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SPECIAL REPORT

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Analysis of the Supreme Court's Workload

Summary

This study reveals that the California Supreme Court currently is analyzing a substantially greater number of issues compared with the court during 1970–1986, albeit in fewer opinions. The primary conclusions are:

- Measuring productivity solely by counting opinions filed each year is inaccurate and misleading because the raw number of opinions does not reflect the number of issues analyzed by the court in a given year.
- An appropriate measure of the Supreme Court's productivity should include consideration of two factors often overlooked in simply counting the number of opinions: (i) the number of issues analyzed in the court's opinions (as measured by the number of "headnotes") and (ii) the court's discharge of its non-opinion responsibilities, e.g., deciding petitions for review and original writ applications.
- In an *average year* the court analyzes about 50 percent more legal issues than did the court in

1970–1986, and over 50 percent more legal issues than does the United States Supreme Court.

- An *average opinion in a capital case* analyzes over three times more issues than an average opinion in all other cases. The court resolves over four times more capital cases each year than the court resolved during 1970–1986.
- An *average opinion affirming a capital case* analyzes almost four times more issues than an average opinion in all other cases.
- During the past six years, the number of petitions for review resolved by the court has increased about 28 percent.
- For the past five years, the court has had the additional burden of deciding about ten times more habeas corpus petitions related to capital cases than during 1970–1986. Two of these matters consume as much time as at least one "average" noncapital opinion, but the court's disposition of these petitions is usually not reflected in the yearly number of filed opinions.
- Future studies of appellate court productivity should focus on factors beyond the raw number of "opinions filed."

A recent study by the Administrative Office of the Courts shows that, despite a continuing burden of capital cases and a significant increase in the number of filings, the Supreme Court's current productivity compares favorably to that of the court in prior periods.

In recent years, commentators have compared the annual opinion filings of the Supreme Court with the filings of the court in prior periods. Based on this single statistic, some have suggested that the court is presently less productive.

Other commentators have reached the opposite conclusion. Noted scholar and court observer Bernard E. Witkin, for example, recently asserted that the present

California Supreme Court is the "most efficient and well-run court in the history of this state."

In response to numerous inquiries regarding these disparate assertions, and as part of its ongoing studies of court efficiency, the Administrative Office of the Courts recently undertook this study of the court's work, focusing on two main questions: First, although some have used "opinions filed" data to measure the productivity of appellate courts, is this the best and most accurate measure of productivity, or are there other, more appropriate measures? Second, how does the productivity of the Supreme Court compare with that of the court in prior periods?

1. Defining the measure of the court's "productivity"

An appropriate measure of the California Supreme Court's productivity must focus on the court's proficiency in the performance of its constitutional functions. The court's primary constitutional function is to analyze and resolve legal issues in written opinions "with reasons stated." (Cal. Const., art. VI, § 14.) Toward this end, the court publishes its opinions in the *Official Reports*, which are used by the judicial, legislative and executive branches, the legal profession, the press, and the public to determine the basis of the court's decisions and to guide resolution of legal disputes.

In addition, the court performs various equally important constitutional functions that do not involve the production of written opinions. These secondary functions include, among others, (i) resolving "petitions for review," i.e., deciding which of thousands of lower court judgments the court should accept for review (Cal. Const., art. VI, § 12, subd. (b)), and (ii) resolving "original writ petitions," in which litigants seek an order from the court directing a lower court, agency, or other entity to act in a certain manner (Cal. Const., art. VI, § 10).

Counting the number of opinions published each year in order to gauge court "productivity" fails to measure the court's discharge of these primary and secondary constitutional responsibilities. The fact that there were, for example, 110 opinions filed in a given year reveals nothing about the complexity of those cases, or the number of issues ana-

lyzed in them.¹ Moreover, the court's decisions on whether to grant or deny petitions for review are rendered by order, not opinion, and its resolutions of original writ petitions (including habeas corpus petitions related to capital cases) seldom result in opinions. Accordingly, the work necessary to discharge those functions cannot be measured by counting opinions.

To accurately measure the court's "productivity," it is necessary to focus beyond the raw number of opinions filed and look at the court's performance of its primary and secondary constitutional functions. As explained below, there are objective measures of both functions.

Measuring the court's performance of its "primary function" (analyzing and resolving legal issues in written opinions)

By calculating the number of "headnotes" included in the court's published opinions, we can objectively measure the number of issues analyzed in each opinion and each year. (See sidebar, *What are "headnotes"?*) Kelvin L. Taylor, Editor in Chief of Bancroft-Whitney (publisher of the *Official Reports*), observes that since the late-1960s, editorial standards for identifying headnotes have remained constant, and the headnoting process has been subject to strict quality controls to ensure consistency. He concludes that the annual number of headnotes produced by the Bancroft-Whitney staff is an objective and proper measure of the Supreme Court's production.

What are "headnotes"?

Headnotes are a research tool created by publishers of court opinions, for the use of legal researchers. A brief overview illustrates the nature and purpose of headnotes, and their relevance in assessing the court's "productivity."

After an opinion of the California Supreme Court is filed and released to the public at the court's offices in San Francisco, the court's Reporter of Decisions sends the opinion by computer to Bancroft-Whitney, an independent publisher under contract with the State of California, which publishes the court's *Official Reports*.

Bancroft-Whitney's legal editors analyze each opinion, and flag each place in the opinion where the court analyzes a legal issue. The editors number these analyzed issues consecutively from the start of each opin-

ion, and then prepare a preface for each opinion that both lists the numbered headnotes and provides a short description of each analyzed issue.

According to Kelvin L. Taylor, Editor in Chief of Bancroft-Whitney, the guidelines under which Bancroft-Whitney designates and classifies headnotes have remained unchanged for more than two decades. Taylor explains that since the late-1960s, Bancroft-Whitney has employed strict quality controls to ensure that headnotes have been designated and classified consistently, and that "an increase in the number of headnotes produced by us would indicate that the court's output has risen, and a decrease would indicate that the court's output has fallen." Taylor concludes, "[T]he number of headnotes produced by our staff for any one year would be an accurate and objective gauge of the Supreme Court's production for that year"

Measuring the court's performance of its "secondary functions" (e.g., resolving petitions for review and original writ petitions)

The annual number of dispositions of petitions for review can be compared for various years of the court, as can the annual number of dispositions of original writ petitions (particularly, habeas corpus petitions related to capital cases). By these measures, it is possible to compare the court's present "petition workload" to that of the court in prior periods.

2. Performance of the court's "primary function" (analyzing legal issues in written opinions), 1970–1993

As Figure 1 shows, the average number of opinions filed each year during the period 1987–1993 decreased by 25 percent from the average number of opinions filed annually between 1970 and 1986.² At the same time, as Figure 2 shows, the court's performance of its primary constitutional function during 1987–1993 compared favorably with the court's record during 1970–1986. The average number of legal issues analyzed per year (measured by headnotes) increased by 50 percent from the average number of issues analyzed annually by the court between 1970 and 1986.³

Another way of looking at the court's performance is to consider the average number of legal issues analyzed in each opinion. As Figure 3 shows, an average opinion of the court during 1987–1993 analyzed twice as many legal issues as did an average opinion during 1970–1986.⁴

These findings are corroborated by a separate analysis of headnotes compiled by another legal publisher, West Publishing Company.⁵ Data from West's "unofficial" publication of the California Supreme Court's opinions show that the average number of headnotes per year and per opinion generally tracks the figures for headnotes found in the *Official Reports*.⁶ In addition, the West data show that during 1970–1993, the seven justices of the California Supreme Court consistently analyzed substantially more legal issues per opinion, and per year, than did the nine justices of the United States Supreme Court.⁷

What accounts for the differences in the frequency of headnotes? The variation appears attributable to three factors:

First, some of the disparity may be attributed to the *expanding scope and complexity of the law*, especially statutory law, which inevitably leads to an increase in the number of legal issues raised in, and therefore resolved by, the courts.⁸

Figure 1
Average Number of Opinions Per Year

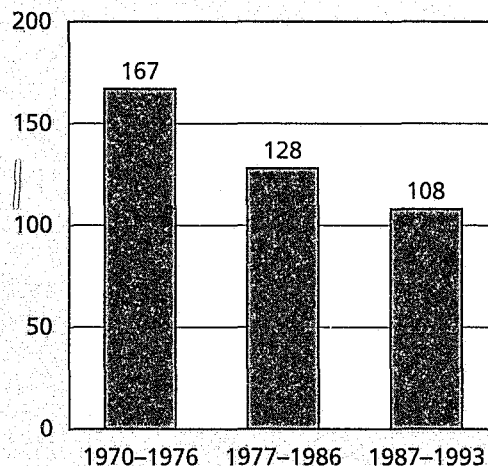


Figure 2
Average Number of Headnotes Per Year

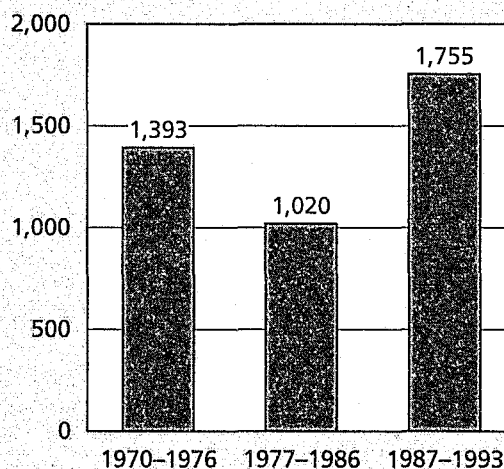
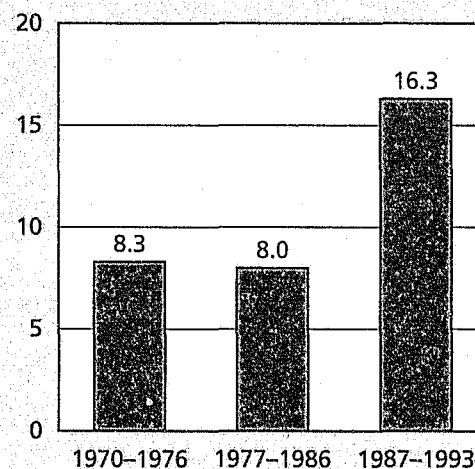


Figure 3
Average Number of Headnotes Per Opinion



Consequently, we might expect to see an incremental increase in the average number of issues analyzed by the California Supreme Court in each opinion, and in the average number of issues analyzed by that court each year.

Second, some of the disparity might be attributed to *streamlining of the court's "opinion versus order" practices* since the mid-1970s. In other words, the court today resolves by order matters (such as "grant and hold" cases and attorney disciplinary cases) that it previously resolved by opinion. (See *ante*, fn. 1.)

But the differences in the three periods of the court cannot be explained solely, or even predominantly, by these factors. Instead, the data show that a third factor is at work here: the *court's capital caseload*.

Under our state Constitution, death penalty cases are appealed directly from the trial courts to the Supreme Court, bypassing the Courts of Appeal. Since 1970, the Supreme Court's capital caseload has increased substantially, in both the number and the legal complexity of cases. Because capital appeals are automatic, the court has neither control over the number of capital appeals filed nor discretion over the number of issues it must resolve.⁹ Moreover, because capital appeals are taken directly to the state Supreme Court in these complex cases, the court does not obtain the benefit of a lower court's written opinion and analysis of the issues, and must conduct the entire, often time-consuming and cumbersome, appellate review process by itself. Transcripts in such cases typically range from 5,000 to 9,000 pages, and some contain as many as 90,000 pages.

The data illustrate the effect of capital cases on the court's annual production of written opinions, and on the "profile" of the court's opinions.

As Figure 4 shows, the average number of capital cases decided each year increased five times between 1970–1976 and 1987–1993. Correspondingly, the average number of "all other" cases decided each year during 1987–1993 dropped by half. Next, Figure 5 shows that the court's capital opinion caseload (the percentage of all opinions that were capital cases) increased almost eight times from 1970–1976 to 1987–1993. The figures show similar significant changes from the 1977–1986 period.

What accounts for the decrease in the court's annual production of "all other" opinions, and for the simultaneous, dramatic increase in the number of legal issues analyzed in the court's opinions? The data show that most of the disparity is attributable to the fact that capital cases generally, and capital affirmances in particular, consume a far greater amount of the court's time, and they typically require the court to analyze and resolve numerous complex and fact-specific issues.

Figure 4
Average Number of Opinions
(Capital and All Other Opinions)

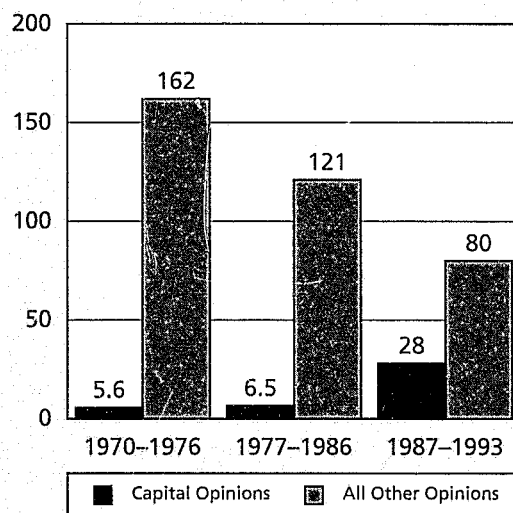


Figure 5
Proportions of Opinions and Headnotes Allocated
to Capital Cases

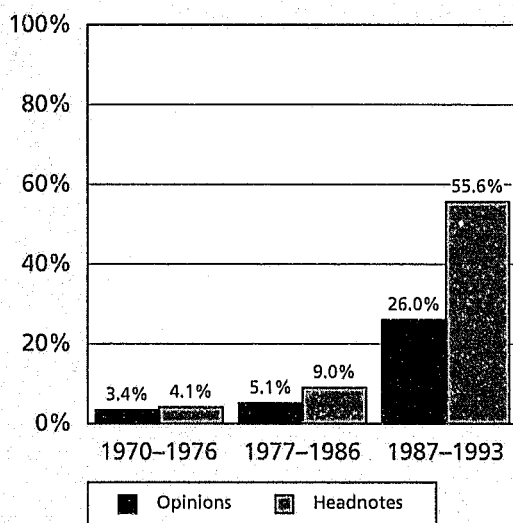


Figure 5 illustrates the general effect of capital cases on the court's analysis of legal issues. Capital cases accounted for about 3 percent of the court's opinions during 1970–1976, but those opinions contained about 4 percent of the court's headnotes. Capital cases accounted for 5 percent of the court's opinions during 1977–1986, but those opinions contained 9 percent of the court's headnotes. During the period 1987–1993 capital cases accounted for 26 percent of the court's opinions, but those opinions contained almost 56 percent of the court's headnotes.

Figure 6
Average Number of Headnotes Per Opinion
(Capital and All Other Opinions)

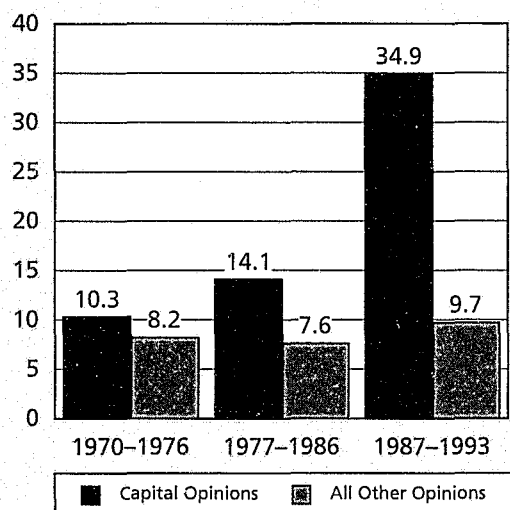


Figure 7
Percentage of Capital Opinions Affirmed

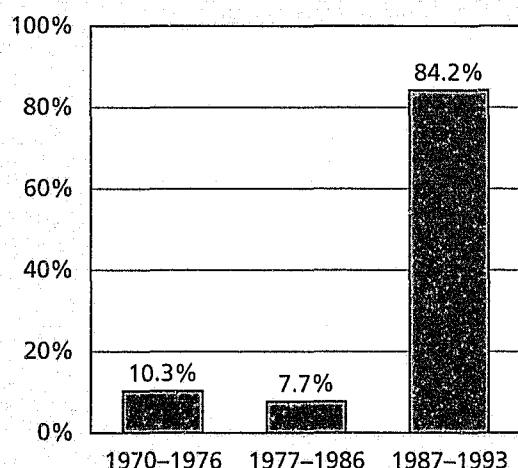


Figure 6 illustrates the allocation of headnotes between capital and all other opinions. During the 1970-1976 period, an average opinion in a capital case analyzed 25 percent more issues than did an average opinion in a noncapital case; during the 1977-1986 period, an average opinion in a capital case analyzed almost two times more issues than did an average opinion in a noncapital case; and during the 1987-1993 period, an average opinion in a capital case analyzed over three times more issues than did an average opinion in a noncapital case.

What accounts for this disparate allocation of headnotes between capital and noncapital opinions? The data show that the controlling factor is the court's capital case affirmance rate.

As Figure 7 reveals, the court during 1970-1976 and 1977-1986 affirmed only 10.3 and 7.7 percent, respectively, of its capital cases, whereas the court's affirmance rate during 1987-1993 was over 84 percent. These changes are significant because, as suggested above, capital cases as a class pose a great burden on the court, and capital affirmances in particular pose the greatest burden. The court may reverse a capital case by focusing on and analyzing the one or two critical issues that resolve the appeal. But when it affirms a capital case, it must analyze and resolve every issue raised by a defendant.

Figure 8 illustrates the disparate allocation of headnotes between capital *reversals* and *affirmances*. During the 1970-1976 period, opinions in capital affirmances analyzed over three times more issues than did opinions in capital reversals; during the 1977-1986 period, opinions in capital affirmances analyzed over two times more issues than did opinions in capital reversals; and during the 1987-1993 period, opinions in capital affirmances again analyzed over two times more issues than did opinions in capital reversals.¹⁰

The effect of capital appeals on the court's production is even more apparent when we compare the court's analysis of issues in capital affirmances with its analysis of issues in all other appeals. As Figure 9 shows, during the 1970-1976 period, the court's four capital affirmances analyzed on average over three and one-half times more issues than did all other opinions; during the 1977-1986 period,

Figure 8
Average Number of Headnotes Per Capital Opinion
(Affirmances and Reversals)

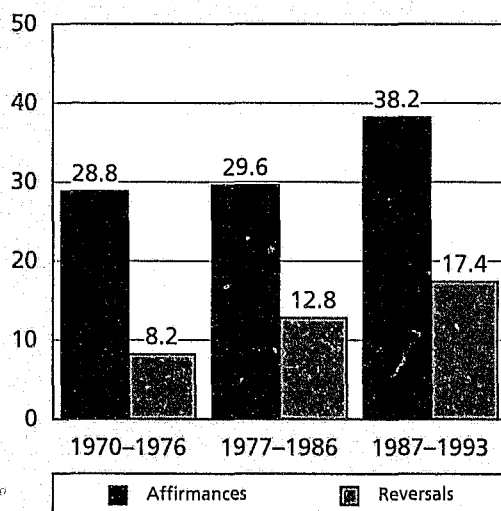
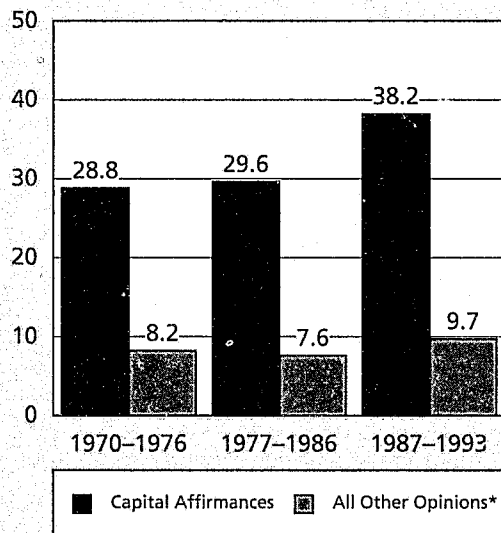


Figure 9
Average Number of Headnotes Per Opinion
(Capital Affirmances and All Other Opinions)



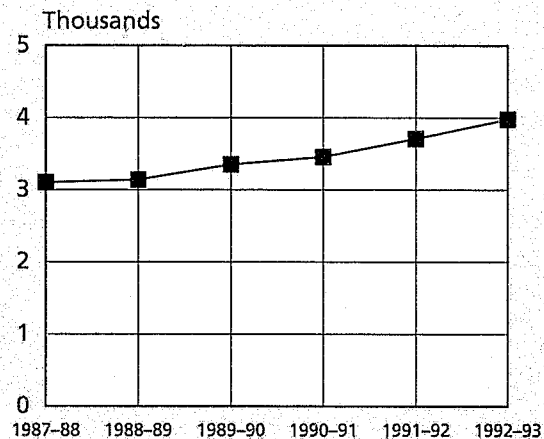
the court's five capital affirmances analyzed on average almost four times more issues than did all other opinions; and again, during the 1987-1993 period, the court's 165 capital affirmances analyzed on average almost four times more issues than did all other opinions.

3. Performance of the court's "secondary functions" (e.g., deciding petitions for review and resolving original writ petitions)

As noted above, the court's performance of its secondary functions is not reflected in the yearly number of filed opinions, because decisions on whether to grant or deny petitions for review are rendered by order and not opinion, and resolutions of original writ petitions, particularly habeas corpus petitions related to death penalty cases, seldom result in opinions.

The California judicial system is the largest in the nation — larger even than the federal judiciary. The California Supreme Court reviews the legal decisions of 88 Court of Appeal justices and over 1,550 trial judges. The annual number of filings with the California Supreme Court (i.e., petitions for review, original writ petitions, attorney disciplinary proceedings, and capital appeals) far exceeds that of any other state supreme court, and compares with that of the United States Supreme Court. Between fiscal years

Figure 10
Petitions for Review Disposed of in Fiscal Years
1987-88 through 1992-93



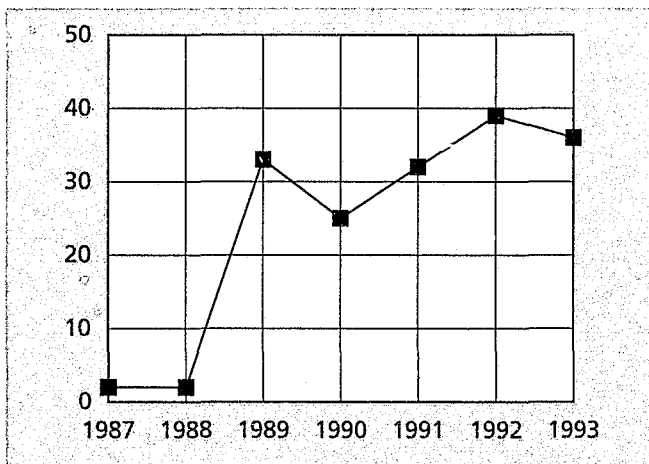
1987-1988 and 1992-1993, filings with the court increased over 25 percent from 4,653 to 5,828.

As Figure 10 shows, dispositions of petitions for review increased 28 percent during that same period, showing a substantial increase in the court's review burden.¹¹ Increases in the court's central staffs (which bear primary responsibility for preparing conference memoranda to assist the justices in deciding petitions for review) during that same period allowed the court to absorb much of that added burden, but the increased number of filings have had an adverse impact on the court's ability to perform its primary function.

As Figure 11 shows, there has been an even more dramatic increase in another area of the court's secondary functions, namely, dispositions of petitions for a writ of habeas corpus related to capital cases. Before 1989 the court resolved about two to three habeas corpus petitions related to capital cases each year. Beginning in 1989, however, the average number of annual dispositions of habeas corpus petitions related to capital cases has increased about 10 times.¹² There were on average 33 dispositions each year from 1989 to 1993.

According to court staff, these petitions typically contain hundreds of pages of briefing and, not infrequently, thousands of pages of exhibits. Each petition is assigned directly to a justice, who prepares for the court a comprehensive memorandum (averaging 34 typed pages, and addressing over 13 issues) that is, in essence, the equivalent of a draft opinion in an ordinary "review granted" case. Thereafter, other justices may prepare their own supplemental memoranda on the issues in the petition.

Figure 11
Habeas Corpus Petitions Related to Capital Cases
Disposed of in Calendar Years 1987 through 1993



Historically, in well over 90 percent of these matters, the court, after extended internal review, denies the petition and disposes of the matter by filing a short order.¹³ Because the court disposes of the vast majority of these matters without a written opinion, its performance of this crucial and resource-intensive function is not reflected in the yearly number of filed opinions.

Court staff estimate that the work needed to analyze and resolve any two of these death penalty habeas corpus petitions is equivalent to the work necessary to prepare an opinion in an "average" noncapital appeal. Accordingly, if the court's work on these petitions were counted in its annual opinion production, its cumulative yearly average would have been about 125 opinions each year for the years 1989 to 1993.

Conclusion

The data disclose that use of "opinions filed" statistics alone to measure the productivity of appellate courts provides an incomplete and at times misleading picture. That approach does not focus on the pertinent question: How well is the court performing its primary and secondary constitutional functions (i.e., analyzing legal issues and resolving petitions for review and writ petitions)? This report suggests a more comprehensive approach, using objective and independent headnote data, to measure the first function. The report further highlights the need to consider and measure the court's second function in order to assess the "hidden" productivity of an appellate court such as the California Supreme Court. The report's use of these measures discloses that the composition of the California

Supreme Court's workload has changed since the 1970s and mid-1980s, but its productivity has not diminished.

Specifically, the above figures show that compared with the court's productivity during prior periods (and compared with the productivity of the United States Supreme Court), the court is satisfactorily performing its primary constitutional function. The court is analyzing over 50 percent more issues each year and twice as many issues per case compared with the court during prior periods. It has accomplished this task despite the substantial increase in filings, and despite the fact that, in every year since 1989, the court has had the increased "uncounted" burden of deciding about 30 additional habeas corpus petitions related to capital appeals, which consume as much time as an additional 15 "average" noncapital appeals.

Finally, this report demonstrates the need for a more sophisticated approach to collecting data to analyze the workload of appellate courts. Focusing on the number of opinions alone illuminates only a small part of an appellate court's workload and productivity. This report suggests an approach that can be expanded upon and refined to better evaluate how appellate courts are performing their constitutional functions.

Notes

¹ In addition, comparing the annual number of opinions filed does not include necessary adjustments related to changes in the court's practices. The California courts' Reporter of Decisions, Edward Jessen, states: "During the 1970s, the Supreme Court filed numerous opinions in matters such as 'grant and hold' cases that would, under current practices, be resolved by order. Since the mid-1970s, however, the court has issued fewer memorandum opinions, and it now resolves all 'grant and hold' cases by order rather than opinion. Likewise, pursuant to statutory changes effective in 1992, the court now reviews and resolves the vast majority of attorney disciplinary matters by order rather than by opinion. Both of these changes have decreased somewhat the court's annual opinion count."

² This study confines its analysis to opinions filed during and since 1970 because Bancroft-Whitney's headnoting and typographical conventions before the late-1960s differed significantly, making comparison difficult.

³ Also during that time, the average number of pages published each year rose in similar proportion from 1970–1976 (2,327 pages per year) and 1977–1986 (2,122 pages per year), to 1987–1993 (3,249 pages per year). (Between 1970 and 1993 typographical specifications — i.e., the size of typeface, etc. — remained constant.)

⁴ During the three periods, the average number of pages published in each opinion rose proportionately, from 1970–1976 (13.9 pages per case), to 1977–1986 (16.6 pages per case), to 1987–1993 (30.2 pages per case).

⁵ In California, there are two publishers of State Supreme Court opinions. Bancroft-Whitney, as noted above, publishes the *Official Reports*. West Publishing Company publishes an independent, competing compilation of court opinions, entitled *California Reporter*.

⁶ The West data concerning the average number of headnotes per year and the average number of headnotes per opinion show: The court during 1970–1976 averaged 1,821 headnotes per year and 10.5 headnotes per opinion; the court during 1977–1986 averaged 1,240 headnotes per year and 9.7 headnotes per opinion; the court during 1987–1993 averaged 2,084 headnotes per year and 19.1 headnotes per opinion.

⁷ The West Publishing Company employs identical standards, and interchangeable legal editors, to identify headnotes in the opinions of the California and United States Supreme Courts. Accordingly, Edward Jessen, Reporter of Decisions, states, "The yearly production of headnotes of each court is a valid objective measure of (i) the number of legal issues analyzed each year in the respective courts' opinions, and (ii) the respective courts' production for that year." The West data show that between 1970 and 1993, the United States Supreme Court consistently averaged 1,350 headnotes per year, and 8.5 headnotes per opinion.

⁸ The number of California statutes has increased dramatically in the past two decades, as has the number of cases interpreting them. One set of *West's Annotated California Codes*, which comprised 122 volumes in 1972, today comprises 217 volumes, a 78 percent increase.

⁹ Although the United States Supreme Court reviews and decides selected issues in death penalty appeals, those cases constitute a small percentage of its annual decisions. Most significantly, the high court's review of those cases, unlike that of the California Supreme Court, is discretionary and issue-specific, meaning it typically analyzes only a few of the issues raised in a capital case, rather than the scores of issues

that our Supreme Court must resolve when it affirms a capital case on direct appeal from a trial court.

¹⁰ The increase in the number of headnotes in capital opinions decided by the court during 1987–1993 may be attributed to a jurisprudential difference between the most recent periods of the court. Review of the court's capital opinions reveals that the court's decisions during 1987–1993 reached and analyzed issues that previously may have been left unresolved, or reserved for resolution in subsequent cases.

¹¹ During the same period, the "difficulty" of these petitions — i.e., the number and complexity of legal issues raised — remained constant. (Petitions for review must be decided no later than 90 days after filing or the court loses jurisdiction over the cause.)

¹² The increase may be attributed to two factors. First, increasing numbers of capital appeal affirmances trigger increasing numbers of habeas corpus petitions in capital cases. Second, the court's "Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases," effective June 1989, encourage the prompt filing of habeas corpus petitions in capital cases.

¹³ In the other cases, the court orders further proceedings, after which it resolves the matter either by order or by opinion.

SPECIAL REPORT:

ANALYSIS OF THE SUPREME COURT'S WORKLOAD

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