State of the Judiciary
Chief Justice Rose E. Bird, California Supreme Court
Message to the California State Bar Meeting
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It is a pleasure to be here this afternoon. I would like to thank the Conference of Delegates for affording me this opportunity to share with you some thoughts about issues which judges, lawyers, and citizens of California will be facing during the coming year;

Our democratic form of government is blessed with a court system that is particularity well-designed to resolve the disputes that arise in a heterogeneous society. There is strength in the diversity of views found ln our society but that strength cannot be drawn upon unless conflicting views are moderated and balanced and excesses checked.

The courts hold a unique position among our democratic institutions. In a sense, they represent one of the last bastions of participatory democracy in our society. They stand as a symbol of the great strength of our representative form of government. The individual disputants go directly before a judge, or a jury to raise and resolve a specific issue. In no other context within our governmental system does an individual have the opportunity to take a problem directly to the decision-maker who represents the full force and power of that particular branch of government.

This direct interchange between the individual and the state is at the heart of the democratic process. As more barriers are raised between the litigant and the decision-maker, the participatory nature of the experience is diminished. We must protect this unique heritage and strive to preserve the values it represents.

The barriers to which I refer are in part the result of the increasingly complex society in which we live. However, I fear that to some extent these barriers are of the judiciary's own making. Our court system is an independent branch of government, and there is strength to be derived from that unity. But until we judges begin to see ourselves as part of an organic whole, that strength will be dissipated and wasted.

Sadly, our justice system is marred by fractionalization and segmentation at all levels. Judging is by its nature often a solitary and time-consuming task. Its demands tend to isolate judges from one another, even though they may serve on the same court. This isolation is intensified when judges are sitting at different levels and is sometimes characterized by feelings of elitism and of superiority over judges of "lower courts."

In turn, these antagonistic feelings have often Jed judges to take a competitive, rather than a cooperative, view of one another - an attitude which only further deepens the sense of isolation and fragmentation.

It is time for this cycle to stop. Our justice system is an interrelated. whole, and the more that judges In one part of the system understand how the other levels function, the more effective we will be meeting the complex realities of the society we serve. The judges at different levels of the

system have different but equally important roles to play.

There are many things that can be done to promote the spirit of cooperation of which I speak. And this spirit can be achieved without imposing any constraints on the power of judges to run their own courtrooms or to make local administrative decisions, which they are uniquely well situated to do.

An important step toward this sense of common judicial venture could be taken by providing state funding for our trial courts. This issue, though not a new one, was recently brought into sharp focus by the passage of proposition 13 and the availability of local funding for the trial courts. As you may know, California ranks last among all states in the percentage of trial court funding coming from the state. This year, local taxpayers will provide about $310 million for the trial courts support, compared to some $25 million from the state general fund.

Like all other county agencies, the trial courts currently must go before their county board of supervisors with their budget requests. However, unlike most other agencies, the courts' budget needs are largely dictated by their many constitutionally and statutorily mandated duties. Andy yet, at a time when the amount of county resources is uncertain, the competition for those resources is likely to become keener, and the courts will have no choice but to join the battle for limited funds.

This budget process puts the trial courts in an extremely difficult situation. On the intra-county level, justice, municipal, and superior courts are forced to vie for funds on the basis of their ability to produce revenue, fight crime, or cut caseloads. Between counties, there exists the possibility of unequal enforcement of state laws to the extent that some counties' courts are less successful than those in other counties in securing sufficient funds to perform their mandated duties.

Not only does such competition tend to isolate the trial courts and obscure their common goals, but it also tends to put them in an awkward posture in the citizens' eyes at a time of unprecedented public focus on the judiciary. For all of these reasons, it is clear that state funding of the trial courts is an idea whose time has come. It will bring to the trial courts a new sense that they form part of the interrelated entity that is the judicial branch.

At the same time, a mechanism must be built in to ensure against any lessening of the trial courts' local control over their own administration. Decentralization must be a key element in any concept of state funding. We must not make the mistake of building a monolith when we are trying to provide an organic environment in which diversity can thrive. In other governmental contexts, state funding has often been followed by greater centralization and increased bureaucracy. Such examples should provide us with fair warning.

Another issue of critical importance to an independent judiciary is how to maintain a court system which remains responsive to human needs. As I noted earlier, our courts are uniquely participatory forms for the resolution of disputes that arise from the diversity of views found in our society. As the society grows and changes, so do the number and types of disputes which the courts are called upon to settle. Techniques and procedures which worked well in the past may

be poorly suited to addressing a new generation of social conflict and tension.

The judicial system must be sensitive to these changes. While continuing to uphold the great constitutional framework which shapes our social fabric, the courts should encourage controlled experiments at both the trial and appellate levels to ensure the judiciary's ability to resolve today's disputes in a timely and effective fashion.

In the past few years, we have seen an increasing demand for judicial reform. We need to look carefully at a broad range of ideas. Any decisions that are made should include full participation by the judiciary, the legal profession, and the public since all will be affected and impacted by the ultimate determination.

The Judicial Council is presently participating in several significant projects intended to make the courts more responsive to our citizens' needs. For example, the Economical Litigation Project is now underway in Los Angeles and Fresno. This is a three-year experimental program which seeks to reduce the cost of litigation and to expedite civil case settlement through streamlined procedural requirements.

The rules of court for this project were developed by the Judicial Council and are under continual review by a special committee which I have appointed. The University of Southern California Law Center has been asked to conduct a multi-disciplinary study of the project to assist the Council in advising the Legislature on possible expansion of the program.

Another experimental project, this one in small claims courts, is in progress in three municipal court districts. This effort is designed to determine whether legal advisors, mediation referral services, and law clerks will help make the small claims system of greater service to those litigants who cannot afford lawyers or whose disputes are too small to make the employment of lawyers economically feasible. The Administrative Office of the Courts is working closely with the advisory committees on both the Small Claims and Economical Litigation Projects to help ensure their proper operation and evaluation.

These programs are representative of the sort of experimentation which should be encouraged at both the trial and appellate court levels. The members of the bench and bar need to be open to all possibilities and not foreclose certain approaches merely because they do not conform to conventional wisdom.

When I appointed two special committees to study trial court congestion and appellate practices and procedures, I urged the Judges, lawyers, and public members to solicit comments from a broad spectrum of the community. Both committees have held public hearings at which testimony was received from individuals who might not ordinarily have taken part in a discussion of judicial administration.

Such exchanges are a very healthy sign, and both committees have just completed reports which are interspersed with numerous comments from such non-traditional sources. For example, the views of 5,000 jurors in the Los Angeles area were solicited.

The importance of this widespread participation lies not so much in the specific suggestions made, significant though they may be, as in the openness of the process through which they are received.

In addition to openness, the experimentation which I am advocating should also be characterized by flexibility. The number of judges on a court, the size of the area it serves, the concentration of its population, the volume of its caseload, and various other factors all affect the court's operations. A procedural innovation that works well in the Los Angeles Municipal Court may be of little benefit in the Modoc Justice Court and vice-versa.

We should design our experiments to produce beneficial change, not uniform results. Here again, decentralization is the key to a court system which best serves the citizens who appear before it. Flexibility of this sort is well calculated to derive maximum advantage from the strengths of our pluralistic society.

At the same time, there is one area where more uniformity is greatly needed. That area is local rules of court. The present rules, different in almost every jurisdiction in the state, are truly a procedural crazy quilt. Instead of reflecting substantive differences between particular courts' judicial operations, they are often merely indicative of a lack of planning and coordination.

Distinctions without a difference have no place in these rules. We must restore some measure of predictability and efficiency to the lives of the steadily growing number of lawyers who appear before our courts in various judicial districts on a regular basis.

To work toward this goal, I have asked Ralph Gampell, the Administrative Director of the Courts to analyze and systematize the multitude of local rules in the hope of devising a uniform system. After several months of work, the staff of the Administrative Office of the Courts is preparing its initial report for discussion at an upcoming meeting of the Judicial Council.

Still another issue that tends to isolate our trial judges from each other and from the people who appear before them is the ever-growing caseload. As I noted earlier, the direct nature of the interchange between judge and citizen is a unique feature of our democratic system. However, as court workloads grow, the time and the care which a judge can give to an individual case are diminished.

The sense of participatory democracy that has characterized our courts in the past may well be destroyed as the contact between judge and citizen becomes a mechanized ritual rather than a personal exchange. The question thus becomes how to maintain that high level of craftsmanship for which California judges have been praised while coping with the volume of work.

In the late 19th and early 20th centuries, industry's answer to the demands for increased production was to move away from the craft approach toward an assembly line operation. Today, these methods are spreading into the courts. We must begin to seriously consider what consequences will result from the industrialization of a formerly individualized process.

If we force our judges to become mass production workers rather than craftsmen, I fear that our

citizens will inevitably lose respect for the process. An assembly line concept has no place in a judiciary whose members take pride in the quality and craft of their work.

In looking for ways to come to terms with an ever-increasing caseload, we must be careful that our answer does not bring efficiency at the expense of a fair hearing. We must look for ways to help our trial judges retain the strength of their individual craftsmanship. If there are disputes which can be avoided or resolved short of the full panoply of courtroom proceedings then we need to identify them. If there are experiments which can be devised to streamline present procedures and expedite the fair resolution of cases, then we should undertake them.

The task is a sensitive one, to be sure. The search for ways in which the trial courts can absorb the increased amount of civil litigation should be conducted energetically and creatively. But the proposed solutions must be cautiously designed so that the courts can continue to afford the protections of the Bill of Rights to those accused of criminal offenses or otherwise threatened with a deprivation of their civil liberties.

If this means that one of the solutions must be more judges, then as a society we should be willing to pay that price. The courts play a central role in keeping the social fabric intact, and our judges should be able to spend the time that is needed to bring their full skills to bear upon their duties. The peacemakers within a society should not be made into programmed robots who must simply process cases. That is not what justice is all about.

If we are to be successful in solving the problems which trial courts face, we must first call for the cooperation of those who would make judges the scapegoats for problems that society as a whole must face and attempt to resolve. Judges are no more the cause of crime than they are of dissolution of marriage or breach of contract. The fact that these matters are heard daily in our courts does suggest that judges can play an important part in seeking answers to the large social questions.

But the answers cannot be sought amidst an atmosphere of recrimination and acrimony. We must instead have a spirit of statesmanship, of cooperation, and openness to ideas if we are to progress at all. Our trial courts are too important an institution for us to allow glib critics to undermine their respect simply because they prove to be easy targets. The answers lie in cooperation, not in castigation.

Thus far, I have directed my remarks to the need for the judiciary to view itself as the third branch of government and for judges to see themselves as an integral part of that organic whole. State funding of the trial courts should help reinforce the judiciary's sense of common purpose. And creative experimentation will enable us to explore alternatives to increased bureaucratization and centralized in dealing with the problems posed by burgeoning caseloads.

Now I would like to speak to some of the issues confronting the appellate courts. Perhaps the greatest problem which the Supreme Court faces is one of identity – is it meant to be a court of last resort or a court of precedent? This problem finds its roots in the dual function of the appellate process.

Essentially, a reviewing court is upon to decide a case by determining or not error occurred below. But at the same time, the impact of its decisions on cases arising in the future must be considered. We are expected to render an opinion which provides guidance and predictability to lawyers and citizens who find themselves involved in situations similar to the case being decided.

This dual role becomes increasingly difficult to play as complex bodies of decisional law develop and as appellate caseloads increase. The pressure to move cases along and to render opinions militates against the deliberate care that is needed to foresee the full range of future ramifications.

At the same time, the desirability of creating such an unharried atmosphere produces a powerful incentive to devise methods of limiting the number of cases which an appellate court is required to receive and decide. The end result of these contradictory forces is a system where neither case-by-case justice nor predictability of result is best served.

The nonpublication rule lends itself to an application which may ultimately have some very deleterious effects on the process of appellate review. One of the most important duties of the California Supreme Court is to review the work of the Courts of Appeals to ensure that the districts are uniformly applying the law and following precedent.

Essentially, this task is performed through the Supreme Court's review of petitions for hearing. Each petition is assigned to one of the seven Justices, who reviews the record, prepares a briefing memorandum for the other Justices, and presents the matter at one of the Court's weekly conferences.

The process is extremely time-consuming, and with the number of petitions for hearing more than doubling during the ten-year period since 1966, a major portion of the Court's resources has had to be directed toward this task. The dilemma which is posed is immediately apparent. The greater the time spent on deciding whether or not to grant a hearing, the less time there is available for deciding those cases where hearings have been granted.

Of course, the court has no control over how many petitions are filed. However, a factor which can be controlled is the number of cases in which a hearing is granted. And yet, if the Supreme Court is confronted with a petition where the reviewing court has erred, it must take steps to ensure that the Court of Appeal opinion does not create confusion in decisional law.

In an effort to deal with this situation quickly and still fulfill its oversight function, the Supreme Court has come to rely increasingly on the nonpublication rule to decertify a published opinion with which the court does not agree in lieu of accepting the case for hearing.

This action poses a particularly difficult problem for the litigants, the Court of Appeal's Justice, and the trial judge, all of whom must rely on conjecture regarding the basis for the Court's decision to depublish since no explanation is given beyond the act of decertification.

Similarly, the Court of Appeal's decision not to publish an opinion in which the Supreme Court discerns possible error may often be accepted as a satisfactory alternative to granting a hearing, on the reasoning that the unpublished opinion cannot be cited as precedent.

When hearings are denied for these reasons, nothing is done to correct the injustice wrought upon the part who was adversely affected by the erroneous ruling of the Court of Appeal. These commentators who contend that the Supreme Court is strictly a court of precedent might not find fault with such result.

However, it must be difficult indeed for attorneys to explain to those whom they represent that the state's highest court may well have agreed that an injustice occurred but chose to afford them no remedy.

And it must be equally difficult for those lawyers to advise prospective clients that their chances of prevailing on appeal may depend more on whether the Court of Appeal opinions is unpublished than on whether past decisional law is favorable to their contentions.

By these remarks, I do not mean to suggest that the nonpublication rule is really a device to ease the Supreme Court's workload or that the Courts of Appeal are engaging in some concerted misuse of that rule. However, it is clear that depublication is a weak instrument by which to ensure that precedent is followed by the appellate courts of this state. Reliance on this technique ironically may result in neither of the two functions of the appellate process, justice, and predictability, being filled.

Those of us who serve on the Supreme Court must strive to do better than that. I am confident that we can devise methods to effectively ensure precedent is followed while at the same time correcting the injustices which are brought to our attention. Toward this end, I have appointed several lawyers and judges to a Special Committee for an Effective Publication Rule.

In selecting the 20 members of this committee, I purposely included individuals with a wide range of views on the subject, from those who support the present rule to those who would abolish it. My hope is that this dialogue will produce for the Judicial Council's consideration a proposal that effectively melds these diverse perspectives into an improved rule.

Judges must be sensitive to the fact that we are personally accountable for every action we take. Justice may be blind, but it must not become impersonal and anonymous. Our appellate courts must never be transformed into bureaucratic black boxes. Litigants and counsel should have the certainty of knowing that their voices are heard and their words are read by the members of those courts. For should our justices become inaccessible, so too will justice itself.

The trend in the courts of appeal toward using large, impersonal central staff as a means of moving the caseload along poses a potentially serious threat to accessibility. In effect, the recently graduated one-year law clerk is becoming the exception rather than the rule. Central staff functions may differ somewhat from one appellate court to another, but the potential for mischief in this bureaucratic structure remains the same – the lack of public accountability.

The point is neither that the central staff members are incompetent, nor that they should be eliminated. Rather, the point is that they are not the judges selected by the appointing power and elected by the people.

There are several steps which can be taken by our Courts of Appeal and the Supreme Court to help ensure the accountability and accessibility of which I speak. We need to establish a firm rule governing the outside employment of research attorneys, law clerks, and externs.

Externs, for example, should not be working for our appellate courts while continuing to clerk for law firms which have issues pending before those courts. Whether or not an actual conflict arises, the appearance of impropriety cannot be tolerated.

I personally favor a rule prohibiting all outside employment. The First District has adopted rules in this area, and I would urge all our appellate courts to give serious consideration to taking appropriate action.

Further, we need to guard against bureaucratization of the appellate process through the creation of permanent staff attorneys not directly accountable to individual justices. A large percentage of Court of Appeal decisions are written by the central staffs and issued as per curiam opinions. We need to modify this practice. Having judges sign the opinions rather than issue them as per curiam would lead to each justice taking direct responsibility for them.

We also need to consider whether there are not some real benefits to the appellate process from the continued use of one-year law clerks. These recent law school graduates bring with them a freshness of spirit, a skepticism toward assumptions, and an inquisitiveness of mind which tends to keep justices from treating even the most repetitive of issues as routine.

An additional benefit of using one-year clerks is their ability to remove some of the needless mystery from the appellate process as they go out into the legal community after their clerkship has ended.

The demystification of the process is crucial to maintaining a positive relationship between the appellate bench and the bar. In accessibility breeds contempt, and there is no reason for the internal operating rules of our appellate courts to be kept secret as long as the confidentiality of the decision-making process remains intact.

On the federal level, the Ninth Circuit has published a booklet of its internal rules, and I would urge our California courts to follow suit. At the Supreme Court, we are in the process of compiling in written form for the first time the body of rules which has developed over a number of years. The Court will then affirm or modify those rules, and I am hoping that the court will ultimately agree to their publication.

We also need to take steps to improve communication between members of the appellate beach and between that bench and the bar. Our Court of Appeal system, with districts located at great distances from each other, is not conducive to the discussion of common problems or the

exchange of ideas. Occasional appellate workshops and seminars have proved helpful but not sufficient.

Accordingly, I now meet regularly with the thirteen Presiding Justices so that we can conduct an ongoing dialogue regarding issues of common concern. It has been suggested that similar meetings between the justices and the bar should take place on a regular basis in each of the five districts.

When such meetings have been attempted in the past, I am told that the bar's interest was minimal. However accurate that may be, I sense that today many attorneys would welcome such an exchange, and I encourage both the Courts of Appeal and the bar to pursue this suggestion further.

In speaking of the many issues confronting the judicial system, I am well aware that the legal profession is not without some pressing issues of its own. Like judges, lawyers have been the subject of substantial public attention of late and have been cited with increasing frequency as the cause of many of the complex problems confronting our society. Because of their current high visibility, lawyers are easy targets.

It is not unusual for individuals under the stress of public attack and criticism to respond by ascribing to others the blame that Is being placed on them. Often, that blame is directed at other groups with whom one works closely. Thus the stage is set for the bar and the bench to engage in an acerbic debate over why the other is at fault for the problems of our legal system.

That is a debate which no one will win, I am confident that both judges and lawyers will decline the invitation to participate. They should instead be working together to improve the legal system.

We judges need the help of lawyers in determining how to make the decisional law more predictable. We need the suggestions of lawyers for experiments that will enable us to better handle the growing caseload. And we need the advice of lawyers in devising a better rule for the publication of appellate opinions.

Lawyers must also look to the future of their profession and give serious thought to what is happening to our young attorneys. It is a great waste for so many recent graduates to be unemployed at the same time that many poor and middle-class Americans are denied meaningful access to the legal system because they cannot afford legal services. In a country of our resources and resourcefulness, we surely must be able to develop a more effective system for delivering legal advice where it is needed.

In part, the solution to this problem lies in the training that is being provided in our law schools. The charge that many lawyers are incompetent in the trial setting has been repeated often in recent months. But is it any wonder that competency is being questioned when most lawyers learn their skills as advocates through trial and error in the courtroom? Perhaps we need to rethink some of the focus of the law school curriculum and the role of law schools in training their graduates to represent people in a competent fashion.

Clinical education is still looked on as second-class in many schools, but until it is given more serious consideration, those schools will not be producing first-class lawyers.

We find ourselves today at a unique time in the history of our judicial system. In the past, our courts were not in the public eye in the same way as were the legislative and executive branches. There was a certain aura about the judicial branch which insulated it from the degree of scrutiny brought to bear on other public institutions.

The inherent fragility of the judiciary was only vaguely perceived if at all. And yet, the courts have always been, by their very nature, the weakest of the three branches. They have no army to enforce their rulings. They have no treasury at their disposal. They have no power to enact statutes. Their authority depends directly upon the respect of the people. And in that respect, in turn, has always flowed from the integrity of the courts in ruling according to the law and independently of personal considerations.

Over the past two hundred years, our courts have been asked to resolve some of the most divisive issues that we as a people have faced – issues which go to the very heart of the Constitution and the Bill of Rights, issues which have been destined to have an enormous impact on the shape of this nation's future.

When the legislative and executive branches have been unable to resolve these issues, the judiciary has had to resolve them. The buck stopped here. Time and again, the courts have faced these fundamental questions squarely and have decided them with integrity.

However, in this last quarter of the 20th century, the judicial branch is being tested as never before. We live in an increasingly fractionalized society. Instead of perceiving the strength that lies in our differences, we more often perceive our differences strongly. The art of compromise, which once guided the legislative and executive branches in resolving tough issues, is no longer practiced with its former conviction and skill.

These two branches are well suited to fashioning the disparate views of partisan factions into a workable solution. The give and take of the legislative process is meant to relieve the tensions associated with an issue so that bottom lines can be discerned and reflected in the end result. And yet, more and more often, the divisive issues that formerly were resolved in the political arenas of the capitol building and the corner office are being passed along to the courts.

The courts have no choice but to deal with these issues as long as they are properly posed in the form of a case or controversy. However, the more the courts are asked to handle political issues, the more of their fragility is exposed, particularly at a time when the judiciary is being subjected to unprecedented public scrutiny. To some extent, the questioning of the courts is simply part of the increased attention that has been paid to all our institutions over the past years.

Although this scrutiny has come to the courts relatively late compared to the other branches, it is certainly a healthy exercise for our institutions to be demystified so that they may be judged on their own merits. As Justice William O. Douglas once remarked, "confidence based on

understanding is more enduring than confidence based on awe."

What concerns me, however, is that the focus of this questioning of the courts seems to be not on matters of substance but rather on points of prejudice and personal pique. A judge's integrity, fairness, temperament, and knowledge of the law are all pertinent areas for public inquiry. The people have every right to express their views on these matters and engage in public dialogue about them.

However, what is happening instead is that judges are being perceived as easy targets and are being portrayed in a manner calculated to create prejudice in the public mind and then play on it.

This technique has met with increasing success as ·the distinctions between the judiciary and the executive and legislative branches have blurred with the thrusting of more and more political issues on the courts. Those who attack for momentary political advantage have not hesitated to seize upon this opportunity. They would paint judges as politicians in black robes who make law while pretending to interpret it, as privileged elitists who are paid exceedingly well for doing little or no work, and as cunning opportunists who decide cases in whatever manner seems most in tune with their own self-interest.

In an earlier day, these attacks might have been harmless. But coming at a time when public scrutiny is intense and when the courts are weakened by an overload of political issues, they may lead to the erosion of our people's confidence in the courts and ultimately to the destruction of the judicial branch's authority.

History has taught us well that when emotions are stirred without thought to consequences and when individuals such as judges, who cannot respond in kind, are denigrated and publicly vilified, an entire system of government may be threatened.

If our courts lose their authority and their rulings are no longer respected, there will be no one left to resolve the divisive issues that can rip the social fabric apart. When the courts are destroyed, so too is the Bill of Rights. The courts are a safety valve without which no democratic society can survive.

As a people, we must understand these dangers, and we must appreciate the fragility of the judicial branch. The people deserve courts which act with integrity. In turn, our citizens must respect the limits which that integrity imposes upon the courts' actions.

Our judicial system is a good one, but it is certainly not perfect. We who are privileged to serve as judges are human and thus fallible. We must always be sensitive to that fact. But we must also be true to the oath of office which we took when we became judges and have the courage and integrity to uphold that oath each time we exercise our judgment. With the help and understanding of lawyers and citizens, we judges will never want for that courage as we strive to resolve. those continuing issues of principle from which our society draws its vitality and strength.