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Creating an Appetite for Appellate Reform in California

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Manifestly judicial reform is no sport for the short-winded or for lawyers who are afraid of temporary defeat. Rather must we recall the sound advice given by General Jan Smuts to the students at Oxford: “When enlisted in a good cause, never surrender, for you can never tell what morning reinforcements in flashing armor will come marching over the hilltop.”

Professor J. Clark Kelso has prepared a balanced menu for appellate court reform in California. The menu includes an ample assortment of soups and salads that will create the illusion of a full belly without really satisfying the hunger for very long. The main courses include most of the standard bill of fare: There’s pork (more judges), lamb (more staff), and even some cutlets (fewer cases). One may be tempted to ask, however, “Where’s the beef?” Professor Kelso gives little attention to the growing use of summary adjudication, a procedure garnering good reviews from other gastronomes. Most dazzling are the desserts—a high-tech array of whiz-bangs and doo-dads to create a paperless world of adjudication by computer chips and video monitors.

The Commission on the Future of the Courts has travelled the highways and byways and invited an impressive list of judges and advocates to the banquet to serve as the Appellate Courts Committee. Curiously, the consumers of California’s justice system, the litigants,
were not among the invited guests, nor were there any notable critics of the current appellate court system. The major organizations of the practicing bar were also unrepresented.

The "Preferred Vision for the Future of the Appellate Courts," the meal the Committee has selected from Professor Kelso's menu, suggests a severe outbreak of collective myopia in which the chief ingredient for reform is more of the same ingredients. The Committee envisions a future populated by really smart judges and really cooperative lawyers, a world in which the legislature has apparently been suspended and the initiative process abolished. In short, the future is a mythical place where appellate litigation is declining because the law has been "settled" and litigants are largely satisfied with the justice meted out in the trial courts.

The Committee's preference for salads and desserts suggests that it simply has not come to grips with the underlying causes of the staggering growth in caseload engulfing our appellate courts, a growth outpacing that of trial courts.

California trial courts have resorted to plea bargaining to cope with a doubling in the number of criminal filings during the past ten years. A decade ago, courts tried seven to eight percent of criminal cases to juries. Today, they try about three percent. At the same time, however, changes in California's sentencing laws opened the floodgates to exponential growth in sentencing appeals. In 1991-92, the ratio of criminal appeals to convictions after trial in superior court was approximately 152 appeals to every 100 convictions, up from 107 to 100 ten years ago. This meant an astounding one-year 12.3% increase in 1991-92 in court of appeal filings during a year in which superior court-contested dispositions actually declined five percent. Civil appeals were also up sharply compared to civil trials. During 1992, there were approximately twenty-three civil appeals for every 100 contested civil cases tried in superior courts, compared with an average of twenty during the preceding four years—a jump of fifteen percent.

The eighty-eight court of appeal justices authored 127 majority opinions per judge in 1991-92, an increase of eleven percent over the

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5. 2 Judicial Council of California, supra note 3, at 26.
6. Id.
7. Id.
previous year, while their backlog of pending cases grew an ominous three percent. But just six years ago, the justices were cranking out an average of only 105 opinions per year each. The causes of this explosion of appellate activity are complex, but many of them are readily identifiable. They include a legislative process that churns out ambiguous laws, an initiative process that imposes incomprehensible reforms, and a bankrupt criminal justice system that persistently promises more than it can possibly deliver.

To these factors, we can add an overlay of 1,553 judges, most of whom are quite average, and 140,000 lawyers, most of whom are quite contentious, and many of whom are hungry. None of these conditions is likely to be alleviated dramatically within the next twenty-six years. If these historical trends continue, conditions will worsen. By the year 2020, the justices of the California Courts of Appeal might well be expected to turn out 250 majority opinions per year per judge—one a day considering vacation time. The “preferred vision” proposes to accommodate the caseloads of 2020 not by significantly increasing the number of judges, but instead by doubling the judicial staff support. Quite bluntly, the proposal is a disastrous recipe to water down the gravy, add “Hamburger Helper” to the ground beef, and turn our appellate courts into a high-tech franchise like McDonald’s.

The proposal simply ignores much of what other states have learned about appellate reform in the past two decades. California, of course, is not the only state to experience dramatic caseload growth in its appellate courts. Six hundred articles, books, and reports have been published since 1965 concerning coping with appellate caseload growth. The results of major changes and experiments in other states have been carefully compiled and compared. Thomas B. Marvell, the director of Court Studies, Inc., authored one of the most succinct summaries of this experience. Using time series-cross section research methods, he tracked the impact in forty-five states of adding

8. Id. at 15.
9. Id. at 22.
10. Id. at 27.
11. Id. at 1.
judges, increasing staff, reducing oral argument time, curtailing opinion publication, and utilizing summary adjudication procedures.\textsuperscript{15} His conclusions raise some alarming concerns about the course envisioned by the California Commission. Giving every appellate judge five law clerks and supreme court justices more will lead to staff usurpation and bureaucratization of the judiciary.\textsuperscript{16} Staff enlargement as the keystone in California's response to caseload growth is consistent with the past, but California is leading a parade with few followers.\textsuperscript{17} Experience elsewhere confirms that this response is not cost-effective:

Adding law clerks has a moderate impact: when judges are given an additional law clerk, they decide one to five more cases a year. Adding staff attorneys has no discernible impact on decision volume, expect possibly in large [intermediate appellate courts]. A likely explanation is that their work products add to the amount of information the judges consider; so they spend more time on some cases. That is, the staff's work goes less towards increasing productivity than towards increasing decision quality.\textsuperscript{18}

On the other hand, the addition of judges produces "constant returns to scale"; that is, adding one judge to a ten-judge court means the number of decisions increases ten percent.\textsuperscript{19} Despite the cost, a significant increase in the number of appellate judges should be a major component of the "preferred vision" for 2020.\textsuperscript{20}

\textsuperscript{15} Id. at 282, 283 n.5.
\textsuperscript{16} Professors Carrington, Meador, and Rosenberg suggest that staff usurpation and bureaucratization are likely to be a problem when a court has more than three attorney aides per judge. CARRINGTON ET AL., JUSTICE ON APPEAL 48 (1976). The American Bar Association Standard commentary set an upper limit of three law clerks per judge. STANDARDS RELATING TO APPELLATE COURTS § 3.62 & commentary at 97-98 (1977).
\textsuperscript{17} Only four states—California, Indiana, Michigan and Pennsylvania—have more than three attorney aides per judge. Marvell, supra note 14, at 287. The Michigan experience is examined in Mary Lou Stow & Harold S. Spaeth, Centralized Research Staff: Is There a Monster in the Judicial Closet?, 75 JUDICATURE 216 (1992). The alarm was sounded in California nearly 20 years ago by Justice Robert Thompson, but no one was listening. See Robert S. Thompson, Mitigating the Damage: One Judge and No Judge Appellate Decisions, 50 CAL. ST. B.J. 476 (1975).
\textsuperscript{18} Marvell, supra note 14, at 289.
\textsuperscript{19} Id.
If a significant increase in the number of appellate judges is part of California's future, some major structural issues must be addressed. Growth should not be achieved by adding new divisions to the courts of appeal, and thus multiplying the risks of conflicting court of appeal decisions. Rather than having eighteen different autonomous courts of appeal ranging from three to ten justices in size, California should have ten courts of ten to twenty justices each. Additionally, the autonomous divisions of the courts of appeal in the First and Second Districts should be consolidated before any new judicial positions are added.\(^{21}\) Consolidation would also facilitate the creation of an en banc panel structure to resolve conflicts among different court of appeal districts.\(^{22}\)

Another major component of the "preferred vision" should be the systematic separation of simpler cases from more complex ones, and the design of an efficient summary adjudication process for routine appeals. At the supreme court level, a summary adjudication procedure should replace depublication of lower court opinions.\(^{23}\)

Achieving a consensus for these reforms may not be as difficult as some would imagine. The political climate in California does not currently promote much dialogue between contending factions. Special interest groups often seem more intent on raising a war chest for the next initiative battle than on frank discussion of acceptable alternatives. But the biggest mistake reformers can make is to proceed on the basis of untested assumptions about how others will react to their proposals. This lesson was spelled out by two researchers with the National Center for State Courts.\(^{24}\) Their study suggests that, contrary to conventional wisdom, variations in attitudes among participants in the appellate process may be minimal and assumptions that others will oppose particular reforms are unwarranted.\(^{25}\) At least with respect to criminal appeals, the researchers suggest that a reform effort can achieve broad consensus among judges, prosecutors, public


\(^{23}\) See Falk, supra note 2, at 40.


\(^{25}\) Id. at 239.
defenders, retained counsel, and appointed counsel because they all share a common goal of greater efficiency without creating an "affirmance track" for appeals. To achieve this consensus, however, the leadership must come from the judiciary: "Although the heads of institutional offices (prosecution and public defenders) may also have a view of the big picture, judges have the ultimate responsibility of drawing attention to problems of volume and delay and the search for possible solutions."

California has a proud tradition of achievement in judicial reform. A reform movement headed by Chief Justice Phil S. Gibson and the California State Bar led to the creation in 1958 of the Joint Judiciary Committee on the Administration of Justice, followed by the creation of the Administrative Office of the Courts and the formation of the Commission on Judicial Performance. The reform resulting in the current method of judicial selection was an initiative organized by a broadly based citizens group led by Earl Warren, then the District Attorney for Alameda County.

The biggest obstacle to reform in California seems to be a lack of appetite that may stem from the contentious battle over the 1986 supreme court justice confirmation. Ever since, any criticism of the supreme court is rebuffed as a political attack attributable to dissatisfaction with the election outcome. A "siege mentality" has set in at the supreme court, and the defensiveness seeps down to every level of the judiciary. Judicial attitudes toward the most vocal civil trial lawyer and criminal defense lawyer organizations have been occasionally contemptuous, and little effort has been made to involve attorneys actively in the work of the Commission on the Future of the Courts.

This distrust must eventually give way to finding remedies for the deterioration in the quality of justice. As one of the most astute observers of appellate justice put it:

Experience demonstrates that improvements in the structure of courts take many years. Judges, lawyers, legislators and the public often do not show much interest and are not likely to approve change until the need becomes irresistible. That something need be done to enable a court to keep up with its caseload will usually be

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26. Id. at 246 (explaining that an affirmation track is a special calendar of cases in which the case outcome of affirmance of the judgment is a foregone conclusion).
27. Id.
demonstrated by its inability to dispose of the cases on its docket reasonably promptly.\textsuperscript{30}

In this sense, judges who accommodate overload by publishing fewer opinions, delegating more decisions to their staff, and generally allowing the quality of their work product to decline are their own worst enemies. They should be in flashing armor, leading the march of reinforcements over the hilltop. They should be the loudest voices calling for appellate reform, instead of the ardent defenders of the status quo. When it comes to the broth of appellate reform, our judges must be the chefs. And the broth will not be spoiled by too many chefs.

Appendix

Chapter 10
The Appellate Courts*

A Preferred Future

In 2020 appellate justice in California remains committed to promoting public trust in justice by correcting errors of other tribunals and enhancing predictability, uniformity, and justice in the development of the law.

In 2020 new methods of dispute resolution and the emergence of a truly multidimensional justice system have had a significant impact on appellate justice. Because disputants tend to be more directly involved in resolving their disputes they tend to be more satisfied with the results and thus less likely to appeal them. Appellate justice continues to embrace the search for appropriate and effective alternative dispute resolution techniques.

Flexible process is the rule, not the exception, in 21st-century appellate justice. In the waning years of the last century, constitutional, statutory, and rule-based impediments to flexibility in the appellate process were eliminated. Briefs, arguments, and written opinions are now seen and heard only where genuinely needed. More effective communication among the appellate and trial courts, the federal bench, and the legislative and executive branches has created new harmonies in the drafting and interpretation of the law.

Technological integration is a hallmark of multidimensional justice. Appellate transcripts are online; motions and briefs are submitted electronically; justices often hear arguments via interactive video media; the Appellate System Network gives justices access to all public and private materials; and the public and the press have direct digital access to all records and proceedings. All proceedings are televised. Not only is the appellate process paperless, it is virtually wireless.


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While in the 1990's some critics urged curbing the growth of appeals by rationing access to appellate justice, such discussions were abandoned as contrary to time-honored and cherished principles. In 2020, appellate justice is accessible, comprehensible, and committed to the public’s interest.

**Appellate Justice: 1993 to 2020**

**1993**

Few principles are more fundamental to the American ideal of due process of law than the right to have adverse decisions of government reviewed by an independent, deliberative body of judges. Throughout history appellate courts have promoted public trust in justice by reviewing for error decisions of lower courts and other governmental tribunals and agencies.

California’s appellate system today consists of three tribunals: appellate departments of the superior courts; the Court of Appeal; and the Supreme Court. The appellate department of each superior court sits in three-judge panels and reviews decisions in misdemeanor cases, infractions, and small civil cases, where the amount in controversy is less than $25,000. Very few small cases of this sort are appealed. In 1991-92, only 2 percent of small civil dispositions and only two-tenths of 1 percent of misdemeanor and infraction dispositions were appealed. However, because minor criminal and civil cases constitute the overwhelming majority of the trial court’s docket, the total number of cases filed in the appellate department is large: 28,061 cases in 1991-92, more than were filed in the Court of Appeal in the same year. Decisions by appellate departments are seldom reviewed by the appellate courts.

The Court of Appeal is divided into six districts and sits in three-judge panels. It hears all appeals taken from judgments issued by the superior courts, which include appeals in all felony matters and in large civil suits. It cannot decline to hear such appeals. In 1991-92, the 88 justices of the Court of Appeal were faced with 21,628 new contested matters (246 per justice), an increase of 20 percent per justice—37 percent system-wide—over 10 years earlier. Projecting future dockets on a straight-line basis, the Court of Appeal will, by 2020, see 40,617 filings per year.

The Supreme Court of California consists of the Chief Justice and six associate justices. Its primary responsibility is to decide cases that raise important public issues, and to maintain the uniformity of the law throughout the state. Access to the Supreme Court is limited and
is largely controlled by the court itself. The court has mandatory direct appellate jurisdiction in all death penalty cases. It also reviews recommendations of the Commission on Judicial Performance, decisions of the Public Utilities Commission, and certain State Bar Court attorney discipline recommendations, the last on a discretionary basis. In virtually all other cases in which a decision has already been reached by the Court of Appeal, the Supreme Court’s jurisdiction is discretionary.

Still, the Supreme Court saw major increases in filings over the past decade. In the 1991-92 term the court faced 5,403 filings (772 per justice), an increase of 36 percent over the 3,969 in 1982-83. Its primary response to this increase was to deny review in a growing number of cases (91 percent denied in 1982-83; 95 percent denied in 1991-92) and to “depublish” an increasing number of Court of Appeal opinions.

2020

If the commission’s vision of a preferred future for the courts is realized, multidimensional/multioption justice will be a reality in California long before 2020. In such a future there will, of course, still be a need for strong and enlightened appellate tribunals to perform their age-old functions of correcting legal error and enhancing predictability and uniformity in the law. In a world of appropriate dispute resolution, however, adversarial and adjudicatory justice will not, in most instances, be the processes of first resort. Many or most disputes will be resolved through mediation or other forms of assisted negotiation, early neutral evaluation, and other consensual processes from which there is no right of appeal. If multidoor and community justice fulfills its potential, the appellate court dockets of 2020 may be significantly more manageable than those of 1993.

In the near term, however, in the face of rising caseloads and uncertain resources, the options for remedying appellate overload appear to be four: enhancing traditional means of processing appeals; encouraging innovative new methods; reducing the number of appeals; and increasing the number of appellate justices and/or legal staff resources.

Enhancing the Appellate Process

Over the years, the appellate process in America has become more or less uniform. Although there are variations in detail, once a notice of appeal has been filed an appeal typically involves: prepara-
tion of the trial court record; preparation and submission of briefs; initial review by the appellate court to determine whether the appeal qualifies for special treatment (e.g., settlement programs, decision without oral argument, denial of review, or alternative disposition in discretionary appeals); oral argument before a panel of three or more judges; the decision process (including pre-argument analysis, a post-argument conference, and collegial drafting of opinion(s)); public release of a reasoned opinion; and consideration of post-judgment motions for reconsideration.

Notwithstanding the credible performance of today's appellate courts, there is always room for increased efficiency. Significant improvements may be attainable through enhanced technology, alternative appellate processes, and more refined and responsive appellate proceedings.

Technological Enhancements

No less than for other judicial and nonjudicial government agencies, established and emerging technologies offer new opportunities for appellate justice. In the commission's vision of future appellate justice, all information will be stored electronically. Paper's use will be limited to those applications in which it is clearly the superior medium. The courts and all state agencies will utilize a standard electronic data structure that will accommodate widespread information sharing.

All trial court filings will be in an approved electronic medium into which any paper filings will be immediately scanned. These filings will be automatically included in the clerk's transcript for appeal, which will be electronically compiled, stored, and accessible as a digitized public document. Reporters' transcripts will be processed in real-time through computer-assisted transcription technology and processed in the same way as the clerk's transcript.

When an appeal is perfected, the clerks' and reporters' transcripts will be immediately and electronically available to counsel and the appellate court for review and processing. All motions and briefs on appeal will be submitted in an approved electronic medium. Absent court order, the entire record on appeal and all appellate motions and briefs will be electronically compiled, stored, and accessible as public documents. The public and press will have direct access through telephone, interactive television, and computer links to all public court information, including the scheduling of hearings and arguments.
Again, there is a distinct possibility that long before 2020 all such technology will be wireless.

Enhanced communications will bring the appellate courts much closer to the public, press, litigants, lawyers, and trial courts. Appellate courts, with the help of educational institutions such as the Center for Judicial Education and Research, will produce multimedia programs to explain the goals, rules, and procedures of the appellate system and to disseminate summaries of important appellate decisions. The programs will be easily accessed through computer terminals and/or video kiosks located in virtually all justice facilities, law enforcement agencies, jails and prisons, educational institutions, public and private (e.g., law firm) libraries, the press, and dial-in services.

Without meaningful diminution of collegiality or of personal access to one another and staff, telepresence and telecommuting will permit appellate justices to perform their work anywhere and at any time. Simply by dialing into the Appellate Court Network, justice system personnel will have access to all publicly available materials—published cases, statutes, treatises, and the record, filings, and motions in every case—as well as to the court’s private materials: internal memoranda, electronic mail, and draft opinions.

Most appellate arguments will be conducted in interactive electronic environments, saving time and money for both courts and disputants. All Supreme Court arguments and selected Court of Appeal arguments will be carried live through the telecommunications network to the press and the public. Simplified, electronic access to the appellate courts, their records, and their proceedings will have a salutary effect on the public's comprehension of and trust in justice.

No less than today, future appellate justice will rely on human judgment in applying the law to the resolution of individual disputes. But increasingly, technology will allow appellate tribunals to do so with greater efficiency.

**Recommendation 10.1:** *Appellate justice should accelerate its adoption of and adaptation to new technology.*

**Innovation in Appellate Dispute Resolution**

Appropriate dispute resolution will play a central role in the public justice system of the future. The effects of this revolution on the appellate system will be at least twofold. First, because nonjudicative dispute resolution processes give parties greater involvement in and control over the decision-making process, disputants are likely to
have greater confidence in the result; fewer appeals will follow. Second, as the judiciary, the bar, and the public become more comfortable with appropriate dispute resolution at the trial level, similar methods will gain currency in the appellate process. A form of appellate mediation—the pre-argument settlement conference—is already in use in several districts in California and around the country. For instance, the Third District Court of Appeal has been utilizing a settlement conference program for almost 20 years. Over the past 4 years, the court held conferences in roughly a third of its civil appeals. Slightly more than 40 percent of those conferences resulted in settlement. (Statewide, the figure is closer to 30 percent.)

RECOMMENDATION 10.2: The appellate system should be innovative and vigorous in instituting alternative appellate processes.

Refrined Appellate Practices

Related to but distinct from the need for nontraditional appellate processes is the need for flexibility in tailoring the conventional process to the demands of individual appeals. Appeals come in all shapes and sizes. Some raise issues that may be easily resolved by existing law. Others raise unsettled questions of law requiring far more resource-intensive review. California's rules of appellate practice do not currently afford the courts discretion to sort their cases and assign them to different appellate tracks. Today, any appellate brief may be as long as 40 printed pages, even though many issues are simple, warrant far less discussion, and would justify far shorter briefs. Similarly, the rules prescribe only a single timetable to govern the appellate process, despite the fact that some cases are far more—or less—time consuming than the norm. Appellate tribunals should have the discretion to determine early-on whether a case requires full or summary process.

The requirements governing oral argument are similarly constraining. While the Constitution has been interpreted as requiring the court to allow argument unless waived by the parties, in most instances briefs provide more than adequate background. Appellate tribunals should have discretion to forego argument, thereby conserving their scarce resources.

Today the Court of Appeal is constitutionally required to issue a written opinion in all cases. Many observers believe that such a requirement is unwarranted. In 1991-92 the Court of Appeal's 88 justices produced 11,064 written opinions, an average of 126 majority opinions per justice, 26 more than the maximum recommended by
some appellate scholars. In addition, the court’s “clearance rate”—the number of dispositions in a given year divided by the number of appeals filed—has consistently been below the break-even point. Appellate tribunals should have the authority to issue true memorandum opinions—such as those issued by some federal appeals courts—that are no lengthier than necessary to advise the parties of the reasons for the decision and provide a basis for further review.

In the final analysis, flexibility should be the hallmark of the appellate process, ensuring a reasoned and credible result as well as a sensible allocation of appellate resources.

**Recommendation 10.3:** Appellate tribunals should be flexible in processing appeals. They should have the ability to assign matters to differentiated “tracks” as warranted.

**Strategies:**

10.3.a. The Judicial Council should examine methods of introducing greater flexibility into the appellate process. Among the rules that the council should focus on are those governing preparation of the record, length and timing of briefs, oral argument, and standards governing issuance, content, and length of opinions.

10.3.b. The Judicial Council, the Legislature, and the Governor should together review and consider revision of constitutional and statutory provisions that limit the appellate courts’ flexibility—e.g., the constitutional requirements of full written opinions and oral arguments, statutory rehearing requirements, etc.

**Outreach and Coordination**

In the future, the appellate courts and their successors should reach out to other institutions in order to improve both appellate processes and products. As but one example, the Judicial Council should create an Appellate and Trial Courts Coordinating Council. The membership of such a council should include appellate and trial court judges and their staffs. It could recommend procedures, rules, and statutes to simplify appellate and trial court functions, and procedures to assist appellate and trial court judges in performing them.

The Judicial Council should also create a State and Federal Courts Habeas Corpus Council to facilitate effective federal court review of state habeas corpus proceedings. Among that council’s functions should be the identification of repetitive constitutional errors in criminal cases that lead to subsequent federal habeas corpus challenges. Further, it should recommend procedures, rules, and statutes to reduce such errors. Both of these coordinating councils—and the
Judicial Council itself—should utilize the scholarly and research resources of the Center for Judicial Education and Research and the state's law schools.

Finally, there should be regular, informal communication among the Chief Justice, the Judicial Council, the presiding justices, and the legislative and executive branches about matters of mutual concern. The hoped-for results would be two: more precisely crafted statutes, and judicial interpretations of those statutes that more fully achieved the laws' intent.

**Recommendation 10.4: To improve the efficiency and quality of the appellate process, the Judicial Council should facilitate more effective communication among the appellate courts, the trial courts, the federal courts, the Governor, and the Legislature.**

**Rethinking Resource Allocation**

In addition to innovation with nontraditional processes, greater flexibility in traditional processes, and greater outreach and coordination, rethinking the allocation of resources to the appellate courts is in order.

If Court of Appeal justices continue to issue written opinions at 126 per justice per year, for example, straight-line projections indicate that by 2020 the state will need 196 Court of Appeal justices (more than double the present number) to produce an estimated 24,649 written opinions. Budgetary issues aside, there are good reasons to be apprehensive about such a large court. Interpretations of the law by one three-judge panel are not binding upon other panels. Such a dramatic increase in the number of judges will increase the number of interpanel conflicts, possibly compromising the cohesiveness of the law and further undermining the Supreme Court's ability to ensure statewide consistency in the law. Conflicts at the appellate level promote additional litigation in the trial courts, which in turn leads to more appeals.

Instead of adding more justices, the Legislature should begin by increasing the staff resources available to the Court of Appeal. Legal staff assist the court in reviewing trial records, conducting legal research, and drafting opinions. Adding staff attorneys can increase and improve output at a much lower cost, with much greater efficiency, than the appointment of new appellate justices.
Recommending 10.5: Before increasing the number of Court of Appeal justices, the Legislature should increase the court's staff resources.

Reconsidering Jurisdiction

In an alternative future in which resources for appellate justice are as or more limited than they are today, one remedy might be to limit the growth of appeals. While the notion of limiting access to public dispute resolution resources at either the trial or appellate level is worrisome to many, some commentators urge limiting appeals to those that genuinely require further review.

Assuming the justice system of tomorrow were to attempt to limit appellate access, the challenge would be to create a method to distinguish the cases deserving of additional review from those that are not. As a generality, the cases that most deserve additional review are those with the highest likelihood of reversible error. The challenge would be to identify those cases before the Court of Appeal completed its initial review.

Two approaches might be possible: reliance upon the marketplace to distinguish between worthy and unworthy appeals; and reliance upon the appellate tribunal itself to make a preliminary determination regarding the appropriateness of appeal.

In today's appellate marketplace, plaintiffs with unmeritorious claims usually find it difficult to secure representation. Civil defendants with clear liability often find it more prudent to settle than to litigate. Prosecutors usually conserve their resources for meritorious criminal actions, and the vast majority of criminal defendants plead guilty. Additional "weeding" of cases occurs after trial and before appeal. Economic factors—principally additional attorney fees and additional delay—deter some civil litigants from going forward. But in fact, for the litigant who has already survived the trial process, there are few real deterrents to appeal.

An additional economic deterrent to filing unmeritorious civil appeals could be created by imposing on losing parties the actual cost to the state of hearing and deciding the case. Estimates of the cost of an appeal range from $6,000 to $50,000. As documented in Chapter 2 in the discussion "Who Pays for Justice?", assuming adequate resources the commission strongly disfavors such an approach at the trial level. At the appellate level there is the additional consideration of the constitutional right to appeal, and the argument that assessing such costs would cause more lower court errors to go uncorrected.
In criminal appeals there is a constitutional obligation to provide legal counsel for those defendants unable to afford it. The absence of any economic disincentive to appeal, combined with the incentive of avoiding a criminal conviction, results in a high rate of appeal, notwithstanding a low reversal rate. An economic penalty levied against either appointed counsel or the indigent appellant for filing a good faith but losing criminal appeal is both impractical and probably unconstitutional.

Alternatively, the Court of Appeal could in each case make a preliminary assessment as to whether an appeal is meritorious. At present, because every losing litigant in the superior court has a constitutional right to file an appeal with the Court of Appeal, the court has little control over its docket. Conceivably, however, access to the appellate system of the future could be controlled through a petition for review, as the Supreme Court controls its own docket today.

Eliminating a disputant’s only appeal as of right is a radical notion. At the very least, the public’s perception of justice would suffer. Far worse, the disputant whose petition for review is denied, notwithstanding errors at trial, would suffer grave injustice. Instituting a petition for review procedure that omits one or more of such elements might reduce the visibility of whole classes of cases—appeals from guilty pleas in criminal cases, for instance—without regard to their individual merit.

Finally, it has not been established that time and effort would be saved by instituting a petition for review procedure. Counsel would still have to present briefs setting forth alleged errors at trial. The Court of Appeal would still be obliged to evaluate the merit of such claims. Thus, even if it were constitutionally permissible to implement such a process, dramatic efficiency gains would be unlikely.

Recommendation 10.6: The appeal as of right should be retained.

The Death Penalty

Original appellate jurisdiction lies with the California Supreme Court in all capital cases. Although the total number of capital appeals is small compared to all appeal and writ proceedings filed in California’s appellate system—there were only 36 automatic appeals in 1991-92 compared to the 21,628 appeal and writ proceedings filed in the Court of Appeal—all capital appeals are concentrated in the Supreme Court. The Supreme Court issued 89 written opinions in 1991-92, but 26 of those opinions (29 percent of the total and almost 4 per justice) were in capital cases.
Because capital cases are appealed directly to the Supreme Court, that court has the responsibility—discharged in virtually all other cases by the Court of Appeal—of reviewing each case fully to correct prejudicial error. Capital cases are usually lengthier and more complex than other criminal cases. It may take a court staff attorney as much as six to nine months to prepare a capital case for consideration by the justices. One recent capital case involved the review of 80,000 pages of material.

Another measure of the magnitude of this responsibility is the total number of pages in the official reports devoted to capital cases. During 1991, for example, opinions in 26 capital cases filled 1,656 pages out of a total of 3,454 for all opinions during the year. Forty-eight percent of the text of the court’s opinions was devoted to death penalty review.

In addition to workload, concentrating capital cases in the Supreme Court may exert unusual pressures on the development of the law. When such a significant portion of the court’s docket involves a single kind of case, there is a risk the court will develop a skewed perspective on criminal law issues. Some commentators have noted possible changes in application of the “harmless error” rule in capital cases, and in consideration of evidentiary questions. Finally, when such a significant portion of the court’s work is devoted to a single type of case, the court’s general obligation to oversee the development of California law may suffer.

There have been several suggestions for easing the court’s capital caseload, among others: repealing the death penalty; creating a special court to handle death penalty appeals; and giving the Court of Appeal initial appellate jurisdiction with subsequent mandatory or discretionary Supreme Court review. Each suggestion has its proponents and opponents. There is no commission consensus on this issue.