

Supremely Futile The George Court's Sisyphean Struggle

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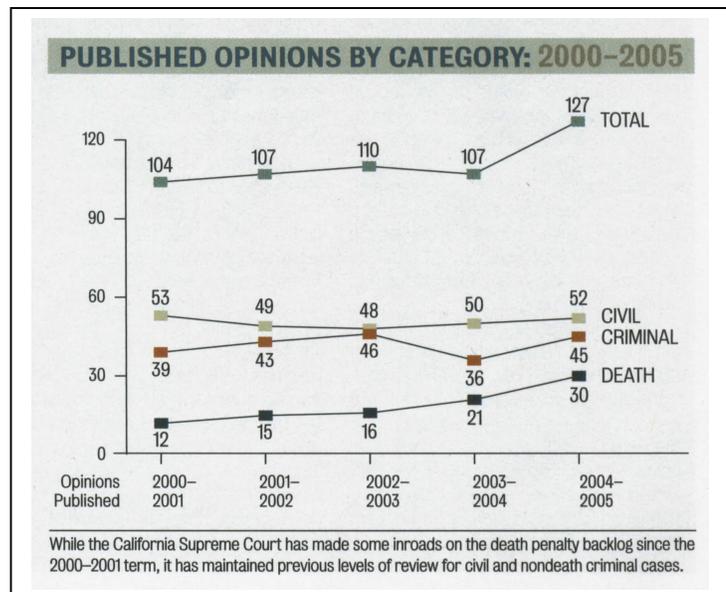
The gods condemned Sisyphus to ceaselessly roll a huge boulder up a steep mountain, only to have it roll back down to the bottom, requiring him to start his labors again. And as they conclude their ninth year, the justices of the George Court can certainly relate to Sisyphus. They have never worked harder. With the sole exception of the Chief Justice, every justice on the court matched or broke a personal record for producing majority opinions in the past year. Their combined output of 127 opinions set a record for the George Court—and is the court's highest total output since 1988-89, the year the Lucas Court decided 55 death penalty cases.

Yet despite this hard work, the court is lagging in its ability to keep current with its caseload. There are currently 134 fully briefed cases awaiting oral argument, more than a year's supply. The boulder has rolled back down the hill, as many cases will have to wait up to one year from the time the briefs are in until the case is scheduled for argument, then wait another three months for a ruling.

According to Stephen R. Barnett, professor emeritus at UC Berkeley's Boalt Hall School of Law, the average time on the docket for all nondeath cases, from grant of review to opinion, is now 575 days—a 19 percent increase in just the past year. (See, *The Supremes, "Longer and Later,"* California Lawyer, April 2005.)

THE BOULDER'S ORIGINS

It's easy to identify the source of the problem. The court is seriously tackling the overwhelming backlog of undecided death penalty appeals, and it is struggling mightily to avoid the precipitous drop in grants of review for civil and nondeath criminal cases that followed in the wake of a similar effort by the Lucas Court a decade ago. It's a task fraught with grave risks. The greatest risk, of course, is judicial burnout. For judges who are asked to maintain this kind of pace year after year, the green pastures of retirement will have growing appeal.



There is also a risk of compromising the court's ability to quickly respond to the recurring crises of confusion that engulf our judicial system with increasing frequency. The confusion in the wake of the U.S. Supreme Court opinion in *Blakely v. Washington* (124 S. Ct. 2531 (2004)), provides a case in point. In sharp contrast with the U.S. Supreme Court, which responded within six months to resolve the federal crisis with a ruling in *United States v. Booker* (125 S. Ct. 738 (2005)), it was well over a year before the California Supreme Court could hear and decide *People v. Towne* (No. S125677) and *People v. Black* (No. S126182). Meanwhile, thousands of cases in the California courts languished as the opinions of the courts of appeal came out on both sides of nearly every issue, simply adding to the confusion.

The supreme court granted review but deferred ruling in 53 cases pending the rulings in *Black* and *Towne*. And in another 235 cases, the court denied review without prejudice to permit renewed consideration after *Black* and *Towne* are decided. It is unlikely these two cases will resolve all the questions about California's determinate-sentencing law posed by *Blakely*. And one can fairly ask why it takes the California Supreme Court twice as long to respond to a crisis than it takes the Supreme Court of the United States.

THE FULL HANDS OF JUSTICE

The explanation certainly is not that the justices of the California Supreme Court are lazy. The court has been deciding an average of about 100 cases a year, in contrast to the current U.S. Supreme Court docket of about 80 cases. The 127 cases produced this year represent 60 percent more decisions than the U.S. Supreme Court, with 22 percent fewer justices to do the work.

Also, to some extent, the workload of the California Supreme Court is dictated by a dysfunctional intermediate appellate structure. The U.S. Supreme Court must resolve conflicts arising among 13 intermediate appellate courts-including the D.C. and federal circuits. The California Supreme Court must resolve conflicts that arise among 19 fully independent intermediate appellate courts, which are not required to follow each other's precedents. Every division of the First, Second, and Fourth appellate districts regards itself as a fully independent court. Our supreme court's docket is increasingly filled with cases of statutory construction of little consequence but for the confusion rendered by conflicting appellate decisions.

Another significant cause of docket delay is the requirement of the California Constitution that justices of both the supreme court and the courts of appeal must issue their decisions within 90 days after a case is submitted, or have their salaries suspended. As a result, cases are not even put on the calendar for oral argument until a decision has virtually been reached. By contrast, the justices of the U.S. Supreme Court usually do not even discuss a case with one another until the oral argument takes place. In California, often the longest delays are inflicted on the cases that are the most difficult and contentious, where the preparation of the tentative ruling requires numerous drafts. One might think that this just shifts the delays to occur before oral argument rather than

after, but in reality it spreads the contentious jockeying to produce a majority opinion over a longer period of time. Occasionally, the tentative opinion cannot muster a majority, so the case must be reassigned to another justice. In the U.S. Supreme Court, the opinion writing is not assigned until the majority has been defined.

Finally, we have that enormous death penalty backlog in California, which operates as a constant drag on the docket. Every death penalty judgment in the state goes directly to the California Supreme Court, where it will be reviewed twice: once on direct appeal, and still another time on petition for state habeas corpus. The Lucas Court's effort to combine the two hearings was a disastrous failure. We currently have 646 inmates on death row, and 450 of them have yet to have their direct appeals decided. The supreme court has been making a concerted effort to move the death cases, increasing their average of 14 cases a year up to 30 last year. This increase may itself account for the increased delay for all the other cases on the docket. Death cases take an inordinate amount of time for opinion preparation. More than 60 of the fully briefed cases now awaiting argument are death cases-and the wait for them to be heard may be as long as two years.

TAKING SKIPS

Although the queue of fully briefed cases awaiting argument is growing longer, the court is free to move cases that call for faster disposition to the front of the line. That leap recently occurred with a trio of difficult scenarios that will require the court to sort out the parental rights and responsibilities of gay couples who split up. (*K.M. v. E.G.* (No. S125643) (ovum donor in a lesbian relationship did not qualify as a parent under the Uniform Parentage Act); *Elisa Maria B. v. Superior Court* (No. S125912) (children of same-sex couples are not entitled to child support from the nonbiological parent); *Kristine Renee H. v. Lisa Ann R.* (No. S126945) (when the biological parents are known, a biological stranger may not be named as a parent by a prebirth judgment).) The cases were not fully briefed until May 11 of this year, but the court moved them to the front of the line and scheduled them for oral argument on May 24.

GORILLAS IN THE MIDST

Then, of course, there's a pair of 900-pound gorillas knocking at the court's door. In *Knight v. Superior Court* (128 Cal. App. 4th 14), the Third District Court of Appeal affirmed the ruling of Sacramento Superior Court Judge Loren McMaster that California's new Domestic Partners Law (Cal. Fam. Code § 297.5) did not violate the Defense of Marriage Initiative barring recognition of same-sex marriage adopted in 2000 as Prop. 22. And in *Judicial Council Coordination Proceeding No. 4365* (March 14, 2005) San Francisco Superior Court Judge Richard Kramer issued a ruling that denying marriage licenses to gay couples violates the equal protection clause of the California Constitution.

The California Supreme Court neatly sidestepped these issues in *Lockyer v. City and County of San Francisco* (33 Cal. 4th 1055 (2004)), holding that the marriage licenses

issued to gay couples by San Francisco were void, but it explicitly reserved the substantive question of the constitutionality of California's statutory provisions limiting marriage to a union between a man and a woman.

The *Knight and Coordination Proceeding* cases present such closely intertwined issues that it makes good sense for the supreme court to hear them together-and quickly, rather than permit them to simmer on the back burner of the docket. The lives of thousands of California couples and children are on hold, awaiting the resolution. At the same time, these issues will in all likelihood divide the court and embroil it in controversy. Judge McMaster has already been targeted by the religious right for political retribution for his ruling in *Knight*. If Justice Brown's nomination for the U.S. Court of Appeals is approved, creating a vacancy on the state Supreme Court, Governor Schwarzenegger's first court appointment may become mired in a deeply divisive political showdown, because it could determine the ultimate outcome of these cases.

Thus, as they embark on their tenth year under the leadership of Chief Justice Ronald George, the justices of the California Supreme Court are facing what is likely to be their most challenging year so far: a docket brimming with politically divisive issues, a potential change in the composition of the court, and a growing problem of delay. As they struggle to roll the boulder up the hill once again, it will be heavier than ever.

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REVISITING PUBLICATION STANDARDS

In November 2004 Chief Justice Ronald George appointed an Advisory Committee to review existing standards for publishing opinions of the courts of appeal and recommend changes "to better assure publication of those opinions that may assist in the reasoned and orderly development of the law." Chaired by Associate Justice Kathryn M. Werdegar, the committee's report was due in June.

The current standards contained in Rule 976 of the California Rules of Court generally provide that an opinion may not be published unless it adds something to existing law, or modifies or criticizes it. Even if a decision meets these standards, the rule does not require its publication; it only permits it.

However, lots of court of appeal opinions that meet these standards are not being published. Currently, less than 7 percent of the opinions are published, down from 14 percent 20 years ago.

There is tremendous variation in the publication rates of different divisions of the court of appeal-currently ranging for civil cases from a high of 23 percent (Division 2 of the First District) to a low of 4 percent (Division 2 of the Second District). Cases are randomly assigned to the various divisions within a district to balance the caseloads, so it is hard to explain variations within the same district by anything other than the idiosyncrasies of a particular division. Division 2 of the Second District publishes 3 percent of all of its opinions, while Division 4 down the hall publishes 12 percent.

Variations among districts may be attributable to heavier caseloads in some districts. The annual rate of written dispositions per judge-both published and unpublished currently varies from 95 in the First District, where 9 percent of all opinions are published, to 166 in the Fifth District, where 4 percent of all opinions are published. But statewide, a 20 percent increase in written dispositions per judge in the past 20 years from 109 to 130-has been matched by a 50 percent drop in the publication rate.

It's hard to resist the conclusion that some rulings are not being published in order to insulate them from further review. Although the George Court has made some progress in subjecting unpublished opinions to greater scrutiny, and even on occasion grants hearings in unpublished cases, there is still a rough correspondence between low publication rates and high affirmance rates. The divisions in the First District with the highest affirmance rates are the three with the lowest publication rates (Divisions 1, 3, and 5). Much the same pattern occurs in the Second and Fourth Districts.

An embarrassing example of an unpublished opinion escaping scrutiny was exposed this year when the U.S. Supreme Court heard the case of *Tory v. Cochran*, in which the court of appeal upheld an injunction preventing a disgruntled former client from ever speaking about attorney Johnnie Cochran. The opinion was not published, even though it clearly met the standards of Rule 976. The California Supreme Court denied review. Yet the U.S. Supreme Court found the decision important enough to merit a grant of certiorari.

Apparently, the Advisory Committee will not directly address the simmering controversy over prohibiting citation to unpublished opinions. But the lack of any clear standard defining which opinions *should* be published, leaving publication up to the discretion of each division of the courts of appeal, adds fuel to the fire. Repeal of the prohibition against citing unpublished opinions would permit those opinions to be relied on for their persuasive force, but they would not be controlling precedents that a court would have to follow. The ultimate test of whether any opinion assists in "the reasoned and orderly development of the law" is whether other courts find it persuasive.

THE 4-3 SPLITS

The George Court registered the highest unanimity rate of its nine-year run this past year, with 95 unanimous opinions. Only 11 of the 127 opinions issued this year split the court 4 to 3.

Chief Justice Ronald George was in the majority of all but one of the splits. His most frequent companions were Justices Ming Chin and Carlos Moreno. Chin moved from a 92 percent rate of agreement with the Chief last year to a 96 percent rate this year. Moreno moved from a 95 percent rate to a 97 percent rate. Thus, the troika at the center of the court no longer includes Justice Kathryn Werdegar; she has been displaced by Justice Chin. This may simply mean the Chief Justice has shifted a little further to the right.

Disagreement rates were generally down across the board. The highest disagreement rates are now the 19 percent separating Justices Janice Brown and Joyce Kennard, and the 18 percent dividing Kennard and Justice Marvin Baxter. But these numbers are half of what they were just six or seven years ago.

A LOOK AT THE SPLITS

Venegas v. County of Los Angeles, 32 Cal. 4th 820

Does a county sheriff sued in state court for violation of civil rights under 42 U.S.C. § 1983 enjoy sovereign immunity as a state officer? **YES:** Chin, George, Baxter, Brown
NO: Kennard, Werdegar, Moreno

Garawan Farming, Inc. v. Kawamura, 33 Cal. 4th 1

Does a complaint alleging that a marketing order promulgated under the California Marketing Act that requires the state's plum growers to finance generic advertising of plums state a cause of action for violation of free speech rights under the First Amendment? **NO:** Moreno, George, Werdegar, Chin **YES:** Kennard, Brown, Ruvolo (sitting for Baxter)

Nolan v. City of Anaheim, 33 Cal. 4th 335

Must an Anaheim police officer seeking full disability retirement because of fear of retribution from fellow officers for blowing the whistle on use of excessive force show that he is incapacitated from performing the usual duties of a patrol officer not only for Anaheim but also for other California law enforcement agencies? **YES:** Brown, George, Chin, Moreno Yes, but: Baxter (burden can be met by showing general psychological incapacity) **No:** Kennard, Werdegar

Cassim v. Allstate Ins. Co., 33 Cal. 4th 780

Must the calculation of attorneys fees for tort recovery under *Brandt v. Superior Court* (37 Cal. 3d 813 (1985)) be apportioned for the attorney's work on a separate but intertwined contract claim? **YES:** Werdegar, George, Kennard, Moreno **NO:** Baxter, Brown, Sims (sitting for Chin)

People v. Robertson, 34 Cal. 4th 156

Can the felony of discharging a firearm in a grossly negligent manner support a conviction of second-degree murder based on the felony murder theory without violating the merger doctrine of *People v. Ireland* (70 Cal. 2d 522 (1969))? **YES:** George, Baxter, Chin, Moreno **NO:** Kennard, Werdegar, Brown

In re Marriage of Harris, 34 Cal. 4th 210

Does court-ordered grandparent visitation over the objection of a custodial parent implicate a constitutional right of the custodial parent? **NO:** Moreno, George, Kennard, Werdegar **YES:** Baxter, Chin, Brown

In re Aguilar, 34 Cal. 4th 386

Should an attorney who failed to notify the court that he had left a firm and would not appear for oral argument be held in contempt of court? **YES:** George, Baxter, Chin, Moreno **NO:** Kennard, Werdegar, Brown

Graham v. Daimler-Chrysler Corp., 34 Cal. 4th 553, and

Tipton-Whittingham v. City of Los Angeles, 34 Cal. 4th 604

May attorneys fees be awarded when the plaintiff has been the catalyst in bringing about the relief sought by litigation? **YES:** Moreno, George, Kennard, Werdegar **NO:** Chin, Baxter, Brown

American Fin. Serv. Ass'n v. City of Oakland, 34 Cal. 4th 1239

Was a city ordinance regulating predatory lending practices implicitly preempted by state legislation when the Legislature considered and rejected an express preemption clause? **YES:** Brown, Baxter, Werdegar, Chin **NO:** George, Kennard, Moreno

In re Dannenberg, 34 Cal. 4th 1061

Can the Board of Prison Terms deny parole to a person convicted of second degree murder based on the gravity of the offense without comparing the crime to others in the same category? **YES:** Baxter, George, Chin, Brown **NO:** Moreno, Kennard, Werdegar