABERGE: [laughs] Before that, before your time, and just sort of in this transition time between the sixties and the nineties, wasn't there some clash, a view of the law school as being arrogant? Arrogant is too strong of a word . . .

KAY: Oh, no no no.

LABERGE: I assume that's what you did, is to dispel that a little.

KAY: I think that my lengthy experience in working with campus committees helped enormously. I had, after all, chaired the Budget Committee and been the chair of the Academic Senate, and people knew me around the campus.

LABERGE: So they weren't known quantities to people?

KAY: They weren't — that's right. And I'd been on — well, you saw that list, I'd been on fifty zillion other committees. So I think they viewed me as not being one of those awful arrogant law school people, [laughs] which helped — it did help. Jud King came to that ballgame [where I threw out the first pitch at the Oakland A's game.] It was "Boalt Night at the A's," and it was shortly after I became dean. That's the picture of the pitch there on my wall.

LABERGE: Oh, he did?

KAY: He did — I invited him to come. He and his wife Jean both came and were sitting in the stands with my husband and all the Boalt alums and students.

LABERGE: Oh, that is great. Well, shall we call that a day?

KAY: Sounds good.

LABERGE: And do affirmative action next time, along with — if we get past that. We might not get past that.

KAY: Okay.

## INTERVIEW 7: AUGUST 7, 2003

LABERGE: Today is August 7, 2003, and this is interview number seven with Herma Hill Kay. We're going to continue the deanship but before we switch subjects, do you have other reflections?

KAY: No, I don't think so.

LABERGE: Okay, all right. We talked about doing affirmative action today, and I thought maybe we could start earlier than your deanship with the first time maybe you ever even heard that term and what your involvement was, from the sixties on.

KAY: All right. Of course, since I was working on this casebook on sex discrimination, I had occasion to look at the origins of the term in the executive orders where it dealt with race discrimination, and then where it was expanded to discrimination based on sex in the [President Lyndon B.] Johnson administration. So I had some sense about the requirements and the attacks on it. At the beginning, it applied almost exclusively to government contractors since it was done by executive order of the president. It was not until much later, after Title VII had been enacted in 1964, that there was a suggestion that you could have voluntary affirmative action that would be consistent with Title VII. That didn't get definitely settled until *United Steelworkers of America, AFL-CIO-CLC v. Weber* [443 U.S. 193 (1979)], where the court did say that voluntary affirmative action would be permissible — it would not be a violation of Title VII.

We really started doing outreach in admissions at that period right after Martin Luther King, Jr., was assassinated. I think I said some of that in that article that you have a copy of on the challenge to affirmative action in legal education.<sup>13</sup> We were acting at about the same time as a lot of law schools of our standing were, because almost none of us had very significant percentages of minority students and we all decided that we needed to have a legal profession that was more representative of the country at the large. It wasn't until after Justice Powell decided the *Bakke*<sup>14</sup> case that we realized we couldn't do it for that reason.

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<sup>13</sup> Herma Hill Kay, "The Challenge to Diversity in Legal Education," 34 *Indiana Law Review*. 59 (2000).

<sup>14</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

LABERGE: Even before the *Bakke* case, something that I read — either '68 or maybe '70 — it said that Boalt started their affirmative action in admissions.

KAY: I said that in my article, I think, because we started it right after Martin Luther King, Jr., was assassinated.

LABERGE: Which was 1968. Yes, I think it was 1968. When you say “we” decided, was there a group . . . ?

KAY: The faculty decided, yes.

LABERGE: The faculty as a whole?

KAY: Yes, the faculty discussed this. First, we tried to find out how many — we started, of course, with African-American students. We tried to find out how many African-American students we graduated and we didn't know, because we hadn't kept records. We got several of our African-American graduates — I remember Henry Ramsey, who later joined our faculty, was one of them — to try and go back and just identify by his recollection and recollections of his friends that he knew who graduated from Boalt. We finally put together a fairly decent list, and we tried then also to look for people who were Hispanic and Asian — there were very few of either of those categories. So we decided that what we would do would be to give special consideration to minority applicants.

By special consideration we meant that they would not be required to meet the same grade point and LSAT score but that we would look at their entire background and try and see whether they would be successful as law students and as lawyers. We did that quite successfully. I think I've got the numbers in that article that I published. The number of minority students increased very quickly at Boalt, and then *Bakke* was decided and *Bakke* made it clear that the only viable basis for doing this was educational diversity. So we restructured our program to meet the requirements of the *Bakke* case. We had been doing that pretty consistently as had almost all the other — I could say *all* the other — law schools in the country.

LABERGE: Did you have anything to do with writing any briefs for the *Bakke* case?

KAY: I didn't. No, it was Paul Mishkin and Jan Vetter from our faculty who worked with Gary Morrison, who was representing the university on filing those briefs. David Feller, I think, also was involved.

LABERGE: After that, you had to change a little bit of how you did that?

KAY: We did, after the decision came out.

LABERGE: Not just a little bit, you had to change — and were you ever on the admissions committee?

KAY: Yes, I was on the admissions committee but that was after this.

LABERGE: Okay. Anything else significant, in the eighties? When we're talking about affirmative action we're also talking about women . . .

KAY: No, we never had an affirmative action program for women. It was always for racial minorities. Of course, women of color were included.

LABERGE: Okay. When you became dean was there already the Office of Civil Rights investigation going on?

KAY: Yes.

LABERGE: Do you want to talk about that a little bit?

KAY: Yes, that had started under Jesse's deanship. They were investigating our procedural implementation of this program — they weren't questioning our right to use the *Bakke* case. The investigation was assigned — nobody quite understands why — to the Seattle office rather than the San Francisco office, which would have been closer.

Anyhow, it got assigned to the Seattle office and I remember vaguely their coming out and talking to people, and so on, but I had no specific involvement with it at that point. The investigation had been poking along for, I think, several years, and it was not until the summer that I became dean — which would have been the first of July [1992] — that we got a letter from them saying that they had finished their investigation and they wanted to come down and meet with us to talk about how we should proceed from here. So it was at that point that Gary Morrison and I became fast friends. Gary came and met with us. Jesse was away for the summer on sabbatical, his one-year sabbatical after being dean. Jan Vetter, who had been Jesse's associate dean and who was quite knowledgeable about the program — he had been one of its strong supporters all along — was there.

And then, of course, the people who were in my administration — the associate dean, John Dwyer; Lujana Treadwell, who dealt with the media and public relations; and the director of admissions, Edward Tom. They were the core group from Boalt.

We had a series of meetings with the OCR people from Seattle and it became clear that what they were concerned about were the practices that had grown up in the admissions office. Let me back up a minute. We have an admissions process that's composed of faculty and student members who read the applications. I think I said to you before that at that point we were getting about 5,000 applications a year for the first-year class of 270 people. The admissions director and his staff read all of them. We didn't leave any of them out; we read all of them. We didn't have a cutoff score, as some schools did. Then he would automatically admit the people who had the highest numbers, and he would send a certain number of files to the admissions committee. He would deny the ones with the lowest numbers. Then he would send all the median group of files, which was a large number, to the admissions committee. The admissions committee was composed of reading teams with one faculty member and one student member. I forget how many teams there were — three or four or five, something like that. Edward Tom would send them instructions saying, "Here's a box of files." Say there's 200 files in the box. "You are to admit twenty, and to deny twenty, and you are to put the rest in the waiting list and then rank them."

The practice had grown up that, instead of having the file boxes randomly filled from among the applicants who were in the pool, they would be sorted by race. You'd have boxes of white applicants, and other boxes of African-American, Hispanic, Chicano, Native American, and Asian applicants. The OCR folks said that doesn't comply with what Justice Powell said in *Bakke*, because everybody is not competing for all the seats. Some people are competing only for a certain number of seats. Our policy said that we would give special consideration to a certain percentage of people in order to maintain educational diversity.

We had actually specified target numbers for various groups in our program. They were public. This was not something that we were doing on the sly. The applicants who were selected from the Asian box, say, would be put on an Asian waitlist, and as the open spaces came up, we would admit sufficient numbers in order to get the percentage we wanted. That was

one thing they wanted us to change. They wanted us to abolish the special waitlists. They wanted to have only one merged waitlist. They wanted us to stop separating the files; they wanted all the files to be randomly assigned to each box. And they wanted us to rethink our rationale for having an affirmative action plan.

LABERGE: Anything about the percentage?

KAY: They were not upset about the percentages, because everyone thought goals and timetables were fine. They didn't see our target percentages as a quota, they only saw that there was not sufficient competition for all seats in the class. They also thought that, although we said we had an educational diversity rationale for this, the way we were administering it made it look dangerously close to being a quota, and so they thought we might want to reevaluate our rationale.

They did not file a formal charge. What they had proposed was that we enter into a consent agreement whereby we would agree to make these procedural changes immediately effective with the new class that was going to be applying in February [1993], and that we would think about coming up with a different rationale. It was about this time of year, it was in August, and our students were about to return for Fall 1992 classes. It was not quite this late in August but it was pretty close. Students were about to show up, and OCR wanted us to sign this agreement immediately. I said to Gary, "There's no way I'm going to sign this agreement at a time when classes haven't started because the students will all think that we're sabotaging the program behind their backs, and this is certainly not what we're doing. I want to wait until I can consult with the students." Well, OCR didn't like that but I was adamant and so they said, "Okay, all right." The second the students got back — and, I think, even before that, because I knew who the president of the student body was, he'd been elected the spring before. I got in touch with the president of the student body right away and said, "Look, this is coming up. I'm going to want to be able to consult with some people from student organizations." This goes back to what you mentioned earlier about this feeling of good will towards me. At least initially, they didn't think I was trying to screw them.

LABERGE: Yes. They didn't walk in, this had been signed and you just said, here I am and look what I just did.

KAY: Exactly, yes. So they had this sense that I was really trying to work this out as best we could.

LABERGE: Now, how did you know to do that? I mean, did somebody else advise you or did Gary say, “Now listen, you better not sign this, you’re going to have trouble.”

KAY: No, no.

LABERGE: You just knew it? [laughs]

KAY: Wouldn’t you have known it if you had been in my place? [laughs]

LABERGE: I think — some people wouldn’t.

KAY: It was perfectly clear to me that you didn’t do this sort of thing when the students were not there. Anyhow, they came back and we got it all worked out. I was going to be in Seattle delivering a lecture. I think it was on September 25 or 26 that I was up there, and I went to the OCR office and I signed the agreement. The chancellor signed it, and we did it. What we did was agree to make the procedural changes immediately, which I didn’t think were a problem, and then we agreed to rethink the rationale. They, for their part, were going to monitor our program and processes for three years. So we had to report back to OCR for three years.

LABERGE: What did the students have to say?

KAY: As long as they were clear that we hadn’t lost our commitment to the program, they were not unduly upset by it. So then, as soon as it was signed, I appointed a task force, which Professor Rachel Moran chaired, and it had faculty, students, and alumni members. It was a very nicely balanced committee from the perspective of different points of view and also of different racial and ethnic background. They went to work, and Rachel worked them very hard. They came out with this really nice report in which they recommended that we needed to have a critical mass of minority students in order to achieve our pedagogical objective of training academically excellent, diverse student bodies — that we couldn’t do it just by numbers alone and we had to create a community of students here who were going to be able to learn from each other. The faculty approved it. Now, it was not until, I think, sometime in early April or it was close to the end of classes when we finally got this done . . .



LABERGE: Nineteen ninety-three?

KAY: Yes. I think I spell all this out in detail in this little piece on diversity in legal education that I gave you. Let's see. [looking] Okay. "Task force on admissions policy chaired by Rachel Moran. Task force appointed as a part of conciliation agreement entered into September 25, 1992, resulting from a compliance review that began in 1989." Yes, the policy task force reported in 1993 and the faculty adopted it on May 6, 1993. "Pedagogical theory of critical mass." Okay, so that was — I mean everybody was cool with that. The students liked it and they liked the process in the faculty. Anyhow, the next thing that happened was unrelated to the law school. The Board of Regents began hearing from the parents whose son was denied admission to the San Diego medical school. That was when they began holding hearings on the admissions process in the entire university, and that led up to the regents' resolution of 1995 [SP1 and SP2]. As part of their hearing process, I was invited to testify before the regents on the law school's admissions practices, and Gary again was very helpful. Gary had been holding my hand through this whole thing. He was just utterly wonderful. So I put together this speech that I have a copy of somewhere if you want.

LABERGE: And there's some quotes from other places, too.

KAY: Yes, there's some quotes from it. I, in effect, said that law schools are different. We're not just training undergraduates, we're not even just training engineers or doctors — we're training people who are going to administer the system of justice in the United States. You can't do that unless you have at least some reflection of the kind of society that you're trying to administer justice for and with. But the regents, of course, were not willing to listen to advice, certainly not from me, considering . . .

LABERGE: And not from anybody, really.

KAY: And not from anybody, considering they weren't willing to follow the advice from all the chancellors and the president on this matter. So they passed this 1995 resolution.

LABERGE: When you were testifying before them, what kinds of questions did you get or what kind of reception did you feel?

KAY: Almost none . . .

LABERGE: They just listened?

KAY: Yes. There were, of course, demonstrations by the students. They had it over at the UC Medical Center down there on the Laurel Heights campus. I had the sense that they were just running the mechanism. I think they knew what the votes were. I think the ones who were behind it knew they had the votes and knew who the opponents were. They'd listen to the testimony that they had requested and then they — not the day I testified, but later — in July, I guess — is when they passed it.

LABERGE: Tell me what was going on here. I know that there were a couple of . . .

KAY: We were away on vacation in southern California when they had that vote, but, oh yeah, there were big demonstrations all over. The students at various campuses staged demonstrations and everybody was protesting at what had happened. Then there was, that fall — because it wasn't to be effective for two years, it was to be effective on January 1, 1997, which would have affected the entering class of '97. There were all these efforts on the campus to galvanize faculty opposition, to try and get the regents to change their minds. Of course, none of that ever happened but at least there was some level of credibility built up between the faculty and the students in general. This was not centered at the law school — it was across the whole campus.

LABERGE: What about the flyers that students put up? There was some restlessness here with hate-based flyers. Did that happen right after that or before? Actually, it doesn't really matter — I just wondered how you handled it.

KAY: I don't remember. I think it was in the fall of '95 or '96, it was before the . . .

LABERGE: Proposition 209?

KAY: No, Proposition 209 had almost nothing to do with this. This was *all* related to the regents' resolution.

LABERGE: Okay.

KAY: Yes, there was hate mail that was put in student mailboxes — actually, now that you've mentioned it, it happened after or just before the week of final exams in '95.

LABERGE: Maybe after you'd given your testimony?

KAY: No, no, no. My testimony was in May. I did distribute the testimony to the whole school so that they would know what I said. But, no, this happened during the final exams after the fall semester of '95, which were given in December, 1995. The resolution had been passed in July. It was just really hateful stuff put into the mailboxes of 1Ls [first-year law students] who were minority students. Sort of, "We don't have to have you here anymore, you're just here because of this program, blah blah blah." We tried to figure out who'd done it. Of course, we had no way because the student mailboxes were right there in the hall — anybody could walk in off the street, they weren't closed in or anything. We were also in the process of rebuilding the building, so everything was just in total chaos. We had town meetings, I met with students, and we tried to make clear that we were trying to find these people, we've reported it, we asked for everybody's help in investigating it. There were also a few hate messages about Jews that came trickling in in the wake of all this stuff. I guess that once you stir up this cauldron, everything comes boiling up. So that was quite difficult.

Through it all, I worried about the minority students — I kept thinking, how are they going to survive? How many of them would there be? What would happen to their student organizations? What would happen to their student journals that were ethnically oriented, and how would they manage to maintain a viable community here? I had appointed another committee — a student, faculty, and alumni committee — to figure how we had to modify the committee report that Rachel Moran had done, because obviously we couldn't continue with that any more after the regents' resolution. Then there was a group of Boalt students and graduates who put together their own report in which they said, "This is what can be done, Dean Kay is being much too timid, and here's what the school ought to do." They had a press conference here releasing their report and then, over the summer, I appointed yet another committee — this one under the leadership of Bob [Robert H.] Cole, who was then my associate dean — to try and say what we were going to be able to do with our program to take account of the regents' resolution. By that time there was a sit-in by the students in the fall. They occupied — first they tried to occupy my office but we had locked my office. I went down and sat out there in the grassy courtyard and sent Lujana Treadwell up to say, "Hey, if you want to talk

to Dean Kay, she's outside and she's happy to talk to you." Of course, they wouldn't come to see me and I wasn't going to come back to my office while they were sitting outside my door, so we had this hour or couple hour-long standoff. Finally, a student who later published a book called *Silence at Boalt Hall*, Andrea Guerrero, came down and talked to me.

LABERGE: And she was a student then.

KAY: She was a student then, and she was very active in the Students for a Diversified Student Body. She came down and talked to me and we sort of tried to talk about what we were going to be able to do. She was at least willing — by that time, the Cole committee report hadn't been released yet. They were sort of just about to finish it but then all the sit-ins and everything disrupted them and so it was delayed by a little while. But finally I think they got the idea, when I refused to resign and when they were not able to get any more out of us, then they started going over and picketing the regents' office in Oakland. There they were met with the Oakland police who were not nearly as friendly to them as the campus police, so I think they stopped doing that. They then formed coalitions that went down to Sacramento and petitioned the Legislature for relief. While all this was going on, the class of 1997 was being admitted, and it became very clear as the summer drew to its end that we were only going to have one African-American student in that class, and he was one who had been admitted in '96 under the old program and had deferred his admission to '97.

LABERGE: What was your reaction? Had you anticipated that?

KAY: No, I hadn't. We had admitted, I think, fifteen African-American students and all of them went somewhere else, and we figured out where they all went. [laughs] They all went to some very good law schools when they decided not to come here. I guess, in hindsight, I should have anticipated it but I didn't. We had never had any trouble attracting the minority students that we admitted. What I hadn't realized was that the minority students in prior years who had the kind of credentials that this group of fifteen had, never came to Boalt anyway. We never were very successful in attracting them.

So we then started trying to figure out what we could do in terms of recruitment, and it was at that point that Proposition 209 became effective. It

had been passed in 1996, but it had been immediately enjoined and it didn't really become effective until after Judge [Thelton] Henderson's opinion got reversed by the Ninth Circuit and the Supreme Court refused to hear it. Then it became effective on August 28, 1997 — ten days after our fall semester had begun. By that time, we already had seen what the result would be. Proposition 209 went beyond the regents' resolution in that it affected scholarship funds and it affected outreach. So we were very worried about what we might be able to do and what kind of support we could accept from outside groups. Our alumni really rallied around the school. They wanted to help us in any way they could. The Alumni Association Board was having a meeting on the Monday when that student group was occupying the registrar's office, so they saw what was going on. I think that was certainly no coincidence, because the registrar's office was directly across the courtyard from the board meeting. Anyhow, they wanted to raise money as an alumni association to be used for scholarships to recruit minority students. I told them I didn't think we could do it, because anybody who gave money to the alumni association was in effect giving money to the school. The alumni association was so closely connected to the school, that I thought we would be a sitting duck for a complaint under Proposition 209 — and there were people watching us quite closely. So, again, I got complaints from some of the students that I was being too timid. But we finally were able to work with BASF, the Bar Association of San Francisco, and also the Wiley Manuel Law Foundation. They raised their own money — they didn't give it to us, they gave it directly to students who had been admitted to all the Bay Area law schools. They were able to do this because they weren't bound by Proposition 209 or the regents' resolution, and that was a terrific help.

LABERGE: Was it found out that your alumni were bound by Prop. 209?

KAY: Well, they accepted direction from me. Obviously they weren't going to do it if I told them I thought it would get us in trouble. I did tell them that, and so plenty of them gave money to these other organizations, so that was quite helpful to the students and, indirectly, to us.

LABERGE: And all during this, was Gary Morrison still advising you?

KAY: Oh yes, I tell you! [laughs]

LABERGE: Day and night.

KAY: Day and night, that's right. Yes, he was extremely helpful. But I was going to back up to the opening day of classes of fall '97. I had telephoned the African-American student. I said to Ed Tom, "Tell me who he is, I'm going to call him and tell him what the situation is because he may not realize it." I called him . . .

LABERGE: Oh, the one admitted student?

KAY: The one admitted student. He was in Indiana. So I called him and said, "This is the dean of your law school." [laughs] I think he was a little surprised. And I said, "You are going to be the only African-American student in the first-year class. We have not told anybody your name, and we're not going to tell anybody your name, but we're expecting a big demonstration at the law school on the day classes open, and you're not going to be hard to identify. So I just wanted you to know that when you come" — because he and his wife were going to come a little early to try and find a place to live, and so on. So I said, "When you get here, come and talk to us and we'll try and see what we can do to protect you from the press as much as possible." So he came and he spent a lot of time with Lujana. She worked closely with him that whole first year. She helped him write what was essentially a press statement.

We scheduled a press conference on the first day of classes, and he and I walked down the hall together to attend it. There were reporters and newspapers and TV cameras from all over the world. I mean, it was just unbelievable. He and I walked down the hall to one of the classrooms; he read his statement, which was about two or three minutes long. Then he left and I took questions, and I refused to make him available. He refused to be available. He just tried his best to keep as low a profile as possible. He did not participate in any of the demonstrations. He did participate in a walk that Reverend Jesse Jackson had organized — I think they walked across the Golden Gate Bridge or something, and he was there. He was on the podium with Reverend Jackson, who introduced him as the only African American in the first-year class at Boalt Hall, which of course he was. He actually mentioned the fact that I called him in an interview that he gave to the *California Lawyer*, a legal monthly, in which he said that he hadn't

realized this until Dean Kay called him. He is now practicing, I believe, at Morrison and Foerster.

But that fall, I literally did almost nothing except answer the telephone and talk to the press. I mean, people from everywhere wanted to come here. At one point I said to them, "You know, all of the University of California law schools are involved in this, why don't you go talk to some people in Davis or UCLA?" But, oh no, they all had to come to Berkeley! [laughs]

LABERGE: Is it because it was Berkeley?

KAY: Oh, I think so.

LABERGE: What was happening throughout the nation at . . .

KAY: Nothing, nothing. This was totally a California phenomenon. Texas had been hit by the *Hopwood* decision, which affected the law schools in the Fifth Circuit. So it was the Texas schools and us. The other schools in the Fifth Circuit, for one reason or another, were under already some kind of court order so nothing much changed for them. So it was really UC and [the University of] Texas who were the two major schools that were affected by this. The dean at Texas, Michael M. Sharlot, and I at one point did an op-ed piece for — I forget what newspaper published it, maybe the *Times*. Anyway, we did that together to try and make clear how the challenge to affirmative action was affecting our schools.

The thing that was the hardest to deal with was to try and dispel the notion that minority students had out there in the great world, that they were not welcome in California. It was just very hard to overcome. Our director of admissions went around and recruited students from many more schools than he had ever been to before. One of our African-American graduates, Warren Widener, who had been the mayor of Berkeley, was an enormous help to the school.

LABERGE: Widener?

KAY: Yes. Warren Widener entertained the minority students we had admitted at his home, and talked to them about how the local alumni group were there to support them and help them and encourage them. I didn't go to any of those events. They wanted their own space, and Warren was just wonderful. He just really went all out to try and make these kids feel at home. And it began to turn around. We had one African-American

student in '97. We had, I think, seven or eight in '98. In '99 we had about that same number. And in 2000, when I stepped down as dean, we were getting close to ten. When John Dwyer came in I think we had fourteen. I don't remember how far these numbers went, but I have the numbers in the back of my article going through the fall of '99, and they were beginning to slowly come back. We enrolled eight in '98 and seven in '99 — African Americans — and twenty-three Hispanics in '98, sixteen in '99. Two Native Americans both years. The numbers that were going up were the Asian numbers, there were forty-eight in '98, thirty-five in '99. Then applicants suddenly declined to state what race or ethnicity they were so we couldn't really put together those statistics.

We also got a great deal of help, in terms of recruitment and scholarship, from the president's office. I think [President Richard] Dick Atkinson did a really courageous thing. He said, "Okay, we can't use scholarship money to persuade people to come here, we can't use it for recruitment purposes, but if they come here we then have got a lot of scholarship money that was given to support students of particular backgrounds. So if we have somebody that we have said is a worthy scholarship recipient and we have money that was targeted for that purpose, then we can have a student-to-fund matching process, in which the student will be able to use the money that had been designated for that purpose." He could have been challenged for doing that under 209 but he wasn't, and it was quite helpful. Later, just as I was going out as dean, the president's office also was able to get some money to help bring people here — again, after we had admitted them — to bring them here to show them the campus, to pay their travel expenses, and so on. That was also enormously helpful.

LABERGE: And was this a part when he instituted an outreach director himself at the president's office?

KAY: Yes, yes.

LABERGE: Okay. But also you did also?

KAY: We did, yes. We hired a director for admissions outreach who is still here.

LABERGE: And who is that?



KAY: His name is Eric Abrams. He's a Stanford graduate, not a lawyer, and an African American. Chancellor Berdahl gave us the money to hire him.

LABERGE: And what about just on the rest of the campus, were you getting help from the chancellor's office?

KAY: No. They were about a year behind us. They've made some of the same mistakes we made, I think, because they didn't really learn from our experience. They also were not prepared for this backlash of "You don't want us, so why should we come?" kind of thing.

Meanwhile, behind the scenes at the regents, there was our alumnus Bill Bagley who had opposed this resolution to begin with, and who — the minute Proposition 209 passed — started hammering at the board saying, "Our resolution is now meaningless except for symbolic purposes. It still makes people think that the university is not receptive to them and doesn't want them to come, and what we ought to do is repeal this." And he finally got them to repeal it, which they did — it was a great thing. So now the only thing that's there is Proposition 209, and there's been some discussion in the wake of the Supreme Court's decision in the [University of] Michigan cases [2003] of trying to launch another initiative to repeal Proposition 209, which would be great if it could be done.

LABERGE: Tell me about the Cole report and which recommendations were accepted and how that was debated in the faculty.

KAY: I do spell this out in my article. The UC schools approached the problem from different perspectives. UCLA tried a race-neutral admissions process that placed great weight on socioeconomic factors, on the theory that you really could do this in a race-neutral way that would still give you a diverse class. Because they gave weight to things like language spoken in the home, the location of the family and how recently they had arrived, and so on, they got a fairly large number of Russian immigrants. They didn't get very many minority students. As part of our faculty discussion of the Cole report, we sent out a letter to all applicants who had been put on the waiting list and people whose applications we had not yet read, saying, "We're going to try a pilot program and you can be part of it. We're sending you this questionnaire and could you fill it out and send it back to us. It won't hurt you — it might help you." So a lot of people did. One member of the faculty read all of those applications that came back with

the new questionnaire. The same thing happened to us that happened at UCLA. We picked up almost no minorities; we picked up a large number of poverty-stricken whites.

It was fairly clear to the faculty, as it had been clear to UCLA, that a race-neutral plan was not going to work, so we continued with our notion of a critical mass to produce a diverse mix. We did eliminate the percentages, even as goals. In the beginning, we had a very low percentage of minority students, but as the years have gone by we've built that up again. I think, last year we were back to 40 percent minority students, which is where we were before the regents' resolution was originally passed, but the mix is different. There are fewer African Americans and more Asians in the current mix.

LABERGE: Are Asians still considered a minority?

KAY: Yes. Except for the Japanese Americans.

LABERGE: I totally lost my question in here.

KAY: [laughs]

LABERGE: Across the UC system, Berkeley's numbers dropped the most. Because we were the highest to start with?

KAY: No. Berkeley is the most selective of all the UC campuses, and in fact our law school at Boalt is the most selective of any public university law school in the country. So that's why we were hit the hardest.

LABERGE: Okay. Tell me your thoughts and feelings about the LSAT [Law School Admission Test], the weight of that and the weight of grade point averages [GPA], and how — in your ideal world what would you do?

KAY: You have to have some kind of comparison. Thousands of people apply to law school every year and they come from all sorts of college backgrounds, and you need some kind of uniform measure. The ABA standards for accreditation require schools to use some standardized test. They do not require the LSAT; they require some kind of standardized test.

One of the things that I did, maybe even as early as '98, was to appoint a committee chaired by Professor Marge Shultz to seek a redefinition of merit and to try and develop some kind of testing device that could be an alternative to the LSAT. The Law School Admissions Council gave us some

money for this purpose. Obviously, they were anxious to improve the LSAT itself and they wanted to see what else might be possible. That committee has continued to work all this time and has just gotten a second grant from the law school admissions people. They've done focus groups, they've done surveys, they've talked to lots of people about what are the qualities of good lawyering that you can identify, and then they tried to work backwards from that. How do you test for those qualities when you're looking at people that you're admitting to law school? They think that they're going to be able to develop a standardized testing instrument that could be used in law schools to predict success in the profession rather than predict success in the first year of law school, which is all the LSAT predicts. That may be the single most important thing I ever did.

LABERGE: To appoint that committee.

KAY: To appoint that committee, yes.

LABERGE: But right now it's still weighted?

KAY: This is one of the things that we had done, even before our conciliation agreement with OCR. Most law schools weight the LSAT 70 percent and the GPA 30 percent. We early on started weighting them equally, GPA and LSAT. One of the things that the Cole committee proposed, that the faculty adopted, was that we stop identifying — we stop weighting schools as to whether we thought they had grade inflation or not. We let the people on the committee decide for themselves how they would rank a Stanford GPA against a Podunk U. GPA. We also started reporting the LSAT scores in bundles of three, because the Law School Admissions Council said the difference between an LSAT of 155 and 158 is not significant, so we started spreading them out a little bit more. We did a lot of cosmetic stuff that may or may not have made any difference but that overall suggested that we were placing less weight on the numerical factors and more weight on the holistic factors.

This is essentially what the Michigan Law School did. We and Michigan did almost exactly the same thing after those committee reports were adopted by the faculty, with the single exception that Michigan still gave specific weight to race and we did not give specific weight to race. Michigan got more minority students than we did, and I think you have to understand that you're always going to get more minority students if you

can give express weight to race as a factor, which is why everybody was defending the Michigan program. As I said in an interview that I gave for a roundtable discussion on the Michigan cases that has just come out in a magazine called *Trusteeship*, which goes to university presidents and administrators around the world, we and [University of] Washington are the only two law schools in the country that can't use race anymore. That's because of Proposition 209 in California and Initiative 200 in Washington, which prohibit the use of affirmative action.

LABERGE: Tell me about the part the students played in getting this turnaround, because I had read that many of them did a lot of outreach and other things.

KAY: Yes. At first they were shell-shocked. I think we all were. At first I think they tried to say, "Well, let's just boycott Berkeley, let's just tell everybody not to come here." And then I think they realized — and I do think this set of essays that was published called *The Diversity Hoax*, which Andrea [Guerrero] was responding to in her book *Silence at Boalt Hall* — I do think that that convinced many of them that it would not be either to their own advantage or to the school's advantage to just try to wipe Berkeley out, because Berkeley could then be taken over by what they saw as the right-wing enemy. [laughs] As the number of minority students began dwindling in the class, there came a moment when you could teach classes with no African Americans or Hispanics. It was really kind of scary. So I think the minority students began to realize that they needed to bring in people of their own group to sustain them and to make the place livable for those few people who were going to be there.

Rachel Moran's committee identified an absolutely valid point when they talked about critical mass. It really does make an enormous difference in people's comfort level. So the students then began working with the admissions office, and they entertained students who were coming here to see the campus, they brought them to their homes, they talked to them. The one thing that made a huge difference was my creating the Center for Social Justice. We were in danger of losing our minority faculty. The two tenured minority women faculty, Rachel Moran and Angela Harris, both had offers from other schools. They were both, I think, feeling quite disheartened by the dwindling number of African American and Chicano

students. The Center for Social Justice enabled them to put on programs to attract students and visiting scholars, and talk about diversity issues and talk about what kinds of work these students could do and how you could actually practice law without ever representing a corporate plaintiff or defendant — mainly corporate defendants, I guess. That has really just been wonderful, and we've had very enthusiastic women who've been directors of that program working with the social justice faculty, which now includes all the minorities and a fair number of Caucasians. They really have just been very active in outreach and recruitment and encouraging people to come. I think that they have just done a terrific job in changing the attitudes of admitted students about accepting our offer and coming here. That's just been a big difference.

LABERGE: While all this was going on and what you were doing was answering phones and questions — how did the business of the law school keep going?

KAY: Oh, it kept going quite well. In describing my management style, I emphasized the word “delegation.”

LABERGE: Yes.

KAY: I had some very good staff people who really stepped up to the plate and assumed a lot of responsibility. Also, I was spending a fair amount of time going around the state and the country, talking to the alumni groups and telling them what was happening and saying this is what we're trying to do. They were very supportive of the school. They really were there when we needed them. I was very, very pleased with their cooperation.

LABERGE: You were getting criticism from both sides.

KAY: It's true, I was. Nobody liked me. [laughs]

LABERGE: Yes, so how did you personally deal with that and how did you answer, particularly when people were criticizing you for not doing enough when really that was what your goal was, too?

KAY: It was really cute. One of our graduates, Kathleen Morris, was working up in Seattle at a public interest law firm — the year after she graduated she was clerking up there — and they had conferred an award upon me. I was to come up and make a speech and accept the award in January. She introduced me and she said, “You know, the students were really outraged

and the students felt the school ought to be doing more and we were going to do what students always do, we were going to sit in the dean's office and make our demands. Then," she said, "it occurred to us: Herma Hill Kay is in the dean's office — how could you say she's not devoted to the rights of women and minorities? Her whole life has been spent doing that." When I got up to speak, I said, "I'm not sure whether it's better or worse to have somebody who really knows you introduce you." [laughs] But I was really pleased.

LABERGE: That can't have been easy, when you were going through — I mean, now you're just talking about it . . .

KAY: Well, yes, but there were these wonderful little things along the way. Before the students all trooped off down to the Sproul steps to denounce me because I wouldn't resign, one of them came back and said, "You know, Dean Kay, I hope you're not taking this personally." I said, "Oh no, no. Why would I take it personally?" [laughs] You have to see it structurally. You have to protest against the dean if you were a radical student — I mean, what else are you going to do? So we managed to get through that, and through it all there were students, even minority students, who were willing to serve on my committees, and they were told by their more radical friends, "Oh, she's just co-opting you." I think they could see that we really wanted their support, their input, and we were listening. So I think that helped.

After 209 was upheld by the Ninth Circuit Court of Appeals and it became clear that this was not just the university, this was the whole state — there was a group of our students who tried to get enough signatures to repeal Proposition 209. They were never able to do that. I think they realized then that it was over, here — which is still the case. That no matter what the U.S. Supreme Court did, it wouldn't help us. The Texas case hadn't gone up and the Michigan case was sort of working its way along. The students were very involved in supporting the students in Michigan who had intervened in the proceedings and all that. I think they realized that California and Washington were dead letters. I mean, at least in Texas, *Hopwood* would be overruled if the Michigan case came out right, which of course is what happened. They realized that nothing was going to happen here *suddenly*, right — there was no quick fix. When John Dwyer came

in as dean, he continued the programs of outreach and recruitment, and continued the appointment of the associate director for outreach. Eric is still here, still doing a terrific job, and they really got the numbers up in a way that was, I think, quite heartening. We're going to have to continue to do that because, unless 209 is ultimately repealed, nothing is going to change for us.

LABERGE: What about faculty? How many faculty did you need to convince or debate?

KAY: Oh no, the faculty were fine with this. I mean the faculty had adopted our program. The faculty had supported it all along. They did want to try and see whether there was a race-neutral way we could produce a diverse mix of students. Once we tried it and they saw it wasn't going to work, then they realized that we had to do what we could do legally, and they were supportive of doing that. I don't know what will happen if Marge's group comes up with a proposed alternative to the LSAT. Because then the question is going to be, "Well, nobody needs it except us and Washington, and what's that going to do in terms of affecting people who are competitively applying here and several other schools too, is it going to help us or hurt us?" We'll cross that bridge when we come to it.

LABERGE: And as far as faculty helping — besides the associate deans — how did they get involved in the response to 209?

KAY: Well, the Academic Senate had groups of faculty who were trying to get signatures for letters to the regents and petitions to the regents and all that. A lot of people signed those. They worked on reforming the undergraduate admissions process. They did almost identically the same thing we had done a year earlier with the Boalt admissions process. They had to try and figure out how to do it in a way that would involve reading more applications. Of course, they have many more applications than we do so it's a bigger job for them, but they did it. The figures, I think, have been inching up on the campus as well.

LABERGE: Boalt faculty in particular, did they do any kind of outreach or talking to people?

KAY: They would talk with students as they were put on the waiting list or when they were accepted. Admissions people, the Center for Social

Justice faculty, and individual members of the admissions committee frequently would call them and say, “What are your interests, and let us tell you what we have here in that field.” One African-American man really was interested in intellectual property and we got the intellectual property people to call him. So it was just a way of trying to let students know that this is what we had available and we wanted them to come. We did not limit ourselves to doing that to minority students, we did that to all students.

LABERGE: Yes. I’m out of questions at this moment. Do you have anything else that — any anecdotes or anything you wanted to throw in?

KAY: Not really.

LABERGE: All right, so we’ll call this a day?

KAY: Right.

## INTERVIEW 8: SEPTEMBER 18, 2003

LABERGE: This is interview number eight with Herma Hill Kay on September 18, 2003. Today we were going to talk about your outside activities, both the committees, the governing boards. So maybe we’ll just look at your résumé and start with the American Bar Foundation. Is that one of the ones we were going to discuss?

KAY: Yes, there are four national organizations that I’ve been involved in and have spent a fair amount of time in, and the one that was first in terms of time was the Association of American Law Schools [AALS]. The Association of American Law Schools is the national professional organization for law schools. The membership is by school; it’s not by individual faculty members. That’s an organization that participates with the American Bar Association [ABA] in the accreditation process for law schools; that puts on every year an annual professional meeting; and that has, throughout the year, special meetings on professional training that have to do with subject matter areas — these are workshops. Law schools will pay for their faculty members to go to these workshops and also to the annual meeting. So it’s both a kind of networking and educational and social situation. The process of faculty hiring grew out of the association’s meetings and then



later became an activity all in itself. It happens every fall, and it's about to come up in October this year.

I had not really been very active in the association as a young faculty member. I had gone to some of the meetings but I had never been really involved in the committee structure, and so on. This sort of goes back, I guess, to the question of men mentoring women. Sandy Kadish, who you know is on our faculty and who was very active in the organization, came to me and asked whether I would be willing to accept nomination to the executive committee, which was quite unusual because people who are asked to be on the executive committee usually had been active in the organization before that.

LABERGE: I see. Was he the dean then?

KAY: Let's see, this was 1986 so Jesse Choper was the dean at that point. Sandy had been the president of the AALS in 1982. He came to see me and said that they would like to nominate me for membership on the executive committee with the hope that I would ultimately go through the chairs and become president. Now, at that point there had been only two women who were presidents of the AALS, Soia Mentschikoff was the first [in 1974], and Susan Prager at UCLA was the second [in 1986], so they were obviously looking to see if they could find a little diversity for this national office. [laughs] I did accept his suggestion and I was nominated to the executive committee, and Susan Prager at that point was the president of the association.

LABERGE: Right and that you were the third woman . . .

KAY: Susan Prager, I thought, did a wonderful job of dealing with that committee. That committee is the one that advises the president and works, like executive committees do, to set policy for the organization that will then be taken to be voted on by the members of the representative assembly, which is composed of deans of the member law schools. I served on that committee for two years from 1986 to 1988, and then was ex officio a member of the executive committee when I was president-elect in '88 and president in '89 and immediate past president in '90. They follow the ABA model, whereby you spend three years in the officer rank if you're going to be president even though you're only president for one year. That makes it possible for you to develop your program and to then try to do as much as you can to get it put in while you're president, and then to oversee

what's going on and be around as a kind of statesperson after you've been president.

The chief initiatives that I was trying to undertake were to increase diversity and particularly to stand behind our gay and lesbian students against the government's efforts to prevent them from being hired by military recruiters, for example. The year I was president, the association passed a resolution that said we would not cooperate with government interviewers if they were going to continue their policy of discrimination against gay and lesbian law students.

LABERGE: It was if the law students were trying to get a government job? Is that it?

KAY: This is for the Judge Advocate General's Corps, the legal arm of the military — JAG they call it. The military recruiters would come to campus and they would say, "We don't want to interview anybody who's openly gay or lesbian, because . . ."

LABERGE: They would say that right out?

KAY: Oh, yes. It's official policy. In fact, we ultimately — here at Berkeley and the other UC schools — couldn't actually abide by this policy that the AALS adopted when I was president. The UC president, David Saxon, had sent out a memo saying that it is not illegal under present federal antidiscrimination law to discriminate on the basis of sexual orientation, which it wasn't. And it still isn't as a matter of national law although it is now as a matter of state law in California and several other states. But his memo said that, since it was not illegal, because the university only prohibited employers who engaged in *illegal* discrimination from using the campus interview facilities, we couldn't refuse to let the military recruiters participate in our program. So they did participate in our program, but every year as dean I would write them a letter saying we understand that you're permitted to be here by order of the president, but this is against the AALS policy, it's against the faculty policy, and we hope you don't come. [laughs] They came, of course, but there was this kind of standoff.

So that was one thing that I felt very strongly about, and we did manage to get it done. The other was an effort to increase diversity in recruiting of candidates for the faculty and also for students. So, those were the issues that I was most associated with during my year as president. After I

stepped down as immediate past president, I served on a couple of nominating committees for the officers: usually the presidents-elect and that's something that you would normally expect to be included in if you've been through those offices. Most recently, I was a member of the *Journal of Legal Education* editorial board, to which the dean of Hastings, Mary Kay Kane, who was then the president of the association, appointed me. So yes, when I was president in '89 I was the third woman president of the association.

LABERGE: How many women are members of other committees?

KAY: It's sort of slow going but it's getting better. It was a long time coming, of course, but I think they're getting a lot better about it now than they had been.

LABERGE: And when you were dean, did you appoint somebody? Do you send members the way Sandy Kadish sent you?

KAY: Oh, no. As a member of the nominating committee I participated in that, but I didn't really send anyone from Boalt the way Sandy did me, he just nominated me. But as dean, of course, I went to all the annual meetings and represented the school there, and carried on the kind of activities that deans perform. The deans really run that outfit.

LABERGE: How were women accepted? How did you feel in the group? Were you comfortable?

KAY: Oh yes. By that time — Susan did a great job, I think, and everybody thought Susan was a spectacular president. So she had certainly smoothed the way for other women. It was really very easy to work with her and to be there when she was there. Then there are certain, like in any other organization, there is a certain handful of people around the country who are available as elder statespeople to be called on, and all that. I'm good friends with the people who are the executive director and the staff with whom I worked when I was there as president. We've kept in touch over the years, and they call me to do things and I'm happy to do it.

LABERGE: Where is it located?

KAY: In Washington, D.C.

LABERGE: How much time did it take?

KAY: Well, a fair amount of time. You know, a lot of cross-country trips on the airplane and so on. This was before e-mail but we were able to do a lot by telephone so I didn't have to go back that often, aside from the regularly scheduled meetings. The executive committee meets, of course, during the year and at the annual meeting. Okay, so that's the Association of American Law Schools.

Then I guess in order of time, I next got involved in the American Bar Foundation. The American Bar Foundation gave me its Research Award. The Fellows of the American Bar Foundation every year give two awards. They give a Research Award to, usually, a faculty member whose research they think is exceptional, and then they give an award to a lawyer who has been in practice for fifty years or more and who exemplifies the highest ideals in the profession. They call that the Fifty-Year Award. I got the Research Award in 1990. When I got that award I was not a fellow. To be a fellow you have to be, again, nominated and elected and all that, so I was not a fellow, but they didn't waste much time inviting me to be a fellow [laughs], so I became a fellow. I was elected in May, 1991 as a Fellow of the American Bar Foundation. After I became a fellow, they invited me to serve on the Research Committee, which I was happy to do. The Research Committee is the committee that screens all the applications for financial support by the foundation to carry out socio-legal research.

The foundation really was established to carry out socio-legal research, and the people they compete with are all universities. They compete with Berkeley, for example. Members of our JSP faculty are engaged in socio-legal research. [University of] Wisconsin is another well-known center for this kind of work. Yale was one of the earlier ones. The American Bar Foundation is not housed in a university, so you would think that when you talk about Berkeley and Yale and Wisconsin, you would think that we would obviously have our pick of the best people, and by and large we do. But the foundation has just done remarkably well over the years in attracting young talent — people who are trained in law and in one of the social sciences. Typically their resident scholars will have half-time appointments at Northwestern University because the Northwestern law school building is right there next door to the American Bar Foundation offices in Chicago. But also we now have one faculty member who's at Chicago and is a resident fellow at the foundation, and a couple from Wisconsin who commute

back and forth to Chicago. I would say that the work they do is certainly on a par with, if not better than, that work that's done at universities, so they're really a top flight organization. And it's the Research Committee that makes recommendations about the people who are going to do that research, and that vets the proposals even on the in-house fellows. I served on that committee until 1995 and then they asked me to serve on the board of directors, and so I was elected to the board of directors. I've been serving on that. This is now my second term and I'll be going off that board in August '04, so this is the last year that I'll be serving on that.

LABERGE: Is it connected to the ABA?

KAY: All of these national organizations — the ABA, the AALS, the ABF — have connections. They're not controlled by the ABA. They do get funding from the ABA but they are an independent entity. The people who are fellows also are members of the ABA. You can't be elected a fellow unless you are a member of the ABA, but the fellows tend to run their own operation. They have their own meeting, they have their own activities, and they interact with the fellows in each state in a much more hands-on way than the ABA does. The ABA tends to be more national. While it has connections with the state bar associations in various states, it's not quite like the fellows, state by state, in their national organization because they're much more integrated.

I joined the American Bar Association as a member, but I had almost no time to give to it until I was invited to become a member of the Section of Legal Education and Admissions to the Bar in 1993. The ABA, I'm sure you understand, is organized into various sections and it'll have sections based on substantive law and trial lawyers have a section. There are special group sections like the [Commission] on Women in the Profession. The Section of Legal Education and Admissions to the Bar is the section that's there for academics and people who are involved in bar admissions. The council of that section is the body that is formally recognized by the accrediting agencies as the body that accredits the professional degree program in U.S. law schools. So they are the ones who supervise whether schools can become accredited, whether they can remain accredited, and they conduct site evaluations of each school every seven years. In doing the site evaluation they cooperate with the Association of American Law Schools, which

has one member of the site evaluation team. I was a member of the council from 1993 to 1999 and then I served two years as an officer, as the secretary, from '99 to 2003. During that period I chaired the section Committee on Diversity and Legal Education for 1996 to 2000.

That committee was trying to figure out — while the Michigan case was pending and in the wake of Proposition 209 in California, the *Hopwood* decision in Texas, and Initiative 200 in the state of Washington — what you would do if you were prohibited from using affirmative action and you still wanted to have a diverse student body in law schools. So we published a couple of reports that made some suggestions about how that might be accomplished. That has pretty much become moot for the rest of the country now that the Supreme Court held in the Michigan case that law schools can continue to engage in affirmative action. That decision overruled *Hopwood*, so Texas can now go back to doing it, but Berkeley and Washington are still bound by those state propositions. I gather that UC Regent Ward Connerly is trying to get a similar proposition passed in Michigan, so this is going to be an ongoing struggle.

LABERGE: Now, you were doing all of this while you were the dean?

KAY: That's right. Yes, that is correct.

LABERGE: How did you do that?

KAY: Most of the people who sit on the ABA council are deans or former deans, so it's something that you are expected to do. And it's quite useful to the school if you are holding that position while you're dean because it puts you in the inside loop and you understand what the issues are and what the emerging policies are. You have a hand in forming the new initiatives that will be sent around to the law schools for their approval or disapproval, so it's actually quite a benefit even though it does take you away from your school when you go to the meetings. After I went off the council, I was appointed to the Joint Committee on Racial and Ethnic Diversity which was set up in 2001 essentially to try and deal with the Michigan litigation and what would happen depending on how it came out. I think that committee is probably going to wither away now that the Michigan cases have come down the way they have. At least, I haven't heard anything about having another meeting for a couple of years. [laughs] I think that one may

become sort of moribund. It was co-sponsored by the ABA, the AALS, and the LSAC [the Law School Admissions Council].

The American Law Institute is outside of the ABA umbrella. It is one of the two major law reform organizations that operate at a national level in the United States. The earliest one to be formed was the National Conference of Commissioners on Uniform State Laws, and that is composed of people who are appointed in each state by the governor. They are lawyers, academics, and judges and their whole purpose is to draft laws that can be promulgated as uniform laws to be adopted in each individual state, to try and make the laws uniform as an alternative to having that done federally by Congress. It's an effort to keep the states involved in proposing and enacting uniform legislation.

LABERGE: And you did this with — for the divorce law or not?

KAY: No. The Uniform Marriage and Divorce Act was a project of the commissioners. I have never myself been a commissioner, but I worked with the commissioners as a co-reporter on the Uniform Marriage and Divorce Act. I was simply telling you what that body does to compare it with the American Law Institute, which is the one in which I am a member.

LABERGE: Okay.

KAY: Now, the American Law Institute was formed later and its purpose is to clarify and improve the law. What they do still as one of their major efforts is to produce these volumes that are called restatements of the law. So you would have the Restatement of Contracts, the Restatement of Torts, the Restatement of Property, the Restatement of Trusts. I mean, name practically any legal subject and there is a restatement of it, particularly when it covers a common law subject. The reporters read all the decisions of the courts and states around the country and you try to see what the majority view is, what the minority view is, and what the emerging trends are. That becomes the content of the book called a restatement. That book then is cited by common law judges in the various states and adopted in certain kinds of cases. The restatements every year will have an appendix showing in what states they have been adopted and will cite opinions that rely on the restatement. In Europe, lawyers treat the restatements as being a compendium of United States law — which is, of course, a myth because

it's United States law only insofar as any individual state has adopted it — but they take it to be a good exemplar of what U.S. law is.

I have never worked as a reporter for any of the ALI projects. My only reporting was done with NCCUSL's Uniform Marriage and Divorce Act. I was invited to join the ALI as a member in 1975. Once again, you have to be elected to membership. There are 3,000 people. Later on, I was elected to the governing body of the organization, which is the council, in 1985. Council is composed of roughly twenty-five to thirty people — judges, lawyers, and academics. Again, at the beginning they had no women and then very few women. Shirley Hufstедler, I believe, was the first woman who was elected to the council. Later, Ruth Ginsburg was a member of the council. She resigned when she was appointed to the U.S. Supreme Court. The council adopts the program for what subjects will be studied, what restatements will be done, and also, in recent years — even before I became a member — they began doing model codes as well as restatements. The Model Penal Code came from them, that was one of their more influential efforts. This project on Principles of the Law of Family Dissolution, which has just been finished, again is not a restatement but principles that could be adopted either by legislatures or by courts. That's a relatively new endeavor for them.

As a member of the council you go to usually three or four meetings a year in addition to the annual meeting, and those are held in Philadelphia, which is where that organization is headquartered. They have one meeting of council a year in New York and then the annual meeting, which is usually in Washington. That's a very interesting organization because it works on substantive law issues. If you serve as an advisor to one of the projects, that involves still more meetings because you then go to meetings with the reporters a couple of times a year when they were ready to submit drafts. I was an advisor to the Family Dissolution Project, and I'm now an advisor to the Employment Law Project, which is just getting off the ground. I've been elected to the executive committee the last three years. That's the committee, again, that carries on the administrative operations of the institute and is advisory to the president of the institute. So that's the ALI.

As I said, I have gone off as a formal member of the Association of American Law Schools and off the ABA's Section on Legal Education. I'm



about to go off the American Bar Foundation board. The American Law Institute is ongoing.

LABERGE: Okay. Well, you tell me what we should do next.

KAY: Maybe I should say a word about the Order of the Coif. The Order of the Coif is the national honor society for law schools, and they usually elect the top 10 percent of the students in each graduating class to be members of the Order of the Coif. My involvement was at the national level. I was, again, first a member of the executive committee, then vice president, and then president. That is a very small group. I think there are not more than five or six people, seven maybe, working with the executive director to organize and administer what the organization does. During the years that I was there we created the triennial book award, which now has become, I think, an annual book award, but then it was given every third year to the leading book published on a legal subject. I chaired the award committee for a three-year period after that was set up. The other two things I was going to talk about were my role in the private foundation world.

LABERGE: Yes.

KAY: Okay. I've been on the boards of two foundations. The first one was the Russell Sage Foundation in New York. That was a foundation that was established by Olivia Sage to improve social and living conditions in the United States, which was a very broad charge. Initially, it was interpreted by the board to include setting up of hospitals and schools in the name of her husband, Russell Sage. Then the board realized that it could spend a great deal of money on hands-on projects like hospitals and schools and that it would be better to try and look for more lasting, structural ways to improve social and living conditions in the United States. That idea took them into finding sociological and other sorts of law reform approaches that would be useful in trying to make a lasting change. It was their interest in law and socio-legal research that got me involved. I — having been at Berkeley and having been involved in working with Laura Nader, which we talked about earlier, and also with the Center for the Study of Law and Society here — was invited to become a member of the board of directors. I served on that board from '73 to '87 and I was the chair of the board for a five-year period from '80 to '84. I think I was the second woman after

Mrs. Sage herself to chair that board, but there have now been several women chairs.

LABERGE: How do you get invited? How did you get invited?

KAY: I think, when they were going to go into funding socio-legal research, they obviously looked at places around the country — Yale, Wisconsin, Berkeley — that were doing it, and I was proposed, probably by some of my colleagues here at Berkeley. They were looking for women because they had no women on their board at that point and so I imagine that I was seen to be a fairly natural candidate. The foundation is a fairly small foundation as foundations go at the national level, but it has made quite an impact in terms of the work that it has done. Since I left the board, it has shifted more into behavioral economics, a little away from sociology, and it still continues to fund research and to undertake projects proposed by people who are resident scholars at the foundation, as well as external scholars. They have an annual meeting once a year in New York to which they invite the past members of the board, and I've tried to go because I think it's important to maintain — how shall I say — I guess a connection to the foundation. So I'll be going probably in November to the meeting this year. I wasn't able to go last year because it conflicted with that wonderful award that I was being given from the faculty and I couldn't make it.

LABERGE: Budd Cheit was on that with you, right?

KAY: He was, yes. Budd was a member of the board when I was the chair, and I believe he has rejoined the board. Maybe he never went off. I'm not sure how long he has been on the board but yes, he's been on the board. Neil Smelser, from Berkeley, was on the board, and I think still is on the board. Those are the two from Berkeley who were active.

LABERGE: And have you been able to influence who has been asked to be on the board?

KAY: I made a number of suggestions when I was active on the board. I have not done so since that time. They don't usually solicit nominations from prior board members. Although I'm sure I could write a letter and make a suggestion to them, but I just haven't done that.

The second private foundation with which I am involved is the Rosenberg Foundation in San Francisco. It's devoted to improving living

conditions of children and youth in California. Ruth Chance was its executive director for many years.

LABERGE: Yes, we have an oral history with her, and I think maybe even somebody from our office talked to you about her.

KAY: Yes, somebody did.

LABERGE: And she's a graduate of Boalt Hall also?

KAY: She's a graduate of Boalt Hall, that's right. She and Barbara Armstrong, of course, were very close. Ruth was still the executive director the first time they asked me to join the board, and at that point I was heavily involved with the Rosenberg Foundation — no, that can't be right. Maybe I was involved with the AALS . . .

LABERGE: Or the Russell Sage?

KAY: Well, I'm looking at my résumé — here's "a member of the Rosenberg Foundation" — yes, that's right, '78. That's right. I was involved with the Russell Sage board and I said I can't do two foundations at once, and so they waited and gave me another invitation later on. So I did join that board and actually was a member of that board at the time that I was chairing the Russell Sage Foundation board. I'm still a member of the Rosenberg Foundation board. They have a rotation for the officers and it's done by seniority. So I was vice president from '85 to '87, president from '87 to '89. Leslie Luttgens is also on that board, and Leslie has been there longer than I have. Every time the rotation comes back to us, Leslie and I sort of tip our hats [laughs] and step aside so the younger members can come up and stay on.

LABERGE: It sounds like from the beginning this one had more women than any of the others.

KAY: It did, yes — and I think that's because of Ruth Chance, right. She certainly saw to it. Kirke Wilson succeeded her after she stepped down as executive director and Kirke is still there, so they've had wonderfully consistent leadership. Because of who Ruth was and because of her activity in the Council on Foundations generally, and also Leslie's activities in the Council on Foundations, the Rosenberg Foundation has had more of an influence in terms of the ethical role foundations ought to play in philanthropy. It has been really quite important, I think, for the way foundations

and philanthropic enterprises are understood, even as against the ones who have so much money that the little bit that we have to spend is totally dwarfed in comparison. But I think its influence has been really quite important.

That foundation has played a remarkable effort in trying to deal with improving the living conditions of immigrants who come to California, trying to get them into the mainstream of society and workplace. It has worked on efforts to try and overcome Proposition 187 (November 1994). We financed a fair amount of the legal challenge to Proposition 187. We're now helping to fund the litigation against Wal-Mart that Equal Rights Advocates is participating in, because that again goes to the question of making the workplace nondiscriminatory to people of different sexes and races and backgrounds. So it's really quite a high-profile organization that again, under Ruth's leadership, looked for cutting-edge issues where it could go in and make a kind of showing that this was important in the hopes of getting other foundations with more resources to accompany us into these fields. By and large, the foundation's been quite successful in doing that, so I'm very happy to continue on that board and think it's quite important. As a matter of fact, on Monday we're going to have a four-hour meeting in which we engage in strategic planning about the next ten years, so that'll be quite interesting to see.

LABERGE: I noticed that there's a new focus on either family law or . . .

KAY: Well, we had a project on enforcing child support. That's now been completed, and I think we all think that we did a fair amount to make some progress there. Child support enforcement is such a morass that it's very hard to get anything lasting really accomplished in that field, and I think we gave it a good try but I wouldn't count that as one of our major success stories.

LABERGE: I wondered how much you had any influence on choosing that as one of the things you looked at.

KAY: I was interested in it, but I think the idea really came — it was one of Kirke Wilson's ideas. He had met with some people in Los Angeles, which is where the real problem was because of the enormous amounts of unenforced child support orders that they have there. There has been an utter failure of the California computerized child support enforcement

efforts, which never worked properly. California is now out of compliance with the federal guidelines on this — I forget how much they're fining California. It may even be a million dollars a year, or whatever — some outrageous amount. California has just done nothing in order to try and get themselves up to snuff on this, so it's not a happy situation. [laughs]

KAY: The Foundation Press is a commercial publisher publishing legal materials, casebooks primarily. It was originally owned by the West Publishing Company and it — like practically every other legal publisher — has been taken over by the Thomson Company, which is now its owner. Foundation Press is a prestige publisher that publishes the leading casebooks written by the leading authors of — I can say that because my casebooks are all published by West [laughs], not by Foundation. It has an advisory board of law professors who advise the press on every piece of paper they publish. It has set very high standards and that's been, fortunately, commercially quite successful. So I'm paid for my service on that board; that's one of my external consultancies that I list on my annual disclosure forms. We meet once a year in New York, which is where the organization is now located, and we communicate by e-mail and we review manuscripts and make suggestions about them. Again, I was the first woman to serve on that board.

LABERGE: That's what I wondered.

KAY: We now have several women serving on the board.

LABERGE: How are the people chosen?

KAY: They're chosen by the board members.

LABERGE: Do you know who chose you?

KAY: Yes, I do know. Harold Eriv, who was at that point the president of Foundation Press, asked me to become a member of the board and I did. I'm sure the board members had recommended me to him.

LABERGE: How did you know him?

KAY: Oh, everybody knew Harold! [laughs] Harold was the one who visited law professors in their office, and made trips to law schools. He used to do it by himself and then later on they hired a stable of sales representatives



HERMA HILL KAY WITH HER HUSBAND, CARROLL BRODSKY,  
AND HER DOG ON THE TERRACE OF THEIR APARTMENT IN  
SAN FRANCISCO, CA. 1979-80

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who went around. They come in, they knock on your door, and ask, “What are you teaching this year? What books are you using? What do you need?” Harold, of course, being — among everything else — probably the best person with a native eye for nuance and gossip, acted as kind of the communications resource among all the law schools [laughs] and picked up everything. So, yes, everybody knew Harold. [laughs]

LABERGE: Well, he picked you up. [laughs]

KAY: Yes, he did. He sure did. He’s now retired and we have another person who was his replacement who’s doing very well. His name is Steve Errick. Of course, the whole operation has now become much more business-oriented than it was before, because of the Thomson Company’s insistence on a corporate hierarchy model.

LABERGE: This might be a good segue into your personal life and how you were able to do all this outside activity, how you were able to teach, be a dean, and still have some other kind of life.

KAY: Well, you understand I never have given birth to a child. [laughs]

LABERGE: That’s a major factor, yes!

KAY: It is a major factor. I’ve never had to deal with juggling care of infants and young children. My first two marriages were childless. My first husband, whom we’ve mentioned, was an artist and really had no sort of geographical demands. My second husband, Larry Kay, who is a graduate of Boalt Hall and who’s now a judge in San Francisco — he’s a Court of Appeal judge; presiding judge actually now — we had no children either, and he was of course working full time, as I was. Then my third husband, to whom I’m still married, Carroll Brodsky, was a widower when we married and he had three boys. There’s a picture of him and the three boys over on my desk. I adopted the youngest boy, who at that point was twelve. The oldest boy was leaving to go to college the year we got married so he never lived at home. The middle son and the younger son both lived with us in San Francisco, but I just didn’t have the kind of time demands that many women have with babies and young children. The boys were always very accommodating. When I went to spend that semester as a visiting professor at Harvard, Tom — the youngest boy, the one I adopted — went with me to Cambridge. So we spent a semester there together and he went to





HERMA HILL KAY'S HUSBAND, CARROLL BRODSKY  
(THIRD FROM LEFT), WITH HIS THREE SONS (LEFT TO RIGHT),  
TOM, MICHAEL, AND JOHN, 2002

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school and I went to teach at Harvard, and Carroll came to visit us a couple of times. He couldn't leave his medical practice.

LABERGE: But you took on the whole mother role.

KAY: Oh yes. But, you know, it's different being the mother of teenage boys than being the mother of teenage girls. [laughs]

LABERGE: Right, but it still can be a challenge.



KAY: Oh yeah, oh yeah. But it was an element of my life that was just really wonderful to be able to have. And we now have four grandchildren — three are children of the middle son, John, and the youngest one is the son of the oldest boy, Michael.

LABERGE: Tom, Michael, and John.

KAY: Tom, Michael, and John. So we now have four grandchildren and they are utterly wonderful. [laughs]

LABERGE: [laughs] On that note, in watching your students or other women faculty, do you see how being a parent has affected either their tenure or their professional life in what they've been able to do?

KAY: Oh, yes. This is one of the things where history sort of folds back on itself, because one of the things that I was active in trying to get done when I was chair of the Academic Senate was to create a half-time tenure position that we finally managed to get through. Arlie Hochschild was one of the first women — if not the first — to hold that position where she was half time in the Department of Sociology and was not half time anywhere else. Her family was the other half time. That was a really major breakthrough when we got it accomplished, because there was a lot of opposition to it. Then, in the last several years, when I was, as dean, serving on the Council of Deans, I started hearing all this objection by people who were saying, "Well, you can't offer half-time positions to women faculty even if they want them because that discriminates against women on the basis of sex." I said, "Hey, wait a minute! [laughs] There's a history here about creating this position for women who wanted to be able to have half time in the professional academic world and half time as mothers. And it was always available to fathers."

LABERGE: Oh, it was?

KAY: Oh, yes. It was not limited to women. In a couple of small departments there were husband and wife teams who were hired as half-time faculty members using one position, right? Of course, then we had a few problems when one of them — when they got divorced. [laughs] But that's a different issue.

LABERGE: So that happened, too?



HERMA HILL KAY AND HER HUSBAND, CARROLL BRODSKY,  
AT THE AMERICAN BAR ASSOCIATION MEETING  
IN LONDON, JULY 2000

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KAY: It did happen, too; yes, that's right. Both of them wanted full-time positions after the divorce, but only one position was available. But no, I've always thought the half-time position was a good idea. Then, of course, the question is, what happens if this half-time person wants to go full time? You then would have a question of — what other positions do you have available, do you want to expand this position? It would be like competing with another person for that position. You wouldn't have any edge in getting it, but neither would you be disqualified from getting it.

LABERGE: Yes.

KAY: But I always thought that was a great idea.

LABERGE: I'm glad we brought that up because I don't think we mentioned that when we talked about the Academic Senate.

KAY: We might not have.

LABERGE: That's still in existence, too?

KAY: That's still in existence, yes. I don't know how often it's used anymore but it's still in existence.

LABERGE: Okay. Back to your personal life. Even so, you do an amazing amount. As we were going through the list of the ALI, et cetera, and you say, "They've asked me to do such and such and I'm happy to do it." Well, being "happy to do it" means quite a bit of time.

KAY: I'm organized. [laughs]

LABERGE: You are definitely, definitely organized.

KAY: I also swim. I like to say I swim every day; actually, I swim about five times a week.

LABERGE: You fit that in before you come to campus?

KAY: No, usually it's in the afternoon.

LABERGE: You do that, and what other hobbies, what else do you juggle?

KAY: I garden. I grow roses and orchids on my balcony in San Francisco. I go for walks. I particularly like that wonderful walk along the San Francisco Bay out at Crissy Field.

LABERGE: Yes, and Land's End?

KAY: Yes, it's marvelous. And I read. I watch baseball — Barry Bonds is about to hit 660. I watch football, the 49ers are looking like they might have a chance this year. I watch all that on television. I don't go to games. I think that's about it. I don't fly anymore. I told you about that?

LABERGE: You did not tell me about that.



HERMA HILL KAY, THE  
AIRPLANE PILOT, ON  
THE WING OF THE PIPER  
CUB AT THE HAYWARD,  
CALIFORNIA, AIRPORT IN  
THE EARLY 1970S

KAY: Oh, I didn't tell you about that? Well, my second husband, Larry Kay, was a private pilot — he had an airplane. It occurred to me as I was sitting there in the right-hand seat as they call it, that if anything bad happened I probably ought to know how to land the thing. So I earned a private pilot's license and actually flew pretty consistently once a week — I had about 300 hours in flight time — until I married Carroll. Then when those two boys came to live with us [laughs] I no longer had time to go flying. That's what I gave up. But that was great fun, I enjoyed it.

LABERGE: I don't have any — I mean there are lots of things we could talk

about but I don't have anything we absolutely have to say. Anything else you want to add?

KAY: I don't think so. I do think that when you start transcribing this, if there are parts that I want to expand on I guess we could do that.

LABERGE: Yes, absolutely. Okay. I want to thank you very much for doing this for posterity and for research — other women will be using this, I'm sure.

KAY: Well, I want to thank you. You've been a wonderful person to work with.

LABERGE: [laughs] Thank you.

# HERMA HILL KAY

## CURRICULUM VITAE

### PRESENT POSITION

Barbara Nachtrieb Armstrong Professor of Law, School of Law, University of California, Berkeley.

### EDUCATION

B.A., Southern Methodist University, Dallas, Texas, 1956.

Phi Beta Kappa; Magna Cum Laude; Departmental Distinction in English.

J.D., The University of Chicago Law School, 1959.

Member, Order of the Coif; Book Review Editor, *Chicago Law Review*.

### HONORARY DEGREES

LL.D. (Honoris Causa), Southern Methodist University, 1992.

LL.D. (Honoris Causa), Mills College, 2000.

### PROFESSIONAL EXPERIENCE

University of California, Berkeley:

Barbara Nachtrieb Armstrong Professor of Law, 1996–.

Dean, 1992–2000.

Richard W. Jennings Professor of Law, 1987–1996.

Professor of Law, 1963–1987.

Associate Professor of Law, 1962–1963.

Assistant Professor of Law, 1960–1962.

Hamline University School of Law:

Bush Foundation Distinguished Visitor, September 1985.

Northwestern School of Law, Lewis & Clark College:

Distinguished Higgins Visitor, October 1984.

Harvard Law School:

Visiting Professor, Fall 1976.

University of Manchester, England:

Visiting Simon Professor, 1972.

National Conference on Uniform State Laws:

Uniform Marriage and Divorce Act, Co-Reporter, 1968–1970.

California Supreme Court:

Law Clerk to Justice Roger Traynor, 1959–1960.

## ADMITTED TO PRACTICE

U.S. Court of Appeals for the Second Circuit, 1995.

U.S. Supreme Court, 1978.

U.S. Court of Appeals for the Ninth Circuit, 1960.

U.S. District Court for the Northern District of California, 1960.

State Bar of California, 1960.

## AWARDS AND HONORS

Berkeley Faculty Service Award, 2007.

Faculty Lifetime Achievement Award, Boalt Hall Alumni Association, 2003.

Career Achievement Award, Women Lawyers of Alameda County, 2002.

Bernard Moses Memorial Lecturer, UC Berkeley, 2000–2001.

American Philosophical Society (elected Member, 2000).

Wiley Manuel Law Foundation Community Service Award, 1999.

Allies for Justice Award, National Lesbian and Gay Law Association, 1996.

Marshall–Wythe Medallion, The College of William and Mary, 1995.

Margaret Brent Women Lawyers of Achievement Award, Commission on Women in the Profession, American Bar Association, 1992.

Fellow, American Bar Foundation (elected, March 1991).

Research Award, Fellows of the American Bar Foundation, 1990.

Fellow, American Academy of Arts and Sciences (elected, May 1989).

Barbara Nachtrieb Armstrong Award, *Berkeley Women's Law Journal*, 1985.

SALT Teaching Award, Society of American Law Teachers, 1984.

Distinguished Teaching Award, University of California, Berkeley, 1962.

## GRANTS AND FELLOWSHIPS

Co-Investigator, California Divorce Law Project (financed by NIMH and NSF), 1973–1978. (Lenore Weitzman, Principal Investigator).

Director, Family Law Project (financed by the Children's Bureau, U.S. Department of Health, Education, and Welfare), 1964–1967.

Fellow, Center for Advanced Study in the Behavioral Sciences, Palo Alto, California, 1963–1964.

## MEMBERSHIP ON GOVERNING AND ADVISORY BOARDS

### American Academy of Arts and Sciences:

Member, The Western Central Executive Council, 1991–1993.

### American Bar Association:

Member, ABA/AALS/LSAC Joint Committee on Racial and Ethnic Diversity, 2001–.

Secretary, Section of Legal Education and Admissions to the Bar, 1999–2001.

Member, Council of the Section of Legal Education and Admissions to the Bar, 1993–1999.

Chair, Diversity in Legal Education Committee, 1996–2000.

Chair, Planning Committee for the 1994 Annual Meeting Program, 1993–1994.

Member, Commission to Review the Substance and Process of the ABA's Accreditation of American Law Schools, 1994–1995.

### American Bar Foundation:

Member, Executive Committee, 2000–2003.

Member, Board of Directors, 1995–2003.

Member, Research Committee, 1991–1995.

### American Law Institute:

Member of the Council, December 1985 – June 30, 2011.

Member, Executive Committee, 2000–2007.

Chair, Special Committee to Review the Rules of Council and the Bylaws, 1993–1995.

Life Member, 2003

### Association of American Law Schools:

Member, Executive Committee, 1986–1990.

President-Elect, 1988.

President, 1989.

Immediate Past President, 1990.

Chair, Nominating Committee, 1992.

Member, Nominating Committee, 1993.

Member, *Journal of Legal Education* Editorial Board, 2001–2004.

### California State Bar:

Member, Commission on the Future of the Legal Profession and the State Bar, 1993–1995.

Law School Representative, Law School Council of the Committee of Bar Examiners, 1993–1995.

Member, Family Law Committee, 1965–1969.

California Women Lawyers:

Member, Board of Governors, 1975–1977.

Equal Rights Advocates, Inc., San Francisco:

Member, Board of Directors, 1973–1999.

Chairperson, Board of Directors, 1977–1983.

Family Violence Appellate Project, Berkeley:

Member, Board of Directors, 2012–.

Foundation Press:

Member, Editorial Board, 1977–.

Order of the Coif:

Member, Executive Committee, 1977–1980.

National Vice President, 1980–1983.

National President, 1983–1985.

Chair, Triennial Book Award Committee, 1990–1993.

Rosenberg Foundation, San Francisco:

Member, Board of Directors, 1978–.

Vice-President, 1985–1987.

President, 1987–1989.

Russell Sage Foundation, New York City:

Member, Board of Directors, 1973–1987.

Chairperson, Board of Directors, 1980–1984.

San Francisco Lawyers' Committee for Urban Affairs:

Member, 1978–.

United States Secretary of State's Advisory Committee on Private International Law, Study Group on International Child Abduction by One Parent:

Member, 1978–1980.

## CALIFORNIA STATEWIDE COMMITTEES AND COMMISSIONS

Member, Lieutenant Governor Cruz M. Bustamante's Commission for One California, 1999–2003.

Member, California Commission on Campaign Financing, 1993–97.



Member, Senator Dianne Feinstein's Statewide Advisory Committee on Judicial Appointments, 1992–1996.

Member, California Coordinating Committee for International Women's Year, 1977.

Member, Governor Edmund G. "Pat" Brown's Commission on the Family, 1966.

## MEMBERSHIP IN PROFESSIONAL SOCIETIES

American Bar Association

American Law Institute

California Women Lawyers

National Association of Women Lawyers

Queen's Bench Bar Association, San Francisco

Women Lawyers of Alameda County

## SERVICE ON UNIVERSITY COMMITTEES

Member, Faculty Advisory Committee, Presidential Search Committee, 2007–2008.

Member, Dean's Advisory Council, UC Irvine Law School, 2009–.

Chairperson, Faculty Screening Subcommittee and Member, Committee to Advise the President on a Chancellor for the Berkeley Campus, Spring 2004.

Chair, Systemwide Academic Senate Committee on Academic Freedom, 2005–2006.

Vice-Chair, Systemwide Academic Senate Committee on Academic Freedom, 2004–2005.

Member, Academic Senate Committee on Academic Freedom, 2003–2004.

Member, Search Committee for Director of Continuing Education of the Bar, 2003.

Member, Coordinating Committee on the Status of Women (CCSW), 2001–2003.

Member, Search Committee for Dean of the Haas School of Business, 2001–2002.

Member, Committee to Advise the President on the Selection of a Provost and Senior Vice President – Academic Affairs, 1995–1996.

Member, Search Committee for Berkeley Chancellor, 1989–1990.

Chairperson, Academic Senate Committee on Privilege and Tenure, 1986–1987; Member, 1985–1986.

Chairperson, Academic Senate Committee on Teaching, 1984–1985; Member, 1965–1967; Chairperson, 1967–1968.

Chairperson, Academic Senate Committee on Budget and Interdepartmental Relations, 1982–1983; Member, 1979–1982.

Member, Universitywide Committee on Academic Personnel, 1982–1983.

Member, Academic Senate-Administration Committee on Faculty Retirement Policy, 1978–1979.

Member-at-Large, Berkeley Representative Assembly, 1974–1976.

Member, Universitywide Academic Planning and Program Review Board (APPRB), 1974–1977; only faculty member on APPRB Steering Committee, 1975–1977.

Member ex officio, University of California Statewide Academic Council and Representative Assembly, January 1, 1973 – September 30, 1974.

Chairperson, Berkeley Division of the Academic Senate, January 1, 1973 – September 30, 1974.

Member, Berkeley Academic Senate Committee on Committees, 1970–1972.

Chairperson, Berkeley Women's Faculty Group, 1969–1970.

Member, Senate Policy Committee, 1968–1970.

Member, Special Committee on Distinction in Teaching, 1964–1965.

## SUBJECTS TAUGHT

Conflict of Laws

Sex-Based Discrimination

Family Law

California Marital Property

Workshop on Judging (with Geraldine Sparrow)

Family Law Seminar

Law and Psychiatry (with Irving Philips)

Law and Anthropology (with Laura Nader)

Civil Procedure

## INVITED LECTURES

Panelist, AALS Workshop on Women Rethinking Equality, June 20–21, 2011, Panel on Women Advocates: Teachers and Learners Across Generations. *Topic*: “Soia Mentschikoff: The ‘Czarina’ of Legal Education.”

Lecturer, Grand Rounds, UCSF Department of Psychiatry, April 14, 2004. *Topic*: “Tailoring Family Law to Evolving Family Forms: A Forty-Year Project that Remains Unfinished.”

Lecturer, International Women’s Day Celebration, Washington University in St. Louis Law School, March 4, 2004. *Topic*: “Celebrating Early Women Law Professors.”

Lecturer, The Graveson Memorial Lecture, Kings College, London, December 11, 2003. *Topic*: “Same-Sex Divorce in the Conflict of Laws.”

Lecturer, The 2003 Sidney and Walter Siben Distinguished Professorship Lecture, Hofstra Law School, March 14, 2003. *Topic*: “‘Making Marriage and Divorce Safe for Women’ Revisited.”

Lecturer, The Frank Irvine Lecture, Cornell Law School, April 18, 2002. *Topic*: “Women Faculty at Cornell Law School and the University of California, 1900–2000.”

Lecturer, The Brigitte Bodenheimer Memorial Lecture, UC Davis Law School, February 21, 2002. *Topic*: “UC’s Women Law Faculty.”

Keynote Speaker, Twenty-Fifth Anniversary of the Marin County Women Lawyers’ Association, Sausalito Yacht Club, November 14, 2001. *Topic*: “Twenty-Five Years of the Marin County Women Lawyers’ Association.”

Lecturer, The Bernard Moses Memorial Lecture, University of California, Berkeley, November 14, 2000, Alumni House, UC Berkeley. *Topic*: “From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law During the Twentieth Century.”

Lecturer, Law Schools and the Legal Profession: A Conference in Celebration of Twenty-Five Years of Service by James P. White, Indianapolis, Indiana Law School, April 8, 2000. *Topic*: “The Challenge to Diversity in Legal Education.”

Lecturer, The Goldmark Lecture, Legal Foundation of Washington, Seattle, Washington, January 23, 1998. *Topic*: “The Impact of Proposition 209 and the UC Regents’ Resolutions on Legal Education in California’s Public Schools.”

Speaker, University of Chicago Law School Alumni, San Francisco, January 7, 1998. *Topic*: "Affirmative Action at the University of California Law School."

Honoree, The Marshall–Wythe Medallion Lecture, Marshall–Wythe School of Law, November 4, 1994. *Topic*: "Women Law Professors."

Lecturer, The Korean Judicial Training Institute, Seoul, Korea, September 15, 1993. *Topic*: "Emerging Trends in American Family Law and Conflict of Laws."

Lecturer, The Baker–McKenzie Foundation Lecture, Loyola University School of Law, Chicago, March 22, 1990. *Topic*: "Women Lawyers vs. Lawyers Who Happen To Be Women: Is This Choice Viable?"

Hague Academy of International Law, Special Course, July 17–21, 1989. *Topic*: "A Defense of Currie's Governmental Interest Analysis."

Lecturer, The Henry J. Miller Distinguished Lecturer, College of Law, Georgia State University, September 28, 1989. *Topic*: "What Is Legal Education? And Should We Permit It To Continue in Its Present Form?"

Lecturer, Robert S. Marx Lectures, School of Law, University of Cincinnati, April 3–4, 1986. *Topic*: "Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath."

Lecturer, The David Baum Memorial Lecture, School of Law, The University of Illinois at Urbana–Champaign, September 17, 1984. *Topic*: "Models of Equality."

Lecturer, The San Diego County Law Library Lecture Series, San Diego, California, April 25, 1980. *Topic*: The Aftermath of *Hisquierdo*: Military Pensions, Social Security, ERISA."

Keynote Address, AALS Workshop on the Professional Development of the Woman Law Teacher, Cincinnati, Ohio, October 5, 1979. *Topic*: "Promotion, Retention, and Tenure."

Six-Hour Lecture to practicing attorneys for California Continuing Education of the Bar Summer Program, August 1978. *Topic*: "Recent Developments in Family Law."

Opening Address at Eighth National Conference on Women and the Law, Madison, Wisconsin, March 1977. *Topic*: "The Equal Rights Amendment and Family Law: Last Frontier for Change."

Keynote Address at Women's Pre-Conference Conference, Council on Foundations Annual Meeting, Atlanta, Georgia, May 1976. *Topic*: "The Changing Legal Status of Women."

Opening Lecture, Montana State Bar Association, December 1975. *Topic*: "The Uniform Marriage and Divorce Act: What it Means in Montana."

Keynote Address at Conference on the Homemaker, sponsored by University of Wisconsin Extension and the Wisconsin Commission on the Status of Women, Madison, Wisconsin, September 1974. *Topic*: "The Legal Economics of Marriage and Divorce."

Luncheon Speaker, Honoring Wives of President and President-Elect of the American Psychiatric Association, 127th Annual Meeting of the American Psychiatric Association, Detroit, Michigan, May 1974. *Topic*: "Sex-Based Discrimination in Marriages by and between Professionals."

Graduation Address, SUNY/Buffalo Law School, Buffalo, New York, June 1973. *Topic*: "Will the Hand that Signs the Brief Change the Law?"

Lecture at Eagleton Institute Conference for Women State Legislators, Pennsylvania, May 1972. *Topic*: "How to Make Marriage and Divorce Safe for Women."

## MEMBERSHIP IN ORGANIZATIONS

National Organization for Women.

National Women's Forum.

National Women's Political Caucus.

Prytanean Alumnae, Inc.: Honorary Member, 1985–.

Women in Philanthropy.

The Metropolitan Club, San Francisco.

The Berkeley City Club.

Zonta Club of Berkeley: Member, 1967–85; President, 1980–81; Honorary Member, 1992–.

# HERMA HILL KAY

## BIBLIOGRAPHY

### BOOKS

TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION (with Tristin K. Green) (7th Ed., 2012; West Group).

CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS (with Larry Kramer and Kermit Roosevelt, III) (9th Ed., 2013; West Group).

### BOOK CHAPTERS

“Same-Sex Marriage in the Conflict of Laws: A Critique of the Proposed ‘Defense of Marriage Act,’” in *THE CIVIL LAW IN THE 21ST CENTURY: Festschrift in Honor of Koji Ono on the Occasion of His Sixtieth Birthday* 831–843, (Hougakushoin, 1996).

“Perspectives on Sociobiology, Feminism, and the Law,” in (D. Rhode, ed.) *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 74–85 (Yale U. Press, 1990).

“Beyond No-Fault: New Directions in Divorce Reform,” in (S. Sugarman & H.H. Kay, eds.) *DIVORCE REFORM AT THE CROSSROADS* 6–36 (Yale U. Press, 1990).

“Reproductive Technology and Child Custody,” in (A. Skolnick & J. Skolnick, eds.) *FAMILY IN TRANSITION* 405–419 (6th Ed. 1989).

“The Offer of a Free Home: A Case Study in the Family Law of the Poor,” in (L. Nader, ed.) *LAW IN CULTURE AND SOCIETY* 304–326 (Aldine Press, 1969); reprinted in (Y. Cohen, ed.) *MAN AND ADAPTATION: THE INSTITUTIONAL FRAMEWORK* 162–175 (Aldine Press, 1971).

“Facing the Community Backlash,” in (Farber & Wilson, eds.) *TEENAGE MARRIAGE AND DIVORCE* 130–135 (Diablo Press, 1967).

“The Outside Substitute for the Family,” in *MAN AND CIVILIZATION: THE FAMILY’S SEARCH FOR SURVIVAL* 3–14 (McGraw-Hill, 1965).

### ARTICLES

“What I Learned About Feminism From the Early Women Law Professors,” *ISSUES LEG. SCHOLARSHIP*, Berkeley Electronic Press, 2011.

Rights of the Putative Spouse in Quasi-Marital Property: Another View,” *The Back Page: Commentary on Family Law Issues*, FAM. L. MTHLY. (Lexis-Nexis, December 2010).

“Berkeley Women’s Law Journal: A Powerful Force at Twenty,” 20 BERKELEY J. GENDER L. & JUST. 1 (2005).

“Same-Sex Divorce in the Conflict of Laws,” 15 K.L.J. 63 (2004).

“Ruth Bader Ginsburg: Professor of Law,” 104 COLUM. L. REV. 2 (2004).

“‘Making Marriage and Divorce Safe for Women’ Revisited,” 32 HOFSTRA L. REV. 71 (2003).

“U.C.’s Women Law Faculty,” 36 U. CAL. DAVIS L. REV. 331 (2003).

“Women Law School Deans: A Different Breed, Or Just One Of The Boys?” 14 YALE J.L. & Feminism 219 (2002).

“No-Fault Divorce and Child Custody: Chilling Out the Gender Wars,” 36 FAM. L.Q. 27 (2002).

“The Challenge to Diversity in Legal Education,” 34 IND. L. REV. 55 (2000).

“Currie’s Interest Analysis in the 21st Century: Losing the Battle, But Winning the War,” 37 WILLAMETTE L. REV. 123 (Winter 2001).

“From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century,” 88 CAL. L. REV. 2017 (December 2000).

“Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer,” 84 CAL. L. REV. 703 (1996).

“The Berkeley Women’s Law Journal: Ten Years of Giving Voice to Underrepresented Women and Their Concerns,” 10 BERKELEY WOMEN’S L.J. 1 (1995).

“The Future of Women Law Professors,” 77 IOWA L. REV. 5 (1991).

“Commentary: Toward a Theory of Fair Distribution,” 57 BROOKLYN L. REV. 755 (1991).

“Private Choices and Public Policy: Confronting the Limitations of Marriage,” 5 AUSTRALIAN J. FAM. L. 69 (1991).

“In Defense of Footnotes,” 32 ARIZ. L. REV. 419 (1990).

“What is Legal Education? And Should We Permit it to Continue in its Present Form?,” 6 GA. ST. U. L. REV. 349 (1990).

“A Defense of Currie’s Governmental Interest Analysis,” 215 RECUEIL DES COURS 11 (Hague Academy of International Law, 1989-III).

- "Commentary, Private Clubs and Public Interests: A View From San Francisco," 67 WASH. U. L.Q. 855 (1989).
- "Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath," 56 U. CIN. L. REV. 1 (1987).
- "An Appraisal of California's No-Fault Divorce Law," 75 CAL. L. REV. 291 (1987).
- "Equality and Difference: The Case of Pregnancy," 1 BERKELEY WOMEN'S L.J. 1 (1985). Reprinted in part in (P. Smith, ed.) FEMINIST JURISPRUDENCE 27-47 (1993) and in (D.K. Weisberg, ed.) FEMINIST LEGAL THEORY FOUNDATIONS 179-189 (1993).
- "Models of Equality," 1985 U. ILL. L. REV. 39 (1985).
- "Chief Justice Traynor and Choice of Law Theory," 35 HASTINGS L.J. 747 (1984).
- "Theory Into Practice: Choice of Law in the Courts," 34 MERCER L. REV. 521 (1983).
- "The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience," 68 CAL. L. REV. 577 (1980).
- "The Need for Self-Imposed Quotas in Academic Employment," 1979 WASH. U. L.Q. 137 (1979). Reprinted in part in H.T. Edwards and V.D. Nordin, HIGHER EDUCATION AND THE LAW 682-688 (1979).
- "Legal and Social Impediments to Dual Career Marriages," 12 U. CAL. DAVIS L. REV. 207 (1979).
- "Marvin v. Marvin: Preserving the Options," 65 CAL. L. REV. 937 (1977) (with Carol Amyx). Reprinted in part in (J.P. Rosenfeld, ed.) RELATIONSHIPS: THE MARRIAGE AND FAMILY READER 153-166 (Scott, Foresman, 1982).
- "Legal Planning for the Mentally Retarded: The California Experience," (with L. Farnham, B. Karren, J. Knakal, and P. Diamond), 60 CAL. L. REV. 438 (1972).
- "A Family Court: The California Proposal," 56 CAL. L. REV. 1205 (1969). An updated version of this article also appears in (P. Bohannon, ed.) DIVORCE AND AFTER 215-248 (Doubleday, 1970).
- "Comment on *Reich v. Purcell*," 15 UCLA L. REV. 584 (1968).
- "The Law and Class Structure: Some Thoughts on Social Perception of Divorce and Child Custody," (with Irving Philips) (in Levitt & Rubenstein, eds.) ORTHOPSYCHIATRY AND THE LAW 157-173 (Wayne St. U. Press, 1968).



"Poverty and the Law of Child Custody," (with Irving Philips), 54 CAL. L. REV. 717 (1966).

"Conflict of Laws: Foreign Law as Datum," 53 CAL. L. REV. 47 (1965).

"The Family and Kinship System of Illegitimate Children in California Law," 67 AMERICAN ANTHROPOLOGIST (Part 2, Special Publication) 57 (Dec. 1965).

"Introduction to Conflicts Symposium," 18 OKLA. L. REV. 233 (1965).

"'Quasi-Community Property' in the Conflict of Laws" (Herma Hill Schreter), 50 CAL. L. REV. 206 (1962).

"Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities" (Herma Hill Schreter) (with Brainerd Currie), 69 YALE L.J. 1323 (1960).

"Unconstitutional Discrimination in the Conflict of Laws: Equal Protection" (Herma Hill Schreter) (with Brainerd Currie), 28 U. CHI. L. REV. 1 (1960).

## BOOK REVIEWS

"Carol King: 'The Woman with a Heart,'" review of A.F. Ginger, CAROL WEISS KING: HUMAN RIGHTS LAWYER, 1895-1952 in 79 WOMEN LAWS. J. 14 (1993).

"Testing the Modern Critics Against Moffatt Hancock's Choice of Law Theories," review essay on M. Hancock, STUDIES IN MODERN CHOICE-OF-LAW: TORTS, INSURANCE, LAND TITLES in 73 CAL. L. REV. 525 (1985).

Review of Betty Friedan, THE SECOND STAGE in THE NEW YORK TIMES BOOK REVIEW, Nov. 22, 1982.

"Protecting Women from Sexual Harassment in the Workplace," review of C.A. MacKinnon, SEXUAL HARASSMENT OF WORKING WOMEN in 58 U. TEX. L. REV. 671 (1980) (with C.M. Brodsky).

"Making Marriage and Divorce Safe for Women," review of M. Rheinstein, MARRIAGE STABILITY, DIVORCE AND THE LAW in 60 CAL. L. REV. 1683 (1972).

Review of Cramton & Currie, CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS in 21 J. OF LEG. ED. 613 (1969).

Review of von Mehren & Trautman, THE LAW OF MULTISTATE PROBLEMS in 18 J. OF LEG. ED. 341 (1966).

## TRIBUTES AND MISCELLANEOUS PUBLICATIONS

“Remembering Mary Dunlap as a Student,” 19 *BERKELEY WOMEN’S L.J.* 3 (2004).

“Introduction,” *Symposium and Workshop on Judging at the University of California, Berkeley, School of Law (Boalt Hall), Spring Semester 2000* (with Geraldine Sparrow), 16 *WIS. WOMEN’S L.J.* 1 (2001).

“Foreword,” *Gender Issues in Divorce: Commentaries on the American Law Institute’s Principles of the Law of Family Dissolution*, 8 *DUKE J. GENDER L. & POLICY* ii (2001).

“Richard W. Jennings and the Academic Senate: A Strong Hand in Troubled Times,” 88 *CAL. L. REV.* 263 (2000).

“In Memoriam: Elisabeth A. Owens,” 112 *HARV. L. REV.* 1403 (1999).

“Tribute to Justice Ruth Bader Ginsburg,” 1997 *ANNUAL SURVEY OF AMERICAN LAW* (NYU School of Law) xxiii (1997).

“Tribute: Ira Michael Heyman,” 81 *CAL. L. REV.* 1095 (1993).

“Wanted by the Law: A Career that Broke the Rules,” 10 *THE WOMEN’S REVIEW OF BOOKS* 22 (1993).

“Tribute: Jesse Choper’s Decadal Decade,” 80 *CAL. L. REV.* 559 (1992).

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Graduation Address at Boalt Hall May 22, 1982: “On Making Trouble (Without Being a Troublemaker),” 15 *THE TRANSCRIPT* (UC Berkeley) 10 (1982).

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