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Depublication: The New Starchamber n1

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INTRODUCTION

What should the supreme court do "when it considers a court of appeal opinion to be 'wrong,' but the circumstances do not warrant either a grant or grant and retransfer" under existing standards? n3 In California, the supreme court may typically resort to the option of depublication, an option which some commentators have chosen to call "a process of covert substantive review." n4 Nearly twenty years have passed since its precarious entrance into the appellate forum. n5 Depublication followed in the wake of selective publication, a process chosen to address the state's corpulent body of published law and its overburdened court system. n6 Since its genesis in 1971, depublication has become a powerful and dynamic legal tool, swiftly shaping and forming the content of California's citable law. n7

Depublication, by its nature, can only have an effect in those states in which the highest court has the ultimate control over the publication of appellate opinions. n8 To date, however, California is the only state to have chosen depublication as an option to disposition by hearing. n9 Depublication is the eradication of precedent setting appellate court opinions, by order of the supreme court, without benefit of public scrutiny or articulated reasoning. n10 The supreme court, pursuant to an application for review or sua sponte, orders that an opinion, already certified for publication by a lower court, not be published. n11

The purpose of this Comment is to clarify the fundamental importance of maintaining the articulated law as the nexus between judicial reasoning as it existed and as it adapts to social change. This Comment will also summarize the setting in which the need arose to modify the volume of published law issuing from the appellate courts, thereby setting the stage for the emergence of depublication. Finally, it will examine the consequential results of developing an alternative to total publication.

HISTORY OF DEPUBLICATION

Where one law cannot be made to apply to all men within a nation, then it is better to tolerate diversity than to impose a degree of uniformity that might be psychologically pleasing but harmful to those whose situation does not fit n12

California blazed the trail for depublication when it pioneered selective publication of appellate court opinions in 1963. n13 Prior to that time, by statute, all opinions rendered by the appellate courts were published. n14 Those opinions which were considered to be improperly decided or reasoned were reviewed by the supreme court, which generally resulted in a new opinion being issued. n15 The State Bar and the Judicial Council, in response to concern from the legal community, concluded that the continuance of an all-publication rule was inappropriate and that a selective publication rule would be preferred. n16 In 1964, in an effort to stem the tide of increasing published opinions, the supreme court and the legislature responded by passing Rule 976 of the California Rules of Court. n17

By 1971, the new rule was considered to be at least a quantitative success since it had reduced by 61% the number of published appellate opinions. n18 Qualitatively, however, the selective process lacked consistency. n19 In response to growing concern and upon the advice of a specially appointed committee, the rule was obverted such that every appellate court opinion was presumed to be unpublishable. n20 Where once the courts of appeal had discretion to publish whenever a case met the criteria for publication, now there was a presumption against publication. n21 Under the "presumption" standard only 800 of the 6,000 appellate cases decided in 1979 were actually published. n22 Thus, the stricter rule was born of the need to gain control over the sheer volume of cases and the inherent difficulty in their retrieval for practical use. n23

Rule 976(b) sets forth the criteria for overcoming the presumption against publication. n24 A majority of the justices on a panel must certify that an opinion conforms to one of the standards in order to defeat the presumption. n25 The rule requires that a publishable opinion establish a new rule of law, or resolve or create a conflict in the law. n26 It could also involve an issue of continuing public interest or criticize existing law or, importantly, it might make a significant contribution to legal literature. n27 These criteria were the product of

the 1983 revision. In California today, selective publication remains the rule statement for that which is citable law. n28 Its integrity exists to the extent that it is properly applied by the justices or manipulated through its progeny - depublication. n29

From the advent of selective publication it was a short step for the supreme court to move to depublication. Where selective publication, by its terms, became "the law" of California, depublication allowed the supreme court to pluck from "the law" that fruit not to its liking. n30 The process was first used by the late Chief Justice Donald Wright in 1970. n31 Depublication became increasingly popular during Justice Rose Bird's tenure. n32 Justice Bird however, was a detractor of the process, dissenting often when the majority favored depublication. n33 The process rapidly gained favor and is now firmly established in the routine of the Lucas court. n34 During the Lucas court's first year, 1988, it depublished opinions at an alarming rate, far in excess of past courts. n35 At the same time, the grants of hearings, plummeted to an all-time low. n36 Not since 1975 had the supreme court granted so few hearings. n37 "As the court finds less time to write its own opinions it is increasingly resorting to depublication to prune and shape the law of California." n38 This process, so valuable to many and so practical to the court, is clearly here to stay. n39

THE COMMON LAW DEPUBLISHED

He now sits down to compose his opinion. Its function is to make his conclusion plausible, to justify it to the legal world and to society's conscience. He has before him a mass of precedents, concepts, principles . . . . He picks and chooses and combines as one would in weaving a rug, in painting a picture from colours on a palette, or in composing a symphony out of myriad possible notes. n40

Depublication, in its purest form, is founded in a common sense approach to two of the many problems facing the court. The first is the increasing volume of litigation. The second is the fact that many decisions issue from the courts of appeal with apparently faulty or erroneous reasoning which is inconsistent with supreme court views. n41 Thus, a swift and effective remedy so far has been one which obliterates the offending opinion from the physical body of the law, leaving the law shaped or molded into that which follows the court's reasoning. n42 Once an opinion is determined to be "publishable" or "not publishable", two bodies of law are in existence - those cases comprising the published body of law and those comprising the unpublished body of law. n43 Cases deemed unpublishable by the appellate courts were never destined to become a part of the fabric of articulated law n44 and are not a concern of this Comment. However, those opinions already certified for publication under selective publication criteria, which later fall prey to depublication orders, were indeed designed to illuminate, distinguish and clarify the law of this state. n45 For a brief period of time they accomplished this purpose, but in so doing they added confusion over which law had precedential effect in California. n46

Depublished opinions are cast, by way of supreme court mandate, into the functional obscurity of unpublished opinions. n47 Though found in the advance sheets for a short time following publication, they will be discarded when the bound volumes are issued. n48 The bound volumes will thereafter contain a page with only the case name and cite and a restatement of the depublication order. n49 As if to amplify the sub rosa nature of the procedure, even the order compelling depublication will soon vanish. n50 It is precisely this feature of the device which has caused it to be called "review by elimination." n51

The law, as we know it, does not exist in isolation nor can it be set apart from civilization as a whole. n52 It plays a role in our culture such that its influence can be measured by its effect on people. n53 The common law developed as an expression of those laws confirming the existence of a natural order and of those areas of our culture responding to free and conflicting behaviors. n54 The system reacts to an unwanted behavior by enacting new law and recording it so society will know the limits. n55 Behavior conforms either by reading that which was written or by imitating the behavior of those who have read it. n56 The common law is resilient and flexible, adjusting to society's needs by its own nature since it acts to enforce the customs and usages of the community. n57

In truth, then, we must look with caution and even suspicion at any convention which purports to artificially contrive the common law. The common law in California and many other states is only that law which has been selectively published. n58 Depublication then acts upon the law erasing those opinions which do not comport with supreme court views. n59 It is not essential that all legal discourse be aligned. n60 Disagreement is a function of serious legal thinking. n61 It is no secret that those opinions which are dissenting ones are often the precursor of the law to come. n62 Depublication has the effect of halting serious disagreement n63 which might rightfully have spawned a "taking of sides" reflective of society's custom and usage. n64 Depublication produces a ripple effect which may silence the voices of dissent. n65

Society, as we know it, is not particularly result oriented. We are, in fact, a means oriented society. n66 The common law chronicles the process of developing the law, preserving it to be shared with future generations. n67 Its value, whether for historic purposes or as trajectory for the future, has been undisputed and undisturbed until the emergence of depublication. n68 It is not essential that the judicial system work with procedural perfection, especially when the cost of such efficiency results in the reconfiguration of the common law in an effort to gain conformity. n69 Nor is it essential that the common law involve great clarity, "sometimes it involves a degree of opaqueness so that courts can gingerly feel their way along." n70 All authority has some benefit to those who decide the cases. n71 Whether it conflicts or conforms, it aids in evaluation. n72

Legislators therefore should not seek to impose excessive uniformity in our legal system. "Petty minds . . . are sometimes stricken with the idea of uprooting the existing nature of things in order to blueprint a new social and political order where exceptions have no place." n73 The common law, however, was never a "blueprint" of what the law must be, n74 nor did it ever produce unshakable certainty of result. n75 To the extent that certainty exists it involves matters of judgment, contrast and distinction. n76 In evaluating the effect of depublication on the common law it is important to keep in mind that one of the criteria for certifying an opinion as publishable is whether it resolves or creates a conflict in the law. n77 The creation of conflicting opinions among the appellate panels generally puts the supreme court on notice that the matter requires a review by that court--something more significant than erasure by depublication. n78 By eliminating conflict through erasure, the court prevents the pot from boiling over in a manner that would have signaled the need for intervention at the supreme court level. n79 Though the call for standards, and public knowledge of the reasons behind a depublication order has reached a clamorous note, the court has chosen to ignore all but the most recent token procedural requirements. n80

THE NULLIFICATION OF PRECEDENT

Every judgment has a generative power it begets in its own image. Every precedent . . . has a directive force for future cases of the same or similar nature. n81

Two purposes are served by judicial decision making. First, to settle the particular dispute before the court, and second, to establish the law that will be used to decide other cases. n82 This method of settling present and future disputes is clearly preferred over the sanguinous alternatives of private warfare and dictatorial mandates. n83 While publication issues appear to address only the second purpose, it is predictably the first which underscores the need for the second. Without a patently discernible body of law, the adjudicatory process is relegated to confusion and economic inefficiency, n84 the very goals which Rule 976 was intended to remedy. n85

It is well settled that the doctrine of stare decisis is the predominant force in preventing the reckless decision of cases before the court. n86 Stare decisis "embodies the notion of judicial subservience to prior decisions or precedents." n87 The concept is critical to the integrity of the judicial system since it requires judges to be bound by judicial precedents, which act to limit their domain to law rather than politics. n88 It is intended that the principle of stare decisis prevent unnecessary litigation, in that most people will not seek to litigate well settled points of law. n89 It is clear then that "stare decisis depends upon the coherent [rather than piecemeal] development of decisional law." n90 Lawyers must be able to evaluate the decisions in similar cases, and be able to cite those cases as authority when they come before the court. n91 Such a format ensures that justice is dispensed evenhandedly. n92

When the decision was made to construct the content of California law through selective publication, that rule became "the primary determinant of the precedential value of the cases." n93 In California, therefore, the equation for precedence is selective publication plus depublication equals stare decisis.

Appellate decisions are, in large measure, a product of analogy. n94 By applying a settled standard to a novel situation, some guidance is expended to the extent that a rule can be applied. n95 A rule of law will be established when one principle is applied to a series of different factual settings. To assure that only the published body of law would be the source of law having stare decisis effect, the court passed rule 977 of the California Rules of Court. n96 While it does not explicitly prohibit the use of unpublished opinions per se, it does state that "they shall not be cited by a court or a party," thus effectively preventing their precedential value. n97 "Once the case is off the books, it has no precedential effect. For many clients this is just as desirable as obtaining Supreme Court review." n98

Depublished opinions are similarly emasculated since the supreme court need not grant review to eliminate a published decision not to their liking but needs only order it depublished. n99 The combined effect of

selective publication, depublication, and the rule prohibiting the citation of any unpublished opinion, becomes a powerful lawmaking force. One need not stretch to conclude that the effect of such a force on California common law is staggering. It controls the development of the law from the origination of the published opinion, under strict guidelines, to its destruction under depublication without explanation. n100 This modern day "starchamber" compares strikingly with the ancient courts so named. They too were "enabled to proceed and act without regard for the common law, in secret session." n101 Depublication has been called a "'stronger' alternative than straight denial." n102 Not only does it eliminate a powerful precedential effect but it removes it from "the realm of judicial discourse, and therefor from the development of the common law." n103

THE PREDATOR IN THE ADVERSARY PROCESS

There was an influence here, dominating perhaps, and surely patent and persuasive, which was exerted . . . from beginning to the end. n104

Certainly both the approach and reasoning of depublished opinions remains available to the diligent upon search. n105 There are, however, those who believe that the mere existence of depublished opinions has given rise to a group of lawyers who have been called "the cognoscenti." n106 They are a group of elite insiders among the appellate bar. n107 Law firms emphasizing appellate practice and others in specialized fields often have access to banks of unpublished opinions. n108 Lawyers with ready access to such sources, whether by luck or superior resources, may have secured an advantage over adversaries. n109 Such advantage is of obvious benefit in that they may use the favored reasoning of a judge or court before whom they appear if for no other reason than "language and rationale, while opposing counsel is unaware of the opinion's existence." n110 "With the justices now depublishing more court of appeal opinions than the publishing of their own opinions, lawyers who closely follow what is being depublished have a stronger reading of the court's pulse than those who merely parse the published opinions." n111 This has a ricochet effect on the appellate panel whose opinion was depublished. Often the sharpest declines in publication are found in those districts targeted for depublication, making them less likely to find the same result again. n112

The cognoscenti element has been encouraged by the whole nether world of the depublication process. n113 Part of the result has been the production of two kinds of lawyers: "the uninitiated ordinary practitioner who keeps up with the advance sheets and knows only what he reads there and the specialist - insider, [the cognoscenti] who collects unpublished opinions in his field as well, and who therefore possesses a special insight into the thinking of the intermediate appellate courts." n114

Consider then, the newly established Rule of Court, Rule 979, which declares that depublication "shall not be deemed an expression of opinion of the Supreme Court." n115 This can be read to imply that the court has been made aware of the cognoscenti and it seeks to limit speculation as to how that group interprets depublication.

With increasing frequency some of these lawyers are attempting "to influence the court's decision to depublish appellate [opinions] by filing mini-briefs or organizing letter writing campaigns." n116 Such forms of communication violate accepted standards of fairness. n117 In a recent opinion, Justice Peterson of the First District Court of Appeal expressed his outrage at these campaigns declaring that ". . . [a] trial judge would be shocked to imagine that counsel not representing parties to the litigation, and not having become amici curiae, could with impunity press their unsolicited views on him concerning an undecided but submitted matter." n118 In refusing to take judicial notice of such ex parte communications, he directs attention to the conflict before the courts. What form of communication, if any, is proper, and where does it cease to be merely informative and, instead, becomes lobbying for law? n119

Often a request for depublication will accompany a petition for hearing by the supreme court. n120 It will be requested as an alternative to a grant of review in the likely event that review is denied. n121 When a depublication request occurs through this process it is of course served on all parties to the matter, and to the appellate division which authored the opinion. n122 This effectively provides notice to all interested parties. n123 It has been suggested that where depublication requests do not accompany a request for hearing they should be served on all interested parties as a matter of courtesy. n124 Depublication, however, has no structural requirements calling for public notice of the petition received prior to the rendering of a decision as to that issue. n125 This conflict arises most notably where the petition for depublication is generated by a third party, a stranger to the pending matter. n126

It is a matter of law that judicial proceedings are public in nature and that non-parties interested in the outcome may submit arguments upon their acceptance as amici curiae. n127 But there must be acceptance by the court. The rules specifying the procedure and limits are clear. n128 Letters to the court, then, are considered

proper where the person or entity has been granted such permission. n129 Often such standing will be accorded to special interest groups representing significant segments of society. n130 "As a tactical matter, amicus briefs are frequently filed when counsel wishes the importance of an issue to be emphasized to the court." n131 Counsel may solicit amici curiae to appear before the appellate or supreme courts. n132 It may be determined by counsel that a presentation on the economic or political impact of the decision will prove a valuable influence on the court. n133 But, the letter writing campaigns of concern, such as the one in Gardner v. Charles Schwab & Co., n134 involved bare ex parte communication, intended to persuade or gain advantage. n135 Often from strangers to the litigation, these letters are advancing an interest of the senders. n136 There is no provision in the rules permitting ex parte communication on a pending matter. n137 The court in Gardner concluded that such communication violated Canon 3A of the California Code of Judicial Conduct prohibiting ex parte communication unless authorized by law. n138 At a minimum it offends the perceived sanctity of the courtroom and undermines public confidence in the judicial system. n139

While amicus curiae letters and other letters urging supreme court review both appear to require notice to interested parties, in the past, "letters that merely urge the court to hear the case are treated as correspondence, with the clerk distributing a copy to each justice. These letters are not filed." n140 The implication was clear; if they were not filed they were not records of the court. If they were not records of the court they did not require notice to interested parties, a fundamental safeguard of due process. n141 The revised rule requires notice to all parties. n142 After twenty years of circular argument, its time has come.

What effect, if any, does ex parte communication have on depublication? Without a reasoned statement regarding depublication, it remains unknown. n143 It is known, however, that letters to the justices which set forth facts and argue for depublication are not kept in the court files "because they do not conform to court rules for briefs." n144 The inference is made that supreme court justices may read and even consider arguments of a potentially biased or partisan nature, made outside of the accepted appellate procedure. n145 The fact that these documents, by their failure to conform, do not become a part of the court file, only encourages this type of ex parte communication with the court. n146 Their absence in the record leaves the highest court in California subject to speculation that extraneous influence was brought to bear on submitted but undecided matters such as encouraging depublication of an opinion as an alternative to a grant or denial of review. n147

Who then are the would-be predators in the adversary process? Generally, they are those lawyers who have become experts at engineering the depublication of an opinion. n148 Today, "any lawyer who practices appellate law who isn't fully familiar with the [depublication] process shouldn't be practicing this law at all . . . . It's that important." n149 Often these depublication specialists are representing large institutional litigants with broad-based economic or social concerns like the insurance industry. n150 When they see an opinion published which does not favor their clients they organize the filing of amicus letters, zeroing in on those points of law least favored by the supreme court as justification for urging depublication. n151 Non-party litigators concerned with the precedential effect will even look at portions of the opinion which are not part of the holding and successfully urge depublication on the premise that this type of ruling would open the flood gates to future litigation. n152

A minority of lawyers support this procedure as the best means available to deal with the backlog of problems facing the court. n153 Attorneys favoring it herald it as an indispensable tool in aiding their clients, n154 and at least one appellate firm "brags about the cases it has gotten decertified. n155 Often, published opinions will have a devastating impact on clients. n156 Generally, these clients are institutional litigants with a primary goal of preventing adverse case law from ever having a destructive precedential effect on their interests. On balance, it must be noted that the matters they seek to erase also have the potential for economic devastation as to individual litigants. It is the individual litigant who shoulders the burden of a precedent which favors big business interests. n157 "A lawsuit devours the tillage of the poor but some men perish for lack of a law court." n158

As one proponent of the procedure opined, "every litigant seeks to shape the law to meet its own interests. That is in the nature of the adversary system. Every group has an interest in obtaining decertification of opinions which adversely affect its interests. That is in the nature of the litigation process." n159

CONCLUSION

I say it and methinks I have undertaken this work with no other view than to prove it. n160

The depublication process is unique to California, but its significance goes well beyond the California courtroom. It is an example of a system reacting to a pressing problem. n161 While selective publication, in

theory, has had the bromidic effect which was sought, it has also enticed passivity to what has become, if you will, censorship of the law through depublication. n162 As one political scientist views it: "It should sensitize us to the question of whether proposals intended to make the courts work more efficiently are not in effect creating a new form of 'lawmaking'." n163 California is the only state which allows its highest court to obliterate the opinions of the intermediate courts without a full hearing on the merits. n164 Neither the federal court system nor the United States Supreme Court use a comparable device to shape the law. This impossibly canted remedy raises questions as to the propriety of the California Supreme Court having the final say over the "correctness" of all decisional law. n165 If it is true that the power to decide finally is the power to decide incorrectly, then our concern must focus on to whom the power to decide has been given. n166 Depublication has slipped rather quietly into acceptance by most of the supreme court justices of the last twenty years. n167 Its full effect will probably never be known since it has erased the evidence of what might have been. However, its lawmaking effect will be felt by those unlucky enough to be caught in lengthy litigation by powerful adversaries and institutional litigants who are adept at depublication.

FOOTNOTES:

n1 Star Chamber: 1) formerly, an English court made up of councilors appointed by royal authority, which met in secret session without a jury, used torture to force confessions, and handed down arbitrary judgments that were extremely severe: abolished in 1641; 2) any tribunal, investigating body, etc. similarly unjust, arbitrary and inquisitorial. WEBSTER'S DELUXE UNABRIDGED DICTIONARY 1774 (2d ed. 1983).

n2 Mentschikoff & Stotzky, Law-The Last of the Universal Disciplines, 54 U.CIN. L. REV. 695, 708 (1986).

n3 Grodin, The Depublication Practice of the California Supreme Court, 72 CALIF. L. REV. 514, 520 (1984).

n4 Gerstein, "Law by Elimination:" depublication in the California Supreme Court, 67 JUDICATURE 292, 298 (1984).

n5 B. WITKIN, MANUAL ON APPELLATE COURT OPINIONS § 582, at 573 (1977). The late Chief Justice Donald Wright was the first to use it in 1971 pursuant to the Court's constitutional power. It was not until 12 years later, in 1983, that the practice was supported by a rule of court when rule 976(c)(2) was passed. The rule stated that "An opinion certified for publication shall not be published . . . on an order of the Supreme Court to that effect." Id. at 574.

n6 Gerstein, supra note 4, at 298.

n7 Carrizosa, Making the Law Disappear, CAL. LAW., Sept. 1989, at 65. "Depublication has emerged as one of the most effective yet covert ways of molding California law." Id.

n8 See B. WITKIN, supra note 5, at 35.

n9 Gerstein, supra note 4, at 298. See also Weaver, The Precedential Value of Unpublished Judicial Opinions, 39 MERCER L. REV. 477, 478 n.7 (1988).

n10 Biggs, Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law, 50 S. CAL. L. REV. 1181, 1181 (1977).

n11 Id. at 1186.

n12 C. MONTESQUIEU, THE SPIRIT OF LAWS 372 (1977).

n13 9 B. WITKIN, CALIFORNIA PROCEDURE § 578, at 569-70 (3d ed. 1985). "Pursuant to its statutory authority, the Supreme Court adopted rule 976 in 1964, and since that time, the publication of opinions of the court of appeal and appellate department of the superior court has been on a selective basis." Id. at 570. See also Derevan, Depublication and its Mysteries: A Primer, ORANGE COUNTY LAW., Nov. 1989, at 16-17.

n14 Gerstein, supra note 4, at 295.

n15 Biggs, Censoring the Law in California: Decertification Revisited, 20 HASTINGS L.J. 1577, 1581 (1979) [hereinafter Censoring the Law].

n16 9 B. WITKIN, supra note 13, § 578, at 570.

n17 Kanner, The Unpublished Appellate Opinion: Friend or Foe? 48 CAL. ST. B.J. 377, 388 (1973).

n18 9 B. WITKIN, supra note 13, § 578, at 570.

n19 Id.

n20 Report of the Appellate Court's Committee on Proposed Rules for Publication of Appellate Court Decisions, Staff Attorney's Report, Mar. 3, 1980, at 1-2, [hereinafter Staff Attorney's Report]. See also Kanner, supra note 17, at 388.

n21 Kanner, supra note 17, at 388.

n22 Staff Attorney's Report, supra note 20, at 1.

n23 Appellate Court's Committee Report, Feb. 9, 1980, at 9 [hereinafter Committee Report]. If all of the opinions for the 6000 cases decided in 1979 were published, the space required to house the bound volumes would have been five times greater, or the difference between 12 volumes and 60 volumes. Staff Attorney's Report, supra note 20, at 1.

n24 Staff Attorney's Report, supra note 20, at 2.

n25 9 B. WITKIN, supra note 13, § 579, at 571-72. See also Uelmen, Depublication, L.A. LAW., Aug.-Sept. 1990, at 49.

n26 Rule 976(b) of the CAL. RULES OF COURT which states:
(b) [Standards for publication of opinions of other courts] No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:
(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
(2) resolves or creates an apparent conflict in the law;
(3) involves a legal issue of continuing public interest; or
(4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute or other written law.

n27 Id.

n28 Carrizosa, supra note 7, at 65.

n29 Id.

n30 Grodin, supra note 3, at 514-15.

n31 Carrizosa, supra note 7, at 65.

n32 Id.

n33 Id. at 65.

n34 Id.

n35 Uelmen, Mainstream Justice, CAL. LAW., July 1989, at 40 [hereinafter Mainstream Justice]. The increased use of depublication by the court is directly related to a drop in the grants of hearing. During its first year (1987-88) the Lucas court depublished 126 cases - 76 civil and 50 criminal. Concurrently the court granted a hearing to 204 (145 civil and 59 criminal). During the preceding 10 years the court averaged 268 grants of hearing per year. During the court's 1988-1989 year the total depublished climbed to 142 cases (98 civil and 44 criminal). During their 1989-1990 year depublication orders dropped to 117 cases (61 civil and 56 criminal). Correspondingly, grants of hearing also dropped precipitously to 80 (50 civil and 30 criminal). See also Uelmen, supra note 25, at 55.

n36 Mainstream Justice, supra note 35, at 37.

n37 Id.

n38 Id.

n39 See generally Grodin, supra note 3. See also Derevan, supra note 13, at 18.

n40 B. LEVY, CARDOZO AND FRONTIERS OF LEGAL THINKING, WITH SELECTED OPINIONS 84 (rev. ed. 1969). A modern day judge's reflection of this view is encompassed in the following statement: "I work in the vineyards of the law. . . .I work as an artist who paints interesting and provocative canvasses so that this world can share the law." Transcript of Telephone Interview with Judge Howard B. Weiner, 4th Dist. Court of Appeal (May 30, 1990) (on file at the Law Review Office of Western State University College of Law) [hereinafter Weiner interview].

n41 Grodin, supra note 3, at 514-15.

n42 Gerstein, supra note 4, at 298.

n43 Kanner, supra note 17, at 388. It is important to make a distinction among the three categories of opinions as they relate to the rules of publication. Unpublished opinions are those opinions which were not certified for publication by the Appellate panel. They may not be cited in court to establish precedent pursuant to Rule 977 of the California Rules of Court. Published opinions were certified as publishable thus complying with one of the standards required to defeat the presumption against publication. Depublished opinions derive from the category of published opinions but because of the mandate to strike their publication, they join the ranks of unpublished opinions. See CAL. RULES OF COURT, Rule 976(b), 976(c)(1)(2), and 977(a).

n44 Silverman, The Unpublished Opinion in California, 51 CALIF. ST. B.J., Jan. 1976, at 40. "The unpublished opinion is written by a judge who knows it will not be published." Id.

n45 See Wiener interview, supra note 40.

n46 Biggs, supra note 10, at 1191-92.

n47 9 B. WITKIN, supra note 13, § § 582-83.

n48 Id. § 582, at 573-74.

n49 See, e.g., Davis v. State Farm, 214 Cal. App. 3d 227, (1989) (depublished by order of the California Supreme Court, Dec. 14, 1989) (notation in bound volumes, full text available in the advance sheets only).

n50 Gerstein, supra note 4, at 298.

n51 Id.

n52 K. LLEWELYN, BRAMBLE BUSH 126 (1st ed. 8th printing 1985).

n53 Id.

n54 Id. at 128-30.

n55 Id. at 72.

n56 Silverman, supra note 44, at 34.

n57 BLACK'S LAW DICTIONARY 144 (5th ed. paperback 1983).

n58 See generally Gerstein, supra note 4, at 295.

n59 See Grodin, supra note 3, at 514-15.

n60 See Carrizosa, supra note 7, at 66.

n61 Id.

n62 K. LLEWELYN, supra note 52, at 69.

n63 Carrizosa, supra note 7, at 66 (quoting from an interview with Bernard Witkin).

n64 Leflar, Sources of Judge Made Law, 24 OKLA L. REV 323-24 (1971).

n65 See Weiner interview, supra note 40.

n66 Id.

n67 Id. Judge Weiner expresses concern for the supreme court's use of depublication. Posing a rhetorical question, he asks whether the court really appreciates the common law any longer.

n68 See K. LLEWELYN, supra note 52, at 74.

n69 See Carrizosa, supra note 7, at 66.

n70 Id.

n71 Id.

n72 Id.

n73 C. MONTESQUIEU, supra note 12, at 372.

n74 See K. LLEWELYN, supra note 52, at 76.

n75 Id.

n76 Id.

n77 See Rule 976(b)(2), supra note 26. This rule expressly requires that courts of appeal publish those cases which criticize existing law. Id. "Yet, from the outset, the supreme court has depublished opinions that were sharply critical of existing law (in whose making the supreme court had a hand)." Kanner & Uelmen, Random Assignment, Random Justice, L.A. LAW., Feb. 1984, at 14.

n78 See Kanner & Uelmen, supra note 77, at 16.

n79 See MANUAL ON APPELLATE COURT OPINIONS § 18, at 29 (1977).

n80 See generally Law and Motion, CAL. LAW., Aug. 1990, at 18.

n81 B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 21-22 (1921).

n82 Leflar, supra note 64, at 319. See also Mentschikoff & Stotzky, supra note 2, at 706.

n83 Mentschikoff & Stotzky, supra note 2, at 706.

n84 Advisory Council for Appellate Justice, Standards For Publication of Judicial Opinions, app. I at 22.

n85 See Gerstein, supra note 4, at 294-95.

n86 Stare Decisis: to abide by or adhere to, decided cases. Policy of courts to stand by precedent and not to disturb settled point . . . . Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same . . . . Under doctrine a deliberate or solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy. BLACK'S LAW DICTIONARY 1577 (4th ed. 1968).
The California Supreme Court has held: "Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California." Auto Equity Sales, Inc. v. Superior Court, 57 Cal.2d 450, 455, 369 P.2d 937, 939-40, 20 Cal. Rptr. 321, 323-24 (1962).

n87 Kairys, Legal Reasoning, in THE POLITICS OF LAW, A PROGRESSIVE CRITIQUE 11 (D. Kairys ed. 1982).

n88 See generally id.

n89 Seligson & Warnlof, The Use of Unreported Cases in California, 24 HASTINGS L.J. 37, 50 (1972).

n90 Censoring the Law, supra note 15, at 1581.

n91 Gerstein, supra note 4, at 295.

n92 Id.

n93 Censoring the Law, supra note 15, at 1581.

n94 Staff Attorney's Report, supra note 20, at 3.

n95 Id.

n96 CAL. RULES OF COURT, Rule 977. Citation of Unpublished Opinions Prohibited; Opinions Ordered Published By Supreme Court
(a) [Unpublished opinions] An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).
(b) [Exceptions] Such an opinion may be cited or relied on:
(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or
(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.
(c) [Citation procedure] A copy of any opinion citable under subdivision (b) shall be furnished to the court and all parties by attaching it to the document in which it is cited, or, if the citation is to be made orally, within a

reasonable time in advance of citation.
(d) [Opinions ordered published by Supreme Court] An opinion of the Court of Appeal ordered published by the Supreme Court pursuant to rule 976 is citable. (footnote omitted)

n97 Id.

n98 See letter from attorney Ellis Horvitz to Author, (Mar. 27, 1990) (on file at the Law Review Office of Western State University College of Law) [hereinafter Horvitz letter]. The reference to clients, in this context, is generally reflective of institutional litigants. Such institutional litigants are often positioned as defendants in matters where the plaintiff is a sole individual seeking a remedy for a loss suffered. The potential dollar loss of the particular judgment is not as damaging to the defendant as a bad precedent will be. In contrast, most individual litigants are concerned with the result of the matter before the court and not its precedential significance.

n99 See Uelmen, supra note 25; see also Mainstream Justice, supra note 35, at 40.

n100 See generally Uelmen, supra note 25.

n101 THE WORLD BOOK DICTIONARY 2042 (1987).

n102 Grodin, supra note 3, at 523.

n103 Id.

n104 B. LEVY, supra note 40, at 184 (rev. ed. 1969) (citing Globe Woolen Co. v. Atica Gas Electric, 224 N.Y. 483, 121 N.E. 378 (1918)).

n105 See Kanner, supra note 17; see also Uelmen, supra note 25, at 49.

n106 Uelman, supra note 25, at 49.

n107 Id.

n108 Committee Report, supra note 23, at 9.

n109 Id.

n110 Id. at 9-10. See also Kanner, supra note 17, at 390.

n111 Uelman, supra note 25, at 49.

n112 Uelmen, Losing Steam, CAL. LAW., June 1990, at 43 [hereinafter Losing Steam.] See also Uelmen, supra note 25, at 51.

n113 Uelman, supra note 25, at 49.

n114 Id.

n115 CAL. RULES OF COURT, Rule 979. Requesting Depublication of Published Opinions.
(a) [Request procedure] A request by any person for the depublication of an opinion certified for publication shall be made by letter to the Supreme Court within 30 days after the decision becomes final as to the Court of Appeal. Any request for depublication shall be accompanied by proof of mailing to the Court of Appeal and proof of service to each party to the action or proceeding. The request shall state concisely reasons why the opinion should not remain published and shall not exceed 10 pages.
(b) [Response] The Court of Appeal or any person may, within 10 days after receipt by the Supreme Court of a request for depublication, submit a response, either joining in the request or stating concisely reasons why

the opinion should remain published. Any response shall not exceed 10 pages and shall be accompanied by proof of mailing to the Court of Appeal, and proof of service to each party to the action or proceeding, and person requesting depublication.
(c) [Action by Supreme Court] When a request for depublication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion depublished or deny the request. The court shall send notice of its action to the Court of Appeal, each party, and any person who has requested depublication.
(d) [Limitation] Nothing in this rule limits the court's power, on its own motion, to order an opinion depublished.
(e) [Effect of Supreme Court order for depublication] An order of the Supreme Court directing depublication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court or of the correctness of the result reached by the decision or of any of the law set forth in the opinion.

n116 See Uelmen, supra note 25, at 49.

n117 Gardner v. Charles Schwab & Co., 217 Cal. App. 3d 1303, 1328, 267 Cal. Rptr. 326, 341 (1990) (depublished by order of the California Supreme Court, May 18, 1990).

n118 Id. at 340 (emphasis added).

n119 See generally id.

n120 See Uelmen, supra note 25, at 51.

n121 Grodin, supra note 3, at 514 n.1.

n122 See Uelmen, supra note 25, at 51.

n123 Id.

n124 Grodin, supra note 3, at 523 n.27.

n125 See Uelmen, supra note 25, at 54; see also Biggs, supra note 10, at 1190.

n126 See Uelmen, supra note 25, at 54.

n127 CAL. RULES OF COURT, Rule 14(b).

n128 Id. See also CALIFORNIA CIVIL APPELLATE PRACTICE § 14.12, at 427 (1985).

n129 CAL. RULES OF COURT, Rule 14(b).

n130 Id. See also Uelmen, supra note 25; Censoring the Law, supra note 15, at 1581.

n131 CALIFORNIA CIVIL APPELLATE PRACTICE § 14.9, at 425 (1985) (emphasis added).

n132 Id. § 14.10, at 426.

n133 Id.

n134 217 Cal. App. 3d 1303, 267 Cal. Rptr. 326 (1990) (depublished by order of the California Supreme Court, May 18, 1990).

n135 Id. at 1324-29, 267 Cal. Rptr. at 338-41.

n136 Id. at 1325, 267 Cal. Rptr. at 339.

n137 Id. at 1327, 267 Cal. Rptr. at 340.

n138 Gardner, 217 Cal. App. 3d at 1327, 267 Cal. Rptr. at 340; see also Mainstream Justice, supra note 35.

n139 Gardner, 217 Cal. App. 3d at 1328, 267 Cal. Rptr. at 340.

n140 CALIFORNIA CIVIL APPELLATE PRACTICE § 14.20 (1985).

n141 Id. An example of the "Catch 22" effect of such reasoning follows: letters which fail to comply with notification mandates cannot be considered briefs and are not accorded the status of court records. If they are not records of the court they do not require notice to other parties. Thus, letters failing to give notice are not records of the court therefore they are not required to give notice! See also Gardner, 217 Cal. App. 3d at 1328, 267 Cal. Rptr. at 340.

n142 CALIFORNIA CIVIL APPELLATE PRACTICE § 14.17 (1985). See also CAL. RULES OF COURT, Rule 979(a) (requiring notice to parties when requesting depublication).

n143 Censoring the Law, supra note 15, at 1581.

n144 Id. at 1592 n.62.

n145 Id.

n146 Id.

n147 Id. See also Gardner v. Charles Schwab & Co., 217 Cal App. 3d 1303, 1328, 267 Cal. Rptr. 326, 340 (1990) (depublished by order of the California Supreme Court, May 18, 1990).

n148 Carrizosa, supra note 7, at 65.

n149 Id.

n150 Id. See copy of amicus curiae letter filed in the matter of Aetna Casualty & Surety Company v. Velasco (Dec. 29, 1987), (letter on file in the Law Review office of Western State University College of Law). Attorneys filed this amicus curiae brief on behalf of their clients: the Association of California Insurance Companies (a voluntary association of 39 insurance companies, both domestic and foreign, licensed to do business in California); the American Insurance Association (a national trade association of approximately 175 property and casualty insurance companies) whose member companies account for 26 percent of the property and casualty insurance carried throughout the United States; the Alliance of American Insurers (a trade association of approximately 175 companies writing property and casualty insurance throughout the United States) whose member companies account for approximately 12 percent of the property and casualty insurance written in the United States; and the National Association of Independent Insurers (a trade association of more than 500 property and casualty insurance companies) whose members write nearly 22 percent of the property and casualty insurance in force in the U.S. See also interview with John Findley of the Pacific Legal Foundation (May 30, 1990) (transcript on file at the Law Review office of Western State University College of Law). Mr. Findley is a conservative advocate, often requesting review of opinions found to be adverse to conservative interests or, in the alternative, urging depublication.

n151 See generally Mainstream Justice, supra note 35. See also CALIFORNIA CIVIL APPELLATE PRACTICE § 14.9 (1985).

n152 See Carrizosa, supra note 7. See also amicus curiae letter, supra note 150, stating, "We believe review or, in the alternative, depublication is necessary because the opinion of the Court of Appeal departs from settled precedent and announces a rule of law that will dramatically increase litigation and the cost of insurance to the premium paying public." (emphasis added).

n153 Carrizosa, supra note 7, at 66.

n154 See Horvitz letter, supra note 98.

n155 The Deeds They Have Undone, CAL. LAW., Dec. 1990, at 18 (Hearsay column). "As part of its promotional material, Horvitz & Levy of Encino includes a six-page list of cases decertified by the Supreme Court in the last six years in which the firm says it has participated. "Participation" does not mean that Horvitz & Levy represented a party. In 12 of the 26 cases on the list, the firm wrote an 'amicus letter.' In another, it was 'requesting decertification to benefit our client in another case.'" Id. (emphasis added). It must be noted that senior partner Horvitz dissembled that the decertification list should not have been included with the promotional materials. "'That is something we prepared for our institutional clients who are interested in depublication'." Id.

n156 Id. See also CALIFORNIA CIVIL APPELLATE PRACTICE § 20.9, at 527 (1985).

n157 See telephone interview with attorney Timothy Orr (July 15, 1990) (transcript on file in the Law Review office of Western State University College of Law). In the interview, Mr. Orr described the economic state of the plaintiffs opposing the insurance industry in the matter addressed by amicus curiae letter quoted in footnote 152. "They were a poor little hispanic couple who owned a small drive-in-dairy and suddenly found themselves facing a multi-million dollar lawsuit."

n158 Proverbs 13, 23.

n159 See Horvitz letter, supra note 98.

n160 C. MONTESQUIEU, supra note 12, at 373.

n161 Gerstein, supra note 4, at 298.

n162 Censoring the Law, supra note 15, at 1583. By way of analogy consider that if the government were to strike all future publication of J.D. Salinger's Catcher in the Rye, would we not call that censorship? Would it not be relegated to the same fate as the depublished opinion, i.e., those with copies of the opinion would have it but it would no longer be available (for whatever reason) in libraries or to others?

n163 Gerstein, supra note 4, at 298. But see letter from Judge Arthur G. Scotland to the Author (May 23, 1990) (letter on file at the Law Review office of Western State University College of Law). "While decertification can erase law, it cannot make law." Id.

n164 Mainstream Justice, supra note 35, at 40.

n165 The power given to the supreme court enabling the court to depublish appellate opinions is authorized by the California Constitution which provides that "the Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate . . . ." CAL. CONST. art VI, § 14.

n166 See generally Losing Steam, supra note 112, at 43.

n167 See Carrizosa, supra note 7, at 65.
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