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Case Dispositions by the California Supreme Court: Proposed Alternatives

Appellate courts serve two functions when they review cases: they examine trial proceedings for correctness of result, and they oversee the development of the law.¹ In current practice, the California Courts of Appeal perform both of these functions.² The California Supreme Court, on the other hand, is concerned primarily with institutional matters; its role in the judicial structure is to supervise the development of California law.³ It serves this role by resolving important and novel legal issues, and also by supervising the courts of appeal.⁴

California courts, like appellate courts throughout the country, are finding it increasingly difficult to fulfill their roles. The current overload of appellate litigation compels the courts of appeal to perform primarily a "review for correctness,"⁵ giving inadequate attention to

1. See NATIONAL CENTER FOR STATE COURTS, *THE CALIFORNIA COURTS OF APPEAL* 32 (1974); Hufstedler & Hufstedler, *Improving the California Appellate Pyramid*, 46 L.A.B. BULL. 275, 278-79 (1971); Leavitt, *The Yearly Two Foot Shelf: Suggestions for Changing our Reviewing Court Procedures*, 4 PAC. L.J. 1, 9-10 (1973); Special Committee re Appellate Courts, *The Court of Review: A New Court for California?*, 47 CAL. ST. B.J. 28, 30-31 (1972). See generally Joiner, *The Function of the Appellate System*, in JUSTICE IN THE STATES 103 (W. Swindler ed. 1971); Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459 (1975).

2. See NATIONAL CENTER FOR STATE COURTS, *supra* note 1, at 32; Hufstedler & Hufstedler, *supra* note 1, at 278-79; Special Committee re Appellate Courts, *supra* note 1, at 30-31.

3. See NATIONAL CENTER FOR STATE COURTS, *supra* note 1, at 32.

4. The supreme court is authorized to grant hearings in order to decide important questions of law and to secure uniformity of decision. CAL. R. CT. 29(a)(1). Although rule 29(a)(1) specifies other grounds upon which a hearing may be granted, these are the two most frequently invoked. See 6 B. WITKIN, *CALIFORNIA PROCEDURE APPEAL* §§ 607-610 (2d ed. 1971). *But see* note 10 *infra*. The supreme court also has original jurisdiction in writ proceedings. CAL. CONST. art. VI, § 10. Except where specifically noted, this Comment does not consider original writ matters heard by the California Supreme Court. Disposition of writs is considerably more flexible in current practice than is disposition of other matters.

5. Special Committee re Appellate Courts, *supra* note 1, at 30.

institutional concerns.⁶ The intermediate appellate process has begun to resemble an "assembly line"⁷ justice system, necessarily producing opinions with such feverish haste that error is unavoidable.⁸ Similarly, time constraints allow the supreme court to grant hearings in a decreasing proportion of the appeals litigated each year.⁹ Consequently, the supreme court can no longer review cases that would have been considered significant enough to warrant a hearing in previous years. Thus, in being forced to confine its attention to the "great and important" cases,¹⁰ the court's supervisory function is being undermined.

This erosion of the supreme court's supervisory function is doubly

6. See generally Thompson, *Mitigating the Damage—One Judge and No Judge Appellate Decisions*, 50 CAL. ST. B.J. 476 (1975) (the author is a justice of the California Court of Appeal, Second District, Division One). See also 1 AMERICAN INSTITUTE FOR CONTINUING LEGAL EDUCATION, INC., CALIFORNIA SUPREME COURT SERVICE, No. 3 (Oct. 13, 1978) (describing experiment by Division Four of the First Appellate District, California Court of Appeal, in rendering oral decisions immediately after oral argument in "uncomplicated" cases); NATIONAL CENTER FOR STATE COURTS, *supra* note 1, at 32; Special Committee re Appellate Courts, *supra* note 1, at 31-33.

For a case illustrating an appellate court's attempt to deal with the litigation crisis, see *People v. Brigham*, 85 Cal. App. 3d 365, 149 Cal. Rptr. 353 (3d Dist. 1978) (advance sheets only), *hearing granted*, Cal. Sup. Ct. Minutes, Nov. 29, 1978 (3d Crim. 9721) Cal. Official Rep. No. 34 (1978) (official advance sheets only). The court of appeal, in a published opinion, summarily affirmed a criminal conviction without affording counsel the opportunity to present oral argument, holding such action appropriate in "criminal appeals which, although theoretically arguable, are as a practical matter hopeless." 85 Cal. App. 3d at 367, 149 Cal. Rptr. at 354. The court's decision appeared to be at least partially motivated by docket concerns; it called such summary affirmance "salutary" because it would lead to "more rapid disposition of appeals and conservation of scarce judicial resources and litigant time and expense." *Id.* Using the technique would rid "the docket of the court of some deadwood." *Id.* (citation omitted). The opinion has been rendered a legal nullity by the supreme court's grant of hearing. See text accompanying note 15 *infra*. Moreover, the fact that the high court granted a hearing in the case may well reflect its concern with the threat to individualized justice posed by such streamlined procedures.

7. Moore, *Bird Calls It Assembly-Line Justice*, San Francisco Chronicle, Jan. 24, 1978, at 10, col. 1 (reporting speech by Chief Justice Bird).

8. *Id.* See Thompson, *supra* note 6. See also note 13 *infra*.

9. From 1965 to 1975 the percentage of petitions for hearing in the supreme court granted decreased from 10.5% to 7.9%. JUDICIAL COUNCIL OF CALIFORNIA, 1977 JUDICIAL COUNCIL REPORT 182 (1977). During the same period the number of petitions for hearing filed in the supreme court increased from 1,205 to 2,894. *Id.* There seems to be an upper limit on the number of opinions the court can write in a year: it filed 255 majority opinions in 1941, 127 in 1949, 199 in 1967, 193 in 1971, 140 in 1972 and 1973, and 187 in 1974. Mosk, *The Supreme Court of California, 1973-1974—Foreword: The Rule of Four in California*, 63 CALIF. L. REV. 2, 7 (1975). The number of filings in the California Courts of Appeal rose from 2,874 in 1960 to 8,684 in 1970. NATIONAL CENTER FOR STATE COURTS, *supra* note 1, at 2. See generally JUDICIAL COUNCIL OF CALIFORNIA, *supra*, at 248-53; note 81 *infra*.

10. Two studies that have attempted to identify the supreme court's motivations for granting petitions for hearing have reached a contrary conclusion. These studies have characterized the supreme court's approach as a "monitor system" of review in which the high court's disagreement with the reasoning or result of a court of appeal opinion is more influential in the decision to grant or deny a hearing than is the novelty of the issues raised. Comment, *To Hear or Not to Hear: A Question for the California Supreme Court*, 3 STAN. L. REV. 243 (1951); Comment, *To Hear or Not to Hear: II*, 4 STAN. L. REV. 392 (1952). A more recent study concurs generally and also finds

alarming because the need for such supervision has increased. To cope with their burgeoning caseloads, the courts of appeal have developed "gatekeeping"¹¹ devices designed to screen out cases that do not warrant full argument, briefing, or written opinion. These devices allow the justices to concentrate on cases of more complexity or merit.¹² The use of such truncated procedures arguably compromises our system of individualized justice,¹³ and even their proponents recognize that their use necessitates stronger safeguards elsewhere in the appellate process.¹⁴ The supreme court is ideally situated to provide such safeguards, but its current caseload prevents it from doing so.

Although similar problems are plaguing other appellate courts, the

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

To the extent that the supreme court presently grants hearings with no institutional justification other than its disagreement with a court of appeal opinion, the court is attempting to supervise the courts of appeal. Both studies considered only published cases; neither examined denials of hearing to determine the number of erroneous appellate opinions in which hearings are not granted and thus shed no light on the degree to which the supervisory function is being performed. The procedures suggested in this Comment would enable the supreme court to monitor the opinions of the courts of appeal with more efficiency and consistency than current procedures allow.

11. Baum, *The Judicial Gatekeeping Function: A General Analysis*, in AMERICAN COURT SYSTEMS 125 (S. Goldman & A. Sarat eds. 1978). Baum breaks down what he calls the "gatekeeping function" of the courts into five basic forms: (1) discretionary jurisdiction, (2) summary disposition, (3) truncated procedure, (4) manipulation of costs, and (5) manipulation of courts' rights to decide. He asserts that "the emphasis of gatekeeping activity is one of making it more difficult for litigants to go to court and to obtain full consideration of their demands." *Id.* at 128.

In California, gatekeeping procedures include the use of permanent staff and per curiam opinions, limitations on oral argument, and the selective publication of court of appeal opinions. *See, e.g.,* Thompson, *supra* note 6.

12. Thompson, *supra* note 6, at 513-16. Thompson asserts that routine matters constitute two-thirds to three-quarters of the courts of appeal's dockets. *Accord*, Lumbard, *Current Problems of the Federal Courts of Appeals*, 54 CORNELL L. REV. 29, 36 (1968); Smith, *A Primer of Opinion Writing for Law Clerks*, 26 VAND. L. REV. 1203, 1206 (1973). *See also* Christian, *Using Prehearing Procedures to Increase Productivity*, 52 F.R.D. 55 (1970).

13. *See, e.g.,* Carrington, *The Dangers of Judicial Delegation: Concluding Remarks*, 52 F.R.D. 76 (1970); Kamier, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 CAL. ST. B.J. 387 (1973); Thompson, *supra* note 6.

The use of permanent staff to separate unmeritorious "routine" appeals from those which warrant careful consideration is an especially effective but dangerous innovation. Staff members prepare memoranda and draft opinions for those cases which are found suitable for "routine disposition." Thompson, *supra* note 6, at 513-19. When the court of appeal panel to which such a case has been assigned holds its prehearing conference, the justices review the memorandum and opinion. *Id.* at 515. *See also* Molinari, *The Decisionmaking Conference of the California Court of Appeal*, 57 CALIF. L. REV. 606 (1969). If the overworked panel members have not had an opportunity to review the briefs before the conference, the staff-prepared materials or the arguments of a single justice may become the sole basis for decision. The result is what Justice Thompson terms a "one judge" or "no judge" appellate decision. Thompson, *supra* note 6, at 515.

14. Thompson, *supra* note 6, at 515-19. In spite of his criticisms, Justice Thompson views the use of career staff, limited publication, and other efficiency devices as "absolutely necessary to the case load of urban area appellate courts." *Id.* at 516. However, he feels strongly, as do the authors, that safeguards must be taken to avoid the dangers inherent in these streamlined procedures.

situation is exacerbated in California, where the supreme court's decision to grant a hearing forces it to consider a cause in its entirety. When a hearing is granted and a cause is transferred to the supreme court, the court of appeal opinion becomes a nullity.¹⁵ The cause is then heard by the supreme court as though on direct appeal from the trial court.¹⁶ Because the lower appellate court's opinion is annulled, the California Supreme Court, unlike the United States Supreme Court, cannot grant a hearing, decide a single issue, and then refer the parties to the court of appeal opinion for resolution of the remaining issues. Similarly, due to an express constitutional prohibition,¹⁷ the California Supreme Court cannot grant a hearing, decide a single issue, and then return the case to the court of appeal for further deliberations;¹⁸ nor can it write memorandum opinions summarily disposing of

15. See CAL. CONST. art. VI, § 12. See also *Ponce v. Marr*, 47 Cal. 2d 159, 161, 301 P.2d 837, 839 (1956); *Knouse v. Nimocks*, 8 Cal. 2d 482, 483-84, 66 P.2d 438, 438-39 (1937); *Estate of Kent*, 6 Cal. 2d 154, 156, 57 P.2d 901, 902 (1936); CAL. R. CT. 976(d), 977; Gustafson, *Some Observations About California Courts of Appeal*, 19 U.C.L.A. L. REV. 167, 175 & n.36 (1971).

This system does not appear to be constitutionally compelled, but rather is a judicial construction stemming from the historical development of the California appellate system. See text accompanying notes 25-51 *infra*. It thus appears that the court itself could, simply by overruling the cases in which this unusual requirement was developed, abolish the current system and replace it with one in which appeal to the supreme court is taken from the court of appeal rather than from the trial court, leaving the intermediate appellate opinion intact except as modified by the higher court's subsequent opinion. Cf. Note, *The Effect of Transfer of Causes from the District Courts of Appeal to the Supreme Court of California*, 31 SO. CAL. L. REV. 87 (1957). This would allow partial decision and would thereby alleviate some of the problems discussed in this Comment.

In fact, in a recent opinion, *People v. Hidalgo*, 22 Cal. 3d 826, 587 P.2d 230, 150 Cal. Rptr. 788 (1978), the supreme court did resolve an appeal by reference to the court of appeal's opinion. Hidalgo was convicted of first degree burglary. In a separate action, probation granted Hidalgo on a prior burglary was revoked. These two cases were consolidated on appeal. The judgment of conviction of burglary was reversed summarily by the supreme court for *Marsden* error. *People v. Marsden*, 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970). The supreme court disposed of Hidalgo's appeal from the probation revocation by the following sentence: "Defendant's attacks upon the revocation proceedings were fully considered by the Court of Appeal and we agree they lack merit." 22 Cal. 3d at 828, 587 P.2d at 231, 150 Cal. Rptr. at 789.

Whether this departure from the rule suggests that the court is receptive to changing the system is unclear. Because such a reform would have a profound impact throughout the California court structure, it may be unlikely that the court would implement it. This Comment concentrates, therefore, on proposing alternative dispositions which might be implemented within the context of the currently operating judicial structure. See also note 23 *infra*.

16. See *Menchaca v. Helms Bakeries, Inc.*, 68 Cal. 2d 545, 541 n.1, 439 P.2d 903, 907 n.1, 67 Cal. Rptr. 775, 779 n.1 (1968); *Moran v. District Court of Appeal*, 15 Cal. 2d 527, 530, 102 P.2d 1079, 1080 (1940); *Estate of Stierlen*, 199 Cal. 140, 144, 248 P. 509, 510-11 (1926); *Rockridge Place Co. v. City Council of Oakland*, 178 Cal. 58, 60, 172 P. 1110, 1111 (1918).

17. CAL. CONST. art. VI, § 12 ("The Supreme Court may . . . before decision, transfer a cause . . .") (emphasis added).

18. The supreme court used its transfer power in an extremely unusual manner in *Taylor v. Union Pac. R.R.*, 16 Cal. 3d 893, 549 P.2d 855, 130 Cal. Rptr. 23 (1976). It appears that the court violated the constitutional bar against partial decision, unless the constitutional requirement of

cases.¹⁹

The necessity of holding a hearing and writing a full opinion²⁰ prevents the California Supreme Court from correcting every instance of faulty reasoning or misapplication of the law by the courts of appeal. This Comment suggests, however, that even under the present statutory and constitutional scheme the supreme court has the power to take intermediate action that would allow it to review a greater number of lower court decisions and thereby better fulfill its supervisory function.²¹ It argues that such intermediate action could be taken once the initial screening of petitions for hearing is completed.

The court invests a great deal of time reviewing petitions for hear-

retransfer "before decision" (*see* note 17 *supra*) means "before a determination of the merits of the appeal."

The plaintiffs brought an action to recover for personal injuries. The plaintiffs argued before the court of appeal that they were improperly denied their right to a jury trial. The court of appeal found in favor of the plaintiffs on this issue and therefore did not reach the merits of the appeal. The supreme court granted a hearing "for the sole purpose of considering the jury trial issue." *Id.* at 895, 549 P.2d at 857, 130 Cal. Rptr. at 25. The court concluded that the plaintiffs had waived their right to trial by a jury. However, rather than reaching the merits of the appeal, the court retransferred the cause to the court of appeal. The court justified this disposition solely on the grounds that it considered the procedure "appropriate to assure that complex and substantial issues raised on appeal are initially considered by the Court of Appeal before their presentation to us, thereby providing the parties a more complete form of appellate review." *Id.*

For another example of an apparently unconstitutional partial decision, see *Ferguson v. Keays*, 4 Cal. 3d 649, 484 P.2d 70, 94 Cal. Rptr. 398 (1971) (retransfer to the court of appeal for application of the rule announced by the supreme court in its partial decision of the same case). *See also* 6 B. WITKIN, *supra* note 4, §§ 619, 619B (2d ed. 1971 & Supp. 1977) (apparently approving both cases).

19. The only constitutional provision which may be construed as requiring the court to hear oral argument, and consequently as preventing it from writing memorandum opinions summarily disposing of cases, is CAL. CONST. art. VI, § 2: "Concurrence of four judges present at the argument is necessary for a judgment." Although the somewhat ambiguous constitutional language does not lead to the inescapable conclusion that a right to oral argument is thereby conferred on the parties, the current Rules of Court adopt that interpretation. *See* CAL. R. CT. 22, 28(f), & Draftsman's Explanatory Note 28(f). Moreover, the supreme court itself has long recognized a right to oral argument where an appeal is decided on the merits. *See* *People v. Brown*, 55 Cal. 2d 64, 72-73, 357 P.2d 1071, 1077, 9 Cal. Rptr. 816, 821 (1960) (Traynor, J., concurring); *Metropolitan Water Dist. v. Adams*, 19 Cal. 2d 463, 468, 122 P.2d 257, 259-60 (1942); Witkin, *New California Rules on Appeal* (pt. 2), 17 So. CAL. L. REV. 232, 243-44 (1944). *But see* 1928 Sup. Ct. R. XXX, § 5 (repealed 1943), authorizing the court to submit a cause on the briefs without argument, a power which was seldom, if ever, used. *See* Witkin, *supra*, at 244.

20. CAL. CONST. art. VI, § 14 requires that "[d]ecisions of the Supreme Court and the courts of appeal that determine causes shall be in writing with reasons stated." *See also* CAL. R. CT. 976(a), which provides that all opinions of the supreme court shall be published in the official reports.

21. This Comment discusses only the impact of the proposed intermediate dispositional procedures on the supreme court. There is, of course, another relevant concern: the possible increase in the workload of the already overburdened intermediate appellate courts that could result. Because this Comment is concerned primarily with the more effective functioning of the supreme court, there has been no attempt to predict the increased processing time required at other judicial levels or to evaluate the systemic impact of the proposed dispositions.

ing.²² By the end of the screening process the individual justices usually have formed some impression of the importance of the issues raised in each case and of the accuracy and incisiveness of the legal analysis contained in the court of appeal's opinion. Based on those initial impressions, the justices vote on whether to grant a hearing. They also decide whether certain other intermediate action is appropriate.

The proposals contained herein would increase the number of options available to the court at this juncture,²³ thereby allowing it to take greater advantage of the substantial resources already invested in reviewing petitions for hearing. Three such intermediate dispositions, derived from past and present court practices, are proposed: (1) retransfer to the courts of appeal with directions, (2) comment upon denial of hearing, and (3) comment upon decertification²⁴ of court of appeal opinions.

The viability of these proposals depends upon their consistency with the recognized role of the supreme court in California. Consequently, this Comment first discusses the evolution of California's judicial system and the role that is currently assigned to the supreme court. Next, the procedures through which the supreme court attempts to fulfill that role are examined. Finally, the Comment suggests that the adoption of procedures for the intermediate disposition of cases would better enable the supreme court to supervise the courts of appeal.

22. See Leavitt, *supra* note 1, at 9; Special Committee re Appellate Courts, *supra* note 1, at 28-29.

23. At the outset it should be noted that the proposed strengthening of the court's supervision over the decisions of the courts of appeal does not envision any significant change in the methods by which potential errors would be called to the court's attention. It is not here suggested that the court screen every appellate opinion for possible error; rather, the initial burden of invoking the court's power by petition would remain, for the most part, on the litigants. See CAL. R. CT. 28(b). (Although the court is authorized to transfer causes to itself on its own motion, CAL. CONST. art. VI, § 12; CAL. R. CT. 28(a), it rarely exercises that authority. See Comment, *California Supreme Court Review: Hearing Cases on the Court's Own Motion*, 41 SO. CAL. L. REV. 749, 749-51 (1968)). The implementation of the proposals contained herein would require no constitutional amendments, no legislative action, no committee appointment, and no changes in the current Rules of Court. Although such possibilities are sometimes raised, they are by no means necessary to the implementation of the alternative dispositions proposed herein. See note 15 *supra* & note 140 and accompanying text *infra*. For articles suggesting more extensive reform of the California appellate structure, see Hufstedler & Hufstedler, *supra* note 1; Special Committee re Appellate Courts, *supra* note 1.

24. "Decertification" refers to the procedure whereby the supreme court orders a court of appeal opinion previously certified for publication to be unpublished. See notes 83-94 and accompanying text *infra*.

I

THE EVOLUTION OF THE CALIFORNIA SUPREME COURT

As originally established under California's first constitution, the supreme court sat as a general appellate court with subject matter jurisdiction in a number of broadly defined categories of cases.²⁵ As such, the supreme court alone had ultimate power to formulate the judicial law of California and it was also directly responsible for the dispensation of appellate justice. There were no intermediate level appellate courts comparable to today's courts of appeal.

The Constitutional Convention of 1879 resulted in a major reorganization of the supreme court. Because of the growth of the court's workload,²⁶ the number of justices was increased from five to seven,²⁷ and the court was divided into two departments with three justices assigned to each.²⁸ The individual departments were empowered to "hear and determine causes and all questions arising therein."²⁹ The composition of the departments was determined by the chief justice,³⁰ who was also responsible for apportioning the court's workload between departments.³¹ Additionally, the chief justice was empowered to

25. See CAL. CONST. of 1849, art. VI, § 4. See also *Knowles v. Yeates*, 31 Cal. 82, 85-90 (1866); *Conant v. Conant*, 10 Cal. 249, 253-54 (1858) (construing the then existing constitutional grant of jurisdiction as conferring on the supreme court "appellate jurisdiction in all cases; provided, that when the subject of litigation is capable of pecuniary computation, the matter in dispute must exceed in value or amount two hundred dollars, unless a question of the legality of a tax, toll, impost, or municipal fine is drawn in question.").

26. During the four years preceding the Constitutional Convention of 1879, the supreme court had decided an average of 560.5 cases each year. Disposing of that number of cases required "an almost incredible amount of labor" and had resulted in decisions without opinion in 559 of 2,242 cases. 2 E. WILLIS & P. STOCKTON, *DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA* 950 (1881). (At that time, a written opinion by the supreme court was not required in every case. Although an 1850 statute required the supreme court to publish all its opinions in writing, see Comment, *Publish or Perish: The Destiny of Appellate Opinions in California*, 13 SANTA CLARA LAW. 756, 757 & n.10 (1973), the court held that provision unconstitutional in *Houston v. Williams*, 13 Cal. 24 (1859). The requirement of written opinions was reinstated in CAL. CONST. art. VI, § 2 (1879), and is currently embodied in CAL. CONST. art. VI, § 14). See also Blume, *California Courts in Historical Perspective* (pt. 2), 22 *HASTINGS L.J.* 153, 161 (1970).

27. CAL. CONST. art. VI, § 2 (1879). The number of justices had been increased from three to five in 1862. CAL. CONST. of 1849, art. VI, § 2 (1862).

28. CAL. CONST. art. VI, § 2 (1879).

29. *Id.*

30. *Id.* The chief justice was empowered to assign three associate justices to each department, to change those assignments from time to time, and to sit in either department himself. Membership of the departments could also be changed by agreement among the associate justices. The chief justice presided when sitting in a department, but otherwise one of the three associate justices was selected as presiding justice by his colleagues in the same department. The presence of three justices was necessary, with specified exceptions, to transact business in either department, and the concurrence of three was necessary to pronounce judgment.

31. *Id.*

"order any cause pending before the Court to be heard and decided by the Court in bank"³² at his discretion either before or after judgment had been pronounced by one of the departments.³³ If so made, the order itself had the effect of vacating and setting aside the prior judgment of the department,³⁴ which was replaced by the judgment of the court in bank.³⁵

Thus, each department functioned independently as an appellate court with broad subject matter jurisdiction.³⁶ The court in bank could assert original jurisdiction over any case and was also invested with a power to order rehearing in bank which effectively allowed it to supervise the decisions of the individual departments. This structure was intended to allow the justices of a single department to review the "ordinary current of cases,"³⁷ leaving the "great and important"³⁸ cases for determination by the court in bank.

The California Constitution as amended in 1904 provided for the division of the state into three appellate districts³⁹ and created in each a district court of appeal with broad appellate jurisdiction.⁴⁰ The supreme court retained direct jurisdiction in specified categories of cases⁴¹ and also was given power to transfer cases among the district courts of appeal, from itself to the district courts of appeal, and from the district courts of appeal to itself either before judgment or within thirty days after judgment was pronounced.⁴² This two-tier appellate structure was modeled after the internal structure of the supreme court, with most cases preliminarily decided by the courts of appeal subject to

32. *Id.*

33. *Id.* In the event that one of the departments had already heard and decided the case, however, the order for an in bank hearing had to be concurred in by two associate justices and made within thirty days after judgment by the department. No department judgment became final until thirty days after it had been rendered unless the chief justice approved it in writing with the concurrence of two associate justices. In addition, any four justices could, either before or after judgment by a department, order the cause to be heard in bank.

34. *Id.* See also *In re Wells*, 174 Cal. 467, 471, 163 P. 657, 659 (1917). This was because the order for a hearing in bank was closely analogous to the grant of a petition for rehearing. Two cases decided in 1860 had held that the effect of a grant of rehearing was to render the prior decision a nullity. *Seale v. San Francisco*, 16 Cal. 284 (1860); *Argent v. San Francisco*, 16 Cal. 255 (1860). Hence, it followed that the order for a hearing in bank rendered the prior department judgment a nullity, as was specifically provided in CAL. CONST. art. VI, § 2 (1879).

35. CAL. CONST. art. VI, § 2 (1879). A decision of the supreme court in bank required the concurrence of four justices who were present at the argument.

36. See CAL. CONST. art. VI, § 4 (1879).

37. 2 E. WILLIS & P. STOCKTON, *supra* note 26, at 951.

38. *Id.*

39. CAL. CONST. art. VI, § 4 (1904).

40. See *id.*

41. See *id.*

42. *Id.* The transfer power was interpreted as enabling the court to manage the dockets of the various appellate courts and to supervise the decisions of the courts of appeal. *People v. Davis*, 147 Cal. 346, 347-48, 81 P. 718, 719 (1905).

discretionary supreme court review.⁴³ The supreme court's transfer power was derived from the court's power to order a rehearing in bank after a decision by one of its departments. This provides an historical explanation for the unusual California system in which an intermediate appellate court's opinion becomes a nullity when the supreme court grants a hearing.

The number of courts of appeal⁴⁴ was expanded over the years to the current level of five appellate districts with thirteen divisions.⁴⁵ The number of court of appeal judges has increased from the nine originally established in 1904⁴⁶ to fifty-six.⁴⁷ The number of supreme court justices has remained constant since 1879, and the court is no longer authorized to sit in departments.⁴⁸ Due to the inability of the supreme court to handle the ever-increasing number of appeals over which it had primary jurisdiction, most cases were transferred to the intermediate appellate courts for decision,⁴⁹ and eventually the appellate jurisdiction itself was delegated to the courts of appeal.⁵⁰ The constitutional revision in 1966 left the supreme court with direct appellate jurisdiction only in cases where the judgment of death was pronounced,⁵¹ and that limitation remains in effect.

Thus, the California Supreme Court has been transformed from

43. See *In re Wells*, 174 Cal. 467, 472, 163 P. 657, 659 (1917).

44. They are no longer called "district courts of appeal," but rather simply "courts of appeal." CAL. CONST. art. VI, § 3.

45. See CAL. GOV'T CODE §§ 69100-69105 (West 1976). For a brief history of the expansion, see Gustafson, *supra* note 15, at 168-70. Because the legislature recognized that creating additional appellate courts should not be conditioned upon amending the constitution, § 4a was added to article VI in 1928, empowering the legislature to "create and establish additional district courts of appeal and divisions thereof," with each division having and exercising all of the powers of a district court. A similar provision is now contained in CAL. CONST. art. VI, § 3.

46. CAL. CONST. art. VI, § 4 (1904).

47. CAL. GOV'T CODE § 69100-69105 (West 1976).

48. CAL. CONST. art. VI, § 2. The department structure was first abolished with the constitutional revision of 1966, although the practice had fallen into disuse long before. See Comment, *Significance of the Practice of the California Supreme Court of Commenting on the Opinion of the District Court of Appeal When Denying a Hearing After Judgment*, 28 CALIF. L. REV. 81, 86 n.24 (1939) (noting that the supreme court has not sat in departments since 1929). But see CALIFORNIA CONSTITUTION REVISION COMMISSION, PROPOSED REVISION OF THE CALIFORNIA CONSTITUTION (pt. 1) 17 (1970) (suggesting that the department structure became obsolete with the creation of the courts of appeal in 1904 and "never was used again").

49. Even prior to the 1966 constitutional revision, when the supreme court still retained a fairly broad constitutional grant of appellate jurisdiction, the practice of transferring almost all direct appeals to the courts of appeal for decision had developed as a calendar management technique. See, e.g., *Holt v. Superior Court*, 100 Cal. App. 2d 403, 404, 223 P.2d 881, 882 (2d Dist. 1950). See also Blume, *supra* note 26, at 175; Poulos & Varner, *Review of Intermediate Appellate Court Decisions in California*, 15 HASTINGS L.J. 11, 14-15 (1963); Note, *supra* note 15, at 92 & n.26; Announcement, *Transfer of Original Proceedings by State Supreme Court*, 25 CAL. ST. B.J. 137 (1950).

50. CAL. CONST. art. VI, § 11.

51. *Id.*

an appellate court exercising broad direct jurisdiction to one whose jurisdiction is almost wholly discretionary.

II

THE SUPERVISORY ROLE OF THE CALIFORNIA SUPREME COURT

The evolution of the supreme court's jurisdiction has involved a parallel change in the role it must fulfill within the judicial structure. No longer directly entrusted with assuring the correctness of result in individual cases, the supreme court performs instead the dual role of formulating and directing the development of the law through its consideration of important legal issues⁵² and of safeguarding institutional integrity by monitoring the case law for uniformity of decision.⁵³ While labeled an "institutional" function, the latter aspect of the court's role demands a concern for consistent application of the law in individual cases. The language of the case law and the Rules of Court supports this view, as do fundamental theoretical concerns. Yet it appears that the court's current procedures are no longer adequate to allow a case-by-case monitoring for uniformity. If the court fails to adopt new procedures, it will have allowed practical considerations to redefine its role.

The language of the Rule of Court⁵⁴ empowering the court to grant hearings to assure uniformity is derived from a passage in *People v. Davis*.⁵⁵ That opinion described the California judicial scheme as investing the supreme court with the discretionary power "to supervise and control the opinions of the several district courts of appeal . . . and by such supervision to endeavor to secure harmony and uniformity in the decisions, their conformity to the settled rules and principles of law, [and] a uniform rule of decision throughout the state . . ."⁵⁶ The role thus outlined was broad enough to enable the court to remedy inconsistent application of the law in any individual case regardless of the inherent importance of the legal issues involved.

At the time *Davis* was decided, all court of appeal opinions were

52. CAL. R. CT. 29(a). Few would question that the supreme court aggressively assumes its responsibility for deciding important questions of law. But see note 10 *supra*. The court actively influences the public policy of California through its decisions and is renowned as one of the nation's trend-setting judicial bodies. Therefore, this Comment is not concerned with any perceived timidity on the part of the court to accept for decision the "great and important" cases raising novel and controversial issues.

53. CAL. R. CT. 29(a).

54. *Id.*

55. 147 Cal. 346, 81 P. 718 (1905).

56. *Id.* at 347-48, 81 P. at 719.

published and had precedential value;⁵⁷ therefore the court's concern with consistency in the decision of all cases clearly was justifiable as an element of its role of preserving the integrity of the system. There has been no definitive statement by the supreme court on its role in securing uniformity of decision since the current practice of selectively publishing intermediate appellate opinions was established.⁵⁸ Because published opinions have precedential impact while unpublished opinions have none,⁵⁹ it may be argued that the supreme court's role of assuring institutional integrity could be performed adequately by monitoring the consistency of published opinions only.

The court itself has not so redefined its role, as evidenced by its willingness to grant hearings in unpublished cases⁶⁰ and its demonstrated concern with conformity regardless of whether nonconforming opinions raise otherwise important legal issues.⁶¹ Furthermore, if such a narrow institutional function were the court's only concern, decertification would provide a wholly satisfactory method of pruning inconsistency from the published law. The court has never made such

57. See Comment, *supra* note 26, at 758.

58. Rule 976, allowing selective publication of appellate opinions, first became effective on January 1, 1964. *Conference Committee Report on 1974 Conference Resolution No. 11-18*, 51 CAL. ST. B.J. 400, 400 (1976). Its adoption was prompted by the legal community's concern that judicial efficiency would be seriously threatened unless the number of reported cases was drastically reduced. *Id.* The reasons for initiating a selective publication system included the exorbitant costs of acquiring and maintaining adequate law libraries, both public and private, and the fruitless expenditure of time by attorneys and courts in researching the enormous number of reported cases, many of which had no precedential importance. *Id.* Selective publication according to articulated standards was intended to improve the Bar's efficiency by eliminating unimportant opinions from its research. A secondary, and perhaps unexpected, consequence has been the conservation of appellate court time in actually drafting opinions not intended for publication. See Thompson, *supra* note 6, at 480.

Under rule 976 as originally adopted, all court of appeal opinions were deemed to meet publication standards unless a majority of the court rendering the decision certified the opinion for nonpublication. *Conference Committee Report on 1974 Conference Resolution No. 11-18, supra*, at 400. Since the rule's amendment in 1972, the presumption has been switched to favor nonpublication. See *id.* at 401; CAL. R. CT. 976(c), *quoted in* note 85 *infra*.

59. See CAL. R. CT. 977.

60. This is demonstrated by a brief review of the *Summary of Cases Accepted by Supreme Court*, issued by the Administrative Office of the Courts and published at the beginning of the green pages of the official advance sheets. See, e.g., *Summary of Cases Accepted by Supreme Court*, Cal. Official Rep. No. 2 (1978) (press release for "Week of December 5, 1978" notes three hearings granted, only one of which involved a published court of appeal opinion; press release for "Week of December 11, 1978" notes three hearings granted, only one of which involved a prior published court of appeal opinion; press release for "Week of December 18, 1978" notes two hearings granted, both in cases in which the prior court of appeal opinion was published) (official advance sheets only).

61. See, e.g., *People v. Scott*, 16 Cal. 3d 242, 546 P.2d 327, 128 Cal. Rptr. 39 (1976). The supreme court granted a hearing in *Scott* even though, as the court noted in its opinion, "[t]hese facts, hardly momentous, do not warrant creating a new rule or an exception to well-accepted rules of constitutional construction . . . nor do they justify elevation to the cause celebre perceived by the dissent." *Id.* at 246, 546 P.2d at 329-30, 126 Cal. Rptr. at 41-42.

wholesale use of the decertification power, however, and does not openly condone its use in cases where the wrong result has been reached.⁶² It therefore appears that something more is at stake; the court's concern for uniformity transcends a desire for a flawless body of precedent and implicates more fundamental values.

The most basic function of any judicial system is the settlement of disputes; nonetheless, important attributes of dispute settlement under our system of law are consistency and predictability. These goals are based on deep-rooted notions of fairness and equality which require that disputes be resolved in accordance with established standards⁶³ and that like decisions be rendered in cases presenting identical legal issues in similar factual settings. The goals of consistency and predictability require that the supreme court, uniquely situated to enforce a statewide uniformity norm, monitor the application of the law in *all* cases, regardless of the precedential impact of nonconforming opinions. Indeed, there would be little point in jealously protecting the formulation of the law in the twenty percent of appellate opinions that are published if there were not also some assurance of consistency of application in the other eighty percent.⁶⁴

The extent to which the underlying goals are achieved influences the degree of respect ultimately accorded the legal system by those subject to its jurisdiction. Therefore, the broad monitoring role advocated here does not push the court beyond its general institutional function; the pursuit of overall uniformity is as much directed toward preserving the integrity of the law as an institution as toward providing fair dispute settlement for individual litigants. Fundamental institutional considerations, as well as the supreme court's perception of its role, require its adherence to the definition of its role first articulated in *Davis*.

Despite the importance of the uniformity norm, the court seems to be allowing practical considerations to redefine its role rather than adapting its procedures to enable it to accomplish its traditional goals more effectively. The current volume of litigation makes the monitoring task an enormous one. Human limitations prevent the supreme court from performing this function by holding a hearing and writing a full opinion in every aberrant case. This Comment argues that the court is not constitutionally required to grant a full hearing in every

62. See text accompanying note 147 *infra*.

63. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 5 (1978).

64. Fewer than 20% of the written opinions of the courts of appeal are published in the bound volumes of the Official Reports. *Conference Committee Report on 1974 Conference Resolution No. 11-18, supra* note 58, at 401-02 (1976). During 1974, 1975, and 1976, over 22,000 unpublished court of appeal opinions were filed. NATIONAL CENTER FOR STATE COURTS, *REPORT ON UNPUBLISHED OPINIONS OF THE CALIFORNIA COURTS OF APPEAL* 5 (1976).

case and should monitor the uniformity of appellate decisions more thoroughly by using the intermediate dispositions proposed herein.

The court's apparent reluctance to adopt such innovative procedures may stem from two related concerns of the court and its individual members. First, individual justices may have doubts about the propriety of implementing dispositions not used by their immediate predecessors. The premise is that if the court has not traditionally employed these techniques, then it must be improper to do so.⁶⁵ New members of the court,⁶⁶ uncertain in their roles as supreme court justices, might feel especially constrained by this concern. More senior members may, on the other hand, be so entrenched in a comfortable and familiar routine that they balk at the suggestion of change.

But the routine now approaches an intolerable level of inefficiency. As the court becomes unable to keep abreast of the flood of incoming petitions, its persistent reliance on traditional procedures compels it to abandon concern for the consistency of the *whole* law in favor of a meticulous but spurious solicitude for the published law. There may be no easy solution to the mounting problem of managing appellate court dockets, but clinging to custom for its own sake is not an adequate excuse for the court's failure to implement helpful procedural changes.

The second and perhaps more significant factor which may affect the supreme court's willingness to utilize more creative dispositions is the court's own perception of its relationship to the courts of appeal. By implementing the proposed techniques, the supreme court would risk at least the appearance of intruding upon the independence of the courts of appeal, and would add somewhat to the already overburdened caseloads of those courts.⁶⁷ In either event, there is some

65. Comments on denial of hearing were used in the past, however. The court's failure to continue using this device may have resulted from Justice Houser's adamant objections. See notes 115-29 and accompanying text *infra*.

66. The court currently has several relatively new members—Chief Justice Bird and Associate Justices Manuel and Newman have all been appointed to the court within the past two years.

67. Comments on denials of hearing and decertification would create no drain on the time and resources of the courts of appeal beyond that required to read such comments. The retransfer procedure advocated by this Comment, however, would add more cases to the already swollen appellate court dockets. If, as this Comment assumes, the number of cases in which retransfer is appropriate is relatively small, the courts of appeal should experience no appreciable increase in workload as a result of the implementation of expanded use of the retransfer power. To the extent that use of the proposed procedures would result in some increase in the appellate workload, it is more appropriate that that burden fall upon the courts of appeal. At least more justices could be added to the appellate courts. See notes 44-47 and accompanying text *supra*. If, on the other hand, substantial numbers of appellate opinions represent so inadequate a review for correctness, misstate the law, disregard or overlook relevant precedent, or so egregiously misconstrue other opinions that the uniformity norm is threatened, then more than the supreme court's efficiency is at stake; the quality of appellate justice is threatened. If that is the case, the suggested retransfer disposition might potentially impose an intolerable systemic burden. If inconsistency in appellate opinions is so rampant that its correction by the proposed retransfer technique would noticeably

danger that the courts of appeal would be antagonized and might in some way rebel against the practice.

These practical concerns will not be problems if the supreme court exercises its power in an evenhanded and principled manner. Moreover, the high court's possible concern with not offending or antagonizing court of appeal justices must be subordinated to the far more significant social values underlying the supreme court's role in securing uniformity. In the final analysis, there is no acceptable justification for deference to judicial brethren of the lower courts when it undermines the integrity of the legal system.

III

CURRENT PRACTICE

Currently, when a petition for hearing is filed with the supreme court, one of the justice's staff members prepares a conference memorandum which discusses the issues raised by the petition and recommends whether or not a hearing should be granted.⁶⁸ If, on the basis of the conference memorandum, the court wishes to give the case further consideration, it may grant and schedule a full hearing, grant with the intention of holding the case pending future developments, or grant for the purpose of retransferring the cause to a court of appeal. Each of these grant dispositions requires four votes.⁶⁹ If the court is not inclined to expend further effort on the case, it denies a hearing. As a variation on denial, the court may simply order that an unpublished court of appeal opinion be published, or it may decertify an opinion that a court of appeal would otherwise publish.

In those instances where a full hearing is granted, the case is calendared for oral argument unless argument has been waived and the waiver accepted.⁷⁰ The case is assigned to one of the justices who voted with the majority to grant a hearing. The staff of that justice then prepares a calendar memorandum which fully discusses all issues raised and suggests a resolution on the merits.⁷¹ This memorandum is

increase the appellate court dockets, then a remedy more fundamental than alternative supreme court dispositions is in order. See note 23 *supra*.

68. The petition for hearing includes a brief on the merits. See CAL. R. CT. 28(d)(3). An answer may be filed. CAL. R. CT. 28(c). Ordinarily, no further briefs are filed when hearing is granted. See CAL. R. CT. 13, 14, 28. For a discussion of the internal functioning of the supreme court, see *Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court*, 62 CALIF. L. REV. 309, 309-16 (1974) [hereinafter cited as *Foreword*].

69. CAL. R. CT. 28(e). Justice Mosk has criticized the "rule of four," suggesting that the requirement of a majority vote to grant a hearing be replaced by a three vote rule. Mosk, *supra* note 9, at 3.

70. See CAL. R. CT. 28(f).

71. See *Foreword, supra* note 68, at 315.

prepared prior to oral argument on the basis of the briefs and staff research, and often becomes a tentative draft of the majority opinion.⁷² It pinpoints the issues for the court, allowing the justices to familiarize themselves fully with the case before hearing the argument.

After argument a tentative vote is taken on the result. If the justice whose staff prepared the calendar memorandum still carries the majority, he or she ordinarily will be assigned to write an opinion. If the majority has shifted, the task of writing an opinion is assigned to a justice who voted with the new majority. The tentative majority opinion is then written and circulated for revisions and signatures. Concurring and dissenting opinions are likewise written and circulated until all justices present at the argument have joined in an opinion. The concurrence of four justices present at the argument is necessary for decision.⁷³

Although apparently not acknowledged by the court as a distinct disposition, a review of the advance sheets in recent years demonstrates that a technique also employed by the supreme court is to "grant and hold" a case pending the outcome of another case being considered by the court. In such cases, the supreme court will grant the petition for hearing and transfer the cause to itself, hold it until the opinion in the earlier action has been filed, and then retransfer the still undecided cause to the court of appeal in which it was originally heard for reconsideration in light of the newly established precedent.⁷⁴

From most outward appearances, there is no distinction between a "grant and hold" case and any other case in which a hearing has been granted. The court's action on both is reflected in the Minutes with the identical annotation: "petition for hearing granted and cause trans-

72. *Id.*

73. CAL. CONST. art. VI, § 2.

74. Cases disposed of by the "grant and hold" sequence are readily identifiable by a glance through the *Dispositions*, located just below the *Summary of Cases Accepted by Supreme Court* at the beginning of the green pages in the official advance sheets.

There may be variations on the pattern described in the text. Instead of retransferring the less important case, the court, on occasion, will write a brief opinion which refers back to the opinion in the lead case. See, e.g., *Court of Appeal v. Superior Court (Spelio)*, 21 Cal. 3d 121, 123, 577 P.2d 1013, 1014, 145 Cal. Rptr. 673, 674 (1978) ("For the reasons stated in part I of our opinion in *Younger v. Superior Court (Mack)*, ante [21 Cal. 3d 102, 109, 577 P.2d 1014, 1018, 145 Cal. Rptr. 674, 678 (1978)], respondent Superior Court no longer has jurisdiction . . ."); *People v. Chapman*, 21 Cal. 3d 124, 577 P.2d 1012, 145 Cal. Rptr. 672 (1978) (also relying on *Mack*). Another variation on the pattern described in the text occurs where the second case granted for some reason appears more appropriate for a full opinion than the first. The court may make the second case the "lead" case and retransfer or write an abbreviated opinion in the first. An example of this situation is *People v. Drew*, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1979). The annotation in the press release when *Drew* was granted suggests that the case was originally intended as a "grant and hold" for *In re Ramon M.*, 22 Cal. 3d 419, 584 P.2d 524, 149 Cal. Rptr. 387 (1979). See *Summary of Cases Accepted by Supreme Court*, Cal. Official Rep. No. 22 (1977) (press release no. 77-112 for "Week of July 18, 1977") (official advance sheets only).

ferred to this court.”⁷⁵ Despite superficial similarities between “grant and hold” and “hearing granted” dispositions, there is a very real distinction between the two in terms of the court’s motivation, its willingness to accept a case, and its estimated and actual expenditure of time in disposing of each case. In a “grant and hold” situation, the “hearing granted” annotation in the Minutes is deceptive; apparently the court does not intend to hear argument or write an opinion in the case from the outset.⁷⁶ Rather, the hearing may be granted anticipating that the cause will be retransferred to the court of appeal for decision so that the supreme court can influence the ultimate resolution of the controversy without appreciably draining its resources.

On occasion, the supreme court will grant a hearing and, without further consideration, immediately “retransfer” the undecided cause with directions for the court of appeal to take specified action. In those cases where the court employs the “grant and retransfer” device, there is no confusion as to its intention *not* to hold a plenary hearing.

The decision to grant and hold or grant and retransfer is not a decision on the merits; in fact, the constitution specifically requires retransfer before decision.⁷⁷ The courts of appeal which have considered the issue, however, have uniformly concluded that the supreme court’s directions upon retransfer are binding.⁷⁸ Although a case transferred to the supreme court pends before that court as if it were originally

75. See, e.g., *People v. Murray*, Crim. 20459, Cal. Sup. Ct. Minutes, Apr. 6, 1978, Cal. Official Rep. No. 12 (1978) (official advance sheets only), *granting hearing and transferring* Crim. No. 15602 (Cal. Ct. App., 1st Dist. Feb. 8, 1978) (“Respondent’s petition for hearing granted and cause transferred to this court.”). Note, however, the minute entry for the same cause three months later: “The above entitled cause is retransferred to the Court of Appeal, First District, Division One, for reconsideration in light of *People v. Collins* (1978) 21 Cal. 3d 208 [557 P.2d 1026, 145 Cal. Rptr. 686], *People v. Alcala* (1977) 74 Cal. App. 3d 425 [141 Cal. Rptr. 442 (4th Dist.)], and *People v. Superior Court (Gonzales)* (1978) 78 Cal. App. 3d 134 [144 Cal. Rptr. 89 (2d Dist.)].” *People v. Murray*, Crim. 20459, Cal. Sup. Ct. Minutes, July 19, 1978, Cal. Official Rep. No. 22 (1978) (official advance sheets only). The *Collins* case cited by the court was pending at the time the petition for hearing was filed in *People v. Murray*; the supreme court’s opinion in *Collins* was filed May 3, 1978, less than a month after hearing was granted in *Murray*.

The language of the press release issued by the administrative office of the court at the time hearing was granted in *Murray* provided a clear hint of the eventual retransfer disposition. It noted that “[a]mong the issues presented [in *Murray*] are the proper sentencing procedure under the Uniform Determinate Sentence Law of 1976 for offenses committed prior to its operative date; and the effect of the amendment of section 288a during the interim between conviction and imposition of sentence, a question related to that already before the Court in *People v. Collins*, Crim. 19934.” *Summary of Cases Accepted by Supreme Court*, Cal. Official Rep. No. 11 (1978) (press release no. 78-54 for “Week of July 18, 1977”) (official advance sheets only) (emphasis added).

76. See notes 74-75 *supra*.

77. CAL. CONST. art. VI, § 12.

78. See, e.g., *Nichols v. Canoga Indus.*, 83 Cal. App. 3d 956, 148 Cal. Rptr. 459 (2d Dist. 1978); *Atlantic Richfield Co. v. Superior Court*, 51 Cal. App. 3d 168, 124 Cal. Rptr. 63 (2d Dist. 1975); *People v. Sesser*, 269 Cal. App. 2d 707, 75 Cal. Rptr. 297 (2d Dist. 1969).

filed there,⁷⁹ a case retransferred to the court of appeal may or may not be subject to further argument and briefing, depending upon the directions accompanying the retransfer order.⁸⁰

In the vast majority of cases none of the foregoing grant dispositions is utilized.⁸¹ Where the court's conference decision is that a petition for hearing does not warrant further consideration, there are still three options available, all of them essentially denials of hearing. In most instances, the court denies a hearing outright and provides no reason for the denial.⁸²

As intermediate possibilities, however, the court may order opinions either to be published or unpublished, thereby altering their precedential impact without the necessity of further supreme court action.⁸³ The power to order opinions published or unpublished stems from article VI, section 14 of the California Constitution: "[t]he Legislature shall provide for the prompt publication of such opinions of the Supreme Court and the courts of appeal as the Supreme Court deems appropriate"⁸⁴ Rather than exercise its supervisory power over publication on a case-by-case basis, the supreme court relies in the first

79. See text accompanying note 16 *supra*.

80. The court has interpreted the constitution to confer a right of oral argument where an appeal is decided on the merits. See note 19 *supra*. Whether that right should arise in the court of appeal upon retransfer is an open question. If such a right were recognized, the usefulness of the retransfer procedure would be impaired. In current practice, new argument is heard on retransfer at the discretion of the court of appeal. In *Nichols v. Canoga Indus.*, 83 Cal. App. 3d 956, 148 Cal. Rptr. 459 (2d Dist. 1978), for example, the supreme court retransferred the cause with directions for the court of appeal to refile its original opinion with "appropriate references" to the supreme court's opinion in *Addison v. State*, 21 Cal. 3d 313, 578 P.2d 944, 146 Cal. Rptr. 224 (1978). The respondents in *Nichols* argued that the retransfer order placed the case at large and subject to further argument and briefing. The court of appeal rejected this contention, concluding that it could not "refile" its earlier opinion with reference to *Addison* if it changed the opinion in any respect other than to add the reference. 83 Cal. App. 3d at 958, 148 Cal. Rptr. at 461.

A further question, unanswered by the cases, is whether a court of appeal is free to grant a petition for rehearing and modify its opinion after complying with the supreme court's directions.

81. *E.g.*, in fiscal year 1974-75, 172 hearings were granted and 2,394 were denied; in fiscal year 1975-76, 229 hearings were granted and 2,665 were denied. JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 9, at 248.

82. The usual annotation is a cryptic "petition for hearing denied." The denial is also indicated at the end of the court of appeal opinion if the opinion is published in the official reports. Denial orders in unpublished cases, like other minute orders, do not appear in the bound volumes of the official reports. A minute order denying a hearing may include the names of any justices who voted to grant. See Supreme Court Minutes in green pages of official advance sheets; Baum, *supra* note 10, at 716. All that is required for a denial is the signature of the Chief Justice. CAL. R. CT. 28(e).

83. Although not traditionally considered "dispositions" of petitions for hearing, when such decisions are made at the conference, they do serve as intermediate dispositional alternatives. Such decisions may be made whether or not in response to petitions. CAL. R. CT. 976(c), 978. See Note, *Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law*, 50 So. CAL. L. REV. 1181, 1186, 1190-91 (1977).

84. CAL. CONST. art. VI, § 14.

instance on the Rules of Court⁸⁵ promulgated to implement the selective publication provision.⁸⁶

85. CAL. R. CT. 976 provides:

(a) All opinions of the Supreme Court shall be published in the Official Reports.

(b) No opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports unless such opinion (1) establishes a new rule of law or alters or modifies an existing rule, (2) involves a legal issue of continuing public interest, or (3) criticizes existing law.

(c) Unless otherwise directed by the Supreme Court, an opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports if a majority of the court rendering the opinion certifies prior to the decision becoming final in that court that it meets the standard for publication specified in subdivision (b). An opinion not so certified shall nevertheless be published in the Official Reports upon order of the Supreme Court to that effect.

(d) Regardless of the foregoing provisions of this rule, no opinion superseded by the granting of a hearing, rehearing or other judicial action shall be published in the Official Reports.

(e) Written opinions of the Supreme Court, Courts of Appeal, and appellate departments of the superior courts shall be filed with the clerks of the respective courts. Two copies of each opinion of the Supreme Court and two copies of each opinion of a Court of Appeal or of an appellate department of a superior court which the court has certified as meeting the standard for publication specified in subdivision (b) shall be furnished by the clerk to the Reporter of Decisions. The Reporter of Decisions shall edit the opinions for publication as directed by the Supreme Court. Proof sheets of each opinion in the type to be used in printing the reports shall be submitted by the Reporter of Decisions to the court which prepared the opinion for examination, correction and final approval.

CAL. R. CT. 977 provides:

An opinion of a Court of Appeal or of an appellate department of a superior court that is not published in the Official Reports shall not be cited by a court or by a party in any other action or proceeding except when the opinion is relevant under the doctrines of the law of the case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent.

By prohibiting the citation of unpublished opinions except in severely limited situations involving the same parties, the rule effectively deprives such opinions of precedential value.

CAL. R. CT. 978 provides:

(a) A request by any person for publication in the Official Reports of an opinion not certified for publication may be made only to the court that rendered the opinion. The request shall be made promptly by letter, with a copy to each party to the action or proceeding not joining therein, stating concisely why the opinion meets one or more of the criteria for publication in rule 976. If the court does not, or by reason of the decision's finality as to that court cannot, grant the request, the court may, and at the instance of the person requesting publication shall, transmit the request and a copy of the opinion to the Supreme Court with its recommendation for appropriate disposition and a brief statement of its reasons therefor.

(b) When a request for publication is received by the Supreme Court from the court that rendered the opinion the Supreme Court shall either order the opinion published or deny the request.

(c) An order of the Supreme Court directing publication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion.

86. Prior to 1964, all appellate opinions were published. *See* Comment, *supra* note 26, at 758. In 1963, the California legislature passed a statute providing that the publication of appellate opinions would thereafter be governed by rules of the supreme court. *See Conference Committee Report on 1974 Conference Resolution No. 11-18, supra* note 58, at 400. This legislation prompted the promulgation of the Rules of Court now governing selective publication. *See* notes 58, 85 *supra*.

Under the Rules of Court, the publication decision for intermediate appellate court opinions initially rests with the court rendering the decision and is made according to established publication standards.⁸⁷ Even so, the supreme court occasionally orders published, either upon request⁸⁸ or upon its own motion,⁸⁹ a court of appeal opinion not certified for publication by the lower court.⁹⁰ By doing so, it adds the opinion to the body of California precedent.⁹¹ Similarly, the supreme court may order the Reporter of Decisions not to publish in the official reports a court of appeal opinion previously certified for publication by the lower court, even though that decision already may have appeared in the advance sheets.⁹² In these "decertified" opinions, the judgment remains in effect for the individual litigants, but the case may not be cited in other judicial proceedings and its precedential value is thereby effectively destroyed.⁹³ Typically, no explanation is provided for either publication or decertification orders.⁹⁴

IV

PROPOSED ALTERNATIVE DISPOSITIONS: THE NEED FOR MODIFICATION OF CURRENT PRACTICES

In order to fulfill its role of securing uniformity of decision more effectively, the supreme court should modify its current procedures outlined in Part III of this Comment. The supreme court should use the grant and retransfer disposition more extensively, and it should not hesitate to give strong instructions upon retransfer in those cases where the error being corrected is procedural. Where substantive law is at issue, the supreme court should continue to exercise restraint in the language of its instructions upon retransfer, but it should abandon the "parallel case rule."⁹⁵ In appropriate cases, clarifying remarks should

87. See CAL. R. CT. 976(b).

88. See *id.* 978.

89. See *id.* 976(c).

90. Such publication orders appear only in the Supreme Court Minutes in the green pages of the official advance sheets. They are not published in the bound volumes. No reason for the publication order is given.

91. The potential danger that too much precedential weight might be attributed to opinions published in this fashion is avoided through CAL. R. CT. 978(c). The body of precedent is enhanced by the publication order, but only to the extent that it would have been had the court of appeal itself certified the opinion for publication.

92. Decertification orders appear in the Supreme Court Minutes and in the Cumulative Subsequent History Table at the end of the official advance sheets.

93. See CAL. R. CT. 977, quoted in note 85 *supra*.

94. The court has, however, on at least one occasion provided a reason for decertification. See *People v. Bowling*, 23 Cal. App. 3d 1021, 100 Cal. Rptr. 690 (2d Dist. 1972) (advance sheets only), *decertified*, Cal. Sup. Ct. Minutes, May 3, 1972 (2d Crim. 21296), Cal. Official Rep. No. 14 (1972) (official advance sheets only).

95. See text following notes 103-04 *infra*.

be appended to denials of hearing to guide practitioners and the courts of appeal. The supreme court should also explain decertification orders whenever practicable.

A. *Retransfer with Instructions*

It is difficult to discern a rational pattern to the supreme court's use of "grant and hold" and "grant and retransfer" dispositions in current practice. The cases suggest that the supreme court is more willing to use these devices in cases involving clear procedural errors than where it doubts the accuracy of a court of appeal's statement of the substantive law.⁹⁶ When substantive legal doctrine is at issue the "grant and hold" and "grant and retransfer" dispositions usually are employed only where a court of appeal's decision has been made without the benefit of the opinion in a case then pending before the supreme court or recently decided by the United States Supreme Court.⁹⁷ The court will not "grant and hold" or "grant and retransfer" a cause solely in light of authority that was available to a court of appeal when it determined the cause. This is so regardless of how authoritative and dispositive the older precedent might be and regardless of whether a court of appeal fails to cite the older case or merely misconstrues it.⁹⁸

96. The distinction between substantive and procedural issues also influences the nature of the directions given upon retransfer. When the supreme court is concerned with the accuracy of the court of appeal's statement of the law, the directives upon retransfer are usually for the court of appeal to "reconsider" its prior decision in light of specified precedent. When the court of appeal has committed procedural error it is simply directed to do whatever is necessary to cure the error. An example of the supreme court granting a hearing and retransferring with insufficient directions is *Atlantic Richfield Co. v. Superior Court*, 51 Cal. App. 3d 168, 124 Cal. Rptr. 63 (2d Dist. 1975) (writ proceeding). The court retransferred the case with directions for the court of appeal to issue an alternative writ of mandate, but failed to cite authority suggesting an appropriate theory that would support extraordinary (mandamus) relief. Thus, the court of appeal was forced to choose between several theories, each of which it had presumably rejected previously.

97. See, e.g., *People v. Polk*, 1st Crim. 15817, Cal. Sup. Ct. Minutes, Feb. 23, 1978, Cal. Official Rep. No. 8 (1978) (official advance sheets only), *granting hearing, transferring and retransferring* Crim. No. 15817 (Cal. Ct. App., 1st Dist. Dec. 9, 1977) ("for reconsideration in light of *Moore v. Illinois*, [434 U.S. 220] filed December 12, 1977").

98. On occasion the court will bend this rule and retransfer a cause for reconsideration in light of old and new authority, even when the new case is not directly on point. See, e.g., *In re Vernett J.*, Crim. No. 30635 (Cal. Ct. App., 2d Dist. March 1, 1978), *hearing granted, transferred and retransferred*, Cal. Sup. Ct. Minutes, May 25, 1978 (2d Crim. 30635), Cal. Official Rep. No. 17 (1978) (official advance sheets only). The juvenile court in *Vernett J.* sustained the allegations of a wardship petition and adjudged the juvenile a ward of the court. The juvenile was committed to the California Youth Authority, but the juvenile court failed to make statutorily required findings in support of the commitment order. The court of appeal affirmed the wardship finding on the ground that the failure to enter findings was harmless under the harmless error test of *People v. Watson*, 46 Cal. 2d 818, 299 P.2d 243 (1956). The supreme court granted a hearing and retransferred the cause to the court of appeal for reconsideration in light of *In re John H.*, 21 Cal. 3d 18, 577 P.2d 177, 145 Cal. Rptr. 357 (1978), and *In re Edwards*, 208 Cal. 725, 284 P. 916 (1930). The latter case clearly held that the failure to enter findings is a jurisdictional defect and per se reversible error. *John H.* held that a juvenile court is not required to record reasons in support of the

*People v. Perryman*⁹⁹ is an example of the supreme court's willingness to retransfer with instructions where a court of appeal has made a procedural error. There, the court of appeal affirmed the trial court's denial of the defendant's application for bail, but no statement giving the reasons for denial of the application was obtained as required by the supreme court in *In re Podesto*.¹⁰⁰ The supreme court granted the defendant's petition for hearing and retransferred the cause to the court of appeal with directions "to order the Superior Court of Solano County to comply with [*Podesto*] and upon receipt of the proof thereof, to reassess the application for bail on appeal."

The court's use of its transfer power in *Perryman* demonstrates the potential utility of this device to the court in its efforts to enforce the uniformity norm. However, a threshold question is whether uninhibited use of the transfer power would offend the constitution. The only specific constitutional provision limiting the use of the transfer power is the requirement that the court transfer "before decision."¹⁰¹

Where only procedural questions are involved, use of the retransfer with instructions disposition does not offend this constitutional provision because the supreme court does not decide the cause before retransfer. Moreover, the constitutional scheme intends the supreme court to have some summary powers for use in docket management.¹⁰² Finally, as long as the disposition is used only where the procedural error is clear, no question of usurpation of the judicial prerogative of

required findings, but confirmed that the findings still must be made. *Edwards* was clearly the dispositive precedent; however, it may be surmised that the court would not have intervened in *Vernett J.* if *John H.* had not been so recently decided. (*Vernett J.* was granted and retransferred on the same day that the supreme court denied the petition for rehearing in *John H.*, May 25, 1978.) We have located no case involving a substantive error in which the supreme court was willing to retransfer with reference solely to precedent available to the court of appeal when it first decided the cause.

99. Crim. No. 17559 (Cal. Ct. App., 1st Dist. Dec. 7, 1977), *hearing granted, transferred and retransferred*, Cal. Sup. Ct. Minutes, Dec. 29, 1977 (1st Crim. 17559), Cal. Official Rep. No. 3 (1978) (official advance sheets only). See also *People v. Estolas*, Crim. No. 9390 (Cal. Ct. App., 3d Dist. Aug. 2, 1977), *hearing granted, transferred and retransferred*, Cal. Sup. Ct. Minutes, Sept. 28, 1977 (3d Crim. 9390), Cal. Official Rep. No. 28 (1977) (official advance sheets only), where an appeal was brought from an order denying the petitioner release from a state hospital after a sanity hearing pursuant to CAL. PENAL CODE § 1026a (West 1970). The court of appeal erroneously concluded that the order denying release was nonappealable; it therefore issued a one sentence order dismissing the appeal. The supreme court's retransfer order included directions for the court of appeal to "decide the appeal on the merits."

100. 15 Cal. 3d 921, 544 P.2d 1297, 127 Cal. Rptr. 97 (1976).

101. CAL. CONST. art. VI, § 12.

102. This aspect of the transfer power was described by the supreme court in *People v. Davis*, 147 Cal. 346, 347-48, 81 P. 718, 719 (1905):

One object of the constitutional scheme was to enable the supreme court to distribute the work in hand among the several courts having appellate jurisdiction in such a manner as to give each, as nearly as possible, its due share, keep all of them continuously supplied, and thereby secure a speedy disposition of pending cases . . .

the court of appeal is raised because there is no room for the exercise of discretion by the court of appeal.

Thus, no reason appears for the supreme court to be cautious in deciding to intervene in a case exhibiting clear procedural error, or to be restrained in wording its instructions to the court of appeal upon retransfer. Because appellate procedure is probably the area of the supreme court's greatest competence, its willingness to correct procedural errors by forthright use of the grant and retransfer disposition is proper and should be encouraged.

Similar considerations suggest that the court is properly cautious in framing retransfer directions when substantive law is at issue. If the directions effectively decide the case, the specific constitutional requirement of retransfer before decision is thwarted. Because these directions are construed to be binding on the courts of appeal,¹⁰³ the constitution requires that they be framed in an open ended manner. Moreover, the circumstances in which the retransfer decision is made—at the weekly conference, on the basis of staff research and the petition, without the benefit of oral argument—suggest restraint. Thus, the supreme court's deferential direction to a court of appeal to “reconsider” a substantive issue is as strong and direct as the constitution and other considerations allow.

It is not, however, readily apparent why the supreme court is hesitant to retransfer a case in which substantive errors have been made unless a court of appeal's decision was rendered without the benefit of the opinion in a case then pending in or recently decided by a higher court. The specific constitutional requirement of transfer before decision clearly does not bar the procedure. Although concerns about the quality of judicial decisionmaking and the role of the court at first seem to support the restriction, close analysis undercuts the argument.

The concern for the quality of decisionmaking rests on the idea, reflected in California's constitution, that cases ought not to be decided without holding a hearing and announcing the decision in a written opinion. If a hearing is granted in anticipation of retransfer at a time when a case presenting a similar issue is pending before the court, there is some assurance that the supreme court has carefully considered that issue. If the supreme court has decided the “parallel” case recently enough that the opinion would not have been available to the court of appeal when it decided the appeal at issue, similar assurances are present. On the other hand, if no parallel case will be or recently has been considered by the supreme court, a court of appeal's judgment is nulli-

103. See note 78 and accompanying text *supra*.

fied by that of the supreme court rendered in conference without appearance of counsel or oral argument.

In California, quality of process standards have long differed for different kinds of decisions. As explained by the supreme court:

[F]rom the constitutional provision concerning argument it does not follow that the parties are entitled to oral argument in all matters passed upon by the court in bank. When . . . the court is convened in *executive sessions* . . . numerous matters . . . such as . . . petitions for transfer from the District Courts of Appeal, and petitions for rehearing of our own decisions . . . are disposed of by order of at least four members of the court, but *no oral argument thereon is provided for by the Constitution or otherwise permitted, and no grounds for the rulings are stated in writing, except in very rare cases in the discretion of the court.*¹⁰⁴

In a case involving substantive error, the supreme court's decision to grant and retransfer is a ruling that *the court of appeal* should reconsider its previous judgment. The retransfer disposition therefore more closely resembles a decision to grant hearing or rehearing than a pronouncement of judgment. Thus, the propriety of the grant and retransfer disposition should be measured by the same quality of process standard as the decision to grant hearing or rehearing, a standard which is satisfied without reference to parallel cases pending before the court.

The parallel case requirement is more directly supported by concerns about the court's role. The supreme court clearly was intended to supervise the decisions of the courts of appeal. But the specific constitutional requirement of retransfer before decision, the requirement that the supreme court hold a full hearing on all issues when it decides a case, and the provisions of article VI read as a whole suggest that the California Constitution contemplates a judicial scheme in which the supreme court and the courts of appeal function with some decisional or judgmental independence. The parallel case rule, by limiting substantive retransfer to those cases in which the court of appeal could not have been familiar with the parallel case, is responsive to these role concerns; it limits both the degree and appearance of usurpation by the supreme court of the court of appeal's judicial prerogative.

Nevertheless, the supreme court can intrude upon the courts of appeal in order to manage its docket. Indeed, this was one of the original rationales for the retransfer power.¹⁰⁵ Substantive retransfer can be characterized as a docket management device. The procedure is intended to secure a more complete review for the parties before the most

104. *Metropolitan Water Dist. v. Adams*, 19 Cal. 2d 463, 468, 122 P.2d 257, 259-60 (1942) (emphasis added).

105. See note 102 and accompanying text *supra*.

appropriate court, and to allocate the work among the appellate courts. So characterized, substantive retransfer does not impinge upon the judicial prerogatives of the courts of appeal, and, therefore, role-based considerations do not justify the parallel case rule.

This conclusion is further supported by the supreme court's conclusion that it is permissible to retransfer under the parallel case rule. The supreme court's function is the same when it uses substantive retransfer regardless of the presence of a parallel case; in either situation the supreme court makes a summary review of the merits and returns to the court of appeal a case it previously decided. From the point of view of the supreme court, it is difficult to discern a significant difference between the case in which the court of appeal did not consider relevant authority because it was unavailable and the case in which, from the clear and exaggerated nature of the error involved, it seems clear that the court of appeal must have overlooked available authority. Both kinds of decisions are identically flawed when the supreme court gets the petition for hearing; the issue in which the supreme court is interested has not been adequately discussed.

Thus, while quality of process and role-based considerations support the supreme court's hesitance to include overly intrusive instructions upon retransfer, they do not justify the parallel case rule. This Comment suggests that the supreme court should abandon this artificial limitation and make greater use of its retransfer power. Retransfer should be one alternative considered whenever, in reviewing a petition for hearing, the supreme court's attention becomes focused upon a clear, prejudicial error by the trial court which should have been detected by the court of appeal in its review for correctness. Retransfer should also be considered when the supreme court discovers a clear error of law on the part of the court of appeal which appears to have affected that court's decision as directly as if the overlooked or misconstrued authority had been unavailable. In each of these situations, as in those in which the court currently uses its power, retransfer would allow the supreme court to secure a more complete form of review for the parties and enforce the institutional imperative of uniformity of decision. The latter goal would be realized both in the individual case by alerting the court of appeal to probable errors, and by creating a climate of compliance with and enforcement of established standards for appellate decision.

B. Denials with Comments

Although the supreme court has occasionally indicated that its denial of a hearing "is not to be taken as an expression of any opinion by this court . . . nor . . . as an affirmative approval by this court of the

proposition of law laid down in such opinion,"¹⁰⁶ a review of the case law supports the conclusion that there is considerable confusion on this point.¹⁰⁷ Practitioners and appellate court justices alike may, in fact, consider a denial of hearing to enhance the precedential value of an appellate opinion.¹⁰⁸ It has even been concluded by one former associate justice of a court of appeal that the precedential effect of a court of appeal opinion in any given case may turn entirely upon whether or not a hearing has been sought and denied.¹⁰⁹

It is virtually certain that the supreme court does not condone the attachment of such extraordinary precedential significance to its denials of hearing. The court has nevertheless compounded the confusion

106. *People v. Davis*, 147 Cal. 346, 350, 81 P. 718, 720 (1905). This view has been reiterated a number of times by the California Supreme Court. *See, e.g., Western Lithograph Co. v. State Bd. of Equalization*, 11 Cal. 2d 156, 167-68, 78 P.2d 731, 737 (1938); *Shelton v. City of Los Angeles*, 206 Cal. 544, 550, 275 P. 421, 424 (1929); *People v. Rabe*, 202 Cal. 409, 418-19, 261 P. 303, 307 (1927); *In re Stevens*, 197 Cal. 408, 423-24, 241 P. 88, 94 (1925); *Bohn v. Bohn*, 164 Cal. 532, 537-38, 129 P. 981, 984 (1913).

107. Compare the view expressed in the text accompanying note 106 *supra* with the contrary conclusion often drawn by the courts of appeal. *See, e.g., People v. Hasson*, 265 Cal. App. 2d 865, 866-67, 71 Cal. Rptr. 664, 665 (5th Dist. 1968) (positing that, at least in a case where the court of appeal decision was rendered by a divided court, "the failure of the Supreme Court to grant a hearing upon petition seems to us to be equivalent to a decision by that court in accordance with the majority opinion in the Court of Appeal"); *Hobbs v. Northeast Sacramento County Sanitation Dist.*, 240 Cal. App. 2d 552, 556, 49 Cal. Rptr. 606, 609 (3d Dist. 1966) (noting that a court must consider "the weight of the denial of a hearing by our Supreme Court"); *Housing Auth. of Los Angeles v. Peters*, 120 Cal. App. 2d 615, 616, 261 P.2d 561, 561 (2d Dist. 1953) (declaring that "when the precise question of law has been decided by a District Court of Appeal and the Supreme Court has denied a hearing, such decision will be followed as settling the law in the absence of a later decision of the Supreme Court overruling or modifying the prior case"). *See generally* 6 B. WITKIN, *supra* note 4, §§ 669-670 (2d ed. 1971 & Supp. 1977), and cases cited therein.

This conflict of authority is discussed more thoroughly in Gustafson, *supra* note 15, at 170-83; Kanner, *It's a Busy Court: The Effect of Denial of Hearing by the Supreme Court on Court of Appeal Decisions*, 47 CAL. ST. B.J. 188 (1972).

108. *See* note 107 *supra*. *See also* Comment, *supra* note 48, at 87; Cominent, *Comments by the Supreme Court on Denial of a Petition for Hearing*, 13 SO. CAL. L. REV. 461, 464 (1940). For an illustration of confusion among commentators, *see* Note, *Validity of the California Anti-Trust Law*, 12 SO. CAL. L. REV. 312, 314 (1939), wherein the author draws the inference that a denial of hearing by the supreme court is "tantamount to a decision of the highest state court" in accordance with the court of appeal decision.

109. Gustafson, *supra* note 15, at 172. The author concludes that court of appeal decisions in which supreme court review has not been sought and denied are not binding even on courts of appeal in the same district. *Id.* at 171-72, 176-77. He concedes that the doctrine of stare decisis will usually compel adherence to an earlier decision by a court of appeal of the same district. *Id.* at 172 n.22. He does, however, cite cases where courts of appeal have refused to follow or have "disapproved" statements in earlier cases decided in the same district. *Id.* at 176-77 & nn.43 & 44, 186 n.76. He further suggests that an appropriate response to the current uncertainty surrounding the significance to be accorded denials of hearing by the supreme court would be to regard denials uniformly as signifying nothing more than that four justices did not vote to grant. *Id.* at 182-83. *Cf. Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917 (1950) (opinion on denial of certiorari) (announcing a similar interpretation by the United States Supreme Court).

by its ambiguous statements.¹¹⁰ The uncertainty in this area undoubtedly stems from the inherent ambiguity of a denial of hearing. In some instances, a denial means that the court agrees with and approves of the court of appeal's opinion. In others, it means that, although the supreme court disagrees with certain aspects of the opinion, the case does not present an important question of law and the opinion is not so questionable that it deserves further supreme court action. Denial in the latter situation is an unfortunate and unwarranted deviation from the court's proper role in securing uniformity of decision. The deviation can be explained, without being justified, by the ever-increasing number of petitions for hearing; a denial may simply mean that the supreme court does not have the time to grant a hearing and write an opinion.¹¹¹

In assessing the significance of denials of hearing, no simple formula can be devised to fit every case; the underlying cause of confusion in this area is that neither the courts of appeal nor the supreme court itself is willing to accept the fiction that denials of hearing never have significance.¹¹² To the contrary, it is clear that the court does, on occasion, intend by its denial of hearing to convey a message to the

110. In *Eisenberg v. Superior Court*, 193 Cal. 575, 578, 226 P. 617, 618 (1924), the court said that the "order of this court denying a petition for a transfer to this court after . . . decision of the district court of appeal may be taken as an approval of the conclusion there reached, but not necessarily of all of the reasoning contained in that opinion." See also *Cole v. Rush*, 45 Cal. 2d 345, 351, 289 P.2d 450, 453 (1955), declaring that, in a case in which the supreme court has denied a hearing, the court of appeal's "judgment stands . . . as a decision of a court of last resort in this state, until and unless disapproved by [the California Supreme Court] or until change of the law by legislative action." As Gustafson, *supra* note 15, at 174, correctly points out, the court's use of the term "decision" must refer to the decisional law contained in the opinion, since the judgment itself, once it becomes final, cannot be altered by either the supreme court or the legislature. The quotation seems to imply that a court of appeal opinion in which a petition for hearing has been denied carries more weight than one in which there has been no petition for hearing. Yet, in the same opinion, the supreme court again declares that its denial of a hearing does not necessarily indicate its approval of the decisional law contained in the opinion. 45 Cal. 2d at 351 n.3, 289 P.2d at 453 n.3.

Most notable was the court's statement in *DiGenova v. State Bd. of Educ.*, 57 Cal. 2d 167, 178, 367 P.2d 865, 871, 18 Cal. Rptr. 369, 375 (1962):

Although this court's denial of a hearing is not to be regarded as expressing approval of the propositions of law set forth in an opinion of the District Court of Appeal or as having the same authoritative effect as an earlier decision of this court . . . it does not follow that such denial is without significance as to our views.

111. See Gustafson, *supra* note 15, at 181-82.

112. See notes 107 and 110 *supra*. As one commentator has noted:

The problem of determining the status of an opinion of the district court of appeal after the supreme court has denied a hearing thereon is a problem which is bound to exist in an appellate court system where there are intermediate and final appellate courts. When the intermediate court makes a decision and the high court denies a hearing thereon, there is a natural inference of fact arising that there is nothing radically wrong with the decision, and that the rules of law contained therein are substantially correct.

Comment, *supra* note 48, at 87.

lower courts.¹¹³ In those presumably rare cases, it should do so explicitly at the time of denial rather than leaving practitioners and the lower courts to discern correctly some unexpressed "significance as to [its] views."¹¹⁴

The suggestion is not without precedent. In earlier years denials of hearing by the supreme court commonly included explanatory remarks.¹¹⁵ Despite the commentators' generally favorable reactions¹¹⁶ to the practice, however, the court has virtually abandoned it in recent years.¹¹⁷ The specific reasons for the discontinuance are unclear. Several objections to the practice might be raised. First, it might be argued that qualified denials are not constitutionally permissible. Second, comments on denial may actually increase the uncertainty already surrounding denials of hearing.¹¹⁸ Third, a general argument might be advanced that commenting on denials would unduly detract from opinionwriting time, and that the risk of error due to the court's necessarily summary decision in such matters would outweigh any potential benefit.

The constitutional objection was articulated in several vigorous attacks by a former supreme court justice.¹¹⁹ In *Wires v. Little*,¹²⁰ Justice Houser questioned whether the supreme court was constitutionally empowered to approve or disapprove any declarations of law appearing in the opinions of the courts of appeal.¹²¹ He argued that the constitution

113. See *DiGenova v. State Bd. of Educ.*, 57 Cal. 2d 167, 367 P.2d 865, 18 Cal. Rptr. 369 (1962).

114. *Id.* at 178, 167 P.2d at 871, 18 Cal. Rptr. at 375.

115. One commentator counted 255 such denials with qualifications between the years 1905 and 1938. Comment, *supra* note 48, at 82. In the ten-year period from 1928 to 1938, an average of one in every seventy-five denials included a comment by the court. *Id.* at 82 n.7.

116. See Comment, *supra* note 108; Comment, *supra* note 48.

117. See 6 B. WITKIN, *supra* note 4, § 622, at 4545. The supreme court does, on occasion, include certain remarks in its denials of hearing. See, e.g., *People v. Martinez*, 1st Crim. 17287, Cal. Sup. Ct. Minutes, July 13, 1978, Cal. Official Rep. No. 21 (1978) (official advance sheets only), *denying hearing* Crim. No. 17287 (Cal. Ct. App., 1st Dist. July 13, 1978) ("Bird, C.J. is of the opinion that the petition should be granted under *In re Yurko*, 10 Cal. 3d 857 [519 P.2d 561, 112 Cal. Rptr. 513 (1974)]"); *People v. Newton*, 2d Crim. 30721, Cal. Sup. Ct. Minutes, Apr. 27, 1978, Cal. Official Rep. No. 14 (1978) (official advance sheets only), *denying hearing* Crim. No. 30721 (Cal. Ct. App., 2d Dist. Feb. 28, 1978) ("petition for hearing denied without prejudice to his right to file a petition for writ of habeas corpus").

118. See notes 106-11 and accompanying text *supra*.

119. In separate opinions filed with general orders denying hearings, Justice Houser stated that he was not in accord with those portions of the orders commenting on the denials. See *Scott v. McPheeters*, 33 Cal. App. 2d 629, 641, 93 P.2d 562, 562 (3d Dist. 1939) (Houser, J., dissenting from denial of hearing); *Kane v. Universal Film Exch.*, 32 Cal. App. 2d 365, 370-71, 91 P.2d 577, 577 (1st Dist. 1939) (Houser, J., dissenting in part from denial of hearing); *Wires v. Little*, 27 Cal. App. 2d 240, 245, 82 P.2d 388, 389 (2d Dist. 1938) (Houser, J., concurring in denial of hearing).

120. 27 Cal. App. 2d 240, 245, 82 P.2d 388, 389 (2d Dist. 1938) (Houser, J., concurring in denial of hearing).

121. *Id.* at 245, 82 P.2d at 389.

provided only for granting or denying a hearing, and that "[n]o middle course [was] available."¹²² He further reasoned that if the supreme court could, without granting a hearing, "modify" the lower court's opinion in this fashion, it could also go so far as to "expressly reach an opposite conclusion."¹²³

Justice Houser's objections generally have not been given serious consideration by commentators. Professor Witkin, for example, called the attack "artificial and insubstantial."¹²⁴ The basic flaw in Justice Houser's argument is his assumption that jurisdictional concepts are implicated. A court exercises its jurisdiction when it takes "cognizance of a case and proceeds to its determination;"¹²⁵ when it refuses to grant a purely discretionary hearing, it obviously does not exercise its jurisdiction. A court manifestly cannot exceed its jurisdiction by refusing to exercise it.

Moreover, the constitution gives the supreme court complete authority over the publication of both its own opinions and those of the courts of appeal.¹²⁶ In view of the supreme court's present decertification power,¹²⁷ by which it might deprive an opinion of precedential value altogether, there can be little serious debate over its power to comment on those opinions when denying a hearing. The intent and effect of such comments is not to "modify" intermediate appellate court opinions or to create technically binding precedent.¹²⁸ Such comments, which cannot affect the outcome of the case in which they are made, are purely informational, intended to aid practitioners and the courts in their evaluation of the precedential weight to be accorded individual opinions, and to provide guidance in future appellate opinions. As one commentator has observed:

it is hard to find anything in the constitution which can fairly be construed to deny the court power to give reasons for refusing to grant a hearing. The statements of the court that it approves, disapproves, or withholds approval of part of the opinion below seem to be no more than dicta which courts universally employ.¹²⁹

More substantial than Justice Houser's constitutional objections to denials with comments is another criticism: that the appended remarks

122. *Id.* at 246, 82 P.2d at 389.

123. *Id.*

124. 6 B. WITKIN, *supra* note 4, § 622, at 4544.

125. BLACK'S LAW DICTIONARY 126 (4th ed. 1951).

126. CAL. CONST. art. VI, § 14.

127. *See* notes 83-94 and accompanying text *supra*.

128. *See* Comment, *supra* note 108, at 464. *But cf.* *San Leandro Canning Co. v. Perillo*, 211 Cal. 482, 488-89, 295 P. 1026, 1028-29 (1931) (where on a subsequent appeal the supreme court criticized the trial court for disregarding "the intimations" in the prior opinion on denial of hearing).

129. Comment, *supra* note 48, at 86-87.

may tend to foster greater uncertainty as to the precedential effect of a denial of hearing by the supreme court.¹³⁰ The force of this argument is enhanced by the sometimes ambiguous explanatory remarks previously used by the court.¹³¹ In past practice, the court sometimes stated that it would "express no opinion" as to a portion of the lower court's opinion,¹³² expressly withheld its approval of a portion of the opinion,¹³³ or emphasized that its denial should not be understood as affirming, approving, or concurring with a portion of the opinion below.¹³⁴ Although the supreme court had announced in *People v. Davis*¹³⁵ that no opinion of the court or approval of the opinion below was to be inferred from *any* denial of hearing,¹³⁶ such remarks tended to imply that a denial *without* qualification was in effect a tacit approval of the court of appeal opinion.¹³⁷ Similarly, if qualifying remarks were addressed only to a *portion* of the opinion below, an inference might be drawn that the court approved of the rest of the opinion.¹³⁸

This objection to commenting on denial assumes that the previous tendency of the court to make ambiguous comments is unavoidable. It is by no means clear, however, that such confusion cannot be avoided in the future if the comments appended to denials of hearing are expressed in the most straightforward manner possible. Moreover, it must be emphasized that when the supreme court comments upon only a portion of the lower court's opinion, it merely "approve[s], or disapprove[s], or withhold[s] approval from the specified part of the opinion below; as to the rest of the opinion, [it] express[es] no view whatso-

130. See *id.* at 82.

131. The explanatory remarks previously used by the court tended to fall generally into five categories: (1) denials indicating the supreme court's express approval of or agreement with the court of appeal opinion or a portion thereof, including cases in which the court simultaneously disapproved or purported to "overrule" prior inconsistent court of appeal opinions; (2) cases in which the court stated that it would "express no opinion" as to a portion of the lower court's opinion; (3) denials in which the court expressly withheld its approval of a portion of the opinion or emphasized that its denial should not be understood as affirming, approving, or concurring with a portion of the opinion below; (4) denials expressing doubt as to the correctness of a portion of the opinion, expressly disapproving a portion, or stating that a portion was erroneous or incorrect; and (5) denials disapproving a portion of the opinion and giving what the supreme court considered a correct statement of the law. These categories are derived from those identified in Comment, *supra* note 108, at 464-65. For a more detailed breakdown of specific comments by the court, see Comment, *supra* note 48, at 88-91 app.

132. See, e.g., *Mancini v. Setaro*, 69 Cal. App. 748, 755, 232 P. 495, 498 (1st Dist. 1925).

133. See, e.g., *Scott v. McPheeters*, 33 Cal. App. 2d 629, 640-41, 93 P.2d 562, 562 (3d Dist. 1939); *Kane v. Universal Film Exch.*, 32 Cal. App. 2d 365, 370, 91 P.2d 577, 577 (1st Dist. 1939); *Klemmer v. Klemmer*, 42 Cal. App. 618, 628, 187 P. 85, 88 (1st Dist. 1919).

134. E.g., *Weiss v. First Sav. Bank*, 28 Cal. App. 2d 140, 149, 83 P.2d 35, 35-36 (3d Dist. 1938); *Bank of America v. McLaughlin*, 22 Cal. App. 2d 411, 418, 72 P.2d 554, 554 (1st Dist. 1937).

135. 147 Cal. 346, 81 P. 718 (1905).

136. *Id.* at 350, 81 P. at 720. See note 106 and accompanying text *supra*.

137. See Comment, *supra* note 108, at 464; Comment, *supra* note 48, at 82.

138. See Comment, *supra* note 48, at 82.

ever.”¹³⁹

Additionally, a Rule of Court could be promulgated which would prevent citation of denials of hearing except those accompanied by comment.¹⁴⁰ Such a rule would overcome any implication that denials without comment are tantamount to the supreme court's approval of the lower court's opinion.

The arguments that the practice of commenting on denials would consume time better spent writing opinions, and that the risk of error inherent in such summary decisionmaking would outweigh the value of the comments, are less compelling in light of the procedure that would be used. The court would make the decision to comment at the initial conference, probably at the suggestion of the conference memorandum.¹⁴¹ Appending a comment, unless a lengthy one, would thus require very little of the court's time; the actual drafting of the comment could usually be assigned to the staff of one of the justices. Furthermore, the court presumably would not comment unless there was general agreement among the justices and the legal issues were clear.¹⁴² Of course, the feasibility of the practice would vary with each individual case. As with the other proposed dispositions, the court would need to balance the benefit likely to accrue from use of the technique in a specific case against the time required to apply it and the risk of error in the court's summary consideration. Since commenting on denial would not create binding precedent,¹⁴³ however, it may be assumed that the value of the court's remarks would generally outweigh the risk of error.

139. *Id.* at 83.

140. Such a Rule of Court could be patterned after current rule 977 which severely limits citation of unpublished opinions, thus depriving them of precedential value. *See* note 85 *supra*. By similarly prohibiting the parties and the courts from citing denials of hearing by the supreme court, it might be possible to enforce a rule that no significance is to be attached to such denials. An exception should be made, of course, for any denials to which the court has appended commentary in order to allow the judiciary to profit from the supreme court's remarks.

141. *See* text accompanying notes 22-23 and 68-69 *supra*.

142. A similar situation currently exists with respect to comments on denial of petitions for writs of habeas corpus. The supreme court sometimes explains its reasons for denial of such petitions by citations to other cases. *See, e.g.,* Dowd on Habeas Corpus, Crim. 20742, Cal. Sup. Ct. Minutes, Dec. 13, 1978, Cal. Official Rep. No. 2 (1979) (official advance sheets only); Worthington on Habeas Corpus, Crim. 20744, Cal. Sup. Ct. Minutes, Dec. 13, 1978, Cal. Official Rep. No. 2 (1979) (official advance sheets only); Gonzales on Habeas Corpus, Crim. 20745, Cal. Sup. Ct. Minutes, Dec. 13, 1978, Cal. Official Rep. No. 2 (1979) (official advance sheets only). In other habeas corpus denials, the court appends no such explanatory citations. *See, e.g.,* Stubbs on Habeas Corpus, Crim. 20743, Cal. Sup. Ct. Minutes, Dec. 13, 1978, Cal. Official Rep. No. 2 (1979) (official advance sheets only); Lowery on Habeas Corpus, Crim. 20748, Cal. Sup. Ct. Minutes, Dec. 13, 1978, Cal. Official Rep. No. 2 (1979) (official advance sheets only). It is clear that the court has no hard and fast rule; apparently it appends citations when the reasons for denial are clear, the justices agree on those reasons, and little time is needed to provide an explanation (as where a mere case citation is sufficient).

143. *See* note 128 and accompanying text *supra*.

Because there is no constitutional impediment to denials with comments, and because the alleged ambiguity created by such a procedure is either avoidable or illusory, the supreme court should feel free to use this device. By qualifying denial orders in appropriate cases with remarks explaining the reasons for denial or commenting upon a court of appeal's resolution of a specific issue, the supreme court could better perform its supervisory function. Although the technique will not directly promote uniformity, that goal is more likely to be achieved in a judicial system which provides as much guidance and feedback as possible to the lower courts. Appropriately employed, comments on denial would clarify the court's views on specific issues, provide further guidance to the courts of appeal, and serve as a useful aid in evaluating selected individual cases as precedent.

For example, if a published opinion admirably resolved an important question of law upon which the supreme court has rendered no previous decision, the court could enhance the precedential value of that opinion by expressing its approval of the opinion in its denial order. The supreme court could send this signal without using its limited opinionwriting resources to restate what in essence already has been said. A denial with qualification would also be useful where an appellate opinion misstates the law, the supreme court has no doubt as to what the law should be on the question involved, and the error does not necessitate a different result between the parties. The court of appeal's opinion might be specifically disapproved or "questioned" as to its misstatement of the law, or the supreme court might provide a concise clarification of the law.¹⁴⁴

The denial with comment technique would be most appropriate as a means of evaluating published appellate opinions as precedent. In unpublished cases, however, the benefits of qualified denials would be much more limited. The court's comments would have little value to practitioners generally, who would not have easy access to the opinion and, in any event, could cite neither the unpublished opinion nor, presumably, the comment on denial in practice.¹⁴⁵ It is also unlikely that court of appeal justices would obtain copies of unpublished opinions of

144. If correcting an appellate court's error would not alter the outcome between the parties, a qualified denial would provide a satisfactory alternative to grant and retransfer with directions. The supreme court could also use the disposition under appropriate circumstances to "resolve" conflicts among the district courts of appeal by expressly approving one line of cases and disapproving the others. Denial with comment is not recommended, however, in any case where a court of appeal's erroneous legal reasoning would affect the outcome of the controversy. In that situation, the proper disposition would be to grant a hearing or grant and retransfer.

145. Because CAL. R. CT. 977 prohibits citation of unpublished opinions by both courts and parties except in limited situations, *see* note 85 *supra*, it may be assumed that citation of comments on denial of such opinions would likewise be prohibited, if for no other reason than the difficulty of citing them without also citing the appellate opinion.

other courts. Nevertheless, the method could be used in appropriate unpublished cases to inform the litigants of the grounds for denial and to point out errors in the opinion for the edification of counsel, the court of appeal that rendered the decision, and other interested parties. The disposition would be particularly appropriate if the procedural posture of a case would require retrial.

This Comment in no way suggests that the court should attach to every denial of hearing an explication of its reasons for denial or a general evaluation of the strengths and weaknesses of the court of appeal's opinion.¹⁴⁶ On the contrary, such a system would require a prohibitive expenditure of time on what usually would be trivial discussion. But by abandoning in recent years the practice of making comments on denial of hearing, the court has relinquished a relatively simple, time-saving method of influencing the development of the law and encouraging uniformity of decision. Careful selection of cases appropriate for qualified denials would make the system both workable and more beneficial than either the present level of uncertainty accompanying denials of hearing or a rigid adherence to the monolithic view that denials never have significance.

C. Decertification with Explanation

Decertification of appellate opinions by the supreme court is appropriate where the

correct result has been reached by the court of appeal but the opinion contains language which is an erroneous statement of the law and if left on the books would not only disturb the pattern of the law but would be likely to mislead judges, attorneys and other interested individuals.¹⁴⁷

In theory, it should never occur when the court of appeal has reached an incorrect result. Unfortunately, there have been instances in which precisely this has happened.¹⁴⁸ The current lack of explanation for

146. The supreme court has long maintained, and properly so, that its jurisdiction is purely discretionary and that no justification for a denial of hearing is required. *See, e.g.,* Metropolitan Water Dist. v. Adams, 19 Cal. 2d 463, 468, 122 P.2d 257, 259-60 (1942); *People v. Davis*, 147 Cal. 346, 348, 81 P. 718, 719 (1905).

147. Letter from former Chief Justice Donald R. Wright to Julie Hayward Biggs, *quoted in* Note, *supra* note 83, at 1185 n.20.

148. *See, e.g.,* *People v. Superior Court (Scott)*, 35 Cal. App. 3d 621, 110 Cal. Rptr. 875 (1st Dist. 1973) (official reports, advance sheets only; Cal. Rptr., bound volume), *decertified*, Cal. Sup. Ct. Minutes, Feb. 7, 1974 (1st Civ. 33834), Cal. Official Rep. No. 7 (1974) (official advance sheets only), in which the supreme court tacitly admitted decertifying the opinion because it was incorrectly reasoned and wrongly decided. The *Scott* trial court suppressed evidence that marijuana and LSD were found on the defendant in a pretransportation pat-down search. The trial court concluded that the pat-down was illegal because the police officers had no reason to suspect that the defendant was armed and dangerous. In a published opinion, *id.*, the court of appeal concluded that the pat-down was permissible under *People v. Superior Court (Simon)*, 7 Cal. 3d 186,

decertification increases the potential for abuse. Moreover, it provides no guidance to practitioners and courts as to the nature of the error in the decertified opinion. The value of the decertification procedure is therefore confined to preserving the integrity of published law with, at best, uncertain results in preventing similar errors in other cases. By explaining its reasons for decertification the court would avoid even the appearance of decertification abuse. By providing, where practical, what the supreme court considers a correct statement of the law on the issue, the court could more effectively prevent similar errors from occurring and efficiently clarify certain points of law.¹⁴⁹

Decertification orders differ from ordinary denials of hearing in that they necessarily represent the supreme court's disapproval of the appellate opinion in some respect. Thus, the specific arguments in favor of providing reasons for decertification are somewhat different from those in favor of commenting on denial of hearing. Denials with comment are desirable largely because they clarify the otherwise uncertain precedential value of published opinions. Decertification, even without explanation, clearly destroys the precedential value of an opinion, and a decertified opinion cannot mislead later interpreters.

Explanations of decertification would also be more limited in prospective value than would comments on denial of hearing in published cases. Reasons for decertification presumably would appear both in the Supreme Court Minutes and in the Cumulative Subsequent History Table of the advance sheets and might also be reprinted in the bound official reports where the opinion had been scheduled to appear prior to the decertification order.¹⁵⁰ But the bare explanation of why an opinion had been decertified would be of little value years later if the opinion itself could not be examined.¹⁵¹ Moreover, neither the decertified

212, 496 P.2d 1205, 1224, 101 Cal. Rptr. 837, 855 (1972) (Wright, C.J., concurring). On petition to the supreme court, the court of appeal opinion was decertified, and the matter was resumed in the trial court. Because the decertification order left the court of appeal decision in force, the defendant's renewed motion to suppress was denied, and he pleaded guilty to possession of LSD. *See* *People v. Scott*, 16 Cal. 3d 242, 245, 546 P.2d 327, 329, 128 Cal. Rptr. 39, 41 (1976). After judgment was affirmed by the court of appeal, the supreme court granted a hearing. In its opinion, the court stated that the first court of appeal holding "was a manifest misapplication of the *Simon* opinion: the search was not justifiable on the stated ground." *Id.* at 247, 546 P.2d at 330, 128 Cal. Rptr. at 42. It went on to hold that the search was not justifiable on any ground and reversed the judgment. *Id.* at 251, 546 P.2d at 333, 128 Cal. Rptr. at 45.

149. The explanations could often be very brief. For instance, if the court of appeal had simply overlooked a controlling precedent, citation to the appropriate case would be sufficient explanation for the decertification order. This method is currently used for explaining denials of petitions for writs of habeas corpus. *See* note 142 *supra*. *See also* text accompanying notes 163-64 *infra*.

150. In this respect, comments on decertification would be more permanent than comments on denials of hearing in unpublished cases, which would never appear in the official reports. *See* note 82 and text accompanying note 145 *supra*.

151. A system might be devised whereby the supreme court could deprive an opinion of pre-

opinion¹⁵² nor, presumably, the explanatory decertification order could be cited in judicial proceedings.¹⁵³ Therefore, the primary value of providing explanations for decertification would be the immediate exposure of the reasons for the court's relatively rare exercise of its decertification power and the immediate guidance to the courts of appeal derived from those explanations.

Nevertheless, to the extent that public exposure of judicial reasoning is a valued goal,¹⁵⁴ the reasons for providing an explanation of decertification orders are even more compelling than those for appending explanatory remarks to denials of hearing. Ordinarily, the public's interest in scrutinizing the supreme court's refusal to exercise its completely discretionary jurisdiction by requiring reasons for *every* denial of hearing is outweighed by the extreme burden thereby thrust upon the court and the corresponding hindrance of its effective functioning.¹⁵⁵ In light of the potential abuses of decertification,¹⁵⁶ however, the public has an increased interest in the reassurance that injustice is not being swept "under the judicial rug"¹⁵⁷ when opinions are decertified. Decertification by the supreme court overturns the court of appeal's decision to publish an opinion.¹⁵⁸ The public's interest in being provided with a rationale for that decision is stronger than in ordinary denials of hearing, and the corresponding burden on the court is significantly less due to the relatively small number of decertification orders.¹⁵⁹ Thus, while this Comment suggests that the court's decision to comment on denials of hearing should remain entirely discretionary, there is a stronger argument for *requiring* explanation in the case of decertification.¹⁶⁰

edential value, but it would nevertheless be published in the bound volumes with appropriate cautionary remarks appended. If the comment upon decertification were published beside the discredited opinion the value of explanation upon decertification would be enhanced.

152. See CAL. R. CT. 977.

153. Cf. note 145 *supra* (comments on denial).

154. This societal value is reflected in the constitutional requirement that appellate opinions be rendered in "writing with reasons stated." CAL. CONST. art. VI, § 14. See generally Note, *supra* note 83, at 1187-90.

155. See note 146 and accompanying text *supra*.

156. See note 148 and accompanying text *supra*.

157. Kanner, *supra* note 13, at 391.

158. The supreme court's decision to unpublish a court of appeal opinion effectively overrules the evaluation by a majority of the court rendering the decision that the opinion meets the standards for publication. See CAL. R. CT. 976(b), (c), *quoted in* note 85 *supra*. The supreme court's decision to unpublish does not, however, constitute a review of the appellate court's decision to publish under rule 976(b), Note, *supra* note 83, at 1188 n.40, but rather is based on a review of the opinion itself.

159. The supreme court decertified 22 court of appeal opinions in 1973, 12 in 1974, 13 in 1975, 32 in 1976, and 24 through August 23, 1977. See Note, *supra* note 83, at 1201-06 app.

160. See Note, *supra* note 83, at 1194-99. The Note proposes the adoption of a new Rule of Court requiring the explanation of all decertification orders. *Id.* That proposal would require

The practical argument against requiring explanation of decertification is that the individual members of the court often may not agree as to why, or indeed whether, an opinion should be decertified.¹⁶¹ The requirement of reasons for such action would thus raise the spectre of a proliferation of opinions concurring in or dissenting from the decertification order. That eventuality would be wasteful of court time better spent writing opinions and would defeat the purpose of alternative time-saving dispositions proposed in this Comment. Therefore, this Comment advocates no imposition of an *obligation* upon the court to justify its actions in every case. It does, however, strongly urge the court to provide as much explanation and guidance as possible on decertification when there is general agreement among the justices as to the proper disposition and the reasons therefor.

CONCLUSION

As the supreme court's caseload forces it increasingly to emphasize its function of deciding important legal issues over that of securing uniformity of decision, the quality of the judicial process in California necessarily suffers. The institutional benefit derived from the court's attention to writing letter-perfect opinions diminishes if there is not also some means of assuring that the principles contained therein filter down through the system into widespread and uniform application throughout the state.¹⁶² Insofar as the dispositions we propose would enable the supreme court to enforce the uniformity norm more effectively, beneficial effects might be felt throughout the judicial system. If

written and citable explanations of every decertification order, designation of specific errors appearing in criminal and constitutional cases, and public notice of the supreme court's intention to decertify, including reasonable time for written argument from the public. The Note further suggests that the supreme court promulgate a rule barring the citation of appellate opinions until they appear in a bound official reporter. 1978 Conference Resolution No. 10-5, proposed by the Santa Clara County Bar Association and passed by the State Bar Conference of Delegates, recommends that the State Bar Board of Governors request the adoption of such a Rule of Court.

161. This same objection militates against a requirement of reasons for every denial of hearing. Such a requirement is not, of course, advocated by this Comment. See text accompanying note 146 *supra*.

162. Ordinarily this is accomplished largely by operation of the doctrine of stare decisis. However, it is not the only factor influencing lower courts' compliance with the principles announced by higher courts. See Baum, *Lower-Court Response To Supreme Court Decisions: Reconsidering A Negative Picture*, 3 JUST. SYS. J. 208, 209 (1978) (summarizing the literature). In his organizational analysis of lower court response to decisions of the United States Supreme Court, Professor Baum notes several factors affecting compliance which are of general application. These include: (1) "the clarity with which a policy is delineated . . ."; (2) the effectiveness of its communication"; (3) the "authority" of the Supreme Court, which refers to the lower court's acceptance of an obligation to follow Supreme Court decisions; (4) the fear of reversal; (5) the "policy preferences" of individual lower court judges; and (6) the benefits and costs of compliance to the lower court judge, including social, professional, administrative, financial and other possible costs and benefits to individual lower court judges. *Id.* at 211-14.

the supreme court more closely supervised the intermediate level appellate courts, those courts presumably would tighten up their supervision of the trial courts as well. The result would be a more widespread, if predictably not universal, implementation of the standards established by the supreme court. No simple procedural device can alleviate all the systemic problems currently plaguing appellate courts; however, readily available procedural remedies certainly should be adopted.

The long-term benefit to the quality of appellate justice would justify the marginal amount of time that would be required to use the procedures.¹⁶³ It also may be surmised that the clarification of the body of precedent resulting from these procedures would ultimately reduce the amount of appellate litigation. Uncertainty and inconsistency in the case law stimulate litigation; cases are brought to trial and trial verdicts are appealed because this uncertainty places the rights and obligations of individuals in doubt.¹⁶⁴ Furthermore, by using the proposed dispositions, the supreme court could, in appropriate cases, avoid the necessity of holding a full hearing and writing an opinion without compromising the institutional goal of securing uniformity of decision. Thus, the suggested dispositions should be viewed as alternatives not only to unexplained denials of hearing but also to hearings granted unnecessarily.

It is a basic premise of our legal system that governance by established and uniform standards is preferable to governance by the varying opinions of individuals. The adoption of the procedures proposed herein would allow the supreme court to monitor more closely the courts of appeal and to ensure that the appellate review conducted by those courts conforms to the standards established by the supreme court in its institutional capacity. The more responsive the review for correctness becomes to the mandates of the institutional review process, the more our appellate process assimilates to a system of law as opposed to some other, less principled dispute settlement system.¹⁶⁵

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163. See text accompanying notes 22-23 and 68-69 *supra*.

164. See, e.g., Rubin, *Views From the Lower Court*, 23 U.C.L.A. L. REV. 448, 454, 464 (1976). See also Baum, *supra* note 162.

165. See generally R. DWORKIN, *supra* note 63; P. SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE (1969); Fuller, *The Forms and Limits of Adjudication*, in AMERICAN COURT SYSTEMS 42 (S. Goldman & A. Sarat eds. 1978).

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