

*Report of the
Commission on the
Future of the
California
Courts*

JUSTICE IN THE BALANCE
2020

A Preferred Future for the California Courts, c. 2020

IT IS 2020. In both perception and practice the California courts are scrupulously fair, accessible to all. Comprehensible and comprehending, they have the confidence of the powerless and the powerful, the poor and the wealthy, the victim and the offender. Their commitment to high-quality, equal justice is absolute.

IT IS 2020. Justice's greatest asset is its servants, who in every action personify respect for public service and a commitment to the public's interest. Judges and other dispute resolution providers are the embodiments of excellence. They are culturally competent, representative of the genders, races, and ethnicities they serve. They are community leaders, outspoken advocates for justice in its broadest sense.

IT IS 2020. The courts have evolved into a truly multidimensional justice system consisting of: multioption justice centers; smaller, publicly supported community dispute resolution centers; and numerous private providers. Together, they offer a wide range of appropriate dispute resolution options. Resolution processes are fit to the dispute, rather than the converse. Bench and jury trials are reserved

for the disputes that genuinely need them. Superior case assessment, assignment, and management have led to far greater efficiency, without compromising quality. Language has long since ceased to be a barrier to effective access. While the system is both human and humane, technology plays a key role as access provider, facilitator, and justice enhancer.

IT IS 2020. Justice remains loyal to its age-old principles, yet is much changed. Its transformation is in part the result of sustained public investment in the courts. At the same time, society is less inclined to view the courts as the emergency room for society's most stubborn ailments; Californians recognize the economies and benefits of treating conflict's causes, as well as its symptoms. Children are the beneficiaries of much of this resolve. Their health, nurture, and education are public pri-

orities, signifying society's determination to care for the future by caring for those who will inhabit it.

IT IS 2020. Californians are committed to conflict reduction and crime prevention. Courses in conflict resolution and the role of the public justice system are taught in every school at every level. As a result, the average Californian understands disputes and how to resolve them — quickly, affordably, and fairly. Though more accessible, comprehensible, and effective than their forebears, 21st-century "courts" actually process a smaller volume of disputes. The public views them not as the dispute resolvers of last resort, but as the appropriate recourse when constructive self-help is not enough.

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This report was developed with grants from the State Justice Institute, the Weingart Foundation, the Amicus Foundation, and other contributors. Points of view expressed herein are those of the commission and do not represent the positions or policies of the grantors.

COMMISSION ON THE FUTURE OF THE CALIFORNIA COURTS

Robert R. Dockson *Chair* ♦ Howard P. Allen *Vice-chair*

December 1, 1993

Hon. Malcolm M. Lucas
Chief Justice
Supreme Court of California
San Francisco, California 94107

Dear Chief Justice Lucas:

It is with great pleasure that I transmit to you the final report of the Commission on the Future of the California Courts: Justice in the Balance, 2020.

The report represents more than two years of intensive work by 43 committed, independent individuals drawn from a broad spectrum of professions and interests. What unified this diverse group was a commonly held vision of a high-quality justice system, accessible to all Californians.

This is truly a consensus document. Given the commission's heterogeneous membership, it was inevitable that not every member would or could agree completely with every recommendation. Nonetheless, it is extremely gratifying that despite my invitation to members to author brief statements of dissent from any commission recommendation with which they disagreed strongly, none felt it necessary to do so.

I confess that when you asked me to serve as the commission's chairman I could not foresee clearly all that the job would entail. Conjuring up a vision of "preferred justice" for the courts of the future seemed a truly herculean task. While that judgment proved to be accurate, what was even more difficult was identifying the myriad obstacles to the vision's realization,

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and the steps necessary to overcome them. Despite such challenges, we believe we have largely succeeded in our mission. We hope that the report will serve as a cornerstone for all those who seek to improve today's courts.

As you know, I am not a lawyer. This proved both a hindrance and an asset. It was a hindrance in that I needed a fair amount of remedial education on a number of issues that lawyers and judges deal with daily. It was an asset insofar as it better allowed me to see from a layperson's perspective the challenges confronting the courts of today and tomorrow. While the public's confidence in the American way of justice is largely intact — as is my own, certainly — there is a widespread public perception that the judicial branch is in need of major repair. Many or most of such weaknesses have their roots in the profound social and economic changes that California has witnessed in the last two decades. The commission's 200-or-more recommendations are offered with an acute awareness of the inseparable relationship between justice and socioeconomic realities.

As of this writing, California remains mired in a serious recession. The tremendous population increase that the state has witnessed in the last 30 years, the state's changing demographic profile, the increase in crime, the recent decline in employment, and the dramatic reduction in public resources have all had a profound impact on the courts. These and other trends are analyzed at length in the pages that follow. Indeed, they provide the foundation for many of the commission's recommendations.

There is one issue about which I feel especially strongly, an issue that underscores virtually every other area in the report, and that is the critical importance of justice. Perhaps even more than education, even more than employment, even more than health care, justice is the indispensable component of a healthy society. If the courts of 2020 are to be truly independent, viewed by all as a coequal branch of government and not merely "just another agency," all of us, both inside and outside government, must commit ourselves to ensuring the adequacy of their support. At stake is the courts' very ability to provide equal, accessible, affordable justice for all. This report's chapter on governance gives voice to the need to preserve zealously the independence of the judiciary. The chapter on finance makes a number of proposals for rethinking court revenues, spending, and resource management. It is my sincere hope that these recommendations will receive the careful attention they so clearly deserve. To the greatest extent possible,

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we must make certain our courts are removed from politics and that Californians are not shortchanged when it comes to justice.

This report is the product of many contributions by many people. The commission's 43 members collectively devoted thousands of volunteer hours to the project, and did so with enthusiasm, imagination, and conviction. To them, especially, I extend my warmest thanks. Indispensable leadership and committee guidance was provided by the members of the commission's Executive Committee: Scott Bice, Dean, University of Southern California Law Center; Richard Chernick, Attorney, Gibson, Dunn & Crutcher; Honorable Harry W. Low, Associate Justice (Retired), Court of Appeal, First Appellate District; Honorable Judith McConnell, Judge of the Superior Court, San Diego County; Honorable George Nicholson, Associate Justice, Court of Appeal, Third Appellate District; and Honorable Vance W. Raye, Associate Justice, Court of Appeal, Third Appellate District. Other important contributors included: the commission's research paper authors; Keith Boyum and Ed Trotter, our evaluators; Paul Saffo and the Institute for the Future; the many individuals who testified at commission public hearings; the participants at our December 1992 symposium; the experts who participated in the commission's Delphi study; and many others.

Thanks are also due to the commission's staff. We would not have this report today but for the long hours contributed by Steve Johnson, the document's author. Steve shaped the substance of the report, translated the commission's vision of future justice into words, sought members' comments and suggestions on the several drafts, and responded to them with tact and creativity. The project was planned initially by Andrea Biren, and ably administered by Rochida Alfred; oversight was provided by Robert Page, Chief Deputy Director of the Administrative Office of the Courts (AOC). The AOC contributed many additional staff hours to ensuring the project's success, especially in the extensive work of those who assisted the commission's seven committees, the commission's two excellent summer interns, the staff of the Research and Statistics department, and the office's designers, typesetters, and publications editor.

No project of this scope and magnitude can succeed without significant funding. The commission acknowledges with sincere gratitude the State Justice Institute's initial grant, the generous support of the Weingart Foundation, the contribu-

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tions of a large number of California individuals, corporations, and law firms, and the in-kind contributions of the Judicial Council of California and the Administrative Office of the Courts. We are especially indebted to Howard Allen, Vice-Chair of the commission, for his successful fundraising activities.

Last, and certainly not least, the commission thanks you for having the vision and resolution to embark on this project. As Dean Roscoe Pound once said, this work is not for the faint of heart. Your determination to launch a study that inevitably would find the courts wanting in some important respects is ample proof of your courage and sincerity. I am personally grateful to you because without your urging, I would not have chaired this effort, and thus would have missed one of the most interesting and exciting experiences of my life.

Although the publication of this volume brings our study to a close, the work has clearly just begun. The commission's vision of justice in the next century is accompanied by more than 200 recommendations and strategies for implementation. Some of the initiatives we propose can be accomplished in the near future. Others, even with aggressive leadership, are unlikely to be fully achieved by 2020. However, we do believe the implementation of these recommendations will go far toward improving not only the perception but also the reality of justice in California. We hope our work will serve you well as you lead the courts into the next century.

Sincerely,



Robert R. Dockson
Chairman

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It is no news that California is changing — rapidly, dramatically, irrevocably. By the year 2020, roughly 50 million people will make the state their home, and their demographic profile will be very different from the nation’s as a whole. The vast number of peoples and cultures resident in the state will exceed 1993’s. Today’s polyphony of 224 languages will have been joined by others. Indeed, by the year 2000 everyone in California will be a minority. This much is fairly certain.

Less certain is whether the social compact that governs the multicultural society of 2020 will be healthy or malignant — whether most Californians will have jobs, enjoy a quality education, or inhabit an environment that can fairly be described as hospitable. The realities of 2020 are being shaped today, sometimes purposefully, sometimes not. The choices of the 1990’s will reverberate loudly in the third decade of the 21st century.

While California in 2020 will have a third branch of government consisting of at least in part of judges and courts, it is not possible to forecast with precision whether the 3,357,688 nontraffic/nonparking disputes filed in 1991–92 will represent a peak or a valley on the historical bar chart of case filings. It is not known whether the courts will be resolving more disputes with fewer resources, or fewer disputes with fewer resources. Nor can it be predicted whether by 2020 the courts will be more or less accessible to the poor and the middle class, whether they will be more or less comprehensible to the average user, or whether they will offer a full range of dispute resolution options within their own walls.

Few near-term public policy decisions will have greater long-term impact than those made by and affecting California’s courts. Courts, in addition to being the law givers, symbolize the law’s primacy in a civilized society. If such symbols are to have currency, if the law is to have authority in the next century, then the courts must begin now to anticipate the dramatic changes ahead. Better yet, they should be willing to become agents of change, positive participants in shaping a preferred future for California. The choice to be partners or bystanders in the process is the courts’ to make. How that and related decisions are made today will have profound consequences for all Californians tomorrow.

INTRODUCTION



**“Where there is no vision,
the people perish.”**

Dr. Mattie M. Walker, Los Angeles Hearing, April 29, 1993

*“It will be
important to stay out in the future.
This is not a
court reform commission.
I am not asking you
to deal with the problems of today,
but those we may encounter
in 30 years.”*

Chief Justice Malcolm M. Lucas,
Address to the Commission,
December 12, 1991

COMMISSION ORIGINS

Long before the creation of the Commission on the Future of the California Courts in December 1991, Chief Justice Malcom M. Lucas was speaking publicly about the growing need to plan for the future of the third branch. In an address to the State Bar Board of Governors in late 1990 the Chief Justice said: “We need to anticipate change and plan for action. We need to lead and not wait to be led into the next millennium.”

The Chief Justice was not implying that the courts were inattentive to their future. To the contrary, both the Judicial Council — the courts’ policy-making body — and the local courts had been engaged in planning activities for some time. But by 1990 it was clear that new approaches were needed. It was evident, for instance, that existing methods of projecting future resource needs were deficient. Judgeship needs were being calculated on a weighted caseload basis, an inadequate planning device. The method’s shortcomings were illustrated in a RAND Corporation study, “Averting Gridlock: Strategies for Reducing Civil Delay in the Los Angeles Superior Court,” which found that Los Angeles alone was short 106 judges.

In 1990, as this commission’s foundations were being laid, the annual budget process was the principal planning tool for both the Judicial Council and the state’s 58 counties. While the council had for some time been engaged in an annual planning and priority-setting process, its focus was fairly near-term. Determined to develop what in

recent years has become known as “the long view,” the Judicial Council in its 1991 Annual Plan identified a new priority: the Commission on the Future of the California Courts.

What the Chief Justice and the Judicial Council contemplated was a planning process fairly novel in the nation’s courts at that time, one known as “alternative futures planning.” Embracing conventional forecasting, trend analysis, and scenario construction, alternative futures planning allows policy and decision makers better to anticipate what the future *might* be, in order to propose what it *should* be. That “preferred future” then becomes the target at which subsequent planning efforts are aimed.

Mandate and method defined, the Chief Justice appointed a commission chairman: Dr. Robert R. Dockson, founder and former dean of the Graduate School of Business at the University of Southern California, and chairman-emeritus of CalFed, Inc. Next, potential members of the “blue-ribbon” commission were identified. It was clear that the commission’s membership needed to be diverse, representative of the courts’ many constituencies. Accordingly, in late 1991 the Chief Justice and the commission chairman selected (and the Chief Justice appointed) 40 members to the commission: representatives of the public at large, the judiciary, the Legislature, the executive branch, academia, law enforcement, the business community, citizens’ groups, court administrators, futurists, and others. Five additional members were added in January 1993.

On December 12, 1991, the commission assembled for the first time. In addressing the members Chief Justice Lucas charged them to: explore the trends likely to affect the courts of the future; create a vision of a preferred future for the courts; and develop a set of recommendations to move the courts toward that future. To those assembled it seemed a task of daunting proportions. They would not be proved wrong.

WORKING ITS WAY INTO THE FUTURE

The commission set to work. Its first task was to find funds to support the ambitious project. Initial funding was secured from the State Justice Institute, a nonprofit corporation created and funded by Congress to support innovation and planning in the state courts. Next, under the chairman's leadership, a substantial grant was obtained from the Weingart Foundation. Vice-Chair Howard Allen and a number of other commission members also succeeded in obtaining support for the project.

The commission was divided into five committees, each assigned to a major area of inquiry: Alternative Court Structures; Civil Cases; Crime; Family Relations and Juvenile Justice; and Technology. (Two additional committees — Governance and Finance; Appellate Justice — were added later.) To lay the substantive groundwork, the commission spent much of the first half of 1992 identifying and contracting with California and national

scholars to author 15 research papers for the commission. The papers emerged as valuable commentaries on the California courts of today and tomorrow. Most can be found in volume 66, no. 5 (Fall 1993) of the *University of Southern California Law Review*. The paper on appellate justice is published at 45 *Hastings Law Journal* no. 2 (January 1994).

Because the commission was vitally interested in public opinion about the courts, in 1992 it retained the national opinion research firm of Yankelovich, Skelly & White/Clancy Shulman ("Yankelovich") to conduct telephone interviews with 1,000 English-speaking California residents, 250 Spanish-speaking California residents, and 250 attorneys. Sometimes predictable, often unexpected, the results of that survey are reported extensively in the pages that follow, primarily in Chapter 5, Public Trust and Understanding.

In late 1992, the commission also contracted for a written and oral survey of Californians expert in the law and the courts, a so-called "Delphi study." In numerous interviews and meetings, 106 judges, academics, lawyers, and others proposed possible futures for the California courts.

In an attempt to become better futurists, the commission retained the Institute for the Future (IFF), a prominent forecasting organization, to inform and train the commission's members in the futures process, and to prepare a comprehensive forecast of California's demographic, economic, sociological, and technological futures. Much of that data appears in Chapter 1.

Important to the commission's work throughout

*“We invite you
to share your views on
the need to rethink and redesign
existing practices and
procedures that will strengthen
our California courts. . . .
Our goal is to
create a shared vision of
a more ideal system of justice for
tomorrow.”*

Commission Chairman
Dr. Robert R. Dockson, Invitation to
Los Angeles and Statewide Hearings

its life was the ongoing, objective project evaluation supplied by Dr. Keith Boyum and Dr. Edgar Trotter of California State University, Fullerton.

From the beginning, the commission was determined to involve the courts and legal communities in its work. To that end, a number of committees hosted forums to advance their research and deliberations. Among others, the Technology Committee and the Family Relations and Juvenile Justice Committee each held two such meetings. The Civil Committee, working with the RAND Corporation, convened a number of focus groups on discovery reform.

Of all the commission’s outreach efforts, the most ambitious was its December 1992 statewide symposium on the future of the courts. For two days in San Francisco the commission and 300 individuals representing every type of justice system operative and user debated the commission’s questions, its preliminary ideas, and its research. Those discussions sowed the seeds of many of the recommendations that appear in the following pages.

With the new year came a new phase in the commission’s work: public hearings, consensus building, and report preparation. In the early months of 1993 the committees completed their work. In the spring, the commission met for four days of deliberation on the preferred future of the courts, and the strategies necessary to achieve that vision. With the dimensions of the preferred future defined and a working set of proposals in hand, staff set about drafting this report.

Seeking more personal and anecdotal testimony than had been obtained from the Yankel-

ovich public opinion survey, the commission organized two rounds of public hearings for 1993.

In April 1993 the commission held four hearings in largely non-White Los Angeles communities. Los Angeles was selected because, by a range of measures, the effectiveness and fairness of the courts was a highly visible issue there. Organized by commission member William Johnston — former Superintendent of the Los Angeles Unified School District — in cooperation with the district’s Division of Adult Education, the hearings produced a wealth of comment as well as impassioned testimony from ordinary citizens about the confusion and misunderstanding that many Angelenos — especially non-English speakers — feel as they attempt to navigate the corridors of justice. Many of those thoughtful, creative suggestions for change appear in the following pages.

A second set of hearings was held in August 1993, co-sponsored by the League of Women Voters. Sited in Eureka, Fresno, Los Angeles, San Diego, San Francisco, and San Jose, their purpose was to sample opinion from a more geographically representative cross section of the population, and to invite the testimony of justice system personnel (judges, administrators, and criminal justice personnel) and representatives of interest groups and civic organizations (community, bar, advocacy, and business), as well as the interested public. The commission also distributed selected preliminary recommendations to witnesses in advance. Between August 16 and 25 the commission heard from more than 150 witnesses on topics that ranged

from new court structures to mechanizing justice, from decriminalization to public education about the courts. Testimony from those hearings, too, is referenced throughout the report.

In September 1993 the full commission again convened for two days, this time to review, debate, modify, and eventually adopt the commission's draft report. As the report goes to press, the commission's intention is to present it to Chief Justice Lucas and the Judicial Council in January 1994.

RETHINKING THE FUTURE

Future-of-the-courts work is not intuitive. Its origins and its methods bear brief explanation.

Those who are skeptical about long-range and futures planning in the courts can be divided into two camps. In the first are those who believe that court systems are basically static creatures, like leopards, unable to change their spots. In the second are those who believe that courts *can* change, but only with superhuman effort. Among this group are those who have witnessed endless court reform campaigns, the birth and death of strategic plans, the eternal unveiling of remedial initiatives and pilot projects, and have seen too few results.

Neither brand of skepticism is entirely unjustified. The endurance and the success of courts is partly due to their adherence to age-old tenets and traditions; judicial credibility is closely associated with judicial constancy. It is also true that the

hallmark of Anglo-American justice — the clash of opposing arguments before a neutral finder of fact — has remained its cornerstone for centuries, relatively undisturbed. Skeptics about change can also point to the plentiful wreckage of failed legislation aimed at reforming the structures and processes of justice.

But there are also idealists, those who seek to change the judicial status quo because despite often heroic efforts, today's courts are not as good as they can be. Over the past 50 years these hopefuls have often sought to change the justice system. Many such efforts have failed, at least for now. One example is the effort within the courts and the Legislature to secure a stable funding base for the judiciary, which, although enacted into law, continues to elude implementation. But other campaigns appear about to succeed. Trial court unification, the subject of a 30-year effort, is, at this writing, enticingly close to becoming a reality. And there are other major reform efforts that can fairly be termed successes, civil delay reduction in the trial courts being but one example.

Change in the courts is possible. But there are more efficient, more effective ways for courts to meet tomorrow's challenges. This commission's charge was to find such a way.

COMMISSION PREDECESSORS

In 1990, when planning for the commission was still in its infancy, only a handful of states — Hawaii, Virginia, and Arizona — had completed court futures projects. What galvanized the nation's courts

*“In planning
for the future, the
candid and constructive suggestions
of concerned citizens
are the most valuable resource
we have for
informing ourselves
about public will and public
preferences.”*

Chief Justice Malcolm M. Lucas,
Written Welcome at Statewide and
Los Angeles Hearings

*“The law
tends to exercise foresight
through a
rear-view mirror.”*

James Dator,
Futurist,
University of Hawaii

and launched at least a dozen futures projects in as many states was The Future and the Courts Conference, a national symposium on court futures convened in May 1990 in San Antonio. Organized and funded by the American Judicature Society and the State Justice Institute, the conference brought together for four days 300 judges, lawyers, futurists, legal scholars, social scientists, doctors, technology experts, and others, including Chief Justice Lucas and three Californians who were to go on to become members of this commission. Many participants arrived at the conference counting themselves among the skeptics. Most departed converted. Commenting on this transformation at the California commission’s December 1992 symposium, Chief Justice Lucas said:

The participants . . . were polled about their visions of improved future justice. The results were startling, not only because of the wide support for dramatic changes in our state courts, but also because of who the respondents were. Among others, they included the chief justices of at least five states. Notwithstanding the presence of that radical faction, only 11 percent of the conferees preferred a status quo vision of the future. Half voted for considerable change, and 40 percent favored dramatic change — in other words, a system not found in the United States today.

The Chief Justice’s surprise was shared by many. Most judges and lawyers are neither trained nor naturally inclined to be futurists. To the con-

trary, the law often requires the opposite — looking backwards to rules and principles of sometimes ancient origin. The past, as precedent, is the law’s most familiar roadmap.

TRENDS

One of the most difficult tasks in futures work is learning to think creatively, even fancifully, about the future. The first step typically includes trend identification. Trends are patterns of change over time in which can be found intimations of the future. The first chapter of this report discusses present-day demographic, sociological, economic, and technological trends in the state. It also provides a *forecast of tomorrow’s profile*. The trends identified below are the forecasts of the judicial and nonjudicial participants in the commission’s Delphi study. The 106 experts who participated in that study were asked to identify and rank both the socioeconomic and court-related trends likely to have the most significant impact on the state in coming years. Because the responses of judicial and nonjudicial respondents are merged, the ranking of items is inexact.

Significant Socioeconomic Trends for California’s Future Identified in the Commission’s Delphi Study

1. Growth of violence in society.
2. Illegal drug trade.
3. Unbreakable poverty cycles.
4. Weakening of the family.
5. Handgun availability.

6. Children in poverty.
7. Parental abdication of responsibility for children's conduct.
8. Widening gap between rich and poor.

Significant Court-Related Trends for California's Future Identified in the Commission's Delphi Study

1. Caseload growth.
2. Prison overcrowding.
3. Insufficient court funding.
4. Escalating litigiousness.
5. Alternative dispute resolution.
6. Court-linked family needs.
7. Corrections failures.
8. Judicial compensation.

This inventory has a decidedly negative cast. With the exception of the hoped-for growth in alternative dispute resolution, it paints a gloomy picture of California in the next century. Absent from the canvas is the promise of a brighter future tied to, for instance, declining drug use, technology's applications for justice, genetic engineering, or the greater social stability that is associated with the state's aging population.

Comparison with a comparable national survey conducted in 1990 reveals significant differences. California panelists were much more concerned about the trend toward violence in society than were the national respondents. While poverty was prominent in both surveys, environmental degradation and ensuing disputes were deempha-

sized by the California panel. On a positive note, California respondents evidenced much more confidence in the quality of their state judges than did their national counterparts.

Chapter 1 explores some of these trends' likely consequences for the courts.

SCENARIOS

Straight-line projections of present-day trends can sometimes yield useful insights about the future. But they can also miss the truly unexpected event that will render linear projections, at best, erroneous. An obvious recent example is the collapse of the Soviet Union, an event that consigned to the dust heap of history the projections of all but the most prescient foreign observer. Effective futures planning requires tools that better indicate the future's complexity: scenarios of alternative futures.

A scenario is a snapshot of a possible future. It represents a combination of trends, events, and ideas in an image of what *might* be. Because there are many potential futures, scenarios are most useful in multiples. Equipped with knowledge of the possible, organizations and individuals can better identify the preferred.

"Wild card" scenarios are images that describe seemingly outlandish and impossible futures. Ten years ago the collapse of the Soviet Union would have been such a scenario; 75 years ago space travel would have qualified. By proposing the seemingly preposterous, wild card scenarios illustrate the need for contingency planning.

Among the negative scenarios that have

"Alternative futures planning is not about predicting the future but about postulating a plausible range of futures, to help us select that which we hope to see. Remember Ebenezer Scrooge. When the Ghost of Christmas Past shows him a scenario of a possible future based on trends in Scrooge's life, Scrooge asks, 'Are these things that must be, or only things that may be?' The answer for Scrooge and for us is that we may create and choose the vision of the future that we prefer, and then seek to make it real."

Commission Chairman
Dr. Robert R. Dockson, Address to the
Symposium on the Future of the Courts,
December 1992

*“Some see
things as they are and say
‘Why?’
I dream
things that never were and say
‘Why not?’”*

George Bernard Shaw

been suggested for the future of the courts are those in which social disintegration has been so complete that the courts no longer have authority or purpose and have been either co-opted or suppressed by the powerful. Not quite so apocalyptic is a future in which there are essentially no resources at all for the courts (or any other branch of government), in which the only justice is private, governing relations among the rich while the underclass exists in virtual anarchy.


Positive scenarios often include images of a world transformed for the better through the use of technology. With respect to the courts, such a future might include “courthouseless courts” in which litigants, judges, and witnesses interact in video, holographic, or virtual reality environments. Other futures assume societal changes that create a greater sense of community responsibility, a greater focus on solving basic social problems, far less conflict, and far fewer lawyers. And there is the back-to-the-future scenario in which the judiciary looks and acts much as it does today, only better funded and organized. In one “wild card” future the judiciary is ascendant and has assumed responsibility for virtually all the functions of government. In a utopian future widespread tolerance has eliminated conflict.

Images and possibilities such as these are consistent with the yearning for a very different tomorrow that Chief Justice Lucas reported encountering at the national court futures conference, a desire for courts “not like any found in the United States today.”

VISION

A “vision statement” or “preferred future” is a statement of aspiration, an expression of what an organization would ideally like to be. Mission statements define organizational purpose. Vision statements describe what an organization *hopes* to become.

Statements about preferred futures for the courts typically are of three types: those that seek to create futures that resemble the status quo; those that urge moderate change; and those that envision high-change futures. Among the first are visions that place heavy reliance on adversary justice in a traditional court environment. Moderate-change visions also assert the primacy of adjudication, but enhance it with high-tech innovations and new roles for judges and administrators. High-change visions, on the other hand, propose dramatic new ways of providing access to justice, of punishing, and even of changing society’s basic assumptions about disputes and conflict.

This commission yields to none in its commitment to preserving the best elements of adversary justice and traditional adjudication. At the same time, it is proposing changes so numerous and in some cases so dramatic that its vision can only be termed high-change. The future justice system that this commission proposes is so different from today’s that if transported there tomorrow, no member of this commission would know how to navigate it. The vision of that future appears inside this report’s front cover. 

The California courts are among the world's finest. Yet, with some notable exceptions, the methods by which they resolve disputes have changed very little in the last 100 years. While there is value in such constancy, it may be neither possible nor desirable to maintain the status quo into the next century. The very fact that by 2020 the state will be home to roughly 50 million people may challenge the axiom that for every dispute there must be — or perhaps even can be — an adjudicative, judicial forum for its resolution.

The commission's vision of a preferred justice future embraces two very different models. One bears witness to age-old principles of fairness, due process, and adversary justice. The other proposes fundamental changes in assumptions about what courts are for, about the way they process disputes, and indeed, about how conflicts can best be resolved — fully, fairly, efficiently, and satisfactorily.

Just as no report can do complete justice to such a broad and complex subject, no summary can adequately treat such a diversity of recommendations and strategies. The following pages merely preview the recommendations that are central to the commission's proposed model of a very different justice system for a very different future. Page references are indicated in parentheses.

CHAPTER ONE — CALIFORNIA: 1993 AND 2020

By the year 2020 California's population is expected to reach 50 million, an increase of 66 percent over today's (19). Most of this growth will occur on the fringes of major metropolitan areas. At the same time, some Gold Country and Sierra counties will double in size (20). If court dockets continue to track the population, courts in rapidly growing counties will need an increasing share of total court resources.

The state's population is becoming ever more diverse, both racially and ethnically (20). By 2002 non-Hispanic Whites will no longer constitute a majority of the state's population. By 2020, Hispanic Californians will represent roughly 41 percent of the total, Whites 40.5 percent, Asians, Pacific Islanders, and Native Americans 12 percent, and Blacks 6 percent (20). The 224 spoken languages in the state today will

S U M M A R Y



SUMMARY

Poverty in California is growing, especially among children. One in four children in California now lives in poverty; the national average is one in five. The human toll aside, such children have a greater-than-average statistical chance of appearing before the delinquency and adult criminal courts of the future.

likely be joined by others. By 2020 the median age of non-Hispanic Whites is likely to have increased to 44, among Hispanics to 27 (21). The courts of 2020 will face not only intercultural issues, but perhaps intergenerational issues as well.

Immigration is expected to contribute some 65 percent of all newcomers to California over the next couple of decades (21). At the same time, the number of Californians emigrating from the state will continue to exceed the number of newcomers arriving from other states (22). The impact of such trends on the tax base and the demand for public resources — including judicial resources — is impossible to project.

The number of Californians under the age of 18 will almost double between today and 2020, but their representation in the total population — roughly 27 percent — will change very little (23). The percentage of Californians between the ages of 15 and 24 is expected to reach 14.1 percent in 2020, indicating potential continued growth in the crime rate.

In the state's economic future, per capita income — compared to the nation generally — will continue to decline (25). By the year 2010 it will have slipped from 17 percent above the national average (in 1980) to only 4 percent above the average. Regional disparities in wealth are expected to increase, with the Los Angeles basin and the San Francisco Bay Area becoming more wealthy while other regions become less so (25). If court finance remains largely a county responsibility, the quality of justice in California may depend on its location.

While the rate of job growth in the state is expected to decline in coming decades, total employment will continue to rise; 9 million jobs are expected to be added by the year 2020 (26). By that year, manufacturing will represent only 13 percent of all jobs in the state; service sector jobs will rise to 33 percent (26).

Poverty in California is growing, especially among children. One in four children in California now lives in poverty; the national average is one in five (28). The human toll aside, such children have a greater-than-average statistical chance of appearing before the delinquency and adult criminal courts of the future (28).

California's economic future is increasingly tied to the world economy. If, as some expect, the state becomes the import-export hub for the Pacific Rim, commercial disputes will take on a distinctly international flavor (29).

CHAPTER TWO — MULTIDIMENSIONAL JUSTICE

In the coming decades, case filings in the California courts are expected to continue to outpace population growth. This, combined with ambiguous scenarios for funding the third branch, suggests that in the future it will be virtually impossible for the state's courts to continue to process cases as they have traditionally.

In some important respects the notion of a California "court system" is a fiction. But in 2020, a true, comprehensive, integrated, dispute resolution

system it must be. Such a system should consist of: (a) “multioption” justice centers, forums offering a full range of dispute resolution processes and services (41); (b) community dispute resolution centers — locally oriented, smaller versions of the multidoor justice center, resembling a marriage between today’s justice/municipal court and a neighborhood justice forum (47); and (c) a network of private dispute resolution providers (51).

The cornerstone of multidimensional justice is appropriate dispute resolution (ADR). In an ADR world, disputes will receive the appropriate type and quantity of publicly provided resolution assistance (40). Through careful dispute assessment and referral, disputants can be steered to those public forums — and in specialized cases, private providers — best suited to the resolution of their differences (42). In both multioption and community dispute resolution centers there will be a wide range of processes available (43).

One of those options will be traditional adjudicatory justice — bench and jury trials. However, the trial will remain a limited resource.

How much justice the third branch of tomorrow can provide will depend on resource availability (45). If, in the future, resources for the courts keep pace with population growth and inflation, disputants should continue to assume some of the cost of justice, in the form of user fees, as they do today (46). In an alternative future in which court funding increases in real terms, the additional funds should be applied first to ensuring greater access to counsel in those matters that require counsel (46).

In a third, dystopian future, one in which the courts have far fewer resources than today, civil justice might necessarily be subject to a “pay-as-you-go” formula. Those disputes that have little “public good” value should be assessed the full cost of the public resolution processes they utilize (47). In such a future the Legislature should establish broad criteria for determining which cases are and are not presumptively “public good” matters. In all three scenarios, fee waivers should be provided to those individuals otherwise unable to pay.

CHAPTER THREE — ACCESS TO JUSTICE

In the preferred future, justice will be fully accessible to all Californians, regardless of income, race, gender, culture, or disability (55).

Effective access begins with comprehension. Today, language and cultural barriers frustrate meaningful access for far too many Californians (56). In 2020, such frustration must be rare or nonexistent. Interpreter services must be available to all court users who require them (56). Simultaneous real-time translation should be provided for all (56). Multilingualism should be cultivated among court personnel (57). The justice system must develop the capacity to explain the fundamentals of the dispute resolution process to disputants from different cultures (57).

In both the spoken and the written word the language of justice should be clear and comprehensible (57). The multidimensional justice system itself should play a significant role in effectively

In an appropriate dispute resolution world, disputes will receive the appropriate type and quantity of publicly provided resolution assistance. Through careful dispute assessment and referral, disputants can be steered to those public forums — and in specialized cases, private providers — best suited to the resolution of their differences.

The public justice system of the future must be “culturally competent”: both judicial and nonjudicial personnel must be aware of and sensitive to cultural differences in society and among disputants who use the courts. Cultural competence training should be routine throughout the system.

informing the public about rights and responsibilities, disputes and their resolution, and the use of public and private dispute resolution forums (58).

The doors to justice should open equally wide to all. Justice facilities should be designed to ensure equal access (59). The courts must commit to removing physical and attitudinal barriers that deny the disabled equal justice and equal access to justice (61). Where public access to justice can be enhanced through expanded or alternative hours, justice facilities should do so (63).

In a more ideal future, justice will be far more affordable. Many cases that today are routinely adjudicated will be resolved in nonadversary proceedings not requiring counsel. So long as adversary justice remains the norm, however, the state must strive to make legal services resources adequate to the need (66). Qualifying criteria for legal aid should be expanded to afford access to legal services for the “working poor” (66).

The state should develop new resources for funding legal services, e.g., a Civil Justice Fund (67). The bar should do more to ensure that there is adequate legal representation for all who need it (68). The proliferation of nonlawyer professionals is desirable, but it must be monitored to ensure that it both serves the public interest and promotes access to quality justice (68).

CHAPTER FOUR — EQUAL JUSTICE

Today, 53 percent of Californians rate the overall quality of the courts no better than average; people

of color are even more ambivalent. In the future, justice must not only be equal, it must also appear to be equal.

The public justice system of the future must be “culturally competent”: both judicial and nonjudicial personnel must be aware of and sensitive to cultural differences in society and among disputants who use the courts (74). Cultural competence training should be routine throughout the system (74). The third branch should promote cultural competence education in law schools, in the bar, and throughout the justice system (74).

Ensuring that the bench and the courts are representative of the population they serve can do much to increase their legitimacy in the public eye (75). Women, people of color, and the disabled must all be fully represented among judicial officers and nonjudicial personnel (76).

The courts of today should prepare for the intercultural disputes of tomorrow. Community dispute resolution centers should host forums to discuss intercultural issues, before they become conflicts (77).

While the commission is adamant that legal standards and norms must be uniform for all the state’s peoples, the cultural backgrounds of the disputants should be a factor in the dispute assessment and referral process (78).

All persons and disputes that come before the courts must be treated in a manner that is scrupulously free from any influence of bias or prejudice, expressly including gender bias (79).

CHAPTER FIVE — PUBLIC TRUST AND UNDERSTANDING

Many Californians are ambivalent about the quality of justice in the state today. The commission's public opinion survey revealed that only 56 percent of Californians believe that one can expect the same decision from a court regardless of its location or the identity of its judge. Forty-five percent believe that courts often make erroneous decisions. Notwithstanding such doubts, the survey indicates that the public continues to care deeply about the quality of justice.

The quality of judicial officers is the public's top priority for future justice (82). To ensure their quality, all judicial officers should be selected through a new, merit-based process. Clearly articulated selection criteria should be developed and applied in all cases, with the goal of reducing the role of political partisanship in the selection process (88).

Continuing judicial education should address a wide variety of subjects; it should also be mandatory (90). To ensure the effective delivery of high-quality justice and to enhance judicial performance a system of judicial performance evaluation should be developed (92). Judicial conduct review mechanisms must be of the highest quality (93). Every court should establish mechanisms to implement statewide standards that address public complaints about improper treatment (94).

The judicial branch should work with the bar to enhance the quality of lawyers, the availability of legal services, and the reputation of the bar (95). The justice system and the schools should

enter into partnerships to teach Californians about conflict and conflict resolution and the structure and processes of the justice system.

Judicial officers should play an active role as spokespeople for justice and the courts (98). In order to promote better public understanding of justice and the justice system, press and public access to court proceedings and data should be virtually unrestricted, absent some compelling interest to the contrary. In addition, the judiciary should make affirmative efforts to reach and educate the press and the public (99).

CHAPTER SIX — INFORMATION TECHNOLOGY AND JUSTICE

In their adoption of technology the courts of today lag the private sector and even their sister branches of government. In the future, the judicial branch must integrate into virtually every one of its essential functions the best that technology has to offer.

Information about justice and the courts should be easily accessible to the public through common, well-understood technologies (105). Where the courts cannot efficiently do so themselves, they should work with commercial information providers to develop publicly accessible information systems (106). To promote efficiency, access, and convenience, and to reduce costs, interactive video technology should be incorporated into justice proceedings wherever possible (107).

Courts must become paperless (108).

Today, court-related and statistical data are

Only 56 percent of Californians believe that one can expect the same decision from a court regardless of its location or the identity of its judge. Forty-five percent believe that courts often make erroneous decisions. Notwithstanding such doubts, the public continues to care deeply about the quality of justice.

Court intervention in family conflict, while often necessary, is not an act that is undertaken lightly. In order to avoid the need for such intervention, families should be able to draw upon readily available community resources at the earliest stages of family dysfunction.

fragmented. There is no comprehensive data network that serves the entire system. In the future, a comprehensive and integrated network should connect and serve the entire judicial branch, other agencies, and the public (110). Standards should be developed to ensure the integrity of network data (111).

Automated case management systems should be commonplace in California's courts (111). Expert systems should be integrated into the judicial decision-making process wherever practicable (112).

To coordinate and oversee the initiatives described above, the Judicial Council should create a standing advisory committee on technology (113). Judicial officers should receive ongoing education on the use of justice system technology. They should also play leadership roles in the modernization of court information systems (114). As labor-intensive clerical and other functions are mechanized, justice system employees should be retrained for more public-oriented roles (115).

CHAPTER SEVEN — CHILDREN AND FAMILIES

The family has changed profoundly over the past three decades, and the trend toward greater diversity in the configuration of the family and greater stress on family dynamics is expected to continue into the next millennium. The courts must be prepared for the attendant challenges.

Court intervention in family conflict, while

often necessary, is not an act that is undertaken lightly. In order to avoid the need for such intervention, families should be able to draw upon readily available community resources at the earliest stages of family dysfunction (122). Intensive, early, in-home family preservation services should be available to help ensure that children are not inappropriately removed from homes (122). To better assist troubled families and youth, family and juvenile courts should have access to a wide range of social services (123).

Continuity is important in judicial and social services interventions in the family. Wherever possible, a single case worker should be assigned to work with each troubled family throughout the course of court intervention (123). Family and juvenile courts should have the means to monitor the quality of the programs into which they place and the services to which they refer individuals (124).

The judicial branch should exercise a greater leadership role in coordinating the work of courts, related social service agencies, law enforcement agencies, and protective service agencies (126).

Appropriate dispute resolution has great utility in family and juvenile matters. The courts should expand mediation's use to all appropriate family and juvenile matters including dependency and minor delinquency cases (127). Wherever warranted, it should be community-based (128).

Juvenile courts should continue to exercise primary jurisdiction in delinquency cases (129). A concerted effort should be made to further reduce

delay in family and juvenile matters especially (130). Better communication among court divisions and improved coordination among individual courts is needed (131).

CHAPTER EIGHT — CIVIL JUSTICE

Although the filing rate for civil cases in California's courts is well below the national median, a number of factors may conspire to make civil dockets burdensome for the courts of the future.

In order to expedite and process civil dockets efficiently, all disputes in the public justice system should be actively managed, from filing to disposition (135). Differentiated case management plans should be commonplace (136).

Discovery reform could take a number of shapes. Among those measures that should be subject to pilot projects and empirical study are: mandatory, phased discovery plans in complex litigation; mandatory sanctions for discovery abuse; mandatory early neutral evaluation in large and/or complex matters; and judicial discovery in a selected type of dispute (140).

The jury, although it must be zealously protected as an institution, can be used more effectively (141). Additional flexibility should be built into jury selection, empanelment, and management. In certain matters the courts should experiment with juries of fewer than 12 (142), and with the use of expert panels (143).

Punitive damages should be reviewed with

an eye to establishing a more rational method for their award and distribution. Consideration should be given to directing some portion of such awards to a Civil Justice Fund, the proceeds of which should be applied to providing civil representation in adjudicative proceedings to those who otherwise would be unrepresented (144).

CHAPTER NINE — CRIMINAL JUSTICE

Not only did the workload of California's criminal courts essentially double in the last 30 years, but criminal filings per capita rose in the 1980's. Despite some reduction in the filing rate in the last two years, absent dramatic new approaches to crime and criminal dispute resolution, the next three decades portend a vast volume of cases for the criminal courts.

Better crime control and criminal justice are only part of the solution. In order to have much hope of interrupting the cycle of poverty and crime in society, California must begin by investing in its children (151). Attending to the health, nutrition, education, vocational training, and ethical development of children and youth should be a fundamental strategy in the state's campaign against crime.

Greater coordination and cooperation are needed in the criminal justice system. Criminal Justice Centers should be created to house under a single roof adjudicatory and nonadjudicatory criminal dispute resolution forums; support service providers; jail facilities; prosecution, defense,

Despite some reduction in the [criminal] filing rate in the last two years, absent dramatic new approaches to crime and criminal dispute resolution, the next three decades portend a vast volume of cases for the criminal courts.

For most first-time property offenses and many other first-time nonviolent crimes, alternatives to incarceration should be the sanctions of first resort. For recidivist offenders and others who pose a threat to the public's safety, incarceration is appropriate.

and probation agencies; and victim assistance resources (152).

Even before charging and possible diversion, eligible individuals accused of nonviolent criminal acts should be diverted from the formal criminal justice system to community dispute resolution centers (152). Well-trained law enforcement officials should have expanded discretion to make such determinations (153).

Minor criminal offenses that do not put the public or the environment at significant risk should be decriminalized and made civil offenses, subject to appropriate fines and regulatory sanctions (153).

Victims' interests must be better protected through, e.g., opportunities to be heard, regular notification of case status, and greater attention to victim security and convenience (154).

To enhance the public's trust, avoid the appearance of secrecy, and create a public record, all pleas (and detailed reasons for them) should be made a matter of record (156).

Sentencing should be simplified to ensure a focus on appropriate disposition, consistency, and certainty (157). "Truth in sentencing" is essential. The parties and the public must understand not only the objective and rationale behind every sentence imposed, but also its true duration (157).

For most first-time property offenses and many other first-time nonviolent crimes, alternatives to incarceration should be the sanctions of first resort. For recidivist offenders and others who pose a threat to the public's safety, incarceration is

appropriate (159). Because the role and responsibilities of probation departments will expand in direct relation to the growth in use of such alternatives, probation offices must be adequately funded to meet existing and future demands (159).

The state should commit resources to effective literacy and job-training programs for both incarcerated and nonincarcerated offenders (161).

CHAPTER TEN — THE APPELLATE COURTS

In 2020 appellate justice in California will remain committed to promoting public trust in justice by correcting errors of other tribunals and enhancing predictability, uniformity, and justice in the development of the law (163).

Appellate justice should accelerate its adoption of and adaptation to new technology (167). It should be innovative and vigorous in instituting alternative appellate processes (167). Appellate tribunals should be flexible in processing appeals. They should have the ability to assign matters to differentiated tracks as warranted (168).

To improve the efficiency and quality of the appellate process the Judicial Council should facilitate more effective communication among the appellate courts, the federal courts, the Governor, and the Legislature (169).

Before increasing the number of Court of Appeal justices, the Legislature should increase the court's staff resources (169).

CHAPTER ELEVEN — GOVERNING THE THIRD BRANCH

Today the governance of the California courts is fragmented. Notwithstanding the committed efforts of judges and staff, few would say that the structure of the courts or the protocols for their governance have produced real clarity or efficiency in defining and implementing judicial policy. Change is afoot, however. And more is needed (174).

The judicial branch must be responsible for its own governance. The courts' policymaking body should be broadly constituted, with representation from all court levels and regions. Recognizing the importance of public input to judicial policy, the body should include public, voting members (175).

Communication among the three branches of government on issues of common interest should be facilitated through the creation of an interbranch standing commission (176).

Judicial independence without accountability runs the risk of violating fundamental principles of checks and balances. New mechanisms should be created to ensure the third branch's ongoing management accountability (177). Court management plans and performance should be subject to regular review and audit (177). Cost and efficiency incentives should be built into all management plans (177).

With respect to the organization of the third branch, the commission believes that a unified trial court is an important first step on the road to a fully integrated, multidimensional justice system (177).

Notwithstanding such unification, regionalization of local courts should be allowed in order for the judicial branch to take advantage of economies of scale and provide specialized services (177).

The administration of justice should be delegated to the most local level feasible. Administration of local courts should be premised on accommodating the justice needs of the communities they serve (178).

Judges must also be managers. A judicial candidate's skills in areas related to effective judicial governance should be a significant factor in the judicial selection process (180).

Long-range and near-term planning should play a prominent role in the courts of tomorrow (180). The third branch should develop the capacity to monitor, study, and make recommendations on trends that affect the courts (178). Innovation in the judicial branch should be ubiquitous (181).

CHAPTER TWELVE — FINANCING FUTURE JUSTICE

The state's economic recession and the resulting reduction in court funding have cast doubt on the fiscal future of the courts. When such doubts intersect with projections of significant increases in future caseloads, the courts' very ability to provide basic services is called into question (184).

Funding for the courts should be stable and adequate to meet the obligations of the third branch. Except possibly for facilities costs, the courts' funding source should be the state. Funding should be independent of court-generated revenues (188).

The administration of justice should be delegated to the most local level feasible. Administration of local courts should be premised on accommodating the justice needs of the communities they serve.


Accounting and budget functions for the courts should be performed by a state budget commission, with significant input from individual trial courts (189).

Fines and penalties should be assessed according to statewide standards, but their precise level may reflect local decisions on how to penalize criminal behavior. Such revenues should remain local (190).

Local courts should be authorized to contract with county and local governments that wish to obtain court services above and beyond those mandated and paid for by the state (190).

Budget and program performance reviews should be instituted at all levels of the judicial branch. Peer review teams should conduct assessments of courts selected by the state budget commission on a rotating basis for in-depth review of operations and budget management (193).

Statewide guidelines should be established to govern most operational areas of the third branch (192). Subject to such guidelines, court financial management and resource allocation decisions should be delegated to the most local level feasible (191).

To promote accountability and performance, the judicial branch should, where appropriate, introduce incentives, rewards, and sanctions into its operations (192). 

It is sometimes said that nothing is certain but change, and California's future is a case in point. No institution will be untouched by the demographic, fiscal, social, economic, and technological transformations that await the state in the new millennium, and few institutions will be more affected than the courts.

From its inception the Commission on the Future of the California Courts sought reliable forecasts concerning the state's likely future. Excerpted here, those projections informed the commission's work and influenced strongly the creation of its plan for the courts of the next century.

To be sure, looking backward from 2020 with 20/20 hindsight will prove some of these projections wrong. Others, however, will withstand the test of time.

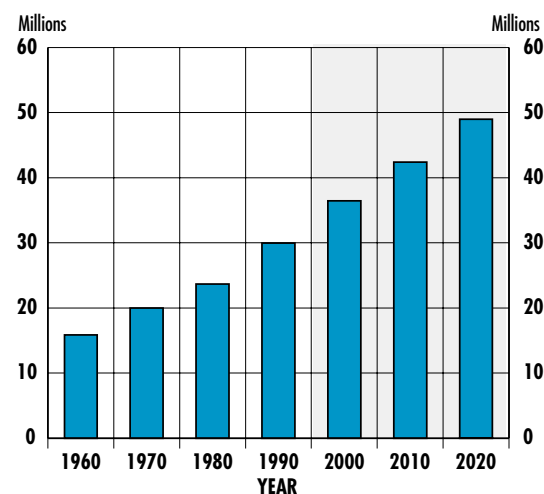
CALIFORNIA: 1993 AND 2020

POPULATION

If anything in the state's future is certain it is that California's vast population will continue to grow rapidly in coming decades. The state's Department of Finance projects that today's population of 30 million residents will, by 2020, swell to roughly 50 million (Fig. 1.1).¹

The rate of growth will be rapid, although less so than in recent years. If projections hold, the population will grow at an annual rate of 2 percent from 1991 to 2000, and 1.5 percent from 2000 to 2020. Although this pace is slower than that of the 1980's (2.4 percent annual increases), it will still exceed the nation's average.²

Critical to planning for the future is the ability to project not only how much, but where population growth will occur. Present patterns appear likely to continue, with the most growth occurring outside central metropolitan areas. Some of the fastest-growing areas in the state are located on the fringes of the Los Angeles metropolitan area. Riverside County is expected to see 163 percent growth and San Bernardino County a 133 percent increase over the next 30 years. The Central Valley will follow close behind. Between today and 2020 Fresno County is projected to see growth of 136 percent, Kern County 138 percent, Merced 123 percent, Stanislaus 123 percent, and Tulare 105 percent.

FIGURE 1.1 California Population

Source: California State Department of Finance.

While the rate of growth is slowing in some of California's largest counties, because of their large existing populations they will still see significant increases in coming decades. Among such jurisdictions are the Southern California counties of Los Angeles, Orange, San Diego, and Ventura; the San Francisco Bay counties of Alameda, Contra Costa, Santa Clara, Solano, and Sonoma; and the Central Valley's Sacramento County. In addition, many Gold Country and Sierra counties — among them Amador, Calaveras, El Dorado, Madera, Nevada, Placer, Sutter, and Yuba — will at least double in size by 2020. If future court dockets continue to track the population, courts in rapidly growing counties will need an increasingly large share of resources, both for capital and for operating costs.

RACIAL AND ETHNIC DIVERSITY

Already the most ethnically diverse state on the mainland, California will be even more so by 2020. Department of Finance figures show that in 1990 non-Hispanic Whites represented 57 percent of all Californians, Hispanics 26 percent, Asians and Pacific Islanders 9 percent, Blacks 7 percent, and Native Americans 1 percent. (Throughout this report the labels assigned to the state's racial and ethnic populations follow accepted Department of Finance demographic classifications. Hence, "non-Whites" rather than "minorities," "Blacks" rather than "African Americans," "Hispanics" rather than "Latinos," etc.)

Looking to the future, by the year 2002

non-Hispanic Whites will no longer constitute a majority of Californians, and by 2020 Hispanics will be the largest ethnic group in the state. Projections for 2020 show the Hispanic population at 41 percent and the non-Hispanic White population at 40.5 percent of the total. Asians, Pacific Islanders, and Native Americans will make up 12 percent of the population, and Blacks will constitute 6 percent (Fig. 1.2).³

General demographic projections cannot adequately capture the state's true diversity. A better indicator may be the 224 languages spoken in California homes, the greatest number in the nation.⁴ Moreover, the Department of Finance's classifications are imprecise. Each of its racial and ethnic classifications encompasses an entire range of peoples and cultures. "Hispanics," for instance, as defined in the 1990 Census of Population/Housing, include Californians from all racial groups: White, African American, Native American, Asian or Pacific Islander, and others.

The "Asian, Pacific Islander, and Native American" classification is also complex. Within it the Department of Finance subclassifies Native Americans as: American Indians, Eskimos, and Aleuts. "Asians" include Chinese, Filipinos, Japanese, Asian Indians, Koreans, Vietnamese, Cambodians, Hmong, Laotians, Thais, and others. "Pacific Islanders" include Polynesians (Hawaiians, Samoans, Tongans, and others), Micronesians, Melanesians, and others.

While the median age of the general population is rising, the median ages of California's

subpopulations are not expected to increase at the same rate. For instance, by 2020 the state's two largest subpopulations will be separated by almost an entire generation: the median age of non-Hispanic Whites will increase from today's 36 to 44, while the median age in the Hispanic population will increase from 24 to 27.⁵ The median ages of the state's other major population groups will be distributed across this range. The median age of Black Californians will increase from 29 to 31, while the median ages of Asians, Pacific Islanders, and Native Americans will increase from 30 to 37. The courts of 2020 may find themselves at the center of a complex generational/cultural divide, faced with the task of sorting out not only inter-cultural but also intergenerational conflicts.

MIGRATION AND IMMIGRATION

No understanding of California's past and future demography can ignore what in recent decades has sometimes seemed a torrent of migrants and immigrants. (The commission has adopted the Department of Finance's distinction between "migrants" — those coming to California from other states — and "immigrants," newcomers from other nations.) And the reality bears out that impression. In the years since the Second World War, newcomers to California have contributed 55 percent of the state's total population growth.⁶

Prior to the 1970's, about two-thirds of California's new arrivals came from other states. During the 1980's, however, that pattern was reversed: 35 percent of the state's population growth was at-

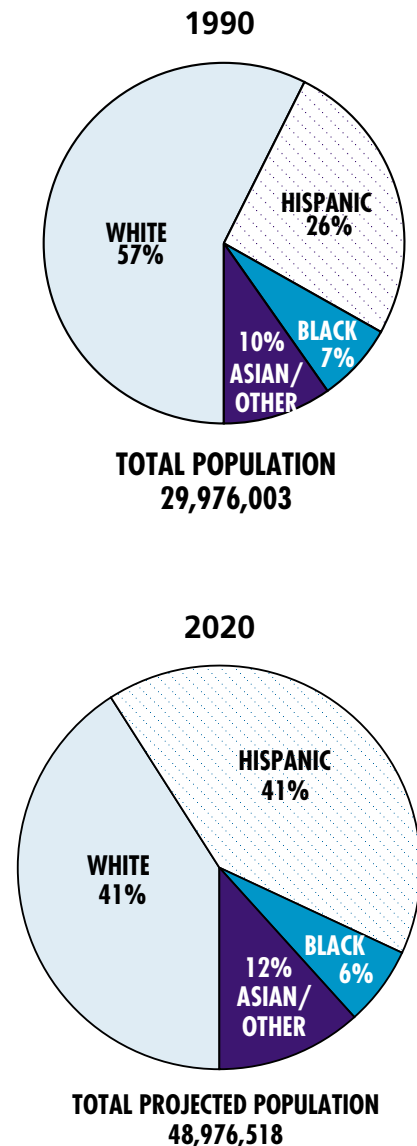
tributable to immigration, and only 20 percent was contributed by migrants (45 percent of total growth came from new births).⁷

Put differently, immigration contributed almost 65 percent of all newcomers to California in the 1980's.⁸ While forecasters at the Institute for the Future suggest that this pattern is likely to continue at least through the 1990's,⁹ other students of demography are not so sure. Social ecologists John Dombrink and James W. Meeker of the University of California—Irvine note that immigration could rise or fall dramatically in the years ahead, depending on factors such as the creation of North American or other free trade zones, California's economic competitiveness, and the political and economic climate in the Pacific Rim.

Immigration is a divisive topic in California and elsewhere. National public opinion surveys show growing public sentiment for limiting immigration. California politicians have recently proposed initiatives to stem illegal immigration, to return illegal immigrants to their country of origin, and to deny U.S. citizenship to the children of illegal immigrants, even when the children are born in this country.

Estimates of the extent of illegal immigration to the state in the 1980's vary, ranging from as low as 29 percent of total immigration to as high as 44 percent.¹⁰ Department of Finance figures indicate, however, that while legal foreign immigration has grown slowly since 1970, illegal immigration has been relatively flat. As to the economic effects of illegal immigration, one apparent impact is on

FIGURE 1.2 California Population by Ethnic Group



Source: California State Department of Finance, Projected Total Population of California Counties; Report 93 P-3.

“What will happen when California is filled by 50 millions of people and its valuation is five times what it is now? There will be more people — as many as the country can support — and the real question will not be about making more wealth or having more people, but whether the people will then be happier or better off than they have been hitherto or are at this moment.”

Lord James Bryce, British Ambassador to the United States, 1909

the state’s corrections population. One source claims there are 14,000 undocumented aliens in state prisons and 10,000 in county jails, at an estimated cost of \$500 million a year.¹¹ Illegal immigration clearly consumes substantial amounts of court and corrections resources.

It is also argued that immigration creates other burdens. It is clear that new arrivals do strain public resources in areas such as Los Angeles and San Diego, for example. However, the conventional wisdom that immigrants are an enormous drain on the economy is not supported by recent research findings. A July 1993 study by the state Senate Office of Research reports that 4.1 percent of those living in the households of U.S.-born residents for more than five years receive some form of public assistance — social security, welfare, or other benefits. This compares with 3.8 percent of California’s newcomers who have been in the state more than ten years, and 4.8 percent of those who have been in the state less than ten years.¹² The Governor’s office summarized the study’s findings this way:

It doesn’t matter if the person is born in Mexico, Michigan or Monterey. The point is that if that person receives state money it has a fiscal impact on the state.¹³

Researcher William Frey of the University of Michigan found that most immigrants to California live above the poverty line: from 1985 to 1990, California saw a net gain of 1,000,000 immigrants above the poverty line and 500,000

below the poverty line.¹⁴ However, in times of fiscal hardship the resource demands of Californians both above and below the poverty line, immigrants and native-born alike, tend to increase.

EMIGRATION

Emigration from California is on the rise. Indeed, according to recent data, the number of people moving to other states now exceeds the number arriving in California from other states.¹⁵ Just as there is an age disparity among races, there is also a significant age differential between migrants and emigrants. By and large, the newcomers are younger, the emigrants older. In 1992–93, approximately 22,000 more people between the ages of 18 and 24 entered California than left it. In the 25–29 age group, California lost a net of about 7,500 people to other states. Among those age 30–44 there was net emigration of over 80,000, and among those 45 and older, California also lost approximately 80,000 residents to other states.¹⁶

Many of those who emigrated from California in the late 1980’s were poor. The University of Michigan’s Frey found that in the late 1980’s 40,000 poor Californians left the state and 175,000 immigrants above the poverty line entered it.¹⁷

The picture presented by migration/emigration patterns is obviously mixed. If existing patterns continue, the state may suffer a loss of employment experience and social stability, but enjoy a net gain in wealth and energy from an influx of newcomers. The courts would be affected by any resulting boost to the state’s economic condition,

and negatively affected by any increase in social instability. However, the state's current recession may have badly tarnished California's image as a land of opportunity. Potential immigrants, both wealthy and poor, may seek the Golden State in significantly smaller numbers. Time and further study will reveal more about the new California demographic.

BIRTHRATES

California's birthrate rose in the 1980's and it is expected to remain above the U.S. average until 2020.¹⁸ The last ten years saw the state's birthrate increase from 17 births per 1,000 population in 1980 to 21 births per 1,000 population in 1990, a rate significantly higher than the national average. (During the same time the U.S. birthrate rose only slightly — from 16 to 17 births per 1,000 population.) Forecasters suggest that this trend will not continue indefinitely. Over the next three decades the state's birthrate is expected to decline to 16 per 1,000 population, while the U.S. average is projected to decline to 15 per 1,000 (Fig. 1.3).

Much of California's higher-than-average birthrate is attributable to the fact that the state's large immigrant population, especially that segment of Mexican origin, has a higher-than-average fertility rate. According to the National Center for Health Statistics and the California Department of Finance, Hispanics in California have a fertility rate of 3.3, while non-Hispanic Whites have a rate of 1.9, African Americans a rate of 2.5, and Asians and Others a rate of 2.1.

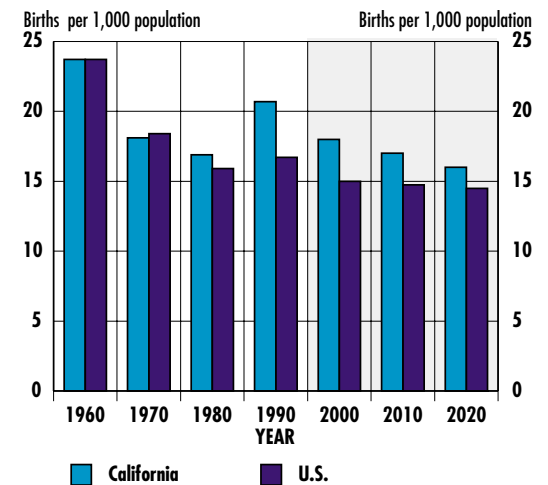
However, differences among fertility rates virtually disappear over time. According to U.S. Census Bureau data, immigrants who have been in the country less than 5 years have a fertility rate of 3.1; those in residence from 5 to 9 years have a rate of 2.8. After 10–14 years of residence the rate declines to 2.8, and after 14 years to 1.8, substantially *lower* than the national average of 2.4.¹⁹ The implication for the courts may be that so long as California has a large population of new immigrants, family and juvenile dockets may be larger than they would be otherwise.

CHILDREN AND YOUTH

In 1990, the youth population in California — those under the age of 18 — numbered 7,870,000. By 2020 that number is expected to reach 13,201,000. Over the next decade youth will increase as a percentage of total population — from 26 percent in 1990 to 28 percent in 2000 — and then gradually decline to 27 percent as the year 2020 nears. Thus, projections for activity in juvenile dependency and delinquency dockets are virtually flat, suggesting little significant fluctuation in the years ahead.

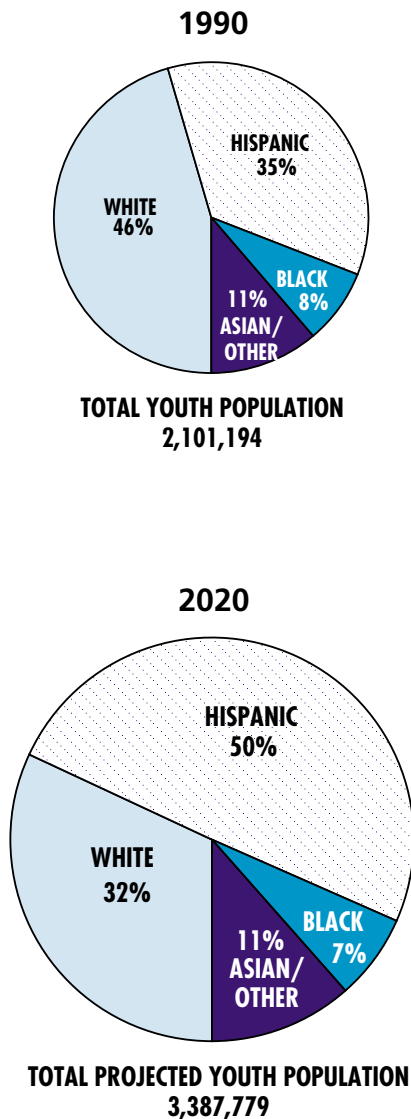
Because the vast majority of crime is committed by young men between the ages of 15 and 24, fluctuations in that population are especially significant to sociologists and criminologists. In 1990, Californians between the ages of 15 and 19 constituted 7 percent of the population. In 2000 they will equal 6.8 percent of the total, and about 6.9 percent in 2020. Californians between the ages

FIGURE 1.3 Birthrates



Source: Institute for the Future.

FIGURE 1.4 California Population, Ages 15–19, by Ethnic Group



Source: California State Department of Finance, Projected Total Population of California Counties; Report 93 P-3.

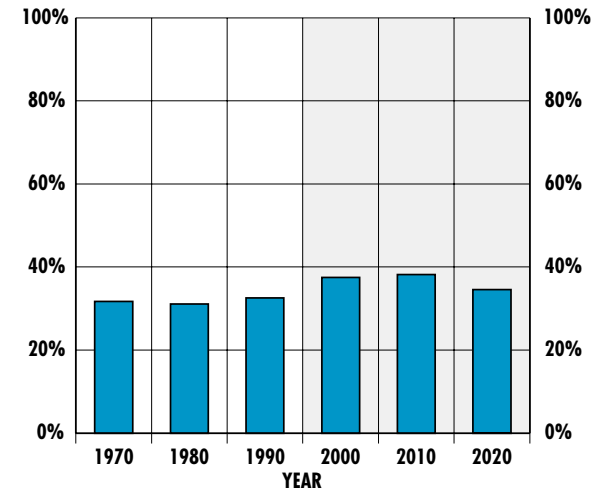
of 20 and 24 represented 8.5 percent of the state’s population in 1990. By 2000 they are projected to number 6.4 percent, and by 2020 7.2 percent. Given such numbers, crime rates may decline until the end of the decade and then increase again out toward 2020.

In coming decades the racial and ethnic balance in the youth population is expected to change even more significantly than in the population as a whole. Department of Finance figures for 1990 indicate that among Californians aged 15 to 19, non-Hispanic Whites represented 46 percent of the total, Hispanics 35 percent, African Americans 8 percent, and Asians, Pacific Islanders, and Native Americans 11 percent. By 2020 this picture will be very different. Fifty percent of Californians 15–19 years old will be Hispanic. Non-Hispanic Whites will represent 32 percent of the total, Blacks 7 percent, and Asians, Pacific Islanders, and Native Americans 11 percent (Fig. 1.4).²⁰ Merely as a corollary of their percentage in the population, the number of people of color in the criminal courts is likely to increase. The cultural competence of criminal justice will continue to be tested.

THE AGING POPULATION

Although the young continue to migrate and immigrate to California, the state is growing older. In the near term it is the number of middle-aged Californians, those between 35 and 64, that will increase most rapidly. In 1990, the middle-aged equalled 33 percent of the total. By 2000, they are expected to reach 38 percent, and then decline to

FIGURE 1.5 Percent of California Population, Ages 35–64



Source: California State Department of Finance.

35 percent by 2020 (Fig. 1.5).²¹ This phenomenon might be labeled the aging of the Baby Boom generation (those born between 1945 and 1965). A significant percentage of California’s population will be in its peak earning years around the turn of the century, contributing to the state’s economic base. In addition, the middle-aged are statistically less crime-prone. They tend to be more concerned about the quality of government services, safety, and security. As a consequence, this growing segment of the population may be more insistent on effective justice, and better able to pay for it.

While the number of elderly Californians will also increase dramatically in coming years, they will remain a relatively small segment of the

population. In 1990 there were 1.3 million Californians over the age of 75. Because of greater longevity, by 2000 that number is projected to reach nearly 2 million, and 3 million by 2020.²² Courts may hear more cases involving life and death decisions, conservatorships, the quality of elder care, and estate and probate matters.

ECONOMIC TRENDS

Long-range forecasting is risky and rare in economics. When it is attempted at all, “long-range” may mean as little as three to five years. The majority of the projections that follow are based on data obtained from the state Department of Finance and supplied to the commission by the Institute for the Future.

The California economic miracle may be over for the near term, but the state still retains substantial economic assets, among them a rapidly growing population, rich natural resources, an affluent middle class, and a well-educated population. Less encouraging is the projection that by 2020, California, long one of the nation’s wealthiest states, will find itself somewhere in the middle of the pack. The coming decades seem likely to be a “good news, bad news” story for the Golden State.

PERSONAL INCOME

Per capita income in the state, traditionally much higher than the nation’s average, is expected to de-

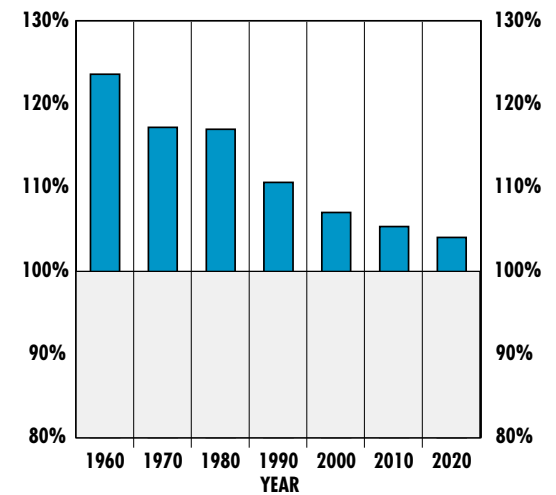
cline in coming years. In 1980, California’s per capita income was 17 percent higher than the U.S. average. By 1990 it exceeded the average by “only” 11 percent, and by 2010, it is expected to decline to 4 percent above the national average (Fig. 1.6).²³

Growth in personal income will also slow. In the 1980’s the rapidly expanding state economy fueled 3.5 percent average annual increases in personal income. In the decade between 2010 and 2020 such growth is projected to slip to 2.8 percent annually.²⁴

While Californians may be becoming more average, regional disparities in the state are on the increase. Within the state’s two largest metropolitan areas — the Los Angeles basin and San Francisco Bay Area — incomes are well above the state average and rising. For example, the ratio of Contra Costa County’s per capita income to the state average was 1.23 in 1990; it is expected to rise to 1.30 by 2000.²⁵ Orange County’s ratio will rise from 1.18 to 1.23 over the same period.

In contrast, outside the two metropolitan centers, per capita income is slipping. By 1990 Fresno County’s ratio had fallen to 0.79; it is expected to decline to 0.76 by the year 2000. In Kern County, a decline from 0.77 to 0.75 is expected over the same period. During the next decade, existing income gaps among counties will widen.²⁶ To the extent that court finance remains largely a county responsibility, the quality of justice may depend on its location.

FIGURE 1.6 California Per Capita Income as a Percent of U.S. Average



Source: Institute for the Future.

EMPLOYMENT

Changes in California's job market are everywhere. While the rate of job growth declines, total employment in the state continues to rise. According to the Department of Finance, nonfarm employment will increase in the 1990's at about two-thirds the 1980's rate.²⁷ It is projected that 3 million jobs will be added to the state's economy in the 1990's, 9 million by 2020.²⁸

Employment in California is changing in kind as well as in number. Over the next decade the state will continue to lose manufacturing jobs, although not as quickly as the rest of the nation. (Jobs in the manufacturing sector fell from 27 percent of the total in 1960 to 17 percent in 1990. A further decline to 13 percent is expected by 2020.) Service sector jobs, which rose from 15 to 27 percent in the three decades preceding 1990, will provide 33 percent of the total by 2020.²⁹ Among other industries, defense — before reorganizing and again contributing to economic growth — is likely to see further declines in total employment.³⁰ In the construction industry, the hyperconstruction boom of the 1980's left California with a glut of retail and commercial property that will need little addition in the near future. Residential housing is only in demand at the entry- and moderate-price levels.

INVESTMENT

In the future, both private and public sector investment is expected to rebound from recent historic lows. As the boom of the early 80's came to a

close, manufacturing investment began to slump. Its decline was accelerated by recession, lower exports to Asia, defense cutbacks, and the decline in construction. From a 1985 peak of nearly \$6,000 invested for every worker, investment fell to less than \$5,000 per worker. Forecasters project, however, that as the recession ends private investment will again pick up, perhaps to as much as \$10,000 per worker by 2020. Unlike labor-intensive earlier decades, however, investment is expected to be concentrated in technology and knowledge industries. As business activity picks up, civil disputes involving trade, patents and copyrights, securities, and antitrust issues may clamor for the courts' attention.

Public sector investment is less certain, and perhaps more urgent. Infrastructure investment is badly needed in California. While bond issues for schools, highways, water projects, and parks were commonplace in the 1950's and 1960's, the 1970's and 1980's saw their dramatic decline. Faced with an aging infrastructure and a steadily rising population, California will soon be obliged to address when and how public investment will occur. While bond-financed spending is likely to increase — although perhaps not on a per capita basis — the state may also be obliged to find creative new ways to invest in its infrastructure. Many of today's courthouses are approaching the status of bona fide antiques. Unless the commission's scenario of future high-tech "courthouses-without-walls" becomes the reality, funds to build the dispute resolution centers of tomorrow will have to be found.



Within the state's two largest metropolitan areas — the Los Angeles basin and San Francisco Bay Area — incomes are well above the state average and rising. The ratio of Contra Costa County's per capita income to the state average was 1.23 in 1990; it is expected to rise to 1.30 by 2000. Orange County's ratio will rise from 1.18 to 1.23 over the same period.

POVERTY

In the decade between 1979 and 1990, poverty increased in California and the nation (Fig. 1.7). Nationally, the number of workers at or below the poverty level increased from 12 to 14 million. Workers with no more than a high school education and workers from minority populations were especially affected. When jobs were replaced, it was typically by lower-paying service sector jobs, often at minimum wage and without health or other benefits.³¹

Tax restructuring and deindustrialization in the 1980's took their greatest toll on the lower and lower-middle classes. Nationally, families in the bottom 40 percent of the population suffered a decline in real income. At the same time, the income of the top fifth of the population rose by 29 percent and the income of the 1 percent of the wealthiest Americans rose by 74 percent.³²

Between 1979 and 1989 wealthy California counties became wealthier, while poorer counties lost ground. For example, Marin County's income relative to the state average grew from 1.42 to 1.76, while Yuba County's declined from 0.70 to 0.59.³³

Poverty's advance has undercut many Californians' quality of life, especially that of the young. The General Accounting Office reports that during the 1980's the number of preschool children in poverty rose from 18 to 19 percent. Since that time California's recession has driven the number of children in poverty up to 2.2 million — one in four, compared to the national average of one in five.³⁴ In addition to the human toll, poverty has

close correlates. Its high correlation with crime, for example, suggests that those children growing up in poverty today have a greater-than-average statistical chance of appearing before juvenile delinquency and adult criminal courts tomorrow.

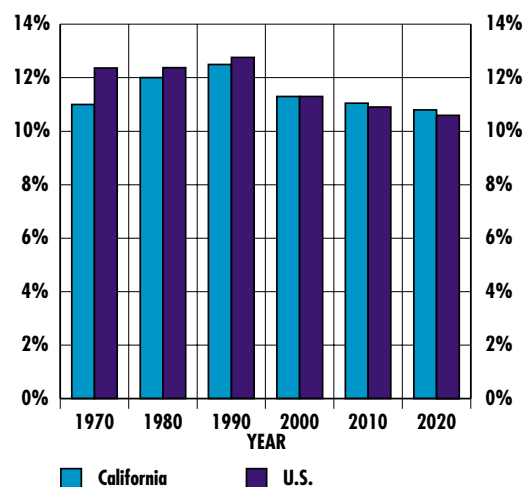
WORKFORCE

The composition of California's workforce is changing rapidly, and it will change further by 2020 as the Baby Boom generation ages. In 1990, only about 43 percent of workers were over the age of 40, a historic low. By the year 2000, however, workers over 40 will equal roughly 60 percent of the workforce.³⁵ If this trend continues until 2010, when Baby Boomers begin to retire, the increasing number of older Californians in the job market seems likely to add to the number of disputes over age discrimination, retirement issues, pension benefits, and health insurance.

The workplace is also becoming increasingly female. By 2000, women will represent 48 percent of the workforce. Today, nearly 58 percent of all women over age 16 are employed; by 2000 that number will reach 63 percent.³⁶

In the future a higher proportion of women with children will work outside the home. In 1990, nearly 75 percent of women with children aged 6-17 and almost 58 percent of those with children under age 6 worked outside the home. By 2020, projections indicate that those percentages will have grown to 80 and 70 respectively.³⁷ Family day care and family support will increasingly be priorities for public and private employers. Public

FIGURE 1.7 Poverty Rates



Note: Poverty rates are defined by an income threshold, recalculated each year to represent the minimum amount necessary to sustain a minimum living standard.

Source: Institute for the Future.

service providers — including the courts — may be expected to make greater provision to accommodate those who seek their services.

CALIFORNIA'S INCREASINGLY INTERNATIONAL ECONOMY

With every passing year California's economy becomes more closely tied to the global marketplace. For the last 30 years, with the exception of a brief period in the early 1980's, California's imports and exports have grown considerably faster than the state's economy generally. In the late 1980's, imports grew by more than 4 percent a year and exports grew by 10 percent.³⁸

Much of the world's future economic growth is expected to occur in Mexico, China, and the Pacific Rim, and California is uniquely positioned to participate in the development of these emerging markets. As international trading partners build closer ties with the state, trade will have increasing influence on the economy. In a hopeful scenario, California will capitalize on its strategic geographical position and become the import-export hub for the Pacific Basin. In less optimistic scenarios the state will become balkanized or political instabilities in the Pacific Rim will dim such a prospect.

Whatever the future, the move to a more global economy seems certain to add to foreign investment in California commerce and real estate. Today, foreign investment accounts for less than 6 percent of total assessed property value and only 4 percent of total employment. By 2020, those fig-

ures are expected to reach 12.5 and 10 percent respectively. The impact of increased foreign trade and investment on California's courts is difficult to predict. At the very least, it portends growth in trade dispute and commercial dispute resolution services, and among dispute resolvers who practice in those areas.

Growth in international trade and investment does not alone account for the increasing globalization of California. The end of the Cold War is already accelerating the trend. Collapsing political barriers and the revolution in communications technology promise far greater contact with other nations and cultures. As California and the nation face tomorrow's challenges they may profit by looking to other cultures for new models of dispute resolution, problem solving, and cooperative partnerships.

In a darker scenario, a shrinking world will create greater conflict. Examples abound. As of this writing, the United States is engaged in diplomatic and military initiatives in Central Europe, Africa, and the Middle East. International terrorism is on the rise. California will surely have some exposure to this future, perhaps with greater consequences for the federal courts than the state's.

TECHNOLOGY

Few Californians can have missed the arrival of the Information Age. Its reach is long and its effects are many. Moreover, barring a truly cataclysmic scenario,

it is here to stay and to have changed forever the way Californians communicate, manage information, work, play, and live. The third branch is likely to be both a beneficiary and a victim of this revolution.

If the revolution has an icon it is probably the microchip. Already, 37 percent of the labor force uses a personal computer at work; by 2020 this number will have grown to nearly 75 percent. At the same time, more and more computers are linked in local area networks (LANS). By 2020, nearly 60 percent of the workforce will be working on LANS, half will be connected to electronic mail networks, and over a third will be using database services accessed by computer. Links to the Internet, the government-sponsored “information highway” network, are growing at nearly 15 percent per month.³⁹ As society becomes ever more dependent on the information-processing and communications technology of today, the courts are still mired in the technology of yesterday.

Computers are becoming part of the very fabric of society; software is also growing in power and importance. Already, revenues from sales of software are catching up with hardware revenues. By 2020, software will generate \$450 billion in sales, three times as much as hardware.⁴⁰ The software of 2020 will provide easier access to the power of computers, both by making computers easier to use and by assisting them in performing more complex tasks. While the courts will inevitably obtain and master all but the most complex technology, in the meantime they are attempt-

ing to resolve growing numbers of disputes involving complex patent and copyright issues.

The growth in communication abilities will change where people work, as well as how they work. Telecommuting — working from the home or another place outside the traditional office — will increase. By the year 2000 more than one of every 10 workers will telecommute at least one day a week.⁴¹ The court system today is beginning to address such changes with its own employees.

Technology will also change how people meet, interact, conduct business, and resolve their disputes. While face-to-face meetings may remain the norm in some situations, there will be an increasing reliance on more efficient media. The private sector is already making extensive use of video communications; by the 21st century interactive video will be widely available in airports, shopping malls, and libraries.⁴²

Virtual reality is a new technology that places the user in an artificial, computer-simulated world. Already a user can “inhabit” this world, using the computer for both sensory inputs and outputs. While virtual reality has obvious communications potential, it also raises troublesome questions. According to experts, those who spend significant amounts of time in virtual reality environments may lose the ability to distinguish between the real and the virtual, creating new issues concerning cognition and criminal intent.

In the future, the courthouse may not always be a finite physical space. Information technology will allow the justice system to hold meetings,

hearings, and even trials in video and perhaps virtual reality environments. Almost without question the courts will be paperless. Before such innovations are adopted, however, the third branch must first resolve critical issues concerning due process rights and data security (see Chapter 6, Information Technology and Justice). Moreover, strict safeguards must be created to ensure that technology does not disadvantage any class of justice seeker. In a complex multidimensional justice system, technology will be the great equalizer. It will enhance the abilities and the opportunities of the disabled and the poor, both within and outside the justice system.

Biotechnology and reproductive technology represent other revolutions where the barricades are inexorably coming down. The surrogacy and custody cases to which such technologies are giving birth today are straightforward compared to those the future promises. Researchers around the world are working to map and decipher the genetic codes that control human development. Already they have pinpointed the location of 2,372 human genes, or 5 percent of the total.⁴³ With progress expected to increase exponentially, the unlocking of the human genome is expected to be complete well before the year 2020. The results will equip scientists to identify the genes that are linked with some diseases and behavioral disorders, thereafter possibly to cure them. In the future, employers and health officials will be able to screen individuals to detect health and other genetic risks. Embryos might be genetically customized according

to their parents' tastes. Courts will be obliged to grapple with fundamental questions: Who owns genetic information? Who should and who should not be able to access it? And what kinds of genetic changes in humans is society prepared to accept?

THE "JUSTICE SYSTEM"

THE THIRD BRANCH TODAY

"Criminal justice system," and "civil justice system" are terms commonly used to refer to today's courts. Unfortunately, they mislead more than they inform. "Systems" are combinations of parts that constitute a unified whole "organized according to a formulated method or plan."⁴⁴ The California justice system is not that. Rather, it is a loosely knit network of courts, officials, agencies, and organizations, spanning the three branches of government.

The "third branch of government" or "the judicial branch" is more easily described. The California judiciary today consists of 1,554 judges who sit in 203 courts. At the local level, there are 47 justice courts and 91 municipal courts — courts of limited jurisdiction that includes some civil cases (less than \$25,000), small claims, residential evictions, all misdemeanors and infractions, and preliminary felony proceedings. They account for 670 judges, 7 referees, and 163 commissioners.

At the state level, each of the state's 58 counties is home to a superior court. Together, those 58 courts account for 789 judges. The superior courts

Systems are combinations of parts that constitute a unified whole organized according to a formulated method or plan. The California justice system is not that. Rather, it is a loosely knit network of courts, officials, agencies, and organizations, spanning the three branches of government.

are courts of general jurisdiction. Their reach extends to appellate review of lower courts, larger civil cases (more than \$25,000), family law, juvenile law, probate law, and final felony proceedings. The superior courts also employ 23 referees and 117 commissioners who perform limited judicial functions. Currently pending in the Legislature is legislation that would unify the trial courts and change much of the above.

At the appellate level there is a Court of Appeal, divided into six districts, in which sit 88 justices. The state Supreme Court consists of a Chief Justice and six associate justices.


OTHER JUSTICE PARTICIPANTS

In California today there are roughly 138,000 lawyers registered with the California State Bar.⁴⁵ The great majority of these are private practitioners. In addition there are 58 district attorney offices, 58 or more public defense organizations, 58 county counsel, roughly 350 city attorneys, the State Attorney General's office, the Department of Justice, and the State Public Defender's office.⁴⁶ There are also several publicly funded indigent trial and appellate defense programs.

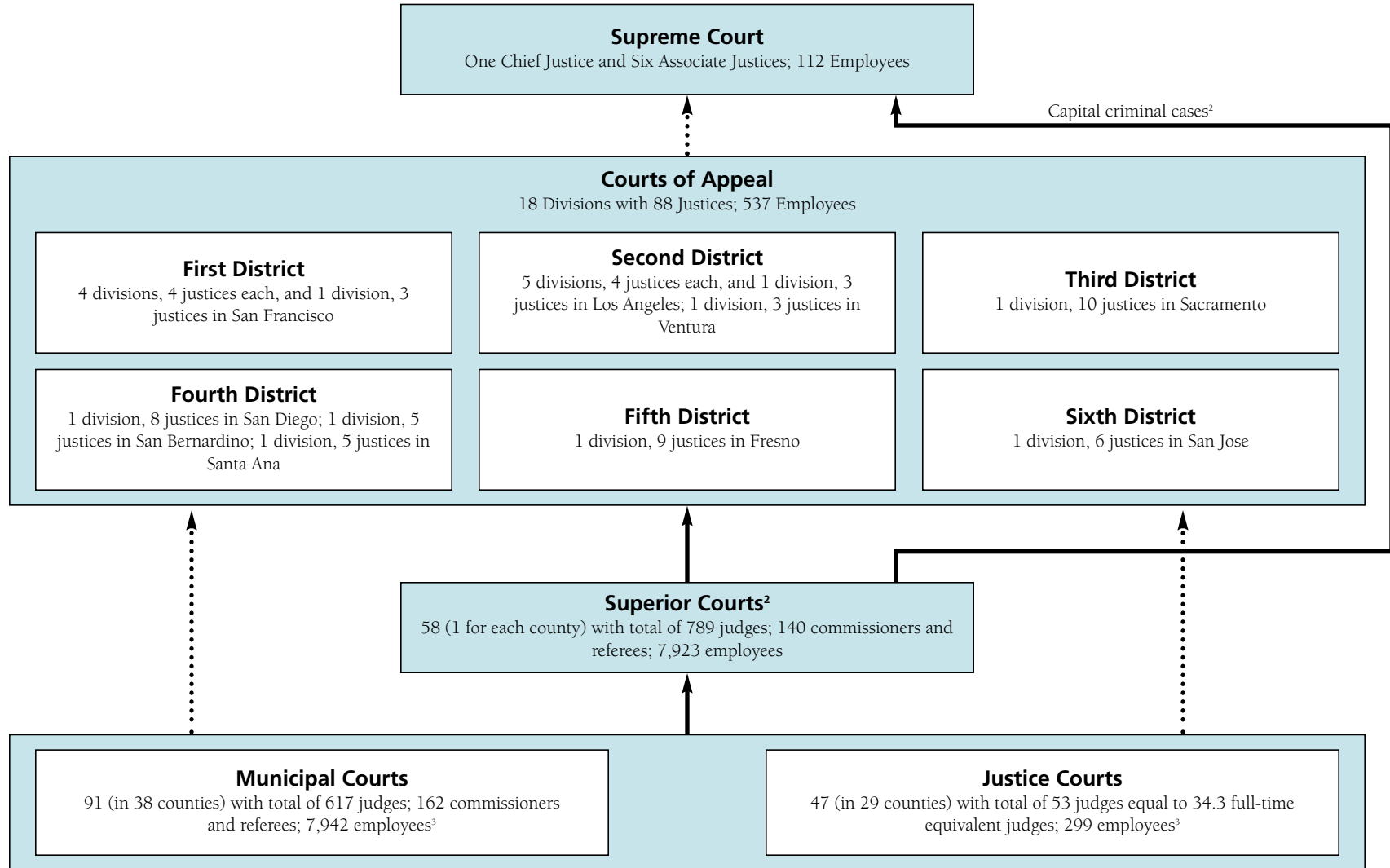
Countless public and private agencies also play important roles in the justice network. There are, for instance, 58 local probation departments, 58 county social welfare agencies, 58 sheriffs' offices and their local corrections systems, the State Office of Administrative Law, the State Department of Corrections, the State Youth Authority, various state mental health institutions, the State Depart-

ment of Motor Vehicles, the Workers Compensation Appeals Board, and numerous private sector organizations such as title companies, insurance companies, collection agencies, legal assistance programs for the poor, and many others.⁴⁷

DISPUTES TODAY AND TOMORROW

The last 30 years have seen major increases in the number of disputes processed by the California courts, and similar increases in the size of many judicial workloads. Data on the dimensions of that growth can be found, principally, at the beginning of Chapters 2 (Multidimensional Justice) and 9 (Criminal Justice). 

California Court System¹



¹Total number of judges refers to authorized judicial positions as of June 30, 1992

²Death penalty cases are automatically appealed from the superior court directly to the Supreme Court

³As of October 1, 1991

————— Line of appeal
 Line of discretionary review

A PREFERRED FUTURE

It is 2020. In structure and in process California's courts are dramatically different. In their strict adherence to principles of justice and fairness, however, they are unchanged.

The single California trial court that came into being in the mid-1990's has evolved almost beyond recognition: it is a true, "multidimensional" public justice *system*. No longer merely "multi-door," its approach to dispute resolution represents complementary, mutually supporting relationships among the third branch, other government agencies, and the private sector. By 20th-century standards the system is decentralized. But because information and communications are universal, because institutional borders have become less meaningful, the system is also better integrated.

The paradigm shift in justice is not merely the product of new structures and processes. It is also the result of better informed disputants, lawyers wearing hats other than the traditional adversary ones, court personnel playing new roles, and new ways of sequencing and managing the resolution process.

No longer merely courts, the justice forums of 2020 are true multioption justice centers that provide a broad range of dispute resolution processes, often under a single roof. Community dispute resolution centers — the descendants of 20th-century municipal and justice courts — offer a more limited range of services than larger metropolitan justice centers, but they tend to be more closely integrated in the community. Where indicated, some matters are referred out of the justice system to other agencies. Private dispute resolution providers meet any number of specialized needs.

The objective of multidimensional justice is to provide appropriate dispute resolution forums in which disputants can be active and informed participants in managing and resolving their conflicts. Assessment officers evaluate each dispute that enters the system and refer it to the resolution process most likely to resolve it fully, effectively, and efficiently. Among the available process options are the familiar — mediation, neutral case evaluation, and arbitration — and the less familiar: med-arb, mini-trial, and the evolutionary descendants of other 20th-century hybrids. Disputants are seldom obliged to use such processes serially; in most cases a single resolution process is sufficient to resolve the matter. Proving

MULTIDIMENSIONAL JUSTICE

20th-century pundits wrong, bench and jury trials not only have survived but have become more efficient, without a sacrifice in quality. Justice is transformed.

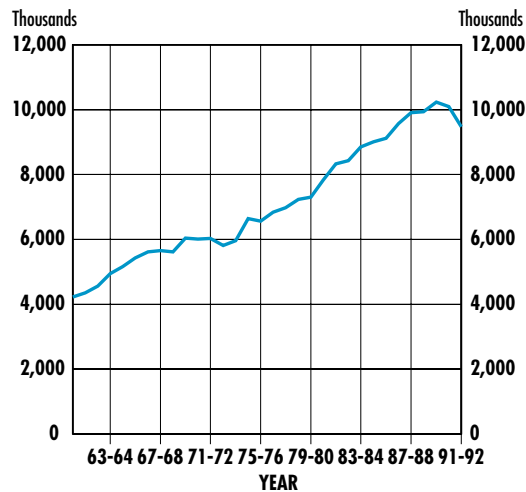
JUSTICE YESTERDAY AND TOMORROW

Predictions of a “crisis” in the courts date back almost a hundred years.¹ Opinions differ as to whether or not the California courts are in crisis today, but if growing caseloads and shrinking resources define a crisis, then the California courts may be headed for one.

Most crisis scenarios suppose a litigation “explosion” that triggers the collapse of an overextended and physically exhausted court system. The commission’s public opinion survey indicates that the public believes that such a scenario describes today’s reality, that the courts’ ability to deliver justice is in real jeopardy. (See Chapter 5, Public Trust and Understanding.)

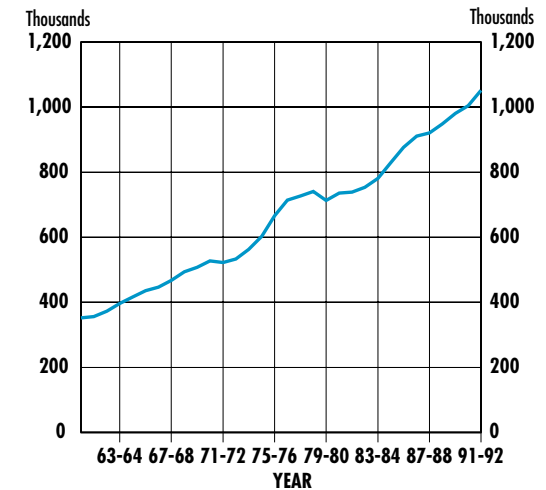
The public is not alone in this opinion — the bar and the third branch itself are also alarmed. Recent trends suggest that some of such worry is warranted: demand for court services may slowly but steadily be outpacing government’s ability to provide them. Absent significant change, Californians in 2020 may find that justice has become a rare and expensive commodity.

FIGURE 2.1 California Municipal and Justice Courts, Nonparking Filings, Fiscal Years 1960–61 Through 1991–92



Source: Judicial Council Annual Reports.

FIGURE 2.2 California Superior Courts, Total Filings, Fiscal Years 1960–61 Through 1991–92



Source: Judicial Council Annual Reports.

THE PAST 30 YEARS

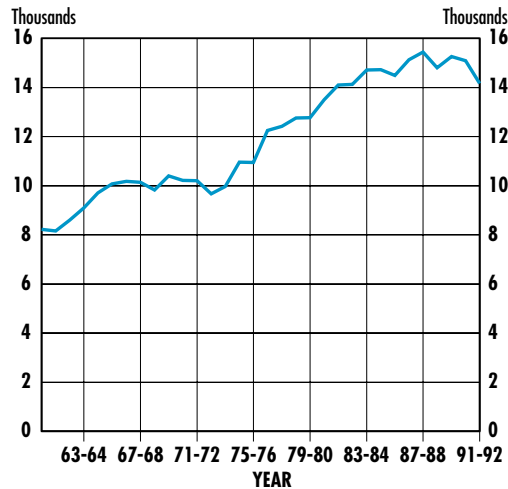
The last 30 years have seen major increases in the number of disputes processed by the California courts. Annual nonparking filings in the justice and municipal courts doubled between 1961 and 1992, to nearly 9.5 million. Filings in the superior court during the same period nearly tripled, to over 1,000,000 (Figs. 2.1 and 2.2). The largest percentage increases, however, occurred in the Court of Appeal, where between 1961 and 1991 filings of records on appeal and original proceedings grew by 697 percent.

The greatest growth in case filings over the last three decades has been in the courts’ criminal

dockets. In the superior court the number of criminal filings rose from around 35,000 in 1961 to about 165,000 in 1992, a 375 percent increase. At the municipal/justice court level during the same period, criminal filings — felony preliminaries and nontraffic cases — more than doubled, from around 550,000 to over 1,100,000.

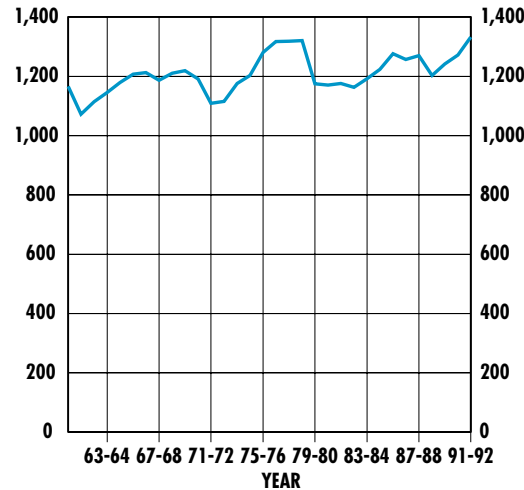
On a filings-per-capita basis, the state ranks near the middle of the 50 states in civil filings, and in the bottom third for criminal filings. In 1961 there were 5,088 civil filings in the trial courts for every 100,000 Californians. By 1992 that number had grown to 6,207, an increase of 22 percent. During the same period criminal filings per 100,000 Californians increased from 3,699 to 4,244, an increase of 15 percent.

FIGURE 2.3 California Municipal and Justice Courts, Nonparking Filings per Judge, Fiscal Years 1960–61 Through 1991–92



Source: Judicial Council Annual Reports.

FIGURE 2.4 California Superior Courts, Total Filings per Judge, Fiscal Years 1960–61 Through 1991–92



Source: Judicial Council Annual Reports.

While no new judgeship positions have been created in the state since 1988, in the 28 preceding years the number of superior court judges more than doubled, from 302 to 789. At the municipal/justice court level the number rose from 514 to 669. Despite such additions, judicial workloads continued to grow.

In 1961 a municipal/justice court judge, on average, faced an annual docket of 8,226 nonparking cases. By 1992 that number had risen to 14,160, an increase of 72 percent. In the superior court the increase in cases per judge was less marked, growing from 1,166 cases per judge in 1961 to 1,332 in 1992. (Figs. 2.3 and 2.4.)

THE NEXT 30 YEARS

What can the courts expect in the next 30 years? Straight-line projections assume that caseloads will grow at a constant rate. This is a risky assumption, given the factors that affect caseload composition and volume: population, age, ethnic diversity, economic growth, governmental regulation, increased mobility, technological advances, and the growth of private judging, to name but a few. While academics have long sought to bring greater accuracy to such projections, commission consultant Professor Samuel Krislov admits that “advances in this field have been more accurately described as expeditions that have found out what does not cause caseload variance, rather than explaining what does actually drive the system.”²²

Of all the variables that drive caseload growth, population has proved to be the most reliable. Thus, rather than trust in more arcane science, the commission relies primarily on population growth as its principal basis for caseload forecasts.

Projected population growth in the state suggests no imminent explosion in court caseloads. Figure 2.5 depicts forecasted filing rates for the next 30 years. It shows both the historical increasing-filings-per-capita rate, and a flat-filings-per-capita rate.

The figures speak for themselves. Even assuming flat per capita growth in total system-wide case filings, the judicial branch can expect to see more than 18 million cases annually by 2020. And it is the commission’s assumption that filings per capita will in fact continue their historical growth

pattern. Thus, even in the “flat per capita growth” scenario, additional judicial positions will be needed just to maintain today’s judicial workloads. In the “rising per capita growth” scenario, absent profound changes in society and the courts, many more additional positions will be needed just to keep pace with demand.

FEWER RESOURCES

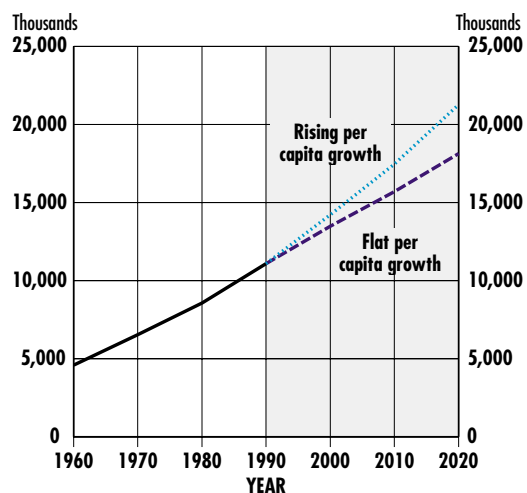
Until relatively recently, judicial branch budgets saw fairly predictable growth over the last 30 years. Between 1983 and 1991, state funding for the trial courts increased 750 percent, local funding for the trial courts increased 63 percent, and state funding for the appellate courts increased 250 percent. This 141 percent overall increase equals an average nominal annual increase of almost 12 percent. With inflation averaging 4–5 percent per annum during much of this period, the third branch saw substantial *real* increases in funding.

Today’s trends suggest that future resources may be less plentiful. If fiscal 1993–94’s judicial budget is a harbinger of future trends, the courts will soon be sailing in uncharted waters.

ALTERNATIVE FUTURES SCENARIOS

In attempting to anticipate the unknown, the commission’s fiscal consultant, Professor John Hudzik, created three scenarios of possible fiscal futures for the courts: low-range, mid-range, and high-range funding estimates. (Hudzik’s projections are treated in greater detail in Chapter 12, Financing Future Justice.)

FIGURE 2.5 California Trial Courts, Total Nonparking Filings, 1960–1990 and Projected Nonparking Filings, 1990–2020



Source: The Futures Commission.

In a “low-range judicial resources” scenario, California’s economic recovery does not materialize until the late 1990’s and entitlement program spending continues to increase at today’s rates. In such a scenario, funding for the courts would be likely to increase at an average nominal rate of no more than 3–5 percent per annum. Inflation could quickly translate such an increase into a net reduction.

A mid-range funding scenario assumes the same time frame for the state’s economic recovery, and some success in curbing entitlement spending. In this scenario, total court funding is projected to increase at a nominal average rate of 4–6 percent per annum. Given moderate inflation rates, current real funding levels could be maintained.

A high-range scenario assumes a robust recovery and significant reforms in entitlement spending. In this rosy future, total funding for the courts could increase at a nominal average rate of 6 percent or greater per annum. Absent significant inflation, the courts would realize a net budgetary gain over time.

Unfortunately, overlaying *any* of these scenarios with the *conservative* caseload and judicial workload projections above produces a sobering snapshot of the future. Even if the high-range scenario were tomorrow’s reality, it is doubtful that annual budget increases of 6 percent would be adequate to fund the courts of the future. If crime rates increase or Californians become more litigious, almost no realistic level of funding will be adequate to allow the courts to continue to process disputes as they do today.

Only one prescription holds much promise in the face of this grim prognosis. Without any real prospect of resource increases sufficient to process cases in traditional ways, the courts must find new ways of doing business.

CREATING A NEW MODEL: MULTIDIMENSIONAL JUSTICE

Devising a plan that would do no more than keep the courts’ head above water in the next century was not the commission’s charge. Even assuming a way could be found to provide minimum allowable levels of conventional justice, the commission cannot endorse such a future. To have any hope of excellence, a very different model of justice is needed.

A TRUE PUBLIC “SYSTEM”

In its broadest configuration, the justice system today encompasses not only courts, but criminal justice, human services, and other agencies. It can hardly be termed a “system” at all. Lack of communication and coordination among the various agencies creates massive inefficiencies and in some cases actual injustice. Today, the “system’s” component parts share common hopes and related goals but little else. The result is often a duplication of effort, an endless reinventing of the wheel. In the commission’s preferred future this network of loosely connected public courts, agencies, and offices must become a fully coordinated, integrated system.

“Coordination among all the segments of the community is the answer to the issues that we have, . . . not simply hiring more judges, getting more buildings built.”
Attorney, San Jose Hearing, August 19, 1993

Today, when justice-related agencies do interact — in a judicial referral of a matter to a human services agency, for example — there is often little follow-up to ensure that the ordered action has occurred. Fragmentation compromises both access and quality. The sheer number of courts, agencies, and other justice organizations can confound and alienate all but the most sophisticated and knowledgeable justice seeker. Even seasoned attorneys are sometimes baffled by inscrutable relationships among interlocking justice and service providers.

The judicial branch has a unique opportunity to begin the transition to “system,” and it should begin with the courts themselves. Proposals to unify the trial courts are currently pending in the Legislature. While not all commission members support all the provisions of the pending legislation, the commission is virtually unanimous in its endorsement of the goal of trial court unification. Discarding distinctions among superior, municipal, and justice courts will not be universally popular, but it is a necessary first step.

RECOMMENDATION 2.1 *The courts must become a true, integrated “system,” coordinated, connected, efficient, and affordable, yet respectful of local differences in judicial and social culture.*

Strategy:

- 2.1.a. As a first step toward greater integration and efficiency, the trial courts should be unified.

EXPANDING DISPUTE RESOLUTION OPTIONS

The second component in the commission’s preferred future is increasing the number and the availability of dispute resolution options. Appropriate dispute resolution is central to providing effective, affordable, satisfying justice to all Californians.

Today, dispute resolution options in the courts are limited. While alternatives are increasing — court-annexed mediation in family and juvenile settings, for example — to participate in nonadjudicative processes most disputants are obliged to seek them in the private sector. There, mediation, arbitration, and other processes are readily available, although often at substantial cost.

For many disputes, both today and tomorrow, adjudication — a trial to a judge or jury — is the most appropriate resolution method. For many others, however, nonadjudicatory processes allow the parties greater involvement in the resolution of their conflicts, produce results that are equally or more satisfying, and often cost less. Fundamental to the commission’s vision of multidimensional public justice is a wide array of appropriate dispute resolution (ADR) processes. (While “ADR” has historically been used as an acronym for *alternative* dispute resolution, the commission adopts a different meaning. Not only is “alternative” unhelpful — alternative to what? — but “appropriate” better conveys the concept of “the method best suited to” resolving the dispute. When “alternative” is used, it is used in the sense of “one of many.”) The commission also endorses the continued existence —

indeed the growth — of private dispute resolution choices. (See the last section in this chapter, “Private Justice.”)

RECOMMENDATION 2.2 At a minimum, California’s multidimensional justice future will see (1) a fully integrated public justice system, and (2) private dispute resolution providers. The public justice system should include multioption justice centers — “courts” offering a full range of dispute resolution processes and services — and publicly supported community dispute resolution centers.

THE MULTIOPTION JUSTICE CENTER

Essential to the commission’s vision of preferred justice is a statewide system of multioption justice centers, centers resembling the multidoor courthouses of today. Conceived in the 1970s, the multidoor courthouse was a response to the recognition that there are many appropriate ways to resolve disputes, that courts could offer an entire menu of dispute resolution options both within and outside their walls.

RECOMMENDATION 2.3 Justice centers should provide a range of dispute resolution options, including bench and jury trials.

For courts to offer a range of dispute resolution options is not to indict traditional justice. Rather, it is a recognition that not all disputes are best resolved by adjudication. Such an admission in no way diminishes the importance of adjudica-

tory justice. To the contrary, as fewer disputes are tried to a judge or jury, adjudication will be more easily recognized as the valuable, limited resource it is. Through their adjudicative function the courts will continue to play their pivotal role as creators and ratifiers of social norms. All serious criminal matters will still be adjudicated. Civil disputes that warrant a trial will still receive one.

It is a fact, however, that litigation and adjudication are cost- and labor-intensive processes. And because today they are largely dependent on counsel, they are simply not accessible to growing numbers of Californians. Other processes, in addition to being more appropriate and more satisfying to many disputants, can also be simpler, faster, and less costly. While the objective of multidimensional justice is not “cheaper” justice, economy will in many cases be a happy byproduct of the multioption model.

Strategies:

- 2.3.a. Public justice centers should provide a varied menu of dispute resolution processes including, among others: mediation, arbitration, early neutral evaluation, expedited proceedings (like today’s small claims), referee-panel adjudication, administrative law forums, and bench and jury trials.
- 2.3.b. Most such processes should be simple, understandable, and well suited to parties unrepresented by counsel. In certain consensual processes (small claims and

“Simplicity ought to be a part of whatever the law is. Not superficiality, but simplicity to a degree that an average citizen has more than a passing understanding of law.”

Teacher, Van Nuys Community Adult School
Hearing, April 22, 1993

certain types of mediation, for example) counsel should be excluded by rule.

The public justice system of 2020 should also offer disputants assistance in the resolution of especially complex or specialized disputes. Specialty forums and processes should be provided in some larger or regional justice centers. Such processes might be geared to matters such as complex technology (including biotechnology), mass tort litigation, and certain commercial matters.

- 2.3.c. Specialized dispute resolution processes and forums should be created as necessary. They may be most appropriately located in regional facilities.

ASSESSMENT AND REFERRAL

Effective dispute assessment and referral is essential to appropriate dispute resolution. Accurate matching and referral promotes disputant satisfaction and accounts for much of the cost and resource efficiency inherent in multidimensional justice.

Assessment officers in public justice facilities will adhere to evolving guidelines in evaluating and referring disputes. Most disputes will be referred to resolution forums within the justice center. Others may be referred to administrative or social services agencies. In rare cases a matter may be referred outside the public system entirely, to a community-supported or private dispute resolution forum.

Guidelines should also be developed to iden-

tify those matters for which traditional adjudication may be the appropriate resolution process, e.g., disputes involving important public issues or those likely to establish important precedents. Such guidelines must not become automatic prescriptions for adjudication. Their use should be limited to helping skilled assessment officers make the best possible referrals.

Strategies:

- 2.3.d. The courts should establish evolving guidelines to assist assessment officers in the review and referral of disputes to the most appropriate dispute resolution process.

Dispute assessment, if it is to be truly effective, must consist of more than merely matching disputes with the appropriate resolution process. The assessment officer should also act as a quality control officer and as a dispute consultant. He or she is uniquely positioned to examine the claims presented. With appropriate guidelines — to be developed by the courts’ policy-making body — assessment officers should be permitted to counsel disputants. The level of permissible counsel might, for instance, be conditioned on whether the assessment officer is or is not a judicial officer.

- 2.3.e. Assessment officers should have the authority to counsel disputants about their disputes, including the processes and resources available to resolve them, both within and outside the justice system.

The evaluation and referral process must be carefully administered and monitored. Absent quality controls, disputant confidence and efficiency gains may be lost through inappropriate or untimely referrals. The judicial branch's policy-making body should regularly update the assessment-monitoring process and standards.

Today, the assessment function in some very successful multidoor courthouses is performed by nonjudges. In some circumstances in the future — in small, rural justice centers, for instance — a judge might perform assessments as but one of many functions. In other situations, however, trained nonjudicial personnel will be the better choice.

2.3.f. Because the process of assessment and referral is a quasi-judicial function, it should be developed, monitored, and reviewed by judicial officers. Assessment officers may but need not be judges.

An assessment officer's referral decision should not be appealable. In a multioption justice environment many or most dispute resolution processes are consensual and nonbinding. Unless they choose to do so, disputants do not waive any right to adjudicate their disputes. To allow mini-trials or even hearings for the purpose of contesting an assessment officer's referral would sacrifice the process's efficiency gains.

2.3.g. There should be no right of appeal from an assessment officer's referral decision.

In 2020, advances in communication and

information technology will enable disputants to access public justice centers via a variety of media. One option is justice kiosks, similar to automated teller machines, in public locations. Such kiosks exist today in Long Beach and elsewhere. In the future, disputants might use interactive terminals at such kiosks to communicate with assessment officers. Further advances may allow the assessment officer's primary function — screening — to be performed largely by “expert systems.” (See Chapter 6, Information Technology and Justice.)

2.3.h. In the future, subject to the development of appropriate criteria, standards, and technology, assessment and referrals via interactive computer programs supported by expert systems should be permitted.

PROCESSES

While Californians are becoming better acquainted with appropriate dispute resolution, most are unaware of the rich variety of options that exists today.

Of all forms of nonadjudicatory dispute resolution, **mediation** is probably the most common. In mediation a third person (the “neutral”) assists the parties in reaching a mutually agreeable solution. The parties agree on and retain control of the process and decide the important issues and facts. Because the parties arrive at a resolution voluntarily, mediated settlements tend to endure longer than those imposed on disputants by third parties.³

Mediation can be rights-based or interest-based. In the former, the neutral advises the parties

“I think we should deemphasize the adversarial nature of our legal system. . . . We should have professional mediators meeting with the parties right from the beginning — before their heels are dug in — to get them to settle.”

Attorney, Van Nuys Community Adult School Hearing, April 22, 1993

on the legal issues in the dispute and assists them in reaching an agreement that may reflect how the dispute would be decided if it were before a court. Interest-based mediation, on the other hand, seeks to promote agreements that reflect the parties’ fundamental interests.

Minitrial is a variation on mediation that utilizes more formal presentation of the parties’ positions and involves party representatives who have the authority to negotiate a resolution of the dispute. A neutral may also participate and serve as a mediator to assist the party representatives in reaching agreement. If no agreement is reached, the third party may provide a nonbinding “evaluation” that resembles a judge’s settlement conference evaluation. Equipped with both interest-based and rights-based analyses, the parties may be better able to reach agreement.

Early neutral evaluation utilizes an evaluator who is familiar with the subject area of the dispute and who assists the parties in focusing on the strengths and weaknesses of their claims. The evaluator assists in early settlement discussions and may prepare a written evaluation for the parties.

In **arbitration**, parties relinquish substantial control over both process and result to a third party arbitrator, often a judge, attorney, or other expert in the subject matter of the dispute. Today, parties sometimes voluntarily seek arbitration and stipulate to binding and final orders. Or they may be required by courts to enter into nonbinding arbitration as a precondition to a trial.

In so-called “**med-arb**” the parties first

attempt to negotiate a mediated, mutually acceptable agreement. That failing, the neutral then assumes the role of arbiter and imposes a rights-based decision.

Private judging is provided for by the California Constitution and by statute. It encompasses three court-based processes.

- *General Reference* — The parties agree to a court order appointing one or more referees to decide one or all issues in a case. The referee’s report is entered as the court’s judgment and may be appealed.

- *Special Reference* — The parties are involuntarily referred to a referee for a defined task — resolution of a discovery dispute, for example. The referee then recommends action to the court, which may alter the referee’s determination. Parties retain the ultimate right to submit their case to the court or jury.

- *Temporary Judge* — A temporary judge is a lawyer or retired judge appointed by the court (with the agreement of the parties) to act as a judge on a particular issue or the entire case. The temporary judge has all the powers of a public judge and enters judgment on the case or issue or the entire case. The appeal process is the same as in an ordinary case.

THE NEED FOR STANDARDS

New dispute resolution methods and the new use of old methods have inevitably created new questions. It is not always clear, for instance, when certain proceedings and results should be kept confi-

dential and when they should be open to public scrutiny. Other issues concern the role of counsel in dispute resolution, immunity for dispute resolution providers, training, certification, and the like.

RECOMMENDATION 2.4 *As appropriate dispute resolution evolves, standards must be developed to ensure quality, efficiency, and fairness.*

Strategies:

- 2.4.a. Subject to case-law constraints, standards should be developed to govern: basic procedural formats for all new dispute resolution methods; confidentiality; and the extent of judicial immunity conferred on mediators, arbiters, and other dispute resolution providers.
- 2.4.b. Standards should be created for the training and certification of public justice system mediators and other public dispute resolution providers, and for those private providers who receive referrals from a court.

Privacy, confidentiality, and judicial oversight in the context of private dispute resolution are discussed further in the last section of this chapter, “Private Justice.”

WHO PAYS FOR JUSTICE?

In the future, resource availability will play a major role in determining the level and quality of serv-

ices that the public justice system can provide. While Chapter 12, Financing Future Justice, addresses intrabranch fiscal issues, the more general questions of how much justice the courts should provide and who should pay for it are considered here.

The utility of government providing a wide range of “free” dispute resolution services is realized only when disputes are resolved appropriately. Appropriate dispute resolution assumes accurate referrals and that disputants make effective use of the resolution options they utilize. A nontrial resolution process that the parties view merely as a prelude to trial seldom amounts to more than an expensive waste of time. Incentives are needed to ensure that disputants use public dispute resolution resources in good faith.

RECOMMENDATION 2.5 *The justice system should create incentives to ensure that parties utilize the most appropriate dispute resolution options and make good-faith efforts to resolve their disputes.*

Strategies:

- 2.5.a. In public justice system disputes that are assessed, referred to a nontrial dispute resolution process (e.g., mediation), and not successfully resolved there, the parties should bear some portion of the costs of using further public dispute resolution options.
- 2.5.b. Party costs should be shifted based upon

“In alternative dispute resolution there doesn’t necessarily need to be a loser. There need to be two people willing to work at finding a resolution for themselves.”

Mediation Center Representative,
San Diego Hearing, August 23, 1993

the reasonableness of the opposing party’s conduct (as determined by the trier of fact) and the outcome of the resolution process.

- 2.5.c. Court costs (user fees) should be shifted among parties based upon the reasonableness of the opposing party’s conduct and the outcome of the resolution process. The amount of such costs should be determined by the Legislature. Full costs are not necessarily contemplated.
- 2.5.d. In shifting either party costs or court costs, the parties’ ability to pay must be a factor.

THREE SCENARIOS

Again, any one of three possible scenarios may define the courts’ fiscal future: resource levels remain more or less unchanged; they increase; or they decline. Fundamental to alternative futures planning are alternative strategies to respond to the future reality, no matter what it may be. In the first fiscal scenario, judicial branch resource levels in 2020 (adjusted for inflation and population growth) are approximately the same as today.

RECOMMENDATION 2.6 *If judicial branch resource levels remain essentially unchanged, disputants in the public system should continue to assume some of the cost of justice, as they do today.*

Strategies:

- 2.6.a. As today, such costs should be assessed in the form of user fees, e.g., filing fees, motion fees, jury fees, etc. Such fees should be assessed for both traditional adjudicatory processes (trials) and other dispute resolution options provided in the public justice system.
- 2.6.b. The justice system of the future should impose modest fees for both dispute assessment and dispute resolution services.
- 2.6.c. Justice center operations should also be funded with the efficiency savings that are the result of appropriate dispute resolution.

In a second, preferred future, funding for the judicial branch will be significantly greater than current levels. In such a future the third branch will be able to supplement the services that it provides; its top fiscal priority should be to enhance access to civil justice for those otherwise unable to afford it (see Chapter 3, Access to Justice). While in the commission’s preferred future far fewer disputants will require the assistance of an attorney, counsel will still be needed in cases referred to adjudication.

RECOMMENDATION 2.7 *If the third branch enjoys greater fiscal resources than today, the priority should be to provide counsel*

to those disputants who still require counsel but are unable to afford it.

In a third scenario, one in which judicial branch resources are significantly reduced, the justice system's ability to provide any civil justice at all may be jeopardized. Civil justice could be reduced to a pay-as-you-go process, with those who use public forums for private disputes paying the true cost of the resolution services they use.

While such a proposal will strike some as unfair — if not unconstitutional — it is offered here as a worst-case approach for a dystopian fiscal future. That said, nearly half the commission's members supported the adoption of a similar approach to funding civil justice today. Their position was that the public should not be burdened with the expense of providing a free public resource for the resolution of essentially private disputes. They endorsed public subsidies for those who are unable to pay.

RECOMMENDATION 2.8 In an alternative future in which there are far fewer resources for civil justice, those disputants whose civil disputes have no “public good” value should be assessed the full costs of the public dispute resolution processes they utilize. The Legislature should establish broad criteria for determining those cases that are presumptively “public good” cases and those that are essentially private.

In such a future, because of the potential

for economic discrimination, “public good” should be broadly defined. Among those matters that would presumably qualify are: (1) criminal cases, (2) public law cases, (3) cases involving the enforcement of private dispute resolution, (4) cases involving the creation of public norms for civil conduct, and (5) most juvenile and family law cases. Fee waivers should be available to all those otherwise unable to pay.

The issue is complex. It receives comprehensive treatment in Professor Lawrence Solum's paper for the commission, “Alternative Court Structures in the Future of the California Judiciary.”

OTHER STRUCTURES, OTHER NEEDS

COMMUNITY DISPUTE RESOLUTION CENTERS

Community dispute resolution centers will play an important role in the commission's preferred justice future. By way of analogy, some see community dispute resolution centers as the 21st-century descendants of today's municipal and justice courts. Like the multioption justice centers of the future, they will be fully funded by the state. In addition to offering a range of dispute resolution options, community dispute resolution centers will act as an important point of entry, evaluation, and referral for complex matters better resolved in multioption justice centers.

MULTIOPTION JUSTICE: A CASE STUDY

In March 1990 one of the nation's first true multi-door courthouses, the Middlesex MultiDoor Courthouse, opened its doors for business in Cambridge, Massachusetts. Initially supported by a grant from the National Institute for Dispute Resolution, the program was evaluated two years later under a grant from the State Justice Institute (SJI). The following overview is based largely on SJI's report.

Annexed to the county's superior court, the Middlesex MultiDoor Courthouse handles civil matters that include tort, contract, real property, and equity cases, among others. As in all multidoor courthouses, its principal function is to screen cases and refer them to the most appropriate dispute resolution (DR) process. In addition, because subsequent dispute "tracking" is an integral function of the multidoor courthouse, the process also serves as a case management tool for the courts.

The Middlesex MultiDoor Courthouse offers dispute resolution options that include early neutral case evaluation, mediation, arbitration, and complex case management. Hybrid and other DR methods — summary jury trial, mini-trial, etc. — can be crafted to individual matters as circumstances suggest. The Middlesex MultiDoor Courthouse is largely self-supporting; an administrative fee of \$100 per party is assessed at time of entry. If a dispute proceeds beyond

screening to dispute resolution, a neutral's fee of \$150 per hour is borne equally by the parties.

In the Middlesex MultiDoor Courthouse court-annexed program, once participation is ordered by the court, attendance at a screening session is mandatory. Thereafter, however, participation in any dispute resolution process is discretionary. The screening process, which generally takes 15 to 45 minutes, is conducted by the multidoor courthouse's professional staff, not judges. Screening typically involves a review of the dispute's issues, discovery and settlement history, and the available resolution options. The screener then recommends a dispute resolution process. The choice of process, if any, is left to the parties and their counsel, however.

In the Middlesex MultiDoor Courthouse most two-party personal injury matters go to early neutral case evaluation. Commercial disputes are referred to mediation, as are most multi-party matters. Two-party case evaluations typically last an hour and a half. Other processes take longer, depending on the number of parties and issues involved.

In 1992 the Middlesex MultiDoor Courthouse scheduled 700 cases for screening. Of these, 600 (86 percent) were actually screened; the remainder settled or were otherwise resolved. Of the

600 cases that were screened, the parties in 454 (76 percent) opted to proceed to some form of appropriate dispute resolution. Of those 454 matters, 235 (52 percent) went to case evaluation, 207 (45 percent) proceeded to mediation, 8 (2 percent) were arbitrated, and 4 (1 percent) went to complex case management.

The evaluators, using 1990–91 data (1,041 cases screened), found that of those matters that went to early neutral case evaluation or mediation, 63 percent settled. Of the 894 screening conference exit surveys that were completed, “respondents overwhelmingly indicated that they would recommend the screening process to others (97 percent), and the vast majority (94 percent) would voluntarily bring another case to the Middlesex MultiDoor Courthouse for screening.” Among the indicated benefits of the screening process, the most frequently expressed were:

“Brought the parties together in the same room and provided a chance to communicate, an opportunity that we might not otherwise have had.”

“Offered a forum to discuss settlement.”

“Sharpened/narrowed the issues in dispute.”

“Assisted us in setting deadlines/dates for discovery.”

“Forced us to look at the case earlier.”

In order to verify the validity of these extremely high levels of satisfaction, the evaluators also used a control group of parties involved in traditional case processing in the courts. While both

Middlesex MultiDoor Courthouse participants and the control group expressed satisfaction with the process, the multidoor courthouse participants expressed consistently higher levels of satisfaction with “the manner in which legal matters were addressed . . . the manner in which non-legal matters were addressed. . . . the opportunity to participate in structuring the outcome of the case . . . and the fairness of the process.”

The evaluators also compared the cost of the multidoor courthouse and traditional justice, based on attorney time, required judicial activity, and court clerk’s office activity. Among the significant differences:

Over 25 percent more attorney hours were spent on control group cases than on multidoor courthouse cases.

Thirty-three percent more motions were filed in control group cases than in multidoor cases.

More documents per case were processed by the clerk’s office in control group cases.

— *State Justice Institute, Middlesex MultiDoor Courthouse Evaluation Project, Final Report, March 1992, SJI Grant No. SJI-90-03C-E-046.*

Central to the notion of community justice is the fact that certain disputes are better resolved in a community environment than in a less personal, sometimes anonymous, formal courtroom setting. Landlord-tenant matters, neighbor quarrels, noise complaints, minor civil cases, many family and juvenile matters, and some minor criminal complaints are but a few of the disputes with a distinct community nexus. With their local connections, culture, and understanding of community norms, community dispute resolution centers can marshal both community support for settlements and community pressure to adhere to agreements.

In order to leverage the benefit of their community links, community dispute resolution centers should wherever possible employ community members as judges, neutrals, clerks, and probation officers. The resulting familiarity may persuade disputants who have little knowledge of or who distrust the public justice system to use this “door” to the public justice system.

The prototypes for state-funded community dispute resolution centers — the neighborhood justice centers of today — have proved their ability to enhance community trust. Dispute resolution in such centers reinforces social norms and educates the community. Because the resolutions are the product of consensual agreements based on shared interests, needs, and values, the participants are typically much less likely to reject them for reasons of bias.

Community dispute resolution centers should try cases as necessary. However, because far

fewer matters will be adjudicated, the need for counsel may be limited. In providing an entry point for disputes better resolved in larger, full-service justice centers, community dispute resolution centers should be staffed with at least one assessment officer and interactive computer and/or video terminals for on-line access to the larger centers. Such a link effectively equips the community center with a wider range of dispute resolution services, enabling it to better serve the community.

While it is the commission’s view that community dispute resolution centers should be important partners in the public system and funded by the state, they should be operated and managed locally. Community justice is effective only if it retains its community identity. Decisions as to staffing and administration should in large part be a local prerogative.

In a different, resource-poor future, community dispute resolution might of necessity remain community supported. In such a scenario, the state should still support community justice as resources allow. Because of relatively high levels of public confidence in community justice, retaining the state/community connection will help preserve public trust in justice generally. If community justice centers are not fully integrated in the public justice system, they should be required to meet certain minimum levels of service and quality before becoming eligible for state funding.

RECOMMENDATION 2.9 The state should make community justice a priority.

Community dispute resolution centers should be full partners in the public justice system.

ADMINISTRATIVE JUSTICE IN THE FUTURE

In the preferred future, a significant number of disputes that are now adjudicated in the courts will become the province of administrative agencies. Those agencies, in turn, will join the appropriate dispute resolution movement.

Historically, administrative adjudication has proved effective in a range of disputes. Its success is due to its greater efficiency, use of streamlined procedures, the specialized expertise of administrative law judges, and the development of conventions to govern recurring factual and legal issues.

While already less formal than many judicial procedures, administrative justice stands to gain from adopting many of the same approaches that will be the hallmarks of the third branch in 2020: careful dispute assessment, appropriate referrals, and the utilization of the appropriate amount and kind of resolution resources. More efficient justice, better satisfied disputants, and fewer appeals to adjudicative tribunals are the likely results.

In referring growing numbers of disputes to administrative forums the multidoor public justice system of the future must ensure quality control. Only those disputes that are clearly suited to administrative resolution should be removed from tomorrow's court-equivalents. Without trespassing on the legitimate authority of another branch of

government (the executive branch), the third branch should periodically evaluate the procedures in nonjudicial forums to ensure that basic civil liberties are not inadvertently compromised. Clearly the judicial branch should not refer disputes to agencies unskilled in particular matters or certain processes. Equally clear is the need to ensure adequate funding for executive branch agencies to allow them to meet their mandates.

RECOMMENDATION 2.10 The judicial branch should establish and maintain a close and collaborative relationship with administrative agencies. Where greater efficiency would result, disputes should be referred out of the public justice system to administrative forums.

PRIVATE JUSTICE

While the commission yields to none in its commitment to and confidence in the quality of public justice in the next century, virtually certain is the continued, parallel growth of private justice. Integral to multidimensional justice is an expanding universe of private dispute resolution providers, existing in a collegial, cooperative relationship with the public justice system.

Private dispute resolution can often resolve conflicts more quickly and less expensively than public options. It is economies of cost and time that are prompting the securities, insurance, and bank-

“People go to court today because they think it’s their only option for settling their dispute. We should have three or four steps in the process so that [non-adjudicative] dispute resolution is the first — not the last — process.”

Witness, Eureka Hearing, August 16, 1993

ing industries to include private arbitration and mediation clauses in consumer contracts. Other benefits of private justice may be less obvious. One is efficiency. By assigning a price to dispute resolution services the marketplace can determine more or less efficiently what conflict resolution should cost. Profit motives and competition create incentives for providers to hold down cost and minimize delay. The disputant (whose objectives are similar) has a strong incentive to purchase only those resolution services that the dispute warrants.

Another advantage of private dispute resolution is the ability to tailor the process to the conflict. While the justice center of the future will have considerable latitude in creating hybrid processes, “boutique” private providers will probably always be able to offer an extra measure of specialization. Sometimes by prior contractual arrangement, sometimes only after the fact, disputants will be able to spell out with specificity the kind of method(s) they will utilize, and the order in which they will do so. For example, a contract between a wholesaler and a retailer might prescribe — in the event of a dispute — not only the resolution provider but the sequence of services that would be sought: early neutral evaluation, followed if necessary by mediation, followed if necessary by arbitration, with no right of adjudicative appeal.

Private justice is not appropriate for all disputes. While criminal disputes are in some instances suited to mediation in community-supported neighborhood justice centers (see Chapter 9, Criminal Justice), most criminal justice matters

will almost certainly remain in the public justice system.

“Private” dispute resolution is a misnomer when applied to judicial references and temporary judge proceedings (see “Processes” glossary above). Where cases or issues are referred by a judge to a referee, California Rules of Court make clear that the proceedings are essentially public, fully open to public view. Only the referee’s fee is “private.”

The motivation of a private judge may differ slightly from that of a public judge, however. As commentators Landes and Posner note:


Private judges may have little incentive to produce precedents. They will strive for a fair result between the parties in order to preserve a reputation for impartiality, but why should they make any effort to explain the result in a way that would provide guidance for future parties? To do so would confer an external, an uncompensated benefit, not only on future parties, but also on competing judges. If anything, judges might deliberately avoid explaining their results because the demand for their services would be reduced by rules that, by clarifying the meaning of the law, reduce the incidence of disputes.⁴

Other forms of private dispute resolution that some would claim come within the “private judging” rubric are closed to public view. Arbitrations have always been regarded as essentially confidential except for necessary court involvement, e.g., enforcing agreements to arbitrate, reviewing

arbitration awards, and enforcing judgments entered upon such awards. Mediations are protected from public view by statute.

Nevertheless, courts do broadly supervise various aspects of private judging processes. The conduct of arbitrations is subject to court review and the products of references and temporary judge proceedings are subject to trial and/or appellate review. Extensive disclosures by referees and temporary judges are now mandated. But parties have always been free to agree to resolve their disputes without judicial assistance both within and outside the public justice system, and they should remain free to do so. Indeed, appropriate dispute resolution, if it stands for anything, stands for the principle of parties' control over the resolution of their own disputes.

There is some concern that development of extensive private systems of justice may discourage support for public systems and attract public judges away from their public office. Adequate judicial compensation is the best defense against a "brain drain" into the private sector. (See Chapter 11, Governing the Third Branch.) The existence of a high-quality network of private dispute resolution providers in no way relieves government of its obligation to provide justice of similar or higher quality.

RECOMMENDATION 2.11 Judicial branch oversight over private dispute resolution processes should be limited to instances in which the parties use the public system ancillary to some aspect of the process. 

The existence of a high-quality network of private dispute resolution providers in no way relieves government of its obligation to provide justice of similar or higher quality.

A PREFERRED FUTURE

In 2020 *access* to justice is no longer an issue about which there is much debate — justice is an integral part of people’s lives. Disputants know how and where to resolve their conflicts fully, efficiently, affordably, often without recourse to public dispute resolution assistance.

Much of the growth in access is attributable to the emergence of a true multidimensional justice system. “Fitting the forum to the fuss” in multioption justice centers and community dispute resolution centers has transformed the resolution of conflict. No longer is it presumed that adversary justice is always the best justice.

In 2020 justice comprehends and is comprehended by all. In the public justice system no justice seeker is denied access or disadvantaged because of language, custom, lack of comprehension, or disability. Illiteracy no longer hinders participation in the justice process. Neither geography nor physical impediment bars the door to justice, and that door opens equally wide to poor and wealthy alike.

For those disputes that are still adjudicated or otherwise require counsel, legal services are widely available, paid for in large part with the proceeds from a self-supporting civil justice fund. But many disputes have effectively been “delegalized.” Roles that in the 20th century were invariably performed by lawyers are increasingly played by trained, lay legal providers. As a result, consumers of dispute resolution assistance are able to tailor such services to their needs, both in kind and in quantity. Justice is less expensive and there is more of it.

ACCESS THROUGH COMPREHENSION

Lack of comprehension is perhaps the greatest single barrier to justice. A failure to understand the system, the law, or the language of legal proceedings renders justice incomprehensible at best. At worst, it can result in severe injustice.

ACCESS TO JUSTICE

“I think it’s a challenge to make democracy work. I don’t see how it could work if systems are not affordable, sensible, intelligible, and understandable to the average American.”

Teacher, Van Nuys Community Adult School
Hearing, April 22, 1993

Those who do not understand the law cannot know when they have run afoul of it, or when their rights have been violated. Those who do not understand the legal process are poorly equipped to make choices about how they can resolve their disputes, or whether they require the assistance of counsel to do so.

LANGUAGE AND CULTURAL BARRIERS TO JUSTICE

Effective justice presupposes effective communication and understanding. Removing language barriers to justice is essential.

The third branch today makes often-herculean efforts to accommodate non-English speakers and those who may be hearing or speech impaired. Unfortunately, such efforts are sometimes not enough. As one commentator notes: “Those groups that do not yet have command of English or understand American law and the legal system are years away from taking bold initiatives to redress their grievances. Many of the language minorities are often illiterate in their own language as well as English.”¹

The scope of the language hurdle is illustrated in the growth of the state’s Spanish-speaking population. Nearly 5.5 million Californians speak Spanish, of whom over 650,000 speak no English. At the same time as immigrants and their children seek to improve their English proficiency, the state can anticipate a continued influx of Spanish-speaking people from Mexico and Latin America. For the foreseeable future the third branch will

need to pay special attention to the needs of Spanish-speaking newcomers especially.

It is not just the volume but also the diversity of non-English-speaking Californians that will challenge the public justice system of the future. Already California is the most linguistically diverse state in the nation; the U.S. Census Bureau counts 224 languages and innumerable dialects. Of the 32 percent of Californians who speak a non-English language, nearly one in ten speaks no English. In the Los Angeles school district, two-thirds of the students speak a language other than English at home. It is estimated that the number of primary languages in the district is around 85.² In San Francisco, over 60 languages are spoken in the public schools.³

RECOMMENDATION 3.1 Interpreter services must be made available to all court users who require them, including those without fluency in English, the sight and hearing impaired, and the illiterate.

For those who are not fluent in English and for the hearing impaired, so-called “real-time translation” offers tremendous potential. In real-time reporting a court reporter’s stenograph is connected to a computer, the notation is translated instantaneously, and the words appear on computer or projector screens only seconds after they are spoken.

RECOMMENDATION 3.2 Simultaneous real-time translation should be provided for all — those not fluent in English, the hearing

impaired, judges, counsel, witnesses, and jurors, among others. The courts should support research to develop computer-aided translation services.

Cultural differences can also pose serious impediments to comprehension. To bridge that gap, judges and nonjudicial personnel must strive to become more “culturally competent,” that is, comprehending of and sensitive to cultural differences. (See Chapter 4, Equal Justice.) A first step in achieving cultural competence is hiring more multilingual court personnel, both judicial and nonjudicial.

RECOMMENDATION 3.3 The public justice system should make every reasonable effort to develop multilingualism in both judicial officers and nonjudicial court personnel.

Cultural comprehension can also be fostered through the use of “cultural interpreters,” intermediaries who can explain the fundamental assumptions and procedures of Anglo-American justice to justice seekers with different cultural and justice reference points. Wherever possible, the justice system should reach into the community and recruit volunteers for such functions.

RECOMMENDATION 3.4 The courts must develop the ability to explain the fundamentals of the dispute resolution process to disputants from different cultures.

Many court users who are thoroughly profi-

cient in English confront another linguistic challenge in the courts: the language of lawyers, or “legalese.” “Res ipsa loquitur,” “malum prohibitum,” “tortfeasor,” and “tenancy at will” are only some of the mysteries that afflict today’s court user. Unless absolutely necessary to make a fine point of law for which there is no English or common usage equivalent, the language of the courts should be comprehensible, even without a lawyer/translator.

RECOMMENDATION 3.5 The language of justice should be comprehensible and clear in both the spoken and the written word.

Even when laws are written in English, the legislative process and “policy-speak” can conspire against public comprehension. Modern statutes — often a patchwork of ideas contributed by different authors — can be oblique. Rights and remedies are often left intentionally vague. In the future, laws and legal opinions should be written simply for the public at large, not only for policymakers, lawyers, and judges.

Strategies:

- 3.5.a. Statutes should be written in plain English. They should set out rights, responsibilities, and remedies in clear and simple terms.

The complexity of court rules can also inhibit public understanding. Today, every court in the state has the power to issue local rules to govern protocol, scheduling, law and motion calendaring,

*“Many kids get in trouble
but their parents, some of them
don’t speak English.
So when they go to court
their translator is their son.
Now, if I am in court
and I am translating for my mom,
there is a little
conflict of interest right there.”*

Student, Roosevelt Community Adult School
Hearing (L.A.), April 13, 1993

*“People go up there
[to the court] and people just give them
the runaround — well,
you don’t belong in this office,
go to this one, go to the other one.
People start losing faith in the system,
the system begins to fail.
We do not need a system of justice
that does not work.”*

Student, Roosevelt Community Adult School
Hearing (L.A.), April 13, 1993

and a variety of other procedures. Failure to observe the rules can result in cancelled hearings, barred motions, even dismissed cases. At the same time, the rules are sometimes so complicated that even long-time practitioners have been known to keep well-thumbed compilations within arm’s reach. While surely of some value to local courts, for parties without counsel they can bar effective access.

- 3.5.b. Court rules should be simplified. From county to county and court to court they should be as uniform as possible.

INFORMATION BARRIERS

Inadequate information about justice and its procedures is another significant impediment to access. Californians should have multiple sources of readily available, reliable information about public justice, and how to obtain it. In the past, attorneys were the gatekeepers and providers of such knowledge. In the future that gate must open more freely.

In 2020 the primary source of information about justice will be the public justice system itself. Information about public and private dispute resolution options and their cost must be available in every public justice system facility, be it a large, urban multioption justice center, a small neighborhood community dispute resolution center, or a rural interactive video link with a judicial branch information provider.

RECOMMENDATION 3.6 *The multidimensional justice system of the future must*

inform the public about rights and responsibilities, disputes and their resolution, and the effective use of public and private dispute resolution forums.

The source of such information must not be limited to public justice facilities, however. Time, distance, and anxiety about the courts can all be deterrents to obtaining such information in public dispute resolution forums.

Strategies:

- 3.6.a. Information on the law and dispute resolution options and processes should be readily available in all appropriate languages in schools, libraries, government facilities, and other public places.

Even in a future in which technology is customer-friendly, machines will be no substitute for human information providers. They can, however, be powerful information conduits and enhancers.

Beginning with the telephone, the courts should harness technology to make information available quickly and at low cost. By 2020 interactive video, an interactive data network, and computer systems that “reason” will assist judicial branch personnel in providing information to the public, creating more flexible information access. The justice system user will be able to retrieve information on a range of topics in a range of languages. As technology becomes more commonplace in the justice environment, it may be that electronic media

will supersede humans in providing certain basic kinds of information and processing simple transactions. (See Chapter 6, Information Technology and Justice.)

- 3.6.b. Justice information should be provided through all widely available technologies including the telephone, the computer, and interactive video.

For other purposes, however, well-trained justice personnel will still be essential. While an automated, voice-response computer system may be suitable for providing tutorials on various dispute resolution processes, justice personnel are the superior guides for confused, intimidated, first-time disputants arriving at a large urban justice center, for instance.

- 3.6.c. Throughout the justice system the courts should install information kiosks staffed by helpful employees at which court users — especially those unrepresented by counsel — can obtain information and guidance on the dispute resolution process.

OPENING NEW DOORS TO JUSTICE FACILITIES

DESIGNING THE MULTIDIMENSIONAL JUSTICE SYSTEM

Courthouses today are often confusing, even intimidating to the average user. Numerous divisions, departments, and courts within a single courthouse, coupled with a lack of signs, maps, and information can conspire to make the average courthouse a veritable maze for all but the most seasoned user. (And see section following regarding the special needs of the disabled.)

RECOMMENDATION 3.7 All judicial branch facilities should be designed and built to ensure access for all.

Strategies:

- 3.7.a. All plans for designing and renovating justice system facilities should be thoroughly reviewed by a committee on which the public is well represented.

Advanced information technology will be an integral part of justice tomorrow. Plans to ensure that physical facilities can accommodate advanced information technology hardware are, in some cases, on the drawing boards today. As the pace of technological change quickens, the courts' technology oversight body — see Chapter 6, Information Technology and Justice — must increasingly be involved in justice facility design and renovation.

“That’s what our courts are failing miserably at. We don’t tell people where to go. They bump into walls and walk away unsatisfied. So we’ve got to be prepared to serve people when they walk in.”

Juvenile Court Judge, San Jose Hearing,
August 19, 1993

“[T]here should be a policy adopted by all the courts of the State of California regarding providing access to people with disabilities.”

Superior Court Judge, Los Angeles Hearing,
August 25, 1993

3.7.b. The Judicial Council Technology Committee must be consulted in the design or renovation of any justice system facility.

Court-annexed child care is an idea whose time has come. Studies have shown that by removing children in all their exuberance from courtrooms, the administration of justice is enhanced. Perhaps even more importantly, children are spared the wrenching, sometimes frightening experiences that are a part of daily life in the courts. Child care programs need not be expensive. And in a preferred future in which resources for justice are plentiful, such programs should be expanded to accommodate the children of court personnel as well as court users.

3.7.c. Child-care programs should be available to justice participants, e.g., disputants, jurors, victims, witnesses, etc. The design of new court facilities should make provision for such programs, either in-house or in convenient off-site locations. Resources allowing, programs should be expanded to accommodate the children of court personnel.

EQUAL ACCESS FOR THE DISABLED

Consistent with the Americans with Disabilities Act, it shall be the policy of the courts of this State to provide all persons with disabilities full access to the justice system by ensuring their

full participation in all court programs, activities and services.

From “Draft Rule Regarding Accessibility to the State Courts by Persons with Disabilities,” adopted by the State Bar of California, July 1993

“Equal justice” and “equal access to justice” are not mere catch phrases. They are cherished and time-honored principles. Unfortunately, for too many Californians such ideals are more aspiration than reality. Perhaps for none is this more true than for the disabled.

At a number of commission hearings and in regular correspondence with the disability community, the commission received a substantial number of comments about the special justice needs of the disabled. At its August 1993 Los Angeles public hearing in particular, the commission heard a number of eloquent statements on this important subject.

As but one example, the chairperson of the California bar’s Subcommittee on the Employment of Attorneys with Disabilities, quoting from an American Bar Association report, noted that

in the 1990s state courts increasingly are facing a new challenge — more persons with disabilities will, or will want to, use the judicial system. An unequivocal social mandate exists to meet their needs. To furnish equal access to justice state courts must ensure access to each court program in a way that integrates persons with disabilities as much as possible into the mainstream of court activities.

Another thoughtful commentator pointed out that the recognition of the disability community as a “minority” is so recent that traditional thinking about minority rights often fails even to include people with disabilities. Since 1969, however, long before the enactment of the Americans with Disabilities Act, California law has required all publicly funded new construction and renovation to be “accessible to and useable by” disabled persons. Such laws, both state and federal, must be scrupulously observed. Wherever possible, the courts especially should do more.

The objective of so-called “universal design” is to create a barrier-free, user-friendly environment, one that accommodates and serves all sectors and generations of the population. Universal design should be the common denominator in all future justice facility design, the renovation of existing facilities, and all efforts to retrofit courthouses and justice centers. The objective is not merely to make justice facilities accessible, but to render them genuinely easy to use. Many of the commission’s recommendations in this chapter and Chapter 6 (Information Technology and Justice) are aimed at achieving just this result.

On a related subject, real-time reporting holds out tremendous promise for the hearing impaired. William Slate, a nationally known court expert, testified before the commission that

[r]eal-time reporting allows the 24 to 30 million hearing-impaired persons [in the United States] to fully participate in courtroom proceedings whether as counsel, judge, juror, witness,

litigant, or spectator by enabling them to read courtroom dialogue on a computer monitor only seconds after it is spoken.

Slate also noted that a newly developed adjunct technology allows the addition of a braille printer to a computer-integrated courtroom installation to enhance justice for the visually impaired.

In February 1991 nearly 200 judges, court administrators, attorneys, and representatives of the aging and disability networks attended the landmark National Conference on the Court-Related Needs of the Elderly and Persons with Disabilities. From that conference emerged a wide range of recommendations on the needs of the disabled and the elderly on issues including physical and communications access, dispute resolution, stereotypes, education, case processing, court data, victims and witnesses, and capacity determinations. The report is important and will serve as a reference work for the Judicial Council for years to come.

At more than one of its several hearings the commission was presented with a statement of principles concerning equal justice and access to justice for the disabled. Hard-pressed to improve on that statement, the commission incorporates it in large part here, in the form of recommended strategies.

RECOMMENDATION 3.8 Justice must be fully accessible to persons with disabilities. The courts must commit to removing physical and attitudinal barriers that deny the disabled equal justice and equal access to justice.

“There was really a lack of understanding of the needs of people with disabilities. One judge wrote back to me and said, ‘I’m sure that the courts will be concerned and considerate.’ I don’t want my rights based on whether you’re going to be concerned and considerate. What if you’re having a bad day?”

Disability Community Representative,
San Diego Hearing, August 23, 1993

“Perhaps evening court could be held to handle some of the cases such as uncontested divorces, misdemeanor cases, and small claims cases.”

Black Nurses Association Representative,
San Diego Hearing, August 23, 1993

Strategies:

- 3.8.a. The courts should create a model of accessibility based on a design principle that ensures a barrier-free and technologically enhanced environment.
- 3.8.b. The courts should identify the court-related needs of persons with disabilities, including the needs of judges, lawyers, parties, witnesses, jurors, court personnel, and other persons who are or wish to be participants in court programs, activities, and services.
- 3.8.c. Through a statewide information-gathering program, the courts should identify architectural, physical, attitudinal, and communications barriers to the disability community’s full participation in the courts.
- 3.8.d. The courts should educate judicial and nonjudicial personnel to be aware of and sensitive to cultural diversity among persons with disabilities in society and in the courts.
- 3.8.e. The courts should ensure that the disabled are represented among judicial and nonjudicial personnel in the courts.

Today, there is no committee or subcommittee of the Judicial Council exclusively responsible for disability issues. Although the council is in

the process of creating a committee on access and fairness, in the meantime the disabled should be widely represented in council activities.

- 3.8.f. Persons with disabilities should be represented on Judicial Council study committees concerned with access to justice.

ENHANCING LOCAL ACCESS

The telephone, the computer, and the television will do much to bring justice to rural areas and communities not served by community dispute resolution centers. In the future, however, justice facilities will still need to be sited carefully, with an eye to accommodating existing population centers and future population growth, although not at the expense of rural areas.

RECOMMENDATION 3.9 *Justice facilities should be sited in locations that will promote the greatest possible access.*

In some communities, especially urban neighborhoods and rural jurisdictions, one way to enhance access to justice is by dispatching judicial officers and staff to the users, rather than vice versa.

Strategy:

- 3.9.a. A pilot project should be launched to create mobile dispute resolution centers — “judgemobiles” — to serve selected neighborhoods and/or rural areas.

EXTENDED HOURS

For many who seek justice, time is often the greatest barrier. Many working Californians cannot visit courthouses during working hours, often the only hours most justice facilities are open.

Alternative court hours have been tried with some success in California. The Judicial Council's Report on Alternative Sessions inventoried court programs that had instituted evening hours for traffic court, small claims court, and criminal court sessions. In some cases courts had extended their hours because they simply could not accommodate demand during normal working hours. In others, courts were seeking to enhance access. In traffic court, where cases are generally simple and can be resolved quickly, the results were very encouraging. In small claims court, the results were more ambiguous.

RECOMMENDATION 3.10 *Where public access to justice can be enhanced through extended court hours, courts should institute evening or weekend sessions.*

ECONOMIC ACCESS AND ADEQUATE REPRESENTATION

In a “tomorrow is today” fiscal future, public justice resources (adjusted for inflation and population growth) will remain relatively constant. Despite this, if the commission's vision of access to

justice is realized there will be far more access than there is today. Effective dispute resolution will depend less on the intercessions of lawyers. Through extensive and comprehensive public education, disputants will be increasingly likely to rely on informed, facilitated self-help in resolving their conflicts. Multidimensional, multioption justice will effectively match disputes with appropriate forums and processes, many of which will be relatively simple, informal, and independent of the need for counsel.

While such a future will surely strike some as implausible — and others as absolutely utopian — its foundations are being laid even today. Appropriate dispute resolution is growing in leaps and bounds. The public is evincing increasing interest in legal self-help, interest by no means always born of necessity. In schools, greater attention is being paid to dispute resolution and the justice system. And the courts themselves are showing real willingness to conceive their essential nature as dispute resolvers and not merely as adjudicators. With concerted effort this preferred future can be the 21st-century reality.

Even in such a preferred future, however, some disputes will still be best suited to resolution through the adversary process. And in the years leading up to the full transformation of the courts, lawyers will continue to play a pivotal role. Without an attorney's guidance, many or most disputants may become lost in the justice labyrinth. Without an advocate's arguments, unequal justice will regularly result. In the near term, access to

“The poverty population in California has grown a lot faster than the poverty population throughout the rest of the country. The consequent reduction in legal services funding has just exacerbated this serious problem.”

Legal Services Representative, Eureka Hearing, August 16, 1993

“The cost of securing quality legal advice and representation is a scandal. . . . For disenfranchised members of our community the vision of equal justice is not a reality but a cruel joke.”

Affordable Justice Advocate,
Roosevelt Community Adult School Hearing
(L.A.), April 13, 1993

counsel will often mean the difference between justice and justice denied.

THE EXTENT OF UNMET LEGAL NEEDS

For many, legal representation is unaffordable. Nationally, it is estimated that less than 20 percent of the legal needs of the poor are being met. In California — based on Census Bureau estimates of poverty levels and American Bar Association estimates of unmet legal needs — it is estimated that only 15.2 percent of the legal needs of the poor were met in 1990. More than 2 million legal problems went unaddressed.

Unfortunately, it is the poor for whom legal representation is most critically needed. A study of unmet legal needs by New York’s Marrero Committee concluded that the poor often live in such desperate circumstances that

[t]heir needs for legal services are not in any sense optional but rather deal with access to essentials of life: shelter, minimum levels of income and entitlements, unemployment compensation, disability allowances, child support, education, matrimonial relief, and health care.⁴

While a range of social and government programs exist to mitigate the plight of the poor, without legal assistance such means are often illusory. In the eyes of many Californians, when rights are constructively denied because legal representation is not available, the effectiveness — if not the legitimacy — of the entire legal system is suspect. While it is the commission’s hope that the need for

counsel will be far less acute tomorrow, it is the reality today.

DEBATING THE RIGHT TO COUNSEL

In *Gideon v. Wainwright*, the United States Supreme Court established a right to legal representation for those accused of crimes, but with few exceptions such a right has never been extended to the indigent in civil matters. In this respect, the United States stands virtually alone among the major western democracies. England has provided free counsel to civil litigants since 1495; France, since 1851; Switzerland, in all cases requiring knowledge of the law, since 1937; nearly all Australian states since 1970; and nearly all Canadian provinces.

Proponents of a “civil *Gideon*” argue that because equality before the law is a fundamental constitutional right, access to justice should not be predicated on personal wealth.⁵ Opponents question whether society truly needs to create such a right, and if it did, how it would be paid for. Cost aside, in an article entitled “After Professional Virtue,” Professor Geoffrey Hazard explains some of the reasons why the notion of a constitutional right to civil legal assistance has to date failed to take hold:

[T]here was a long tradition, exemplified in workman’s compensation proceedings, juvenile court, and small claims, that legal dispute resolution could be kept more just, more expeditious and less expensive if lawyers were kept out. For another thing, in civil cases there was no apparatus of legal assistance provided by

the state to assist one side, as was provided for the prosecution in criminal cases. . . . There was a more fundamental difficulty in fixing the provision of civil legal aid. The measure of necessary legal aid in criminal cases was the quantum provided the prosecution. There was no similar measure for civil legal aid.

Few would dispute that the presence of competent counsel can help ensure a more efficient, less costly legal process. Many a judge has expressed frustration with cases involving litigants — sometimes on both sides — not represented by counsel. A recent front-page story in the *Wall Street Journal* reported that in Des Moines, Iowa, 53 percent of all family court litigants are without counsel. In Washington, D.C., the number is 88 percent. (No comparable figures for California are available at this time.) The article, in addition to decrying the congestion to which unrepresented parties contribute, also poses the increasingly common question: is a system designed for lawyer-assisted parties capable of delivering justice to the increasing numbers of the lawyerless?

In 2020 some disputes will still be best resolved by a trial to a judge or jury. It may be that there are very few such cases. It may be that the efficiency savings realized through the use of appropriate dispute resolution will make state-provided civil representation readily affordable. It may be that the state is once again wealthy. Or it may be that the commission's worst-case scenario is the reality — California is broke and civil litigants who

are able to pay are underwriting the costs of those who cannot.

A majority of commission members favored the creation of a *right* to representation in civil matters in which life's essentials — shelter, health care, education, nutrition, child support, disability allowances, etc. — are at issue. Other commission members opposed such a right, largely on the basis of cost. In the end, rather than splitting the commission over this emotionally charged issue, the commission decided instead to recommend an admittedly tentative first step: studying mechanisms, funding sources, and experiences in countries where civil representation is a right today.

RECOMMENDATION 3.11 The Judicial Council should study those justice systems that provide a right to counsel in civil cases, and make appropriate recommendations.

ADEQUATE LEGAL SERVICES

Whether or not civil representation ever becomes a right, for the foreseeable future countless poor Californians will continue to need legal services. The point bears repeating: in a preferred future disputants may be far less dependent on representation by counsel. They may neither need nor want the assistance of a lawyer. Adjudication may be among the least utilized of dispute resolution processes. In the near term, however, lawyers are likely to remain the essential intermediaries that they are today, without the services of whom the door to justice is effectively closed.

“One of the critical components of access to the courts is knowing what your rights are and knowing how to use that access. That is where access to legal information is critical.”

Law Librarian, San Francisco Hearing,
August 17, 1993

“I would bet 90 percent of the attorneys in this town, if they were sued as a defendant and did not have insurance, would have to consider settling the case just because of the cost of the defense, regardless of whether the case had any merit.”

Attorney, San Diego Hearing, August 23, 1993

Today, funding for legal services for the poor is by-and-large provided at the discretion of state and federal government. In California the availability of such funding and representation has historically been woefully inadequate. As noted above, only 15 percent of the legal needs of poor Californians were met in 1990. The Public Interest Clearinghouse reports that on a per capita basis, the number of legal services lawyers in the state is declining rapidly. While in 1980 there was one legal service lawyer for every 5,727 poor Californians, by 1990 that number had dropped to one for every 10,074 poor people. Today, legal aid programs receive less than \$10 for each indigent client served.

In this country legal services for the poor are provided through both staff attorney programs and “judicare” programs. Staff attorney programs employ full-time lawyers. While their principal mandate is to provide individualized legal help in traditional attorney-client relationships, legal aid staff attorneys may also pursue more broadly based institutional reform through class actions and test cases. The staff attorney model is sometimes criticized for emphasizing institutional reform at the expense of the client-attorney relationship. Defenders of the model counter that individual client counseling alone is inefficient, that far greater progress for the poor and disenfranchised can be achieved through class actions.

“Judicare” programs refer the eligible poor to members of the private bar who are then reimbursed by the state on a fixed-fee basis. In use in a

number of countries, their strength lies in their preservation of the traditional client-attorney relationship. Clients can choose their attorneys and often have more control over their cases.

RECOMMENDATION 3.12 *So long as adversary justice remains the dispute resolution norm in poverty law matters, the state must strive to make legal services resources adequate to the need.*

Today, it is not just the very poor but also the working poor who often have no effective access to counsel. For federally subsidized legal aid the income cutoff for eligibility is low — 125 percent of the poverty level. In many urban areas where housing costs are high, individuals significantly above this cutoff may in fact be poor. The ABA’s Conference on Access to Justice in the 1990’s documented the fact that “each year the number of people who are unable to pay for their own lawyers but are ineligible for free legal services increases.”⁶ California bar officials acknowledge that “a moderate income person with a legal matter that involves \$5,000 or less will experience real difficulty in finding an attorney in private practice willing to handle the case.”⁷

RECOMMENDATION 3.13 *Qualifying criteria for legal aid should be expanded to afford access to legal services for the “working poor.”*

Central to efforts to expand the scope of legal services for the poor and working poor will

be finding a source of funding. The courts must work with the Legislature to establish stable legal aid funding that will not demand the diversion of funds from other programs. Where possible, new and creative funding sources should be found.

RECOMMENDATION 3.14 California must develop new funding sources for legal services.

In Chapter 8, Civil Justice, it is proposed that today's system of punitive damage awards be reconsidered. Specifically, it is proposed that the Judicial Council study the issue with an eye to creating a mechanism to divide such awards between plaintiffs, counsel, and the state, the state's portion going to a dedicated fund to defray the cost of legal services.

Strategies:

- 3.14.a. A state Civil Justice Fund should be created and funded from the portion of punitive damages awards retained by the state. So long as adjudication is the norm, the fund should be devoted to supporting legal services for the poor.
- 3.14.b. The courts should work with the bar and the Legislature to create and expand programs for lawyers willing to represent the poor on a full-time basis. Fellowships for participating lawyers should be underwritten by the Civil Justice Fund.
- 3.14.c. Publicly provided civil counsel should

not be available in mediation, neutral evaluation, small claims, or other processes not requiring counsel.

PUBLIC SERVICE AND THE BAR

Public service and volunteer (“pro bono”) legal services are a time-honored tradition in the legal profession. Many believe that it is through the growth of such services that the legal needs of the poor can best be met. Unfortunately, the trend appears to be headed in the opposite direction. Nationally, only 17 percent of the bar participates in organized pro bono services.

Requiring lawyers to provide legal services on a “voluntary” basis strikes many not only as contradictory, but as unfair. It is also argued that the quality of such services tends to be inferior to those that are truly voluntary; that such requirements are difficult to enforce; and that mandated lawyers are put at a competitive disadvantage with those in neighboring states who face no such requirement. Proponents of mandatory pro bono respond that government has created legal rights that are not self-enforcing and that lawyers, as an integral part of the legal system, have an obligation to ensure access to justice.

In the future, multidimensional justice will offer a range of dispute resolution options that do not require a lawyer's assistance. At that time lawyers may argue persuasively that they are not essential conduits to justice, and therefore should have no obligation to provide pro bono services.

“The perception of many people is that they are left out of the system. They may be ex-professionals, they are not uneducated, but they have difficulty in understanding the court system and making use of it.”

Tenants' Association Representative,
San Francisco Hearing, August 17, 1993

However, so long as they remain the gatekeepers to the temple of justice, they should acknowledge the duty to provide access.

RECOMMENDATION 3.15 *The bar must do more to ensure adequate legal representation for those who need it.*

Strategy:

- 3.15.a. To ensure adequate representation in civil matters requiring counsel, the Judicial Council should further investigate mandatory pro bono for California lawyers.

NEW LEGAL SERVICES PROVIDERS

All across the nation, group legal plans are signing up new members in a crusade to bring attorney access to the middle class. The young legal insurance industry has grown more quickly in California than in many other states, and California is one of the few that generally does not limit group insurance plans by regulation. The third branch, with its interest in fostering access to justice, should play a role in the future growth of such plans through informed recommendations to the Legislature and the executive branch.

RECOMMENDATION 3.16 *The Judicial Council should study and play a constructive role in the evolution of group legal plans in California.*

Even more likely to have an effect on access

to justice is the proliferation of nonlawyer services. In greater and greater numbers and at far less cost, trained paralegals and “legal technicians” are performing functions that were once the sole province of lawyers. As scholar Roger Cramton says: “Market principles favor it, people want it and legislators want it. . . . [Efforts by the legal profession to restrain the practice of law] are going to be very difficult to maintain.”⁸

In California the move toward authorizing lay practitioners has reached the Legislature, which is considering requiring the registration of non-lawyer “self-help legal service providers” with the Department of Consumer Affairs.⁹ A state bar task force has already recommended allowing non-lawyers to practice family law, landlord-tenant law, and bankruptcy. The trend seems clear.

The subject is extensive and no brief treatment of it here can do it justice. The Judicial Council, however, will surely be an active participant in the coming debate over the role of non-lawyer professionals. As a point of departure, the commission recommends to the council for its consideration the relevant resolutions of the first National Assembly on the Future of the Legal Profession, co-sponsored by the American Bar Association and Case Western Reserve’s Institute on the Future of the Legal Profession in June 1993.

RECOMMENDATION 3.17 *The Judicial Council should work with the Legislature, the bar, and others to ensure that the expansion of nonlawyer professionals serves the public interest and promotes access to quality justice.*


Strategy:

3.17.a. The Judicial Council should evaluate the following resolutions of the first National Assembly on the Future of the Legal Profession:

(1) Restrictions on multistate practice should be eased. Attorneys who are admitted to practice before any federal court should be entitled to practice before all federal courts. State courts should permit the practice of any attorney who is licensed by another state, remains in good standing, and shows competence in specialized local law.

(2) The organized bar and the courts should encourage expansion of legal assistance to citizens who have no access to such services by simplifying procedures and increasing alternative dispute resolution; by educating citizens about the law; by aiding nonlawyers who assist people in the legal system; by allowing citizens to choose who helps them advocate their position; and by discouraging legal practice complaints in the absence of consumer complaints.

(3) Current restrictions on ownership and management of legal practices — e.g., Model Rule 5.4. — hurt consumers by reducing competition in legal services markets. A new rule is needed

allowing nonlawyers to own or manage organizations employing lawyers, so long as lawyers' obligations to clients and disciplinary rules remain intact. 

In greater and greater numbers and at far less cost, trained paralegals and “legal technicians” are performing functions that were once the sole province of lawyers. As scholar Roger Cramton says: “Market principles favor it, people want it and legislators want it. . . . [Efforts by the legal profession to restrain the practice of law] are going to be very difficult to maintain.”

A PREFERRED FUTURE

It is 2020. The justice system treats all justice seekers equally and fairly, regardless of race, ethnicity, culture, gender, disability, or income. All those having business with the courts are treated with dignity and respect.

It is 2020. Justice is culturally competent and culturally comprehensible, understanding of cultural differences, understood by all. Such terms do not mean or suggest an endorsement of culturally relative laws; government must not create and society must not tolerate different laws and different norms for different cultures. The absence of shared laws and values is at best a recipe for cultural conflict. At worst it is an invitation to social anarchy. A single set of laws and society's expectation that all will adhere to them are fundamental to both democracy and justice.

Comprehension is essential to equal, accessible justice. In 2020 interpretive services are available to all court users who need them, including non-English speakers, the sight and hearing impaired, and the illiterate. Simultaneous real-time translation is commonplace. Society recognizes the value in and seeks to foster the adoption of a common language.

It is 2020. Judicial officers and justice staff are selected through a system that is committed to gender, racial, and ethnic diversity, and to employing the disabled as well as the able bodied. The judicial branch is representative of the many peoples it serves. It is equipped to confront prospectively and to resolve the intercultural disputes of tomorrow.

PERCEPTIONS OF JUSTICE

Californians and their courts are facing an uncertain future, one that Lewis Butler, the president of California Tomorrow, describes as “the world’s first truly multicultural, multiracial society.” What such a society will demand of its citizens and its courts is not easy to predict. But it seems likely that the potential for cultural conflict will increase. The role of the courts — establishing and ensuring adherence to common

EQUAL JUSTICE

norms and laws — may be even more critical tomorrow than today. How multidimensional justice performs that role in 2020 is too large a topic for any single commission. The Commission on the Future of the California Courts can only preview some of the issues that will receive far more comprehensive treatment in the report of the Judicial Council's Committee on Racial and Ethnic Bias in the Courts, a report expected some time in 1994.

In his role as the keynote speaker at the commission's December 1992 symposium, California Tomorrow's Butler put his audience on notice:

California is in the midst of a demographic revolution. It is a revolution so profound that it will require drastic changes in every institution in this society, from schools to courts. It is a revolution unprecedented in the recent history of the country and unique in the world.

While the Department of Finance uses less "cosmic" (Butler's term) imagery, its numbers are still compelling. Its most recent projections indicate that by 2020, Hispanics will be the largest ethnic group in the state, representing just under 41 percent of the population, up from 26 percent in 1990. Whites will no longer be the state's largest minority; they will constitute roughly 40.5 percent of the total, down from 57 percent in 1990. Asians and Others will increase from 10 to 12 percent, while the percentage of Blacks will decline slightly, from 7 to 6 percent.

Whether 2020's metaphor for society's de-

mographic mix is "melting pot," "patchwork," or a label yet to be coined, California's peoples will need to live together harmoniously, if not homogeneously. How they view the law and justice will have much to do with whether the social compact holds.

Lack of information, misinformation, and failures within the courts themselves have combined to produce public perceptions of justice today that are, at best, mixed. The commission's public opinion survey found that 53 percent of Californians rate the overall quality of the courts as no better than average. People of color were far more negative. Moreover, 54 percent of Blacks and 34 percent of Whites point to equal justice and fairness as the justice system's top priority for the future.

Perceptions of unfairness are nearly as damaging to public trust and confidence in justice as the reality. To give but one example, in the United States today Blacks and to a lesser extent Hispanics are incarcerated in percentages that greatly exceed their representation in the population. In 1991 Blacks constituted 7 percent of California's population but represented 34 percent of the prison population.

Facts such as these threaten the image — and for some the very legitimacy — of justice. Whether the rates of incarceration are fairly correlated with the commission of crimes, whether those behind bars were justly convicted and properly sentenced, is only part of the question. For many Californians, especially people of color, the numbers alone create the appearance of injustice. Add to this the fact that California's courts are mostly peopled with

White judges and other court personnel, that the courts enforce laws enacted in large part by White men, and the system is “guilty” by inference.

Combined racial, cultural, and generational differences may create other public perception problems for the judicial branch. For instance, most crimes are committed by young men. Projections indicate that by the year 2020 just under half the young men (age 15–24) in the state will be Hispanic, while non-Hispanic Whites will predominate in the older, more affluent segment of the population. There is potential for intergenerational conflict with an ethnic twist. In resolving such conflicts the courts of tomorrow must be zealous both in their fairness and in their appearance of fairness.

Relying on FBI figures, the National Institute on Drug Abuse estimates that while 12 percent of drug users in 1989 were Black, Blacks made up 44 percent of all drug possession arrests. A 1991 review of 700,000 California criminal cases suggested that Hispanics and Blacks received less favorable plea bargain deals than Whites who faced similar charges. It also found that Whites went to prison less often and when they did their sentences tended to be lighter than those of Blacks or Hispanics.¹ While 70 percent of those imprisoned for drug offenses in Sacramento are Black, Whites fill over 63 percent of available drug treatment slots.² In the juvenile justice system, non-Whites account for most incarcerated offenders, even though Whites account for roughly 75 percent of all under-18 arrests. Some juvenile justice

officials believe that White defendants, who tend to be wealthier and better educated, are often able to afford private treatment and avoid incarceration.³

Perceptions of justice among immigrants pose a different kind of challenge for the courts. California is the destination of 30 percent of all legal immigrants entering the United States. Studies of both Asian and Hispanic immigrants confirm the obvious: newcomers’ conceptions of the American legal system are strongly influenced by their own cultural experiences.⁴ As one commentator notes:

In order for people to make the transition to believe in and support a legal system, there must be concerted efforts to bridge the gap of understanding. Many of the new immigrants are fleeing countries where expectations of a legal system were virtually nonexistent; in fact, a contrary view was often more prevalent. One author suggests that the absence of trust and predictability which exists in the Central American countries is a major cause for flight and disruptions in the affairs of those countries. These are the refugees now landing in American cities and this is the baggage they carry.⁵

The courts of the future must invest the effort and resources necessary to make themselves comprehensible to California’s newcomers, and to earn their trust.

The commission’s public opinion survey offers other insights into public perceptions of justice. Hispanics in California have a better overall

*“No matter how guilty
this young man might be, he
was not receiving a . . . trial by a jury of
his peers. We wondered how often this
young man thought of himself as
being the only Black person
in the courtroom. . . . Not only did
all the members of the jury appear to be
White, they also appeared to be much
older than the defendant, much better off
socially and economically than he
had ever been. . . . The young
man was convicted and
now has been sentenced to death.”*

Minister, Fresno Hearing, August 18, 1993

*“The accuracy or inaccuracy
of the perception [of unfairness]
is almost beside the point.*

*The efficacy of the courts is inseparably
tied to public confidence.*

*It is not enough to be scrupulously fair —
we must also appear to be so.”*

Chief Justice Malcolm M. Lucas,
Symposium on the Future of the Courts,
December 1992

opinion of the courts than other people of color, while Spanish-speaking residents express higher levels of confidence than do English-speakers. This fact may reflect acculturation. Immigrants often reflexively trust the American justice system more than that which they left behind. Survey results indicate that nonimmigrants and immigrants⁶ who have been in the state for some time have less confidence in the California courts than do newer residents and immigrants.

ENSURING EQUAL JUSTICE FOR ALL

CULTURAL COMPETENCE AND UNDERSTANDING

If it is to succeed in a democratic society, a justice system must scrupulously apply the same legal standards to all citizens. It is also a fact that the cultural awareness of those who enforce the law can have an important effect on how it is enforced. Treating disputants not only with basic courtesy and respect but with understanding can significantly improve the quality of the justice seeker’s experience in the court. In many cases, a better understanding of the disputants’ cultural reference points can have a positive effect on the dispute’s disposition.

In the commission’s vision of preferred justice, the courts of the future will be “culturally competent.” While its meaning is necessarily im-

precise, this term is used throughout the report to describe courts that understand the cultures of the disputants that come before them, and judicial branch personnel who understand and are sensitive to cultural differences. “Culture” is used in its broadest sense. It may describe a national culture, an ethnic or racial culture, gay/lesbian/bisexual culture, deaf culture, youth culture, etc.

Today, with few exceptions, there is little cultural competence training in the courts. In the future, it must be routine.

RECOMMENDATION 4.1 To ensure a culturally competent judicial branch, cultural competence training should be routine throughout the system.

Strategies:

- 4.1.a. The California Center for Judicial Education and Research (CJER) should develop a complete cultural competence curriculum, drawing upon the best available professional and academic research.
- 4.1.b. All judicial officers and judicial personnel should be required to participate in cultural competence training.

Cultural competence in tomorrow’s justice system can be accelerated by beginning cultural awareness study in the training academies for future judicial officers: the law schools. Such training might be modelled after today’s required ethics curriculum. Initially resisted, ethics schooling has

become an accepted component of a legal education. Cultural competence training should be no less so.

RECOMMENDATION 4.2 *The judicial branch should cooperate with law schools in developing a cultural competence component for law schools’ required curricula. It should cooperate with the state bar in incorporating a cultural competence component into the bar’s minimum MCLE requirement. It should promote culture competence throughout the justice system, e.g., in probation and prosecutors’ offices, and among social services providers and corrections officials.*

A REPRESENTATIVE JUSTICE SYSTEM

Ensuring that those who work within the courts — both judicial officers and other judicial branch personnel — are representative of the populations they serve can have a salutary effect on public confidence in justice. As Los Angeles Superior Court Presiding Judge Robert M. Mallano has said: “Without an ethnically diverse bench, there is a heightened perception that the judiciary is not for everybody.”

The virtues of a culturally diverse court system need no argument. Through its inclusiveness such diversity promotes public trust in justice. Through its diversity such a court system enhances its own cultural competence. Even simple daily interactions among justice personnel from different cultures can create an unequalled educational op-

portunity, one that spans gender, racial, ethnic, and other lines.

California has a long way to go in achieving an ethnically representative bench. Today, of California’s 1,554 judges, 5 percent are Black, 5 percent are Hispanic, 3 percent are of Asian or Pacific Islander descent, and 0.1 percent (a single judicial officer) is Native American. In a state in which only 57 percent of the population is White, Whites constitute 87 percent of the bench. The causes of this imbalance aside, its effect is to create the impression of a justice system run by and for White Californians.

Equally worrisome is the fact that at the speed the state’s demographic profile is changing, the racial and ethnic disparity between the bench and the population at large seems likely to increase. Unless significant changes in the pattern of judicial appointments occur soon, a truly representative bench is far in the future indeed.

RECOMMENDATION 4.3 *An important goal of the judicial selection process should be the selection of judicial officers who are representative of the state’s population generally.*

One impediment to the creation of a more representative bench is that the pool of *potential* judicial officers — the state bar — is also overwhelmingly White. According to a study by the State Bar of California, 91 percent of its members are White, 3 percent are Asian, 2 percent are Black, and 3 percent are Hispanic. All races and ethnicities except

“I wish judges would look not only at what is being presented before them but also be able to understand and relate to the ethnic background of every person that they’re going to be judging.”

Witness, San Diego Hearing, August 23, 1993

“One of the reasons I became active in this commission is that I am totally convinced that unless every resident of California truly believes that there is access to a judicial system that is genuinely just, then the very heart of a democracy — particularly a multicultural, pluralistic democracy comprised of a diversity of peoples — is very much at risk.”

Manuel Romero, Commission Member,
San Francisco Hearing, August 17, 1993

Whites are significantly underrepresented in the attorney population.

While there has in recent years been some progress toward greater diversity in the bar, even the bar’s youngest members do not constitute a representative cross-section of the state’s population. Among state bar members under the age of 35, 88 percent are White, 5 percent are Asian, 2 percent are Black, and 5 percent are Hispanic. For the courts to be truly representative of the state’s population, there must be a qualified, representative pool of judicial candidates. While such change will not come quickly, it must be steady.

RECOMMENDATION 4.4 The judicial branch, the bar, and the state’s law schools should cooperate in identifying and providing educational opportunities and support for young people of color who show an interest in a legal career.

A truly representative justice system depends on more than mere diversity among judicial officers. The public is far more likely to have day-to-day dealings with nonjudicial justice system employees than with judges. From the assessment officer in the multioption justice center to the mediator in the community dispute resolution center, from the probation officer to the family services case worker, third branch personnel must reflect the communities they serve.

RECOMMENDATION 4.5 To create a justice system that is fully representative of

the many constituencies it serves, the courts must employ women, people of color, and the disabled.

COMPLAINT MECHANISM

As discussed in greater detail in Chapter 5, Public Trust and Understanding, the justice system would benefit from a public complaint mechanism that is less formal, more accessible, and broader in its mission than that of the Commission on Judicial Performance. One of the important functions of such a mechanism should be responding to complaints of bias, prejudice, and insensitivity.

DIFFICULT ISSUES

ANTICIPATING INTERCULTURAL DISPUTES

In at least one plausible scenario, the judicial branch of the future will be called on to resolve more intercultural disputes. In some intercultural disputes the common denominator is likely to be economic inequality among different races and ethnic groups.

One of the goals of cultural competency training in the courts should be to identify the likely intercultural disputes of the future and begin to devise appropriate dispute resolution processes. In addition, the public justice system should provide forums where intercultural issues can be discussed prospectively, before they erupt into full-

blown conflicts. The evolutionary descendants of today's justice courts — community dispute resolution centers — will lend themselves to these important harmonizing and educational functions.

RECOMMENDATION 4.6 *The courts of today should begin to prepare for the intercultural disputes of tomorrow. Community dispute resolution centers should sponsor community forums on intercultural issues, before they become conflicts.*

ACCOMMODATING NON-ENGLISH SPEAKERS

In California and the nation today there is growing anti-immigration and anti-immigrant sentiment that may indirectly pose a threat to due process of law. In a 1992 poll conducted by the Roper Organization for the Federation for American Immigration Reform (FAIR), 76 percent of Californians said that the number of immigrants entering the state was too high. Forty-two percent of Americans hold similar views about national immigration trends.

Principal among the worries of most survey respondents is that immigration will impose a financial burden on their state's economy.⁷ But as indicated in Chapter 1, recent findings in California show that while *new* immigrants do consume more public resources than nonimmigrants, after five years the opposite is true. Californians are also concerned that immigration may result in the usurpation of English as the common language; in

1986 Californians passed an initiative making English the state's official language.

Legitimate concerns about illegal immigration may be poisoning the social climate for all immigrants. In such an environment the courts may find it increasingly difficult to obtain the fiscal resources necessary to provide essential translation services. The courts must persuade the public and its elected representatives that without adequate translation, comprehension can be limited or nonexistent, compromising due process and basic fairness.

RECOMMENDATION 4.7 *The courts must be effective advocates for fiscal resources sufficient to provide the essential translation services needed to ensure equal, comprehensive justice for all.*

EQUAL JUSTICE AND APPROPRIATE DISPUTE RESOLUTION

In California today there is an ongoing debate over the relative merits of cultural assimilation versus the retention of cultural identity. Most Californians clearly favor a common language and many elements of a common culture. There is, however, academic and empirical evidence of the economic and social benefits to immigrants of life in relatively homogeneous ethnic communities.⁸ Professor Troy Duster of the University of California–Berkeley makes the point that ethnic identity and association are not necessarily impediments to the coalescence of a strong society.⁹

“Language and cultural barriers must be overcome. To truly honor our commitment to equal justice we must protect those who cannot protect themselves.”

Women's Shelter Representative,
Eureka Hearing, August 16, 1993

“We’ll never get justice anywhere, even in 2020, if we continue to have all-White juries. I don’t want to wait until 2020.”

Mexican-American Association Representative,
Fresno Hearing, August 18, 1993

The courts are in a unique position to act as a catalyst for acculturation, while at the same time respecting cultural differences. While the commission is adamant that different legal standards and different legal norms for different cultures are unacceptable, in matching a resolution process to a dispute in a justice facility every effort should be made to find a process appropriate to both the dispute and the disputants. An important element in determining the appropriate process is the cultural experience of the disputants. For two disputants from a culture in which the adversary model of justice is unknown, conventional adjudication would be a less appropriate choice of resolution process than, say, mediation. The notion is not to create specialized processes to accommodate different cultures. Instead, the objective should be to choose the resolution process from the standard multi-option menu that is most likely to assist the disputants in resolving their conflict.

RECOMMENDATION 4.8 *In fitting resolution processes to disputes, justice centers and community dispute resolution centers should factor in the cultural backgrounds of the disputants. While standards and the application of the law should be uniform, dispute resolution processes should foster respect and appreciation for cultural differences.*

POVERTY CORRELATES

Although poverty cuts across race and culture, it is a fact that it affects non-White populations far

more severely than Whites. U.S. Census Bureau figures indicate that in 1990 the poverty rate among Whites was 11 percent. Among Blacks it was 32 percent, among Hispanics 28 percent, and among Asians it was 12 percent. Ensuring equal justice in a population of such disparate poverty levels raises race-based access-to-justice issues. In providing subsidized legal services to those who require access to justice, great care must be taken to ensure that such resources are allocated on a strict needs-based formula.

EQUAL JUSTICE FOR WOMEN AND MEN

Just as this commission cannot begin to replicate the work of the Judicial Council’s Committee on Racial and Ethnic Bias, it cannot and should not attempt to replicate the work of the council’s Advisory Committee on Gender Bias in the Courts. However, the commission is acutely aware of the pernicious effects of gender bias in the courts today, and is unequivocally committed to a future in which gender bias has been effectively eliminated.

For a variety of reasons, there are far fewer women on the bench and in the bar in California today than there are men. Of California’s 1,554 judges, only 234 — 15 percent — are women. Among state bar members, 26 percent are female. Despite the growing number of women entering law school, only one-third of California lawyers under the age of 35 are women.

Hearings conducted by the gender bias committee indicated that bias against women is a reality among some judicial officers. The committee also found evidence that judges are sometimes insufficiently zealous in ensuring the unbiased behavior of other court participants. Among judges polled, only 49 percent felt it was proper to intervene each time an incident of gender bias occurs in the courtroom. There is also evidence that male judges are far less likely to recognize bias in the first instance; among judges polled, women were twice as likely as men to say that they are aware of gender bias in the courts.

Judicial officers must play the leading role in eliminating bias from the courts. As Margaret Morrow, the newly invested president of the State Bar of California, testified in gender bias committee hearings:

It is judges who set the tone. It is they who control the participants. It is they who define the boundaries of appropriate and inappropriate conduct, and they who in many cases make the ultimate decision as to the rights and responsibilities of the litigants.

There is also evidence of gender bias against litigants, especially in the areas of domestic violence and family law. For instance, only 46 percent of male judges disagree with the assertion that a woman's testimony in domestic violence cases is often exaggerated. Seventy-four percent of female judges disagree with that statement. In other words, female jurists are significantly more likely

than their male peers to believe women who claim they are the victims of domestic violence.

Attorneys, too, display gender bias. Female attorneys regularly report being sexually propositioned by male attorneys and being the object of offensive jokes and sexual innuendo. In addition, some attorneys, male and female, use gender as a tactic in the courtroom, including name calling, disparaging female witnesses, interrupting women participants, and manipulating potential juror bias in jury selection.


RECOMMENDATION 4.9 All persons and disputes that come before the courts must be treated in a manner that is scrupulously free from any influence of bias or prejudice.

It would be a disservice for this commission to endorse selectively the exhaustive recommendations of the gender bias advisory committee. Instead, the commission excerpts three representative committee proposals that would do much to help move the courts toward the preferred future.

Strategies:

- 4.9.a. “Request the Judicial Council to transmit and urge consideration by the California Judges Association of the advisory committee’s recommendation that the association adopt Canons 3B(5) and (6) of the Draft Model Code of Judicial Conduct of the American Bar Association. This canon imposes the obligation upon judges to perform all judicial duties without bias or prejudice, to refrain from manifesting

bias or prejudice by word or conduct, to prohibit staff and others under the judges' control from engaging in similar conduct, and to require lawyers to refrain from similar conduct.”

- 4.9.b. “Request the Judicial Council to instruct its staff to prepare an educational manual for judges and court personnel on fairness governing the following issues: (a) the fair treatment of and appropriate courtroom behavior toward lawyers, jurors, court staff, experts, litigants, and others involved in the court process; and (b) a suggested opening statement to be read at the beginning of all court proceedings expressing the court’s refusal to tolerate all kinds of biases.”
- 4.9.c. “Request the Judicial Council to transmit and urge consideration by the State Bar of the following advisory committee recommendations: (a) The State Bar should adopt a Rule of Professional Responsibility analogous to ABA Draft Model Code of Judicial Conduct sections 3B(5) and (6) that would create a duty for all attorneys not to manifest bias on any basis in any proceeding toward any person, including court employees, with an exception for legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or other similar factors, are issues in the proceeding.” 

A PREFERRED FUTURE

In 2020 public confidence in justice is high. The justice system — justice centers, community dispute resolution centers, and private providers — is highly regarded, and deservedly so. Appropriate dispute resolution has increased access, reduced user and system costs, created new efficiencies without sacrificing quality, and most importantly, given disputants more control over the resolution of their disputes.

In 2020, judges and justice system personnel are fair, efficient, and highly qualified. The excellence of judicial officers and other justice system personnel is in part the result of merit-based judicial selection and progressive performance evaluation practices. Initially resisted, by 2020 such practices have long been embraced by judicial personnel as useful, performance-enhancing tools. Ongoing, high-quality, mandatory training and education for all judicial officers and other third branch personnel are ubiquitous.

In 2020 the public understands the goals and processes of justice. The result is greater disputant satisfaction and enhanced public trust. The judicial branch is a full partner in promoting educational programs about the law, the justice system, and dispute resolution. At almost every grade level, in institutions of higher learning, and in continuing community education programs, curricula include instruction about dispute resolution techniques and the use of the courts.

Judges are community leaders; they view community education about justice as an important aspect of their jobs. The public is actively involved in the monitoring, improvement, and governance of the justice system. The bar is widely respected for its integrity and tradition of active public service. And the press enjoys virtually unrestricted access to judicial branch proceedings and data, as well as the ability to inform the public freely and fairly about justice.

PUBLIC PERCEPTIONS OF JUSTICE — 1993

Inherent in all long-range planning is the risk that the problems of the present will obscure any vision of the future. The present's pull is strong, especially for judicial branch pragmatists concerned with budget

CHAPTER

5

PUBLIC TRUST AND UNDERSTANDING

Figure 5.1 Top Five Desirable Qualities of Justice

- **Judges have sufficient education and training.**
- **Gives citizens their “day in court.”**
- **Treats minorities fairly.**
- **Allows anyone to participate.**
- **Courts are affordable.**

Note: Based on percentage of respondents who indicated that the attribute is “absolutely essential” or “very desirable.” See Figure 5.8 for more complete information.

Source: “Surveying the Future — Californians’ Attitudes on the Court System,” Yankelovich, Skelly and White/Clancy Shulman, Inc. (December 1992).

shortfalls, shrinking staffs, and burgeoning dockets. The commission has sought to avoid this pitfall and to keep its eye on the future. But in seeking a measure for contemporary perceptions of the courts, the present was the appropriate place to begin.

In the first known research of its kind in California, the commission retained the national public opinion firm of Yankelovich, Skelly & White/Clancy Shulman to survey Californians about their views of justice today and their hopes for the courts of tomorrow. At the commission’s December 1992 symposium on the future of the courts, Chief Justice Lucas spoke for many when he said: “The findings provide cause for both encouragement and concern.”

CAUSE FOR ENCOURAGEMENT

It is encouraging that the public continues to care deeply about the quality of justice. Survey respondents overwhelmingly endorse the notion of a judicial branch that delivers high-quality justice to all. Inherent in high-quality justice are high-quality judicial officers: 79 percent of those surveyed make this a top priority.¹ Fair treatment for court users and affordable justice are the runners-up. (Fig. 5.1.)

The yearning for high-quality justice is constant across the spectrums of race, ethnicity, gender, and age. While some subpopulations are more critical than others of some aspects of justice, the desire for a system that is responsive, effective, and fair is more or less common to all respondents.

Also encouraging — especially to a commis-

sion concerned about the future — is the public’s strong support for innovation in the third branch. Eighty-three percent of the 1,500 Californians surveyed favor the use of alternative dispute resolution methods for resolving both civil and minor criminal matters. And the public strongly endorses alternatives to incarceration (72 percent of Californians favor) and greater judicial discretion in criminal sentencing (64 percent favor). Contrary to findings in other surveys, respondents evidenced no great desire for greater severity in sentencing. (At its ten public hearings, however, the commission heard calls for longer sentences for violent crime.)

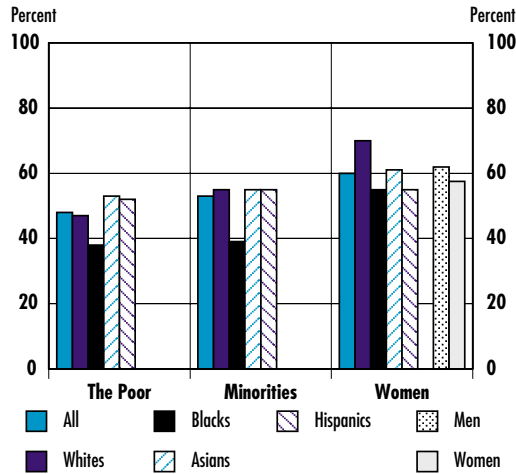
CAUSE FOR CONCERN

Worrisome, however, is that public opinion about today’s courts is more negative than positive. Although expressions of public dissatisfaction with justice must be viewed in perspective (see discussion below), the survey’s findings still provide ample room for concern.

Too few Californians believe that the courts of today treat all justice seekers fairly, regardless of race, gender, or economic status. Only slightly more than half of all respondents (53 percent) believe that non-Whites receive the same treatment as Whites. Only 48 percent believe that the poor are treated as well as the wealthy. And only 60 percent agree with the proposition that judges and juries believe a woman as often as they believe a man.

Perceptions of unfairness in the courts vary by race. Black Californians believe there is more

FIGURE 5.2 Public Opinion on Fairness in the Courts (percentage of respondents who agree that the poor, minorities, and women receive fair treatment in the courts, by ethnic group)



Source: “Surveying the Future — Californians’ Attitudes on the Court System,” Yankelovich, Skelly and White/Clancy Shulman, Inc. (December 1992).

unfairness in the courts than do other respondents. Fifty-seven percent of Black respondents believe that non-Whites do not receive equal treatment in the courts (Fig. 5.2).

Californians also question the courts’ ability to deliver high-quality justice consistently. Only 56 percent of those polled believe that one can expect the same decision from a court regardless of its location or the identity of the judge. Over half of all respondents (58 percent) believe that court decisions are often influenced by politics. Forty-five percent believe that courts often make erroneous decisions.

Perhaps most troubling is the public’s overall opinion of the courts. Offered a range of descriptors that included “poor, fair, good, very good, and excellent” over half (53 percent) of Californians surveyed rate the courts as “poor” or “only fair.” Among Blacks, 70 percent of respondents hold that opinion (Fig. 5.3).

It is perhaps not surprising that across the board attorneys were more positive in their appraisals of the courts than was the general public. For instance, 79 percent of attorney respondents view the courts as “good” or better, compared to only 48 percent of the public generally. The public points to a lack of fairness, access, and affordability as the third branch’s greatest challenges; attorneys also cite inefficiency and congestion as pressing problems.

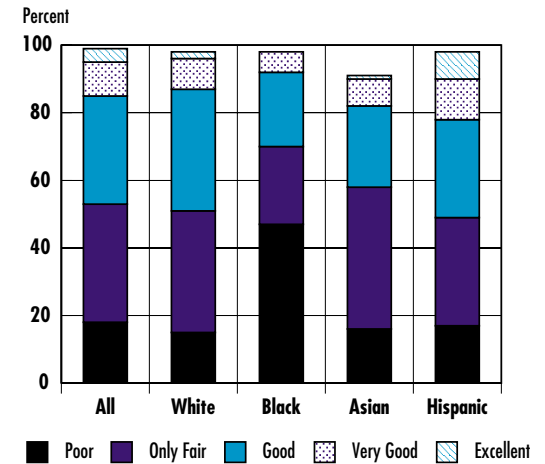
There are at least two possible explanations for such a divergence of opinion. One is that attorneys, as justice “insiders,” are better informed about the courts and their relative strengths and weaknesses. Another possibility is that attorneys are expressing a reality: for insiders the system works quite well. Very likely there is some truth in both explanations.

CONFIDENCE IN THE COURTS

Asked about their confidence in the courts, 37 percent of respondents say they are “somewhat” confident, 23 percent say they are “slightly” confident, and 19 percent are “not at all” confident. Black Californians indicate less confidence than do Whites.

Because expressions of confidence in the

FIGURE 5.3 Public Opinion of the Courts (by ethnic group)

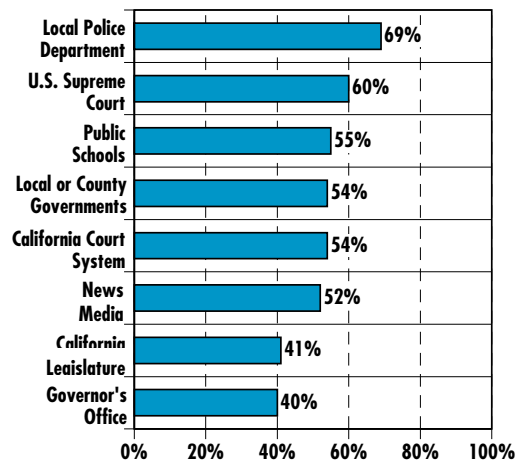


Source: “Surveying the Future — Californians’ Attitudes on the Court System,” Yankelovich, Skelly and White/Clancy Shulman, Inc. (December 1992).

courts may in fact be indicators of more general attitudes about society and its institutions, the commission’s pollsters cross-referenced expressions of confidence in the courts — or lack of it — with public confidence levels in other institutions. Based on this analysis the Yankelovich organization found that respondents who hold a high opinion of the court system are more confident in public institutions generally. The converse is also true.

Californians have more confidence in the courts than in the Governor’s office or the Legislature. Police departments and the United States Supreme Court inspire more confidence than do the courts (Fig. 5.4).

FIGURE 5.4 Confidence Levels in Public Institutions (percentage of respondents who indicated that they were extremely, very, or somewhat confident in the institutions)



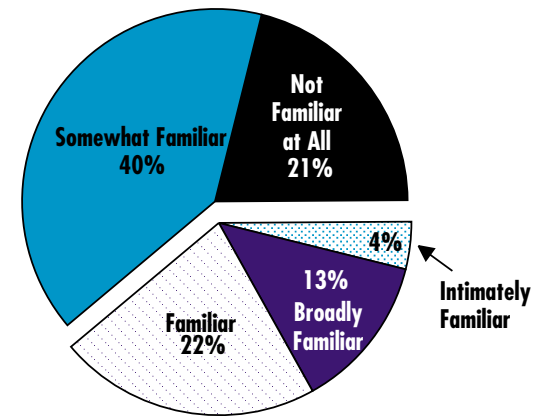
Source: “Surveying the Future — Californians’ Attitudes on the Court System,” Yankelovich, Skelly and White/Clancy Shulman, Inc. (December 1992).

FAMILIARITY AND EXPERIENCE WITH THE COURTS

Dr. Keith Boyum, a public opinion specialist and consultant to the commission, warns that “general citizen expressions of confidence, evaluations of fairness and voicings of criticisms of the courts should not be taken at face value.”²² Boyum’s point is not only the foregoing — that lack of confidence in one public institution may in fact reflect low confidence levels in public institutions generally — it is also that absent significant public knowledge of such institutions, much of public opinion amounts to mere speculation.

Commission survey results reveal that by and large Californians do not know a great deal about their courts. More than 60 percent of those polled claim limited familiarity with the judicial branch (Fig. 5.5). Forty percent say they know

FIGURE 5.5 Levels of Familiarity with the Courts

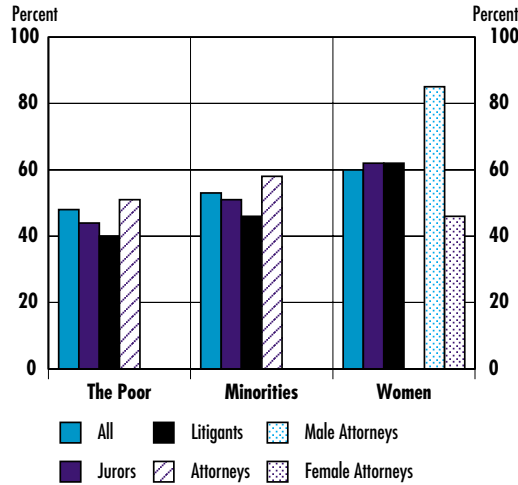


Source: “Surveying the Future — Californians’ Attitudes on the Court System,” Yankelovich, Skelly and White/Clancy Shulman, Inc. (December 1992).

little more than the location and name of their court. Hispanics and Asians rate their familiarity with the courts lower than do Whites and Blacks.

As to actual experience with the courts, most Californians have had only indirect contact with the third branch. Only one-fifth of Californians have ever served on a jury or appeared as a witness in a case. Only 17 percent have ever been parties to a civil case, and only 10 percent have ever been a victim or defendant in a criminal matter. Both direct and indirect experience with the courts is significantly lower among Asians and Hispanics than among Blacks and Whites.

FIGURE 5.6 Public Opinion on Fairness in the Courts (percentage of respondents who agree that the poor, minorities, and women receive fair treatment in the courts, by category of court user)



Source: “Surveying the Future — Californians’ Attitudes on the Court System,” Yankelovich, Skelly and White/Clancy Shulman, Inc. (December 1992).

In sum, Californians appear to have relatively little knowledge of or experience with the justice system, a fact that at first blush would seem to call into question many of the public’s negative perceptions. Unfortunately, the perceptions of those Californians who do have experience with the courts are comparable to those of Californians who do not. For example, 53 percent of all survey respondents believe that non-Whites and Whites receive equal treatment in the courts (Fig. 5.6). Among those respondents who consider them-

selves “highly familiar” with the system, 52 percent hold that view.

Similarly, as between all survey respondents and those who are “highly familiar” with the courts, general confidence levels are virtually identical: with the exception of lawyers, roughly only 15 percent of respondents express high levels of confidence in the courts. Litigants have the lowest confidence levels of all (Fig. 5.7).

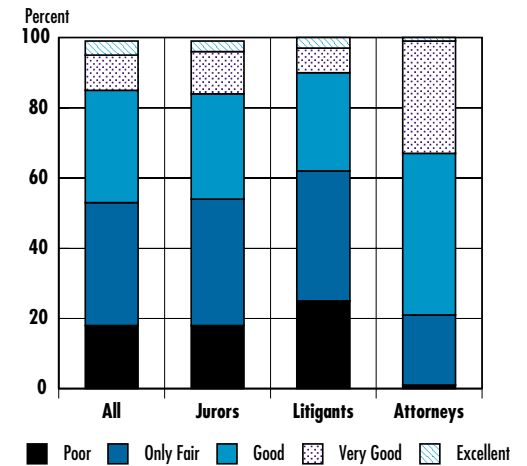
PUBLIC HOPES FOR FUTURE JUSTICE

What are the qualities that Californians seek in the courts of the future? Survey respondents were asked to identify the most desirable attributes of future justice. Perhaps surprisingly, the results were remarkably consistent across the spectrums of race and ethnicity, gender and age.

Of all possible attributes, judicial quality was the winner. Californians are also committed to fairness; many of the qualities that were rated “highly desirable” were related to issues of equal justice for non-Whites, the poor, and women. And for most Californians, especially attorney respondents, increased efficiency and reduced cost are priorities (Fig. 5.8).

Californians are unequivocal: the courts of the future must be fair, competent, affordable, and easy to use. For too many litigants and victims, jurors and defendants, witnesses and lawyers, today’s courts have a long and difficult road ahead of them.

FIGURE 5.7 Public Opinion of the Courts (by category of court user)



Source: “Surveying the Future — Californians’ Attitudes on the Court System,” Yankelovich, Skelly and White/Clancy Shulman, Inc. (December 1992).

Figure 5.8 Desirable Qualities of Justice (percentage ranking attributes as absolutely essential or very desirable)

Attribute ¹	All Respondents	Attorneys	Highly Familiar ²	Jurors	Litigants
Judges have sufficient education and training	79	92*	77	77	77
Gives citizens their “day in court”	78	87*	80	76	78
Treats minorities fairly	78	92*	77	75	79
Courts are affordable	77	80	76	74	77
Allows anyone to participate	77	79	80	77	79
Treats poor people fairly	73	88*	72	67*	70
Helps decrease crime	72	61*	69	65*	71
Concludes court cases in a timely manner	71	76	71	68	72
Informs average citizens on courthouse rules	71	60*	70	70	71
Same decisions regardless of location or judge	70	79*	71	68	71
Accommodates other languages	70	67	62*	57*	70
Has sufficient clerical personnel	69	82*	67	64	64
Is impartial	64	82*	64	59	65
Courthouses are conveniently located	63	53*	60	60	58
Offers alternative means of resolution	63	71*	63	60	67

¹Table includes only those attributes that more than 50% of all respondents indicated to be absolutely essential or very desirable.

²Respondents who described themselves as intimately or broadly familiar with the California court system.

*Differed from all respondents by more than 5 percent.

Source: “Surveying the Future — Californians’ Attitudes on the Court System,” Yankelovich, Skelly and White/Clancy Shulman, Inc. (December 1992).

acter and integrity of the law. The health of the public justice system now and in the future is inseparable from the quality of its judges.

In the commission’s vision of a preferred future, judicial officers will continue to be the foundation on which the judicial edifice stands. But they will be more representative of the population they serve, and they will perform a wider range of functions than today. In addition to adjudicating those disputes that require it, in the justice and community dispute resolution centers of the future judicial officers will also preside over arbitration proceedings, minitrials, and some mediation proceedings. While it is contemplated that some dispute resolution functions in the multidoor system will be performed by nonjudges, the recommendations that follow apply to judges.

Californians are concerned about judicial quality. The commission’s public opinion survey found “well-qualified” judges to be the courts’ single most desirable attribute, receiving a mean score of 80 out of 100. Californians are also concerned about the impartiality of the bench. Warranted or not, such perceptions threaten the efficacy of the courts.

Judicial Appointment

All appellate justices and the overwhelming majority of trial judges are appointed by the Governor. Appellate justices subsequently stand for uncontested “retention” elections every 12 years, and trial judges face potentially contested elections every six years. The latter elections are responsible

BUILDING TRUST IN JUSTICE

JUDICIAL SELECTION

For many Californians, ensuring the high quality of judicial officers should be the top priority in creating the multidimensional justice system of tomorrow. And with good reason. Judges, in addition to dispensing justice, personify the very char-

for the investiture of that small number of trial judges not appointed by the Governor. gubernatorial appellate appointments are subject to confirmation by the Commission on Judicial Appointments, composed of the Chief Justice, the Attorney General, and the presiding justice of the appellate district in which the seat is being filled.

Appointment is a time-honored and effective process for the selection of judges. Combined with confirmation by the Commission on Judicial Appointments at the appellate level, and with elections at both the trial and appellate level, appointment is subject to meaningful accountability safeguards. But the appointment process is not free from criticism. A significant portion of the public would prefer to elect all its judges. Appointment may also add to the public impression that judges are removed, isolated, and insensitive to public needs. If such concerns are to be countered, the judiciary, the bar, and the press must do a better job of educating the public about the legitimate need for judicial independence.

Even with such education it will be difficult to persuade the public that the appointment process is not based on political affiliation or patronage. While the perception may be erroneous, it is a fact that the California bench today does not fully represent the state's diverse population. (See Chapter 4, Equal Justice.) As but one example, while Hispanics constitute 26 percent of the state's population, they represent only 5 percent of the bench. Women are substantially underrepresented. Seventy percent of the judicial appointments in the last

10 years have gone to former prosecutors. While such a practice may be in keeping with public concern about crime, it does not ensure a balanced, heterogeneous bench.

Judicial Election

Despite its shortcomings, appointment is preferable to a pure electoral system of judicial selection. While at its best judicial election does produce a measure of public accountability, it is not at all clear how large a measure that is. Moreover, election's negatives are numerous.

A small library would be needed to shelve the volumes of scholarly literature that criticize the selection of judges by popular election. Commentators begin by questioning the very principle of making the third branch subject to the will of the majority. By law and by oath judges are bound not to bend to public opinion. At best, requiring a judge to stand for election every six years undermines the appearance of impartiality. Nor can it be argued that elections produce the most qualified judges. Voters in judicial elections are seldom well informed. As court commentator Ernest Friesen notes in a report on the future of state courts:

What can a judicial candidate argue other than "I am intelligent, experienced and virtuous?" Certainly one should not announce a predisposition on cases which might come before the courts.³

It is also a fact that contested judicial elections are becoming increasingly rare in California.

*"Who are the role models
for the children of tomorrow?
We better start with the adults of today,
with those who are sitting on the benches
now, or the D.A.'s of today."*

Witness, San Francisco Hearing,
August 17, 1993

“A problem that we encounter, especially around election season, is we don’t have access to information on judges. We really don’t have a way to make informed decisions on which judges are good and which judges aren’t.”

National Organization for Women
Representative, San Jose Hearing,
August 19, 1993

Municipal and superior court judges need not run unless their seat is contested. In those instances where incumbent judges are challenged, few lose.⁴

Information available to voters in many appellate retention elections is extremely limited. The ballot contains little or no information by which the voter can measure the ability or past performance of the justice. Lawyers are discouraged by their own professional self-interest from waging negative campaigns. While the 1986 Supreme Court retention election was an exception to this trend, that election involved the state’s highest court. As a consequence it received much more publicity than do most appellate court retention elections. Moreover, the 1986 election was as much a referendum on capital punishment as on judicial retention.

A recent report by the California Commission on Campaign Financing identified a number of troubling patterns in judicial campaign finance. Between 1974 and 1984 the cost per vote in California superior court elections rose from 7 cents to 41 cents.⁵ Judging by the decline in the number of sitting judges facing election challenges in the same period, it is a fair inference that rising costs are having a negative effect on competition for judicial seats.

Of even greater concern is the source of funds for most judicial election campaigns. The same Campaign Financing report notes that lawyers and law firms are the largest single source of campaign contributions to sitting judges. The second greatest source is personal wealth and family loans, a fact

that favors wealthier candidates. More recently, corporations and special interest groups have increased their contributions in certain court races. Such practices and trends create the appearance if not the reality of contributor influence over judicial decision making.

Recommendations

In the future, the selection of judges should continue to reflect a balance between judicial autonomy and public accountability. In view of that objective, the role of politics in the process should be reduced. Judges should be selected on the basis of merit. This is not to say or imply that the existing process does not seek the best qualified judges, nor certainly to imply that those who occupy the bench today are not meritorious. However, if the objectives of public trust and judicial excellence are paramount, change is needed.

RECOMMENDATION 5.1 All California judicial officers should be selected through a new merit-based process. Clearly articulated selection criteria should be developed and applied in all cases, with the goal of reducing the role of political partisanship in the selection process.

In one possible future, merit could be sought through an appointment commission. The so-called “Missouri Plan” for judicial selection uses a bipartisan, broadly constituted judicial appointment commission to gather information on potential appointments and to submit a limited list of

qualified candidates to the Governor for selection. Ideally, the result of such a process is candidate lists consisting of a limited number of highly qualified, bipartisan or nonpartisan candidates. To ensure public trust, such commissions must be fully representative of the public at large, especially as to race, ethnicity, gender, and political affiliation.

Strategies:

- 5.1.a. A Judicial Appointment Commission should be created and charged with recruiting, interviewing, evaluating, and recommending the best qualified judicial candidates for gubernatorial appointment.
- 5.1.b. The commission's membership should include representatives of the general public, the bar, the Legislature, and, consistent with the American Judicature Society's Model Judicial Selection Provisions, no more than one judge. Its membership should reflect the cultural, ethnic, and political diversity of the state.
- 5.1.c. The commission should empanel a sub-commission in each county to provide substantial input into the recommendation of judicial candidates to be appointed to serve in that county.

In addition, minimum professional qualifications in the areas of training, experience, motivation, and integrity should be established. Such stan-

dards should be promulgated by a body that includes members of the public, the legal profession, the judiciary, the Legislature, and the executive branch. (In its *Handbook for Judicial Nominating Commissioners*, the American Judicature Society provides one list of qualifications for judicial office.)

- 5.1.d. Minimum professional requirements should be established for all judicial nominees.

From the vantage point of 1993 it appears likely that contested elections for trial court judges and retention elections for appellate justices will still be a fact of judicial life in 2020. To ensure that judges do not become full-time politicians, and to reduce the appearance of undue influence on the courts, guidelines should be created to govern judicial campaigns, and campaign finance in particular. Additionally, consideration should be given to extending the terms of trial court judges beyond six years, thereby making lower court judges less susceptible to the political pressures of frequent campaigns.

- 5.1.e. Clear guidelines should be created to govern judicial campaigns, with special attention to campaign finance. Consideration should be given to extending the terms of trial court judges.

JUDICIAL EDUCATION

Few observers within the courts or outside them question the need to train and educate judicial

*“I feel that judges
should have the attitude of being
public servants rather than conductors
of a train or a ship.”*

Witness, San Diego Hearing, August 23, 1993

“I am leaving legal practice in part because I am so disenchanted with how our system works. I have represented Fortune 500 companies, insurance companies, and impoverished individuals. The system worked for virtually none of them.”

Attorney, Van Nuys Community Adult School
Hearing, April 22, 1993

officers to perform their duties effectively. While most judges have considerable experience as trial lawyers before they reach the bench, new judges invariably confront problems unknown to them as practitioners. Absent new skills and knowledge, experienced judges will find it increasingly difficult in the future to manage their dockets in the face of uncertain caseloads, technological innovation, and social and cultural evolution.

In one negative future scenario an avalanche of cases will stretch the already overextended courts to the breaking point. Massive dockets will test the management abilities of even the best judges. Case management training will be essential. If such a future is to be avoided, appropriate dispute resolution must become the reality. Judges who have not become fully acquainted with a full range of dispute resolution techniques in law school will need to learn them, quickly. Multidimensional justice will require judicial officers who are facile and creative in “fitting the forum to the fuss.”

Since 1973 the California Center for Judicial Education and Research (CJER) has been a leader in the training of judicial officers. CJER’s excellence in new judge orientation as well as continuing judicial education for experienced judges is renowned. More must be done in the future. Social, demographic, and technological changes in California will require a higher level of judicial competence. CJER should lead the way.

Education and training for judges cannot be discretionary. It is nearly as important for the experienced judicial officer as for the new one, and as

the pace of change accelerates, even that discrepancy may disappear. Any judge changing assignments should be able to obtain education and training in the new assignment.

RECOMMENDATION 5.2 Judges should receive mandatory continuing education in subjects including but not limited to: the law; case management; alternative dispute resolution; and cultural diversity and understanding.

Judicial education in the future must strive to limit inconvenience and downtime for judicial officers. Advances in technology and information management will help. Even today technology exists to educate judges via interactive video, computer-generated courtroom simulations, teleconferencing, and a variety of other tools that can facilitate and expedite training.

Strategies:

5.2.a. Judicial education should employ advanced technology to deliver quality training with minimal downtime.

California’s courts should draw upon creativity, wisdom, and good judgment wherever it can be found. Many of the challenges confronting California’s courts are similar to those found in other states, the federal system, and other countries. In the face of globalization and new free trade regimes, judicial cooperation with Canadian, Mexican, and other nations’ benches and bars will become increasingly important.

5.2.b. Judicial educators should assist in the creation of new models of international dispute resolution, and international cooperation among judges and lawyers.

JUDICIAL PERFORMANCE EVALUATION

Excellence in judicial selection and training will provide the state with a thoroughly qualified and highly effective judiciary. To ensure that this resource is preserved and maintained and to assist judicial officers in enhancing their performance, judicial performance should be periodically evaluated.

Standards

Standards for trial court performance are not a new means of promoting self-improvement among courts. The National Center for State Courts/ U.S. Department of Justice's blue-ribbon trial court performance standards study committee promulgated standards in five areas: access to justice; expedition and timeliness; equality, fairness, and integrity; independence and accountability; and public trust and confidence.⁶ Because the performance of courts and judges is closely linked, the standards have considerable utility in evaluating judicial officers.

An important goal of standards is to ensure consistency in both process and result across the judicial spectrum. Regrettably, the judiciary today does not receive high marks for consistency, at least not from the public. The commission's public opinion survey found that nearly half of all Californians (44 percent) believe that judicial decisions may

vary according to the location or the identity of the judge. While appellate courts serve as a check on the legal accuracy of trial court judges, they cannot be the guarantors of other performance measures. Judicial performance standards would further reduce the demand for appellate review.

Judicial performance standards are not intended to and must not be allowed to create mechanical or formula-based justice. Dispute resolution is a human process and it must remain so. Whether a judicial officer is mediating a neighborhood dispute in a community dispute resolution center or trying a complex copyright case in a justice center, he or she must still exercise discretion in complicated, often emotional matters. Performance standards must not be allowed to interfere with judicial discretion. Rather, such standards should enable judges to evaluate their own performance and decisions to ensure that they are of the highest quality.

Nor may such standards be allowed to compromise judicial independence. They should be established by the third branch, with significant input from the trial courts. They must do more than merely provide a measure of the ability to process cases. While timeliness and effectiveness should be factors in such standards, the overarching objective should be to promote high-quality justice. Standards should address the full range of judicial functions.

“The shift [of cases] away from the courts is not going to take away our responsibility as lawyers and judges — and as the public — to take care of those people who do not have access.”

Witness, San Jose Hearing, August 19, 1993

Measuring Performance

In the preferred future, judicial performance standards should be used first for self-evaluation, second for peer review. Judges and courts should regularly assess their own performance. Judicial officers should perhaps be required to file an annual report documenting their performance that year. On a regular basis judges should also participate in peer review and performance enhancement sessions in which performance is discussed in a collegial, supportive process. In every instance, performance should be assessed in the context of case-load complexity, dispositions completed, staff availability, geographic location, and other factors unique to the performance of the judicial officer.

RECOMMENDATION 5.3 To ensure effective delivery of high-quality justice and to enhance performance, a system for evaluating judicial performance should be developed.

Strategies:

- 5.3.a. Standards should be developed to establish minimum levels of judicial performance. Such standards should address all aspects of judicial performance.
- 5.3.b. Performance evaluation should consist in the first instance of self-evaluation, subsequently of peer review.
- 5.3.c. Continued service on the bench should be predicated on a finding that past service meets established standards of quality.

JUDICIAL CONDUCT

There are today more than 1,500 judges serving in the California trial and appellate courts. Depending on the scenario, this number will either increase or decline over the next 30 years. In the near term, until the courts have reaped the efficiency gains of appropriate dispute resolution, the number is likely to increase. Inevitably, despite the highest-quality selection, education, and evaluation, a few judges will run afoul of the Code of Judicial Conduct, an extensive and demanding body of rules and precepts. Judicial misconduct is rare, but when it does occur there is nothing more certain to undermine public confidence in justice. Mechanisms for its correction must be effective.

In 1961, California created the Commission on Judicial Performance to investigate allegations of judicial misconduct that extend to: abuse of power, denial of rights, drug abuse, gender or racial bias, actions prejudicial to the administration of justice, and other matters. On a finding of misconduct the commission is empowered to issue advisory letters, private admonishments, or public reprimands, recommend public censure, or even recommend removal from the bench by the Supreme Court.

In recent years the commission has come under fire for allegedly failing to investigate misconduct charges effectively, and where wrongdoing is found, for failing to take appropriate action. Critics note that in 1992, for example, the panel received 975 complaints against the state's 1,500 judges. Three complaints resulted in public reprimand,

40 resulted in advisory letters, and 11 resulted in private admonishments.⁷ Others criticize the confidential nature of the proceedings, arguing that judges are public servants and should be subject to public discipline.

While such allegations have prompted some in the Legislature and elsewhere to call for the commission's abolition, such an action would be short-sighted. Public accountability, balanced with judicial independence, is of paramount importance. The better option is to enhance the mandate of the Commission on Judicial Performance. The composition of the commission (five judges, two lawyers, and two laypersons appointed by the Governor) should be broadened to represent more fully the state's many constituencies.

In an alternative future the public perception of the commission could be enhanced by opening some of its proceedings to greater scrutiny. While initial complaints and preliminary investigations should remain fully confidential, if a complaint is found to warrant formal investigation that fact is properly one of public record, as is the result of the investigation and the nature of any disciplinary action taken. In any misconduct investigation the process must be swift enough to exonerate quickly any judicial officer wrongly accused.

RECOMMENDATION 5.4 *Judicial conduct must be beyond reproach. Mechanisms for ensuring the highest levels of judicial integrity must be reliable, worthy of the public's trust, expeditious, and fair.*

OTHER JUDICIAL BRANCH EMPLOYEES

Highly qualified judicial officers alone will not maintain the public's trust. Equally important is the quality of the third branch's staff. Many parties to a dispute never reach the stage at which they come in contact with a judicial officer. Many of the criticisms leveled at the courts may be attributable to what the public views as unprofessional treatment by justice system employees.

RECOMMENDATION 5.5 *Judicial branch personnel should be selected, trained, and evaluated according to standards established by the judiciary, designed to ensure quality public service. Employees should be trained in and adopt a "customer service" approach to justice.*

COMPLAINT MECHANISMS

The public too often feels lost in the justice maze. As the commission heard repeatedly at its public hearings, the public feels it has no effective mechanism for voicing either its criticism or its approval of the courts. Judges sometimes seem intimidating and seldom have the time to hear grievances. Court clerks are often busy. Many court personnel are powerless to act in the face of complaints.

Many grievances are unrelated to judicial acts and therefore do not fall within the jurisdiction of the Commission on Judicial Performance. In minor matters, most aggrieved parties merely wish to be heard. In more serious matters — involving bias or prejudice, for instance — more formal

"I like the idea of neighborhood courts . . . but there must be an information system, and perhaps a complaint system."

Tenants' Association Representative,
San Francisco Hearing, August 17, 1993

“Encourage the law schools to require ADR classrooms so that future lawyers understand the techniques.”

Attorney, Fresno Hearing, August 18, 1993

procedures are in order, procedures that at a minimum provide some response to the aggrieved court user. Statewide standards for the creation of such mechanisms would ensure a measure of uniformity from county to county and forum to forum. At the same time, there should be sufficient flexibility in implementing the standards to take account of local resources and realities.

RECOMMENDATION 5.6 All persons and disputes that come before the courts must be treated in a manner that is scrupulously free from any influence of bias or prejudice. All justice facilities should establish mechanisms to implement statewide standards that address public complaints about improper treatment by judges, attorneys, or court personnel. The mechanisms should be published.

BUILDING TRUST: THE BAR

In most cases today, contact with the judicial branch involves contact with a lawyer. While there are thousands of individuals who appear without counsel in traffic and small claims matters, in more serious cases lawyers are the public’s principal means of access to the system and navigating the corridors of justice. Attorneys are officers of the court. Negative attitudes towards the legal profession taint public perceptions of justice generally, just as positive models of advocacy inure to the system’s credit.

In the commission’s preferred multidimensional justice future, there will be far more facilitated self-help, far more legal facilitators who are not lawyers per se, and far simpler dispute resolution procedures that do not call for the assistance of counsel. Market theory suggests that there will also be fewer lawyers. In the near term, however, attorneys will be plentiful.

The bar must regain its past reputation for integrity, honesty, and public service. To do so it will be necessary to reexamine the role of lawyers in society, with an emphasis on improving professionalism, ethics, and public service. The State Bar of California’s recent creation of the Commission on the Future of the Legal Profession is a giant step in the right direction. If the opportunity is pursued vigorously, that commission offers tremendous potential for the bar’s self-examination and improvement.

As long ago as 1978, in a National Center for State Courts report on the future of the courts, a public opinion survey revealed growing public concern over ethics in the bar. Almost half of the respondents (44 percent) felt that lawyers are too expensive. Twenty-three percent felt that lawyers are often more interested in themselves than in their clients. Twenty-eight percent believed that lawyers often do not treat poor clients as well as their affluent clients.⁸

Such sentiments have not gone away. In a recent survey by the *National Law Journal*, 36 percent of the respondents said the image of lawyers has “gotten worse.” In the same poll the number of people who believed that “lawyers are less honest

than most people” increased from 17 percent in 1986 to 31 percent today.⁹

Central to enhancing the image of lawyers is integrity. While there is no substitute for an attorney’s personal honesty, the bar should regularly and thoroughly review the lawyers’ code of professional responsibility and the bar’s own disciplinary mechanisms. Critics of the bar maintain that lawyer discipline is inscrutable to the public, and that sanctions are too lenient. Whether such perceptions are accurate or not, the bar must ensure that misconduct is addressed swiftly and effectively.

The training of lawyers must also be a bar priority. In the multidimensional justice world of the future, adversary justice will retain an important role. But the need for counsel who are well versed in nonadjudicative dispute resolution techniques is growing. The bar should take an active role in training its current and future members to be dispute resolvers and not dispute enhancers.

In addition to offering high-quality continuing legal education curricula in traditional legal subjects and appropriate dispute resolution, the bar should work with law schools to ensure: (1) that legal ethics receive more than merely cursory treatment in the course of a legal education; and (2) that appropriate dispute resolution is a required part of the law school curriculum. Changing the legal culture to move away from the presumption that no dispute is well resolved unless it is adjudicated will not be easy.

Finally, the bar should redouble its efforts to meet the legal needs of those who are unable to

pay for legal services. Other than irreproachable legal ethics, there is nothing more certain to restore the public’s trust than to provide affordable representation to all who need it. (See Chapter 3, Access to Justice.)

RECOMMENDATION 5.7 *The judicial branch should work with the bar to enhance the quality of lawyers, the availability of legal services, and the reputation of the bar.*

Strategies:

- 5.7.a. The courts should work vigorously with the bar to ensure that the integrity of lawyers is enhanced and maintained.
- 5.7.b. The bar should ensure that its members receive high-quality continuing legal education. Emphasis should be given to anticipating those subjects and processes (e.g., ADR) that will have particular relevance in the future.
- 5.7.c. The courts and the bar should redouble their commitment to meet the legal services needs of the poor and others who are unable to afford legal services.

PUBLIC TRUST THROUGH PUBLIC INVOLVEMENT

Too often the public feels excluded from a process that it feels should be its own. Judges, judicial

“My recommendation to you is that you hold hearings like this one every month in every city and town in this state.”

Witness, San Francisco Hearing,
August 17, 1993

“[Teaching dispute resolution] teaches kids a skill that is priceless if they acquire it at an early age. And it gives them confidence to know that they can resolve their own disputes.”

Commission Member Joseph Santoro,
Van Nuys Community Adult School Hearing,
April 22, 1993

branch personnel, and lawyers are often regarded as either “out of touch” with the community or merely self-serving.

By and large the public and the courts share common hopes and goals: justice that is accessible, affordable, comprehensible, and as speedy as fairness allows. Better communication would go far toward bridging this gulf. It would inform the third branch of public discontent and at the same time educate the public to the judiciary’s own challenges and limitations.

At a minimum, the courts’ policy-making body should include significant public representation on all study and advisory committees. The Judicial Council is conscientious in this regard today, but the public is sometimes not represented in adequate numbers.

In addition, the council should study the efficacy of citizen court-monitoring programs in other states. While usually staffed by volunteers, some monitoring programs have enjoyed public financial support. Most programs seek to monitor limited aspects of the justice process, e.g., front-line service or judicial demeanor. A New York–based group, the Fund for Modern Courts, monitors court facilities, court delay, and judicial behavior in the New York judicial system. Its observations and suggestions have in many cases been translated into procedural changes or increased funding for needy facilities.

Routine surveys of public opinion and regular public hearings on the successes and shortcomings of the courts are also recommended.

Because jury questionnaires are limited in scope, function, and audience, the courts should engage in periodic and regular polling of a small but representative sample of Californians. Results must be made public.

RECOMMENDATION 5.8 The public must have effective means of providing input into the governance of the courts.

Strategy:

- 5.8.a. With the objective of enhancing public participation in the administration of justice, the Judicial Council should evaluate and if advisable implement: court monitoring programs; regular public opinion surveys; and regular public hearings about justice.

UNDERSTANDING JUSTICE: PUBLIC EDUCATION

Californians are underinformed about basic legal principles, procedures, and the courts. Commission survey findings indicate that only 52 percent of Californians know that a defendant is presumed innocent, and only one-third know that the state cannot appeal a criminal verdict for the defense. Non-White Californians tend to harbor even greater misunderstandings than do Whites.

While misunderstanding the law can have serious consequences, misunderstandings about

the courts can also have negative repercussions. The public's ignorance of the successful delay reduction campaign in the trial courts may give rise to the false belief that delay and congestion are beyond remedy. Conversely, a lack of information about the process can also elevate a court user's expectations unreasonably, resulting in disillusionment or worse.

Public education can inform the dispute resolution process. Basic knowledge of substantive law allows the potential disputant to better evaluate his or her rights and duties under the law. Basic knowledge of procedural law would reduce the time that the court expends explaining procedures at trial.

The court's most immediate goal must be to be better understood by the people of California. The best place to begin is with the next generation of potential justice seekers. Programs about conflict resolution and reduction should be integrated into both public and private school curricula at all levels. The goal should be to create a generation of Californians who understand that the courts are not always the best place to resolve every dispute.

Public schools should supplement basic civics curricula with courses on fundamental justice principles that address basic concepts of civil and criminal law, as well as how the judicial system works and how to access it. The programs should emphasize constitutional rights and responsibilities.

Basic instruction in the law and dispute resolution should not be limited to elementary and secondary education; it should also be included in

the curricula of community education programs. Members of the bench and bar should approach community college and unified school district adult education programs to offer their services as teachers of law-related and dispute-resolution-related courses for adults. The state might also consider financing an expanded "street law" program for first-year law students, the goal being to utilize underemployed law students to teach basic law to the public during the summer.

More must be done to bring the public into the courts. Too often school field trips are limited to visits to the capital to see the workings of the Legislature and the executive branch. While the work of the courts is frequently wrenching and often sad, at the appropriate grade level students should be exposed to both civil and criminal proceedings. Americans can now visit any number of courtrooms via television. In a future of interactive video there will be unlimited potential for participatory education about justice.

Educating children and the public about conflict and its appropriate resolution has the potential to transform the way Californians think about the justice system. If equipped from an early age with increasingly sophisticated tools for resolving their own disputes — sometimes with the aid of a third party, sometimes not — within a generation or two Californians will come to view the justice system not as the remedy of last resort, but as a resource to be used when constructive self-help has failed.

“I think it's very important that kids start at an early age to learn about the criminal justice system and the court system, and I believe there should be some type of rural educational program starting no later than the fourth grade level.”

Mexican American Association Representative,
Fresno Hearing, August 18, 1993

“We need somehow to break the courts out, get the courts into the community, get more involved with the community.”

Youth Center Director, Roosevelt Community Adult School (L.A.) Hearing, April 13, 1993

RECOMMENDATION 5.9 The justice system and schools at all levels should enter into partnerships to teach Californians about conflict and conflict resolution, basic civil rights and responsibilities, the structure and processes of the public justice system, and local appropriate dispute resolution resources. Judges and attorneys should be active volunteers.

UNDERSTANDING JUSTICE: OUTREACH

Regrettably, the shaping of the public image of the courts today is too often a reactive exercise. Judicial officers either are too busy or feel constrained by judicial ethics from speaking out on the importance of the third branch, its challenges, or the conundrums that society regularly sends the courts' way.

In the future the judicial branch should exercise greater leadership in creating its own image. Court officers — judges especially — should regularly engage in active outreach programs aimed at improving public understanding of the role and function of the courts. Such a judicial role has recently been endorsed by the American Bar Association (ABA), which adopted a resolution urging “judges, courts, and judicial organizations to support and participate actively in public education programs about law and the justice system.” The resolution also urged that “judges be allotted reasonable time away from their primary responsibili-

ties on the bench to participate in such public education programs, consistent with the performance of their primary responsibilities and the Code of Judicial Conduct.”¹⁰

Washington State Superior Court Judge James A. Noe interprets the resolution this way:

Whether or not judges and lawyers become involved in educating the public, others — including the media and a range of special interest groups — will surely do so in any event. Therefore, it is far preferable that those in the judiciary, who have special understanding and insight into these matters, take a more active and prominent role in this area.¹¹

RECOMMENDATION 5.10 Judicial officers should play an active role as spokespeople for justice and the courts.

UNDERSTANDING JUSTICE: THE MEDIA

Freedom of the press is protected by the constitutions of both the United States and California. In part, such protections were created to ensure that government — including the judiciary — is subject to the scrutiny of the governed. Implicit in this arrangement is a vigorous press, legally literate, able to attend court proceedings, review court files, and report effectively on what it has learned.

Telecommunications and the dawning of the digital age hold great promise both for further edu-

cating the press about justice and for facilitating the process of informing and educating the public. Technology may afford direct media access to the most detailed workings of the third branch. As but one example, cameras in the courtroom — especially video — have the unrivalled ability to inform the public about the courts and their processes.

Today, a court order is usually required for the press to use cameras in the courtroom. In the future, there will continue to be some cases where judicial officers may exclude cameras from court facilities to promote confidentiality, safety, or some other compelling interest. Such situations aside, the presumption should favor the use of cameras in the courts, as well as the more general goals of press and public access. More than 13 years ago Bernard E. Witkin, the state’s preeminent legal commentator for the last half century, suggested it is the privilege of the news media to create informed public opinion. The judiciary should facilitate the exercise of that privilege and duty.

RECOMMENDATION 5.11 *In order to promote better public understanding of justice and the justice system, press and public access to court proceedings and data should be virtually unrestricted, absent some compelling interest. In addition, the judiciary should make affirmative efforts to reach and educate the press and the public.*

Strategies:

- 5.11.a. The Judicial Council should launch a pilot project to provide the press and the

public with virtually unrestricted access and data in both trial and appellate courts. Judicial officers should retain the authority to limit or bar such access wherever required by confidentiality, safety, or other compelling interest.

The changes in the courts that this report proposes have far-reaching implications. Some may be viewed by the public — not to mention the bench and the bar — as little short of revolutionary. Any fundamental change is unlikely, however, without an informed public, one persuaded that such change is in its best interests, and in the interest of preserving a workable, effective third branch of government. To reach the broadest audience — the audience that shapes public opinion — the judiciary must reach out to the press with the tools and spirit needed to educate the media and the public about the serious challenges facing public justice, and their potential solutions. As Witkin observed in 1980:

The bar and the bench cannot even commence, let alone complete, a wholesale reform of the legal system. Basic changes must come about by actions of legislatures and electors; and these persons must first be informed and then activated by the molders of public opinion: press radio and television. . . . The media must engage in a nationwide effort to shake public confidence in legal institutions as they now operate. . . . They must look to substance — the manner in which the institutions of law serve

“There’s not enough education [about justice] in the schools. Most people are totally mystified by the justice system. Basically they try and stay away from it and have nothing to do with it.”


Witness, Eureka Hearing, August 16, 1993

the personal, economic, and cultural interests of our people.

- 5.11.b. The Judicial Council should encourage the state's law schools and the Center for Judicial Education and Research to conduct periodic programs in cooperation with the media on the substance of justice, the need for fundamental judicial reform, and ways to promote widespread public access to justice, its data, and its processes.
- 5.11.c. The Judicial Council should work with the Bench, Bar, Media Committee of the California Judges Association to promote public and press education and access. Other components of the judiciary should be encouraged to form such committees to promote these objectives. Membership should include representatives of print and electronic media, publishers, journalism and legal scholars, and technology experts. Women and minority journalists and media leaders should be encouraged to join such efforts at every level.

As commission member Justice George Nicholson and State Office of Information Technology Director Steve Kolodny wrote recently:

Improved access to justice is not limited to lawyers and litigants. Public access through the news media is instantaneous, comprehensive,

and universal. . . . Public accountability of all elements of the judiciary and the justice network is assured. 

A PREFERRED FUTURE

It is 2020. The judicial branch has transcended the 20th century's simple fascination with technology. In virtually every function, the courts have integrated into their work the best that technology has to offer.

It is 2020. "Multidimensional justice" and "full access to justice" are realities. Access to law-related information no longer assumes a trip to a courthouse or the ability to navigate a law library. In 2020 it means that all Californians can access justice information and new and/or relevant law in a language of their choosing from public information kiosks, through on-line services, or via interactive television in their homes.

Physical presence is no longer required in most justice proceedings. While preserving disputants' constitutional rights — the right to confront one's accuser in physical, nonelectronic space, for instance — courts have adopted remote interactive video and virtual reality technology for most conferences, hearings, and dispute resolution proceedings, including some trials. The successors to document imaging and computer-aided transcription afford participants instant access to all evidence and testimony. Expert systems assist judges in a range of rule-based analytical functions.

In 2020 paper has nearly vanished from the courts. All pleadings and other "documents" are transmitted, processed, and filed electronically. Paper documents are used only where there are no superior alternatives. With little need for traditional clerks and records managers, court personnel have been retrained to manage electronic data and to assist the public.

The access revolution has seen the emergence of a comprehensive statewide justice data network that contains full-text case files, opinions, statistical reports, schedules, and encyclopedic law and general purpose libraries.

Most importantly, technology has made justice more efficient, more accessible, more understandable, and higher quality. Rather than dehumanizing justice as some had feared, it has "rehumanized" dispute resolution. At the same time, it has unburdened judicial branch personnel of most routine, mechanical tasks, freeing them to focus on the needs of court users.

CHAPTER

6

INFORMATION TECHNOLOGY AND JUSTICE

THE FUTURE AND TECHNOLOGY

Evolving technology is a trend as old as human-kind, and, like many trends, it is accelerating exponentially. After hundreds of thousands of years of increasing technological sophistication, the human animal has graduated from the bicycle age to the space age in a mere century.

Some technologies evolve more quickly than others, and information technology's evolution has been quicker than most. As commission consultant Paul Saffo puts it, if the automobile had evolved as quickly as information technology in the last 50 years, the average family car today would cruise at 100,000 miles per hour, get 500,000 miles to the gallon, be more comfortable than a Rolls Royce, and be so cheap that it could be abandoned at its destination.

Paper and cash transactions will be virtually unknown by 2020. Records, letters, and magazines will be sent and recorded electronically. Powerful information systems will be simple to understand and operate. Users will need no special training to use them, and the only equipment necessary to operate them will be as common and well understood as today's telephone and television.

Vast quantities of information will be within the reach of almost any user via a network that will make today's Internet seem primitive by

comparison. The global library will contain billions of documents. The challenge in 2020's world of almost limitless information will not be adequate information, but sorting and selecting the limited information that a user actually needs. Powerful new information tools and software will search, sort, interpret, and correlate the data. Information intermediaries will use these tools and their own expertise to turn information into knowledge. While some information and services will be free, others will be extraordinarily costly.

Travel to meetings will be an antiquated relic of the transportation era. By 2020, video conferencing, the early 21st-century successor to physical meetings, may well have been replaced by sophisticated virtual reality systems that better capture the nuances of physical presence.

In 2020 the information technology revolution will have changed fundamentally notions of privacy. However, public debate about whether the Bill of Rights protects people in cyberspace will be a thing of the past. The Supreme Court will have reaffirmed every person's right to a legitimate expectation of privacy, in any medium.

JUSTICE TECHNOLOGY, c. 1993

For increasing numbers of Californians, information technology is becoming more commonplace, more accessible, and more sophisticated. Today the public uses credit cards for electronic purchases, does its banking at automated teller machines, and buys groceries at supermarkets that scan prices and debit the purchase automatically from the buyer's checking account (at a yet-to-be-determined cost to privacy). Computer use at home and work is becoming ubiquitous. The high-resolution video game in the urban arcade and the analyst's link to the Internet are but two examples of how the public is becoming accustomed to technology that 10 years ago was, to most, unimaginable.

While much emerging technology has applications for justice, its integration in the courts is, with some exceptions, still years in the future. Perplexed by the courts' seeming inability to keep pace with the private sector and other branches of government, a witness at a commission hearing put the question this way: Were the courts designed to be inefficient? Is it important that they remain so?

Despite some degree of automation in most California courts today, in the adoption of new information technologies the private sector and other branches of government have left the judiciary behind. While manual clerical work is rapidly disappearing from the workplace, the courts are lagging the field.

If the public dispute resolution system can-

not keep pace with change, it will increasingly be viewed as out of touch with the times. The public is becoming steadily more accustomed to the high-quality services that technology can provide. The courts have it within their power to transform their relationship with technology. If they do not, their inefficiency will at best frustrate the public. At worst, disputants will seek out private dispute resolution forums and withdraw their patronage and support from the public justice system altogether.

Even in simple cases, delay is frustrating and annoying; it can make complex matters an interminable morass. While administrative reforms such as the Trial Court Delay Reduction Act have helped, that reprieve may prove short-lived.

Reducing delay is only one reason for the courts to accelerate their automation. Another is cost reduction. Technology holds the promise of increased efficiency in information management, case processing, and judicial decision making; the resulting efficiency savings will reduce the cost of justice. While the courts account for only a tiny fraction of total state spending, in a fiscal nightmare scenario such savings could make a significant contribution to the quality of justice.

Judicial branch personnel are no less frustrated by the slow pace of change than the public; indeed, they are probably more so. A team of commission consultants from Stanford Law School and the law firm of Fenwick & West notes: "The caliber of the personnel we need (and are fortunate to have) in the California courts will not long tolerate technologically primitive working conditions."

The courts have it within their power to transform their relationship with technology. If they do not, their inefficiency will at best frustrate the public. At worst, disputants will seek out private dispute resolution forums and withdraw their patronage and support from the public justice system altogether.

JUSTICE TECHNOLOGY AND THE PUBLIC INTEREST

THREE SUCCESS STORIES

Throughout the state, innovative local courts are experimenting with technological hardware, software, and sheer creativity to make justice simpler, faster, and more satisfying for the consumer. The following are but three examples of how resourceful public servants are seeking to create a justice future that better serves the public.

Long Beach

In the Long Beach Municipal Court interactive technology kiosks allow motorists to resolve traffic citations 24 hours a day, 7 days a week. In both English and Spanish, audio tapes explain court procedures and options for resolving citations. Fines can be paid by credit card or bank debit card. Future plans call for automating the filing of small claims actions, the collection of civil and criminal fees, property tax payments, and other services.

Public Benefit: Simple, uncontested cases can be resolved quickly and conveniently. Average transaction time is two minutes.

Los Angeles

The Los Angeles Municipal Court is one of several California courts that has introduced interactive video technology into the arraignment proc-

ess. Personal arraignment appearances can involve delays of several days, a trip to the downtown Criminal Courts building, and a long wait in a holding cell. In contrast, video arraignment is fast. Accompanied by counsel, suspects are educated about the process by videotape. The judge, defendant, counsel, and the prosecution can see one another simultaneously on display monitors. Defendants who are released pending trial can be freed immediately after the hearing.

Public Benefit: Video arraignment can be more efficient, more secure, and less costly than the physical equivalent.

Ventura County

Ventura County provides an example of technology at its best in today's courts. There, the Municipal Court Information System (MCIS) has computerized the handling of all criminal and traffic cases. In traffic cases law enforcement officials enter citations into a portable computer and provide the motorist a copy from a portable printer. Each day, the computerized information is sent to the MCIS, which opens a case file, checks with the DMV for previous violations, and prepares courtesy notices for mailing. The citation is available on line to court clerks who collect the fines for uncontested citations, and to the judge who presides over contested citation hearings. At such hearings deputies enter the minutes of the proceeding as they occur and provide the motorist a printout when the hearing is complete. For motorists who must

attend traffic school as part of their sentence, the MCIS calculates the deadline for filing traffic school certification and sends notices to those who are tardy.

Public Benefit: Matters can be resolved more quickly and efficiently. Paper files are disappearing from the clerk's office and the courtroom.

PUBLIC ACCESS TO INFORMATION

Today, for the public and the press, easy access to justice system information is more fiction than fact. “Access” may consist of going physically to the courthouse, standing in line, requesting case files that may or may not be in the courthouse, and searching through them page by page. In practice, it is only the legal community that has effective access to court-related information, access that in some states and the federal courts is already on line.

More accessible, user-comprehensible justice is basic to the commission's vision of a preferred future for the courts. Technology has the proven potential to help make that vision a reality, as the three near-term examples above illustrate.

In a preferred future Californians will have access to and be knowledgeable about powerful information technologies, systems that will make long-distance access to justice information and dispute resolution a reality. The near-term reality, however, is far less advanced. Many Californians cannot afford and have no access to even the sim-

plest computer technology. And many Californians, regardless of economic status, are unschooled in and uncomfortable with new information technologies. For now, and during the transition to a more sophisticated technological future, the courts should make significantly greater use of technologies that are widely available and universally understood: telephone and video.

The telephone — and interactive video as it becomes more widely available — should be used more extensively for public information purposes. As long ago as 1978 a study by the National Center for State Courts identified widespread public interest in the creation of legal help lines. Many questions about the law and the courts do not require the assistance of a lawyer or even a court clerk. In the not-too-distant future, simple legal questions might be answered by a database/voice-response system. For those who cannot afford to consult an attorney, for those who live far from the nearest justice facility, for the disabled, such a tool would greatly enhance public access to justice.

RECOMMENDATION 6.1 Justice information should be easily accessible through common, well-understood technologies.

Strategies:

- 6.1.a. The third branch should ensure easy public access to justice via consumer-friendly technology that is comprehensible and requires little or no training, e.g., telephone and television.

*“Too often
the courts operate as if the telephone
were yet to be invented.”*

Hon. Harry Low,
Commission Member

“As interactive television and other interactive systems become available we’ll be able to get the general public involved in a real-time experience with the courts, and with learning these skills as they are being developed, not only from the corporate and education worlds, but in the community.”

Technology Expert, San Francisco Hearing,
August 17, 1993

6.1.b. The Judicial Council’s Standing Committee on Technology (see below) should create minimum standards to ensure that such systems are easy to use.

6.1.c. The design of such technology must:

(1) Ensure that those of few or moderate means can afford and use it effectively.

(2) Meet the needs of those who are physically impaired and require access by alternative means.

(3) Provide effective access to non-English speakers.

(4) Meet the needs of the technologically illiterate.

The third branch need not — indeed, should not — undertake such a wide-reaching, ambitious venture alone. Private sector innovators and providers can do much to assist the judiciary in its automation and modernization.

6.1.d. When the courts cannot efficiently do so themselves, they should work with commercial information providers to develop publicly accessible on-line services and databases.

The courts should not, however, relinquish control over justice data. While some see the Information Age as one of unlimited information available on inexpensive equipment, others see less rosy futures. Today, banks, insurance companies, credit

companies, and other enterprises collect detailed information on their customers and potential customers. This information is compiled in massive databases and is sometimes sold both within and outside the industry. As the technologies for manipulating data become more powerful, the information becomes more valuable. To maximize profit, enterprises that control information may seek to restrict access and/or increase the price. In either case, there is a risk that poorer individuals and institutions may be left out of the Information Age. While this scenario is less likely to define the future of a public institution such as the courts, every care must be taken to ensure that justice data are available to all.

6.1.e. The courts should retain control over justice data.

Similar to but distinct from justice system information and case data is law-related material: the contents of law libraries. Telecommunications has already created an electronic network that links the state’s public and private law libraries. In the future such a network should be national, perhaps a component of the Internet or its successor. The contents of the nation’s law libraries should be digitized, thoroughly but simply indexed, and available to the public, the press, disputants, counsel, and the courts.

6.1.f. The Judicial Council should create a Law Library Coordinating Council to define and implement policies related to the law library network.

ACCESS AND TELEPRESENCE

Telepresence has the potential to make physical presence at the courthouse virtually obsolete. Hearings, other pre-trial proceedings, some civil and criminal trials, and most appellate proceedings can all be effectively conducted electronically with existing technology.

In a number of California jurisdictions “virtual arraignments” have been routine for a decade. In 1983, the San Diego Municipal Court became the first court in the nation to install a video arraignment system. Court officials there report that savings in wages and transportation costs recoup the initial investment many times over; corrections officials report improved prisoner security and safety.

Creative courts in California are expanding the horizons of video still further. The Central Courts Video Project of the Los Angeles Municipal Court combines video conferencing with work group computing (using an all-electronic file) to speed pre-arraignment processing. Other examples abound.

By 2020, courts will have completed the installation of audio and video teleconferencing facilities and cellular communication networks. These technologies will allow video hearings at which counsel and parties will appear electronically. While infrastructure limitations may initially restrict video to routine hearings, the first multilocation video trial is likely to occur long before 2020.

RECOMMENDATION 6.2 To promote efficiency, access, convenience, and cost re-

duction, interactive video technology should be incorporated into all justice proceedings.

Telepresence seems certain to raise due process of law issues. The justice system has traditionally placed a high value on the ability of a judge and/or jury to personally observe a witness’s demeanor. Telepresence may filter or distort such perceptions. Similarly, due process generally affords a criminal defendant the right to appear at public hearings, to confront witnesses, and to appear at felony arraignments. The courts must decide whether such rights are preserved when the defendant or a witness appears as a video image. As video-conferencing technology improves, courtroom hearings could become the exception to the rule. Litigants, witnesses, counsel, judges, and juries may be joined not in the courtroom but through an audio/video communications network. Balancing efficiency gains with quality of justice considerations will be a delicate task, perhaps one that will be performed in some virtual courtroom of the future.

Strategy:

- 6.2.a. Experts familiar with civil, criminal, trial, and appellate law should evaluate the effects of telepresence on the judicial process, and make recommendations to mitigate any adverse effects.

CREATING PAPERLESS COURTS

A paperless revolution is brewing outside the temple of justice. It is a revolution that the courts must not miss. The paperless court — one in which information is transmitted, recorded, stored, retrieved, reviewed, and presented electronically — will transform the way courts do business.

Today, document storage and retrieval consume vast amounts of court time and account for considerable delay. In the future, court “documents” will consist of electron streams flowing into the court’s database. There they will be available for immediate electronic review by judges and litigants, the press and the public, counsel, and the criminally accused. Access will be possible from any number of public locations.

The electronic filing of documents occurs today in some courts. In the near term, however, because not all disputants have access to electronic filing, the courts should install simple imaging technology that can read paper documents and convert them to electronic files, allowing them to be entered into the database without retyping.

Paperlessness also has potential for use in the courtroom, especially in complex cases. In a recent federal trial that involved complex financial and engineering data the jury was presented with evidence via visual presentations on a video screen. The court used real-time transcription of testimony, which became available several seconds later in plain English. The trial transcript was computerized, allowing immediate full-text searches for tes-

timony. Complex documentary evidence was retrieved from optical disc memory through bar coding. The judge reported that technology had reduced trial time by 50 percent.

In 1992 the Judicial Council Strategic and Reorganization Plan approved the concept of paperless courts. Long before 2020, all judicial forums, both trial and appellate, should be fully electronic.

RECOMMENDATION 6.3 Courts must become paperless.

Strategy:

- 6.3.a. At the earliest opportunity the Judicial Council’s Standing Committee on Technology (see below) should create and implement paperless models of both trial and appellate forums.

While paperless courts will bring speed and efficiency to the justice system, safeguards will be needed. If electronic service of process is allowed, for example, courts must ensure that it can be verified. As connectivity increases, complications will inevitably arise, but they will be manageable complications.

JUSTICE TECHNOLOGY AND JUDICIAL ADMINISTRATION

EXPEDITING THE BUSINESS OF JUSTICE

Just as technology holds the promise of making justice consumer oriented, so too does it promise far greater speed, efficiency, and accuracy in judicial and administrative functions. The Stanford/Fenwick team identified four principles that should guide the use of technology in the courts both today and in the future:

Data should be entered in the system only once. It should be integrated into databases accessible by: the courts; prosecutors; public and private defenders; all other elements of the public and private bar; human services and law enforcement agencies; other state and local agencies; and the private sector, including the media.

Delays between steps in the dispute resolution process should be reduced by consolidating steps, by performing them in parallel processes, and by simply speeding the process and eliminating schedule conflicts.

Wherever possible, telepresence should be used to facilitate access, reduce the need for travel to court facilities, and speed the process of justice.

The object of all such initiatives should be the active, efficient, effective management of the judicial process. To prevent delay, conserve

judicial resources, and protect the public interest, courts should manage their time and resources zealously.

These four principles, if observed conscientiously in every administrative and judicial procedure, would go far toward creating multidimensional justice.

STATEWIDE DATA DISTRIBUTION NETWORK

As described above in the context of public access to justice data and information, an integrated data distribution network is central to the commission's vision of the future of court technology. Not only will such a network make access to justice a reality, it will greatly simplify the business of judicial administration.

In a statewide data distribution network a single file, entered once, will be immediately available to an unlimited number of users. No intermediaries will be needed to retrieve requested documents. Sophisticated scheduling and case management applications will be available on line. Documents will be retrieved instantaneously at trial and displayed on monitors to all participants. On appeal, both clerks' and reporters' transcripts will be immediately available to the appellate tribunal.

The network will be a clearinghouse for judges, court information managers, attorneys, clients, and the public. Every California court will have access to and share information through the network. It will contain scanned images of filed paper documents, electronically filed documents,

“If we convert to an electronic [justice system] database immediately, it will be far easier to put this information in the hands of the public later. Putting this information in the hands of the public is the major way to take back the justice system.”

Witness, Eureka Hearing, August 16, 1993

and the courts' case management system. Once authorized, any user will be able to access and retrieve information or enter data, although clearance will be required to enter data.

If the data network is to be a reality, state-wide leadership will be necessary to: ensure the installation of compatible hardware and software; develop norms and standards for access; create safeguards for transmitting and using sensitive information; and standardize nomenclature and procedures among courts, prosecutors, public and private defenders, all other elements of the public and private bar, human services and law enforcement agencies, other state and local agencies, the press, and the private sector. The Standing Committee on Technology would be well suited to this leadership role.

RECOMMENDATION 6.4 A comprehensive and integrated data distribution network should be created to connect and serve the entire judicial branch, other agencies, and the public.

Strategy:

- 6.4.a. The Technology Committee should develop and promulgate new standards to govern the exchange of information within the judicial branch.

DATA SECURITY

While widespread access to judicial branch data is clearly desirable, it will also expose such data to

new and unforeseen hazards. Committing the courts to new information technologies will require safeguards. Access to information must be restricted wherever necessary to protect confidential or privileged data, and to prevent tampering with evidence. Information must be protected from unwanted disclosure, modification, or destruction, as must the systems themselves. The courts' technology oversight body should participate in the development and implementation of the research agenda aimed at accomplishing these objectives.

If security is to be effective, protocols will be necessary. As to "read only" data, security measures should be implemented to ensure that readers cannot override the read-only format, thereby intentionally or inadvertently altering data. Because some justice information users will have a legitimate need to alter files, security clearance such as a password or more sophisticated recognition device will be needed.

Court data may fall prey to other hazards, such as the now-infamous computer viruses that can go undetected until they have altered or destroyed large quantities of data. With increasing reliance on computers there undoubtedly will be significant progress in data safeguards, ensuring that public access to justice data is not incompatible with data authenticity.

Finally, the courts' information systems must be protected from physical threats. Timely justice information can be critically important — e.g., information pertaining to arrest warrants or restraining orders — and must not be jeopardized

by physical sabotage, power failures, or accidental errors. Safeguards and backups must be built into all judicial branch data systems.

RECOMMENDATION 6.5 Standards to ensure the integrity of justice data must be developed and carefully implemented.

Confidentiality and privacy must also be protected. Already Californians are evidencing more interest in safeguarding their privacy than are other Americans. Nine out of 10 U.S. metropolitan areas with the highest number of unlisted phone numbers are in California. One-third of all access lines are unlisted and the fraction is rising. By 2020 it is projected that nearly half of all California telephone numbers will be unlisted.

The courts must ensure that information is not subject to unauthorized access. The judicial data network will contain restricted information. While some experts suggest that future research will offer improved safeguards for electronic information, the computer “hackers” of 2020 are also likely to be more sophisticated. In order to ensure that private information remains confidential, the courts will need to be both conscientious and creative.

Strategies:

- 6.5.a. The distinction between public and non-public information should be preserved; the latter should be vigorously protected.
- 6.5.b. The Technology Committee should study and make recommendations to the

Judicial Council concerning legislation and rules to govern on-line access to justice system data.

CASE MANAGEMENT

Comprehensive case management systems can leverage courts’ ability to manage vast case dockets. In Maricopa County, Arizona — a court technology pioneer — the public defender’s caseload exploded from 26,000 to 40,000 filings annually because of stricter drug law enforcement, yet the size of the defender’s staff remained unchanged. The case-tracking system in the defender’s office was programmed to record all relevant case data, including the defendant’s personal history, past criminal record, details of the arrest, all charges and pleas, the designated attorney, and more. The system was also cross-referenced so that each defender’s caseload could be tracked and every attorney’s work monitored. County administrators say that the management system has been central to helping the county remain within budget while continuing to manage dockets and caseloads effectively.

RECOMMENDATION 6.6 The judicial branch should install case management systems as soon as feasible.

Strategy:

- 6.6.a. The Technology Committee should research and evaluate computer-assisted case intake and processing systems in other jurisdictions.

“The impression is that judges have no business touching keyboards; that’s what clerks do. Judges touch gold Cross pens. We’ve been systematically ignored when it comes to developing things that would help us do our jobs.”

Maricopa County (Arizona)
Judge David Phares,
Pioneer in Judicial Workstations

“We’re like monks working in our own little abbeys. We don’t communicate with other agencies and we don’t share information. I think it would help if we did get a computer system where you could talk to the federal people, the county, and other state agencies.”

Parole Officer, San Diego Hearing,
August 23, 1993

EXPERT SYSTEMS

Today, computers can be programmed to analyze rule-based judicial decision making, apply such rules to different fact patterns, and produce decisions that mirror those of judges and other experts. Sometimes referred to as “artificial intelligence,” such technology is commonly known as “expert systems.” No later than the end of the decade, expert systems will be widely used in business, engineering, medical diagnosis, and other fields.

Research into expert systems and the law has been under way for more than 20 years. Already, computer programs are used in some courts to determine levels of child or spousal support, analyze legislation, and identify appropriate criminal sentences in determinate sentencing jurisdictions. While some critics fear that such decision-making software will one day replace human judges and juries, it is more likely that for the foreseeable future such technology will remain an adjunct to judicial decision making.

RECOMMENDATION 6.7 *As the technology evolves, proves itself, and demonstrates its utility for judicial decision makers, the courts should be prepared to integrate expert systems into their work.*

Strategies:

6.7.a. The Center for Judicial Education and Research should assist judges in identifying and utilizing available and emerging technology that can facilitate rule-based decision making — e.g., the calculation

of support payments, applications of sentencing formulas, etc.

6.7.b. In order to set appropriate limits and to preserve judicial discretion, the Technology Committee should carefully evaluate the utility of expert systems for giving legal advice and/or for legal decision making.

MANAGING TECHNOLOGY

PRESERVING LOCAL INNOVATION

The resourcefulness of local courts accounts for much of the success in judicial branch automation to date, and local initiative is likely to remain a rich source of future modernization.

Locally pioneered court innovations are reducing costs and allowing the more effective use of employees’ time. Others are reducing paper flow. Still others are making the courts easier to use. Much innovation grows out of old-fashioned problem solving: one or two astute employees identify a problem and invent a process to remedy it. The judicial community is relatively small; innovators can become leaders by convincing other administrators and judicial officers to use their new applications.

RECOMMENDATION 6.8 *In the justice system of the future, local innovation should be encouraged, supported, acknowledged, and rewarded.*

EFFICIENCY THROUGH COORDINATION

Absent coordination, local initiatives are unlikely to achieve their full potential. Without some degree of technological uniformity among courts, the potential benefits of enlightened local initiatives will be lost. Effective communication between courts is impossible, for example, if individual courts use incompatible applications. Moreover, if too many disparate technologies coexist in the courts, the market will become fragmented. Private sector vendors will lose the incentive to develop new applications for the courts.

If the 21st-century justice system is to be accessible, efficient, and affordable, it is critical that the courts adopt a systematic approach to technological modernization. An oversight body should be created to provide policy and implementation guidance to the courts.

RECOMMENDATION 6.9 *The judicial branch should create a standing advisory committee on technology. In its oversight role, such a body should develop branch-wide policies and procedures for the use of technology in judicial administration and decision making.*

Strategies:

- 6.9.a. The Judicial Council should establish a Technology Committee that is broadly representative of the justice system.
- 6.9.b. In seeking to improve efficiency and reduce the cost of justice via the informed

use of appropriate technology, the Technology Committee should work with the private sector, the bar, and other governmental entities at every level.

- 6.9.c. The Technology Committee should be consulted and included in the design and renovation of all justice system facilities.
- 6.9.d. A separate body composed of users and technical specialists from the system's various entities should advise the Technology Committee on potential improvements to technology standards and policies.
- 6.9.e. The Technology Committee should regularly evaluate justice technology's impact on the poor, the disabled, and the elderly to ensure that access is equally available to all.

The blueprint for effective oversight of modernization must include two key elements: uniform standards and institutional coordination. Effective integration of court technology will require minimum standards and rules to ensure that the judicial branch's hardware, software, and data are compatible and connectable. Local courts need no less if they are to both access and contribute data to the network.

Uniform rules for governing and managing innovation are also needed. In addition to recommending protocols to ensure data security the Technology Committee could redraft over-restrictive

rules that limit technological innovation, and draft new rules to ensure that technology's doors open equally wide to all.

Agencies and organizations that interact with the courts also need better access. Inadequate organization and funding of the various components of the civil and criminal justice systems not only impede but may even paralyze the prompt, efficient, and fair delivery of justice. The weak-link-in-the-chain metaphor aptly applies to system-wide technological innovation — the chain of technology acquisition is only as strong as its weakest link. Consequently, appropriate technologies must be ubiquitous, interagency, and intraagency.

The technology oversight body should act as a clearinghouse for local innovation and provide guidance to local jurisdictions. The court data network is the obvious medium for providing such information. The committee should also coordinate the courts' connection to the world outside the judicial branch. The courts' business is intimately connected with that of public and private agencies and organizations. Information access and equipment will pay off in better communication and better coordination. The civil and criminal justice systems require simpler, faster exchanges of information among the courts, prosecutors, public and private defenders, all other elements of the public and private bar, human services and law enforcement agencies, other state and local agencies, and the private sector, including the press.

PERSONNEL: TRAINING, AUTOMATION, AND RETRAINING

Integrating technology fully into the life and work of the multidimensional justice system will require the cooperation, participation, and understanding of every employee of the judicial branch. Judges will need to retool if they are to be effective information managers in the technology age. While they need not be technology experts, they will need to know enough to ask the right questions about the systems the courts acquire. More importantly, if they are not to be at the mercy of expert technology witnesses at trial, they will need enough knowledge to make at least rudimentary judgments about technological evidence.

Judicial computer workstations are coming on line. All across the country judges are using computers to access court records, search electronic legal libraries, communicate with clerks and other judges, word-process memoranda, and perform countless other functions. Clearly, information technology has the ability to make the work of judicial officers both more efficient and of higher quality.

RECOMMENDATION 6.10 *Judicial officers should receive ongoing education on the use of justice system technology and play leadership roles in the modernization of court information systems. As necessary, staff should be retrained for nonmechanical functions.*

Strategies:


- 6.10.a. The Center for Judicial Education and Research (CJER) and the California Judges Association (CJA) should provide technology training programs for judicial officers. Such programs should include instruction in technology's applications to judicial functions and court operations. Regular updates should ensure the effective use of on-line resources, classes, and research tools.

Judicial system employees are on the front line of the drive toward judicial branch modernization. As witnesses to public frustrations with court inefficiency and as the victims of unnecessarily slow, mechanical functions, court employees are modernization's greatest advocates. It is vital that they be trained early and often in the use of all technologies they are likely to encounter in their day-to-day work. Their continued experimentation and innovation with information technology applications must be encouraged and rewarded.

- 6.10.b. Judicial officers should take a leadership role in technological innovation and applications, in full partnership with non-judicial staff. Regular, high-quality staff training in technological applications should be the rule.

The concern is sometimes heard that technological efficiency may replace the very employees who were responsible for the system's techno-

logical evolution. The goal of efficiency, however, is not merely to cut costs but to improve justice. The courts' new emphasis on customer service and appropriate dispute resolution will create new opportunities for justice system employees. Technology will free court workers from the crush of paper record keeping and for new, important roles in the courts. Retraining and redeployment plans should be developed at the earliest sign of worker displacement.

- 6.10.c. Courts should design new labor-saving systems that free staff for work that cannot be performed mechanically. Planning for resulting personnel reassignment and retraining is essential. 

“The courts should not become a slave to technology. Technology should not be used to avoid human contact, which is essential to the resolution of disputes.”

American Jewish Congress Representative,
San Francisco Hearing, August 17, 1993

A PREFERRED FUTURE

In 2020 family and juvenile law matters continue to symbolize society's shortcomings and successes, the family's collapse and recovery, the individual's failure and triumph. Changing definitions of the family, an increasingly diverse population, the feminization of poverty, surrogacy, and elder care issues are but a few of the questions that challenge society, ethicists, and the justice system. As in 1993, complex family problems are not amenable to predetermined, narrowly focused solutions.

In 2020 the justice system's response to these realities is coordinated intervention with a broad array of human services and multioption justice solutions. The adversary process and adjudication are the exceptions to the rule. Because recourse to both human and judicial services is initially voluntary, families feel resource-equipped, able to maintain or regain control of their lives and their futures. The result is more appropriate, more economical investment of public resources over the long term.

In 2020, because of more effective education, public assistance, and appropriate justice system intervention, many families are less fragile than their 20th-century predecessors. The dispute resolution forums of the future address both the causes and the symptoms of family dysfunction. As a consequence, many families are less likely to require repeated justice system intervention.

Juvenile justice is a priority. Juvenile judges have access to a wide range of services and placements to address the needs of juveniles and their families. Rehabilitation is a reality. In order to maximize community involvement and support, the majority of family and juvenile matters are resolved in community dispute resolution forums. Complex matters are adjudicated by specially trained judges in regional justice facilities.

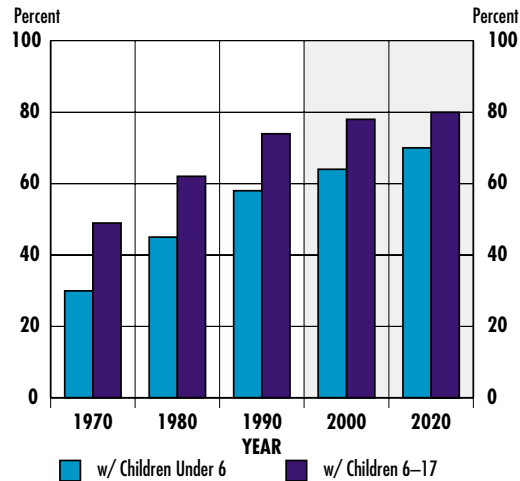
In 2020, families and juveniles are healthier, in large part because society has committed its energies and its resources to addressing the very causes of family dysfunction, among them: poverty, illiteracy, inadequate education, inadequate mental health care, joblessness, child abuse and neglect, the drug epidemic, firearms, violence, and the need for ethical behavior in the individual, the family, and society itself.

CHAPTER

7

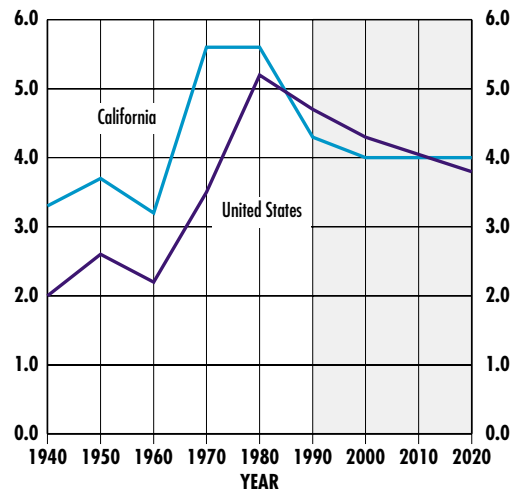
CHILDREN AND FAMILIES

FIGURE 7.1 Percent of Married Mothers Working Outside the Home



Source: IFTF; historical data on United States from U.S. Bureau of Labor Statistics, *Employment and Earnings and Handbook of Labor Statistics*.

FIGURE 7.2 California and United States Divorce Rate (per 1,000 population), 1940–2020



Source: IFTF; historical data from National Centers for Health Statistics, *Vital Statistics of the U.S.*

FAMILIES TODAY AND TOMORROW

CHANGES IN FAMILY STRUCTURE

In both California and the nation, the family has undergone profound changes in the last 30 years. Between 1960 and 1989 the nation’s fertility rate declined 34 percent. In California, rates tracked the nation’s until 1975, when rising immigration produced a 20 percent increase in the state’s birthrate.

Changing behavioral norms and changing social attitudes about unwed parenting produced an increase in births outside of marriage. A U.S. Census Bureau report on the subject notes, “Society is not frowning on them anymore. Families have changed their attitudes toward pregnant daughters.”

According to the same report, in 1960 only 5 percent of births nationally occurred outside of marriage. By 1985 that number had risen to 22 percent. In California the percentage of unwed mothers rose from 11 percent to 19 percent over the past decade. At the same time, the number of families headed by single women rose 15 percent. Legal questions about family rights and the rights of children born outside of marriage have increased accordingly.

Family structure and dynamics have been affected by the dramatic increase in mothers working outside the home. While in 1970 roughly 30 percent of mothers with children under 6 worked

outside the home, by 1990 that number had almost doubled (Fig. 7.1).¹

Increasing divorce rates are changing the family. Data from the National Center for Health Statistics indicate that for decades California had a lower marriage rate and a higher divorce rate than the nation’s. When divorce rates rose dramatically in the 1960’s, California’s rose almost 30 percent faster than the nation’s. Today, divorce rates in the state and nation have converged and stabilized at roughly 4.5 per 1,000 population per annum (Fig. 7.2).

Such changes reflect broad social and economic changes, changes tied to industrialization and urbanization. They have altered expectations about marriage and family. The family is not dying — to the contrary, by some measures it is showing renewed signs of life — but it is clear that the nature of the institution is changing. Its evolution is certain to continue in coming decades.

DEMANDS ON THE FAMILY

Less-visible, less-reported trends are also affecting the family. Reduced time outside the workplace is surely taking its toll. The increasing numbers of parents working outside the home are spending longer hours at work, and in getting there. Travel time to and from the office has increased markedly in California, where there has been substantial migration to housing outside the central cities.

The U.S. Bureau of the Census reports that one in five Americans has changed residence in the past year, including one in three young adults and

one in four young children. In California, the numbers are believed to be even higher, as recent newcomers relocate in response to changing property values and development. Relocation adds to the pressures of family life by obliging families to adapt to new environments.

Traditional social support networks have been disrupted by longer work hours and increased mobility. In the past, families could rely on family and neighbors to assist with child care and family problems. Today, however, family stress is compounded by isolation. As one commentator notes:

What is most striking about parents today is how isolated many of them are from other families and from each other, and how hungry they are for new ways of making contact. “Sometimes I feel like the last person on earth,” one PTA president told me. Isolation among parents helps create isolated kids — or more specifically, kids isolated from the adult world, more vulnerable to their peers. Why are parents so isolated? Longer commutes; both parents working ever-longer hours; the new urban form; the fading of older networks — coffee klatches, churches, neighborhood schools. In the work place, parents seldom discuss parenting because parenting is too often considered a career hindrance. Instead of support from the society, we get advice, a booming how-to-parent industry. “I’m afraid of other parents,” said one mother. “You never know what kind of weirdos are raising your

child’s friends.” As lonely parents fear their environment and doubt their own competence, community — the real preventer of child abuse and other violence — diminishes.²

As traditional support systems disappear, social services — certainly never a fully adequate substitute for family and community — have failed to fill the vacuum. In fact, they are on the decline, and according to the Office of Technology Assessment, especially so in California. The combination of cutbacks in government spending and reductions in health insurance coverage has meant that ever-fewer families have access to assistance. And the services that are available often fail to address families’ problems successfully. As Dr. Gary B. Melton of the Center on Children, Families, and the Law notes, a majority of existing programs offer fragmented, “single-issue” services, despite the overwhelming evidence that an integrated approach is far more likely to succeed. As a consequence, families today have fewer options for coping with greater numbers of increasingly severe problems.

ECONOMIC STRESS ON THE FAMILY

It is hardly news that families suffer as economic hardship increases. Deep-rooted structural changes in the American economy have significantly reduced the standard of living for many families. The National Commission on Children reports:

Growth in real wages virtually halted in 1973, and families today spend a higher proportion

“I want to quote from Roger Wilkins, the leading Black analyst on urban problems, who said, ‘I don’t believe that any social program in the world can do for a child what a healthy, economically stable family can do.’”

Juvenile Court Commissioner,
San Francisco Hearing, August 17, 1993

of their incomes on housing, transportation, health care, higher education, and taxes. Poverty rates among young families have almost doubled since the mid-1960s, and middle-income families report greater difficulty making ends meet.³

During the 1980s the income of families in the bottom 40 percent of the economy declined. While it remained relatively stable for families in the middle 20 percent, this was largely accomplished through longer work hours and more two-worker families. Among the top 20 percent of families, income rose 29 percent, and for the top 1 percent of the population it increased 74 percent.⁴

According to the U.S. Bureau of Economic Analysis, wealthy counties in California are becoming wealthier while poorer counties become poorer. This phenomenon contributes to the state's economic restructuring and the exacerbation of economic class division, with a managerial-professional-technical class at the "top" and "an exploding underclass at the bottom, ill-educated, struggling to find affordable housing, seeing the doors of opportunity become more difficult to open."⁵

Often, families under the greatest stress have the fewest resources to cope with it. Young single mothers are a prime example. Not only are they likely to be poor, but they tend to have less support from other family members.⁶ These and other socioeconomic realities of the 1990s are being translated into the rising number of complex,

"multiproblem" cases appearing in the courts and social service agencies. In California, the Statewide Office of Family Court Services found that 42 percent of court-mediated divorce cases involve two or more issues relating to child neglect, spousal abuse, or substance abuse.

Other research shows that child maltreatment has multiple corollaries, among them unemployment, substance abuse, family conflict, illiteracy, lack of prenatal care, racial and cultural discrimination, mental health problems, physical or developmental disability, and social isolation.⁷ Similarly, juvenile delinquency is closely associated with unsatisfactory family relationships, education, neighborhoods, peer groups, socioeconomic status, and lack of verbal and problem-solving skills.⁸ Clearly, the family's problems are complex, and they show no sign of becoming less so in the future. Only integrated approaches aimed at the very causes of family dysfunction can effectively address the problem and curb the ever-increasing demand for justice system resources.

FAMILY AND JUVENILE COURT TRENDS

Today's family dysfunction is a harbinger of tomorrow's court dockets. Absent a concerted effort to mend the social fabric, the consequences of family disintegration will continue to be a burden to the courts, the public schools, and society itself.

FAMILY COURTS

Family cases are posing an increasing challenge for the courts. Judicial Council statistics show that family law dispositions — which represent only a small subset of all family matters in the courts — have increased 14 percent over the past decade. Court-based mediation is increasing faster than the population is growing. A large fraction of those using public mediation live in poverty, including one-fourth of fathers and more than one-half of mothers.

Family law matters are not only numerous, they are also complex. For instance, as women enjoy greater economic opportunity, dissolutions can become more complicated. As nonmarital cohabitation becomes more common, courts may in-

creasingly face issues arising from the termination of those relationships.

DEPENDENCY CASES

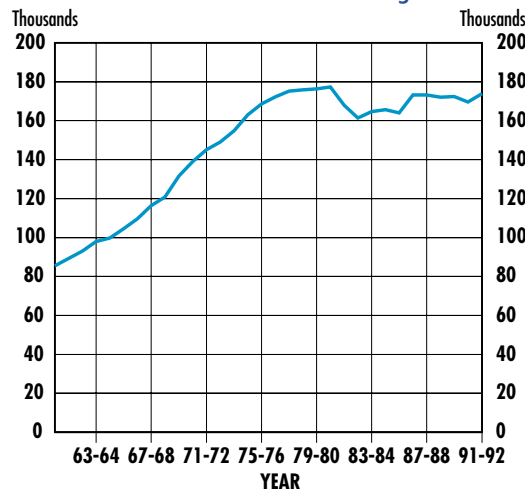
Cases of child abuse and neglect have grown alarmingly over the past 30 years. Reports of battered child syndrome increased from 302 cases nationwide in 1962 to well over 2 million in 1990.⁹ California accounts for about one-fifth of all child abuse and neglect cases in the United States; the number of reported instances increased 216 percent in the past decade. Juvenile dependency filings more than doubled during the past 15 years (Fig. 7.4). California Department of Social Services figures offer no sign of any impending reduction.

JUVENILE DELINQUENCY

While total juvenile arrests are declining, the number of arrests for violent crimes is on the rise.¹⁰ Moreover, the state Department of Finance projects that beginning in 1995 there will be an increase in the percentage of 10–19 year olds in the state. Thus, between 1995 and 2005 the courts should expect a further increase in juvenile filings as the population of crime-prone adolescents crests. Later, around 2020, another increase in 10–17 year olds is projected, marking the beginning of another rise in juvenile caseloads.

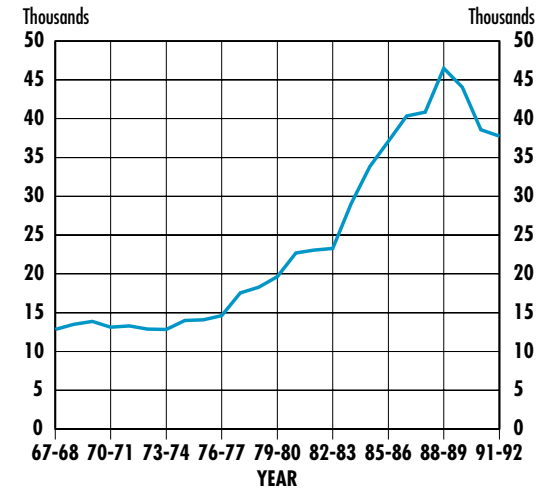
While population trends are fairly reliable crime forecasters, more important to the juvenile courts may be policy decisions about how to treat juvenile crime. Today, California's juvenile justice system diverts a high percentage of juvenile filings

FIGURE 7.3 California Superior Courts, Family Law Filings, Fiscal Years 1960–61 Through 1991–92



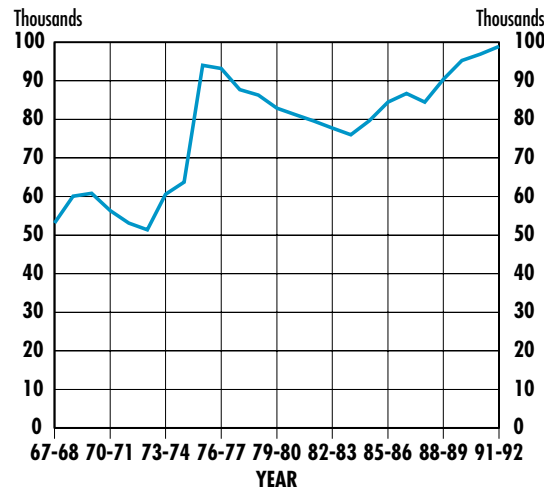
Source: Judicial Council Annual Reports.

FIGURE 7.4 California Superior Courts, Juvenile Dependency Filings, Fiscal Years 1967–68 Through 1991–92



Source: Judicial Council Annual Reports.

FIGURE 7.5 California Superior Courts, Juvenile Delinquency Filings, Fiscal Years 1967–68 Through 1991–92



Source: Judicial Council Annual Reports.

out of the courts. The National Center for State Courts reports that the state has an unusually low rate of delinquency filings — 1,200 per 100,000 population, lower than all but four reporting states.¹¹ For those juveniles who remain in the system, however, the consequences can be severe. The National Council on Crime and Delinquency reports that California’s rate of placing juveniles in custody — 595 per 100,000 youth — is 2.3 times the national average, exceeding only the District of Columbia. Indeed, California accounts for 27 percent of the nation’s juveniles in custody.¹²

INTEGRATING JUSTICE AND HUMAN SERVICES TO PRESERVE THE FAMILY

Trends evident today suggest that the family and juvenile courts of the future will increasingly serve individuals and families who face a multitude of problems, many of which may not be in any sense “legal.” Clearly, courts alone will be no match for the challenge. Integrated, timely, effective intervention will require a carefully crafted focus of community, social, and government resources.

EARLY PROVISION OF VOLUNTARY SERVICES

While children in the dysfunctional family are often at the greatest risk, adult members are sometimes not far behind. Assisting such families when their problems are in their infancy can be critical to

preventing family collapse. In the long term, the family, the taxpayer, and the courts are best served by intervention that is both timely and appropriate in scope to the magnitude of the problem.

RECOMMENDATION 7.1 In order to avoid the need for court intervention, families should be able to draw upon readily available community resources at the earliest stages of family dysfunction.

IN-HOME FAMILY PRESERVATION

Family preservation is a central objective of family and juvenile courts. Often, the most effective way for a court to help a family remain intact and to avoid removing children from the home is to provide adequate social services support. Juvenile courts as a rule attempt to avoid separating children from their families, and family courts generally prefer a custody arrangement agreed to by the parents to one imposed by a court. By providing assistance as early as possible, by averting crisis situations that may result in the removal of children from the home, courts can often succeed in preserving families. The sooner that a family can confront its problems, the greater the likelihood of resolving them successfully.

RECOMMENDATION 7.2 Intensive, early, in-home family preservation services should be available to help ensure that children are not inappropriately removed from homes.

EXPANDED HUMAN RESOURCES

To resolve family and juvenile disputes successfully, family and juvenile courts require special resources. Almost unique among courts, they require the ability to order social service treatment and analysis in order to decide matters before them, whether the issue is child custody, juvenile dependency, or child support.

In the future, family and juvenile judges and other dispute resolvers must have adequate resources available to them. In addition to training in the law, dispute resolvers should have greater social service training and experience. Given the effectiveness of appropriate dispute resolution in family and juvenile forums, far more justice providers should receive training in such techniques.

RECOMMENDATION 7.3 *To assist in the resolution of disputes and to address underlying conflict, the family and juvenile justice system must have access to a full range of social services.*

THE NEED FOR CONTINUITY

For intervention to be effective, “multiproblem” families often require the expertise of numerous social service providers. Family and juvenile proceedings often continue at least until any children involved have reached the age of majority. And with an increasing need for assistance to the aging, a family may proceed directly from issues involving the needs of children to those involving the needs of the elderly. Indeed, a multiple-generation

family might find itself involved in both juvenile and aging issues simultaneously.

Extensive and possibly long-term provision of social services poses the danger of a balkanized approach to intervention. Without coordination, any hope of a comprehensive disposition designed to address all of a family’s problems may be lost. Assigning a single case worker to each family in need can help prevent such fragmentation. The worker can act as a liaison to the various courts with which the family is involved and ensure that agency intervention is integrated and consistent.

RECOMMENDATION 7.4 *Wherever possible, a single case worker should be assigned to work with each troubled family throughout the course of court intervention.*

CONTROLLING JUVENILE PLACEMENTS

California juvenile courts have jurisdiction over children who are delinquent, status offenders (runaways, truants, or “habitually” disobedient), abused, abandoned, or neglected. Once a minor is declared a ward or dependent of the court, the judge must determine whether the child should be removed from a parent, and what services should be provided. In such actions the juvenile court acts as the parent of that child, assuming both parental powers and obligations.

Under California juvenile law a court may remove a minor from the home and place him or her in a group or foster home. But limits on the authority to order specific placements also limit the

“It really comes down to what is going on for these children that are dragged through the courts for years and years and see this therapist, that psychologist, that mediator, tearing the family further and further apart.”

National Organization for Women
Representative, San Francisco Hearing,
August 17, 1993

ability of courts to ensure accountability. Courts must be able to control the quality of placements and programs, to monitor rehabilitation and treatment services, and to supervise a child's progress. To do so, they must have some modicum of control over the placement process. In an era in which the quality and quantity of such resources may be in decline, in which judges seek to ensure effective and efficient services, this authority is all the more important.

RECOMMENDATION 7.5 Family and juvenile court judges should have access to and control over a wide array of specific placements and related social services. Such services should include education and training, psychological and medical treatments, evaluation of living conditions, and institutionalization. Placements and custody arrangements should take into account children's need for contact and identification with the culture of their parents.

The idea that juvenile courts should have jurisdiction over parents in juvenile delinquency matters found support among some commission members, although ultimately the proposal was not adopted. While wary of creating a potential adversary relationship between parents and the court, commission supporters felt that courts need the authority to intervene in some parents' lives — to order a parent to attend Alcoholics Anonymous meetings or obtain counseling, for instance. In the future, family-wide jurisdiction may become a

reality for courts attempting to address especially complex and otherwise intractable family problems.

MONITORING COURT PLACEMENTS

To be certain that the objectives of their placement orders are achieved, judges need the ability to evaluate meaningfully the performance of service agencies. Today there is no effective mechanism to ensure that foster placements or correctional facilities are providing quality programs for minors under the court's jurisdiction. Nor can judges know if the social service intervention they order is effective in a multiproblem family. One key to better integrating the efforts of family and juvenile courts with social service providers is to ensure court access to reliable information about provider effectiveness.

RECOMMENDATION 7.6 In order to ensure that their orders are effected, family and juvenile courts should have the means to monitor the quality of the programs and services into which they place or refer individuals.

EXPANDING THE DEFINITION OF FAMILY

As fewer California families can be termed nuclear or "traditional," courts are grappling with the very definition of the family. The U.S. Bureau of the Census projects that by the year 2000 the number of married-couple families will decline from 1980's 57 percent to 47 percent. Meanwhile, the number of "nontraditional" families will continue to climb. Dr. Gary Melton notes that in many ethnic groups,

extended and multigenerational families have long been the norm. Increasing numbers of unmarried couples, both opposite-sex and same-sex, are raising children together. And as the horizons of biomedical sciences expand, such changes may accelerate. By the year 2020, the definition of the family may have changed beyond recognition. Courts will continue to be challenged in sorting out family rights and obligations. To serve and support the families of tomorrow, government in general and the courts in particular will need to rethink what it means to be a family.

RECOMMENDATION 7.7 To better meet the needs of individuals, the justice system’s definition of “family” must evolve to reflect the reality of a diverse California.

Strategies:

- 7.7.a. Where helpful and appropriate, the definition of family should be expanded to encompass individuals who can complement or supplement the parental function.
- 7.7.b. “Families” might include individuals who can be required to provide financial support to children, the disabled, and older family members.

A LEADERSHIP ROLE FOR THE COURTS

In juvenile court and to a lesser extent in family court, effective case disposition requires tools not traditionally used in civil and criminal matters.

The criminal courts have an entire corrections and probation system available to implement their decisions. Civil court decisions are left to the parties to execute.

In contrast, the juvenile courts often rely on noncourt agencies to implement their orders. In an era of growing numbers of multiproblem families, no juvenile court can hope to resolve disputes effectively without access to a wide array of alternative dispositions. Similarly, in the family courts, a wide range of services and sanctions is essential. As Professor Melton notes:

Families with complex multiple problems appear before the juvenile and family courts in multiple proceedings over a protracted time period. To be effective in changing behavior, the courts’ dispositional plans often must be highly integrated, with community, family, peer group, economic-support, educational, and vocational components.

Today, family and juvenile courts in California are dependent on county-funded human services and corrections services. To ensure an adequate supply and array of services the courts must be effective advocates with county government. To guarantee a wide choice of dispositions, family and juvenile judges must reach out to the other agencies that are essential partners in the mission of the family and juvenile courts. The judicial branch should be a helpful and forceful participant in ensuring that families receive the social support they need.

“With so many failing families, millions of children are becoming permanently dependent on society, rather than contributing members of it. National, state, and local priorities and resources must be redirected in favor of children, and those who care for and nurture them.”

Witness, San Jose Hearing, August 19, 1993

RECOMMENDATION 7.8 The judicial branch should exercise a greater leadership role in coordinating the work of courts and related social service agencies.

Strategies:

- 7.8.a. The judicial branch should become actively involved in improving the services offered by the courts and support agencies.
- 7.8.b. The judicial branch should help coordinate the provision of information on social service needs to state and local legislative bodies.
- 7.8.c. The judicial branch should form relationships with private support groups.

The epidemic of domestic violence is just one indication of the urgent need for coordination in social and justice services. The FBI reports that at least one in four U.S. women will be battered two or more times by her husband or male partner, a statistic that cuts across all social, economic, ethnic, racial, and religious groupings. Such victims have a wide variety of needs, including shelter, counseling, protection from the batterer, and other services. It is important that law enforcement and protective services are coordinated to adequately address the needs of domestic violence victims.

RECOMMENDATION 7.9 The judicial branch should exercise a leadership role in en-

suring that there is improved coordination and cooperation among the courts, law enforcement agencies, and protective services agencies in cases involving suspected domestic violence, child abuse, the needs of older adults, and the needs of the mentally ill.

BETTER USES FOR OLD MODELS

APPROPRIATE DISPUTE RESOLUTION

Throughout this report the commission is unequivocal in its commitment to the role of appropriate dispute resolution in the multidimensional justice system of the future. Alternatives to adjudication that build trust and stable relationships are especially well suited to family and juvenile disputes.

Alternative dispute resolution is not new in California's courts. Beginning with the conciliation court in the late 1960's and its then-novel approach to custody disputes, California's family courts have been leaders in initiating alternatives to the adversary process. In 1979, nonbinding arbitration for civil disputes was instituted. In 1984, new law created a continuing support program for neighborhood justice centers. In 1981, child custody mediation became mandatory in all disputed cases. Since then, California's court custody mediation program has become the largest in the nation, with 65,500 matters mediated in 1991.

The reviews are positive. Statewide evaluation reveals a high degree of user satisfaction and high settlement rates. A study by the Statewide Office of Family Court Services indicates that much of the program's success can be attributed to the fact that clients feel they are listened to in such forums, that the results are fair, and that they are encouraged to arrive at their own agreements.

One commentator summarizes some of the virtues of mediation this way:

Since it is nonadversarial and consensual, mediation can resolve disputes without destroying an important relationship between the disputants. Since it is not bound by formal legal definitions and rules, it can fashion creative and integrative solutions of higher quality than a by-the-rule court decision. And since it allows the parties themselves to find a solution to their problem, mediation educates disputants in self-reliance and responsibility. All three of these objectives — preserving relationships, finding creative solutions, and educating parties in responsibility — are clearly of great importance in parent-child and student-student conflicts.¹³

The California results find support in studies elsewhere. Not only is mediation's value increasingly demonstrable in civil matters and some dependency proceedings, its effective use may also extend to delinquency cases. (See Chapter 9, Criminal Justice, for a discussion of mediation's use in adult criminal proceedings.) In California, howev-

er, *statewide* mandates for appropriate dispute resolution are still limited to child custody mediation.

RECOMMENDATION 7.10 *In addition to continuing to mandate mediation in child custody cases, the courts should expand mediation's use to all appropriate family and juvenile matters, including dependency, minor delinquency matters, and financial issues.*

The early application of appropriate dispute resolution processes can eliminate the need for subsequent adjudication. Especially in family and dependency matters, early mediation can reduce conflict and promote greater cooperation in resolving family problems.

RECOMMENDATION 7.11 *When mediation is appropriate in family and juvenile proceedings it should be attempted as early as practicable.*

COMMUNITY-BASED APPROPRIATE DISPUTE RESOLUTION

Resolving disputes at the community level should be a central goal in California's dispute resolution future. In addition to being highly accessible, local dispute resolution centers have the ability to harness community resources in the pursuit of conflict reduction. Moreover, at a time when the loss of community is widely decried, assisting families within their own communities can help to reestablish social ties, ties that can provide much-needed support.

“Our court system still does not accommodate the needs of children and families very well. It still seems to have the idea that justice is something that should have to be translated to the public.”

Witness, San Jose Hearing, August 19, 1993

“Encourage the schools to teach conflict resolution techniques. The youth today learn that they deal with problems either by ignoring them until they’re a crisis, or hitting or drinking, rather than discovering the alternatives.”

Attorney, Fresno Hearing, August 18, 1993

In the commission’s vision of a preferred future the community dispute resolution center will provide local multioption justice, justice well suited to treating family and juvenile conflict. In a state with an increasingly diverse population, local centers — especially those employing community members — are likely to be more fully representative of the community than their big siblings, the multioption justice centers.

Referring family and juvenile disputes to community dispute resolution centers will also benefit communities. While cultural diversity will inevitably lead to misunderstandings among residents, culturally competent dispute resolvers addressing such disputes at the local level not only will reduce community conflict, but will also provide an important form of public education about cultural differences.

RECOMMENDATION 7.12 *In the future, many or most family and juvenile justice disputes — including but not limited to matters involving families with small children, elder care, and delinquent youth — should be resolved in community dispute resolution centers.*

Nonadjudicatory dispute resolution is not a panacea for family and juvenile conflict. Mediation and other nonadjudicatory processes cannot always provide all the protections afforded by the adversary process. Nonadversary processes will not be appropriate in every kind of dispute or for every party. In instances where there is a serious imbalance of power between parties, resolution process-

es that require trust between the participants are often inappropriate, even counterproductive. This can be particularly true in family violence cases. Assessment officers in the multidimensional justice system must be sensitive to such realities and make referrals accordingly.

In some cases, mediation may also be less effective than adjudication in addressing complex family dysfunction. As one expert notes, sometimes “a family’s problems are so manifold and profound that conducting a mediation session at all, in certain circumstances, seems to be an exercise not only in futility, but in deception.”¹⁴ Clearly, careful evaluation, screening, and referral will be essential in tomorrow’s multidimensional justice environment.

PRESERVING JUVENILE JUSTICE

Young people have special justice-related needs, a fact that led to the creation of juvenile courts. In the future, the public justice system must preserve the distinction between juvenile and adult justice.

Traditionally, juvenile courts focused primarily on the treatment and rehabilitation of delinquent youth. In recent decades, at the same time as legislation and case law have expanded minors’ due process rights, accountability and punishment have become legitimate objectives of California juvenile law.

Today, opinion in the state is divided over the proper role of the juvenile courts. While most Californians would continue to emphasize juvenile justice’s rehabilitative role, almost all believe that offenders who commit violent or property crimes

should be punished.¹⁵ Half of all Californians surveyed for a 1992 report believe serious property offenders should be tried in adult court. Nearly as many favor incarceration in adult facilities for juveniles who commit violent crimes. A large majority — 82 percent — believes that juveniles should enjoy the basic due process rights they are sometimes denied, e.g., the right to counsel.

Expert opinion also varies. Some experts favor complete elimination of the juvenile courts on the grounds that procedural protections are inadequate. Such a plan would merge the juvenile delinquency docket with the adult criminal docket. Others favor reforming the juvenile courts by clarifying their rehabilitative mission, at the same time expanding their jurisdiction and available resources. This approach might divert more cases to social service agencies and appropriate dispute resolution. Yet a third proposal would create a juvenile court with enhanced procedural protections and redefine due process from a juvenile perspective.

The commission strongly endorses the preservation of juvenile jurisdiction. Some juveniles require parental control and oversight that their own parents cannot provide. Many delinquent children come from families already involved in the dependency system. Such children require the intervention of the state — represented by a juvenile court — to act as a substitute parent. Society's goals of rehabilitation, treatment, accountability, and punishment will remain no less important in the future. Juvenile justice must be preserved.

RECOMMENDATION 7.13 *The juvenile court — and in the future, juvenile forums in the multidoor justice system — should continue to exercise primary jurisdiction in delinquency cases.*

REDUCING DELAY

“Justice delayed is justice denied” has special meaning in family and juvenile proceedings. For the abused or neglected child, delay can impede placement in a stable foster or adoptive home. When adoption cases are postponed repeatedly, children often remain in foster care, their futures on hold.

Three principles should guide judicial action in cases involving abused or neglected children, principles aimed at providing a stable and nonabusive home as quickly as possible. They are: the avoidance of out-of-home foster placement wherever safety permits; the reunification of children with their parents as soon as feasible; and the timely adoption of children who cannot be returned home safely.

Delay in dependency matters is also sometimes the result of inadequate or misused child welfare services, judicial and court staff resources, and attorney resources. Many of these shortcomings can be remedied through better coordination. Committing resources early will also help. Better case-screening methods will prevent unnecessary removals. But the bottom line must be to reduce the total time a dependent child is in the system.

“Family and juvenile courts must have sufficient resources. The rapid escalation of caseloads in areas of violent youth crime, abuse, neglect, nonsupport of children, and other family violence is a national crisis.”

Witness, San Jose Hearing, August 19, 1993

RECOMMENDATION 7.14 All family and juvenile cases — especially dependency and nondependency adoption cases — should be streamlined to reduce or eliminate delay wherever possible. At a minimum, unnecessary hearing dates and continuances must be eliminated.

PROMOTING JUDICIAL EXCELLENCE

One obstacle to high-quality family and juvenile justice is an all-too-common lack of judicial training in these specialized areas. Unlike other judges, family and juvenile judges receive little training in law school, as lawyers, or as judges that adequately prepares them for their specialized assignments. For example, judges seldom acquire an understanding of child development issues prior to assuming the bench. The Judicial Council's recently passed mandatory educational requirement for family law judges is a step in the right direction.

Inexperience is exacerbated by the brevity of most family and juvenile court assignments. Often lasting no more than a year, such assignments allow little time in which to develop much substantive experience. Some cases last far longer than a year. Some families may be repeatedly involved with the courts over several years. Only a judge who is witness to the continuum of such events can fully comprehend the scope and pattern of family collapse.

The problem of excessively brief assign-

ments is sometimes compounded by judicial inexperience. The fact is that family and juvenile assignments, despite their critical contributions to the social order and individual well-being, carry less status on the bench and in the bar than other judicial postings. As a result, they often go to new judges. The judicial neophyte is then faced with the task of mastering a complex interaction of law and family processes at the same time as he or she is learning the ways of the bench.

The Judicial Council has recognized that a presiding judge should serve a term of “not less than one year.” The council has also encouraged the assignment of juvenile court judges for terms of no less than three years. Even longer terms are appropriate for family and juvenile judicial officers.

RECOMMENDATION 7.15 Family and juvenile judges should be well qualified and well trained for the special demands of their assignments.

Strategies:

- 7.15.a. Judges in family and juvenile courts should serve long-term assignments.
- 7.15.b. Assignments to family and juvenile courts should be based on a judge's background and training. Wherever possible such assignments should be a matter of preference.
- 7.15.c. Family and juvenile court judges should receive mandatory continuing judicial education in subjects bearing on their

jurisdiction, e.g., child development, social psychology, the dynamics of the family unit, etc.

IMPROVING THE PROCESS

If a family's problems are to be addressed fully and effectively in the justice system of the future, greater coordination is essential. Dysfunctional families typically have multiple problems that find their way into multiple forums. Similarly, contacts with both family and juvenile courts are not uncommon in the context of marriage dissolution proceedings, custody disputes, support actions, juvenile dependency actions, juvenile delinquency proceedings, and domestic violence actions. Unfortunately, each proceeding can be isolated from the next. As an example, an accusation of sexual abuse raised in a child custody action may not come to the attention of a dependency court that is considering whether the child should be placed in foster care. Disjointed treatment curtails the courts' ability to address a range of problems coherently. In a worst-case scenario, courts may actually undo one another's work unintentionally.

The courts should create a systematic, coordinated approach to meeting family needs. In the commission's preferred future, the multidimensional justice system would go far toward ensuring this result. Today, however, to treat families not as unconnected problems but as interconnected needs, courts must first determine whether the disputants before them are also involved elsewhere in the jus-

tice system. Once that is determined, courts must develop ways to coordinate their actions.

RECOMMENDATION 7.16 *The family and juvenile courts should develop effective relations and communications among court divisions, and improved coordination among individual courts.*

EARLY INTERVENTION/ EARLY ACCOUNTABILITY

Central to the successful resolution of juvenile delinquency matters is timely judicial intervention. When courts can intervene constructively at the earliest signs of repeat or escalating delinquency, they can often help prevent a downward spiral into full-fledged adult crime. Early accountability requires the offender to be personally responsible. When such accountability is promoted through the appropriate use of sanctions, in many cases it can prevent future criminal behavior.

RECOMMENDATION 7.17 *To encourage personal responsibility and to prevent future delinquent behavior, the courts and the justice system should intervene with delinquent youth appropriately and consistently, at the first evidence of repeat or escalating delinquent behavior.*

FOSTERING REHABILITATION

Seventy-eight percent of Californians endorse the rehabilitative mission of juvenile justice.¹⁶ There is

*“Our American law is
a window on life, and real life is a
cheerful life.”*


Student League Representative,
San Francisco Hearing, August 17, 1993

also strong support for punishing juveniles who commit serious crimes. Incarceration can play an important role in the juvenile justice system, but juvenile facilities especially should provide offenders with help and training. Given the high cost of crime and long-term incarceration, the state should provide every reasonable opportunity for a juvenile offender's rehabilitation.

RECOMMENDATION 7.18 Where juvenile incarceration is necessary it should be in juvenile facilities that provide educational opportunities and rehabilitative services.

EVALUATING EFFECTIVENESS

To be effective, the family and juvenile courts must institutionalize the capacity to evaluate their own service delivery. Through ongoing research and planning the courts must anticipate the changing needs of the community they serve. They should be active in and not reactive to demographic and other evolving social trends.

RECOMMENDATION 7.19 Family and juvenile forums, no less than other components of the justice system, must regularly evaluate their own performance. 

A PREFERRED FUTURE

It is 2020. Civil justice has transcended the challenges that threatened its very credibility in the last decade of the 20th century. For those disputes that warrant formal adjudication the process is very familiar to those who can still recall the civil trial practice of the last century. But there are also differences. Judges are trained in case management; cases destined for trial are actively managed from the time of filing to the time of settlement or trial. Complaints of discovery abuse are rare — facts significant to a dispute’s fair disposition are disclosed fully and early. The five-day deposition is a thing of the past. Jury reforms extend to jury selection, management, and even to the types of panels that hear certain matters.

In 2020 civil disputes with a local nexus are almost always heard in community dispute resolution centers where the dispute resolution options include community-oriented mediation or arbitration, traditional mediation or arbitration, and adjudication. Californians are schooled and skilled in civil dispute resolution. In most instances, disputes are resolved informally, sometimes with the assistance of a third-party neutral, sometimes not. Demand for dispute resolution services has been further reduced by the cooperative relationship of the third branch, the Legislature, and the Governor. Working together they produce laws that are clear, comprehensible, and certain in the rights, prohibitions, and remedies they prescribe.

CIVIL JUSTICE TODAY

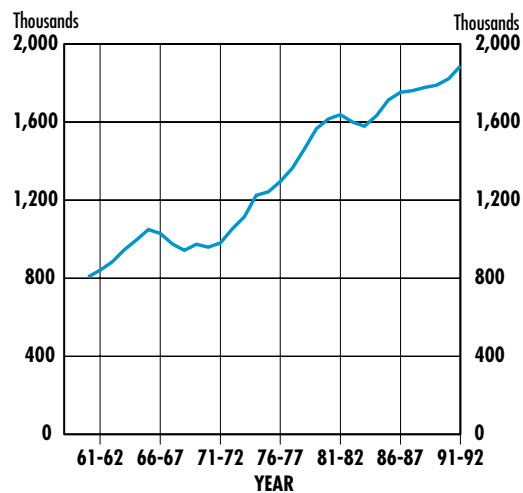
It is generally known that California’s courts have seen a massive increase in civil litigation in the last 30 years; what is not as well known is that the growth in civil dockets has closely tracked that of the population. On a per capita basis Californians are only marginally more litigious today than they were in 1960. Indeed, Californians enjoy a civil dispute filing rate of “only” 6,000 cases per 100,000 residents, well below the national median (Figs. 8.1, 8.2, and 8.3).

CIVIL JUSTICE

Despite this comparatively positive picture, a number of troubling trends could conspire to make tomorrow both qualitatively and quantitatively more demanding for civil justice. For instance, the courts continue to struggle with substantial criminal caseloads. If criminal disputes per capita increase, more and more civil disputants may leave the public system in search of private dispute resolution forums.

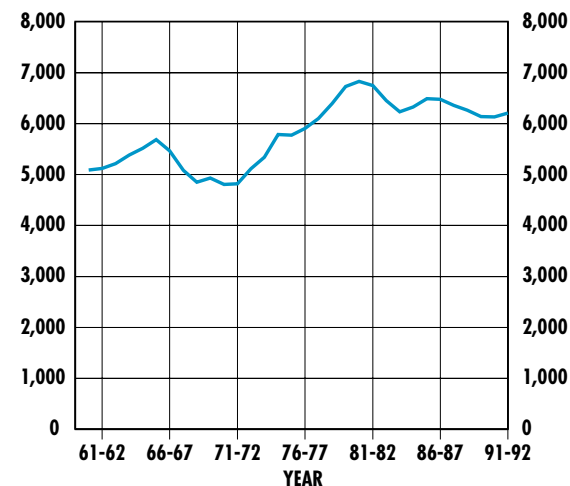
Civil justice today is falling victim to its own foibles. Complex cases involving extensive discovery, large numbers of expert witnesses, and complex issues of fact or law are on the rise. While there is little available data on the number of such cases on California dockets today, 5 percent is a figure cited by both practitioners and judges. On its face a modest percentage, the greater time needed to resolve a complex case can account for a significant portion of total demand for civil adjudication.

FIGURE 8.1 California Trial Courts, Total Civil Filings, Fiscal Years 1960–61 Through 1991–92



Source: Judicial Council Annual Reports.

FIGURE 8.2 California Trial Courts, Civil Filings per 100,000 Total Population, Fiscal Years 1960–61 Through 1991–92



Source: Judicial Council Annual Reports; California State Department of Finance.

LOOKING TO THE FUTURE

While the promise of appropriate dispute resolution is great, high-quality adjudication must be available for those disputes that require it. For some types of disputes traditional adjudication will surely remain the dispute resolution option of choice. Civil cases that may presumptively be suited to the “adjudication door” to multioption justice include those that are likely to establish broad precedents, those involving public law or other

issues with broad public interest ramifications, and those affecting third parties. Unless there are substantial reforms and refinements to both structure and process, future civil litigation may continue to suffer from the very inefficiencies and shortcomings for which it is justifiably criticized today.

CASE MANAGEMENT

In 1993 the commission retained the RAND Corporation to convene several focus groups on civil justice in California. Participants included civil practitioners, judicial officers, academics, and others. The most frequently cited area of potential civil process improvement was the active judicial management of civil cases.

Today, too many court rules and practices provide too little room for judicial intervention in the early stages of civil litigation. Both the pace and nature of pre-trial and discovery proceedings are, to a large extent, in the hands of the parties. Strategic maneuvering by one or both parties contributes to delay, clogged dockets, expense, and reduced access to justice.

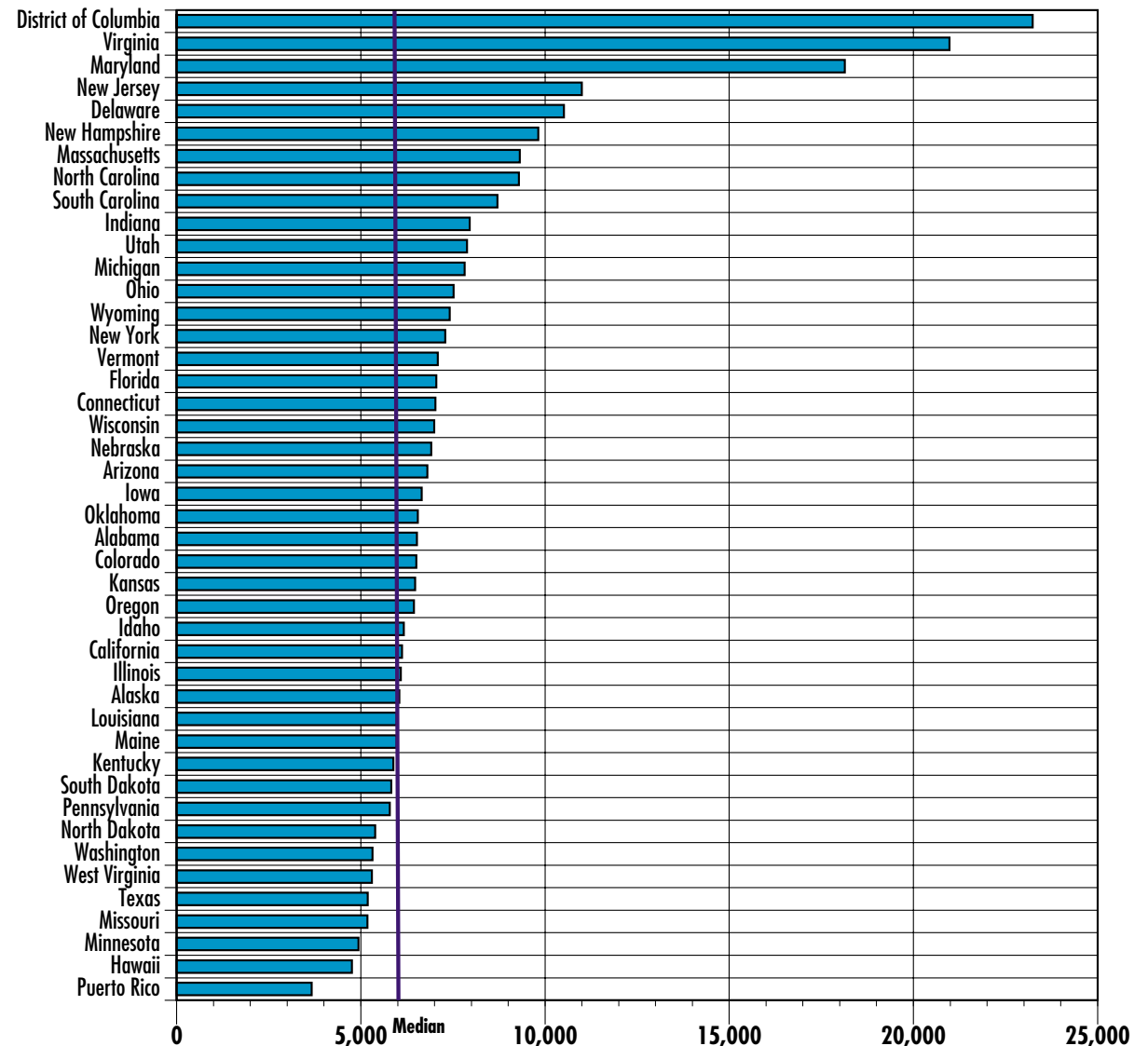
The year 1986 saw the passage of the Trial Court Delay Reduction Act. Mandating the creation of pilot programs in the superior courts of nine counties, the legislation was designed to control the pace of litigation through active judicial case management. Shortly after its passage, ten additional superior courts volunteered for the program.

Seven years later, civil delay has been substantially reduced. Much of the program's success is attributable to the use of early status conferences, discovery plans, and mandatory settlement conferences. The results were encouraging enough that the Legislature enacted the Revised Trial Court Delay Reduction Act of 1990 and the Trial Court Realignment and Efficiency Act of 1991, the combined effect of which was to require all superior and municipal courts to implement delay reduction programs by July 1, 1992.

RECOMMENDATION 8.1 Cases in the public justice system should be actively managed from the time of filing to disposition.

Differentiated case management plans sort cases by type and assign them to different management and adjudication tracks based on their

FIGURE 8.3 Civil Case Filings per 100,000 Total Population in State Trial Courts, 1990



Note: The following states are not included: AR, GA, MS, MT, NM, NV, RI, TN.

Source: State Court Caseload Statistics: Annual Report 1990.

complexity, the number of parties involved, and other factors. Ninety-five percent of lawyers and 90 percent of judges support such plans.

Strategies:

8.1.a. All courts should develop uniform differentiated case management plans providing for the expeditious and efficient disposition of cases. Such plans should acknowledge that greater dispute complexity demands additional time and resources.

In a survey conducted by the National Center for State Courts, attorneys were more positive about delay reduction and case management programs when they felt that they had played a role in their development.¹ In 1988 the judiciary and the California bar formed the Delay Reduction Consortium, a group of lawyers and judges committed to delay reduction. Future delay reduction initiatives should be cooperative.

8.1.b. To promote cooperative case management, the courts should include members of the public and the bar in the development and implementation of case management procedures.

8.1.c. Training in case management techniques should be mandatory for both judicial officers and nonjudicial court staff.

8.1.d. Presiding judges should assign the most difficult cases to the most competent managers.

8.1.e. Formal and informal incentives should be used to promote effective case management by judicial officers and administrators.

DISCOVERY REFORM

While few aspects of the legal process today are more regularly criticized than civil discovery, there is little agreement about appropriate remedies or even whether there is a genuine problem. While discovery abuses alone are surely not responsible for hobbling civil litigation, there is general agreement that in some cases discovery is misused, at substantial cost to litigants, third parties, and the courts.

For several decades jurists, commentators, and counsel have sought to quantify the extent of abuse in the discovery process, and to propose remedies. While hard numbers are few, the experts have at least identified some of the factors that contribute to discovery's abuse. Among them are:

- The adversarial role of lawyers in the fact-finding process. It can result in counsel seeking all possible information, relevant or not, while the other side seeks to create all possible barriers to its disclosure.
- The use of discovery to gain tactical or strategic advantage rather than as a search for factual information relevant to a dispute's resolution.
- The billable hour. The prevailing method of accounting for lawyer time rewards counsel for maximizing time expended in

resolving matters. It creates disincentives to limit discovery voluntarily.

Discovery can place an exorbitant cost on the resolution of even simple disputes. For parties later adjudged blameless and/or for innocent third parties the cost of participating in extensive discovery can be especially onerous. Such costs contribute significantly to the inability of many middle- and low-income persons to litigate civil disputes at all. As the cost of civil discovery goes up at the same time as the percentage of lower-to-middle-income Californians increases, more and more Californians may be unable to afford civil justice. The RAND Corporation's report to the commission inventories some of the research on potential remedies.²

RAND's research reveals that most studies of discovery to date have focused on the quantity of discovery rather than its quality. Little work has been done on the central issue in the discovery debate — the appropriateness of discovery requests to the issue in controversy. Much of the evidence that does exist is subjective. For instance, a 1986 study of attorneys' attitudes in 12 federal districts that had adopted local rules limiting discovery found that a majority of respondents approved of such rules. Support for limits did not vary by type of practice or by the extent of the respondent's litigation experience.³

In an unrelated study of federal and state judges, 45 percent of the federal judges and 34 percent of the state judges cited “abuse of the discovery process” as among the most serious causes of civil delay in their courts.⁴ One-third of the fed-

eral and state judges said that there were “a lot of problems” with the discovery process in their jurisdictions.⁵ When asked what approaches might best address the problem, the state judges expressed support for changes to rules and informal practices, and for greater judicial discretion.⁶

The absence of agreement about remedies points up the challenge for discovery reformers: an abundance of ideas and little agreement about which have the greatest prospect of achieving the desired result. In inventorying the options, RAND identified seven possibilities: (1) adopting standardized rules limiting the amount or timing of discovery; (2) mandating early disclosure of key information; (3) imposing monetary sanctions for violations of court-enunciated practice standards; (4) assisting attorneys in more efficient discovery management; (5) cost and fee shifting; (6) tighter attorney management by clients; and (7) shifting responsibility for discovery management to judges, a common practice in many European jurisdictions.

Standardized Rules to Limit Discovery

Standardized rules are undoubtedly the most common approach to stemming discovery abuse. Some rules seek to do so by limiting the time for discovery. While such rules can reduce total time to dispute disposition, they often do not reduce the quantity of discovery. In fact, as attorneys have less opportunity to prepare needs-based discovery plans, discovery requests may actually increase under timing constraints.

Limiting the number of discovery requests

*“There is an old Irish proverb
which states that there are three things
that are important in life:
God, human folly, and justice.
The first two are beyond our control,
so we must do what we can with
the third.”*

Attorney, Los Angeles Hearing,
August 25, 1993

The consensus in the commission's focus groups was that 1985 rules changes limiting the number of discovery requests had been ineffective, largely due to the existence of an exception that allows the filing of additional requests for cause.

appears to have little effect. Attorneys too often simply combine multiple requests for information into one large request with numerous subparts. The consensus in the commission's focus groups was that 1985 rules changes limiting the number of discovery requests had been ineffective, largely due to the existence of an exception that allows the filing of additional requests for cause. The exception also shifts to the opposing party the burden of showing why the request should not be accommodated. In the opinion of commission focus group participants, the exception is too often observed in the breach. In the future, the party seeking discovery beyond that authorized by the rules should bear the burden of showing why it is justified.

In "phased discovery," attorneys with or without the assistance of the court develop plans for sequencing discovery.⁷ Sequencing may be variously orchestrated and may be prescribed by a broadly applicable rule or on a case-by-case basis. In phased discovery the goal is to focus parties on the most salient aspects of a dispute as early in the process as possible, thereby compelling early consideration of dispositive facts and issues.

Such timing/numerical constraints are more likely to be effective when they are used in conjunction with differentiated case management plans, when they can be tailored to the size and nature of the particular dispute.

Mandatory Automatic Disclosure

As part of its civil justice reform agenda, the Bush administration proposed amending rule 26 of

the Federal Rules of Civil Procedure to require early disclosure of (1) all persons "known to have personal knowledge of any material fact directly relevant to the particularized allegations of the pleadings, including any claim or defense" and (2) "a general description of the location of all documents, data compilations" and other evidence in the possession of the party and "known to be directly relevant to any claim or defense."⁸ This proposal was controversial among both plaintiff and defense bars. Federal rules mandating such practices have been dropped.

Sanctions

Increasingly, proposals for restrictions on discovery are accompanied by calls for monetary sanctions against parties who violate the standards. The 1983 amendments to the Federal Rules explicitly authorized sanctions for discovery abuses, as did California's Civil Discovery Act of 1986. Empirical research suggests that courts and individual judges are inconsistent in their sanctions practices.⁹ There is some evidence that judges' willingness to impose sanctions increases in direct relation to the growth of their caseloads.

Assisting Parties and Counsel with Discovery Planning

More and more courts are becoming involved in discovery planning. As part of the Trial Court Delay Reduction Project, some California courts instituted the practice of scheduling early status conferences, an opportunity for counsel,

parties, and the court to assess disputes and draft rational discovery plans.

One relatively new mechanism for assisting attorneys in the development of discovery plans is mandatory early neutral evaluation (ENE). In ENE an attorney volunteer (the “neutral”) meets with the parties and their counsel early in the litigation process. The neutral assesses the case and suggests a discovery plan. At worst, the parties obtain objective third party input on discovery. At best, the neutral evaluation can move disputants significantly closer to settlement. Of the 34 federal district courts that have developed delay or expense reduction plans, 11 have included proposals to establish early neutral evaluation programs.¹⁰

Cost and Fee Shifting

Under the “American Rule,” each party to a litigated dispute bears its own costs, including the costs of both “offensive” and “defensive” discovery. In certain circumstances, however, federal and state rules provide for limited discovery cost shifting. Both rule 11 of the Federal Rules of Civil Procedure and the California Civil Discovery Act authorize “shifting” the responsibility for expenses incurred because of an opponent’s inappropriate behavior.

Proposals for enhanced fee shifting have met with mixed reviews. A proposal suggested by the Bush administration would have required parties to file discovery plans with the court, and in the event that additional discovery was sought, to charge the seeking party with the opposing party’s costs, including attorney fees.¹¹

Managing Counsel

Large corporations in California and elsewhere are restructuring their relationships with legal service providers. In a recent survey, 95 percent of legal officers in Fortune 1000 corporations said they involve in-house counsel in planning strategy on major matters. Sixty percent said that they require litigation budgets, including itemized discovery budgets, in all major cases.

Almost all respondent companies (98 percent) require their counsel to submit detailed bills. Many are also experimenting with alternative billing practices intended to reduce attorneys’ incentives to “keep the meters running.” For example, some in-house legal officers are requesting that outside counsel charge flat rates for certain cases or for certain litigation activities (“menu billing”).

Such changes in in-house/outside counsel relationships have the potential to heighten corporate parties’ attention to the costs and benefits of alternative discovery strategies. Smaller companies have even more to gain.

Judicial Discovery

Anglo-American civil justice, and the American civil litigation system in particular, relies on the adversary process to investigate (“discover”) and present the facts relevant to a dispute. Each side is assumed to have the incentive to discover those facts necessary to support its case. In theory, if the parties have equal resources and equally skilled representatives, such incentives ensure that all relevant facts are discovered.

Under European “inquisitorial” systems, the judge may be wholly responsible for deciding what issues are relevant, at what stage of the process to hear those issues, and what evidence should be presented.

Under European “inquisitorial” systems, the judge may be wholly responsible for deciding what issues are relevant, at what stage of the process to hear those issues, and what evidence should be presented. In German civil proceedings, for example, the parties identify witnesses to appear before the court but question them little if at all before trial. Nor do they investigate the facts beyond that information they obtain from their clients.¹²

Recommendations

In a preferred future, discovery will be substantially changed. At the very least, disputants will treat seriously and honestly the obligation to disclose salient information to their opponents at the earliest opportunity.

RECOMMENDATION 8.2 Measures should be adopted to curb the abuse and the cost of discovery.

Strategies:

8.2.a. As soon as practicable pilot projects should be launched to test the following reforms:

(1) Mandatory, phased discovery plans in complex litigation.

(2) Mandatory, automatic disclosure in a selected type of dispute — e.g., automobile personal injury matters.

(3) Mandatory sanctions (including attorney fees) for discovery abuse.

(4) Mandatory, early neutral evaluation in large and/or complex matters.

(5) Imposition of sanctions on parties for discovery abuses committed by their attorneys.

(6) Judicial discovery in a selected type of dispute — e.g., professional malpractice.

8.2.b. At the earliest opportunity the Judicial Council should commence a comprehensive review of discovery practices in other nations with the object of identifying other practices suitable for reforming California discovery.

JURIES

Trial by jury is the best institution calculated for the preservation of liberty and the administration of justice that ever was devised by the wit of man.

David Hume (1762)

While Hume’s view was once the prevailing one, juries are no longer sacrosanct in America. There is no lack of critics — among them lawyers, advocates, judges, politicians, and everyday citizens — ready to impugn the modern jury.

Although the reasons for such a radical change in public sentiment are not entirely understood, one large cause of public disapproval may be highly publicized verdicts in highly visible cases

that some in the public and the press view as “errant.” Jury defenders argue that such examples are little more than the overpublicized anomalies of a system that works surprisingly well. Former Los Angeles prosecutor and author Joseph Sorrentino agrees: “In a nation of 300 million, with hundreds of thousands of trials, in 10 years only a minuscule percentage of verdicts have come under fire. No system is perfect.”¹³

As society becomes more complex and more diverse, as government becomes more bureaucratic, juries remain an important bulwark against intolerance and intimidation. They continue to be effective finders of fact and judges of witness credibility. Recent Chicago studies confirm that judges and juries are more apt than not to reach the same verdict. The jury also performs the important role of preventing court officials and attorneys from processing cases in a routine or bureaucratic fashion.

The infusion of community values into the decision-making process can serve as a vital check on the validity of current law. When juries circumvent a court’s instructions it is often a sign that the law is out of sync with community standards. And more often than not juries enhance public confidence in justice. Many Californians’ first extensive encounter with the justice system is as a juror or prospective juror. Such experiences can help persuade the public of the system’s fairness and accessibility. Without juries, public contact with the courts would be significantly reduced.

With some exceptions, the jury is alive, well, and worthy of preservation. In 1992 the American

Bar Association and the Brookings Institution convened the Symposium on the Future of the Civil Jury System in Charlottesville, Virginia.¹⁴ The ensuing report described the jury as providing “important protections against the abuse of power by legislatures, judges, the government, business, or other powerful entities.”¹⁵ The participants also found that the jury “provides a means for legitimizing the outcome of dispute resolution and facilitating public understanding and support for and confidence in our legal system.”¹⁶

Effectiveness

But there is room for improvement, and jury selection is the appropriate place to begin. Juries that are representative not only of the community but also in some measure of the races, cultures, and backgrounds of the parties to a dispute are far more likely to enjoy the community’s confidence than those that are not.

RECOMMENDATION 8.3 Jury selection and empanelment procedures should be flexible.

Strategies:

- 8.3.a. Judges should more actively manage voir dire, the selection of jurors.

Juries of six are used routinely in some states in civil matters, and in misdemeanor criminal matters in others. Their virtue is efficiency. Their liability is a reduction in representativeness, and the greater ability of individual jurors to sway deliberations.

“The civil jury is the most effective form of sovereignty of the people. It defies the aggressions of time and man. During the sixteenth century, the civil jury did in reality save the liberties of England.”

DeTocqueville

*“To make the process more fair,
involve the jury more.”*

Witness, Eureka Hearing, August 16, 1993

- 8.3.b. In some civil matters juries of less than 12 should be allowed. In such instances peremptory challenges should be reduced accordingly.

Around the country there is a growing body of case law that makes impermissible the exclusion of jurors by counsel when the objective is to limit the racial, ethnic, or gender composition of the panel.

- 8.3.c. The Judicial Council should monitor closely the evolving legal definition of a jury “of one’s peers.”

A related but different issue is jury duty avoidance. Jury duty too often connotes delay, protracted proceedings, and economic loss for employers and individuals. Too often the result is juries with an unrepresentative proportion of the elderly, the less-educated, and the under- or unemployed.

RECOMMENDATION 8.4 Exemptions from jury service should be narrowed. Greater effort should be made to ensure a jury’s socioeconomic diversity.

Strategy:

- 8.4.a. Greater effort should be made to accommodate juror availability. Some trials should be scheduled on nights and weekends.¹⁷

Juror effectiveness can also be enhanced by encouraging their more active participation in the

trial process. Today, jurors typically sit through hours of evidentiary motions and discussions, many of which occur outside their hearing and most of which have little meaning for them. In more complicated cases, jurors are expected to absorb vast amounts of information that may or may not be comprehensible to the parties, their counsel, or the court. Thereafter they are often orally instructed on the applicable law and expected to remember the particulars.

RECOMMENDATION 8.5 Process reforms should be implemented to assist jurors in better performing their primary function: the review and evaluation of evidence.

Strategies:

In many jurisdictions today, note taking by jurors is not permitted. Such prohibitions date back to the time when much of the population was illiterate and it was feared that the few jurors who could take notes would command undue influence over the rest. The rationale today is that note taking may distract the jury during the presentation of important evidence. One critic of this argument points out that note taking is: “the basic tool of fact-finding, encouraged all through school.”¹⁸

- 8.5.a. Jurors should, as a matter of right, be allowed to ask questions and take notes in court.

For much the same reason, written jury instructions should be available to jurors during their

deliberations. The complexity of court instructions often makes them insusceptible to memorization or ready comprehension. As journalist Fred Friendly pointed out to the 1978 Commission on the Future of State Courts, “It is curious that judges expect juries to remember charges that they’ve read a hundred times and still haven’t committed to memory.”¹⁹

- 8.5.b. Jury instructions should be written and available to jurors during deliberation.
- 8.5.c. The Judicial Council should launch a pilot project to substitute edited videotape for live trials to determine whether improvements in juror understanding, accuracy, and satisfaction can be achieved. Proceedings suitable for deletion would include sidebar conferences and all other matters not meaningful to the jury.

In some disputes the use of a jury may be so inappropriate that it should be avoided altogether. Highly complex cases involving technical issues of fact might be a good starting place. One example of such a case was the infamous 1978 IBM antitrust litigation in which the jury deadlocked after five months of trial. Afterward, jurors conceded that they had not understood many of the technicalities of the case and had, at best, only a minimal understanding of the legal issues.²⁰ Attorneys have argued that “it violates constitutional due process and fundamental fairness to have fac-

tual issues resolved by [juries] who do not understand such issues.”²¹

RECOMMENDATION 8.6 For certain types of cases, alternatives to lay juries should be considered.

Strategies:

- 8.6.a. Special juries of experts should be empanelled where appropriate.
- 8.6.b. In complex cases the judge — or a specialty panel — should be granted the discretion to determine liability, thereby leaving damages issues to the jury. Where appropriate, the damages jury should be allowed to view relevant portions of the videotape of the liability proceedings.

MASS TORTS AND COMPLEX LITIGATION

The past three decades have seen explosive growth in complex cases — product liability, aircraft accidents, disaster claims, and banking and thrift claims among them. New cases are looming on the horizon, including toxic torts and genetic engineering accidents. Coordinated litigation and class actions have both been used with some success (and some significant shortcomings) in connection with extensive asbestosis litigation in the last two decades. Whether or not these or yet-to-be-invented procedures hold the answer to complex litigation, the public justice system must be prepared to handle complex cases fairly, thoroughly, and as expeditiously as possible.

RECOMMENDATION 8.7 The public justice system should begin today to craft new rules and procedures to govern the complex cases of the future.

PUNITIVE DAMAGES

Virtually no contemporary discussion of the successes and shortcomings of our civil justice system can ignore punitive damages. At their best punitive damages serve to deter willful misconduct and other undesirable behavior. At worst, they punish inconsistently and unfairly, penalizing where they should not, failing to deter where deterrence is needed.

Today there are few uniform rules or guidelines for deciding when punitive damages are appropriate and even fewer guidelines for calculating such awards. Those that do exist have been called into question by recent U.S. Supreme Court decisions.²² The Legislature should persevere in its decades-old attempt to reinject sensibility into punitive damages.


RECOMMENDATION 8.8 Punitive damages should be reviewed with an eye to establishing a more rational method for their award and distribution.

Strategies:

8.8.a. A pilot project should further evaluate the efficacy of two-stage trials in which the first stage is devoted to the determination of liability and the second addresses

compensatory damages, civil penalties, and punitive damages.

Inconsistency is not the only troubling aspect of punitive damages. They can also produce irrational windfalls for parties and attorneys. In the commission's view a more equitable arrangement would apportion any monetary award between the injured party, the party's attorney (in order to ensure the retention of appropriate incentives for representation), and a public trust fund devoted to subsidizing counsel for the indigent.

8.8.b. Punitive damage awards should be apportioned among the prevailing party, the party's attorney (if any), and a State Civil Justice Fund statutorily committed to providing civil representation to those who would otherwise be unrepresented. In order to avoid any possible appearance of conflict of interest, the judicial branch should benefit neither directly nor indirectly from punitive damage awards. 

A PREFERRED FUTURE

It is 2020. Criminal justice is a true “system” at last, integrated, cooperative, and highly professional. It protects the rights of the public, victims, and defendants. Witnesses and jurors are treated with dignity and respect. Resources are adequate and are shared among courts, prosecutors, defenders, probation, and other criminal justice offices according to their needs.

Greater resource availability is the product of reduced demand for traditional criminal adjudication. The reduction is due in large part to publicly approved, selective decriminalization of non-violent property offenses; greater use of diversion programs; and community-based criminal justice.

There is broad agreement about the purposes of sentencing: protecting society by restraining the offender; punishing him or her where appropriate; affording the opportunity for rehabilitation; and deterring similar conduct in others. Incarceration is used primarily to restrain those who pose a threat to the safety of others. While judges have significant discretion in determining sentences, sentences are predictable and certain. “Alternative sentencing” is used wherever appropriate. Those sentences, initiatives, and programs that prove to be ineffective are discarded and new alternatives are found.

Probation officers supervise effectively large numbers of offenders. As its role has grown, probation’s resources have kept pace. New technological, pharmacological, and behavioral therapies are able to reduce drug and alcohol abuse and otherwise to minimize an offender’s future danger to society. Such treatments receive rigorous constitutional, ethical, and scientific scrutiny.

While crime is no stranger in 2020, there is less of it than in the last decade of the 20th century. Its reduction is the result of society’s willingness to confront with vigor and persistence: poverty, illiteracy, inadequate education, inadequate mental health care, joblessness, child abuse and neglect, the drug epidemic, the proliferation of firearms, escalating violence, and the failure of individuals to practice and teach basic ethical, disciplined behavior.

CRIMINAL JUSTICE

CRIME AND THE COURTS: 1993

A DOCKET OVERVIEW

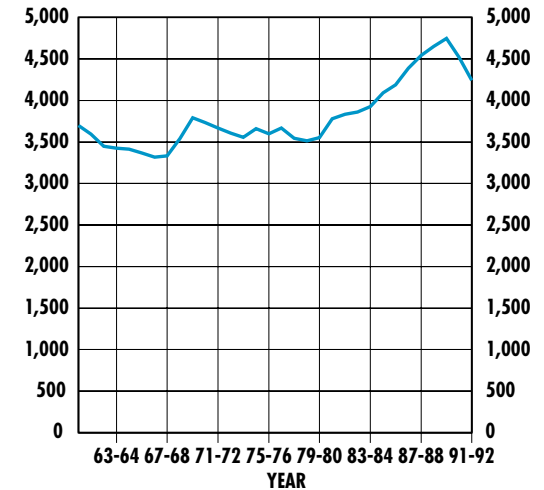
In the California courts today the preferred future above seems very remote indeed. Although the last two years have seen a net decline in criminal filings in the state, the preceding 30 years saw criminal cases increase dramatically. Even with the recent reduction in new filings, barring a far more significant change in the crime rate — or equally significant reforms in justice policy or the law — the public justice system can anticipate a substantial criminal docket in the next century. In a worst-case scenario, public civil justice will become virtually unknown as criminal matters monopolize judicial resources.

In the ten-year period between 1980 and 1990, real growth in criminal filings (excluding traffic violations) has been both steady and significant. Judicial Council statistics show that the increase in criminal arrests, filings, adjudications, and dispositions has essentially doubled the workload of the criminal courts in the last 30 years.

Figure 9.1 illustrates the increase in non-traffic criminal filing rates in California's courts since 1960. Perhaps surprisingly, growth in the rate of criminal filings did not see much acceleration until 1980. However, a linear extrapolation to the year 2020 presents a worrisome picture.

Population growth alone does not account for the increase in crime in California and the na-

FIGURE 9.2 California Trial Courts, Criminal (Felony* and Nontraffic) Filings Per 100,000 Population, Fiscal Years 1960–61 Through 1991–92



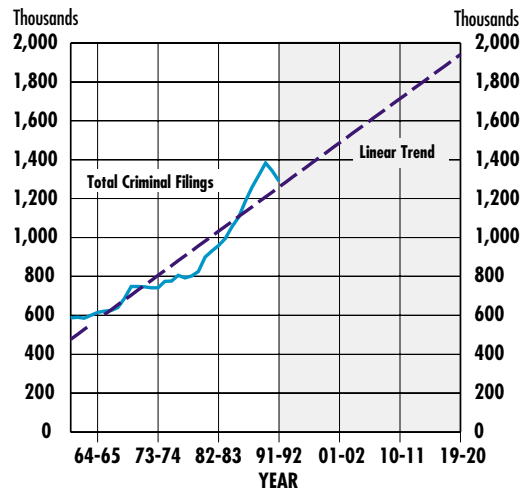
* Includes preliminary hearings in municipal and justice courts.

Source: Judicial Council Annual Reports; State of California Department of Finance.

tion. As seen in Figure 9.2, criminal filings per capita also increased during the period 1980–90. If this trend continues, if the decline in filings of the last two years is an aberration, society should be prepared for significantly more crime in the future.

The crimes that the courts are processing today are more serious than those of a decade ago. Felony filings are increasing much faster than less serious criminal matters. Since 1979, felony filings in the justice and municipal courts have increased more than 130 percent (Fig. 9.3), while misdemeanor filings during the same period rose “only”

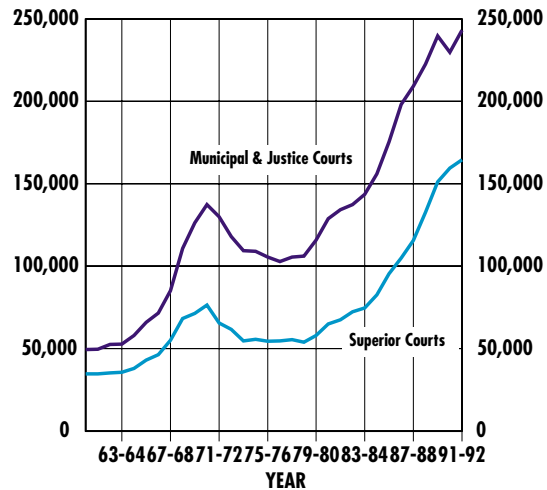
FIGURE 9.1 California Trial Courts, Total Criminal (Felony* and Nontraffic) Filings and Linear Projected Criminal Filings, Fiscal Years 1960–61 Through 1919–20



* Includes preliminary hearings in municipal and justice courts.

Source: Judicial Council Annual Reports.

FIGURE 9.3 California Trial Courts, Felony Filings,* Fiscal Years 1960–61 Through 1991–92



* Includes preliminary hearings in municipal and justice courts.
Source: Judicial Council Annual Reports.

35 percent. In the superior courts — which process only felonies — filings have increased threefold.

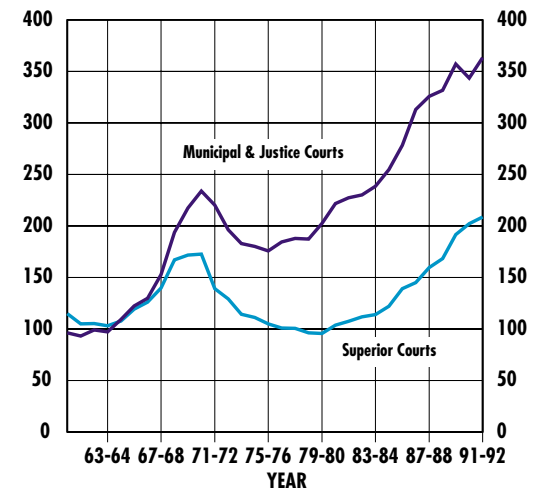
Felony filings per judge are increasing sharply. In the municipal courts, annual criminal filings per judge rose from 1,498 to 1,747 between 1976 and 1992. In the justice courts, largely as a result of the reduction in the number of those courts, filings increased from 479 to 926 during the same period. While in 1976 the average municipal court judge saw 224 felony filings, by 1992 that number had increased to 378. Over the same period justice court felony filings per judge increased from 60 to 193.

Nor have the superior courts been spared. There, felony filings per judge roughly doubled over the 1979 to 1992 time frame, from 96 to 209. (See Fig. 9.4.)

The complexity of criminal matters contributes to their burden on the courts. Criminal cases consume more of a court’s time than mere volume measures can illustrate. Based on old weighted-caseload methodology (currently under revision), estimates of judicial time expended per activity indicated that while felony filings constitute less than 2 percent of all municipal/justice court filings, they consume about 26 percent of the courts’ total judicial time. In the superior courts, criminal cases represent 16 percent of the docket but occupy 46 percent of the courts’ time. While new methodology may alter these figures, clearly volume measures alone do not tell the whole story.

The Judicial Council estimates are supported by a RAND Corporation study of the Los Angeles Superior Court that showed that in 1984 judges spent far more time on the average criminal matter than on any other kind of case. While each criminal filing consumed an average of 249 minutes of judicial time, the average case in the next most time-intensive category — juvenile delinquency — required “only” 91 minutes. Juvenile dependency matters consumed an average of 53 minutes, and civil cases consumed 50. Because criminal cases have constitutional priority on the judicial calendar, as criminal filings increase they push other matters ever further to the back of the docket.

FIGURE 9.4 California Trial Courts, Felony* Filings per Judge, Fiscal Years 1960–61 Through 1991–92



* Includes preliminary hearings in municipal and justice courts.
Source: Judicial Council Annual Reports.

FISCAL RESOURCES AND CRIMINAL JUSTICE

A recent statewide survey of the trial courts showed that criminal justice especially has been affected by state economic belt-tightening, in part because of the number of participants in the process. In 1991–92, at the same time that felony filings increased 30 percent in the San Francisco Superior Court, there was no corresponding increase in district attorney, public defender, or court staff. In the Contra Costa Municipal Court District, cuts in the district attorney's office led to a 15 percent reduction in misdemeanor filings, allowing known offenders to go unprosecuted. In Marin County, the staff of the public defender's office saw attorneys reduced from 25 to 17. The consequences of such cuts are predictable. Fewer cases are prosecuted and those that are sometimes receive cursory or inefficient treatment.

Other effects of resource reductions may be less visible but they are no less consequential. As of this writing, Sacramento County Superior and Municipal Courts' felony pre-trial services face elimination. The loss of this program would mean that judges could no longer effectively examine defendants' background in deciding who should and should not be released on bail. Some courts have recently been obliged to eliminate bailiff and marshal positions.

The intersection of severe resource limitations with a steady increase in the number and complexity of criminal cases is a grave problem. The solutions are not obvious. One approach would be to equip the criminal justice system with sufficient

resources to continue to process offenses as it has in the past, an unlikely scenario. The alternative is to find new ways to address crime and its causes.

FORECASTING THE FUTURE

The dimensions of the criminal docket of 2020 cannot be precisely known. Helpful indicators can be found, however, in the trends that are shaping the state's demographic future.

Commission consultant Dr. Candace McCoy and other sociologists and demographers forecast a major increase in crime in California in the first decade of the next century. This likelihood is due to one incontrovertible fact: the vast majority of crimes are committed by young men between the ages of 15 and 25.¹ A bulge in the youth population around the turn of the century is expected to bring a corresponding increase in crime. Dr. McCoy predicts a crime wave in California beginning in the year 2000 and lasting until the end of the decade.

Many offenders will be young male Californians reaching the ages of 15–19 in that period. In some cases only toddlers today, they are the children of the last Baby Boomers. Moreover, the coming crime wave may be even worse than expected. More young males are committing crimes. The *New York Times* cites a study of the FBI's Uniform Crime Reports showing that between 1985 and 1991 arrests of 15-year-olds increased 217 percent while arrests of boys 12-and-under doubled.

While such a crime wave may appear inevitable, demographic projections and realities can change quickly and dramatically. “Wild card” scenarios could alter significantly the size of the crime-prone youth population. California population projections are based on current trends that affect population growth. Such estimates assume that immigration will continue at approximately current levels, and that women will bear children in predictable patterns. But such trends can change. While the 15–19 year olds of 2000 are already born, those of 2020 are not.

Unpredictable variables abound. Free trade compacts are under discussion worldwide. In one scenario the adoption of such treaties will increase immigration to the state. In another it will reduce it. Change in attitudes toward child bearing is another, unrelated possibility.

Poverty levels are also a significant variable in forecasting the incidence of crime. Criminologists generally agree that poverty and crime are closely correlated. While poverty does not cause crime, as noted above a disproportionate amount of crime is committed by young men raised in poverty. Thus, poverty’s rising tide may have serious consequences.

Writing in 1981, Senator Daniel Patrick Moynihan projected that a staggering number of children born in the next decade would live in female-headed households, one-third of which would receive Aid to Families with Dependent Children. His forecasts proved correct. Moreover, the number of children living in extreme poverty

is on the rise. The United Way’s Strategic Institute reports that in 1989, 5 million American children lived in families with incomes 50 percent below the poverty line. If such trends persist, a poverty-correlated crime-ridden future is a distinct possibility.

The AIDS epidemic may also be a wild card in predicting future crime rates. AIDS affects young men in their crime-prone years, but because of the lag between infection with HIV and the emergence of AIDS symptoms, the disease may not greatly affect the mortality of young men. However, if current trends relating to the infection of women continue, many young women in their child-bearing years may die, and many fewer children may be born. If this were to occur, the reduction in the fertility rate would slow the growth of the crime-linked youth population.

Illegal drugs pose another unknown. Today, narcotics offenses and prosecutions clog the criminal courts. For the last decade the “war on drugs” has consumed a rising share of justice system resources. The FBI’s Uniform Crime Reports show that between 1979 and 1988, state and local drug arrests doubled. Between 1986 and 1991 the percentage of drug offenders in state prison populations rose from 9 to 22 percent, according to the ABA’s Criminal Justice Section. During most of this period expenditures for drug enforcement were increasing. Despite this, Dr. McCoy and others found no empirical evidence of any significant change in overall drug use.

Recent surveys by the National Institute on Drug Abuse do show a small, recent decline in

“The courts alone cannot resolve all our social problems, including those related to crime. It’s easy to use the courts as a dumping ground for social problems that seem too expensive, or too messy to solve in other ways.”

State Bar Committee Chair, Fresno Hearing,
August 18, 1993

“If you want to reduce the crime rate of 2020, give poor women of 2005 meaningful vocational alternatives to childbearing, and encourage poor men to stay with the families they have started.”

Dr. Candace McCoy, Sociologist,
Commission Consultant

drug use. Whether there is relief in the future for drug-weary courts remains to be seen. While the commission takes no position on the issue of decriminalizing drugs, it does acknowledge recent studies — some coming out of the Hoover Institute at Stanford University — that suggest the principal result of the war on drugs has been the incapacitation of the courts.

BEGINNING WITH PREVENTION

INVESTING IN CHILDREN AND YOUTH

Many social pathologies that are correlated with crime have a disproportionately severe impact on children and youth. Childhood poverty, illiteracy, inadequate education, exposure to domestic violence, and abuse and neglect are all correlated with adult crime. Improving children’s health and nutrition, their education, their opportunities for future employment, and their exposure to and adoption of society’s ethical norms are, in the commission’s view, important steps in countering cycles of poverty and crime.

Assisting children often means assisting their families. Commission consultant McCoy notes that in a world that provides poor women few avenues to affirm their lives, these women, especially African Americans and Latinas, turn to motherhood. Breaking the link between poverty and crime will require meaningful opportunities for

education and jobs. Worldwide, women who have greater economic and educational opportunity have lower birthrates and smaller families. Families with fewer children are less likely to live in poverty than larger families. And reduced poverty is closely correlated with reduced crime rates.

While it may seem obvious, it is worth repeating that although crime may not have social causes, it clearly has social correlates. What this does not mean, of course, is that society and not the individual is responsible for crime. Clearly, even youths who grow up as victims of poverty, abuse, and racism must be held morally and legally accountable for their actions. It is a fact, however, that it is the children who grow up in poverty today who will commit much of the crime tomorrow.

Crime that is closely correlated with poverty is not easily deterred by conventional punishments, especially imprisonment. A study by the National Council on Crime and Delinquency provides some insight into this reality in a revealing description of the lives of young men in the inner-city underclass:

[Their] choice is not between conventional and illegal paths to the good life, but illegal and risky paths or no satisfaction at all. They are faced with a very limited and depressing choice between a menial, dull, impoverished, and undignified life at the bottom of the conventional heap or a life with some excitement, some monetary return, and a slim chance of larger financial rewards, albeit with great risks of being imprisoned, maimed, or even killed.

Consequently, many “choose” crime, despite the threat of imprisonment.²

For many young males, especially African Americans and Hispanics who are unemployed in percentages far higher than Whites, prison is an inadequate deterrent. In a world where incarceration raises the standard of living for some and where criminal activity pays better than many jobs, the threat of prison will never completely deter crime. Today, the high incarceration rates for non-White men mean that in many communities, prison is simply an accepted part of life. Imprisonment is effective as a deterrent only if it is less appealing than the hardships that the law-abiding face. For millions of American males, imprisonment poses no such threat.

The commission is unequivocally committed to a future that includes the best possible law enforcement and criminal justice system that resources can buy. However, if California is also to have a future in which there is *less* crime — not merely better-controlled crime — then society and government must redouble their efforts to address effectively those social problems that are crime’s corollaries.

RECOMMENDATION 9.1 Children and youth must be assisted in escaping the cycles of poverty and crime. California should commit the resources necessary to ensure children’s health and nutrition; provide them with meaningful opportunities for education

and future employment; and build educational curricula that promote self-discipline and cooperative problem solving, appreciation of cultural differences, self-confidence and self-esteem, recognition for achievement, an understanding of ethical norms, and incentives to complete secondary education.

CRIMINAL JUSTICE PROCESS

COORDINATION

Today, attempts to reduce and control crime are subject to a confusing patchwork of policies and programs. Coordination among law enforcement and other governmental agencies is often lacking. In the future, less balkanized relationships can produce greater agreement about purpose and method in crime control.

The courts are only one component in California’s complex, interconnected criminal justice “system.” (For many who work in criminal justice, the very existence of a “system” is a subject of regular debate. The word is used here more for convenience than to express an opinion about whether a system in fact exists.) At the state level, the California Council on Criminal Justice functions as a coordinating body, as does the state’s Office of Criminal Justice Planning. Some local jurisdictions also have created criminal justice coordinating bodies. Los Angeles County, for instance, has created the

“Look at it from my point of view for a minute. Let’s say I go and get wiped [killed]. Then I ain’t got no more needs, right? All my problems are solved. I don’t need no more money, no more nothing, right? OK, supposin’ I get popped, shot in the spine and paralyzed for the rest of my life — that could happen playing football, you know. Then I won’t need a whole lot of money because I won’t be able to go no place and do nothin’, right? So, I’ll be on welfare, and the welfare check is all the money I’ll need, right? Now if I get busted and end up in the joint pullin’ a dime and a nickel, like I am, then I don’t have to worry about no bucks, no clothes. I get free rent and three squares a day. So you see, . . . I really can’t lose.”

Urban youth quoted in a report by the National Council on Crime and Delinquency

“A crime is a violation of another person and the only way there can be any healing for anyone in the case is for the victim and the offender to make things right between themselves.”

Victims’ Rights Representative, Fresno Hearing,
August 18, 1993

Countywide Criminal Justice Coordination Committee (CCJCC), which represents municipal and superior courts, the police, the district attorney, the public defender, and others. Through increased cooperation and communication, the CCJCC has launched ambitious projects, including plans to install high-speed electronic communications and widespread videoconferencing.

At the local level, simply moving criminal justice entities closer to one another would promote coordination and cooperation. Criminal justice centers could provide an important door into tomorrow’s justice system.

RECOMMENDATION 9.2 *The relationship between criminal justice agencies should be strengthened through greater cooperation and coordination. The “criminal justice center” model should be further developed. Such centers should house, under a single roof: adjudicatory and nonadjudicatory criminal dispute resolution forums; support service providers; jail facilities; and prosecution, defense, probation, support agencies, and victim assistance programs.*

COMMUNITY DISPUTE RESOLUTION CENTERS AND CRIMINAL JUSTICE

Central to the commission’s view of a preferred future is the notion of keeping justice local wherever possible. Criminal disputes can in many cases be best resolved in the neighborhood in which the offense was committed, where victims, witnesses,

the defendant, law enforcement personnel, and dispute resolvers are personally known to one another. To achieve this goal, the commission proposes making community dispute resolution centers full partners in the public justice system (see Chapter 2, Multidimensional Justice).

Programs in other states have shown positive results in resolving some criminal matters in community or neighborhood justice centers. In one Department of Justice pilot project a remarkable 88 percent of the parties on both sides were able to produce satisfactory consent agreements. In a Massachusetts alternative program, of 483 referrals to a criminal community mediation program, 72 percent of the parties agreed to participate. Of those, 86 percent resolved their disputes amicably. Such programs have been shown to be more likely to change defendants’ conduct and more likely to result in a victim’s belief that justice has been served.

RECOMMENDATION 9.3 *Even before formal charging and possible diversion, those accused of nonviolent criminal acts and some acts involving no more than minimum levels of violence should be referred to community dispute resolution centers. The objective should be to achieve facilitated, satisfactory outcomes between victims and offenders, and to increase community involvement in criminal justice.*

COMMUNITY POLICING AND PRE-CHARGING DIVERSION

In numerous cities and towns, community policing — which typically involves police officers becoming a part of the community through programs “to know and become known” — has succeeded in reducing crime rates and building trust between residents and law enforcement personnel. Once an effective community policing program is established, once police officers have gained the trust and respect of the local community, they can play an important role in alternative criminal justice procedures.

Working closely with community dispute resolution centers, properly trained law enforcement officers should have the discretion to direct first-time, nonviolent offenders (or other troubled community members) to such centers. Law enforcement officers seldom have such authority today.

RECOMMENDATION 9.4 *Where appropriate, well-trained community police officers should have greater discretion to determine whether an eligible accused should be referred to: (1) a community dispute resolution center for pre-charging diversion/counseling; or (2) the formal criminal process.*

DECRIMINALIZATION AND DIVERSION

In the future, as today, traditional criminal adjudication will be a limited resource. It should be reserved primarily for cases involving violence or significant levels of economic injury. Wherever

possible and appropriate, minor offenses should be resolved outside the criminal justice system.

In many states, the campaign to decriminalize certain offenses and to substitute civil for criminal penalties has for years been an on-again/off-again undertaking. Where decriminalization has occurred, jurisdiction for the newly “civilized” offenses is typically vested in administrative agencies. In 1969 in California, consistent with public opinion that found them not appropriately classified as criminal acts, parking violations lost their misdemeanor status and were reclassified as infractions. Parking violations are being removed from the courts entirely.

The impact of such a change can be enormous. The Judicial Council reports that of the 15,200,000 filings in California municipal and justice courts in 1991–92, over one-third were parking violations.

Other minor offenses may also lend themselves to administrative resolution. While such changes in the law require careful consideration and careful preservation of due process rights, when made judiciously the courts can be substantially unburdened without any resulting reduction in public safety.

RECOMMENDATION 9.5 *Minor criminal offenses that do not put the public or the environment at significant risk should be decriminalized and made civil offenses, subject to appropriate fines and regulatory sanctions.*

Diversion programs can also substantially

“We’d like to see the court system balanced a little more so that victims receive the personal attention they require and deserve. . . . Victims feel misled and lied to when they realize the sentence imposed will not be fully served.”

Witness, San Diego Hearing, August 23, 1993

reduce criminal docket congestion. Such programs typically remove first-time or minor offenders from the criminal justice process soon after arrest and divert them to counselling and other remedial programs. Unfortunately, in California today there is no generally applicable statutory authority for diversion.

RECOMMENDATION 9.6 *Diversion programs should be statutorily authorized and made available in all appropriate circumstances for crimes not involving a high level of violence.*

RIGHTS OF VICTIMS AND WITNESSES

As evidenced by the approval of the 1982 Victims’ Rights Bill of Rights initiative and the 1990 Crime Victims Justice Reform Act, Californians are concerned about victims’ rights and are willing to codify them at the ballot box. (The Bill of Rights initiative of that year gave crime victims the right to give victim-impact statements at the time of sentencing.) Such initiatives are part of a national grass roots victims’ rights movement that has sought to enfranchise crime victims. The Department of Justice reports that nationally the number of prosecutors informing victims about the outcome of cases rose from 35 percent to 93 percent between 1974 and 1990.

Do such initiatives go far enough? A study by the National Institute of Justice has concluded that “the right to allocution at sentencing has had little net effect on the operation of the California

criminal justice system, or on sentences in general.” While voters undoubtedly act in what they believe to be the best interests of crime victims in passing such initiatives, “few victims show any great predisposition to exercise the right.”³

Whether or not victims’ rights are routinely exercised, it is important that victims have them. Ensuring victim and witness safety in the courthouse, showing them every basic courtesy, and inconveniencing them as little as possible are the minimum that victims and witnesses should be able to expect in the justice system of tomorrow.

RECOMMENDATION 9.7 *Victims and witnesses must be treated with respect and courtesy at all times. Throughout the criminal justice process, every reasonable effort must be made to minimize their inconvenience and maximize their safety.*

Better educating both victims and the public about the appropriate role of victims in the criminal justice process is part of the solution. And better communication — facilitated by the best available technology — between the court, counsel, victims, and witnesses would be a welcome first step.

Strategies:

- 9.7.a. The courts should help victims and witnesses better understand the criminal justice process. The justice system should strive to improve communications among victims, witnesses, and the courts.

Improved scheduling and greater consideration for both victims and witnesses is important. Too often, witnesses who must participate and victims who wish to participate in court proceedings endure scheduling changes and delays that frustrate their participation.

- 9.7.b. The courts must work with counsel to ensure that victims and witnesses are not inconvenienced unnecessarily; that judges know when victims and witnesses are waiting to be heard; and that those waiting are fully and accurately informed of the reasons for any delay or continuance.

Victims have a major stake in the outcome of criminal justice proceedings, but too often they are left on the sidelines at the conclusion of a criminal proceeding. When cases are disposed of by plea — as the majority are — victims often receive neither notice of the arrangement nor an opportunity to comment. Courts must do more to ensure that victims who wish to can participate at all appropriate points in the justice process.

- 9.7.c. A victim should, in every instance, be informed of the proposed terms of a plea bargain or an indicated sentence. Victims should be afforded the opportunity to be heard at all critical points in the proceedings.

Victims and witnesses are sometimes subject to overt intimidation. In the future the courts must do more to provide safe, secure waiting areas for victims and witnesses.

- 9.7.d. Victims and witnesses should be provided safe, nonpublic waiting areas.

Department of Justice statistics indicate that the number of state prosecutors who routinely notify witnesses of the status of proceedings has risen from 77 percent in 1974 to 95 percent in 1990. By affording participants the means to access up-to-date information on case status, information technology can make the criminal justice process yet more humane and convenient for victims and witnesses.

- 9.7.e. Victims and witnesses should have on-line access to information regarding case status and hearing dates.

PLEA BARGAINS

Plea bargains appear to be increasing in the California courts. According to Judicial Council figures, in 1973–74, 19 percent of California superior courts' criminal cases were disposed of through trials. In 1981–82 only 12 percent of superior court criminal matters were tried. By 1991–92 the number had declined to 5 percent.

The public today is ill-informed about the role of the plea bargain in the criminal justice process. There is little public understanding of plea bargaining's merits, or the extent of its use. But as opinion surveys make abundantly clear, the public has little affection for the practice.

The public mistrusts plea bargains largely because it misunderstands the process. The courts

“How can the general public understand how and why decisions are made that appear to be soft on criminals? We want to support the courts but we need more education to understand how the courts work.”

Student, Van Nuys Community Adult School
Hearing, April 22, 1993

“[Criminal dispositions should be] swift, sure, and severe. That’s perhaps a policeman’s approach, if you will. But I think it’s what our state needs in its [justice] system in the future.”

Deputy Police Chief, Van Nuys Community Adult School Hearing, April 22, 1993

can mitigate much of this mistrust by making the criminal justice process more public and more comprehensible. Courts must consistently explain to the public, defendants, witnesses, and victims the evidentiary basis for a guilty plea, and make the terms and the rationale part of the record. (In a more ideal future, all such proceedings would occur in open court.) In every case, the court’s rationale, whether provided orally in open court or in writing, must be a matter of record. The prosecution and the defense should also explain the reasons for their actions on the record.

The courts should take the lead in informing and educating the public about criminal justice generally (see Chapter 5, Public Trust and Understanding) and the plea bargain in particular. The fundamentals of criminal justice should be taught routinely in the schools. Such initiatives will enable the public to make informed judgments about the merits and demerits of a plea-based criminal justice process.

RECOMMENDATION 9.8 To enhance the public’s trust, avoid the appearance of secrecy, and create a public record, all pleas and detailed reasons for them should be made a matter of record.

SENTENCING AND CORRECTIONS: NEW APPROACHES

In a preferred criminal justice future there will be broad agreement about the purposes of sentencing: protecting society by restraining the offender; punishing him or her when appropriate; affording the opportunity for rehabilitation; and deterring similar conduct in others. Sentencing will produce predictable and certain results. At the same time, judge must retain sufficient discretion to take account of individual circumstances.

SIMPLIFYING SENTENCING

Sentencing in California today seems to satisfy no one. Sentences appear inappropriately harsh to some, excessively lenient to others. A 1985 Field Institute poll showed that 79 percent of Californians believed that “judges these days are too lenient in the sentences they pass on criminal lawbreakers.” Nationwide, only 25 percent of Americans had a “great deal” of confidence in the courts’ ability to sentence criminals appropriately; 73 percent had little or no confidence. By these measures, at least, judges are failing to meet public expectations about sentencing.

The California Legislature passed the Determinate Sentencing Act in an attempt to achieve a certain level of uniformity and fairness in sentencing. Judicial discretion, however, remains important. In its public opinion research for the commission, the Yankelovich organization found that

roughly 60 percent of survey respondents approved of judicial discretion in sentencing. Judges must retain the ability to fine-tune sentences to fit individual circumstances.

RECOMMENDATION 9.9 Sentencing should be simplified to ensure a focus on appropriate dispositions, consistency, and certainty. Within this framework judges should retain sufficient discretion to ensure that injustice is avoided.

PROMOTING PUBLIC UNDERSTANDING

Greater public understanding of sentencing's objectives would reduce the public's mistrust of criminal justice. At present, however, confusion about sentencing's purposes — restraint; deterrence; retribution; rehabilitation; restitution — is widespread. And the confusion is not limited to the general public. A question in a recent Gallup poll suggested to respondents that protecting the pre-conviction procedural rights of an accused was in some way incompatible with effective sentencing. As one commentator put it: "Apparently, some pollsters would benefit from education along with the general public."⁴ Judges could help cut through this fog of misunderstanding by explaining in plain language at the time of sentencing their reasons for imposing a sentence. If judges did so routinely, the public, the press (and pollsters) would better understand sentencing theory and practice.

RECOMMENDATION 9.10 In imposing sentence judges should explain in open court the purpose(s) and the objective of the prescribed penalty.

TRUTH IN SENTENCING

The public also mistrusts sentencing because sentences too often are not what they seem. While the duration of a 10–15 year sentence may seem obvious, the possibility of parole, time off for good behavior, and early release to reduce prison overcrowding can dramatically reduce actual time served. Judicial officers should explain at sentencing the factors that may reduce actual time served, and the likely duration of imprisonment.

RECOMMENDATION 9.11 "Truth in sentencing" must be the rule. At the time of sentencing, the defendant, the victim, and the public should all clearly understand the likely duration of incarceration, and those factors — e.g., time off for good behavior — that might reduce the term.

INCARCERATION AND ITS ALTERNATIVES

Despite escalating rates of imprisonment, crime per capita in California is on the rise. From 1981 to 1990, California's prison population increased from 29,202 to 97,309. The California Attorney General's office reports that prison operating costs increased

"Sometimes [justice] means putting people where their sentence will do the most good. That doesn't always mean teaming them up in a cell with Mr. 20-Years-in-the-System and teaching them to be a better crook."

Parole Officer, San Diego Hearing,
August 23, 1993

*“To keep a kid straight he
[the probation officer assigned to
Roosevelt High School] has also managed
to put a human face on law enforcement
. . . erasing the ‘them versus us.’
He has been able to have us somehow
look at . . . police officers as our friends,
not our enemies, which is
very important.”*

Student, Roosevelt Community Adult School
Hearing (L.A.), April 13, 1993

400 percent over the same period. By 1990 Californians were spending nearly \$3 billion a year to operate their prisons and jails. During the same period, violent crimes actually increased 21 percent.

Alternatives to incarceration make sense. First, for many potential offenders, incarceration has limited deterrence value. (See also “Investing in Children and Youth,” above.) Whether this is indicative of a prison system that coddles its inmates (as some commission members contend) or is instead a commentary on the oppressive and dangerous nature of life on the streets, it is a fact. It is also a fact that California’s determinate sentencing system sometimes produces inequitable results, with some serious offenders being released too soon, and some recidivist offenders receiving sentences only a little more severe than those received by nonrecidivists.

Second, imprisonment is extremely costly. Especially in times of fiscal need the state will be unable to spend what it has in the past on prisons and prison construction. As of this writing the state is unable to open two new prisons because it cannot afford to operate them.

A third, related reason to rely more heavily on alternatives is that California’s demand for prison space may be impossible to meet. The National Council on Crime and Delinquency reports that California’s prison system, operating at 183 percent of capacity, is the most overcrowded in the nation. As a result, the system spends millions of dollars each year defending against court cases challenging overcrowding. Staggering recidivism

rates contribute significantly to this burden, and neither incarceration nor its alternatives have had much success in reducing them.

Today, the most commonly used alternatives to incarceration are probation, orders for community service, and diversion from the criminal justice system. Between 1987 and 1992, orders of probation increased by almost 60 percent. Unfortunately, crimes per capita did not decline, confirming what many criminal justice experts have long known: neither incarceration nor its alternatives hold easy answers for redressing the complex problem of crime in society.

In the future, indeed in 2020, there is little question that incarceration will still be necessary. For it to be effective, however, it must be sufficiently onerous to make prison a place to be avoided (although it must always be humane). At the same time, the criminal justice system must continue to be innovative in finding creative and effective alternatives to imprisonment. The public supports both approaches. At the commission’s public hearings numerous witnesses spoke in favor of longer and swifter prison sentences, especially for repeat offenders. In its public opinion research the commission found that 70 percent of English-speaking respondents and 64 percent of Spanish-speaking respondents support alternative sentences.

Both today and in the future, criminal sentences should be carefully tailored to fit the offense. Serious offenses, especially where the offender remains a danger to society, warrant incarceration. For nonviolent, nondangerous offenders,

however, alternatives may be both more effective and less costly.

RECOMMENDATION 9.12 For most first-time property offenses and many other first-time nonviolent crimes, alternatives to incarceration should be the sanctions of first resort. For most recidivist offenders and those who pose a threat to the public safety, incarceration is appropriate.

Strategy:

9.12.a. Judges should have access to the wide array of information and services necessary to sentence persons effectively. Such services should include: prison facilities; drug and alcohol treatment programs; other treatment services; mental health programs; community-based facilities and programs; and yet-to-be-discovered technologies.

PROBATION

Effective alternative sentencing presupposes the availability of resources and personnel to implement, manage, and supervise offenders in alternative programs. Today — and very likely in the future — probation departments and officers will bear the primary responsibility for the operation of such programs.

Despite Californians' deep concerns about public safety and crime reduction, probation has no more been spared the budgetary knives than

any other criminal justice agency. The consequences are both discouraging and alarming. In Sacramento County it is reported that some 54 percent of probationers and parolees go unsupervised. Robert Keldgord, the county's chief probation officer, reported to the commission:

On each judicial day hundreds of California judges sentence thousands of offenders to probation, sternly enumerating the many conditions of probation that are to be enforced by the probation officer. Unfortunately, virtually all of these offenders will never see a probation officer and there will be absolutely no enforcement of the court ordered conditions. Equally unfortunate is that all the players in this drama — especially the offender — understand that the offenders will go unsupervised, will have no accountability to the courts, and will in a high percentage of the cases simply reoffend.

The California Blue Ribbon Committee on Inmate Population Management (1990) and a report of the RAND Corporation entitled “Granting Felons Probation” (1985) both cited the need for systematic approaches to probation funding. Without adequate resources, probation's promise as a means to control offenders, to reduce inmate populations, and to reintegrate offenders into society will not be realized.

RECOMMENDATION 9.13 Probation departments must have sufficient resources to perform their expanding mission.

Adequate probation funding is only part of the formula for effective corrections. Institutional relationships also need adjustment. In California the relationship between probation departments and the courts varies from county to county. In some counties the chief probation officer is hired by and reports to the county's presiding judges. In others the probation department reports to the board of supervisors. If probation is to achieve its potential as the manager and supervisor of most alternative sentences, it must be accountable to those who prescribe those sentences: the courts. Sound judicial administration and uniform policy and procedure demand no less.

Such proposals are not new, nor are such relationships uncommon elsewhere. In the federal courts probation is an arm of the court, with probation personnel serving as both probation and parole officers. Similarly, in Connecticut and New Jersey, probation is part of the state courts' administrative office. Such institutional organization aids coordination of judicial and probation functions and promotes judicial awareness of resources for alternative sentences.

RECOMMENDATION 9.14 Consistent with the unification of the trial courts and with the state's assumption of fiscal responsibility for the courts, probation should be fully incorporated into the judicial branch and made a statutory arm of the courts.

TECHNOLOGY AND CRIMINAL JUSTICE

In the future, new technologies will be able to reduce an offender's danger to society. Today, electronic anklets allow probation officials to monitor offenders under house arrest. Tomorrow, satellites will be able to track offenders anywhere in the world using devices resembling the emergency location transponders on aircraft. Advances in biochemistry will allow the targeting of the causes of mental illness. Many behavioral disorders that cause crime will be treatable with drugs. Whether society and the courts will allow such technology to be used in the criminal justice context will be the subject of continuing discussion and judicial review.

RECOMMENDATION 9.15 New technologies should play a role in criminal justice, but only after careful constitutional review and the establishment of appropriate guidelines.


CORRECTIONS

In the commission's preferred future the corrections system will play a major part in reducing both crime and the prison population. It will accomplish these objectives by further improving programs that have proved successful today, abandoning programs that cannot succeed, and adopting new programs as they prove themselves.

Literacy programs in the context of corrections are meeting with widespread success. Not surprisingly, there is a strong link between illiteracy and crime. The Correctional Education

Association reports that over 70 percent of the nation's prison population do not have a high school diploma. Equally unsurprising is that educating probationers can assist them in finding jobs and reentering society. Sacramento County has instituted two projects that aim to help prisoners break the cycle of illiteracy and crime. JurisLit allows probationers to reduce their probation time by participating in literacy programs. In the ReadOut program, prison inmates can shorten their sentences by successfully participating in educational programs aimed at earning a GED or improving their reading, writing, and mathematical skills.

Prison literacy and effective vocational training alone cannot prevent recidivism. But there is good evidence that it can help many inmates and probationers rejoin society.

RECOMMENDATION 9.16 The state should commit resources to effective literacy and job-training programs for both incarcerated and nonincarcerated offenders. 

Prison literacy and effective vocational training alone cannot prevent recidivism. But there is good evidence that it can help many inmates and probationers rejoin society.

A PREFERRED FUTURE

In 2020 appellate justice in California remains committed to promoting public trust in justice by correcting errors of other tribunals and enhancing predictability, uniformity, and justice in the development of the law.

In 2020 new methods of dispute resolution and the emergence of a truly multidimensional justice system have had a significant impact on appellate justice. Because disputants tend to be more directly involved in resolving their disputes they tend to be more satisfied with the results and thus less likely to appeal them. Appellate justice continues to embrace the search for appropriate and effective alternative dispute resolution techniques.

Flexible process is the rule, not the exception, in 21st-century appellate justice. In the waning years of the last century, constitutional, statutory, and rule-based impediments to flexibility in the appellate process were eliminated. Briefs, arguments, and written opinions are now seen and heard only where genuinely needed. More effective communication among the appellate and trial courts, the federal bench, and the legislative and executive branches has created new harmonies in the drafting and interpretation of the law.

Technological integration is a hallmark of multidimensional justice. Appellate transcripts are online; motions and briefs are submitted electronically; justices often hear arguments via interactive video media; the Appellate System Network gives justices access to all public and private materials; and the public and the press have direct digital access to all records and proceedings. All proceedings are televised. Not only is the appellate process paperless, it is virtually wireless.

While in the 1990's some critics urged curbing the growth of appeals by rationing access to appellate justice, such discussions were abandoned as contrary to time-honored and cherished principles. In 2020, appellate justice is accessible, comprehensible, and committed to the public's interest.

CHAPTER

10

THE APPELLATE COURTS

APPELLATE JUSTICE: 1993 TO 2020

1993

Few principles are more fundamental to the American ideal of due process of law than the right to have adverse decisions of government reviewed by an independent, deliberative body of judges. Throughout history appellate courts have promoted public trust in justice by reviewing for error decisions of lower courts and other governmental tribunals and agencies.

California's appellate system today consists of three tribunals: appellate departments of the superior courts; the Court of Appeal; and the Supreme Court. The appellate department of each superior court sits in three-judge panels and reviews decisions in misdemeanor cases, infractions, and small civil cases, where the amount in controversy is less than \$25,000. Very few small cases of this sort are appealed. In 1991–92, only 2 percent of small civil dispositions and only two-tenths of 1 percent of misdemeanor and infraction dispositions were appealed. However, because minor criminal and civil cases constitute the overwhelming majority of the trial court's docket, the total number of cases filed in the appellate department is large: 28,061 cases in 1991–92, more than were filed in the Court of Appeal in the same year. Decisions by appellate departments are seldom reviewed by the appellate courts.

The Court of Appeal is divided into six dis-

tricts and sits in three-judge panels. It hears all appeals taken from judgments issued by the superior courts, which include appeals in all felony matters and in large civil suits. It cannot decline to hear such appeals. In 1991–92, the 88 justices of the Court of Appeal were faced with 21,628 new contested matters (246 per justice), an increase of 20 percent per justice — 37 percent system-wide — over 10 years earlier. Projecting future dockets on a straight-line basis, the Court of Appeal will, by 2020, see 40,617 filings per year.

The Supreme Court of California consists of the Chief Justice and six associate justices. Its primary responsibility is to decide cases that raise important public issues, and to maintain the uniformity of the law throughout the state. Access to the Supreme Court is limited and is largely controlled by the court itself. The court has mandatory direct appellate jurisdiction in all death penalty cases. It also reviews recommendations of the Commission on Judicial Performance, decisions of the Public Utilities Commission, and certain State Bar Court attorney discipline recommendations, the last on a discretionary basis. In virtually all other cases in which a decision has already been reached by the Court of Appeal, the Supreme Court's jurisdiction is discretionary.

Still, the Supreme Court saw major increases in filings over the past decade. In the 1991–92 term the court faced 5,403 filings (772 per justice), an increase of 36 percent over the 3,969 in 1982–83. Its primary response to this increase was to deny review in a growing number of cases (91 percent

denied in 1982–83; 95 percent denied in 1991–92) and to “depublish” an increasing number of Court of Appeal opinions.

2020

If the commission’s vision of a preferred future for the courts is realized, multidimensional/multioption justice will be a reality in California long before 2020. In such a future there will, of course, still be a need for strong and enlightened appellate tribunals to perform their age-old functions of correcting legal error and enhancing predictability and uniformity in the law. In a world of appropriate dispute resolution, however, adversarial and adjudicatory justice will not, in most instances, be the processes of first resort. Many or most disputes will be resolved through mediation or other forms of assisted negotiation, early neutral evaluation, and other consensual processes from which there is no right of appeal. If multidoor and community justice fulfills its potential, the appellate court dockets of 2020 may be significantly more manageable than those of 1993.

In the near term, however, in the face of rising caseloads and uncertain resources, the options for remedying appellate overload appear to be four: enhancing traditional means of processing appeals; encouraging innovative new methods; reducing the number of appeals; and increasing the number of appellate justices and/or legal staff resources.

ENHANCING THE APPELLATE PROCESS

Over the years, the appellate process in America has become more or less uniform. Although there are variations in detail, once a notice of appeal has been filed an appeal typically involves: preparation of the trial court record; preparation and submission of briefs; initial review by the appellate court to determine whether the appeal qualifies for special treatment (e.g., settlement programs, decision without oral argument, denial of review, or alternative disposition in discretionary appeals); oral argument before a panel of three or more judges; the decision process (including pre-argument analysis, a post-argument conference, and collegial drafting of opinion(s)); public release of a reasoned opinion; and consideration of post-judgment motions for reconsideration.

Notwithstanding the credible performance of today’s appellate courts, there is always room for increased efficiency. Significant improvements may be attainable through enhanced technology, alternative appellate processes, and more refined and responsive appellate proceedings.

TECHNOLOGICAL ENHANCEMENTS

No less than for other judicial and nonjudicial government agencies, established and emerging technologies offer new opportunities for appellate justice. In the commission’s vision of future appellate justice, all information will be stored electronically. Paper’s use will be limited to those applications in

Few principles are more fundamental to the American ideal of due process of law than the right to have adverse decisions of government reviewed by an independent, deliberative body of judges.

Most appellate arguments will be conducted in interactive electronic environments, saving time and money for both courts and disputants. All Supreme Court arguments and selected Court of Appeal arguments will be carried live through the telecommunications network to the press and the public.

which it is clearly the superior medium. The courts and all state agencies will utilize a standard electronic data structure that will accommodate widespread information sharing.

All trial court filings will be in an approved electronic medium into which any paper filings will be immediately scanned. These filings will be automatically included in the clerk's transcript for appeal, which will be electronically compiled, stored, and accessible as a digitized public document. Reporters' transcripts will be processed in real-time through computer-assisted transcription technology and processed in the same way as the clerk's transcript.

When an appeal is perfected, the clerks' and reporters' transcripts will be immediately and electronically available to counsel and the appellate court for review and processing. All motions and briefs on appeal will be submitted in an approved electronic medium. Absent court order, the entire record on appeal and all appellate motions and briefs will be electronically compiled, stored, and accessible as public documents. The public and press will have direct access through telephone, interactive television, and computer links to all public court information, including the scheduling of hearings and arguments. Again, there is a distinct possibility that long before 2020 all such technology will be wireless.

Enhanced communications will bring the appellate courts much closer to the public, press, litigants, lawyers, and trial courts. Appellate courts, with the help of educational institutions such as

the Center for Judicial Education and Research, will produce multimedia programs to explain the goals, rules, and procedures of the appellate system and to disseminate summaries of important appellate decisions. The programs will be easily accessed through computer terminals and/or video kiosks located in virtually all justice facilities, law enforcement agencies, jails and prisons, educational institutions, public and private (e.g., law firm) libraries, the press, and dial-in services.

Without meaningful diminution of collegiality or of personal access to one another and staff, telepresence and telecommuting will permit appellate justices to perform their work anywhere and at any time. Simply by dialing into the Appellate Court Network, justice system personnel will have access to all publicly available materials — published cases, statutes, treatises, and the record, filings, and motions in every case — as well as to the court's private materials: internal memoranda, electronic mail, and draft opinions.

Most appellate arguments will be conducted in interactive electronic environments, saving time and money for both courts and disputants. All Supreme Court arguments and selected Court of Appeal arguments will be carried live through the telecommunications network to the press and the public. Simplified, electronic access to the appellate courts, their records, and their proceedings will have a salutary effect on the public's comprehension of and trust in justice.

No less than today, future appellate justice will rely on human judgment in applying the law

to the resolution of individual disputes. But increasingly, technology will allow appellate tribunals to do so with greater efficiency.

RECOMMENDATION 10.1 Appellate justice should accelerate its adoption of and adaptation to new technology.

INNOVATION IN APPELLATE DISPUTE RESOLUTION

Appropriate dispute resolution will play a central role in the public justice system of the future. The effects of this revolution on the appellate system will be at least twofold. First, because nonadjudicative dispute resolution processes give parties greater involvement in and control over the decision-making process, disputants are likely to have greater confidence in the result; fewer appeals will follow. Second, as the judiciary, the bar, and the public become more comfortable with appropriate dispute resolution at the trial level, similar methods will gain currency in the appellate process. A form of appellate mediation — the pre-argument settlement conference — is already in use in several districts in California and around the country. For instance, the Third District Court of Appeal has been utilizing a settlement conference program for almost 20 years. Over the past 4 years, the court held conferences in roughly a third of its civil appeals. Slightly more than 40 percent of those conferences resulted in settlement. (State-wide, the figure is closer to 30 percent.)

RECOMMENDATION 10.2 The appellate system should be innovative and vigorous in instituting alternative appellate processes.

REFINED APPELLATE PRACTICES

Related to but distinct from the need for nontraditional appellate processes is the need for flexibility in tailoring the conventional process to the demands of individual appeals.

Appeals come in all shapes and sizes. Some raise issues that may be easily resolved by existing law. Others raise unsettled questions of law requiring far more resource-intensive review. California's rules of appellate practice do not currently afford the courts discretion to sort their cases and assign them to different appellate tracks. Today, any appellate brief may be as long as 40 printed pages, even though many issues are simple, warrant far less discussion, and would justify far shorter briefs. Similarly, the rules prescribe only a single timetable to govern the appellate process, despite the fact that some cases are far more — or less — time consuming than the norm. Appellate tribunals should have the discretion to determine early-on whether a case requires full or summary process.

The requirements governing oral argument are similarly constraining. While the Constitution has been interpreted as requiring the court to allow argument unless waived by the parties, in most instances briefs provide more than adequate background. Appellate tribunals should have discretion to forego argument, thereby conserving their scarce resources.

In the final analysis, flexibility should be the hallmark of the appellate process, ensuring a reasoned and credible result as well as a sensible allocation of appellate resources.

Today the Court of Appeal is constitutionally required to issue a written opinion in all cases. Many observers believe that such a requirement is unwarranted. In 1991–92 the Court of Appeal's 88 justices produced 11,064 written opinions, an average of 126 majority opinions per justice, 26 more than the maximum recommended by some appellate scholars. In addition, the court's "clearance rate" — the number of dispositions in a given year divided by the number of appeals filed — has consistently been below the break-even point. Appellate tribunals should have the authority to issue true memorandum opinions — such as those issued by some federal appeals courts — that are no lengthier than necessary to advise the parties of the reasons for the decision and provide a basis for further review.

In the final analysis, flexibility should be the hallmark of the appellate process, ensuring a reasoned and credible result as well as a sensible allocation of appellate resources.

RECOMMENDATION 10.3 Appellate tribunals should be flexible in processing appeals. They should have the ability to assign matters to differentiated "tracks" as warranted.

Strategies:

10.3.a. The Judicial Council should examine methods of introducing greater flexibility into the appellate process. Among the rules that the council should focus on are those governing preparation of the record,

length and timing of briefs, oral argument, and standards governing issuance, content, and length of opinions.

10.3.b. The Judicial Council, the Legislature, and the Governor should together review and consider revision of constitutional and statutory provisions that limit the appellate courts' flexibility — e.g., the constitutional requirements of full written opinions and oral arguments, statutory rehearing requirements, etc.

OUTREACH AND COORDINATION

In the future, the appellate courts and their successors should reach out to other institutions in order to improve both appellate processes and products. As but one example, the Judicial Council should create an Appellate and Trial Courts Coordinating Council. The membership of such a council should include appellate and trial court judges and their staffs. It could recommend procedures, rules, and statutes to simplify appellate and trial court functions, and procedures to assist appellate and trial court judges in performing them.

The Judicial Council should also create a State and Federal Courts Habeas Corpus Council to facilitate effective federal court review of state habeas corpus proceedings. Among that council's functions should be the identification of repetitive constitutional errors in criminal cases that lead to subsequent federal habeas corpus challenges. Further, it should recommend procedures, rules, and

statutes to reduce such errors. Both of these coordinating councils — and the Judicial Council itself — should utilize the scholarly and research resources of the Center for Judicial Education and Research and the state’s law schools.

Finally, there should be regular, informal communication among the Chief Justice, the Judicial Council, the presiding justices, and the legislative and executive branches about matters of mutual concern. The hoped-for results would be two: more precisely crafted statutes, and judicial interpretations of those statutes that more fully achieved the laws’ intent.

RECOMMENDATION 10.4 To improve the efficiency and quality of the appellate process, the Judicial Council should facilitate more effective communication among the appellate courts, the trial courts, the federal courts, the Governor, and the Legislature.

RETHINKING RESOURCE ALLOCATION

In addition to innovation with nontraditional processes, greater flexibility in traditional processes, and greater outreach and coordination, rethinking the allocation of resources to the appellate courts is in order.

If Court of Appeal justices continue to issue written opinions at 126 per justice per year, for example, straight-line projections indicate that by 2020 the state will need 196 Court of Appeal justices (more than double the present number) to produce an estimated 24,649 written opinions.

Budgetary issues aside, there are good reasons to be apprehensive about such a large court. Interpretations of the law by one three-judge panel are not binding upon other panels. Such a dramatic increase in the number of judges will increase the number of interpanel conflicts, possibly compromising the cohesiveness of the law and further undermining the Supreme Court’s ability to ensure statewide consistency in the law. Conflicts at the appellate level promote additional litigation in the trial courts, which in turn leads to more appeals.

Instead of adding more justices, the Legislature should begin by increasing the staff resources available to the Court of Appeal. Legal staff assist the court in reviewing trial records, conducting legal research, and drafting opinions. Adding staff attorneys can increase and improve output at a much lower cost, with much greater efficiency, than the appointment of new appellate justices.

RECOMMENDATION 10.5 Before increasing the number of Court of Appeal justices, the Legislature should increase the court’s staff resources.

RECONSIDERING JURISDICTION

In an alternative future in which resources for appellate justice are as or more limited than they are today, one remedy might be to limit the growth of appeals. While the notion of limiting access to public dispute resolution resources at either the

“Just recently we had two Black individuals released from prison who had not committed the crime, and thank God for an appeal.”

Witness, Van Nuys Community Adult School
Hearing, April 22, 1993

trial or appellate level is worrisome to many, some commentators urge limiting appeals to those that genuinely require further review.

Assuming the justice system of tomorrow were to attempt to limit appellate access, the challenge would be to create a method to distinguish the cases deserving of additional review from those that are not. As a generality, the cases that most deserve additional review are those with the highest likelihood of reversible error. The challenge would be to identify those cases before the Court of Appeal completed its initial review.

Two approaches might be possible: reliance upon the marketplace to distinguish between worthy and unworthy appeals; and reliance upon the appellate tribunal itself to make a preliminary determination regarding the appropriateness of appeal.

In today’s appellate marketplace, plaintiffs with unmeritorious claims usually find it difficult to secure representation. Civil defendants with clear liability often find it more prudent to settle than to litigate. Prosecutors usually conserve their resources for meritorious criminal actions, and the vast majority of criminal defendants plead guilty. Additional “weeding” of cases occurs after trial and before appeal. Economic factors — principally additional attorney fees and additional delay — deter some civil litigants from going forward. But in fact, for the litigant who has already survived the trial process, there are few real deterrents to appeal.

An additional economic deterrent to filing

unmeritorious civil appeals could be created by imposing on losing parties the actual cost to the state of hearing and deciding the case. Estimates of the cost of an appeal range from \$6,000 to \$50,000. As documented in Chapter 2 in the discussion “Who Pays for Justice?”, assuming adequate resources the commission strongly disfavors such an approach at the trial level. At the appellate level there is the additional consideration of the constitutional right to appeal, and the argument that assessing such costs would cause more lower court errors to go uncorrected.

In criminal appeals there is a constitutional obligation to provide legal counsel for those defendants unable to afford it. The absence of any economic disincentive to appeal, combined with the incentive of avoiding a criminal conviction, results in a high rate of appeal, notwithstanding a low reversal rate. An economic penalty levied against either appointed counsel or the indigent appellant for filing a good faith but losing criminal appeal is both impractical and probably unconstitutional.

Alternatively, the Court of Appeal could in each case make a preliminary assessment as to whether an appeal is meritorious. At present, because every losing litigant in the superior court has a constitutional right to file an appeal with the Court of Appeal, the court has little control over its docket. Conceivably, however, access to the appellate system of the future could be controlled through a petition for review, as the Supreme Court controls its own docket today.

Eliminating a disputant's only appeal as of right is a radical notion. At the very least, the public's perception of justice would suffer. Far worse, the disputant whose petition for review is denied, notwithstanding errors at trial, would suffer grave injustice. Instituting a petition for review procedure that omits one or more of such elements might reduce the visibility of whole classes of cases — appeals from guilty pleas in criminal cases, for instance — without regard to their individual merit.

Finally, it has not been established that time and effort would be saved by instituting a petition for review procedure. Counsel would still have to present briefs setting forth alleged errors at trial. The Court of Appeal would still be obliged to evaluate the merit of such claims. Thus, even if it were constitutionally permissible to implement such a process, dramatic efficiency gains would be unlikely.

RECOMMENDATION 10.6 *The appeal as of right should be retained.*

THE DEATH PENALTY

Original appellate jurisdiction lies with the California Supreme Court in all capital cases. Although the total number of capital appeals is small compared to all appeal and writ proceedings filed in California's appellate system — there were only 36 automatic appeals in 1991–92 compared to the 21,628 appeal and writ proceedings filed in the Court of Appeal — all capital appeals are concen-


trated in the Supreme Court. The Supreme Court issued 89 written opinions in 1991–92, but 26 of those opinions (29 percent of the total and almost 4 per justice) were in capital cases.

Because capital cases are appealed directly to the Supreme Court, that court has the responsibility — discharged in virtually all other cases by the Court of Appeal — of reviewing each case fully to correct prejudicial error. Capital cases are usually lengthier and more complex than other criminal cases. It may take a court staff attorney as much as six to nine months to prepare a capital case for consideration by the justices. One recent capital case involved the review of 80,000 pages of material.

Another measure of the magnitude of this responsibility is the total number of pages in the official reports devoted to capital cases. During 1991, for example, opinions in 26 capital cases filled 1,656 pages out of a total of 3,454 for all opinions during the year. Forty-eight percent of the text of the court's opinions was devoted to death penalty review.

In addition to workload, concentrating capital cases in the Supreme Court may exert unusual pressures on the development of the law. When such a significant portion of the court's docket involves a single kind of case, there is a risk the court will develop a skewed perspective on criminal law issues. Some commentators have noted possible changes in application of the "harmless error" rule in capital cases, and in consideration of evidentiary questions. Finally, when such a significant portion

of the court's work is devoted to a single type of case, the court's general obligation to oversee the development of California law may suffer.

There have been several suggestions for easing the court's capital caseload, among others: repealing the death penalty; creating a special court to handle death penalty appeals; and giving the Court of Appeal initial appellate jurisdiction with subsequent mandatory or discretionary Supreme Court review. Each suggestion has its proponents and opponents. There is no commission consensus on this issue. 

A PREFERRED FUTURE

In 2020, while the third branch of government has changed dramatically, its mandate has not. The justice system remains committed to providing fair, affordable, prompt, and accessible justice to all Californians.

In 2020 the judicial branch is responsible for its own governance. Policy is established by a governing body chaired by the Chief Justice. Its members are representative of every level of the public justice system and of every geographical region of the state. Public input into judicial branch policy making is important and public representatives serve as voting members of the courts' governing body.

In 2020 court unification is 25 years old. The transformation of the courts into a multidimensional justice system has occurred slowly but steadily. The last justice facility offering only conventional adjudication began providing multiple dispute resolution options in 2003. Local courts have become community dispute resolution centers, some of which have entered into efficiency-seeking regional partnerships while maintaining the quality and character of local justice.

The judicial branch communicates its operational objectives clearly. It does so both through branch-wide discussions and in consultation with other branches of government. Administrative accountability has long been an accepted fact of life. System-wide and local programs are evaluated periodically; when they fail to achieve their goals they are either modified promptly or terminated. The executive and legislative branches receive periodic management reports on judicial branch expenditures, sufficiently detailed to allow meaningful performance evaluation.

Management incentives are used widely and managers and administrators are rewarded for efficiency and innovation. Review teams are utilized at the local level with the objective of enhancing local court performance.

Long-range planning is an integral part of third branch governance. Long-range goals for the system and for individual courts are clearly articulated, regularly updated, and published. Such goals appear consistently in the courts' recurring activities and products. By any standard, the courts are well governed.

GOVERNING THE THIRD BRANCH

Each of California's more than 200 courts today functions as a sort of autonomous city-state under general rules established by the Legislature and the Judicial Council.

ENSURING THE INDEPENDENCE OF THE JUDICIARY

For a tripartite, democratic system of government to succeed, it is essential that the judicial branch be truly independent. The unique responsibility of the third branch — the interpretation of the Constitution and laws enacted by the Legislature and the executive branch — requires the strictest impartiality. Fairness and justice are dependent on judicial decision makers' absolute freedom from influence in the exercise of their judicial functions. While fiscal accountability to the public and the judiciary's sister branches is clearly appropriate, it must be balanced carefully with the need for uncompromised independence in decision making.

RESPONSIBLE SELF-GOVERNANCE

Today the governance of the California courts is fragmented. Notwithstanding the committed efforts of judges and staff, few would say that the structure of the courts or the protocols for their governance have produced real clarity or efficiency in defining and implementing judicial policy. Each of California's more than 200 courts today functions as a sort of autonomous city-state under general rules established by the Legislature and the Judicial Council. There is a perception at the local court level that the Legislature, because it does not understand local court operations, and the council, because it is out of touch with local needs, are not well equipped to provide system-wide leadership.

Change is afoot. Trial court coordination and delay reduction are working. Under the leadership of Chief Justice Lucas the Judicial Council has been reorganized to be more representative of the courts. Standing committees of key court personnel have been created to provide regular input to the council. And significant efforts are under way to unify the trial courts and further enhance the operations of the council.

In the future, individual courts and their 21st-century successors — multioption justice centers and community dispute resolution centers — must continue to enjoy significant autonomy in local matters, especially in those relating to the delivery of justice. At the same time, the judicial branch should establish statewide goals and policies to ensure that judicial resources are used wisely and efficiently, particularly as new statewide programs and initiatives (e.g., delay reduction) are implemented. As the judiciary becomes better coordinated and improves its relations with the other two branches of government, it must consistently speak with one voice. The Legislature and the Governor's office must be assured that the positions advanced by the courts' governing body are widely supported at the local level.

To better ensure judicial independence the judicial branch's policy-making body should be further reorganized. The Judicial Council today includes voting members of both the Legislature and the courts. While legislative input on court policy is vital, the courts' governing body is not the optimal conduit for such input. The leadership body of

one branch of government is not necessarily improved by the membership of representatives of other branches. Court leadership is no better suited to legislative membership than are legislative committees or the Governor’s cabinet to judicial membership. The Judicial Council must be free to speak as the governing voice of the judicial branch.

At the same time, however, the judicial branch must be more responsive to the public. While voters participate in the election and retention of judges, more direct public participation is warranted.

RECOMMENDATION 11.1 *The judicial branch should establish statewide policies for its own operation through a representative body that includes both judicial and public members.*

Strategies:

- 11.1.a. A constitutional amendment should be put before the electorate to change the composition of the Judicial Council to include only judicial branch and public members. Representatives of local bar associations, the Legislature, and the executive branch should serve as advisory members.
- 11.1.b. The council’s mandate to improve the administration of justice should be interpreted broadly. Issues relevant to court operations — e.g., maintaining trial

court records and establishing records retention schedules — should be addressed by Judicial Council rule rather than by statute.

- 11.1.c. The council should define those processes that should be uniform statewide and implement and maintain them by statewide rule. Local rulemaking consistent with statewide rules should continue, so long as it does not unduly inhibit public understanding or access.

HIGH-QUALITY JUDICIAL AND NONJUDICIAL PERSONNEL

The ultimate measure of the strength of the third branch is the quality of its judicial officers and nonjudicial personnel. The commission’s public opinion research shows that high-quality judicial officers are the public’s single greatest priority among possible improvements to the system. Every effort must be made to ensure that the best and the brightest are attracted to service in the judicial branch.

RECOMMENDATION 11.2 *The judicial branch must seek and employ judicial and other personnel of the very highest quality. Judges and nonjudicial personnel should be fairly compensated. A broadly constituted independent body should be created to recommend appropriate levels of compensation for both judicial and nonjudicial personnel.*

The commission’s public opinion research shows that high-quality judicial officers are the public’s single greatest priority among possible improvements to the system. Every effort must be made to ensure that the best and the brightest are attracted to service in the judicial branch.

Judges should speak out on public policy issues that affect the courts but are usually decided elsewhere — e.g., issues such as criminal sentencing policy and the expansion of nonlawyer legal services.

BETTER COMMUNICATION AND COOPERATION

Effective government demands effective inter-branch communication and cooperation. Such efforts today are haphazard, sometimes even reluctant. In the future, both formal and informal consultation among the branches of government should be ongoing. Judges should regularly communicate with the Legislature and the public concerning the justice system's strengths, weaknesses, and needs. Just as important, judges should speak out on public policy issues that affect the courts but are usually decided elsewhere — e.g., issues such as criminal sentencing policy and the expansion of nonlawyer legal services. To impose a discipline on the relationship between the branches, the third branch should file with the Legislature judicial impact statements on legislation affecting the courts. Similarly, the Legislature should volunteer its own projections of the impact of such legislation. To better promote the public's interest, communication in government must be improved.

RECOMMENDATION 11.3 *Communication among the three branches of government on issues of common interest should be facilitated through the creation of an inter-branch standing commission.*

Strategies:

11.3.a. The commission's principal objectives should include the creation of protocols aimed at minimizing crisis management, and the facilitation of interbranch strategic planning.

11.3.b. To impose a discipline on the relationship between the branches, "judicial impact statements" should be developed by both the courts and the Legislature on legislation affecting the courts.

ACCOUNTABILITY

Independence without accountability is at odds with the fundamental principle of checks and balances. As the courts assume greater responsibility for their governance they must ensure that they retain both the public's confidence and that of their sister branches. While the judiciary should establish its own policies and standards, the public, the Governor, and the Legislature have a legitimate right to demand fiscal and administrative accountability from the courts.

The third branch is accountable today. All judicial officers face periodic elections — contested elections for trial court judges and retention elections for appellate justices. (See Chapter 5, Public Trust and Understanding.) Moreover, the public has significant additional influence over the third branch through the initiative process, influence exercised in the Victims' Rights initiatives of 1982 and 1990, for example.

Other mechanisms to promote responsible self-governance are available. While enlightened appointment and retention procedures hold part of the answer, high-quality, mandatory judicial

education, judicial performance standards, and periodic internal judicial review are also needed. Recommendations to provide for judicial performance review can be found in Chapter 5.

Inherent in effective management is fiscal responsibility. (See Chapter 12 for a more detailed discussion of this subject.) Incentives for court managers to reduce costs and improve efficiency are appropriate, as is statewide and local peer review of fiscal management practices. Upon the invitation of individual courts, broadly constituted teams should review local court management practices. Such teams would logically include judicial officers, private experts, public members, and representatives of the legislative and/or executive branches. The mandate of such teams should be evaluation, with the ultimate objective of improving fiscal performance and efficiency. Management reports should be filed regularly with both the Legislature and the executive branch.

RECOMMENDATION 11.4 *New mechanisms should be created to ensure the third branch’s management accountability.*

Strategies:

- 11.4.a. Court management plans and performance should be subject to regular review and audit. Cost and efficiency incentives should be built into all management plans.
- 11.4.b. Upon the invitation of local courts, review teams should assist those courts in

evaluating performance and improving efficiency.

ORGANIZATION

SINGLE TRIAL COURT

The commission believes that a unified trial court is an important first step on the road to an integrated, multidimensional justice system. (See Chapter 2 for further discussion of this issue.)

REGIONALIZATION

Where regional courts or justice centers can optimize the use of judicial resources, local courts should have the option to create regional partnerships. Some regions in the state may find that while individual counties cannot justify or afford a specialized court, a joint venture may be feasible. In those situations, local courts should decide how best to use their resources and how best to ensure access for all court users.

RECOMMENDATION 11.5 *To promote economies of scale and provide specialized services, the regionalization of local justice facilities should be authorized.*

LOCAL ADMINISTRATION

By the year 2020 California is projected to have 50 million residents. While statewide coordination and leadership in the third branch will be needed,

The administration of justice should be delegated to the most local level feasible. Administration of local courts should be geared to accommodating the justice needs of the communities they serve.

accommodating community needs will require substantial management discretion at the local level.

RECOMMENDATION 11.6 *The administration of justice should be delegated to the most local level feasible. Administration of local courts should be geared to accommodating the justice needs of the communities they serve.*

Strategies:

- 11.6.a. While the courts should have statewide personnel policies and procedures, personnel decisions should be made at the local level wherever possible.
- 11.6.b. The commission recommends the creation of a judicial appointment commission (see Chapter 5). Such a commission should utilize some equivalent of county-based subcommittees, with substantial input into appointment recommendations for positions in their counties.
- 11.6.c. Each local court should have the authority to determine its own governance structure — e.g., a strong presiding judge, an executive committee, or an en banc system.
- 11.6.d. Court geographical boundaries should be adjusted in the best interests of justice and local needs. Population growth, crime rates, and other factors should be taken into account in making such adjustments. To coincide with the census,

court redistricting commissions should be appointed by the Judicial Council at least every 10 years.

- 11.6.e. Local court/community dispute resolution center personnel should reflect the multiethnic, multicultural composition of the local population. Personnel standards should reflect that goal.

JUDICIAL RESEARCH

In 2020 the judiciary should more consistently contribute to the public policy debate on issues that affect the courts. The third branch is uniquely qualified to speak to a host of justice-related issues. Mechanisms should be created to ensure that judicial officers and other judicial branch personnel are informed about issues that bear on the law and the administration of justice. The commission recommends that the third branch develop a research capacity within its administrative offices. Such a capability would allow judicial branch personnel and outside experts from the public and private sectors to investigate new trends and developments in the law, economics, technology, and the sciences. This recommendation does not contemplate the creation of a new administrative entity.

RECOMMENDATION 11.7 *The third branch should develop the capacity to monitor, study, and make recommendations on trends that affect the courts.*

Strategy:

- 11.7.a. The courts should monitor trends in technology, demographics, economics, psychology, and the social sciences, assess their likely impact on law and justice, issue policy papers, and pioneer initiatives to improve justice and its administration. Research subjects might include: sentencing policies; new and effective ways to deal with drug offenders; case calendaring practices; subject matter jurisdiction in the trial and the appellate courts; attorney fee awards; new technology with applications for enhancing access to justice; privacy encroachments that may result from new technology; the merits of independent v. court-provided appropriate dispute resolution; etc.

MANAGEMENT AND ADMINISTRATION

JUDGES AS MANAGERS

As the future becomes more complex, enlightened management will increasingly be needed in the third branch. The need for skilled judicial managers will grow more acute. If caseloads rise in an era of limited resources, courts at all levels will be obliged to become more efficient. It is judicial officers who must lead them.

Informed management must be the norm in

the Information Age. Change will be quicker. The procurement, personnel, management, and fiscal decisions with which judicial administrators will be confronted will be far more numerous. Integrating new technology into the courts will be essential. Sophisticated case management systems, far-reaching communication systems, and powerful research and analytical tools will be commonplace in the commission's preferred justice future. (See Chapter 6, Information Technology and Justice.)

As the multidimensional justice system evolves, judges will face new management challenges. Justice centers will demand familiarity with appropriate dispute resolution processes and dispute screening, evaluation, and referral. Integrating such processes with adjudication will require ingenuity.

Judges today are too seldom trained in management. Historically, the judicial culture and the court management culture were separate and distinct; judges judged and managers managed. Those days are gone. In the future, judicial officers at all levels will need management skills.

The issue and the challenge are described in the words of a California municipal court commissioner:

If the answer to the complaint of the time it takes to get to trial is "We have so many cases that we're backed up," all the answer does is restate the problem. The judge's job is to reduce the backlog, and that requires administrative training skills not ordinarily thought of as judicial in nature.¹

Sophisticated case management systems, far-reaching communication systems, and powerful research and analytical tools will be commonplace in the commission's preferred justice future.

RECOMMENDATION 11.8 A judicial candidate’s skills in areas related to effective judicial governance — technology-aided research, analysis, decision making, and administration — should be a significant factor in the judicial selection process.

PLANNING

The work of the Commission on the Future of the California Courts can serve as a point of departure for future judicial branch planning. The commission’s two years of work represent the most comprehensive, longest-range planning effort in the judiciary’s history. The work of the commission should be integrated into the Judicial Council’s ongoing strategic planning process, thereby ensuring a continuity of vision and objectives.

RECOMMENDATION 11.9 Long-range and near-term planning should play a prominent role in the courts of tomorrow.

Strategies:

- 11.9.a. The council should establish a long-range planning capacity in the courts that can integrate demographic, sociological, technological, and other analysis into third branch planning.
- 11.9.b. A planning unit should be created within the Administrative Office of the Courts to continue the work begun by the commission and to work with local courts in the development of local plans.

- 11.9.c. Successor long-range planning or futures commissions should be appointed periodically to continue and revise this commission’s work.

A CONSUMER ORIENTATION

Discussed in detail in Chapters 3 (Access to Justice) and 5 (Public Trust and Understanding), implementing a “customer service” approach to justice is essential. It is judicial branch administrators and personnel who will make customer service a reality. It is they who can assist the confused disputant without counsel or help a party complete a routine form. In the past, a sometimes artificial prohibition deterred clerks and other courthouse personnel from providing such assistance. While judicial branch personnel cannot be expected to — nor should they — practice law, they can and should do more to assist disputants.

RECOMMENDATION 11.10 Assisting the court user should be a priority of all court personnel.

Strategies:

- 11.10.a. Nonjudicial court personnel should be trained as service providers and facilitators. Their primary responsibility should be to provide timely, accurate, and efficient service to all persons having business with the courts, and to assist litigants in reaching the next step in resolving their disputes.


- 11.10.b. Prohibitions against providing advice to litigants should be reexamined and modified to allow court personnel to assist in moving disputes toward resolution.

INNOVATION

Innovation is the key to the future of the judicial branch. The Court Improvement Fund that was to have been created under the Brown-Presley Delay Reduction Act has never materialized. A fund for third branch innovation and pilot projects should be created.

RECOMMENDATION 11.11 Innovation in the judicial branch should be ongoing.

Strategy:

- 11.11.a. A Court Improvement Fund should be created to support innovation. 

*It is judicial branch
administrators and personnel
who will make customer service a reality.*

*It is they who can assist
the confused disputant without
counsel or help a party complete
a routine form.*

A PREFERRED FUTURE

In 2020 California's judicial branch is a truly independent and coequal branch of government, neither greater nor lesser than its sister branches. Inherent in its independence is fiscal autonomy. Adequate levels of dispute resolution and other services — as defined by the judicial branch — are funded by the state.

In 2020 the courts are free to manage their resources as they see best, are free from untoward interference, but act always in the public interest. The courts are funded without regard to the revenues they generate. Rather than competing for resources, the three branches of government are mutually supportive in their collective mission to promote the public good.

In 2020 the judicial branch, through a statewide commission, defines levels of service that must be maintained in order for the judicial system to meet its obligations. The levels are adjusted periodically to accommodate changes both in the courts and in society.

The courts acknowledge their public responsibility to preserve resources and operate in the most cost-efficient and cost-effective manner possible. Resource allocations to individual courts are sufficient to meet agreed-upon levels of service. Budget management is delegated to the most local level feasible. In some areas regionalization has been adopted to take advantage of economies of scale.

Independence with accountability is a fact. The judicial branch has instituted judicial and administrative performance criteria, both statewide and locally. Local standards are discussed locally with both judicial and nonjudicial personnel.

COURT FINANCE TODAY

The mission of the courts is to provide equal, affordable, and accessible justice. Their success or failure depends in large part on the availability of resources with which to do the job. In the past, state and local resources were sufficient to fund basic needs. The courts responded to the state's tremendous population growth by becoming the largest court "system" in the country.

FINANCING FUTURE JUSTICE

The state's economic recession and the resulting reduction in court funding have cast doubts on the courts' fiscal future. When such doubts combine with projections of significant increases in future caseloads, the courts' very ability to provide basic services is called into question.

To better analyze court finance and understand how funding relates to organization and operations, the commission retained Professor John K. Hudzik of Michigan State University, a national expert on court finance. Hudzik was asked to project several possible futures for court finance and to develop possible alternative resource management models. The commission drew heavily on Professor Hudzik's findings.

THE MACRO ENVIRONMENT: STATE FINANCE

During the 1980's public spending in California grew faster than the national average. U.S. Department of Justice figures show that nationally, state and local budgets grew at a rate of about 7 percent per annum, while in California, Department of Finance figures indicate that state and county government combined grew at a rate of about 10 percent.

In the 1990's the bubble burst. The State Legislative Analyst's Office now predicts significant near- and long-term budget shortfalls.¹ While official estimates project annual growth in state expenditures of 7.3 percent per year until 2005, more conservative estimates peg growth at only 4.7 percent.² If the latter proves to be the reality, the impact

on the justice system — indeed on all state government — will be profound.

Declining personal and corporate income has eroded the revenue base. In 1991, revenues declined slightly; in 1992 they rose only 1 percent; and in 1993 they are projected to decline again.³ Low consumer confidence and enormous debt service burdens continue to keep the economy in low gear. A sluggish economy, higher unemployment, and lower-paying jobs suggest flat public revenues in the years ahead. Moreover, the State Department of Finance foresees a significant reduction in the ratio of "taxpayers" — mainly those in the 18–64 age group — to "tax receivers," most of whom are either younger or older than the first group. This situation may be aggravated by the nature of the state's population growth: a relatively high birth-rate and continued immigration.⁴

The redistribution of federal spending has also contributed to California's economic woes. During the 1980's the percentage of state and local government revenue derived from federal revenue sharing declined from 25 to 18 percent.⁵ Economists blame the reductions on increased interest payments on the federal debt, the "New Federalism," and increased military and entitlement spending.⁶ In the absence of public or political support for the restoration of federal revenue sharing, neither California nor its justice system should count on future federal windfalls.

During the 1980's, California county revenues from federal transfers fell from 25 to less than 20

percent of total revenues.⁷ Despite the state’s effort to make up some of the difference, counties have felt the pinch. The consequences for judiciary budgets that are more than 50 percent county-dependent have been predictable.

Expenditures

The growth in state spending on nondiscretionary programs is accelerating. In some nondiscretionary programs, costs are rising faster than either the population or state revenues. The California Commission on State Finance predicts that “costs in K–12 education, health, and welfare . . . will continue to grow faster than the state’s general population.”⁸ This trend is confirmed by 1990–91 national increases in Medicaid spending (18 percent), Aid to Families with Dependent Children (17 percent), prisons (17 percent), and education (10 percent).⁹ In California, the State Legislative Analyst’s Office predicts that Medi-Cal costs will grow by 9 percent annually because of caseload growth and rising medical costs. Education costs are also expected to increase by 8 or 9 percent per year, primarily because of enrollment growth and increases mandated by Proposition 98.¹⁰ The 1993–94 state budget for the Department of Corrections includes a 10 percent increase over last year, an increase of over \$250 million.¹¹ In addition, in 1993–94 the state is committed to resume the payment of retirement contributions from the General Fund.

The state’s options are three: reduce spending, raise taxes, or both. At least in the near term,

however, the likelihood of significantly reducing nondiscretionary spending is slim. Proposition 13 and later initiatives evidence little public tolerance for increased taxes.¹² Discretionary spending, then, is the logical target. As that pie shrinks, the courts will be forced to compete tenaciously for resources.

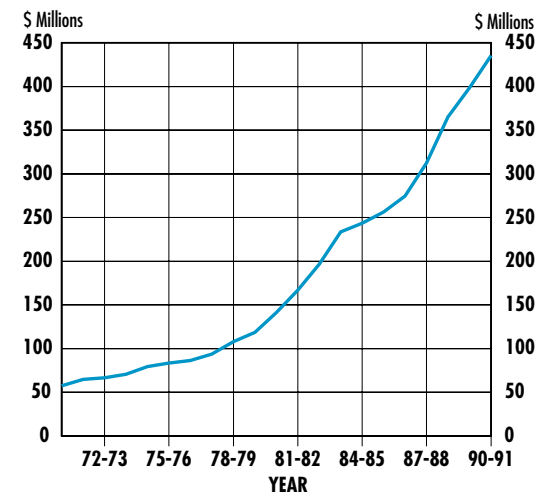
THIRD BRANCH FINANCE

Over the past 30 years, and particularly during the 1980’s, the courts enjoyed a period of growth, attributable in large part to the growth of the public sector generally. California’s overall operations expenditures, according to the State Controller’s Office, grew during the 1980’s at an average nominal annual rate of nearly 13 percent. Spending at the local level increased at an average nominal annual rate of about 10 percent.

Between 1982–83 and 1990–91, state funding for the trial courts increased by 750 percent, local funding for the trial courts increased 63 percent, and state funding for appellate court operations increased about 250 percent.¹³ During that period, funding for the judiciary in California increased 141 percent in nominal terms, an average nominal increase of almost 12 percent per year.¹⁴ With general inflation averaging about 4–5 percent per annum during much of this time, the courts enjoyed substantial *real* funding growth.

Important to this growth was the phased introduction of the block grant trial court assistance project. Beginning in fiscal 1988–89, the state began to allocate funds to the trial courts, and in 1991 the Legislature passed the Trial Court Realignment

FIGURE 12.1 California General County Revenues (in \$ millions), Fiscal Years 1970–71 Through 1990–91



Source: Annual Report of Financial Transactions Concerning Counties of California, State Controller’s Office.

and Efficiency Act in anticipation of full state funding by the end of the century.

The resulting combination of local and state funding under the new legislation significantly contributed to the growth in court resources. Despite massive population growth in the state, the courts both had more and spent more per Californian in each year of this period.

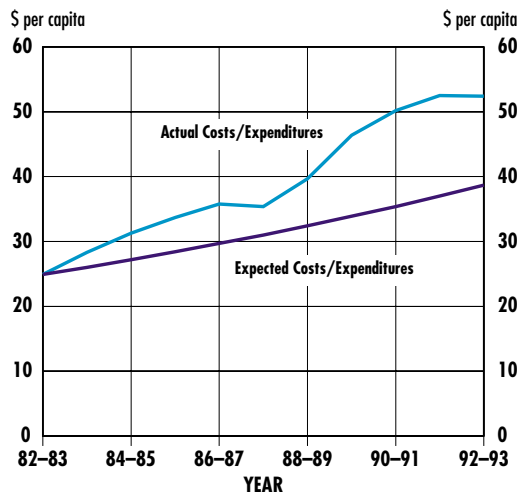
In Figure 12.2, the upper line traces the judiciary's actual per capita expenditures per year. The lower line represents what per capita expenditures would have been had they held constant in real terms — no real growth, only nominal increases to cover inflation. The wider the gap between the lines, the greater the real increases in judiciary per capita expenditures.

The state's structural budget problems have already reversed the positive funding trends of recent years. As Figure 12.3 shows, the state's contribution (General Fund) has steadily declined. To some extent, the reduction has been offset by the revenue flow generated by court operations. Contrary to the 1991 legislation's intent that state funding for the trial courts reach 60 percent, recent court budgets show a decrease in the state's share from 50 percent in 1992–93 to 44 percent in 1993–94.

THREE RESOURCE SCENARIOS

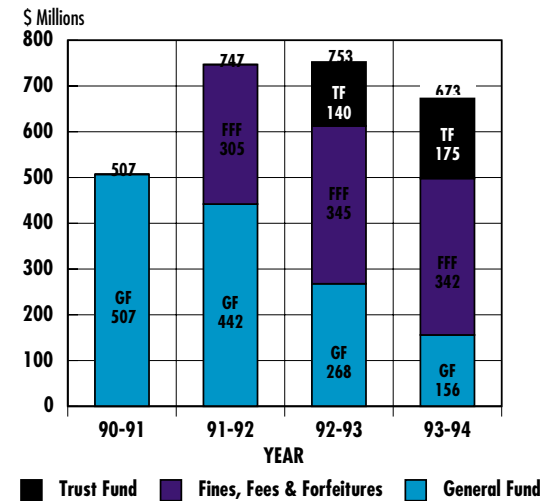
California's economic future cannot be known. Current economic patterns, resource availability, or third branch budget needs may change dramatically and unpredictably over the next 30 years. Alternative futures scenarios can, however, help clarify

FIGURE 12.2 Total State and County Per Capita Costs of the Judiciary v. Estimated Per Capita Costs (inflated to 1990 at the average state inflation rate using 1982–83 as the base year)



Source: Administrative Office of the Courts (1992) and Abstracts (1991:12).

FIGURE 12.3 General Fund Contributions to the Trial Courts, Fiscal Years 1990–91 Through 1993–94



Source: AOC analysis of the 1993–94 Budget Bill.

priorities and formulate objectives to achieve the desired future. Three possible scenarios follow.

High-Range Scenario

This scenario assumes that growth rate in the economy and in personal income will be only slightly less than that enjoyed during the last decade. It also assumes that spending for medical care, public assistance, and corrections will stabilize through programmatic reform. Finally, it assumes the implementation of the existing plan for full state financing of the courts. Given these assumptions, expenditures for the third branch

should match increases in overall state expenditure levels, which the Commission on State Finance has projected at 6.1 percent per annum. This would represent a significant real increase in funding for the courts.

Mid-Range Scenario

Unlike the high-range scenario, this scenario assumes that reforms in nondiscretionary programs have limited success in slowing costs. It also assumes that economic recovery is delayed in California until well into 1994. Given such assumptions, the third branch would at best receive funding increases equal to no more than the annual increase in state revenue. In such a scenario commission consultant Hudzik projects annual average increases of as little as 4–6 percent in nominal terms.

Low-Range Scenario

This scenario assumes growth at near-current levels in nondiscretionary spending. It also assumes that the economic recovery is less than robust and results in a significant decline in the growth of personal income. Obviously, under this scenario there will be few funds for nondiscretionary spending. Professor Hudzik estimates that overall funding increases under this scenario would equal no more than 3–5 percent per annum.

These alternative fiscal scenarios are displayed graphically in Figure 12.4. Superimposed on this graph is a straight-line projection of current spending patterns. Clearly, under only the

high-range scenario will the court system be funded at the levels of the recent past. Unfortunately, as Professor Hudzik makes abundantly clear, the low-range scenario is far and away the most likely of the three.

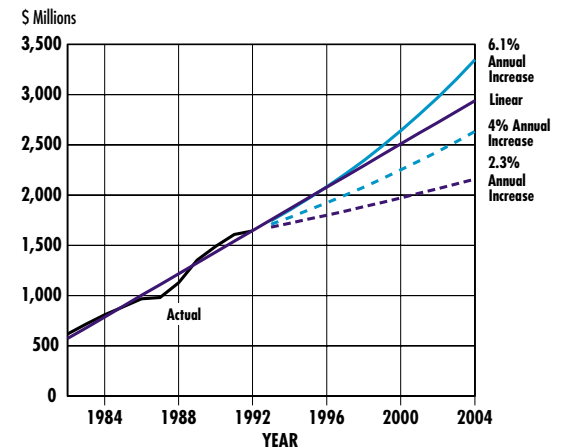
The financial future of the California courts depends not just on state finances generally. Even in relatively good times the courts will be obliged to compete with other state programs for funds. To ensure that they can still perform their essential mission in a time of shrinking resources, the courts must develop new and creative tools.

THE FUTURE OF COURT FINANCE

Whatever their financial future, the courts must still provide equal, affordable, and accessible justice to all Californians. Thus, the courts must rethink the manner in which they manage their purse. In 2020, the methods by which judicial finances are planned, managed, and funded are likely to be very different from today's.

In the commission's preferred future, court finance will reflect the principle of independence with accountability. Independence will be reflected in the third branch's responsible self-governance, and in its effective administrative and financial management. Accountability will be reflected in the measures the judiciary adopts to ensure that resources are managed both wisely and efficiently.

FIGURE 12.4 Alternative Projections for Total Estimated Costs of the Judiciary (State and County) in California



Source: Administrative Office of the Courts (1992).

The most promising method of achieving adequate and stable resources for the courts is through single-source funding. In the main, that source should be the state.

SINGLE-SOURCE FUNDING

The courts' role in a tripartite system of government is critical; adequate resources are essential to their ability to play the part. The third branch should be funded at a level that readily permits its component elements to meet their constitutional mandates. Funding should be sufficiently stable to allow the courts to meet this obligation without fear of untoward disruption.

The most promising method of achieving adequate and stable resources for the courts is through single-source funding. In the main, that source should be the state.

State funding would provide a more reliable — not necessarily larger — source of funds than local funding. The current arrangement in which a portion of court budgets derives from the state and a portion is contributed by local government does not allow for meaningful long-range planning and resource allocation.

Single-source funding would also reduce funding inequities among courts. Under the current hybrid system, many smaller and/or rural counties have ongoing resource problems. Full state funding, on the other hand, would allow the judiciary to allocate resources as needed, so that all courts would be able to meet the minimum needs of their communities. State funding would also reduce duplicative effort. Accounting and budgeting procedures would be standardized and handled by a central agency, with significant input from local courts.

The Trial Court Realignment and Efficiency

Act expressed the Legislature's intent to move the courts toward state funding in 5 percent yearly increments. The Legislative Analyst's Office, in its respected report "Making Government Make Sense" (February 1993), also recognized the importance of state funding for the courts.

RECOMMENDATION 12.1 *Funding for the courts should be stable and adequate to meet the obligations of the third branch. Except possibly for facilities costs, the courts' funding source should be the state. Funding should be independent of court-generated revenues.*

It is particularly important that the level of court funding be independent of revenues. While it is anticipated that in the future the courts will continue to assess civil filing fees and collect criminal fines, that function should be distinct from budgetary needs assessment and requests for appropriations. In the past, attempts have been made to tie funding to revenues. Such a connection undermines both the efficiency and quality of justice. The revenues generated from fines, fees, and forfeitures represent fulfillment of orders of the court and as such those funds should be pursued vigorously. But their generation should not be tied to overall resource needs.

UNIFORM BUDGETING

Greater control over their finances will not single-handedly solve the courts' present financial riddle. More efficient resource allocation and utilization

are also needed. Efficiency will essentially allow the courts to do more in the way of enhancement projects without increasing overall resource levels.

Central to this strategy is a re-examination of current accounting and budgeting practices. Prior to 1991, the accounting and budget functions for the individual trial courts were performed at the local level. Court accounting practices were dictated by county procedure. After enactment of the Trial Court Realignment and Efficiency Act of 1991, trial court budget and resource management were increasingly prescribed by state agencies, e.g., the Trial Court Budget Commission.

As the trial courts move toward state funding, there will be an increasing need for statewide budgeting. A statewide court budget commission would perform the important function of setting minimum standards for service, and allocating resources to ensure that local deficiencies are met with adequate funds. To ensure uniformity, the commission should seek substantial input from individual trial courts regarding minimum workable funding and service levels. In addition, regional commissions composed of judicial officers and court administrators should be created to assist and work with the statewide commission.

The commission, in cooperation with the Administrative Office of the Courts, should have primary responsibility for collecting and processing budget data for the entire court system. Individual trial courts should have significant input into the process.

Central to the budget process will be the development of a strategic plan that addresses branch-wide needs and objectives. Individual courts should develop individual plans to optimize resource allocation and management.

The allocation of funds to individual trial courts should be the responsibility of the budget commissions, and should be subject to guidelines developed to ensure continuity of basic services. Individual trial courts must, however, retain the authority to allocate resources at the local level.

Civil fees collected by the courts should be deposited in the state's General Fund, as they are today. Criminal fines and penalties should be assessed pursuant to state statute, but through the legitimate exercise of judicial discretion they may vary from jurisdiction to jurisdiction to reflect local public safety priorities. Because of this de facto localization, fines and penalties should be retained at the local level.

Local governments should be authorized to contract with local courts to provide dispute resolution and other services that supplement those mandated by state policy and funded by state appropriation. However, such relationships must create for the courts neither the appearance nor the reality of conflicting loyalties.

RECOMMENDATION 12.2 Accounting and budget functions for the courts should be performed by a state budget commission, with significant input from individual trial courts.

Decentralized financial management assumes the centralization of decisions about large-scale allocation of resources, and the decentralization of decisions about the actual management of local appropriations.

Strategies:

- 12.2.a. The responsibility for preparing and overseeing the third branch budget should reside with a state commission chaired by the Chief Justice. That authority should be shared with regional commissions consisting of judges and court administrators.
- 12.2.b. The role of the state budget commissions should be:
 - (1) To define — after consultation with local courts and regional commissions — the minimum acceptable levels of service for the components of the judicial branch.
 - (2) To adopt budget guidelines for, e.g., the transfer of funds among line items.
 - (3) To establish budgetary goals and objectives consistent with the courts' strategic plan.
 - (4) To allocate and reallocate funds for operations and capital improvements that ensure that all courts are funded at least at the minimum level of service.
- 12.2.c. Local governments should be authorized to contract with local courts to provide dispute resolution and other services above and beyond those mandated by

state policy and funded by state appropriation.

- 12.2.d. Fines and penalties should be assessed according to statewide standards, but their precise level may reflect local decisions on how to penalize criminal behavior. Revenues should remain local. Civil filing fees and other user fees should be treated as revenues to the state.
- 12.2.e. The third branch's budget — including the Supreme, appellate, and trial courts, the Commission on Judicial Performance, the Judicial Council/Administrative Office of the Courts, and the assigned judges program — should take the form of a single, comprehensive document. It should be submitted directly to the Legislature, with comments from the executive branch.
- 12.2.f. The annual budget should reflect the goals and objectives of the Judicial Council's strategic plan, and of the local plans of individual trial courts.
- 12.2.g. The budget should be organized by function.

DECENTRALIZED RESOURCE MANAGEMENT

The traditional model of management in both the public and private sectors has been hierarchical. Top-down management, with its various chains of command, was largely effective in an expanding,

resource-rich environment. Centralized management, however, also created inflexibility.

Decentralized financial management assumes the centralization of decisions about large-scale allocation of resources, and the decentralization of decisions about the actual management of local appropriations. Commission consultant Hudzik explains:

[R]esults improve when people throughout the organizational hierarchy are empowered to make their own decisions. Although those at the top must make the final decisions about how to allocate a limited resource pie, those in the organization (at the operational level) are in the best position — because of timely access to relevant information — to allocate, reallocate and manage the resources provided, and to provide input to budget planning. When line managers are empowered to manage their resources without overly restrictive constraints, they become more effective and active partners in advising policy makers.¹⁵

Each local court should be a largely autonomous financial and management unit. Decisions on the allocation of resources should by and large be made at the local level, but under guidelines adopted by the courts generally.

RECOMMENDATION 12.3 *Subject to statewide guidelines, court financial management and resource allocation decisions should be delegated to the most local level feasible.*

Strategies:

- 12.3.a. Resource allocations to individual courts should be based on individual need.
- 12.3.b. Supplementary allocations should be available to support special local initiatives and pilot projects. Continued funding should be contingent on demonstrated results.
- 12.3.c. Once its budget is adopted a local court should have the authority, subject to statewide guidelines, to move funds among various function and budget line items.

One example of *appropriate* centralization is broadly based personnel policies. The movement to a statewide personnel system would assist the statewide budget commission in evaluating court needs and abilities. This might entail the creation of a common classification system for court staff, with attendant minimum qualification and performance criteria. Local personnel decisions, including hiring and evaluation, should remain local.

ESTABLISHING STATEWIDE NORMS

As suggested above, statewide guidelines for the individual components of the multidimensional justice system are both needed and appropriate. The adoption of such standards and norms will allow programmatic evaluation of individual justice facilities and provide a basis for determining where resources are needed most.

While the courts must of course remain accountable for providing acceptable levels of service, that accountability should be as to outcome, not as to process. The internal operations of both the judiciary and the trial courts should be managed by the third branch, not by other branches of government.

Statewide guidelines should ensure that acceptable levels of service are provided by every trial court or justice facility. They should take into account local economies and the justice needs of particular courts. In some instances this may require reallocating monies from courts funded in excess of acceptable minimum levels to courts in financial difficulty.

Such guidelines should be established by the judicial branch, with input from the statewide and regional budget commissions. Regular evaluation will allow adjustments as the courts' mission and objectives evolve. The guidelines for decentralized resource management should establish minimum performance levels for both courts and staff.

RECOMMENDATION 12.4 *Statewide guidelines should be established to govern most operational areas of the third branch.*

Strategies:

- 12.4.a. The Judicial Council should adopt a statewide personnel classification system for all court employees.
- 12.4.b. The state budget commission should consider adopting cost-of-living and cost-of-business differentials for the state's various budget regions.

12.4.c. The state budget commissions should periodically establish performance criteria by which court performance and efficiency can be measured. These performance criteria should be reviewed and revised as necessary to reflect new needs and priorities.

12.4.d. A judicial and nonjudicial salary commission should be appointed to recommend judicial salaries. Membership should include representatives of the executive, legislative, and judicial branches and the public.

INCENTIVES AND SANCTIONS

Increasingly, government is adopting the best practices of the private sector. It is generally agreed that performance incentives and rewards have utility in certain public sector settings; the judicial branch should review its own operations with an eye to implementing such practices.

One example might be to allow local courts to retain a portion of any budget surpluses produced through efficiency savings, as a further incentive to maximize efficiency. The remainder could be directed into a pool for distribution among the courts generally, or returned to the General Fund.

RECOMMENDATION 12.5 *To enhance efficiency and performance, the judicial branch should explore the use of incentives, rewards, and sanctions in its operations.*

Strategies:

- 12.5.a. The personnel system should provide financial incentives for efficiency, savings, and exemplary effectiveness.
- 12.5.b. Local courts should be allowed to retain a significant portion of budget savings; the remainder should be returned to the courts' central budget pool.
- 12.5.c. Budget units failing to meet minimum budget and financial management performance standards should be subject to penalties that include: greater management controls by the budget commissions and the Administrative Office of the Courts; budgetary withholding; and ineligibility for merit/bonus pay.

BUDGET PERFORMANCE REVIEWS

Regular evaluation of budget and program performance should be commonplace in the comprehensive justice system of the future. The courts must know what works and what does not. Programs that do not meet expectations should be evaluated. If found ineffective, they should be terminated.

RECOMMENDATION 12.6 Budget and program performance reviews should be instituted at all levels of the judicial branch.

Strategies:


- 12.6.a. The budget units of individual courts should regularly assess their court's perfor-

mance according to statewide standards and submit their findings to the statewide and/or regional budget commissions.

- 12.6.b. Peer review teams should conduct assessments of courts selected by the state budget commission on a rotating basis for in-depth review of operations and budget management. Every court should receive such a review no less than once every five years.

(1) The findings should be submitted to the budget commission with an opportunity for local court comment.

(2) The findings and comments should be made available to the executive and legislative branches.

- 12.6.c. Judicial branch financial audits should be conducted on a regular schedule by judicial branch auditors reporting directly to the Chief Justice and the director of the Administrative Office of the Courts. Special audits should be conducted as directed by the Chief Justice and the system's administrative director. 

The courts must know what works and what does not. Programs that do not meet expectations should be evaluated. If found ineffective, they should be terminated.

Conclusion: Into the Future

“I want you to tell me that after this meeting something is going to happen, not like other programs that come and stay for awhile and if they don’t work people just leave.”

Manuel Lopez, Student, Roosevelt Community Adult School
Hearing (L.A.), April 13, 1993


The testimony above is a plea for action. It represents the hope of countless Californians, hope for justice that is — to quote the commission’s vision statement — “scrupulously fair, accessible to all, comprehensible and comprehending.” Such goals cannot remain mere aspiration for long. Action to make them tomorrow’s reality must be swift, concerted, and enduring.

Peter Drucker once said that all great ideas eventually deteriorate into work. It is the commission’s hope that translating the foregoing proposals into action will not be “deterioration” but evolution, in the most positive sense of that word. However, there is no denying that much hard work will be required if the commission’s vision is to be achieved by 2020, or indeed by any year.

Though the commission has accomplished its immediate mission, its work is really just beginning. While its dissolution will coincide with the presentation of this report to the Chief Justice and the Judicial Council, even then the commission’s members will not

be entirely freed from their mandate. An intended consequence of their two-year labor was that in the process the members would become converts to the future, believers in the ability to shape the destiny of justice. The great majority of them did. They can be counted on to be defenders of the judiciary’s many virtues, honest critics of its shortcomings, and, most importantly, advocates for its constructive change.

Of course change in the courts — and indeed everywhere else — is constant. But this work can serve both as its catalyst and as a rough roadmap. Sometime after the publication of this report the courts will publish a five-year plan, a distillation of near-term commission proposals that can be acted upon now. But already early commission ideas and materials have spawned initiatives in courts around the state. Court managers have been trained by commission consultants in both long-range and short-term strategic planning. Through overlapping memberships the Judicial Council’s own strategic planning committee has been cross-pollinated with commission ideas. To that committee and the council itself will fall significant responsibility for implementing the commission’s proposals.

In the final analysis, however, responsibility for realizing the vision will fall not only to the courts, the Legislature, and the Governor, but to all Californians who treasure justice and believe in the possibility of a better future. Manuel Lopez’s plea is not directed to government alone. It is a plea to all of us. 

A P P E N D I C E S



CHAPTER ONE CALIFORNIA: 1993 AND 2020

Notes

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