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II. JURISDICTION OF THE CALIFORNIA COURT OF APPEAL

A. Essay - Restructuring the Judicial Pyramid: Expanding the Jurisdiction of the California Court of Appeal

Robert S. Thompson*

This paper accepts and examines the general perception that the overload of matters calling for the attention of the California Supreme Court is overtaxing its capacity. My approach proceeds in four steps. First, I examine the causes of supreme court overload and their past impact upon the decisional processes employed by the supreme court. I conclude that the court has subordinated judicial participation in crafting of opinions to controlling the court’s agenda by ruling on petitions for review. Second, I argue that any approach to expansion of the decisional capacity of the court to cope with overload involves a normative judgment of the relative values of agenda control and judicial participation in the development of opinions. Third, I suggest how restructuring of appellate jurisdiction and procedure might be accomplished depending upon the significance attached to these values. Fourth, relying upon the normative conclusion that the value to the judicial process of intellectually disciplined opinions is a fundamental one, equal to or greater than agenda control — a proposition which I defend elsewhere¹ — I propose a restructuring of the court of appeal to remedy the consequences of high court overload, which inhibits the exercise of this discipline. I suggest that while this restructuring will increase the burden upon the court of appeal, a reorganization of this court will permit the court of appeal to cope with this additional burden without increasing its complement of justices.

Section I is based upon the available windows into the internal

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operations of the California Supreme Court. These indicate that its overload is a combination of mandatory first instance appellate jurisdiction and the sheer numbers of petitions for review. Except for an immediate and short range problem of death penalty cases, the latter are by far the most significant factor. These windows indicate further that the California Supreme Court has adapted to an increased inflow of matters by emphasizing agenda control at the expense of judicial contribution to the production of opinions.

Section II analyzes the importance attached to agenda control and judicially employed intellectual discipline upon development of means to cope with overload.

Section III proposes that the process of intellectually disciplined opinions is a dominant value. In this section I argue that, given the current rate of petitions for review of decisions of the court of appeal, this value can be implemented only by transferring some workload from the high to the intermediate court in a fashion which does not denigrate the present values of supreme court review. I suggest a change in structure of the court of appeal to create a permanent en banc panel. I claim that: (1) this change will serve a policy of statewide uniformity which is an important underpinning of mandatory, first instance jurisdiction in the high court, and of the expressed standards for supreme court review; (2) it can be utilized to reduce the burden of considering petitions for review by the supreme court; and (3) it will also increase the capacity of the appellate system to serve the values implicated in successive tiers of appellate review.

Section IV suggests that, if necessary to cope with the workload shifted from the supreme court to the court of appeal, the court of appeal can also be restructured to increase its capacity. I argue that: (1) this restructuring should take the form of the creation of the positions of appellate commissioner (or magistrates); (2) these officers can, subject to a court review which either adopts their opinions or readjudicates, dispose of a large segment of cases within the court; (3) this process is little different from the intermediate court’s present use of central staff but limits the role of justices to the much easier task of determining whether a request for rehearing within the court of appeal demonstrates substantial error in the commissioner’s opinion; and (4) in the bulk of cases now treated as “routine” and processed by central staff the probability of demonstrable error is very slight.²

² See Oakley & Thompson, From Information to Opinion in Appellate Courts, 1986 ARIZ. ST. L.J. 1, 68-71, 75-76, 78 (describing and justifying this procedure).
Because this paper is a discussion of only one portion of a one-day symposium, I do not purport to develop in any great detail justification for most of its propositions. Rather, where possible, I make reference to my efforts to do so appearing in other essays. Nor have I made reference to literature pertinent to the subject except where reference is absolutely necessary.

I. THE CAUSES AND CONSEQUENCES OF SUPREME COURT OVERLOAD

A. The Causes of Overload

The supreme court overload results from the almost universal problem in urbanized states of too many cases facing too few judges. Theoretically, the number of trial court judges can be increased without limit to meet the needs of expanding populations and the needs of the legislatures and the courts as they both create new justiciable claims and increase the complexity of traditional and new claims. Increase in the number of panels of intermediate appellate judges is limited only by the possibility that disparity of cases in common law development inherent in the process of decision by human beings becomes unacceptable. Expansion of high courts operating in the common law tradition is limited, however. This tradition, one of decisions collegially reached, mandates that the court remains small so that full collegiality is promoted.

In the fiscal year 1959-60, there were 300 superior court judges in California, and twenty-one justices of the court of appeal. There were seven justices of the supreme court. In the fiscal year 1984-85, there were 777 superior court judges, seventy-seven justices


If our 13 divisions — comprising an almost unlimited number of three-judge panels — are each free to go off in different directions, we either force the Supreme Court to grant hearings to settle needless conflicts, or we perpetuate the balkanization of our law, because the Supreme Court simply cannot keep up with all the 'critical evaluations' of which fifty appellate justices are capable.

Id. at 15.

In the ten years since Justice Kaus produced his monograph, the number of justices of the court of appeal has increased by over fifty percent and fragmentation of the court into autonomous divisions has continued apace.

4. Judicial Council reports giving statistics relating to the California judiciary are compiled on a fiscal year ending June 30.

5. 1961 CAL. JUD. COUNCIL REP. at 96, 144.
of the court of appeal, and still seven justices of the California Supreme Court. In 1959-60 the court of appeal decided 1440 cases by opinion, and there were 783 petitions seeking hearing by the supreme court of cases decided by the court of appeal. In 1959-60 the supreme court filed 167 opinions. In 1984-85 the court of appeal decided 8599 cases by opinion, and there were 3464 petitions for hearing in the supreme court. In 1986 the supreme court filed 125 opinions. The number of petitions for hearing increased over four fold in the period, while the number of opinions of the supreme court decreased by about one fourth.

Out of the 783 petitions in 1959-60 and the 3464 petitions in 1984-85 the seven justices of the California Supreme Court were required to select those petitions which necessitated supreme court action to secure uniform decisions or to settle important questions of law, and then to produce an opinion (along with dissenting and concurring opinions in some cases) resolving the cases in which review was granted. The more time the justices and their staffs spent upon the determination of which cases to review, the less time there was available for the production of opinions declaring the most important legal policy of California, resolving conflicts in court of appeal decisions and deciding appeals in the court’s first instance appellate jurisdiction.

With no data in the form of time and motions studies of the internal workings of the high court, assumptions are necessary to determine the impact of the changes from 1959-60 to 1984-85. Assume for our purposes that in 1959-60 justices and their staffs allocated twenty percent of their time to determination of the cases on which they should grant or deny review and eighty percent to resolutions of cases. Assume also that the twenty percent of time allocated to exercise of the court’s discretion to grant or deny review did not involve wasted effort — that the time was well spent. With the number of petitions for review quadrupled in 1984-85, the allocation becomes eighty percent to exercise of the discretionary function and twenty percent to the mandatory jurisdiction cases and those where a

6. Id. at XV, 119.
8. 1961 CAL. JUD. COUNCIL REP. at 146.
10. Id. at 100.
11. Id. at 102.
12. CAL. R. CT. 29(a) (the rule also provides for review by the supreme court where the court of appeal lacked jurisdiction or the decision of the intermediate court lacked concurrence of the required majority of judges).
hearing was granted. If, as seems likely in 1984-85 because of death penalty cases, the number and complexity of cases within mandatory first instance jurisdiction of the court increased out of proportion to cases involving review of decisions of the court of appeal, a very small proportion of the justices’ time was available for opinions resolving conflict in decisions and declaring policy.

Efficiency devices adopted by the court in determining which petitions for review to accept (such as its “A” and “B” lists which pre-screen problematic petitions from those clearly deniable) could have reduced the full impact of the fourfold increase in petitions for review. Nevertheless, this increase must have severely diminished the judicial time available for the crafting of opinions.

B. The Consequences of Overload

An outsider to the California Supreme Court is by no means fully equipped to assess its internal operating procedures. In this segment of the paper I rely upon the few glimpses into the operations of the court supplied by the public record in two proceedings before the California Commission on Judicial Performance. The first deals with the proceedings leading to the involuntary retirement of Justice Marshall McComb. The second is the transcript of the public portion of the 1979 Hearings Concerning the Seven Justices. The transcript of 1979 is revealing but almost ten years old. The operating procedures of the court may have been modified considerably, a subject I leave to commentators on this paper. Because nothing else is publicly available, this portion of the paper is based upon procedures disclosed in the 1979 hearings.

The court's method of operations in 1979 centered around Wednesday conferences at which petitions for review were considered. The Wednesday conference dominated the professional lives of the justices. Justices devoted the first part of each week to preparation for the conference by reviewing conference memoranda on cases prepared by or under supervision of other justices. The conference on Wednesday at which these memoranda were considered consumed about half of this day. By Thursday, each justice was engaged in preparing or supervising preparation of memoranda on cases as-

15. These procedures are described in greater detail in Thompson, supra note 1.
signed to them. These memorandums would be distributed to other justices for future conferences.17

The justices’ time for work on opinions was limited; Justice Tobriner had one to one and one half days a week for this activity.18 Opinion preparation was primarily the function of staff attorneys employed by the justices subject to their supervision.19 The justices had virtually no time for collegial discussion to test one another’s thoughts, or to discuss the applicability, contours, and limitations of principles of decision employed in opinions.20 The Wednesday conference was taken up with other duties, and in any event the staff attorneys drafting the language of opinions were excluded from this conference. The court’s internal operating process failed to provide for a meeting of all the justices to discuss the content of opinions. At such meetings, the process of collegiality of decision could be promoted. Indeed it seems that such a meeting would have been of little value because of the predominance of staff attorney contribution to opinion writing. Collegial interaction, where it occurred, consisted primarily of sporadic contact between staff attorneys working for different justices.21

II. Agenda Control and Production of Opinions

On the basis of relative time devoted to the functions, it is clear that in 1979 the justices of the California Supreme Court placed an overarching value upon agenda control and a much lower value upon their personal participation in the crafting of opinions. Assuming this is still the case, the correctness of this conscious or inadvertent allocation of values must be examined as a prelude to consideration of the ways to enhance decisional capacity. If agenda control is the overriding value, then means to increase the capacity of the justices to exercise this control are the primary concern. If personal judicial participation in opinion production is equal to or more important than the other values, then the questions of means to enhance judicial capacity are quite different.

17. See, e.g., id. at 176, 558-60 578-86, 1180.
18. Id. at 578-60, 1180.
20. See, e.g., id. at 134, 1418-19, 2149-50.
A. Agenda Control

The conventional wisdom is that one factor which distinguishes judges from other political actors is lack of control by judges of their agenda — judges must act within the confines of cases which come to them, but which they do not seek. This may be an overstatement. There is likely to be a rather broad field of agenda control where high court judges can select from among approximately thirty-five hundred petitions per year; at the same time, they can also indicate their areas of interest by speeches, law journal writing, and casual conversation as a means of influencing the litigation agenda of parties and their lawyers. At the other extreme of the balance, judicial discretion in determining the content of opinions might be so limited that agenda control necessarily should dominate.

Agenda control would be the overriding value of an adherent of Critical Legal Studies who believes that supreme court law is only politics and the allocation of social power. Opinions are then public relations propaganda and not exercises in intellectual discipline. It is results which count, and preferably the result should be abolition of the social hierarchies which an individual deems illegitimate. To an extreme Legal Realist, agenda control is also the primary value because any result in a case of any difficulty is justifiable by an opinion, and the high court deals with this sort of cases. In this case also it is the result that counts much more than its justification.

If personal judicial input into the content of opinions is not deemed important, and if opinions are simply designed to declare a result and law upon which the result is based and to explain this to public and professional audiences, the solution to increasing caseloads is relatively simple. Expansion of the corps of supreme court staff attorneys is limited only by the ability of the justices to supervise their work. Justices need only tell the staff what result they desire and what legal principles should be enunciated. Presumably, organization of staff attorneys in a hierarchical form with a chief of staff and staffs of subunits working for each justice could permit a broad expansion of the decisional capacity of a court which is determined to proceed by way of this bureaucratic (in the nonpejorative sense) structure. Justices who possess global views of the good society, and who also view their role as instruments to achieve it, can devote all of their time to agenda control.

22. This is by no means an off-the-wall view of the judicial role. See Tobriner, Can Young Lawyers Reform Society Through the Courts, 47 CAL. ST. B.J. 294, 296-98 (1972): "[D]emands for social reform — and even for social "revolution" — [should] be pressed in the
Opinions which justify the result and the principle of the decision are much more time-consuming to produce than judicial decisions which state how a judge would like a case and the law resolved. Decision without justification may be the role of judges preferred by the hypothetical extreme exponent of Critical Legal Studies or the ultra Legal Realist. Justices of the supreme court would be viewed as future oriented, wise, and learned people vested with a special status and independence. This special status enabling them to carry out their wishes because their opinions would be viewed more likely to be correct than the preferences of others.

At the other extreme, it may make no difference who decides cases and declares law so long as the job is skillfully performed. From an ultra formalist position, the law exists; the task is to find it and apply it to the facts of a particular case. In this approach the task of gleaning the law may be difficult and require great skill, but the opinion merely records what has been found. Then justices of the supreme court can be viewed as supervisors of others: highly competent administrators and skilled evaluators of the talent and capacity of their employees who find and apply the law.

If either of these approaches is adopted, the solution to the strain on supreme court resources is also an increase in its decisional capacity by increasing the number of staff attorneys. Eventually, restructuring of the court of appeal would be necessary only if the resources of the supreme court justices in managing this staff were overtaxed. It is only if the normative conclusion is reached that judicial opinions serve a goal which is equally or more significant than agenda control that there should be concern over the consequences of supreme court overload. These concerns must be directed at the restricting effect of overload on the justices’ time spent crafting and collegially discussing opinions.

At the other extreme, the supreme court justices might view agenda control as having very little importance. They could adopt the pragmatic view that the court’s capacity to decide cases is limited. At any given time there is likely to be room for only so many more judicial sphere and framed in the context of legal relationships.” Id.

While Justice Tobriner was writing from the perspective of the failure of the legal system to respond to the needs of women, racial minorities, and powerless groups, the same thought of courts as instruments of social change seems present, though from a quite different end of the political spectrum, in the writings of some prominent law and economics scholars appointed to the bench. In their case, the change would be in the direction of utilization of a free market, defined to extend beyond the sphere of commerce, as the primary instrument of social control.


Id.
cases in the queue awaiting decision by opinion as there are cases to be removed from the queue by resolution. Staff, supervised by its most talented and experienced personnel and acting within guidelines set by the court, could then be instructed to assign a rank number to twice the number of cases which are the best candidates for supreme court action. With agenda control deemed unimportant, selection by the justices from the short list should not be overly time consuming. The justices' time could be devoted primarily to crafting opinions.

Restructuring of the court of appeal to reduce the demand upon the resources of the supreme court is necessary only if these resources are overtaxed. It may be that overload can be addressed by total emphasis upon agenda control or by total subordination of agenda control. It may or may not be that either of these scenarios is accurate, but in my opinion one does not reach the question of accuracy. Accommodation of diversity of judicial approaches on the court requires that its resources be sufficient to allow justices to participate in both functions. When the combined functions are considered, there is little doubt that the conventional wisdom that the court is overloaded is correct. If this contention is true, restructuring of the court of appeal to relieve the supreme court of some of its burden warrants consideration.

I suggest that while agenda control should not be the overarching value which submerges or subordinates the value of judicial participation in crafting of opinions (a point I develop in the next section), judicial agenda control is important. In a sense, the overarching emphasis placed upon agenda control by the court in 1979 can be attributed to the activist, in the nonpejorative sense, approach of the justices. Activism requires not only that the pace of development of legal principles be rapid, but also that avenues by which the development can occur be sought. Hence, agenda control was highly significant to the activist justices of 1979 whether they did or did not consciously recognize its importance. What I see as wrong in the agenda control of 1979, which from all I can tell from casual conversation persists today, is that judicial participation in production of opinions was submerged. Participation in activism was not restrained by the justices' desire to personally participate in justifying the expanded legal principles which they adopted.

I suggest that there may always be, and should be, some justices of the court who are activists. Indeed, from my fifteen years in the California judiciary I know of very few judges who are pure formalists — who are not at some point and to some degree activists. The
problem in agenda control is not to preserve it, but to keep it within bounds so that the opinion crafting function is not submerged. To this end, restructuring of the court of appeal in a fashion which enhances the supreme court’s resources available both to judicial participation in crafting of opinions and in agenda control merits consideration.

B. Production of Opinions

I draw the normative conclusion that opinions serve a vital function which is equal to or more important than agenda control. In so doing I suspect that I am rekindling a twenty-five year battle over the subject with Bernard Witkin. Mr. Witkin will have his say as a commentator to this paper.

I suggest that the judicial opinion serves a dominant value in the judicial system of the United States by disciplining and restraining the judicial decision. In my view, neutral principles have not gone the way of high button shoes and buggy whips. It must be conceded that judicial decisions are value laden as a result of the life experience of judges and their place within the political system. I am aware of no current jurisprudent who still argues the validity of Langdell type formalism. With formalism rejected there is a judicial value choice in deciding hard cases. Absolute neutrality of principle is an unattainable goal. However, it is the aspiration to this goal which is a primary factor distinguishing the judicial role from the role of other political actors. The late Chief Justice Roger Traynor made this point:

In sixteen years I have not found a better test for the solution of a case than its articulation in writing. A judge, inevitably preoccupied with the far-reaching effect of the immediate solution, often discovers that his tentative views will not jell in writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day.

24. The battle has been a pleasant one. My regard for Bernie Witkin is evidenced by the action of what was then called the Conference of California Judges in the year of my presidency of the organization. In 1974 Bernie Witkin was designated official Guru of the California judiciary with indicia of office to match.


26. This point is defended at greater length in Thompson, supra note 1.

27. Traynor, Some Open Questions on the Work of State Appellate Court, 24 U. CHI.
One may simply conclude that the special position of the judiciary alone gives it the trump cards when its conclusions clash with the other branches. One can also seek the reasons why these cards are in the judicial hand. The intellectual discipline which strives for neutrality employed in the judicial process is absent in the other branches. Thus, the judiciary is distinguishable from the other branches. If this is true, judicial opinion crafting is equally or more important than judicial agenda control. Overload must then be addressed in the context of increasing the time available to justices to participate in the process of crafting opinions. Consideration of restructuring the court of appeal as a means to this end is then worthwhile.

III. RESTRUCTURING THE COURT OF APPEAL

A. Some Possible Forms of Restructuring

There are a number of directions which restructuring of the relationship between the supreme court and court of appeal could take. For example, the supreme court might totally emphasize agenda control. With this objective in mind, a second tier review panel of the court of appeal, an en banc panel of some set number of appellate judges, could be created to which the supreme court would

The constructive model ... does not support the policy of submerging apparent inconsistency in the faith that reconciling principles must exist. On the contrary, it demands that decisions taken in the name of justice must never outstrip an official’s ability to account for these decisions in a theory of justice. ...

Id. See also Smith, A Primer on Opinion Writing for Four New Judges, 21 Ark. L. Rev. 200, 201 (1967):
Why an opinion at all? Above all else to expose the court’s decision to public scrutiny, to nail it up on the wall for all to see. In no other way can it be known whether the law needs revision, whether the court is doing its job, whether a particular judge is competent.

Id.

But see B. Witkin, Manual on Appellate Court Opinions 16 (1977):
In government, business, and the academic world, the writing down of significant thoughts is often done by someone with special skills in expression and plenty of time to devote to the task, working for someone who initiates or acquiesces in those thoughts but has only limited time to phrase them. Thus, courts need not seek excuses for delegating part of the opinion-writing function to talented experts with superior legal training and experience in writing. It is the task of stating reasons for the decision, not the authority to decide that is delegated. No matter how elaborate or polished the draft opinion may be, the justice must make the final version his own opinion, because he is responsible for what it says.

Id.
direct the decision on cases which have been granted review. Review *en banc* would be the final step in the process. The justices of the supreme court could use all of their time for agenda control. Freed of any obligation of agenda control the justices of the *en banc* panel could devote all their time, except for administrative duties and hearing argument, to opinions.

Rather than one *en banc* panel, the court of appeal could be restructured with several panels each devoted to a specialized area or areas of cases. The supreme court would then control the agenda and divert disposition of a case after it granted review to one of the specialized panels.

The restructuring could also be in the reverse direction. Agenda control could be transferred to the *en banc* panel which would determine all petitions for hearing and send those granted a hearing to the supreme court. The bulk of the supreme court justices’ time would then be available for personal participation in crafting opinions.

Different changes in structure are required if the conclusion is reached that the supreme court should continue in its role as the judicial maker of important policy while retaining control of its agenda and allowing its justices time for personal participation in crafting of opinions. These changes must seek a balance of both judicial participation in crafting opinions and in agenda control.

It is possible to restructure the court of appeal to give its *en banc* panel influence over agenda control, with the final word in the supreme court, while dividing the function of crafting opinions between the *en banc* tribunal and the supreme court. The objective here is to reduce the load upon the supreme court by transferring some of both agenda control and opinion production to the *en banc* tier.

Because this last possibility does the least violence to the supreme court’s traditional role as the formulator of policy decisions and controller of its agenda, I will further develop this form of restructuring. I do so with the following objectives in mind: (1) There should be a tribunal which satisfies notions of uniformity of appellate decisions within the state; (2) To the extent feasible if this tribunal is not the supreme court, it should be in step with the high court. However, the judges of this tribunal should be free to make their own judgments without *ex parte* influence; (3) The *en banc* panel

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and the supreme court should be organized with adequate attorney staffs assisting the justices of the respective tribunals. In addition, processes of decision should allow adequate time to their justices to exercise intellectual discipline in the crafting of opinions, either by writing them personally or by close supervision of staff attorneys, at each significant step of the opinion crafting process.29

B. A Suggested Format

1. Structure and Function

I suggest that the following structure and allocation of function serves the objectives I have noted. There should be one *en banc* panel empowered to exercise discretionary review over decisions of the other panels of the court of appeal. This power of review by the *en banc* panel should complement supreme court review. To the extent possible, the supreme court should review cases involving important public policy. The *en banc* panel should review cases involving inconsistent decisions and lack of majority in the original appellate panel. By necessary amendments to the California Constitution and statutes, mandatory first instance appellate jurisdiction should be placed in the *en banc* panel, subject to petition for review in the supreme court. To provide for the possibility that the workload will not be divided approximately equally between the two courts of review, there should be provisions for transfer of cases or categories of cases from one to the other by order of the supreme court.

The *en banc* panel should consist of seven justices of the court of appeal. Each justice should be designated to the *en banc* panel by one justice of the supreme court including the Chief Justice. Alternates should be appointed in the same fashion to provide for absences and recusals. To avoid the appearance that the appointing justices of the supreme court control the decisions of the *en banc* panel, appointments should be for a term. The justices of the *en banc* panel should be supported by attorney staffs and other subordinate personnel equivalent to the supreme courts staff support. The chambers of the justices of the *en banc* panel should be located at one place within the state to ease communication and enhance collegiality.

The term for which these appointments should be made presents a formidable problem. Short terms such as one year pass the

29. See Oakley & Thompson, *supra* note 2, at 42-44, 63-64 (describing forms of delegation by judges to attorney staffs and evaluating various forms of delegation).
honor around and avoid the appearance of “two supreme courts.” But if the en banc court is adequately staffed, all of its continuity will then be in that staff. By the time a judge learns enough about the capacities and idiosyncrasies of his staff attorneys to be able to work with them comfortably, the term will end. In the meantime, there is an unacceptable risk that the newcomer judge will be overdeferential to the judgments of the long term staff attorneys, or the judge overcompensating for this possibility. As a result, the staff attorneys’ value is diminished.\(^{30}\)

I do not view the appearance of “two supreme courts” or the failure to pass the honor around as being significantly undesirable for reasons other than blows to judicial egos. In my view, the judicial ego alone is not a value that deserves protection. I therefore suggest that each appointment to the en banc panel be for the remaining term of the appointing supreme court justice or until his or her death or retirement. Justices of the en banc panel should be free to resign and return to their divisions of the court of appeal. Supreme court justices should be free to reappoint the same court of appeal justice or another when they begin a new term.

2. Procedure

There are three broad options for designing a system of review by the two tribunals, and in the process allocating the business of review of court of appeal decisions between them. Choosing from among them is a matter; first, of acceptability in terms of the extent of departure from familiar practice; and second, of the extent to which the change serves the objective of making more time available to judges for work on opinions while retaining an appropriate degree of agenda control.

One option is for initial review in the en banc tribunal, with further review in the supreme court at its discretion if a petition is filed by a litigant disappointed with the en banc panel’s decision.

The second is like the first but would give the en banc tribunal authority to recommend to the supreme court that it exercise its discretion to take the case for review, either in the first instance or after decision by the en banc tribunal.

The third involves two contemporaneous tracks in which the litigant can request supreme court review of issues which raise important public policy considerations and at the same time request review

\[30.\] Oakley & Thompson, supra note 2, at 35-36.
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by the \textit{en banc} tribunal because of mandatory jurisdiction, inconsistency of decision, or lack of a majority in the court of appeal panel. Under any of the options, the sole basis for review by the supreme court, other than its own decision to transfer cases to equalize the workload, is the important public policy considerations underlying the case. Under all the options, the supreme court retains its infrequently exercised power to transfer particularly important cases requiring quick resolution to itself.

The third option is the most problematic. It involves the greatest change from accepted practice, and is procedurally complex. While theoretically dividing the petition consideration task between the two tribunals, it is unlikely to have much impact in this regard in practice. Lawyers are unlikely to give away the slightest chance that some ground for review will work and hence are likely to file petitions in both courts.

Although the first and second options are quite similar, I suggest that the second is preferable in the context of appropriate reliance by the supreme court upon staff for agenda control. Under neither of these options is significant reduction in the number of petitions for review filed in the supreme court likely to result. It must be recognized that both options involve a greater burden on the bar in the form of the duplicative process: an unwise result if it is not compelled by supreme court overload. Both options double the judicial complement available for crafting opinions. However, if the assumed twenty percent of judicial time now available for this purpose in the supreme court is spread over one half of its opinions, the additional time available may still be inadequate without greater reliance upon staff attorneys in agenda control than in the present system. If a substantially greater reliance upon staff attorneys in the processing of petitions for review in both the supreme court and the \textit{en banc} tribunal is feasible, less judicial time will be consumed in the process.

Consider how staff might be utilized in the \textit{en banc} tribunal in the first and second options. The staff attorney deemed most capable by the justices because of past experience, knowledge of the pattern of past cases, training, and innate ability, would be assigned as head of a corps of other capable staff attorneys. The Rules of Court should specify that petitions for review must first state the ground(s) for review provided in the Rules of Court upon which the petition is based and then show a substantial basis raised by the record which supports the ground(s) asserted. Support for the grounds that review is required for reasons of important public policy must be demon-
strative and not speculative. All asserted grounds which are not sub-
stantially supported by statements in the petition will be summarily
stricken.

The attorney staff will scan the petition to determine compli-
ance with the rules and to determine where summary denials of peti-
tions and summary dismissals of grounds are required. The staff will
then recommend appropriate action to the justices. Since these steps
should be taken only if the reasons for them are clear, there is little
need for either extensive memoranda or judge time in reading and
acting on them.

As to grounds which survive initial screening, a staff attorney
memorandum reviewed critically by the chief staff attorney will re-
cite the ground(s) for review. Does, for example, that the case in-
volves an issue important to the public policy of California, the need
to resolve a conflict in court of appeal opinions, or a lack of a major-
ity in the panel of the court of appeal? As to each ground, the
memorandum will state whether the statements in the petition sup-
porting the ground are correct, whether the ground is supported by
the record, and whether it is available in the procedural posture of
the case.

Where the ground is resolution of discrepancies in court of ap-
peal opinions or lack of a majority of the appellate panel, the staff
memorandum is likely to be brief: reading it should not be very time
consuming to the justice. This can be an “either it is or it isn’t”
question. If the discrepancy is problematic a good reason for the
court to take up the case should exist. The presence or absence of the
good reason, again, does not need extensive treatment.

The ground of necessity to resolve issues of important public
policy is more ephemeral and hence likely to result in a longer staff
prepared memorandum. However, it appears that the justices can
justifiably rely upon the memorandum’s content. The policy implica-
tions of the case can be stated crisply. Because the memorandum
issues from a staff working for the court as a whole, it is not subject
to the influence of the inner workings of the psyche of an individual
justice, as is the current procedure. Hence, no one justice need be
concerned that these have influenced the memorandum’s recomenda-
tion.

Those justices who are not driven by a need for activism can, by
reliance upon the memoranda, substantially limit the time spent
upon petitions for review. One may hope with some justification that

the time saved will not only permit these justices to participate actively and critically with their staffs in producing opinions, but also that regular conferences at which the justices collegially and critically discuss the content of opinions before they are filed will result.

Justices driven by activism will be free to concentrate on activist pursuits. They can utilize the bulk of their time on petitions for hearing while they seek avenues in which activism should proceed. The contours of the activism they propose will be tested by the input of other justices with the time to give it.

Assume in the second option a petition for review to the supreme court where there has already been a determination by the *en banc* court. The only question is the presence of an issue involving important public policy. Presumably, the petition begins with a statement of what this issue is and why it is significant. If the petition doesn't do so it should be dismissed. A staff attorney is perfectly able to make this determination and convey it by a short memorandum to the justices. Where the statement is contained in the petition, the questions are: (1) is the statement of the issue correct; (2) does resolution of the issue involve important public policy; (3) is the issue really involved when the procedural posture of the case and relevant portions of the record are considered; and (4) is there another issue in the case which might avoid the need to consider the issue implicating public policy.

All of these matters can be resolved by a capable and experienced staff attorney and incorporated in a rather short memorandum to the justices. With review having already occurred in the *en banc* tribunal (with authority to recommend review by the supreme court) anything other than a clear showing of the need for supreme court action can be treated as grounds for denial.

One senses that discretion of the supreme court justices to review is influenced by the effect of review on outcome. Here, the outcome has in many cases been determined by other justices in whom there is confidence so that little, if any, attention need be given to their solution in the memorandum. Thus, this result is a reason for preferring the second option over the first.

C. *Tiers of Review and Uniformity*

I have discussed the impact of restructuring the court of appeal upon the workload of the supreme court. The presence of the *en banc* panel serves the long accepted value of having a court which is available to review decisions of a multitude of autonomous divisions of the court of appeal. It is important that like cases are treated simi-
larly. However, empirical studies of the impact of the autonomy of the divisions indicate that they, as do other small long standing groups, develop an internal culture and unarticulated norms which influence their decisions.\textsuperscript{32} Discrepancies in resolutions by the divisions thus result.

While the subject of the supreme court's backlog of death penalty cases is covered by others at this symposium, I note that the \textit{en banc} panel seems a much more appropriate vehicle for handling this situation than the individual divisions if the decision is made to transfer some of the high court's backlog of death penalty cases to the court of appeal. Studies of the individual divisions in the Second District have demonstrated a wide discrepancy in their rate of reversal of criminal cases which has occurred so consistently and over such a period of time that it cannot be attributed to differences in the cases reviewed by the division.\textsuperscript{33}

With the differential in reversal rates so demonstrated, it is unfair, and perhaps a problem of due process, to transfer the death penalty cases to the present divisions of the court of appeal without expensive and detailed rehearing by the supreme court. The problem would be avoided if the \textit{en banc} tribunal were utilized.

\section*{IV. Further Restructuring of the Court of Appeal}

Removal of seven of its justices to a permanent \textit{en banc} panel assigned the caseload I have suggested removes about nine percent of the judicial complement of the court of appeal. Perhaps the justices of this court are now worked to their limits so that there is no slack, and the court must be further restructured.

I have suggested and defended elsewhere the proposition that the elevation of senior staff attorneys, or their equivalent, to positions of appellate commissioner (or magistrate) will greatly reduce the work of justices now devoted to central staff cases.\textsuperscript{34} There is no need to repeat the detail or defense of this suggestion here. In very broad outline, cases now processed by central staffs in the court of appeal, and other similar cases that could be so processed if these staffs were expanded, will be assigned by the court to one of its commissioners. The commissioner will decide the case by opinion subject to rehearing by the court on petition. In this review, the court will either adopt the opinion by a one sentence order, modify and adopt it, or

\begin{footnotes}
\item[32.] For support of this proposition see Oakley & Thompson, \textit{supra} note 2, at 46-52.
\item[33.] Oakley & Thompson, \textit{supra} note 2, at 46-52 (discusses three empirical studies).
\item[34.] Oakley & Thompson, \textit{supra} note 2, at 75-77.
\end{footnotes}
grant a rehearing in its discretion. Because these cases are routine in the sense that any skilled decision maker would reach the same result, rehearing or modification by the court is unlikely. Rehearing is necessary only if the case has been misclassified as routine and the misclassification is readily apparent from a quick comparison of the commissioner's opinion with the petition for rehearing. If one assumes that court of appeal justices spend significantly more than nine percent of their time on central staff cases, the process I describe compensates for the loss of seven members of the judicial complement of the court of appeal.

V. CONCLUSION

There is a general perception that the supreme court is overloaded. It may be that the load is due to past overenthusiastic exercise by justices of the court of their power to review, but overload seems more likely a result of lack of expansion of the judicial system to handle a constantly increasing number of more complex cases. The supreme court's resort to primacy of agenda control has resulted in a greatly reduced participation by its justices in the crafting of opinions. If one believes, as I do, that this personal participation is important at least as agenda control, means must be found to increase the time of judges available for crafting opinions. I suggest the restructuring of the court of appeal as this means.

APPENDIX

The Honorable Malcolm M. Lucas
Chief Justice, California Supreme Court
350 McAllister Street
San Francisco, CA 94102
Dear Chief Justice Lucas:

We had the opportunity to meet and talk briefly when you were in San Diego last month for Justice Benke's confirmation hearing. At that time, I mentioned that the Appellate court Committee of the San Diego County Bar Association had been studying the concept of an en banc conflict resolution panel for the California Court of Appeals and inquired whether the Select Committee on Internal Procedures of the supreme court might be considering such a concept. You suggested that I send you a copy of any proposal we developed and graciously indicated you would pass it on to the Select Committee.

The institutional pressures on the California Supreme Court are a source of increasing concern not only to the court but also to
appellate practitioners and members of the Bar in general. Although the influences are gradual and subtle, there is no question but that the quality of practice — and indeed of justice — suffers when the capacity of the supreme court to function as the institutional leader of the California judicial system is impaired.

It seems difficult to contest the observation that the supreme court's ability to guide and shape the development of California law has been significantly reduced over the last 25 years. As you are undoubtedly aware, while the number of opinions issued annually by the court during that period has remained relatively constant, the number of cases the court is asked to hear has increased dramatically. In 1961, the number of opinions issued was roughly 25% of the number of requests for hearing. By 1986, that figure had shrunk to less than 4%.

One of the key functions of the supreme court in the California judicial pyramid is to resolve conflicts among the intermediate appellate courts. (See Cal. Rules of Court, Rule 29(a)(1)). With the increases in the number of autonomous districts and divisions of the court of appeals (10 in 1961 compared with 18 in 1987) and the number of court of appeals justices (30 in 1961 compared with 76 in 1987), this function has become even more critical now than it was 25 years ago. If the California Citation Guide found in the advance sheets is an accurate indication, there were at least 35 cases last year in which the court of appeals opinion explicitly recognized a conflict with another court of appeals decision.

With these facts in mind, our Appellate court Committee has, for approximately the last year and one-half, been evaluating the possibility of an en banc procedure for the California Court of Appeal which would establish a mechanism for resolving conflicts among intermediate appellate panels without the necessity of a supreme court grant of review. The genesis of the project was a discussion between members of the Committee and then recently appointed Presiding Justice Daniel Kremer of the Fourth Appellate District, Division One in December of 1985.

The Committee's initial focus was on developing a procedure for resolving conflicts within an appellate district. In researching this idea, we contacted several persons well-versed in California appellate practice. Among them was former court of appeals justice and ninth circuit judge Shirley Hufstedler. Judge Hufstedler expressed interest in the project and suggested we expand our concept to encompass a state-wide en banc court which could resolve conflicts among all the court of appeals and thus more substantially aid the supreme court.
Shortly after we received Judge Hufstedler's suggestion, we met informally with three justices from the Fourth Appellate District, Division One to discuss the idea: Justice Kremer, Justice Howard Wiener and former Justice Gerald Lewis. All three expressed an interest in Judge Hufstedler's concept and encouraged us to pursue it.

The attached outline is the Committee's initial attempt at a discussion piece embodying the concept of a state-wide en banc procedure to resolve conflicts among panels of the court of appeals. There appear to be two significant types of benefits which would result from such a proposal. One involves the assumption that there are a substantial number of cases in which the court of appeals opinion creates or perpetuates a conflict which the supreme court is unable, unwilling or believes it unnecessary to resolve. Because a conflict in court of appeals opinions means superior courts are free to choose from among the competing rationales, *see Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 456, *** P.2d *** , *** Cal. Rptr. *** (1966), such conflicts create uncertainty for litigants and difficulties for lawyers attempting to advise their clients on a course of action. It has been the experience of the members of this Committee that there is a direct relationship between the amount of legal uncertainty and the transaction costs of the judicial system because uncertainty reduces the incentive to settle cases, thereby engendering further litigation. Thus, a key benefit of the proposal is that the number of existing conflicts — and hence systemic uncertainty — would be reduced.

Equally significant in terms of benefits is that an en banc conflicts procedure would give the supreme court an alternative means of dealing with those conflict cases in which it now feels compelled to grant review. If conflict cases could be referred to the en banc court, it would free up the supreme court's time for granting review in other types of cases. Accordingly, regardless of the frequency with which the supreme court currently grants review in conflict cases, an en banc procedure would result in significant benefits for the California legal system.

Some specific aspects of the proposal deserve comment. Two value judgments underlying the entire project have been the practical concerns that an en banc court is only as valuable as it is used and that adding another level of appellate review is duplicative and undesirable if the en banc court does not finally dispose of most matters transferred to it for hearing. These two judgments tend to dovetail in at least one respect. Obviously an en banc court cannot achieve the benefits noted above if the supreme court routinely feels obligated to
grant review of its decisions. The corollary of this proposition is that if the supreme court becomes uncomfortable with the en banc procedure because it is creating rather than saving work, it will seldom transfer a case for decision. Unused, the en banc procedure cannot result in the benefits suggested above.

The Committee's discussions quickly focused on the composition of the en banc panel as the most controversial issue. The Committee split on the selection procedure. A slight majority supported a plan which would allow each member of the supreme court to select one member of the en banc panel. (Paragraph C1). This selection process would tend to insure that the supreme court was comfortable with the make-up of the en banc court and thus would encourage its use. Moreover, the potential for subsequent supreme court review would be reduced because, as a practical matter, one justice of the supreme court would have to disagree with his or her nominee in order for review to be granted.

Although recognizing the practical advantages of this selection procedure, the remaining members of the Committee did not view the potential for disagreement between the supreme court and the en banc court as sufficiently significant to justify a departure from the theoretical concept of an en banc court as being randomly drawn from the entire court of appeals. (compare ninth circuit rule 25) For this reason, an alternative selection provision was incorporated into the proposal. (Paragraph C2). Under either procedure, the same court of appeals justice would be precluded from serving on the en banc court in successive years.

With respect to the grounds for transfer of a case to the en banc court (section IV), the Committee considered and rejected the possibility of including cases other than ones in which a conflict was present. The resolution of conflicts traditionally has been considered a proper ground for a hearing or rehearing en banc because it allows the intermediate appellate court to resolve an institutional tension which that court itself created. The Committee was concerned that the en banc court with broader jurisdiction might come to be viewed as a mini-supreme court or that it could become a dumping ground for those less glamorous cases with which the supreme court would prefer not to deal (e.g., State Bar, P.U.C., workers comp., taxation, etc.). There may be valid reasons why cases involving certain subject areas should be heard initially by the court of appeals or by some specialized appellate tribunal, but it was felt that was not a proper role for an en banc court of appeals.

Our Committee is very interested in the work of the Select
Committee and hopes that the en banc concept will be one of the topics it considers. We recognize that the outline of our proposal is general in nature and that various specifics would need to be resolved before draft legislation to implement it (presumably a constitutional amendment) could be prepared. Nonetheless, given the fact that the Select Committee is now beginning its work, we thought it best to forward the outline at this time. Needless to say, we would be happy to work further on this proposal if the Select Committee considers it worth pursuing or, indeed, provide any other type of assistance we can.

Thank you for taking the time to review our proposal and for passing it on to Justice Richardson and the Select Committee. Again, it was a pleasure meeting you in San Diego.

Sincerely, William S. Dato /s/
Chair, Appellate Court Committee
OUTLINE OF PROPOSED STATEWIDE “CONFLICTS”
EN BANC COURT OF APPEAL

I. Purpose
A. To promote uniformity of decision, legal certainty, reliance on the law, and equal protection of the law.
B. To reduce the California Supreme Court’s burden of resolving conflicting court of appeal decisions.
C. To create an alternative to depublication.

II. Composition
A. The statewide en banc court of Appeal would consist of seven active justices of the court of appeal.
B. Each justice would serve a one year term on the court. The justice would continue to serve in his or her court of appeal position in addition to being on the en banc court. A reduction of the justice’s normal workload would be necessary. Appointments would continue until all cases which were submitted during the justices’ one year term had been finally decided.

C1. Each supreme court justice would choose one justice and one alternate for the en banc court. The alternate would serve in the event that the supreme court justice’s nominee was disqualified or unable to sit on a particular case or cases. If both the nominee and the alternate were disqualified on any given case, the chairperson of the Judicial Council would select a qualified justice of the court of appeal to sit pro tem. A justice serving on the en banc court one year would not be eligible for reappointment as a justice the following year, but could serve as an alternate. Alternate justices are not precluded from serving in any capacity the following year. No two justices of the en banc court could be from the same division of the court of appeal.

or

C2. Prior to the beginning of the en banc year, each division of the court of appeal and each district of the court of appeal not separated into divisions would choose one justice, by random selection, to serve on the en banc court...
for the coming year. The names would be submitted to the clerk of supreme court, who would choose, by a random procedure, seven justices and one alternate from the names submitted. If the nominee and the alternate are both disqualified on any given case, the chairperson of the Judicial Council would select ad qualified justice of the court of appeal to sit pro tem. A justice or alternate serving on en banc court one year would not be eligible to serve the following year.

D. The Presiding Justice of the en banc court would be chosen by the chief justice of the supreme court from among the seven justices.

III. Jurisdiction

A. The en banc court would hear only those matters referred to it by the supreme court. The method of transfer would be to grant review and transfer the case to the en banc court.

B. Decisions of the en banc court would be reviewable by the supreme court under the normal petition for review process.

C. If not reviewed by the supreme court, the decisions of the en banc court would be binding on all trial courts and all divisions and districts of the court of appeal.

IV. Grounds for transfer to en banc court

A. The supreme court would be empowered to transfer to the en banc court only those cases in which the court of appeal opinion creates or perpetuates a conflict.

V. Hearing procedures

A. The procedures applicable after transfer to the en banc court would be identical to those utilized by the supreme court. There would be optional briefing, oral argument, etc.
Let me start with the problem we are given, which says in effect, should the structure of the California Court of Appeal be modified to relieve the California Supreme Court of some of its workload. I think the answer that I come to is maybe yes, or maybe no. It depends upon a number of factors.

First, as an outsider, I can not know whether the resources of the supreme court are, in fact, overtaxed at this point. I suspect they are from a sheer increase in workload, but I'll leave it to the commentators to answer as they know more about that problem. The second factor is whether the resources of the supreme court may be expanded internally by addition of staff or by change in the nature of staff to avoid any need for restructure. In the end, then, we are at this point: If there is an overload, we must balance internal expansion of the resources of the court against restructuring of the court of appeal.

The restructuring can take several different forms. In talking about those forms, let's look at the nature first of the supreme court load because, if we are talking restructuring, it isn't enough to think about load itself, you have to think about its consequences and how those consequences are attacked.

Now, what is happened to that load? Let us use a twenty-five year period. In fiscal year 1959-60 there were 300 superior court judges in California. On appeals from those courts, there were twenty-one justices of the court of appeal who issued something like 1,440 opinions. Of those, 783 resulted in petitions to the supreme court and the supreme court in that year issued 167 opinions. Bear with me that the key figure at this point is the 783 petitions for hearing. Look what happens twenty-five years later in fiscal year 1984-85. There are now 777 superior court judges and they are working. This is not a matter of appointment of judges that overtax the golf courses. These are judges putting out decisions. There are now seventy-seven court of appeal justices and they are issuing almost 8,600 opinions, 8,599, to be exact, and these result in 3,464 petitions to the supreme court.

The petition load of the supreme court has increased by a multiple of four. Now that is going to affect workload because assume in that earlier period, that the justices of the court were spending about
twenty percent of their time determining which cases to hear. The other eighty percent of the time was spent on opinions, leaving aside matters related to hearing arguments and administration and the like. Control of the court's agenda is likely to become much more important in terms of time spent on that activity compared to the production of opinions.

Now this is borne out to some degree, at least as of 1979, by the transcript of the hearings before the Judicial Performance Commission as the hearings concerning the seven justices are euphemistically called. And those hearings show that agenda control, the determination by the supreme court of which cases to hear, was to many of the justices, at least, the over-arching consideration. Justice Tobriner's testimony indicates he spent something like one to one-and-a-half days a week on opinions. I think Justice Richardson said about half, about even-steven. I don't know what Justice Mosk said because that portion was sealed. And Justice Kaus will have his own comments. Be that as it may, agenda control was treated as very significant.

Now, this gets to the proposition of restructuring the court of appeal. One has to think about both agenda control and opinion production. We can say that agenda control dominates the problem of overload, so that the court must have more time for that. Or we can say that production of opinions is a dominant value, or we can say they are both important and we simply need an overall expansion of capacity. If agenda control dominates, the court could delegate virtually all opinion production to staff, leaving the resources of the judges available primarily, almost exclusively, to consideration of petitions for review. The other way, is for the court to transfer some or all of its agenda control function, the determination of which cases to hear, to a newly structured court of appeal with some kind of an en banc panel or something of the sort that would make this determination.

Now, the flip side, of course, is that if judicial participation in opinions dominates, then we delegate the agenda control function and the court could delegate to its staff the problem of which petitions to hear, and leave all of its time on opinion production. Same with the special panel of the court, which in this instance would control agenda.

Yet, if neither agenda control nor judicial participation in opinion production is the over-arching value then the restructuring of the court of appeal becomes much more complex. We have to leave its capacity and resources to staff to make the necessary agenda control decisions as the supreme court at least determines the high policy of
the state. If you read the literature on administrative agencies, agenda control is very important to law-making over the long run. It is outcome determinative.

Now I suspect I rekindle an old battle with Bernie Witkin, who is more than able to handle himself. I am primarily a platform at this point. I think, as a personal view, that intimate judicial participation in the crafting of opinions is important. Based upon the skimming of jurisprudence one discovers as a member of a law faculty for nine years, there is a discretionary element in supreme court law-making. Now, true, if you are a critical legal scholar and you believe the law is politics and nothing more, that judges can do what they want, then you don't care whether the judge participates in the opinion or not. The judge decides how the case ought to come out, the judge decides what the principal law ought to be and tells the staff member "give me the appropriate eyewash so nobody will know what I'm doing." You might take that approach if you were an extreme legal realist.

At the other extreme, if you're a positivist, Langdel-style formalist, you would say, it doesn't make any difference who writes this opinion, the law is out there somewhere to be found. All we need is the properly skilled person to find it and we'll go hire law clerks like Bernie Witkin and Ralph Clapson, Ray Peters, and we'll get the job done very well.

But I simply don't buy either ultra-realism (CLS) or Langdel positivism and that influences what I say about participation in opinion production. I may be the last living example of anybody who believes in Hart and Wechsler's neutral principles. Even I do not accept them as a fact but as an aspiration; the kind of thing that Dworkin writes about, the kind of thing that Roger Traynor wrote about, saying that in sixteen years on a court of appeal, he had found no better test for the validity of a decision than its articulation in writing, which Chief Justice Traynor called "thinking at its hardest." A statement of the aspiration to the neutral principle.

Now, how would I suggest that this judicial participation in opinions occur if the supreme court justices had maximum time to do it. Not necessarily in writing the opinion. It is a matter of working with staff intimately, at each step of the proceeding, to make sure the thinking is at its hardest. Consider the hypothetical situation you are a judge of the supreme court and you would like this result. There is nothing wrong with, and I have put a lot of research in the area, you telling your staff attorney "this is what I want by way of outcome and justification. Now you come back, having spent a lot of time
with this, and tell me everything that is wrong about the way I want to go.” Or conversely, to tell the staff attorney: “You take off in this direction,” and then the judge to tell the staff attorney everything the judge thinks is wrong for the staff attorney which makes him/her defensive.

Now, where does that leave us with this theory that the judges participate in both agenda control and production of opinions? It means you have to divide the workload. We do that, I suggest, by reference to something that has been floating around at least for twenty-five years in the literature. My guess is it probably goes back some time to Aristotle. We create an *en banc* panel of the court of appeal. We do it a little differently, and whether this is Justice Kaus’s idea or mine, I can not tell you. Because this is like some of my conversations with Bernie Witkin. At some point one or the other of us will claim as an idea that which originated with the other, but we have an informal agreement—it is all right. So I will take credit for this. I will give Otto credit for the title. Otto calls it the “clone court” and that is so Kaussian I can not possibly take credit for it.

The theory would be that each justice of the supreme court would appoint one member of a seven judge panel of the court of appeal, which in effect, would constitute the *en banc* panel for the court. I will not go over the detail of that appointment. That is in the paper. There are three possible procedures by which this court could be employed, as I see it. One is a two-track system of petitions for hearing from the court of appeal, which I think I would reject out of hand, because it would involve simultaneous petitions to the *en banc* panel and the supreme court. That seems to me to be unworkable for reasons that I point out in the paper. The other is a straight line form of appeal, that is, an appeal from the trial court to the court of appeal, to the *en banc* panel, discretion to take or reject the petition for review and then the same kind of process from the *en banc* panel to the supreme court. Again, for reasons I state in the paper, this looks to me not to reduce the workload on the supreme court. It does give us the kind of increase in capacity we are looking for because we are doing everything twice. The third possibility, if it can be worked out mechanically, involves a screening process by this *en banc* panel, in which it does two things. One, it takes some cases for itself. These would be the cases that do not involve high policy; where there is a discrepancy in the court of appeal. These include mandatory jurisdiction cases where there is a policy for state-wide uniformity in state bar matters, PUC matters and death penalty
cases. In any event, some cases are screened off to reduce the load on the California Supreme Court. At the same time, this court has the power to recommend to the supreme court that it take the case directly, because the primary issue is one of high policy, as opposed to one of these lesser important issues that justify hearing or review. Conceivably, one can structure this recommendation in several forms. You could say that if one or two judges of the en banc panel recommend hearing, the supreme court will take it. One could say that unless they all recommend hearing, the supreme court won't take the case. Looking at the possible structure of the California Court of Appeal as the means to address the problems of agenda control, production of opinions by judges, and balancing problems of restructure—expense, complexity of procedure, duplication of process by lawyers—against the need to reduce overload, I think that the need is there and the "clone court" is justified.

Let me now conclude with what I think would be the rule of court which would solve all of the problems of California. California Rule of Court Number 1: The court of appeal may cite no principle that has not appeared in Witkin, Summary of California Law, California Procedure, Criminal Law or Criminal Procedure. Rule 1A: If one of these volumes does not contain the necessary principle, the court may refer the matter to Mr. Witkin, for publication of an appropriate supplement. Rule 1B: Copies of the appropriate Witkin supplement shall of course, be published and available to the public and the price shall not exceed fifty dollars per page where there is a reference.

2. The Panelists' Discussion*

a. Justice Stanley Mosk**

The proposal that Professor Thompson makes is based on the use of our internal resources and the thing that troubles me a bit is to suggest that we're not performing much of a function when we consider what cases to take over, that all we should be concerned with, really, is the writing of opinions. But what cannot be overlooked is that when we deny a petition for hearing, that leaves the court of appeal published opinion intact and it is the law until, of course, some future decision may change it. So, the process of determining what cases to take in the first instance is of tremendous sig-

* We are indebted to Professor Cynthia A. Mertens for moderating this discussion.
** Associate Justice of California Supreme Court (1964-present).
nificance to the pattern of the law and I don’t think it can be deni-
grated by suggesting, “well, it ought to be brushed aside, or given to
law clerks or given to some new tribunal that’s about to be created.”

It seems to me the seven members of the supreme court were
selected to judge, not to find methods of avoiding judging. While, of
course, we get help from the superior courts and the courts of ap-
peal, the final responsibility is that of the seven members of the su-
preme court. And, despite what some critics may suggest, we all do
review each petition and we don’t delegate the responsibility of judg-
ing to law clerks or members of the staff or central staff or anyone
else. And I consider myself to be a judge, not merely a chairman of
the board.

Now, let me give you an example. I give it to you because it
makes me look good. In a case known as In re Lynch, this fellow
Lynch wrote a handwritten petition to the court, just like Clarence
Gideon had done to the United States Supreme Court, and in it he
said, “The Parole Board won’t give me parole and I think I deserve
it. Please do something about it.” Well, this went automatically to
our central staff of law clerks and the memorandum to the court
was, “There’s no merit to this at all. Obviously, we can’t second
guess the Parole Board.” Correct, so far, but I read that petition and
what concerned me is, why was a fellow convicted of indecent expo-
sure sitting in Folsom Prison, when indecent exposure is normally a
simple misdemeanor? Well, it turned out it was a second conviction
of indecent exposure which may be a felony and the punishment for
that felony was, not less than one year. What’s the maximum? Po-
tentially life. So ultimately, our court produced an opinion in which
we prescribed the three criteria for determining when a punishment
offends the cruel or unusual punishment provision of our constitu-
tion. But here, if we had allowed this to remain merely with the law
clerks, and if they had determined the merits of it, that case would
never have been written.

I’m one who does not believe that our workload is overwhelm-
ing. There’s much talk about it being so, and there are statistics to
indicate so. I don’t think that it is so overwhelming that it cannot be
handled by the seven members of the supreme court. As a result I do
not favor another tier in the court system. A similar proposal, as you
all know, was made by Professor Freund of Harvard and former
Chief Justice Burger on the national level and it has not achieved
wide-spread support. I don’t believe that it would save any time, any
effort, and certainly would do nothing but increase the cost to liti-
gants. So, I frankly do not favor that.
Well, do I have any suggestions? Yes. Perhaps we ought to be able to make some reaffirmances and occasionally a summary reversal with directions, as the United States Supreme Court does. That would save a great deal of time in the preparation of a written opinion, which the Constitution now requires. And there are certain matters that could be taken away from our original jurisdiction, state bar, public utilities cases and so forth.

Now in Bob Thompson’s paper, he expresses a fear of the creation of two supreme courts. He suggests that this intermediate appellate court might be deemed another supreme court and he is a little wary of that. My answer to that is, why not have two supreme courts? And that gives me an opportunity to revive my previously moribund suggestion for the creation of a bifurcated supreme court. At the present time we have constant competition in our court for attention between civil cases and criminal cases. Generally, criminal cases deserve priority because human liberty is involved and that means we frequently are unable to handle some civil cases that deserve attention and in many respects affect more people in our society than does the issue of whether a single individual ought to be imprisoned or not. So, what I have suggested before is that we have a bifurcated supreme court. A supreme court/civil, a supreme court/criminal, each with five members on it, a chief justice to be the administrative director of both and to sit in either division when one of the justices is unable to because of illness, vacation, or disqualification. I would have five members on each section of the supreme court and have cases that are civil go to one, cases that are criminal to the other, and that decision would be final. I would have separate reports, so that lawyers, if they handle only civil cases, need not buy the criminal reports.

Well, there’s an objection. This creates a specialization of courts and that is somehow frowned upon. Well, we have a separate tax court now, we have workers’ compensation matters heard by a separate tribunal and I don’t know why we can’t divide matters coming up to the supreme court between civil and criminal cases. Now I must say, when I originally made this suggestion in an article several years ago, I ran it up the flagpole and the only people who saluted were a few members of the Governor’s office who saw an opportunity to get some more judicial appointments. On the other hand, opponents of the Governor were vehemently opposed to it for that very same reason. But I think we have to consider that above and beyond the matter of personalities and determine whether it is a sound proposal. As perhaps you know, it is being used in Texas and in
Oklahoma. They’re not exactly the greatest jurisdictions to which I would like to point, but, on the other hand, it does show that the process is not completely unworkable. So with that suggestion, I would much prefer that to the proposal that Professor Thompson has made.

b. Justice Otto Kaus*

Before I join Bob Thompson and Stanley Mosk in trespassing on Bernie Witkin’s time, let me just say that I’m somewhat taken by surprise at Justice Mosk describing himself as the Justice McReynolds of the California Supreme Court and then coming up with a revolutionary proposal like the one that we just heard for the first time in about five years. I may think of something to say about it while I talk about other things but I didn’t like it then and I don’t like it now.

I don’t recognize this “clone court” that Professor Thompson talks about. All of a sudden, what I thought was a simple proposal to help the California Supreme Court with one of its functions, namely what Professor Thompson calls agenda control, has suddenly turned into a brand new tier of appellate review, the last thing that we need in my opinion.

Let me tell you how I got to the proposal and then explain what it was meant to do and what it was not meant to do. When I got on the court, I found to my surprise that far too much of my time was being taken up with the problem of what to hear and what not to hear, or today it would be what to review or not to review. First of all, there was the production of one’s own memoranda that were submitted to the rest of the court. That was a three or four week effort. You started in with the stuff that you would put on three weeks down the road, you would talk to your law clerk or an extern about it, then the next bunch of cases that you had to review every week were the ones that were only two weeks away, then the ones that were only one week away and then the ones that were coming up the following Wednesday and they took up an awful lot of your time. In fact, my week consisted of the following: Friday I spent in Los Angeles to work on opinions. Friday was my opinion day. I always kept one opinion in the typewriter so I could always say I’m working on an opinion. That was one day in five. The rest of my staff worked on all the others but I was always working on an opin-

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ion. That day my secretary in San Francisco mailed off the hundred or so memoranda to me in Los Angeles by federal express. I started to read them on Saturday morning, I read them on Saturday, I read them on Sunday. I had about five or six left when I got on the plane at 7:00 a.m. on Monday morning to fly up to San Francisco. I finished the last one as we came in for a landing. I went over the more difficult ones on Monday with particular members of my staff. On Tuesday I went through the whole calendar with the entire staff, case by case. On Wednesday, of course, we had the conference. On Wednesday afternoon after the conference I needed a massage and basically, Wednesday afternoon and Thursday were times that I could theoretically use for opinion writing but then again, you had to start thinking ahead to the conference three weeks down the road, two weeks down the road, and so on and so forth.

Now, I felt that we could use some help in connection with this particular process, the process of deciding whether or not to hear, and nothing else. Not opinion writing, because opinion writing is what I wanted to have more time for. So, it occurred to me that we could have, well, it occurred to Bernie Witkin, that we don't need any more judicial manpower. He says it can all be done by staff, they do it anyway, they are much more intelligent. They could basically handle the Wednesday conference at the staff level. I think this is politically not feasible, that you have to have judges. And you have to have judges that are more or less in tune with the supreme court. So why not have each member of the supreme court appoint one of the eighty-odd, whatever it is now, justices of the court of appeal to aid him for a period — and that's a very flexible thing, it could be one year, two years, three years — in connection with the agenda control. That is not to say as a law clerk, that the seven appointees would sit as an intermediate court which does nothing but the work that is now done by the supreme court and its staff with respect to the question "to hear or not to hear." The reason why I say appointed for one or two or three years, is that nobody wants to do that for the rest of his career. People want to write opinions, people want to be with their families. Not all the justices in California live in the bay area and you would have to have those people work in one place. But it would be kind of fun, perhaps, to do it for one or two years. They should be given a permanent staff, that is to satisfy Mr. Witkin, and to preserve some continuity on that court. A staff that knows what issues the supreme court is looking for, what needs to be brought to the court's attention. They could then vote whether to hear or not to hear. There would have to be, of course, some safety
valves. The precise number is not important, but I would suggest that if two or three of the "clone court" vote to hear a case, but the majority votes against it, then that case would automatically be taken up by the supreme court. That way, the supreme court might get five or six cases a week without having to do any of the preparatory work for memorandum and that, believe me, is an awful lot of work. So that should be the function of the clone court.

Now, if you want to give the "clone court" something else to do, fine. Let's do that. But not because we need help in opinion writing. What I suggest, I think, would free the supreme court to write all the opinions it needs to write. But, to give the "clone court" something to do, maybe you can turn it into, what is known, I think, in the trade as a pour-over court. If the supreme court gets a case which it just as soon would not have for one reason or another, perhaps it needs another opinion before it wants to get down to it, maybe its a case where a hearing never should have been granted, they can transfer it to the "clone court" for the writing of an opinion. But that should not be one of its major functions. Its major function, ninety-five percent of its work, would consist of taking from the supreme court the burden of deciding whether to hear or not to hear. Professor Thompson's proposal, which has built upon the idea of a "clone court" and made an intermediate court of appeal out of it, I very much fear adds to the total amount of judicial business more than the "clone court" can handle. And in the last analysis, the total number of judges will get less done than they do today and the proposal will, therefore, be self-defeating.

While I'm at it, I just can't let this opportunity go by to try and sell something I've been trying to sell unsuccessfully for ten years. Justice Mosk said, when the court of appeal says something in a published opinion, it is the law. I wish it were. It is simply a point at which the next court of appeal may start the discussion of what the law ought to be. It is not the law. Courts of appeal in California feel free to disagree with each other for no better reason than that they disagree. It is not because the rule has proved unworkable or different or for all the other legitimate reasons, which you use to distinguish opinions you don't like. Courts of appeal simply say we don't agree with that case, we're not going to follow it. Now, in California, you understand, trial courts have to follow court of appeal decisions from everywhere in the state on pain of acting beyond their jurisdictions. The upshot is that trial courts in California get reversed for doing the only thing they have jurisdiction to do, and that is to follow a court of appeal opinion because the court of ap-
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peal, to which the appeal from the trial court goes, disagrees with this other court of appeal. I believe the San Diego Bar Association is on a big campaign to abolish that practice in the California Courts of Appeal and I wish them the best of luck. Now I'll turn this over to the man you've all come to hear.

c. Bernard Witkin*

It seems to me after fifty years of observation of the supreme court and court of appeal that the structure is fundamentally sound. The court of appeal is a court of appellate jurisdiction which processes appeals by examining records and briefs and applying settled law to the decision. It has no expertise in the selection of cases for review by the supreme court and utilization of court of appeal justices to assist in the petition for review process would gain us nothing as far as I can see.

The supreme court, with the exception of death penalty appeals, has no appellate jurisdiction. Its staff and operations are not directed to processing records and briefs and applying the law to the determination of the appeal. It is sometimes called a certiorari court. It monitors, it attempts to keep the law in pattern and to keep the decisions of the court of appeal as uniform as possible in order that trial judges and appellate courts and people in the whole legal system can have a relatively stable system of precedent. Those are the considerations which seem to me to indicate that no restructuring of the court of appeal is necessary. The supreme court can, by its own controls of its internal operations, achieve every result of improvement of efficiency except the elimination of death penalty appeals. And that issue has been effectively foreclosed from our consideration by the last panel, which concluded unanimously that it is not feasible at this time. I therefore make no further comment on that.

Let me return now to the point which I thought underlay the original proposal of this intermediate court. We all agree that what Bob Thompson calls agenda control is a major problem in the supreme court operation. The consideration by all of the justices of all of the petitions for review with a reading of the petitions and answers and the reading of carefully prepared memoranda, not to mention the preparation of such memoranda, takes an inordinate amount of time. It also, in addition to the physical time, takes a toll of the rhythm of study and preparation of opinions in cases which have

* Author, SUMMARY OF CALIFORNIA LAW; CALIFORNIA PROCEDURE, CALIFORNIA EVIDENCE, CALIFORNIA CRIMINAL PROCEDURE.
been heard and submitted and are to be decided. Anyone in the professional writing racket knows that you must have continuity of thought to produce effective essays on these complicated legal questions and the weekly interruption of a hundred petitions, with a thousand issues, destroys the capacity of the court to do its opinion writing.

Professor Thompson was quite correct in saying we must make a choice and surely we should make a choice in favor of improving the capacity of the court to perform its essential function of the creation of precedent-making decisions with opinions for all the courts to follow. Now, we should understand that this business of examining petitions for review is a judicial function but does not create any judicial opinion. All it does is start you at the basis by determining what to begin to decide, and it is important if we're to stress the quality of decisions that we give lesser court attention to determining what to decide.

The second point to notice is that determination does not involve a great deal of judicial thinking. The criteria are there in the rule and they're obvious and they're common sense criteria: important questions of law and conflict of decision. The experts on the staff apply those criteria in the same way that a judge would do so. And their preliminary determination is as realistically correct a determination as any justice would make or any group of justices would make in conference.

I propose, therefore, that we continue the staff preparation of memoranda and recommendations, taking into account the actual facts of important question or conflict and their relative importance, and make a preliminary determination. The staff could work under the supervision and consulting services of a judge temporarily assigned to the process to keep their thinking and methods in line with what the court wants to use as the process of selection. The rest of the court would be relieved from that task and in its conferences would simply take up disagreements with the recommendation. The judges as a group would no longer read all the petitions, all the memoranda, but could devote themselves to useful judicial work.

Now as to the court of appeal entering the process for the precise purpose of eliminating conflicts of decision in the various courts of appeal, this is the San Diego Bar Association program and it has been espoused by a number of our justices and is mentioned in Professor Thompson’s essay. I think it misconceives the problem. The problem is not wholesale conflict of decisions by the courts of appeal. The notion that our courts of appeal are independent enclaves of
obstinate justices ignoring the work of other panels, that is not the case. As the years have gone on, the cooperative spirit among the California Courts of Appeal, as demonstrated in our institutes, in the present production of the tracking system, in the conferences of research attorneys of those courts, indicates that they have a lively feeling of the necessity to avoid duplicative effort and conflicts of decision. It is possible administratively for the courts working through their processes, through their communications, through their tracking systems, to defer in many instances to another court handling a particular issue, and even to have input through that system into the processing of one court's opinions.

What will remain? There will still be conflicts where able courts take different positions on precedent, principle, or policy and choose one or another solution. That's not bad, it's good. That's the way the cases are set up for the supreme court to take over the problem of monitoring and to bring not necessarily a better or more considered appellate decision but one which has the power of the court behind it. When there are conflicts and a choice must be made, it has to be made by the supreme court. The en banc panel of the court of appeal which would resolve conflicts would give us nothing but a pseudo-precedent, what Confucius, Jr. described as dependent relative stare decisis—an opinion binding until the supreme court gets into the act.

This is the point, therefore, that I stress above all others. The existing system is a good one. The supreme court should greatly streamline its process of handling petitions. We should not have another tier. The court of appeal is already on the way toward changing its internal operations to achieve better cooperation and better uniformity in decision and when the decisions clash the supreme court should take over the case in order to handle the problem of uniformity throughout the state. We have, for example, the recent case of the non-marital cohabitant seeking recovery for emotional distress under the Dillon bystander rule, or loss of consortium. We had a bundle of court of appeal opinions, some of them excellently crafted, showing the different views on that subject, and the supreme court got the point and with all deliberate speed, as it displayed in the Marvin case, took the case over. And that's the only way in which we can have those conflicting policies and principles resolved in a manner which will give us a binding precedent.

I therefore say in conclusion that unlike Justice Mosk, I have
not forsaken liberalism for conservatism. I merely remain an observer who thinks that efficiency can be achieved within the court’s internal system by the exercise of its own inherent powers.