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Tribute to Justice Kathryn Mickle Werdegar

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Tribute to

JUSTICE KATHRYN MICKLE WERDEGAR

JOSEPH R. GRODIN*

About forty years ago, I was chair of the hiring committee for the First District Court of Appeal, and I interviewed a young woman for a position on the court's central staff. Though you would never know it from her shy and modest demeanor, she had a remarkable record of academic and professional accomplishments, and I did not hesitate to recommend her to the court. It is on this basis that I claim credit for launching Justice Werdegar on her extraordinary judicial career.

When we talk in the public arena about great judges, we are inclined to focus on influential opinions which moved the law in a new direction, for those are the inflection points easiest to identify and describe, and easiest to understand by people who are not lawyers. And during her tenure on the court, Justice Werdegar had her share of blockbusters. But those of us who are familiar with the process of judging know there are other yardsticks, possibly more significant yardsticks, for measuring a judge's performance.

One of these is craft — the ability to analyze a case down to its essentials, to view it in the context of precedent, to explain the issues in terms

* Former Associate Justice, California Supreme Court; Distinguished Emeritus Professor, UC Hastings College of the Law. Remarks delivered at the Retirement Celebration for Justice Werdegar at the California Supreme Court, San Francisco, August 2, 2017.

that are clear and understandable, to give due account to the competing arguments, with respect for the views of one's colleagues, in a fair and open-minded way, and to offer a persuasive rationale for the opinion's conclusion. Is "craftswoman" a word? If so, it applies to Justice Werdegar.

In addition to craft there is what might, for lack of a better term, be called judgment. And judgment is more difficult to describe. There is a temptation to use the term to describe an outcome with which one happens to agree, but when we push that temptation aside we can recognize that an opinion reflects good judgment even if we might disagree with the conclusion in a particular case. Judgment entails a sense of balance between competing considerations, as reflected in the scales of justice. We might not be able to explain what the mind does when it is supposed to be balancing, but we can recognize when a person has engaged in the process with seriousness of purpose, maturity of reasoning, and good faith. Wisdom might be a better word. Justice Werdegar has been a wise judge.

But then, there is more to the process than that. The metaphor of the judge calling balls and strikes has its popular appeal, but all of us know it has its limitations, and that there is more to judging than reporting what one sees. What is more is not simply "politics," at least not in the crude sense of political affiliation. And it isn't "ideology," in the sense of commitment to some preconceived notion of how society ought to be organized. Benjamin Cardozo referred to this added factor as "morals and social welfare," or at other times as "social justice," but Cardozo was careful to insist on a distinction between a judge's private morality — his or her "idiosyncrasies of conduct or belief" — and what he referred to as "the customary morality of right-minded men and women."

Now I grant you that this is a difficult distinction to define and defend, as the many writings of legal philosophers before and after Cardozo demonstrate, but there is no getting around the fact that any attempt to describe the judicial process, and any attempt to evaluate the contributions of particular judges, is incomplete without some consideration of what might generally be called "values." And while neither time nor the limits of my own competence permit an intensive exploration of the philosophical parameters of the term, I feel comfortable for present purposes in saying, with acknowledgments to Justice Stewart, I know good values when I see them.

And I see them in the opinions of Justice Werdegar. I see them in her opinions that reflect concern for the environment, for the challenges of the workplace, for privacy, for due process and fairness of treatment, for the importance of protecting against discrimination, for the protection of whistleblowers, for the value of diversity, including diversity of sexual orientation, for the protection of consumers against faulty dangerous products, and, as they say in the *PBS News Hour*, much more. Justice Werdegar is entitled to take particular pride in her dissenting opinions, especially those in which her dissenting views prevailed in her court, as in *American Pediatrics v. Lungren*, protecting a minor's right to decide whether to have an abortion, or in the United States Supreme Court, as in the case in which she insisted that search of a cell phone required a warrant or exigent circumstances. The values reflected in her opinions may not always reflect the public mood at a particular time, but I would argue that they do reflect the enduring notions of liberty and equality that underlie our common core beliefs about the nature of justice.

What our country needs right now, most of all, is not a wall separating us from our neighbors, but support for the rule of law that binds us together as a community, builds common trust, and stabilizes democratic institutions, a wall that protects all of us against arbitrariness, discrimination, and unregulated power, through a truly independent judiciary. Justice Werdegar's entire judicial career — including her judicial craftsmanship, her balanced judgment, her commitment to common values — has contributed in highly significant ways to the maintenance of the rule of law, and for that she deserves our praise, and our gratitude.

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