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The Negative Side of Judicial Decision Making: Depublication as a Tool of Judicial Power and Administration on State Courts of Last Resort

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THE NEGATIVE SIDE OF JUDICIAL DECISION MAKING: DEPUBLICATION AS A TOOL OF JUDICIAL POWER AND ADMINISTRATION ON STATE COURTS OF LAST RESORT

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I. INTRODUCTION

AS THE population of the United States has grown and as the amount of trial and appellate litigation has increased, the volume of work confronting the justices who sit on state courts of

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last resort has become increasingly formidable.¹ Unfortunately, because the decision-making process in state supreme courts is a collegial one, it has not been possible to ease the workload burden simply by increasing the number of justices. "The number of justices must be small enough to encourage a good working relationship between them and to insure that the court will operate efficiently."² Thus, most state high courts have seven members and none has more than nine.³

With the total number of justices necessarily limited, more ambitious approaches have been attempted to solve the problem of caseload volume and to reduce the delay necessarily associated with overburdened courts. These have included, but have not been limited to: 1) creation of intermediate state appellate courts; 2) substantial reduction or elimination of state supreme court mandatory jurisdiction and creation of a largely discretionary docket; 3) enlargement of high court legal support staff, including the appointment of commissioners, creation of central legal staffs, and increases in the number of law clerks; 4) increased use of high courts' power of summary disposition; 5) limitations on the frequency of, and time devoted to, oral argument; 6) utilization of decision-making panels and reduction of hearings en banc; and 7) more frequent use of per curiam, memorandum and unpublished opinions, resulting in a reduction of the number of cases requiring full opinion.⁴

Surely the creation of intermediate appellate courts and the change in the jurisdiction of state supreme courts from primarily mandatory to largely discretionary have been among the most important of these approaches. Intermediate appellate courts, now found in at least thirty-six states,⁵ serve primarily to preserve the

1. See, e.g., J. MARTIN & E. PRESCOTT, *APPELLATE COURT DELAY: STRUCTURAL RESPONSES TO THE PROBLEMS OF VOLUME AND DELAY* (1981); T. MARVELL, *BIBLIOGRAPHY: STATE APPELLATE CASELOAD AND DELAY* (1979); S. WASBY, T. MARVELL, & A. AIKMAN, *VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPONSES* (1979).

2. M. OSTHUS, *INTERMEDIATE APPELLATE COURTS I* (1976).

3. *Id.* at 1 (citation omitted).

4. See, e.g., J. MARTIN & E. PRESCOTT, *supra* note 1, at 7-16.

5. See H. STUMPF, *AMERICAN JUDICIAL POLITICS* 87, 91-92, table 3-5 (1988), from *THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, 1986-1987*, at 157-58, table 4.2 (1986). These states include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, and Wisconsin. For a complete and detailed accounting of specific state court structures and jurisdictions, see

right of litigants to perfect at least one appeal regardless of the merits or significance of the issues they raise. The state supreme court is then free to concentrate its attention upon only those cases presenting significant or controversial statutory and constitutional questions. It is often said that one of the most important powers possessed by the Supreme Court of the United States is its discretionary power to "decide what to decide."⁶ The same may be said of state supreme courts which possess discretion to determine which cases they will review and which they will leave undisturbed.⁷ Such discretion not only allows a court to control its caseload, but also permits it to exercise simultaneously a "negative power to turn aside issues it prefers not to address . . . [and] a positive ability to set its own agenda."⁸

These "gatekeeping" decisions are critical. Not only do they help a state high court to control its workload, but they are also an essential part of a high court's role as a policy-making branch of state government. Although research has confirmed that many factors influence judges' decisions to accept or deny review, such as conflict among lower courts, it has also been shown that judges respond to requests for review in terms of their assessment of the correctness of lower court decisions. Judges are more likely to grant review when they disagree with the result of a lower appellate court's judgment. As a consequence, there is a relationship between "screening" decisions and subsequent treatment of the merits of the cases granted review.⁹

Possessed with a vast amount of discretion over the size and content of its docket, the California Supreme Court is one of these courts with the important power to "decide what to decide." California's constitution requires the supreme court to hear direct appeals only from trial court judgments imposing the death penalty.¹⁰ The California Supreme Court exercises discre-

NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT, 1984 (1986).

6. See, e.g., Provine, *Deciding What to Decide: How the Supreme Court Sets Its Agenda*, 64 JUDICATURE 320 (1981).

7. See NATIONAL CENTER FOR STATE COURTS, *supra* note 5, at 111.

8. Baum, *Decisions to Grant and Deny Hearings in the California Supreme Court: Patterns in Court and Individual Behavior*, 16 SANTA CLARA L. REV. 713, 713 (1976).

9. See *id.*; Baum, *Policy Goals in Judicial Gatekeeping: A Proximity Model of Discretionary Jurisdiction*, 21 AM. J. POL. SCI. 13 (1977) [hereinafter Baum, *Policy Goals*]; Baum, *Judicial Demand—Screening and Decisions on the Merits: A Second Look*, 7 AM. POL. Q. 109 (1979) [hereinafter Baum, *Judicial Demand*].

10. Direct appeals to the supreme court from judgments imposed at the trial court level are permitted only in criminal cases where the penalty of death has been imposed. See CAL. CONST. art. VI, § 11. The supreme court also pos-

tionary jurisdiction over other cases, originating in six district courts of appeals,¹¹ and accepts only about ten percent of the petitions filed for hearing.¹² And, as is the case in other courts with extensive discretionary jurisdiction, research has provided evidence that, at least in some types of cases, the supreme court justices respond to these petitions in light of their philosophical and ideological agreement or disagreement with the result and/or opinion of the lower appellate court.¹³

Unlike any other court with discretionary jurisdiction, however, the California Supreme Court possesses one additional and significant power—the power to order “depublished” any published opinion of the courts of appeals.¹⁴ When the court exercises this power, appellate opinions issued for publication, which

sesses original jurisdiction in habeas corpus matters and must review executive clemency recommendations for persons with two or more felony convictions. *Id.* art. VI, § 10 [habeas corpus]; art. V, § 8 [clemency]. It also has jurisdiction to act upon recommendations of the State Bar of California and the Commission on Judicial Performance concerning the discipline of attorneys and judges for misconduct. *Id.* art. VI, § 18(b)(c).

11. The Sixth Appellate District was authorized by the Legislature to begin operation on January 1, 1982, but litigation challenging the validity of the authorizing legislation delayed operation, as did delays in the appointment and confirmation of justices to sit on the new court. The district finally began operation on November 19, 1984, which was too late to be considered in the present study. See JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT 111 (1986) [hereinafter JUDICIAL COUNCIL (1986)].

12. JUDICIAL COUNCIL (1986), *supra* note 11, at 104, table T-4. In November, 1984, California voters approved Proposition 32, a constitutional amendment giving the supreme court authority to selectively consider issues presented in cases accepted for review from the courts of appeals. As a consequence, the supreme court no longer had to decide all the issues raised in every appealed case. The rules of court adopted to implement Proposition 32 have resulted in a change of terminology so that “petitions for hearing” are now called “petitions for review.” See CAL. CT. R. 976(d). Because these new rules took effect May 6, 1985, well beyond the period covered by this study, the former terminology will be utilized here. See JUDICIAL COUNCIL (1986), *supra* note 11, at 23 n.103. The impact of the passage of Proposition 32 upon the supreme court’s exercise of its depublication practice will be addressed in the concluding section of this paper.

13. See Baum, *supra* note 8; Baum, *Policy Goals*, *supra* note 9. *But see* Baum, *Judicial Demand*, *supra* note 9.

14. As will be discussed below, the supreme court technically possesses the power to determine which of the opinions certified for publication by the court of appeals will be published in the Official California Appellate Reports. However, because certified court of appeals opinions are first published in the Official Advance Sheets, it has become accepted to refer to the supreme court’s action as “decertification” or “depublishing.” For ease of discourse and the sake of consistency, the latter will be employed throughout this paper.

It should also be noted that the term “depublishing” is not meant to apply to those previously-certified court of appeals opinions which, under the California Rules of Court (976(d)), are automatically superceded and ordered not published by virtue of the supreme court’s grant of a petition for review or rehearing. Under the new rules of court adopted to implement Proposition 32,

appear in the official advance sheets, are thereby prevented from being printed in one of the bound volumes of the official state reporter. Because Rule 977 of the California Rules of Court generally prohibits the use of unpublished appellate opinions in any other action or proceeding,¹⁵ the effect of a depublication order is to eliminate an opinion's status as precedent binding on California trial courts and as a citable precedent in appellate proceedings.¹⁶

Similar to the practice of the federal courts of appeals and many other states, California's intermediate appellate courts engage in "selective publication" of their opinions.¹⁷ Although required under the state constitution to issue written decisions in disposing of the cases before them,¹⁸ these courts only publish an opinion if a majority of the three judge appellate panel rendering the decision certifies that the opinion satisfies certain standards for publication provided in Rule 976 of the California Rules of Court.¹⁹ Adopted in 1964 and amended in 1972 and 1983 pursu-

the court may, depending upon its own disposition of the case, subsequently order the original court of appeals opinion to be published in whole or in part.

15. CAL. CT. R. 977. Rule 977 prohibits citation of an unpublished opinion "by a court or a party in any other action or proceeding, except . . . (1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or (2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another action or proceeding." *Id.*

16. Published appellate opinions are binding on California trial courts. *See* Auto Equity Sales, Inc. v. Superior Court, 57 Cal. 2d 450, 369 P.2d 937, 20 Cal. Rptr. 321 (1962).

17. *See* Chanin, *A Survey of the Writing and Publication of Opinions on Federal and State Appellate Courts*, 67 L. LIBR. J. 362 (1974).

18. CAL. CONST. art. VI, § 14.

19. *See* CAL. CT. R. 976. Initially advocated as a means to reduce the volume of appellate opinions through disposal of routine cases that present no significant legal issues and thus possess no precedential value, selective publication today results in the publication of only 15% of the written opinions issued by the courts of appeals. *See* JUDICIAL COUNCIL (1986), *supra* note 11, at 118, table T-15. Although recognized as a significant cost-saving device which has reduced the volume of printed opinions, selective publication has been the object of much critical commentary. *See, e.g.,* Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 CAL. ST. B.J. 386 (1973); Note, *Publish or Perish: The Destiny of Appellate Opinions in California*, 13 SANTA CLARA L. REV. 756 (1973). Selective publication has also been the subject of empirical research at the federal level. *See* Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 JUST. SYS. J. 405 (1981); Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981) [hereinafter Reynolds & Richman, *The Price of Reform*]; Reynolds & Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807 [hereinafter Reynolds & Richman, *Limited Publication*]. Selective publication has been the subject of state research as well. *See* NATIONAL CENTER FOR STATE COURTS, REPORTS ON UNPUBLISHED OPINIONS OF THE CALIFORNIA COURTS OF APPEAL (1976). It has

ant to the supervisory authority of the California Supreme Court over the publication of appellate opinions, Rule 976(b) provides that an opinion of a court of appeals shall not be published unless that opinion:

(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule; (2) resolves or creates an apparent conflict in the law; (3) involves a legal issue of continuing public interest; or (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.²⁰

Even once “certified for publication,” however, an opinion remains vulnerable to “decertification” and consequent “depublication.”²¹ Although the practice is nowhere explicitly described or authorized, and although there are no explicit rules governing its use, depublishation is said to be implicitly authorized by a constitutional provision requiring the legislature to “provide for the prompt publication of such opinions of the supreme court and courts of appeal as the supreme court deems appropriate”²² and by a statutory provision providing for the publication of such opinions of the courts of appeals “as the [s]upreme [c]ourt may deem expedient.”²³

also prompted numerous suggestions for reform. *See, e.g.*, CALIFORNIA SUPREME COURT, REPORT OF THE CHIEF JUSTICE’S ADVISORY COMMITTEE FOR AN EFFECTIVE PUBLICATION RULE 20-23 (mimeo June 1, 1979) [hereinafter ADVISORY COMMITTEE]; Andreani, *Independent Panels to Choose Publishable Opinions: A Solution to the Problems of California’s Selective Publication System*, 12 PAC. L.J. 727 (1981); Goodwin, *Partial Publication: A Proposal for a Change in the “Packaging” of California Court of Appeal Opinions to Provide More Useful Information for the Consumer*, 19 SANTA CLARA L. REV. 53 (1979).

20. CAL. CT. R. 976(b), 976(c)(1).

21. Conversely, Rule 978 allows the supreme court to receive and consider requests to publish opinions not certified for publication by the courts of appeals. The supreme court may thus order published an opinion previously considered unpublishable. From all indications, however, this power is rarely exercised.

22. CAL. CONST. art. VI, § 14.

23. CAL. GOV’T CODE § 68902 (West 1976). Each depublishation order, as reported in the supreme court’s minutes, also makes reference to Rule 976 as authority for the procedure. Rule 976(c)(2) currently provides that “[a]n opinion certified for publication shall not be published, and an opinion not so certified shall be published, on an order of the [s]upreme [c]ourt to that effect.” CAL. CT. R. 976(c)(2).

The supreme court may assert its depublication power upon its own motion, and has, on occasion, exercised its power in response to requests from interested third parties.²⁴ However, since the court first utilized the practice in 1971, the overwhelming majority of instances of depublication have accompanied the court's denial of a request for review filed after the appellate court's opinion has been certified for publication.²⁵ As with other kinds of decision-making in the California high court, four of the seven justices are required to vote in favor of depublication to issue the depublication order.²⁶

Although individual justices' motivations for depublication may differ with respect to particular cases,²⁷ it appears clear that cases are not ordered depublished simply because the justices disagree with the courts of appeals over whether the criteria for publication have been satisfied.²⁸ Rather, depublication "allows the [s]upreme [c]ourt to excise erroneous statements of the law appearing in opinions of the courts of appeal [without having] to grant a hearing in the case, necessitating full-scale review with an opinion . . . disposing of all issues raised."²⁹ Depublication is thus said to be most common "when the [c]ourt considers the result [of the court of appeals decision] to be correct, but regards a portion of the reasoning to be wrong."³⁰ If the opinion was "left on the books [it] would not only disturb the pattern of the law but would be likely to mislead judges, attorneys, and other interested individuals."³¹ Depublication allows the court to simultaneously deny review, because the majority is in agreement with the result, and remove from publication an opinion which "would mislead the bench and bar if it remained as citable precedent."³² Depublication "provides a more direct and less time-consuming means of accomplishing the same end."³³

24. Note, *Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law*, 50 S. CAL. L. REV. 1181, 1186 (1977).

25. *Id.*

26. See Grodin, *The Depublication Practice of the California Supreme Court*, 72 CALIF. L. REV. 514 (1984); Mosk, *The Supreme Court of California, 1973-1974 Foreward: The Rule of Four in California*, 63 CALIF. L. REV. 2 (1975).

27. Grodin, *supra* note 26, at 524.

28. *Id.* at 514; see also Note, *supra* note 24, at 1188-89 n.40.

29. Note, *supra* note 24, at 1185.

30. Grodin, *supra* note 26, at 522.

31. Note, *supra* note 24, at 1185 n.20 (quoting former California Supreme Court Chief Justice Donald R. Wright).

32. Grodin, *supra* note 26, at 515.

33. Note, *supra* note 24, at 1185.

Despite the apparent utility of depublication as a time-saving device and as a part of the supreme court's exercise of its discretionary jurisdiction, depublication has been the subject of a substantial amount of professional and public criticism, some of which has originated very close to the court itself. Former Chief Justice Rose Elizabeth Bird criticized the practice of depublication in her first State of the Judiciary Address in 1978, and later appointed an "Advisory Committee for an Effective Publication Rule" which labeled depublication "undesirable" and called for its elimination.³⁴

Because depublication results in the removal of a written opinion from the body of decisions made by the courts of appeals, it is sometimes criticized for the same reasons that the practice of selective publication is attacked. These include the belief that important and valuable opinions with precedential importance will lie among the nonpublished opinions, that unpublished decisions pose a threat to the full development of the common law based under the doctrine of stare decisis, that the public's expectation of justice fairly and consistently dispensed will be undermined by "hidden" decisions, and that judicial accountability will be rendered impossible by the suppression of the tangible evidence of judges' work.³⁵

At another level, depublication has been subjected to separate criticisms that have not haunted selective publication. Because the supreme court makes its depublication decisions in private, guided by no explicit criteria and offering no explanation for its decision to depublish a particular opinion, depublication is seen, at a minimum, as "intellectually annoying."³⁶ Furthermore, it is viewed as unfair to the losing party who "is effectively left with an unreasoned judgment against him."³⁷ One critic has pointed to the dangers of "judicial lobbying" created by the access the court has occasionally offered to third parties who seek to have opinions depublished but who are not required to inform or seek the response of the litigants involved.³⁸ Finally, and most

34. ADVISORY COMMITTEE, *supra* note 19, at 24.

35. See Goodwin, *supra* note 19, at 53-66. Kanner, *supra* note 19, at 388-91, 436-49; Note, *supra* note 19, at 761-69; see also Andreani, *supra* note 19, at 731-39.

36. Yegan, *Depublication: The Missing Determinate Sentence Law Opinions*, 5 L.A. LAW 34, 34 (Apr. 1982).

37. Gerstein, "Law by Elimination:" *Depublication in the California Supreme Court*, 67 JUDICATURE 293, 297 (1984).

38. Biggs, *Censoring the Law in California: Decertification Revisited*, 30 HASTINGS L.J. 1577, 1580-84 (1979).

importantly, rather than being regarded as an effective tool wielded by the supreme court to prevent the intrusion of confusing statements of legal principles into the body of published law, depublication is seen as counterproductive, creating "uncertainty in the law because of the appearance and disappearance of precedential opinions."³⁹

As former Justice Joseph Grodin argued, some of these criticisms do not survive close scrutiny.⁴⁰ This is particularly true if one considers the need to reserve the court's option to grant review only to the truly important cases, the limits upon the court's time in attempting to explain every hearing denial or depublication order and the impact of the suggested alternatives to depublication. Conceding that depublication without explanation is "hardly an ideal state of affairs," Grodin argued that depublication is nevertheless preferable to a mere denial of a petition for hearing which leaves a misleading opinion on the books.⁴¹ "Judicial lobbying" with respect to depublication is not, at least in quantitative terms, a very significant problem, and can be easily cured by the adoption of a court rule governing public notice and response when the court receives a third-party request for depublication.⁴² Moreover, depublication can hardly be seen as doing more psychological harm to a losing litigant than that suffered by losing litigants generally; indeed, depublished opinions are likely to be longer and more thoroughly reasoned than those filed in cases which do not warrant a publishable opinion in the first place.⁴³ Finally, depublication is no more secretive than most court processes: the justices' votes on depublication are discernible from the supreme court's published minutes, and opinions ordered depublished remain available in the official advance sheets

39. Note, *supra* note 24, at 1187. Another criticism of depublication relates specifically to depublication in cases involving the length of criminal sentences. Where a favorable decision benefits the individual bringing the appeal, depublication of the accompanying opinion prevents other imprisoned individuals from using the principle established to attempt to win reductions in their own sentences. This result raises issues of equitable treatment and justice. See Christian & Tami, 'Law by Elimination': *The Supreme Court's Depublication Practice is Bad for the Law, the Public, and the Justice System*, 4 CAL. LAW. 25, 26 (Oct. 1984); Gerstein, *supra* note 37, at 297-98; Yegan, *supra* note 36.

40. Grodin, *supra* note 26, at 521-23.

41. *Id.* at 521-22.

42. *Id.* at 523 n.27.

43. Studies of selective publication in the federal court system have shown that published opinions are longer and more thoroughly reasoned than unpublished ones. See Reynolds & Richman, *The Price of Reform*, *supra* note 19, at 598-606; Reynolds & Richman, *Limited Publication*, *supra* note 19, at 817-19.

for public review and comment.⁴⁴

Not so easily answered, however, are increasingly frequent and vitriolic criticisms that depublication has become part of “a process of covert substantive review” which “allows the [s]upreme [c]ourt to dispose of an objectionable interpretation of law without having to risk the exposure involved in hearing a case and reversing it on reasoned basis.”⁴⁵ Critics assert that depublication is a formidable instrument of judicial power with which the court can “shape the law while protecting itself from the institutional damage that would result from having to deal straightforwardly with controversial issues.”⁴⁶ In the view of former Justice Grodin, this criticism “goes beyond any specific defect in the depublication process,” stemming instead from a “feeling . . . that depublication is somehow egregious per se—that it smacks of an attempt to rewrite history, to censor the expression of views, and perhaps even to carry out some secret agenda known only to the [c]ourt.”⁴⁷ As one critic has argued, the supreme court could not be using depublication simply to correct errant statements of law expressed in lower appellate opinions: “That the Court of Appeals is not seen [by the Judicial Council, the bar or the academic community] as being an incompetence-inspired shambles should be convincing evidence that in fact it isn’t—and that the error rationale does not wholly reflect what may really be happening: The [s]upreme [c]ourt is using decertification—not as it says—but for other purposes.”⁴⁸

Thus, in separate analyses, critics argue that, in particular kinds of cases, such as those requiring interpretation of California’s Determinate Sentencing Law⁴⁹ and the “Victims’ Bill of Rights” adopted by the voters as Proposition 8 in 1982,⁵⁰ patterns in the court’s depublication orders suggest that the court is using depublication as a means of achieving certain policy objectives held by a majority of its members. In the main, these objectives appear to be in the area of criminal law where a liberal majority, which controlled the court until just recently, has sought to provide significant protections for the rights of criminal de-

44. Grodin, *supra* note 26, at 522-23.

45. Gerstein, *supra* note 37, at 298.

46. *Id.*

47. Grodin, *supra* note 26, at 515.

48. Vance, *Secretive State High-Court Procedure Opens Judiciary to Criticism*, L.A. Daily, Nov. 13, 1984, at 4.

49. See Yegan, *supra* note 36.

50. See Vance, *supra* note 48.

pendants.⁵¹ According to a study conducted by the Office of the State Attorney General which examined the cases ordered depublished in 1982 and 1983, two-thirds of the court's depublication orders are in criminal cases while only about one-third of the opinions published by the courts of appeals involve criminal matters.⁵² More importantly, according to the Attorney General's analysis, ninety percent of the depublished cases in one year involved courts of appeals opinions favorable to the prosecution, while a sample of published appellate opinions produced prosecution rulings in only about sixty percent of the cases. According to the author of the Attorney General's study, "[t]he 30 percentage points difference in those figures is far too large to be merely chance but suggests the supreme court uses its depublication power to remove from precedential uses cases which help the prosecution."⁵³

In sum, there is considerable interest in the power of depublication, but also considerable disagreement over how that power has been exercised. Some commentators have perceived depublication as a "practical and proper" tool at the supreme court's disposal to prevent the intrusion of errant legal statements into the body of citable precedent without having to grant full-dress review to an otherwise "unworthy" case.⁵⁴ Others have viewed depublication as a carefully wielded weapon of judicial power that permits the court's majority to pursue a policy agenda for which it cannot be held publicly accountable. In this latter view, the California experience with depublication should be of broad interest to states considering methods to relieve their overburdened state supreme courts by raising "the question of whether proposals intended to make the courts work more efficiently are not in effect creating a new form of 'Lawmaking'."⁵⁵

Despite a noteworthy amount of interest, there has been very little systematic empirical research conducted on depublication.

51. See Barnett, *The Supreme Court of California, 1981-82 Foreword: The Emerging Court*, 71 CALIF. L. REV. 1134 (1983); see also P. JOHNSON, *THE COURT ON TRIAL: THE CALIFORNIA JUDICIAL ELECTION OF 1986* (1985). In November, 1986, the three most liberal members of the court were removed from office after having failed to win their retention elections. These justices were replaced by appointees of conservative Republican Governor George Deukmejian. The court today is decidedly more conservative than it has been for two decades.

52. Ashby & Benfell, *Esoteric Court Practice Undercuts California Prosecutors*, 16 CAL. J. 137, 138 (1985).

53. See *id.*

54. Grodin, *supra* note 26, at 515.

55. Gerstein, *supra* note 37, at 298.

The leading critical law review analyses⁵⁶ focus primarily upon objectionable features of depublication as a *process* and have very little to say with respect to the kinds of cases depublished, except that some would have qualified for publication under the criteria of Rule 976.⁵⁷ More importantly, these analyses could rely upon only about 150 opinions which had been depublished up to that time. The number depublished *since* 1979 has more than tripled, bringing the total number of depublication orders up to 569 by the end of 1983-84. Similarly, the two analyses of depublished cases in specific areas of law noted earlier⁵⁸ are necessarily quite limited. One addresses "the more glaring" of approximately twenty depublished opinions involving the California Determinate Sentence Law,⁵⁹ the other⁶⁰ comments on less than a half dozen cases spawned by the passage of Proposition 8. Even the most sweeping attempt at empirical analysis, offered in the Attorney General's study, examined depublication only over a two year period and was concerned primarily with the role of depublication in shaping criminal law.

Accordingly, the purpose of this paper is to provide a more complete empirical examination of depublication by the California Supreme Court from the 1970-71 through 1983-84 fiscal years.⁶¹ This analysis examines depublication over the entire period of its history, charting and describing changes in its frequency and nature during that period, exploring possible explanations for such changes, and examining the aggregate quantitative impact of the supreme court's depublication decisions in broad areas of law. Prior studies have either analyzed the appropriateness of the court's depublication decisions in light of the statements of legal principle announced by the courts of appeals⁶² or assessed the impact of depublication in particular areas

56. See e.g., Note, *supra* note 24; Biggs, *supra* note 38.

57. See, e.g., Note, *supra* note 24, at 1188-89 n.40; Biggs, *supra* note 38, at 1584-93.

58. Vance, *supra* note 48; Yegan, *supra* note 36.

59. Yegan, *supra* note 36, at 34.

60. Vance, *supra* note 48.

61. Because official statistics on the workload of the supreme court and the courts of appeal are reported by fiscal year, the depublished cases were collected and so organized. However, detailed study, involving a comparison of published and depublished cases, was limited to those cases depublished no later than June 30, 1984 where the original court of appeals opinion was issued no later than June 30, 1983. Because collecting and analyzing depublished cases is time-consuming and laborious, it was not possible to perform this kind of intensive analysis for cases depublished during 1984-85 and 1985-86.

62. See, e.g., Biggs, *supra* note 38, at 1584-93.

of law.⁶³ In contrast, the approach here is strictly quantitative in two senses: 1) its concern with the frequency and rate of depublication; and 2) its examination of the frequency with which depublication has appeared to work to the advantage or disadvantage of particular kinds of litigants. As such, the importance of this kind of study lies in its overview of depublication and in providing another measure of its impact upon the California appellate system. This study is a necessary supplement to, but not a substitute for, the kind of intensive analysis of opinions that others have completed or may attempt in the future.

II. OBJECTIVES AND METHODS

The objectives of this paper are, therefore, both descriptive and analytical. The aim of the descriptive portion is to provide an empirical account of the practice of depublication since 1971, to identify the numbers and kinds of cases involved, and to observe any significant changes therein. The broader analytical goal is to test specific hypotheses that might help account for any patterns or changes observed in the supreme court's depublication practice. For instance, it should be possible to examine the relationship between depublication and the supreme court's workload, thereby testing the validity of the assertion that depublication has been used primarily as a device to help the court manage its growing workload.

Similarly, it should be possible to assess the degree of empirical support for the suggestion that the supreme court has been using depublication systematically to shape the body of substantive law as declared by the courts of appeals. If depublication is being used as a tool of substantive review, it should be possible to show that the depublished cases are more likely to involve a lower court disposition at odds with what a majority of the supreme court would probably endorse had the case been accepted for review.

As a preliminary methodological note, it must be recognized that the California Supreme Court is only one of the two major institutions that can influence the number and direction of depublished cases. The other, of course, is the California Court of Appeals which generates the published decision that may be accepted for review by the higher court, depublished, or left standing undisturbed. Consequently, it is certainly possible that

63. See, e.g., Yegan, *supra* note 36; Vance, *supra* note 48.

any changes in the depublication patterns may be due not solely to any changes in the standards or criteria of depublication applied by the high court, but also by changes in the behavior of the courts of appeals. For example, the courts of appeals may have produced an increasing supply of opinions which, by virtue of their quality or content, "warranted" depublication. This study attempts a partial remedy of this conceptual problem by comparing the depublished cases with the published cases issued by the courts of appeal during the same period. It remains only a partial remedy since a certain number of published opinions—those accepted for review by the supreme court—are automatically deleted from the body of decisional law upon the grant of hearing by the higher court. Nevertheless, to the extent feasible, the published opinions of the courts of appeals serve as a base line against which those cases chosen by the supreme court for depublication are to be compared. Shifts in the base line of courts of appeals decision making can thus be identified and compared to any observed changes in the depublication behavior of the supreme court.

This study, therefore, is based upon the 569 cases depublished by the California Supreme Court from fiscal year 1970-1971 through 1983-1984 and upon a random sample of 600 published opinions issued by the courts of appeals during a portion of the same period selected for comparison. The cases depublished from the beginning of the study to August 23, 1977, are those previously identified by Julie Hayward Biggs for the first critical analysis of depublication.⁶⁴ These 126 cases were supplemented by 443 other cases identified by examination of the Subsequent History Table in the Official Advance Sheets of the California Appellate Reports. Those cases for which depublication was indicated in the Subsequent History Table were then checked against the Minutes of the supreme court to determine whether one or more of the justices registered opposition to the order of depublication.⁶⁵

Each case was then located in the Official Advance Sheets.⁶⁶

64. See Note, *supra* note 24, at 1200-06.

65. It was not possible to locate ten cases in the supreme court's minutes on the date of depublication as indicated in the Subsequent History Table. Therefore, where appropriate, such as in the analysis of patterns of dissent to the court's depublication orders, these cases have been excluded.

66. Because certain volumes of the Advance Sheets were missing from both of two law libraries to which I had convenient access, the texts of two depublished cases could not be obtained. Where appropriate, these cases have been excluded from the analysis.

From the text of the opinion it was possible to record the length of the majority opinion⁶⁷ and the presence or absence of concurring and dissenting opinions. From the case summary printed before each opinion it was possible to obtain a variety of pertinent information about each case, including: 1) the name of the judge authoring the majority opinion and the names of concurring and dissenting judges; 2) whether the judge authoring the majority opinion was a regular judge of the court of appeals or a superior or municipal court judge sitting on assignment; 3) the court of appeals disposition of the case with respect to the decision of the court below (e.g., affirmed, reversed, affirmed with modifications, etc.); 4) the primary substantive area of law involved; and 5) the party winning or most favored by the decision of the courts of appeals.

With respect to the categories of law used and the identification of the winning party, the typology employed was one previously used in dozens of studies of judicial behavior which have attempted to distinguish between "liberal" and "conservative" judicial decisions.⁶⁸ This typology is based upon the notion that a "liberal" judge is one who evidences apparent sympathy for the claims of litigants who are representative of less privileged and less powerful political, economic or social groups, while a "conservative" judge is one who is more likely to support the claims of

67. The number of pages per opinion was calculated by counting the number of pages rounded to the nearest .5 page beginning with the text of the majority opinion and not including the case summary or the head notes. Additionally, it was necessary to take into account a change in the printing format of the Official Advance Sheets which occurred at volume 137, p. 561 and thereafter. Rather than the usual page configuration which was identical to that used in the bound volumes, the Advance Sheets were changed to a two-column format, resulting in more material printed per page than before. Accordingly, after having selected three full pages at random under each format and having calculated the mean number of words per page (450 words per page under the old format, 700 under the new), it was determined that the page counts obtained for opinions printed after v. 137: 561 would be multiplied by 1.56 to provide an estimate of the length of these opinions had they been printed under the former format. One other complicating factor—a newsprint shortage occurring in late 1979 and early 1980 causing the publishers of the Advance Sheets to reduce page, margins—was estimated to have added only about three sentences per page, an amount judged insignificant for purposes here.

68. See, e.g., P. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 168-72 (1980); Goldman, *Voting Behavior on the U.S. Court of Appeals*, 89 AM. POL. SCI. REV. 491 (1975); Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843 (1961) [hereinafter Nagel, *Political Party Affiliations*]; Nagel, *Multiple Correlation of Judicial Backgrounds and Decisions*, 2 FLA. ST. U.L. REV. 258 (1974) [hereinafter Nagel, *Multiple Correlation*].

comparatively powerful and privileged parties. Thus, a court of appeals decision was categorized as a "liberal" one if it favored:

1. the defendant in criminal cases;
2. the debtor in debtor/creditor cases;
3. the employee in employee/employer disputes, including workmen's and unemployment compensation cases;
4. the interests of labor in labor/management disputes, including collective bargaining cases;
5. the tenant in landlord/tenant cases;
6. the consumer in sales of goods/services cases, including some cases involving insurance coverages;
7. the claimant in personal injury, wrongful death, negligence, malpractice, fraud, and defamation actions;
8. a claim of a state constitutional provision governing individual rights.

Cases were also assigned to a number of other categories where it is not possible to discern such a clear "liberal/conservative dichotomy," such as those in the areas of family law (e.g., marriage dissolutions and custody disputes), trusts and estates, contracts, eminent domain and condemnation, zoning, licensing, agency regulations, administrative law, and civil procedure.⁶⁹

The cases categorized along the liberal/conservative dimension do not constitute the whole of judicial decision making, either by the courts of appeals or the California Supreme Court. The categories used correspond closely to those suggested by a leading scholar who has described the supreme court's majority position of recent years "as innovative and activist, sympathetic toward the poor, especially careful of the rights of civil plaintiffs

69. Previous studies of judicial behavior have also tested the hypothesis that judges with "liberal" attitudes could be expected to vote disproportionately for the government in tax cases, for the administrative agency in business regulation cases, and for the government in matters of eminent domain and condemnation. Results of this research have been mixed, primarily because there is a wide range of parties and issues involved in cases involving the exercise of state regulatory and administrative power. Unlike criminal, economic, and civil liberties cases, where the parties advocating the "liberal" position are usually the disadvantaged and less privileged social and economic groups, cases involving government regulation often involve the so-called "underdog" groups and individuals as well as the powerful and privileged business interests. See P. DUBOIS, *supra* note 68, at 171. For this reason, cases involving various aspects of business regulation, including those reviewing administrative agency decisions in matters of licensing, permits, taxes, eminent domain, condemnation, zoning, land use, etc., are not included in the portion of the analysis involving a comparison of liberal/conservative judicial decisions.

and criminal defendants, inclined toward the expansion of individual rights against government and business enterprises, and less concerned about property and corporate rights."⁷⁰ As such, these categories will be helpful in testing the critics' claim that the California Supreme Court employs depublication as a means of shaping the substantive body of legal precedent published by the courts of appeals and not solely to eliminate errant legal statements offered in cases where the results are otherwise acceptable.

For comparison purposes, similar data were collected from a sample of 600 published opinions issued by the courts of appeals during the eight fiscal years from 1975-76 through 1982-83.⁷¹ To ensure that the number of published opinions would be roughly comparable to the number of opinions depublished in any given year, fifty cases were drawn for each of the first two comparison years, seventy-five in each of the next three, and one hundred in each of the last three. In addition, to ensure that the published cases selected would be distributed evenly within each fiscal year, each *n*th case published in the Official California Appellate Reports was selected, where *n* was calculated by dividing the number of opinions published in that fiscal year by the size of the desired sample (i.e., 50, 75, or 100).⁷² Where appropriate, the Chi-square χ^2 test has been applied to determine whether the differences observed between the published and depublished cases are sufficiently large to be considered statistically significant and not the result of chance.⁷³

III. DEPUBLICATION AND SUPREME COURT WORKLOAD

As discussed in the Introduction, depublication is usually de-

70. Barnett, *supra* note 51, at 1141.

71. 1975-76 was chosen as the initial year for this intensive comparative analysis because it was the first year in which depublications numbered above 25 and appeared to be the beginning of major growth in the frequency of depublication (see Figure 1). Published cases are especially appropriate for comparison since they do not include cases in which review has been sought and granted by the supreme court. A grant of hearing by the supreme court results in automatic deletion of the court of appeals opinion, subject to the supreme court's issuance of its own opinion, possible reinstatement of the original court of appeals opinion, or other order.

72. So as to assure comparability between the published and depublished cases, the depublished cases utilized in the comparative analysis which follows were limited to those in which the original court of appeals opinion was issued on or before June 30, 1983. This explains the different number of depublished cases reported in the analysis of section IV and V where depublished and published cases are compared.

73. See H. BLALOCK, SOCIAL STATISTICS 275-87 (1972).

fended, at least in part, as the supreme court's natural response to its heavy and ever-increasing workload.⁷⁴ The first question that must be answered, therefore, is whether the practice of depublication is becoming more frequent. If so, what factors might account for its increasing use? Is depublication required by the supreme court as a tool to manage its growing workload or is it, as critics have suggested, just another weapon in the arsenal of judicial powers?

Both critics and supporters of the depublication practice seem to have little doubt that depublication has become a more frequent occurrence. The first published critical analysis of depublication showed that while the supreme court depublished just three cases in 1971, the number of depublications had grown to 32 in the last full calendar year of the study, 1976.⁷⁵ Gerstein⁷⁶ reported that the supreme court depublished 103 cases in 1981, while the Attorney General's study⁷⁷ identified 76 depublished cases for 1982 and 95 cases for 1983. Although he offers no count of his own, even Justice Grodin concedes that the court has utilized depublication "[o]n increasingly numerous occasions since 1971."⁷⁸

Indeed, when one examines the number of depublished opinions over the period from 1970-71 to 1983-84, it can be easily confirmed that the frequency of depublication has increased. As Figure 1 shows, with the exception of a rather sharp drop in the number of depublished opinions from 1981-82 to 1982-83 (precipitated by a sharp rise in depublication orders in 1981-82), there has been a steady rise in depublications from 1970-71 (one case) to 1982-83 (120 cases). Interestingly, the largest number of depublications occurred in 1983-84 at the height of public and professional criticism of the practice.⁷⁹ Indeed, in this year, the

74. Grodin, *supra* note 26, at 516-18.

75. Note, *supra* note 24, at 1200-06.

76. Gerstein, *supra* note 37, at 294 n.1.

77. Ashby & Benfell, *supra* note 52, at 138.

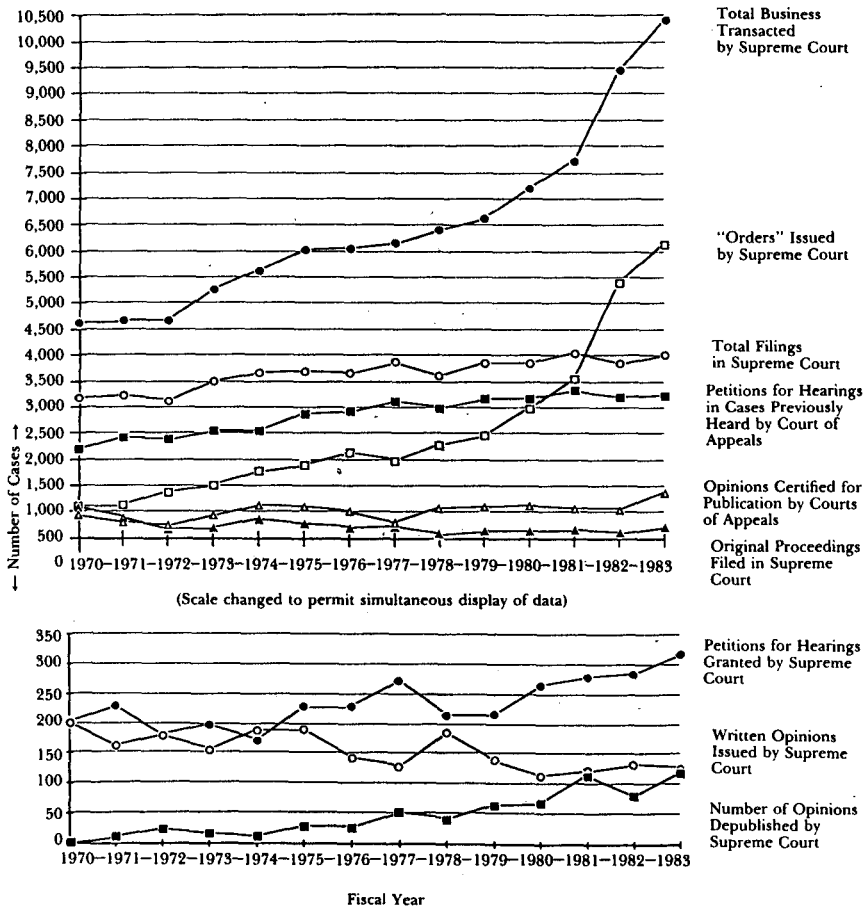
78. Grodin, *supra* note 26, at 514. One other critic of depublication has reported a count of 48 depublished cases in 1982, 41 in 1983, and 20 through half of 1984. Both the other studies of depublication and my own suggest that these figures are incorrect. See Vance, *supra* note 48.

79. Gerstein, *supra* note 37; Grodin, *supra* note 26; Vance, *supra* note 48; Yegan, *supra* note 36. The most probable reason for the discrepancy between my calculation of the number of depublished cases and those reported in previous studies is the difference between the use here of fiscal as opposed to calendar years. For a discussion of the particular years chosen for this empirical study, see *supra* note 61.

court depublished nearly as many opinions as it authored itself (i.e., 126).

Figure 1

FREQUENCY OF DEPUBLICATION AND VARIOUS MEASURES OF WORKLOAD IN THE CALIFORNIA SUPREME COURT, 1970-71 TO 1983-84



Knowing the number of depublished cases is only partially helpful in understanding the changing role of depublication in the California appellate process. It is also equally important to know how the rate of depublication has changed. Unfortunately, there is no one clearly-defined measure of the rate of depublication. Surely the most useful measure would be one which allowed us to know how frequently the supreme court has ordered depublication when presented with the opportunity to do so (i.e., petitions for hearings in cases accompanied by published opinions

issued by the courts of appeals). For various reasons, however, such a statistic cannot be determined.⁸⁰ One possible substitute is to calculate the number of depublications as a percentage of petitions for hearing received by the supreme court, in much the same way that the percentage of cases accepted by the court for plenary review is calculated.⁸¹ Alternatively, one may calculate the number of depublications as a percentage of all published opinions—a measure which provides a quantitative assessment of the impact of depublication upon the size of the body of court of appeals opinions bearing precedential importance.⁸²

By either of the available measures, the rate of depublication has increased. As a percentage of petitions for hearing, depublication orders have ranged from a low of less than .1% in 1970-71 to 3.7% in 1983-84. As a percentage of published opinions,⁸³ depublications have grown from barely .1% in 1970-71 to a high of 10.5% in 1981-82. In neither case, however, has the growth

80. As noted in the Introduction, although the court may depublish a case upon the request of interested parties or upon its own motion, the overwhelming majority of depublications result from "a petition for hearing with the supreme court after the court of appeals' opinion had been certified for publication." Grodin, *supra* note 26, at 514 n.1. However, official court statistics do not report the proportion of cases with published opinions involving subsequent petitions for hearing by the supreme court. It is known, however, that only about 30% of the appeals decided by the courts of appeals by written opinion, published or not, are followed by petitions for hearing by the supreme court. See JUDICIAL COUNCIL (1986), *supra* note 11, at 104 table T-3A.

81. JUDICIAL COUNCIL (1986), *supra* note 11, at 104 table T-4.

82. Obviously, such a measure cannot address the question of the significance or importance of the opinions ordered depublished by the supreme court or the substantive impact of depublication upon California law.

83. The number of opinions certified for publication was estimated by taking the official reports of the number of majority opinions authored in the courts of appeals. JUDICIAL COUNCIL (1986), *supra* note 11, at 114 table T-10. JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT 94 Table X (1976) [hereinafter JUDICIAL COUNCIL (1976)]. That number was then multiplied by the reported percentage of majority opinions published. JUDICIAL COUNCIL, *supra* note 11, at tables XV or T-15 (for individual years, and then added to the number of opinions depublished in each fiscal year). Due to rounding of the percentage of majority opinions published in some years, (1971-72, 1973-74, 1974-75, 1982-83, and 1983-84), there is undoubtedly some imprecision in these data, although the conventions of rounding limit the possible error to 0.5% of the total number of majority opinions in any one fiscal year. Thus, in 1983-84 for instance, where 15% of the 8,515 majority opinions written were published (or 1,277), the actual figure could have been as low as 14.5% (1,235) or as high as 15.4% (1,311). This, in turn, could slightly affect the percentage of certified opinions depublished, ranging from a high of 8.9% to a low of 8.4% (instead of the figure of 8.6% used in the analysis). For the purpose of showing the overall increase in the utilization of depublication, however, this degree of indecision is quite tolerable.

been unhalting, and neither measure increased in more than three consecutive years over the entire period.

Whether this growth in depublication is due to the increasing number of demands made upon the supreme court is difficult to say. It is not difficult to show a general connection between the frequency of depublication and various measures of supreme court workload. As Figure 1 suggests, there has been a general upward movement since 1970-71 both in the number of depublished cases and several principal measures of the work of the supreme court. Further, in statistical terms, this parallel upward movement produces very strong and consistent positive correlations between the frequency of depublication and supreme court workload. As Table 1 shows, the number of depublished cases correlates very highly with the supreme court's reported total of "business transacted," the total number of filings in the court, and the number of petitions for hearing emanating from the courts of appeal.⁸⁴ Indeed, the supreme court's workload appears to bear a stronger relationship to the frequency of depublication than it does to either the number of petitions for hearing granted by the court or the number of opinions written to dispose of those cases. The only major measures of workload not positively correlated with the number of depublication orders are the number of original proceedings⁸⁵ and the number of written opinions issued by the court.

Despite these strong correlations, however, the measures of supreme court workload need to be considered with caution in terms of trying to explain the court's increasing reliance on depublication. Table 1, for example, shows that the strongest correlation with depublication is the court's "total business transacted," a number which has grown steadily since 1970-71, from 4,637 to 10,420 in 1983-84. The most significant increases in the court's "business" have come, however, in the category of "or-

84. Approximately 80% of the supreme court's "total filings" consist of petitions for hearings in cases previously decided by courts of appeals. The other major case categories are original proceedings and direct appeals (i.e. death penalty cases). As Figure 1 shows, the number of original proceedings filed in the supreme court has fluctuated considerably over the past several years, ranging from 1,154 in 1974-75 to 591 in 1978-79. Direct appeals have similarly varied, from just 3 in 1977-78 to 43 in 1981-82 declining since then to just 24 in 1983-84. See JUDICIAL COUNCIL (1986), *supra* note 11, at 83 table 1, 100 table T-1.

85. Most of the court's "original proceedings" consist of unmeritorious petitions for writs of habeas corpus filed by prisoners. Gustafson, *Some Observations About California Courts of Appeal*, 19 UCLA L. REV. 167, 178 (1971-72).

Table 1

**CORRELATION^a OF FREQUENCY OF DEPUBLICATION
WITH MEASURES OF SUPREME COURT WORKLOAD,
1970-71 TO 1983-84**

Measure of Supreme Court Workload	Number of Depublished Cases	Petitions for Hearing Granted by Supreme Court
Total Business Transacted	.89*	.84*
Total Filings	.82*	.72*
Petitions for Hearing from Courts of Appeals	.86*	.76*
Number of Opinions Certified for Publication by Courts of Appeals	.62*	.60*
Original Proceedings in Supreme Court	-.58	-.57
Petitions for Hearing Granted	.84*	—
Number of Opinions Written	-.76*	-.77*

^a Pearson's product-moment correlation coefficient.

* Significant at .05 level of significance.

ders," which includes cases ordered transferred between two divisions of the same court of appeal district or from one district to another (usually to balance workload), cases accepted by the court but retransferred to the courts of appeals with instructions, and "routine and miscellaneous" orders. The cases transferred and retransferred numbered only 169 in 1970-71 and hovered at or about 200 through 1980-81. However, beginning in 1981-82 and continuing through 1983-84, there was a tremendous increase in these transfer actions, primarily due to the need to move cases to new divisions created in the First, Second, and Fourth Appellate Districts, and due to transfers and retransfers necessitated by the delayed formation of the Sixth Appellate District.⁸⁶ Similarly, the "routine and miscellaneous" orders amounted to just 948 in 1970-71, but gradually increased over the period to 4,221 in 1983-84.

Although these orders constituted 60% of the "total business transacted" by the court in 1983-84 and accounted for 87% of the court's total workload increase since 1970-71, they do not appear

86. For remarks about the Sixth Appellate Division, see JUDICIAL COUNCIL (1986), *supra* note 11.

to be matters requiring the regular involvement and attention of most of the court's members. Transfers and retransfers to balance workload can be handled by administrative staff with the court's concurrence.⁸⁷ Similarly, "routine and miscellaneous" orders "reflect the administrative workload of the court, involving such matters as time extensions and appointment of counsel."⁸⁸

On the other hand, other parts of the court's workload which are positively correlated with the frequency of depublication are concededly time-intensive. Although the number of petitions emanating from the courts of appeals has remained relatively stable since 1977-78, the court has gradually accepted an increasing percentage of those cases for hearing.⁸⁹ In 1983-84, the number of granted petitions for hearings climbed to 318. Although the court has not issued more written opinions to respond to these cases, it undoubtedly must give close scrutiny to the decisions and opinions issued below so as to be able to intelligently exercise its options to fully review the case itself, grant and hold the case pending some other related case on its calendar, or retransfer the case back to the court of appeals with instructions.⁹⁰

Similarly, raw data on filings may not reveal the true growth and accumulation of workload. Most significantly, although the number of direct appeals reaching the court each year have not increased dramatically,⁹¹ there is a significant backlog of death penalty cases awaiting resolution by the court.⁹² One member of the court is reported to have asserted that death penalty cases now consume from one-fourth to one-half of the justices' time.⁹³

Beyond the level of gross correlation, however, it is difficult to make any definitive statements about potential workload-re-

87. The official description of the supreme court's procedures indicates that cases are transferred and retransferred by order of the Chief Justice without court action, or upon the vote of four justices assenting thereto. SUPREME COURT OF CALIFORNIA, SUPREME COURT OF CALIFORNIA: PRACTICES AND PROCEDURES 25 (1985).

88. JUDICIAL COUNCIL (1986), *supra* note 11, at 77.

89. *Id.* at 104 table T-4.

90. Grodin, *supra* note 26, at 518-20.

91. For a discussion of the make up of total cases with the Court, *see supra* note 84.

92. Grodin, *supra* note 26, at 519 n.11.

93. *See* P. JOHNSON, *supra* note 51, at 20 n.32. It has been asserted by one source that each death penalty case requires 1,141 days from the time of the trial court judgment to final decision by the supreme court on appeal. At this rate of decision, the court would require until the year 2,105 to clear its current backlog of capital cases. *See* CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, PROSECUTORS' WHITE PAPER ON THE SUPREME COURT CONFIRMATION ELECTION 7 (1985).

lated explanations for the increased frequency of depublication or to attempt to explain either the major or minor fluctuations in the annual number of depublication orders issued. It is a mathematical certainty that, given a constant rate of depublication, an increase in the number of cases considered for hearing by the high court should increase the number of depublication orders.⁹⁴ On the other hand, depublication appears to have increased at a rate slightly faster than most of the principal quantitative measures of supreme court workload.

As Figure 1 suggests and as Table 1 confirms, the frequency of depublication also corresponds closely ($r=.84$) to the number of hearings granted by the court in response to petitions for review from decisions issued by the courts of appeals—a measure which more than any other speaks to the court's willingness to examine the correctness of the judgments or opinions of the intermediate appellate courts. This parallel growth is particularly marked since 1978-79,⁹⁵ where both the number of hearings granted and the number of depublications increased (from 216 to 318, and from 40 to 120, respectively) along with the number of petitions requesting review (from 3,006 to 3,244). However, only 15.6% of the growth in the number of granted hearings and only 2.5% of the growth in depublications can be attributed to increases in the number of petitions considered.⁹⁶ In both the use of its discretionary powers to grant review and to order depublication, the California Supreme Court can in this sense be said to have grown more “activist” over the last several years.

Other than the workload, what factors might help to account for the court's increasing use of depublication? The following

94. This also assumes that the proportion of petitions for hearing which involve published opinions, potentially subject to depublication, remains constant over time as well. There is no way to know whether this may be so.

95. The official reports of judicial statistics warn that prior to 1978-79 a change in the method of counting petitions for hearing may have rendered those figures not strictly comparable to those in 1978-79 and thereafter. Limiting this kind of comparison to the latter years is thus especially appropriate. See JUDICIAL COUNCIL (1986), *supra* note 11, at 100 table T-1.

96. In 1978-79, the supreme court granted 216 of 3,006 (or 7.2%) of the petitions for hearing. Applying this rate of acceptance to the 3,244 petitions for hearing submitted in 1983-84 indicates that the court could have been expected to grant hearings to 232 cases as a result of the increase in the number of submitted petitions. Thus, growth in this aspect of the court's workload accounted for 16 (232-216) of the 103 (318-216) additional petitions granted by the court in 1983-84 compared to 1978-79, an increase of 15.6%. A similar calculation was performed with respect to changes in the number of depublished cases.

section examines certain characteristics of the depublished cases for possible explanations.

IV. THE CHARACTERISTICS OF DEPUBLISHED AND PUBLISHED CASES COMPARED

Depublication is usually defended as a practical tool by which the supreme court, unable to review more than a limited number of important cases, can nevertheless prevent the incorporation of misleading or confusing statements of law as expounded by one of the courts of appeals into the body of binding published precedent in the state of California. As two justices of the court have explained publicly, in most instances of depublication "the court considers the result to be correct, but regards a portion of the reasoning to be wrong and misleading."⁹⁷

It is not possible, of course, to determine directly whether the opinions depublished by the supreme court actually contained misleading statements or incorrect interpretations which might justify the court's order. That kind of analysis would require a careful reading of each opinion, a full understanding of the applicable case law, and then an interview with each justice to ascertain their individual perceptions of the error that warranted depublication. Some analysts have analyzed depublished opinions, thereafter offering their personal opinions as to the appropriateness of depublication and even speculating as to the court's motivation in issuing particular depublication orders.⁹⁸ An alternative and less subjective approach is to compare depublished and published opinions by some indirect measures which might bear upon the plausibility of the claim that depublication is used by the supreme court as a tool to prevent the entry of misleading or misguided statements into the body of citable precedent and not, as critics have suggested, to censor the expression of objectionable legal viewpoints by members of the courts of appeals. Although these indirect indicators can be criticized as inadequate measures of the likelihood of "error" by the courts of appeals, they have the advantage of providing some objective evidence that depublished opinions are qualitatively different than published ones. Further, the indicators examined here have been utilized successfully in prior research—primarily that which has attempted to explore differences in the characteristics of published and unpublished opinions. By extension, it is possible to use some of the same

97. Grodin, *supra* note 26, at 522; *see* Note, *supra* note 24, at 1185 n.20.

98. *See, e.g.,* Biggs, *supra* note 38, at 1586.

indicators to probe the existence of differences between published and depublished cases.

One such indicator is the length of the majority opinion. Research comparing published and unpublished opinions by the United States Courts of Appeals has shown that published opinions are generally longer and more carefully reasoned than unpublished opinions.⁹⁹ Presumably, this difference occurs because judges spend more time and effort preparing opinions bound for publication than those judged not to be worthy of publication.¹⁰⁰ Published and depublished cases cannot be as easily distinguished, of course, since depublished opinions are already certified as “publishable” by the court of appeals and have presumably received a considerable amount of attention from the justices who authored them. Nevertheless, if the cases chosen by the supreme court for depublication frequently contain incorrect statements of law and if those errors are also due to overburdened appellate court justices with insufficient time to dedicate to the resolution of some of the complex issues before them,¹⁰¹ then it might be expected that the majority opinions filed in depublished cases would be generally shorter in length than those issued in published cases.

Another indirect indicator that might support the claim that depublished cases contain erroneous or misleading statements would be evidence showing that cases authored by superior or municipal court judges sitting by assignment on the court of appeals are more frequently depublished than those authored by sitting justices. As Chairperson of the Judicial Court, the Chief Justice of the supreme court may assign trial court judges to temporarily sit as justices of the courts of appeal to help expedite the processing of cases in overloaded appellate districts. Once assigned, a trial judge assumes the same role as a “regular” court of appeals justice, including the occasional obligation to author a

99. Reynolds & Richman, *Limited Publication*, *supra* note 19, at 817-19; Reynolds & Richman, *The Price of Reform*, *supra* note 19, at 598-604.

100. Wold, *Going Through the Motions; The Monotony of Appellate Court Decision-Making*, 62 JUDICATURE 58, 63 (1978); Wold & Caldeira, *Perceptions of Routine Decision-Making in Five California Courts of Appeal*, 13 POLITY 334, 343 (1980-81).

101. In interviews with justices of the California Courts of Appeals, Wold and Caldeira observed that justices themselves believed that their workload affected the quality of their work even in decisions that were scheduled for publication. Some jurists claimed that they were able to spend less time than they wished in reflection and research on the “important” cases. Time limits apparently forced them to reduce both the length and scholarliness of almost all opinions that they wrote. Wold & Caldeira, *supra* note 100, at 343.

majority opinion.¹⁰² Although a judge must obtain the concurrence of at least one of the two colleagues assigned to the panel on which the judge sits, the author of the opinion is almost entirely responsible for preparation of the opinion, including the restatement of relevant facts, isolation of the appropriate legal issues, research of the statutory and case law bearing upon those issues, and a recommended disposition.¹⁰³ Given the growing workload of the courts of appeals, the other justices on the panel "have time to do no more on a case assigned to their colleague than to read the opinion,"¹⁰⁴ an opinion which "will usually be accepted on faith, subject only to flaws obvious on its face."¹⁰⁵ If it can be assumed that trial court judges are generally less experienced in writing appellate court opinions than "regular" appellate justices and that this inexperience translates into more frequent misstatements of law, then depublication should be more frequently observed in opinions authored by trial court judges.

Two tables were constructed from the data collected on depublished and published cases to test these hypotheses. Table 2 compares the length of majority opinions while Table 3 compares the frequency of published and depublished opinions authored by regular justices of the courts of appeals, by trial court judges sitting by assignment, and by "the court" (i.e. unsigned unanimous opinions).

Table 2 shows that there is very little difference in the typical lengths of published and depublished opinions; in both cases, the median opinion was 6.0 pages, with opinions in both groups nearly equally divided among those of short (0-4.5 pages), medium (5.0-7.0 pages), and longer (over 7.5 pages) lengths.

102. Over the past decade, assigned judges have been responsible for anywhere from 7-15% of the authored majority opinions written by the courts of appeal. JUDICIAL COUNCIL (1986), *supra* note 11, at 114 table T-10. The percentage of published opinions authored by assigned judges is not reported in official court statistics, but the sample of published cases drawn for this study places that figure at about 12.8%.

103. See Thompson, *One Judge and No Judge Appellate Decisions*, 50 CAL. ST. B.J. 476, 478-80 (1975).

104. Gustafson, *supra* note 85, at 199.

105. Thompson, *supra* note 103, at 478; see also Molinari, *The Decisionmaking Conference of the California Court of Appeal*, 57 CALIF. L. REV. 606 (1969); Wold, *supra* note 100, at 64; Wold & Caldeira, *supra* note 100, at 343-44. As long ago as 1971, a retired court of appeals justice observed that the time pressures upon the justices prevented all members of a panel from giving close attention to all aspects of the majority opinion as written by the judge to whom the case had been assigned. "The result, of course, is often a one-judge opinion masquerading as an opinion of a three-judge court." Gustafson, *supra* note 85, at 199.

Table 2

COMPARISON OF DEPUBLISHED AND PUBLISHED CASES,
1975-76 TO 1982-83, BY LENGTH OF MAJORITY OPINION,
IN PAGES

<u>Length of Majority Opinion</u>	<u>Depublished Cases</u>	<u>Published Cases</u>
0.0 - 4.5 pages	32.7%	34.0%
5.0 - 7.0 pages	30.1%	30.8%
7.5 + pages	<u>37.2%</u>	<u>35.2%</u>
	100.0%	100.0%
	(N=505)	(N=600)
Median Length	6.0 pages	6.0 pages

$\chi^2 = 0.52$ with 2 d.f. (non-significant)

Similarly, Table 3 shows virtually no difference between the proportion of depublished (12.6%) and published (12.8%) opinions authored by assigned judges. As in the comparison of opinion lengths, the minor differences between the published and depublished cases are not statistically significant.

Table 3

COMPARISON OF DEPUBLISHED AND PUBLISHED CASES,
1975-76 TO 1982-83, BY PRESENCE OF ASSIGNED OR
REGULAR JUDGE AS AUTHOR OF MAJORITY OPINION

<u>Author of Majority Opinion</u>	<u>Depublished Cases</u>	<u>Published Cases</u>
Regular Court of Appeals Justice	84.4%	85.3%
Assigned Judge	12.6%	12.8%
Opinions by "The Court" ^a	<u>3.0%</u>	<u>1.8%</u>
	100.0%	99.9%*
	(N=506)	(N=600)

* Does not sum to 100.0% due to rounding.

^a Opinions by "The Court" are unsigned, usually unanimous, opinions.

$X^2 = 1.53$ with 2 d.f. (non-significant)

In the absence of statistically significant differences between the published and depublished cases on these two measures, we are entitled by the canons of social science only to assert that it is *not* possible to reject the "null hypothesis" that there is no differ-

ence between the two groups of cases.¹⁰⁶ Alternatively, had a significant difference been revealed, we would have only been able to say that the published and depublished cases are statistically distinguishable but not to confirm any particular causal explanation for that difference, such as that overworked appellate judges or inexperienced trial court judges produced legal errors warranting depublication. Since there are no significant differences on either measure, however, we are able to reject these as probable explanations for the general practice of depublication, (although legal error might explain particular depublication orders).

Both of the first two indicators assumed that any "errors" resulting in depublication were relatively clear-cut and obvious ones which would not have been made if the decision-making process of the courts of appeals were more deliberative and collegial¹⁰⁷ or if its workload did not demand the assignment of temporary justices. However, it may also be the case that an "error" by the courts of appeals may occur in those developing or uncertain areas of the law where there are no clear standards or guidelines for decision. In these instances, the supreme court may order depublication simply because it disagrees with the interpretation offered by the lower court. If this is the case, depublication should be observed more frequently in controversial cases where the governing legal principles are either unclear, uncertain, unsettled, or unknown.

Two additional indicators are available to test this hypothesis indirectly. First, presence of a dissenting or separate opinion in a court of appeals disposition may "reveal disagreement over the present state of the law, thus clearly implicating the court's law-declaring function."¹⁰⁸ If that uncertainty is shared by the supreme court and if the high court's majority does not agree with the interpretation of law as declared by the court of appeals' majority, depublication can be expected to result. Analysis of the California Supreme Court's exercise of its discretionary jurisdiction has already shown that cases decided within the court of appeals with a dissenting vote are more likely to be accepted for

106. See H. BLALOCK, *supra* note 73, at 110-16, 155-66.

107. By "more collegial" I mean a decision-making process in which all three of the justices sitting on each panel are more actively involved in helping to shape and refine the majority opinion as opposed to the situation where one judge shoulders the opinion uniting burden in overworked three judge panels. See *supra* note 105 and accompanying text.

108. Reynolds & Richman, *Limited Publication*, *supra* note 19, at 829-30.

review by the high court than unanimously-decided cases.¹⁰⁹ Depublication, of course, is an “intermediate” response between denying review on the one hand and accepting the case for hearing on the other.¹¹⁰ Accordingly, a divided panel on the court of appeals should more frequently be seen in depublished cases than in published ones.

Similarly, reversal or modification by the court of appeals of the trial court or the administrative agency below¹¹¹ should be more frequent in depublished cases. Reversal by the court of appeals may indicate more than that the proceeding below involved some elementary or commonplace legal error; it may, instead, “point to uncertainty about the content of governing law.”¹¹² Baum has shown that the supreme court is more likely to accept for review those cases in which the appellate court has reversed or modified the decision of the court or agency below than those cases involving affirmance.¹¹³ Like cases involving dissent within the courts of appeals, the reversal of lower courts or administrative agencies evidences “disagreement among the judges below [which] may suggest to the [supreme] court the difficulty or closeness of the issues involved in a case.”¹¹⁴ And just as these cases are favored by the high court for hearing, they should also be favored for depublication when the Court chooses not to grant a full review.¹¹⁵

Table 4 compares the percentages of depublished and published cases decided by unanimous votes by the courts of appeal

109. Baum, *supra* note 8, at 724-25.

110. Former Justice Gordin has observed that “depublishing is a stronger alternative than straight denial because it not only eliminates the court of appeals’ opinion as precedent, but it also removes that opinion from the realm of judicial discourse, and therefore from the development of the common law.” See Gordin, *supra* note 26, at 523.

111. In addition to hearing appeals from trial court judgments, the California Courts of Appeals hear appeals from the orders or awards of certain administrative bodies, such as the Worker’s Compensation Appeals Board and the Agricultural Labor Relations Board.

112. Reynolds & Richman, *The Price of Reform*, *supra* note 19, at 618. Studies comparing published and unpublished federal appellate opinions have shown that published cases more frequently involve reversal of the court below than unpublished ones. Baum, *supra* note 8, at 724; see Reynolds & Richman, *Limited Publication*, *supra* note 19, at 819-21; Reynolds & Richman, *The Price of Reform*, *supra* note 19, at 617-20.

113. Baum, *supra* note 8, at 724.

114. *Id.*

115. Baum, *supra* note 8, at 740-41. Baum found that when the supreme court does grant review it is likely to reach a result different from that reached by the courts of appeals in about two-thirds of the cases.

(or, in some cases, the Appellate Department of the Superior Court) and by votes in which one justice indicated either a partial dissent from the majority opinion (i.e., a "split court") or complete disagreement (i.e., a "divided court"). The results here indicate, as hypothesized, that depublished cases are more likely to involve non-unanimous decisions by the courts of appeals (18.4%) than published cases (4.8%).

Table 4

COMPARISON OF DEPUBLISHED AND PUBLISHED CASES,
1975-76 TO 1982-83, BY FREQUENCY OF DIVIDED
OPINION WITHIN COURTS OF APPEALS

<u>Court of Appeals Decision</u>	<u>Depublished Cases</u>	<u>Published Cases</u>
Unanimous	81.6%	95.2%
Split ^a	2.4%	1.2%
Divided ^b	<u>16.0%</u>	<u>3.7%</u>
	100.0%	100.1%*
	(N=506)	(N=600)

* Does not sum to 100.0% due to rounding.

^a A "split" court is defined as one in which one justice filed an opinion concurring in part and dissenting in part to the majority opinion.

^b A "divided" court is defined as one in which one justice dissented from the majority opinion.

$X^2 = 52.87$ with 2 d.f. (non-significant)

Although this difference is statistically significant, it might nevertheless be observed that the existence of disagreement in the courts of appeals is relatively rare even in the depublished cases, and that more than eight of every ten depublication orders have come in cases in which the appellate justices have no disagreement over the meaning or application of the prevailing law. This observation, while correct, needs to be tempered, by consideration of the strong institutional incentives operating in the courts of appeals against the expression of dissent, not the least of which are burdensome caseloads and official judicial workload formulas that recognize only the production of majority but not dissenting opinions.¹¹⁶

Thus, there is some limited evidence that controversial cases,

116. See Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 AM. B. FOUND. RES. J. 543, 583 n.146,

as indicated by the appearance of division within the courts of appeals, may be more likely candidates for depublication than unanimously-decided cases. However, this limited evidence is not reinforced by the data on the frequency of courts of appeals-ordered reversals in published and depublished cases.¹¹⁷ As Table 5 shows, the proportion of times in which the courts of appeals chose to reverse or modify the judgment of the trial court in whole or in part in depublished cases (50.2%) is nearly identical to that observed in the published cases (52.2%). Indeed, although the differences are not statistically significant, the proportion of reversals is slightly higher in the published cases than in the depublished ones.¹¹⁸

622 n.256 (1984); Gustafson, *supra* note 85, at 200, 196-203; Wold, *supra* note 100, at 64; Wold & Caldeira, *supra* note 100, at 345.

117. The frequency of reversal varies depending upon the precise definition of "reversal" of the trial-court decision. As Baum notes, although "a request to the court of appeals for issuance of a writ is not truly an appeal from the trial court, and the court of appeals in such a case does not actually 'reverse' the trial court decision, [nevertheless] in a non-technical sense a request for a writ is an attempt to overturn the trial-court decision in question, so that the issuance or denial of a writ can be interpreted as an affirmance or reversal of the trial court." Baum, *supra* note 8, at 723-24 n.28. That convention has been adopted here as well. Additionally, as Baum had done, modifications and reversals were considered together in the category of "reversed in whole or in part," akin to what Davies has described as "interventions" by the courts of appeals—actions that changed the trial court or administrative agency decision below. Compare Baum, *supra* note 8, at 723 n.27 with Davies, *supra* note 116, at 573. Other categorizations, including an attempt to distinguish those cases in which the "major issue" in each case was reversed or affirmed, made no substantive change in the results here.

118. As with the expression of dissent, there are strong institutional norms which make justices of courts of appeals reluctant to completely reverse trial court judgments. The leading analysis of the impact of these "norms of affirmance" is Davies. See Davies, *supra* note 116, at 583-636. In addition to the role perception held by most of the appellate justices that they are engaged primarily in "error correction" rather than "law articulation" and that stare decisis serves as a significant constraint upon their actions, legal doctrines such as the "harmless error" rule support the tendency of the courts of appeals to affirm rather than reverse trial court decisions. Although the frequency of reversal varies depending upon the precise definition of "reversal," there seems to be no doubt that most of the trial court decisions brought to the courts of appeals for review emerge substantially unscathed. See Davies, *supra* note 116, at 573-82 and accompanying notes. Official judicial statistics indicate the reversal rate to be generally less than 10% in criminal matters. See JUDICIAL COUNCIL (1986), *supra* note 11, at 115 table T-10A; see generally Davies, *supra* note 116, at 578-82. The reversal rate for civil cases is not officially reported, but sample estimates suggest that it is probably about 25%. See Davies, *supra* note 116, at 574 table 6, 573 n.113.

Table 5

COMPARISON OF DEPUBLISHED AND PUBLISHED CASES,
1975-76 TO 1982-83, BY COURTS OF APPEALS
DISPOSITION OF TRIAL COURT JUDGMENTS^a

<u>Disposition by Courts of Appeals</u>	<u>Depublished Cases</u>	<u>Published Cases</u>
Trial Court Judgment Affirmed	49.8%	47.8%
Trial Court Judgment Reversed in Whole or in Part	<u>50.2%</u>	<u>52.2%</u>
	100.0%	100.1%*
	(N=502)	(N=600)

^a Includes decisions by administrative agencies reviewed by the courts of appeals.

$\chi^2 = .37$ with 1 d.f. (significant at .01)

In sum, there are few indirect indicators which would tend to confirm the assertion that depublication is used primarily to prevent the publication of misstatements of law by the courts of appeals. Depublished cases are very similar to published opinions in terms of their length, the proportion authored by trial judges sitting on assignment, and the frequency with which they reverse or modify trial court judgments. However, depublished opinions are nearly four times as likely as published ones to be seen in cases in which one or more of the justices on the courts of appeals has expressed a dissenting view, a phenomenon which suggests either that particularly controversial or unsettled legal issues may be among the factors that prompt the supreme court to order depublication.

V. THE IDEOLOGY OF DEPUBLICATION

Although some caution must be observed in interpreting these data, it does not appear that the supreme court is using depublication to prevent the publication of careless statements of law offered up by overworked or underprepared appellate judges. In addition, publication does not appear to be "triggered" by the

existence of disagreement between the trial and appellate courts as evidenced by the frequency of appellate reversal. At best, depublication is more likely to occur in those cases in which there is a difference of opinion within a court of appeals over the meaning or application of law in a specific substantive area. The next logical question, then, is whether there are any other patterns in the supreme court's depublication orders that might suggest some explanation as to the factors motivating the court's increasing reliance on the practice. Specifically, there remains the untested assertion, frequently voiced by the court's critics, that depublication has become an important tool of covert substantive review to achieve certain ideological or policy goals held by the court's majority.

A. *Types of Legal Disputes and Depublication*

An initial area of inquiry is whether the supreme court's depublication decisions are concentrated in particular substantive areas of law or whether they are distributed across areas of law in proportions comparable to those observable in other published cases decided by the courts of appeals. In the former situation, it might be inferred that the supreme court has consciously used depublication to shape the direction of law in areas of particular concern and importance to the court's majority.

To examine this possibility, Table 6 presents the distribution of the cases depublished from 1975-76 to 1982-83 and the matching sample of published cases in nineteen major categories of legal disputes.¹¹⁹ The results suggest that the court has used depublication disproportionately in criminal cases. Although just one-third of the published opinions (33.0%) involved issues of criminal law, nearly two-thirds of the depublished cases fell into the criminal law category.

119. The nineteen categories used and displayed in Table 6, were modelled upon those suggested by Nagel for an analysis of the decision-making propensities of judges. See Nagel, *Political Party Affiliation*, *supra* note 68. Assignment of a case to one of these categories was based upon the author's assessment of the primary issue in each case as determined by a reading of the case summary prepared by the reporter of decisions. Although another scholar undertaking the same analysis might come to slightly different judgments with respect to the assignment of cases to categories, the analysis here is at least consistent since all 506 depublished cases and all 600 published cases were categorized by just one person. Further, to ensure comparability between the published and the depublished cases, the depublished cases were organized by the fiscal year in which the courts of appeals originally divided them, rather than the fiscal year in which they were ordered depublished.

Table 6

COMPARISON OF DEPUBLISHED AND PUBLISHED
OPINIONS BY TYPES OF LEGAL DISPUTES

<u>Area of Law</u>	<u>Depublished</u>	<u>Published</u>	<u>Difference (D - P)</u>
Criminal	62.3% (N=315) of 506	33.0% (N=198) of 600	+29.3%
Civil ^a			
Family Law	(6.8%)	(14.2%)	-7.4%
Trusts/Estates	(2.6%)	(5.2%)	-2.6%
Contracts	(6.3%)	(2.7%)	+3.6%
Labor/Management	(7.3%)	(2.7%)	+4.6%
Consumer/Consumer	(5.2%)	(5.7%)	-0.5%
Debtor/Creditor	(1.6%)	(2.2%)	-0.6%
Employee/Employer	(13.1%)	(11.2%)	+1.9%
Personal Injury	(22.5%)	(19.2%)	+3.3%
Fraud/Defamation	(3.1%)	(2.5%)	+0.6%
Eminent Domain	(2.1%)	(2.7%)	-0.6%
Zoning/Land Use	(1.0%)	(2.0%)	-1.0%
Permits/Licensing	(2.1%)	(3.2%)	-1.1%
Agency Regulations	(4.2%)	(5.7%)	-1.5%
Tax	(0.5%)	(5.2%)	-4.7%
Civil Liberties	(4.7%)	(2.5%)	+2.2%
Property	(2.6%)	(4.0%)	-1.4%
Corporations	(1.6%)	(0.5%)	+1.1%
Others	(12.6%)	(8.5%)	+4.1%
Total - Civil Cases	99.9%* (N=191)	99.9%* (N=402)	

* Does not sum to 100.0% due to rounding.

^a The percentages listed for the civil cases are based on the total number of civil cases, excluding those in the criminal category.

Further analysis reveals a slight growth over time in the proportion of depublished cases occurring in the area of criminal law. Through the 1979-80 fiscal year, the proportion of criminal law depublications averaged 56%, ranging from a low of 51% (1978-79) to a high of 59% (1979-80), while the proportion of published cases in the area of criminal law averaged 31% (rang-

ing from 26% to 35%). In 1980-81, however, 74% of depublication orders were made in connection with criminal cases, compared to 37% of the published opinions. In each of the next two fiscal years, criminal cases totalled 65% of the depublished cases, compared to 42% and 25%, respectively, of the published cases.¹²⁰

In the kinds of civil law issues involved, Table 6 shows comparatively little difference between the published and depublished cases. However, in comparison to the published cases (see column 3 of Table 6), the court was slightly more likely to depublish cases in the areas of contracts, labor/management disputes, employer/employee conflicts, personal injury, and civil liberties. With the exception of contracts, these cases are among the areas of law which are thought to most frequently demonstrate the tension between "liberal" and "conservative" justices, i.e., economic-based disputes involving litigants of differing economic status, issues of equity and justice for aggrieved individuals (e.g., personal injury, wrongful death, negligence, malpractice, defamation, etc.), and matters involving alleged deprivations of constitutionally-guaranteed rights and liberties.¹²¹ These types of civil disputes and criminal appeals, particularly where the governing legal principles are unclear or evolving, frequently require judges to call upon their personal philosophical and ideological perspectives on such matters as the appropriate amount of legal protection to be provided criminal defendants, the degree of sympathy to be accorded "underdog" economic litigants, and the balance to be struck between the power of government to protect the health, welfare, safety, and morals of the public and the rights of individuals to enjoy fundamental personal liberties.

120. The criminal cases were further analyzed with respect to the kinds of major issues involved to see whether there might be found any noticeable changes over time that might help explain the sharp rise of criminal case depublications in 1980-81. Specifically, an attempt was made to see whether there had been increases in the number of criminal appeals challenging sentencing dispositions, many of which could have been stimulated by the passage of California's Determinate Sentencing Law (DSL) in 1977 or in the number of cases raising search and seizure issues, a particularly thorny policy area for the California appellate courts in recent years. However, although cases involving sentencing and confinement issues, not limited to interpretations of the DSL, were responsible for about one-third of the additional criminal cases depublished in 1980-81 and thereafter compared to preceding years, there was virtually no growth in the number of depublications involving search and seizure issues. Two-thirds of the growth in criminal law depublications involved a general subcategory covering issues concerning the sufficiency of evidence, adequacy of jury instructions, composition of the jury panel, competency of counsel, etc.

121. See P. DUBOIS, *supra* note 68, at 154-72.

These data on the type of depublished opinions suggest the possibility that the court has used this power to achieve certain policy objectives. It remains to be determined whether additional supporting evidence for this interpretation can be obtained from an analysis of the results of the cases ordered depublished by the court.

In most empirical analyses of appellate judicial decisions, scholars are able to look directly at the behavior of individual judges based upon judges' votes either in support of the majority opinion or in dissent. In the case of depublication, however, the views of individual justices are not so easily ascertained. Although individual justices are free to dissent to the decision of the majority to order a case depublished and these dissents are part of the majority depublication order and part of the supreme court's public minutes, only two of them—former Chief Justice Rose E. Bird, an outspoken critic of depublication, and former Associate Justice William Clark—chose to exercise this option with any regularity. Although the silence of other justices could be construed as support for the depublication order, there are very good reasons not to make such an assumption.¹²² Thus, in addition to a comparison of the dissenting behavior of Bird and Clark, an analysis will be offered of the results of those cases ordered depublished by the court considered as a whole, with full recognition that just four of the seven justices are required to order depublication. In this connection, an attempt will be made to determine whether there is sufficient evidence to support the inference that depublication has increasingly been used by the court's liberal majority to disproportionately remove from the

122. The California Supreme Court is one of the few state courts to publicly report the votes of its members to grant hearings under its discretionary jurisdiction. Justices who do not join the decision to grant a hearing can be presumed either to have voted to deny hearing or, in a limited number of instances, not to have participated in the decision. See Baum, *supra* note 8, at 716. The same is not true of depublication orders, however. The court's order is simply reported, with no indication of which justices may have supported the decision. Justices are free to express disagreement with the depublication order, but only former Chief Justice Bird and former Justice Clark did so on a regular basis, with each dissenting approximately 40% of the time. In contrast, the average rate of dissent to depublication for the other fourteen justices who served on the court from 1971-83 was just 4%, with the average justice having dissented just 2.5 times. The range of variation among these fourteen justices is so narrow and the disparity between them and Bird/Clark is so great that there is reason to believe that most justices view it as unnecessary to express any disagreement they may feel when the majority votes to depublish. Like the United States Supreme Court's treatment of certiorari petitions, dissents to depublication are the exception and not the rule.

body of published precedent decisions of the courts of appeals reaching a conservative result.¹²³

B. Dissent to Depublication: Behavior of Justices Bird and Clark

As noted above, one observable aspect of individual judicial behavior in connection with depublication is when a member of the supreme court publicly expresses disagreement with the order to depublish. However, only former Chief Justice Bird and former Justice Clark dissented to depublication in a significant proportion of cases. Fortunately, in terms of their decision-making propensities, Bird and Clark occupied opposite ends of the logical spectrum, with Bird widely acknowledged as the court's most liberal member and Clark as one of its most conservative in recent years.¹²⁴ Thus, their behavior offers a unique opportunity to compare the influence of ideology upon depublication. If ideology affects justices' decisions on depublication, one would expect Chief Justice Bird to express disagreement with the depublication of those opinions of the courts of appeals which reached liberal results, while Clark would be expected to disagree with the intended depublication of appellate opinions reaching conservative results.¹²⁵

Of the cases ordered depublished during his eight year tenure on the court,¹²⁶ Clark dissented to the order of depublication

123. For the definition of "conservative" and "liberal" as it applies to the results of judicial decisions, *see supra* note 69 and accompanying text.

124. *See* Barnett, *supra* note 51; Baum, *supra* note 8; Baum, *Policy Goals*, *supra* note 9; Baum, *Judicial Demand*, *supra* note 9.

125. Both the following analysis of dissenting behavior of Bird and Clark, and the subsequent analysis of the court's depublication decisions are limited to those kinds of disputes which most readily appear to involve the conflict between liberal and conservative judicial philosophies (e.g., criminal law, labor/management, employee-employer, consumer/business, personal injury, civil liberties) and exclude those which do not (i.e., family law, trusts and estates, civil procedures, etc.). This limitation results in the exclusion of 81 of the 506 (or 16.0%) depublished cases and 217 of the 600 (or 36.1%) sampled published cases decided from 1975-76 to 1982-83.

126. For both Clark and Bird, the rate of dissent to depublication was calculated by dividing the number of dissents reported for each justice by the total number of cases ordered depublished during their tenure on the bench beginning with the date on which each took the oath of office and ending either with the reported date of retirement (for Clark) or the end of the 1982-83 fiscal year (for Bird). Cases which could not be located in the supreme court's minutes were also excluded from the base number of depublished cases. For a discussion of this problem, *see supra* note 65. It is recognized that each justice might not have participated in some of the cases depublished during their respective tenures, but this would affect only the percentage of dissents to depublication and not the subsequent analysis of the patterns of the dissents filed. For a general discussion of the problem, *see* Baum, *supra* note 8, at 716.

38.0% of the time. Since she joined the court in the spring of 1977 and through 1982-83, Bird dissented to 43.1% of more than 450 depublication orders voted by the court. Indeed, during those four years in which they served on the court together, Bird and Clark jointly dissented in 32.5% of the cases depublished during that time.

Table 7 represents the frequency with which Chief Justice Bird and Justice Clark dissented to depublication during their respective tenures on the high court, depending upon whether the decision by the courts of appeals could be considered liberal or conservative. The results suggest that ideology is not an unimportant consideration in the decision to dissent to depublication. Chief Justice Bird has been more likely to dissent to the depublication of liberal courts of appeals decisions while Justice Clark was more likely to dissent to the depublication of conservative lower court decisions. At the same time, each justice also dissented to depublication on occasions when it would not be entirely consistent with their individual ideological outlooks. For instance, although Chief Justice Bird dissented to 54.3% of the depublications ordered in cases in which the court of appeals decision was liberal, she also dissented to 38.5% of the lower court decisions reaching a conservative result. The same tendency is observable in the dissenting votes filed by Justice Clark.

Table 7

**DISSENTING BEHAVIOR BY CHIEF JUSTICE BIRD AND
JUSTICE CLARK TO ORDERS OF DEPUBLICATION BY
RESULT OF DECISION IN COURTS OF APPEALS**

<u>Result in Courts of Appeals^a</u>	<u>Percentage of Cases in Which Each Justice Dissented to Depublication</u>	
	<u>Chief Justice Bird^b</u>	<u>Justice Clark^c</u>
Criminal Cases		
Liberal	46.6% (N=58)	29.2% (N=48)
Conservative	34.9% (N=198)	39.6% (N=96)
Civil Cases^d		
Liberal	67.9% (N=34)	45.9% (N=24)
Conservative	52.9% (N=51)	48.6% (N=35)
All Cases^e		
Liberal	54.3% (N=92)	34.7% (N=72)
Conservative	38.5% (N=249)	42.0% (N=131)

^a For the definition of "liberal" and "conservative," see *supra* note 69 and accompanying text.

^b Based upon all cases depublished during her tenure from March 26, 1977 to end of study (June 30, 1983).

^c Based upon all cases depublished during his tenure from March 3, 1973 to March 24, 1981.

^d Includes only certain civil cases; see *supra* note 125.

^e Sum of criminal cases and certain civil cases; see *supra* note 125.

Table 8 examines the dissenting behavior by Bird and Clark in those cases depublished during their four years together on the bench from 1977 to 1981. The results are revealing. In nearly like percentages regardless of whether the lower court result was liberal or conservative, Bird and Clark joined together in dissent to the order of depublication. Indeed, in the civil cases, Bird and Clark jointly dissented in over half of the depublication orders, without regard to the nature of the decision below. However, as seen in the data presented in Table 7, the two justices also exhibit ideological differences. Justice Bird was far more likely than Clark to dissent to the depublication of liberal appellate court de-

cisions, while Justice Clark was more likely than Bird to dissent to the depublication of conservative lower court decisions.

Table 8

DISSENTING BEHAVIOR BY BIRD AND CLARK DURING
THEIR JOINT TENURE, 1977-1981^a

Result in Courts of Appeals ^b	Percentage of Cases in Which:		
	Bird Dissented Without Clark ^c	Clark Dissented Without Bird ^c	Bird and Clark Dissented Together ^c
Criminal Cases			
Liberal (N=36)	30.6%	8.3%	25.0%
Conservative (N=73)	16.4%	21.9%	24.7%
Civil Cases ^d			
Liberal (N=18)	33.3%	5.6%	50.0%
Conservative (N=23)	8.7%	17.4%	54.5%
All Cases ^e			
Liberal (N=54)	31.5%	7.4%	33.3%
Conservative (N=96)	14.6%	20.8%	31.3%

^a Includes all cases depublished from March 26, 1977 to March 24, 1981.

^b For the definition of "liberal" and "conservative," see *supra* note 69 and accompanying text.

^c May or may not have included other justices in joint dissent.

^d Includes only certain civil cases; see *supra* note 125.

^e Sum of criminal cases and certain civil cases; see *supra* note 125.

In sum, at least as can be determined from the dissenting votes of just two members of the court, a justice's ideological outlook is not irrelevant to the judgment as to whether or not a court of appeals decision should be depublished. At the same time, justices of opposing ideological perspectives often agree on the decision to depublish or, as Bird and Clark indicate, agree to disagree with the majority which has voted for depublication.

C. *Depublished: The Results of the Court's Depublication Orders*

Apart from the behavior of individual justices, it is possible also to examine the nature of the cases ordered depublished by the supreme court acting as an institution. Needless to say, the

danger of such an approach is to infer that there is a single institutional motivation governing the decision to depublish a given case or set of cases. As former Justice Grodin observed, if the supreme court were required to explain the reasons behind its own depublishing decisions, any attempt to forge a statement expressing the consensus of the majority would be "a heroic feat" which would, in all likelihood, stimulate dissenting and concurring views.¹²⁷ Nevertheless, such an approach does allow a general test of the assertion by critics that the liberal majority which has dominated the supreme court over the past decade in disposing of cases on the merits has used the power of depublishing in a similar fashion.

Table 9 presents a comparison of the depublished and published cases decided in each fiscal year from 1975-76 through 1982-83 in terms of the result of the decision by the courts of appeals. As the table indicates, if one aggregates all of the cases over the entire period, there is very little difference between the two groups of cases. In the criminal area, the proportion of depublished cases which involved a conservative result (66.3%) is nearly identical to the proportion of conservatively-decided published cases (66.7%). In the civil area, there is slightly greater disparity, with depublished cases tending to be slightly more likely than published ones to have involved conservative results—59.1% to 50.3%, respectively. Considering all cases together, depublished cases are only marginally more likely to be "conservative" than the published ones—64.5% to 58.7%, respectively.

127. Grodin, *supra* note 26, at 524.

Table 9

**COMPARISON OF DEPUBLISHED AND PUBLISHED
OPINIONS, 1975-76 TO 1982-83, BY DIRECTION OF
COURTS OF APPEALS DECISIONS
(% of Support for "Conservative" Result)**

	Criminal Cases		Civil Cases		All Cases	
	<u>Depublished</u>	<u>Published</u>	<u>Depublished</u>	<u>Published</u>	<u>Depublished</u>	<u>Published</u>
1975-76	36.8%* (N=19)	75.0%* (N=16)	45.5% (N=11)	61.5% (N=13)	40.0%* (N=30)	69.0%* (N=29)
1976-77	68.4% (N=19)	80.0% (N=15)	50.0% (N=8)	81.3% (N=16)	63.0% (N=27)	80.6% (N=31)
1977-78	33.3% (N=24)	46.2% (N=13)	63.6% (N=9)	57.1% (N=14)	42.9% (N=35)	51.9% (N=27)
1978-79	60.0% (N=25)	66.7% (N=24)	60.0% (N=15)	54.2% (N=24)	60.0% (N=40)	60.4% (N=48)
1979-80	56.8% (N=37)	65.4% (N=26)	50.0% (N=12)	32.0% (N=25)	55.1% (N=49)	49.0% (N=51)
1980-81	74.3% (N=70)	67.6% (N=37)	66.7% (N=12)	43.3% (N=30)	73.2%* (N=82)	56.7%* (N=67)
1981-82	76.6%* (N=64)	66.7%* (N=42)	47.1% (N=17)	36.0% (N=25)	70.4%* (N=81)	55.2%* (N=67)
1982-83	77.2% (N=57)	64.0% (N=25)	75.0% (N=24)	55.3% (N=38)	76.5%* (N=81)	58.7%* (N=63)
Total	66.3% (N=315)	66.7% (N=198)	59.1% (N=110)	50.3% (N=185)	64.5%* (N=425)	58.7%* (N=383)

* Value of χ^2 test applied to difference between depublished and published cases significant at .05.

The most interesting trend in depublication, however, is to be found in the year-by-year comparisons presented in Table 9, particularly with respect to the criminal law cases. Up until 1980-81, the court tended to depublish a lower proportion of conservative courts of appeals opinions than were being published by the court of appeals at the same time. In 1980-81 and thereafter, however, three-fourths of the depublished criminal cases have involved conservative decisions compared to two-thirds of the published cases. Combined with a similar disparity in the civil cases, it can be observed that the court has gradually tended to depublish larger proportions of conservative decisions than are to be found among the published work of the courts of appeals. Indeed, by 1982-83, the gap has become rather large; whereas 58.7% of the published cases reached conservative results, 76.5% of the cases ordered depublished had conservative outcomes.

VI. CONCLUSION: DEPUBLICATION IN THE FUTURE

As might have been expected, the empirical evidence on the California Supreme Court's practice of depublication is mixed. Depublication has increased in response to the supreme court workload, but workload explains only part of the court's increasing reliance on the practice. Depublished opinions manifest many of the characteristics of published cases, such as average length, and the frequency with which they reverse or modify lower court judgments. Depublished cases are four times as likely as published cases to involve disagreement within the courts of appeals, but eight of every ten published cases have been unanimously decided by the three-judge panels. Depublished cases are disproportionately concentrated in the area of criminal law, but neither the analysis of individual justices' dissenting behavior nor of the entire court's decisions suggest a singleminded usage of depublication as a tool of substantive review to advance a particular ideological viewpoint. Justices' ideological viewpoints undoubtedly affect their assessment of the correctness of the courts of appeals decisions in some cases and this results in the depublication of some cases. But ideology is hardly the entire story, and the reasons for many of the court's uses of the power of depublication escape ready explanation through the use of the kind of quantitative analysis employed here. If the joint dissenting behavior of Chief Justice Bird and Justice Clark is any indication, then perhaps from one-quarter to one-half of the cases depublished are so ordered for reasons other than the justices' disagreement with the result of the decisions by the courts of appeals.

What the future may hold for depublication is difficult to predict. In November, 1984, California voters approved Proposition 32, a constitutional amendment empowering the supreme court, among other things, to engage in selective review of one or more of the significant issues presented on appeal without having to dispose of all of the issues raised by the litigants.¹²⁸ Presumably, by being able to select only parts of cases for review, the supreme court may be able to take on and resolve some of the issues apparent in courts of appeals decisions that otherwise would have been resolved by depublication. Since the mechanism of selective review should save the supreme court's time in disposing of most cases it accepts for consideration on the merits, depublication

128. See, Stone & Stone, *New Rules of the Game: The Dramatic Impact of Proposition 32 on the California Supreme Court*, 8 L.A. LAW 44 (1985); JUDICIAL COUNCIL (1986), *supra* note 11, at 9-23.

may become less necessary.¹²⁹ On the other hand, the court is unlikely to use its power of selective review simply for the purpose of "error correction" of errant statements in opinions of the lower courts and thus depublication will undoubtedly have a continuing utility. What remains to be seen is whether the court will also use depublication as a limited instrument for deferring the consideration of controversial issues even when the option of selective review is available. Indeed, the court's approach to selective review, depublication, and decision making generally is a matter of some uncertainty since the dramatic election defeat of three of its most liberal members in the November, 1986, elections, and their subsequent replacement by the appointees of conservative Republican Governor George Deukmejian.¹³⁰ I leave these empirical questions to others who may wish to explore them.

The potential utility of depublication as a tool of judicial administration in other states remains to be explored as well. Obviously, the practice has no relevance for those states which have yet to create intermediate appellate courts and vest substantial discretion in their state supreme courts to decide which cases they may accept for review. Depublication would also only be practicable where the intermediate appellate court already observes the practice of selective publication.¹³¹ If every appeal taken from the decision of an intermediate appellate court is accompanied by a potentially depublishable opinion, it is doubtful that a state supreme court would be able to deal with the additional workload anticipated by the requirement that it evaluate each case not just on the merits of the petition for review, but also for the presence of significant misstatements of law.

129. Grodin, *supra* note 26, at 528.

130. For a discussion of the 1986 California judicial retention elections, see Wold & Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987).

131. Although an exhaustive survey was not conducted for the present study, a quick review of state constitutional and statutory provisions and court rules suggests that at least two-thirds (and perhaps more) of the states with intermediate appellate courts provide for the selective publication of appellate opinions. The specific mechanisms governing selective publication vary considerably, ranging from states which have specific criteria that must, in the view of a majority of the participating justices, be satisfied for an opinion to be deserving of publication (similar to California's Rule 976(b)) to those which vest the decision to publish in the reporter of decisions or even a committee on opinions. Illustrative examples include: ILL. S. CT. R. 23; IOWA S. CT. R. 10; OHIO SUP. CT. R. 2; N.J. CT. R. For an earlier comprehensive survey of state publication practices, see Chanin, *supra* note 17, at 367-75.

Selective publication of intermediate appellate court opinions is also important because it indirectly places an important limit upon the high court's practice of depublication. The California experience is illustrative. Since only about a third of the decisions of the courts of appeals taken to the supreme court for possible review, and only 15% of all intermediate appellate court opinions are published, and since the supreme court depublishes less than 10% of these opinions, depublication currently occurs in only a small proportion of all decisions issued by the courts of appeals. Given the current level of public and professional criticism of depublication, one can imagine the storm of controversy over depublication if the supreme court were asked to examine published opinions accompanying each of the petitions for review it receives, and as a result, the number of depublished cases were to grow to many times its current level.

Under such circumstances, even though a substantial proportion of a high court's depublication decisions might reflect the justices' considered judgment that the intermediate appellate court opinions contained incorrect or potentially misleading statements of law, there would be an inevitable erosion of confidence from both within and without the judiciary due to the sheer number of depublication orders. That might very well mean that the costs of depublication would far exceed any benefits it might offer as an option available to a state supreme court in the exercise of its discretionary jurisdiction.