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PUBLICATION AND DEPUBLICATION OF CALIFORNIA COURT OF APPEAL OPINIONS: IS THE ERASER MIGHTIER THAN THE PENCIL?

*Gerald F. Uelmen**

What is a modern poet's fate?
To write his thoughts upon a slate;
The critic spits on what is done,
Gives it a wipe—and all is gone.¹

I. INTRODUCTION

During the first five years of the Lucas court,² the California Supreme Court depublished³ 586 opinions of the California Court of Appeal, declaring what the law of California was not.⁴ During the same five-year period, the California Supreme Court published a total of 555 of

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1. Attributed to Thomas Hood (1799-1845) by Hallam Tennyson, *Alfred Lord Tennyson, A Memoir* (1897), vol. ii, ch. 3. Hood's obscurity, however, may not be entirely attributable to his critics. Not only did he rhyme "done" and "gone," he also wrote:

Never go to France
Unless you know the lingo,
If you do, like me
You will repent, by jingo.

French and English, st. 1 (1839). If civilization ever declines to the point of having a Supreme Court of Poetry, it should definitely be given the power of depublishation.

2. Malcolm Lucas became Chief Justice of the California Supreme Court on January 1, 1987. Three new justices did not take office until March 25, 1987, however.

3. The data for depublishation orders, grants of hearings and published opinions were collected on an annual basis from April 1 to March 31, for the five years ending March 31, 1992. The data for courts of appeal caseloads and publication rates were taken from the annual reports of the California Judicial Council, which tabulates data by fiscal year. Data regarding the court of appeal for the five-year period ending June 30, 1991 was utilized for this Article and is collected in the appendix.

4. This total includes all orders entered pursuant to Rule 976(c)(2) of the California Rules of Court, providing that "[a]n opinion certified for publication shall not be published, and an opinion not so certified shall be published, on an order of the Supreme Court to that effect." CAL. R. CT. 976(c)(2). In addition, upon a grant of hearing by the California Supreme Court, the opinion of the court of appeal is automatically depublished. *Id.* 976(d). By operation of this rule, another 856 court of appeal opinions were depublished between April

its own opinions, declaring what the law of California was.⁵ For many years, I have devoted substantial quantities of ink to analyzing the messages delivered in the published opinions of the California Supreme Court.⁶ The purpose of this Article is to assess the negative message depublishment orders are delivering to the court of appeal. Analysis of the output of individual districts and divisions of the court of appeal and comparison of their rates of publication and depublishment demonstrates that one message is being delivered loud and clear to selective divisions: Publish fewer opinions.

The same five-year period has seen the overall rate of publication of California Court of Appeal opinions drop precipitously from 14% to 11%.⁷ Some of this decline is attributable to an increase in workload. During the same period, the average annual output of opinions—both published and unpublished—from California Court of Appeal justices grew from 105 to 114.⁸ Justices who have to decide more cases will undoubtedly be less inclined to invest the extra time and energy required to polish an opinion for publication. But the increase in workload has not been uniform. In some districts and divisions it has actually declined. This Article will attempt to assess what relative impact the California courts' workload, the nature of the cases being decided (and depublished), and the current depublishment practice have had on the rate of publication.

1, 1987 and March 31, 1992. Two hundred eighty-one were criminal cases and 575 were civil cases. See *infra* appendix table 1.

5. See 2 JUD. COUNCIL CAL. ANN. REP. 1992, at 13 (Judicial Statistics for Fiscal Year 1990-1991) [hereinafter 1992 ANN. REP.]. This included 152 opinions deciding death penalty appeals, which were appealed directly from the trial courts to the supreme court, and 160 opinions in attorney discipline cases, reviewing actions by the State Bar. The court issued 180 opinions in civil cases previously reviewed by the court of appeal, and 63 opinions in nondeath criminal cases previously reviewed by the court of appeal. These statistics are taken from the annual reports of the Judicial Council of California.

6. See Gerald F. Uelman, *Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts*, 23 LOY. L.A. L. REV. 237 (1989); Gerald F. Uelman, *Losing Steam: California Supreme Court, the Year in Review*, CAL. LAW., June 1990, at 33; Gerald F. Uelman, *Lucas Court, First Year Report*, CAL. LAW., June 1988, at 30; Gerald F. Uelman, *Mainstream Justice: A Review of the Second Year of the Lucas Court*, CAL. LAW., July 1989, at 37; Gerald F. Uelman, *Plunging into the Political Thicket*, CAL. LAW., June 1992, at 31; Gerald F. Uelman, *The Disappearing Dissenters*, CAL. LAW., June 1991, at 34 [hereinafter Uelman, *The Disappearing Dissenters*]. Criticism has not been limited to the work of the Lucas court. See Gerald F. Uelman, *The Know-Nothing Justices on the California Supreme Court*, 2 WESTERN LEGAL HISTORY 89 (1989); Gerald F. Uelman, *Judicial Reform and Insanity in California—A Bridge Too Far*, PROSECUTOR'S BRIEF, May/June 1979, at 17.

7. See *infra* appendix tables 2-3.

8. See *infra* appendix table 4.

Apart from its impact on the output of the court of appeal, no attempt will be made to weigh the costs and benefits of depublication. Both the defenders⁹ and the detractors¹⁰ of the practice have marshalled all the arguments to be made. Creative alternatives to make depublication unnecessary or limit its disadvantages have been propounded,¹¹ and ignored. While the current justices of the California Supreme Court apparently regard their power of depublication as a "necessary evil,"¹² at some point, we can pray, they will realize the wisdom of Andrew Jackson's injunction: "There are no necessary evils in government. Its evils exist only in its abuse."¹³

9. See, e.g., Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514 (1984) (arguing that depublication, though not ideal, is better than any present alternative); Kent L. Richland, *Depublication*, 13 L.A. LAW., Aug./Sept. 1990, at 48 (arguing that depublication brings greater certainty to California law). While not a "defender" of depublication, an excellent objective, empirical analysis of the operation of the depublication practice of the California Supreme Court from 1970 to 1984 is offered in Phillip L. Dubois, *The Negative Side of Judicial Decision Making: Depublication as a Tool of Judicial Power and Administration on State Courts of Last Resort*, 33 VILL. L. REV. 469 (1988). Professor Dubois concludes that whether the costs of depublication exceed the benefits is largely dependent on the number of opinions depublished—the larger the quantity, the greater the risk of erosion of confidence in the judiciary. *Id.* at 514.

10. See, e.g., Julie H. Biggs, *Censoring the Law in California: Decertification Revisited*, 30 HASTINGS L.J. 1577 (1979); Robert S. Gerstein, "Law by Elimination:" *Depublication in the California Supreme Court*, 67 JUDICATURE 292 (1984); Julie H. Biggs, Note, *Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law*, 50 S. CAL. L. REV. 1181 (1977); Winslow Christian & Molly T. Tami, *Law by Elimination*, CAL. LAW., Oct. 1984, at 25; M. Reed Hunter, *Not to Be Published in Official Reports*, BRIEF/CASE, May 1980, at 11; Gideon Kanner, *A Court for All the People*, RECORDER, June 6, 1990, at 6; Gerald F. Uelmen, *Depublication*, L.A. LAW., Aug./Sept. 1990, at 49.

11. See Jerome B. Falk, Jr., *Summary Disposition: An Alternative to Supreme Court Depublication*, CAL. LITIG., Winter 1992, at 35. Falk suggests that a summary disposition procedure similar to that employed by the United States Supreme Court could be adopted by California Rules of Court, without requiring a constitutional amendment. *Id.* at 38-39. A more modest suggestion was made in Uelmen, *supra* note 10, at 56-57, that the California Supreme Court identify the specific portions of a depublished opinion that are disapproved. In 1979 a committee appointed by Chief Justice Rose Bird proposed that the court simply withhold approval from erroneous portions of court of appeal opinions when denying a hearing. CHIEF JUSTICE'S ADVISORY COMMITTEE, REPORT OF THE CHIEF JUSTICE'S ADVISORY COMMITTEE FOR AN EFFECTIVE PUBLICATION RULE 31-33 (1979).

12. Falk, *supra* note 11, at 40.

13. ANDREW JACKSON, VETO OF THE BANK BILL, July 10, 1832. *But see* Publilius Syrus (commonly called Publius), *Maxim* 553 ("Necessity knows no law except to prevail."). The final word on the subject, however, should go to the philosopher William James: "Had his whole life not been a quest for the superfluous, he would never have established himself as inexpugnably as he has done in the necessary." WILLIAM JAMES, *Reflex Action and Theism*, in *THE WILL TO BELIEVE* 131 (new ed. 1937).

II. PROCEDURE FOR PUBLICATION AND DEPUBLICATION

Currently, only 11% of the decisions rendered by the California Court of Appeal are published in the official reports.¹⁴ Rule 976(b) of the California Rules of Court sets forth the standards that the court of appeal is required to follow in determining whether an opinion should be published. No opinion may be published unless a majority of the justices rendering the decision certify¹⁵ that it:

- (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
- (2) resolves or creates an apparent conflict in the law;
- (3) involves a legal issue of continuing public interest or
- (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.¹⁶

The court may edit an opinion for partial publication, if only a portion of the opinion meets the standards of Rule 976(b).¹⁷

Any person, whether or not a party to the appeal, may request publication of an unpublished opinion, or depublishation of a published opinion.¹⁸ The procedure for such requests, however, differs significantly. A request for *publication* must be made "promptly" to the court of appeal that rendered the decision.¹⁹ The rules impose no limitation on the size of the request, but copies of the request must be served on the parties to the action.²⁰ The request must refer to the publication standards of Rule 976(b) and state concisely why one of the standards is met.²¹ If the court that authored the opinion denies the request, or it can no longer act because of the finality of the decision,²² then the court must transmit the

14. 1992 ANN. REP., *supra* note 5, at 31.

15. CAL. R. CT. 976(c)(1).

16. *Id.* 976(b).

17. *Id.* 976.1; see Eva S. Goodwin, *Partial Publication: A Proposal for a Change in the "Packaging" of California Court of Appeal Opinions to Provide More Useful Information for the Consumer*, 19 SANTA CLARA L. REV. 53 (1979).

18. CAL. R. CT. 978(a).

19. *Id.*

20. *Id.*

21. *Id.*

22. Ordinarily, a decision of the court of appeal becomes final 30 days after filing, and it is no longer subject to modification by the authorizing court. See *id.* 24(a).

request to the California Supreme Court.²³ The court of appeal accompanies the request with its own recommendation and a brief statement of its reasons. Requests for publication are rarely granted by the supreme court.²⁴

A request for *depublication* must be made to the California Supreme Court.²⁵ The supreme court can also order an opinion depublished on its own motion.²⁶ Ordinarily, an order of depublishation does not indicate whether, or from whom, a request was received, and the court releases no data indicating how many requests for depublishation are received. A request for depublishation frequently accompanies a losing party's petition for a grant of hearing to the supreme court. Clearly, when the court significantly reduces grants of hearings, it utilizes depublishation as an alternative disposition, eliminating precedents with which it disagrees but has no time to fully consider on the merits.²⁷

Depublished opinions normally appear in the advance sheets of the official reports. If a case is depublished, the pages on which it appeared are simply deleted from the official bound volumes. An opinion that has been depublished may not be cited or relied upon by a court or a party in any other proceeding.²⁸ This injects a great deal of uncertainty in the citation of recent court of appeal opinions as authority because they are still subject to depublishation. The rules impose no time limit within which the supreme court must grant or deny a request for depublishation, and the court has been known to depublish opinions as late as fifteen months after publication.²⁹

23. *Id.* 978(a).

24. For example, from April 1, 1989 to March 31, 1990, the California Supreme Court denied 183 requests for publication pursuant to Rule 978 and granted five requests. Uelmen, *supra* note 10, at 54.

25. CAL. R. CT. 979. The request for depublishation may not exceed 10 pages, and must be made within 30 days after the decision becomes final. *Id.* Copies must be served on the court of appeal and the parties to the action, who are permitted to submit a response within 10 days. *Id.* While a statement of "concise reasons" why an opinion should not remain published is required, those reasons are *not* limited to failure to meet the publication standards of Rule 976(b). *Id.*

26. *Id.* 979(d).

27. Table 1, *infra* appendix, summarizes the grants of hearings in civil and criminal cases for the past five years, as well as the depublishation orders entered by the supreme court in civil and criminal cases. Since the 1989-1990 term, it appears the rate of depublishation has held steady or dropped, despite a rising level of hearing grants.

28. CAL. R. CT. 977.

29. *See, e.g., In re Grant*, 198 Cal. App. 3d 1458, 244 Cal. Rptr. 552 (1988) (depublished, 773 P.2d 450, 259 Cal. Rptr. 64 (1989)) (decision of Fourth District Court of Appeal rendered Feb. 26, 1988, ordered depublished May 18, 1989).

III. DISTRICT AND DIVISION VARIATIONS IN RATE OF PUBLICATION AND WORKLOAD

The California Judicial Council annually collects and publishes the rates of publication for each district and division of the California Court of Appeal.³⁰ Publication rates are separately compiled for civil and criminal cases. The data for each of the five years up to June 30, 1991, are collected in Table 2 (civil cases) and Table 3 (criminal cases).³¹

There are two remarkable aspects of this data. First is the incredible variation in publication rates, not only between districts, but between divisions in the same district. In the most recent year, the rate of publication in civil cases ranged from a low of 6% (Second District, Division Two) to a high of 27% (First District, Division Three).³² In criminal cases, the rate ranged from a low of 1% (Second District, Division One) to a high of 11% (Second District, Division Seven).³³

Second is the clear downward trend of publication rates for both civil and criminal cases. In civil cases, the decline is most notable in the Second District, where the rate of publication dropped from 20% to 12% in the past five years.³⁴ The decline for civil cases is even more remarkable when contrasted with the Second District's 1985-1986 rate of publication for civil cases, which was 24%.³⁵ While there are countertrends,³⁶ the statewide rate of publication in civil cases dropped from 19% in 1986-1987 to 16% in 1990-1991.³⁷

The explanation for the variation in the publication rates is not simply variation in the workloads. Among different divisions in the same district, there is no variation in workloads because cases are randomly assigned on a rotational basis to ensure that each division receives a proportionate share of new filings. While there are variations of workload among districts, the differences are minimal. A rough measure of workload is the number of dispositions by written opinion per judge equivalent. The Judicial Council annually compiles this data, which is

30. CAL. CONST. art. VI, § 6.

31. See *infra* appendix tables 2-3.

32. See *infra* appendix table 2.

33. See *infra* appendix table 3.

34. See *infra* appendix table 2.

35. JUD. COUNCIL CAL. ANN. REP. 1987, at 98 (Judicial Statistics for Fiscal Year 1985-1986).

36. The civil publication rate in the Fourth District Court of Appeal rose from 14% to 20% during the same period, and the rate for the Fifth District Court of Appeal rose from 14% to 19%. See *infra* appendix table 2.

37. See *infra* appendix table 2.

summarized here, for the same five-year period.³⁸ Except for the First District, the variation for 1990-1991 goes from a low of 110 dispositions (Fifth District) to a high of 122 dispositions (Fourth District).³⁹ Interestingly, both the Fourth and the Fifth Districts register at the highest rates of publication for both civil and criminal cases. The First District has experienced a steady decline in workload, to a low of ninety-three dispositions in 1989-1990, but has maintained a relatively stable level of publication in civil cases. In 1986-1987, for example, the First District's rate of civil publication was highest in the state, with a workload factor substantially higher than current levels. The Second District has experienced a steady growth in its workload during the past five years but not significantly greater growth than the Fifth District. The Fifth District rate of publication in civil cases actually increased during this period, while the Second District's rate declined dramatically.

To some extent, variance in publication rates may reflect a district's or division's view of its work. Because production of published opinions is time consuming, a low publication rate may indicate that a division is more concerned with quickly moving cases through the system than with contributing to the fabric of developing law. Thus, the time that it takes to file opinions is relevant.

Variations in the time factor are illustrated in a Judicial Council report which compiled the elapsed time in days for the filing of opinions in each division and district for 1990-1991.⁴⁰ Glaring contradictions, as well as some startling confirmations, were discovered. Within the Second District, divisions with the lowest civil publication rates appeared at both the top and the bottom of the time-lapse charts. Of the five divisions with the highest civil publication rates in the state, four were faster in disposition time than the statewide medians.⁴¹ For criminal cases, the two slowest divisions in the state are the only two divisions of the Second District with criminal publication rates exceeding the statewide average.⁴² But the divisions of the First and Fourth District with the highest

38. See *infra* appendix table 4.

39. See *infra* appendix table 4.

40. See *infra* appendix tables 5 (civil cases), 6 (criminal cases):

41. The highest rates of publication in civil cases were registered by First District, Division Three (27%), First District, Division Five (23%), Fourth District, Division One (22%), Fourth District, Division Two (22%) and First District, Division One (21%). See *infra* appendix table 2. Of these, only the First District, Division One was slower than the statewide medians for disposition time.

42. Divisions Five and Seven of the Second District.

criminal publication rates are also significantly faster than the statewide medians for disposition time.⁴³

This data confirms the perception that the quality of justice meted out by different divisions within the same appellate district may vary substantially,⁴⁴ and maintaining autonomous divisions may not be recommended.⁴⁵ The divisional differences, however, provide the best opportunity to analyze the impact of depublication. Rates of depublication show great variation among different divisions of the same district. Thus, comparing variations in depublication rates to variations in publication rates and workload will produce interesting and provocative conclusions.

IV. SUPREME COURT DEPUBLICATION

Table 7 collects all California Supreme Court depublication orders for the five-year period, from April 1, 1987 to March 30, 1992. The cases are divided between civil and criminal cases and are broken down by the district and division that authored the depublished opinion.⁴⁶ The Lucas court has utilized depublication more often in civil cases than in criminal cases, depublishing 364 civil cases and 222 criminal cases during the five-year period.⁴⁷

For both civil and criminal cases, the depublication numbers vary substantially among different districts and divisions. So that the figures can be compared, the numbers are reduced to "per judge equivalents" because the divisions and districts have significantly different sizes.⁴⁸

43. First District, Division Two (10%) and Fourth District, Division Two (9%).

44. Cf. Leonard M. Friedman & Gerald Z. Marer, *The Appellate Divisions Are Out of Control*, CAL. LAW., Apr. 1983, at 13 (increasing number of appellate divisions from 13 to 18 will cause conflicting decisions and jeopardize health of judicial system); Gideon Kanner & Gerald F. Uelmen, *Random Assignment, Random Justice*, L.A. LAW., Feb. 1984, at 10 (revealing wide divergence in outcomes of civil and criminal appeals among seven divisions of Second District Court of Appeal).

45. See Gerald Z. Marer, *A New Trial for the California Court of Appeal: A Proposal to Abolish its Autonomous Divisions*, L.A. DAILY J. REP., No. 82-83 (Dec. 3, 1982). The 1983 State Bar Conference of Delegates endorsed a resolution calling for the dismantling of the autonomous divisions of the First, Second and Fourth Districts. A bill to accomplish this was introduced in the 1983 legislative session by Sen. Nicholas Petris. S. 1038, Cal. 1983-84 Reg. Sess.; see Kanner & Uelmen, *supra* note 44, at 16.

46. See *infra* appendix table 7.

47. *Infra* appendix table 7. This contrasts sharply with the Bird court, which used depublication disproportionately in criminal cases. From 1975 to 1983, although only one-third of the published opinions involved issues of criminal law, nearly two-thirds of the depublished opinions involved criminal cases. Dubois, *supra* note 9, at 502.

48. Divisions One through Four of the First District and Divisions One through Five of the Second District are authorized to have four judges each. Division Five of the First District and Divisions Six and Seven of the Second District have three judges. The Third District was

The combined total for civil and criminal cases varies from a per judge equivalent low of 2.7 depublications (Second District, Division One) to a high of 17.7 depublications (Second District, Division Seven). But in some divisions, the rate of depublication varies significantly between civil and criminal cases. Division Five of the First District, for example, has the second highest depublication rate in the state for civil cases but has a depublication rate for criminal cases well below the state average.⁴⁹ Conversely, Division Six of the Second District is tied for the highest depublication rate in the state for criminal cases, but has a civil depublication rate slightly below average.⁴⁹

One would anticipate that the courts with the highest publication rates might have correspondingly high numbers of depublished opinions. The depublication rates in Table 7 can be compared to the publication rates for civil cases in Table 2 and for criminal cases in Table 3. The correlation is far from precise.

Using the statewide average of 4.1 depublished civil opinions per judge as a guide, three divisions that significantly exceeded that rate had publication rates that were consistently below average. Division Four of the First District had a depublication rate of 5.2 opinions per judge,⁵⁰ although its publication rate was at or below the state average four of the five years included.⁵¹ Similarly, Division Four of the Second District had a publication rate at or below the state average four of the five years,⁵² but it had a depublication rate of 5.0.⁵³ In Division Three of the Fourth District the publication rate was well below the state average all five years, although its depublication rate was 5.2.⁵⁴

Nonetheless, the three divisions with the highest depublication rates were all divisions that consistently exceeded the average publication rate. Division Seven of the Second District, with a phenomenal depublication rate of 13.3,⁵⁵ had the highest publication rate in the state four of the five years included.⁵⁶ Division Five of the First District, with the second

increased from seven to 10 judges in 1989. In the Fourth District, Division One grew from six to eight judges in 1988, while Division Three grew from four to five judges. Division Two has remained at four judges. The Fifth District added one judge in 1990, for a total of nine. The Sixth District has six judges. See *infra* appendix table 8.

49. *Infra* appendix table 7.

50. *Infra* appendix table 7.

51. *Infra* appendix table 2.

52. *Infra* appendix table 2.

53. *Infra* appendix table 7.

54. *Infra* appendix table 7.

55. *Infra* appendix table 7.

56. *Infra* appendix table 2.

highest depublication rate of 6.3,⁵⁷ exceeded the statewide average publication rate four of the five years.⁵⁸ And Division One of the Fourth District, with a depublication rate of 6.2,⁵⁹ also exceeded the statewide average for publication four of the five years.⁶⁰

Conversely, some of the districts and divisions with the lowest depublication rates also had low publication rates. The Third District was below the statewide average publication rate three of the five years,⁶¹ and had a depublication rate of 2.0.⁶² Division One of the Second District was well below the statewide average publication rate all five years⁶³ and had a depublication rate of 2.2.⁶⁴ A notable exception, however, is the Fifth District. While it has the lowest depublication rate in the state (1.9), it was at or above the statewide average publication rate four of the five years.

As noted above, civil publication rates have declined during the past five years. Interestingly, divisions with the sharpest declines were the most heavily depublished. The publication rate for Division Seven of the Second District, which has the highest depublication rate, dropped steadily from 38% to 20%.⁶⁵ Division Five of the First District dropped from 28% to 18%, then rebounded to 23% in 1990-1991.⁶⁶ Division Six of the Second District had dropped from 17% to 5%, rebounding to 8% in 1990-1991.⁶⁷ Division One of the Fourth District, however, has actually increased its publication rate in the midst of a trend towards increasing rates of depublication.⁶⁸ The most notable countertrend districts and divisions are ones that enjoy relatively low rates of depublication: Divisions One and Three in the First District, Division Two in the Fourth and Fifth Districts.⁶⁹

Shifting to the criminal side, the patterns are generally consistent, but at least three districts and divisions show remarkably higher rates of depublication for criminal cases than for civil cases. Sharing honors for the highest depublication rate in criminal cases are Divisions Six and

57. *Infra* appendix table 7.

58. *Infra* appendix table 2.

59. *Infra* appendix table 7.

60. *Infra* appendix table 2.

61. *Infra* appendix table 2.

62. *Infra* appendix table 7.

63. *Infra* appendix table 2.

64. *Infra* appendix table 7.

65. *Infra* appendix table 2.

66. *Infra* appendix table 2.

67. *Infra* appendix table 2.

68. *See infra* appendix table 2.

69. *See infra* appendix tables 2 (civil publication rates), 7 (civil depublication rates).

Seven of the Second District.⁷⁰ Nevertheless, Division Six posts a civil depublication rate below the state average.⁷¹ Division One of the First District has the next highest criminal depublication rate, even though its civil depublication rate is among the lowest in the state.⁷² The Fifth District, which is the least depublished on the civil side, has a criminal depublication rate well above the average, at 3.6. In all three of these districts and divisions, the pattern of publication for criminal cases closely tracks the pattern of publication for civil cases.

In two other divisions, a low rate of depublishing criminal cases contrasted with a high rate of depublishing civil cases. Division Five of the First District, which had the second highest depublication rate in the state for civil cases, posted a 1.7 rate for criminal cases, well below the state average of 2.5.⁷³ Division Three of the Second District had the second lowest rate of criminal depublication in the state, although its civil depublication rate was well above average.⁷⁴ However, the differences in depublication rates seem to be consistent with the publication rates. Both divisions generally have above-average rates of publication in civil cases and below-average rates of publication in criminal cases.

There are dramatic differences between rates of depublication and publication rates. A number of these aberrational patterns require further explanation. Of particular interest are three divisions that have unusually high rates of depublication, even though their rates of publication are generally at or below average: Division Four of the First District, Division Six of the Second District and Division Three of the Fourth District.⁷⁵

V. THE POLITICS OF DEPUBLICATION

With the electoral removal in 1986 of three California Supreme Court justices,⁷⁶ who were all appointed by a Democratic governor, and with their replacement in 1987 with three appointees by a Republican

70. See *infra* appendix table 7.

71. The civil depublication rate in Division Six is 4.0 and the state average is 4.1. See *infra* appendix table 7.

72. Division One of the First District has a civil depublication rate of 2.7 and a criminal depublication rate of 4.0. See *infra* appendix table 7.

73. *Infra* appendix table 7.

74. See *infra* appendix table 7.

75. See *infra* appendix tables 2 (publication in civil appeals), 3 (publication in criminal appeals), 7 (depublishation rates).

76. The removal of Rose Bird, Cruz Reynoso and Joseph Grodin in 1986 marked the first defeat of sitting justices of the California Supreme Court since 1934. Gerald F. Uelman, *Supreme Court Retention Election in California*, 28 SANTA CLARA L. REV. 333, 334-35 (1988).

governor,⁷⁷ the dominant political philosophy of the supreme court changed dramatically. Political change at the court of appeal level has been more gradual, but the trend of appointees of Republican governors supplanting Democratic appointees has changed the nature of several districts and divisions that were previously dominated by Democratic appointees or evenly split.⁷⁸ Currently, there remain only three divisions with a majority of Democratic appointees: Division Five of the First District, Division Six of the Second District and Division Three of the Fourth District.⁷⁹ By remarkable coincidence, two of these are among the divisions whose high depublication rates are inconsistent with their low publication rates: Division Six of the Second District and Division Three of the Fourth District. Division Five of the First District also had an unusually high depublication rate, but it also has a high publication rate.

The dominant political affiliation of the districts and divisions, in fact, presents a startling correlation with both the highest and lowest rates of depublication. Five of the six divisions with the highest overall rate of depublication were dominated by Democratic appointees for at least part of the five-year period from 1987 to 1992. These divisions include:

Division Seven of the Second District (Democrat to Republican, 1988);

Division One of the Fourth District (Democrat to Republican, 1988);

Division Three of the Fourth District (Democrat);

Division Six of the Second District (Democrat); and

Division Five of the First District (Democrat).⁸⁰

Only Division Four of the First District posts a depublication rate as high as these five divisions, despite its domination by Republican appointees. In part, the explanation may lie in the penchant of its lone Democratic appointee, Justice Poché, to frequently write acerbic and well-reasoned dissents, many of which lead to prompt depublication of both the majority and dissenting opinions.⁸¹

77. Governor George Deukmejian appointed John Arguelles, Marcus Kaufman and David Eagleson to fill the vacant seats.

78. Reference to "Democratic" or "Republican" appointees throughout this Article refers to the political affiliation of the appointing governor. No attempt was made to ascertain the actual party registration of the appointees.

79. See *infra* appendix table 8.

80. See *infra* appendix tables 7-8.

81. No attempt was made to assess the proportion of depublished opinions that included dissents, although it is quite likely a dissent substantially increases the risk of depublication.

Conversely, only one of the six divisions with the *lowest* depublication rates was ever dominated by Democratic appointees during the covered five-year period. The Third District shifted from Democratic to Republican domination in 1989. The political composition of the other five divisions with the lowest overall rate of depublication was as follows:

- Division One of the Second District (Republican);
- Division Three of the First District (Split to Republican, 1990);
- Division Two of the Second District (Split);
- Division Five of the Second District (Republican); and
- Fifth District (Split to Republican, 1989).⁸²

None of this should be surprising. Clearly, governors consider political philosophy in making appointments, and it is not unusual that divided opinions split courts along lines closely matching the political persuasions of the appointing governors. To the extent that depublication is part of a court's effort to maintain consistency in the law, it is not surprising that the divisions of the court of appeal, dominated by a political philosophy at odds with that of the supreme court, will see more of their opinions depublished.

Although it was documented in a very different way, a similar phenomenon occurred during the Bird court era. In a study of court of appeal opinions depublished by the Bird court, Professor Philip L. Dubois categorized the depublished opinions as "liberal" or "conservative."⁸³ Dubois found that 76.5% of the opinions depublished by the "liberal" Bird court from 1982 to 1983 had conservative outcomes.⁸⁴ It is quite likely that opinions by "conservative" divisions of the court of appeal were depublished by the Bird court with greater frequency than opinions by "liberal" divisions.

Viewed from this perspective, depublication can be seen for precisely what it is: a device to suppress dissenting views. The decline of the expression of dissenting views on the Lucas court has been noted

The divisions with the highest depublication rates may include the divisions with justices who have a greater propensity to dissent, such as Division 7 of District II.

82. See *infra* appendix tables 7-8.

83. Dubois, *supra* note 9, at 484. An opinion was categorized as "liberal" if it favored:

1. The defendant in a criminal case
2. The debtor in debtor/creditor cases
3. The employee in employee/employer disputes
4. Labor in labor/management disputes
5. The tenant in landlord/tenant cases
6. The consumer in sales of goods/services cases
7. The plaintiff in tort actions
8. A claim of a state constitutional provision governing individual rights

Id.

84. *Id.* at 511.

elsewhere.⁸⁵ The use of depublication to obliterate the opinions emanating from those courts of appeal with a differing judicial philosophy is a closely related phenomenon. While one criteria calling for *publication* of a court of appeal opinion is that it "criticizes with reasons given, an existing rule,"⁸⁶ the supreme court frequently depublishes such opinions, leaving no citable trace of disenchantment in the court of appeal. Even when an issue is closely divided, a narrow majority of the supreme court can create a false aura of harmony by eliminating all opinions that resolve the issue in a manner that is not to their liking. Three justices cannot grant a hearing, so the discontent remains buried in the graveyard of depublication. The harmonious picture of the law presented in published opinions, however, is a gravely misleading one.

The existence of different judicial philosophies is one of the great strengths of our legal system. Judges of different philosophies challenge one another so that assumptions are constantly retested in the face of changing circumstances. As political majorities shift, there will be shifts on our courts as well. While depublication assists the supreme court in maintaining a facade of harmony in the law, it may ultimately contribute to the growing lack of public confidence in the courts, by making the shifting changes appear more sudden and dramatic than they really are.

VI. CONCLUSION

The relationship between publication and depublication remains elusive, but the data presented here lead to some confident conclusions. First, courts of appeal differ substantially in applying the standards that govern which opinions should be published. Second, rates of publication are declining. Third, the growing use of depublication is partly responsible for the decline in publication. And fourth, depublication is selectively employed most aggressively against divisions of the court of appeal with a prevailing judicial philosophy contrary to the prevailing judicial philosophy of the supreme court.

Obviously, then, a high rate of depublication cannot serve to make any qualitative judgment about a particular division of the court of appeal. As the data demonstrate, the divisions that are the hardest working, producing the highest rates of published opinions in the shortest period of time despite high workloads, may well be divisions that see the highest proportion of their work product consigned to oblivion by the California Supreme Court. The concluding Table 9 is a summary for the

85. See Uelmen, *The Disappearing Dissenters*, *supra* note 6, at 34.

86. CAL. R. CT. 976(b)(1).

various districts and divisions of the court of appeal.⁸⁷ The letters assigned reflect a quantitative judgment only. "A" indicates that a district or division is among the highest third in workload, speed of disposition and current rate of publication. "B" places a court in the middle third, while "C" indicates that a court is in the bottom third. With respect to depublication, however, "A" indicates that a court is among the lowest third in per judge equivalent depublication orders, while "C" places it in the highest third.

In terms of workload, speed and rate of publication for civil cases, there is only one "AAA" division in the state: Division One of the Fourth District. In terms of depublication, it earned a "C" from the California Supreme Court. Likewise, only one division rated "AAA" for workload, speed and rate of publication for criminal cases: Division Two of the Fourth District. In terms of depublication, it earned a "B" from the California Supreme Court.

87. See *infra* appendix table 9.

TABLE 1
GRANTS OF HEARINGS AND ORDERS OF DEPUBLICATION

	<u>1987-88</u>	<u>1988-89</u>	<u>1989-90</u>	<u>1990-91</u>	<u>1991-92</u>	<u>5 Yr. Total</u>
CRIMINAL CASES						
Hearings Granted	59	40	30	53	99	281
Opinions Depublished	50	44	56	39	33	222
CIVIL CASES						
Hearings Granted	145	148	50	111	121	575
Opinions Depublished	76	98	61	61	68	364

TABLE 2
 PERCENTAGE RATE OF PUBLICATION IN CIVIL APPEALS

	<u>1986-87</u>	<u>1987-88</u>	<u>1988-89</u>	<u>1989-90</u>	<u>1990-91</u>
DIST. I (Averages)	(22)	(19)	(18)	(22)	(21)
Div. 1	18	15	12	23	21
2	23	24	23	25	18
3	26	20	20	22	27
4	18	17	16	19	14
5	28	19	18	18	23
DIST. II (Averages)	(20)	(20)	(17)	(14)	(12)
Div. 1	11	14	9	10	10
2	18	20	11	12	6
3	20	19	19	17	12
4	17	17	20	12	16
5	23	24	19	15	13
6	17	19	17	5	8
7	38	31	25	32	20
DIST. III	16	13	13	18	16
DIST. IV (Averages)	(14)	(14)	(14)	(20)	(20)
Div. 1	19	19	21	26	22
2	12	6	9	13	22
3	10	13	11	17	14
DIST. V	14	18	19	19	19
DIST. VI	15	22	16	15	16
STATEWIDE AVERAGE	19	18	16	18	16

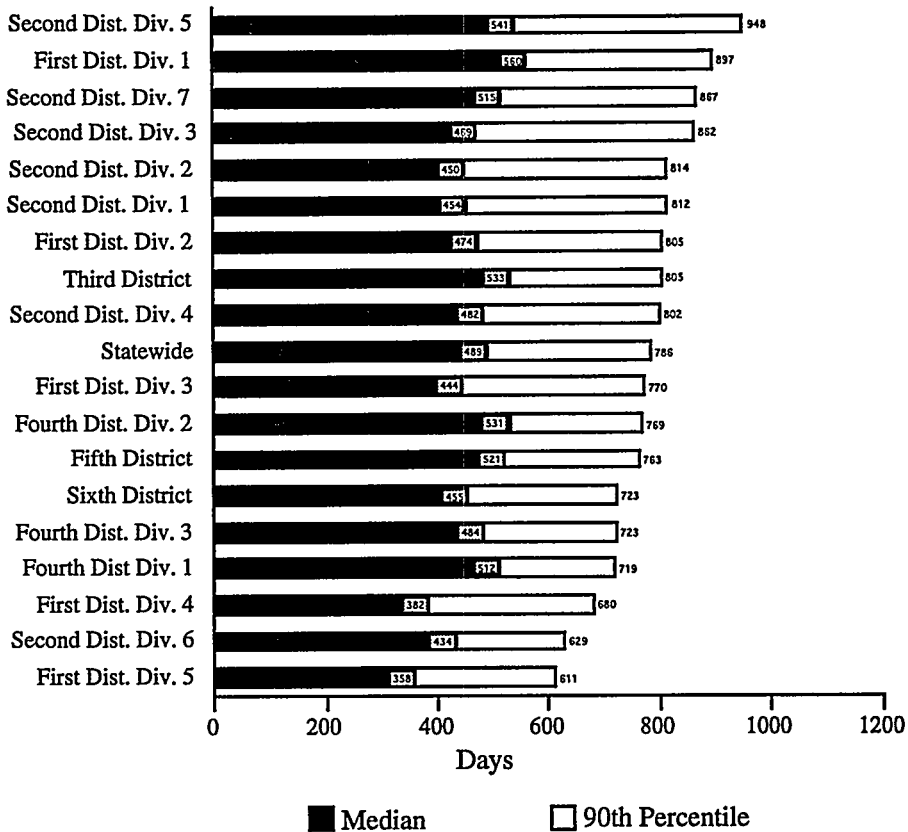
TABLE 3
PERCENTAGE RATE OF PUBLICATION IN CRIMINAL APPEALS

	<u>1986-87</u>	<u>1987-88</u>	<u>1988-89</u>	<u>1989-90</u>	<u>1990-91</u>
DIST. I (Averages)	(9)	(9)	(8)	(6)	(7)
Div. 1	8	6	11	7	7
2	7	9	9	6	10
3	11	7	7	6	7
4	10	13	8	6	3
5	8	11	4	3	6
DIST. II (Averages)	(6)	(6)	(4)	(4)	(4)
Div. 1	2	4	2	2	1
2	4	3	4	6	2
3	4	5	3	4	2
4	7	6	3	2	3
5	7	9	5	5	9
6	6	8	5	4	5
7	13	7	5	8	11
DIST. III	4	5	5	4	3
DIST. IV (Averages)	(7)	(6)	(7)	(8)	(7)
Div. 1	8	9	9	9	6
2	5	2	4	5	9
3	8	9	8	8	5
DIST. V	11	8	9	7	7
DIST. VI	5	11	7	4	6
STATEWIDE AVERAGE	7	7	6	5	6

TABLE 4
DISPOSITIONS BY WRITTEN OPINION
PER JUDGE EQUIVALENT
1986-1991

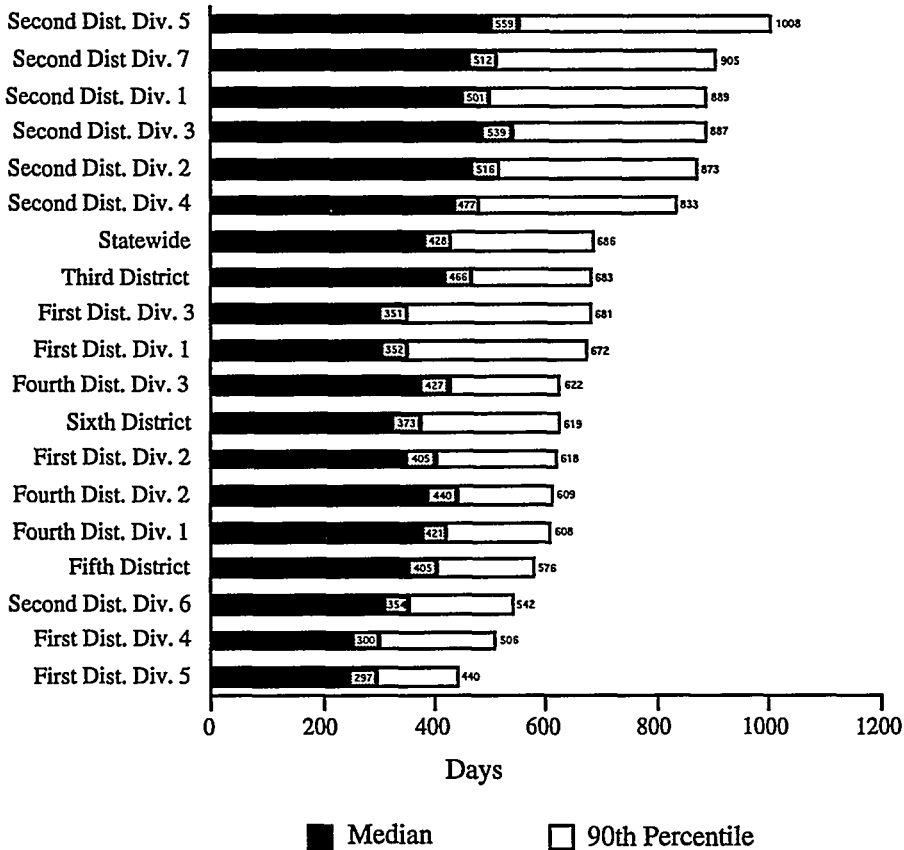
	<u>1986-87</u>	<u>1987-88</u>	<u>1988-89</u>	<u>1989-90</u>	<u>1990-91</u>
DIST. I	111	101	100	93	96
DIST. II	92	94	110	116	121
DIST. III	117	124	118	111	113
DIST. IV	123	116	112	119	122
DIST. V	89	106	116	112	110
DIST. VI	122	132	111	132	118
STATEWIDE AVERAGE	105	105	110	112	114

TABLE 5
TIME (IN DAYS) TO FILING OF OPINION FOR CIVIL APPEALS 90TH
PERCENTILE AND MEDIAN
FISCAL YEAR 1990-91*



*Reproduced with permission from the Administrative Office of the Courts.

TABLE 6
 TIME (IN DAYS) TO FILING OF OPINION FOR CRIMINAL APPEALS
 90TH PERCENTILE AND MEDIAN
 FISCAL YEAR 1990-91*



*Reproduced with permission from the Administrative Office of the Courts.

TABLE 7
 SUPREME COURT DE PUBLICATION
 BY DISTRICT AND DIVISION
 1987-1992

	<u>CIVIL CASES</u>		<u>CRIMINAL CASES</u>		<u>TOTAL</u>
	<u>Per Judge</u>		<u>Per Judge</u>		<u>Per Judge</u>
	<u>Number</u>	<u>Equiv.</u>	<u>Number</u>	<u>Equiv.</u>	<u>Equiv.</u>
DIST. I (Totals)	(81)	(4.3)	(48)	(2.5)	(6.8)
Div. 1	11	2.7	16	4.0	6.7
2	16	4.0	8	2.0	6.0
3	14	3.5	4	1.0	4.5
4	21	5.2	15	3.7	9.0
5	19	6.3	5	1.7	8.0
DIST. II (Totals)	(124)	(4.8)	(52)	(2.0)	(6.8)
Div. 1	9	2.2	2	0.5	2.7
2	11	2.7	8	2.0	4.7
3	21	5.2	3	0.7	6.0
4	20	5.0	5	1.2	6.2
5	11	2.7	8	2.0	4.7
6	12	4.0	13	4.3	8.3
7	40	13.3	13	4.3	17.7
DIST. III	20	2.0	14	1.4	3.4
DIST. IV (Totals)	(93)	(5.5)	(62)	(3.7)	(9.1)
Div. 1	50	6.2	29	3.6	9.9
2	17	3.4	14	2.8	6.2
3	26	5.2	19	3.8	9.0
DIST. V	17	1.9	33	3.6	5.5
DIST. VI	29	4.8	13	2.2	7.0
STATEWIDE TOTALS	364	4.1	222	2.5	6.7

TABLE 8
POLITICAL AFFILIATION OF APPOINTING GOVERNOR
FOR COURT OF APPEAL JUSTICES
1987-1992

DISTRICT I

- Div. 1 (Democrat to Split, 1990; Split to Republican, 1991)
Racanelli (D)/1991/Strankman (R)
Elkington (D)/1988/Stein (R)
Holmdahl (D)/1990/Dossee (R)
Newsome (D)
- Div. 2 (Split)
Kline (D)
Benson (R)
Rouse (R)/1988/Peterson (R)
Smith (D)
- Div. 3 (Split to Republican, 1990)
White (D)
Barry-Deal (D)/1990/Chin (R)
Merrill (R)
Scott (R)/1988/Strankman (R)/1991/Werdegarr (R)
- Div. 4 (Republican)
Anderson (R)
Channell (R)/1990/Reardon (R)
Poché (D)
Sabraw (R)/1988/Perley (R)
- Div. 5 (Democrat)
Low (D)
Hanning (D)
King (D)

DISTRICT II

- Div. 1 (Republican)
Spencer (D)
Devich (R)
Hanson (R)/1990/Vogel (R)
Lucas (R)/1988/Ortega (R)

- Div. 2 (Split)
Roth (D)
Beach (R)/1990/Nott (R)
Compton (R)/1987/Fukuto (R)
Gates (D)
- Div. 3 (Democrat to Split, 1987)
Klein (D)
Arabian (R)/1990/Hinz (R)
Danielson (D)
Lui (D)/1987/Croskey (R)
- Div. 4 (Democrat to Split, 1988; Split to Republican, 1990)
Woods (D)
Arguelles (R)/1987/George (R)
Kingsley (D)/1988/Goertzen (R)
McCloskey (D)/1990/Epstein (R)
- Div. 5 (Republican)
Feinerman (D)/1988/Lucas (R)
Ashby (R)
Eagleson (R)/1987/Boren (R)
Hastings (R)/1988/Kennard (R)/1989/Turner (R)/
1991/Grignon (R)
- Div. 6 (Democrat)
Stone (D)
Abbe (D)/1990/Yegan (R)
Gilbert (D)
- Div. 7 (Democrat to Republican, 1988)
Lillie (R)
Johnson (D)
Thompson (D)/1988/Woods (R)

DISTRICT III (Democrat to Republican, 1989)

- Puglia (R)
Blease (D)
Carr (D)
Evans (R)/1990/Nicholson (R)
Regan (D)/1987/Marler (R)
Sims (D)
Sparks (D)
(1989) Davis (R)
(1989) Dechristoforo (R)/1991/Raye (R)
(1989) Scotland (R)

DISTRICT IV

- Div. 1 (Democrat to Republican, 1988)
Kremer (R)
Butler (D)/1988/Froehlich (R)
Lewis (R)/1987/Benke (R)
Staniforth (D)/1986/Todd (R)
Wiener (D)
Work (D)
(1988) Huffman (R)
(1988) Nares (R)
- Div. 2 (Republican)
Kaufman (R)/1987/Dabney (R)
McDaniel (R)/1990/McKinster (R)
Hews (R)/1990/Timlin (R)
Campbell (R)/1990/Ramirez (R)
Rickles (D)/1988/Hollenhost (R)
- Div. 3 (Democrat)
Trotter (D)/1988/Scoville (R)/1990/Sills (R)
Crosby (D)
Sonenshine (D)
Wallin (D)
(1988) Moore (R)

DISTRICT V (Split to Republican, 1989)

- Brown (R)/1988/Stone (R)
Ballantyne (R)/1988/Baxter (R)/1990/Harris (R)
Best (R)
Franson (R)/1991/Buckley (R)
Woolpert (D)/1989/Dibiaso (R)
Hanson (D)/1988/Ardaiz (R)
Martin (D)
Hamlin (D)/1989/Vartabedian (R)
(1990) Thaxter (R)

DISTRICT VI (Republican)

- Agliano (R)
Brauer (R)/1989/Bamattre-Manoukian (R)
Cottle (R)
Capaccioli (R)
Elia (R)
Premo (R)

TABLE 9
SUMMARY
CALIFORNIA COURTS OF APPEAL

	Work- load	Pol. Aff.*	CIVIL CASES			CRIMINAL CASES		
			Speed	Pub. Rate	Depub. Rate	Speed	Pub. Rate	Depub. Rate
DIST. I:	C							
Div. 1		R	C	A	A	B	A	C
2		S	B	B	B	B	A	B
3		R	B	A	B	B	A	A
4		R	A	B	C	A	C	C
5		D	A	A	C	A	B	A
DIST. II:	A							
Div. 1		R	C	C	A	C	C	A
2		S	C	C	A	C	C	B
3		S	C	C	C	C	C	A
4		R	B	B	B	C	C	A
5		R	C	C	A	C	A	B
6		D	A	C	B	A	B	C
7		R	C	A	C	C	A	C
DIST. III:	B	R	B	B	A	B	C	A
DIST. IV:	A							
Div. 1		R	A	A	C	A	B	B
2		R	B	A	B	A	A	B
3		D	A	B	C	B	B	C
DIST. V:	C	R	B	B	A	A	A	B
DIST. VI:	B	R	A	B	B	B	B	B

* Current "political affiliation" in terms of whether a majority of justices was appointed by a Democratic governor (D), a Republican governor (R) or whether appointments are evenly split (S).