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DIVISION OF LABOR BETWEEN ARKANSAS'S APPELLATE COURTS

*John J. Watkins**

Throughout most of its history, Arkansas has had only a single appellate court with statewide jurisdiction. The Arkansas Supreme Court, which replaced the superior court that had existed during territorial days,¹ carried the burden alone for more than 140 years: from 1836, when it was created under the state's first constitution,² until 1979, when the six-judge Arkansas Court of Appeals was established pursuant to a constitutional amendment approved the previous year.³

The creation of the intermediate appellate court was a response to the supreme court's increasingly heavy workload.⁴ Today, the state's two appellate courts face another "crisis of volume."⁵ In fiscal year 1992-93, there were as many appeals filed in the supreme court as in the 1978 calendar year, the last before the court of appeals began to hear cases.⁶ Total appellate filings in the state more

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1. See Act Establishing the Territory of Arkansas, ch. 49, 3 Stat. 493, 495 (1819). The court initially consisted of three judges. Two of the original appointees left Arkansas before assuming the bench, having found "frontier life in the territory too rugged and severe." Oscar Fendler, *The Arkansas Judicial System at the Crossroads*, 17 ARK. L. REV. 259, 261 (1963).

2. ARK. CONST. of 1836, art. VI, § 2. For the present jurisdictional provision, see ARK. CONST. art. 7, § 4. The court initially had three judges, but the number has been set at seven since 1927. See Act of Mar. 21, 1925, No. 205, § 1, 1925 Ark. Acts 597, 597 (adopted pursuant to ARK. CONST. amend. IX, § 1); Edwin H. Greenebaum, *Arkansas' Judiciary: Its History and Structure*, 18 ARK. L. REV. 152, 157 (1964).

3. ARK. CONST. amend. LVIII (approved Nov. 7, 1978); Act of Feb. 23, 1979, No. 208, 1979 Ark. Acts 467. The enabling legislation is codified at ARK. CODE ANN. §§ 16-12-101 to -114 (Michie 1994).

4. See *Report on Proposed Amendment No. 58*, 12 ARK. LAW. 160, 161 (Oct. 1978) (arguing that supreme court was at "breaking point" at which additional cases "just can't be handled").

5. See *In re Ark. Bar Ass'n Comm.*, 303 Ark. 752, 798 S.W.2d 923 (1990) (describing increase in appellate filings from 1978 to 1990 and suggesting that caseload may soon become unmanageable). The phrase "crisis of volume" has been frequently used to describe the steadily increasing caseloads in state appellate courts. See, e.g., ABA COMM. ON STANDARDS OF JUDICIAL ADMIN., STANDARDS RELATING TO APPELLATE DELAY REDUCTION 11 (1988).

6. Filings totaled 514 in fiscal year 1992-93, compared to 516 in calendar year

than tripled during this period and increased by 26.5 percent from fiscal year 1987-88 to fiscal year 1992-93.⁷ While the supreme court has managed to keep its docket current, the court of appeals faces a significant backlog: 448 cases as of April 30, 1994.⁸

To avoid delay in the disposition of appeals, the supreme court decides cases at a rapid pace. On average, the court hands down a decision approximately two weeks after submission.⁹ This method of keeping current, while successful, is not without cost. The judicial decision making process suffers when judges have precious little time for reflection and contemplation, not to mention independent research. Opinions are often short on analysis and reasoning, language is sometimes employed carelessly, and ramifications of a particular holding are not always fully considered.¹⁰ By providing little guidance

1978. See ADMIN. OFFICE OF THE COURTS, ANNUAL REPORT OF THE ARKANSAS JUDICIARY, STATISTICAL SUPPLEMENT 1 (1992-93); JUDICIAL DEP'T OF ARKANSAS, FOURTEENTH ANNUAL REPORT 9 (1978). Judicial statistics in Arkansas were reported on a calendar year basis from 1964 to 1982. After a transition period during the first six months of 1983, a fiscal year format was employed. The Administrative Office of the Courts, which compiles the statistics, is the successor to the Judicial Department. See ARK. CODE ANN. § 16-10-102 & Publisher's Notes (Michie 1994).

7. There were 516 appeals filed during calendar year 1978, compared to 1,643 in fiscal year 1992-93. Of the latter group, 514 were filed in the supreme court and 1,129 in the court of appeals. FOURTEENTH ANNUAL REPORT (1978), *supra* note 6, at 9; ANNUAL REPORT, STATISTICAL SUPPLEMENT (1992-93), *supra* note 6, at 1, 5. In fiscal year 1987-88, appeals filed in both courts totalled 1,299, of which 400 were in the supreme court. JUDICIAL DEP'T OF ARKANSAS, ANNUAL REPORT OF THE JUDICIARY OF ARKANSAS 37, 39 (1987-88).

The Arkansas experience is consistent with the national trend. Since the Second World War, state appellate caseloads have on average doubled every ten years. STANDARDS RELATING TO APPELLATE DELAY REDUCTION, *supra* note 5, at 11. During the period 1987-1992, appellate filings nationally rose from 208,962 to 259,276, an increase of 24.1 percent. NAT'L CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1987 53 (1989); NAT'L CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992 51 (1994).

8. ARKANSAS JUDICIAL COUNCIL LONG RANGE PLANNING COMMITTEE, REPORT OF THE APPELLATE COURTS SUBCOMMITTEE 5 (1994).

9. In 1992-93, the average was 11 days in criminal cases, 17 days in civil cases. The court of appeals averaged 22 and 27 days, respectively. ADMIN. OFFICE OF THE COURTS, ARKANSAS JUDICIARY ANNUAL REPORT 4, 6 (1992-93). According to one member of the supreme court, "in the majority of cases the justices write their opinions over . . . two and one-half days." Robert L. Brown, *From Lawyerin' to Judgin': Life on the Supreme Court After a Year and a Half*, ARK. LAW., July 1992, at 44, 45. By way of comparison, the American Bar Association standard for opinion preparation is 60 days from the date of oral argument or assignment (90 days in death penalty cases and cases of "extraordinary complexity"), plus an additional 20 days for voting on opinions that have been circulated (30 days if a written dissent is filed). STANDARDS RELATING TO APPELLATE DELAY REDUCTION, *supra* note 5, at 19-20.

10. For discussion of two cases that exemplify these problems, see Robert

for the bench and bar or by sending mixed messages, these opinions may diminish the legitimacy and acceptability of judicial decisions and breed further litigation.¹¹

Moreover, because its caseload is heavy and its jurisdiction almost entirely mandatory, the supreme court cannot adequately perform the major function of an appellate court of last resort: development of the law in an orderly and coherent manner. Simply put, the justices cannot focus their energies on the cases that pose questions of great public interest or present issues of significance to the legal order and the evolution of the law. In some states, an intermediate appellate court serves as "a buffer, a breakwater against which the tidal waves of appeals spend themselves, leaving the top court protected in quieter waters to deliberate on specially important questions."¹² Under the present Arkansas arrangement, however, the court of appeals is in no position to play such a protective role, and the supreme court finds itself on an open sea.

What can be done to eliminate, or at least minimize, these problems? The General Assembly has taken the first step by expanding the court of appeals to twelve judges, effective July 1, 1995.¹³ Further change is necessary, however, particularly with respect to the division of labor between the state's two appellate courts. Despite the inherent danger in making any call for reform,¹⁴ this article suggests two methods for restructuring the present system. Both would allow the supreme court to focus on law development while at the same time reducing the likelihood of "double appeals,"

Laurence, *The Supreme Court and the Defaulting Garnishee: An Essay on Metal Processing, Inc. v. Plastic & Reconstructive Associates, Ltd. and a Few of Its Predecessors*, 40 ARK. L. REV. 1 (1986), and John J. Watkins, *Procedural Issues in an Annexation Case: A Dissenting Opinion to Gay v. City of Springdale*, 1986 ARK. L. NOTES 55. This article briefly considers a more recent example in note 88, *infra*. This problem is not unique to the Arkansas Supreme Court. See Robert Laurence, *Bona Fide Purchaser Analysis, Beverage Products Corporation v. Robinson, and the Case against Very Short Opinions*, 1990 ARK. L. NOTES 85 (discussing an opinion of the court of appeals).

11. There is "an inevitable conflict" between avoiding delay and producing quality decisions. "The ideal is to eliminate delay while maintaining excellence, an end more easily stated than achieved, but one that must be a court's constant goal." ROBERT A. LEFLAR, *INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS* 9 (1976).

12. DANIEL J. MEADOR & JORDANA S. BERNSTEIN, *APPELLATE COURTS IN THE UNITED STATES* 26 (1994).

13. Act of Apr. 13, 1993, No. 1085, § 1, 1993 Ark. Acts 3275, 3276 (codified at ARK. CODE ANN. § 16-12-101(c) (Michie 1994)).

14. As an English lord observed in the 1840s: "Reform, Sir, reform! I've heard enough about reform. Things are bad enough as they are." Roger C. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 335 (1982).

those in which a given case is considered on the merits by both appellate courts. These proposals are set forth below, following a review of some historical and statistical matters, the role of appellate courts, and various models of case allocation.

I. BACKGROUND

As early as 1965, there were indications that the supreme court's workload was to the point that "some relief may soon be necessary."¹⁵ That was the conclusion of the Arkansas Judiciary Commission, an advisory body created by the General Assembly in 1963 to make a comprehensive study of the state's judicial system.¹⁶ However, the Commission did not believe that an intermediate appellate court should be established; rather, it recommended that the supreme court "sit in divisions in all except questions of constitutional law and capital cases, or except when there is a dissent in a division."¹⁷

The supreme court did not take this step immediately, despite a steadily growing caseload that was consistent with the national trend.¹⁸ From 1964 to 1974, for example, the number of decided cases jumped from 274 to 440, an increase of 60.6 percent.¹⁹ Creation of an intermediate appellate court was proposed in 1968,²⁰ and authorization for such a body was included in the judicial article

15. ARKANSAS JUDICIARY COMM'N REPORT TO 1965 GENERAL ASSEMBLY 14 (1965).

16. See Act of Feb. 28, 1963, No. 116, 1963 Ark. Acts 321. John A. Fogleman, who later served with distinction on the supreme court, chaired the commission.

17. REPORT TO 1965 GENERAL ASSEMBLY, *supra* note 15, at 14. A statute giving the supreme court authority to sit in three-judge panels has been on the books since 1925. See Act of Mar. 21, 1925, No. 205, § 2, 1925 Ark. Acts 597, 597-98 (codified at ARK. CODE ANN. § 16-11-104 (Michie 1994)).

18. See Thomas B. Marvell, *Is There an Appeal from the Caseload Deluge?*, JUDGES' J., Summer 1985, at 34, 35 (noting that appellate caseloads "began to skyrocket" in the mid-1960s). As another commentator has observed, "[t]he growth in the caseloads of appellate courts, both federal and state, since 1960 almost defies comprehension." ROBERT J. MARTINEAU, APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS 155 (1990).

19. See JUDICIAL DEP'T OF ARKANSAS, TENTH ANNUAL REPORT 6 (1974); JUDICIAL DEP'T OF ARKANSAS, FIRST ANNUAL REPORT 16 (1964-65).

20. The state's judicial department, for example, recommended that "serious consideration and study be given to appropriate methods, including the establishment of an intermediate appellate court, . . . to avoid the delays experienced by other states at the appellate level." The department also noted that Colorado, a state with a seven-member supreme court and a comparable workload, was considering a six-judge intermediate appellate court. JUDICIAL DEP'T OF ARKANSAS, FOURTH ANNUAL REPORT 12-13 (1968).

of the ill-fated 1970 constitution that was rejected by the voters.²¹

In 1974, the supreme court responded to the problem by providing for unpublished opinions in cases without significant precedential value.²² Two years later, the court adopted the commission's recommendation and began sitting in divisions, rather than en banc, on most appeals.²³

These measures, however, proved to be of the stopgap variety. In 1977, the supreme court disposed of 576 appeals,²⁴ a 60.9 percent increase from the 1974 total. On average, each justice produced 70 signed majority opinions;²⁵ with concurring opinions, dissents, and *per curiam* opinions included, the average was 81 per judge.²⁶ Justice John A. Fogleman alone wrote 100 signed opinions, or about two per week.²⁷ Concluding that the court could not cope with an increased caseload by sitting in divisions, he believed that creation of an intermediate appellate court was "desirable."²⁸ Chief Justice Car-

21. The proposed constitution was the product of a constitutional convention held in 1969-70. See generally Robert A. Leflar, *Constitutional Revision in Arkansas*, 24 ARK. L. REV. 155 (1970). Section 5 of Article V, the judicial article, provided:

A court of appeals is established, which shall remain inoperative until activated by rule of the supreme court and funds therefor are appropriated by the General Assembly.

The court of appeals shall consist of such divisions and have such appellate jurisdiction as the supreme court shall by rule determine.

Judges of the court of appeals shall have the same qualifications as justices of the supreme court and shall be elected by majority vote on a non-partisan basis at statewide general elections for terms of six years.

For a review of the judicial article, see Ronald L. Boyer, *A New Judicial System for Arkansas*, 24 ARK. L. REV. 221 (1970).

22. See George Rose Smith, *The Selective Publication of Opinions: One Court's Experience*, 32 ARK. L. REV. 26, 28-29 (1978). There was considerable dissatisfaction among Arkansas lawyers with this practice. See David Newbern & Douglas L. Wilson, *Rule 21: Unprecedented and the Disappearing Court*, 32 ARK. L. REV. 37, 39-42 (1978).

23. See *In re Supreme Court Procedure for Sitting in Divisions*, 260 Ark. 380 (1976). The court had previously considered sitting in divisions but had been unable to reach agreement on the matter because some justices preferred "to attempt to obtain a constitutional amendment authorizing an intermediate appellate court." Chief Justice Carleton Harris, Speech to Pulaski County Bar Association (1977), quoted in Don E. Tomlinson, *A court of appeals of Arkansas: To Be or Not To Be?*, ARK. LAW., Oct. 1978, at 196, 200; see also Lyle Brown, *The Handling of Supreme Court Cases—Processing, Practice, and Procedure*, 22 ARK. L. REV. 679, 684 (1969) (noting that court was "surveying the possibility" of creating divisions).

24. JUDICIAL DEP'T OF ARKANSAS, THIRTEENTH ANNUAL REPORT 6 (1977).

25. *Id.* at 1.

26. *Id.*

27. *Id.* at 10.

28. Remarks to the Annual Meeting of the Arkansas Judicial Council, Helena, Arkansas (Oct. 14, 1970), quoted in C.R. Huie & G. Lawrence Jegley, *Is Justice*

leton Harris sounded the same theme: “[I]t will be difficult for the Court to keep pace with its skyrocketing workload in the years to come unless help in the form of an intermediate appellate court . . . is forthcoming.”²⁹

The General Assembly responded in 1978 by placing before the voters a proposed constitutional amendment permitting the creation of such a court. The measure was approved in the November general election and became Amendment 58 to the Arkansas Constitution:

The General Assembly is hereby empowered to create and establish a court of appeals and divisions thereof. The court of appeals shall have such appellate jurisdiction as the supreme court shall by rule determine, and shall be subject to the general superintending control of the supreme court. Judges of the court of appeals shall have the same qualifications as justices of the supreme court and shall be selected in the manner provided by law.

Enabling legislation enacted in the next session of the General Assembly established a six-member appellate court, effective July 1, 1979.³⁰

Those who supported creation of the court of appeals were concerned primarily, if not exclusively, with reducing the supreme court’s workload while avoiding a two-step appellate system in which cases were routinely reviewed by both courts.³¹ In defining the new court’s jurisdiction,³² the supreme court adopted the same philosophy. As the Court explained in *Moose v. Gregory*:³³

Delayed? A Report from the Court Administrator, 1 U. ARK. LITTLE ROCK L.J. 51, 61 n.11 (1978). As the supreme court observed several years later, its use of divisions to cope with the caseload crunch was “met with various degrees of dissatisfaction.” *In re Arkansas Bar Ass’n Comm.*, 303 Ark. 752, 753, 798 S.W.2d 923, 924 (1990).

29. Transmittal letter to Governor David Pryor and the Seventy-first General Assembly, JUDICIAL DEP’T OF ARKANSAS, TWELFTH ANNUAL REPORT (1976).

30. Act of Feb. 23, 1979, No. 208, 1979 Ark. Acts 467 (codified at ARK. CODE ANN. §§ 16-12-101 to -114 (Michie 1994)). For background regarding creation of the court of appeals, see C.R. Huie, *Juris Dictum*, ARK. LAW., July 1979, at 106; *Report on Proposed Amendment No. 58*, ARK. LAW., Oct. 1978, at 160; Tomlinson, *supra* note 23. With respect to the enabling legislation, see Christopher J. Heller, Survey, *Legislation*, 3 U. ARK. LITTLE ROCK L.J. 309, 311-13 (1980).

31. See *Report on Proposed Amendment No. 58*, *supra* note 30, at 161 (arguing that supreme court was at “breaking point” in terms of caseload and emphasizing that court of appeals would not be “just another step” in securing review by supreme court but will have “final jurisdiction in some types of cases”).

32. ARK. SUP. CT. R. 1-2(a). See *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm’n*, 307 Ark. 171, 818 S.W.2d 935 (1991); *Moose v. Gregory*, 267 Ark. 86, 590 S.W.2d 662 (1979).

33. 267 Ark. 86, 590 S.W.2d 662 (1979).

Amendment 58 vested in the supreme court the power to determine the jurisdiction of the court of appeals, so that the total caseload might be apportioned between the two appellate courts. Ideally, the supreme court and the court of appeals will each have its own field of primary jurisdiction. Ideally, each court will in effect be a court of last resort, with its decisions having a desirable finality. Ideally, it will be immaterial to the litigant whether his particular case goes to one court or to the other. Our goal is to provide each litigant with the opportunity for one appeal only, not two.³⁴

Under the present jurisdictional scheme adopted by the supreme court pursuant to Amendment 58,³⁵ cases falling into one of seventeen categories are assigned to the supreme court in the first instance, with all others left to the court of appeals.³⁶ This division of labor initially reduced the supreme court's workload, but the number of cases disposed of on appeal each year by that court has risen steadily over the past five years and is now approaching the 1978 level. During that calendar year, the last full reporting period before the legislature established the court of appeals, the supreme court terminated 585 appeals, an all-time high.³⁷ In 1980, total terminations began to drop, reaching a low of 404 in 1985-86.³⁸ Over the last three fiscal years, however, the court has averaged 512 terminations annually,³⁹ with the 1991-92 total of 521 representing the high-water mark since creation of the intermediate court. The number of appeals filed each year reflects a similar pattern; as noted previously, the supreme court's total for 1992-93 is virtually identical to that of 1978: 514 vs. 516.⁴⁰

34. *Id.* at 89, 590 S.W.2d at 664; *see also* Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 307 Ark. 171, 174, 818 S.W.2d 935, 937 (1991) ("[W]e would not overlook the intent of Amendment 58 and our duty as an appellate court to see that any decision was fairly and completely reviewed once").

35. ARK. SUP. CT. R. 1-2(a). This assignment of cases is "intended to achieve an equalization of appellate workload." ARK. SUP. CT. R. 1-2(g).

36. ARK. SUP. CT. R. 1-2(a).

37. FOURTEENTH ANNUAL REPORT (1978), *supra* note 6, at 1, 6. Technically, the supreme court disposed of more appeals (657) in 1979. However, that total includes 173 cases transferred to the court of appeals, which began work on July 1 of that year. If the transferred cases are excluded, the supreme court terminated 484 appeals. *See* JUDICIAL DEP'T OF ARKANSAS, FIFTEENTH ANNUAL REPORT 8 (1979).

38. JUDICIAL DEP'T OF ARKANSAS, ANNUAL REPORT OF THE JUDICIARY OF ARKANSAS 47 (1985-86).

39. There were 508 terminations in 1990-91, 521 in 1991-92, and 506 in 1992-93. ADMIN. OFFICE OF THE COURTS, ANNUAL REPORT OF THE ARKANSAS JUDICIARY, STATISTICAL SUPPLEMENT 1 (1990-91); ADMIN. OFFICE OF THE COURTS, ANNUAL REPORT OF THE ARKANSAS JUDICIARY, STATISTICAL SUPPLEMENT 1 (1991-92); ANNUAL REPORT, STATISTICAL SUPPLEMENT (1992-93), *supra* note 6, at 1.

40. *See supra* note 6. In 1985-86, when the court terminated 404 appeals, filings totaled 411. *See* ANNUAL REPORT (1985-86), *supra* note 38, at 47.

The number of majority opinions produced annually also offers insight into the supreme court's workload. At first blush, it appears that the number of opinions has declined substantially. In 1978, the court completed 539 signed majority opinions (77.0 per judge), compared to an average of 380 over the three most recent fiscal years for which data is available (54.3 per judge).⁴¹ However, these statistics are somewhat misleading. Of the 539 opinions prepared in 1978, 328 were deemed significant enough to warrant publication, while 211 were not published.⁴² Typically, unpublished opinions are shorter and less detailed than the published opinions;⁴³ indeed, one reason that the supreme court adopted the practice of publishing only selected opinions was to "reduc[e] the time which must be devoted to opinion writing."⁴⁴ Justice George Rose Smith explained:

It cannot be doubted that selective publication does lighten the task of opinion writing. [M]uch of the difficulty [in opinion writing] disappears when an appellate judge sits down to write an opinion not meant for publication. Here he writes almost

41. ANNUAL REPORT, STATISTICAL SUPPLEMENT (1990-91), *supra* note 39, at 2 (384 opinions); ANNUAL REPORT, STATISTICAL SUPPLEMENT (1991-92), *supra* note 39, at 2 (388 opinions); ANNUAL REPORT, STATISTICAL SUPPLEMENT (1992-93), *supra* note 6, at 2 (368 opinions); FOURTEENTH ANNUAL REPORT (1978), *supra* note 6, at 10. The figures in the text do not include per curiam opinions in decided cases. The following table, derived from the sources cited above, provides a more complete picture:

Year	Signed Ops.	Per Curiams	Total	Per-Judge Avg.
1978	539	16	555	79.2
1990-91	384	63	447	63.9
1991-92	388	56	444	63.4
1992-93	368	75	443	63.3
3-yr. average	380	65	445	63.5

42. FOURTEENTH ANNUAL REPORT (1978), *supra* note 6, at 10. Under supreme court rules then in effect, an opinion would not be published unless:

- a. The opinion establishes a new rule of law or alters, modifies, or clarifies an existing rule; or
- b. The opinion involves a legal or factual issue of continuing public interest; or
- c. The opinion criticizes existing law; or
- d. The opinion resolves a real or apparent conflict of authority; or
- e. The opinion will serve as a useful reference, such as one reviewing case law or legislative history.

ARK. SUP. CT. R. 21, reprinted in Smith, *supra* note 22, at 36. For the present provisions, which are also applicable to the court of appeals, see ARK. SUP. CT. R. 5-2(c), (d).

43. Of course, some of the 211 opinions that were not published in 1978 may have treated important issues in something more than a cursory fashion. See Newbern & Wilson, *supra* note 22, at 48-56 (reviewing unpublished opinions from 1974-77 and concluding that some went into considerable detail in addressing significant questions).

44. Smith, *supra* note 22, at 29.

entirely for the benefit of the lawyers, the litigants, and, at times, the trial judge. The opinion need not narrate the procedural history of the case nor its facts. The writer might begin his opinion with such an abrupt statement as this: "This case, for two significant reasons, is not governed by our decision in *Doe v. Roe*, 280 Ark. 216." Basically, the judge is merely explaining to a very limited audience why the case is being decided as it is.⁴⁵

Thus, the difference in the number of 1978 opinions and those written during the three-year period from 1990-91 through 1992-93 does not necessarily reflect a great disparity in the court's workload. In any event, relying exclusively on the number of signed majority opinions underestimates that workload. This approach does not take into account per curiam opinions in decided cases, concurring and dissenting opinions, orders disposing of motions and petitions,⁴⁶ time spent in conference, and the handling of various administrative responsibilities.⁴⁷ Moreover, the supreme court, in carrying out its constitutional duty to oversee the state's judicial system, must deal with such matters as admission to the bar, attorney discipline, and

45. Smith, *supra* note 22, at 29. In light of Justice Smith's comments, consider the Michigan Court of Appeals' decision in *Denny v. Radar Indus., Inc.*, 184 N.W.2d 289 (Mich. Ct. App. 1970). The entire opinion in that case is as follows: J.H. GILLIS, Judge.

The appellant has attempted to distinguish the factual situation in this case from that in *Renfroe v. Higgins Rack Coating and Manufacturing Co., Inc.* (1969), 17 Mich. App. 259, 169 N.W.2d 326. He didn't. We couldn't.

Affirmed. Costs to appellee.

46. In years past, the court's annual statistics included the number of petitions and motions (excluding motions for extension of time) that required the justices' attention. In 1978, for example, the court passed on 203 petitions and 282 motions, a total of 485. By adding this figure to the number of appeals terminated (585), one could determine the court's "dispositions" for the year, in this case 1,070. FOURTEENTH ANNUAL REPORT (1978), *supra* note 6, at 6-8. Over the past several years, petition statistics have been reported, but those concerning motions have not. This gap makes it impossible to compare total dispositions in 1978 with those in more recent years. In 1991-92, for example, the court terminated 521 appeals and ruled on 309 petitions, a total of 830. ANNUAL REPORT, STATISTICAL SUPPLEMENT (1991-92), *supra* note 39, at 1. If the court also handled 240 motions during that period, its overall dispositions would have reached 1,070, the same level as in 1978. Although the Administrative Office of the Courts could not provide information as to motions, the number could easily be as high as 240 per year. In 1983-84, the last year for which such information is available, the court terminated 304 motions, as well as 448 appeals and 252 petitions — a total of 1,004 dispositions. JUDICIAL DEP'T OF ARKANSAS, ANNUAL REPORT 18-20 (1983-84).

47. See generally *Brown*, *supra* note 9 (describing the court's work and internal operating procedures).

the rules of civil and criminal procedure.⁴⁸ Little of this work is reflected in the annual statistics.

Even if one focuses solely on the number of majority opinions as an indicator of an appellate court's workload, the supreme court is shouldering a heavy burden. In Kansas, a nearby state with approximately the same population as Arkansas, the number of opinions per judge on the supreme court is 28.6,⁴⁹ about half the Arkansas average of 54.3. In Louisiana and Missouri, the averages are even lower: 13.0 and 16.0, respectively.⁵⁰ Excluding Arkansas, the state in this region with the highest average is Tennessee with 42.2 opinions per judge.⁵¹ Still, that figure represents only about three-fourths of the Arkansas Supreme Court's output, which was approximately the same in 1992-93 as in 1968,⁵² when proposals for establishing an intermediate appellate court began to appear.⁵³ Moreover, the combined average per judge of Arkansas's two appellate courts is now higher than the supreme court's average in 1978, the year before the court of appeals came into existence.⁵⁴

48. See ARK. CONST. art. VII, § 4 (supreme court has "general superintending control over all inferior courts of law and equity"); ARK. CONST. amend. XXVIII (supreme court "shall make rules regulating the practice of law and the professional conduct of attorneys at law").

49. STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, *supra* note 7, at 94 (seven judges, 200 dispositions by signed opinion). States with similar averages include Colorado (30.8) and Illinois (25.1). STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, *supra* note 7, at 94. Actually, most averages taken from data in this report are inflated, for they are based on a court's "total dispositions by signed opinion," not simply majority opinions. For example, the Kansas dispositions include signed opinions, per curiam opinions, and some memoranda and orders. STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, *supra* note 7, at 94.

50. STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, *supra* note 7, at 95. These averages are not unusual for states with a court of last resort and at least one intermediate appellate court, as the following figures indicate: California (12.7), New Jersey (11.1), Oregon (16.6), and Wisconsin (12.4). STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, *supra* note 7, at 94-96.

51. STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, *supra* note 7, at 97. Because three states in the region have different appellate structures, direct comparisons with Arkansas are more difficult. In Mississippi, which has no intermediate appellate court, the average is 42.8. STATE COURT CASELOAD STATISTICS: ANNUAL REPORT, *supra* note 7, at 96. Oklahoma and Texas both have separate courts of last resort for civil and criminal cases. Data for Oklahoma was not available, but the Texas Supreme Court and Texas Court of Criminal Appeals had averages of 14.1 and 22.9, respectively, and a combined average of 18.5. STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, *supra* note 7, at 97.

52. The average in 1992-93 was 52.6, compared to 53.4 in 1968. See ANNUAL REPORT, STATISTICAL SUPPLEMENT (1992-93), *supra* note 6, at 2; FOURTH ANNUAL REPORT (1968), *supra* note 20, at 18.

53. See *supra* note 20 and accompanying text.

54. In 1978, the supreme court issued 539 signed majority opinions, an average

A judge serving on a court of last resort cannot produce opinions at the rate of more than one per week and devote sufficient time and energy to the judicial process. Appellate judges must give the legal issues careful study, refine their thinking in the course of drafting opinions and interacting with law clerks and colleagues, and produce opinions that will not only win majority approval but also illuminate the issues for lower courts and practicing lawyers.⁵⁵ Judging requires much more than the mechanical application of precedent; judges are not assembly line workers,⁵⁶ and courts are not simply "processing institutions."⁵⁷ As H.L. Mencken once wrote, judges should not "perform their duties in the manner of checkers at a race-track or pump-men at a filling station."⁵⁸

II. THE ROLE OF APPELLATE COURTS

There is little disagreement as to whether appellate review is essential in the administration of justice. Although such review is not required as a matter of due process,⁵⁹ litigants in this country have traditionally been provided with one appeal as a matter of

of 77.0 per judge. FOURTEENTH ANNUAL REPORT (1978), *supra* note 6, at 10. In 1992-93, the supreme court produced 368 such opinions and the court of appeals 652, a combined average of 78.5 per judge. ANNUAL REPORT, STATISTICAL SUPPLEMENT (1992-93), *supra* note 6, at 2, 6.

55. Writing good opinions is difficult and time-consuming. As Professor Cooper has noted:

[T]he outstanding legal writers have preferred to revise, and revise, and then revise again. Cardozo found that phrases, like diamonds, required laborious polishing to achieve a brilliant luster. Brandeis often rewrote an opinion a dozen times. Once, Justice Frankfurter tells us, there were fifty-three revisions.

FRANK E. COOPER, WRITING IN LAW PRACTICE 33 (1963); *see also* Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965, 992 (1993) (noting that the conditions under which judges work "make good opinion writing difficult" and that "[t]ime for thoughtful consideration and reconsideration is hard to come by").

56. Judges have employed the mass production metaphor to describe one consequence of increasing caseloads. *See, e.g.*, WARREN BURGER, YEAR END REPORT OF THE JUDICIARY 2 (1981) (noting that heavy caseloads force the courts "towards an assembly line model"); James A. Gazell, *Chief Justice Rose Bird: A Two-Year Performance Review*, 1980 DET. C.L. REV. 419 (quoting the former California chief justice's statement that "[a]n assembly line concept has no place in a judiciary whose members take pride in the quality and craft of their work"); *see also* J. Woodford Howard, Jr., *Are Heavy Caseloads Changing the Nature of Appellate Justice?*, 66 JUDICATURE 57, 58 (1982) (expressing concern about "assembly line justice" caused by increasing appellate caseloads).

57. Robert Bork, *Dealing with Overloads in Article III Courts*, 70 F.R.D. 231, 233 (1976).

58. H.L. Mencken, Book Review, AM. MERCURY, July 1933, at 381.

59. *E.g.*, *Ross v. Moffitt*, 417 U.S. 600, 606 (1974); *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 43 (1954).

right.⁶⁰ Chief Judge John Parker of the United States Court of Appeals for the Fourth Circuit explained the rationale for this system as follows:

The judicial function in its essence is the application of the rules and standards of organized society to the settlement of controversies, and for there to be any proper administration of justice these rules and standards must be applied, not only impartially, but also objectively and uniformly throughout the territory of the state. This requires that decisions of trial courts be subjected to review by a panel of judges who are removed from the heat engendered by the trial and are consequently in a position to take a more objective view of the questions there raised to maintain uniformity of decision throughout the territory.⁶¹

It is also generally agreed that appellate courts have two basic functions: "to review individual cases to assure that substantial justice has been rendered" and "to develop the law for general application in the legal system."⁶² With respect to the former, usually referred to as "error correction," appellate courts "serve as the instrument of accountability for those who make the basic decisions in trial courts and administrative agencies."⁶³ As for the latter, often called "law development," appellate courts "keep the law in proper order"⁶⁴ by providing "a means for the ongoing . . . evolution of the law in the common-law tradition."⁶⁵

60. See ABA COMM. ON STANDARDS OF JUDICIAL ADMIN., STANDARDS RELATING TO APPELLATE COURTS § 3.10(a), at 13 (1977) (stating that with minor exceptions, "[a] party to a proceeding heard on the record in a trial court should be entitled to an appeal of right from a final judgment"); ROBERT STERN, APPELLATE PRACTICE IN THE UNITED STATES 22 (1981) (stating that the "accepted model for fair appellate procedure" has included the right to one appeal). The appellate tradition is a venerable one that "dates back some 4000 to 6000 years to several highly developed civilizations in that fecund area of the world we call the Near East." FRANK M. COFFIN, THE WAYS OF A JUDGE 17 (1980).

61. John J. Parker, *Improving Appellate Methods*, 25 N.Y.U. L. REV. 1 (1950).

62. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 60, at 4 (commentary to § 3.00); see also THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL 14-16 (1994); PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 2-3 (1976); LEFLAR, *supra* note 11, at 3-5 (1976); MARTINEAU, *supra* note 18, at 28-30; MEADOR & BERNSTEIN, *supra* note 12, at 3-4.

63. CARRINGTON ET AL., *supra* note 62, at 2.

64. LEFLAR, *supra* note 11, at 4.

65. MEADOR & BERNSTEIN, *supra* note 12, at 4. This function is also described as "institutional review" or "lawmaking." See, e.g., CARRINGTON ET AL., *supra* note 62, at 2; LEFLAR, *supra* note 11, at 4. However, the term used in the text seems preferable. "Institutional review" is not in itself particularly descriptive, and "lawmaking" carries a negative connotation among those who, like George Bush,

While appellate review serves other purposes as well,⁶⁶ these dual functions lie at the core of the process. In jurisdictions without an intermediate appellate court, both are necessarily performed by the supreme court.⁶⁷ When an intermediate appellate body exists, however, it has primary responsibility for error correction, while law development is left largely to the supreme court.⁶⁸ This division of labor is recognized in the American Bar Association's *Standards Relating to Appellate Courts*.⁶⁹

Of course, the line between the error correction and law development functions is not a bright one. A state court of last resort clearly has an obligation, in hearing a case accepted under its discretionary jurisdiction, to correct a trial court error. Similarly,

cling to the naive notion that courts do not "make law." The lawmaking function has been with us for some time; as Professor Kurland has observed, it "is the genius of the common law system that we inherited from our English forbears." Philip B. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 618 (1974).

66. As noted previously, appellate review helps ensure uniformity and, therefore, promotes the evenhanded treatment of litigants within the system. Kurland, *supra* note 65, at 618. Moreover, such review "heighten[s] the legitimacy and acceptability of judicial decisions." MEADOR & BERNSTEIN, *supra* note 12, at 4. Without this review, losing litigants and the general public may not consider a trial judge's ruling a legitimate resolution of the controversy. Similarly, appellate courts "provide a means for the institutional sharing of judicial responsibility for decisions." MEADOR & BERNSTEIN, *supra* note 12, at 5. Appellate courts also "provide executive direction and assistance to the trial courts." Shirley M. Hufstedler, *Constitutional Revision and Appellate Court Decongestants*, 44 WASH. L. REV. 577, 587 (1969).

67. Eleven states and the District of Columbia do not have intermediate appellate courts. Those states are: Delaware, Maine, Mississippi, Montana, New Hampshire, Nevada, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. North Dakota has a "temporary court of appeals" that functions under authority delegated by the supreme court. Seldom used, it has no permanent membership and is staffed by trial court judges and retired judges. MEADOR & BERNSTEIN, *supra* note 12, at 145; see also STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, *supra* note 7, at 172-223 (describing key features of each state's court organization).

68. See MEADOR & BERNSTEIN, *supra* note 12, at 26 (stating that "the supreme court is concerned primarily with the development of the law, while the intermediate court is concerned primarily with the application of existing law"); James D. Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOK. L. REV. 459, 462 (1975) (intermediate appellate courts "relieve the burden" on the court of last resort, which is then able to focus on "the development of the law as a whole"); Richard H. Mills, *The Caseload Explosion: The Appellate Response*, 16 J. MARSHALL L. REV. 1, 3-4 (1982) (stating that the intermediate appellate court "is assigned the function of correcting mistakes," while the court of last resort has as its primary function "the obligation of law development, of resolving conflicts among lower courts, of teaching the other courts and lawyers and [the] public about the law").

69. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 60, at 4 (commentary to § 3.00).

an intermediate appellate court will from time to time help develop the law. For example, the court might be confronted with an issue of first impression or a question of fact situation that does not fall squarely within existing precedent.⁷⁰ Proportionately, though, the intermediate appellate court will handle more error-correction appeals and face fewer new issues than the supreme court,⁷¹ and its principal task is "to apply the existing law of the jurisdiction as best it can interpret it, not to make new law."⁷²

Accordingly, an intermediate appellate court should not be so brazen as to reject controlling supreme court precedent or seek to undercut a prior decision by "distinguishing it away."⁷³ As Dr. Robert A. Leflar has pointed out, however, an intermediate appellate court may quite properly "stimulate revision of the law by calling attention to the need for change, either legislative or judicial, when it cannot itself make changes."⁷⁴ While adhering to precedent, the court might suggest that a particular rule is unfair, difficult to apply,

70. *E.g.*, *First Nat'l Bank v. Arkansas Dev. Fin. Auth.*, 44 Ark. App. 143, 870 S.W.2d 400 (1994) (holding that the agreement to waive statute of limitations for all time, made at the inception of the contract, is void because it violates public policy); *Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994) (determining standard to be applied by trial court in deciding when custodial parent may relocate outside the state).

71. Benjamin Kaplan, *Do Intermediate Appellate Courts Have a Lawmaking Function?*, 70 MASS. L. REV. 10, 12 (1985). Justice Cardozo divided cases into three categories: (1) cases in which the law and its application are plain; (2) cases in which the rule of law is certain and its application alone is doubtful; and (3) cases in which both the rule of law and the application are doubtful. He estimated that at least 90 percent of the cases decided by appellate courts fall into the first two categories. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 60 (1924); see also Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218, 222 (1961) (agreeing with Cardozo's estimate); Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 856-57 (estimating that about 50 percent of cases are easy, 35-45 percent "hard" in the sense that each party is able to advance at least one plausible legal argument in its favor, and the remaining 5-15 percent "very hard").

72. MEADOR & BERNSTEIN, *supra* note 12, at 27.

73. These techniques have been labeled "bold challenge" and "quiet usurpation," respectively. Hopkins, *supra* note 68, at 466. Judge Hopkins considered both inappropriate, arguing that the intermediate appellate court should avoid "infringing upon the prerogative of the highest court to make changes in the law." *Id.* at 467; see also *Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973) ("To allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level."); *First Nat'l Bank v. Lockeby*, No. CA 88-180, 1988 WL 122816, at *2 (Ark. Ct. App. 1988) ("[T]his Court is bound by our supreme court's decision and obviously cannot overrule them.").

74. LEFLAR, *supra* note 11, at 64.

or at odds with the modern trend.⁷⁵ For example, in *Coleman v. State*⁷⁶ the Arkansas Court of Appeals expressed its "misgivings" about a decision of the supreme court but did its best to apply the holding.⁷⁷ In some jurisdictions, including Arkansas, an intermediate appellate court can certify cases of legal significance or public importance to the court of last resort.⁷⁸

Even though Arkansas has had an intermediate appellate court for fifteen years, the division of functions described above has never been achieved. Indeed, it was not intended. As discussed previously, those who favored creation of the court of appeals believed that it should generally have the last word in the cases within its jurisdiction, with further review by the supreme court limited to exceptional circumstances.⁷⁹ This view, which is reflected in the present jurisdictional arrangement, has resulted in a large number of cases being appealed directly to the supreme court as a matter of right. Because most of these cases are insignificant in terms of law development, the court's only role is correction of error. On the other side of the coin, the court of appeals has the final say in a great many cases and thus plays a major role in development of the law. While the supreme court may in its discretion review such cases,⁸⁰ it is

75. Such an effort to reshape the law might take the form of a "polite nudge" or an "outright plea for change." Hopkins, *supra* note 68, at 465.

76. 12 Ark. App. 214, 671 S.W.2d 221 (1984).

77. *Id.* at 218, 671 S.W.2d at 223; *see also* High v. Southland Racing Corp., No. CA 92-794, 1993 WL 366977, at *1 (Ark. Ct. App. 1993) ("Although we concede that we do not fully understand the basis for the supreme court's decision, we are bound by it.').

78. *See* LEFLAR, *supra* note 11, at 76-77. At present, the Arkansas Court of Appeals may certify a case to the supreme court upon finding that the case either falls outside the jurisdiction of the court of appeals or "involves an issue of significant public interest or a legal principle of major importance." The supreme court "may accept for its docket cases so certified or may remand any of them to the court of appeals for decision." ARK. SUP. CT. R. 1-2(d). For other states that provide for some type of predecisional certification, *see infra* note 138.

79. *See supra* text accompanying notes 31-34.

80. The supreme court's rule governing petitions for review of decisions by the court of appeals provides as follows:

No appeal as of right shall lie from the court of appeals to the supreme court. A petition for review *may be granted* by the supreme court for review of a decision of the court of appeals only if the supreme court determines that the case (1) should have come to the supreme court originally under Section (a) of this Rule, (2) should have been certified to the supreme court under Section (d)(2) of this Rule, or (3) was decided in the court of appeals by a tie vote.

ARK. SUP. CT. R. 1-2(f) (emphasis added). The fact that a case falls within one of these categories means only that the supreme court may grant review, not that it is required to do so. *See, e.g.,* Perkins v. Perkins, 267 Ark. 112, 113, 589 S.W.2d 29, 30 (1979) (holding that the supreme court "do[es] not automatically grant . . . review" in cases where the court of appeals is evenly divided).

not likely to do so with any degree of regularity because of its mandatory jurisdiction. Facing a docket crowded with direct appeals, the supreme court has precious little time to consider decisions of the court of appeals. In its 1993-94 term, for example, the supreme court decided with full opinion only five cases on petition for review from the court of appeals.⁸¹ During the same period, the supreme court accepted only eight cases via certification.⁸²

Apart from the blurring of appellate functions, the present method of allocating cases on the basis of their subject matter can lead to doctrinal confusion. Consider the following example from the choice-of-law area. Under Supreme Court Rule 1-2(a)(16), “[c]ases presenting a question about the law of torts” are appealed directly to the supreme court. In 1987, the court held that choice-of-law questions in tort cases are to be governed by Dr. Leflar’s famous “choice-influencing considerations.”⁸³ This decision came ten years

81. Those five cases are: *Second Injury Trust Fund v. White Constr.*, 317 Ark. 26, 875 S.W.2d 834 (1994); *Second Injury Trust Fund v. POM, Inc.*, 316 Ark. 796, 875 S.W.2d 832 (1994); *Maloy v. Stuttgart Memorial Hosp.*, 316 Ark. 447, 872 S.W.2d 401 (1994) (deciding case in which court of appeals was evenly divided); *Grimes v. North Am. Foundry*, 316 Ark. 395, 872 S.W.2d 59 (1994) (deciding case in which court of appeals was evenly divided); *Hawkins v. City of Prairie Grove*, 316 Ark. 150, 871 S.W.2d 357 (1994) (deciding case that should have been heard by supreme court in the first instance, since it involved question of statutory interpretation). The supreme court also handed down two per curiam opinions in cases from the court of appeals: *Porter v. State*, 315 Ark. 160, 865 S.W.2d 300 (1993) (allowing criminal defendant to file belated petition for review of court of appeals’ decision affirming his conviction); *Mangiapane v. State*, 314 Ark. 350, 862 S.W.2d 258 (1993) (reversing dismissal of appeal as untimely and remanding to court of appeals for decision on merits).

Technically speaking, the supreme court is reviewing the judgment of the trial court, not the decision of the court of appeals. That is, the supreme court “review[s] the case as though it had been originally filed in this court.” *Maloy v. Stuttgart Memorial Hosp.*, 316 Ark. 447, 449, 872 S.W.2d 401 (1994). However, there are cases suggesting the contrary. *E.g.*, *Hall’s Cleaners v. Wortham*, 311 Ark. 103, 107, 842 S.W.2d 7, 10 (1992) (“We therefore affirm the court of appeals.”). Of course, the supreme court need not ignore the opinion issued by the court of appeals. If that opinion is particularly persuasive or includes a theory not advanced by the parties, then the supreme court is certainly free to adopt it.

82. Those cases are: *Martin v. Martin*, 316 Ark. 765, 875 S.W.2d 819 (1994); *Brown v. State*, 316 Ark. 724, 875 S.W.2d 828 (1994); *Alexander v. Town & Country Foods*, 316 Ark. 446, 872 S.W.2d 390 (1994); *Gidron v. State*, 316 Ark. 352, 872 S.W.2d 64 (1994); *Department of Human Servs. v. Hardy*, 316 Ark. 119, 871 S.W.2d 352 (1994); *Smith v. State*, 316 Ark. 32, 870 S.W.2d 716 (1994) (appeal dismissed); *Teague v. Walnut Ridge Sch.*, 315 Ark. 424, 868 S.W.2d 56 (1993); *Norwood v. Robinson*, 315 Ark. 255, 866 S.W.2d 398 (1993).

83. *Schlemmer v. Fireman’s Fund Ins. Co.*, 292 Ark. 344, 346, 730 S.W.2d 217, 218-19 (1987); see generally Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584 (1966).

after the court had formally abandoned the old *lex loci delicti* rule without clearly identifying the modern choice-of-law method that would replace it.⁸⁴

Because Rule 1-2(a) does not mention cases involving the law of contracts, those are assigned to the court of appeals. In a 1986 decision, a three-judge panel of that court set forth the general choice-of-law rule for contracts as follows: “[T]he nature, validity and interpretation of contracts are to be governed by the law of the place where they are made.”⁸⁵ The court took this language from a supreme court case decided in 1913,⁸⁶ a time when the courts were wedded to a mechanical choice-of-law approach. This same thinking had, of course, spawned the *lex loci delicti* rule that the supreme court jettisoned in 1977. In light of what it perceived to be the settled rule in contracts cases, however, the court of appeals apparently decided that it was not free to break new ground in deciding the issues before it.⁸⁷

84. *Wallis v. Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453 (1977) (apparently using a combination of the RESTATEMENT (SECOND) OF CONFLICTS and Leflar's choice-influencing considerations); see also *Williams v. Carr*, 263 Ark. 326, 332, 565 S.W.2d 400, 403-04 (1978) (citing *Wallis* for proposition that Arkansas courts “are free to apply the rule based on the ‘most significant relationship’ as affected by the . . . choice-influencing considerations”). A decade earlier, the court had specifically declined an invitation to discard the *lex loci delicti* rule. *McGinty v. Ballentine Produce, Inc.*, 241 Ark. 533, 536-38, 408 S.W.2d 891, 893-94 (1966).

85. *Hammons v. Prudential Ins. Co.*, 19 Ark. App. 112, 114, 717 S.W.2d 819, 820 (1986); accord *White v. Toney*, 37 Ark. App. 36, 40, 823 S.W.2d 921, 924 (1992). At one time, this was the “orthodox statement” of the rule. Robert A. Leflar, *Conflict of Laws—Arkansas*, 10 U. ARK. LAW SCH. BULL. 45, 56 (1942).

86. *Lawler v. Lawler*, 107 Ark. 70, 153 S.W. 1113 (1913).

87. The Arkansas choice-of-law rule for contracts cases was not as settled as the court of appeals apparently thought. As Dr. Leflar pointed out more than 50 years ago, Arkansas cases could be found in support of three different approaches: the law of the place where the contract is made; the law of the place of performance; and the intent of the parties, if the place has a substantial connection with the contract. ROBERT A. LEFLAR, *THE ARKANSAS LAW OF CONFLICT OF LAWS* 212-16 (1938).

By the 1960s, there were Arkansas decisions “in which an intelligent effort ha[d] been made to devise a choice-of-law rule that may avoid the three-directional confusion of the old cases by giving real reasons for the choices made.” Robert A. Leflar, *Conflict of Laws: Arkansas*, 1969-72, 27 ARK. L. REV. 1, 13 (1973) [hereinafter Leflar, *Conflict of Laws: Arkansas*]. For this proposition, Dr. Leflar cited *Cooper v. Cherokee Village Dev. Co.*, 236 Ark. 37, 364 S.W.2d 158 (1963), in which the supreme court noted the three lines of authority but declined to choose among them. The court also mentioned but did not employ the “center of gravity” approach, a close cousin to the “most significant relationship” test. In a 1969 case, however, the court stated flatly that the law of the place of performance governs. *McDearmon v. Gordon & Gremillion*, 247 Ark. 318, 324-25, 445 S.W.2d 488, 492 (1969). This case, among others, prompted Dr. Leflar to remark that

It was not until 1994 that the supreme court responded with a decision employing a more modern choice-of-law rule for contracts cases.⁸⁸ For several years, therefore, the court of appeals as a practical

"[t]he Arkansas law governing choice of law in contracts cases appears less settled now than it did a few years ago." Leflar, *Conflict of Laws: Arkansas, supra*, at 12.

In a subsequent usury case, the supreme court seemed to adopt, without discussion or elaboration, a choice-of-law test that looked to the state in which the "principal significant contacts" occurred. *Standard Leasing Corp. v. Schmidt Aviation, Inc.*, 264 Ark. 851, 855, 576 S.W.2d 181, 184 (1979). In that decision, the Court also failed to recognize the relevance of the choice-of-law provision set out in Section 1-105 of the Uniform Commercial Code. See ARK. CODE ANN. § 4-1-105 (Michie Supp. 1993). See generally Robert A. Leflar, *Conflict of Laws Under the U.C.C.*, 35 ARK. L. REV. 87 (1981); Note, 34 ARK. L. REV. 297 (1980) (criticizing the *Standard Leasing* case).

88. *Ducharme v. Ducharme*, 316 Ark. 482, 485, 872 S.W.2d 392, 394 (1994) (adopting "most significant relationship" test of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971)). In this decision, the court relied on two earlier usury cases, neither of which expressly made reference to the *Restatement* approach. See *Standard Leasing Corp. v. Schmidt Aviation, Inc.*, 264 Ark. 851, 855, 576 S.W.2d 181, 184 (1979) (determining that "principal significant contacts" occurred in Arkansas); *Yarbrough v. Prentice Lee Tractor Co.*, 252 Ark. 349, 353, 479 S.W.2d 549, 552 (1972) (although there was nothing to "establish one state's contacts as being more significant than the other," Louisiana did not lack "substantial connection" to the transaction).

In *Ducharme* the court also pointed to Dr. Leflar's treatise to support its adoption of the "most significant relationship" test. *Ducharme*, 316 Ark. at 485, 872 S.W.2d at 394 (citing ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS LAW* § 149 (4th ed. 1986)). In that section of the treatise, however, Dr. Leflar and his co-authors simply describe the test and note that "a majority of American courts" probably follow it. ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS LAW* § 149, at 425 (4th ed. 1986). The lengthy footnote accompanying this statement lists several cases, none from Arkansas. *Id.* at n.13. The two Arkansas decisions cited in *Ducharme* are mentioned in § 152 of the treatise, which deals with usury. *Id.* § 152, at 432 n.6, 433 n.9. As the authors point out, the *Restatement* uses "a rule peculiar to usury," namely, "a contract will be sustained if its rate of interest is permitted by any state to which the contract is substantially related and is not greatly in excess of the rate permitted by the state whose law would otherwise govern the contract." *Id.* at 431 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1971)).

Even more troubling is the supreme court's failure in *Ducharme* to explain why the "most significant relationship" test, rather than the Leflar choice-influencing considerations used in tort cases, should be controlling. Dr. Leflar anticipated that his approach, having been adopted in Arkansas for torts cases, would "in due time" be applied "to contracts and other areas. . . ." Robert A. Leflar, *Conflict of Laws: Arkansas, 1973-77*, 32 ARK. L. REV. 1, 18-19 (1978). As he subsequently pointed out, "The American trend is toward applying a unified test, or approach, to all kinds of choice-of-law problems, rather than having one rule for tort cases, another (or several others) for contracts, and so on." Robert A. Leflar, *Conflict of Laws: Arkansas, 1978-82*, 36 ARK. L. REV. 191, 198 (1982).

It is perhaps worth noting that the court of appeals has used the choice-influencing considerations outside the tort setting. See, e.g., *Sherrill v. Faas*, No.

matter had the last word on a choice-of-law issue, simply because the case involved a contract rather than a tort. This result, which is hardly limited to the choice-of-law area,⁸⁹ has been succinctly criticized:

The supreme court . . . decides many cases which are very insignificant to all but the parties involved because they can be said, for example, to involve a question in the law of torts. The court of appeals decides many very significant cases by a panel of three judges because those cases do not fall within an arbitrarily selected category assigned to the supreme court.⁹⁰

In *Moose v. Gregory*, the supreme court cited the comments of Dr. Leflar to support its conclusion that the court of appeals should "be treated as a court of final authority in the particular area of its own jurisdiction."⁹¹ However, the court failed to take

CVA 90-367, 1991 WL 111010 (Ark. Ct. App. 1991) (case involving personal property); *Threlkeld v. Worsham*, 30 Ark. App. 251, 785 S.W.2d 249 (1990) (Leflar approach employed in connection with § 1-105(1) of the Uniform Commercial Code); *Orintas v. Meadows*, 17 Ark. App. 214, 706 S.W.2d 199 (1986) (workers' compensation case).

89. *E.g.*, *First Nat'l Bank v. Arkansas Dev. Fin. Auth.*, 44 Ark. App. 143, 870 S.W.2d 400 (1994) (holding that agreement to waive statute of limitations for all time, made at inception of contract, violates public policy and is therefore void); *Spencer v. Floyd*, 30 Ark. App. 230, 785 S.W.2d 60 (1990) (determining that when beneficiary of life insurance policy intentionally kills insured, proceeds from policy should be distributed to contingency beneficiary rather than to insured's estate); *Council v. Owens*, 28 Ark. App. 49, 770 S.W.2d 193 (1989) (concluding that income of spendthrift trust in hands of trustee who is without discretion to withhold income from beneficiaries may be attached to satisfy arrearage in alimony).

The cases cited above all involved issues of first impression in Arkansas. Because the questions have not been addressed by the supreme court, however, they cannot be considered as definitively resolved. Of what authoritative weight, then, are decisions of the court of appeals? This question arises in all jurisdictions with intermediate appellate courts. *See, e.g.*, Taylor Mattis, *Precedential Value of Decisions of the Court of Appeals of the State of New Mexico*, 22 N. MEX. L. REV. 535 (1992); Comment, *The Minnesota Court of Appeals: A Court Without Precedent?*, 19 WM. MITCHELL L. REV. 743 (1993).

90. REPORT OF THE APPELLATE COURTS SUBCOMMITTEE, *supra* note 8, at 4. As the report points out, the allocation scheme also invites manipulation. Under Rule 1-2(a)(3), cases involving questions of statutory interpretation are assigned to the supreme court. "It is a poor advocate who cannot find some sort of statutory interpretation issue to raise on appeal of virtually any civil case and thus permit the possibility of shopping for a forum of seven justices as opposed to a panel of three judges in a case which has little implication for 'law development.'" REPORT OF THE APPELLATE COURTS SUBCOMMITTEE, *supra* note 8, at 4.

91. *Moose v. Gregory*, 267 Ark. 86, 88, 590 S.W.2d 662, 663 (1979). The court said:

We acknowledge our indebtedness to the wisdom of Dr. Robert A. Leflar, an outstanding professor of law and a former member of this court. Dr.

into account Dr. Leflar's warning about the dangers of allocating cases on the basis of their subject matter. In his influential book, *Internal Operating Procedures of Appellate Courts*, he addressed this issue as follows:

It is quite proper for matters of major importance, such as constitutional issues and death-penalty cases, to go directly to the top court; they should go there eventually in any event. Little is gained by running them through the intermediate court first, and both delay and lost effort may ensue. Broader jurisdictional allocations, however, may miss the whole point of having two appellate levels. A case involving less than \$10,000 may present basic legal issues that ought to be passed on by the top court, and one involving more than \$10,000 may present no such issues. An equity case may or may not produce major issues. Similarly, Public Service Commission and workmen's compensation appeals vary. It is best not to make little supreme courts out of intermediate courts by making their decisions final in cases that fall within some arbitrary classification. Nor should the system be deprived of the economy of appellate trial in intermediate courts because of a classification that may automatically require the top court to hear unimportant cases. Any type of case can be potentially important. Apart from a few areas such as constitutional law in which nearly all issues are important, it is best to let the intermediate court have jurisdiction over all kinds of appeals, subject to some discretionary authority that will enable the top court to take over the final adjudication of those that, for policy reasons, belong there.⁹²

Other commentators share this view,⁹³ which is reflected in the

Leflar repeatedly urged, from the time Amendment 58 was first proposed, that the new court should not merely add another step to the appellate process. To the contrary, Dr. Leflar urged that the proposed court of appeals have its own areas of jurisdiction, with corresponding final authority. It was Dr. Leflar's thought that cases requiring a determination of public policy or the setting of important precedent should be reserved for the supreme court, with more routine cases going to the court of appeals.

Id. at 88, 590 S.W.2d at 663-64.

92. LEFLAR, *supra* note 11, at 70-71.

93. *E.g.*, Thomas B. Marvell, *Appellate Capacity and Caseload Growth*, 16 AKRON L. REV. 43 (1982). As Mr. Marvell observed in this article, "The division of jurisdiction between appellate courts . . . may be unclear for many appeals, leading to confusion among the bar and to additional issues that must be decided by the supreme court." *Id.* at 90. There are other major drawbacks as well:

The jurisdictional alignments, although typically based on judgments about the importance of various types of appeals, can only imperfectly route

ABA's standards for appellate courts.⁹⁴

To be sure, the supreme court, not the General Assembly, is responsible for defining appellate jurisdiction, and the court is free to modify Rule 1-2 at any time. By initially establishing a six-member court of appeals, however, the legislature significantly limited the supreme court's options with respect to the allocation of cases between the two courts.⁹⁵ In adopting Rule 1-2, the supreme court was simply playing the hand that it was dealt by the General Assembly.

III. EXPANDING THE COURT OF APPEALS

A larger intermediate appellate court is necessary if the supreme court is to have discretion over its docket and the concomitant ability to give adequate attention to its law-development responsibilities. If the judges remain "chained totally to the caseload," they cannot maintain "the degree of spacious vision" necessary to play their proper role in the evolution of the law.⁹⁶ It has been suggested that, for law development purposes, a judge cannot reasonably be expected to produce more than twenty majority opinions annually.⁹⁷ In a typical year, each member of the Arkansas Supreme Court writes more than twice that many.

the important issues, especially law-making issues, to the court of last resort. Thus, some appeals with important issues are initially filed in the intermediate court, requiring double appeals. Another problem is that a jurisdictional alignment based on a state's appellate caseload in one period very often leads to an overburdened supreme court several years later. As caseloads rise, the supreme court must hear more appeals of right, many of which do not contain important questions and could be decided by the intermediate court. The supreme court's caseload may continue to increase drastically and overwhelm the court.

Id. at 92.

94. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 60, § 3.10(b), (d), at 13-14 (with limited exceptions for death penalty appeals and cases of "great and immediate" public importance, initial appellate review should lie in intermediate court). As the commentary to this section explains, "Provisions conferring a right of direct review before the supreme court . . . have invariably resulted in inappropriate allocations of the supreme court's resources. . . ." *Id.* at 16 (commentary to § 3.10). Such a misallocation occurs "when the high court must decide many cases without substantial legal issues." Marvell, *supra* note 93, at 91.

95. The legislature also contributed to this problem by requiring that a case be submitted to the court of appeals en banc if the three-judge panel to which it was initially assigned did not reach a unanimous decision. ARK. CODE ANN. § 16-12-113 (Michie 1994) (effective until July 1, 1995).

96. Thomas R. Karrenberg & Daniel Watkiss, Note, *An Intermediate Appellate Court: Does Utah Need One?*, 1979 UTAH L. REV. 107, 124 (1979) (quoting Judge Shirley Hufstедler, formerly of the U.S. Court of Appeals for the Ninth Circuit).

97. Robert J. Martineau, *The Appellate Process in Civil Cases: A Proposed*

Expansion of the court of appeals, followed by revision of Rule 1-2, will have a dramatic effect on the function of the supreme court, as the experience in North Carolina indicates. In 1967, when the state had only one appellate court, the seven-member North Carolina Supreme Court wrote 473 opinions, an average of 67.5 per judge. In 1969 and 1970, after an intermediate appellate court was established and the supreme court's jurisdiction was made almost wholly discretionary, the annual average was 94 opinions — about 13.5 per judge.⁹⁸ A similar average is not unusual in states with intermediate appellate courts.⁹⁹

The drop in caseload did not mean that the judges of the North Carolina Supreme Court were doing less work; rather, they were doing *different* work. As the authors of one study have observed:

[The judges] now had to screen petitions for review, and there are indications that they began to spend more time and effort on each case they accepted. The average 1969 opinion was almost twice as long as that of 1967, and dissents and reversals were more frequent. The North Carolina Supreme Court came to think of itself as a lawmaking and policymaking court . . . [that] considered only "truly significant questions of law."¹⁰⁰

During its 1993 session, the Arkansas General Assembly provided for expansion of the court of appeals to twelve judges, effective July 1, 1995.¹⁰¹ Assuming that funding is available for these new positions, two issues arise: (1) whether this increase will enable the supreme court to redefine its own role by routing the vast majority

Model, 63 MARQ. L. REV. 163, 171-72 (1979). Without focusing specifically on courts of last resort, Dr. Leflar has argued that the upper limit for an appellate judge is "35, or conceivably 40, full-scale publishable opinions" each year. "Even the most learned and facile judge could not write more without the risk of writing shoddy opinions and shirking other duties. . . ." LEFLAR, *supra* note 11, at 9.

98. Robert A. Kagan et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 131 (1977). During the most recent four-year period for which statistics are available, the annual average was 16.5 opinions per justice, excluding per curiam opinions. Henry C. Martin, *Statistical Compilation of the Opinions of the Supreme Court of North Carolina Terms 1989-90 through 1992-93*, 72 N.C. L. REV. 1453, 1454 (1994).

99. In 1992, for example, the average in New Jersey was 11.1, while the Oregon average was 16.6. Other states in this range included California (12.7), Missouri (16.0), Washington (15.0), and Wisconsin (12.4). See STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, *supra* note 7, at 94-96.

100. Kagan et al., *supra* note 98, at 131-32; see also Roger D. Groot, *The Effects of an Intermediate Appellate Court on the Supreme Court Work Product: The North Carolina Experience*, 7 WAKE FOREST L. REV. 548, 572 (1971) (observing that the supreme court, "previously operating under tremendous burdens, has begun to operate more effectively and is achieving a position of true leadership in the legal development of the state").

101. Act of Apr. 13, 1993, No. 1085, § 1, 1993 Ark. Acts 3275, 3276 (codified at ARK. CODE ANN. § 16-12-101(c) (Michie 1994)).

of cases to the court of appeals; and (2) if so, whether this reallocation of appellate workload will be possible under the operating procedures established for the court of appeals by statute.

The first issue must be considered in light of the fact that the court of appeals presently has a very heavy workload. Each of the court's six judges averages about 111 majority opinions annually, and each year the court disposes of approximately 188 cases per judge.¹⁰² Even for an intermediate appellate court whose primary function is error-correction, these numbers are high. It has been suggested that, on an annual basis, the "realistic maximum" for courts of this type is 100 cases per judge, although many courts dispose of substantially more.¹⁰³ This does not mean that each judge is expected to write 100 opinions per year; rather, the figure refers to the number of cases that the court handles on a per-judge basis.

Had six new judges been added to the court of appeals prior to fiscal year 1992-93, its workload would have been 94 cases per judge,¹⁰⁴ just below the "realistic maximum." A similar workload can be anticipated, at least initially, if the size of the court is increased as scheduled in 1995. This expansion would also give the judges an opportunity to reduce the court's backlog. However, if a workload level of 100 cases per judge were to be established for the court of appeals, the supreme court would be required to hear a substantial number of cases in the first instance and would thus lack the flexibility to make its own docket largely discretionary.

Nonetheless, a system that assigned almost all cases to a twelve-judge court of appeals as an initial matter would produce a workload that is significantly lower than that of the present six-member court. Statistics from fiscal year 1992-93 are illustrative. During that twelve-

102. These figures are based on statistics from the last three fiscal years for which data is available: 1990-91, 1991-92, and 1992-93. During that period, the court on average disposed of 1,130 appeals per year (188.3 per judge) and produced 668 signed majority opinions (111.3 per judge). About sixty percent of the cases terminated without opinion were appeals from the Employment Security Division, with the remaining forty percent about equally divided between dismissals and transfers. See ANNUAL REPORT, STATISTICAL SUPPLEMENT (1992-93), *supra* note 6, at 5; ANNUAL REPORT, STATISTICAL SUPPLEMENT (1991-92), *supra* note 39, at 5; ANNUAL REPORT, STATISTICAL SUPPLEMENT (1990-91), *supra* note 39, at 5.

103. Martineau, *supra* note 97, at 172; accord CARRINGTON ET AL., *supra* note 62, at 143 (suggesting limit of 300 dispositions per year for each three-judge panel, or 100 per judge); Richard S. Brown, *Allocation of Cases in a Two-Tiered Appellate Structure: The Wisconsin Experience and Beyond*, 68 MARQ. L. REV. 189, 190 (1985) (same); Hopkins, *supra* note 68, at 463 (same).

104. There were 1,129 appeals filed in the court of appeals during 1992-93. ANNUAL REPORT, STATISTICAL SUPPLEMENT (1992-93), *supra* note 6, at 5. With a court of twelve judges, the average per judge would be 94.08.

month period, 514 appeals were filed in the supreme court and 1,129 in the court of appeals.¹⁰⁵ If a twelve-member court of appeals had disposed of all 1,643 cases, its workload would have been 137 per judge — an average in excess of the “realistic maximum” but substantially lower than the present average and well within the range of intermediate appellate courts in other states.¹⁰⁶ Of course, the court’s workload would be reduced by the number of cases that the supreme court might hear in the first instance, either via direct assignment of a class of cases or under one of the allocation methods discussed in Part IV of this article. Moreover, the intermediate court might implement — or, where necessary, ask the supreme court or the General Assembly to adopt — techniques to streamline the appellate process.¹⁰⁷

Therefore, expansion of the court of appeals to twelve judges would enable the supreme court to reallocate cases between the two courts and make its own docket discretionary. The court of appeals would still face a backlog, but its lower per-judge workload would permit the court to chip away at that problem over time. A move to add more than six judges to the court would probably not be politically feasible, particularly in light of the fact that other states

105. ANNUAL REPORT, STATISTICAL SUPPLEMENT (1992-93), *supra* note 6, at 1, 5.

106. For example, the 1992 average in Indiana was 138.4 cases per judge, while the average in Alaska was 172.3. Others in the same ballpark include Massachusetts (158.0) and Minnesota (144.9). In the states that surround Arkansas, the average was better: Kansas (69.6), Louisiana (54.7), Missouri (113.8), Oklahoma (116.6), Tennessee (106.7), and Texas (116.0). In Mississippi, which has no intermediate appellate court, the supreme court’s average was 96.9. These averages are derived from the disposition totals in STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, *supra* note 7, at 68-77.

107. These techniques might include summary disposition, “fast track” appeals, mandatory settlement conferences in civil cases, sanctions for frivolous appeals, greater reliance on law clerks or staff attorneys, and use of temporary judges. See Susan A. FitzGibbon, *Appellate Settlement Conference Programs: A Case Study*, 1993 J. DISP. RESOL. 57; Timothy E. Gammon, *The Central Staff Attorneys’ Office in the United States Court of Appeals, Eighth Circuit: A Five-Year Report*, 29 S.D. L. REV. 457 (1984); Roger A. Hanson, *An Assessment of Florida’s Fourth District Court of Appeal’s Settlement Conference Program*, 18 FLA. ST. U. L. REV. 177 (1990); Doyal E. McLemore, Jr., *Appellate Delay Reduction: An Organized Approach*, 33 JUDGES’ J. 28 (1994); John B. Oakley, *The Screening of Appeals: The Ninth Circuit’s Experience in the Eighties and Innovations for the Nineties*, 1991 B.Y.U. L. REV. 859; Thomas B. Marvell, *The New Mexico Court of Appeals Summary Calendar: An Evaluation*, 22 N. M. L. REV. 501 (1992); Marvell, *supra* note 93; Mills, *supra* note 68; John M. Perry, *The Fast Track: Accelerated Dispositions of Civil Appeals in the Oklahoma Supreme Court*, 6 OKLA. CITY U. L. REV. 453 (1981); Philip A. Talmadge, *Toward a Reduction of Washington Appellate Court Caseloads and More Effective Use of Appellate Resources*, 21 GONZ. L. REV. 21 (1985-86).

of similar size and similar caseloads typically do not have intermediate appellate courts with more than twelve members.¹⁰⁸ Moreover, unless the court is expanded in multiples of six judges, the present judicial districts would have to be redrawn.¹⁰⁹

If it funds the six new judgeships for the court of appeals, the General Assembly will also need to revise statutes governing the court's operating procedures before the supreme court can make wholesale changes in Rule 1-2. Since 1983, the court of appeals has been authorized by statute to sit in two three-judge panels called "divisions."¹¹⁰ If a panel decision is not unanimous, the case "shall be submitted to the court en banc for decision."¹¹¹ Under the statutory scheme that will take effect on July 1, 1995, the court will be organized into four three-judge panels.¹¹² The requirement of panel unanimity will remain in effect, but en banc consideration will no longer be necessary in the event of a dissent. Instead, the case is to be resubmitted to six of the court's twelve judges — the original panel plus one of the others — for decision.¹¹³

108. Kansas, for example, has a ten-judge intermediate appellate court. The state's population is about 2.5 million, and its appellate filings for both the supreme court and court of appeals totaled 1,573 in 1992. By way of comparison, Arkansas, with about 2.4 million people, had total appellate filings of 1,533 during the same period. STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, *supra* note 7, at 68, 70.

109. A bill introduced early in the 1995 legislative session would reduce the number of court of appeals districts from six to four, with the new boundaries tracking the state's four congressional districts. Three judges would be elected from each district. S. 199, §§ 1, 3-4, 80th General Assembly, Reg. Sess. (1995).

110. Act of Mar. 13, 1983, No. 410, §§ 1-2, 1983 Ark. Acts 687, 687-88 (codified at ARK. CODE ANN. § 16-12-109 (Michie 1994) (effective until July 1, 1995)). The General Assembly took this step "[t]o assist the court of appeals in meeting its case load. . . ." *In re Arkansas Bar Ass'n Comm.*, 303 Ark. 752, 798 S.W.2d 923 (1990). The legislation that created the court pursuant to Amendment 58 made no provision for panel decisions and apparently contemplated that all cases would be heard en banc. See Act of Feb. 23, 1979, No. 208, 1979 Ark. Acts 467 (codified at ARK. CODE ANN. §§ 16-12-101 to -108 (Michie 1994)).

111. Act of Mar. 13, 1983, No. 410, § 3, 1983 Ark. Acts 687, 688 (codified at ARK. CODE ANN. § 16-12-113 (Michie 1994) (effective until July 1, 1995)).

112. Act of Apr. 13, 1993, No. 1085, § 7, 1993 Ark. Acts 3275, 3278-79 (codified at ARK. CODE ANN. § 16-12-109 (Michie 1994) (effective July 1, 1995)).

113. *Id.* § 10, at 3279-80 (codified at ARK. CODE ANN. § 16-12-113 (Michie 1994) (effective July 1, 1995)). If there is a tie vote, "the decision appealed from shall be affirmed." *Id.* Of course, the possibility of tie votes exists under the current law. For an interesting discussion of one problem that arises when the judges are split down the middle, see Robert Laurence, *A Very Short Article on the Precedential Value of the Opinions from an Equally Divided Court*, 37 ARK. L. REV. 418 (1984). While the supreme court may grant review under Rule 1-2(f)(3) when the court of appeals is equally divided, it need not do so. *Perkins v. Perkins*, 267 Ark. 112, 113, 589 S.W.2d 29, 30 (1979); see also *Farmer v. Everett*, 279 Ark.

Obviously, this requirement will result in some cases being heard by six judges rather than three.¹¹⁴ By assigning more judicial resources to particular appeals, the statute will decrease the court's flexibility and threaten its ability to handle an expanded caseload. If the court is to achieve maximum productivity, the basic decisional unit must be the three-judge panel, regardless of whether there is unanimity among its members in a given case. Reliance on those panels could increase the possibility of inconsistent decisions; however, that possibility also exists under the 1995 scheme, since it contains no provision for *en banc* review. More importantly, "further review by the supreme court is an adequate means of resolving decisional conflicts" among panels.¹¹⁵

In addition, there are methods to minimize the potential for such conflicts. For example, a simple rule that one panel is bound by the prior decision of another panel goes a long way toward eliminating inconsistent decisions,¹¹⁶ as does a requirement that panel decisions be circulated among all members of the court prior to issuance.¹¹⁷ Rotation of judges among the panels on a regular basis

361, 651 S.W.2d 99 (1983) (dismissing petition for review as "imprudently granted"); Kelley v. State, 278 Ark. 497, 646 S.W.2d 703 (1983) (declining to hear case involving constitutional issue where court of appeals had affirmed by a tie vote). The supreme court observed recently that it has "traditionally granted certiorari for the review of tie-vote court of appeals' decisions that affirm a judgment of the trial court." Ferguson v. Order of United Commercial Travelers, 307 Ark. 452, 453, 821 S.W.2d 30, 31 (1991). As one of my colleagues has pointed out, however, "[i]t is something of a stretch to find a 'tradition' of review here," since the justices have granted review in only seventeen of sixty-eight such cases — about twenty-five percent. Robert Laurence, *Four Observations and an Inquiry about the Practice and Frequency of Dissenting Votes by the Judges of the Arkansas Court of Appeals*, 1994 ARK. L. NOTES 89, 91-92 n.3 [hereinafter Laurence, *Four Observations and an Inquiry*].

114. Any attempt to predict the number of cases that would fall into this category is fraught with difficulty and, in any event, well beyond the author's statistical skills. It has been suggested, however, that judges serving on the court of appeals since adoption of the present statutory requirement in 1983 "have tempered their dissents in order to avoid the administrative inconvenience of having to sit *en banc*." Laurence, *Four Observations and an Inquiry*, *supra* note 113, at 93 n.7.

115. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 60, at 11 (commentary to § 3.01). Generally, a mechanism for *en banc* review "is essential in the federal courts of appeals but unnecessary and inappropriate in most state appellate courts systems." STANDARDS RELATING TO APPELLATE COURTS, *supra* note 60.

116. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 60, at 11-12. This rule is followed by most federal appellate courts. *E.g.*, *In re Hammond*, 27 F.3d 52, 57 (3d Cir. 1994); *United States v. Wright*, 22 F.3d 787, 788 (8th Cir. 1994); *Securities & Exch. Comm'n v. AMX Int'l, Inc.*, 7 F.3d 71, 74 (5th Cir. 1993).

117. See STANDARDS RELATING TO APPELLATE COURTS, *supra* note 60, at 61

also helps promote consistency.¹¹⁸ These considerations favor a unitary structure, *i.e.*, a court with statewide jurisdiction that sits at a central location, rather than a system based on geographical lines and fixed panels.¹¹⁹

Apart from these matters, there is some doubt as to whether the statutory resubmission requirement is constitutional under the separation of powers doctrine.¹²⁰ Arguably, the General Assembly's

(commentary to § 3.36); LEFLAR, *supra* note 11, at 71. This technique has been used by the Minnesota Court of Appeals. See Peter S. Popovich, *Ten Years Later: Justice Delayed is No More*, 19 WM. MITCHELL L. REV. 581, 585 (1993). No mechanism exists to resolve conflict between panels of that state's intermediate court, but practicing lawyers have found "no great inconsistency" in its decisions. David F. Herr & Mary R. Vasaly, *Appellate Practice in Minnesota: A Decade of Experience with the Court of Appeals*, 19 WM. MITCHELL L. REV. 613, 657 (1993).

118. See Paul H. Anderson, *Reflections on the Future of the Minnesota Court of Appeals*, 19 WM. MITCHELL L. REV. 569, 577 n.15 (1993); LEFLAR, *supra* note 11, at 71; Popovich, *supra* note 117, at 585. The ABA standards call for a change in the composition of panels at least once a year. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 60, § 3.01(b), at 7. Other techniques to maintain consistency have also been suggested. For example, the court's staff attorneys could monitor incoming cases so that those involving the same issue can be assigned to the same panel or notice can be given to a panel that the same issue is involved in another case. The staff lawyers might also review all opinions prior to publication to identify conflicts. If conflicts are found, they may be resolved, without the necessity of an en banc hearing, by reconsideration or joint deliberation among the panels. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 60, at 61 (commentary to § 3.36).

119. See LEFLAR, *supra* note 11, at 71; Hufstedler, *supra* note 66, at 601. As Dr. Leflar has noted, a unitary system, coupled with regular rotation of panels, prevents forum shopping. LEFLAR, *supra* note 11, at 73. Moreover, a unitary structure poses fewer administrative difficulties, requires a smaller staff, ensures an even distribution of the appellate workload, permits easy expansion of the court, and avoids political battles over regional units. Hufstedler, *supra* note 66, at 601. These considerations notwithstanding, a bill introduced in the 1995 legislative session would split the court of appeals into four three-judge divisions serving districts that parallel the state's four congressional districts. Each three-judge panel would be permanently assigned to its geographic division and would hear on appeal only those cases that were originally filed in counties within the division. The four panels would be located in El Dorado, Fayetteville, Jonesboro, and Little Rock. S. 199, §§ 1, 6-9, 80th General Assembly, Reg. Sess. (1995). Proponents of territorial appellate courts argue that this arrangement provides "accessibility of the appeals process to state residents" by reducing "travel, cost, and time involved in appealing the case from a trial court." Karrenberg & Watkiss, *supra* note 96, at 130 (quoting from M. OSTHUS, INTERMEDIATE APPELLATE COURTS 2 (1976)). This accessibility can also be provided, however, if judges serving on a centralized court regularly sit around the state to hear cases. See Popovich, *supra* note 117, at 585.

120. The Arkansas Constitution contains explicit separation of powers language, providing for "three distinct departments," none of which "shall exercise any power belonging to . . . the others." ARK. CONST. art. IV, §§ 1-2. As the supreme court has observed, "Neither of the three departments of government is subordinate to the other and neither can arrogate to itself any control over either one of the

authority under Amendment 58 to “establish a court of appeals and divisions thereof” carries with it the power to limit these panels to cases where the three judges are unanimous. Indeed, the supreme court seemed to say as much in a 1984 case upholding the validity of the present statute requiring panel unanimity.¹²¹ On the other hand, Amendment 58 expressly gives the supreme court “general superintending control” over the court of appeals and the authority to determine its jurisdiction. Any attempt by the General Assembly to place restrictions on the ability of the panels to hear cases would appear to infringe on the supreme court’s powers with respect to appellate jurisdiction and supervisory control. The decision mentioned above sheds no light on this issue, but subsequent cases suggest that the supreme court has expansive constitutional and inherent authority with respect to the workings of the state’s courts.¹²²

IV. MODELS FOR CASE ALLOCATION

With a twelve-member court of appeals that hears all cases in panels of three judges, the supreme court would be able to assign the great majority of appeals to that body and devote its own resources to those that present opportunities for law development or issues of public interest. The question then becomes: how should the supreme court go about implementing such a system?

Under the most common approach, appeals are taken to the intermediate appellate court in the first instance, with a few cases — such as those that impose the death penalty or raise constitutional questions — possibly reserved for direct review by the highest court.¹²³

others in matters which have been confided by the constitution to such other department.” *Wells v. Purcell*, 267 Ark. 456, 462, 592 S.W.2d 100, 104 (1979); *see also* *Arkansas Newspaper, Inc. v. Patterson*, 281 Ark. 213, 215, 662 S.W.2d 826, 827 (1984) (noting that exception in Freedom of Information Act exempting from disclosure any documents protected by order or rule of court “prevents any entanglement in the separation of powers doctrine”).

121. *Citizens Bank v. Estate of Pettyjohn*, 282 Ark. 222, 667 S.W.2d 657 (1984). The court concluded: “We hold that Act 410 of 1983, authorizing the court of appeals to sit in divisions of three and authorizing either division to affirm or reverse a case by a unanimous decision, is a valid exercise of legislative authority as contemplated by Amendment 58.” *Id.* at 227, 667 S.W.2d at 660.

122. *See, e.g., Weidrick v. Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992); *State v. Sypult*, 304 Ark. 5, 800 S.W.2d 402 (1990); *see also* Morton Gitelman & John J. Watkins, *No Requiem for Ricarte: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure*, 1991 ARK. L. NOTES 27; Kala R. Holt, *The Balance of Power: Weidrick v. Arnold and the Conflict over Legislative and Judicial Rulemaking Authority in Arkansas*, 46 ARK. L. REV. 627 (1993).

123. *See* STANDARDS RELATING TO APPELLATE COURTS, *supra* note 60, § 3.10(b), (d), at 13-14 (initial appellate review should lie in intermediate court; however,

In any event, the vast majority of appeals are filed in the intermediate court, where, as Dr. Leflar has put it, "they are somehow sorted out."¹²⁴ This process can take several forms.

The American Bar Association's standards for appellate courts favor an arrangement giving the highest court discretion to review any decision of the intermediate body.¹²⁵ Critics of this two-tiered structure have argued that it results in wasteful and costly "double appeals" that cause further delay in the appellate process.¹²⁶ Other commentators, however, downplay this problem, pointing to statistics suggesting that about forty percent of the cases decided by intermediate courts are appealed to courts of last resort, with only about fifteen percent of those actually accepted for review.¹²⁷ As a result, no more than five percent of intermediate court decisions in most states receive full-scale supreme court review.¹²⁸ While these figures are based on data from the early 1980s, and are thus rather dated, they are consistent with recent statistics from Minnesota. In 1992, seventy-three percent of all appellate cases ended in the state's court of appeals, and the Minnesota Supreme Court granted review in only four percent of the others.¹²⁹

In addition, problems of delay and expense seem overstated. The extra expense is typically slight in the vast majority of cases, because review is denied. When a second appeal does occur, steps can be taken to contain costs; for example, the parties might be required to resubmit the briefs filed in the intermediate court, with

direct appeal of right may be provided to court of last resort in death penalty cases, and that court should have discretion to review directly "cases of great and immediate public importance").

124. LEFLAR, *supra* note 11, at 75.

125. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 60, § 3.10(c), at 13-14. The commentary to this section identifies "two basic mechanisms" for invoking the court's discretion: petition by a party or certification by the intermediate court. The latter "should be effective only when it has reached its own decision, so that the certification procedure may not be employed as a means of shifting that court's decisional responsibilities to the higher court." STANDARDS RELATING TO APPELLATE COURTS, *supra* note 60, at 17 (commentary to § 3.10(c)).

126. See LEFLAR, *supra* note 11, at 75-76; Brown, *supra* note 103, at 205-07.

127. Marvell, *supra* note 93, at 88. The fifteen percent figure cited in the text represents the median; overall, the percentages vary from eight to twenty-five percent. Marvell, *supra* note 93, at 88.

128. Marvell, *supra* note 93, at 88.

129. Anderson, *supra* note 118, at 570-71. The author, chief judge of the intermediate court, added that these statistics "eliminat[e] the concern that the court would merely be an additional, intermediate stop adding to the delay of finality." Anderson, *supra* note 118, at 571; see also Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System*, 45 FLA. L. REV. 21, 30 (1993) (concluding that a two-tier appellate system "results in a significant workload savings" and "shift[s] the time-consuming review-for-correctness function to the court of appeals").

opportunity for supplementation when warranted. Similarly, delay is likely to be minimal when a petition for review is denied, particularly because there is typically no oral argument or written opinion. Consequently, the possibility of significant delay would arise only when a case is accepted for supreme court review. Even then, it has been suggested that the total time in both courts "is probably less than the time in an overburdened high court if no intermediate court existed."¹³⁰

More importantly, a double appeal need not be considered a liability. An initial decision by the intermediate court can sharpen the issues, explore the case from a perspective considerably different from that of counsel, and otherwise serve as a laboratory for the highest court.¹³¹ As Chief Justice Stone once observed:

I should deplore any direct appeal to the supreme court. The public little realizes how much is accomplished by passing through an intermediate court — the clash of counsel, the preparation of briefs and judicial decision, before the case comes to the supreme court often does much to clarify the question and the minds of court and counsel in dealing with it. . . .¹³²

The foregoing comments do not address what may be a more serious problem with the double appeal, namely, the time that an intermediate court must devote to cases which, because they are potentially significant in terms of law development, are most likely to be reviewed by the supreme court. If the intermediate court must tackle these appeals in the first instance, it has less time remaining for the "error correction" cases for which it is best suited.¹³³ Moreover, law development cases will presumably take longer to decide and require more detailed work than those that involve only error correction. "Despite this expenditure of resources, a petition for review to the highest court often ensues."¹³⁴

Not surprisingly, there are variations on or alternatives to the ABA model. At least four approaches have been identified: bypass, reach-down, certification, and deflection.¹³⁵ The bypass mechanism

130. Marvell, *supra* note 93, at 89.

131. See, e.g., Hopkins, *supra* note 68, at 473; Hufstедler, *supra* note 66, at 600-01.

132. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 386 (1956).

133. See Brown, *supra* note 103, at 206-07.

134. Brown, *supra* note 103, at 190-91.

135. Brown, *supra* note 103, at 209. The author of this article, an intermediate court judge in Wisconsin, surveyed the twenty-eight states that had two-tier appellate court systems in 1983. Brown, *supra* note 103, at 209 n.91. The described methods are sometimes referred to by different names. Brown, *supra* note 103, at 209.

gives the parties an opportunity to seek initial review by the highest court, thus circumventing the court of appeals. Standing alone, the bypass mechanism is not considered particularly effective; the litigants themselves must invoke the discretion of the supreme court, which is likely to have little inclination for hearing appeals in the first instance.¹³⁶ Under the reach-down approach, the highest court may on its own motion shift a court of appeals case to its own calendar. As a method of case allocation, a reach-down system requires the members of the supreme court, a committee thereof, or staff attorneys to screen for possible transfer all appeals filed in the intermediate court.¹³⁷

Certification places the screening burden on the intermediate court rather than the supreme court. After reviewing the cases, perhaps with the assistance of staff attorneys, the judges on the intermediate court certify the most important cases to the supreme court for decision on the merits.¹³⁸ If judges on the intermediate court screen the cases without the involvement of staff attorneys, certification then has an advantage over the reach-down approach: judges should be better-equipped than staff "to identify those cases

136. Brown, *supra* note 103, at 212. Several states have bypass provisions. See, e.g., ARIZ. R. CIV. APP. P. 19(b); KY. R. CIV. P. 74.02(1)-(4); MINN. STAT. ANN. § 480A.10(2)(a) (West 1990); TENN. CODE ANN. § 16-3-201(d)(1), (2) (1994); WASH. R. APP. P. 4.3.

137. See, e.g., MASS. GEN. LAWS ANN. ch. 211A, § 10 (West 1986 & Supp. 1994). Judge Brown identified Massachusetts as one state in which reach-down is employed to allocate cases. Brown, *supra* note 103, at 213-15. Courts of last resort in several other states, including Arkansas, also have reach-down authority but apparently do not use it as a means of case allocation. See, e.g., ALA. CODE §§ 12-3-14 to -15 (1986); ARIZ. R. CIV. APP. P. 19(f); ARK. SUP. CT. R. 1-2(c); CAL. CONST. art. VI, § 12(a); COLO. REV. STAT. ANN. § 13-4-109(3) (West 1989); CONN. GEN. STAT. ANN. § 51-199(c) (West 1985); ILL. SUP. CT. R. 302(b); MO. CONST. art. V, § 10; MINN. STAT. ANN. § 480A.10(2)(b) (West 1990); N.M. STAT. ANN. § 34-5-8(B) (Michie 1990); TENN. CODE ANN. § 16-3-201(d)(3) (1994); WASH. R. APP. P. 4.3. Under the Arkansas rule, the supreme court "may transfer to the supreme court any case appealed to the court of appeals." ARK. SUP. CT. R. 1-2(c).

138. Brown, *supra* note 103, at 217-19. The ABA standards recognize certification as an appropriate mechanism for presenting cases that the intermediate court has decided to the court of last resort for discretionary review. See *supra* note 125. In contrast, the method discussed in the text is predecisional. Several states, including Arkansas, authorize predecisional certification, though apparently not as part of a general screening process undertaken for purposes of case allocation. See, e.g., ALASKA STAT. § 22.05.015(b) (1988); ARIZ. R. APP. P. 19(c); ARK. SUP. CT. R. 1-2(d); COLO. REV. STAT. ANN. § 13-4-109 (West 1989); KAN. STAT. ANN. § 20-3016 (1988); KY. R. CIV. P. 74.02; MD. CT. R. 8-304; MINN. STAT. ANN. § 480A.10(2)(b) (West 1990); N.M. STAT. ANN. § 34-5-14(C) (Michie 1990); OR. REV. STAT. § 19.210 (1988); OR. REV. STAT. § 138.255 (1990); UTAH CODE ANN. §§ 78-2-2(3)(b), 78-2a-3(3) (Supp. 1994).

which should be allocated to the highest court.”¹³⁹ Largely for this reason, intermediate court judges in Florida play a significant role in that state’s certification system.¹⁴⁰

Dr. Leflar has described certification as the procedure that “appears to afford maximum realization of the useful purposes for which intermediate courts are typically established.”¹⁴¹ However, he has cautioned that certification requires that “the interrelationships between the intermediate court and the top court [must] be intelligently planned and not allowed to develop haphazardly.”¹⁴² If the criteria for certifying cases is not clear, delay may result as cases are bounced from one court to the other.¹⁴³

139. Brown, *supra* note 103, at 219. While staff attorneys must rely on the briefs (only the appellant’s brief in some systems), the intermediate court judges could certify the case at a later point, even after oral argument or during the opinion-writing process. Brown, *supra* note 103, at 219.

140. Certification is available in Florida both before and after an intermediate court decision. See FLA. CONST. art. V, § 3(b)(4), (5). With respect to predecisional or “pass-through” certification, the intermediate court certifies that the pending appeal is “of great public importance” or will “have a great effect on the proper administration of justice throughout the state” and, in either case, requires “immediate resolution by the supreme court.” For its part, the supreme court has discretion as to whether to accept jurisdiction. *Id.* § 3(b)(5). See generally Ben F. Overton, *District Courts of Appeal: Courts of Final Jurisdiction with Two New Responsibilities - An Expanded Power to Certify Questions and Authority to Sit En Banc*, 35 U. FLA. L. REV. 80 (1983). It appears, however, that predecisional certification has not been frequently used. Cope, *supra* note 129, at 34-35.

In discussing the Florida system, Judge Overton pointed out that use of staff attorneys or law clerks to make screening decisions “has been criticized as placing substantial power in sometimes young and inexperienced lawyer personnel.” Overton, *supra*, at 83; see also Mary L. Stow & Harold J. Spaeth, *Centralized Research Staff: Is There a Monster in the Judicial Closet?*, 75 JUDICATURE 216 (1992) (suggesting that some appellate courts rely too heavily on staff).

Of course, there is nothing inherently wrong about providing judges with staff assistance. See STANDARDS RELATING TO APPELLATE COURTS, *supra* note 60, § 3.62, at 96-97 (discussing role of law clerks and staff attorneys). As Dr. Leflar has pointed out, staff attorneys can be useful in a number of areas, including the case allocation process: “It would not be well for judges to relinquish all responsibility for screening, but there is no necessity for them to do all the work involved in it.” LEFLAR, *supra* note 11, at 89. The specter of delegation is not a problem if judges retain “the two inherent functions of the appellate decisional process: (1) assuring justice under the law to the litigating parties, and (2) keeping the law in order.” LEFLAR, *supra* note 11, at 94; see also STANDARDS RELATING TO APPELLATE COURTS, *supra* note 60, at 99 (commentary to § 3.62) (stating that courts must “guard against any tendency to rely on staff for decisions that should be made only by judges personally”).

141. LEFLAR, *supra* note 11, at 77.

142. LEFLAR, *supra* note 11, at 77.

143. The criteria might, for example, specifically identify cases that are candidates for certification. These could include: cases that present issues of substantial public importance or interest; cases which, if decided in accordance with current trends,

Certification seems particularly effective when combined with the bypass and reach-down methods. That is, the supreme court may assume jurisdiction over cases filed initially in the intermediate court not only upon certification from that body, but also on its own motion or on that of a party. As one commentator has written:

Enormous flexibility is built into the system. . . . This permits the circumstances of the individual case, rather than any arbitrary classification made in advance, to be the determining factor in which cases the supreme court will hear. This procedure eliminates any possibility of an appeal being taken to the wrong court — all appeals must go to the court of appeals — but the court of appeals can be bypassed when appropriate.¹⁴⁴

An arrangement of this type would be workable in Arkansas. If, as suggested in Part III, an expanded court of appeals sitting in three-judge panels would be able to decide the vast majority of the cases now being filed in Arkansas, then it obviously could screen those cases for purposes of allocation. As an intermediate court judge from Wisconsin has pointed out:

[w]riting a certification takes less time than writing a decision because the panel is merely shaping the legal issues for the high court [to] review [rather than] actually *deciding* the case and giving reasoned elaboration in support.¹⁴⁵

The time savings would be particularly significant with respect to law development cases, which would be certified to the supreme court for decision. By referring these appeals, the court of appeals

might be in conflict with a prior decision of the supreme court; cases in which the intermediate court seeks revision of the law; cases in which supreme court review seems likely; cases that should be decided quickly in the interest of justice; cases that present the same or similar issues as a case pending in the supreme court; cases that reveal a need to interpret an opinion previously issued by the supreme court; cases that present issues of first impression; and criminal cases that involve the death penalty, life sentences, or egregious felonies. Brown, *supra* note 103, at 223-31; *see also* Cope, *supra* note 129, at 45-62 (discussing commonly used criteria for discretionary review).

144. Martineau, *supra* note 97, at 174. Writing in 1979, Professor Martineau described the Wisconsin scheme, which was adopted in 1978 upon creation of an intermediate court. In practice, however, the system did not work well. As Judge Brown pointed out in 1985, litigants infrequently filed motions asking for immediate supreme court review. Brown, *supra* note 103, at 208. Moreover, the supreme court did not take cases *sua sponte*, and there was apparently no mechanism whereby the court could screen cases for possible transfer. Thus, certification was the method most often employed. Brown, *supra* note 103, at 208.

145. Brown, *supra* note 103, at 221.

would not be required to spend its time dealing with important legal issues that the supreme court would likely consider on further review. In addition, the number of double appeals would drop substantially.

The fourth approach, deflection, has many of the same benefits as certification but operates in a mechanically different fashion. Under this system, all appeals are initially filed in the supreme court which screens and allocates the cases to the intermediate appellate court.¹⁴⁶ Because the supreme court makes the allocation decision, law development cases remain at the top rung of the judicial system while error correction cases are assigned to the intermediate court. If the appeals are properly allocated at the outset, decisions of the intermediate court will not require further appellate consideration.¹⁴⁷

As Dr. Leflar has pointed out, this system "is based on the assumption that the top court allocates cases in a thoughtfully informed manner, that it is honest in not attempting to turn difficult or disagreeable cases over to the other court."¹⁴⁸ Its major defect, he has argued, is that all cases must be reviewed by the supreme court: "Even the most efficient staff screening, with an accurate identification of the issues posed in every case, cannot replace this time-consuming duty."¹⁴⁹ For this reason, it has been suggested that deflection is best suited for states that have a relatively low number of appellate filings.¹⁵⁰

At least five states now employ the deflection method: Hawaii, Idaho, Iowa, Oklahoma, and South Carolina.¹⁵¹ However, only Iowa and Oklahoma have caseload levels that permit meaningful comparison to Arkansas. In 1992, there were 1,398 appeals filed in the Iowa Supreme Court and 1,509 appeals filed in the Oklahoma Supreme Court.¹⁵² By way of comparison, 1,643 appeals were filed

146. LEFLAR, *supra* note 11, at 74-75. Judge Brown calls this system "deflection." Brown, *supra* note 103, at 209.

147. Brown, *supra* note 103, at 210.

148. LEFLAR, *supra* note 11, at 75.

149. LEFLAR, *supra* note 11, at 75.

150. Brown, *supra* note 103, at 211; Robert L. Stern, *Remedies for Appellate Overloads: The Ultimate Solution*, 72 JUDICATURE 103, 104 (1988).

151. See HAW. REV. STAT. § 602-5(8) (1985); HAW. R. APP. P. 31; IDAHO CODE § 1-2406 (1990); IDAHO R. APP. P. 108; IOWA CODE ANN. §§ 602.4102, 602.5103 (West 1988); IOWA SUP. CT. R. 4; IOWA R. APP. P. 401; OKLA. STAT. ANN. tit. 20, § 30.1 (West 1991); OKLA. R. CIV. APP. P. 1.16(F), 1.204(II); S.C. R. APP. CT. 214. The Arkansas Supreme Court may transfer to the court of appeals any case appealed to the supreme court. ARK. SUP. CT. R. 1-2(c). However, this provision is not used as a case allocation device.

152. STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, *supra* note 7, at 70, 76. The 1992 statistics for the other states are as follows: Hawaii (five

in the two Arkansas appellate courts during fiscal year 1992-93.¹⁵³ If all of these cases were initially filed in the supreme court, it would have a screening load somewhat higher than its counterparts in Iowa and Oklahoma. However, the number of cases to be screened would drop substantially if appeals from the Employment Security Division (ESD) automatically transferred to the court of appeals.¹⁵⁴ For example, of the 1,643 appeals filed in 1992-93, 317 were ESD cases. Assuming that all would be assigned to the court of appeals, the number of cases filed in the supreme court would be 1,326, a manageable total in light of the experience in Iowa and Oklahoma.¹⁵⁵

As a practical matter, however, it seems that the supreme court could cope with deflection only by delegating what Dr. Leflar called the "time-consuming duty" of screening to a rotating panel of three justices, perhaps with the assistance of staff attorneys. Iowa uses this method, with a three-judge panel making the assignment decision after initial review of the cases by staff attorneys.¹⁵⁶ This approach might be criticized because it does not involve the entire court in the screening process and could lead to heavy reliance on staff recommendations. Moreover, the need to rotate panel members regularly could result in the allocation of cases in an inconsistent manner.

While these concerns should not simply be brushed aside, they do not seem sufficient to scuttle the deflection technique. Indeed, the potential problems can be addressed by court rules and internal operating procedures. In Iowa, for instance, a rule identifies the types of cases that are "ordinarily" retained by the high court,

judges, 541 cases, 108.2 per judge); Idaho (five judges, 400 cases, 80 per judge); South Carolina (five judges, 587 cases, 117.4 per judge). STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, *supra* note 7, at 68, 72. It should be noted that the Oklahoma Supreme Court has jurisdiction only in civil cases. The state's court of last resort in criminal matters is the Oklahoma Court of Criminal Appeals. See OKLA. STAT. ANN. tit. 20, § 40 (West 1991).

153. See *supra* note 7.

154. Iowa has adopted this procedure in cases involving termination of the parent-child relationship. These appeals have been exempted from the screening process and are transferred directly to the court of appeals. IOWA R. APP. P., Division XI, Supervisory Directive.

155. Because both the Iowa and Oklahoma supreme courts have nine members, their per-judge averages would be lower than that of the Arkansas Supreme Court. Using the appellate filings mentioned in the text, the Iowa and Oklahoma averages would be 155.3 and 167.7, respectively, while the Arkansas average would be 189.4, excluding ESD cases.

156. IOWA SUP. CT. R. 4(a), (b); see also IOWA R. APP. P. 401. In Hawaii, the chief justice of the supreme court, or a judge from that court or the intermediate court designated by the chief justice, is charged with assigning the cases to one court or the other. HAW. REV. STAT. § 602-5(8) (1985); HAW. R. APP. P. 31.

including cases that involve the constitutionality of a statute, questions of first impression, and matters of "broad public importance requiring prompt or ultimate determination by the supreme court."¹⁵⁷ Staff attorneys prepare "case statements" that describe the "status, facts and legal issues" involved in each appeal and recommend "the routing of the case consistent with criteria set forth by rule for the transfer of proceedings to the court of appeals."¹⁵⁸ Supreme court rules make clear that these recommendations "are tentative only," and that all assignment decisions shall be made by a panel consisting of three justices.¹⁵⁹ Moreover, the chief justice may apparently direct by supervisory order that cases be screened by another method or that panel decisions be reviewed by the entire court.¹⁶⁰

V. CONCLUSION

It appears that expansion of the court of appeals to twelve members, coupled with changes in the statutory scheme and the method of case allocation, would permit the supreme court to focus primarily on law development, which is the primary task of a court of last resort. Proper allocation, either via the deflection approach or the certification method described above, would also enhance certainty because "[a] single definitive statement on a significant legal question would emanate from the highest court in the first instance."¹⁶¹

Deflection seems more likely to prevent double appeals and is certainly consistent with the supreme court's supervisory duties under Amendment 58. In the long run, however, this approach would probably require the supreme court to turn to staff attorneys for assistance in the screening process. Certification has the advantage of placing the allocation decision primarily in the hands of judges, but the potential for inappropriate or inconsistent case allocation exists unless the certification criteria are made clear. Given the potential for confusion, particularly at the outset, certification should

157. IOWA R. APP. P. 401(b), (c).

158. IOWA SUP. CT. R. 4(a).

159. IOWA SUP. CT. R. 4(a), (b). This rule is consistent with Dr. Leflar's admonition that "staff attorneys must understand that they are not deciding cases but only providing materials to help the judges in that task." LEFLAR, *supra* note 11, at 85. The ABA standards provide that "the role of legal staff [should] be particularly described in the published statement of the court's internal operating procedures. . . ." STANDARDS RELATING TO APPELLATE COURTS, *supra* note 60, at 99 (commentary to § 3.62); *see also supra* note 140.

160. IOWA SUP. CT. R. 4(b).

161. Brown, *supra* note 103, at 191-92.

be supplemented with reach-down and bypass procedures that enable the supreme court to transfer a case to its docket *sua sponte* or upon motion. On balance, this system seems preferable given the additional personnel costs associated with deflection.¹⁶²

Regardless of which of the two allocation methods is utilized, a mechanism should be established by which some appeals, such as death penalty cases, are heard in the first instance by the supreme court, while others, such as ESD cases, are heard by the court of appeals.¹⁶³ Moreover, discretionary supreme court review should be available for all cases decided by the court of appeals. Even with the most efficient screening system, some significant cases are bound to be erroneously assigned to the court of appeals at the outset, and on some occasions the law development potential of a particular case might not become apparent until the intermediate court is in the midst of the opinion-writing process.

162. This recommendation is similar but not identical to that of a subcommittee of the Arkansas Judicial Council's long range planning committee. According to the subcommittee:

The method preferred . . . is to have all cases, other than capital felony cases and those involving interpretation of the Arkansas Constitution, assigned to the court of appeals. The supreme court should have the authority to bring the record up in cases when it is convinced by petition of a party, or certification by the court of appeals, that an important matter of "law development" is at stake.

[This] method is preferred because the time of neither court would be spent in screening *all* of the cases, and the parties would have the opportunity to persuade the supreme court to take a case. The guidance of counsel could be very significant in exercising the Court's discretion.

REPORT OF THE APPELLATE COURTS SUBCOMMITTEE, *supra* note 8, at 5.

163. As noted previously, the ABA standards indicate that direct appeals of right to the court of last resort are appropriate in death penalty cases. *See supra* note 123; *see also supra* note 162 (quoting report of Arkansas Judicial Council subcommittee recommending that capital felony cases and those involving questions of state constitutional law be appealed directly to the supreme court). Some cases must be heard by the supreme court as a matter of constitutional law. For instance, the court has original jurisdiction to issue extraordinary writs, such as certiorari, mandamus, and prohibition. ARK. CONST. art. 7, § 3. These writs "are designed for the appropriate exercise of [the court's supervisory] jurisdiction, where appellate remedy is unavailable or inadequate." *State ex rel. Purcell v. Nelson*, 246 Ark. 210, 215, 438 S.W.2d 33, 37 (1969). Another example is the court's "original and exclusive jurisdiction" over cases involving the sufficiency of statewide petitions to amend the constitution or adopt a statute. ARK. CONST. amend. 7; *see, e.g., Christian Civic Action Comm. v. McCuen*, 318 Ark. 241, 884 S.W.2d 605 (1994). Other election cases, however, are initially brought in chancery and may presumably be appealed to either the supreme court or the court of appeals. Under the present allocation scheme, all election cases are assigned to the supreme court. ARK. SUP. CT. R. 1-2(a)(7); *see, e.g., Walmsley v. McCuen*, 318 Ark. 269, 885 S.W.2d 10 (1994) (involving constitutional amendment proposed by General Assembly).

In any event, the Arkansas appellate system is ripe for change. The court of appeals is facing a significant backlog, and the supreme court is struggling to keep its docket current. Neither long delay nor hurried decision-making, both of which are present to some degree in the current system, is acceptable. As the familiar saying goes, "justice delayed is justice denied." At the same time, however, "justice rushed is justice crushed."¹⁶⁴ The state and its citizens deserve appellate courts that not only process cases efficiently, but also decide them correctly in a well-reasoned manner that enables the law to grow. The proposals set out above would be a step in this direction.

164. Marvell, *supra* note 93, at 47.