



**Digital Commons@**

Loyola Marymount University  
LMU Loyola Law School

## Loyola of Los Angeles Law Review

---

Volume 26

Number 4 *Symposium on the California  
Judiciary and The Second Annual Fritz B. Burns  
Lecture on the Constitutional Dimensions of  
Property: The Debate Continues*

Article 9

---

6-1-1993

### The Business of the California Supreme Court: A Comparative Study

Karl Manheim

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

---

#### Recommended Citation

Karl Manheim, *The Business of the California Supreme Court: A Comparative Study*, 26 Loy. L.A. L. Rev. 1085 (1993).

Available at: <https://digitalcommons.lmu.edu/llr/vol26/iss4/9>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# THE BUSINESS OF THE CALIFORNIA SUPREME COURT: A COMPARATIVE STUDY

*Karl Manheim \**

Review by the Supreme Court . . . will be ordered . . . where it appears necessary to secure uniformity of decision or the settlement of important questions of law . . . .<sup>1</sup>

Given the considerable limitations upon the court's time and resources . . . and taking into account the burden of automatic appeals in death penalty cases and state bar disciplinary matters, the option to grant is not one that ought to be, or indeed can be, exercised lightly.<sup>2</sup>

## I. INTRODUCTION

The functions of appellate review are many: to correct error, to secure uniformity of decision, to develop common law, to supervise the administration of justice and others.<sup>3</sup> If a single overarching principle were used to describe these functions, it would likely be: "promoting the rule of law." This is especially true of the several high courts in the federal and state systems. It has become customary to expect these supreme courts to hear and decide the important legal and social issues of the day.<sup>4</sup> Although litigants may look to supreme courts for individ-

---

\* Professor of Law, Loyola Law School, Los Angeles.

1. CAL. R. CT. 29(a).

2. Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514, 519 (1984) (footnotes omitted).

3. DANIEL J. MEADOR, NATIONAL CENTER FOR STATE COURTS, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME 2-3 (1974). Judge Shirley Hufstedler has described the functions of appellate review as principally the "review for correctness" and the "institutional function[.]" Shirley M. Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 910 (1971). It is the latter function that guides and develops the body of law within the American legal system. See Charles W. Joiner, *The Function of the Appellate System*, in JUSTICE IN THE STATES 97, 102 (William F. Swindler ed., 1971).

4. Intermediate appellate courts also have the opportunity to articulate legal doctrine, as in cases of "first impression." However, to the extent a decision is truly novel or advances doctrine, it is likely to be reviewed by the highest court of the jurisdiction. In California, therefore, "the Court of Appeal does not fully share the policy-articulation domain of the Supreme Court. . . . [It] primarily engages in the particularistic review of trial court dispositions." THOMAS Y. DAVIES III, ORGANIZATIONAL BEHAVIOR AND THE DISTRIBUTION OF CASE OUTCOMES IN A CALIFORNIA COURT OF APPEAL 112-13 (1980).

ual relief, the profession and the community at large depend upon them for guidance, legal reform and perhaps most importantly, predictability.<sup>5</sup> Business, government and individuals all develop expectations of legal results based on high court decisions of a particular time.<sup>6</sup>

Quite apart from the substance of legal rules, the existence of discernable doctrine is critical. Unless the rules and their certainty are known, it may be difficult to formulate behavior.<sup>7</sup> In a society like ours in which law is an integral component of commercial, political and personal transactions, the absence or uncertainty of law retards progress<sup>8</sup> and the protection of individual rights.<sup>9</sup>

The legislature is the primary law maker in our legal culture. Yet, because of the law's breadth and complexity, courts have the task of interpreting positive law, filling in its interstices, and adapting it to social developments.<sup>10</sup> We rely heavily on judge-made or "common law" to supply the substantive rules of the community. This is a function of our

---

5. According to Justice Holmes, law is merely a prediction of what courts will do. See Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

6. Indeed, eras of legal development are named after the personalities who populate the nation's high courts such as the "Warren era," the "Bird court" and so forth.

7. See WILLIAM L. REYNOLDS, JUDICIAL PROCESS § 4.5(d), at 54 (2d ed. 1991).

[S]tability in expectations must be considered as an extremely important end in itself. Stability reduces uncertainty and thus helps all those who come in contact with decisional law . . . to plan their activities with a minimum of risk. Thus, stability is a very important end for the adjudicative process to seek.

*Id.* at 56.

8. *Id.* at 164-65 ("Whenever the law is uncertain, risk increases in a transaction and the cost of that transaction increases.").

9. One area where this has occurred is in the development of state constitutional law, where the California Supreme Court was once in the vanguard. Recently, it has fallen behind other state courts in using their own constitutions to develop doctrine independent of that articulated by the U.S. Supreme Court. See generally JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS & DEFENSES (1992) (discussing growing role of state courts in revitalizing state constitutional rights). The California Supreme Court's caseload simply does not give it the opportunity to address many of the emerging issues found in the state's constitution. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 800 (1992). Another factor is that the court may be philosophically opposed to developing substantive law under the state constitution, preferring instead to rely on the U.S. Supreme Court's articulation of federal standards. See, e.g., *Sands v. Morongo Unified Sch. Dist.*, 53 Cal. 3d 863, 903, 809 P.2d 809, 834, 281 Cal. Rptr. 34, 59 (1991) (Lucas, C.J., concurring) (emphasizing that while decisions are "not binding on questions of state constitutional law . . . such decisions will not be departed from in the absence of cogent and persuasive reasons"), *cert. denied*, 112 S. Ct. 3026 (1992).

10. The term "positive law" denotes law passed by legislative authority in a constitution, in a statute, by an initiative or through an executive regulation. In contrast, "common law" refers to law made by judges, either in interpreting positive law or in creating their own judicial rules.

appellate courts—principally the highest or supreme court of a jurisdiction.<sup>11</sup>

What happens when a supreme court becomes overloaded, slows down or otherwise leaves important legal issues unresolved? For one thing, it leaves a vacuum in the law, making the jobs of lower courts and lawyers more difficult to perform.<sup>12</sup> Frustration of the bar and lower bench may ultimately result in social malaise and business hesitation.<sup>13</sup> At the extreme, it may contribute to withdrawal from the judicial process,<sup>14</sup> or worse yet, a general sense that government is not working—a breach of the social contract.<sup>15</sup> The point may be overstated, but only to illustrate the degree of dependency we have on the work of supreme

11. Intermediate appellate courts rarely make law, recognizing that as the domain of the supreme court. See DAVIES, *supra* note 4, at 135 (“Law articulation in the Courts of Appeal is significantly more restrained than in the Supreme Court.”).

12. In this regard, see the opinion of Lord Halsbury in *London Streets Tramways Co. v. London County Council*, 1898 P. 375 (Eng. C.A.), referring to “the disastrous inconvenience—of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal.” *Id.* at 380.

Retired Court of Appeal Justice Thompson describes the problem as it affects capital cases: “[T]rial courts, unguided by a decision of the high court, proceeded as they had before on undecided questions. Cases decided in these courts became candidates for reversal on grounds unknowable by the trial judge. Reversal after reversal became the pattern.” Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2035 (1988).

13. See, e.g., Philip Hager, “Unsexy” *Cases Passed Over by Strapped High Court*, L.A. TIMES, Mar. 18, 1990, at A3. One commentator has stated:

[T]he collective impact of the court’s inability to decide a wide-range of issues is causing growing concern in the legal community. . . .

Legal experts say the resulting delay in resolving civil issues is causing increasing confusion and uncertainty in the lower courts—as judges, lawyers and litigants lack the firm and clear judicial precedents they need from the state’s highest court.

*Id.*

14. Harry N. Scheiber, *Changes in the California Courts Since the 1960s: A Historical Perspective* (unpublished manuscript, on file with *Loyola of Los Angeles Law Review*).

One loss is certainly the diminishing judicial articulation of public values. Another might easily be a long-term trend toward withdrawal from the system—that is, an increasing reliance on alternatives to courts or upon court-annexed processes—by wealthier litigants seeking to avoid delay; this may result in a loss of interest on the part of influential citizens in the question of public support for the courts’ fiscal needs

. . . .

*Id.* at 34.

15. Public confidence in the American judicial system, as measured by opinion polls, appears very low. A nationwide survey conducted for the National Center for State Courts found:

Of 15 major American institutions rated by respondents in this national survey, state and local courts ranked near the bottom in public confidence . . . . More than a third of the respondents indicated little or no confidence in the courts . . . . [T]he data revealed that the more experience people had with the courts—as litigants, witnesses, or jurors—the less confidence they expressed in the judicial system.

courts.<sup>16</sup> The supreme courts' significant departure from their traditional function is problematic at many levels of society.

To the consumers of judicial services—lawyers and litigants—speed, efficiency and dependability in the delivery of service may be as valuable as the goods themselves. Thus, even where the “quality of [justice] is not strained”<sup>17</sup> in terms of substantive result, inaccessible courts can inhibit the overall regime of law. We are far from the point of breakdown, for example, in the way often attributed to the legal system in India.<sup>18</sup> Still, virtually every segment of the community has criticized California's judicial system and its inherent delays.<sup>19</sup> Lawyers have

Thomas W. Church, *The Mansion vs. The Gatehouse: Viewing the Courts from a Consumer's Perspective*, 75 JUDICATURE 255, 256 (1992).

The picture may not be quite so bleak in California. According to a recent survey taken for the Judicial Council of California, Californians were nearly split on their opinions of the state court system. Almost half of the Californians surveyed said the court system is “good,” “very good” or “excellent,” while 52% had an “only fair” or “poor” opinion on a five-point scale ranging from excellent to poor. YANKELOVICH, SKELLY & WHITE/CLANCY SHULMAN, 2020 VISION: THE COMMISSION ON THE FUTURE OF THE COURTS, SURVEYING THE FUTURE: CALIFORNIANS' ATTITUDES ON THE COURT SYSTEM 5 (1992) [hereinafter 2020 VISION].

16. There is abundant literature and a growing jurisprudence on the work and function of appellate courts. It is not the purpose of this Article to explore the issue beyond an empirical review of the workload of the California Supreme Court.

17. With apologies to Portia, who explained to Shylock: “The quality of mercy is not strain'd.” WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* 86 (A.D. Richardson III ed., rev. ed. 1960). Portia added:

Though justice be thy plea, consider this,  
That in the course of justice, none of us  
Should see salvation. We do pray for mercy . . .

*Id.*

18. See *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 848-52 (S.D.N.Y. 1986) (discussing sources of delays in Indian legal system); see, e.g., L. Babu Ram v. Sri Raghunathji Maharaj, 1976 A.I.R. (S.C.) 1734, 1735 (1976) (case in litigation for 25 years). For an overview of the problems of the Indian court system, see Rajeev Dhavan, *For Whom? And For What? Reflections on the Legal Aftermath of Bhopal*, 20 TEX. INT'L L.J. 295, 298-99 (1985) (explaining that poor are victims of Indian legal system, due to endemic delays and underdeveloped tort law), and Marc Galanter, *Legal Torpor: Why So Little Has Happened in India After the Bhopal Tragedy*, 20 TEX. INT'L L.J. 273 (1985) (arguing that condition of Indian legal system would make it difficult for India to handle Bhopal litigation).

19. As Bernard E. Witkin stated a decade ago:

I am not alone in saying that the legal system has been in jeopardy for 50 years. The system has grown far too cumbersome, and the laws and procedures are far too complex. The methods of getting justice are delayed too long.

What we need is a rational re-examination and overhauling of a system that has grown up without adequate continual appraisal.

. . . [W]here we fall down is in the operation of the courts. . . . No one who understands the system can say that it is operating in an efficient manner.

*B.E. Witkin: 'Our Legal System Is in Jeopardy'*, CAL. LAW., Sept. 1982, at 82, 83 [hereinafter *Witkin*] (question and answer interview with Witkin conducted by Diana Diamond and Jonathan Maslow).

complained.<sup>20</sup> Legislatures have held hearings.<sup>21</sup> Jurists have decried the "crisis in the courts,"<sup>22</sup> even to the point of using their opinions to promote reform.<sup>23</sup>

The stark reality of clogged courts and endemic delay stands in contrast to idealistic visions of American justice. Confidence in our legal system depends on the efficient administration of justice.<sup>24</sup> Yet, when it

---

20. Titles in professional journals reveal anger and alarm within the profession. *See id.* at 82; Joseph McNamara, *Chaos in the Criminal Courts*, CAL. LAW., Sept. 1981, at 7, 7 ("Even those lawyers and judges who react angrily to criticism of the legal process concede that the court system is on the verge of chaos. The courts have become incredibly slow, expensive and inefficient."). These are matched by articles in the popular press. *See, e.g.*, Michele Kort, *Fairly Unpredictable: On the Lackluster California Supreme Court*, L.A. TIMES MAG., Feb. 7, 1993, at 31.

Of course these commentaries are nothing new. For instance, the 1932 *California State Bar Journal* included the following articles: Fred E. Borton, *The Breaking Down of Our Judicial System*, 7 STATE B.J. 7 (1932); Peter J. Crosby, *A Message from the President Concerning Appellate Court Congestion*, 7 STATE B.J. 10 (1932); F.H. Dam, *California's Appellate Problem*, 7 STATE B.J. 11 (1932); Evan Haynes, *Congestion in the Appellate Courts of California*, 7 STATE B.J. 3 (1932); and, John W. Preston, *Proposed Legislation to Relieve Appellate Court Congestion*, 7 STATE B.J. 17 (1932).

21. *See, e.g.*, CAL. ASSEMBLY JUDICIARY AND CRIM. JUSTICE COMMS., COURT OF APPEAL EFFICIENCY 76-86 (1981).

22. *See, e.g.*, Marcus Kaufman, *Crisis in the Courts*, CAL. LAW., Aug. 1990, at 28.

23. *See* Justice Hanson's concurring opinion in *Gonzalez v. Superior Court*, in which he felt "compelled to speak out on the subject of court reform." 140 Cal. App. 3d 146, 189 Cal. Rptr. 696, 709 (1983) (Hanson, J., concurring), *vacated*, 154 Cal. App. 3d 583, 201 Cal. Rptr. 435 (1984) (depublished, July 12, 1984).

[I]t is absolutely essential that California's appellate justices assume a leadership role and speak out and beat the drums for court reform not only on every "soapbox" available but also follow the lead of Chief Justice Burger and speak out in their written opinions. In California the need for appellate justices to speak out in their published opinions toward court reform in order to generate a dialogue directed at improving the administration of justice is clearly recognized by providing that one of the criteria for publication of appellate opinions is criticism of existing rules, with reasons for such criticism.

*Id.*, 189 Cal. Rptr. at 711 (Hanson, J., concurring) (depublished, July 12, 1984).

In denying the petition for hearing in *Gonzalez*, the supreme court "ordered that the opinion be not officially published." 154 Cal. App. 3d 583, 201 Cal. Rptr. 435 (1984); *see* CAL. R. CT. 976(c)(2) (depublishing by order of supreme court). A depublishing order means that the case "shall not be cited or relied on by a court or a party in any other action or proceeding." *Id.* 977(a); *see infra* note 87. The Rules of Court, however, do not and could not prohibit citation of unpublished opinions in law review articles or other nonjudicial forums. *See generally* George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477 (1988) (exploring extent to which unpublished opinions serve to settle case before court and to establish law used to decide other cases).

24. This was a major theme of former Chief Justice Warren Burger, who urged court reform to restore public confidence in the American judicial system. For instance, in his 1982 Annual Report on the State of the Judiciary before the American Bar Association (in Chicago on January 24, 1982), the Chief Justice stated: "To fulfill our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with a minimum of stress on the participants.

takes four or more years to bring a case to trial in the superior court,<sup>25</sup> and years more for appellate review,<sup>26</sup> the maxim "justice delayed is justice denied,"<sup>27</sup> assumes tangible meaning. Former Justice Marcus Kaufman thus echoes a familiar refrain when he says that "the most serious problem facing the California justice system is overload."<sup>28</sup> "Caseload stress" exacts a high price on the legal system.

The California Supreme Court has long endured criticism of this nature. Virtually from its inception, the court has struggled with means to increase productivity and reduce delay. The current era is no different. The complexion of the supreme court's docket has changed, partly in response to obligations imposed on it by law. One result is that the number of civil cases heard has declined, corresponding to an increase in capital cases and, until recently, attorney discipline matters. By some measures, the number of hearings granted and decisions filed are near their historic lows.<sup>29</sup> While at the same time, the number of court of appeal decisions ordered republished by the supreme court has reached a record high.<sup>30</sup> The net result is less law, or at least relatively fewer published decisions from which doctrine can be ascertained.<sup>31</sup>

The consequences of such trends, if true, are beyond the scope of this Article. I leave it to others to draw their own conclusions. Perhaps to the anarchists among us, less law is better, returning us—even if infinitesimally so—to a state of nature unbound by legal rules.<sup>32</sup> In contrast,

---

That is what justice is all about.'" *Gonzalez*, 140 Cal. App. 3d 146, 189 Cal. Rptr. at 709 (Hanson, J., concurring) (republished, July 12, 1984) (quoting Chief Justice Warren E. Burger, Report Before the American Bar Association (1982)).

25. See *Witkin*, *supra* note 19, at 83. "When it takes four years to get to trial in a civil case, something is radically wrong. When it takes two weeks to pick a jury in a prominent criminal case, somebody must be nuts. And endless post-conviction review in criminal cases also seems very wrong." *Id.*

26. "On the Court of Appeal level, civil case litigants and counsel have experienced the aggravation and frustration of carrying the burden of uncertainty from median time of 12 to 29 months, statewide, awaiting decision from the time of filing notice of appeal." *Gonzalez*, 140 Cal. App. 3d 146, 189 Cal. Rptr. at 713 (Hanson, J., concurring) (republished, July 12, 1984).

27. The phrase was coined by William Gladstone, Prime Minister of Great Britain in the 19th century.

28. Kaufman, *supra* note 22, at 28.

29. See *infra* notes 133-44.

30. Gerald F. Uelman, Dean of Santa Clara University School of Law, recently reported that the number of lower court opinions republished by the supreme court exceeded the number of its own published decisions. Gerald F. Uelman, *The Disappearing Dissenters*, CAL. LAW., June 1991, at 35, 39; see *infra* notes 92-93.

31. See MEADOR, *supra* note 3, at vii ("[A]ggravated delay has persisted, and the larger the appellate system, the more likely the deterioration of doctrinal consistency."); Thompson, *supra* note 12, at 2051.

32. Although returning us to *ferae naturae* is hardly the California Supreme Court's objective, the court has managed to eliminate entire categories of claims from judicial oversight.

many believe that the inability to predict legal outcomes invites disaster. For instance, a slowdown in the courts drives dispute resolution underground, where substantive and procedural rules are shielded from the light of public and juridic scrutiny.<sup>33</sup>

But, that is not the point of this Article. Nor does this Article set some normative standard by which the performance of the California Supreme Court or other courts can be measured. Rather, this Article is merely descriptive. It examines the caseload of our state's supreme court over the past two decades and compares certain aspects of the court's docket to that of high courts in other states.

In this manner, some observations can be made about the business of the California Supreme Court. First, and of little surprise to court-watchers, the supreme court spends an increasing amount of its time on death penalty cases.<sup>34</sup> The percentage of its docket devoted to capital cases is also high compared to supreme courts in other states.<sup>35</sup> Second, a petitioner's chance of having review granted by the supreme court is now about five percent, half of what it was a decade ago, and one-fifth of what it was forty years ago.<sup>36</sup> Perhaps as a consequence of this, the number of appellate decisions in which review is sought in the supreme court is on a steady decline.<sup>37</sup> Third, the number of cases that the supreme court disposes of without written opinion is rapidly increasing.<sup>38</sup> Fourth, the number of cases the supreme court orders depublished is increasing.<sup>39</sup> Particularly in the civil area, these developments add up to fewer law-settling decisions by our supreme court.

But it would be a mistake to accuse the court either of shirking its responsibilities or of inefficiency. Indeed, the total amount of business transacted by the court is impressive.<sup>40</sup> The problem may simply be that the nation's most populous state, and the world's sixth largest economy,<sup>41</sup> transacts a lot of legal business and simply needs more appellate

---

Kaufman, *supra* note 22, at 30 (describing seven classes of cases either eliminated or restricted in judicial access by supreme court).

33. *Id.* at 29 ("[E]limination of such cases from the court system will only result in their resolution in nonjudicial tribunals where the rights of litigants are greatly attenuated.").

34. *See infra* part IV.

35. *See infra* notes 189-97 and accompanying text.

36. *See infra* p. 1110, Chart 4. In 1951 the court granted 25% of all petitions for hearing. DAVIES, *supra* note 4, at 120.

37. *See infra* text accompanying notes 140-41.

38. *See infra* notes 146-47 and accompanying text.

39. *See infra* notes 92-93.

40. *See infra* note 144.

41. *See The Squeeze on the Middle Class Is a Chokehold on the State*, L.A. TIMES, Sept. 30, 1991, at B4.



justices than can be afforded during an era of diminishing resources.<sup>42</sup> It may be that the court does a remarkable job given the constraints and, at times, even the outright hostility from the legislature and other sectors. Or perhaps the court should refocus its priorities to recapture the lustre that once shone on the California Supreme Court. In any event, this Article presents data for further discussion and debate.

## II. A HISTORY OF DELAY

Court delay and clogged dockets are not new to California courts. Complaints of a "crisis in the courts" have been common throughout the twentieth century.<sup>43</sup> Indeed, congestion has been nearly endemic since the days of the California Republic in the 1840s. The periodic pleas for reform since then fill many volumes, but changes have not shown much success.<sup>44</sup>

At the supreme court, delays were recorded from the very beginning. Under the Constitution of 1849, the supreme court was the state's only appellate court,<sup>45</sup> and it had only three justices.<sup>46</sup> Because of rapid turnover in the early years, there were often "only two justices available

---

42. This is a real problem, at least insofar as the supreme court's budget is concerned. While some have suggested that increased judicial budgets could help unclog the appellate system, *see infra* note 234, the California Legislature seems intent on reducing it. Shortly after the supreme court upheld Proposition 140, which imposed term limits and a 38% budget cut on the legislature, an Assembly committee recommended a retaliatory 38% reduction in the court's budget. Bill Ainsworth, *Judiciary Not Spared From the Budgetary Ax*, RECORDER, Apr. 8, 1992, at 1. A Senate committee reduced the cut to 21.5%, *id.*, and ultimately it was cut by only 2.5%. Monica Bay, *Blowing Up at the Bar*, RECORDER, Oct. 6, 1992, at 1. Nonetheless, the legislature seems poised to use the court's budget as a weapon to influence outcomes. Outrageous perhaps, but not as extreme as cancelling court sessions, *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), or eliminating jurisdiction, *see Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), to affect pending cases.

43. *See* DAVIES, *supra* note 4, at 325 (describing dire warnings of caseload growth in 1920s and 1930s); Scheiber, *supra* note 14, at 3. Scheiber explains "court congestion should be seen not as unprecedented phenomena of our own day, but rather as recurring problems." *Id.*

44. Scheiber, *supra* note 14, at 4.

The bench and bar and legislative bodies have been producing inventories of proposed changes for decades. Most have proven nearly impossible to implement because of the conflicting objectives of participants in the processes of adjudication and because of the continued escalation of tensions between the separate branches of government dating back to *Marbury vs. Madison*.

TASK FORCE ON COURTS, L.A. COUNTY ECONOMY AND EFFICIENCY COMM'N, REPORT ON THE COURT SYSTEM, LOS ANGELES COUNTY at iv (1981).

45. CAL. CONST. of 1849, art. VI, § 4. The supreme court had sole appellate jurisdiction except in cases decided by justices of the peace, in which original appellate jurisdiction lay with the county courts. *Id.* § 9.

46. *Id.* § 2.

to hear cases, and if they disagreed, no decision could be rendered."<sup>47</sup> At some points, the court could not muster a quorum.<sup>48</sup> Responding to the problem, the California Legislature authorized the use of temporary or interim justices to "aid the work of the Court,"<sup>49</sup> but the effort proved unsuccessful.<sup>50</sup> Eventually, the constitution was amended in 1862 to expand the court to five members.<sup>51</sup>

Nonetheless, delay persisted. By 1879, the justices had fallen behind on their calendars and were unable to issue written opinions in nearly half of their cases.<sup>52</sup> By 1882, the average wait for decisions in pending cases was two years.<sup>53</sup> In an attempt to reduce this delay, the court dispensed with oral arguments and decided cases based on the briefs that were submitted.<sup>54</sup> The legislature once again sought to provide additional personnel to assist the court. It authorized the appointment of

---

47. ARNOLD ROTH, *THE CALIFORNIA STATE SUPREME COURT: A LEGAL HISTORY 1860-1879*, at 8 (1973). In its first seven years, eight justices retired from the court. *Id.* "This constituted a rapid turnover because no more than three justices sat at any one time. . . . [W]ith this turnover reversals of decisions were likely, and little could be done toward establishing a system of precedents." *Id.*

48. *Id.* at 10.

49. *Id.* at 9.

50. The court declared the authorization to be unconstitutional because there were no vacancies to be filled. *Id.* at 9-10. This problem was cured by a 1926 constitutional amendment that authorized the chief justice to "provide for the assignment of any judge to another court of a like or higher jurisdiction to assist a court or judge whose calendar is congested." CAL. CONST. of 1879, art. VI, § 1a (1926). Temporary assignments began the next year. DAVIES, *supra* note 4, at 325.

The current provision is found in article VI, § 6, which states:

The Chief Justice shall seek to expedite judicial business and to equalize the work of judges. The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired judge who consents may be assigned to any court.

CAL. CONST. art. VI, § 6. Section 170.8 of the California Code of Civil Procedure also provides that the chairman of the judicial council (chief justice) may assign a judge to hear an action or proceeding in a court if there is no qualified judge in that court to hear the action or proceeding. CAL. CIV. PROC. CODE § 170.8 (West Supp. 1993).

It is now common for the chief justice to fill temporary vacancies on the supreme court by appointing lower court judges to sit by designation. *See, e.g., Mosk v. Superior Court*, 25 Cal. 3d 474, 481, 601 P.2d 1030, 1035, 159 Cal. Rptr. 494, 499 (1979).

51. The 1862 constitutional amendment also provided for direct election of supreme court justices by the voters. This replaced the scheme of legislative appointments provided in article VI of the 1849 constitution. CAL. CONST. of 1849, art. VI, § 3 (1862).

52. *See* Randall D. Sosnick, Comment, *The California Supreme Court and Selective Review*, 72 CAL. L. REV. 720, 725 (1984).

53. SUPREME COURT OF CAL., SUPREME COURT OF CALIFORNIA PRACTICES AND PROCEDURES 8 (1990). The court consisted of seven members then, as it does now. But no intermediate appellate courts existed. *Id.* at 8-9.

54. *Id.* at 8.

commissioners to help dispose of backlogged cases.<sup>55</sup> Apparently, this plan fared little or no better than the earlier one. The five appointed commissioners "did not sufficiently alleviate the court's workload."<sup>56</sup>

A constitutional amendment in 1879 expanded the supreme court to seven members and authorized a division of the court into two departments.<sup>57</sup> Still, delay persisted. Initial attempts to create intermediate appellate courts to relieve congestion at the supreme court level were unsuccessful.<sup>58</sup> Finally, in 1904, the legislature approved a constitutional amendment to create the district courts of appeal.<sup>59</sup> These courts were to handle appeals in the "'ordinary current of cases,'" leaving the "'great and important' cases" to the supreme court.<sup>60</sup> Not only did this amendment allow the court of appeal to relieve the supreme court of the burden of ordinary appeals,<sup>61</sup> it also made the court of appeal the repository for most writs and other original filings.<sup>62</sup> The creation of the court of appeal permitted the supreme court "to concentrate its efforts on the articulation of legal policy."<sup>63</sup>

---

55. *Id.*

56. *Id.*

57. CAL. CONST. of 1879, art. VI, § 2; see Sosnick, *supra* note 52, at 725 nn.34-37.

58. Sosnick, *supra* note 52, at 726-27. The 1879 convention rejected a proposal to establish a court of appeal "because of the unsatisfactory results obtained with the New York Court of Appeals, which had at that time become 'a sort of receptacle for worn out old Judges,' and was often in conflict with the state supreme court." *Id.* at 725 n.32 (quoting 3 E.B. WILLIS & P.K. STOCKTON, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1455 (1881) (remarks of Mr. Wilson)). Voters defeated a similar proposal at the polls in 1900. *Id.* at 726 n.38.

59. Act of Mar. 14, 1903, ch. 38, 1903 Cal. Stat. 737 (amending scattered sections of CAL. CONST. art. VI).

60. William W. Blume, *California Courts in Historical Perspective*, 22 HASTINGS L.J. 121, 173-74 (1970) (quoting 2 E.B. WILLIS & P.K. STOCKTON, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 951 (1880) (remarks of chairman of judiciary committee)); see also *People v. Davis*, 147 Cal. 346, 349, 81 P. 718, 720 (1905).

At the time this constitutional amendment was put forward and adopted this court had been for years unable to dispose of the business before it as fast as it accumulated, and the cases were decided from two to three years after the appeals were filed. . . . The amendment was adopted chiefly for the purpose of affording a remedy for this evil.

*Id.*

61. The court of appeal's appellate jurisdiction extended to civil actions up to \$2000 in controversy and noncapital criminal cases. CAL. CONST. art. VI, § 4 (repealed 1966). In addition, the supreme court could transfer cases from its docket to the court of appeal. *Id.* "Within a short time after the creation of the Courts of Appeal, the Supreme Court was transferring a substantial proportion of the cases in its own jurisdiction down to the District Courts of Appeal." DAVIES, *supra* note 4, at 117.

62. DAVIES, *supra* note 4, at 117.

63. *Id.* at 118.

There were few other significant changes in court structure during the first half of the twentieth century. The Judicial Council was created in 1926 "[t]o improve the administration of justice" and "to expedite judicial business."<sup>64</sup> It has taken a leading role in California judicial reform and has promoted efficiency, competence and public confidence in the courts.<sup>65</sup> In the 1940s, Chief Justice Gibson professionalized the supporting staff of the supreme court.<sup>66</sup> "[L]aw clerks were supplemented by career staff attorneys whose task it was to aid the justices."<sup>67</sup>

The jurisdiction of the court of appeal was expanded in 1966 to include virtually all appeals except capital cases, attorney discipline actions and the review of Public Utility Commission orders.<sup>68</sup> Constitutional amendment of 1984 further attempted to reduce the supreme court's workload.<sup>69</sup> Proposition 32 instituted selective review, allowing the supreme court to review "all or part of a decision."<sup>70</sup> Under the prior rule, granting a petition for hearing had the result of vacating the decision below, thus necessitating supreme court review of a case in its entirety.<sup>71</sup> A grant of review would result in the lower court opinion being vacated, because it was a "nullity."<sup>72</sup> Under the current practice of selective review, the appeal is "confined to the specified issues and issues fairly

---

64. CAL. CONST. art. VI, § 6.

65. Scheiber, *supra* note 14, at 37-77.

66. Thompson, *supra* note 12, at 2012.

67. *Id.*

68. DAVIES, *supra* note 4, at 117.

69. CAL. CONST. art. VI, § 12(c) (enacting Proposition 32 (1984)).

70. *Id.* As explained in the Advisory Committee comment to California Rule of Court 29.2:

If the Supreme Court decides only limited issues, other issues in the cause will be disposed of by the Court of Appeal as the Supreme Court directs. If the Court of Appeal is not directed to take further action, the original Court of Appeal resolution of the other issues stands as between the parties.

CAL. R. CT. 29.2 advisory committee's cmt. (West Supp. 1993).

71. Sosnick, *supra* note 52, at 720.

72. See *Knouse v. Nimocks*, 8 Cal. 2d 482, 66 P.2d 438 (1937), in which the court stated: The opinion and decision of the District Court of Appeal, by our order of transfer, have become a nullity and are of no force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed. . . . [T]he opinion may serve as a brief on the legal questions involved therein, and may be adopted by this court as its opinion in the pending action. But without some further express act of approval or adoption of said opinion by this court, that opinion and decision are of no more effect as a judgment or as a precedent to be followed in the decision of legal questions that may hereafter arise than if they had not been written.

*Id.* at 483-84, 66 P.2d at 438-39 (citation omitted).

The rule requiring vacation of court of appeal decisions contrasts with the practice in the federal judiciary. Each federal circuit has its own practice regarding publishing opinions, *see, e.g.*, 5TH CIR. R. 47.5, and there is no provision for vacating or depublishing opinions. *But see* Arthur D. Hellman, "Granted, Vacated, and Remanded"—*Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389 (1984) (discussing effect of United States

included" in the order granting review.<sup>73</sup> The 1984 amendment was "[d]esigned to help the court run more efficiently" and to provide "the justices more time to focus on the most important issues."<sup>74</sup>

In addition to the constitutional changes noted here, the supreme court has implemented internal policies designed to speed up the decision-making process. These include measures to increase office efficiency and reliance on the court's central staff.<sup>75</sup> This corresponds to similar reform movements across the country.<sup>76</sup> However, such policies deemphasize the role of the judge in appellate decision making<sup>77</sup> and result in

---

Supreme Court's summary orders vacating judgment below and remanding for further consideration).

The former California rule also had the unintentional effect of dissuading lower courts from writing comprehensive opinions. See, e.g., *In re Mitchell P.*, 74 Cal. App. 3d 420, 141 Cal. Rptr. 504 (1977), *vacated*, 22 Cal. 3d 946, 587 P.2d 1144, 151 Cal. Rptr. 330 (1978), *cert. denied*, 444 U.S. 845 (1979). The court in *Mitchell P.* stated:

It appears inevitable that the Supreme Court will grant a hearing in this case to secure uniformity of decision. Therefore, since this opinion will be short-lived and our deathless prose promptly lost to posterity, we will attempt to be brief—a mere statement that we disagree with the decisions in the other cases and a brief explanation of our reasons for so holding.

*Id.*

73. CAL. R. CT. 29.2(b).

74. SUPREME COURT OF CAL., *supra* note 53, at 10. Selective review was also intended to reduce the need for the supreme court to depublish court of appeal decisions as an alternative to granting review. Grodin, *supra* note 2, at 528. It apparently has not had this salutary effect. See *supra* note 30.

75. SUPREME COURT OF CAL., *supra* note 53, at 10. For instance, the central staff now prepares "conference memos" on filed cases, recommending that a hearing be granted or denied. *Id.* at 30. At least in civil cases, conference memos were once written by individual justices or their clerks. Stephen R. Barnett, *The Death of Oral Argument*, CAL. LAW., June 1990, at 45, 45-46. "Central staff answer to the chief judge and to the court as a whole, rather than to an individual judge." REYNOLDS, *supra* note 7, § 3.11, at 46.

76. See REYNOLDS, *supra* note 7, § 3.11, at 45 ("There has been a marked increase in 'para-judicial' staff in recent decades. . . . Most appellate courts now also have a central staff, some of which are quite large."); see also MEADOR, *supra* note 3, at 12 (describing development and operation of staff attorneys); William M. Goodman & Thom G. Seaton, *Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court*, 62 CAL. L. REV. 309, 312-13 (1974) (discussing staff and decision-making process).

The California Supreme Court has more law clerks and staff attorneys per justice than any other state. See Thomas B. Marvell, *State Appellate Court Response to Caseload Growth*, 72 JUDICATURE 282, 287 (1989) (indicating that California had 6.3 staff aides per justice in 1984, compared to national average of 2.3).

77. See Grodin, *supra* note 2, at 519 n.13.

From time to time it is suggested, usually by someone outside the court, that the workload each justice can handle could be increased if greater responsibility was delegated to his or her staff. . . . I doubt that I could delegate responsibility further to any significant extent and still perform what I consider to be my constitutional obligation.

*Id.* See REYNOLDS, *supra* note 7, § 4.5(d), at 46, who states:

The increase in staff has led to a change in the way courts operate. No longer can decisions be thought to be the exclusive work of the judges themselves. Today's

the "bureaucratization of the judiciary."<sup>78</sup> The president of the American Bar Association has admonished the California Supreme Court that its reliance on staff to write opinions was "dangerous."<sup>79</sup> Other measures are similarly controversial, such as the practice of transferring and retransferring cases to the court of appeal.<sup>80</sup>

In 1989 the supreme court adopted a policy of issuing its decisions within ninety days of submission.<sup>81</sup> Thus, it now "voluntarily" complies<sup>82</sup> with the constitutional time limit for rendering decisions after submission.<sup>83</sup> "The court believes the new procedures may ultimately result in a speedier disposition of cases."<sup>84</sup> Not everyone is impressed

---

judge runs a small law office—several clerks, central staff, even student interns—and the decisions generally must be thought of as a product of that office. . . . [I]n minor cases and in other areas of decision-making—such as deciding whether to grant certiorari or to hear oral argument—staff play a large (and largely unacknowledged) role in today's appellate decision making.

*Id.*

78. See Marvell, *supra* note 76, at 286 (stating that "many fear that the judges are delegating too much of the decision process" to their staff attorneys).

79. Becky Morrow, *Janofsky Hits State High Court's Review Process*, L.A. DAILY J., Feb. 29, 1980, at 1, 24; see also Robert S. Thompson, *Mitigating the Damage: One Judge and No Judge Appellate Decisions*, 50 CAL. ST. B.J. 476, 513-16 (1975) (discussing role of staff attorneys and inherent danger in relying too heavily on them).

80. Bernard Witkin described this as an "'appellate musical chairs gimmick.'" *Gonzalez v. Superior Court*, 140 Cal. App. 3d 146, 189 Cal. Rptr. 696, 711 (1983) (Hanson, J., concurring) (quoting BERNARD E. WITKIN, *MANUAL ON APPELLATE COURT OPINIONS* § 38 (1977)), *vacated*, 154 Cal. App. 3d 583, 201 Cal. Rptr. 435 (1984) (depublished July 12, 1984). It is

a feat of judicial prestidigitation that makes part of the workload disappear because you don't see where it was. The underlying notion is that you rid yourself of overload by transferring part of that load to another tribunal. . . . When our Supreme Court transfers a matter to itself and then retransfers that matter to a Court of Appeal for decision, it may be a good deal for the Supreme Court, but in no sense does it relieve the appellate system's overload.

*Id.*, 189 Cal. Rptr. at 711-12 (Hanson, J., concurring) (depublished, July 12, 1984).

81. A case is typically submitted at time of oral argument or filing of post-hearing briefs. Professor Barnett criticizes the court's 90-day rule as "simply shift[ing] much of the decision-making process from after the oral argument to before it." Barnett, *supra* note 75, at 46. He explains that the justices "vote on the case and draft their dissenting and concurring opinions before the argument." *Id.*; see also *State High Court Begins 1980 With Reduced Case Load*, L.A. DAILY J., Jan. 2, 1980, at 1 (reporting that "Chief Justice Rose Bird is delaying hearing arguments on cases in order to keep within the 90-day limit").

82. See Barnett, *supra* note 75, at 46. Not all have viewed the court's compliance with the 90-day rule as discretionary. In July 1979, a lawsuit was filed against the justices by the Law and Order Campaign Committee seeking to compel the justices' compliance or have them forfeit their paychecks. See *State High Court Begins 1980 With Reduced Case Load*, *supra* note 81.

83. CAL. CONST. art. VI, § 19.

84. Hager, *supra* note 13, at A37 (quoting Supreme Court Public Information Officer Lynn Holton).

with the ninety-day rule, however. Dean Gerald Uelman sees it as contributing to, rather than ameliorating, the court's backlog.<sup>85</sup>

Perhaps the most controversial of the supreme court's policy innovations is the growing practice of "depublication." Rather than accept a case for review, the court, if it disagrees with the opinion below, can simply order that the opinion not be published in the official reports.<sup>86</sup> Depublication is intended to deprive the lower court opinion of stare decisis effect,<sup>87</sup> while not affecting the judgment in the case. It makes the decision "non-law,"<sup>88</sup> as if it had never been published in the first place.<sup>89</sup> Rather than resolving conflict or explaining the error of a lower court decision, depublication relieves the supreme court of its obligation to "secure uniformity of decision" and "settle[ ] important questions of law."<sup>90</sup> Disagreement with court of appeal decisions thus results in nullification

85. Gerald F. Uelman, *Losing Steam*, CAL. LAW., June 1990, at 33, 42. According to Uelman,

[t]he chief cause of the court's productivity drop is undoubtedly the 90-day rule, which . . . has shifted much of [the court's] effort to the preargument stage. . . . [I]t is taking much longer to make the trek from grant of hearing to calendar date for oral argument. In response the court vigorously slashed the rate at which it granted new hearings. Thus the slowdown promises to be more than a temporary phenomenon.

*Id.*

86. See CAL. CONST. art. VI, § 14; CAL. R. CT. 976(c)(2), 979. The criteria for publication of court of appeal decisions are contained in California Rule of Court 976(b). If a majority of the court issuing the opinion certifies that it meets those criteria, the opinion is published. *Id.* 976(c)(1). However, the supreme court may order that any opinion which has been certified for publication not be published, a practice referred to as "depublication." *Id.* 976(c)(2). See generally Grodin, *supra* note 2 (critiquing California Supreme Court depublication practice).

87. Opinions by the court of appeal that are not published may not "be cited or relied on by a court or a party in any other action or proceeding." CAL. R. CT. 977(a). Thus, a depublished opinion is unavailable as precedent. See *Powers v. Sissoev*, 39 Cal. App. 3d 865, 872 n.8, 114 Cal. Rptr. 868, 873 n.8 (1974).

88. REYNOLDS, *supra* note 7, § 3.9, at 32. This contrasts with the practice in federal court. See, e.g., 5TH CIR. R. 47.5.3.

Unpublished opinions are precedent. However, because every opinion believed to have precedential value is published, an unpublished opinion should normally be cited only when it (1) establishes the law of the case, (2) is relied upon as a basis for res judicata or collateral estoppel, or (3) involves related facts. If an unpublished opinion is cited, a copy shall be attached to each copy of the brief.

*Id.*

89. Professor Reynolds is critical of the entire practice of nonpublication.

[L]imited publication diminishes both judicial responsibility and accountability. . . . [T]he unpublished list is a convenient place for a court to unload opinions in areas where it is unwilling (or unable) to make its decisions known; that is, limited publication can be used deliberately by a court to avoid deciding according to the rules of stare decisis.

REYNOLDS, *supra* note 7, § 3.9, at 33; see also DAVIES, *supra* note 4, at 139-42 (because most decisions are not published, court decides most cases in particularistic fashion in which considerations regarding integrity of legal doctrine play diminished role).

90. CAL. R. CT. 29.

rather than correction.<sup>91</sup> Despite the criticism,<sup>92</sup> the court has found depublication to be an increasingly useful vehicle to reduce its caseload.<sup>93</sup>

Despite these innovations, a "deluge of litigation"<sup>94</sup> continues to undate our courts. One often-heard explanation for burgeoning dockets and their attendant congestion is the so-called "litigation explosion" in American society.<sup>95</sup> We seem to resort to judicial dispute resolution mechanisms more often than other industrialized societies. For instance, in 1989, nearly 100 million cases were filed in the United States.<sup>96</sup> In 1990, more than eleven million civil and criminal cases were filed in California.<sup>97</sup> Yet, as Professor Scheiber explains, such large-scale resort to

---

91. Disagreement with lower court decisions historically has been a prime factor influencing review both at the United States and California Supreme Courts. DAVIES, *supra* note 4, at 123 (citing Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 214-15 (1957)).

92. Many have strongly criticized the court for its depublication practices. See, e.g., Barnett, *supra* note 75, at 116. "Since the court is now depublishing as many cases as it decides by opinion, it seems extraordinary that the court's official statement of its practices and procedures scarcely mentions this practice. One can only conclude that the court is embarrassed about depublication, as it should be." *Id.*; see also Robert S. Gerstein, "Law by Elimination: Depublication in the California Supreme Court, 67 JUDICATURE 293, 294-95 (1984) (criticizing selective publication). See generally Grodin, *supra* note 2, at 520-23 (discussing criticisms of depublication procedures).

93. The supreme court began using the practice in 1971, when it ordered three cases depublished. See 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, 1200 (1977). In following years, it decertified an average of 20 court of appeal opinions per year. See *id.* at 1200-06. However, "[b]y 1982, the court was decertifying appellate court opinions at the rate of one-hundred-and-eighteen a year, twelve per cent of the published opinions of the court of appeal. This approached the total number of opinions of the California high court in the same period." Thompson, *supra* note 12, at 2051 (footnote omitted) (citing Gideon Kanner & Gerald F. Uelman, *Random Assignment, Random Justice*, L.A. LAW., Feb. 1984, at 10, 14; see also *supra* note 30).

94. Richard H. Bein et al., *The Court of Review: A New Court for California?*, 47 CAL. ST. B.J. 28, 36 (1972).

95. See Marvell, *supra* note 76, at 282 & n.1 ("The appellate caseload explosion and the resulting pressures on the courts are hard to exaggerate.").

96. Randall Samborn, *Filings Outpace the Gains*, NAT'L L.J., July 1, 1991, at 26 (reporting 98.4 million state court filings in 1989, "including: 17.3 million civil cases; 12.5 million criminal cases; 1.4 million juvenile cases; and 67.2 million traffic or other ordinance violations. Federal trial courts, by comparison, reported 223,113 new civil filings and 62,042 new criminal cases in 1989.").

97. Philip Hager, *Lucas Details Plan for Studying Drug Crisis*, L.A. TIMES, Mar. 5, 1991, at A3, A24. When routine traffic and parking matters are included, the number jumps to 18 million. Hager, *supra* note 13, at A37. In the Los Angeles Superior Court alone, more than 300,000 civil cases were filed in 1991. Randall Samborn, *Courting Solutions: Rising Caseloads Spur Judiciaries to Seek Solutions*, NAT'L L.J., July 1, 1991, at 27.



the courts "is of long historic standing—a feature of our society as American as apple pie."<sup>98</sup>

What is undoubtedly true, however, is that California's population has outpaced its judicial resources.<sup>99</sup> Our state has the same number of supreme court justices now—seven—as it did in 1879; the court is constituted in basically the same way, and it is vested with similar jurisdiction.<sup>100</sup> Yet, the state's population has increased thirty-five fold, from 864,964 in 1880<sup>101</sup> to nearly thirty million in 1990.<sup>102</sup> Similar but less dramatic comparisons could be made for the court of appeal as well.<sup>103</sup> This point has not escaped the chief justice<sup>104</sup> or other members of the court.<sup>105</sup>

Population increases alone, or in relation to the quantum of judicial resources, do not fully explain court congestion and delay. Professor Scheiber believes that the "'legal culture' of the lawyers, court officials, and judges" plays an important role in "determin[ing] the pace at which cases move (or fail to move) through the civil courts."<sup>106</sup> For example, delay can become part of widely shared litigation strategies. Other factors, such as business and political trends, frequency of settlements, pros-

---

98. Scheiber, *supra* note 14, at 3. Professor Scheiber disputes the notion of any recent "litigation explosion." He states that "[e]ven in the last thirty years, the litigation rate (cases filed in proportion to population) has been fairly steady, and it appears likely that the rates were probably higher—perhaps much, much higher—a century ago in California." *Id.* at 3-4.

99. Two decades ago it was suggested that the California Supreme Court reached the upper limit of the amount of work it can do. PREBLE STOLZ, *JUDGING JUDGES* 3, 194-200 (1981).

100. *See* SUPREME COURT OF CAL., *supra* note 53, at 7-10.

101. *ENCYCLOPEDIA AMERICANA* 200B (1992).

102. *THE WORLD ALMANAC AND BOOK OF FACTS* 74-75 (1992).

103. *See generally* DAVIES, *supra* note 4, at 320-40 (discussing generally growth of appellate litigation in California courts from 1905-1976). "[S]tatistics indicate that a growing caseload has been the normal condition for the Courts of Appeal since their creation." *Id.* at 320. There were three "district courts of appeal" when first created in 1904. *Id.* The legislature was authorized by constitutional amendment in 1928 to increase the number of districts and create divisions within each district. CAL. CONST. art. VI, § 3. There are now six districts with a total of 18 divisions. Richard G. Wallace, Comment, *Attorney Discipline and the California Supreme Court: Transfer of Direct Review to the Courts of Appeal*, 72 CAL. L. REV. 252, 255 (1984).

104. In his 1990 State of the Judiciary Address to the California Legislature, Chief Justice Lucas complained that the size of the supreme court has remained unchanged since 1879: "There were seven justices then and there are seven justices now . . . In that time, however, the numbers of people, of lawyers, of cases filed and of lower court judges have increased exponentially." Hager, *supra* note 13 (quoting Lucas, C.J.).

105. *See* Kaufman, *supra* note 22, at 32 ("[T]he public and the Legislature must be willing to provide adequate resources to handle the tremendous growth in the population and the inevitable increase in litigation in California in the last 25 years.").

106. Scheiber, *supra* note 14, at 5 (citing Larry L. Sipes, *Managing to Reduce Delay*, 56 CAL. ST. B.J. 104 (1981)).

ecution policies, sentencing and changes in the substantive law, all affect patterns of litigation.<sup>107</sup> Perhaps, the increase in the number of California lawyers might by itself suggest a cause of the "litigation explosion."<sup>108</sup>

Based on the multiple factors affecting litigation patterns, raw numbers alone may tell us little or nothing about judicial efficiency. Indeed, in the dual-judicial system of American federalism, an analysis of state courts reveals only one-half of the picture. Shifting preferences between state and federal court adjudication, often having little to do with the relative availability of judicial resources, complicate any quantitative analysis.<sup>109</sup> In some respects, federal courts have greater control over their dockets than state courts. The former have limited jurisdiction, while the latter are deemed courts of general jurisdiction. It is not difficult for federal courts concerned with docket congestion to use and abuse jurisdiction-avoidance devices as a means of shifting their caseloads to state courts.<sup>110</sup>

---

107. For a thorough description of the various social and jurisprudential forces affecting California courts, see Scheiber, *supra* note 14, at 13-27; see also Richard Lempert, *Docket Data and "Local Knowledge": Studying the Court and Society Link Over Time*, 24 LAW & SOC. REV. 321, 327-28 (1990) (discussing factors affecting docket data surveys); and John Goerd, *Examining Court Delay: The Pace Of Litigation In 26 Urban Trial Courts* (1989), *microformed on* National Center for State Courts (William S. Hein & Co., Inc.) (giving caseload statistics and survey methodology).

Chief Justice Warren Burger remarked to the ABA's winter convention in New Orleans, February 6, 1983:

The [caseload] problems we face have resulted from the growth of the country, changes in science and engineering, the increasing complexity of society, the increasing complexity of the structure of business and industry, the enlargement of rights of individuals, changes in the relationships of people to government, and, underlying all this, the increasing litigiousness of our people.

*Gonzalez v. Superior Court*, 140 Cal. App. 3d 146, 189 Cal. Rptr. 696, 708 (1983) (Hanson, J., concurring) (quoting Chief Justice Warren E. Burger, Remarks to the American Bar Association (Feb. 26, 1983)), *vacated*, 154 Cal. App. 3d 583, 201 Cal. Rptr. 435 (1984) (depublished July 12, 1984). In California, "the justices of the courts of appeal perceived the rising volume of criminal appeals as resulting from the stimulation of the Warren Court's due process decisions." DAVIES, *supra* note 4, at 333.

108. Professor Scheiber reports that the number of lawyers in California increased 481% from 1960 to 1990. Scheiber, *supra* note 14, at 29.

109. Professor Scheiber describes these as the "'federal effects' on change in the California courts." *Id.* at 23.

110. The several abstention doctrines permit federal courts to "defer" to state court adjudication, even in uniquely federal cases. See, e.g., *Younger v. Harris*, 401 U.S. 37, 43 (1971); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941). Expanding jurisdictional bars, such as the Eleventh Amendment, claim preclusion, exhaustion doctrines and narrowing interpretations of substantive federal law, all serve to prohibit or dissuade federal adjudication. Finally, the U.S. Supreme Court's control over its own docket, and the elimination of mandatory appeal jurisdiction, may put subtle pressures on state courts to grant discretionary

The fact remains, however, that "California's archaic, horse-and-buggy, system of appellate review is too slow and too costly."<sup>111</sup> Improvement is not on the horizon, at least if statistical trends over the past two decades are any indication.

### III. CASELOAD TRENDS

This section describes the caseload of the California Supreme Court over a twenty-one year period, from fiscal year 1970-1971 through 1990-1991. This two-decade period was chosen because it spans several different courts and judicial eras. It is sufficiently long enough to make meaningful comparisons in key areas. Some trends are discernible over the period.

First, some general observations. The supreme court's total workload has nearly doubled in the past two decades.<sup>112</sup> As impressive as this appears, it is matched by statistics for other courts. For instance, case filings in the federal circuit courts grew eightfold from 1960 to 1987.<sup>113</sup> Filings in the United States Supreme Court grew from 1181 in the 1950 term, to over 4000 annually in the 1980s.<sup>114</sup> A survey of state courts shows that in a recent ten-year period, the number of appeals more than doubled.<sup>115</sup>

These other figures are not meant to downplay the impact of accelerated case filings in the California Supreme Court. Cases continue to stream into the court at the rate of up to 180 per week—triple the load twenty-five years ago. The justices spend up to half of their time simply determining which of these cases to review.<sup>116</sup> This takes an obvious toll on the court's ability to hear and decide cases.

---

review. See generally FRIESEN, *supra* note 9 (discussing independent use and interpretation of state bills of rights in civil and criminal litigation).

111. *Gonzalez*, 140 Cal. App. 3d 146, 189 Cal. Rptr. at 712 (Hanson, J., concurring) (depublished, July 12, 1984).

112. The court notes an even sharper increase in the 25-year period prior to 1987-1988. Total business transacted increased 200% during that time from 2233 to 7189 matters. The comparison for case filings is also dramatic. They totalled 4390 in fiscal year 1987-1988, including 3241 petitions for review (appeal) from the court of appeal. This is compared with one-third as many filings (1562) and one-quarter as many petitions for hearing (907) in 1962-1963. SUPREME COURT OF CAL., *supra* note 53, at 2.

113. Robert L. Stern, *Remedies for Appellate Overloads: The Ultimate Solution*, 72 JUDICATURE 103, 103 (1988).

114. *Id.*

115. *Id.* Many sources provide statistics on the appellate caseload in California. See, e.g., CAL. ASSEMBLY JUDICIARY AND CRIM. JUSTICE COMMS., *supra* note 21, at 76-86; DAVIES, *supra* note 4. Perhaps the richest source of raw data is contained in the Annual Statistical Survey of the California Judicial Council. The latter provides the source data for most of the statistics reported here.

116. Hager, *supra* note 13, at A37.

### A. Filings in the Supreme Court

There are several routes by which cases reach the California Supreme Court. The most familiar is by appeal from a lower court. In most appeals, the case is first heard by the court of appeal, followed by a petition for review in the supreme court.<sup>117</sup> Capital cases, however, bypass the court of appeal and are directly reviewed by the supreme court.<sup>118</sup> The court also can review cases decided by the appellate department of the superior court, again bypassing the court of appeal.<sup>119</sup> The supreme court typically receives over 3000 petitions for review each year, and accepts roughly five percent of them.<sup>120</sup>

Cases also can be filed directly with the supreme court. It has original jurisdiction in habeas corpus proceedings and in proceedings "for extraordinary relief in the nature of mandamus, certiorari, and prohibition."<sup>121</sup> As with most of its docket, the court has discretion to accept original proceedings for decision. It generally receives over 1000 such filings each year, but accepts only a small fraction of them.<sup>122</sup> The court is partial to election disputes and challenges to initiative meas-

117. CAL. CONST. art. VI, § 12. The court "may, before decision, transfer to itself a cause in a court of appeal," *id.* § 12(a), although it is far more typical for the court to grant review after decision by the court of appeal.

118. *Id.* § 11.

119. *Id.* § 11, ¶ 2. The appellate department of the superior court provides initial review of cases tried in the municipal court. *Id.*

120. See *infra* P. 1110, Chart 4.

121. CAL. CONST. art. VI, § 10.

122. In fiscal year 1990-1991, the California Supreme Court received 1184 filings in original proceedings. 2 JUD. COUNCIL CAL. ANN. REP. 7 (1992) (Judicial Statistics for Fiscal Year 1990-1991) [hereinafter 1992 ANN. REP.]. The vast majority of these were habeas corpus petitions (1022), while 99 were civil petitions and eight were appeals of Public Utilities Commission orders. *Id.* In the same year, the court disposed of 1121 original proceedings, *id.*, 1067 of which were without opinion, *id.* at 13. This suggests that more than 95% were dismissed without a hearing. The table below, from the 1992 Annual Report, shows figures for the past decade.

Year	Filings	Dispositions	No opinion	% Granted
1981-82	675	*	514	—
1982-83	617	*	427	—
1983-84	747	*	585	—
1984-85	882	*	716	—
1985-86	974	*	789	—
1986-87	1,060	*	818	—
1987-88	1,125	*	918	—
1988-89	1,031	1,182	1,118	4%
1989-90	1,213	1,158	1,115	4%
1990-91	1,184	1,121	1,067	6%

\* Dispositions are not reported for these years. Because the court does not necessarily act on a filing in the same year as received, the number received and number disposed are not directly comparable. See *id.* at 10-13.

ures.<sup>123</sup> These cases often raise significant or urgent public issues and demand quick attention from the supreme court.<sup>124</sup> Other cases filed directly in the supreme court are either dismissed outright or transferred to the court of appeal for consideration.

Until very recently, the court received a large number of attorney discipline matters. These cases reach the court after the State Bar has recommended some form of disciplinary action against a member.<sup>125</sup> At its pinnacle, the court would hear oral argument and issue opinions in roughly ten percent of the cases, while the rest of the cases would be disposed of without a hearing.<sup>126</sup>

### B. Total Filings

Filings in the supreme court fall into four main categories: (1) petitions for hearing following decision of the court of appeal; (2) original proceedings; (3) attorney discipline; and (4) direct appeals (capital cases).<sup>127</sup> The combined total of these categories has increased steadily over the past two decades, from 3166 in 1970-1971 to 5023 in 1990-1991. Chart 1, on the next page, illustrates total filings for these and intervening years.<sup>128</sup>

---

123. See, e.g., *Legislature v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991), *cert. denied*, 112 S. Ct. 1292, and *cert. denied*, 112 S. Ct. 1293 (1992) (upholding most of ballot initiative that put limits on legislators' terms, pensions and appropriation powers). For an illustration of a case taken under its original jurisdiction, see *Brosnahan v. Brown*, 32 Cal. 3d 236, 241, 651 P.2d 274, 276, 186 Cal. Rptr. 30, 32 (1982) ("It is uniformly agreed that the issues are of great public importance and should be resolved promptly. Accordingly, under well settled principles, it is appropriate that we exercise our original jurisdiction.").

124. For example, *Wilson v. Eu*, 1 Cal. 4th 707, 823 P.2d 545, 4 Cal. Rptr. 2d 379 (1992), was decided two weeks after oral argument.

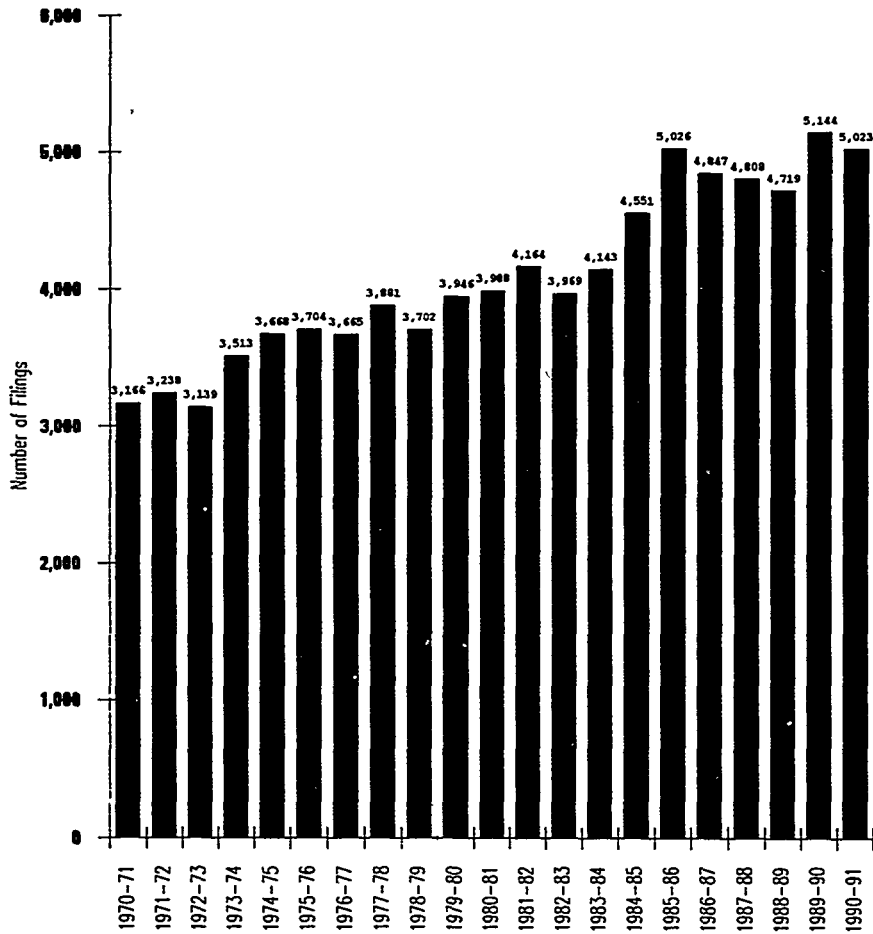
125. See *infra* Part V.

126. In 1989-1990, 488 attorney discipline matters were filed. 1992 ANN. REP., *supra* note 122, at 11. The following year, 48 such matters were decided. See *infra* pp. 1127-28, Charts 12, 13. Similar ratios for previous years indicate an average 10% opinion rate. These ratios are based on the assumption of a one year lag time between filing and disposition.

127. There are other miscellaneous cases within the supreme court's jurisdiction, such as review of Public Utilities Commission decisions. See CAL. PUB. UTIL. CODE §§ 1756, 1759 (West 1975 & Supp. 1993).

128. Data for the California court charts found in this Article are derived from the following sources: 1992 ANN. REP., *supra* note 122; 2 JUD. COUNCIL CAL. ANN. REP. (1991) (Judicial Statistics for Fiscal Year 1989-1990) [hereinafter 1991 ANN. REP.]; 2 JUD. COUNCIL CAL. ANN. REP. (1990) (Annual Report of the Administrative Office of the California Courts) [hereinafter 1990 ANN. REP.]; and 2 JUD. COUNCIL CAL. ANN. REP. (1989) (Annual Report of the Administrative Office of the California Courts) [hereinafter 1989 ANN. REP.]. The data referred to in the chart on the following page are found in 1992 ANN. REP., *supra* note 122, at 7; 1991 ANN. REP., *supra*, at 7; 1990 ANN. REP., *supra*, at 24; and 1989 ANN. REP., *supra*, at 20.

**CHART 1**  
**TOTAL FILINGS IN THE**  
**CALIFORNIA SUPREME COURT**  
**(1970-1991)**



As the chart indicates, there has been modest but steady growth in the total number of matters coming before the supreme court. Total filings have increased by an average of 100 cases—or approximately 2.5%—each year for the past two decades. This is a huge number of cases, now exceeding 5000 filings per year. The court must sift through these cases in a relatively brief amount of time. For instance, it must decide whether to grant or deny review, or take other action, on 160 or more cases each Wednesday at its weekly conference.<sup>129</sup> These conferences occupy an inordinate amount of the court's time.<sup>130</sup> In the mid-1960s, the court had, on average, one-quarter as many cases on its conference calendar.<sup>131</sup>

### C. *Petitions for Hearing and Review*

Not surprisingly, the number of petitions for hearing<sup>132</sup> has risen steadily. Increasing from 2200 in 1970-1971, to 3500 in 1990-1991, there are now sixty percent more petitions than twenty years ago. The greatest difference has been in criminal cases, where there has been a 265% increase over the period,<sup>133</sup> compared to only a twenty-two percent increase for civil petitions.<sup>134</sup>

Chart 2, on the following page, shows a fairly steady rate of civil petitions for review, but a significant increase in the number of criminal

---

129. See Philip Carrizosa, *Profile*, L.A. DAILY J., Jan. 2, 1984, at 1, 17; Kaufman, *supra* note 22, at 28 (reporting average of 120 matters per conference in 1987-1988). For a thorough description of the court's weekly conferences, see Grodin, *supra* note 2, at 517-18; *supra* note 116.

130. Justice Kaufman states that the court "spent 35 to 40 percent of [its] time in preparation and review of matters for Wednesday conferences." Kaufman, *supra* note 22, at 30; see also Thompson, *supra* note 12, at 2027 ("The justices spent most of their time preparing for and attending their weekly Wednesday conferences . . .").

131. See Sosnick, *supra* note 52, at 722 & n.15.

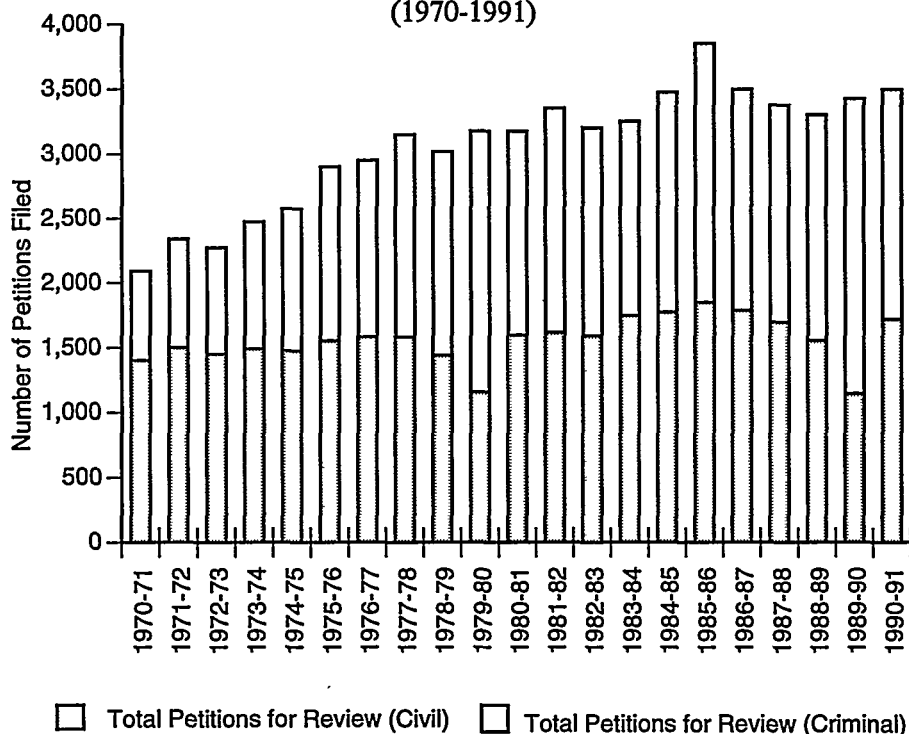
132. A petition for hearing is an appeal from a decision by the court of appeal. See CAL. R. CT. 28. Petitions for hearing were redenominated "petitions for review" following the 1984 constitutional amendment allowing for partial review by the supreme court. See *supra* notes 69-74. The terms are used interchangeably in this Article.

133. In 1990-1991, there were 1792 petitions for review in criminal cases (consisting of 1342 regular criminal appeals and 450 appeals from original proceedings in the court of appeal). See 1992 ANN. REP., *supra* note 122, at 8. In 1970-1971 there were only 675 petitions for hearing (consisting of 624 regular criminal appeals and 51 appeals from original proceedings). See *id.*

134. In 1990-1991, there were 1713 petitions for review in civil cases (consisting of 1102 regular appeals and 611 appeals from original proceedings in the court of appeal). *Id.* There were 1401 petitions for hearing in 1970-1971 (consisting of 636 regular appeals and 765 appeals from original proceedings).

petitions filed.<sup>135</sup> The pace of increase in petitions for hearing in the California Supreme Court is less than that for many other state appellate courts.<sup>136</sup> For the country as a whole, "[a]ppeals have been doubling about every decade since World War II."<sup>137</sup>

**CHART 2**  
**PETITIONS FOR REVIEW FILED**  
**IN THE SUPREME COURT**  
**(1970-1991)**



The increase in filings in the California Supreme Court is also lower than the rate of increase for state court of appeal decisions. In 1979-1980, the court of appeal issued 3813 written opinions.<sup>138</sup> They issued

135. *Id.*; 1991 ANN. REP., *supra* note 128, at 8; 1990 ANN. REP., *supra* note 128, at 24; 1989 ANN. REP., *supra* note 128, at 20.

136. *See, e.g.,* Marvell, *supra* note 76, at 283 (comparing growth in appeals filed for 46 states).

137. *Id.* at 282. "In the 40 states with both filing and decision data, the ten-year growth averaged 123 per cent for filings and 115 per cent for decisions." *Id.* at 284.

138. JUD. COUNCIL CAL. ANN. REP. (1974) (Judicial Statistics for Fiscal Year 1972-1973) [hereinafter 1974 ANN. REP.].



10,017 written opinions for 1990-1991,<sup>139</sup> a 263% increase in twenty years. This compares to only a sixty percent increase in the total number of petitions for hearing filed in the supreme court during the same period.

Another way to look at the data is to compare the ratio of petitions for review in the supreme court to the number of written decisions in the court of appeal. In 1979-1980, nearly one-half of the written decisions by the court of appeal were appealed to the supreme court.<sup>140</sup> In 1990-1991, however, less than one-third of the written court of appeal decisions were appealed.

Chart 3, on page 1109, is obtained from the annual report of the Judicial Council for 1992. It shows petitions for hearing and their relation to court of appeal decisions. The drop-off in court of appeal decisions being appealed to the supreme court may be due to the diminishing likelihood of having one's petition granted. Chart 4, on page 1110, shows the total number of petitions for review granted from 1970-1971 through 1990-1991 and as a percentage of total petitions filed.<sup>141</sup>

#### *D. Business Transacted*

The great volume of cases demands greater judicial productivity,<sup>142</sup> but ultimately contributes to judicial burn-out. "[J]ustices of the Supreme Court must and do work six and a half to seven days a week, 10 or so hours a day, with rarely a day off and in most cases without significant vacation."<sup>143</sup> The cause for this overload is no mystery. The court transacts nearly ten thousand items of business each year. These consist principally of petitions for hearing, orders and case dispositions.<sup>144</sup>

---

139. 1992 ANN. REP., *supra* note 122, at 9.

140. These figures were derived from the 1992 and 1989 Judicial Council Annual Reports, *supra* notes 122 and 128. The 1989 report shows that there were 6659 dispositions by written opinion in the court of appeal in 1979-1980. 1989 ANN. REP., *supra* note 128, at 51. In 3183 of these cases, petitions for hearing were filed in the supreme court. This is a 48% appeal rate.

The number of petitions for hearing (following disposition by the court of appeal) remained fairly constant throughout the 1980s, but the number of cases decided by written opinion in the court of appeal rose significantly. In 1990-1991, the court of appeal issued an estimated 10,716 written dispositions, of which 3505 (33%) were appealed to the supreme court by way of petition for review. 1992 ANN. REP., *supra* note 122, at 12, 26.

141. 1991 ANN. REP., *supra* note 128, at 9.

142. Nationally, there has been "an astounding increase in judicial productivity [from 1968-1984]. The main response to the appeals explosion, therefore, has been greater output per judge and only secondarily, more judicial capacity." Marvell, *supra* note 76, at 285.

143. Kaufman, *supra* note 22, at 29.

144. In 1990-1991 the court received 3505 petitions for hearing and 54 for rehearing, issued 3510 miscellaneous orders, disposed of 1067 original proceedings without opinion, and decided 127 cases by written opinion. 1992 ANN. REP., *supra* note 122, at 12-14.

**CHART 3**  
**WRITTEN COURT OF APPEAL DECISIONS FOLLOWED**  
**BY PETITION FOR REVIEW IN SUPREME COURT**  
**(1979-1991)**

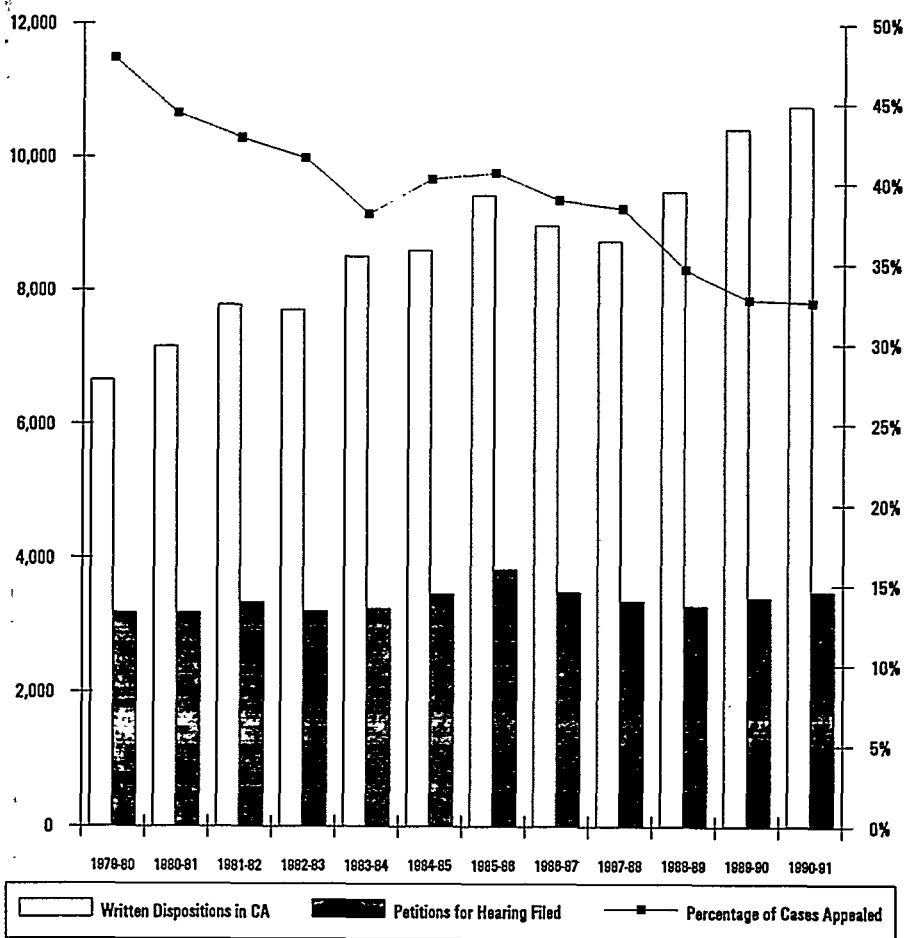
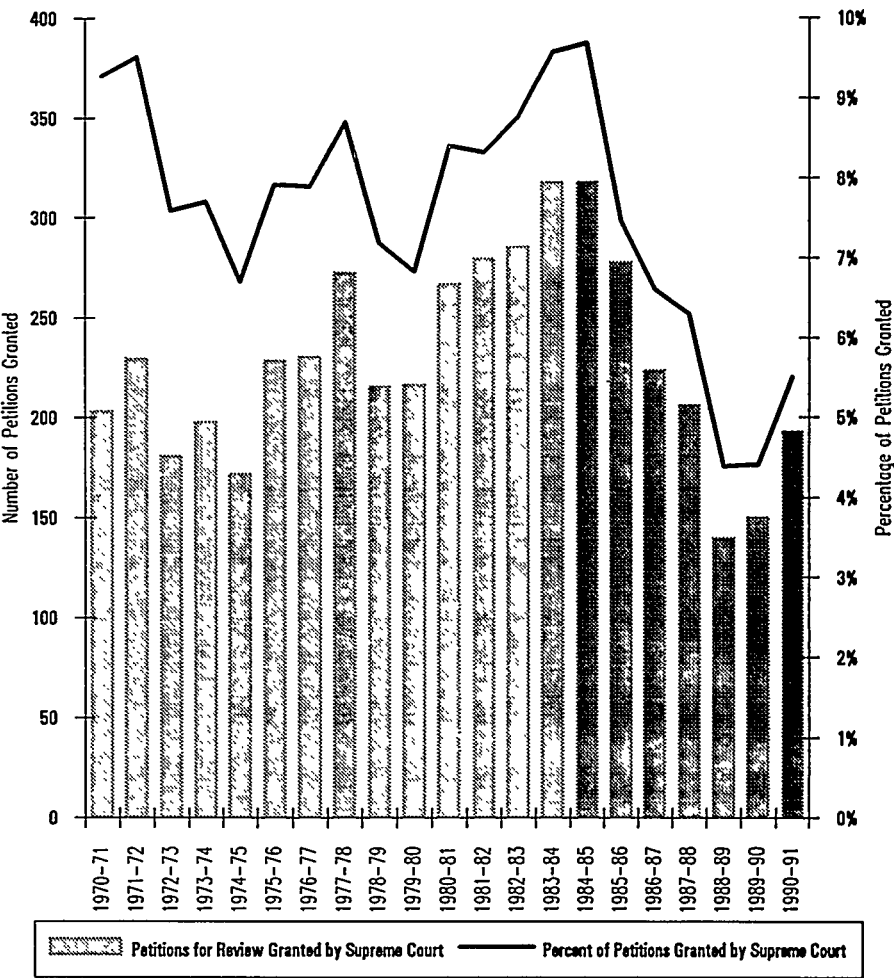
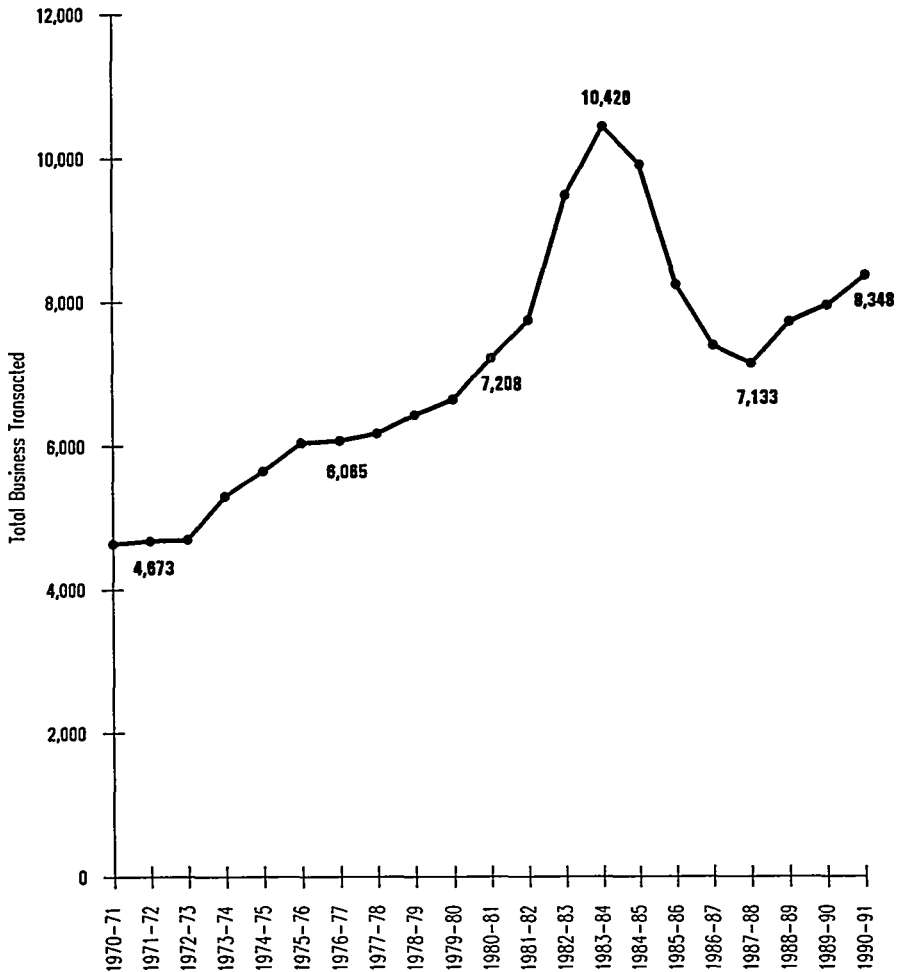


CHART 4  
PETITIONS FOR REVIEW GRANTED  
BY THE SUPREME COURT  
(1970-1991)



**CHART 5**  
**TOTAL BUSINESS TRANSACTED**  
**BY THE CALIFORNIA SUPREME COURT**  
**(1970-1991)**



TOT-BUS1.XLC

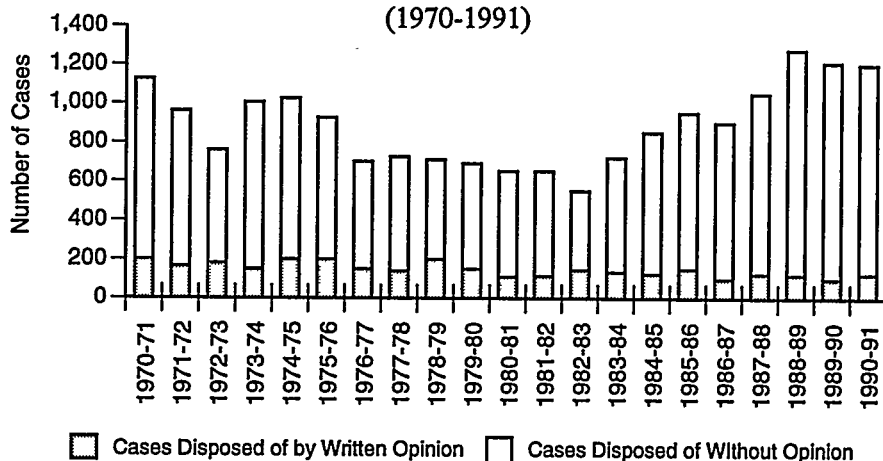
Chart 5, on page 1111, reflects total business transacted over the past two decades. It shows a steady rise through the 1983-1984 fiscal year, with a noticeable drop off after that. The upward trend has resumed in recent years, now approaching its historic high.<sup>145</sup>

### E. Written Opinions

As the amount of business increases relentlessly, the number of written opinions declines correspondingly. In 1970-1971, the supreme court, under Chief Justice Donald Wright, decided 202 cases by written opinion. That number dropped to eighty-six in 1986-1987, the tumultuous year of personnel change on the court.<sup>146</sup> Since then, the number of written opinions has remained in the 100 to 130 range.

In contrast, the number of cases disposed of without written opinion is now twice that of a decade ago. The following chart shows the number of cases decided by written opinion, and those without opinion, respectively.<sup>147</sup>

**CHART 6**  
**CASE DISPOSITIONS**  
**WITH AND WITHOUT WRITTEN OPINION**  
**(1970-1991)**



145. 1992 ANN. REP., *supra* note 122, at 13.

146. *See infra* notes 158-62.

147. 1992 ANN. REP., *supra* note 122, at 7.

The foregoing charts describe the business of the California Supreme Court in gross terms, lumping the different categories of cases together. Yet, one of the principal focal points for judicial reform is in the area of the court's capital jurisdiction. The following sections detail the court's caseload in two specific areas: direct capital appeals and attorney discipline. By segregating these classes of cases for examination, more informed impressions may be available for discussion.

#### IV. CAPITAL JURISDICTION CASELOAD

The California Supreme Court has always had appellate jurisdiction in capital cases.<sup>148</sup> When the court of appeal was created in 1904, capital cases were excluded from its jurisdiction, thus permitting direct appeal to the supreme court.<sup>149</sup> California Supreme Court review of death sentences became mandatory in 1935.<sup>150</sup> This is consistent with the practice in most other states.<sup>151</sup> Indeed, mandatory review of death sentences by a state's highest court was seemingly required in *Gregg v. Georgia*,<sup>152</sup> the United States Supreme Court decision that reauthorized the death penalty in 1976.<sup>153</sup> The Court has since then backed off from particularized mechanisms of review.<sup>154</sup>

In California, the number of capital cases reviewed has grown from a relatively small number<sup>155</sup> to become one of the largest areas of supreme court business in recent years. The California Supreme Court devotes a greater share of its attention to capital cases than do high

---

148. Robert Weisberg, *Death Penalty Appeals in California*, 28 SANTA CLARA L. REV. 243, 251 (1988); see CAL. CONST. art. VI, § 11.

149. Weisberg, *supra* note 148, at 251.

150. See CAL. CONST. art. VI, § 11; see also CAL. PENAL CODE § 1239(b) (West 1982 & Supp. 1993) (stating that appeal of death penalty is automatic).

151. Weisberg, *supra* note 148, at 251. The Judicial Council reported that, as of 1987, all 36 states with a death penalty provided for mandatory appeal to the state's highest court. *Id.* at 251 n.27. In Oklahoma and Texas ultimate review is by their special courts of criminal appeals. *Id.* at 251. Only two of the states, Ohio and Alabama, route their capital cases through their intermediate appellate courts before high court review of a death sentence. *Id.* at 251-52.

152. 428 U.S. 153 (1976).

153. The death penalty was briefly viewed as unconstitutional, principally for its inherent procedural defects. *Furman v. Georgia*, 408 U.S. 238 (1972). See generally Karl Mannheim, *The Capital Punishment Cases: A Criticism of Judicial Method*, 12 LOY. L.A. L. REV. 85 (1978) (criticizing failure of U.S. Supreme Court to develop coherent standards in capital cases).

154. Weisberg, *supra* note 148, at 253.

155. "[The] practice [of direct review] can be traced historically to a period when only eight death sentences had to be reviewed each year, and they were disposed of with the same routine dispatch as other criminal cases." Gerald F. Uelman, *Dissent: Supreme Court Reform: Diver-sion Instead of Division*, 11 PEPP. L. REV. 5, 6 (1983).

courts from most other states.<sup>156</sup> Partly because of this volume, the delay between filing and decision in capital cases is substantial.<sup>157</sup>

The court's capital jurisdiction has been the eye of several storms.<sup>158</sup> Perhaps the best known controversy was the 1986 retention election of Chief Justice Rose Bird and her associate justices.<sup>159</sup> Another justice, Otto Kaus, announced his resignation before the election.<sup>160</sup> To a large measure, the campaign focused on the court's record in overturning death sentences.<sup>161</sup> Three of the justices standing for election were voted out of office.<sup>162</sup> Governor Deukmejian was able to reconstitute the court with judges more inclined to uphold death sentences.<sup>163</sup>

However, the Lucas Court's record on capital cases has not come without cost. The sheer number<sup>164</sup> and volume<sup>165</sup> of capital cases may impede the court's ability to handle other cases, both civil and noncapital criminal. The emerging backlog and delay in capital cases has become

---

156. See *infra* note 189 and accompanying text.

157. As of 1986, delay averaged three-and-one-half years. Cook & Kang, *Facing Judgment*, S.F. EXAMINER, Jan. 15, 1986, at 11.

158. For instance, while *Furman v. Georgia*, 408 U.S. 238 (1972), was pending in the United States Supreme Court, the California Supreme Court declared the death penalty unconstitutional under the state constitution. *People v. Anderson*, 6 Cal. 3d 628, 656, 493 P.2d 880, 899, 100 Cal. Rptr. 152, 171, *cert. denied*, 406 U.S. 958 (1972), *superseded by* CAL. CONST. art. I, § 67.

159. The associate justices were Joseph Grodin, Malcolm Lucas, Stanley Mosk, Edward Panelli and Cruz Reynoso.

160. Justice Kaus officially retired on October 16, 1985, but remained on the court until the end of the 1985 term.

161. The Bird court reversed 52 death sentences out of 55 cases reviewed between 1977 and 1985. See Kenneth Jost, *Court's Scoreboard Hides Important Shift*, L.A. DAILY J., Jan. 6, 1986, at 2. The state supreme court, under the leadership of Chief Justice Donald Wright, Bird's predecessor, reversed the death sentence in all 176 capital cases that came before it. *Id.*

162. Justices Lucas, Mosk and Panelli did not face any significant opposition and survived the election. Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, at A1.

163. In one of its early capital cases, the Lucas court overruled or restricted many of its predecessor's precedents. *People v. Ghent*, 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987), *cert. denied*, 485 U.S. 929 (1988). The indications turned out to be correct. For example, during its fourth term, 1990-1991, the Lucas court affirmed 29 of the 30 death penalty cases it reviewed. See Uelmen, *supra* note 30, at 37.

164. In 1984, the supreme court's docket had approximately 150 pending capital cases. See Grodin, *supra* note 2, at 519 n.11.

165. The average length of a capital record on appeal is about 6000 pages, but many records exceed 20,000 pages. Weisberg, *supra* note 148, at 247. The opinions in capital cases also tend to be lengthy. See, e.g., *People v. Price*, 1 Cal. 4th 324, 821 P.2d 610, 3 Cal. Rptr. 2d 106 (1991) (119, 79 and 79 pages in length), *cert. denied*, 113 S. Ct. 152 (1992). However, it may be a mistake to equate the length of trial records with the difficulty or burden of particular cases. See Frank M. Coffin, *Research for Efficiency and Quality: Review of Managing Appeals in Federal Courts*, 138 U. PA. L. REV. 1857, 1861 (1990) ("[T]he bulk of the record of a particular case was no reliable predictor of its burden . . .").

legendary.<sup>166</sup> There was an upsurge in capital cases following the United States Supreme Court's pronouncements and California's own corrective surgery by statute and initiative.<sup>167</sup> Many of the cases during the 1980s dealt with broad-based constitutional challenges to and statutory interpretation of capital sentencing laws.<sup>168</sup> But with many of the core issues decided, the California Supreme Court's recent cases mostly involve ad hoc applications of death sentences.<sup>169</sup>

The court appears to be growing weary of its capital caseload. This is made apparent in several ways. First, there has been unusually rapid turnover on the court. While it would be facile to attribute retirements from the court solely to the capital caseload, it is undoubtedly a contributing cause.<sup>170</sup> The court also has been accused of treating appointed counsel poorly in death penalty cases.<sup>171</sup> If true, this practice could be

---

166. See generally Weisberg, *supra* note 148, at 246-51 (discussing delay and backlog in supreme court).

167. The death penalty was revived in California by initiative amendment of the state constitution, CAL. CONST. art. I, § 27, followed by then state Senator George Deukmejian's bill, Act of Aug. 11, 1977, 1977 CAL. STAT. 1256 (amending scattered sections of CAL. PENAL CODE) (Senate Bill 155), which passed over Governor Brown's veto in 1977. The law was modeled after the Georgia capital sentencing law upheld by the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976). In 1978, the Briggs Initiative superseded the 1977 law and specified additional crimes eligible for the death penalty. 1978 CAL. STAT. PROP. 7 (codified at CAL. PENAL CODE § 190.2 (West 1988 & Supp. 1993)). Proposition 8 relaxed certain procedural protections in criminal cases. Victims' Bill of Rights Initiative Measure Proposition 8 (approved June 8, 1982) (codified at CAL. CONST. art. I, §§ 12, 28; CAL. PENAL CODE §§ 25, 667, 1191.1, 1192.7, 3043 (West Supp. 1992); CAL. WELF. & INST. CODE §§ 1732.5, 1767, 6331 (West Supp. 1992)).

168. See, e.g., *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983), *overruled by* *People v. Anderson*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987) (mandating intent-to-kill requirement in death penalty initiative); *People v. Ramos*, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982) (discussing constitutionality of jury instructions), *rev'd sub nom.*, *California v. Ramos*, 463 U.S. 992 (1983), *cert. denied*, 471 U.S. 1119 (1985) (discussing constitutionality of jury instructions).

169. See Gerald F. Uelman, *Lucas Court: First Year Report*, CAL. LAW., June 1988, at 30.

170. For instance, Justices John A. Arguelles and Marcus M. Kaufman recently retired, although they served on the court less than three years. "Although neither publicly cited the caseload as the reason for stepping down, both acknowledged that the load was a difficult one for the court." Hager, *supra* note 13, at A37. But see Kaufman, *supra* note 22, at 30 (noting Justice Kaufman's disagreement with assertion that "death penalty review is responsible for the premature retirement of justices of the court").

"The burden is very, very heavy at the Supreme Court." Hager, *supra* note 13, at A37 (quoting Justice Harry Low of First District Court of Appeal). "Five years from now, 10 years from now, will anyone want to subject themselves to that huge volume of work all the time? Some new methods have to be looked at. . . . If you spend all your energy on death cases, civil cases have to be neglected." *Id.* (quoting Justice Harry Low of First District Court of Appeal).

171. See Grace Suarez, *It's the Court's Fault*, CAL. LAW., June 1990, at 130, 130. One lawyer stated: "Their payments are delayed for months; amounts owed are cut back with no



counterproductive. Not only are many of the dedicated capital lawyers refusing to take new cases,<sup>172</sup> the court is spending its valuable time combing expense statements and finding other counsel.<sup>173</sup> "Some otherwise sane and sober lawyers are beginning to talk about filing a lawsuit against the high court, and about going on strike."<sup>174</sup>

### A. *Historical Trends*

A review of the California Supreme Court's capital caseload over the past two decades shows that the court spends a considerable amount of its judicial energy on death penalty cases, leaving less time to handle civil and noncapital criminal cases. It is easy and ultimately dangerous to draw simple conclusions from these stark statistics. Numbers alone cannot measure whether the court is failing to keep pace with developments in civil and general criminal law.<sup>175</sup> Although fewer cases are being decided by the court, they may cut as broad a jurisprudential swath as in previous eras. Ultimately, this is a subjective question, requiring that the legal community draw on its collective judgment to decide whether the court is adequately doing its job.

Chart 7, on the following page, shows the number of direct appeals filed since 1970-1971. It indicates a marked upsurge in appeals following the reimposition of the death penalty in 1977. The number reached its peak in 1981-1982, when forty-three capital appeals were filed with the supreme court. The number tapered off until the judicial retention election of 1986, when the death penalty was a focal point. Shortly after replacement justices were appointed in 1987, the number of capital filings rose significantly, but declined after the initial upsurge.<sup>176</sup>

---

explanation whatever; requests for funds to pay experts and investigators are denied. The result is that attorneys who represent capital defendants suffer, both financially and emotionally . . . ." *Id.*

172. *Id.*

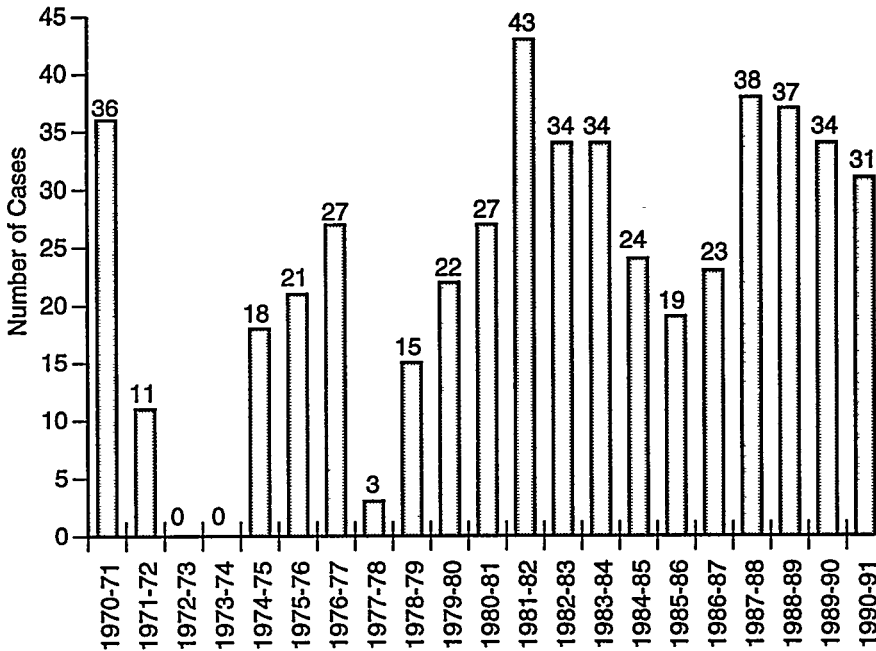
173. *Id.* "The situation is deteriorating rapidly—that is clear from the increase in the number of unrepresented [capital] appellants." *Id.*

174. *Id.*

175. For instance, Justice Kaufman is critical of statistics-driven conclusions about the court's job performance. Kaufman, *supra* note 22, at 30. He contends that "[t]he assumption that the Supreme Court's preoccupation with death penalty cases is preventing the court from granting review in important civil cases is based on misleading statistics. . . . [T]o my knowledge no case involving important issues of statewide significance was denied review." *Id.*

176. Data for filed capital cases was obtained from the Judicial Council Annual Reports described *supra* note 128. It relates to "automatic appeals," which the reports describe as "death penalty cases." *E.g.*, 1991 ANN. REP., *supra* note 128, at 7. For the number of capital cases decided between 1987 and 1992, see Gerald F. Uelmen, *Plunging into the Political Thicket*, CAL. LAW., June 1992, at 31, 36.

CHART 7  
CAPITAL CASES FILED  
IN THE SUPREME COURT  
(1970-1991)



Because the California Supreme Court has little control over its capital caseload, the trends in the above chart are caused mostly by external events. For instance, political and legal phenomena probably affect the number of filings, and ultimately the number of cases the court must decide.

The percentage of time the court spends on capital cases in relation to other matters determines the impact the court's capital jurisdiction has on its ability to hear other cases. No direct data is available, and the anecdotal evidence is conflicting. Former justices have widely different assessments of the impact that capital cases have on the court.<sup>177</sup> The issue may be approached indirectly, however, in a number of ways.

177. Justice Kaufman believes that the court's capital caseload is not problematic: "I would estimate that consideration of death penalty issues did not take more than 20 percent of our time." Kaufman, *supra* note 22, at 30. Justice Grodin's assessment is different:

One method would be to compare the number of capital and non-capital cases decided in any given year. Dean Gerald Uelmen of Santa Clara Law School has done just that. His annual report in the *California Lawyer* describes the work product of the court. Starting in 1987, Dean Uelmen has tracked the case output by category.<sup>178</sup> Since then, the court has averaged twenty-six death penalty cases per year, and sixteen other criminal cases. It also has heard an average of thirty-two attorney discipline matters, and thirty-eight civil cases.<sup>179</sup>

Another indirect method to measure the impact of capital caseload would be to tally the total number of pages written in capital cases compared to the court's other decisions. Dean Uelmen has done this for 1990-1991.<sup>180</sup> He reports that one quarter of the court's total written product involved capital cases, some of which were tomes in their own right.<sup>181</sup>

A third method, and one done here, would be to compare the California Supreme Court's caseload with that of other states. This also, indirectly, may measure the significance of capital jurisdiction on the court's workload.

### B. Comparison With Other States

This section compares the caseload of the California Supreme Court with that of five other states: Florida, New Jersey, New York, Ohio and Texas. These states were chosen primarily because they are populous and have demographics similar to those of California. Texas and Florida have, respectively, the highest and second highest rate of capital sentenc-

---

[D]eath penalty cases consume a disproportionate share of the court's resources of staff and judges alike—I would estimate anywhere from three to ten times the resources expended on the average case. . . . The more capital cases there are, the less likely it is that the court will be able to perform its other duties adequately.

JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 100-01 (1989).

178. See Uelmen, *supra* note 169, at 30 ("[T]he crushing load of death penalty appeals means the court no longer has time to function as the architect of California case law.").

179. According to Dean Uelmen, the court's written opinions were comprised as follows:

Year	Civil	Capital	Other Crim.	Discipline	Total
1986-87	53	12	33	8	106
1987-88	26	16	9	29	80
1988-89	41	55	15	31	142
1989-90	28	19	15	43	105
1990-91	40	30	7	48	125
5-year Average	38	26	16	32	112

180. Uelmen, *supra* note 169, at 33.

181. *Id.* at 34.

ing and execution in the country.<sup>182</sup> New York is closest in population to California, but has no death penalty.<sup>183</sup> Ohio is one of the few states with intermediate review in capital cases.<sup>184</sup> Texas directs its capital cases to a special court of criminal appeals, reserving its state supreme court for civil cases.<sup>185</sup> This bifurcation occurred in 1876 "[t]o relieve the Supreme Court of some of its caseload."<sup>186</sup>

It is necessary to be cautious when making comparisons such as those contained here if the purpose is to predict how California's appellate dockets would respond to reform. A variety of indeterminable factors affect the statistical analysis. As Professor Weisberg notes: "[W]e would have to account for such interstate variables as the murder rate, the behavior of prosecutors and juries, the substantive capital murder law, the doctrinal behavior of the state appellate courts, and the role of the federal habeas courts with jurisdiction over those states."<sup>187</sup>

Nonetheless, it may be instructive to view graphically California's docket as compared to the dockets of these five other states.<sup>188</sup> The results are dramatic. Chart 8 shows the total number of capital cases decided by each of the six states for 1990 or 1991.<sup>189</sup>

---

182. Florida capital offenses are defined in FLA. STAT. ANN. § 782.04(1)(a)(b) (West 1992), and the consequences of a conviction are set forth in *id.* § 775.082 (West 1992). Texas capital offenses are defined in TEX. PENAL CODE ANN. § 19.03 (West 1989 & Supp. 1993). A conviction may result in a penalty of death. *Id.* § 12.31 (West Supp. 1993).

183. See N.Y. PENAL CODE § 70.00 (McKinney 1987) (describing felony penalties that do not include death penalty).

184. OHIO CONST. art. IV, § 2(B)(2)(a)(ii); OHIO REV. CODE ANN. § 2929.05 (Anderson 1987). Ohio's death penalty is contained in OHIO REV. CODE ANN. §§ 2903.01, 2929.02, 2929.04 (Anderson 1987).

185. Texas has a bifurcated high court. The supreme court hears civil cases only, while the court of criminal appeals is the highest court for criminal cases. TEX. CONST. art. V, § 1. Capital cases are automatically reviewed by the court of criminal appeals. See TEX. R. APP. P. 40(b). Oklahoma also places capital jurisdiction in a separate court of criminal appeals. See OKLA. STAT. tit. 21, § 701.13 (1991).

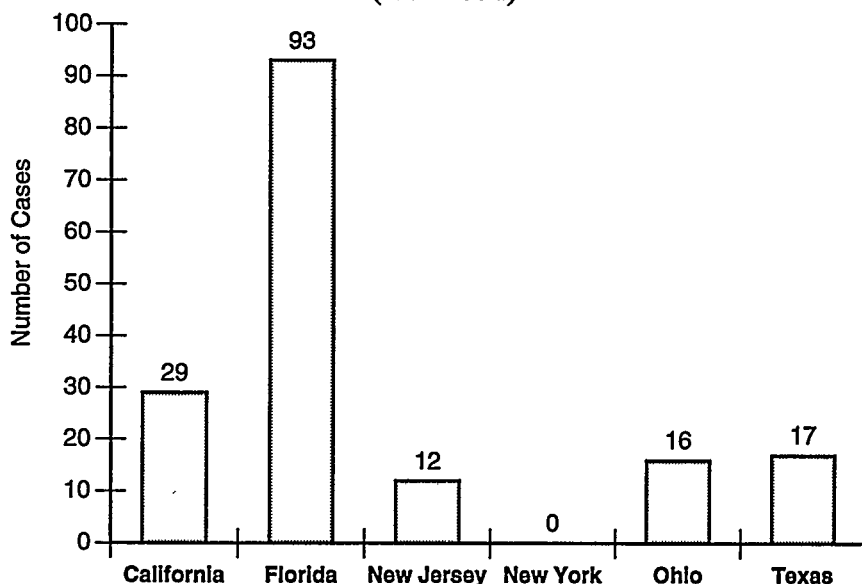
186. 1991 TEX. JUD. SYS. ANN. REP. 16 (Office of Court Administration, Austin, 1991).

187. Weisberg, *supra* note 148, at 260.

188. The states use slightly different reporting periods and have different delays in publishing statistics. The figures were obtained from the following sources: New York (calendar year 1990), STATE OF N.Y., THIRTEENTH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 31, tbl. 11 (1991); New Jersey (court year 1990-1991), N.J. JUDICIARY, ADMINISTRATIVE OFFICE OF THE COURTS, 1990-1991 ANNUAL REPORT 3-3 (1991); Ohio (calendar year 1991), THE SUPREME COURT OF OHIO, OHIO COURTS SUMMARY: 1991, at 28B-29B (1991); Florida (calendar year 1990), Statistics from the Office of the State Court Administrator, Tallahassee, Florida (1991); Texas (fiscal year 1990-1991), 1991 TEX. JUD. SYS. ANN. REP., *supra* note 186, at 16.

189. Data obtained for this chart came from two sources for each state. The first was the state's official statistical summary. See *supra* note 188. The second was a Westlaw search, within the respective state databases, using the following search query: CO(HIGH) & OP("DEATH PENALTY" OR "CAPITAL PUNISHMENT") & DATE(xx); "xx" in the

CHART 8  
SIX STATE COMPARISON OF  
CAPITAL CASES DECIDED  
(1990-1991)



It is not surprising that California, given its size, would have more capital cases than other states.<sup>190</sup> As Chart 9, on the next page, illustrates, when the number of capital cases is compared to population, California emerges as a moderate state.<sup>191</sup>

The picture changes dramatically when noncapital cases decided by the state high courts are compared. Although California is the most pop-

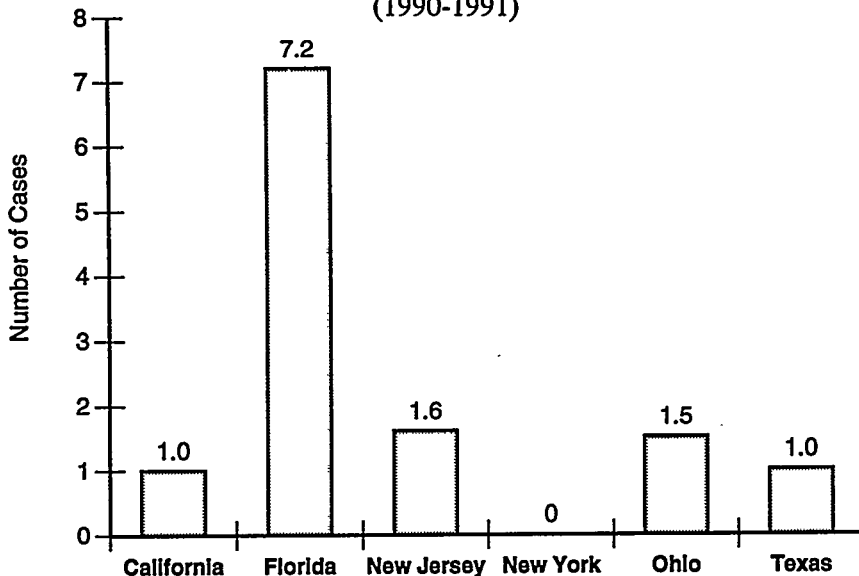
---

date restrictor corresponded to the period covered by the state's official court publication. The cases obtained by this search were then each checked to ascertain whether they were capital cases, or merely referenced ones. The Westlaw search produced the following results: California (1990-1991), 29 cases; Florida (1991), 93 cases; New Jersey (1990-1991), 12 cases; New York (1991), none; Ohio (1991), 16 cases; Texas (1990-1991), 17 cases.

190. Texas had the greatest number of executions (41) and Florida the second most (27) between 1977 (when capital punishment was reinstated) and 1991. Jack Broom, *Death-Penalty Foes Ponder Ways to Get Message Out*, SEATTLE TIMES, Nov. 3, 1991, at B3. California did not have its first post reinstatement execution until 1992. See THE WORLD ALMANAC AND BOOK OF FACTS, *supra* note 102, at 955.

191. Population statistics for the six states are for 1990. THE WORLD ALMANAC AND BOOK OF FACTS, *supra* note 102, at 628 (California); *id.* at 630 (Florida); *id.* at 640 (New Jersey); *id.* at 641 (New York); *id.* at 643 (Ohio); *id.* at 647 (Texas).

**CHART 9**  
**SIX STATE COMPARISON OF**  
**CAPITAL CASES DECIDED**  
**PER MILLION POPULATION**  
**(1990-1991)**



ulous state, Chart 10, on the following page, shows that its supreme court decides fewer noncapital cases than any of the others in the survey.<sup>192</sup>

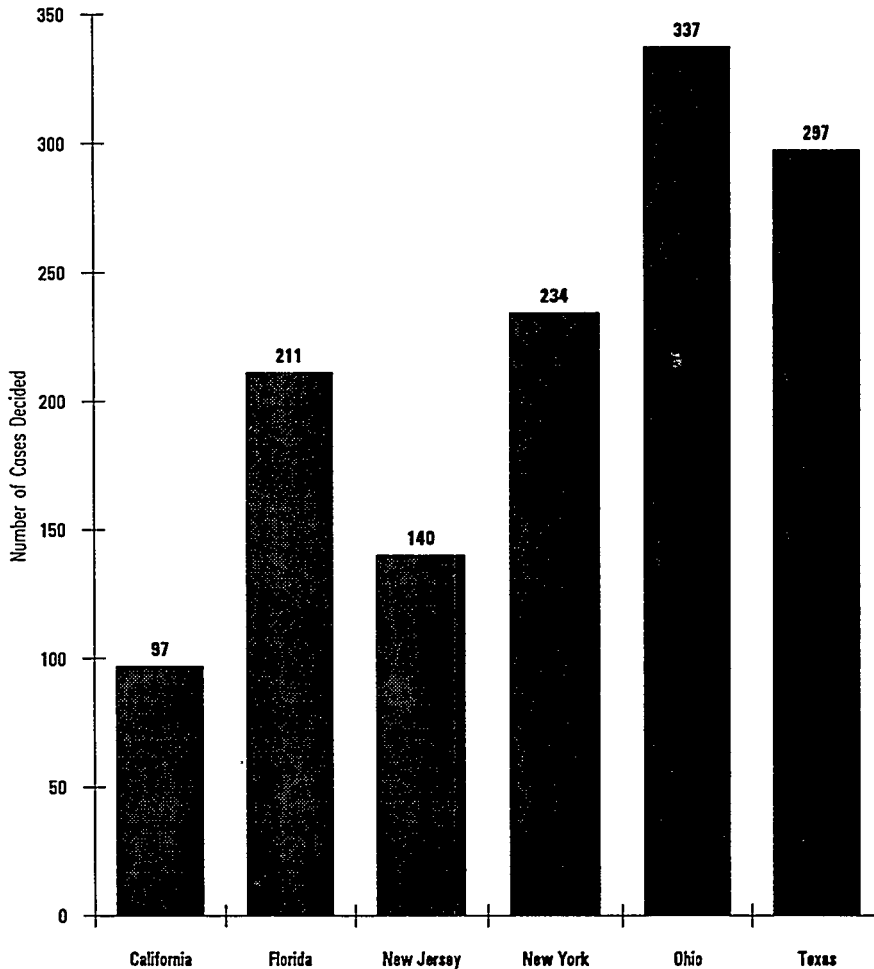
Some of the discrepancy is explained by the court structure in other states. Texas, for example, has a bifurcated high court. Its supreme court hears only civil cases, while all criminal cases (capital and other) are heard by the court of criminal appeals.<sup>193</sup> Justice Stanley Mosk and others advocate this system for California.<sup>194</sup> Ohio reviews death

192. Data for this chart is taken from the official court summaries published by the respective states. See *supra* note 188. In some instances, the number of noncapital cases was derived by subtracting the number of capital cases from the total number of cases in the reports.

193. See *supra* notes 185-86.

194. Justice Mosk has been the most vocal proponent of a bifurcated supreme court. See Stanley Mosk, *Opinion: A Two-Part State Supreme Court*, 11 PEPP. L. REV. 1, 3 (1983). As noted above, within the United States, Texas and Oklahoma have separate high courts for civil and criminal appeals. Similar systems of divided jurisdiction are also used by Great Britain, Canada and Australia. See Stern, *supra* note 113, at 106. France, Germany and Japan apportion their appellate workload among panels of high court judges. *Id.* at 106-08. This approach

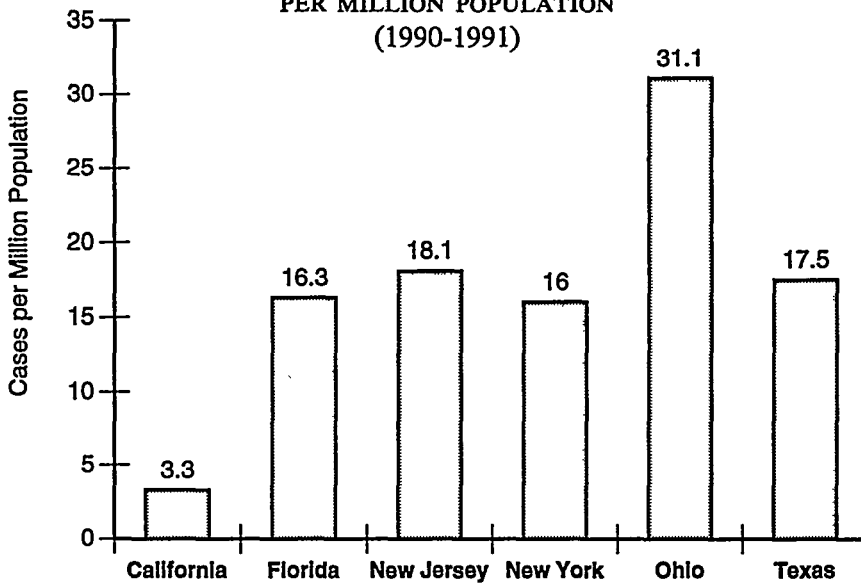
**CHART 10**  
**SIX STATE COMPARISON OF**  
**NONCAPITAL CASES DECIDED**  
**(1990-1991)**



was authorized for the California Supreme Court prior to the constitutional amendments of 1966, although it was never implemented. Mosk, *supra*, at 3.

Justice Mosk's proposal was gaining favor in the early 1980s when Rose Bird was chief justice. Governor George Deukmejian stated he was "seriously considering" the plan because of the "tremendous backlog of death penalty cases in the calendar." Alan Ashby, *Deukmejian Eyes Proposal to Split State High Court*, L.A. DAILY J., Nov. 10, 1983, at 1. The idea was not, however, universally received. For example, state Senator Barry Keene, chair of the Senate Judiciary Committee, compared it to President Roosevelt's court-packing plan in 1937. Offi-

CHART 11  
SIX STATE COMPARISON OF  
NONCAPITAL CASES DECIDED  
PER MILLION POPULATION  
(1990-1991)



sentences only after intermediate review by that state's court of appeal.<sup>195</sup> This relieves the supreme court of some of the burden in capital cases. New York has no death penalty, so it is not a factor in that court's workload. Florida appears to be the anomaly. Not only does its supreme court handle significantly more capital cases than does California's, it also decides more than twice as many other cases. The number of death penalty decisions by the California Supreme Court, as a percentage of all cases decided, is second only to Florida.<sup>196</sup>

---

cials at the National Conference on State Courts opposed the plan, as apparently did the American Bar Association. *Id.*; see also Uelmen, *supra* note 155, at 5 (proposing to direct attention to flow of cases coming into court and alternatives available for diverting that flow).

A similar proposal for California was made in the 1930s, but was opposed by the Judicial Council and never adopted. See Ronald H. Beattie, *The Proposal to Establish a Court of Criminal Appeals in California*, 9 CAL. ST. B.J. 105, 128 (1934).

195. See *supra* note 184 and accompanying text.

196. For the survey years, 23% of the California Supreme Court's case output was comprised of capital cases, compared to 30.6% for Florida, 7.9% for New Jersey, 5.4% for Texas, 4.5% for Ohio and zero for New York. These percentages were calculated by dividing the number of capital cases decided by the sum of capital cases and noncapital cases decided. See *supra* notes 182-92 and accompanying text.



The differences are even more pronounced when the output of non-capital cases for the six states are compared to their populations, as illustrated in Chart 11, on the preceding page.<sup>197</sup>

It may be true that neither the number of cases nor the volume of important legal issues bears a linear relationship with either a state's general population or its population of lawyers. Indeed, one does not expect to need twice as much law for twice as many people. Yet, the opportunity for legal development would seem greater in more populous states, and the clamor for justice by individual litigants would seem louder. If this is a proper measure, then the California Supreme Court trails far behind its surveyed counterparts.<sup>198</sup>

This is an area where further study is justified. If courts in sister states publish more cases, both absolutely and in proportion to population, then one might draw conclusions about appellate justice in California. In short, there simply may be too little to go around. Or, to be more precise, the state supreme court may not participate sufficiently in the appellate process.<sup>199</sup>

## V. ATTORNEY DISCIPLINE CASES

An examination of the California Supreme Court's treatment of attorney discipline cases is useful for two reasons. First, until recently, disciplinary matters consumed a great amount of supreme court time.<sup>200</sup> Second, and more importantly, attorney discipline is an area where the bench and bar have come together to devise a system of adjudication without making disproportionate demands on judicial resources.

The California Supreme Court began reviewing attorney discipline matters even before the State Bar of California was established in 1927.<sup>201</sup> In that year, the State Bar Act confirmed judicial control over attorneys.<sup>202</sup> Of course there were far fewer attorneys and disciplinary

---

197. See *supra* notes 188-89 for a description of the research methodology and census data.

198. For a comparison of average judicial output per judge in the state appellate courts, see Marvell, *supra* note 76, at 284. It shows that during 1984, justices on the California Supreme Court and Court of Appeal averaged 109 decisions per year (combined statistics), whereas the average for judges in the six most productive states was over 150 decisions per year. *Id.*

199. The California Supreme Court decides only one percent of all state appellate cases; the remainder terminate in the court of appeal. This is the lowest percentage of any state in the union. See Marvell, *supra* note 76, at 286 (1984 comparison of 45 states).

200. See Uelmen, *supra* note 169, at 34.

201. See Wallace, *supra* note 103, at 257. The State Bar was created by the State Bar Act, Act of Mar. 31, 1927, ch. 34, 1927 Cal. Stat. 38 (codified as amended at CAL. BUS. & PROF. CODE § 6000 (West 1990)).

202. See Wallace, *supra* note 103, at 257 nn.41-43. Attorney discipline was handled not only by the supreme court, but by the court of appeal as well. *Id.* at 257 n.41.

matters then.<sup>203</sup> As the number of attorneys in the state grew, the disciplinary system in California seemed to get out of control. Each disbarment or suspension of a lawyer required supreme court action.<sup>204</sup> The number of attorney discipline cases reached its peak in 1989-1990, when nearly 500 cases were filed in the supreme court.<sup>205</sup>

Centralized control over disciplinary matters by a state's highest court is recommended by the American Bar Association<sup>206</sup> and is the system followed in most states.<sup>207</sup> In California, even though the supreme court was not required to hear oral argument in each case,<sup>208</sup> it did so in ten percent of the cases. This was the highest ratio of hearings to filings for any category of cases, except for cases where review is mandatory. In recent years, attorney discipline cases have accounted for approximately thirty percent of the court's total output.<sup>209</sup>

Many commentators agree that attorney discipline matters consumed a disproportionate share of judicial resources.<sup>210</sup> Centralized review in the supreme court caused significant delays throughout the system. At one point the backlog of unprosecuted cases reached 5000.<sup>211</sup> In January 1987, the legislature ordered a monitor to review the discipline system.<sup>212</sup> In his initial report, the monitor stated that the system was "well below acceptable levels."<sup>213</sup> The legislature responded in 1988 by creating the State Bar Court "to act . . . in the determination of disci-

---

203. When the State Bar was organized under the 1927 Act, there were approximately 11,000 attorneys in California. *Id.* at 252 n.3.

204. Section 6082 of the California Business and Professions Code states:

Any person complained against and any person whose reinstatement the board may refuse to recommend may have the action of the board, or of any committee authorized by it to make a determination on its behalf, pursuant to the provisions of this chapter, reviewed by the California Supreme Court or by a California Court of Appeal in accordance with the procedure prescribed by the California Supreme Court.

CAL. BUS. & PROF. CODE § 6082 (West 1990); *see also id.* § 6100 (West 1990) (granting supreme court power to disbar or suspend in attorney discipline matters).

205. 1991 ANN. REP., *supra* note 128, at 7.

206. Wallace, *supra* note 103, at 258-59.

207. *Id.* at 256.

208. *See id.* at 257-58.

209. Uelmen, *supra* note 169, at 34.

210. *See, e.g.,* Gerald F. Uelmen, *Losing Steam*, CAL. LAW., June 1990, at 33, 42 (quoting Professor Emeritus Gideon Kanner of Loyola Law School, "wondering why 'sleazy lawyers' occupy so much of the court's time, while 'worthier' litigants wait in the wings").

211. Katherine Bishop, *Moral Turpitude Case vs. Lawyers' Public Image*, N.Y. TIMES, Feb. 24, 1989, at B5. The State Bar receives approximately 50,000 calls from the public each year, many of which lead to prosecutions. *California Confusion*, NAT'L L.J., Oct. 8, 1990, at 12.

212. Professor Robert Fellmeth of the University of San Diego's Center for Public Interest Law was appointed by then Attorney General John Van de Kamp.

213. *See* Bishop, *supra* note 211, at B5.

plinary and reinstatement proceedings.”<sup>214</sup> The new court was staffed by a coterie of professional judges<sup>215</sup> and funded by a fifty-percent increase in bar dues for practicing lawyers.<sup>216</sup> The State Bar Court began hearing cases in December 1990.<sup>217</sup> The backlog of pending disciplinary matters was shortly reduced to under 600.<sup>218</sup>

The jurisdiction of the State Bar Court was enhanced in February, 1991, when Rule 954 was added to the California Rules of Court.<sup>219</sup> Rule 954 limits the grounds for review in the supreme court and provides that denial of review “shall constitute a final judicial determination on the merits and the recommendation of the State Bar Court shall be filed as an order of the Supreme Court.”<sup>220</sup> The purpose of Rule 954 was to work “a substantial decrease in the number of cases in which the Supreme Court must hold hearings and write opinions.”<sup>221</sup> The figures demonstrate that it has fulfilled its purpose.

While “[n]othing in this chapter [on the State Bar Court] shall be construed as limiting or altering the powers of the Supreme Court of this State to disbar or discipline members of the bar,”<sup>222</sup> it is clear that the new court has had a salutary effect on the supreme court’s caseload. Chart 12, on the following page, shows a dramatic dip in the number of attorney discipline cases filed in the supreme court following creation of the State Bar Court in 1990.<sup>223</sup>

---

214. CAL. BUS. & PROF. CODE § 6086.5 (West 1990). There also is an internal appeal from decisions of the State Bar Court to the Review Department. *Id.* § 6086.65 (West 1990).

215. *See id.* § 6079.1 (West 1990 & Supp. 1993).

216. “[T]he State Bar . . . devotes 80 percent of its \$44 million annual budget to lawyer discipline.” Harriet Chiang, *State Bar Gets Power to Discipline Lawyers*, S.F. CHRON., Sept. 26, 1990, at A16.

217. The State Bar Court became effective Dec. 1, 1990, with the adoption of Rule 951 of the California Rules of Court. CAL. R. CT. 951.

218. *See* Greg Lucas, *State Bar Clearing Up Complaint Backlog*, S.F. CHRON., Feb. 21, 1990, at A4.

219. CAL. R. CT. 954(b) (authorized by CAL. BUS. & PROF. CODE § 6087 (West 1990)).

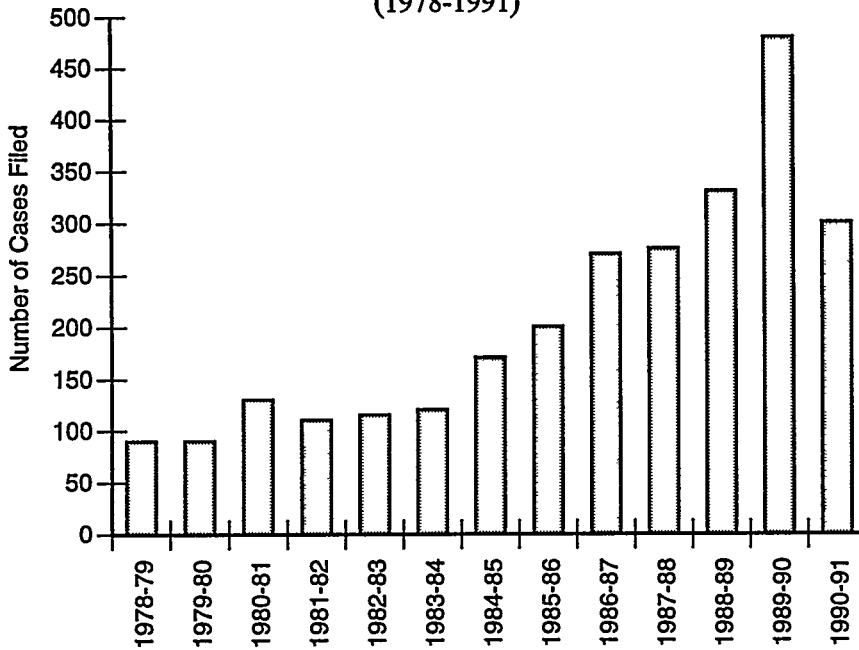
220. *Id.* In 1988, the legislature also authorized the supreme court to transfer review of disciplinary matters to the court of appeal. *Id.* § 6082.

221. Philip Hager, *Supreme Court Moves To Ease Caseload*, L.A. TIMES, Oct. 28, 1990, at A3. William E. Davis, Director of the Judicial Council of California, has also stated: “The new rules are expected to save the Supreme Court a substantial amount of time, which it now will be able to spend on other cases. The rules also recognize the important contributions of the State Bar Court.” William E. Davis, *California Council Clarifies Several Points*, NAT’L L.J., Nov. 5, 1990, at 14.

222. CAL. BUS. & PROF. CODE § 6087 (West 1990).

223. 1991 ANN. REP., *supra* note 128, at 11.

**CHART 12**  
**ATTORNEY DISCIPLINE CASES**  
**FILED IN THE SUPREME COURT**  
**(1978-1991)**



In its first year of operation, the State Bar Court decided nine published cases.<sup>224</sup> In 1990-1991, the State Bar Court decided thirty-seven published cases. That period also saw an all-time high of forty-eight decisions published by the supreme court on attorney discipline matters.<sup>225</sup> Together these two courts seem to have made a substantial dent in pending disciplinary cases. The effect on the necessity of supreme court review has been dramatic. In 1991-1992, the State Bar Court decided nineteen published cases; the supreme court decided only four.

224. Fiscal years are used for this analysis, corresponding to the supreme court's reporting year. The number of published cases was obtained using the following Westlaw search: "STATE BAR COURT" AND DATE(AFT 6-30-89) AND DATE(BEF 7-1-90).

225. This was likely due to the number of filings the prior year, 488, which was the highest number since the Judicial Council began reporting attorney discipline filings.

**CHART 13**  
**ATTORNEY DISCIPLINE CASES**  
**DECIDED BY SUPREME COURT**  
**BY PUBLISHED OPINION**  
**(1986-1992)**

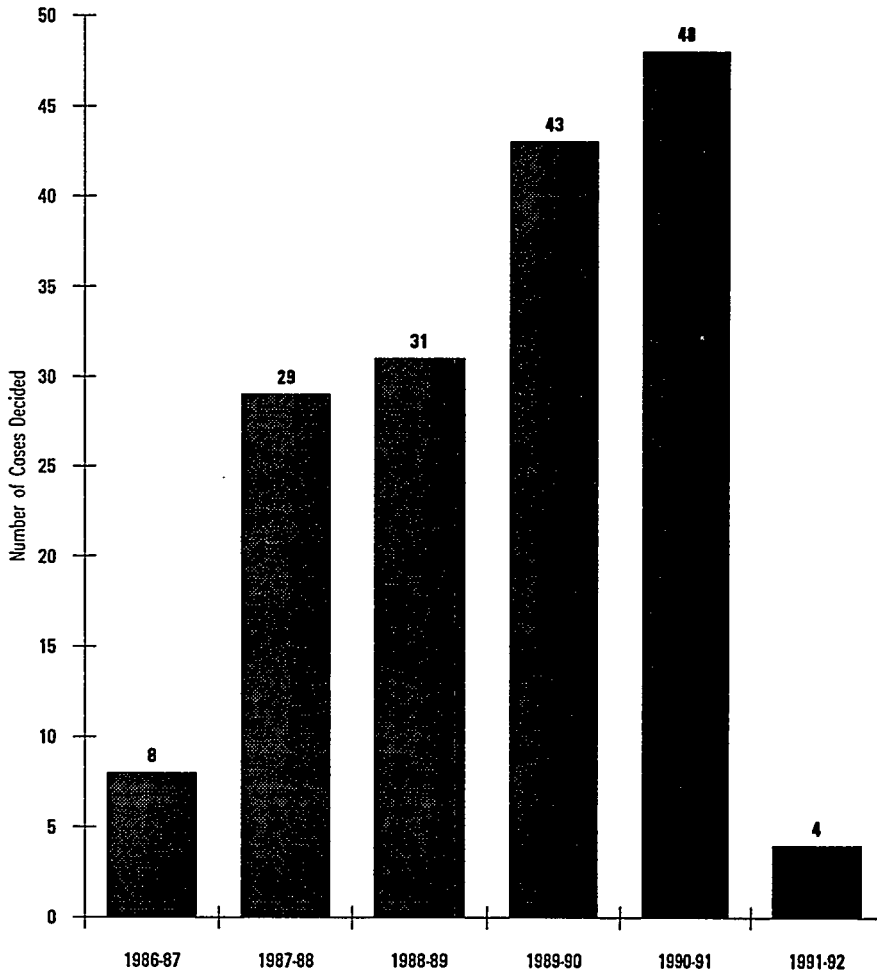


Chart 13 shows a significant decline in supreme court attorney discipline cases.<sup>226</sup>

---

226. Statistics for years 1986-1987 through 1990-1991 were obtained from Dean Uelmen's published studies in the *California Lawyer*. See *supra* note 179. Statistics for 1991-1992 were obtained from a Westlaw search using the following query: "STATE BAR" AND CO(HIGH) AND DA(AFT 6-30-91) AND DA(BEF 7-1-92).

## VI. CONCLUSION

The California Supreme Court has weathered a "100-year flood."<sup>227</sup> Each era seems to bring its own cause for concern and controversy. The current area of discussion is the court's capital jurisdiction. It appears likely that unless structural changes are made to the court's jurisdiction or operating procedures, the "crisis in the courts" will continue to expand.

Many court-watchers have offered solutions to the crush of death penalty appeals. Some of the most frequent proposals are: (1) treating capital cases like any other criminal case with appellate jurisdiction in the court of appeal and discretionary review thereafter in the supreme court;<sup>228</sup> (2) intermediate appellate review of capital verdicts and sentences by the court of appeal with automatic review thereafter in the supreme court;<sup>229</sup> (3) creating a special court of appeal with appellate jurisdiction over all capital cases, with or without review thereafter in the supreme court;<sup>230</sup> and (4) bifurcating the supreme court into civil and criminal branches, as was done in Texas and Oklahoma.<sup>231</sup>

Other proposals have been made to ease the burden of death penalty cases,<sup>232</sup> and to facilitate the supreme court's work in general. Among the latter are en banc review by a district court of appeal in the event of conflicting panel decisions,<sup>233</sup> increasing the court's budget<sup>234</sup> and raising

---

227. Ray Reynolds & Clyde Leland, 'We Have No Hidden Agenda': Chief Justice Malcolm M. Lucas Sees a More Tranquil Period Ahead, CAL. LAW., June 1987, at 21, 101 (quoting Chief Justice Lucas).

228. See Weisberg, *supra* note 148, at 244.

229. *Id.*; see also Kaufman, *supra* note 22, at 32 (asserting court of appeal review would simplify supreme court's review of capital cases).

230. This solution was proposed by Bernard Witkin and embodied in Senate Bill 174 of the 1987-1988 Regular Session of the Legislature. See Weisberg, *supra* note 148, at 244. It is reminiscent of proposals on the federal level to create a national court of appeal. See generally *id.* at 255-56 (discussing and criticizing proposal to create national court of appeal); Paul A. Freund, *A National Court of Appeals*, 25 HASTINGS L.J. 1301 (1974) (discussing debate over and specific benefits of National Court of Appeal).

231. See *supra* note 185.

232. Professor Weisberg describes some of them as having the common theme of court of appeal jurisdiction over convictions but not the penalty aspect of cases. The supreme court would review death sentences only where the conviction is affirmed. See Weisberg, *supra* note 148, at 245.

233. See Uelmen, *supra* note 155, at 6.

234. See *id.* (criticizing court's budget decrease imposed by legislature).

[S]evere budget cuts mean the court will lose support staff [and] . . . will certainly reduce the court's ability to manage its growing caseload. . . . [T]he results of substantial cuts are readily predictable: fewer grants of hearings, more depublication orders, fewer opinions in civil cases and the same level of death penalty decisions. And more judicial retirements.

judicial salaries.<sup>235</sup> More radical reforms have been tried in other jurisdictions, such as deciding cases without opinion, curtailing oral argument and using summary judgment procedures.<sup>236</sup>

In November 1991, Chief Justice Lucas appointed the Commission on the Future of the Courts, vesting it with "the distinctive mission of thinking about and helping the courts prepare for a future 30 years from now."<sup>237</sup> The Commission embarked on a two-year project entitled "2020 Vision: A Plan for the Future of California's Courts."<sup>238</sup> The Commission has generated a number of suggestions and possible scenarios for California courts.<sup>239</sup>

It is difficult to predict whether structural changes in the supreme court's capital jurisdiction will work any substantive change in death penalty jurisprudence, in the number of executions or in the frequency of capital sentences. Some commentators have theorized that unclogging the appellate route would increase the pace of sentences and executions. This result might be due to a shorter appellate process or a de-emphasis on the uniqueness of the penalty.<sup>240</sup> The converse might also be true.

---

Uelmen, *supra* note 169, at 36; *see also* Kaufman, *supra* note 22, at 32 ("[I]t is wholly unrealistic to expect timely and effective delivery of justice from a court system that does not have enough judges, courtrooms, staff and equipment.").

235. *See* Kaufman, *supra* note 22, at 32 ("Judicial and attorney staff salaries are pitifully low compared to those paid in the private sector."). Despite its appeal, increased funding of courts and personnel is not a likely outcome. *See* Church, *supra* note 15, at 261.

Politicians allegedly know they do not win elections by spending more money on the judicial system, or by raising judicial salaries, or by increasing court staff. In times of financial stringency, politicians spend scarce tax dollars on programs likely to increase their political capital and help them win the next election.

*Id.*

236. *See* Thomas B. Marvell & Carlisle E. Moody, *The Effectiveness of Measures to Increase Appellate Court Efficiency and Decision Output*, 21 U. MICH. J.L. REFORM 415, 416 (1988).

237. *Judicial Council Symposium Turns Spotlight on the Future of California Courts*, PR NEWSWIRE, Nov. 30, 1992, available in LEXIS, Nexis Library, Wires File. The 40-member commission is charged with four tasks: (1) to identify the "trends that will have an impact on the courts in the year 2020"; (2) to envision the alternative futures and preferred choices for the courts; (3) to report on the probable future structure of the courts; and (4) to devise a plan which will lead California's courts toward the desired choices. *Id.*

238. *Id.* Other state courts have embarked on similar projects. Virginia and Arizona have established commissions to study the future of their courts. Hawaii has held a "Judicial Foresight Congress" sponsored by the Hawaiian State Judiciary and the American Judicature Society. *Id.* The State Justice Institute and the American Judicature Society sponsored a "Conference on the Future and the Courts" in San Antonio, Texas in 1990. *See* Martin L. Haines, *Vision and Truth: The National Center Report*, N.J. L.J., Aug. 29, 1991, at 17.

239. *See, e.g.,* Lawrence B. Solum, *Alternative Court Structures in the Future of the California Judiciary*, 66 S. CAL. L. REV. (forthcoming July 1993). Professor Solum describes five alternative scenarios: the traditional justice system, the privatization of justice, the multi-door courthouse, the administrative justice system and the community-based model. *Id.*

240. *See* Weisberg, *supra* note 148, at 254.

For instance, adding intermediate appellate review could lengthen the time between sentence and execution. The involvement of another layer of appellate courts could generate new doctrine and grounds for scrutiny of death sentences.

While some advocates of court reform may be motivated by expectations of results coinciding with their views on capital punishment, this does not appear to be a major force among the growing chorus of critics. Many commentators seem to recognize the salutary effects of reform quite apart from its ultimate impact on the death penalty itself. To borrow Professor Weisberg's term, they are "death-neutral" in their analysis and criticism of the supreme court's capital jurisdiction.<sup>241</sup> That is not to deny that advocates of reform often press their own special interests and views of judicial priorities.<sup>242</sup> Yet, there appears to be a remarkable consensus within the profession that systemic changes are long overdue.

It is not the purpose of this Article to advocate any particular mechanism of reform. That has been done effectively elsewhere.<sup>243</sup> Nor is its purpose to comment on the death penalty itself, its application or even the virtue of automatic appeal to the supreme court. Rather, the goal of this Article is to provide empirical data for further study and debate. There seems to be a need for that.

---

241. Professor Weisberg stated: "[N]ot many [critics] advance changes in rates of sentencing or execution as a benefit—or drawback—of reform. Most act upon an unstated premise that structural changes will be 'death-neutral.'" *Id.* But, he sounded a cautionary note in accepting the premise by stating, "we may be engaged in some academic shadow-boxing." *Id.*

242. *See, e.g.,* *Gonzalez v. Superior Court*, 140 Cal. App. 3d 146, 189 Cal. Rptr. 696, 710 (1983) (Hanson, J., concurring), *vacated* 154 Cal. App. 3d 583, 201 Cal. Rptr. 435 (1984) (depublished, July 12, 1984); Mosk, *supra* note 194, at 2.

243. *See, e.g.,* Weisberg, *supra* note 148, at 256-66; Kaufman, *supra* note 22, at 32. More than 600 articles, books and reports on this topic have been published in recent years. *See generally* Marvell, *supra* note 76.



