MARQUETTE LAW REVIEW

Volume 68 Winter 1985 No. 2

ALLOCATION OF CASES IN A TWO-TIERED APPELLATE STRUCTURE: THE WISCONSIN EXPERIENCE AND BEYOND

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INTRODUCTION

The intermediate state appellate court developed initially as a result of increased judicial business.[1] It has been the device most often employed to relieve a single appellate court of an unmanageable workload.[2] The addition of an intermediate appellate court provides assistance by: (1) reducing the sheer number of cases on the calendar of the highest court, and (2) releasing the highest court to address itself solely to the determination of significant questions of law, with a particular view toward development of the law as a whole.[3]

The ideal two-tier appellate system allows differentiation in the type of case each appellate court will hear. The highest court is allowed, by the exercise of discretion or some procedural device for the allocation of cases, to hear only important cases. The full flow of appeals, then, is centered on the inter-

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The author would like to express his deep appreciation to Professor Graham C. Lilly of the University of Virginia School of Law and Chief Staff Attorney Steven A. Felsenthal of the United States Court of Appeals for the First Circuit for their valuable comments on initial drafts of this Article. The author also acknowledges the helpful comments of Ronald R. Hofer, Ruthann M. Riedl, and Larry R. Steffes.

1. *See* Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459, 461 (1975).

2. *See id.* at 462.

3. *See id.*

mediate courts, whose normal function is to apply established law to case-by-case factual findings.[4] As a result, the overcrowded appellate docket is largely transferred to the intermediate courts.[5] In Wisconsin, for instance, a supreme court backlog of 1,193 cases in 1978 was relieved by the establishment of an intermediate appellate court, but the Wisconsin Court of Appeals soon developed a heavy caseload. In 1983, for example, the court of appeals had a pending caseload of 1,471 cases.[6]

Despite the number of pending cases, Wisconsin's intermediate court, which consists of only 12 judges, decided 2,284 cases in 1983.[7] These numbers are significant because some commentators have concluded that a single appellate court judge should participate in the decisional process of 225 cases on the merits each year.[8] Another commentator indicates that 300 to 350 appeals per year should be considered by each judge.[9] Using 300 cases as a representative standard of the number of appeals considered by each panel of three, the optimum caseload for the twelve-judge Wisconsin Court of Appeals should be 1,200 cases per year. The fact that the court of appeals decided almost double this number strongly suggests that the Wisconsin intermediate court is falling behind, despite a performance that, on the basis of cases processed, exceeds expectations. In fact, statistics indicate that most of the nation's intermediate courts are increasingly being subjected to an undue pressure of cases[10] and have grave workload problems.

In addition, the advent of state intermediate appellate courts often does not totally eliminate the workload problem in the highest court. In Wisconsin, for example, despite the heavy docket of the intermediate courts of appeal, the supreme court continues to have workload problems.

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4. *See id.* at 464.

5. *See id.* at 463.

6. *See* 1983 Wis. Ct. App. Ann. Rep. (available at Wisconsin Court of Appeals, District II, Waukesha, Wisconsin).

7. *See id.*

8. *See* Aldisert, *Appellate Justice*, 11 U. MICH. J.L. REF. 317, 317 (1978) (citing P. CARRINGTON, D. MEADOR, & M. ROSENBERG, JUSTICE ON APPEAL 196 (1976)).

9. *See* Hopkins, *supra* note 1, at 463.

10. *See id.*

Although the number of cases decided with full opinions in the Wisconsin Supreme Court seems manageable at about 150 per year,[11] the justices and their clerks must nonetheless find time to screen the petitions for review, on average numbering about 600, that flood the court.

Various alternatives to relieve both courts of the burdensome workload problem have been proposed. These include more intermediate appellate judges, more courts, and more staff. Very little sustained attention has been paid, however, to another avenue of assistance — the concept of immediately transferring some of the more important intermediate court cases to the highest court while simultaneously reducing the amount of time that the supreme court spends on less important error correcting matters. This basic principle of allocation operates, at least to a small degree, in most states. It deserves attention, nonetheless, because it often operates inefficiently.

For example, in Wisconsin appeals are of right to the intermediate court. After appeal, the losing party may request further review by the supreme court. This petition to review is examined by all seven justices of the supreme court, and a vote is taken on whether further review of the case is warranted. If that vote is affirmative, the result is what is commonly known as the "double appeal," or second review.

The basic theme of this Article is that the misallocation of cases between the Wisconsin Court of Appeals and the supreme court causes unnecessary congestion at both appellate levels. Important cases first decided at the intermediate level require time-consuming and detailed work. Despite this expenditure of resources, a petition for review to the highest court often ensues.

If a case is more appropriately the province of the highest court, then it is logical that the highest court claim it in the first instance. This early reference would eliminate the practice of the intermediate appellate court expending its time in deciding an important issue that is later reconsidered by the supreme court. The suggested solution also eliminates many petitions to review, thereby abating the need for the highest

11. *See* Antoine & Gleisner, *From the Bench . . .*, 6 THE VERDICT 4 (Fall 1983) (interview with Wisconsin Supreme Court Chief Justice Heffernan).

court to spend time evaluating a flood of petitions. Finally, efficient early allocation avoids the possibility of a double appeal, thus eliminating duplicative efforts by both courts on the same case, a condition which aggravates the workload problems.

In addition to easing workload problems and eliminating double appeals, proper allocation of cases would enhance certainty in molding the law. A single definitive statement on a significant legal question would emanate from the highest court in the first instance. There is less certainty, at least for an interim period, with a double appeal, especially when the highest court accepts a petition to review a published court of appeals opinion. While an appeal is pending in the highest court, the trial bench, the bar, and the public are relying on the intermediate court's opinion. The ensuing opinion from the highest court, when finally rendered, makes largely obsolete the intermediate court's opinion.

Part I of this Article identifies the basic jurisdictional premise of each appellate court in Wisconsin's two-tier appellate structure. The assigned appellate roles are substantially the same as those in other states. Yet, despite the rather clear role differentiation, analysis of Wisconsin intermediate court cases indicates that the intermediate court often decides the types of cases which should be the province of the supreme court; conversely, the same analysis shows that the highest court takes some cases not to make or develop the common law or reinterpret a statute but to correct the result of an intermediate court opinion with which it disagrees. Under an ideal system, this kind of error correcting function by the supreme court would be eliminated.

Part II outlines the consequences of having the intermediate court write most of the "law-development" cases in the first instance. Two results especially highlighted include unnecessary congestion of cases at both appellate levels and uncertainty in the law. This section also analyzes the goals which a state judicial system should strive to achieve.

Part III examines the various methods for more efficient allocation of cases. A number of state systems are surveyed with a view toward identifying and categorizing different types of allocation schemes. A discussion and analysis of the

relative advantages and disadvantages of each category follows.

Part IV offers an allocation proposal for the Wisconsin appellate system. This section also discusses the need for adopting certain criteria to help identify those cases better suited for detour of the intermediate court in favor of initial allocation to the highest court.

Part V discusses the various criteria used to allocate cases in the appellate systems of other states. It closes by urging the adoption of certain of those criteria as well as internal operating procedures for the Wisconsin system.

I. Role Identification and the Confirmation of Misallocated Cases

A. Types of Cases

In order to fully comprehend the problem of misallocation, it is important first to identify the kinds of cases likely to be misallocated. This analysis must begin by explaining the difference in the opinion writing process between cases reviewed solely to correct trial court error and cases written for institutional or precedential purposes. Commentators have defined three groups of cases, each of which calls for a different writing process.

When a dispute centers around the application of settled legal precepts to the facts, it may be termed a "fact case" rather than a "law case."[12] This type of case can readily be divided again into two subcategories: (1) cases which ask the appellate court to choose a different factual inference than that chosen by the trial fact finder, and (2) cases which ask the appellate court to change or ignore settled legal precedent.

One example of the first subcategory is a case in which the appellant is claiming that the fact finder (either jury or judge) made findings of fact contrary to what the appellant considered to be overwhelming testimonial evidence. Here, the scope of review by a reviewing court is greatly limited. In Wisconsin, for instance, a trial court's finding of fact will not be overturned unless the finding is clearly erroneous.[13] A

12. Aldisert, *supra* note 8, at 318.
13. *See* Wis. Stat § 805.17(2) (1983-84).

jury's finding will not be set aside as long as there is "any credible evidence that under any reasonable view supports the verdict and removes the issue from the realm of conjecture."[14] For example, when the jury returned a verdict finding that a fifty-three year old man acted in self-defense in an altercation between the man and two minors, credible evidence existed in the record to allow the jury to believe the boys had been taunting the older man.[15] This evidence was sufficient for the appellate court to sustain the jury's verdict.

The second subcategory involves deciding cases in accordance with precedents that are clearly apposite or in accordance with a statute.[16] It is not usually difficult for a judge — whether trial or appellate — to extract from the precedents the underlying principle, the *ratio decidendi*. It has often been said that it is no more difficult than matching the colors of the dispute at hand against the colors of many sample cases spread out on the desk. The facts in a given dispute, for example, may be only somewhat different from the precedents, but the appellant may claim that a new rule of law is necessary. A reviewing court's role in the decision of this kind of case is extremely limited. Such a case does not belong on the highest court calendar. If appealed, it should go no further than the intermediate court.

A good illustration of this type of case is *State v. Santana*.[17] The defendant appealed from a judgment of conviction for operating a motor vehicle after his license had been revoked. He claimed a "mistake of fact" defense existed, asserting that he erroneously believed his driving an "illegally

14. Coryell v. Conn, 88 Wis. 2d 310, 315, 276 N.W.2d 723, 726 (1979).

15. *See* Krahn v. Topalof, No. 83-072, slip op. at 3-4 (Wis. Ct. App. Dec. 7, 1983). *See also* Bemis Co. v. Ready-Crete, Inc., No. 83-432, slip op. at 4 (Wis. Ct. App. Feb. 22, 1984) (brochure which represented bagger could produce *up to* twenty-two bags per minute supported the jury's finding of a fifteen-bag per minute warranty); State v. Johnson, No. 83-064-CR, slip. op. at 6-7 (Wis. Ct. App. Dec. 7, 1983) (evidence that defendant owned apartment where cocaine and heroin were found, that he had a key to the building, that the doors were locked upon investigation and that the only other person allegedly having key denied having one, was sufficient to allow a reasonable jury to be convinced beyond a reasonable doubt of the defendant's guilt for possession with intent to deliver cocaine and heroin); Goode v. Ohio Casualty Ins. Co., No. 83-845, slip. op. at 3 (Wis. Ct. App. Feb. 1, 1984) (jury's rejection of "emergency doctrine" in finding driver 10% causally negligent in automobile collision supported by credible evidence).

16. *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 164 (1921).

17. No. 83-527-CR, slip op. (Wis. Ct. App. Oct. 7, 1983).

and dangerously exposed car"[18] from a city street into a parking lot was not driving the car in violation of the law. He maintained that the trial court erred in not giving the jury an instruction regarding mistake of fact. Settled Wisconsin precedent, however, establishes that ignorance of the law is not a valid defense. Since the trial court properly applied Wisconsin precedent in refusing to give a mistake of fact instruction, the conviction was affirmed.[19]

In the second category of cases, the rule of apparently applicable law is certain, but its application to the facts at hand is doubtful.[20] These are the error correcting cases. In theory, it is the role of the intermediate court to review trial court application of the law to a particular set of facts and to correct error when it is found.[21] Typically, the intermediate court is occupied with assignments of error alleging that existing rules have not been followed. The highest court need not be called upon to expend its energies and resources in reviewing this kind of case.[22]

Perhaps the most blatant illustration of an error correcting case involves a situation in which the trial court clearly failed to apply settled law. For instance, Wisconsin Supreme Court Rule 11.02(1) authorizes the appearance of attorneys without the presence of their clients in any case except felony actions. Therefore, reversal was necessary when a trial court dismissed the trial de novo of a municipal conviction because the defendant's attorney appeared in court without the defendant.[23]

This is not to say that the second category, the error correcting one, is unimportant. These cases require more than a mere knowledge and understanding of the legal precedents amply provided by the advocates' briefs.[24] Although a complete understanding of the policy behind the precedents is required, the decisional process itself is not taxing, and the work

18. *Id.* at 1.

19. *See id.* at 4.

20. *See* B. CARDOZO, *supra* note 16, at 164.

21. *See* Donaldson, *A Crisis in the Idaho Court System: An "Appealing" Remedy*, 13 IDAHO L. REV. 1, 5 (1976).

22. *See* Hopkins, *supra* note 1, at 460.

23. *See* City of Muskego v. Anderson, No. 83-1516, slip op. (Wis. Ct. App. Mar. 7, 1984).

24. *See* Aldisert, *supra* note 8, at 319.

of justification — the reasoned elaboration — is not too burdensome.[25]

As previously stated, this type of case encompasses the bulk of the appellate caseload. Most cases involving a trial court's use or misuse of its discretionary powers fall into this category, as well as those cases in which either the facts are unique or the law is new and has not been applied to many fact situations.

U.S. Aviation Underwriters, Inc. v. National Insurance Underwriters[26] provides an interesting illustration of a second category case. The legally significant facts were undisputed: two aircrafts collided while both were attempting to land at the Burlington, Wisconsin airport. The evidence presented at trial established that one aircraft landed on top of the other.[27]

Neither party disputed the applicability of the Federal Aviation Regulations, specifically the right-of-way rules for the landing of aircraft.[28] At issue, however, was whether this regulation comprised a safety statute under Wisconsin law, the violation of which constitutes negligence per se. The trial court declined to enter a finding of negligence per se, leaving the negligence determination for the jury. On appeal, the Wisconsin Court of Appeals reversed, holding that the aviation regulation was a safety regulation and that a violation of this regulation constituted negligence per se.[29] The decision provides a good example of a situation in which both the facts and the apparently applicable law were clear, but the law's application was doubtful.

Another case involving application of the law to a particular set of facts is *In re B.L.P.*[30] The *B.L.P.* case involved the

25. *See id.* at 320.

26. 117 Wis. 2d 417, 344 N.W.2d 532 (Ct. App. 1984).

27. *See id.* at 420, 344 N.W.2d at 534.

28. *See* 14 C.F.R. §91.67(f) (1984).

29. *See id.* at 421, 344 N.W.2d at 534.

30. 118 Wis. 2d 33, 345 N.W.2d 510 (Ct. App. 1984). *See also* Chudnow Constr. Corp. v. Johnson Sand & Gravel, Inc., No. 81-2110, slip op. at 5 (Wis. Ct. App. Oct. 19, 1982) (trial court reversed because promise was an original and primary obligation falling outside statute of frauds); Goldstein v. Muskat, No. 82-1241, slip op. (Wis. Ct. App. Aug. 16, 1983) (trial court's granting of summary judgment reversed as pleadings raised genuine issues of material fact); Crear v. Labor & Indus. Rev. Comm'n, 114 Wis. 2d 537, 339 N.W.2d 350 (Ct. App. 1983) (upholding application of Wisconsin's definition of supervisor to employment discrimination case).

issue of whether juvenile courts were required to follow Wisconsin's statutory contempt statutes when exercising their contempt powers. The decision itself dictated the contempt procedures to be followed by Wisconsin juvenile courts. Yet, it involved the application of settled statutory contempt law to a new factual situation — the contemptuous activity of a juvenile.

The final category requires a maximum commitment of time and energy.[31] These cases will be referred to throughout as third category cases. Sufficient time must be alloted for full institutional review of these cases.[32] Cardozo defined this third category as:

> a percentage, not large indeed, and yet not so small as to be negligible, where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power.[33]

It is these cases which ideally should be reserved for the highest court. Conversely, given its workload and the extent of its staff and resources, the intermediate court should not be writing the majority of third category cases. That is because third category cases inquire into "unexplored territory" where the application of the law is extremely difficult because the law is either unclear or undeveloped.

State v. Neave[34] clearly portrays a third category case. The *Neave* case involved the questions of whether a criminal defendant who does not understand English had the right to an interpreter at the preliminary hearing and trial and, if so, whether that right could be waived by the defendant's attorney. The case law in other jurisdictions was sparse, and Wisconsin courts had never directly addressed the issue. Therefore, the *Neave* decision necessarily involved a significant development of the common law. After an examination of the case, including law and policy considerations, the Wisconsin Supreme Court held, as a matter of fairness and sound judicial administration, that a defendant who does not under-

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31. *See* Aldisert, *supra* note 8, at 320.
32. *See id.*
33. *See* B. CARDOZO, *supra* note 16, at 165.
34. 117 Wis. 2d 359, 344 N.W.2d 181 (1984).

stand English has the right to an interpreter. Further, the court held this right may only be waived by the defendant.[35]

Placing third category cases exclusively in the province of the highest court, freeing it from the burden of deciding most first and second category cases, is warranted by the nature and function of the highest court. The highest court has the time, capacity, and resources to write a more thoroughly researched and considered opinion.[36] Nationwide, the formation of intermediate courts has allowed for longer and more extensively supported opinions by the highest courts.[37] In addition, the highest courts can have longer oral arguments, develop more extensive opinions, write more dissents and concurrences, and decide more constitutional issues.[38] As a result, the highest court can concentrate on creating and overseeing a uniform body of state common law.

Of course, cases do not divide themselves neatly into first, second, or third category decisions. It is often a question of degree. Also, a single case often can involve issues from all three categories. Yet, even when the third category issue is just one of many in a case, as long as that issue is determinative of the case, it warrants a decision from the highest court.

This is not to say that only third category cases result in the creation of new law or the further development of existing law. Even if an appellate system divides its caseload so that the intermediate court receives the first and second category cases, these — and especially the latter — cannot be written without at least some creative efforts. The intermediate court is the court of last resort in the great majority of appeals; it has the duty of assuring uniformity of treatment, particularly in the area of discretionary rulings by the trial courts.[39] As such, it is in a position to determine in which areas of the law confusion is occurring and where clarification is necessary.[40]

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35. *See id.* at 361, 344 N.W.2d at 182. *See also* Dixon v. Dixon, 107 Wis. 2d 492, 500, 319 N.W.2d 846, 850 (1982) (legislature did not intend to allow the circuit court to consider marital misconduct as a relevant factor in granting maintenance payments).

36. *See* Hopkins, *supra* note 1, at 460.

37. *See* Donaldson, *supra* note 21, at 5-6.

38. *See* Kagan, Cartwright, Friedman & Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 999 (1978) [hereinafter cited as Kagan].

39. *See* Hopkins, *supra* note 1, at 478.

40. *See id.* at 464.

In addition, decisions of the intermediate court develop the law by resolving cases involving factual and legal distinctions calling for deviation from doctrine or for choice of one doctrine over another.[41] It is in these second category cases, in which the competing rules of law are certain but the application doubtful, that the intermediate court finds its creative niche in the judicial process.

B. The Misallocation of Cases

Still, in addition to resolving first and second category cases, the intermediate courts in most states, including Wisconsin, also decide third category cases. As a result, there is an overlap in the decisional process between the intermediate court and the supreme court. Cases in which third category "creative law" has been written by Wisconsin's intermediate court are too numerous to mention. By illustration, in 1981 alone, one intermediate court opinion established the methodology for scope of review;[42] another held that interest in the goodwill of a law firm was not an asset that could be valued as part of an estate;[43] another case changed state law concerning election of remedies in fraud cases;[44] and a fourth case decided questions of constitutionality and burden of proof in a statute relating to the termination of parental rights.[45]

A recent example of the decisional overlap this practice creates is *State v. Beno*.[46] Beno appealed a writ of attachment confining her in jail until she had testified and produced documents in accordance with a subpoena issued by the Department of Revenue. In a seventeen-page published opinion, the Wisconsin Court of Appeals developed a "reasoned elaboration" on the complex issues presented regarding legislative immunities, privileges, exemptions, and waivers.[47]

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41. *See id.* at 472-73.

42. *See* State v. Drogsvold, 104 Wis. 2d 247, 311 N.W.2d 243 (Ct. App. 1981).

43. *See* Holbrook v. Holbrook, 103 Wis. 2d 327, 309 N.W.2d 343 (Ct. App. 1981).

44. *See* Head & Seemann, Inc. v. Gregg, 104 Wis. 2d 156, 311 N.W.2d 667 (Ct. App. 1981), *aff'd*, 107 Wis. 2d 126, 318 N.W.2d 381 (1982).

45. *See* R.D.K. v. Sheboygan County Social Servs. Dep't, 105 Wis. 2d 91, 312 N.W.2d 840 (Ct. App. 1981).

46. 110 Wis. 2d 40, 327 N.W.2d 712 (Ct. App. 1982), *rev'd*, 116 Wis. 2d 122, 341 N.W.2d 668 (1984).

47. See *id.* at 43, 327 N.W.2d at 714, listing the six specific issues decided.

A petition to review was granted in the *Beno* case by the Wisconsin Supreme Court. Approximately a year after release of the court of appeals opinion, the supreme court issued its own twenty-eight page opinion reversing the previous court of appeals opinion.[48]

The third category cases written by the court of appeals are, almost without exception, published in the official state reports. Although Wisconsin has a limited publication rule for intermediate appellate decisions, 398 opinions or 16 percent of the intermediate court opinions have been published since the intermediate court's inception,[49] because they met publication guidelines.[50] Admittedly, a percentage of those opinions published included second or even first category cases. However, a survey of these published cases reveals that approximately 300 (75 percent of *all* published intermediate court opinions) were third category cases. This approximation demonstrates that the Wisconsin intermediate appellate court writes about 100 third category cases per year, or about one-sixth of its total yearly production of full opinions.

Conversely, the Wisconsin Supreme Court takes some cases, not because they are necessarily third category cases, but because there is a question whether the intermediate court reached the right result. In theory, this question should not be grounds for granting a petition to review because the proper function of the highest court is to mark a trend in the law — it is not to see that individual justice is done to every litigant who persistently appeals a disagreeable decision.[51] Of course, this is not a phenomenon found only in Wisconsin. After studying the judicial product in California, observers

48. *See* 116 Wis. 2d 122, 341 N.W.2d 668 (1984).

49. *See* Wis. Ct. App. Ann. Rep., *supra* note 6.

50. The criteria for publication in the official reports include whether the opinion:

1. Enunciates a new rule of law to a factual situation significantly different from that in published opinions;

2. Applies an established rule of law to a factual situation significantly different from that in published opinions;

3. Resolves or identifies a conflict between prior decisions;

4. Contributes to the legal literature by collecting case law or reciting legislative history; or

5. Decides a case of substantial and continuing public interest.

WIS. STAT. § 809.23 (1983-84).

51. *See* B. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 67 (1977).

concluded that petitions to review were often granted in cases in which the intermediate court correctly applied existing law to the facts, but the supreme court disagreed with the result.[52] Another commentator has expressed the opinion that members of the highest courts are well aware of the temptation and the frequency of departures of this kind, suggesting that this is a national problem.[53]

In Wisconsin, as elsewhere, this departure can be documented. Two recent examples are *Lobermaier v. General Telephone Company* [54] and *Poynter v. Johnson*.[55] In *Lobermaier*, the plaintiff sued to recover damages for hearing loss because of an electrical charge received from an alleged improperly grounded telephone. The court of appeals, after reviewing the record, concluded that the trial court abused its discretion in refusing to allow surrebuttal evidence. Finding this error prejudicial, the court of appeals reversed. The supreme court reversed the court of appeals. It held that the court did not abuse its discretion. Although other issues were discussed as well, it is quite clear that the supreme court granted the petition to review not to announce a trend in the common law but to differ with the court of appeals' handling of a pure error correcting issue. The highest court did not attempt to develop law, but merely corrected what it perceived to be the intermediate court's error.

The *Poynter* decision dealt simply with whether a genuine issue of fact existed regarding an acceptance of a road as a public road. The trial court held, and the court of appeals agreed, that there was no dispute that the plaintiffs failed to comply with the town conditions for acceptance of the road as a town road. The supreme court disagreed, concluding from its reading of the record that there was a factual conflict. This case is an error correcting case that fails to mark any creative trend in the common law. The supreme court corrected what it perceived to be the court of appeals' error in making the wrong conclusion concerning the facts.

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52. *See, e.g.*, Comment, *To Hear or Not to Hear: II*, 4 STAN. L. REV. 392, 394 (1952).

53. *See* B. WITKIN, *supra* note 51, at 67.

54. 119 Wis. 2d 129, 349 N.W.2d 466 (1984).

55. 114 Wis. 2d 439, 338 N.W.2d 484 (1983), *rev'g* 109 Wis. 2d 691, 326 N.W.2d 781 (Ct. App. 1982).

It can be concluded, therefore, that the Wisconsin Supreme Court does serve in an error correcting role and that the court of appeals is writing decisions having a far reaching impact on the common law. Thus, if it can be said that the highest courts should take the third category cases and intermediate courts should take the first and second category cases, misallocation does take place.

II. THE CONSEQUENCES OF MISALLOCATION

A major consequence of having Wisconsin's intermediate appellate court write a large number of third category opinions and having the highest court decide error correcting cases is that the workload problems of both of the appellate courts are exacerbated. A discussion and explanation of this problem and a possible solution follow.

A. The Problem

The commitment of time and energy to the writing of a decision logically depends upon the nature and complexity of the case. The third category creative case requires maximum utilization of a judge's time for thorough, detailed, analytical study and writing. The reasoned elaboration[56] required in writing this type of case is much greater than that for first and second category cases. Reasoned elaboration is not, of course, confined to third category cases. Indeed, it takes place in every written opinion of both Wisconsin appellate courts. In fact, section 752.41(1) of the Wisconsin Statutes requires that in each case the appellate court shall provide a written opinion containing a summary of the reasons for the decision made by the court.

In third category decisions, however, this reasoning process requires a proportionately greater amount of the court's

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56. Reasoned elaboration has been defined as follows:

> The phrase, as applied to the Supreme Court, demand[s], first, that judges give reasons for their decisions; second, that the reasons be set forth in a detailed and coherent manner; third, that they exemplify what Hart called "the maturing of collective thought;" and fourth, that the Court adequately demonstrate that its decisions, in the area of constitutional law, were vehicles for the expression of the ultimate social preferences of contemporary society.

White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 286 (1973). *See also* Aldisert, *supra* note 8, at 321.

time than does a first or second category case. As one commentator explained, third category cases are "[c]omplex, important cases [which] may require longer opinions with more citations."[57] It is difficult, however, for an intermediate court to devote maximum use of chamber time for the decision-making process in third category cases when it must also provide reasoned opinions for first and second category cases. Again, shades of degree sometimes separate categories of cases as well as the elaborative content of opinions, but there are significant differences among the paradigm cases.

Statistics bear out the problem. In Wisconsin, the court of appeals is divided into four districts. Final judgments from the trial court are appealable by right to the court of appeals.[58] In juvenile cases, small claims, misdemeanors, municipal ordinance violations, traffic offenses, and mental commitments, the appeals are to one appellate judge.[59] In all other cases, the appeal is to a full panel of three judges.[60] Each panel takes on an average of twenty-four new cases per month.[61] When one-judge cases are included, the number of cases undertaken increases by seventeen percent.[62]

Of the twenty-four monthly panel cases, 43.5 percent are assigned to staff for written disposition under supervision by the panel of judges;[63] the remaining 56.5 percent of the cases are resolved by opinions authored by the judges themselves.[64] In 1983, the combined panels wrote 475 three-judge opinions[65] or an average of 39 opinions per judge. When adding one-judge opinions, which also require a written analysis of reasons, the average number of opinions per judge jumps to fifty-seven per year.[66] In summary, each judge *writes* about five opinions per month, three of which are three-judge opinions, in addition to reading briefs, participating in the discus-

57. Project, *The Effect of Court Structure on State Supreme Court Opinions: A Re-examination*, 33 STAN. L. REV. 951, 959 (1981).
58. *See* WIS. STAT. §§ 752.03, .11-.19 (1983-84).
59. *See* WIS. STAT. § 752.31(2)-(3) (1983-84).
60. *See* WIS. STAT. § 752.31(1) (1983-84).
61. *See* Wis. Ct. App. Ann. Rep., *supra* note 6.
62. *See id.*
63. *See id.*
64. *See id.*
65. *See id.*
66. *See id.*

sion of cases at the decision conference, voting on the disposition of each case, reading the opinions of colleagues, and dealing with a host of motions, administrative matters, and prerogative writs. As these statistics show, time is at a premium.

Of the five assigned opinions per month, some take more time to analyze and discuss than others. Generally, those requiring more time are third category cases. Statistics and analysis show that a significant portion of the intermediate court's writing consists of such cases. Forty-five percent of authored three-judge opinions are published.[67] As has been previously stated, roughly three-quarters of the published decisions are third category cases.[68] Therefore, about one-third of all three-judge opinions, or one case per judge per month, require the time that is typically demanded by the third category case.

The question thus arises whether many of these cases are more appropriately considered initially, not by the intermediate court, but by the highest court. Many reasons suggest an initial allocation to the supreme court. First, the intermediate court was conceived, designed, and staffed as a volume court, and as appeal is by right, it has no discretion to turn aside cases in order to spend more time on third category cases. Consequently, there is less time to invest in each such case, and arguably at least, this shortage could threaten the quality of the decision-making. Second, an intermediate court operates in an area of legal uncertainty because it does not have the highest court's power to resolve conflicts in the law by definitive pronouncement.[69] Thus, its very nature and authority prevent it from settling many of the issues raised in third category cases. Third, the highest court generally has better resources than an intermediate court to devote to a third category case. The Supreme Court of Wisconsin, for instance, has a library consisting of 30,000 volumes as compared to the court of appeals which has an average of 8,000 volumes per district.[70] The supreme court produces an average of twenty-

67. *See id.*

68. *See id. See supra* text accompanying notes 49-50.

69. *See* B. WITKIN, *supra* note 51, at 68.

70. Telephone interview with Marcia Koslov, Wisconsin Supreme Court Law Librarian (Feb. 14, 1984).

three opinions per year per justice compared to fifty-seven per year per court of appeals judge,[71] thus affording to the highest court more time for research, reflection, and collegial exchange. Logic suggests that the fewer occasions the intermediate court must set aside the estimated two to three weeks to write a third category case, the more time it can use for first and second category cases, thus decreasing the backlog of cases awaiting decision. As these reasons suggest, better allocation of third category cases would drastically ease the workload problems of the intermediate court.

A direct allocation of third category cases to the highest court's calendar would not significantly strain that court's capacity. If the supreme court directly took more third category cases, it might curb the temptation to grant review of cases in which it merely disagrees with the intermediate court's result. As one commentator has noted, a loser's simple objection that the intermediate decision is wrong should not constitute a valid ground for additional review.[72] Constraint of time necessarily demands trade-offs in both courts so that less error correcting cases are taken for supreme court review and less third category cases are decided by the intermediate courts.

Nonetheless, a few commentators apparently believe that the intermediate appellate court's job is to write third category opinions. The intermediate court opinion is viewed as a sort of a dress rehearsal or preliminary exploration of the issues for the high court hearing that is almost sure to follow. One commentator sees the role of an intermediate court as a laboratory for the highest court.[73] The intermediate court eases the task of the highest courts by sharpening the legal issues and determining the factual issues.[74] This view has been coined as the "stepping stone" approach.[75] The intermediate courts are seen as "mere stepping stones along the appellate way."[76] The

71. *See* Wis. Ct. App. Ann. Rep., *supra* note 6.

72. *See* R. LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 76 (1976).

73. *See* Hopkins, *supra* note 1, at 473.

74. *See id.* at 478.

75. Karlin v. City of Miami Beach, 113 So. 2d 551, 553 (Fla. 1959). *See also* Magruder, *The Trials and Tribulations of an Intermediate Appellate Court*, 44 CORNELL L. REV. 1, 5 (1958).

76. Karlin v. City of Miami Beach, 113 So. 2d 551, 551 (Fla. 1959).

resultant reproduction of effort, known as the double appeal, is not considered a liability.

Most commentators, however, reject the stepping stone concept. One noted commentator opined that however attractive and helpful intermediate argument and decision would be to justices of the highest court, such a preview does not justify the delay, the additional expense to the parties, and the cost to the taxpayers of maintaining or enlarging an intermediate court to take care of protracted litigation.[77] The proponents of the stepping stone position meet these objections by pointing out that very few intermediate appellate opinions are accepted for review. One commentator has pointed out that, nationally, only about forty percent of the cases decided by intermediate appellate courts are appealed to courts of last resort.[78] Between eight and twenty-five percent of these cases, the median is about fifteen percent, are actually accepted for review.[79] Therefore, they argue that the double appeal does not cause the delay, lack of finality, or increased staff costs as some suggest.

The double appeal proponents ignore two significant considerations. First, they fail to take into account the time spent by an intermediate court, at least in Wisconsin, in writing third category opinions. They fail to realize that writing third category cases reduces the amount of time remaining for the court to decide first and second category cases, which it is arguably better suited to resolve. Because of the sheer volume, this mixed appellate agenda results in a trade-off of either additional delays in deciding first and second category cases or writing less encompassing opinions on third category cases.

Second, double appeals may be more prevalent than reported and, thus, are a problem. Even though the average of cases taken by the highest court is low compared to the gross number of intermediate opinions, the number of reviews granted by the highest court in third category cases, in Wisconsin at least, is high. As previously indicated, about seventy-five percent of all cases published by the intermediate

77. *See* R. LEFLAR, *supra* note 72, at 75.

78. *See* Marvell, *The Problem of Double Appeals*, 1979 APP. CT. AD. REV. 23, 23 (1979).

79. *See id.*

court are third category cases.[80] From 1981 through 1983, the Supreme Court of Wisconsin granted review in over twenty percent of those cases.[81] This amounts to eighty-one cases over a three year period, an average of twenty-seven per year, or close to seven cases per panel each year, that are subject to a second review. A better system of allocation of these third category cases would have saved weeks of intermediate courts' chamber time. In fact, estimating that each third category case takes an average of three weeks to write, each panel would have saved twenty-one weeks if it did not have to write those decisions in the first instance.

In summary, the routine use of the intermediate court as a "stepping stone" for review of third category cases causes time constraint problems at both appellate tiers. In the intermediate court, nearly exclusive use of chamber time on these cases creates a backlog of cases properly suited for intermediate disposition. Consequently, the quality of the decision-making process on all cases suffers. In the high court, duplicative effort on third category cases leads to delay, lack of finality, and increased costs. The acceptance and resolution of error correcting cases exacerbates the problem.

B. Present Methods of Allocation in Wisconsin

The right to one appeal is ordinarily considered sufficient to ensure justice between litigants.[82] If we accept the principle that one appellate review is sufficient and the correlative principle that most appeals should be resolved at the intermediate level, the major problem remaining is which cases go to the highest court and by what procedural device.[83]

If carefully planned, allocation can be an efficient way of routing cases to the correct appellate court; correct allocation also eliminates the dysfunctional consequences of haphazard placement on the appellate dockets. Because there is a general awareness of the value of proper allocation, most states, in-

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80. *See* Wis. Ct. App. Ann. Rep., *supra* note 6. *See supra* text accompanying notes 49-50.

81. *See* Wis. Ct. App. Ann. Rep., *supra* note 6.

82. *See* Overton, *District Courts of Appeal: Courts of Final Jurisdiction with Two New Responsibilities — An Expanded Power to Certify Questions and Authority to Sit En Banc*, 35 U. FLA. L. REV. 80, 83 (1983).

83. *See* R. LEFLAR, *supra* note 72, at 76.

cluding Wisconsin, have some designated method for circumventing the intermediate court for placement on the docket of the highest court. In Wisconsin, the system is defined by two statutes: one is by-pass by petition of the litigants, and the other is certification by the court of appeals or upon motion of the supreme court.[84]

Thus, in Wisconsin, a case may be transferred directly to the supreme court docket in three ways. First, the litigants themselves may request a transfer. This by-pass procedure is rarely used. Between 1981 and 1983, for example, there were only 113 petitions to by-pass out of 7,247 appeals filed, or 1.6 percent.[85] The supreme court took thirty-one of those cases.[86] Second, the supreme court may, on its own motion, take the case. This power has never been used by the Wisconsin Supreme Court, and no mechanism seems to exist to screen cases for sua sponte transfer. Third, the court of appeals may request transfer or certify the case for immediate review and determination by the supreme court. This is the method most often used in Wisconsin. Between 1981 and 1983, the court of appeals requested transfer in 151 cases.[87] Of these cases, the supreme court accepted eighty.[88] Despite these figures, however, this mechanism is used comparatively infrequently by

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84. WIS. STAT. § 809.60 (1983-84) provides:

(1) A party may file with the supreme court a petition to bypass the court of appeals pursuant to s. 808.05 no later than 10 days following the filing of the respondent's brief under s. 809.19 or response. The petition must include a statement of reasons for bypassing the court of appeals.

(2) An opposing party may file a response to the petition within 10 days of the service of the petition.

(3) The filing of the petition stays the court of appeals from taking under submission the appeal or other proceeding.

(4) The supreme court may grant the petition upon such conditions as it considers appropriate.

(5) Upon the denial of the petition by the supreme court the appeal or other proceeding in the court of appeals continues as though the petition had never been filed.

WIS. STAT. § 809.61 (1983-84) provides:

The supreme court may take jurisdiction of an appeal or other proceeding in the court of appeals upon certification by the court of appeals or upon the supreme court's own motion. The supreme court may refuse to take jurisdiction of an appeal or other proceeding certified to it by the court of appeals.

85. *See* Wis. Ct. App. Ann. Rep., *supra* note 6.

86. *See id.*

87. *See id.*

88. *See id.*

the intermediate appellate tier. It requested transfer in only 2.08 percent of the cases.[89] In addition, although the supreme court was willing to hear 52.98 percent of the cases transferred, these cases constituted only about 15 percent of its calendar.[90]

Three reasons for the comparative infrequency of transfer are: (1) the uncertainty of each court's role in the appellate process; (2) insufficient recognition of the severity of the problems created by misallocation; and (3) the lack of uniform criteria which would offer a commonly understood language between the two appellate courts regarding which cases should be allocated. By studying the systems in use throughout this country and by analyzing the advantages and disadvantages of each, at least a tentative approach for reducing the liabilities associated with misallocation may be developed.

III. METHODS OF ATTACKING THE ALLOCATION PROBLEM: STRENGTHS AND WEAKNESSES

Based upon a survey by questionnaire of twenty-eight states having a two-tier appellate system, four basic methods of detour to the highest court have been identified.[91] Although they are sometimes referred to by different names, they can best be described as deflection, by-pass, reach-down, and certification.

A. Deflection

Deflection is a system whereby all appeals from the trial courts are originally filed in the highest court. The highest court then conducts a screening process and allocates to the intermediate court those cases it thinks should be handled at the intermediate level.[92] This arrangement is based on the assumption that the highest court will allocate cases in a thoughtfully informed manner and will not attempt to turn

89. *See id.*

90. *See id.*

91. This information was obtained from unpublished court reports resulting from a survey conducted by the author in early 1983.

92. *See* R. LEFLAR, *supra* note 72, at 74-75.

difficult or disagreeable cases over to the intermediate court simply to escape resolution by the high court.[93]

Three states, Hawaii, Idaho, and Iowa, can currently be identified as pure deflection jurisdictions.[94] An example of how the deflection system works may be drawn from the Idaho system. There are five members on Idaho's supreme court and three on the intermediate court. All appeals are initially filed in the supreme court. Each appeal is first screened by the clerk of the court to determine whether the case involves capital punishment, the industrial commission, or the public utilities commission. If so, the supreme court is required to retain jurisdiction.[95] In the remaining cases, a staff attorney reviews the briefs and, if necessary, the record and makes a recommendation to an assignment justice.[96] The staff attorney may recommend that the case be retained by the supreme court or assigned to the court of appeals, or in a borderline case, the staff attorney may refer it to the assignment justice for determination.[97] Even if a case is allocated to the court of appeals for review, the losing party in the trial court may, prior to decision at the intermediate level, petition for discretionary review by the highest court. The court of appeals may also request that the case be transferred back to the supreme court.

According to one observer, the advantage of deflection is that a smaller number of petitions to review and transfer are made because the policy making cases are, at least in theory, kept by the supreme court.[98] There are two drawbacks. First, the decision to put a case on the calendar is made only by the assignment justice and arguably should be made by all of the

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93. *See id.* at 75.

94. *See* HAWAII REV. STAT. § 602-5(8) (1983); IDAHO CODE § 1-2406 (1984); IOWA CODE § 684-1(2) (1983). In Oklahoma civil cases go directly to the supreme court. Those cases that the supreme court does not keep are then sent to the court of appeals. *See* OKLA. STAT. tit. 20 § 30.1 (1983-84). Washington also has limited instances in which cases are automatically appealed to the supreme court subject to later reassignment. *See* WASH. REV. CODE § 2.06.030 (1984-85).

95. IDAHO CONST. art. V, § 9.

96. The office of the assignment justice is filled on a rotating basis by a supreme court justice designated by the chief justice.

97. Letter from Lon F. Davis, Staff Attorney for the Idaho Supreme Court to Judge Richard S. Brown of the Wisconsin Court of Appeals (Feb. 6, 1984) (discussing mechanics of Idaho deflection system).

98. *See* Marvell, *supra* note 78, at 25.

justices of the supreme court.[99] Second, even the most efficient staff screening, with an accurate identification of the issues posed in every case, cannot replace the justices' time-consuming duty of making the final decision on whether to take a case.[100] Therefore, deflection is likely to work well in states with a relatively low number of filings, but may be inefficient in populous states with heavy litigation.

Statistics from a low caseload state such as Idaho, a moderate caseload state such as Wisconsin, and a large caseload state such as California illustrate the important context that volume plays in the utility of deflection as an allocation device. In 1983, for instance, the Idaho Supreme Court screened 448 newly filed cases in order to determine their proper allocation.[101] They wrote 193 opinions and considered 30 petitions for review.[102] Thus, there was a total workload of 641 cases.[103] During the same year, the Wisconsin Supreme Court wrote 189 opinions and considered 583 petitions to review for a total of 772 cases.[104] It did not have to screen, in the first instance, the 2,418 filings with the court of appeals for that year. If the Wisconsin Supreme Court had to screen every new case, its workload would have been 3,189 cases, not 772. Even assuming that prior screening would reduce the number of petitions to review, the workload problem created by the screening device would dwarf any benefit derived from a smaller volume of petitions to review.

In California, the use of deflection would cause an even greater workload problem. In 1983, there were 10,140 new appeals filed with the state's intermediate appellate courts.[105] It would be a practical impossibility for the present California Supreme Court justices to screen each one of these cases. It is highly doubtful that the immense increase in workload brought about by a deflection system could be offset by a decrease in the 3,205 petitions to review filed in 1983.[106] Thus,

99. *See* R. LEFLAR, *supra* note 72, at 75.
100. *See id.*
101. *See* 1983 Idaho Sup. Ct. Ann. Rep.
102. *See id.*
103. *See id.*
104. *See* Wis. Ct. App. Ann. Rep., *supra* note 6.
105. *See* 1983 Ca. App. Ct. Ann. Rep.
106. *See id.*

the advantages of deflection are offset in busy jurisdictions because of the time required for the high court to implement the deflection system — a block of time that obviously cannot be devoted to the resolution of cases that are determined on the merits by the high court. Of course, the system of deflection can be implemented by staff attorneys, but at the cost of losing the judge's expertise that ideally is needed to result in optimum allocation.

B. By-pass

By-pass is the mechanism employed in jurisdictions in which the appeal is initially heard by the intermediate court with discretionary review of that decision by the highest court; this is the procedure available in Wisconsin. In by-pass, the litigants themselves request detour of the intermediate court in favor of initial review by the highest court. Usually, motions for by-pass are made soon after briefing is completed and before the intermediate court takes the case under submission.[107] Of course, the high court must agree to take the case and resolve it on the merits.

In no state surveyed has the highest court used this procedure as an allocation tool to any great degree. It is generally not considered an effective method of allocation. First, the responsibility for bringing the motion for by-pass lies with the litigant. Perhaps because of the expense, in no state have litigants sought by-pass to a great extent. Second, and suggestive of another reason why by-pass is not often sought, few jurisdictions have shown enthusiasm for granting petitions to by-pass.[108] Massachusetts is a possible exception. Between April 1, 1973 and March 31, 1974, about seventy-three percent of the applications for direct review were accepted.[109] Most of the highest courts recognize that the opposing parties and their counsel invariably do not present all sides of the issue.[110] If given a choice, the highest courts prefer to invite briefs on issues the intermediate courts think important. In response to

107. *See supra* note 91 and accompanying text.

108. *Id.*

109. *See* Tauro, *The State of the Judiciary — Annual Report of the Chief Justice of the Massachusetts Supreme Judicial Court*, 59 MASS. L.Q. 217, 232 (1974).

110. *See* R. LEFLAR, *supra* note 72, at 74.

one question on the survey, most of the highest courts indicated a preference that the intermediate court frame the issues.[111]

C. *Reach-down*

Reach-down, like by-pass, assumes that jurisdiction of most appeals initially rests in the intermediate court. Here, however, the highest court may sua sponte "reach down" and place a case on its own calendar.

Of the states responding to the survey, seven — Alabama, California, Kansas, Massachusetts, Missouri, New Jersey and Washington — can be characterized as having an available reach-down procedure.[112] Wisconsin has reach-down available, but as explained earlier, this procedure has never been used.[113] This same lack of use is revealed by data from Alabama and California.[114] Missouri and New Jersey have used this procedure but sparingly.[115] New Jersey, for instance, has used the mechanism in disputes regarding an upcoming election, but on few other occasions.[116]

Massachusetts is one state, on the other hand, in which reach-down apparently works. The Supreme Judicial Court of Massachusetts has used reach-down as an affirmative tool to maintain an equitable distribution of cases in its appellate

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111. *See supra* note 91 and accompanying text.

112. ALA. CODE § 12-3-14, 15 (1975); CAL. CONST. art. VI, § 12; KAN. STAT. ANN. § 20-3018(c) (1981); MASS. GEN. LAWS ANN. ch. 211A, § 10(A) (1984-85); MO. CONST. art. V, § 10; N.J. SUP. CT. R. 2:12-1 to 2:12-11; WASH. SUP. CT. R. 4.3.

113. WIS. STAT. § 809.61 (1983-84).

114. In fact, in Alabama, reach-down has never been exercised. Letter from L. Charles Wright, Presiding Judge of the Alabama Court of Civil Appeals, to Judge Richard S. Brown of the Wisconsin Court of Appeals (Jan. 21, 1983). Leland Johns, principal attorney for the California Court of Appeal (1st App. Dist., San Francisco), reported in his questionnaire that he was only aware of one instance in which the California Supreme Court transferred a case to itself from the court of appeal before a decision was made in that court. Letter from Leland Johns to Judge Richard S. Brown of the Wisconsin Court of Appeals (Jan. 18, 1983).

115. New Jersey had 7,009 petitions for review in 1982. It reached down to take only 12 of these cases. Missouri follows a similar pattern. *See supra* note 91 and accompanying text.

116. *See* R. MacCrate, J. Hopkins & M. Rosenberg, Appellate Justice in New York 80 (1982). Certain commentators on behalf of the American Judicature Society recommended adoption of this technique for New York, but that state's highest court declined to adopt the recommendation. *See id.*

courts.[117] It has what it calls a Hearing List Committee composed of three justices of the court, assisted by two staff attorneys, and the clerk of the court.[118] The committee screens every new appeal for possible "vertical" transfer.[119] By this means alone, twenty-five to fifty percent of all cases are transferred.[120]

The Massachusetts internal operating procedure entrusts staff attorneys to prepare memoranda on those cases which the staff feels the highest court should take.[121] The memoranda are forwarded to the committee, which then meets periodically with the staff.[122] This legal staff also prepares memoranda for motions filed by litigants to by-pass the intermediate court.[123] The principal difference in screening the motions by litigants for direct review and reviewing sua sponte cases pending below is the point at which the cases are screened. Motions by litigants for direct review are usually filed in the highest court within twenty days after the case is entered in the intermediate appeals court and before any briefs are filed. Thus, the screening is usually done on the basis of the motion alone. Screening of cases for possible sua sponte transfer usually does not begin until after the appellant's brief is filed.[124] The theory must be that if the high court is to reach down for a case, it wants to be as fully informed as is practical about the issues to be determined.

Commentators close to the Massachusetts operation believe the system works well. There is a common understanding between the intermediate and high courts of their comparative functions, and there is the highest amount of co-

117. *See* Johnedis, *Massachusetts' Two-Court Appellate System in Operation*, 60 MASS. L.Q. 77, 81 (1975).

118. *See id.* at 80.

119. *Id.*

120. Tauro stated that the court transferred on its own motion about 25% of all cases filed in the appellate court in 1973 to 1974. *See* Tauro, *supra* note 109, at 219-20, 232. Johnedis, in his answer to the author's survey, estimated that between 1977 and 1983, one-third to one-half of the cases were taken from the appeals court on the supreme court's own initiative. *See supra* note 91 and accompanying text.

121. Letter from Alexander M. McNeil, Administrative Assistant to the Massachusetts Appeals Court, to Judge Richard S. Brown of the Wisconsin Court of Appeals (Jan. 20, 1983).

122. *See id.*

123. *See id.*

124. *See id.*

operation between them. There is also an equitable distribution of the cases, and the workload of the highest court is manageable.[125] For instance, since most of the cases likely to be taken by the highest court prior to their resolution at the intermediate level have already been taken, the practice of sua sponte transferring significant cases for direct review substantially reduces later petitions to review.[126] Thus, of the 289 cases written by the Massachusetts Supreme Judicial Court in 1981, for example, only 24 were taken as a result of petition. For the same year, the Wisconsin Supreme Court, by comparison, wrote 171 opinions of which 135 were by petition to review.[127] Thus, Massachusetts' figures seem to bear out the claims of those familiar with the reach-down procedure of that state. The system effectively balances the caseloads of the two appellate courts, at least as to significant cases,[128] and minimizes double appeals.[129]

D. Certification

Many states have an allocation procedure which can generically be defined as "certification." This term commonly refers to a process in which the intermediate court, rather than the highest court, screens a case for possible transfer. The extent to which this allocation device is actually used varies considerably. Of the twenty-eight states surveyed, four — Florida, Kentucky, Washington, and Wisconsin — use the system to at least some extent. Both Florida and Washington have approached allocation with the same spirit as Massachusetts has approached reach-down.

In Florida, a 1980 constitutional amendment gave important responsibility to the intermediate court judges: expanded authority to certify questions to the supreme court.[130] Florida Supreme Court Justice Ben F. Overton wrote that court of appeals judges were better suited to be screening agents than staff attorneys and law clerks. He stated:

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125. *See id.*
126. *See supra* note 120 (Johnedis' response).
127. *See* Wis. Ct. App. Ann. Rep., *supra* note 6.
128. *See supra* note 121.
129. Johnedis, *supra* note 117, at 80-81.
130. FLA. CONST. art. V, § 3(b)(4), (5).

> The use of central staff attorneys or law clerks to make these types of decisions has been criticized as placing substantial power in sometimes young and inexperienced lawyer personnel. One commentator has expressed the view that a central staff is a "cancerous growth" that should be controlled, and another has stated that central staff attorneys are, in reality, the "hidden judiciary."[131]

Overton explained that one of the key philosophical determinations made by the Florida Supreme Court in recommending the 1980 jurisdictional amendment to the legislature was the rejection of the central staff approach.[132] The court expected that under the new amendment, a part of the screening responsibility would be exercised by the intermediate court judges.[133] This new role, Overton reasoned, gives the intermediate courts a significant role in the law making function, in addition to carrying out their error correcting function.

Although many commentators have been critical of Florida's appellate reforms, the criticism has been largely confined to Florida's use of P.C.A.'s (one line per curiam affirmance decisions issued without supplying any reasons), and its rule preventing supreme court review of P.C.A.'s. Apparently, no one has criticized Florida's use of the intermediate courts as screening agents. It is claimed that screening by the intermediate court of appeals has played a part in reducing the amount of time the Florida Supreme Court spends on its own screening responsibility.[134]

In Washington, the intermediate courts also play a significant role in dividing the caseload between the supreme court and the court of appeals.[135] Although Washington has a statute which designates certain types of cases for direct initial review by the supreme court, most appeals fall outside these direct-review categories. Indeed, the bulk of the supreme court docket consists of cases certified to the supreme court by the court of appeals.[136] This suggests considerable confidence

131. Overton, *supra* note 82, at 83.

132. *See id.*

133. *See id.*

134. *See id.* at 87.

135. Report from Prof. Robert Leflar to Washington Court of Appeals at 18 (Dec. 12, 1977) (discussing internal operating procedures) [hereinafter cited as Leflar Report].

136. *Id.*

on the part of the supreme court that the lower appellate court has correctly identified the cases that ought to be resolved by the highest tribunal.

IV. Reach-Down Versus Certification and a Proposal for Wisconsin

There is merit to both the reach-down and certification methods of allocation, if these procedures are carefully practiced. Statistics strongly suggest that the more cases the highest court takes by an active reach-down or certification process, the fewer petitions to review it will feel obliged to grant. The workload on third category cases is thereby more adequately distributed, thus relieving the intermediate court of the need to spend an inordinate amount of time on a case likely to be reviewed by the supreme court. As a result, double appeals are held to a minimum. Thus, the effective use of either of these methods can result in reducing the workload of both courts and in increasing the awareness of their capacities in the appellate process.

In practice the real difference between reach-down and certification is in the use of staff. In the reach-down procedure employed by Massachusetts, staff attorneys are used to screen every case that is appealed. The staff drafts memoranda recommending both sua sponte transfer and acceptance of applications for direct review by litigants. With certifications, it is usually the intermediate court judges who do the screening and make the recommendations. Of course, staff attorneys could be used in the certification process, but their extensive use would be likely to undermine the high court's confidence that the proper cases have been tendered for resolution. Separated both physically and in terms of supervisory authority from the staff of the intermediate court, the supreme court justices may be circumspect about the wisdom of the recommendation to certify.

Furthermore, commentators have echoed Justice Overton's dissatisfaction with relying on staff attorneys to screen cases for allocation. Supreme Court Justice John Paul Stevens has suggested that the United States Supreme Court divest itself of its power to choose its caseload and instead place that

responsibility in a new court.[137] Stevens, noticing the staggering number of petitions for review filed with the Supreme Court, has indicated that because of the sheer volume, the selection process had necessarily been delegated to "anonymous clerks" and administrators and had thus been relegated to "second-class work." He estimated that he did not look at over eighty percent of the petitions.[138]

On the other hand, reliance on staff attorneys in reach-down has its benefits. The use of supreme court staff attorneys to review cases for possible placement on the highest court calendar does arguably save the intermediate court judges some time by freeing them from that screening burden. Furthermore, in reach-down, the staff is under the direct supervision of the justices who unilaterally determine when to reach-down. One could suppose that most third category cases will be allocated to the highest court; the remaining cases could be written by the intermediate court with at least some assurance that a second review was unlikely. This would mean more time for the intermediate court judges to write these and other cases.

There is, nonetheless, a *quid pro quo* if reach-down is adopted. At least in Wisconsin, its implementation would require the hiring of more staff attorneys. For example, the Massachusetts Supreme Judicial Court now has four staff attorneys, a number that is considered sufficient to handle review of that state's workload. Massachusetts, however, had but 1,416 appeals in 1983.[139] Wisconsin has 6 staff commissioners and, as indicated earlier, entertained 2,418 appeals in 1983. If reach-down were adopted, more staff would need to be hired to review the additional 1,000 appeals that are filed yearly in Wisconsin.

Furthermore, either the Wisconsin Supreme Court as a whole, or some segment of it, would have to function as a hearing committee to review the staff's recommendations. This review, of course, would entail an increased commitment of judicial time. While the downturn in the number of peti-

137. *See* Special Report, *Justice Suggests New Panel to Select High Court Cases*, 13 CRIM. JUST. NEWSLETTER 6 (Aug. 16, 1982).

138. *Id.*

139. *See* 1983 Mass. Sup. Ct. Ann. Rep.

tions to review may completely offset the increased commitment, such a result is not assured. Two thousand four hundred appeals would still have to be reviewed, requiring additional staff. The result is that reach-down might actually increase the workload of the highest court. Thus, while reach-down would assure the supreme court of discretion over its caseload, the effect on its workload is uncertain.

It can be concluded that intermediate court judges, rather than high court staff, are actually better able to identify those cases which should be allocated to the highest court. There are practical reasons that perhaps make intermediate judges superior "allocaters" of the issues. The staff attorney, in a Massachusetts-type reach-down procedure, must depend upon the legal briefs as the material for making the allocation decision. However, because these briefs are adversarial in nature, they can rarely be relied upon to present a sufficient exposition of the law. In addition, the quality of written appellate advocacy is often disappointing.[140]

On the other hand, certification, which uses an intermediate court judge or a panel of judges, has certain advantages. The mechanics of certification offer more flexibility than reach-down, in terms of when the decision to allocate is made. Judges can certify at many different graduated levels in the decisional process. For instance, although reach-down takes place after the appellant's brief is filed, certification allows judges the luxury of reading both sets of briefs. They can decide to certify after reading the briefs and before decision conference or to withhold decision until after oral argument is held (if indeed oral argument is ordered). In the alternative, the judges have the option of waiting until the decision conference. Additionally, after the case has been assigned and the writing process has begun under the direction of the writing judge, the writing judge may discover that the case will necessarily have a great effect on the law. The matter can then be brought to the attention of other panel members as a possible certification candidate, and certification can take place at that time.

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140. *See* F. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 103-04 (1980).

Some might conclude that certification by the court of appeals should come earlier in the decisional process — at least before conference. It might, in fact, be suggested that effective case flow management demands implementing a system of early identification, that courts should be aware of incoming cases and the issues they pose. Some might argue that flexibility would be wasteful in some cases. The later the certification, the argument goes, the greater the duplication of effort.

This viewpoint fails to take into account the powerful impact of oral arguments, decision conferences, and drafting of opinions as influential tools for correctly identifying important issues. First, the panel has the benefit of collegiality at a decision conference. This is important because the law, facts, and policy considerations may take on a flavor of importance not fully considered when reading the briefs.

Second, after the decision conference takes place and assignment of the cases is proportioned among the panel members, the judges decamp to their respective chambers. Until that time, at least in Wisconsin, little writing has taken place other than a judge's personal notes concerning a case. The creation of a written product entails the processes of thinking, discussing with clerks, researching the law, becoming intimately acquainted with the record, making notes, writing a first draft, editing, and revising.[141] This process is a remarkably effective device for detecting fissures in accuracy and logic.[142] Thus, even if certification is not thought appropriate at the decision process stage, the writing process may reveal an issue which is most appropriately addressed by the highest court. What may have been originally assumed to be a trivial issue, worth perhaps a page or two, suddenly becomes an issue recognized as "a problem" in the law for many years. A decision mulled over in one's mind or discussed in conference may look significantly different when dressed up in written words.[143]

It is no answer to say that if the panel's processing of a case has entered the writing stage, the decisional process has been completed and might just as well be written. At the on-

141. *See id.* at 143-44.
142. *See id.* at 57.
143. *See id.*

set of the writing process, the reasoned elaboration has simply not yet taken shape. The writer is likely to discover additional questions as the work progresses. If, during the writing process, the panel becomes uncomfortable about making new law in an area in which further review is possible, allocation to the highest court then becomes a desirable alternative. The judicial insight gained from the decision conference and writing process makes certification a more flexible process and a singularly more attractive means of allocation than reach-down.

Finally, the process of certification is not really time consuming. The briefs have been prepared, and therefore, no further briefing or revising of briefs is necessary. If clarification is needed to determine whether a certifiable issue indeed exists, it can be taken care of at a scheduled oral argument. Writing a certification takes less time than writing a decision because the panel need only explain the issues and each side's reasoning. While the panel can say which side it prefers and can state its reasons why it prefers one side over the other, it is merely shaping the legal issues for the high court review; it is not actually *deciding* the case and giving reasoned elaboration in support. To the extent that the intermediate court judges have spent time on the case that they would not have under reach-down, it is not lost time but quality time spent in the allocation process. As previously stated, a high court prefers to have the legal issues presented by judges, rather than staff, since judges have more expertise and are, in the main, more experienced. There is less turnover in the judiciary than with the staff, and judges have the flexibility to determine *when* in the decisional process certification is necessary.

V. CRITERIA FOR ALLOCATING CASES AND PROCEDURES FOR EFFICIENT PROCESSING IN A CERTIFICATION SYSTEM

It is important that the interrelationships between the intermediate court and the highest court be intelligently planned and not allowed to develop haphazardly.[144] This is true with respect to any system of allocation. The two courts should constitute a unified appellate system in which both units work

144. *See* R. LEFLAR, *supra* note 72, at 77.

together to achieve the goals of individual justice and sound "law development" with maximum efficiency, minimum delay, and reasonable cost.[145] To facilitate these goals, an efficient process for allocating cases is needed. As the previous section has implied, certification, properly structured and implemented, is the best method of achieving this result. The effectiveness of any certification process, however, depends on the development of effective guidelines and criteria. An outline of the present system in Wisconsin and practical suggestions for its improvement follows.

Currently, although Wisconsin has a system for certification[146] and the supreme court does take approximately fifty percent of certified cases, there are no useful, shared criteria for determining when a case is certifiable. Under the present scheme, for example, if certification is denied by the supreme court, the intermediate court has no way of determining the reason for the denial. In short, the supreme court is not required and does not undertake to assign reasons for its denial of a certification. Without standards, denial of a certification can be made arbitrarily, or on an unknown but reasoned basis. By establishing a system calling for brief explanations why a certification is denied, standards will eventually take form, and the intermediate court can determine, over time, what kinds of cases the highest court is most likely to accept.

The remainder of this Article explores the various criteria used by other jurisdictions and recommends the acceptance of many of these standards for Wisconsin. The criteria surveyed will be divided into two categories. The first consists of those criteria recommended for adoption; the second sets out criteria which are not recommended for adoption by Wisconsin. Finally, internal operating procedures are proposed for putting a cohesive procedure into effect.

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145. *See id.*

146. *See* WIS. STAT. § 809.61 (1983-84).

A. *Criteria from Other States Recommended for Adoption in Wisconsin*

1. Substantial public importance or interest

The criterion of public importance is found in Alaska, California, Florida, Hawaii, Illinois, Kansas, Kentucky, Massachusetts, and Missouri.[147] Although Wisconsin has no criteria for determining what kind of case is certifiable, the Chief Justice of the Wisconsin Supreme Court has commented that the supreme court is interested in taking cases of great importance.[148] He further explained that a case is of great importance when it has the potential to determine what the trend of the common law is going to be in Wisconsin.[149]

If this definition is accepted, the intermediate court is in an excellent position to assess whether a case will potentially determine a trend in the common law. Since the flow of appeals is centered on the intermediate court, it receives cases in every legal area. Additionally, some of the areas overlap. Thus, the intermediate courts of appeal are in a unique position to determine when legal confusion is prevalent and where reform, clarification, or direction is necessary.[150] The intermediate court can direct the highest court to those areas which are in need of explication.

The intermediate court, when writing a certification based on the public-interest criterion, should bring the various conflicts and dark spots to light, sharpening the issues for ultimate consideration by the high court. In this way, the intermediate court can best explain why the case is of great public importance. Suppose, for example, the case of *Head and Seemann, Inc. v. Gregg*,[151] were processed under the proposed system. In *Head and Seemann*, the defendant fraudulently induced the plaintiff to sell the defendant's home. The plaintiff asked for recission of the contract and, in addition,

147. ALASKA SUP. CT. R. 408(b); ALASKA STAT. § 22.05.015(b) (1983); CAL. SUP. CT. R. 29(a)(1); FLA. CONST. art. V, § 3(b)(4); HAWAII SUP. CT. R. § 29(b); ILL. SUP. CT. R. 315; KAN. STAT. ANN. § 20-3016(a)(2) (1981); KY. SUP. CT. R. 76.18(2); MASS. GEN. LAWS. ANN. ch. 211A, §§ 10(A)(3), 12 (West 1984-85); MO. CONST. art. V, § 10.

148. *See* Antoine & Gleisner, *supra* note 11, at 7.

149. *See id.*

150. *See generally* B. WITKIN, *supra* note 51, at 68.

151. 104 Wis. 2d 156, 311 N.W.2d 667 (Ct. App. 1981), *aff'd*, 107 Wis. 2d 126, 318 N.W.2d 381 (1982).

for recovery of rent. The issue was whether to allow recission *and* restorative damages or whether the two types of damages amounted to double recovery, requiring the plaintiff to elect his remedy. It was clear to the intermediate court panel that this area of the law was volatile because either answer would mark a trend in the common law. The court of appeals certified the case to the supreme court, but it was refused. After a decision by the court of appeals, the supreme court granted a petition to review and eventually affirmed by adopting the court of appeals opinion in a per curiam decision. If this criterion had been in place, the supreme court might well have taken the case in the first instance, thus avoiding duplicative effort.

It is important, at this point, to note the difference between an issue of "great public importance" and one of "great public interest." While a case may be of great importance to the law, it may not be of interest to the media or the general public. It should not be required that the public actually know of, and be interested in, the legal issue in order for the case to be considered certifiable. Florida recognized this difference and made a change in the criterion from one of "great public interest" to one of "great public importance."[152] Care should be taken to ensure unambiguous wording if this criterion is adopted.

2. Cases, which if decided in accordance with current trends, might be in conflict with the highest court

When an intermediate court seeks to institute change by openly overruling a doctrine of the highest court, a quick and contrary response by the highest court may occur. Such intermediate decisions, therefore, should be avoided. They cause double appeals and duplicate the decisional process. They also usually cease being of any value to the progress of the law because the *ratio decidendi* of the intermediate court decision will likely be repudiated; it would no longer be used as authority and, therefore, would be consigned to limbo.

152. *See* Overton, *supra* note 82, at 87.

There are times, however, when existing precedent may possibly be distinguished by factual differences from the case being resolved. Whether such a dilution of an existing legal doctrine should occur is best determined by the highest court. Therefore, rather than risking the highest court's disagreement by writing a case that can be interpreted as an erosion of doctrine, the case should be certified. Florida and Washington expressly allow the intermediate court the prerogative of certifying cases which, if written, might be in conflict with a prior decision of the state's highest court.[153]

If transfer is requested based on this "conflict" criterion, the intermediate court certification should reveal the existing state of the law as the intermediate court believes it to be. This can alert the highest court as to whether confusion exists regarding the parameters of the doctrine and whether clarification is necessary. The certification should also state *how* the existing precedent is possibly factually distinguishable from the case at hand.

3. Cases in which the intermediate court seeks revision of the law

Several commentators have suggested that one intermediate court function is to stimulate critical review in the law.[154] In such cases, the intermediate court may make a direct statement showing that the case offers an opportunity for the highest court to change existing doctrine.[155] Judicial resources can be preserved if certification is used to alert the highest court to this kind of case. The highest court, given the opportunity to respond, can alleviate the need of the intermediate court to write an opinion. If certification is denied, it would be a signal that no revision is to take place. Missouri has this express criterion, and Alaska's supreme court has approved of this criterion through case law.[156]

153. *See* FLA. CONST. art. V, § (3)(b)4; WASH. REV. CODE § 2.06.030(1)(e) (1974).
154. *See, e.g.*, Hopkins, *supra* note 1, at 464; R. LEFLAR, *supra* note 72, at 64.
155. *See* Hopkins, *supra* note 1, at 465.
156. *See* MO. SUP. CT. R. 83.02; Miller v. State, 648 P.2d 1015 (Alaska 1982).

4. Highest court review likely anyway

Frequently, intermediate court judges know that if an issue is decided a certain way, review is likely. Often, statistics prove that certain results will, in all probability, be subject to further review. For instance, in Wisconsin, reversals in favor of a criminal defendant are frequently reviewed by the Wisconsin Supreme Court. From 1981 through 1983, statistics reveal that when an intermediate court decision reversed in favor of the criminal defendant, a subsequent petition to review was granted seventy-five percent of the time.[157] Conversely, when a reversal favored the state, as opposed to a criminal defendant, the supreme court denied review in seventy-five percent of the cases.[158]

It is wasted labor for an intermediate court to overturn a criminal conviction when it has reason to believe that supreme court review will take place three out of every four times. It would be preferable for the intermediate court to certify the case, explain it is about to reverse and state the reasons why. The supreme court would then have the opportunity to accept the case and avoid a double appeal. Kentucky and Massachusetts seem to have this criterion of allowing certification on grounds that a petition for review is likely anyway.[159]

5. Workload equalization

One of the major themes of this Article is workload equalization. It is important, for reasons already advanced, to balance the workload of the two courts. One commentator favors the highest court deciding some complex cases in the first instance simply on the basis of equitable distribution of the workload.[160] Although certification of a case based on this criterion may not necessarily present significant issues requiring clarification or development of the law, it will ordinarily require a great amount of chamber time and resources because of issue complexity.[161] While the intermediate court should

157. *See* Wis. Ct. App. Ann. Rep., *supra* note 6.

158. *See id.*

159. *See supra* note 91 (Kentucky Court of Appeals survey response) and accompanying text; Johnedis, *supra* note 117, at 80-81.

160. *See* Shepard, *How the Court of Appeals Gets Its Cases*, IDAHO B.J. 27 (Aug. 1983).

161. *See id.*

not certify a case merely because it is time consuming, certification may still be justified when research materials such as state or federal legislative history are more readily at the highest court's disposal. Ready access to research material in a complex case greatly abbreviates the decision and writing process. Idaho, Kansas, Massachusetts, and Missouri have this criterion.[162]

6. When delay would adversely affect the administration of justice

This criterion is highly recommended. It involves cases which, because they have a great effect on the proper administration of justice throughout the state, require "immediate resolution by the supreme court."[163] Election issues are one example. In such a case, there may be a need for what Florida terms as "pass-through."[164] Such criterion might be put into use, for instance, when a new statute is subject to constitutional attack in a great number of cases throughout the state. Each trial court might answer the question differently, leaving the area in great confusion. Trial courts are prone to hold the matter in abeyance pending an appellate decision. Because of the length of time involved in the ordinary legal process, the number of these cases can grow exponentially. The number of retrials that might be required also grows. The supreme court, as law-harmonizer and policy-maker, can speed the entire legal process with the help of the intermediate court judges. "Pass-through" can be an important tool in realistically forging justice through administration reform.

7. Cases with the same or similar issues as a case currently pending in the highest court

If an issue is currently before the supreme court, it should be the intermediate court's duty to certify a similar case to the supreme court rather than to hold the case or decide it without the benefit of the highest court's decision. It is preferable

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162. *See* IDAHO CODE § 1-2406 (1984); KAN. STAT. ANN. § 20-3016(a)(4) (1981); MO. SUP. CT. R. 83.06. See also Johnedis, *supra* note 117, at 80, and Shepard, *supra* note 160, at 27, for the Massachusetts usage.

163. Overton, *supra* note 82, at 87-89.

164. *See* FLA. CONST. art. V, § 3(b)(5).

to certify such a case because the facts may be significantly different from the case under submission by the high court. Thus, certifying the related case will provide the supreme court with an opportunity to see varying facts before announcing changes in existing legal doctrine. Also, if the cases are substantially alike, the supreme court might wish to conserve judicial time by consolidating them.

If certification is based on the "parallel" case, the certifying judges should carefully set out the facts and explain how the certified case might expand or limit the case the supreme court has already taken for review. This criterion is found in California.[165] Its potential usefulness suggests that it ought to be more widely adopted.

8. Cases in which an intermediate court judge is a party to the action, thus preventing any intermediate court judge from hearing the case

Although this situation occurs infrequently, the conflict of interest presented by such a case requires certification. The highest court should not expect members of the intermediate tier to sit in judgment of their colleagues.

A Wisconsin example is *State ex rel Cannon v. Moran*.[166] In this case, certain Milwaukee County circuit judges had a pension plan with the county. When the judicial system was switched from a "county supplement" program to pure state employment, the judges were able to join the state pension plan. They then "retired" from the county system, which allowed them to collect a full pension while still working as judges under the state plan. The judges, two of whom were then sitting on the court of appeals, brought suit when the legislature enacted a statute disallowing the collection of the county pension. The case made its way to the court of appeals, and a panel of judges certified the case because it recognized the great public importance of the case. Unsaid, but obvious, was the fact that the panel was being placed in the position of passing judgment on its own colleagues. A by-pass was also requested. The supreme court refused both by-pass

165. *See supra* note 91 (Cal. Sup. Ct. survey response) and accompanying text.

166. 111 Wis. 2d 544, 331 N.W.2d 369 (1983), *rev'g* 107 Wis. 2d 669, 321 N.W.2d 550 (Ct. App. 1982).

and certification, leaving the case to be decided in an environment that could, at best, be described as awkward. The court of appeals held that the statute was sound and that the judges could not recover. The supreme court then granted a petition to review and eventually reversed the court of appeals.

9. Need to interpret an opinion or mandate previously issued by the supreme court

At times, an intermediate court must write a decision that depends upon interpreting a previous decision of the highest court which, upon examination, is subject to two or more reasonable constructions. Because the court which originally wrote the opinion is in the best position to interpret the case, certification is desirable.

When writing a certification based on this criterion, the intermediate panel should first state the alternative views that are possible. Then the panel should explain what it believes to be the correct interpretation. If the panel is correct in its interpretation, the highest court should not grant the certification. This would signal to the court of appeals that the highest court favors the selected interpretation, and a decision based upon that interpretation will most likely not be subject to further review. If, on the other hand, the highest court feels the intermediate court's suggested interpretation is wrong, or is in need of further analysis, the certification should be granted.

10. Conflicts within the courts of appeals

Unlike the federal circuit courts of appeals, the intermediate appellate court panels in Wisconsin are unified.[167] As such, each district is bound by the published decisions of another district. If a district feels that the written decision of another panel is wrong, it is probably better to write a decision following, although criticizing, that panel than to certify the issue. It takes little expenditure of judicial resources to decide an issue that has been previously decided. There is no justification for allocation of the case to the highest court on the basis that one panel does not agree with the decision of an-

167. *See generally* WIS. STAT. ch. 752 (1983-84).

other panel. Resolution of any conflict can occur at the supreme court level.

There are times, however, when two districts will find themselves writing on the same subject at the same time. This could conceivably lead to a "race" between the two districts to release and publish their decisions first, especially if the two panels have divergent views. One proposal for solving this dilemma is to allow the intermediate court to sit en banc to resolve this conflict by majority vote. All members from each district would be present, each having been given a period of time to study the alternative drafts. Debate could then be held, and a decision made. One draft could become the majority opinion, the other a dissent. The cases would be consolidated and published. Identification of possibly conflicting cases could be made by asking each district to present a list of problem cases at a monthly conference. In that way, the other districts could be alerted to these potentially conflicting cases.

The problem with an en banc decision is that it is time consuming. It would be preferable to certify both cases to the supreme court before either are released, explaining the debate between the panels and asking the supreme court to resolve the issue. Thus, the resolution is secured at less cost than an en banc hearing and certainly at less cost than a double appeal.

B. Criteria from Other States Not Recommended for Adoption in Wisconsin

1. Cases of first impression

This criterion relates to either questions of law — including constitutional questions — that have never been decided or to the application of accepted law to facts that are significantly different from prior cases. The problem with this criterion is that almost any case is going to develop the law somewhat, by the very nature of the different fact situations. The difference between old and new is one of degree. Thus, a large number of cases can conceivably be considered "first impression" cases.

Perhaps the first impression category can be part of another class of certifiable cases. It seems that only when the first impression case is of public importance, as opposed to a

"new" case of relatively minor import, and will chart the law in a certain field is the case really worth resolution by the highest court. In such a case, the "substantial public importance" criterion could serve just as well. Although Hawaii, Idaho, and Massachusetts have the first impression criterion,[168] it is not recommended that Wisconsin adopt it.

2. Death sentences, life sentences, and egregious felonies

Many states have certification procedures or other means for high court review in cases which have imposed death sentences. This criterion is irrelevant in Wisconsin since it is not a capital punishment state; were this otherwise, this criterion might be highly recommended. Some might feel that the same should hold true for cases in which life sentences have been meted out. But simply because an accused receives a life sentence does not necessarily mean the case is of great public importance or involves an intricate question of law mandating supreme court review.[169]

C. Mechanics of Certification

Established criteria permit certification to be written according to an intelligently planned outline of guiding principles rather than in a haphazard manner. The highest court should adopt the criteria which it feels best meets its needs and codify these as part of the statutory rules of appellate procedure. In addition, the interrelationship between the intermediate court and the highest court requires agreed upon noncodified internal rules of operating procedure. Suggested internal operating procedures for both courts follow.

1. The intermediate court

The intermediate court should not usually consider the filing of certification until the briefs have been submitted and a decision conference is held. If judge-induced certification is to

168. *See* HAWAII REV. STAT. § 602-6 (1983); MASS. GEN. LAWS ANN. ch. 211A, § 10(A) (West 1984-85). *See also supra* note 91 (Idaho Ct. App. survey response) and accompanying text.

169. It should be noted incidentally that Massachusetts allows certification of cases in which a person is tried for first-degree murder and convicted of second-degree murder. *See* Johnedis, *supra* note 117, at 80, 83. The reason is unknown, and its adoption is not recommended for Wisconsin.

be accepted as the major allocation device, it is primarily because the decisional process of the certifying judges improves the screening process. It would impair the accuracy of screening, at least in most cases, to allow certification prior to the decision conference. At this conference, the judges, now adequately informed about the cases, can share their insights and recommendations.

The need for this internal operating procedure is illustrated by *State v. Herro*.[170] In that case, the Wisconsin Court of Appeals entertained a petition for leave to appeal a nonfinal order detaining Herro under a new bail statute. His counsel attacked the new statute on several constitutional grounds. The intermediate court granted leave to appeal and immediately certified the case without benefit of briefs. The supreme court accepted the certification. Then, Herro changed counsel and his new counsel submitted a brief on a constitutional ground not asserted in the petition for leave to appeal and failed to address the constitutional grounds raised in the original petition. When the supreme court received Herro's briefs, it revoked the certification.

Following this case, the supreme court adopted a policy to accept no cases for certification or by-pass prior to filing of briefs.[171] The policy should be uniform with both courts. In most circumstances, no certification should be processed until after the briefing and decision conference have been completed.

No further briefing or response to the certification should be allowed. The mechanics of making an appeal should not differ depending on whether certification is requested. The briefs should be written as though the intermediate court is going to decide the case. There should be no opportunity for rebriefing once certification is made. The reason for this is that once the Wisconsin Supreme Court takes a case, it almost always allows oral argument when the issue can be squarely debated by the litigants. In addition, that court most often allows supplemental briefing, or if the parties prefer, allows the briefs submitted to the court of appeals to stand as

170. No. 83-2259, slip op. (Wis. Ct. App. Dec. 16, 1983).

171. Letter from Chief Justice Heffernan of the Wisconsin Supreme Court to Judge Gartzke of the Wisconsin Court of Appeals (Dec. 14, 1983).

the briefs to be considered by the supreme court. Thus, the litigants are not left without means to argue the issue as posed by the intermediate court, should it differ from the original issues raised.

If the supreme court denies certification, Wisconsin statutes allow the parties to move the court to allow supplemental briefing, explaining that they wish to respond to the certification. Each party is, of course, informed of the certification; each received a copy of the certification when the original was transmitted to the supreme court. Thus, counsel for each party plays at least a supplemental role in the certification process.

Certification is designed to make full use of the intermediate court judge's experience and intuition. The certification should either be written by an assigned judge or under that judge's supervision. To use memoranda independently conceived and authored by the staff would be a dilution of judicial review responsibility.[172] The advantage of certification, as here conceived, is that the recommendation to transfer is that of the panel rather than that of the staff. Everything contained in the recommendation, including the reasoning, should be collegially determined so as to insure a high level of persuasiveness with members of the highest court. Over the long run, more desirable objectives are likely to be achieved when the entire panel undertakes the requisite responsibility.

The certification should contain an analysis of the reasons supporting the transfer. It should explain the criteria upon which the request for transfer is being made. In other words, the certification should explain *why* transfer is thought appropriate. Here, of course, the various criteria for certifications are pertinent. Furthermore, the certification should indicate how the panel would rule if it were to decide the case. An explanation of how the panel would rule gives the highest court an opportunity to assess the likelihood of a double appeal. If there is a likelihood of further review either because the result or the reasoning is subject to question by certain members of the highest court, then a double appeal can be avoided by accepting the certification.

172. *See* R. LEFLAR, *supra* note 72, at 93.

It presently takes at least three affirmative votes, out of seven, for the Wisconsin Supreme Court to accept a petition to review. It takes four votes to accept a certification or bypass. It is possible, therefore, to have enough members of the court concerned with the intermediate court's decision to cause a petition for review to be granted, but not enough for a certification to be taken. This inconsistency exacerbates the problem of double appeals. Therefore, it is suggested that the supreme court make uniform the necessary number of votes in each case.

2. The highest court

The highest court should continue to have full discretion to accept or reject certification. The present statute regarding certification in Wisconsin, section 809.61 of the Wisconsin Statutes, allows the supreme court full discretion in refusing to take jurisdiction of an appeal certified to it by the intermediate court. The highest court knows its own capacity and should set its own calendar. While the present problem of misallocation demands the taking of most certifications, the final decision must remain with the highest court.

A supreme court liaison committee should, however, be established to meet periodically with an intermediate court committee. It is a waste of judicial resources to prepare certifications only to have them rejected. If there are certain cases which the highest court is not prone to accept or there are questions about how to interpret a certain criterion, communication between the two courts can cure the problem. Close collaboration between the courts is essential if a fair degree of consistency is to be maintained in the decisional law of the jurisdiction.[173] The state of Washington has a supreme court liaision committee.[174] A similar institution in Wisconsin would greatly facilitate the certification process.

The highest court needs not only to adopt and codify criteria, but it also needs to make a positive effort to ensure that the certified cases meet its objectives. A rate of nearly 100 percent between cases certified and cases accepted should be the goal of both courts. To reach this goal, there must be reg-

173. *See id.* at 74.

174. *See* Leflar Report, *supra* note 135, at 17-18.

ular communication between the courts so that the intermediate court learns the supreme court's objectives in accepting certifications and gains confidence to certify more cases than it has in the past.

VI. CONCLUSION

State appellate court systems have undergone a tremendous transformation since their inception. In the last century, American state supreme courts were open to everyone, whether the claim represented a widespread issue or was peculiar to a single sector or party.[175] As state populations grew, unlimited accessibility produced enormous caseloads for the high courts.[176] The courts were criticized for delays and backlogs and for the mechanical quality of their shorter and more perfunctory decisions.[177] In practice, accessibility to appellate justice became limited.

Intermediate courts were designed to relieve these problems of congestion and access. Upon the establishment of intermediate courts, most states gave its highest court discretion to choose the appeals it wanted to hear. The highest court could, therefore, concentrate on appeals that it thought meritorious or that raised important issues of policy or principle.[178] Despite these intentions, however, the creation of intermediate courts coupled with discretionary appeals to the supreme court have not solved the workload problem for the highest courts. Litigation has increased throughout the United States. The highest courts must now find the time to screen large numbers of petitions for review and, at the same time, try to maintain a manageable caseload. Intermediate courts have also become overburdened as a result of exploding dockets. Adding to this burden is the expenditure of substantial time in researching and writing cases more appropriately resolved by the high court.

A significant factor in the workload problem of both intermediate and high courts is misallocation of cases. The highest court often takes cases for the single reason of correcting an

175. *See* Kagan, *supra* note 38, at 998.
176. *See id.*
177. *See id.* at 999.
178. *See id.*

"erroneous decision" of the intermediate court. In seeking to preserve the principle that the supreme court is open to everyone, the high courts have unnecessarily increased their own workload problem by indirectly encouraging a flood of petitions to review. At the same time, the intermediate court finds itself reading many cases which will eventually be reviewed by the high court. In short, current practices contribute to poor allocation and duplicative effort.

A more efficient system of allocation would help to reduce the workload problems in both courts. By preferably using a certification procedure as outlined earlier, or perhaps reach-down, the highest court would be able to place only those cases on its calendar which it believes will make or develop the common law or resolve important statutory or constitutional questions. Petitions to review in error correcting cases could be discouraged by emphasizing the differing roles of the two courts. As a result, the highest court would be free to spend more time writing decisions important to the law and less time inspecting petitions to review. The intermediate courts would have more time to spend writing error correction cases, thus relieving their already over-crowded dockets.

For an allocation system to be truly effective, workable standards must be designed and followed. These standards must be tested in practice and amended when necessary. Only then can the allocation between the two appellate courts be based upon the highest level of communication and cooperation.

To be sure, allocation will not, by itself, *solve* the workload problem for either court. It will help, however, in fostering a healthy identification of the roles each court is to play. By doing so, the calendars of each court will be less congested, the cases decided by the intermediate and high courts will be more appropriate to their respective functions, and the waste to judicial resources will be minimized.