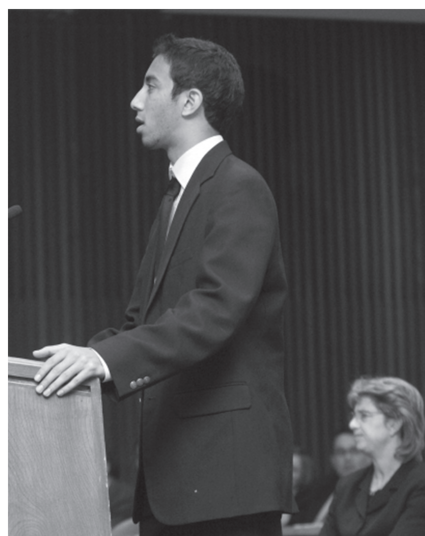
Special Session of the

Supreme Court

Berkeley, California

November 3, 2009

The Supreme Court in session at Berkeley Law School's Boalt Hall.
Photo: Jim Block



Berkeley Law School students Nikhil Vijaykar (left) and Kara Cook (right) ask the Supreme Court of California justices questions at the Berkley special sessioon on November 3, 2009.
Photos: Jim Block

SPECIAL SESSION OF THE SUPREME COURT
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The Supreme Court of California convened for a special session at the University of California, Berkeley, School of Law, Boalt Hall, Booth Auditorium, Berkeley, California on November 3, 2009.

Present: Chief Justice Ronald M. George, presiding, and Associate Justices Kennard, Baxter, Werdegar, Chin, Moreno, and Corrigan.

Officers present: Frederick K. Ohlrich, Clerk, and Gail Gray, Calendar Coordinator.

CHIEF JUSTICE GEORGE: Good morning, I am very pleased to welcome you to this special session of the California Supreme Court. This is the ninth consecutive year in which our court has engaged in a community outreach effort by holding oral arguments at a location other than its traditional venues of San Francisco, Sacramento, and Los Angeles.

I would like to begin by introducing my colleagues on the bench. They are seated in order of seniority, alternating between my right and left. On my immediate right is Justice Joyce Kennard; next to her is Justice Kathryn Werdegar, and to her right is Justice Carlos Moreno. To my immediate left is Justice Marvin Baxter; next to him is Justice Ming Chin, and to his left is Justice Carol Corrigan.

Also with us today is the court's very able Clerk/Administrator, Fritz Ohlrich, who, as is always the case, has been of invaluable assistance in facilitating this special oral argument session.

It is now my pleasure to introduce Christopher Edley, Jr., Dean of the Berkeley Law School. Since he arrived here in 2004 after more than two decades as a professor at Harvard Law School, he has been a strong proponent of preserving and enhancing Berkeley Law School's excellent academic

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Special session transcribed by Carol Gilbert.

reputation. He has also been recognized for his interest in focusing on multi-disciplinary exploration of the issues that affect our society. He has served in the administrations of two United States presidents in a variety of roles, and on numerous government committees and commissions charged with examining federal election reform, civil rights issues, and the ramifications of the No Child Left Behind Act.

I want to express the court's great appreciation to Dean Edley for his interest in the California Supreme Court and in our state's entire judicial branch, and for extending the invitation to hold today's oral argument session here at Berkeley Law. Our thanks also go to the professors, lawyers, law school staff, and students who have worked to make this a successful educational event.

I now would like to call upon Dean Edley to share his perspective on today's session.

DEAN EDLEY: Thank you, Mr. Chief Justice and members of the court. I want to express my deep appreciation personally and institutionally for your visiting this new venue. As far as we know, this is the first time that the court has sat at UC Berkeley and specifically at Boalt Hall. We very much believe that our teaching and research mission can be enhanced by working closely with the court, and we hope that, in return, our teaching and research can be of service to the court.

Let me say a word of thanks specifically to the three dozen students who, as members of the Board of Advocates, have worked to ensure the success of this day. The program of the Board of Advocates includes the McBaine moot court competition, the Bales Trial Competition, many regional and national appellate advocacy trial and alternative dispute resolution mechanisms, and provides extraordinarily effective and exciting opportunities for law students to get a sense of what it's like to practice before judges like yourselves.

I also want to advise all of the students at Boalt that we have an ambitious program of judicial externships, including a couple of externs working with this court itself. And I want to encourage all Boalt students to consider positions as judicial externs working in our state's courts.

Finally, just a word about what you do. I think it's often lost on Americans how extraordinary our institutions of justice are. The State Department has over 400 attorneys in Afghanistan. Now, why is that? It's because of a recognition

that peace, that development, that progress, whether in economics or in human rights, cannot come without an effective judiciary, an independent judiciary, a judiciary full of able individuals like yourselves.

The Chief Justice has been on a court of some sort probably longer than just about everybody in this room has been alive. I think he was appointed by the King of Spain.

CHIEF JUSTICE GEORGE: I'm feeling quite ancient.

DEAN EDLEY: I don't recall whether the king was a Democrat or Republican, but it was a brilliant appointment nonetheless.

What you do by reaching out to the public and demonstrating the workings of the court is an important way of reminding the public just how fortunate we are to have institutions such as this.

Let me close simply by saying bless this court and its members; bless all the people who work for it; bless all the people for whom it works. Thank you again.

CHIEF JUSTICE GEORGE: Thank you very much, Dean Edley. This is not the first collaboration between Berkeley Law and the California Supreme Court in the court's ongoing efforts to expand public knowledge and understanding about the judicial system and its role as one of the three branches of government. At the conference on the California Supreme Court hosted by the law school last year, panels composed of judges, faculty members, and lawyers engaged in discussions highlighting some of the challenges facing the courts and the numerous reforms and innovations they have undertaken to improve access and services for the public. Dean Edley and I each had an opportunity to deliver an address, and several of my colleagues participated as panel leaders.

In conjunction with the court's special oral argument sessions, including today's, briefs relating to the cases the court will be hearing have been posted online, along with synopses of the issues and descriptions of the operations of the California Supreme Court and the state's judicial system, so that these materials may be studied ahead of time. Students from local high schools are able to review the materials and discuss them, and then attend the court session or—often with a local judge or lawyer serving as a mentor—view the arguments in their classrooms on the California Channel, which today is again broadcasting the proceedings.

Lawyers recruited through the Alameda County Bar Association will be meeting with students afterwards to discuss the oral arguments they have seen. The Administrative Office of the Courts, the staff arm of the state's Judicial Council headed by Bill Vickrey, who is here today, the Director of the AOC, has notified teachers who have participated in the On My Honor program, which provides information concerning the courts and government, about today's session and will be sending them a packet of information to use in further sessions with their students.

Some persons may wonder whether law students will benefit from the special court session here, because they can be expected to understand the judicial system and how it operates. But much of legal education is directed at or based upon federal courts and federal precedent, and the functions and operations of the state courts often are afforded little attention. Perhaps this focus reflects the circumstance that the students attending national law schools, such as this one, can be expected to pursue careers in various parts of the United States.

But as I observed at your conference on the California Supreme Court last year, as much as 98 percent of the nation's legal disputes are resolved at the state court level. It is there that judicial decisions are made concerning issues such as whether a party to a contract is compensated for a breach of that agreement; whether an injured person is awarded a judgment for an injury caused by someone's negligence; what will be the financial and custodial consequences of a marital dissolution; whether a tenant can be lawfully evicted; or whether a defendant facing criminal charges will be found guilty and be sentenced to prison, or in some cases face the death penalty. The stakes in these cases may be very high, affecting the most fundamental aspects of an individual's life. Millions of Californians are affected each year by the cases brought in their courts. And the size of California's judiciary is double the size of the federal Article III judiciary nationwide.

The population served by the courts of our state has changed dramatically over the years. Presently, more than one hundred languages are translated in our state courts every year, literally ranging the gamut from A to Z—Albanian to Zapotec. More and more litigants appear without counsel, particularly in family law matters. In some areas of the state, the number of self-represented litigants in family law cases is more than 80 percent, a drastic change from the days when representation by a lawyer was not simply the norm, but was considered a necessity if a case were to proceed to court.

At the same time, society increasingly looks to the courts to solve often intractable problems. For example, in California our governmental system increasingly seems dominated by the initiative process. Courts frequently are placed in the position of determining the constitutional validity of these measures, or sorting out the intended meaning of poorly drafted provisions. Although judges cannot allow themselves to be concerned about how their exercise of this responsibility may affect their popularity in certain quarters, it is troubling that the role of the courts often is not fully understood, and a court's actions then may be interpreted through a political lens rather than as a reflection of its obligation to apply the law impartially by interpreting constitutional and statutory provisions and applying case precedent.

Courts often are also at the mercy of our sister branches of government in terms of the resources made available to us. Courts, of course, have no power to tax and our role in the annual ritual of creating a state budget (now more like a quarterly ritual) is essentially no more than an opportunity to persuade the Legislature and the Governor that our requests for funds are justified in light of our obligation to provide accessible justice to the public we serve.

This task is never easy, but this year it has been extraordinarily challenging—and the coming year may be even more difficult. The court system saw a $450 million decrease in its approximately $4 billion statewide budget.

We in the judicial branch have adopted a number of measures and strategies to absorb the reductions with the least adverse impact on the public's access to the courts. Probably the most dramatic step has been the Judicial Council's action closing all courts statewide—including this court—one day each month on the third Wednesday of every month.

The Judicial Council acted knowing all too well that litigants already encounter delays in the resolution of their claims and that services to assist self-represented clients, domestic violence victims, foster children, drug-dependent defendants, and others have been cut back or put on hold. The public at large also suffers when court services are curtailed. Yet our adoption of a statewide court closure plan was designed to ensure as much consistency and predictability as possible for the public's benefit, to avoid layoffs of valued court staff and more extensive court closures, and to recoup a substantial amount of savings from our security costs, which have been the largest and fastest growing part of the judicial branch budget.

Despite the difficult current economic conditions faced by the judicial branch and all segments of our state and local government structure, as well as by most individuals and entities in the private sector, the California courts continue to engage in innovative programs designed to increase the public's access to justice. A few examples include a self-help Web site, as well as self-help centers offering assistance to unrepresented litigants—a standard feature in almost every court facility—and some of these sites are translated into foreign languages. And special courts dealing with drug abuse, domestic violence, and juvenile mental health problems work collaboratively with local agencies to help defendants deal with the issues that put them in violation of the law, and to help them avoid future encounters with the criminal justice system.

The state judicial branch, in short, is a vital, energetic, and very creative place. Perhaps that is why so many Berkeley Law School alumni have gone on to careers on the state court bench. Several former Chief Justices and associate justices of our court are graduates. Berkeley Law School graduates have served with distinction at every level of state and federal court in California. The first woman appointed to California's Court of Appeal, Annette Abbott Adams, was a Berkeley Law School graduate, and served as Presiding Justice of the Third Appellate District from 1942 to 1952. In 1950, sitting on a case by assignment, she became the first woman to serve on the California Supreme Court.

The seven justices of our court hope that today's court session will help all of you obtain a better understanding of California's judicial system—of the rule of law that protects us all, serving as the cornerstone of our democratic system of government. Perhaps one day, some of the students listening today, whether here at the law school or through a broadcast, will be at the counsel table, prepared to advance the development and understanding of the law. And some of you may be in our seats. I certainly hope so. California's judicial branch is in an extraordinary period of innovation and challenge. Your understanding of California's judicial system and your support of its efforts to improve the public's access to justice will be vital to the success of our efforts.

Thank you once again for inviting us and for making today's special session possible. I hope that these proceedings will serve to encourage all of you to learn more about the administration of justice in California and our nation.

The court will now entertain questions from Berkeley Law School students present in this auditorium before proceeding with oral argument in the first case. We invite the first question at this time.

MS. MEHLMAN: Good morning, Mr. Chief Justice and associate justices of the court. My name is Julia Mehlman. I'm a first year law student. You spoke to this briefly in your opening remarks, but I would like to ask, how has California's budget crisis affected the courts?

CHIEF JUSTICE GEORGE: The California judicial system has to do its part, as all parts of government do, in helping us get through this crisis. And, unfortunately, as I mentioned in my remarks, we've had to sustain more than 10 percent by way of cuts in our budget. We don't want to have a general decline in the level of justice that is conferred around the state. We don't want to have specific programs like counsel for dependency children, or drug court funding, or domestic violence measures eliminated. And that's what happened when the court had a similar, although not as severe, crisis a few years ago. So we decided that a statewide approach was necessary, and therefore we decided that, with some irony, closing the courts one day a month was the best way to preserve the public's access.

But we have many vital efforts, including the development of our case management system and, literally, billions of dollars of courthouse construction that's been authorized that some say, well, we should grab those funds and eliminate these long-term projects because of the difficult economic times. And we are strongly resisting those efforts. That would be very shortsighted. We need to build up the judicial branch in every way, qualitatively and quantitatively, and keep those programs going because they all are critical to our function of delivering accessible justice to the people of the state whom we serve. Thank you for your question.

MS. MEHLMAN: Thank you.

MR. ROSENFELD: Good morning, Mr. Chief Justice and associate justices of the California Supreme Court. My name is Josh Rosenfeld, and I am a third year law student. My question is, given our constitutional structure, do courts have a legitimate countermajoritarian role?

CHIEF JUSTICE GEORGE: Justice Kennard would be pleased to respond to your question.

JUSTICE KENNARD: I'll try to. The answer depends on what one means by a countermajoritarian role. As a preliminary matter, it is important to note that it is not the role of the court to question or second-guess the wisdom

of certain laws enacted by the Legislature or the electorate. Courts have no authority to override the will of the majority simply because of a difference of opinion pertaining to questions of public policy.

But courts do have authority to determine the validity of legislation. For instance, the court may decide that a statute is invalid and unenforceable because required procedures were not followed in the enactment or because the statute conflicts with either the state or the federal Constitution. In particular, under the equal protection guarantees of both the state and the federal Constitutions, courts are obligated to invalidate statutes that selectively deny a fundamental right or freedom to persons in an unpopular minority group.

In these situations, it can be said that courts are acting contrary to the will of the majority of legislators or voters who enacted the particular statute. But it is equally true that when a court invalidates a statute on constitutional grounds, the court is enforcing the enduring will of the majority as embodied in the state and federal Constitutions.

CHIEF JUSTICE GEORGE: Thank you for your question and response, Justice Kennard.

MR. PALLEY: Mr. Chief Justice and associate justices of the Supreme Court, my name is Miles Palley, and I'm a first year law student. Does sympathy or compassion have a legitimate role in analyzing the legal merits of a case before you? And if you do have sympathetic or disapproving reactions to a party before you, how do you temper that reaction in your decision?

CHIEF JUSTICE GEORGE: Justice Baxter will respond to your question.

JUSTICE BAXTER: Thank you, Miles. Sometimes it's only human to feel sympathy or disapproval toward a party in a case. We're not robots. We're human beings. But this is a broad topic so we really need to break it down.

If we're talking specifically about feelings of personal sympathy or disdain toward a party, then we, as appellate judges, should never allow those types of personal feelings to interfere with our responsibility to identify and apply the appropriate legal principles in a case. And on this score, our judicial system is already well-equipped to temper whatever personal reactions we may have by imposing familiar standards of appellate review, such as the abuse of discretion,

substantial evidence and harmless error standards. Our system helps to ensure that verdicts and judgments are not overturned based on personal feelings of sympathy or disapproval.

Although our personal feelings toward the parties are irrelevant, we can and do look to the circumstances that land the parties in our court. As an example, in selecting cases for review we focus primarily on whether a matter presents a significant or unsettled legal issue. But we'll also carefully consider whether to grant review and take a closer look in cases subjecting a party to a particularly harsh or onerous result.

When we grant review, the particular circumstances in a case are often very important to how we decide it. For instance, a case might involve a highly questionable result in the application of a statute. And as Justice Kennard just indicated, although we're not at liberty to second-guess the Legislature's public policy reasons for enacting a statute, we are obligated to ensure its proper interpretation and application. So when statutory language is ambiguous and fairly susceptible of two constructions, we'll assume the Legislature meant to enact provisions that are reasonable, fair, and harmonious with the statute's underlying purpose and will reject the construction that would lead to absurd consequences the Legislature couldn't have possibly intended.

Alternatively, when a common law doctrine is before us and there is no legislative intent to consult, we do have more latitude to exercise our judgment in shaping the law's development. In these types of cases, we'll still keep our personal feelings toward the parties out of our legal analysis, but we may properly consider whether justice would be served by modifying or extending the common law doctrine to take into account the type of circumstances that are presented in the case before us. Thank you.

MR. PALLEY: Thank you.

CHIEF JUSTICE GEORGE: Thank you.

MS. AMERIKANER: Good morning, Mr. Chief Justice and associate justices. My name is Ary Amerikaner. I'm a first year law student. And my question is a simple one: I wanted to know if you could talk a little bit about how you choose cases to hear.

CHIEF JUSTICE GEORGE: Justice Werdegar will respond to your question.

JUSTICE WERDEGAR: Thank you, Ary. As your question implied, we do have discretion as to what cases to grant review, except with death penalty judgments. Those cases come automatically to our court. We meet every Wednesday morning in conference to vote on whether to grant or deny the petitions for review that come our way. And over a year's period, we might have from 5,000 to 7,000 petitions for review of which we grant only 4 or 5 percent.

In making the decision as to what cases to grant review, we're guided by a rule of court which provides that we may review a Court of Appeal decision when necessary to secure uniformity of decision or to settle an important question of law. So if the Courts of Appeal are in conflict, they need our guidance and we will grant review. Or, if they're not in conflict, if the issue hasn't really come before many of them but it's a question of statewide importance such as the validity of an initiative, which we never are keen on having to decide, but that is the kind of question that we will grant review to hear. And I think as you follow through the cases that we've granted today, you'll see that they are questions of statewide importance that require the guidance of this court. Thank you.

CHIEF JUSTICE GEORGE: Thank you.

MR. RAPORE: Mr. Chief Justice and associate justices of the Supreme Court, my name is James Rapore, and I'm a second year law student. I'd like to ask, do you think state judges should be appointed for life terms in a similar manner to federal judges in order to insulate them from political tension surrounding their decisions?

CHIEF JUSTICE GEORGE: Justice Chin will respond to your question. He heads a commission that we have appointed to study questions such as that, the Commission for Impartial Courts. He's our resident expert on that.

JUSTICE CHIN: Thank you, James. That's an excellent question. The short answer is yes. But we live in the real world. I'm not saying yes just because I'll be on the ballot next year along with the Chief Justice and Justice Moreno, but when you see the names Chin, George, and Moreno on the ballot, please vote yes.

We have a hybrid system here in California. It's called the retention system. It's yes or no. There is no opposition. This is certainly better than those states that have contested party elections for supreme court justices. In many of the elections across the country in recent years they have broken records on fundraising. And the supreme court elections in many states now surpass fundraising for either the gubernatorial seat or the senatorial seat. I think this is the wrong path. I think the system that we have in California is a better system.

A long time ago, the people of California decided that they wanted some say in whether or not judges should be retained in their seats. The Commonwealth Club of California, an organization that I was involved in many years ago, was instrumental in settling on the retention system because they knew that lifetime appointments were not going to be a possibility in their lifetimes. I think that was in the 1920's. So I think the retention system is a good one.

But the system can only continue to work well if the voters really understand what a judge's job is really all about. And Justice Kennard outlined for you some of the considerations that we take into account. A judge's job isn't to be popular. We can't make the law reflect our own personal view, our own personal opinions. A judge's job is to figure out as objectively and impartially as possible what the law says according to what the people who passed it said or what the Legislature that passed the statute said.

In my personal view, when deciding whether to retain particular judges, voters should rate judges on how well they do this job, not by whether or not they agree or disagree with particular decisions.

So I think the answer to your question is that we have a pretty good system here in California. As a matter of fact, the Commission for Impartial Courts that the Chief Justice alluded to did not recommend a sweeping change, that is, wipe out all judicial elections. We do want to, however, remove as much politics as we can from judicial elections. Thank you.

CHIEF JUSTICE GEORGE: Thank you.

MR. NEFF: Good morning, Mr. Chief Justice and associate justices of the court. My name is Eric Neff, and I'm a first year law student. I would like to ask, what are the processes and factors by which you choose your clerks?

CHIEF JUSTICE GEORGE: Justice Moreno will give you a full account of that.

JUSTICE MORENO: Thank you, Chief, and thank you, Eric. Unlike the federal system, where I served for four years with lifetime tenure, the state judicial system does not have term clerks. All of the staff attorneys who assist the various chambers are career attorneys who serve for indefinite terms. I have five career attorneys who assist me, one of whom, by the way, happens to be a UC Berkeley graduate. There's very little attrition among those staff positions.

There are a handful of term positions, I believe, in our central criminal staff of attorneys. But with the budget freeze and other concerns, I think whether or not openings in that particular unit are available is certainly open to question.

I do, and a number of my colleagues also do, hire or take on a number of externs throughout the year, and particularly during the summer. And I think we really consider—in picking from the vast number of very qualified applicants—writing sample, grades, and research and writing courses. We also consider recommendations from your law professors. I think I give those a great deal of weight. Essentially, we look for diversity of experience, students who have an interest in—at least my perspective—an interest in public service and an interest in litigation.

Applications are generally submitted anywhere from four to five months before the hiring or starting term. I look for students who have a love for research and writing and, certainly, a curiosity about the law. So I would encourage the students in the audience to consider applying for an externship either with our court or with any of the other appellate courts, or with the federal courts, for that matter, which also use externs.

The competition for law clerk positions, generally, particularly in the federal system, as you know, is highly, highly competitive. And I think a good introduction to any court, and perhaps easier to enter, would be through an externship program. Thank you.

CHIEF JUSTICE GEORGE: Thank you.

MS. CAMACHO: Good morning, Mr. Chief Justice and associate justices of the Supreme Court. My name is Toni Camacho, and I'm a second year law student here at Boalt. I would like to ask, I have often heard that the court's

opinions are drafted well before oral arguments, and I was wondering to what extent that these opinions change in substance after oral arguments, and how true is this for your court?

CHIEF JUSTICE GEORGE: Justice Corrigan will respond.

JUSTICE CORRIGAN: That is true, and it does seem kind of counterintuitive, doesn't it? But the reality is that we have found all the effort that goes into our preparation for a day like today really is time very well spent. So once the case is assigned to a given justice by the Chief Justice, then we look at everything. As you would expect, we look at the record in terms of what happened below; we look at the arguments and the briefing that were made below; we read the opinion that was written by the Court of Appeal below and look at the briefing from there; and we then look, of course, at the briefing that's presented on the specific questions that we take the case to resolve.

And after all of that happens in the chambers of one of the justices, then that assigned justice prepares what we call a calendar memo. That calendar memo gets circulated to all the other chambers, and each of the justices and their staffs review all of the record all over again in light of the calendar memo that has been prepared by the authoring justice.

All of this helps really focus and refine our thinking so that by the time we show up for oral argument, we really have not a fixed idea necessarily of how the opinion ought to come out, but we can be pretty confident that we've asked all the right questions and that we've looked behind the arguments that are made in the briefing to make sure that there is not another take that is not being really focused on.

So we hope that we come to oral argument with focused and sharpened thinking. And we really do want to engage the advocates in turning this case around and looking at all the facets of it to make sure that, ultimately, when we write an opinion that's going to go in the books and, hopefully, help sharpen the legal approach to these kind of questions in the future, that we've looked at everything and we've kind of test-driven the calendar memo so that we can invite the advocates to take a look at what our current thinking is to see whether or not we're missing something or there's a different approach that ought to be taken. So the time for us to really have the last, best chance to look at it is at oral argument. And that leads to the conclusion that is often voiced, that it's hard to win a case at oral argument, but it's easy to lose it.

So I hope that doesn't intimidate any of the advocates today. But that's the kind of the process we follow.

MS. CAMACHO: Thank you.

CHIEF JUSTICE GEORGE: Thank you.

MS. ROSE: Mr. Chief Justice and associate justices, good morning. My name is Cora Rose, and I'm a first year law student. And I'd like to know how it is chosen who will be the author of these opinions.

CHIEF JUSTICE GEORGE: On our court, the Chief Justice assigns the opinions on a tentative basis, obviously, because the person assigned the case has to be able to muster, again, four or more votes for his or her position. But this does differ from the practice in the United States Supreme Court in granting certiorari where, by the way, one less than the majority, four out of nine, can grant review.

In the United States Supreme Court, if the Chief Justice does not vote to grant certiorari or review, that task of assigning the case falls to the senior associate justice among those who voted to grant review. But in our court, it's always the Chief Justice who performs that function, whether or not he or she voted to grant review. And we also have a practice of the case being assigned only to a justice who was among those who voted to grant review, not one of those who did not.

Now, I'll let you in on a little secret that really has been ignored by most observers of the court. Once in a while, if somebody were astute enough to look at the minute orders in terms of who voted to grant review and who was the author of the opinion, you would see that the author of the majority opinion was not among those who voted to grant review, which seems to run contrary to what I just described to you. But that would probably reflect the circumstance that the person initially assigned the case was unable to muster four or more votes and had to give the case up, choosing not to accommodate the majority, and then somebody started from scratch who may not have been among those who voted to grant review, and inherited the case. So that's a little bit of inside baseball, so to speak.

I would also indicate that in performing the function of assigning cases, I try first and foremost to make sure that everybody has as near as possible

an equal workload. Also, of course, tying into that are the number of death penalty cases, which, as Justice Werdegar explained, are not assigned by way of granting review and they're not assigned by me. They just are assigned on a rotational basis as they come into the clerk's office, and that sort of evens things out among the quantity.

But also I try to give some variety in subject matter so that one person doesn't either willingly or unwillingly become the resident expert on some particularly onerous or exotic area of the law. So that's another factor. And also, sometimes it appears either from a justice's past votes on other cases or from the discussions at the time we granted review in the case, that he or she may not be able—even though voting to grant review—to garner a majority because of certain views that are expressed concerning the case right then and there.

So this is where there's a bit more art than science. I try to at least avoid situations where, from preliminary indications, which, of course, can change later, it might appear that a justice, although in favor of granting review, might be unlikely to garner a majority. Because when that happens, further down the process, months later, that justice will have to decide whether or not to change his or her views to accommodate a contrary majority or, instead, give up the case, in which event I have to reassign the case and the process starts all over again, which is sometimes why a case in our court may take longer than the average.

So I would share those thoughts with you, and also just add that sometimes, although the memos analyzing cases up for petition for review are prepared by our central staff, sometimes the justices weigh in, have a different perspective or a strong point of view that they wish to add to what's presented to us through the memos that we get from our central staff. They do an excellent job, by the way, of analyzing what's about 10,000 petitions a year. And sometimes when a justice has made a contribution to our review of whether review should be granted and has expressed himself or herself in a separate memo, I would take that into consideration and be more likely to assign the case to that justice. So that's sort of an overview. Thank you.

MS. ROSE: Thank you.

MR. FRAM: Good morning, Mr. Chief Justice and associate justices of the Supreme Court. My name is Nicholas Fram, and I'm a first year law student. And like many of my peers, I am investigating different career options, and

I was wondering what advice you have for myself and similarly situated law students as to the avenues to pursue in and immediately following law school.

CHIEF JUSTICE GEORGE: Justice Kennard will respond to your question.

JUSTICE KENNARD: There are several parts to your question so it may take me a little bit longer to come up with an answer. I entered law school not for the purpose of practicing law, but with the hope that a law degree would give me a more competitive edge in landing a job in public administration, the field in which I was pursuing a master's degree while in law school. Well, things, obviously, didn't go as planned. A little background information may explain this.

Let's go backward in time to roughly the late 1960's. While doing four years of college in three, I was working at least 20 hours a week for an attorney. As I was my sole financial support, I really needed the job. My boss told me that my plan of getting a graduate degree in German was all fine but, he pointed out, Joyce, once you graduate with that graduate degree in German, what are you going to do? In the current job market, there really is no great demand for anyone with a graduate degree in German. And I think he said that I would still be working as a secretary. My boss encouraged me to go to law school.

I thought about what he had told me, and I thought he does have a point that a law degree would be more useful than a graduate degree in German. I had no desire, however, to be a lawyer. But I was intrigued by the dual degree program in law and in public administration that was being offered at USC. The thought of working not as a lawyer, but as a public administrator, appealed to me. So I applied and, luckily, got accepted.

But after graduating, I did not find a single ad in the Los Angeles Times looking for someone with a graduate degree in public administration. In the meantime, I was working as a secretary at a temp agency. Then someone told me that the criminal division of the state Attorney General's office was hiring recent law school graduates. I was desperate for a job, any job, even a job as a lawyer. I applied and got hired and I fell in love with appellate practice. So it was fate that got me to practice law.

As to you, Nicholas, don't worry that as a first year law student you are not sure what you want to do after law school. Two years or so from now, you may have a better idea of what career you would like to pursue. Right now, give

your law studies your all. Be grateful that you got accepted by an excellent law school, and your law degree will be a valuable asset irrespective of your career path.

In the meantime, work hard, very hard, at your law studies. Don't forget to nurture your friendships. And go after your dreams, even the impossible ones. To quote a favorite line of mine by the poet Langston Hughes, "Hold fast to dreams. For if dreams die, life is a broken-winged bird that cannot fly." Nicholas, I wish you the very, very, very best.

CHIEF JUSTICE GEORGE: Thank you.

MS. LUMPKIN: Good morning to the Chief Justice and the associate justices of the Supreme Court. I am Mellori Lumpkin, and I am a first year law student. And I would like to ask, as the final arbiter of the law, the California Supreme Court may be charged with the responsibility of creating policy on questions of first impression. What standards does the court evaluate in making a decision where there's maybe no legislative or executive case that directly addresses the issue? Furthermore, in making the opinion, how does the court determine whether it will address issues that may not necessarily have been raised in the parties' briefs, but are essential to the analysis of the opinion?

CHIEF JUSTICE GEORGE: Justice Baxter will respond to your question.

JUSTICE BAXTER: Thank you, Mellori, for that thoughtful question. I want to make sure we have our terms defined before I answer them. The court is the final arbiter of state law, but in a very limited sense in that the Legislature or the people can overturn a common law decision by passing a statute or an initiative; the Legislature or the people can overturn an interpretation of a statute by amending the statute; and the people can overturn even a constitutional decision by amending or revising the state Constitution. And, as has recently been noted, the people have often utilized that power here in California. Consider the fact that the federal Constitution has been amended only 17 times since the adoption of the Bill of Rights, but the California Constitution has been amended more than 500 times.

And courts generally don't create policy, as that term is commonly understood. Courts determine what the law is and that decision may have policy consequences. But I don't think we create policy in the way the legislative and

executive branches do, even when confronted with questions of first impression. And here's what I mean. Even where there is no executive or legislative text that directly addresses the issue, either because the case arises under the common law or presents a scenario that the elected branches never anticipated, we operate under substantial constraints.

First of all, we consider whether it is an issue the judiciary is able to handle well. We exercise discretion over most of our docket, and we can decline to get involved in difficult issues when the political branches could provide a quick and better solution, or where the law has already changed and the prior law governs only a small and finite number of cases.

Then if we take the case, we do look to whatever text is available, including relevant statutes and regulations, any legislative history, and the public policies that underlie the statute or the regulation. If it is a common law matter, we look to prior cases. We reason by analogy, which is something lawyers and judges do all the time. And we try to deduce how the public policies articulated by the other branches might apply in this individual circumstance. And we also try to apply a dose of common sense, but carefully, because on a multimember court, we may not all agree on what that means.

Is this process a science? No. As with other professions, it involves an exercise of judgment. But courts, unlike the other branches, are not able to convene investigative hearings, consult with experts, or conduct experiments, which are the traditional methods by which policy is made. So to my mind, it is very important that courts move incrementally and with humility on questions of first impression, since the other branches are almost always better equipped to answer those types of questions. And when they refuse to do so, all I can say is, we may step in and do the best that we can.

As to what happens when an important or vital issue has not been presented or considered in the briefs, we typically direct the parties to address the issue in supplemental briefing. There is a statute, Government Code section 68081, that directs courts to do so before rendering a decision based on an issue that was not proposed or briefed by either party. Even when an issue would have significance only for a dissenting view, it is our court's practice to accommodate and request supplemental briefing. Thank you.

MS. LUMPKIN: Thank you.

CHIEF JUSTICE GEORGE: Thank you.

MS. DE LA TORRE: Mr. Chief Justice, associate justices of the Supreme Court, good morning. My name is Elizabeth De la Torre, and I am a first year law student here at Berkeley. My question is the following. Because of now Supreme Court Justice Sonia Sotomayor's confirmation hearings, there has been substantial debate about the role of a person's experience in the role as a judge. How do you think your own personal experience affects the way you judge, if at all?

CHIEF JUSTICE GEORGE: Justice Werdegar will respond to your question.

JUSTICE WERDEGAR: Well, thank you, Elizabeth. The most obvious personal experience in my case that comes to mind is that I'm a woman. As you well know, traditionally, historically, judges have been men and maleness has been the norm. So the question for me would be, how has my experience as a female impacted my judging? And, curious to know what my staff attorneys might think, I asked them. And one—she happens to be the lone woman on my staff—said, well, I certainly hope so.

But in my view, a judge's life experience rarely has a direct impact on how he or she decides a case. The exception might be where the legal conclusion depends on the facts, and one's view of the facts is colored by one's life experience. And a frequent example would be cases of sex discrimination. A woman judge might perceive the facts in the case a little differently than her male colleagues, especially if she, herself, has experienced discrimination. And as a consequence of that, she might reach a conclusion different from her male colleagues.

Now, Justice Ginsberg has been quoted as saying that although she and Justice O'Connor often differed, they always came together and agreed on sex discrimination cases. She also has been quoted as lamenting that in a recent soccer case involving a strip search of a 13-year-old girl, that her male colleagues could not understand what it is like to be a 13-year-old girl and how sensitive she might be to a strip search.

Be that as it may, in the end, a unanimous Supreme Court—Justice Ginsberg and her eight male colleagues—declared that the strip search was unconstitutional. What we can't know is whether Justice Ginsberg's sharing of her impressions of a 13-year-old girl's sensitivity influenced that decision.

I'll close by saying that I think we all benefit from the members of the court having diverse backgrounds in life and in law. If we have this diversity and the bench members come together and share these experiences with their colleagues as the court strives in its collective wisdom to reach a just result, I think we all benefit from that. Thank you.

MS. DE LA TORRE: Thank you.

CHIEF JUSTICE GEORGE: Thank you.

MR. VIJAYKAR: Good morning, Mr. Chief Justice, associate justices of the Supreme Court. My name is Nikhil Vijaykar. I'm a first year law student. I would like to ask, when hearing a case on highly technical subject matter in an area that you may not be familiar with, how much do you look to research and familiarize yourself with the subject matter in preparation for the case? Do you ever look to experts in the field to help you get familiarized or do you primarily rely on the oral arguments and briefs submitted by the parties?

CHIEF JUSTICE GEORGE: Justice Chin will respond to your question.

JUSTICE CHIN: Thank you. That is also an excellent question. But in order to answer it, you have to understand and drill down to look at the function of this court. The matter has already been tried. The matter has already been heard on appeal. So it's been through two levels of hearing. It is not the function of this court to decide facts. Those have already been determined in the trial court. If the trial court and the attorneys have done their job and if the Court of Appeal and the attorneys have done their job, the record should be complete. If it is not, I think Justice Baxter's solution was an excellent one: We should get supplemental briefing if there is a gap.

Now, do judges ever look at outside sources, particularly with the Internet? My guess is that they do. But my guess also is that they should be very careful because, as you know, not all of the information that you get on the Internet is objective. And we have to make sure that when we're making decisions as judges that we have all the information necessary. Whenever science and the law intersect it is important that both be on a sound foundation. That means that both disciplines must understand the function of the other discipline. Judges must understand the scientific method that was used in the particular case.

I'll give you an example. Many years ago I authored three DNA opinions in California when I was on the Court of Appeal. There was virtually nothing to go to, outside source or other, to find out the basic fundamentals of DNA forensic science. After I did those opinions, I was asked by the National Institute of Justice to draft a forensic DNA training program for judicial officers. We did that and it's now online. You can get it at DNA.gov and it is an online forensic training program for judges.

I submit to you that things like that are helpful in getting judicial officers aware of scientific areas that they may not be familiar with. There are also possibilities on a trial court for the trial judge to appoint an outside expert, an objective expert to advise the court on technical matters. It is not often used, but it's certainly a possibility. I understand it was more frequently used in the federal courts, but even my federal colleagues tell me that that has fallen out of favor. So it is possible to do that.

But I think that we should primarily depend upon the record that comes to us. And, as I said before, if there are gaps in that record, we should ask for supplemental briefing.

MR. VIJAYKAR: Thank you.

CHIEF JUSTICE GEORGE: Thank you.

MS. WALDRON: Good morning, Mr. Chief Justice and associate justices. My name is Maya Waldron. I'm a first year law student. I would like to ask what substantive area of the law has seen the most dramatic or important change in the past decade, and what area of law would likely see the most important or dramatic change in the next decade?

CHIEF JUSTICE GEORGE: Justice Moreno will give that prediction.

JUSTICE MORENO: Thank you, Chief, and thank you, Maya, but I don't know if I have a prediction. But my own personal view is that in the time that I've been on the court, there have been, it seems to me, every year a handful of cases involving the subject of arbitration, really, a fair number every year. I see a steady ferment of arbitration issues coming to the court in a variety of contexts: wage and hour, employment, consumer contracts, class action, even health contracts, and attorney fee disputes controlled by arbitration.

And a number of issues are raised by the arbitration scenario with respect to unconscionability, waiver of fundamental rights, allocation of cost, who's going to absorb those costs? Who decides in the first instance if arbitration is available, the arbitrator or a judge? Recently, both on our court and on the United States Supreme Court, the question of what is the scope of judicial review of an arbitration decision? And are we creating a different system of justice where significant issues are being decided outside of the judicial system? And the whole question of federal preemption versus state jurisdiction.

So I think that that brief recitation shows the kinds of cases and contexts and issues that have come before our court and are likely to continue and so I would anticipate seeing more cases, both at the federal and state level, particularly as the tension between the Federal Arbitration Act and the California Arbitration Act comes into play.

MS. WALDRON: Thank you.

CHIEF JUSTICE GEORGE: Thank you.

MS. COOK: Good morning, Mr. Chief Justice and associate justices of the Supreme Court. My name is Kara Cook, and I'm a second year law student. And all law students at Berkeley Law have to learn how to write a brief and some of us struggle. So my question is, how can you write a brief to the Supreme Court that's both persuasive and interesting while still being sure to cite precedent in law.

CHIEF JUSTICE GEORGE: Justice Corrigan will provide that guidance.

JUSTICE CORRIGAN: Kara, I would hope that citation to precedent isn't inherently boring. But there are a number of things that you can do. Obviously, you can't start with "It was a dark and stormy night" to jazz it up. But a good brief really ought to be a pleasure to read. And good brief writing is the same as all good writing, which is, in turn, kind of the same as all good teaching. So you are on the receiving end of a great deal of good teaching here.

And I think the biggest challenge is to structure your argument to give us or to give the reader your position first. Clearly set out the question. And then, you know, part of the challenge is to organize and synthesize the material. You've

spent however long you've spent, you know, drilling down, as Justice Chin says, really into all the minutiae of the case. And then you need to kind of take a step back and say, okay, what does my reader need to know and in what order do they need to know it? Because sometimes reading a bad brief is sort of like walking in during the middle of a movie, you know, and you think, okay, I know all this is important but I have no idea why. So you want to set out the question clearly and concisely and then organize your argument in a way that takes the reader kind of from the known to the unknown. So establish something, make it clear, and then build on that logically. All that linear thinking that you're learning here really helps when you're writing a brief.

It is important to set out your position first and then marshal the argument that supports it. You know, it shouldn't be like a mystery where you throw out a lot of stuff and then, magically, we get to the answer. And, generally speaking, it's a good idea to make your argument before you turn to demolish the other side's argument.

And, finally, the style of writing is very important. It can't be too colloquial, of course. But it should be clean and crisp and clear. And kind of one way of thinking of that is if the reader has to read your sentence twice in order to understand it, the writer has failed.

So I think one of the challenges, particularly for new lawyers, is to have confidence in presenting their arguments in that kind of clear, crisp, logical writing style, rather than kind of that circular approach that we kind of spend so much time and effort in learning to translate when we're first in law school that—I'm here to confirm that Blackstone is dead. And so none of us really need to feel obligated anymore to continue to formulate our briefs in that kind of circumlocutious style.

MS. COOK: Thank you very much, justices.

CHIEF JUSTICE GEORGE: Thank you.

This concludes the student questions. I want to thank each of the students who formulated questions and addressed them to the court. They were truly excellent questions. Hopefully our responses provided some insight into the workings of our court system. The justices appreciate your participation and also that of the faculty members and attorneys who assisted in this program.

The Reporter of Decisions is directed to spread these special proceedings on the minutes of the court so that they will be included in the Official Reports of the decisions of this court. We will now proceed with the Clerk calling this morning's calendar.