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HARRY N. SCHEIBER*

I. INTRODUCTION

In public discussion of California's judicial system and its current problems, the central focus of attention almost invariably is upon issues of caseload volume, delay, and congestion—that is to say, upon matters of efficiency and "management" in holding trials and, more generally, in processing disputes. It is a commonplace theme—with judges, judicial administrators, lawyers, legal scholars, lay commentators and elective officials—that the courts are in an unprecedented state of crisis because of the effects of an alleged civil "litigation explosion" and the rising numbers and complexity of criminal prosecutions.

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All interpretations in this paper represent the individual views of the author and do not necessarily reflect the position of the Judicial Council or of the Commission on the Future of the Courts.
Unfortunately, in seeking to analyze the current problems of delay and congestion, and determine their causes—and in seeking to formulate solutions—we can all too easily make erroneous assumptions and rely upon questionable, often superficial, interpretations of what caseload statistics can tell us. The study of "law in action," which Roscoe Pound long ago insisted we must undertake rather than being content to know only "law in books," is an enterprise fraught with all the difficulties accompanying the analysis of complex institutions.¹ This is true especially with an institution such as the judiciary, which is elaborately interrelated with several powerful professional subsystems, including the organized bar, court administrators, the law enforcement apparatus, and penal agencies—to say nothing of its relationship with the legislature and the executive.² In California during the period of this study, the courts also operated in the context of rapid population growth, social and economic change, and political volatility.³


². On “environmental interdependencies impacting the organization,” including relationships such as insurance adjusters, probation departments, and volunteer groups, see Geoff Gallas, The Conventional Wisdom of State Court Administration: A Critical Assessment and an Alternative Approach, 2 JusT. Sys. J. 35, 44-45 (1976). Gallas also speaks of “resource dependency” as a problem for courts, with respect to reliance on the state legislature and on local governments—with all the exposure they entail—for financing. Id.; see also MALCOLM FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL (1983) (treating, at length, some of the same phenomena under the rubric of “segmentation” of professional bureaucracies in the courts); John P. Heinz & Peter M. Manikas, Networks Among Elites in a Local Criminal Justice System, 26 LAW & SOC’Y REV. 831 (1992) (a richly documented analysis of the full range of public and private actors, institutions, and organizations in the criminal justice process—a case study of Cook County, Illinois). One recent commentator takes the analysis a step further than merely recognizing the degree of autonomy that separate actors enjoy, offering the model of a “constellation of... various sets of relations” among judges and other professionals and organizations involved in judicial process, and goes so far as to suggest that one should “think of courts as loosely coupled networks of activities rather than as formally integrated and closed systems.” Carroll Seron, The Impact of Court Organization on Litigation, 24 LAW & SOC’Y REV. 451, 457 (1990); see also Wolf Heydebrand, Organizational Contradiction in Public Bureaucracies, 18 SOC. Q. 1, 83, 96 (calling traditional courts “semi-feudal power centers” or “pluralistic network[s] of organized activities” that are “coordinated more or less unsuccessfully by political processes”). It should be noted that the entire thrust of the modern judicial reform movement, which seeks to achieve bureaucratization, centralization, and integration, is aimed at elimination of many elements of the traditional system, whose autarchic elements are thus stressed—perhaps excessively—in the rather extreme version postulated by Seron and Heydebrand, as quoted here.

³. Summary statistical indicia of these sweeping socio-economic changes are conveniently collected in Robert Page, Data Reference Book Draft (Nov. 6, 1992) (a 2020 Vision Project document on file with the Commission on the Future of the Courts, Judicial Council of California).
First of all, court delay and congestion should be seen not as unprecedented phenomena of our day, but rather as recurring problems: The proper explanations for these problems in the California courts will very likely be vastly different for different time periods and different localities.\textsuperscript{4} The fact that congestion has been a recurrent and continuous problem for at least a century is made clear by the careful research of legal historians in several recent, and highly important, case studies. Complaints of a crisis in the courts, involving intolerable delays and congestion, in fact, have been heard regularly throughout the twentieth century—not only in California, but in many other states and in the federal courts.\textsuperscript{5}

Second, the "litigation explosion," usually thought of as a product of our own times, and having become prominent recently in the rhetoric of lawyer-bashing politicians, actually may represent a style of dispute resolution and a resort to the law that is of long-historic standing—a feature of our society as American as baseball and apple pie. Even in the last thirty years, the litigation rate (cases filed in proportion to population) has been fairly steady, and it appears likely that the rates were probably higher—perhaps much, much higher—a century ago in California.\textsuperscript{6}

Third, we also know from the available historical studies that California courts have adopted in the past a great variety of procedural reforms as remedies for the ailments of delay and congestion. And, alas, the evidence suggests that the reforms have seldom been truly successful.\textsuperscript{7} The "streamlining" of procedures—including changes in discovery rules, the imposition of mandatory pretrial settlement or other case-management procedures, the adoption of new calendar and judicial assignment techniques, and the addition of judges to the bench—have all proven to be of questionable effectiveness in reducing delay, except perhaps for short periods of time.\textsuperscript{8} Moreover, as the pioneering study by Selvin and Ebener on the Los Angeles Superior Court from 1880 to 1980 has demonstrated, the inauguration of administrative reforms often coincided with other changes in law or administrative policy—making it very difficult to isolate the variables so as to attribute any improvements, or

\textsuperscript{4} See infra part III.


\textsuperscript{6} See infra part III.

\textsuperscript{7} See, e.g., Selvin & Ebener, supra note 5, passim.

\textsuperscript{8} Id.
lack thereof, to specific reform moves. There is, withal, much evidence to support commentators' warnings that the hopeful pursuit of "reform" may in truth be the application of nostrums—and that the historical record is littered with "great promises and failed reforms."

Still another caveat is suggested by the long-term history of trial courts in California as well as in other jurisdictions. Several historians and experts on judicial administration and civil litigation have contended that the single most important factor that determines the pace at which cases move (or fail to move) through the civil courts may be what they term the "legal culture" of judges, lawyers, and court officials in a given locality at a given period of time—that is to say, their attitudes and expectations with regard to litigation, the strategies that they regard as standard, their willingness to adopt or even to make routine various tactics of delay on behalf of clients, and the like. Hence the ostensibly "hard" and "objective" quantitative data of changes in the rates, or even the volume, of filings, settlements, and trials may not tell us very much about the efficacy of procedural or administrative reforms already instituted—or about the potential of reforms now being contemplated for the future. Similarly, the raw data regarding numbers of appeals may be highly misleading if they are set forth without reference to their substantive content or degree of importance, as measured by impact on subsequent appeals and trial court operations.

Many research studies of patterns of change in the criminal courts make a parallel finding: Prosecutorial policies may be the most important determinant of changes in the volume of indictments, the proportion of cases that come to trial, and other indicia of the criminal process such as guilty plea rates. This observation is especially pertinent with regard to

9. Id. at 113-15.
11. See Larry Sipes, Managing to Reduce Delay, 56 CAL. ST. B.J. 104, 105 (1981) (reporting findings of a 1979-80 large-scale experimental study that "court structure, caseloads, and backlog do not appear to govern the speed of litigation. Rather, the delay or the absence of delay is more the result of 'local legal culture,' i.e., the expectations, practices, and informal rules of behavior that judges, court staff members, and attorneys have concerning the pace of local litigation"). The social-scientific term "local legal culture" has already found its way into the case reports in litigation bearing on recent "streamlining" procedural changes associated with the effort to cut back on delay and congestion. See Reygoza v. Superior Court, 281 Cal. Rptr. 390, 395 n.7 (Ct. App. 1991); cf. Jones v. Superior Court, 12 Cal. Rptr. 2d 376 (Ct. App. 1992).
12. See infra part III (further discussing these issues of data sufficiency).
the California courts after 1978, when the determinate sentencing law went into effect, and even more so after 1982 when the effects of Propositions 8 and 115, which fundamentally revised the criminal code, became evident. The observation also applies more generally to criminal prosecution from 1960 to 1990. An example that comes to mind is a revision of the drunk driving laws in 1982, establishing much stricter standards of enforcement and providing harsher penalties than had previously prevailed. The soaring caseloads that had been expected did not, however, materialize. It was a curious outcome, one that may be explained by the way in which prosecutors handled the inflow of DUI arrests.

None of this is to argue that today’s problems of delay in the state courts are trivial, let alone mythical. The problem of court congestion indisputably is a harsh and costly reality for the many parties to civil disputes who find themselves unable to obtain timely access to the courtroom (when they want it) to which the rule of law entitles them. Nor are the pressures on criminal courts chimerical. It is a matter of serious concern to many informed commentators that, after the sweeping revisions to California’s criminal code by direct ballot measures in the last decade, the quality of criminal justice may be eroding because of too much, rather than too little, streamlining of procedure, speedup of court processes, radical redefinition of constitutional guarantees, and fundamental redesign of sentencing practices. By contrast, defenders of these “streamlining” changes welcomed them as a long-overdue rebalancing of the criminal justice system in favor of police and prosecutors, with at least incidental concern for specification of new “victims’ rights.”

What follows in this study is an effort to examine the history of changes in the California judicial system from 1960 to 1990. One of the objectives is to reconstruct the record of the movement for “court reform” in California—a movement that includes the aforementioned concerns about delay and congestion. Attention will also be given, however, to the larger range of problems, real or perceived, that have long formed the core of the more comprehensive agenda for judicial reform—the agenda of long-standing efforts to accomplish directed and purposeful

14. See infra part V; see also FEELEY, supra note 2, at 143-45; MATHER, supra note 13, passim.


change in the judicial system. Some of the issues in this agenda have been addressed in California since 1960 by the Judicial Council (the constitutional body that has principal responsibility for issues of judicial administration) and other government bodies, private reform groups, professional organizations, special-interest groups, and political coalitions. Some of their efforts have resulted in new legislation, administrative changes, and rule-making innovations. It is important to recognize, however, that other problems—viewed as urgent by important voices in the public and scholarly dialogues on law and judicial administration—have been either sorely neglected by the principal actors or only peripherally or superficially addressed by them. An understanding of why change has been resisted, moreover, is a question no less interesting and important than inquiries into why change did occur.

This Article seeks also to probe the forces external to the judicial system and to the cadres of jurists, lawyers, and other professionals that populate it. In this sense, it is a quest to find in the larger record of political, social, cultural, and economic change in California since 1960 some of the formative influences that have constituted the broad context of change in the courts. These influences, after all, have largely shaped the problems that our courts confront; they have tended to establish the effective parameters within which efforts at purposeful change—or "reform," if one prefers to call it that—have been given play.

Part II of this Article is a survey of the large-scale changes in the social and political contexts of change in the courts from 1960 to the present day. Part III then provides a brief overview of the statistical indicia of change over time in caseload. The trends from the 1960s to the 1980s are compared with those that historians have identified in their studies of earlier periods of California judicial history.

In Part IV, the analysis comes to a focus upon the broad goals and specific objectives that have been pursued by those who have espoused "change by design"—that is, who have championed reform. Here a clarification of terminology is in order: Although this paper accepts the convention that efforts at purposeful change are to be referred to as "reform," it is important to recognize that the term can be misleading. One person's "reform" is another's "reactionary effort at turning back..."
the clock,” and a measure is not an unalloyed good simply because it represents a new approach. Many changes that are routinely called reforms are not truly reformative in any way but rather are better termed “adjustments.”

Part V, the final section, offers a summary view of some of the widely varied patterns of reform, innovation, and resistance and how they have affected the state’s courts. Of particular concern here are the varied sources of ideas and pressures for change, both internal and external, to the judicial and legal system.

Throughout, brief commentary is offered as to portents, cautions, and suggestions for future reform that this historical case study may suggest, as the Commission on the Future of the Courts’ 2020 Vision project turns to the challenge of responding to change—and effecting change in the courts—in the decades ahead. Most important, perhaps, is the cautionary message from the examples of change that are encountered here; for the varied patterns they reveal serve as a vivid reminder that issues in law can appear suddenly, and with an immediate impact on the courts—as innovations in environmental law did in the 1970s. By contrast, innovations can cause caseloads to recede, as happened after no-fault divorce was achieved. They can be volatile in their impact, with the kind of volcanic style of change that has affected the law and administration of criminal justice. Or, instead, they can work with something much closer to the deep-cutting effects of glaciation—as perhaps we can say of the trends in civil litigation, with intractability and perdurability features of the landscape as important as the changes that were etched by innovation in the three decades that are the subject here.

Called upon some years ago to predict major trends in the future of American law, a prominent California legal scholar declared that the truly gifted “futurists” were those who could explain most satisfactorily just why their previous predictions had gone so badly wrong!20 Alas, a similar test applies to historians: As new evidence comes to light, or as new insights are brought to bear on the meaning of long-known facts, even the most careful historians can find themselves in the business of explaining why the interpretations that they had formerly advanced suddenly appear so flawed. As the present foray into California judicial and legal history has proceeded, the chastening effect of that thought has been all the more telling.

II. THE SOCIAL AND POLITICAL CONTEXT OF CHANGE IN THE CALIFORNIA COURTS

The period from 1960 to 1990 was marked by a series of profound changes in California society. Those changes reshaped the state’s economic structure, brought a vast population inflow from other states and foreign countries, and stimulated massive growth in urban and suburban areas. At the same time, those changes created the now-familiar, escalating problems of complexity and scale in a multicultural society—problems that are now painfully testing the capacity of the state’s governmental institutions to respond to such new challenges.

These three decades also witnessed equally dramatic shifts in the political assumptions and attitudes that animate the California electorate in its approach to the political process. Some of those shifts represented the kind of fundamental shifts that we can properly call sea changes. A notable example was the emergence of a pervasive “rights consciousness” that was associated with demands for constitutional reform and legal redress for groups suffering discrimination. Another was the series of dramatic popular responses—both favorable and hostile—to the legal revolution in “due process” that came out of the federal and state courts in the 1960s and 1970s, and responses to the legislation inspired by the new constitutional jurisprudence. Principal actors in this drama on the national stage were Chief Justice Earl Warren, previously Governor of California, and two Californian Presidents. Together, Richard Nixon and Ronald Reagan mobilized the national political forces that sought to undo the Warren Court’s principal doctrinal legacy—a legacy which reflected, in vital respects, doctrines that the California Supreme Court had enunciated some years prior to their adoption by the federal high court.21 Closely associated with the demand for expansion of substantive

21. See William H. Levitt et al., Expediting Voir Dire: An Empirical Study, 44 S. CAL. L. REV. 916, 916 n.1 (1971) (“There have always been ‘big cases’ . . . [and] lengthy trials . . . But it is a phenomenon of our modern world that the judicial system is the place in which new ‘rights’ evolve, occasioning additional types of litigation and increasingly complicated technical expert testimony in the courts necessitating longer trials.”).

On the history of constitutional rulings in the 1950s-70s period by the California Supreme Court, under the doctrine of independent and adequate state grounds—the impact of which included an increase in resort to the courts to press claims of individual rights—see Arthur Alarcon, The California Constitution and the Federal Courts, in HARRY N. SCHEIBER ET AL., LAW AND CALIFORNIA SOCIETY: 100 YEARS OF THE STATE CONSTITUTION (1980); Note, The New Federalism: Toward A Principled Interpretation of the State Constitution, 2 STAN. L. REV. 297 (1977); see also William J. Brennan, State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1977) (praising state court initiatives in invoking state constitutional guarantees); George Deukmejian &
rights in that era was a growing readiness to challenge the claims of professionalism—what one writer described as "a demystification of professional work and a demand for lay or client participation" directed against the legal profession perhaps more than against any other.\textsuperscript{22}

Another element of change in politics—equally basic and even more prominently associated with its California origins—was the emergence of popular concern with the condition and future of the natural environment. Both environmentalism and the forces that have mobilized to oppose conservationist legislation and environmentalist policies have succeeded in producing far-reaching changes in California and national law. The courts themselves have been of crucial importance in this process. First, they advanced the environmental movement through their adoption of doctrines such as the public trust, and the liberalized criteria for standing to sue. Later, they were important in placing some new doctrinal obstacles in the way of environmentalist goals. In this regard, the California judiciary has paralleled and often anticipated moves by the federal courts.\textsuperscript{24}

Clifford K. Thompson, Jr., \textit{All Sail and No Anchor—Judicial Review Under the California Constitution}, 6 HASTINGS CONST. L.Q. 975 (1979) (attacking the California court by expressing the constitutionalism associated with the emerging political campaign to remove Rose Bird and achieve, through the direct ballot or other processes, a reversal of direction in California jurisprudence on independent state grounds); Peter J. Galie, \textit{State Supreme Courts, Judicial Federalism, and the Other Constitutions}, 71 JUDICATURE 100 (1987) (giving a summary overview of independent state grounds in California and other state high courts).

Mr. Justice Mosk, who with Justices Brennan and Chief Justice Hans Linde of the Oregon Supreme Court was among the principal architects of the new state constitutional jurisprudence, provides an incisive retrospective analysis of the issues and of the new (if uneasy) alliance of conservative and liberal lawyers in advancing this aspect of sovereign state authority, in Stanley Mask, \textit{State Constitutionalism: Both Liberal and Conservative}, 63 TEX. L. REV. 959 (1985); cf. \textit{Raven v. Deukmejian}, 801 P.2d 1077 (Cal. 1991) (expressing contrasting opinions on the doctrine of independent state grounds). The uniquely important bellweather role of the California bench in this area of law, as in tort law, is widely recognized. \textit{See, e.g.}, JOSEPH GRODIN, \textit{IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE} 118-30 (1989); Erwin Chemerinsky, \textit{As California Goes . . .}, CAL. LAW., Aug. 1992, at 47.


There has also been a sea change in the politics of California and the nation with regard to public support for governmental institutions and public services. Throughout the 1960s and until the late 1970s, the California electorate seemed, on the whole, content to accept as axiomatic the proposition that mass society, undergoing accelerating change, required growth in public services comparable to the rate of growth in population, private sector activity, collective wealth, and complexity of late-20th-century industrial and "post-industrial" life. However, an increasingly vocal element, one that expressed in their politics in deep skepticism about the efficacy of public sector activity, began to gather strength in California. This movement verged over into what became a comprehensive antigovernmentalism. A Republican governor, Ronald Reagan, and his Democratic successor, Jerry Brown, each contributed in his own way to the new antigovernmental rhetoric and ideology, and to the renunciation of inherited progressive and liberal approaches to problem solving by government.


California's most rapid growth took place during the years after the philosophy of modern liberalism had become acceptable. Not only were economic and social discrepancies perceived as problems, affirmative governmental action to relieve them was expected. Social planners came increasingly to favor legislative solutions to the problems they perceived; statutes proliferated in California. A relatively sparse body of common law, inadequate to meet an apparent need for increased governmental planning, had created a climate favorable to legislative activity; and as legislation fostered problems in statutory interpretation, the California judiciary was forced to expand the range of its activity.

The California appellate judiciary in the years of Traynor's tenure accordingly faced the recurrent task of defining its role as a contributing institution to the "welfare state" system of government.

Id. at 294-95.


This new ideology was directed in the first instance against bureaucracy, redistributive public policies, and the entrepreneurial state. The central concern, however, soon became the source of public revenues—the tax system. In 1978, this new movement found its target in California with Proposition 13. This change in state law, which struck with the fury of a lightning storm, has had as much influence as any other single factor in producing the difficulties that California’s judicial institutions have confronted since 1960 in meeting their responsibilities. That is to say, Proposition 13 arguably had an effect as significant as some of the major innovations in constitutional doctrine, tort law, or even the “litigation explosion” that has received such prominent attention in scholarly and public debates.27

Even in the best of circumstances, American governments have generally allocated a lower level of financial support to courts, relative to overall public civilian expenditures, than have other industrial democracies.28 But the general fiscal crisis precipitated by Proposition 13 and the proliferation of successor direct-ballot measures limiting state government’s taxation authority, have brought not only constraints on funding of the court system but also erosion of law-enforcement budgets. All this occurred at a time when crime control was becoming increasingly problematic in many areas of the state, generating pressure on the time and resources of the judicial system.29 These problems alone proved to be a vicious cycle for the courts, but at the same time changes in the volume and complexity of civil litigation were also challenging the capacity of courthouse and conference room.

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28. Statistical data on state levels of support for court functions in California and other states are in Judicial Council reports. Professor Marc Galanter of the University of Wisconsin Law School cites international comparisons in unpublished research generously shared with the author. For analysis of the fiscal situation of the California courts in the early 1990s, with some historical perspective on public financing, see John K. Hudzik, Financing and Managing the Finances of the California Court System: Alternative Futures, 66 S. CAL. L. REV. 1813 (1993).

Ineluctably, it was not long before the state courts, already suffering appropriations shortfalls because of the impact of Proposition 13, also were fully swept into the maelstrom of the new antigovernmental politics. Thus, in what Chief Justice Malcolm Lucas has termed a “hundred year storm,” the state’s high court—an institution that previously had been universally acknowledged as one of the brightest jewels in the nation’s judicial crown—entered in the late 1970s into a period of unprecedented controversy during which it suffered deep wounds. The travails of the California Supreme Court in those years may well have been an indicator of the intensity of political passions that had been aroused, as California’s electorate reacted to the enormous strains in American society influenced by racial conflict, the Watts riots, the anti-Vietnam war protests, and the previously mentioned tensions associated with the larger shifts in society and politics. More recently, the success of direct ballot measures imposing term limits and cuts in legislative staff, together with occasional flareups between the judiciary and executive and legislative leaders in Sacramento, provide further evidence of continuity in the strength of anti-governmentalism.

The court’s political difficulties were also emblematic of yet another fundamental change in California society—the new dimensions of criminal activity and their impact upon the public’s perceptions of law enforcement, its sense of security and well being, and its confidence in the...
institutions of governance, including the judicial institutions.\textsuperscript{33} By all the evidence, this crime wave has retained its momentum—a crisis with corrosive and demeaning effects on the public's sense of community, whatever the immediate day-to-day differences in its impact on various localities, ethnic groups, and social classes. The consequences of rising crime, especially in light of the seeming intractability of drug and street-gang violence, are particularly damaging to the position of courts. This damage results from the expectation that the justice system is supposed to be at the front line in dealing with crime—regardless of the steady post-Proposition 13 decrease in the police-to-population ratio, let alone the police-to-crime rate ratio. Moreover, the priority that courts must give to the administration of criminal justice, when it involves such a scale and intensity of effort, comes at the expense of time and resources available for administering other problems of justice for which the courts are responsible.\textsuperscript{34}

One of the overarching factors and shifts in cultural norms we need to assess is the role of litigiousness in what has often been termed the "adversary culture."\textsuperscript{35} Litigiousness is commonly portrayed as uniquely American in its intensity and its practical results. Based on this portrayal, the standard evidence is commonly interpreted as supporting the notion that the problem is unique to American society. This notion persists irrespective of whether the analysis rests upon international comparisons of the number of lawyers per capita,\textsuperscript{36} or upon data illustrating the

\textsuperscript{33} Early on, Chief Justice Donald R. Wright identified some of the ramifications of increased criminal activity and criminal filings associated with new laws that reclassified offenses such as making drug possession a felony. Wright also foretold the dangers of more elaborate procedural requirements imposed by the legislature and the courts, such as the requirements for pretrial procedure. Quality of Justice Being Strained, The Recorder, Jan. 8, 1971, at 1.


\textsuperscript{36} Galanter, supra note 28.
comparative propensity to engage in the cycle of "blaming," "naming," and "claiming"—finally resorting to law—when a perceived harm needs to be redressed—the propensity to sue rather than to absorb losses or use alternative arenas for dispute resolution.\(^{37}\) Similarly, the data on delay and other administrative pathologies in the nation’s courts are cited as evidence of a uniquely American phenomenon.\(^{38}\) However, scholars who have carefully studied the international comparisons of legal behavior and institutions seriously dispute whether such litigiousness is unique to the United States.\(^{39}\)

However that may be, there is no gainsaying that one element of American resort to law—to assert individual or group rights, to challenge administrative procedures, or to otherwise intervene to shape the substantive and procedural operations of government agencies—is apparently more salient in American legal culture than in the legal cultures of other industrial democracies. This is the phenomenon that Professor Robert Kagan has termed "adversarial legalism." Under this phenomenon both governmental regimes for social and economic regulation and basic procedural law for civil disputes, in the courts and in court-annexed dispute resolution, are structured in ways that let the parties at interest control, challenge, and shape outcomes to a degree largely absent in more corporativist and civil law regimes abroad.\(^{40}\) Environmental regulation vividly illustrates the difference between the two types of regimes. The Environmental Protection Act offered "strong incentives to resort to adversarial legal weapons," as Kagan argues, and in 1985 eighty percent of EPA regulations were challenged in court.\(^{41}\) California environmental law was created virtually \textit{de novo} in the period that concerns us, and its development—and impact on the courts—paralleled the juridical history, and impact on the courts, of national environmental law.\(^{42}\)


\(^{38}\) See FEELEY, supra note 2.


\(^{41}\) Id. at 371.

In addition, we need to take account of the transformation of American federalism since 1960 and to reckon with the shifting relationship between the State of California and the national government as an essential element of the political, constitutional, and administrative context of changes in California’s courts. Deep structural and constitutional changes were introduced in the American system of federal governance during the 1960s and later years; they have profoundly influenced every aspect of law, finance, organization, and administrative operations of the government of California. They have also had a pervasive impact upon such substantive policies as the provision of medical care services, civil rights regulations and enforcement, the “War on Poverty” programs of the Lyndon Johnson era (and the programs of welfare aid that survived the seventies), reclamation and conservation, the regulation of consumer and occupational health and safety, and, finally, aid to education.43

What may, thus, be called “federal effects”44 on change in the California courts came in various forms. Some of these effects were rooted in law, for example, the changes wrought by Congress and the Supreme Court in civil rights law and the new procedural and equal protection guarantees fashioned by the Warren and Burger Courts in criminal and reapportionment law. Other effects were fiscal, most notably the federal incentives to undertake new “shared” activities and programs in the federal grant-in-aid arsenal of the 1960s and 1970s. Those programs were succeeded by the block grant programs of the Nixon-Ford era.45

During its heyday, the Law Enforcement Assistance Administration had a direct impact upon data collection, initiation of pilot projects for alternative punishment, development of experiments with neighborhood justice centers, and financing of court-annexed dispute resolution programs.46

43. For a recent overview of federalism and the courts, see Harry N. Scheiber, Federalism, in OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 697 (1992). For an historical analysis of federal governance, politics, and constitutional law, see Harry N. Scheiber, Federalism, in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 697 (Leonard W. Levy et al. eds. 1987).


46. FEELEY, supra note 2, at 93-98 (on a San Jose alternative sentencing project); Mary-Alice Coleman, Implementation of California’s Dispute Resolution Programs Act: A State-Local Partnership, 16 PEPP. L. REV. 75, 77 (1989).
Federal preemption of state law, in a variety of substantive areas, also generated new issues for state and federal courts, as did legislative mandates in a great variety of policy areas. These areas included antitrust, farm-labor regulation, the provision of legal services to the poor, and the standards of state administration of medical services. Federal legislation mandating child-support schedules has also resulted in new areas of responsibility for the state courts.47

More subtle, but nonetheless influential, has been the emulation effect of federal procedural initiatives with respect to arbitration mechanisms, procedural reforms, judicial “case management” innovations, and court-annexed settlements. Equally influential has been the emulation effect of federal institutional reform models. The California Judicial Council, judges’ organizations, and other bodies representing the state judicial branch have emulated the federal example—through the U.S. Judicial Conference and other organizations—in seeking to obtain control over the rule-making power for the judiciary. By doing this, these organizations hope to represent and lobby for the judicial system’s interests in the legislative and political arenas, and to mobilize efforts to revise substantive laws and policies that affect the courts. The models of federal court organization and procedural innovation have been especially relevant to California courts because both the Ninth Judicial Circuit and the U.S. District Court for Northern California have been among the most creative courts in the nation in case management, consultative procedure, and other innovations. The immediacy and proximity of innovation in the federal courts in California have provided an extraordinary milieu and model for reform that very few states have enjoyed. In fact, it is all too easy for California jurists and lawyers to assume that California’s exceptional experience is the norm.48

Last, one must recognize explicitly the impact of technological change upon operations of the courts and upon the social, economic, and political issues that come to the courts for adjudication. Half a century ago, the development of electronic eavesdropping techniques required the law to take an entirely new perspective on the meaning of Fourth Amendment constraints. Presently, virtually every aspect of adjudication—from basic constitutional issues to the potentialities for transformation of information sources, delivery, and analysis; to the most


mundane issues of daily operations embodied by the FAX machine, teleconferencing, and database reliance and to the outer dimensions of leading-edge genetic, pharmaceutical, and applied microelectronic inventive activity—has come up for reappraisal with accelerating speed.\(^9\)

It presents a difficult methodological puzzle to know how to delineate with any precision the causal connections between such large macro-factors as the foregoing ones, in the process of socioeconomic and cultural-political change, and the operations of trial and appellate courts. Richard Lempert, one of the leading students of courts and dispute resolution, has observed that this kind of “law and society connection” presents an intractable and complex problem of interpretation in the analysis of docket data, in addition to the difficulties associated with identifying the effects of local legal culture.\(^{50}\) Such analysis, Lempert writes:

> is problematic because both the filing of court cases and the modes of dealing with them are affected by many factors that change over time. These include (not exhaustively and in no particular order) local cultural norms, specialized bar norms, the presence and cost of lawyers, the personal proclivities and reputations of key court personnel, the availability and cost of alternatives to litigation, jurisdictional and procedural rules, substantive law, rules of thumb that are known within the jurisdiction to modify the procedural and substantive law, and social structural conditions that can generate or forestall legal problems. This last factor, social structural conditions, could in turn be expanded into a list longer than the preceding one, including such items as the state of the economy, technological development, population density, and media attention to legal matters.\(^{51}\)

An analysis of modest scope cannot hope to solve this methodological puzzle. It seems obvious, however, that one cannot adequately understand thirty years of change in the courts without confronting the challenge of taking such factors into account. Equally important, within the context of current reform efforts, is the question of whether macro-level

\^9\ Compare, for example, the range of technological issues considered in the study prepared for the Commission on the Future of the Courts Technology Committee, with the issues appraised sixteen years ago in James Willard Hurst, Law and Social Order in the United States 157-213 (1977) (discussing science, technology, and public policy). For an overview of technological issues to 1985—even now somewhat dated in light of the range of topics that have appeared on the agenda of the Technology Committee of the Commission on the Future of the Courts—see Harry N. Scheiber, The Impact of Technology on American Legal Development, 1790-1985, in Technology, the Economy, and Society 83 (Joel Colton & Stuart Bruchey eds., 1987).


\(^{51}\) Id. at 327-28 (emphasis added).
law and society relationships will represent continuities or discontinuities in their influence over the next thirty years.

Thus, this paper next turns to the more specifically micro-level element of the relationship. Part III examines the legal dynamics of the judicial system—the "statistical past," or at least a statistical past— in an effort to identify, concretely, some key dimensions of the changes California courts experienced between 1960 and 1990.

III. THE STATISTICAL DIMENSION: A SUMMARY VIEW OF TRENDS IN THE COURTS

In assessing some of the most important trends in the operations of our state courts from 1960 to 1990, as reported in a preliminary paper from this project, there have been some clear trends discernible in caseload composition and magnitude. However, there are also some important areas of ambiguity in the data. The sharp increase in the number of lawyers in California during this period has been discussed frequently. Steadily increasing filings and dispositions in the municipal, superior, and appellate courts are also a well recognized feature of the era. Trial judges' case dispositions declined from 1965 to 1985, then rose again in 1990. However, the number of trial court juries sworn declined—dropping to only 0.2% of dispositions in 1990.

In the municipal and justice courts, criminal filings rose more rapidly than other categories. For the municipal and justice courts (unified in 1976), two distinctive surges marked the rise in criminal proceedings:

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52. The shrewd and essential distinction between "the statistical past" and "a statistical past" was drawn by the editor of a famous work in economic history, an attempt to reconstruct the statistics of economic changes—not entirely unlike the massive scholarly effort associated with the reconstruction of trial court data in the U.S. and other countries. William N. Parker, Introduction to Nat'l Bureau of Economic Research, Trends in the American Economy in the Nineteenth Century 3 (1960).


54. Unlike the trend in number of attorneys per 100,000 population in California—rising from 118 in 1960 to 362 in 1990—there has been a decline in the relative number of judges (5.1 per 100,000 in 1960 to 4.9 in 1990). Page, supra note 3, at 59.

55. Dispositions per judicial position were 1,000 in 1965 and slightly higher in 1970, then declined steadily to just over 800 in 1985, rising again slightly to 1990. Id. at 61.

The first was marijuana prosecutions in the late sixties and early seventies, and the second was crack-cocaine prosecutions in the late 1980s.\textsuperscript{57} The superior courts, which deal with felony prosecutions, also reported a sharp 394\% rise in criminal cases. There is some measure of agreement among commentators about at least the short-term trends. Certainly, prosecutorial policies have been an important determinant, as commentators have almost uniformly asserted.\textsuperscript{58} The 1977 Determinate Sentencing Act strengthened prosecutorial discretion:\textsuperscript{59} “While shifting authority away from the Adult Authority (which was abolished),” the Sentencing Act, one distinguished scholar has averred, “did not always enhance the power of judges. Where prosecutors had been powerful before the reform, they continued to dominate the sentencing process.”\textsuperscript{60}

Much public attention has been focused in recent years on mass tort litigation. Such cases occasionally involve millions in personal injury or other kinds of damages in high-visibility areas like medical malpractice; similarly, SLAPP and SLAPP-back suits, though not numerous, have placed new pressures on the courts.\textsuperscript{61} However, it is difficult to obtain

\textsuperscript{57} Adult drug-related offenses rose steadily from 1982 to 1989 (from 343.3 to 788.2 per 100,000 population), then declined to 527.2 in 1991; juvenile drug offenses rose from 107.5 per 100,000 in 1982 to a range of 376.0 to 392.5 during 1986-89, then declined sharply to 222.4 in 1991. Page, supra note 3, at 57.

\textsuperscript{58} See, e.g., Feeley, supra note 2, at 3-32, passim (summarizing research on criminal courts nationally, with local case studies of problems and the solutions attempted); Candace McCoy, Politics and Plea Bargaining: Victims’ Rights in California (1993); Victims’ Rights Symposium, supra note 17.

\textsuperscript{59} E.g., Sheldon L. Messinger & Phillip Johnson, California’s Determinate Sentencing Statue: History and Issues, in PROCEEDINGS OF THE SPECIAL CONFERENCE ON DETERMINATE SENTENCING, BOALT HALL SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA, BERKELEY, MARCH 1978, at 13 (U.S. Dept. of Justice, LEAA, 1978); see also, e.g., Mather, supra note 13.

\textsuperscript{60} Herbert Jacob, Law and Politics in the United States 291-92 (1986); see, e.g., Franklin E. Zimring, Sentencing Reform in the States: Lessons from the 1970s, in REFORM AND PUNISHMENT: ESSAYS IN CRIMINAL SENTENCING 101 (Michael Tonry & Franklin E. Zimring eds., 1983); Jason Wechter, The Preliminary: California’s Defacto [sic] Criminal Court, CAL. LAW., Apr. 1986, at 42.

Determinate sentencing impact on prosecutorial practice is further complicated in California and numerous other jurisdictions by mandatory sentencing requirements. See Gary T. Lowenthal, Mandatory Sentencing Law: Undermining the Effectiveness of Determinate Sentencing Reform, 81 CAL. L. REV. 61, 73-74 (1993) (“By requiring courts to impose severe sentences in certain circumstances, mandatory punishment statutes cast a long shadow over plea bargaining practices, fact-finding procedures, and the scope of the Fourth Amendment exclusionary rule.”).

\textsuperscript{61} The term SLAPP stands for “strategic lawsuits against public participation”—civil damage suits filed as a technique for undermining efforts by private citizens or groups to press claims against government agencies in the forms of complaints or petitions for action. SLAPP-back suits are similar actions inaugurated by the citizens or groups who are the target of SLAPPS. For a discussion and some case studies, see Penelope Canan et al., Political Claims, Legal Derailment, and the Context of Disputes, 24 LAW & SOC’Y REV. 924 (1990). In what became a closely followed case, owners of residential property near San Francisco International Airport pursued claims for damage in small
enough detail to get the full picture of the overall civil caseload. One of
the statistical categories in Judicial Council docket is simply designated
"Other Civil Cases." This category constitutes a third or more of the
entire caseload and rose enormously in this period. Until this category is
disaggregated, it will be impossible to have the level of information
needed to fully reveal caseload composition. It is probably true, how-
ever, that the expansion of the regulatory state in California has contrib-
uted enormously to this segment of litigation.

Various well publicized experiments have made it all too easy to
assume that overcrowded dockets represent a new problem. This
research involved alternative dispute mechanisms, proactive interven-
tionist judicial case management meant to cut down on delay and
courage settlement, and other measures aimed at congestion. In fact,
as Selvin and Ebener have abundantly documented in their important
study of delay in the Los Angeles Superior Court, a succession of meas-
ures was instituted to clean up case backlogs. Thus, for example, the
appointment of additional judges, the "streamlining" of procedures—
including changes in discovery rules, the imposition of mandatory pre-
trial settlement and other case management procedures, the adoption of
new calendar and judicial assignment techniques, and the addition of
judges to the bench—all apparently proved to be of questionable effec-
tiveness in reducing delay, except perhaps for short periods of time.
Moreover, Selvin and Ebener persuasively contend that the inauguration
of administrative management reforms often coincided with other
changes in law and administrative policy—making it extremely difficult
to isolate the variables, so as to attribute any improvements, or the lack
thereof, to specific reform moves. There is, withal, much evidence with
which to credit commentators' warnings that hopeful pursuit of reform

62. Scheiber et al., supra note 53; see JUDICIAL COUNCIL OF CAL., ANNUAL REPORT 42
(1992) [hereinafter ANNUAL REPORT 1992] (noting that the "Other Civil" category includes con-
tract, real estate, and "other business" cases). The great mass of data that must be consulted to
provide any useful assessment of this "Other Civil" category will probably require resort to intensive
sampling analysis. Discussion by author with Judicial Council staff members. On perplexities of
research technique methodology in litigation studies in relation to reform, see Maurice Rosenberg,

63. SELVIN & EBENER, supra note 5, passim.

64. Id. at 52-100. Their Figure 3.1 shows major responses, often repetitive in the face of past
failures, to civil delay in the L.A. courts. Id. at 55. See generally ERNEST FRIESEN, JR. ET AL.,
MANAGING THE COURTS (1971); MANAGING THE STATE COURTS (Larry C. Berkson et al. eds.,
1977); THE POLITICS OF JUDICIAL REFORM (Philip Dubois ed., 1982).
may in truth be the application of nostrums—and that the historical record is littered with "great promises and failed reforms."\(^\text{65}\)

In other words, the record of reform efforts from 1960 to 1990\(^\text{66}\) must be seen as the continuation of a long-term record of experimentation and innovation. In some ways, however, these efforts only reiterated reforms attempted earlier, and their lack of success serves as a cautionary note when we anticipate what to expect from recent initiatives to effect significant change. It is difficult to sort out the impacts of the various innovations of the 1960 to 1990 period, but there seems to be considerable optimism in some quarters today about the possibly strong impact of the Trial Court Delay Reduction Act, especially as the post-1990 data accumulate.\(^\text{67}\)

The overall data suggest a trend toward "routinization" in the sense that the criminal courts are increasingly disposing of cases based on pre-trial pleas rather than trials; the data also indicate a trend toward settlement or ADR solutions (including the "rent-a-judge" alternative which many fear is not a serious option for any but wealthy litigants) and a decline in traditional court procedures. An historical analysis by Lawrence Friedman and Robert Percival on the comparative caseload compositions of the Alameda and San Benito county courts has shown that "routinization" is a long-term trend in California state courts, marking the consistent direction of change from very early in the century.\(^\text{68}\)

Some critics of the present trend away from trials have lamented that it amounts to a costly flight from adjudication. What may occur in this process, many thoughtful critics contend, is that reforms stressing "efficiency" in "processing" cases—what U.S. Supreme Court Chief Justice Taft once colorfully termed the need in the courts to "get rid of business and do justice"\(^\text{69}\)—may exact a high price from our constitutional system. One loss is certainly the diminishing judicial articulation of public values. Another might easily be a long-term trend toward withdrawal from the system: an increasing reliance on alternatives to courts

\(^{65}\) Geoff Gallas, \textit{supra} note 10, at 503; Wheeler, \textit{supra} note 10, at 138.

\(^{66}\) See infra part IV.

\(^{67}\) Private communication from Judicial Council staff; see also \textit{ANNUAL REPORT 1991}, \textit{supra} note 29, at 39-42, 50-52.


or court-annexed processes by wealthier litigants seeking to avoid delay. This withdrawal might result in a loss of interest on the part of influential citizens in the state’s meeting the fiscal needs of the courts—which in turn could weaken the general ability of the courts to handle cases and afford timely access to poorer litigants. Hence the attractiveness of procedural reform within the system: Efficiency and fairness are not mutually exclusive goals. As Chief Justice Lucas has recently affirmed: “We cannot lose sight of the fact that delay reduction is devised not to produce statistics, but to enhance justice.”

IV. EXPECTATIONS AND PERFORMANCE: THE PROCESSES OF CHANGE BY DESIGN

Since the Progressive era, some ninety years ago, the leadership of the organized bar and the judiciary have pursued the agenda of what is called “judicial reform”—with the support of various political leaders, legal academics and scholars in the field of court administration, and reform groups dedicated to upgrading governmental institutions. Both in California and in the nation, advancing this agenda has remained the particular concern of elite groups. Indeed, programs of reform for court organization, structure, and procedure traditionally have not received much attention from even large segments of the bar, let alone the electorate at large, except when issues surface in ways that directly threaten particular interests, or when the specter of higher taxes awakens general interest.

70. See Judith Resnik, From Cases to Litigation, 54 Law & Contemp. Prob. 5 (1991) (on related problems in “processing” mass tort claims).
71. In a seminal essay on scholarly and professional analysis of court operations since 1950, Professor Willard Hurst reminds us that efficiency issues implicate questions not only of the financial but also of the “institutional and human costs of handling large files of filed cases.” Concern in the literature with justice, he writes, “has centered on the extent to which courts properly addressed the particular merits of particular disputes or processed them with mechanical routine, and the extent to which the litigious process disfavored small claims, however meritorious, or worked to the prejudice of individuals of small means.” Hurst, supra note 56, at 436. For a trenchant critical analysis of how abandonment of traditional court-centered institutions and procedures can diminish concern with justice and also adversely affect disadvantaged litigants, see Richard L. Abel, The Contradictions of Informal Justice, in 1 THE POLITICS OF INFORMAL JUSTICE 267 (R. Abel ed., 1982). For a process-focused normative critique, see Owen Fiss, Against Settlement, 93 Yale L.J. 1073 (1984).
73. For a typology of law reform in American history that does not give much attention to the administrative side (which is discussed in this Section) but offers an insightful analysis of professionally oriented reform in legal institutions and procedure generally, see Lawrence Friedman, Law Reform in Historical Perspective, 13 St. Louis U. L.J. 351 (1969). For an excellent study on court
During the last half-century in California, the Judicial Council has taken the leading role in judicial reform. The Council, a result of the reform movement in the 1920s, began with the inauguration of Phil Gibson as Chief Justice in 1940. It has pursued an active and often highly assertive role with regard to change in the California courts. The Council's functions have included the collection and analysis of statistics, the maintenance (on an increasingly centralized basis) of routine administrative functions, the conduct of research on court problems, the formulation of measures for organizational or procedural innovations (the essential "reform" function), and the arduous work of selling innovations to the bar, interest groups, and the legislature. This last function, which in a narrow sense is educational but in a broader sense is political, has involved the Council in joint development of studies and proposals with the State Bar and other elite professional organizations. Also, the Council has become involved in cooperation with the leadership of the legislature and with the governor's office, and, not least, in elaborate coalition-building and consensus-building.

The California Judicial Council's activities and the broader-based judicial-reform movement have continuously included a more extensive set of objectives that transcend mere concern for correcting problems of delay and congestion. The reformers have sought to promote a higher

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74. Many elite organizations participate, not only within professional boundaries but (ineluctably) also in the larger public arena, in the processes of substantive law reform and judicial reform. Among the most prominent agencies and groups influential from 1960-90—and deserving much fuller attention than can be given in a paper of this scope—were the state and county bar associations, the California Law Revision Commission, specialized attorneys' organizations such as the regional and local trial lawyers associations, the California Judges Association, the California District Attorneys Association, and the professional groups in which social workers, penal officials, and law enforcement officers pursue their special concerns in law, policy, and administration. At specific moments in reform, California law schools, national academic or policy and functional interest group organizations such as the American Judicature Society, the National Conference of Commissioners on Uniform State Laws, the American Law Institute, and the Federal Judicial Conference all were influential. An example of cooperation and coordination among such groups was a conference report on court modernization, produced from a meeting in San Francisco in 1975 under cosponsorship of the Bar Association of San Francisco, the Hastings College of Law, and the American Judicature Society; see Roger J. Traynor, The Unguarded Affairs of the Semikempt Mistress, 113 U. Pa. L. Rev. 485 (1965), reprinted in The Traynor Reader: Nous Verrons—A Collection of Essays by the Honorable Roger J. Traynor 99 (Hastings L.J. ed., 1987).

75. Stolz & Gunn, supra note 18.
degree of efficiency—as variously defined and measured—in the "processing" of cases, and also to advance the autonomy and the competence of the courts. The focus has been upon the improvement of administration, operations, and organizational structure, and upon the enhancement of the role of professionals—including judges, the bar, court administrators, probation officers, and others—within the judicial system. By these means, the reform movement has sought to enlarge the range of functions, at all levels in the courts, in which professional expertise will have the decisive role. It is this reformist tradition and its record in effecting change in the California courts from 1960 to 1990, to which we now turn.

Within this reformist tradition, several distinctive (but still closely related) types of measures have been proposed and debated in California. Eight are identified here, and will be considered individually to suggest their impact on the state's courts in the modern era.

A. Reform of Judicial Selection and Discipline

A central tenet of the court reform creed has been the need to strengthen the judiciary's independence—a goal of high importance, given the basic structure of our constitutional system of separation of powers—by tempering or caging the political element in the process of selecting judges. Champions of judicial reform have pursued this objective, especially through proposals for "merit plan" appointive processes and through plans for establishing minimum professional requirements (credentials and experience) for judges at all levels. Related to this objective is the corollary need for mechanisms to discipline or remove judges, as is done with lawyers when incompetence or malfeasance is found.

76. For a provocative study that introduces the key issues in contemporary court reform, see Feeley, supra note 2. The post-1965 national movement for court reform is also the subject of a brief interpretive essay. Frank Munger, Movements for Court Reform: A Preliminary Interpretation, in The Politics of Judicial Reform, supra note 64, at 51. For a penetrating analysis on the same subject, see Austin Sarat, The Role of Courts and the Logic of Court Reform, 64 JUDICATURE 300 (1980).

77. See Fish, supra note 69, at 437 (on how "administrative institutions foster the judiciary's long run capacity to function as a coordinate part of the national political system"). For a discussion on the separation of powers in constitutional theory and in relation to political history, see Harry N. Scheiber, Constitutional Structure and the Protection of Rights, in The United States Constitution: Roots, Rights, and Responsibilities 183 (A.E. Dick Howard ed., 1992).

78. For a classic critique of the reformist view, forcefully contending that to bypass political parties in the appointment or election of judges is to undermine the legitimate element of majoritarianism that ought to play into the process, and instead turn over control of the process to the elite "inside" power structure of the bar, see Francis D. Wormoth & S. Grover Rich, Jr., Politics, the Bar,
The California State Bar and Judicial Council leadership were inspired by the plans for reform that were championed by prominent figures in state and federal judicial reform from the Progressive era on, most notably by the programs advocated by Chief Justice Vanderbilt of New Jersey during the 1950s and 1960s.79 By 1960 the State Bar and the Judicial Council had deployed themselves to press hard for a key element of the reform agenda: the creation of “merit” procedures in the appointment of judges, together with mechanisms for removal of incompetents and malfeasant. The alignment in favor of reform, from within the profession, was an impressive one. In 1959 the Council and the State Bar, joined by the Conference of California Judges and the Joint Interim Committee of the Legislature on the Administration of Justice, advanced a reform plan to establish a commission to evaluate the qualifications of judicial nominees for the trial courts. Despite such impressive support, the plan failed to obtain the necessary votes in the legislature.80 The Judicial Council lamented in 1968 that “[t]he goal of selecting [trial] judges in a nonpolitical context has not been attained,” even though California had required confirmation by an independent commission of appellate judges as early as 1934.81 With a ringing statement of support from Governor Ronald Reagan, the Council and the State Bar leadership proposed a “Merit Plan” that provided for a judicial nominating commission that would present the governor with three names for any judicial appointment. The organized bar, however, did not support the Merit Plan with anything like unanimity. About half the local bar associations in California voted to support the plan, but the third largest one—the Lawyers’ Club of San Francisco—organized well publicized opposition. Among other individuals, the revered former Chief Justice Phil Gibson testified at a public hearing that the plan would unwisely relieve the governor of “full responsibility” for nominations.82 Although


82. Forum Feature: Merit Plan, 43 Cal. St. B.J. 564 (1968); Transcript of oral history interview of John H. Finger (Regional Oral History Collection Bancroft Library, UC Berkeley).
the measure passed in the state Senate, the Assembly’s Judiciary Committee killed it.\textsuperscript{83} Subsequently this part of the reform agenda seemed to recede from the forefront.

In the area of discipline and removal, however, the reform movement had more success. A proposal to establish a commission empowered to recommend to the California Supreme Court the removal of judges for willful misconduct was placed before the voters in a direct ballot referendum in 1960, as part of a more comprehensive set of innovations and reforms in judicial administration.\textsuperscript{84} When the electorate voted to adopt the measure, thereby establishing the Commission on Judicial Qualifications, it placed California in the national forefront of judicial reform: “It was like throwing a brick through the window of a mansion,” the commission’s executive director later recalled.\textsuperscript{85}

The commission actually referred few cases in its early years—the mansion’s windows seemed to be fitted with unbreakable glass—but in a ten-year period beginning in 1973 it heard complaints that led to the forced retirement of seventy-seven judges and the removal of six more by the supreme court.\textsuperscript{86} Clearly, the brick became more lethal when 1966 constitutional revisions added to the grounds for discipline or removal “conduct prejudicial to the administration of justice,” and disabilities precluding adequate performance of judicial duties.\textsuperscript{87}

The most dramatic incident in the history of the commission, however, unquestionably was the 1979 investigation of the state supreme court’s handling of the \textit{Tanner} case.\textsuperscript{88} The impact of this decision on

\begin{footnotes}


8. \textit{People v. Tanner}, 139 Cal. Rptr. 167 (Ct. App. 1977) (officially depublished); \textit{People v. Tanner}, 596 P.2d 32 (Cal. 1979). In \textit{Tanner}, a 4-3 court majority invalidated California’s recently enacted “use a gun, go to prison” statute, which mandated a prison sentence for anyone convicted of using a gun in a serious crime. This decision was controversial because it overturned a politically popular law and because of published allegations that release of the court’s decision had been delayed until after the November election in which four justices, including Chief Justice Rose Bird,

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state politics extended into the following decade. Ramifications included the effect upon the 1986 vote that rejected the continuation on the bench of Chief Justice Rose Bird and two associate justices. Echoes of the Tanner controversy are still occasionally heard vividly in current-day state politics.  

B. COURT UNIFICATION AND CONSOLIDATION

The consolidation, or unification, of trial courts—for purposes of assuring uniformity of procedure, eliminating local variations in justice, enhancing administrative efficiency through centralized calendar control and judicial assignments, and establishing well defined hierarchical lines for appeals—has always been a leading element of the judicial-reform agenda.  

Roscoe Pound, who was prominently involved in framing that agenda for more than a half-century, wrote in an oft cited 1940 essay:

Unification of the courts [of original or limited jurisdiction] would go far to enable the judiciary to do adequately much which in desperation of efficient legal disposition by fettered courts, tied to cumbersome and technical procedure, we have been committing more and more to administrative boards and commissions. Ours is historically a legal polity, and the balance of our institutions will be sadly disturbed if the courts lose their place in it. If they are to keep that place they must be organized to compete effectively with the newer administrative bodies.  

It is worth noting that Pound framed the issue in terms of judicial efficiency as a means of retaining jurisdiction in fields of law that legislatures had been gradually devolving on administrative boards; whereas judicial

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89. This episode in the commission's history is recounted fully, with a strong interpretive position offered, by Stolz, supra note 31, at 200-12, 218-39.
90. Steven Hays, Contemporary Trends in Court Unification, in MANAGING THE STATE COURTS, supra note 64, at 122.
91. Roscoe Pound, Principles and Outline of a Modern Unified Court System, 23 J. AM. JUDICATURE SOC'Y 233 (1940). In a widely cited 1971 lecture Judge Hufstedler offered an acute reminder that, however "demurrer-proof" Pound's indictments of "archaic court systems and procedures," the challenges faced by reformers in the 1970s "[were] not only different in degree but different in kind from those Dean Pound assaulted 65 years ago." Hon. Shirley M. Hufstedler, New Blocks for Old Pyramids: Reshaping the Judicial System, 44 S. CAL. L. REV. 901, 902 (1971).
reformers today are often keenly intent on effecting precisely such devo-
lution, regarding it as a way of relieving the caseload burdens of courts or
protecting courts from the political exposure associated with certain
types of cases. Be that as it may, in California a succession of proposals
for unification of trial courts—at times put forward alongside comple-
mentary proposals for restructuring the appeals courts—have been mat-
ters of high controversy at several junctures in the state’s recent history.

A remarkable dispersion and decentralization of judicial power pre-
vailed in the constitutional courts of California from the adoption of the
1879 Constitution until some forty years ago, when a major move toward
reorganization and consolidation was successful. As of 1950, six differ-
et types of lower courts, numbering 760 courts in all, were functioning
in the California judicial system. A constitutional amendment was
adopted in 1950 consolidating the lower courts into the two types—
municipal and justice courts—that continue to function today.\(^2\) Since
the 1950 revision, advocates of further unification of the trial courts have
continued to push ardently for a full merging of justice and municipal
courts in order achieve a neater administrative organization, to permit
mergers of municipal jurisdictions, to make caseloads more uniform
throughout the state, and to provide greater room for flexibility in the
assignment of judges, staff, and physical facilities. Another argument for
increased uniformity through consolidation was based on the procedural
complexities that confronted superior courts in hearing appeals from a
vast number of courts with varying rules of practice.\(^3\) In the Judicial
Council’s view, however, the 1950 amendment “achieved only a part of
the unification, flexibility and responsibility that are the essential attrib-
utes of a modern trial court system.”\(^4\)

The efficiency issue caught the attention of the California Legislative
Analyst, who in 1961 recommended administrative reorganization of the
trial courts. In this scheme, presiding judges appointed by the Chief Jus-
tice would supervise the trial courts in specified districts and would


\(^3\) Variation in 1972-73 caseloads, for example, as weighted by Judicial Council formulas,
ranged in the municipal courts from 104,304 in one four-judge court, to 25,681 in a two-judge court.
This kind of evidence of lack of uniformity led one reform advocate to contend that the municipal
courts needed to be placed under presiding judges on a county basis for more effective calendar
management, equalization of caseload, and “better use of the support staff and physical facilities
available.” Melvin E. Cohn, Trial Court Reform—Past, Present and Future, 49 Cal. St. B.J. 444,
481 (1974). The Judicial Council has fairly consistently taken much the same position.

assume "to some degree the overall responsibility" for systemwide administration.95 That plan and others introduced in the legislature in later years failed to carry. Finally, however, the Judicial Council committed itself to a major push for reform, commissioning a study of the lower courts in 1970-71 by the consulting firm of Booz, Allen, and Hamilton.96 Armed with a recommendation from this firm to establish a strongly defined hierarchy of court administration and to unify the trial courts, the Council submitted its plan to the legislature in 1972. But again, the Council met with failure, in the face of opposition from local elective officials and many of the individual judges who would be affected.97

In a 1974 decision that came as a political surprise, the California Supreme Court, in Gordon v. Justice Court,98 ruled that the judge must be a qualified attorney in any trial proceeding in which a jail sentence might be imposed. The decision created additional pressure to consolidate or unify the trial courts, as the judicial system had to adjust its flow of cases in the municipal and justice courts to accommodate the new ruling. Following up on the Gordon decision, the Council not only promulgated implementing guidelines, but also issued a report in 1975 calling for jurisdictional and procedural uniformity in the justice and municipal courts, "with a single class of judges."99

The Judicial Council issued still another major study in 1975 advocating trial-court unification. At the same time, there was extensive public commentary on the high cost of maintaining multiple courts in many small-population districts. Nonetheless, the legislature continued to respond sympathetically to the many local officials who resisted giving up the ideal of "the judge as a neighborhood guy on the cracker box at the general store."100 To this day, full formal unification has not been achieved, a proposition on the 1982 ballot for unification having failed to pass. Emblematic of opposition views was that of then-Presiding Judge

95. Id.
96. BOOZ, ALLEN & HAMILTON, INC., FINAL REPORT ON THE CALIFORNIA UNIFIED TRIAL COURT FEASIBILITY STUDY (1971); BOOZ, ALLEN & HAMILTON, INC., CALIFORNIA LOWER COURT STUDY (1971).
98. Gordon v. Justice Court, 525 P.2d 72 (Cal. 1974); see also Stolz & Gunn, supra note 18, at 896-98.
David Eagelson of the Los Angeles Superior Court who condemned the measure as "a cosmetic effort to placate the public" when the real issues confronting the courts were the control of congestion and the need to reform "antiquated procedures." Fiscal realities have in the long term, however, nearly prevailed in areas with the lowest caseloads. By 1988 only seventy-nine justice courts remained in operation in districts with fewer than 40,000 persons, and the number had dwindled even further by 1990. Meanwhile, in 1986 the legislature enacted the Trial Court Delay Reduction Act (known as the Fast Track law)—a measure that one administrator, in a moment of high enthusiasm, described as "the most significant legal change in the history of California." This reform, considered further below, set the stage for the Trial Court Realignment and Efficiency Act of 1991, which was aimed at reducing diffusion of authority and inconsistencies of practice in the lower courts. The Act required each county to submit to the Judicial Council by March 1992 all of its plans for the coordination of justice, municipal, and superior court operations and for ADR policies and organization.

C. COORDINATION, CENTRALIZATION, AND PROFESSIONALIZATION: THE JUDICIAL COUNCIL

Another important item in the agenda of judicial reform has been the establishment of judicially controlled, quasi-administrative—and designedly administrative—mechanisms for advancing professionalization and for bringing systemwide court operations under a single responsible body. As the American Judicature Society's journal urged, with unusual directness, in 1913: "Closer coordination of judges is the remedy indicated for the avoidance of individual eccentricities."

In California, efforts to achieve this type of reform in the 1920s centered on the creation of the Judicial Council. Later, it centered on strengthening the Council's prestige and jurisdiction and, in 1962, on

102. Id.; ANNUAL REPORT 1990, supra note 29.
107. Fish, supra note 69, at 24.
establishing the Office of the Administrator of the Courts. The California Judicial Council has advanced a ramifying agenda that includes bringing professional expertise to bear on administration, collection of court statistics, rule-making issues, and substantive issues of law that have a major impact on courts. Recently, under Chief Justice Malcolm Lucas the Council has devoted sustained attention to future planning for the courts.

Prior to the 1920s, nearly all state court systems in this country operated entirely without centralized administrative authority of any kind even for routine housekeeping, let alone for such purposes as assignment of judges or establishment of calendar management standards. Nor was there much systematic data collection that could serve as the basis for consideration of administrative reform.\(^\text{108}\)

In the mid-1920s California joined a widespread movement for the establishment of statewide judicial councils that would provide the structure for increased centralization of control over court operations. Initially, the California Judicial Council was composed exclusively of judges; and its functions were generally confined to low-profile issues, mainly the formulation of procedural rules within subject areas not controlled by statute. The Council was created by an amendment to the state constitution and empowered

\begin{quote}
...to survey the condition of business in the several courts with a view to simplifying and improving the administration of justice; submit such suggestions to the several courts as may be seen in the interest of uniformity and the expedition of business; report to the Governor and the Legislature . . . such recommendations as it may deem proper; and adopt or amend rules of practice and procedure for the several courts.\(^\text{109}\)
\end{quote}

The Chief Justice, in his capacity as chairman of the Council, was authorized to "expedite judicial business and to equalize the work of the judges" through the assignment power. Today that authority includes the power to make temporary assignments to courts of higher jurisdiction.\(^\text{110}\)

The succession of Phil Gibson to the chief justiceship in 1940 presaged the transformation of the Judicial Council—and indeed of the entire court reform movement in California. Gibson proved to be a brilliant advocate, political-coalition builder, and intellectual leader across a

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108. *Id.; Vanderbilt, supra* note 79.
110. *Id.; see Stolz & Gunn, supra* note 18, at 881-82.
broad range of issues in judicial reform. At the same time he gave new
impetus to the development of the Judicial Council as an effective admin-
istrative instrument.111 In later years, Gibson’s successors, Traynor and
Wright, closely emulated their predecessor in cooperating closely with
the State Bar and other professional groups. Still later, Chief Justice
Bird adhered to the Gibson tradition in some regards but departed from
it, amidst much controversy, in other important ways. Present Chief
Justice Lucas, whose style of leadership will probably be viewed as a cre-
ative variant on the Gibson tradition, has adopted a heavier emphasis on
long-range planning and a far more inclusive approach to involving the
public in consultative roles.112 All of the chief justices since 1940 have
given a high priority to their duties as administrative leader of the courts.

It was a source of great frustration to Chief Justice Gibson—who in
his long tenure oversaw progress toward trial court unification and other
reforms—that the legislature did not approve the appointment of a pro-
fessional court administrator to serve as the chief justice’s right hand in
court management, oversight of procedural reform, and supervision of
the Judicial Council.113 As is well known, the incomparable Bernard
Witkin played a heroic role over many years, providing research and
analysis of procedure and legal issues for the chief justice and the
supreme court.114 It is commonly said that the cadre of highly skilled
professionals employed in subsequent years by the Judicial Council has
had its work cut out for them trying to equal the mass and quality of
Witkin’s output!115 For two decades Gibson, Witkin, and a phalanx of
State Bar leaders publicly pursued the goal of building up professional
competence within the Council and the courts.116 For Gibson and his
successors, a central objective with respect to this goal was to enhance
the role of professional administrators, in addition to that of staff
lawyers.

The 1960 ballot initiatives provided the change that Gibson had so
earnestly sought. In the same election that approved the creation of the
Commission on Judicial Qualifications, the voters approved the creation

111. See SELVIN & EBENER, supra note 5, at 62; STOLZ, supra note 31, at 96-99.
112. By all accounts, Traynor, whose passion was the intellectual element of judging and less so
the administrative, was far less committed than the others and probably less suited to the task. (I
rely here upon interviews with court officials, attorneys, and former clerks, but see also STOLZ, supra
note 31, at 99.).
113. See Joseph A. Ball interview (Regional Oral History Collection, Bancroft Library, UC
Berkeley).
114. See interviews cited, supra note 112.
115. Id.
116. STOLZ, supra note 31, at 97.
of the Administrative Office of the Courts, as a staff agency of the Judicial Council. In what amounted to an inaugural message to the bar, the first director, Ralph Kleps, wrote:

[F]or the first time, the Judicial Council and its chairman have available to them the vital power to delegate. . . . [T]he original proposals which led to the creation of the Judicial Council in 1924 and 1925 contemplated that the Council would act as a “board of directors” for the judicial system of the state, with the Chief Justice as chairman of the board. Following this analogy, it might be said that we have now given the board of directors an operating staff. . . .

The office [of the Administrator of the Courts] is being organized in accordance with principles which have proved themselves in other areas of government, and its structure will resemble other major departments of state government. Thus . . . [it will be the] equivalent to the directorship of a department.117

Here Kleps analogized to other government agencies and suggested that he was the equivalent of a gubernatorial cabinet secretary. Other rhetoric in his writings revealed his attraction to the paradigm of the modern business management expert. Thus, he wrote that “[i]t is widely recognized that court administration can profit from the adaptation to court use of proven management methods and administrative techniques.”118

Kleps recognized that the most basic structural elements of American state government—localism, separation of powers, and power over the fisc—could make difficult the attainment of his objectives. Nonetheless, he was determined to move “cautiously and experimentally” toward his goals.119 In an article published some years later, Kleps wrote in revealing terms that “calendar management is court management; it is court management at the most critical point, the production line.”120 Production-line analogies, intense concern for efficiency in “case processing,” placing caseload issues at the forefront of policy debate, and lauding the merits of systematic administrative centralization of the state court system all became staples of the technocratic side of court administration in California, as in other states.121

118. Id. at 334.
119. Id.
121. See Court Administrators: Who They Are and What They Do, in Managing the State Courts, supra note 64, at 164.
INNOVATION, RESISTANCE, AND CHANGE

There has always been in the Council’s operations and public aspect a professionally controversial—and, politically, often extremely par-lous—balancing of the kind of policy preferences based on these “man-age ment-oriented” objectives, on the one side, with the enduring ethical and constitutional concerns that are expressed in the basic values of the justice system in America.

Coping with the administrative policies, collection of statistics, legis-lative monitoring (and lobbying) tasks, and other aspects of management in the context of a system of enormous size and complexity constitutes an abiding preoccupation of the Council. The growth in population of the state, the expanded reach of regulatory law, changing litigation and prosecution patterns, and the notorious problem of caseloads all have increased the challenge of the Council’s objectives and functions at the “management” end of its agenda’s spectrum. This has been reflected in a change in scale of the Council’s operations: As late as 1975, the Judicial Council and Administrative Office of the Courts state-supported staff numbered forty persons (lawyers, statisticians, management and business officers, and research staff), and its budget was $12 million. Fifteen years later, the ten operating units that functioned under supervision of the Director, as depicted in the 1990 organization chart (Figure 1), employed 561 full-time staff, including 261 professionals, on a budget of $27 million.

Beneath the statistics lies evidence of some significant substantive shifts in the spread and emphases of the Council’s work. One major innovation, which had its vocal detractors (though staunchly champiioned by Bernard Witkin and accepted with apparent enthusiasm by most of the high court’s justices) but is now well institutionalized, is the employment of long-term professional legal staff to handle much of the research and writing in the consideration of appeals. Educational and

122. The Los Angeles superior and municipal courts alone, for example, in 1991 housed in 30 buildings some 472 judges and commissioners, and a total of 5,462 court employees; the annual budget was $587 million. Headache City, CAL. LAW., Aug. 1992, 36, at 37.
123. See supra part II.
126. See Witkin on Appellate Court Attorneys, CAL. LAW., Mar.-Apr. 1979, at 106. The trend toward centralization of research and legal staffing functions—and the Council's commitment to professionalization in this mode—was given a major boost during the first years of Justice Lucas's tenure as chief justice; and in 1988 the legislature appropriated $1.25 million for expansion of the supreme court's staff, including provision for fourteen lawyers. Robert Egelko, More Central Staff for Court, CAL. LAW., Jan.-Feb. 1988, at 16. For a rare personal insight on the justices' relationships with their staffs, see Otto Kaus, Retrospect—Oral History: Justice Otto Kaus, 15 HASTINGS
ADMINISTRATIVE OFFICE OF THE COURTS – 1990 ORGANIZATION CHART

DIRECTORS OFFICE
William E. Davis, Director
Robert W. Page Jr., Chief Deputy Director

COURT SECURITY
Mike Henegy, Security Coordinator

AUDITING
Vacant, Fiscal Auditor

COURT SERVICES
Court Records Project
Vacant

FAMILY COURT SERVICES
Isabella Bocchi, Court Administrator

RESEARCH AND STATISTICS
Roddie, Business Manager

TRAINING AND CONSULTING
Sharron Camp, Court Administrator

THIRD COURT DELAY REDUCTION AND SPECIAL PROJECTS
Vacant

PUBLIC INFORMATION
Lynne Holton, Court Administrator

JUDICIAL ASSIGNMENTS
Beth Mullin, Court Administrator

ADMINISTRATIVE SERVICES
Pat Yen, Assistant Director

ACCOUNTING
Valerie Charambat, Court Administrator

ADMINISTRATIVE SUPPORT
Cal Templeton, Office Manager

BUDGET/BUSINESS SERVICES
David N. Seward, Court Administrator

INFORMATION SYSTEMS
Ann L. Sundby, Court Administrator

PERSONNEL
Judith A. Myers, Court Administrator

GOVERNING COMMITTEE
Paul L. Zeir, Chair

CENTER FOR JUDICIAL EDUCATION & RESEARCH
Mike Keil, Assistant Director

LEGAL
Don Day, Assistant Director

APPOINTED COUNSEL PROGRAM
Mary Gibbs, Manager
training programs for judges has been another particularly noteworthy innovation by the Council. Instituted in 1973—and heralded by Chief Justice Wright as “the most significant recent development I know of for improving the operation of our trial and appellate courts”127—by 1990 the program had conducted a cumulative total of more than 250 educational programs, including two-week judicial colleges, specialized subject-matter workshops, orientation courses for new judges, continuing in-service programs, and short-term institutes, attended in all by 18,547 members of the California judiciary.128 In addition to sponsoring these courses for judges, which are organized in the Center for Judicial Education and Research under direction of a board of directors appointed by the Judicial Council and by the California Judges Association, the Council has instituted similar programs for court administrators and support personnel through the Training and Consulting Unit of the Administrative Office of the Courts.129

In recent years, the tension between competing values associated with maximizing efficiency and protecting the basic goals of the justice system—to provide equality of treatment and to assure fairness—have come into play in prominent ways as the Judicial Council has dealt with a series of controversial measures in the field of court management, financing, and procedure. These issues are dealt with in the sections that follow in this Part.


127. Chief Justice Wright quoted in First Director of New State Center for Judicial Education, THE RECORDER, June 19, 1973, at 1. Bernard Witkin contended similarly, in a recent forum, that the Council’s educational programs for judges and appellate research attorneys constitute a function of unique importance and impact, essential for the authentic “modernization” of court operations. Many appointees to the bench, he pointed out, however distinguished their careers may have been, have had a narrow and highly specialized practice, and limited experience in trials or settlement, let alone day-to-day oversight of administrative tasks as are required in the judiciary. Bernard E. Witkin, Statement at panel discussing an earlier draft version of the present Article, at the meeting of the Commission on the Future of the Courts, San Francisco, Cal. (Dec. 1992) (notes on session on file with author). Witkin was quoted in an interview in 1987 as stating: “We can no longer consider [judicative skills] a minor sideline you can pick up while practicing law.” Michael Bowker, Basic Training for the Bench, CAL. LAW., Nov. 1987, at 41, 42.

The first director of the Center for Judicial Education and Research was Paul Li, who was author of a widely used attorney’s procedure guide and who had made a career in judicial administration, having served for nearly a decade on the Judicial Council staff. THE RECORDER, June 19, 1973.

129. Id. at 109-10.
D. Judicial Rule-Making Authority

Judicial reformers have pressed the need to vest the rule-making power for all trial and appellate courts in the judicial branch alone. These advocates seek to enhance flexibility and adaptability, to protect the judicial process from partisan politics, and purportedly to relieve the legislature (which does not always show much interest in being so relieved!) from the detailed writing of rules. Reformers in all states, including California, consistently have sought to capture or recover, as the case may be, the rule-making power for the judiciary, reaching to all trial and appellate courts. Over the years the California chief justices have had their differences on a range of other issues, but on the matter of rule-making authority they have consistently adhered to the reformist view. Not only the chief justices from Gibson to Lucas but also the Judicial Council and various professional organizations and coalitions, including judges' groups and the organized bars, have consistently espoused the reformist position on rule making.

Although the legislature had earlier vested control over appellate rules in the California Supreme Court, neither that court nor the Judicial Council has succeeded in the quest to win full control over rule-making for the trial courts. Traynor hoped that the legislature would support this reform at the time it was preparing the 1960 ballot measures. He contended then that failure to give the Council full power in this area set California apart at a time when it was a national leader in governmental modernization in other regards. "Our state is out of character," he wrote, "in lagging behind thirty other states and the federal government, which have already returned the rule-making power to the judicial branch where judges in cooperation with the profession can insure the timely adoption of appropriate rules." Administrative Office of the Courts Director Ralph Kleps reiterated Traynor's position when he assumed office in 1962. Kleps advocated devolution of the rules as "much to be preferred over the complicated patch-work of statutory procedure found in our 1872 practice codes. . . .

130. Such, at least were the arguments advanced by Chief Justice Phil Gibson in one of his many appeals to the legislature to devolve the rules-making power on the Council. The legislature, he argued, was much too busy with important legislation to provide the time and expertise that were required for modernization of the court's rules. Phil S. Gibson, Chief Judge Urges Effective Plan to Give Courts Rule-Making Power, 15 Cal. St. B.J. 331 (1940).


[M]any people believe that the solution to our problems of congestion and delay is to be found in the use of an effective rule-making authority."¹³³

The legislature has retained a wide measure of control over procedural rules in such basic areas as discovery, but it has given the Judicial Council only a limited range of discretion, for purposes of experimentation or reform, in other areas like pretrial procedures or the post-1988 "Fast Track" rules. In California, therefore, the judicial reformers have not carried the day as they have elsewhere with respect to full control over rules of court.

E. REFORM OF APPELLATE PROCEDURES

The need for reform aimed at correcting alleged inadequacies of appellate court organization and procedure has been another recurring issue of prominence in California debates. A major achievement of the Judicial Council and its allies in the 1960 amendments was the reform of procedures for appeals from the justice and municipal courts. Those reforms ended "the anomaly whereby 22 courts of last resort could render conflicting opinions with no procedure for resolving conflicts."¹³⁴

In the 1960s the Judicial Council zeroed in on the rising volume of criminal appeals that was generated by the doctrines of the Warren Court and the Traynor Court extending new procedural rights to criminal defendants. "There seems to be no constitutional objection," the Council declared, "to California's placing some limitation on the right of appeal in criminal cases" so long as no discriminatory effect resulted. The Court proposed that the legislature establish summary appellate procedures for review in "cases that do not involve substantial issues."¹³⁵

Ironically, while a majority of state chief justices were campaigning avidly against the Warren Court decisions that had inspired the new habeas jurisprudence, Gibson and Traynor defended the Warren Court.¹³⁶

¹³³ Kleps, supra note 117, at 337.
¹³⁴ Enerson, supra note 80, at 17; see also New Procedure for Municipal and Justice Court of Appeals, Cal. St. B.J. 265 (1962); Gustafson, supra note 131, at 167; cf. Kaus, supra note 126, at 221-23.
¹³⁶ For a discussion on the extended campaign to curb habeas, see Victoria A. Saker, Federalism, the Great Writ and Extrajudicial Politics: The Conference of Chief Justices, 1949-1966, in Federalism and the Judicial Mind 131 (Harry N. Scheiber ed., 1992). Not only the California
A wholesale approach to appellate court reform was manifested in an ill-fated—and, in retrospect, somewhat idiosyncratic, if not to say quixotic—proposal generated in 1972 by the State Bar that called for a new “Court of Review.” The Bar’s Special Committee on Appeal Courts Workload—echoing in a sense, the Judicial Council approach that would have differentiated “substantial” appeal issues from non-substantial ones—advocated creation of a new court to hear appeals in cases involving matters of special legal, social, or political importance. From 1961 to 1971, total filings in the California Supreme Court increased from 1,313 to more than 3,400. The total caseload of the state courts of appeal increased from 4,109 to 14,500 in the same period. The State Bar’s Committee believed that the solution to this “deluge of litigation” lay in the creation of three-judge panels to handle appeals from trial courts’ verdicts that “simply” sought review of the correctness of the ruling. “Faster, cheaper and better justice can be attained for the parties,” the committee argued, and “greater attention . . . given to the truly significant cases worthy of the governmental role of our appellate courts.”

The Court of Review proposal did not win wide support; and it faded in time, as did contemporaneous proposals to create a new level of federal appellate jurisdiction designed to relieve the U.S. Supreme Court of certiorari responsibilities. Undaunted, the Judicial Council commissioned a study of the California Courts of Appeal, undertaken by the National Center for State Courts and published in 1974. This study


138. Id. at 36. A similar proposal for a federal “Court of Review” that would be charged “to review for correctness”—its decisions not to be given status as precedent—and “simultaneously to screen effectively the upper tiers of the systems that will not serve as vehicles for institutional processing” was advanced by Judge Hufstedler in 1971. See Hufstedler, supra note 91, at 910-15. It is worth noting, in light of the frequently voiced criticism that streamlined procedures and alternative dispute resolution mechanisms detract from the function of courts in giving expression to public values, that Judge Hufstedler contended that by liberating judges from oppressive caseloads, her proposal for reform of appellate structure would give them adequate time “[to] develop what Mr. Justice Frankfurter aptly called ‘the spacious reflection so indispensable for wide judgment.’” Id. at 915 (citing Felix Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 CORNELL L.Q. 499, 504 (1928)); see also Stolz & Gunn, supra note 18, at 894-95 (commenting on the Court of Review proposal and Judicial Council’s subsequent recommendation of a federally funded study, completed in 1975).

139. NATIONAL CTR. FOR STATE COURTS, supra note 131.
addressed the issue of conflicting precedential decisions in the various districts, and it recommended the abolition of divisions and a reduction in the number of districts. These proposals ran directly contrary to the trend of opinion that had dominated, and continued to dominate, in the legislature. Indeed, in 1981 the legislature created new divisions for the courts of appeal, increasing to eighteen the number of courts that could become sources of indirect appeal to the supreme court.

In more recent years, debate of appellate issues in California has centered upon the depublication policy of the high court, and also on the question of precedential standing of appellate decisions outside the districts in which they were handed down. Proposition 32, on the ballot in 1984, gave the California Supreme Court some caseload relief by modifying procedure. In cases accepted on appeal from the courts of appeal, the supreme court might review specific issues rather than effectively depublish the lower court decision as soon as review was granted, as had been the procedure since 1860. There has also been continuing concern with the caseload issue (some of the dimensions and vagaries of which are mentioned in Part III, supra). The impact of the appellate death-penalty caseload became especially controversial in the period of the political firestorm surrounding the Bird Court's criminal law decisions, and continues to be a matter of widespread concern today.

F. Adequacy of Funding

It has been a cardinal tenet in the judicial reform agenda that courts can operate effectively only if they enjoy adequate and assured levels of state funding, and are not required to rely solely upon local government appropriations and court-generated revenues from fines and fees. Stability and adequacy of the court "fisc" is also essential, reformers argue, to maintain judicial insulation from fluctuations in the balance of political power, either statewide or locally. A sound and generous financial base

141. See id. at 16 (criticizing this legislation).
142. See, e.g., JUDICIAL COUNCIL OF CAL., ANNUAL REPORT 17 (1979) (reporting on selective publication rule).
143. CAL. CONST. art. VI, § 12 (amended (1984)); see JUDICIAL COUNCIL OF CAL., ANNUAL REPORT 9 (1985). In addition, the court has been permitted to devolve upon the State Bar its previously held (and time-consuming) responsibility for attorney discipline. See State Court 'Finality Rule' Should Ease Supreme Court Caseload, CAL. LAW., Aug. 1990, at 27.
144. For a sharp difference of views concerning the alleged impact of death penalty appeals on caseload and workload, see Gerald F. Uelmen, Losing Steam, CAL. LAW., June 1990, at 33. Contra, Marcus M. Kaufman, Crisis in the Courts, CAL. LAW., Aug. 1990, at 28.
is also vital to maintain the desired levels of support for a staff of court administrators and other professionals to handle case processing, to provide legal research, to collect and analyze statistics, and to perform the other services deemed important to the smooth and efficient running of the courts—in sum, to support the professionalization of the courts.\textsuperscript{145}

On several occasions, the Judicial Council has linked proposals for restructuring the trial courts with suggestions for fiscal reforms. In its 1975 plan for unification of the justice and municipal courts, for example, the Council proposed that all revenues from fees and fines in these courts be received by the state. The state, in turn, would "bear the responsibility for all trial court expenditures other than capital costs for existing court facilities."\textsuperscript{146} A related issue has been the concern for adequate financing of public defenders' offices and the provision of appeals counsel for indigents. Except in San Francisco, where special local taxes supported the cost of public defenders, funding was drained by the combined impact of Proposition 13 and the Reagan administration's attacks on the Legal Services Corporation budget and on LSC activities in California. Even as the requirements for provision of public defenders were expanded by court decisions mandating counsel in civil contempt proceedings, probate commitments, mental health commitments, and juvenile court pretrial hearings, the public defenders' offices became the object of drastic budget cuts in the post-Proposition 13 years.\textsuperscript{147} Proposals for the creation of an office of a State Public Defender for Appeals were on the table for more than seven years. The National Center for State Courts study endorsed these proposals in 1975. Governor Reagan, however, vetoed legislation passed in 1971. Any progress achieved in providing counsel to indigent appellants was attributable to federal project grants from the Law Enforcement Assistance Administration.\textsuperscript{148}

Even after the approval in 1976 of the State Public Defender Office legislation, budget cuts in the mid-1980s produced a situation in which fully

\textsuperscript{145} In the reformist view, of course, professionalization is equated with increased levels of efficiency. In political confrontations, however, critics of professionalization measures are often wont to see, or at least profess to see, bureaucratization, redundancy, and other elements of inefficiency.

\textsuperscript{146} Judicial Council of Cal., To Meet Tomorrow: The Need for Change at ix (1975).

\textsuperscript{147} See, e.g., Jonathan Kirsch, Rural Justice at the Crossroads, Cal. Law., Apr. 1984, at 24 (comparing funds appropriated for criminal prosecutions up $138.4 million, or 169 per cent, during 1975-83 as compared with an increase of only $45.4 million, or 117 per cent for the public defenders' offices—only 1 percent of which was borne by the state, whose appropriations were constant from 1969 to 1983 at only $775,000 per year); id. at 25 (on San Francisco being the exception).

seventy percent of indigent criminal appellants had to be turned over to private counsel, despite federal mandates.\footnote{149}{Id.}

The judicial leadership pursued its quest for state funding of the courts throughout the 1980s. Chief Justice Bird made the solution of fiscal shortfalls a central matter in her Judicial Council and State Bar messages, reiterating the theme that the state paid only ten percent of judicial costs.\footnote{150}{See, e.g., Myrna Oliver, Who Should Pay for Our Courts?, CAL. LAW., May 1984, at 34.} With mounting public awareness of caseload problems, and with State Bar leaders providing strong support for Bird's funding campaign, the legislature moved to provide block grants to counties despite the divisive events that rocked the California Supreme Court and politicized judicial questions so dramatically during the mid-1980s. The 1985 Trial Court Funds Act (the Brown-Presley Act) was greeted by the Judicial Council as "the first major reform in trial court operations since the abolition of the proliferating city and police courts by Chief Justice Phil S. Gibson in 1949."\footnote{151}{JUDICIAL COUNCIL OF CAL., ANNUAL REPORT (1986) [hereinafter ANNUAL REPORT 1986].} While this was perhaps an overstatement, given other reforms achieved in the intervening years, still it is significant as an indicator of the importance of funding issues at that time. The counties, for their part, gave up the right to set filing fees; revenue from fines, forfeitures, and fees were directed to a trust account for court operations in the state's General Fund. In 1988, the legislation was amended to give block grants to counties, while the state took over most of the court-related fee revenues.\footnote{152}{ANNUAL REPORT 1991, supra note 29, at 50-52.} The intensified state fiscal crisis of the early 1990s culminated in a threat of draconian cuts in court funding during the 1992 period of budget deadlock in Sacramento. This threat underlined the continuing intensity of fiscal pressures on the courts and their relationships with the legislature.\footnote{153}{See Hudzik, supra note 28; Richard Chernick, A Call for Adequate Funding of Our Courts, L.A. LAW., July-Aug. 1992, at 11; Gerald F. Uelmen, Plunging Into the Political Thicket, CAL. LAW., June 1992, 31-32.}
the legislature, at a time of "divided government" when one party controlled the legislature and another the governorship, with the high court justices nearly all appointees of the latter and his predecessor of the same party.

G. DEVELOPMENT OF ALTERNATIVE STRUCTURES AND PROCEDURES

The reform agenda since 1960 has been most prominently concerned with devising alternatives to traditional processing of civil disputes. The subject of crime control and the courts attracted much high-profile public debate, controversy, and a variety of major policy changes touching virtually all aspects of criminal procedure, many through California's direct-ballot initiative process.154

The reformist concern with respect to civil litigation has centered heavily, as we have seen, upon the desire to eliminate delay and congestion.155 Another reform thrust is motivated by a quest to relieve the trial courts from the burdens of such case categories as small claims, which can be readily handled with "streamlined" procedures and at lower cost to litigants. Some commentators and reformers, moreover, depict the regular courts and their procedures as simply inadequate in their competence to meet special needs, such as those which arise in juvenile proceedings or in family law when intervention of social workers and other professionals is deemed more effective than what judges can accomplish in the courtroom. Beyond that, the reform debate has focused also upon the full "dejudicalization" of large areas of law—that is, "to identify those disputes with which the courts are least equipped to deal," and then to "either shift them to other forums [such as workers' compensation or civil rights commissions and panels] or simply terminate organized social attention to them at all."156

Not all reform efforts in California or nationally, it must be noted, have been sympathetic to removing or dejudicializing procedures formerly entrusted to the courts. Thus it has been an important objective of many judicial reform leaders—for many, a paramount objective—to assure that judges will continue to maintain administrative oversight over such alternative dispute mechanisms as may be established in the course of reorganization and reform. Hence the attractiveness of the commonly

154. Innovations in criminal justice are discussed in brief compass below. See infra part V.
155. See supra text accompanying notes 5-10.
used terms "court-annexed" or "court-administered" procedures and institutions.157

The burden of case backlogs in the California trial and appellate courts has been widely regarded by legal observers and many political leaders as a problem that must be addressed vigorously, lest public confidence in the judicial system be altogether undermined. Leaving aside for now the question—an important one for purposes of realistic analysis—whether filings and caseload data are an adequate measure of courts' performance and the quality of justice, the data on congestion from the 1960s provided ample grist for judicial-reform mills. For example, in the Los Angeles Superior Court, which was consistently among the most heavily burdened by delay, there had been a gradual decline during the 1960s in the number of filings per judge; and yet the average time that elapsed from initial filing to trial began a sharp trend upward after mid-decade, reaching nearly thirty months by 1970.158 In the eighteen superior courts in California with five or more judges, the number of civil cases awaiting trial rose from 42,163 in mid-1968 to 70,419 four years later; while the median time from complaint to trial ranged in 1972 as high as 37.5 months in Los Angeles County, 39 months in Marin and San Francisco, and 45 months in San Joaquin.159 By the end of the decade the presiding judge of the Los Angeles Superior Court was predicting that, absent immediate reforms of procedure, there would occur "a complete breakdown in our civil courts."160

As was sometimes acknowledged by reform advocates—and forcefully contended by critics of reformist strategies161—aggregative data on caseloads obscured some important changes of real substance. Thus, a significant shift had occurred from 1960 to 1970 in the composition of superior-court civil filings, as personal injury, death and property damage cases increased seventy-one percent—a rate approximately fifteen percent higher than overall civil filings. These damage cases were about


158. Selvin & Ebener, supra note 5, at 39-41 (Fig. 2.8).


161. See, e.g., Henry R. Glick, The Politics of State-Court Reform, in The Politics of Judicial Reform 17, 31 (Philip L. Dubois ed., 1982) ("[C]ourt reform is good for court reformers and professional managers," and the evidence of reform results does not demonstrate that they have been efficacious.).
nine times more likely than the other categories of civil litigation to culminate in jury trials; and even if they avoided trial altogether, they often involved prolonged and complex pre-trial procedures. Not least important, the personal injury and other damage cases were notoriously subject to purposeful tactics of delay, through unnecessarily elaborate discovery and other means, especially on the part of corporate or insurance defendants. Another dimension to this problem was the fact that the 1960s witnessed the elaboration of the California Supreme Court's new tort liability jurisprudence, significantly expanding the doctrine of strict liability and otherwise enlarging the grounds on which damage suits might be pursued, and enhancing the likelihood of restitution being effected. Meanwhile the 1957 California Discovery Act had gone well beyond even the liberalized federal rules, opening the door to new complexities in—and prolongation of—civil damages cases. Further compounding pressures on the courts was a dramatic increase in the volume of traffic misdemeanors susceptible to full jury trial procedure. Also contributing to the rising concern with issues of congestion was the increasing caseload in the appellate courts, attributable not only to an absolute increase in the trial courts' business but also to the impact of expanded rights extended to criminal defendants by new decisions in the 1960s emanating from both the California and the national high courts.

Alternative structures and procedures to meet the pressures on the judicial system had not been unknown, by any means, in earlier California law. Commissioners, special masters, and referees, for example, had

162. Id. at 38 (statistical data cited); SELVIN & EBEKER, supra note 5, at 43 (discovery impact and other data discussed); see also Wayne D. Brazil et al., Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Solution, 69 JUDICATURE 279 (1986) (discussing litigative tactics and their impact generally).


165. ANNUAL REPORT 1967, supra note 87, at 31-46.

166. ANNUAL REPORT 1969, supra note 135, at 11 (showing that convictions for criminal offenses in superior courts numbered 27,876 in 1960-61, and 9% of guilty findings after trial were appealed; whereas in 1966-67, the percentage of after-trial convictions appealed had risen to 20%, with total convictions having risen to 33,212).

For a discussion of contemporaneous delay and congestion problems in the federal courts, see Mark W. Cannon, Innovation in the Administration of Justice, 1969-1981: An Overview, in THE POLITICS OF JUDICIAL REFORM, supra note 64, at 36 (citing as reasons for the rise in business of the federal courts during the 1960s "new statutes passed by Congress, Supreme Court decisions significantly expanding causes of action in the federal courts, the growing number of lawyers, and the increasing availability of free counsel to the poor"); see also Munger, supra note 76, at 55-65.
long been regarded as conventional in court operations, in California as
in other states and in the federal courts. In one major area of Califor-
nia law, moreover, an alternative structure within the court system had
long been in place: As early as 1939 the counties had been authorized
under the California Civil Code to establish conciliation courts (staffed
by professional counselors) to which disputes in family law might be sub-
mitted for mediation on voluntary consent of the parties. Moreover,
arbitration of commercial disputes had long been a feature of business
agreements in California, and in 1927 new state legislation, modelled on
statutes in other jurisdictions, made arbitration stipulations legally
enforceable. Virtually dormant, but still on the books was a nine-
teenth-century statute that provided for private judging by consent of
parties in commercial disputes—a law that was destined after 1976 to
become the basis for the modern-day "rent-a-judge" phenomenon.
The legislature also had joined numerous other states in the 1950s in
enacting a general arbitration act, regularizing procedures—albeit proce-
dures that sought to foster informality and flexibility—for voluntary
arbitration of disputes.

The response in the legal community to what was portrayed as the
caseload crisis during the 1960s and early 1970s, thus, was predictably
focused on the possibility of substituting alternative resolution processes
for regular judicial process. The superior courts, in their efforts to
improve efficiency in handling civil cases, instituted a number of proce-
dural innovations during the 1950s and 1960s, most notably in the Los
Angeles courts, including mandatory pretrial conferences and voluntary
assignment of smaller damage cases to commissioners.

167. Nor was constitutionality of reliance upon examiners, auditors, special commissioners,
masters, etc., in any doubt under federal doctrine, following the decision of Ex parte Peterson, 253
U.S. 300 (1920); see Brazil et al., supra note 162, at 284-85.
169. SELVIN & EBENER, supra note 5, at 94.
F. Christensen, Private Justice: California's General Reference Procedure, AM. B. FOUND. RES. J. 79,
79-89 (1982); see also id. at 85 (discussing the analogous procedures of arbitration and reference);
171. Christensen, supra note 170, at 85-86.
172. Id. at 89-94; see also id. at 74-89 (discussing earlier efforts at mandatory pretrial conferenc-
ing and other procedural adjustments in early decades—waves of experiment in reforms that were
apparently destined to be reinvented, or at least revivified, in subsequent periods of perceived crisis).

The Judicial Council supervised rule making for voluntary settlement and pretrial procedures,
but not always with much support, let alone enthusiasm, from all segments of the bar. Indeed, on a
number of occasions the Conference of Bar Delegates passed resolutions critical of the Council's
rules; and though the State Bar never endorsed these criticisms, in 1961 one house of the Legislature
actually voted through a bill (which died in the other house) to reverse the Council's policies on
The most aggressive response in the lower courts was the Attorneys' Special Arbitration Plan ("ASAP") instituted in 1971 by the Superior Court for Los Angeles County. The origins of the ASAP effort—which provided for voluntary submission for arbitration of smaller personal injury cases, limited to a $7,500 maximum award—reflected the widely shared concern in the legal community regarding the caseload situation; it was established and set in motion on initiative of both the Los Angeles Trial Lawyers Association and the Association of Southern California Defense Counsel. The project involved some 100 volunteer lawyers, half each from the plaintiffs' and defendants' bars. They obtained financial support from the Board of Supervisors of Los Angeles County, and the project went forward with support from Presiding Judge Charles Loring and his court.\(^{173}\)

Shortly afterward, the Superior Court of San Francisco County put into effect a similar ASAP program.\(^{174}\) Although initially the percentage of eligible cases initially stipulated to arbitration through ASAP in San Francisco was small, palpable cost savings were realized by both the court and the litigants. In immediate terms, both ASAP programs were influential in prompting the legislature to look more closely at arbitration alternatives; and in the longer run, the two programs served as important prototypes for an expanded role that volunteer attorneys began to undertake in various forums to relieve pressures on the courts—a role that a distinguished senior litigator and member of the San Francisco bar viewed, retrospectively, as having been critical to overcoming some of the judiciary's most serious and intractable operating problems in the past twenty years.\(^{175}\)

The Judicial Council's preoccupation with the issue of reducing caseloads was reflected in its annual reports in the late sixties. Its attention was focused especially on the possibility of achieving major reductions in court business through reclassification of minor traffic violations as noncriminal "infractions," eliminating the possibility of jury trial and

\(^{173}\) ANNUAL REPORT 1973, supra note 159, at 46; see SELVIN & EBENER, supra note 5, at 94 (reporting that the limit was later raised to $15,000).


the application of new requirements for counsel to indigent defendants. A sentiment with great appeal within professional judicial ranks was the proposition that, "as a realistic political consideration," the Judicial Council could "minimize statutory changes and rely on Rule of Court modifications instead"—and thereby maximize its autonomous control over operations of the judicial system, at the same time "perfect[ing] its own functions" and presumably heading off political interventions from the other branches. Accordingly, as we have seen, the Council gave intensive attention to proposals for appellate procedural reform. The Council also promulgated during 1971-73 various new rules for case management bearing on the civil calendar, permitted \textit{voir dire} in civil cases without the presence of a judge, authorized superior court experiments such as stipulated eight-person juries in criminal cases in San Francisco, and empowered special commissioners to hear and determine uncontested civil matters. Proposed basic reforms of the grand jury system also became the subject of intensive study by the Council.

Chief Justice Wright gave further impetus to the Council's concerns by appointing, in March 1971, a blue-ribbon "Select Committee on Trial Court Delay." Composed of members of the bar and bench, law enforcement officers, a probation officer, and an accountant, this committee came forward a year later with a set of recommendations across a broad spectrum of procedural and substantive areas. It endorsed no-fault insurance reform, wholesale unification of the trial courts, reduction in size of juries except in the most serious criminal cases, and, not least important, introduction of new procedures and structures to encourage settlements in lieu of trial in civil cases. In a parallel move, both Presiding Judge Francis McCarty of the San Francisco Superior Court and

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176. Such a reclassification reform had been adopted earlier by New York State. \textit{Annual Report} 1967, \textit{supra} note 87, 13-57.


the Bar Association of San Francisco established in 1971 special committees, with distinguished membership from the bar and academic institutions, to study issues of court administration, procedure, and efficiency.\textsuperscript{182} The court's special committee, chaired by attorney John Sutro, also had responsibility for sharing in administrative oversight of the bench and bar's cooperative programs for reduction of civil and criminal delay—programs that won plaudits of judicial reformers in the mid-seventies, as the case backlog was reduced radically in the criminal division and a palpable increase in annual dispositions of civil cases was achieved.\textsuperscript{183}

A Judicial Council study published in late 1972 provided both a \textit{summarium} and an important call to action, setting forth the full case for instituting a full-scale alternative structure alongside an analysis of data from the experience garnered already in local court experiments and pilot projects. Its focus was the issue of how an expanded role for arbitration might address the litigation problem; it was undertaken by the Council in response to a June 1971 resolution of the State Senate.\textsuperscript{184} San Francisco attorney John G. Fall served as project director, supported by Council staff and advised by a blue-ribbon advisory board, drawn mainly from the bar. This report, \textit{The Role of Arbitration in the Judicial Process} (the Fall Report), underlined the statistical significance of personal injury cases—which then constituted close to half the backlog in superior courts—and particularly their importance in producing backlog problems in the courts serving the large metropolitan centers.\textsuperscript{185} The document concluded with a strong endorsement of compulsory arbitration in personal injury cases, with incentives built into the procedures for an appeal system that would induce most defendants to accept the arbitrators' awards. Cognizant of the reservations about compulsory alternative procedures—reservations that are still current in the professional and public dialogues on dispute resolution, centering on the erosion of public values and of the individual guarantees built into established trial procedure—Fall pointed to the fact that the proportion of damage cases in the 1960s that ended injury trial had fallen by a dramatic fifty percent during the decade.\textsuperscript{186} Speculating on the causes of this decline in resort to juries, he suggested that the ongoing experiments in the superior

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\textsuperscript{182} \textit{Bar Association Action}, \textit{The Recorder}, Apr. 6, 1971, at 1.
\textsuperscript{183} \textit{Chief Justice Lauds S.F. Courts & Lawyers}, \textit{supra} note 175.
\textsuperscript{184} SB 139, Cal. Leg., 1971-72 Reg. Sess. (1971) (Moscone Resolution) (referring in its preamble to the “excessive burden of litigation in the courts in California” and asking for a “study of the possible role of the use of arbitration in the judicial process”).
\textsuperscript{185} \textit{Annual Report 1973}, \textit{supra} note 159, at 42-43, 115-23.
\textsuperscript{186} \textit{Id.} at 43.
\end{flushleft}
courts might have led many defendants to opt for settlement, with or without stipulated referrals. "On the other hand," the Fall Report continued:

>[I]t has been suggested that this trend is indicative of the plight of the average claimant, who, faced with the prospect of a 2 to 3 year wait for a jury trial and with immediate financial obligations stemming from his injury or loss of property, is forced to accept an offer from the defendant which is far below what a jury would award.

Whatever the reason, it is clear that private settlement talks, trial setting conferences, mandatory settlement talks and other pre-trial procedures . . . are the overwhelming source of dispositions of negligence cases, and their importance is every increasing. *Thus, it would be more proper to describe the present system for the resolution of negligence disputes as a mediation and settlement system with the sanction of a jury trial as its lever.*

There is no evidence of very general acceptance of Fall's effort to characterize the civil justice system as having already been effectively transformed into a "mediation and settlement system," in which traditional structures and procedural values were subordinated if not rendered altogether obsolete. This characterization was advanced, of course, as a rationale for Fall's proposal to legitimate and institutionalize the new order by compulsorily requiring arbitration, at least in specified categories of disputes. Nonetheless, the Fall Report served to place at center stage of reform debate the idea of compulsory alternative procedures; it marked out much of the agenda that would be pursued—as alternative dispute resolution, including private judging, became increasingly important in the delivery of civil justice in California—during the ensuing decades.

At the time of its appearance, the Fall Report was immediately significant as part of a broadening public debate in California and nationally on the desirability of more aggressive responses to the court "crisis." This debate gained rising public attention when Chief Justice Warren E. Burger, in his 1972 "State of the Judiciary" address, declared that the very survival of "our system of ordered liberty" was at stake in the face of "staggering" caseload problems in the federal courts. *188* This speech was the opening shot in what became the Chief Justice's long-term campaign—a consuming passion for him—to advance procedural reforms, all of which were designed to reduce caseload volume, but some of which

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187. *Id.* (emphasis added).
were explicitly designed to accomplish this end by cutting back on litigants' and appellants' established constitutional and procedural rights.\textsuperscript{189} Also contributing in major ways to the visibility and intensity of the broadening debate over procedural reform and alternative structures, was the record of the federal Law Enforcement Assistance Administration ("LEAA") and its varied programs for funding neighborhood justice centers and other experimental adjudicative and dispute resolution programs.\textsuperscript{190}

The Superior Court for Los Angeles also appointed a special commission, chaired by Judge Arthur L. Alarcon, to evaluate the sources of caseload burdens and to recommend legislation that would expedite the "streamlining" of procedures.\textsuperscript{191}

Also playing a major part in the 1970s debate, however, were persistent older concerns—a focus upon issues that had dominated discussion of alternative dispute resolution in the 1960s. These concerns were expressed in the populistic or "progressive" strain of ADR reform support, as opposed to the more narrowly legalistic strain that was represented by the Judicial Council's studies and the activities of other professional organizations of bar and bench. The more populistic strain that persisted from the 1960s was greatly concerned with expansion of substantive rights—and often with the more embracing political-ideological objective of "greening" political and legal institutions. Its main themes have been summarized as "participation, flexibility of both process and result, and access to justice of those previously foreclosed, as

\textsuperscript{189} Chief Justice Burger led the organization of the privately funded Institute for Court Management, which pursued procedural reform goals; but he linked his pursuit of these objectives with a prolonged campaign along conservative lines to reduce procedural rights, especially with respect to class actions and appellate proceedings, as a way of cutting back on caseload. See Glick, \textit{supra} note 161, at 17; Munger, \textit{supra} note 76. Burger's role in the reform movement reminds one vividly of the truism that "change by design" is critically a matter of whose design provides the guiding principles.

\textsuperscript{190} D. McGillis, \textit{Community Dispute Resolution Programs and Public Policy, in ISSUES AND PRACTICES IN CRIMINAL JUSTICE} (National Institute of Justice & U.S. Dept. of Justice eds., 1986); Feeley, \textit{supra} note 2, \textit{passim}. LEAA also sought to advance public defender programs, court unification, state-federal judicial management coordination, and other objectives through its programs of direct and matching grants. See \textit{id}. On one occasion the Judicial Council voiced strenuous objection to an intervention by the LEAA in ordering of California criminal justice, declaring that conditions attached to the grants—conditions that required statistical reporting by California criminal courts directly to the national government, in an arrangement sanctioned by the state legislature—encroached on Judicial Council authority and served to breach the proper separation of powers between the judicial and legislative branches within the state. \textit{ANNUAL REPORT 1974, supra} note 180, at 13-21. This proved to be a short-lived controversy and a sideshow to the more important evolution of federal judicial and congressional influences on the general direction—sometimes conflicting cross-currents, as exemplified by Chief Justice Burger's more conservative aims—of the debate in California on judicial reform.

well as extension of models of procedural justice into such other domains as the workplace, local community, and family.\textsuperscript{192}

In a continuing tension with the efficiency-oriented concerns that infused much of the California reform rhetoric of the seventies and continue to be heard, voices expressing the populistic view of the ADR reform agenda have also remained vocal to the present time; indeed, to some degree their objectives (for example, greater transparency of procedure, improved access, and greater representativeness as to gender and ethnicity in the forums of adjudication) have been co-opted and absorbed, if not to say routinized, by the more conservative professionally oriented reformers.\textsuperscript{193}

Also persistent down to our own day has been the diversity evident among the main actors in the politics of judicial reform. The range of the motivations and goals is also very wide, even inside the "narrowly legalistic" reform camp, whose adherents seek to limit the scope of reform to within the boundaries of the court system. This variety has been described by Deborah Hensler in the following terms:

Some legislatures view the establishment of [court-annexed alternative procedures and structures] primarily as a means of reducing judicial workload, and hence, reducing the demand for new judgeships. Judges and court administrators frequently view them as components of a differentiated strategy for caseload management, in which specific categories of cases are assigned to different treatments. Lawyers may view the alternatives as a means of clearing the trial calendar for "more important" litigation. Public and private interest groups may regard

\textsuperscript{192} Menkel-Meadow, \textit{supra} note 22. Many of these objectives were embodied in the early programs of the LEAA. \textit{Feeley}, \textit{supra} note 2. Professor Menkel-Meadow identifies the main reform themes of the 1970s movement, as I have considered it here in the light of Judicial Council and other "inside" professionals, as being (by contrast with the 1960s themes) "efficiency, speed of processing, transaction costs in getting disputes resolved, and technical competence for 'best' results." Menkel-Meadow, \textit{supra} note 22, at 300.

Another commentator writes of the ADR resolution debate that there has been, over the years since the early 1960s, a dual focus—a "legalistic" side, which has stressed internal organizational and management reforms, and also has encouraged expanded access to courts; and a side which appears to be at least partly anti-legalistic, which calls for diversion of dispute settlement away from courts. However, "the proposals for diversion of some cases to neighborhood-justice centers, arbitration, and other nonjudicial forums are quite consistent with a legalist, rather than a non- or antilegalist, orientation." Munger, \textit{supra} note 76, at 60-61. See also Professor Galanter's argument concerning the "warm" and "cool" themes in the advancement of case-management objectives, infra text accompanying notes 210-12.

\textsuperscript{193} Menkel-Meadow, \textit{supra} note 22, at 300-01.
alternative dispute resolution procedures as a means of saving litigants' time and money, while perhaps providing a better quality of justice.\(^{194}\)

The patterns of change in California policy with respect to ADR structures and processes from the late 1970s to 1990 have reflected the persistence of these several strains of reform—and also of continuing tension among these actors, with their divergent goals and varied tactics. At an extreme end of the spectrum was a movement for private judging of civil disputes—especially in commercial cases, often involving large sums of money and complex procedural issues. This movement was inaugurated in a remarkable moment in 1976, when three Los Angeles lawyers, in a now-famous maneuver, realized that the 1872 reference statute permitted them to take a complex civil case out of the courts for officially sanctioned private processing, allowing the parties to select their own judge or other referee, to establish the timetable to their own convenience, and to reserve the right to appeal the private judge’s decision.\(^{195}\)

The “rent-a-judge” alternative caught on quickly, especially in the large corporate law firms, and it became elaborately institutionalized as retired federal and California judges took up this activity. Some of these judges entered into it as individual entrepreneurs, but many others have become associated with a private firm that has established a dominant position in this new “judging industry” in California.\(^{196}\)

Another index of the growing importance of diverting disputes to alternative forums is the dramatic proliferation in number, activities, and influence of the varied membership organizations that deal with credentialing and also represent the interest of professional arbitrators, mediators, conciliators and other intermediary dispute-resolution specialists.\(^{197}\)

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194. Deborah R. Hensler, What We Know and Don’t Know About Court-Administered Arbitration, 69 JUDICATURE 270, 270 (1986). Hensler follows the quotation above with the caveat: “Just what is meant by ‘better quality’ is often unclear.” Id.


196. See Judge Robert I. Weil, This Judge for Hire, CAL. LAW., Aug. 1992, at 41-42 (reporting that some 200 private judges are active in practice in California; half are in L.A. County alone, and the one firm that dominates the market has more than 100 retired judges under contract).

197. A recent study reports that “the ADR provider world is vibrant and growing” in California, with more than forty ADR programs receiving state funds. Jay Folberg et al., The Use of ADR in California Courts: Findings & Proposals, 26 U.S.F. L. REV. 343, 372 (1992). A 1988 California
An important innovation that moved in the same direction as the "rent-a-judge" movement—that is, toward removal of cases from the judicial system and placing them into other extrajudicial ADR forums—has been the community dispute resolution movement. In California a program that instituted a state and local governmental partnership as to financing and administration was inaugurated in 1986 and subsequently evolved into wide-ranging mediation, arbitration, and conciliation services. Modeled on experimental neighborhood programs in Los Angeles and other cities under LEAA sponsorship in the 1970s, the new community ADR program for voluntary submission of disputes was championed by a coalition of local bar associations, chambers of commerce, community mental health centers in several counties, local human relations commissions, and other organizations and agencies, but the Judicial Council, which remained committed to court-annexed procedures, was notably absent from the list of endorsers.

In a move that sent a strong message to the public that this was a program for the diversion of cases to alternative forums—and not a court-annexed program, State Bar Association directory of ADR providers revealed the following diversity of agencies and professionals:

[T]hirty-eight were community-based organizations, others specialized in particular substantive areas (for example, landlord-tenant, consumer complaints, or misdemeanor offenses); and others specialized in disputes involving only certain kinds of parties (e.g., international conflicts, people of particular religious faiths, or members of professional associations). The programs also varied with respect to revenue sources, history and program development features, budget levels, and staffing patterns.

Id. at 373. The same authors found that mediation was the mode of settlement pursued in 70% of the cases reported, "although a number of programs offer services including arbitration, mini-trials, and case evaluation," with some 70 to 80% of cases referred having been resolved by the ADR mechanisms pursued. Id. at 374.

Cases submitted to ADR forums tended to be settled quickly relative to the average times required in civil proceedings in the courts. Thus, the average number of weeks to disposition was found in 1989 studies to be only three in conciliation cases, ten in mediation, ten in nonbinding arbitration, and fourteen in binding arbitration. PAGE, supra note 3, at 731. The comparison with much longer periods for disposition of court cases may be misleading, since presumably cases submitted to ADR forums involve parties who are eager to bring matters to a disposition and are not interested in complex litigative maneuvers or delay as a tactic useful to themselves.

More recently, under Chief Justice Lucas' direction, the Judicial Council has moved vigorously to advance empirical studies of, and to develop recommendations for the more effective use of, ADR programs. For example, the Council sponsored a major study of ADR in California that was published in 1992 and currently is the subject of continuing Council deliberations. Folberg, supra note 197. In 1991 the Council also adopted many of the recommendations for further study of ADR submitted by a special Advisory Committee on Private Judges, chaired by Dean Scott Bice of the University of Southern California Law Center. ANNUAL REPORT 1991, supra note 29, at 70.
for handling within the system, such as the Judicial Council had regularly sought to advance—the legislature vested supervisory responsibility not in the judiciary, but rather in the California Department of Consumer Affairs. The role given this executive agency, according to one commentator, reflected its "longtime involvement and commitment to helping consumers resolve their own problems," without resort to the courts.200

Reform efforts in judicial policy within the court system—that is, court-annexed procedures—accelerated after the enactment in July 1976 of legislation providing for arbitration processes that would be voluntary in all cases, mandatory if a plaintiff agreed to a maximum award of less than $7,500. This measure led to a new arbitration statute in 1978 with stronger mandatory features, applicable in jurisdictions with ten judges or more—a law that initially had mixed results with respect to its objectives of reducing cost and time to disposition.201 Meanwhile in 1976, the Judicial Council promulgated what amounted to a thoroughly revised code of juvenile court procedure.202

Professional organizations and the Judicial Council, as well as local courts' presiding judges and the state's cadre of court administrators, continued to keep ADR and structural reform in the public eye. The issue remained prominent in debate within professional circles—and,  

200. Coleman, supra note 46, at 84. Coleman notes that in other states with similar programs—Colorado, Florida, Illinois, Massachusetts, Oklahoma, and elsewhere—the oversight function had been placed in the judicial branch. Id. at 83.


The operation of the 1978 statute is summarized by Selvin and Ebener as follows:
The arbitration program, one of the largest and most ambitious in the nation, operates in all superior courts with ten or more judges. Under its rules the court orders all civil damage suits valued at $15,000 or less to be heard by a single, randomly selected arbitrator. This mandatory program, like the earlier Uniform Arbitration Program, allows any plaintiff who agrees to a ceiling or $25,000 on the arbitration award to elect to submit his case to arbitration without the consent of the defendant. Both parties may also stipulate to the arbitration of any case, regardless of its monetary value. The arbitrator's award has the same force and effect as a court judgment but it may be appealed by either party.


increasingly in political discourse, especially as the political controversies surrounding the Bird Court became intensified—from the late 1970s through 1990. Among the most influential sources of subsequent debate and reformist innovations were the widely publicized pilot projects and permanent procedural reforms introduced, on the lead of Chief Judge Robert Peckham, in the U.S. District Court for the Northern District of California. These innovations included "early neutral evaluation" ("ENE"), by which cases were referred to volunteer attorneys or panels for possible settlement, and also moved toward judicial case management more generally. Meanwhile the federal Ninth Judicial Circuit continued to generate procedural experiments and reforms that brought it wide attention nationally and led to general adoption of many new federal "case processing" rules.

The favorable atmosphere toward experimentation and procedural reform that has prevailed in the federal courts of California no doubt was influential in coloring the environment of debate in the parallel efforts of the California bench and bar to advance procedural innovations. It seems not unreasonable to speculate, moreover, that Chief Justice Lucas' involvement, as a federal district judge, in this experimental milieu, combined with his previous experience on the state bench in Los Angeles County—a major focus of reform concern because of its extraordinary caseload over many decades—may go far toward explaining the vigorous and outspoken role he has played, in his service on the California high court and the Judicial Council, in the promotion of procedural reforms.

The political attack upon the Bird Court, in part as an element of a larger effort to attack "judicial activism" by liberal judges, was elevated to a new level in 1979 when State Senator H. L. Richardson sent questionnaires to the 220 superior court judges who were then before the electorate for continuation in office. This came in the wake of public controversy concerning decisions of the Bird Court regarding schools desegregation (culminating in a popular vote in Prop. 1 [1979] overturning the court's ruling that de facto segregation was unconstitutional and required judicially ordered remedies, including bussing of pupils), criminal defendants' rights, and the death penalty. See Culver & Wold, supra note 31, at 82-85; Ed Salzman, Richardson's Attack on Judges, CAL. J., Dec. 1979, at 424; see also Clyde Leland, What's at Stake?, CAL. LAW., Sept. 1985, at 35.


Jerome Falk commented upon this linkage between state and federal reforms in his comments at the December 1992 symposium on the future of the California courts. See Falk, supra note 175. I have relied also upon discussions with Judicial Council staff about this interaction and linkage between federal and state initiatives.

See Message from the Chief Justice, JUDICIAL COUNCIL OF CAL., ANNUAL REPORT at ii (1987). The Chief Justice states that the Judicial Council's "top priority" is to reduce trial court delay. The same themes are sounded, in the context of the Chief Justice's more comprehensive concerns about judicial function, in his opening address to the Judicial Council conference on the
The genesis of the procedural and structural reforms being implemented in California's courts now, in the 1990s, is also found in a line of research studies, professional conferences, legislative proposals for pilot projects, and finally a set of successful recommendations for permanent reforms that have been the product of sustained Judicial Council efforts for a decade and a half. Some of the most important results from these efforts have taken the form of enhanced authority for judicial case management, the topic to which we turn next.

H. Judicial Case Management

Since early in the century, judicial reformers have contended against the orthodox view that, as Roscoe Pound described it, "the parties should fight out their own game in their own way without judicial interference." It is better, they argue, to have judicial officers—judges and their administrative staffs—engage in pro-active management of each case, either to encourage conciliation and settlement or else to expedite the movement of the case to a conclusion through efficient pretrial and trial phases.

More than perhaps any other single reform agenda item, judicial case management has been designed specifically to attack the problems of delay and congestion in civil litigation. Proactive intervention by judges, with expanded authority for court administrators in moving cases through the litigative process, was at the beginning and until the 1940s closely associated with the idea that reform should focus upon "mediation" of disputes—finding a middle ground, with "adjustment," "compromise," and "conciliation" the stated objectives. These are the key phrases, as Galanter has argued, in the ideology that has represented


At the present writing, the California Supreme Court has only begun to deal with some of the ambiguities and complexities of new "streamlining" procedures. People v. Superior Ct., 17 Cal. Rptr. 2d 815 (Ct. App. 1993) (offering an intriguing example of how daunting a task the sorting-out process will likely become). The task is rendered more difficult, if anything, by adjudication in the context of a Code of Civil Procedure that includes some critical sections that have what one senior appellate justice recently termed a "patchwork quality" because of frequent amendments since original adoption. Jones v. Superior Court, 12 Cal. Rptr. 2d 376, 379 (Ct. App. 1992) (ordered not to be officially published). Some of the most vexatious issues of statutory interpretation surround the crucial matter of rules governing discovery. See, e.g., Wagner v. Superior Court, 16 Cal. Rptr. 2d 534 (Ct. App. 1993).

208. Wheeler, supra note 10, at 144.
209. See, e.g., Selvin & Ebener, supra note 5.
what he calls the "warm" theme in case management reform. Increasingly dominant in recent years, however—in California as in the federal courts and in other states—has been the "cool" theme, which is decidedly more technocratic, being concerned with moving cases through the system, clearing the dockets, "eliminating expense, and unburdening the courts." Although these "warm" and "cool" themes are sometimes "entwined together" historically, as Galanter concedes, they are still distinguishable in the record of efforts to expand the authority of judges to "manage" the course of litigation.

The movement for enhanced judicial control over litigation has enjoyed extraordinary success. In the federal courts and in many states, including California, the trial of facts and the process of judgement in open court has been robustly challenged as the central element of litigation by a model of adjudication that incorporates mandated negotiation as an integral part, for many types of cases the central part, of the process leading to disposition.

Judicial reformers in California have always given at least as much attention, however, to the narrower "streamlining" innovations that are designed to expedite the progress of cases as they move through the conventional pretrial and trial procedures within the court system. Proponents of streamlining argue that, no matter how efficacious, speedy, and fair the alternative non-court-based dispute resolution structures might prove to be, it is every party's right to have meaningful access to the courts, with the procedural guarantees that are attached to judicial process in both civil and criminal matters; such access requires that the flow of cases be kept on a reasonable and efficient schedule. That the institutional survival of an overburdened court system is at stake, they argue, is an equally compelling reason to eliminate unnecessary sources of complexity and delay in the courts.

211. Id.
212. Id. at 258.
213. STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (1977); George L. Priest & Judyth W. Pendell, Foreword to Symposium on Modern Civil Procedure: Issues in Controversy, 54 Law & Contemp. Prob. 1 (1991); Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 376 (1982); see also HERBERT JACOB, LAW AND POLITICS IN THE UNITED STATES (1986); SELVIN & EBENER, supra note 5.
214. Reform leaders in California have not by any means abandoned the linked, traditional concern with obtaining sufficient funding and personnel for the courts to do their business properly. See supra part IV.F. The funding issue and its relationship to fundamental constitutional liberties was pushed to the fore of public attention in a dramatic, indeed startling, way in 1987-88. In that year the Los Angeles County Bar Association filed suit in federal court, subsequently argued on
As early as 1960, more active judicial management in the trial courts had been advocated strongly in reports commissioned by the Judicial Council. One of the earliest of these studies, dealing with automobile accident litigation, was undertaken in response to a 1959 legislative resolution whose preamble cited Chief Justice Gibson to effect that “delay in the final determination of automobile accident claims is unfair to all parties, especially to those injured persons and their families who, though ultimately compensated, suffer privation while waiting for their cases to be determined.”\textsuperscript{215} In presenting their evaluation of various pleading, pretrial, and trial procedure reforms that had been undertaken in other states or were being proposed \textit{de novo} for California, the Judicial Council researchers recognized that “the question whether the trial judge is to remain a passive umpire as in many American jurisdictions or take full command of the trial as in England involves important values;” but they pointed out that California jurisprudence, contrary to that in most other states, had authorized “the trial judge to be more than just an umpire” and warranted a significant measure of flexibility in the framing and judicial implementation of procedural rules.\textsuperscript{216} The various initiatives of the Judicial Council, in the period from 1960 to 1990, to promulgate procedural reforms that would produce speedier resolution and disposition of cases, built on this historic foundation of the judges’ range of discretionary authority.

Major innovations came from several sources. The most important, at least until 1982, originated with the legislature and the Judicial Council. The more prominent initiatives included wide-ranging changes in juvenile court rules under 1961 legislation that were advanced and codified by the Council in 1977. The strong new rules that the Council adopted a decade later specified time limits for the specific elements of criminal proceedings, and they introduced new mandatory requirements and strengthened sanctions designed to speed up civil proceedings. After 1977 various local innovations in civil justice were put into effect under pilot programs supervised by the chief justice’s Advisory Committee on

\begin{footnotesize}
\bibitem{215} JUDICIAL COUNCIL OF CAL., ANNUAL REPORT 17 (1960).
\bibitem{216} Id. at 59.
\end{footnotesize}
Economical Litigation, and the experimental programs in areas of procedure more generally were left to discretion of the trial courts.\(^{217}\) In 1977, the legislature enacted amendments to the state's juvenile law that brought the process of trial for delinquents much closer in many respects to the model of adult criminal proceedings—a departure from the traditional rehabilitative goals of the juvenile system.\(^{218}\) Under terms of other 1977 legislation, the chief justice supervised a five-year pilot project that began in the six-judge El Cajon Municipal Court and was later extended to other municipal courts in San Diego County. This program extended the authority of the municipal judges to exercise all the powers of a superior court bench in dealing with a range of offenses, including felonies and family law cases.\(^{219}\) Apart from the objective of relieving congestion in the superior courts in San Diego, the project was also a laboratory for new streamlining procedures.\(^{220}\) Although the project did not produce indisputable evidence of effectiveness—the Judicial Council, while applauding the San Diego judges' "exceptional enthusiasm leading to a more intensive use of judicial time," conceded that in relieving congestion the results were "not dramatic"—the legislature was encouraged sufficiently by it to extend the authority of superior court judges throughout the state to direct that a matter be heard in municipal or justice court.\(^{221}\)

All the foregoing procedural adjustments in civil justice were of small consequence in comparison with the impact of the 1986 Trial Court Delay Reduction Act, which provided for pilot programs in nine counties, including the three largest county courts. The statute has been

\(^{217}\) SELVIN & EBENER, supra note 5, passim (discussing various experimental programs and innovations in the Los Angeles Superior Courts); Juvenile Court Rules, in ANNUAL REPORT, 1977, supra note 92, at 5; Trial Court Management Rules, in JUDICIAL COUNCIL OF CAL., ANNUAL REPORT 17-18 (1985); How to Reduce Court Costs, THE RECORDER, Jan. 27, 1977, at 1 (discussing the pilot programs the Economical Litigation advisers would oversee, including, programs for the municipal courts, a curtailment of pretrial conferencing, changes in discovery procedure, and "the elimination generally of the use of demurrers or pretrial motions, the permissive use of trial briefs and of narrative testimony, the written submission of direct testimony").

\(^{218}\) The rehabilitative tradition had been at the core of California juvenile law since 1937. For an excellent summary and analysis of the original 1937 legislation and its implementation, the impact of new constitutional rulings, and the 1977 and 1981 amendments, see Teri H. Ashby, Note, Effects of Recent Legislation on the California Juvenile Justice, 17 U.S.F. L. REV. 705 (1983).

\(^{219}\) JUDICIAL COUNCIL OF CAL., ANNUAL REPORT 29 (1983).

\(^{220}\) These experimental efforts included "more efficient judicial time management procedures, delegating to clerks the authority to dispose of certain minor offenses and traffic infractions, [and] successfully using readiness conferences to dispose of many felony matters before the preliminary hearing . . ." Id.

\(^{221}\) Id. at 30-31; see also Cheryl Seltzer, California Pilot Project in Economical Litigation, 53 S. CAL. L. REV. 1497 (1980) (summarizing the legislation and its implementation as to the modification of discovery rules with an informative interim assessment of impact).
described by an appellate court as representing a “fundamental change in the approach to the problem of court congestion” since it required trial judges to “aggressively monitor and manage litigation from filing of the first pleading until final disposition”—thus effecting a transfer of “control over the pace and timing of litigation from lawyers to the trial judge.” With Judicial Council guidance, specific time limits were established for total “processing time” of cases from filing to disposition; the stated objective was “to reduce the pending caseload by disposing of at least 25 percent more general civil cases than are filed” during a one-year period in 1987-88. The rules were tightened further in 1991, when what had become universally known as the Fast Track Program was extended to all superior courts. In the 1991 Act, case-processing “time frames”—illustrated in Figure 2—were specified for completion of each step of litigation processes.

Despite an outcry of protest from attorneys whose cases were affected, the pilot courts often put older (“pre-fast track”) cases aside while commencing with the experimental program. Not for several years did the older cases get back fully into the stream; hence it was difficult to obtain a clear reading on the meaning of the statistics of delay reduction—statistics were received on the whole optimistically by the Judicial Council, though more critically by segments of the bar. Informal commentary by the Judicial Council and other analysts seems to indicate that the program is having a favorable impact in terms of reducing congestion. However, whether different types of cases are being affected differently, whether there is a differential impact on plaintiff and defendant parties, whether various litigative tactics might be influencing the statistics, whether there has been an impact on diversion to ADR forums, and—above all—how well the courts are performing not only in processing cases but in doing justice, are all questions that are not susceptible to analysis by reference only to the published aggregative “processing” statistics on filings and dispositions.


224. Annual Report 1991, supra note 29, at 46. Under the initial legislation, the project’s trial courts were empowered to “impose procedural requirements in addition to those authorized by statute,” and also to “shorten any time specified by statute for performing an act,” inspiring heated complaints that this was excessive discretion for the trial judges. Int’l Union of Operating Eng’rs v. Superior Court, 254 Cal. Rptr. 782, 789 (Ct. App. 1989). The 1991 act, though it tightened time standards, repealed the authority of trial courts to adopt exceptional rules deviating from the statutes or the Rules of Court.

225. Private discussions by the author with court analysts and journalists specializing in legal affairs.
Trial Court Delay Reduction Program Time Limits Flow Chart

Complaint filed

Number of days

- 60
  - 60 days after complaint, file
    - Proof of Service = S
- 90 (S+R)
  - 30 days after service, file
    - Response = R
- 90 (S+R), 165 (S+R+E)
  - 15 days more for response by stipulation
    - Extension = E
- 120 (S+R+H), 135 (S+R+E+H)
  - Anytime within 30 days after responsive pleading
    - File Stipulation for Continuance (H = Hiatus)
- 150 (S+R+H+C), 165 (S+R+E+H+C)
  - 30-day stipulation begins to run
    - Continuance = C
- 120 (S+R) + (SC), 135 (S+R+E) + (SC), 140 (S+R+H+C) + (SC), 145 (S+R+E+H+C) + (SC)
  - Not sooner than 30 days after any of the above continuances
    - Status Conference (or similar event) = SC
- 210
  - Not before 210 days after filing
    - Referral to Arbitration = A
- 330*
  - 30 days before trial
    - Discovery Cutoff (Code Civ. Proc., § 2024(a))
- 345*
  - 15 days before trial
    - Discovery Motion Cutoff (Code Civ. Proc., § 2024(a))
- 345*
  - 15 days before trial
    - Expert Witness Discovery Cutoff (Code Civ. Proc., § 2024(d))
- 350*
  - 10 days before trial
    - Expert Witness Motion Discovery Cutoff (Code Civ. Proc., § 2024(d))
- 360
  - TRIAL
- 365
  - 365 days under case disposition time standards for 90% of cases filed
    - DISPOSITION

* Based on trial date at 360 days after filing (Code Civ. Proc., § 2024) parties may informally agree in writing to extend these times but extension cannot continue or postpone the trial date.
The impact upon California's courts of innovations in criminal procedure amounts to an altogether different kind of picture. To be sure, there were important legislative initiatives—for example, the juvenile justice reforms, already mentioned, which overlapped with concerns of criminal law. The Determinate Sentencing Act, which of course had an immensely important impact, reduced judicial discretion and soon subjected the state's prisons and jails to prisoner loads they could not accommodate—and could accommodate even less competently as post-Proposition 13 revenue cuts affected budgets. Also, under authority of 1987 legislation, the criminal courts commenced an experiment with limited uses of judicial voir dire in criminal cases in two counties.

Unlike the civil justice field, however, criminal justice was vitally affected by the direct ballot. Change by plebiscite in California—with all the attendant problems of legislation or constitutional revision undertaken on a wholesale basis through the initiative process—commenced with sweeping revisions of criminal procedure embodied in Proposition 8, passed in 1982. Champions of the initiative defended its purpose as one of "establishing a legally cognizable right to public safety." Opponents were unpersuaded by the accuracy of the "Victim's Bill of Rights" label attached to the initiative. They regarded the measure's revisions of criminal procedure—several of which were explicitly designed to reverse a series of decisions by the California Supreme Court that had been based upon independent state grounds—as a wanton abandonment of hard-won rights important to all citizens. The voters followed with a further sweeping revision of constitutional and statutory law in the criminal field, with Proposition 115, passed in June 1990. These measures have effected fundamental change in the balance of influence as between prosecutors and judges in the criminal courts and they have resulted in an entirely different statistical profile from the one that prevailed before 1982 with respect to criminal cases going to trial, percentage of guilty pleas, and percentage of convicted persons going to prison. Equally

226. ANNUAL REPORT 1986, supra note 151, at 15.
231. See, e.g., Victim's Rights Symposium, supra note 17.
232. For example, certified pleas of felony sentences, which were 14.8% in 1976-77 and 24.3% in 1980-81, rose to 41.8% in 1984 and 51.8% in 1989-90. See Brown, supra note 17, at 943, passim.
important, however, the success of these direct ballot measures reflected upon an extraordinary episode in the history of judicial action in the development of constitutional law. It represented a popular revolt against the efforts of a state supreme court to establish a constitutional jurisprudence holding its own state government officials to a higher standard of behavior than federal law required. To what extent the longer-term result will be a debilitating abridgement of public confidence in courts, and to what degree any such result is overbalanced by any gains—as yet hard to measure—in the containment of crime, are intriguing questions for another day.

I. PATTERNS OF INNOVATION AND REFORM

All the foregoing objectives of judicial reform share a common concern to infuse the operations and structure of the courts with professionalization of function. The direction of these reforms is, in general, away from local control and toward the centralized direction of court administration—though with control remaining in the hands of the judiciary itself. When the reforms work as intended, they serve to widen the arena of self-governance for the courts, and also to further insulate the judicial system from the vicissitudes of involvement in partisan politics. Such reforms, of course, also potentially place court administration under the increased (though presumably much more benign) influence of "insider politics" of the organized bar and other professional groups.

The individuals and organizations mainly responsible for championing these reforms in California from 1960 to 1990, as in earlier periods of our history, have been drawn mainly from the ranks of judges, lawyers, academics, and other professional "insiders," or else from groups that sought to advance efficiency in governmental operations generally. However, in most instances their goals were not of high and immediate importance to the general public. To achieve their ends, judicial reformers

233. The virtual invisibility of the Judicial Council and its concerns with reform, even within professional circles, was the subject of remark in 1975, when an opinion survey revealed "that only 7 percent of the lawyers admitted to practice [in California] . . . have ever heard of the [Judicial Council/Administrative Office of the Courts], while 14 percent of those who have heard of it . . . approve of its activities." Ralph N. Kleps, Courts, State Court Management, and Lawyers, 50 CAL. ST. B.J. 45, 45 n.l (1975). In 1980 students of the Judicial Council's record contended that the Council—responding to the fact that the system was working well enough and did not need repair—had "consciously remained extremely conservative in its scope of interest and its willingness to apply pressure for implementation of its policies," and that it kept "a low political profile." Stolz & Gunn, supra note 18, at 901. The present author does not think this characterization is applicable to the Council's role in the last decade, especially since the judicial system is no longer widely perceived, even—or perhaps especially—by judges themselves as operating in such an efficient manner that it
have typically needed to enter into coalition building, lobbying, and publicity. Only in these ways could they attain success with the legislature or, in the case of reforms proposed as constitutional amendments, with the electorate at large. In other words, there has been no infallible escape route from the dilemmas that come into play when the judicial system becomes enmeshed in politics: In order to accomplish reforms that would insulate the court system from the partisan political arena, it is necessary to enter into, and to prevail within, that very arena. What one scholar has written of the federal movement for judicial reform in relation to Congress, is also true of state-level reform efforts in relation to the state legislature:

\[
\text{[J]udges lobby judges with bar organizations and congressional committees as interested parties. Courts need and judges want money, manpower, and assorted statutory changes in jurisdiction and court organization.}
\]

The rhetoric of judicial independence notwithstanding, judges must look to Congress to satisfy such requirements. In administration as distinguished from judicial decision-making, the Third Branch is dependent on [the legislative branch] and to a lesser extent on the executive.\(^{234}\)

It is typically the centerpiece of the political strategy of judicial reform leaders to maintain a posture that their objectives are “nonpartisan,” and to distance themselves, insofar as possible, from the treacherous waters of partisan divisions at either the state or local level. How well such distance could be maintained, and with what degree of skill the reform leadership navigated the political shoals and rapids, has varied significantly from one issue (and one time) to another, in the history of California reforms.

It is important to recognize, as part of this general overview of judicial reform, moreover, that each type of reform identified here has deserves immunization from basic reform efforts. (The Judicial Council’s own current preoccupation with “alternative futures” planning and basic reform indicates the intensity of pressures for reform from within the judicial elite and bar leadership circles.)

From time to time, it should be noted, nearly every professional organization concerned with judicial administrative issues is almost unavoidably drawn into public debates about high-visibility policy questions. A revealing example of the mix of concerns in periods of activism for such organizations is the agenda of the California Conference of Judges in 1970. It included: (1) reconsideration of penal code reform, then the subject of hearings by a joint legislative committee; (2) discussion of how current legislation on rights of mentally ill persons was affecting judges’ discretion in handling criminal cases when immediate treatment was deemed appropriate for a defendant; (3) the proposed eighteen-year voting age; and (4) proposed reform of the “antiquated” juvenile court procedures. Hon. Goscoe O. Farley, Conference of California Judges, 45 CAL. ST. B.J. 36 (1970).

\(^{234}\) Fish, supra note 69, at 432.
encountered significant resistance historically, both in the nation at large and in California in particular. Naturally, some of this resistance has come from elements of the population or the interest-group structure of state politics that are located outside the professional boundaries of the legal system’s personnel. But opposition can also come from within that system—judges, court administrators, lawyers, and other professionals form varying coalitions to oppose reform objectives. Often only from within the system is there enough focused concern to make opposition effective.

A major source of opposition to specific reforms in California, especially to centralized administration or to reduced control over funding, has been localized in focus. Such opposition consists of local elective officials, tax-minded groups opposed to loss of control over court budgets, and local judicial officials who stand to lose control over their own courtrooms—and who often eloquently express the notion that the judicial system should leave room for local preferences, variations in community values, and the flexibility inherent in decentralization of power. Such arguments have needed to address, of course, the contention that such local variation can mean unwarranted differences in the procedures and substance of justice, so that the citizenry’s right to equal protection is jeopardized.

Opposition to reform proposals has often represented a clash between the objectives of the judiciary and the legislature’s desire to maintain its own prerogatives. Within the Judicial Council and the judiciary at large, too, there have been occasional confrontations. A particularly vivid incident revealing intrajudicial differences occurred in 1981, when a state constitutional amendment was sponsored by the California Judges Association leadership. The amendment sought to take away from the chief justice her authority to appoint Judicial Council members—a reaction to Bird’s appointment practices. Interestingly, the Association’s officers withdrew the proposal after a poll of its members showed serious division on the matter.

The legislative branch often exhibits a generalized unwillingness to yield authority over procedure, as it has done with respect to trial court rules. But resistance by legislators to reform proposals can also reflect other powerful forces at work. Simple partisanship, for example, can

235. See supra text accompanying notes 100-06.
236. See supra text accompanying notes 92-94; see also Cohn, supra note 93, at 444 (discussing “different local rules, customs, and forms,” producing inefficiency).
237. Rebecca Kuzins, Ordering the Courts, CAL. LAW., Sept. 1986, at 47.
inspire resistance, especially at times when the state supreme court's membership consists heavily of the appointees of one governor or one party. Also, differences in the legislature in matters of principle or substantive policy may simply mirror cleavages in the electorate at large. At times, governors have also vetoed reform legislation that they felt did not go far enough, went too far, or cost too much. For example, citing relatively minor fiscal impacts, Governor Deukmejian rejected procedural reform bills that had passed both houses and were championed not only by the Judicial Council but also by the California Law Revision Commission and the State Bar.

At times, moreover, factions within the relevant professional groups, including the California Bar, have been strongly opposed to one another on particular reform issues. For example, intra-professional factionalism has been prominent in debates of tort law reform, in which the plaintiffs' and the defense bars have staunchly confronted one another over the years. Factionalism has also been manifest in the family law area, first as to no-fault divorce reform (opposed by some segments of the bar) and later as to the advisability of creating a separate family court division in the superior courts. Proposals for court restructuring to reform the handling of cases in juvenile law, and proposals for procedural innovations that are seen as changing the structure of comparative advantage in trial or civil or criminal case processing have similarly been the subject of deep divisions within the California bar—as evidenced, for example, by the heated exchanges between trial lawyers' associations and reform advocates regarding the claims made for the advantages of "fast track" experiments and the extension of the Delay Reduction Act's requirements to all California trial court jurisdictions. Public interest law firms, public defenders, and political leaders have regularly joined in the debate on procedural reforms, for example, in contending that fast track

238. A special twist, in the political interrelationships of reformers and the legislature, was the reliance of the State Bar upon the legislature to sustain its status—and its fisc—as the unified bar. A former president (in 1937-38) of the California Bar Association remarked upon this changing relationship in a recent interview, stating that difficulties that the Bar was encountering with the legislature in the 1980s were "entirely due to the fact that it has not confined its legislative program to procedural matters. Having said that, I must say that I have no regard for the attorneys in the legislature who have attempted to change State Bar policy by holding it hostage on its dues bill."

Gilford G. Rowland, Oral history memoir (Regional Oral History Collection, Bancroft Library, UC Berkeley).

239. See Coleman, supra note 46 (recounting the history).

240. See infra note 248.

and court-annexed arbitration or settlement procedures give advantages to wealthier litigants and defendants.\textsuperscript{242} Governor Jerry Brown's legal advisers often assumed an adversarial stance against the courts and the organized bar by roundly criticizing the size, ethics, compensation, and political role of the California bar.\textsuperscript{243}

Moreover, as the new politics of rights consciousness and political iconoclasm took hold in the 1960s, the judicial and state bar leadership had to come to terms with such new issues as minority representation, affirmative action, women's rights, and legal assistance for politically active groups in poverty or minority status. These developments were difficult for many established leaders of the bench and bar to accept.\textsuperscript{244} Subsequently, to an astonishing degree, such concerns have become thoroughly institutionalized. Thus, the rosters and agendas of Judicial Council advisory committees today are more reflective of the "radical" platforms of the 1960s than they are of the narrow reformist posture of the Council in the 1940s.

The genesis of specific California reforms has not always been in the debates or initiatives of the Judicial Council, the Bar, or the other organizations within the state. Also weighing in as an influence of considerable moment, of course, was a series of Uniform Code proposals.\textsuperscript{245} Variants of "federal effects" have also been significant, most notably the impact of the Law Enforcement Assistance Administration funds in alternative dispute resolution, sentencing, data collection, and other aspects of procedural and administrative reform. Likewise, the innovations undertaken by the Ninth Circuit and the U.S. District Court for Northern California have had enormous influence in regard to case management in the state courts and in regard to organization for judicial administration.\textsuperscript{246}


\textsuperscript{244} See Rowland, supra note 238.

\textsuperscript{245} For example, one such proposal was the Uniform Commercial Code as adopted in 1965. The child custody debate, to cite another instance, has centered in considerable measure around terms of draft uniform legislation.

\textsuperscript{246} See Feeley, supra note 2, at 114-56 (treating the LEAA initiatives for alternative sentencing in San Jose); see also JUDICIAL COUNCIL OF CAL., ANNUAL REPORTS from 1970 to 1979; John W. Winkle, \textit{Toward Intersystem Harmony: State-Federal Judicial Councils}, JUST. SYS. J. 240, 242 (1981) (discussing the response, including California's, to Chief Justice Burger's call in 1976 for the
Indeed, a broad range of recent reform concerns and the dynamics of innovation—from child support to case management, from arbitration to judicial organization and court finance—reflect the transformation of American federalism. The interpenetration of state and federal law that has occurred since the New Deal is now more than matched by the interpenetration of administrative concerns and responsibilities.247

V. THE VARIANTS OF CHANGE

The history of family law, juvenile law, environmental law, and criminal justice reform in California since 1960 illustrate the varying patterns of change. In family law, a landmark reform—no-fault divorce—was accomplished early in the period. Since then there have been no serious efforts to restore consideration of fault for divorce. However, there was tension between the legislature and the judiciary over the degree of discretion that judges would be authorized to exercise as to custody awards and financial settlements. In later years, tension developed between the ideal of equality and the no-fault principle, which was exemplified in the debates that surrounded research findings on the financial status of divorced women in comparison with that of their former husbands. Also, the family law area has been affected by pressures for recognition of unconventional marriages and, more recently, by the legal challenges associated with surrogate mothers and other aspects pertaining to reproductive technologies. Key variables that have shaped caseload and substantive law have been statutory: first no-fault divorce, then reforms mandated by Congress for child support. There is also an unresolved, persistent movement to create a separate family law division in the superior courts and to merge juvenile dependency case processing with overlapping family court jurisdiction.248

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247. See Scheiber, supra note 45.

In juvenile law, initially federal judicial decisions granting new procedural rights and, later, California legislative initiatives abridging traditionally paternalistic process for juvenile delinquency offenders have affected the structure of rights and punishment norms. In both environmental and criminal law, by contrast, some of the most important changes have been mandated by direct ballot. These measures have included coastal zone and toxic control initiatives in the environmental area and the “Victims’ Bill of Rights,” which transformed criminal procedure, as well as the death penalty initiative, in the criminal field. These ballot measures were preceded by and continue to interact with the Determinate Sentencing Act, clearly one of the most directly influential legislative measures of the period. In both environmental and criminal law, issues of technology have come into play in such prominent ways as affecting forensics in the criminal courts, and the methodology of risk assessment, etiology, and public health generally as they relate to environmental litigation.

Environmental law illustrates “adversarial legalism” in that the California Environmental Quality Act (“CEQA”) and other legislation has been challenged across a broad front. Courts have had to play a major part in statutory interpretation. These decisions had major consequences for challenges to governmental action alleged to be in violation of CEQA standards, as well as patterns of defense by regulated private interests. Standing to sue, class actions, and other questions vital to establishing access to courts and viability of litigation strategies have given wide play to the style of resort to law to which the phrase “adversarial legalism” has been applied.

Professor Judith Resnik has recently contended that “[w]hat has happened in mass torts is illustrative of a wider trend—an interest in ‘substantial modifications of traditional court processes’ in a variety of [litigative fields].” Both the narrower innovations (or “reforms”) that

Private Responsibility and the Public Interest, in Divorce Law at the Crossroads, supra, at 166. For the family court proposals, see Cal. Senate, Task Force on a Family Relations Court, Final Report (1990).


250. See, e.g., Stanley Scott, Governing California’s Coast (1975) (discussing the coastal zone initiative); Victims’ Rights Symposium, supra note 17; Messinger & Johnson, supra note 59; see also Preble Stolz, Say Good-Bye to Hiram Johnson’s Ghost, Cal. Law., Jan. 1990, at 44 (on initiative process and its “disastrous influence on law reform in California”).

251. See, e.g., Kagan, supra note 40; Selmi, supra note 42.

252. Resnik, supra note 70, at 51.
focus on administration, case management, settlement mechanisms, judicial rule making, and the like, and the strong common themes in patterns of change in criminal and civil case processing suggest the more general importance of these tendencies. California developments in the period from 1960 to 1990 indicate the breadth and impact of these patterns of judicial reform; and Resnik and others have persuasively sounded the alarm that such reforms—whatever their contribution to case-processing efficiency narrowly defined—are potentially capable of eroding the traditional creative functions, especially the basic value-maintaining functions, of the courts. But I think that the record of change in California since 1960 can also be read as indicating that the direction of basic transformations in the political and socio-economic environments in which judicial reform goes forward—especially in the context of a political process in which the direct ballot, with its potential for sudden accomplishment of wholesale innovation by plebiscite, holds sway—must be taken into account as we reckon with our prospects for sustaining the vitality of the California judicial system’s essential role in a democratic society.