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Charles W. Wolfram

Cornell Law School, charlesw.wolfram@yahoo.com

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Notes from a Study of the Caseload of the Minnesota Supreme Court: Some Comments and Statistics on Pressures and Responses

Charles W. Wolfram*

I. INTRODUCTION

Between October 1, 1967, and September 20, 1968,¹ the Supreme Court of Minnesota delivered 306 opinions in a slightly greater number of cases.² The Court accomplished this task with a membership of seven justices, a number that has remained unchanged since 1930.³ The Court receives direct as-

* Associate Professor of Law, University of Minnesota. The author wishes to express his appreciation to members of the *Law Review* who assisted in the collection of statistics upon which this article in part is based, particularly to Messrs. Richard P. Keller and Allan A. Ryan, second-year students at the Law School and candidates for membership on the *Review*. The author, of course, takes sole responsibility for content.

1. These dates encompass what the *Review* has previously referred to as the "Term" of the Minnesota Supreme Court. As the editors of previous volumes have pointed out, the unit of measurement differs from the Court's statutory term which commences on the first Tuesday after the first Monday in January. See MINN. STAT. § 480.01 (1967); Note, *The Minnesota Supreme Court 1963-1964*, 49 MINN. L. REV. 93 (1964). As is pointed out by the Volume 49 editors, however, a September-October Term is used for the convenience of scheduling and presenting student writing. In order to permit comparison with previously published *Review* statistics, the data forming the basis of the present work was organized conformably. While this precludes direct comparison with the caseload statistics prepared by the Administrative Assistant to the Minnesota Supreme Court—maintained on a January-December basis and published annually—little is lost for present purposes since the two sets of statistics largely overlap, the Administrative Assistant's detailed statistics being available only for the years since 1963. Finally, the data used by Professor Pirsig in his 1940 study of the work of the Minnesota Supreme Court, Pirsig, *The Work of the Supreme Court of Minnesota*, 25 MINN. L. REV. 821 (1941), was based on the statutory January-December term. The statistics given there have been employed at places herein without any attempt to convert them. Hereafter "Term" refers to an October-September measurement and "statutory term" refers to the official January-December measurement.

2. See Table I, 1967-1968 Term, *infra* at 1043. The number of opinions delivered during a typical Term will ordinarily be 10-20 less than the number of cases actually decided because of the consolidation of cases on appeal or for decision after separate argument. It should be noted that throughout this article the unit of measurement is the number of opinions delivered, not the number of cases decided.

3. See Heiberg, *Social Backgrounds of the Minnesota Supreme*

sistance in writing opinions only from one retired justice; he has succeeded a series of statutory commissioners who have continuously been assisting the seven-justice Court since first permitted by legislation in 1943.⁴ The work of the Court is being carried on in quarters that were first furnished to it in 1905, and which have been little expanded since that time. And the Court is accomplishing the work of liquidating its caseload with a membership whose average age might be thought to counsel less hurried activities.⁵ The burden thought to be imposed by these conditions has led the Court and the Judicial Council of Minnesota⁶ recently to recommend that the Governor

Court Justices, 53 MINN. L. REV. 901, 902 (1969). The Supreme Court expanded to its present size of a chief justice and six associate justices pursuant to an amendment to Article VI, section 2 of the Minnesota Constitution adopted by the voters in November, 1930. THE JUDICIAL COUNCIL OF THE STATE OF MINNESOTA, BIENNIAL REPORT 19 (1968) [hereinafter cited as JUDICIAL COUNCIL REPORT], incorrectly states that the number of justices was increased to seven in 1920. The amendment was proposed by ch. 430, [1929] Minn. Laws 676. In the 17-year period between 1913 and 1930, the workload was shared by a chief justice, four associate justices, and two nonvoting commissioners.

There is good reason to believe that the membership of the Supreme Court was not "legally" raised to seven until publication of the Revised Statutes of 1941. The preceding statute, MINN. GEN. STAT. § 129 (1927), stated that the Court's membership consisted of a chief justice and four associates, using the language of ch. 96, § 1, [1919] Minn. Laws 93.

4. See ch. 595, § 3, [1943] Minn. Laws 1870. Since 1943, the Court has been assisted by at least one commissioner. Present legislation permits either a retired justice, a commissioner of the Court, or a district judge to act as a justice at the appointment of the Court. MINN. STAT. § 2.724, subd. 2 (1967). In addition, a justice who has resigned may be appointed by the Court as a "commissioner." MINN. STAT. § 480.21, subd. 1 (1967). Finally, a retired justice may also be appointed a "commissioner" by order of the Court. MINN. STAT. § 490.025, subd. 5 (1967). While neither statute nor rule of the Court make it clear, apparently the functions of "justice" and "commissioner" differ principally in that a temporary justice may be given a vote in the decision of cases while a commissioner may not. The present section 2.724, subd. 2, was enacted in 1957, and the temporary justice has not exercised effective voting power since the number of majority justices has always been sufficient to carry the day. See note 96 *infra*.

5. Calculated as of January 1, 1968, the average age of the seven regular justices was 60.4 years. Including Mr. Justice Gallagher, the average age was 62.9 years. Among all eight justices there are two age groupings, separated by a difference of at least 13 years: Gallagher, J. (80); Nelson, J. (78); Murphy, J. (69); Knutson, C.J. (68); Otis, J. (55); Rogosheske, J. (53); Sheran, J. (51); and Peterson, J. (49).

6. The Judicial Council was first organized in 1937 and consists of a group of eminent attorneys and judges mainly appointed by the Governor, but including several judicial officers sitting *ex officio*. See MINN. STAT. § 483.02 (1967). In its recent recommendations to the Governor and Legislature it was clearly speaking for most members of

and Legislature take prompt steps to create an intermediate court of appeals, as well as to implement certain less radical measures to relieve the caseload of the Supreme Court.⁷

There seems to be rather general agreement among lawyers who follow the work of the Court that the caseload battle has recently reached a crisis stage. However, between January 1, 1927, and December 31, 1927, with a membership of five justices and two commissioners,⁸ the Minnesota Supreme Court delivered 509 opinions in disposing of 538 cases, with accouterments, quarters, and average age of membership roughly comparable to that of the present Court.⁹ In fact, when it was reported about a decade later that the Court in 1937 had written 293 opinions in 307 cases and in 1938 had written 290 opinions in 302 cases, it was apparently felt necessary to suggest that the decline in the caseload did not necessarily mean that the amount of work required had declined by exactly the same percentage.¹⁰ It was apparently assumed, nonetheless, that the work required of the Court and its members had reverted by the late thirties to more comfortable and manageable proportions. At the very least, contemporary writing on the work of the Court contains no recommendation for relieving it of part of its caseload.¹¹

the Supreme Court. See Knutson, *Appellate Review by Divisions*, MINN. BENCH & BAR, NOV., 1967, at 6.

7. JUDICIAL COUNCIL REPORT, *supra* note 3, at 13. The report, due on or before October 1, 1968, MINN. STAT. § 483.03 (1967), was publicly released on January 9, 1969. See *Minneapolis Star*, Jan. 9, 1969, at 18B, col. 8.

The Judicial Council also recommended an increase in the number of justices to nine, the maximum permitted under MINN. CONST. art. VI, § 2, and the addition of two commissioners to assist in opinion-writing. See JUDICIAL COUNCIL REPORT, *supra* note 3, at 21-22.

8. See *The Supreme Court of Minnesota*, 173 Minn. iii (1928); *Justices of the Supreme Court of Minnesota During the Time of These Reports*, 169 Minn. iii (1927).

9. On caseload, see Pirsig, *supra* note 1, at 824-26. Including only the then chief justice and associate justices, the average age on January 1, 1927, was 62.2 years. Including the two commissioners sitting pursuant to ch. 62, [1913] Minn. Laws 53, the average age was 63.6 years. The ages were: Samuel B. Wilson, C.J. (54); Andrew Holt, J. (72); James H. Quinn, J. (70); Holmer B. Dibell, J. (63); Royal A. Stone, J. (52); Myron D. Taylor, C. (72); and Edward Lees, C. (62).

10. See Pirsig, *supra* note 1, at 826.

11. See *id.* About this time (1942), a Committee on the Unification of the Courts submitted a report to the Judicial Council of Minnesota that was truly revolutionary in several respects. Many of its proposals—"merit selection" of judges; "Missouri Plan" elective judicial offices; full empowerment of the Supreme Court to formulate rules, including rules of evidence, for the operation of the lower courts; and

The temptation that arises from this brief historical comparison is to pinpoint the inefficiency of the Court's present processes, and not the size of its caseload, as the chief cause of any lag in present case disposition.¹² One is tempted to ask whether any other factor would adequately explain why a Court that could deliver 509 opinions in 1927 should be viewed as verging on crisis when it delivers 306 opinions—only 60 per cent of its former accomplishment—a generation later. In the pages that follow, I hope to offer suggestions for dealing with such temptations, suggestions that nonetheless leave unanswered many questions regarding the ailments currently afflicting, and said to be afflicting, the Minnesota Supreme Court.

The comments here set forth are in response to an invitation from the editors of the *Law Review* to prepare an introduction to the annual issue devoted to Minnesota legal developments.¹³ My intention is to investigate preliminarily two related areas: First, some statistics concerning the workload of the Minnesota Supreme Court; and, second, a recent major innovation—divisional sittings of the Court—that has been adopted to provide a temporary solution to the threatening build-up of its workload. The statistics derive from a partially completed private study of the processes of the Minnesota Supreme Court. It has been undertaken too recently for inclusion of all its present findings, because of the need for cross-checking, and in many respects the initial investigation of important areas still must be

the removal of jurisdictional distinctions between courts within the state—go far beyond even the modernized system presently in operation. Though there was no provision for an intermediate court of appeals, there was a proposal to permit the Court to refuse leave to appeal in certain cases. See Anderson, *Reorganizing Minnesota's Judiciary*, 27 MINN. L. REV. 383, 386 (1943). These proposals, which contemplated a broad implementing constitutional amendment, were never approved by the Legislature. For a history of the 1942 proposals and their "cold if not hostile reception," see Pirsig, *The Proposed Amendment of the Judiciary Article of the Minnesota Constitution*, 40 MINN. L. REV. 815-16 (1956).

12. To be sure, it has been argued that the complexity of the issues facing the Court has greatly increased in recent years, making inappropriate any direct comparison with the accomplishments of appellate courts of another time. This has previously been suggested by a noted commentator to explain a change in the work pace of the Court at a different period. See Pirsig, *supra* note 1, at 826. I am not entirely convinced that the argument is sound. My suspicion instead is that a social-legal order that produces increasingly complex problems probably produces with rough correspondence increasingly better-trained judges and more efficient research tools to resolve them.

13. Citations to prior annual collections of work on the Minnesota Supreme Court are given at note 18 *infra*.

completed. From the results of this study, I hope to be able eventually to contribute to the formulation of proposals for relieving the docket of the Supreme Court. But since the study is not yet completed, I wish to make clear my feelings on one such proposal, the recent recommendation of the Minnesota Judicial Council to create an intermediate court of appeals.¹⁴ First, great caution should be exercised in increasing the cost, complexity and delay attendant upon obtaining appellate review of trial court and administrative agency action in the State. Second, however, I must state that I am not now in a position to report either statistics or findings that bear directly and with persuasive force upon the issue of creating an intermediate court of appeals.¹⁵ With regard to that issue, it should be appreciated that statements made here are preliminary and in places

14. THE JUDICIAL COUNCIL REPORT, *supra* note 3, at 13. As mentioned in note 7 *supra*, the Report of the Judicial Council became available only on January 9, 1969, at which time this article had already substantially taken its final shape. While certain aspects of the Report will be commented upon herein, it has been impossible in the time available to analyze thoroughly either its major recommendations or the reasons given for them.

15. While clearly calling for the earliest possible creation of an intermediate court of appeals, the Report of the Judicial Council recognizes that a constitutional amendment will first be required. *Id.* at 22-23. Ironically, less than 15 years ago such an amendment would have been unnecessary as the language of Article VI, section 1, then clearly permitted the establishment by the Legislature of ". . . such other courts, inferior to the supreme court, as the legislature may from time to time establish by a two-thirds vote." MINN. CONST. art. VI, § 1 (West's perm. vol. 1946). This language had been in the Minnesota Constitution from the time it was written in 1857. A change was apparently inadvertently precipitated by a post-World War II movement to amend the state Constitution wholesale. While retention of the language of Article VI, section 1, was contemplated, Judiciary Committee, *Preliminary Report on Revision of the Judiciary Article of the Minnesota State Constitution*, 32 MINN. L. REV. 458, 460 (1948), the present version of Article VI, section 1, as approved by the voters in November, 1956, does not seem to permit the creation of a court intermediate between the Supreme Court and the district courts. See MINN. CONST. art. VI, § 1. At the time, this omission met with little alarm. In fact, in commenting on raising the number of authorized associate justices from six to eight, one observer stated:

[T]he change is not dictated by any present need. The number of cases appealed has declined drastically over the last twenty-five years, from approximately 500 cases in which opinions were rendered to about 200 at the present time. . . .

Pirsig, *supra* note 11, at 818. Professor Pirsig went on to caution, however, that in contemplation of "future needs" the present Article VI, section 1, would have been improved by a provision authorizing the creation of divisions within the Court. *Id.* He then suggested that it also would have been wiser to provide for an appellate division of the district court to dispose of evidence-sufficiency appeals. *Id.*

subject to possible revision in the light of future findings and developments.

II. STATISTICS ON THE WORKLOAD OF THE COURT

A. SCOPE OF THE MEASUREMENT

Set out in the series of Tables that appears following the present article are some of the data gathered from the opinions of the Minnesota Supreme Court delivered during the four Terms between October 1, 1964, and September 30, 1968.¹⁶ Generally, the Tables have been designed to permit easy comparison with similar collections of data that have appeared from time to time in the pages of the *Review*.¹⁷ More detailed explanation of the arrangement and composition of the Tables is set out immediately prior to the pages on which the Tables appear for the convenience of those referring directly to them. With the publication of these tables the volumes of the *Review* now contain some comparably similar statistics covering the Court's operations during the following ten periods: 1927, 1937, 1938, 1959-1960, 1962-1963, 1963-1964, 1964-1965, 1965-1966, 1966-1967 and 1967-1968.¹⁸

The statistics for these periods of the Court's operations, and the comments below that are based on these statistics, rely upon the number of opinions rather than cases. The total number of each differs in any year because two or more "cases" may be separately docketed in the Supreme Court but treated as a unit for the purposes of briefing, argument and delivery of an opinion. As a rough guide, an annual production of 200 opinions typically seems sufficient to dispose of approximately 210-215 cases. Since writing an opinion in a typical two-case situation calls for about the same amount of judicial effort as that where only one case is appealed, it would seem that no distortion of the Court's workload results.¹⁹ Another possible source of

16. See pages 1026-47 *infra*.

17. See the authorities cited note 18 *infra*.

18. The data for the 1927, 1937 and 1938 statutory terms is derived from Pirsig, *supra* note 1, at 824-39. Data for the 1959-1960 Term is derived from Note, *The Minnesota Supreme Court 1959-1960*, 45 MINN. L. REV. 123-26 (1960). For the 1962-1963 Term, see Note, *The Minnesota Supreme Court 1962-1963*, 48 MINN. L. REV. 119, 121-25 (1963). For the 1963-1964 Term, see Note, *The Minnesota Supreme Court 1963-1964*, 49 MINN. L. REV. 93, 95-99 (1964).

19. The annual reports of the Administrative Assistant contain the number of both opinions and cases. These now cover statutory terms commencing in January, 1957. See ADMINISTRATIVE ASSISTANT, FIRST

distortion is the use of the number of decided cases, or issued opinions, as the measure of the pressures upon the Court, rather than using the actual number of cases on its docket. In other words, relying upon the number of opinions released as a guide to the Court's workload possibly could belie a large increase in the backlog of pending but undecided cases. Data released over the past six years by the Administrative Assistant to the Supreme Court reveals, however, that the increase in the number of docketed but undecided cases has not, in net effect, been accompanied by an increase in the size of the Court's backlog.²⁰ Thus, it is believed that the use of the number of recorded dispositions will provide a useful indicator of the Court's workload.

There remains, however, one portion of the Court's docket that is largely immune from consideration when analysis is confined to opinions rather than cases. These are the so-called "special" matters that are heard by the Court. Only some of these result in written opinions and are consequently included in the present enumeration. Encompassed within the Court's description of special matters are petitions for extraordinary writs, bar disciplinary matters, and motions of various kinds. During the 1967 statutory term of the Supreme Court, there were 95 such special matters before it.²¹ Nothing short of an examination of the Court's files—an examination not yet undertaken—would permit an accurate evaluation of the degree to which resolution of questions arising on these special matters consumes the time and energies of the Justices. It nonetheless is assumed that the special matters which do *not* result in written opinions consume little of the average justice's time.²²

ANNUAL REPORT ON MINNESOTA COURTS (1965), and the Annual Reports for subsequent years. During 1965-1967, the three-year average was 242.0 "regular" cases and 245.6 opinions in all kinds of cases. As explained at note 21 *infra*, and accompanying text, there are also always a number of "special" cases that result in an opinion.

20. Cf., e.g., ADMINISTRATIVE ASSISTANT, FOURTH ANNUAL REPORT ON MINNESOTA COURTS 4-5 (1968). One must rely in part upon surmise, for there are no statistics in the various Annual Reports relating directly to the number of pending cases. There are, however, statements and statistics about such closely related matters as the average time between notice of appeal and release of the opinion and the number of all kinds of cases decided.

21. See *id.* at 6.

22. From time to time, however, instances come to the surface of special matters not resulting in an opinion that nonetheless must have consumed considerable time. See, e.g., *Rotering v. Jones*, 277 Minn. 253, 256, 152 N.W.2d 353, 354 (1967). For an example of a situation where summary disposition without an opinion was clearly called for, see *State v. Seebold*, 280 Minn. 241, 243, 158 N.W.2d 854, 855 (1968).

Finally, it should also be noted that members of the Court have undertaken, sometimes in response to statutory commands and at other times in response to feelings of professional and civic responsibility, to engage in many activities not directly related to the disposition of appealed cases. The extent to which these activities divert any member of the Court from his more narrowly defined judicial functions is also unknown. For certain justices, most notably the Chief Justice,²³ the diversion must be considerable.

B. INTERPRETATION

Turning then to the figures, and confining one's view to the last decade, the following table represents the number of opinions filed by the Supreme Court:

TABLE A²⁴

| TERM | 1959- 1960 | 1962- 1963 | 1963- 1964 | 1964- 1965 | 1965- 1966 | 1966- 1967 | 1967- 1968 |
|-------------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| Signed (Majority) | | | | | | | |
| Opinions | 163 | 186 | 188 | 206 | 193 | 230 | 270 |
| Per Curiam | 12 | 11 | 32 | 7 | 20 | 35 | 36 |
| Total | 175 | 197 | 220 | 213 | 213 | 265 | 306 |

It appears from this that it is only in the relatively recent past that the court has been required to deal with a radically increased number of dispositions. This becomes significant when one recalls that the number of opinions delivered during each of these Terms, with the sole exception of 1967-1968, was lower than the number delivered in the slack years of 1937 and 1938.²⁵ It is not known what the precise count of opinions was during the

23. The Chief Justice must, of course, exercise general superintendence over the staff and day-to-day operations of the Court. In addition, he has extraordinary functions, such as serving as a member of the Board of Pardons, see MINN. STAT. § 638.01 (1967), and the Judicial Council, see MINN. STAT. § 483.02 (1967), supervising and coordinating the work of the district courts of the state, see MINN. STAT. § 2.724, subd. 2 (1967) and, to some extent, the assignment of judges of the municipal courts, MINN. STAT. § 2.724, subd. 3 (1967). By MINN. STAT. § 2.724 (1967), the Supreme Court is empowered to provide by rule that the Chief Justice need not write opinions. To date, the Rules of Civil Appellate Procedure contain no such exemption. For the opinion production of the Chief Justice during the four most recent Terms, see Tables I for the 1964-1968 Terms *infra* at 1028, 1033, 1038 & 1043.

24. This is a compilation of figures from the sources cited or referred to at note 18 *supra*, and from the Tables I for the 1964-1968 Terms, *infra* at 1028, 1033, 1038 & 1043.

25. See note 9 *supra*, and accompanying text. There were 293 opinions delivered in 1927, 290 in 1938.

years between 1938 and 1959,²⁶ but one survey suggests that it mildly fluctuated, at most times being between approximately 140-225 opinions.²⁷ In short, the steep increases in the number of decisions during the 1966-1967 and 1967-1968 Terms hardly seem appropriate as the sole indicators of what future years will bring. Somewhat incredibly, however, the recent report of the Judicial Council suggests that just such a continued escalation seems probable.²⁸ Simply as a matter of statistics, the prediction seems far from probable.

1. *Criminal Cases*

The introduction of factors other than selected statistics may aid in making a forecast of the future size of the caseload of the Supreme Court. A search for the most dominant of such factors quickly reveals that the increase in the additional work

26. In Pirsig, *supra* note 11, at 818, it was stated that "the number of cases appealed has declined drastically over the last twenty-five years, from approximately 500 cases in which opinions were rendered to about 200 at the present time . . ." Justice Knutson reports that in 1948 the number of formal opinions written by the Court was 150. Knutson, *supra* note 6, at 6.

27. In ADMINISTRATIVE ASSISTANT, SECOND ANNUAL REPORT ON MINNESOTA COURTS 9 (1966), there appears a graph of the trends of the Supreme Court workload between 1939 and 1964. According to this, the number of opinions was between 300 and 340 during 1939-41, in 1942 it fell to below 280 and by 1945 was just slightly over 140. From 1945 until the 1966-67 Term, the Court apparently became accustomed to a workload that never exceeded 220 opinions in any year. *Id.* Ironically, during its post-1930 history the seven-justice Court was first given the assistance of a commissioner in 1943, by which time the great weight of its 1920-40 docket had already been diminished by half. See note 4, *supra*.

28. See, e.g., JUDICIAL COUNCIL REPORT, *supra* note 3, at 19:

Assuming a continuing increase in the number of appeals [similar to the increase during the three statutory terms of 1965, 1966 and 1967], it is immediately apparent that the Supreme Court will soon reach a point where it cannot hope to discharge its functions properly. For example, 400 to 500 written opinions per year will be quite probable by the mid-1970's. It is humanly impossible for a justice to write 70 opinions in a year!

In 1927, two justices and one commissioner wrote between 71 and 76 opinions each. Dividing the number of opinions for 1927, see Pirsig, *supra* note 1, at 825, by the number of members (7) results in an average of 72.7 opinions per member. Excluding the 38 per curiam opinions delivered that year, each member produced an average of 67.3 opinions. While this might have both been herculean and resulted in bad opinions, it does show that it is "humanly possible." With respect to the statistical validity of the Judicial Council's straight-line projection, using only the 1964-1967 caseload figures, the less said the better.

to which the Court finds itself subjected in the past two Terms has been caused mainly, although not entirely, by an increase in the number of criminal cases:

TABLE B

| TERM | 1959- 1960 | 1962- 1963 | 1963- 1964 | 1964- 1965 | 1965- 1966 | 1966- 1967 | 1967- 1968 |
|----------|-------------------|-------------------|-------------------|---------------|---------------|---------------|---------------|
| Criminal | 22 | 34 | 31 | 39 | 64 | 100 | 127 |
| Civil | 138 | 145 | 175 | 174 | 149 | 165 | 179 |
| Total | 160 ²⁹ | 179 ³⁰ | 206 ³¹ | 213 | 213 | 265 | 306 |

The pressure from the responsibility of disposing of criminal cases has increased substantially during the years 1964-1968. From 39 cases in the 1964-1965 Term (18 per cent of the caseload) the figures rise steadily: 64 cases in the 1965-1966 Term (30 per cent of the caseload); 100 cases in the 1966-1967 Term (38 per cent of the caseload); and 127 cases in the 1967-1968 Term (41 per cent of the caseload). But in spite of the fact that criminal cases are the single most important source of additional opinions, it would be inaccurate to cite criminal cases, or the criminal law bar, as the only culprits. An uneven, but occasionally substantial increase in the number of civil cases over the past decade has also played a part. One probably would wish that the most radical increase had occurred in the category of civil cases rather than criminal cases. In the criminal area, greater caution must be exercised so that desires for a less crowded appellate calendar do not over-balance unique, familiar and accepted rights of the criminally accused. This, of course, is not to suggest that it would be unthinkable to exercise controls over the number and kinds of criminal cases to come before the Court, but only that caution would be required in the formulation of any such controls.

In reviewing the number and kinds of criminal cases to be heard, the conventional distinction has been drawn between appeals from post-conviction proceedings—including both habeas

29. Totals less than 175 opinions (see Table A and text accompanying note 24 *supra*) because of the deletion of 15 opinions not classified. See Note, *The Minnesota Supreme Court 1959-1960*, 45 MINN. L. REV. 123, 125 (1960).

30. Totals less than 197 opinions (see Table A and text accompanying note 24 *supra*) because of the deletion of 18 opinions not classified. See Note, *The Minnesota Supreme Court 1962-1963*, 48 MINN. L. REV. 119, 124 (1963).

31. Totals less than 220 opinions (see Table A and text accompanying note 24 *supra*) because of the deletion of 14 opinions not classified. See Note, *The Minnesota Supreme Court 1963-1964*, 49 MINN. L. REV. 93, 98 (1964).

corpus and statutory review actions—and appeals directly from the original trial itself. Conveniently, it has developed that trends in each of these broad areas have diverged and largely distinct problems of policy have emerged, making appropriate separate discussions of the two kinds of appeals as factors in the total caseload of the Supreme Court.

(a) Post-conviction Review Appeals

Although they are an obvious suspect, on closer inspection post-conviction review appeals seem to hold little promise as a starting point for an explanation of the substantial recent increase in the total number of docketed cases. It thus probably would prove to be an ineffective point at which to insert controls over the number of such cases coming to the Court in an effort to relieve its overall burdens. Figures from the study of the operations of the Supreme Court between 1964 and 1968 indicate that although the number of post-conviction review cases decided by the Supreme Court rose from 12 in the 1964-1965 Term to 34 in the 1966-1967 Term, the number has decreased to 28 in the Term that ended in September, 1968.³² There are probable explanations both for the rather low number of post-conviction cases in the past decade, and for the apparent decline in such cases during the most recent Term. For one thing, the period of time within which a person convicted of crime may appeal directly from his conviction is quite long in Minnesota—six months.³³ Significant in this regard is the statistic that of the 90 direct criminal appeals decided during the 1967-1968 Term, 21 were taken by persons who had entered pleas of guilty at the time of their original trials. This suggests that the length of time within which the direct appeal can be taken is sufficiently long to permit convicted persons to change their minds about the advisability of pleading guilty and to appeal without being required to resort to a new hearing at the trial level. It is thus

32. It has not been possible to derive precise figures for the respective numbers of post-conviction review and direct appeal criminal cases coming before the Court during the 1959-1960, 1962-1963 and 1963-1964 Terms for inclusion in Table B, *supra*. The method of categorization in the earlier Supreme Court Notes makes it either impossible or risky to attempt to determine the different kinds of criminal cases, with the exception of the Note on the 1962-1963 Term, which indicates that 12 of the 34 criminal cases were either habeas corpus or coram nobis.

33. MINN. STAT. § 632.01 (1967). By contrast, an appeal from a denial of post-conviction relief must be taken within 60 days. MINN. STAT. § 590.06 (1967).

even more probable that persons who have pleaded not guilty, and who thereby would appear statistically more probable sources of appellate work for the Supreme Court, are more likely to have raised issues upon their original trials and either obtained review through a direct appeal or determined to forego their right to appeal. In short, it is probable that most convicts during the first six months after conviction either decide to contest their incarceration—in which event it is probable that they resort to the still-available direct appeal—or resign themselves to serving out their sentences.

Theoretically it still might be necessary to provide habeas corpus or a similar statutory procedure³⁴ in order to receive evidence at the trial level on issues not raised at the original trial. This might be expected to result in a substantial number of post-conviction cases being brought to the Supreme Court, in spite of the long period of time within which to take a direct appeal. But, probably with the partial purpose of removing such a threat to its docket, the Supreme Court recently has shown ingenuity in inventing and developing special criminal trial procedures calculated to guarantee either (1) that a full evidentiary record will be made at the time of the original determination of guilt or innocence, thus permitting direct review, or (2) that the defendant will be precluded by “waiver” doctrines from raising certain errors that otherwise could become the subject of post-conviction proceedings.³⁵ The great increase in

34. Effective May 10, 1967, the Minnesota Post Conviction Remedy Act, MINN. STAT. § 590.01 (1967), became virtually the only method available to attack the legality of a conviction except by a direct appeal. Subdivision 2 of the Act provides that:

this remedy takes the place of any other common law, statutory or other remedies which may have been available for challenging the validity of a conviction, sentence, or other disposition and must be used exclusively in place of them unless it is inadequate or ineffective to test the legality of the conviction, sentence or other disposition.

For a discussion of the Act's application and some problems it leaves unresolved, see Comment, *An Analysis of the Minnesota Post Conviction Remedy Statute*, 52 MINN. L. REV. 732 (1968).

35. Most prominent among these cases are *State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 141 N.W.2d 3 (1965), and *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). See 51 MINN. L. REV. 331 (1966). In *Rasmussen*, the Court established the rule that before any evidence relating either to a search and seizure or to a confession may be introduced by the prosecution, the defense must be given advance written notice of the probable evidence. Failure by the accused to object to the evidence and demand a pretrial hearing will ordinarily be held to constitute a waiver. See 272 Minn. at 555, 141 N.W.2d at 14. In *Spreigl*, the Court constructed a similar procedure with respect to “other crimes” evidence. The prosecution must notify the defendant a reasonable time

the readiness of the United States Supreme Court and the Minnesota Supreme Court to limit the retroactive effect of new rulings favorable to criminal defendants doubtless has been of substantial additional assistance in sealing off the Court from post-conviction appeals.³⁶ Reportedly,³⁷ not a single instance of a court's refusal to apply retroactively a new ruling of constitutional criminal law could be found prior to the United States Supreme Court's 1965 decision of *Linkletter v. Walker*,³⁸ yet such a limitation has been applied in probably a majority of "new" criminal law cases decided in the four years since passed.

prior to trial regarding the nature of the "other crimes" testimony to be offered at trial. While no case has yet held that failure of the defense to object to such evidence prior to trial constitutes a waiver, the same result will probably be reached by holding that the defendant had ample time to prepare a rebuttal to the noted testimony. See also *State v. Grunau*, 273 Minn. 315, 141 N.W.2d 815 (1966) (judicially imposed "Jencks Act" procedure to require prosecution disclosure of prior testimony of witness).

36. *State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 544-52, 141 N.W.2d 3, 7-12 (1965), refused retroactive application of both *Escobedo v. Illinois*, 378 U.S. 478 (1964) (consultation with attorney required after commencement of "accusatory" process), and *Jackson v. Denno*, 378 U.S. 368 (1964) (independent factual determination by trial judge required on admissibility of confession). In *Johnson v. New Jersey*, 384 U.S. 719 (1966), the United States Supreme Court later reached the same conclusion with respect to *Escobedo*. The extent to which *Jackson v. Denno* will be applied to decisions that had become final before it was decided seems unclear. Compare *Stovell v. Denno*, 388 U.S. 293, 298 (1967), with *Sims v. Georgia*, 385 U.S. 538, 544 (1967). In *State v. Spreigl*, 272 Minn. 488, 496, 139 N.W.2d 167, 173 (1965), the procedure was said to be applicable only to ". . . the trial of this and future criminal cases . . ." A more elaborate rule of limited retroactivity was propounded in *State v. Grunau*, 273 Minn. 315, 323-25, 141 N.W.2d 815, 822-23 (1966).

Other decisions of the Supreme Court of the United States refusing to apply new and judicially developed rules of criminal procedure retroactively include most prominently *Berger v. California*, ___ U.S. ___ (1969); *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966); *Linkletter v. Walker*, 381 U.S. 618 (1965).

The Minnesota Supreme Court has also employed the prospective-only limitation in civil cases. See, e.g., *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 86 (1966), commented on in 51 MINN. L. REV. 346 (1966); *In re Estate of Jeruzal*, 269 Minn. 183, 130 N.W.2d 473 (1964); Note, *Prospective-Prospective Overruling*, 51 MINN. L. REV. 79 (1966).

The most recent rash of literature on prospective-limitation is the result of *Linkletter v. Walker*, *supra*, and the reaction to it in Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965). See also Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650 (1962); Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201 (1965).

37. See Mishkin, *supra* note 36, at 56-57.

38. 381 U.S. 618 (1965).

This means that for most persons whose convictions predated the early 1960's the "criminal revolution" was being won elsewhere. An examination of the post-conviction appeals decided by the Minnesota Supreme Court during the 1964-1968 period bears this out. With certain notable exceptions, most of these cases do not appear to have been brought by persons confined under pre-1960 convictions. Insofar as prospects for relief of the Supreme Court's docket are concerned this is a disappointment, for it seems to dispel the hope that a significant portion of the recent increase in criminal law decisions could be ascribed to nonrecurrent attempts to review old convictions and under recent and more favorable legal rules.

On balance, then, it appears that the pressure on the Court's docket created by post-conviction review cases might have "crested" just prior to and during the 1967-1968 Term.³⁹ Because of the present availability of what might be called finality-inducing devices and doctrines operating against the accused at the trial level and in the original proceeding, it is doubtful that many appeals from post-conviction relief proceedings will come before the Court in this (1968-1969) or future Terms. One possibility that could reverse this decrease—and which can only be a subject of speculation at this time—is that use of the habeas corpus writ as a device to obtain betterment of prison and other rehabilitative conditions will increase greatly. A general extension of such doctrines as procedural due process to prison disciplinary procedures, for example, together with availability of the writ of habeas corpus to test compliance with these doctrines,⁴⁰ could well result in a substantial increase in post-

39. The timing of this development is ironical. In response to decisions of the Supreme Court of the United States substantially enlarging the circumstances under which state post-conviction review procedures would be considered inadequate and federal habeas corpus made available, *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963), many states, including Minnesota, enacted post-conviction remedy statutes. These statutes substantially enlarged both the types of errors that could be objected to after trial and the opportunities of the petitioning prisoner to obtain a plenary evidentiary hearing.

40. The availability in these circumstances of the remedy provided by the habeas corpus statutes, MINN. STAT. §§ 589.01-.30 (1967), is a matter of some doubt. The Post-Conviction Remedy Act is clearly unavailable. It is limited by MINN. STAT. § 590.01, subd. 1 (1967), to challenges to a "conviction, sentence, or other disposition." This appears clearly to relate only to defects arising out of the original judgment rather than to subsequent events alleged to make further incarceration unlawful. MINN. STAT. § 589.01 (1967) (habeas corpus) speaks somewhat more broadly of "[e]very person imprisoned or otherwise re-

conviction litigation by inmates. At present, however, it is probably fair to conclude that the post-conviction review remedies present relatively little threat to the docket of the Supreme Court.

(b) Direct Criminal Appeals

In terms of subject matter, direct appeals from criminal convictions constitute the largest bloc of cases to come before the Court in its most recent Term.⁴¹ Here also, however, there seems to be no compelling reason to conclude that the recent rate of increase will continue inexorably into the future.⁴² To be sure, there has been a recent rise in the number of criminal proceedings initiated at the trial level;⁴³ but there are reasons to believe that there is no strict correlation between present trial court filings of criminal proceedings and the future burden on the Supreme Court. Many imponderables intervene. For one

strained of his liberty, except persons committed or detained by virtue of the final judgment of any competent tribunal of civil or criminal jurisdiction" Presumably, a person challenging the conditions of his incarceration would already have exhausted his attacks upon the original conviction, this then arguably bringing him within the "except" language. Nonetheless, the Minnesota Supreme Court has shown a marked degree of liberality in making the writ of habeas corpus available where the statute well might have been construed to be literally inapplicable. See *State ex rel. Holm v. Tahash*, 272 Minn. 466, 139 N.W. 2d 161 (1965).

41. See Table B *supra* at 948. See also the respective entries for "Criminal Law" cases in the several Tables V *infra* at 1031, 1036, 1041 & 1046.

42. Compare note 28 *supra*, and the discussion there of the recent Biennial Report of the Judicial Council.

43. In Minnesota, the number of new criminal case filings has recently fluctuated, and then joined a national rising trend. For figures on the national trend see FBI, UNIFORM CRIME REPORTS 1 (1967), and the introductory "Summary" to similar reports in prior years. See generally PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, CHALLENGE OF CRIME IN A FREE SOCIETY 22-31, 154-57 (1967). Figures prepared by the Administrative Assistant to the Supreme Court show that there were 2250 new criminal cases filed throughout the state in 1965 (excluding Ramsey County, for which figures were not available). During 1966, there were only 46 more filings for the same area, with a total of 2752 when the 452 for Ramsey County are included. See ADMINISTRATIVE ASSISTANT, THIRD ANNUAL REPORT ON MINNESOTA COURTS 9 (1967). There was a similar equilibrium in the number of criminal case dispositions. *Id.* at 10. For 1967, the figures also remain relatively constant: 2926 new filings overall (including 479 in Ramsey County). See FOURTH ANNUAL REPORT, *supra* note 20, at 12. For 1968, however, there seems to have been a rather substantial increase. For the first six months, there were 1657 new filings, 258 more than in the corresponding period of 1967. See JUDICIAL COUNCIL REPORT, *supra* note 3, at 11.

thing, we operate today under a system of criminal justice that is quite different from the system being employed even five years, and certainly a decade, ago. New and more effective programs are being instituted with the purpose of improving the quality of criminal justice at the trial level.⁴⁴ Through the medium of rulings based only upon its "supervisory power to insure the fair administration of justice," the Court has itself guaranteed that counsel will be available, even to those accused only of serious misdemeanors, if they are not otherwise able to afford an attorney.⁴⁵ Better trained and advised police forces hopefully will exercise greater care in the arrest and search of suspects. This could result in an increase in the number of cases that do not remain contested beyond an initial trial hearing. Trial judges, a few of them reluctantly, are also becoming better informed about the rights of the criminally accused and are exercising greater caution to protect both the assertion and the vindication of their procedural rights. These and similar imponderables would seem to render highly speculative any rigid statistical projection of a continuing increase in the number of direct criminal appeals in the years immediately ahead.

(c) The Public Defender

From the Term just ended, one is tempted to conclude that the blame for the glut of criminal appeals can be laid at the Public Defender's doorstep. While such accusations are heard from time to time, they are true only in a very qualified measure. The Public Defender was involved in 86 of the criminal cases decided in 1967-1968, or in 28 per cent of all cases

44. It is believed by many that the Court has maintained a wise, if occasionally overcautious, course in the area of criminal procedure. It has shown a particular receptiveness to adopt, without legislative preordination, procedural arrangements calculated to lead to fairer, more "final" criminal trials. See note 35 *supra*, and accompanying text. The Court has also relied heavily upon several "model" codes of criminal procedure, developed by committees of the American Bar Association. See, e.g., cases cited note 112 *infra*. See also *State v. Grunau*, 273 Minn. 315, 325, 141 N.W.2d 815, 823 (1966).

45. See *State v. Borst*, 278 Minn. 388, 399, 154 N.W.2d 888, 894 (1967) (counsel must be afforded in any case where trial court might impose jail sentence). The Court expressly refused to base its decision upon either the federal or state constitution, apparently wishing to retain flexible control over the appointment of counsel in non-felony cases. In part, the cost of providing counsel for indigent misdemeanants is being borne by a privately funded grant to the State Public Defender and by local government units. See JUDICIAL COUNCIL REPORT, *supra* note 3, at 6-7.

decided during the Term. In each instance the Public Defender was the petitioning party in the Supreme Court. Next to the Attorney General's office,⁴⁶ the Public Defender was by far the single most familiar party to appear before the Court. But to conclude from these figures that the Office of the Public Defender alone has caused the present plight of the Supreme Court—albeit in response to statutory, and perhaps constitutional, commands⁴⁷—would be unwarranted. For one thing, even during the Public Defender's busiest year (1967-1968), almost one-third (32 per cent) of the criminal cases to come before the Supreme Court were brought by others. Much more must be known. How many of the non-Public Defender criminal cases were those in which court-appointed attorneys (on average, notoriously slow in perfecting appeals) were finally obtaining judicial review of old cases?⁴⁸ Since the Supreme Court no longer must appoint attorneys in most criminal appeals, what part of the 1967-1968 criminal caseload represents a nonrecurrent phenomenon? How many of the criminal cases in which the Public Defender appeared were "old" cases, either direct appeals or post-conviction proceedings in which the court had been unsuccessful in obtaining appointed counsel and thus are also nonrecurrent? In short, how much of the Public Defender appellate caseload is itself nonrecurrent? These and similar questions have thus far received insufficient attention.

46. During the 1967-1968 Term, the office of the Attorney General appeared in cases resulting in 132 opinions, only 13 of which were non-criminal. These 132 opinions represent 43 per cent of the Court's total for the Term.

47. See text accompanying note 51 *infra*.

48. Prior to January 1, 1966, the Minnesota Supreme Court could rely only upon its powers under MINN. STAT. § 611.071 (1967) to appoint attorneys, and then only in felony cases. The office of the Public Defender began actively to represent indigent criminal appellants in the Supreme Court on January 1, 1966. This representation extends to any convicted person appealing directly or pursuing a post-conviction remedy. See MINN. STAT. § 611.25 (1967). After January 1, 1966, the Public Defender assumed responsibility for many appeals that had already been lodged with the Court but in which the Court had been unsuccessful in obtaining appointed counsel. Since the Public Defender has been much more vigorous and effective in prosecuting appeals than were appointed counsel, it is quite probable that a "bunching" of criminal appeals occurred after January 1, 1966, caused by the overlap of "new" criminal cases brought by the Public Defender and "old" criminal cases handled at a more languid pace by appointed counsel. This bunching, if in fact it occurred, would be expected to affect the statistics for criminal cases decided during the 1966-1967 Term and, more significantly, during the 1967-1968 Term. If this hypothesis is correct, during the present (1968-1969) Term there should be a slight leveling off of the number of direct appeals brought by the Public Defender.

Another possibility for shrinkage lies in a delicate area—that of the Public Defender's standards for the selection of criminal cases to appeal. During the 1967-1968 Term, the Public Defender was successful in nine of the 86 decision in which he had represented the petitioner.⁴⁹ While a success rate of slightly over 10 per cent hardly ranks high among all groups of appellate practitioners, the Public Defender labors under many and peculiar handicaps. Perhaps foremost among these is a policy, thought to be dictated by the United States Supreme Court in *Anders v. California*,⁵⁰ that the Public Defender will accept and prosecute an appeal even if the experienced judgment of the Public Defender is that the appeal is probably not meritorious.⁵¹ This policy might stand as the single most significant imposition upon the docket of the Minnesota Supreme Court, and remains a major problem calling for further analysis, study and, possibly, testing. It is perhaps even time to ask whether the problem will always be confined to criminal cases. With the gradual expansion of legal aid services to impecunious civil litigants⁵²—an expansion that has been nurtured to some extent by a noteworthy attitude of liberality in the Minnesota Supreme Court it-

49. Based on compilation from private data.

50. 386 U.S. 738 (1967).

51. I here make no pretense of quoting or even closely paraphrasing the stated policy of the office of the Public Defender. I am conveying only my estimate of what the policy has produced, in a substantial number of instances, as exemplified by appellate opinions. I appreciate that an appellate opinion might distort or wholly fail to mention a meritorious point upon which the appeal was based; that intervening legal developments can emasculate what was a tenable position at the time of briefing and/or argument; that a consensus on how to define a "meritorious" point of criminal law, particularly in light of fast-changing legal rules, might be impossible to attain; and that the Public Defender, unlike "private" attorneys, does not have broad discretion in advising clients not to pursue litigation. I also appreciate that the opinion in *Anders v. California*, 386 U.S. 738 (1967), can be read to preclude the exercise of any independent judgment. Nonetheless, on the basis of some of the cases decided, my suspicion is that improvements can be made. Finally, I certainly do not believe that anyone other than the particular attorney handling an appeal for the Public Defender's office has the power to decide whether or not that attorney should handle an appeal.

52. This still modest expansion has occurred chiefly through the growth of existing legal aid clinics in the Minneapolis, St. Paul and Duluth metropolitan areas, financed mainly through "community fund" donations and foundation grants. In addition, the University of Minnesota Law School operates a student legal aid office that traditionally dealt mainly with legal problems of indigent students. Recently it has expanded its program to include extensive cooperation with the metropolitan legal aid clinics.

self⁵³—the day may soon come when the United States Supreme Court or, more unlikely, the Minnesota Supreme Court, will be asked to extend the same kind of automatic-appeal privilege to certain kinds of civil litigants. A similar requirement that all but “wholly frivolous”⁵⁴ cases be taken to the Court, if applied to any significant portion of the civil litigation conducted—and, analogously to cases appealed after the entry of pre-arranged guilty pleas, including a corresponding percentage of civil actions settled prior to litigation⁵⁵—would require the Court to

53. See, e.g., *In re Karren*, 280 Minn. 137, 159 N.W.2d 402 (1968) (county ordered to underwrite cost of transcript to indigent mother whose parental rights had been terminated), *overruling* *Munkelwitz v. Hennepin County Welfare Dep't*, 276 Minn. 554, 150 N.W.2d 24 (1967). Compare *Jenswold v. St. Louis County Welfare Bd.*, 247 Minn. 60, 76 N.W.2d 639 (1956). See also *State v. Freitag*, — Minn. —, 161 N.W.2d 530 (1968) (permitting waiver of bond on appeal in criminal case from justice court to district court); authorities cited *supra* note 45. Certainly an expansion of economic equal protection doctrines by the United States Supreme Court would lead to an “explosion” of civil indigent cases similar to the wave of criminal litigation that began in the early 1960's. See generally *Harper v. Virginia Bd. of Electors*, 383 U.S. 663 (1966); Note, *Discrimination Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435 (1967).

54. *Anders v. California*, 386 U.S. 738, 744 (1967).

55. Only the number of civil jury cases settled are available for cases in the district courts (no comparable figures being available for the number of settled civil non-jury cases). Based on reports of the Administrative Assistant to the Supreme Court [THIRD ANNUAL REPORT, *supra* note 43, at 9 (Table IV), 12 (Table IX) (for 1965); *id.* at 12 (Tables IX-X) (for 1966); FOURTH ANNUAL REPORT, *supra* note 20, at 15 (Tables IX-X) (for 1967)], the following table has been compiled:

TABLE C
District Court Civil Jury Dispositions

| Year | Total | | Settled | | |
|--------------------|------------|-------|--------------|--------------|------------|
| | Terminated | Total | Before Trial | During Trial | Percentage |
| 1965 | 9854 | 8522 | 7662 | 860 | 86.5 |
| 1966 | 9759 | 8411 | 7414 | 997 | 86.7 |
| 1967 | 10,664 | 9329 | 8468 | 861 | 87.5 |
| Three-Year Average | 10,092 | 8754 | 7848 | 906 | 86.7 |

For a comparable period, the number and types of dispositions in the district courts of criminal cases are as follows, see ADMINISTRATIVE ASSISTANT, SECOND ANNUAL REPORT ON MINNESOTA COURTS 23-24 (1966) (for 1965 but not including Ramsey County figures which were unavailable); THIRD ANNUAL REPORT, *supra* note 43, at 22 (for 1966); FOURTH ANNUAL REPORT, *supra* note 20, at 24 (for 1967):

TABLE D
District Court Criminal Case Dispositions

| Year | Terminated | Court Trial & % | Jury Trial & % | Dis-missed & % | Guilty |
|--------------------|------------|-----------------|----------------|----------------|------------|
| | | | | | Plea & % |
| 1965 | 2207 | 115(5.2) | 209(9.5) | 285(12.9) | 1585(71.8) |
| 1966 | 2606 | 139(5.3) | 224(8.6) | 408(15.7) | 1835(70.4) |
| 1967 | 2779 | 180(6.5) | 283(10.2) | 504(18.1) | 1812(65.2) |
| Three-Year Average | 2531 | 145(5.7) | 239(9.4) | 399(15.8) | 1744(68.9) |

deal with a vastly expanded caseload.⁵⁶

2. Civil Cases

(a) Tort-based Appeals

Aside from direct appeals in criminal cases, the most important category of cases pressing for decision consists of tort-based cases: appeals involving automobile and other types of personal injury and property damage, and appeals from the Industrial Commission under the Workmen's Compensation Act. In fact, if all the automobile-related cases—except criminal cases in which an automobile played a major part—are excluded from Table V of the 1967-1968 Term, this would decrease the number of decisions by 37.⁵⁷ Of these, 25 would have been the familiar type of automobile negligence action, most of which were appealed on points of evidence sufficiency. If the 16 (non-automobile) appeals from the Industrial Commission are included, the personal injury bar can claim credit for about 53 cases before the Court during the 1967-1968 Term, or roughly 17 per cent of its burden.⁵⁸ Actually, a thorough study of the yearly caseload will show that the 1967-1968 Term load of automobile cases represents a percentage decline. In 1964-1965, for example, 39 automobile cases and 22 workmen's compensation cases were decided, representing about 29 per cent of the caseload.⁵⁹

For the number of criminal appeals during the 1967-1968 Term and the percentage of these that stemmed from convictions based on a plea of guilty, see note 33 *supra*, and accompanying text.

56. Employing an admittedly questionable method of projection, a very rough comparison can be ventured. For the three-year period of 1965-1967, there was an average of 2531 criminal cases terminated in the district courts. See Table D, note 55 *supra*. During the same period, the average number of civil cases terminated in the district courts was 10,092. See Table C, note 55 *supra*. During the four Terms from October, 1964, to September, 1968, there was an average of 82.5 criminal cases decided in the Supreme Court. See Table B, *supra* at 948. At a hypothetical ratio of civil appeals to civil dispositions correspondent to the actual ratio of criminal appeals to criminal dispositions, there would have been approximately 329 civil appeals decided in the Supreme Court, on the average, during each of the Terms from 1964 through 1968, instead of the average 166.8 civil cases that actually were decided on appeal during those Terms. *Id.* The resulting total average annual caseload for each year of this period would, hypothetically, have been 411.5.

57. Based on compilation from private data.

58. *Id.*

59. *Id.*

The decline during the 1967-1968 Term in both absolute number and relative percentage of personal injury claims is encouraging, especially as these types have traditionally represented about 50-75 per cent of the cases tried at the *nisi prius* level.⁶⁰ Nonetheless, the remaining number of such cases can only be described as excessive when weighed against their importance. The study of the Minnesota Supreme Court's decisions between 1964 and 1968 attempted to isolate the "principal issue" that occupied the writer of the majority opinion. Although the data is not yet in a form permitting an accurate count, it would appear that a very great percentage of the personal injury appeals present as their principal issue the question whether the evidence was sufficient to support the jury verdict or the trial judge's finding.⁶¹ While experienced appellate judges doubtless have acquired a facility for deciding such cases, their disposition must still consume at least as much time as the average of all cases. It should be apparent that personal injury attorneys are either unable or unwilling to exercise greater restraint in bringing such cases before the Court. Any decrease probably must come from self-restraint by the Court in refusing to become so embroiled in such issues. This restraint could perhaps be supplemented by special techniques such as requiring submission of

60. Accurate figures for Minnesota are unavailable. For a discussion of statistics in New York City, see Rosenberg & Sovern, *Delay and the Dynamics of Personal Injury Litigation*, in DOLLARS, DELAY AND THE AUTOMOBILE VICTIM 79 (1968). See also 1967 DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANN. REP. 210-11; Table C3 in prior annual reports.

61. Implicit in this statement, of course, is the judgment that evidence-sufficiency issues ordinarily should rank low on the order of priorities an ideal court would construct. That judgment apparently is not shared entirely by some members of the Minnesota Supreme Court, although vague rumblings of discontent are heard from time to time. See *Loewe v. City of Le Sueur*, 277 Minn. 94, 98, 151 N.W.2d 777, 780 (1967); *Kvanli v. Village of Watson*, 272 Minn. 481, 486, 139 N.W.2d 275, 280 (1965). Mine is hardly a new or unique position, however. See, e.g., Pirsig, *The Work of The Minnesota Supreme Court*, 25 MINN. L. REV. 821, 829, 841, 844-47 (1941). While it is true that the appellate bar, if I may call it that, has been blameworthy for failing to sift out these kinds of cases, *id.* at 847, the Court is also subject to criticism for encouraging such appeals by taking great pains to deal with evidence-sufficiency issues. Ordinarily, the Court must reserve its energies, if it would use them well, for dealing at length and with effort only with the issues that will have a formulary effect—an effect upon the shape of the law. It is appreciated that an argument can be made that questions of fact sometimes have a unique importance in the shaping of legal rules, see, e.g., Note, *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1070 (1965), and authorities cited, but this is a rarity and the resulting effect is probably slight.

evidence-sufficiency issues without oral argument and in briefs of a limited number of pages, with decisions in short paragraphs or in short, per curiam opinions.

(b) Other Civil Appeals

Aside from the personal injury cases, no other category of civil cases seems to present disproportionate demands upon the time and effort of the Court. As well as such matters can be measured impressionistically, the number of cases in these other categories in Table V⁶² seems roughly representative of the importance of each category. When one turns to the reason why cases in any category have been brought to the court, however, such a satisfying impression is diminished. It seems that many of these cases were appealed and/or disposed of on trifling issues. More is involved here than evidence-sufficiency issues, although those are the most frequently encountered. Another prominent example, in civil cases, is the seemingly labyrinthine rules governing the appealability of trial court orders.⁶³ Whether because of the inherent complexity of these rules, the obtuseness of counsel, the suspicion that the Supreme Court can be persuaded to make ad hoc exceptions⁶⁴ or a combination of

62. *Infra* at 1031, 1036, 1041 & 1046.

63. The entire subject of appealable orders in civil cases has been admirably treated in a recent student work. Note, *Appealable Orders, Prohibition, and Mandamus in Minnesota*, 51 MINN. L. REV. 115 (1966). See also the local classic, Cunningham, *Appealable Orders in Minnesota*, 37 MINN. L. REV. 309 (1953).

64. A sampling among only the more recent of such cases will sufficiently demonstrate the inconsistent, frequently promiscuous attitude that the Court has taken either toward questions of its own jurisdiction or, what is only a slightly different matter, toward the jurisdiction of the trial courts. See *National Surety Corp. v. Schwandt*, 279 Minn. 444, 446, 157 N.W.2d 506, 507 (1968) (passing over issue of jurisdiction of district court on untimely application for agency review); *Reuben E. Johnson Co. v. Phelps*, 279 Minn. 107, 118, 156 N.W.2d 247, 254 (1968) (10 of 19 cases "affirmed" without passing on common issue of reviewability of respective 10 judgments); *In re Jury Panel Selected for Dakota County*, 276 Minn. 503, 507, 150 N.W.2d 863, 866 (1967) (improper plaintiffs and probably no justiciable controversy; merits considered); *State v. J.P. Sinna & Sons, Inc.*, 271 Minn. 430, 435, 136 N.W.2d 666, 669 (1965) (order appealed from nonappealable; merits nonetheless ruled on); cf. *Beatty v. Winona Housing & Redevelopment Auth.*, 277 Minn. 76, 82, 86, 151 N.W.2d 584, 588, 590 (1967) (in spite of clear finding of no appellate jurisdiction, passing to question of parties; then, in spite of finding of lack of proper party plaintiff in declaratory judgment action, passing to strong intimation of merits). With the above, contrast cases such as *State ex rel. Ryan v. Civil Serv. Comm'n*, 278 Minn. 296, 301, 154 N.W.2d 192, 196 (1967): ". . . Our writ of certiorari is statutory and the statutory provisions must be strictly construed . . ." (affirming district court dismissal of action accompanied by defective bond).

these, it seems that rules of appealability are producing a great deal of uncertainty and resulting appellate litigation.⁶⁵ Viewed against the unmistakable magnitude of other problems in the modern world, perhaps there is no pressing societal interest in having rules of appealability settled one way or another; but there does seem to be an urgent need—in terms of the time available for case disposition on the basis of rules and principles governing extra-litigation behavior—for these rules to be settled and capable of more certain application.

3. Questions About the Court's Processes

Beyond the suggested excision of many of the personal injury appeals and other cases essentially concerning the appealability of the trial court's action, there seems to be no other major area in which substantial economies could be effected. But this is to mention only the raw material upon which the Court operates, and much of the dyseconomy of the Court's present operations might stem from the process it applies to these materials. Here, several questions can be raised. Could the Court fulfill its functions while reducing by half the average length of its opinions?⁶⁶ Is there any further justification, other than

65. A rough count indicates that the issue of the appealability of a trial court order was the "principal issue" in about a dozen of the 179 civil appeals decided by the Court during the 1967-1968 Term. See Table B, *supra* at 948. Given the protocol under which the study of the Supreme Court has thus far been conducted, see note 14 *supra*, and accompanying text, it could be expected that the issue would have arisen in perhaps one-third of the civil appeals, but in such a way that it would not have been deemed "principal." As a handy example, in *State v. J.P. Sinna & Sons, Inc.*, 271 Minn. 430, 136 N.W.2d 666 (1965), after the Court decided that the case was *not* appealable, it went on to consider the merits at great length, thus making the remaining discussion the most prominent issue in the case.

The *Sinna* case also serves as a working model of one important reason for any appellate court to avoid unnecessary exercises of its powers, especially where there is a clear absence of jurisdiction. The opinion in the original *Sinna* appeal first concluded that the appeal was premature and thus nonappealable. The opinion nonetheless went on to discuss the merits and stated in unmistakably clear language that certain assets in the hands of a mortgagee were subject to the state's tax lien. *Id.* at 436, 136 N.W.2d at 670. On remand the trial court, in obvious commanded obedience to the language noted, entered judgment for the state. On appeal by the mortgagee, and now characterizing the language in the prior opinion as "dictum," the Court was compelled to reverse on a "holding" that the property involved was *not* taxable. *State v. Industrial Credit Co.*, 280 Minn. 404, 159 N.W.2d 774 (1968).

66. In the survey conducted of the opinions written by the Court during the four Terms from October, 1964 to September, 1968, see page 942 *supra*, each opinion was measured by inches as it appeared in the

forgotten history, for the Court to be required by statute⁶⁷ to prepare a separate syllabus for each case decided? Has the Court been sufficiently restrained about exercising its jurisdiction in doubtful or clearly prohibited areas, thus discouraging litigants from appealing cases that are unready or otherwise inappropriate for appellate review?⁶⁸ Has the Court made full and effective use of the per curiam opinion as a means of reducing the time needed to produce opinions?⁶⁹ Do the Rules of the Court and its attitude in enforcing them impel attorneys to submit briefs and arguments maximally effective for the Court's purposes?⁷⁰

Answering these and like questions must remain for the

unofficial Northwestern Reporter, Second Series, to provide uniform measurements and ready availability of recent decisions. Correlations between the length of opinions and the "principal issue" discussed, note 65 *supra*, the subject-matter of the action in the trial court, and the identity of the petitioning party and whether or not he was successful, see Table V, *infra* at 1031, 1036, 1041 & 1046, have not yet been run. An initial impression, however, is that many opinions are over-long, some grossly so. The extent to which this leads to a waste of judicial man-hours is not known. Conceivably, it could lead under certain circumstances to a conservation of effort if the over-length of the opinion was attributable to reprinting lengthy portions of the record to spare justices other than the opinion-writer the necessity of resorting to the record to see that nothing has been overlooked. While this justification seems feeble, I can think of none other. See, e.g., *State v. Warren*, 278 Minn. 119, 121-128, 153 N.W.2d 273, 274-78 (1967) (footnote, stretching over three pages of reduced-size print, quoting apparently entire proceedings at entry of guilty plea); *State v. Kramer*, 272 Minn. 454, 456-460, 139 N.W.2d 374, 375-78 (1965) (three pages of text quoting arraignment proceedings).

67. See MINN. STAT. § 480.06 (1967).

68. See notes 64 & 65 *supra*. It is, of course, problematical whether decisions such as those noted in fact lead attorneys to raise appeals of doubtful jurisdiction more readily than they would otherwise. From one's armchair, it is difficult to believe that it does not contribute, in ways too subtle perhaps for measurement, to some increase in the number of cases that the Court must decide.

69. See generally *State v. Schmeck*, 280 Minn. 561, 159 N.W.2d 772 (1968) (purely factual issue on understanding waiver of constitutional right); *State v. Lopez*, 280 Minn. 553, 158 N.W.2d 502 (1968) (evidence-sufficiency on issue of guilt in simple robbery case); *Planck v. Minneapolis, St. P. & S. Ste. M. Ry.*, 274 Minn. 561, 143 N.W.2d 641 (1966) (adopting in per curiam opinion, the memorandum opinion written by the trial court in "easy" case). Assuming that the issues were presented with candor, if briefly, each of these cases was quite correctly dispatched without full formal opinion. Similar treatment would also be urged for similar types of cases. See note 61 *supra*.

70. One hears it reported on every hand that the art of advocacy is seldom encountered in the hearings of oral argument in the Supreme Court. A workman-like brief is similarly rare. Whether a massive educational effort, the tightening of sanctions or the rigid imposition of those existing would improve these situations markedly is unknown.

future. The present purpose is to direct attention toward possible or probable areas where improvements could be made. To reiterate,⁷¹ it is doubtful that anything said thus far could fairly be taken to prejudice the question of the wisdom or utility of any current proposal for such improvement. In light of the data generated to date, however, it seems safe to conclude *only* that more must be known before sound and mature judgments can be reached. Others will judge whether the situation is such that no time is available for additional research before innovations are attempted.

Innovation has, of course, already occurred in an attempt to relieve the individual justices of the Supreme Court of some of the burden of participating in the hearing and decision of appeals. I speak here of the arrangement, in effect during the last nine months of the 1967-1968 Term, of hearing and deciding certain pre-selected cases by divisions of the Court. Because the survey of the Court's operations during 1964-1968 has revealed certain aspects of this new system that require discussion and prompt correction and, more broadly, for whatever light a discussion of this system might shed on the continuing problem of applying correctives to the Court's caseload, the divisional system will next be considered.

III. THE COURT'S RESPONSE TO AN INCREASING CASELOAD

A. COMMISSIONER APPOINTMENTS

There are few options available to the Court in dealing with its caseload pressure. It exercised one of them in 1963 when Mr. Justice Frank T. Gallagher was appointed as "commissioner" to aid the Court in preparing opinions. The appointment followed by one day his retirement because of age from regular membership as an associate justice.⁷² Mr. Justice Gallagher brought

71. See *supra* page 943.

72. For the retirement of Mr. Justice Gallagher, his appointment as commissioner and the appointment of Mr. Justice Sheran as a regular member to succeed him, see The Supreme Court of Minnesota, 264 Minn. iii (1963). MINN. STAT. § 490.025, subd. 5 (1967), provides for the appointment by the Supreme Court itself of a retired justice as commissioner ". . . to aid and assist in the performance of such of its duties as may be assigned to him with his consent." Pursuant to this provision, a retired justice sitting as a commissioner exercised no vote on cases and ordinarily would sit only on cases to which he had previously been assigned. (I forego for the present the temptation to vent displeasure at the practice of assigning an opinion-writer prior to hearing oral argument.) Beginning with the start of the statutory term of the Court in January, 1967, the status of Mr. Justice Gallagher's ap-

to the seven-man Court 16 years' experience as an associate justice.⁷³ From 1963 to the present, Mr. Justice Gallagher's assistance has been crucial. As the figures for each Term in Table I illustrate,⁷⁴ in spite of advanced years and the need to stay abreast of a mobile and complex legal landscape, he has continued to be a productive opinion-writer. In three of the four terms from 1964 to 1968, he has written more opinions than the Chief Justice and at least one of the associate justices. In part, this productivity is ascribable to the fact that until January, 1968, Mr. Justice Gallagher attended oral argument only when assigned to write the Court's opinion. This also made it unnecessary for him to attend conferences, to read briefs and records and to draft opinions in cases on which he did not sit.

B. DIVISIONAL SITTINGS

Another alternative in responding to the recent increase in its caseload was given the Court in 1957 when the legislature authorized consideration of cases by divisions of less than the entire membership.⁷⁵ Inspired by a desire to increase the productivity of each justice,⁷⁶ the Supreme Court on October 3, 1967, adopted Rule 135 of the Rules of Civil Appellate Procedure, the text of which is quoted in the margin.⁷⁷ This divisional

pointment was modified. He was assigned "temporarily" by the Court to sit as an "associate justice." The word "temporarily" is used in MINN. STAT. § 2.724 (1964), pursuant to which the assignment was made. Whether the word means "indefinitely" is one debatable question. Whether the statute contemplates such an assignment even when all regular members are functioning and sitting is another. An indefinite appointment would seem to raise more than a minor constitutional question under MINN. CONST. art. VI, § 8, providing for limited six-year terms and requiring popular election of "all judges." A purposeful legislative expansion of the size of the Court to as many as nine full-time members would be constitutional. See *id.* § 1. But at this point MINN. STAT. § 480.01 (1967), stating that ". . . the supreme court shall consist of one chief justice and six associate justices . . .," would seem to create a problem in finding such a purposeful expansion. Finally, it would also seem debatable whether the absence of a formal vote on the actual decision of a case would be enough to place the indefinite assignment of a retired justice under § 2.724 outside the constitutional scheme (whatever its merit) for the popular election of judges.

73. Mr. Justice Gallagher was first elected on November 5, 1946, for a term as associate justice beginning January 6, 1947. The Supreme Court of Minnesota, 223 Minn. iii (1947).

74. See *infra* at 1028, 1033, 1038 & 1043.

75. MINN. STAT. § 2.724, subd. 2 (1967).

76. See the remarks prepared by Mr. Chief Justice Knutson and appearing in *Appellate Review by Divisions*, MINN., BENCH & BAR, Nov., 1967, at 6-7.

77. (1) Cases set for oral argument or submitted on the briefs

scheme was in operation for nine months of the 1967-1968 Term, producing sufficient data to warrant study and comment.

will be heard either en banc or by a division of the court. The Chief Justice will sit with each division and will assign 4 associate justices, including any retired justice serving pursuant to Minnesota Statutes, Section 2.724, Subd. 2, to sit as a division of the court to hear and decide cases assigned to such division. The assignment of associate justices will be made on a rotating basis and may be changed as may be required by disqualification or illness of a justice.

(2) The administrative assistant to the court is hereby designated as a referee of the court for the purpose of reviewing the record, transcript, and briefs in all cases and submitting to all justices of the court his recommendations for the classification of cases for assignment to the en banc or to a division calendar, according to the legal and judicial significance of the issues raised. Any one justice of the court may order a case to be placed on the en banc calendar rather than a division calendar. The Chief Justice, in his discretion and according to the requirements of composing the calendar, shall accept, reject, or revise the recommended classification of cases. Thereafter, the clerk shall prepare the calendar.

(3) The decision of a case by a division of the court shall be by the concurrence of four justices. If four justices do not concur in the decision, the case shall be re-set for an en banc hearing. A copy of the tentative written opinion of a division in each case, prior to filing with the clerk, shall be circulated among the justices who did not sit on the case, and any two justices of the court by questioning the decision, may signify their doubt as to the decision of the division, in which event the case, at a further conference of the court, may be re-set for an en banc hearing. An en banc hearing under this paragraph shall be scheduled at the earliest practicable date, at which hearing the argument time allotted by Rule 134 shall *not* apply, but counsel for the parties will appear to answer legal or factual questions posed by the court. No additional briefs need be filed unless requested by the court.

At the risk of appearing querulous, I must point out what appears to have been another instance of disarray in the rules governing the Court's operations. See also notes 3 & 72 *supra*. This involves an obvious drafting oversight in the scheme set up by Rule 135. The rule appears, of course, as one of the Rules of Civil Appellate Procedure. The first of these Civil Rules, Rule 101, states quite plainly that "these rules" govern the procedure in "civil appeals." If this were not enough, we have it on unimpeachable authority that "the rules apply to civil proceedings only." Mr. Justice Sheran, *Summary of 1968 Amendments to Rules of Civil Procedure*, in 27A MINN. STAT. ANN. viii (1968). Finally, scrutiny of the text of Rule 135, above, fails to disclose any intimation that the rule is to apply beyond the limits imposed generally by Rule 101 for all of the appellate rules. Yet it is unmistakably clear from the Court's practices that Rule 135 divisions are being used in criminal appeals. Of the 104 opinions resulting from divisional sittings of the Court since Rule 135 was put into effect, until the end of the 1967-1968 Term, 50 were criminal appeals. While it is doubtful that this drafting lapse should require any kind of rehearing in any criminal case heard only by a division (because of the probable absence of prejudice to the accused), it would clearly seem advisable to clarify the application of Rule 135 to such cases.

1. *The Mechanics of Rule 135*

Under Rule 135 all cases coming before the Court are first reviewed and classified by the Administrative Assistant.⁷⁸ Those cases considered to be of "less legal and judicial significance"⁷⁹ are assigned for divisional consideration while those considered more significant are assigned for hearing en banc. A single justice can insist that a case assigned for divisional hearing be redesignated for hearing en banc. The Chief Justice possesses the power to accept, reject or modify the Administrative Assistant's classification.⁸⁰

The Court's clerk prepares two calendars, one for divisional hearings, another for en banc hearings. The Chief Justice then assigns to each of the divisional cases four associate justices who, together with himself, sit for argument and decision of the case. The Rule states that the associate justices are to be selected on a "rotating" basis, so that the free time created by absence from a divisional sitting will be equally apportioned to each.⁸¹ Significantly, the Rule also states that a retired justice

78. The primary function contemplated for the Administrative Assistant to the Supreme Court was to serve as a coordinator and expeditor of the work of the state trial courts and, quite secondarily, of the Supreme Court. See MINN. STAT. § 480.15 (1967). The distraction of the Administrative Assistant from these pressing duties by making up the Supreme Court's calendar is regrettable.

79. MINN. R. CIV. APP. P. 135(2) [hereinafter cited as Rule 135]. Surely the Administrative Assistant must operate under guidelines more informative than that stated in Rule 135(2). From the statistics alone, it appears that certain kinds of criminal cases might be considered prime objects for divisional treatment. It is also probable that the Administrative Assistant operates with a rough ratio in mind of divisional cases and en banc cases. Such a ratio would largely reflect the state of the backlog of cases and the pressures to liquidate it. See also notes 105-114 *infra*, and accompanying text.

80. Although the point probably would never seriously arise, the calendaring provisions of new Rule 135 are ambiguous as to the relative powers of the Chief Justice and any associate justice. It is unclear whether the Rule contemplates that the Chief Justice should have the power to overrule an associate justice's reclassification of a case from the divisional calendar to the en banc calendar in addition to the power to reject the Administrative Assistant's suggested classifications. Such an interpretation is doubtful, although the language of Rule 135(2), standing alone, would support either that interpretation or its negative. *But see* Knutson, *supra* note 76, at 7:

If any one justice feels that a case has been erroneously classified [by the administrative assistant?] as a divisions case, he has the right to place the case on the en banc calendar of the court. The Chief Justice will make the ultimate determination of whether a particular case will be heard en banc or by a division

81. Rule 135(1). There is no indication, in Rule 135 or elsewhere,

sitting pursuant to Minnesota Statutes section 2.724, subdivision 2, may be assigned to a division.⁸² This has meant that Mr. Justice Gallagher has become virtually a full member of the Court with respect to divisional sittings.⁸³ This, however, has created other problems.⁸⁴

While perhaps the least disruptive method of coping with an expanded docket, the divisional system must inevitably result in a substantial diminution of collegial interaction among members of the Court. It is probable that most justices will virtually ignore all but the major outlines of most division decisions in which they did not take part.⁸⁵ Unfortunately, most members of the Court perceive themselves as primarily opinion-draftsmen, and are determined to reduce the number of distractions from this task. Whether the quality of the decisional process can be maintained with such emphasis upon individual resolution of legal issues is questionable. Nonetheless, as it is likely that the divisional system will survive for a number of years at least, rather substantial modifications, both in design and in operation, seem required.

2. *Assignment of Justices to Divisions*

Rule 135 states that the assignment of associate justices to divisions will be made "on a rotating basis," with such adjustment as absence or recusal may require.⁸⁶ It would seem neces-

that any associate justice is to have the power to affect the alignment of any particular division after its composition is determined by the Chief Justice. In practice, of course, any suggestion or objection by an associate justice would be expected to be resolved informally. See note 93 *infra*, and accompanying text.

82. Rule 135(1).

83. During the 1967-1968 Term (in only nine months of which the divisional rule was operative), Mr. Justice Gallagher was indicated in opinions as having been a member of 59 divisions and as having signed 19 opinions for the Court en banc, for a minimum total of 78 sittings out of the 306 decisions rendered during the Term. See Table I, 1967-1968 Term, *infra* at 1043. Mr. Justice Gallagher wrote opinions in 15 of the 78 divisions of which he was a member.

84. See *infra* at 970-73.

85. Even with the absences permitted by the division system, during the nine months of its operation in the 1967-1968 Term, the associate justices participated in roughly 10 more cases during that Term than each did during the 1964-1965 and 1966-1967 Terms. See Table III *infra* at pages 1029, 1034, 1039 & 1044 (figures "N").

See also Pirsig, *supra* note 61, at 837-39, for a description of the practices of the less burdened Supreme Court of a generation ago with respect to placing upon the justice drafting the opinion the "major responsibility" for doing the preparatory spade work.

86. Rule 135(1).

sary that a rotation system accomplish at least two essential functions: (1) permitting each justice an equal amount of "free" time by absence from divisional sittings; and (2) ensuring that each justice sits with every other justice roughly an equal number of times. In the nine months of the 1967-1968 Term, during which the divisional system was in operation, 255 decisions were released, 151 by the full Court, and 104 by divisions.⁸⁷ As contemplated by the Rule, Chief Justice Knutson sat on all divisions. Justice Nelson was absent from 40 divisions; Justices Rogosheske, Sheran, Peterson and Gallagher from 45 divisions; and Justices Murphy and Otis from 46 divisions.⁸⁸ Thus, each associate justice was afforded roughly an equal amount of additional time for the preparation of opinions, the major purpose of the innovation.

In sharp contrast, however, analysis of the figures in Table III for the 1967-1968 Term discloses a much greater disparity in the extent to which any one associate justice sits with certain of his colleagues. To take the most extreme example, Justice Rogosheske sat on divisions with Justice Peterson a total of 50 times and with Justice Otis only 16 times.⁸⁹ While it is virtually inconceivable that such a Balkanization of the Court is intentional, it is a matter that requires immediate correction. The circu-

87. These figures are derived from data given in Table II, 1967-1968 Term, *infra* at 1043, and from private data. It should be noted that an undetermined number of the en banc decisions released after January 2, 1968, were heard prior to the effective date of the Rule. Thus, considerably fewer than 151 opinions probably resulted from post-1967 en banc hearings, perhaps only as many as 100-125.

88. See Table I, 1967-1968 Term, *infra* page 1043.

89. To determine the number of times that any justice was absent from a division on which any other justice sat, take the larger number appearing in parentheses at the appropriate column in Table III, 1967-1968 Term, *infra* page 1044, and subtract it from 104, the number of division opinions released during the 1967-1968 Term. See note 87 *supra*, and accompanying text.

The divisional system was in operation for only three-quarters of the 1967-1968 Term, thus there could be a slight amount of distortion of the statistics. It might be noted that, at least with respect to some of the more egregious instances involving isolated pairs of justices, there is some correspondence between a high figure resulting from the above computation and the figure given in the appropriate column "T" for those justices in Table III for the four Terms *infra* at 1029, 1034, 1039 & 1044 and in the same place in the similar compilation from prior Terms. See Supreme Court Notes cited *supra* note 18. The correspondence is far from persuasive of anything other than inadvertence, of course, and hardly operates in most cases. Moreover, the figures for "T" given for any justice for any Term are too low to be suggestive of deep disagreements among justices. The figures raise only a spectre; they do not unearth a skeleton.

lation of all division opinions among those justices who did not sit at oral argument⁹⁰ is doubtless intended to prevent them from losing whatever influence upon the Court's activities they would have had if the case had been heard en banc. But this is hardly an adequate guarantee that bloc voting will not occur.⁹¹ First, the justices likely give less attention to the opinions of divisions on which they did not sit and thus are unlikely to form a forceful position on such cases. Second, there is no formalized procedure for either consultation or exchange of memoranda to elicit the views of the non-sitting justices. Without such a procedure it is doubtful that much interchange occurs. Third, Rule 135(3) provides that objections by both sitting and non-sitting justices be to the proposed "decision" of the division. It is not clear whether the choice of this term rather than "opinion" was intentional. If "decision" means only the ultimate disposition of the case, then the non-sitting justices would be relegated to passing upon only ultimate disposition rather than exercising the additional judicial function of scrutinizing decisional language.⁹² Assurances have been given, however, that the language means that the requisite number of non-sitting justices—or a combination of a non-sitting justice with a dissenting member of the division—may compel a rehearing en banc by ". . . express[ing] a doubt as to the correctness of the decision or the propriety of the language of the opinion" ⁹³ None-

90. See Rule 135(3). See also Knutson, *supra* note 76, at 6, 8.

91. Fears might also be entertained about Balkanization of a slightly different kind—the assignment of certain kinds of cases to a certain group of justices sitting together on divisions that are convened for the specialized purpose of hearing such cases. So far as present information permits a conclusion, it appears that this has not occurred. Moreover, Chief Justice Knutson has given the assurance that ". . . rotation will take place frequently so that the same five justices will not repeat as a division except through ordinary numerical chance" Knutson, *supra* note 76, at 6.

92. Some probably would argue that there has been a traditional willingness on the part of most justices on the Court to go along with both language and result proposed by opinion-drafting brethren, even if with private reservations. If this is accurate, Rule 135 would not constitute a departure from established custom if it were to relegate language objections to a quite secondary position. See Table I for each Term, *infra* at 1028, 1033, 1038 & 1043. In this regard, see *State v. Johnson*, 277 Minn. 368, 375, 152 N.W.2d 529, 533 (1967), where the unknown draftsman of a "per curiam" opinion reported that a "majority" of justices favored a new trial because of the insufficiency of evidence of culpability. The opinion failed to elicit any dissenting or specially concurring opinion or in any other way indicate which justices were in the majority.

93. Knutson, *supra* note 76, at 8. Actually, after a necessary number of objections to either the opinion or disposition, the case is

theless, there remains serious obstacles to actual full-court participation in each decision.

The problems regarding appointment of divisional justices are heightened by the question of the appropriate role for a retired justice sitting pursuant to Minnesota Statutes section 2.724, subdivision 2. As mentioned previously, in January, 1967, Mr. Justice Gallagher was assigned to sit as an "associate justice," rather than as a "commissioner."⁹⁴ The statute provides that the Court ". . . may by rule assign temporarily any retired justice of the supreme court or duly appointed commissioner of said court, or one district judge at a time to act as a justice of the supreme court. . . ."⁹⁵ I do not know whether Mr. Justice Gallagher presently is exercising a vote in divisional decisions.⁹⁶ But whether he is or not problems are presented.

Assume, first, that the terms of Mr. Justice Gallagher's appointment contemplate that he possesses a divisional vote. This is an interpretation more consistent with the language of Rule 135(1) which states that the Chief Justice and four associates, including a retired justice sitting pursuant to Minnesota Statutes section 2.724, subdivision 2, shall ". . . sit as a division of the court to hear *and decide* cases assigned to such division . . ."⁹⁷ Would appointment of a retired justice with voting power be permissible under section 2.724? If so, is the statute constitutional? In the language of section 2.724, quoted above, it is stated that the Court may by rule assign a retired justice "temporarily." Whether the statutory language bears the meaning given it in practice—the term of Mr. Justice Gallagher's appointment is obviously more "indefinite" than "temporary"⁹⁸—

considered by a conference of the full court. If the difficulties are not resolved there, an en banc hearing will be scheduled. *Id.*

94. See note 72 *supra*, and accompanying text.

95. MINN. STAT. § 2.724, subd. 2 (1967).

96. A survey of every case in which Mr. Justice Gallagher has participated either as commissioner or, after January, 1967, as an associate justice, indicates no instance in which he has registered a dissent or special concurrence. *But see* Heiberg, *Social Backgrounds of the Minnesota Supreme Court*, 53 MINN. L. REV. 901 (1969).

97. *Id.* (emphasis added).

98. At the time of this writing, Mr. Justice Gallagher still functions under the January, 1967, appointment as almost a full participant in the divisional system and an occasional member of the entire Court for the drafting of en banc opinions. During the 1967-1968 Term, he participated in over 25 per cent of all the cases heard by the Court, see note 8 *supra*, and in 59 (7 per cent) of the 104 divisional sittings of the Court after the commencement of the statutory term in January 1968. *Id.* See Table II, 1967-1968 Term, *infra* at 1043. Employing the figures appearing in the text accompanying note 8 *supra*, the other

is one question. Whether the statute contemplates such an assignment when all regular members of the Court are functioning and sitting is another. Both questions probably should be answered in the negative. It would seem that an indefinite appointment raises a serious constitutional question under Article VI, section 8, of the Minnesota Constitution, which provides for limited six-year terms and requires popular election of "all judges." Moreover, Article VI, section 2 expressly provides that "a judge of the district court may be assigned as provided by law temporarily to act as a judge of the supreme court upon its request." There is no provision anywhere for such a temporary appointment—and surely no provision for an "indefinite" appointment—of either a retired justice or a Supreme Court commissioner. Yet, both of these are contemplated, at least with respect to "temporary" assignments, by section 2.724, subdivision 2.⁹⁹ It would be constitutional for the Legislature to expand the size of the Court to as many as nine full-time and elective members. But Minnesota Statutes section 480.01, stating that "[t]he Supreme Court shall consist of one chief justice and six associate justices . . .," would seem to indicate that the Legislature has not exercised this power through section 2.724, subdivision 2. In short, it is respectfully suggested that the exercise of a vote by a "temporarily" assigned retired justice or commissioner sitting pursuant to section 2.724, subdivision 2, would be neither permissible under the statute nor constitutional if so permitted. It necessarily follows that Rule 135 should be read to permit only regularly elected, full-time members of the Court to vote on a divisional decision. The only redeeming feature of a contrary, and thus constitutionally infirm, reading of the Rule is that it would avoid most of the problems of the disparity in voting power between the other justices which would be created by a nonvoting status for Mr. Justice Gallagher.

Assume next that Mr. Justice Gallagher is *not* to vote on divisions, a rather unusual assumption when the Justice sits on almost four times as many divisions as the number of divisional opinions he writes.¹⁰⁰ Even here one is left with restive feelings

associate justices of the Supreme Court sat on the following percentages of divisional cases: Justice Nelson, 62 per cent; Justices Rogosheske, Sheran and Peterson, 57 per cent; and Justices Murphy and Otis, 56 per cent.

99. MINN. STAT. § 2.724, subd. 2 (1967).

100. Mr. Justice Gallagher wrote only 15 opinions for the 59 divisional sittings recorded for him. See notes 83 & 98 *supra*; Table I

about the constitutional and statutory permissibility of a long-range appointment which seems, in practice, to contemplate that a retired justice be given indefinite tenure as virtually a full—even if nonvoting—member of the Court. Regardless of its constitutionality, however, a serious objection to the operation of the divisional system itself is created if Mr. Justice Gallagher sits as a member of a division without the power to vote. Under Rule 135, the divisional determination of a case “. . . shall be by the concurrence of four justices. . . .”¹⁰¹ And, as previously mentioned, only a maximum of five justices, including the chief justice, are assigned to any division.¹⁰² Assuming that Mr. Justice Gallagher exercises no vote in divisional cases, it follows that the decision of any division on which he sits will be decided only by the “concurrence” of four members of the Court at a maximum—the barest majority of the regular full-time members of the Court. Another consequence which follows is that any one regular justice who is a member of such a division has the power by using only his own vote to require a rehearing en banc. By dissenting from its decision or language, such a justice can singly deprive the divisional opinion and decision of the necessary votes of a majority of the justices on the Court. This, of course, creates a rank disparity in voting power between these four justices (one of whom will always be the chief justice) and the two regular justices who are not members of the division. As to each of them, the operative language seems still to be that of Rule 135(3) which requires the objections of *two* non-sitting justices to require a rehearing en banc. It is no answer that every regular member of the Court possesses the power under Rule 135(2) to require an en banc hearing by insisting upon an en banc designation in the first instance.¹⁰³ To require a justice to stake all at the time the Administrative Assistant circulates a list of cases tentatively destined for divisional hearings would be absurd. Certainly no justice has the time to read the briefs and record in every case tentatively set for divisional hearing in order to facilitate intelligent exercise of what otherwise—depending upon the apparently fortuitous composition of the division—might

1967-1968 Term *infra* at 1043. Having no vote and not writing the opinion, no role other than that of discussant seems to be contemplated under this interpretation.

101. Rule 135(3). It is doubtful, of course, whether this is anything other than an expression of the constitutionally irreducible majority necessary to make it the act of the Court.

102. See note 81 *supra*, and accompanying text; see also Rule 135(1).

103. Cf. note 80 *supra*.

have been his sole opportunity to exercise single-veto power over divisional or en banc disposition.

Finally, the status of a retired justice cannot be ignored on the argument that under the divisional system any decision is theoretically made by the entire Court of seven regular justices rather than by just the five (or four) regular members who heard the case in division. This argument assumes that a member absent from oral argument and subsequent discussion can still be considered an active participant in the disposition of a case. Such an argument is consistent with the apparently prevailing attitude of the justices that oral argument is of little value, an attitude evidenced by one case during the past Term in which the opinion-writer had not been present at oral argument but had merely listened to a tape recording of it!¹⁰⁴ However, there is much to be gained from well-conducted oral argumentation, and if so conducted it cannot realistically be suggested that an absent member of the Court can meaningfully participate. This question, however, persists: what is to be done with a retired justice sitting pursuant to section 2.724, subdivision 2? Perhaps the most tolerable arrangement would be to limit his participation to en banc hearings, assigning only regular members of the Court to divisions. In no event should such a justice be recognized as possessing the power to vote.

3. *Assignment of Cases for Divisional Disposition*

The Rule 135(1) standard for case assignment—"legal and judicial significance of the issues raised"—provides no assistance in determining the appropriateness of divisional disposition for any particular case.¹⁰⁵ A more satisfactory explanation of the factors properly influencing the exercise of discretion in such a

104. See *State ex rel. Stangvik v. Tahash*, — Minn. —, — n.1, 161 N.W.2d 667, 668 n.1 (1968). See also MINN. R. CIV. APP. P. 134.07 (4):

Whenever any member of the court is not present at the oral argument of a case, such case shall be deemed submitted to such member of the court on the record and briefs therein and when during the consideration of a case there is a change in the personnel of the court the case shall be deemed submitted to the new member or members on the record and briefs.

Although sanctioned by custom, see *Hunt v. Ward*, 193 Minn. 168, 259 N.W. 12 (1935), this usage renders largely ineffectual any attempt to estimate accurately the number of instances in which any member of the Court was, in fact, absent from oral argument but later "participated" in decision of the case. By the same token, extreme caution should be employed in drawing inferences from the figures appearing in the "Abstention" column in any of the Tables.

105. See also note 79 *supra*, and accompanying text.

determination was given by Mr. Chief Justice Knutson. The specific factors he listed were:

. . . the novelty or difficulty of the legal or factual issues involved, the seriousness of the criminal offense charged, the presence or absence of important constitutional questions, or the construction of legislation as a matter of first impression.¹⁰⁶

Yet the Court has been only moderately successful in choosing the cases to be accorded less than the full attention of all members. There are two distinguishable problems involved. First, there is the question of whether cases raising certain predictable issues in a predictable manner should be relegated to divisional hearing. Second, there is the somewhat more difficult question of how to handle the apparently "routine" case that develops, either upon argument or during division deliberation, into a case of more than routine proportions.

Three cases illustrate these difficulties. In *State v. Schmidt*,¹⁰⁷ the Court was plainly presented with the issue of the constitutionality of a so-called "Green River" ordinance enacted by the city council of Brainerd, Minnesota, and requiring the bonding of nonresident house-to-house peddlers. A five-justice division unanimously struck down the ordinance as violative of the equal protection clauses of the federal and state constitutions and of the federal interstate commerce clause. It is submitted that this case should have been decided only by the entire Court. One might have no difficulty with the position taken by the division opinion-writer that the constitutional issues presented no difficulty and were well-settled.¹⁰⁸ But in applying a hierarchy of values to guide selection of cases to be heard by the entire Court, certainly a case involving the validity of a proscription enacted by an important unit of state government should rank high. At issue in such cases is the maintenance of both symbolic and substantive divisions between different levels of state government. This is even more true when, as in the *Schmidt* case, the trial court held the ordinance valid. *State v. Johnson*¹⁰⁹ and *State v. Wolske*¹¹⁰ were similarly ill-advised. In *Johnson*, a guilty plea to third-degree murder was challenged as having been unconstitutionally elicited in the course of plea-bargaining. The case was heard by a division which decided, for the first time, that plea-bargaining was

106. Knutson, *supra* note 76, at 6, 7.

107. 280 Minn. 281, 159 N.W.2d 113 (1968).

108. *See id.* at 284, 159 N.W.2d at 116.

109. 279 Minn. 209, 156 N.W.2d 218 (1968).

110. 280 Minn. 465, 160 N.W.2d 146 (1968).

permissible in Minnesota criminal trials so long as compliance was had with several stated standards.¹¹¹ In *Wolske*, a different division held that a person convicted of a crime more serious than that to which he had bargained to plead guilty should be permitted to withdraw his plea if the prosecutor had failed to fulfill his part of the agreement.¹¹² I have no substantial difficulties with the manner in which the opinion in either *Johnson* or *Wolske* was written. But here again it should have been apparent to the Court that these cases involved questions of "far-reaching potential"¹¹³ and should have been assigned to an en banc hearing, not relegated to divisional disposition.

It might be argued that the importance of the issues involved in the above or similar cases was obscure or totally unrevealed at the time the original divisional and en banc calendars were composed. But this would justify only the initial assignment and hearing of the case, not its final divisional disposition. If oral argument is effectively utilized, an apparently "routine" case will sometimes be discovered to involve a question best suited for full and active participation by all members of the Court.¹¹⁴ It would seem that Rule 135 should be amended to make it clear that in such cases the majority on a division could provide for rehearing by the full Court, even in the absence of disagreement over a decision. This, together with a more attentive examination of appealed cases to isolate those of substantial institutional and constitutional importance, should lead to a more sure-handed allocation of the Court's resources between en banc and divisional hearings.

V. CONCLUSION

The opening of the 1969 statutory term of the Minnesota Supreme Court is marked by uncertainty and experimentation. A partially completed study of the Court's caseload, gauged

111. See *State v. Johnson*, 279 Minn. 209, 214-16, 156 N.W.2d 218, 222-23 (1968).

112. As in *Johnson*, so here the division opinion relied heavily upon suggested standards proposed by a committee of the American Bar Association. See *State v. Wolske*, 280 Minn. 465, 469-72, 160 N.W.2d 146, 150-52 (1968).

113. *State v. Johnson*, 279 Minn. 209, 156 N.W.2d 218, 222 (1968).

114. In *State v. Wolske*, 280 Minn. 465, 467, 160 N.W.2d 146, 148 (1968), the division opinion stated that, although the claims originally asserted on appeal were found to be without merit and many of the asserted facts without support in the record, ". . . it developed on oral argument that a question of first impression which we are compelled to answer on this appeal . . ." was presented.

against the caseload traditionally borne by the Court, suggests that this is by no means a period of unprecedented pressures. Nonetheless, the Court and the Minnesota Judicial Council seem to have assumed that the caseload has reached or is rapidly reaching the point of intolerability and that recent increases will continue indefinitely. In candor, I must confess that my reading of the statistics does not lead to the same assumptions. Several factors other than the sheer number of cases—for example, the Court's processes and habits particularly with respect to opinion-drafting, the work habits of individual justices, and the quality of the work done by members of the bar who habitually practice before the Court—might provide an equally plausible explanation for this impression of intolerability apparently shared by the members of the Court. While a reduction in numbers through creation of an intermediate court of appeals probably would cure current pressures, it might do so at an unnecessarily high price. The challenge of the intermediate court of appeals proposal, as it appears to me, is not to support or oppose it but to search out the core problems afflicting the Court.

This challenge is all the more urgent in view of the divisional sitting device to which the Court has resorted in attempting to relieve the caseload pressure. Even if the several noted defects in the divisional system were immediately corrected, the Court would still be left operating with a serious barrier to greatness. A great court must of necessity be a composite of the diverse talents and skills of its members. A court operating under a divisive system that tends to lessen the mutual interaction of its members must necessarily forfeit attainment of that greatness.