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Gerald F. Uelmen

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Justice Stanley Mosk presents a convincing demonstration of the pressing need for a major overhaul of our appellate process. I do not believe the solution he proposes, however, responds to the need. The addition of four more Justices to the supreme court and splitting the court into separate crminal and civil divisions does not address the underlying problem of the court's workload. I believe we should direct our attention at the flow of cases coming into the court, and explore the alternatives available to divert that flow. At least four alternatives are available which might help significantly reduce the current workload of the supreme court.

1. A major portion of the Justices' efforts is devoted to reviewing petitions for hearing matters previously decided by the courts of appeal. With the addition of four new divisions to the courts of appeal in 1982, a substantial increase in the number of these petitions can be anticipated in the immediate future. Many of these petitions are based upon conflicts among different districts of the courts of appeal, or even among divisions of the same district.

* Professor of Law, Loyola Law School of Los Angeles. Professor Uelmen is immediate past president of California Attorneys for Criminal Justice, a member of the California Academy of Appellate Lawyers, and Co-Chair of the Rules Advisory Committee for the United States Court of Appeals for the Ninth Circuit.

Most of these conflicts could be resolved without supreme court invervention if a procedure for *en banc* review were available within the courts of appeal. Every circuit in the federal system utilizes *en banc* hearings to resolve intra-circuit conflicts, and the new appellate tribunal proposed by Chief Justice Burger would specifically address inter-circuit conflicts. Yet California has no procedure to resolve conflicts among its courts of appeal except review by the state supreme court. *En banc* review would not, of course, require all court of appeal justices to rehear the case. Rehearing panels could be selected by lot, as they are in the United States Court of Appeals for the Ninth Circuit.

2. When the California Supreme Court grants a petition for hearing the entire decision of the court of appeal is vacated and ordered depublished and the supreme court undertakes a *de novo* review of the entire record. This procedure is an anachronism which can only be explained as a historical accident. Before the creation of the courts of appeal, the supreme court sat in divisions and frequently reheard decisions of a division *en banc*. Such a rehearing, of course, required that the division opinion be vacated. That procedure was continued when the courts of appeal were created, even though they were a separate, independant court. The supreme court should be permitted to limit its review to a particular issue, and leave intact the resolution of other issues in a case by the court of appeal. This would give the court the same flexibility the United States Supreme Court has in reviewing *certiorari* petitions. A proposal to accomplish this reform is currently before the state legislature.

3. Another major portion of the supreme court's workload is the direct review of death penalty appeals. The number of these cases is increasing at a much faster pace than the court can decide them, creating the spectre of a monumental backlog which grows every year. Direct review means that the court must address every issue raised by counsel. This is a painstaking and time consuming process, and there is no reason why the supreme court should be saddled with this burden. This practice can be traced historically to a period when only eight death sentences had to be reviewed each year, and they were disposed of with the same routine dispatch as other criminal cases. Today, it makes good sense to allow direct review of these cases by the courts of appeal, permitting the supreme court to limit its review to particular issues on the grant of a petition for hearing. The feasibility of this change is currently under study by Attorney General John Van de Kamp.

4. A final portion of the supreme court's workload which can

be diverted elsewhere is the petitions for original writs. Many of these matters are disposed of by transfer to lower courts, where they should have been filed in the first place. If a petition for a writ is denied by a lower court, the supreme court can review that denial on a petition for rehearing. The petitioner should not have the option of refiling the petition as an original proceeding in the supreme court.

Each of these four alternatives should be fully explored before we resort to a major restructuring of the California Supreme Court. The restructuring which Justice Mosk proposes is only a temporary solution. The same workload would be there, and it would continue to grow, necessitating the expansion of each division by adding more justices. The workload of the court is not evenly divided between civil and criminal cases. Fifty-six percent is criminal, while forty-four percent is civil, so the two divisions would start out with a significant disparity in workload. The Chief Justice would be reduced to an administrative figurehead, with no role in the decision for either civil or criminal cases. Most important, the quality of the decisional output would be adversely affected if the court becomes two courts, each operating in a narrow, specialized sphere. One strength of the California Supreme Court has always been the diversity of background of the Justices, and that diversity certainly enriches both its civil and criminal opinions. The Texas and Oklahoma experience with separate courts of last resort for civil and criminal cases has not been without its critics, who complain that the criminal court does not attract judges of the same stature as the civil court. As an avid student of the criminal opinions of the California Supreme Court for many years, I am consistently impressed with the fact that many of the finest such opinions emanated from Justices who were not regarded as criminal "specialists" before their elevation.

If Justice Mosk's proposal ever comes to pass, each justice on the court would face a difficult choice, selecting either the civil or the criminal tribunal to serve out his or her term. In nearly every case, the State of California would lose. Imagine our sense of loss if Justice Stanley Mosk were never to write another opinion in a civil case. It could only be matched by our sense of loss if Justice Stanley Mosk were never to write another opinion in a criminal case.