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## Measuring the Comparative Influence of State Supreme Courts: Comments on Our “Followed Rates” Essay

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Our Essay, “*Followed Rates*” and *Leading State Cases, 1940-2005*, published in the *UC Davis Law Review* in December of 2007,<sup>1</sup> has generated substantial interest and attention in the media and in law-related blogs.

A few commentators have suggested that our methodology may give too much weight to common law decisions that recognize or expand tort liability, and thereby disadvantage jurisdictions that tend to issue fewer rulings of this type. In our original Essay, we noted several questions that could benefit from further study of our methodology.<sup>2</sup> This additional issue also may merit review, but for the reasons explained below, we question some of the assumptions underlying the hypothesis.

First, as implied in our description of some of the “most followed” California cases,<sup>3</sup> although some of the California civil decisions recognize or extend a basis for finding liability,<sup>4</sup> others are more

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<sup>1</sup> Jake Dear & Edward Jessen, “*Followed Rates*” and *Leading State Cases, 1940-2005*, 41 UC DAVIS L. REV. 683 (2007).

<sup>2</sup> Dear & Jessen, *supra* note 1, at 710-11.

<sup>3</sup> Dear & Jessen, *supra* note 1, at 707-09 (describing briefly 13 of “most followed” California decisions).

<sup>4</sup> Cases recognizing or expanding civil liability include: *Barker v. Lull Engineering Co.*, 573 P.2d 443, 457-58 (Cal. 1978) (product design defect liability); *Tarasoff v. Regents of the University of California*, 551 P.2d 334, 339 (Cal. 1976) (duty of mental health professional to protect others against reasonably foreseeable serious danger posed by patient); *Rowland v. Christian*, 443 P.2d 561, 562 (Cal. 1968) (premises liability and duty of care); *Dillon v. Legg*, 441 P.2d 912, 915 (Cal. 1968) (permitting limited bystander recovery for negligent infliction of emotional distress or close relatives of the direct victim); *Lucas v. Hamm*, 364 P.2d 685, 687-88 (Cal. 1961) (allowing beneficiaries of wills to pursue professional negligence action despite lack of

properly characterized as merely procedural or as doctrinally neutral.<sup>5</sup> Indeed, inquiry into the substance of California's "most followed" civil decisions reveals that a significant number *confine or restrict* causes of action. For example, *Temple Community Hospital v. Superior Court* declined to recognize a tort of third-party spoliation of evidence;<sup>6</sup> *Seely v. White Motor Co.* declined to extend strict liability to purely economic loss;<sup>7</sup> and *Waller v. Truck Insurance Exchange, Inc.*, found there is no duty to defend allegations of incidental emotional distress damages caused by an insured's noncovered economic or business torts.<sup>8</sup> A similar mix is found with respect to the California "most followed" criminal cases — some uphold the claims and rights of defendants;<sup>9</sup> others establish standards that are difficult for defendants to meet, and which often lead to denial of relief.<sup>10</sup>

Second, we undertook to collect and review "followed" data over a lengthy period (sixty-six years) both in order to transcend the influence of judicial philosophies of individual courts, and to enable us to compare and evaluate — or at least to assess depending upon the results — the influence of changing judicial philosophies of various courts over time. As our Essay observes,<sup>11</sup> the "most followed" era of the California Supreme Court appears to be 1987-1996 — the nine years under Chief Justice Malcolm M. Lucas. The court of that time period generally was viewed as less receptive to attempts to expand civil liability, and less receptive to protection of criminal defendants' rights, than the California Supreme Court of earlier periods.<sup>12</sup> As our

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privity).

<sup>5</sup> See, e.g., *Foley v. Interactive Data Corp.*, 765 P.2d 373, 374 (Cal. 1988) (declining to recognize right to tort damages based upon breach of covenant of good faith and fair dealing concerning alleged wrongful termination — but also reaffirming and recognizing rights to specified damages arising out of violation of public policy and breach of implied contract); *Bernhard v. Bank of Amer.*, 122 P.2d 892, 896 (Cal. 1942) (concerning *res judicata* — issue preclusion).

<sup>6</sup> *Temple Cmty. Hosp. v. Superior Court*, 976 P.2d 223, 225 (Cal. 1999).

<sup>7</sup> *Seely v. White Motor Co.*, 403 P.2d 145, 158 (Cal. 1965).

<sup>8</sup> *Waller v. Truck Ins. Exch., Inc.*, 900 P.2d 619, 630 (Cal. 1995).

<sup>9</sup> *People v. Leahy*, 882 P.2d 321, 323 (Cal. 1994) (imposing limitations on use of certain type of field sobriety test); *People v. Wheeler*, 583 P.2d 748, 768 (Cal. 1978) (prohibiting use of peremptory challenges to exclude prospective jurors on basis of race).

<sup>10</sup> *In re Alvernaz*, 830 P.2d 747, 749 (Cal. 1992) (finding, in context of asserted constitutionally inadequate assistance of counsel in connection with decision to enter guilty plea, that petitioner failed to meet high standard required for relief).

<sup>11</sup> Dear & Jessen, *supra* note 1, at 703 Graph 4, and surrounding text.

<sup>12</sup> See, e.g., John H. Culver, *The Transformation of the California Supreme Court: 1977-1997*, 61 ALB. L. REV. 1461, 1476-1477 (1998) (describing court under Chief

data show, the Lucas era ranks higher than the three prior eras of the court — the periods of 1960-1970 (under Chief Justice Roger J. Traynor), 1970-1977 (under Chief Justice Donald R. Wright), and 1977-1987 (under Chief Justice Rose Elizabeth Bird) — all periods that commentators have described as more expansive with regard to civil liability and protection of defendants' rights.<sup>13</sup> These results suggest that California's ranking may not be attributable simply to a particular judicial philosophy, whether liberal or conservative, during the periods under study.<sup>14</sup>

In sum, early reactions postulating that our study's rankings may be linked to the various state courts' ideological leanings do not appear to be well founded. The California decisions included in our data appear to reflect a fairly balanced mix of results. Of course, questions persist as to whether other variables may have influenced the rankings. Moreover, as our Essay acknowledged, caveats apply generally with regard to the probative value of followed data — for one thing, follows are rare,<sup>15</sup> and hence reflect only the tip of the iceberg in terms of a

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Justice Lucas as “cautious. . . . The decisions of the court blunted, but did not reverse, the direction of the high court under [Chief Justice] Bird, other than in the field of criminal law. . . . Most conspicuously, the Lucas Court embraced a decidedly pro-victim, pro-prosecution, and pro-capital punishment stance in criminal law in contrast to the Bird Court”); J. Clark Kelso, *A Tribute to Retiring Chief Justice Malcolm M. Lucas*, 27 PAC. L.J. 1401, 1401 (1996) (the court under Chief Justice Lucas “maintained the appearance of continuity in the law and respect for precedent while, nevertheless, significantly changing the results in individual cases”); Robert L. Rancourt, Jr., *Freeman & Mills, Inc. v. Belcher Oil Co.: Yes, the Seaman's Tort Is Dead*, 27 PAC. L.J. 1405, 1423 (1996) (“[t]he Lucas Supreme Court will go down in history for its conservative shift in ideology from its liberal predecessor, the Bird Supreme Court”); Gerald F. Uelmen, *The Lucas Legacy*, CAL. LAW. 29, 30 (May 1996) (commenting upon “deliberate and gradual pace with which the court [under Chief Justice Lucas] was turned in a more conservative direction”).

<sup>13</sup> See, e.g., Culver, *supra* n.12, at 1465 (noting even prior to 1977 California Supreme Court “was regarded as an innovative, independent, and activist tribunal”; “many of the controversial decisions of the Bird Court were a continuation of judicial doctrines initially set forth by a series of progressive chief justices since 1940”); see also Mary Cornelia Porter, *State Supreme Courts and the Legacy of the Warren Court: Some Old Inquiries for a New Situation*, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 3, 6-7 (Mary Cornelia Porter & G. Alan Tarr eds., 1982) (characterizing California Supreme Court as “activist” for decades prior to Bird court); Stephen R. Barnett, *The Rose Bird Myth*, CAL. LAW. 85, 172 (Aug. 1992) (characterizing the California Supreme Court as having “liberal” ideology since 1940).

<sup>14</sup> But see Dear & Jessen, *supra* note 1, at 697-701 (noting difficulties posed by comparing performance over different time periods).

<sup>15</sup> Dear & Jessen, *supra* note 1, at 690 n.11 (“With regard to the vast majority of citations listed in *Shepard's*, no coding information is provided by *Shepard's*. Moreover, only a comparatively small subset of the citations that earn [any] code are

given court's (or opinion's) influence.<sup>16</sup> But we believe that the methodology, using data compiled by third-party professional legal editors employed by *Shepard's Citations Service*, which for more than 100 years has utilized consistent standards<sup>17</sup> and has no vested interest in the results,<sup>18</sup> is as objective as can be hoped for in evaluating a concept such as influence.

In response to our offer to share our data,<sup>19</sup> we have provided the entire database to a number of scholars, and we look forward to their analyses of it. In addition, we have received numerous requests from state high courts, journalists, private attorneys, and bloggers, often asking for data pertaining to a particular state. We also have shared that single-state data as requested.

In the course of doing so, we had occasion to review the data pertaining to specific states and were chagrined to discover in Graph 2 (the "three-or-more follows" data from 1940-2005) and Graph 3 (the "three-or-more follows" data from 1986-2005) a few errors — not affecting the top or bottom rankings — resulting from failure to properly input data in the spreadsheets that produced the graphs. Corrected Graphs 2 and 3 are set out below, and should be substituted for the original Graphs 2 and 3 presented on pages 695 and 696.

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designated by *Shepard's* as followed.”).

<sup>16</sup> Dear & Jessen, *supra* note 1, at 693 (“[I]t is important to stress that the number or rate of followed cases is not a definitive measure of the impact of a particular court's cases, but instead is a *device* useful in discerning and confirming trends.”); *id.* at 693 n.19 (mentioning “superprecedent” phenomenon — influential decisions that may avoid subsequent citation, let alone “followings,” by “preventing suits or inducing settlement of litigation”).

<sup>17</sup> Dear & Jessen, *supra* note 1, at 690 & n.12 (describing *Shepard's* manual concerning coding of decisions).

<sup>18</sup> Dear & Jessen, *supra* note 1, at 691 n.15 (also observing that “any coding problem applies equally to the full range of the 50-state data and thus would not seem to favor or disfavor any particular jurisdiction”).

<sup>19</sup> Dear & Jessen, *supra* note 1, at 711.



The primary changes are these: (1) New York's position remains the same in both graphs, but the number of decisions followed five or more times shown in Graph 2 is increased, which in turn requires that footnote 24, on page 695, be revised to read as follows (the new language is italicized): "New Jersey is fourth, with 15 cases followed at least five times; *New York is fifth, with 13 decisions*; Minnesota and Wisconsin are tied for *sixth*, each with 11 decisions." (2) West Virginia moves up a few positions in Graph 2. (3) Indiana moves up a few positions in Graph 3. (4) Texas drops several positions in both graphs.

Finally, many commentators have observed that some of the highest ranked states are those with comparatively small populations, whereas some other states are ranked considerably lower than their population figures would predict. Clearly, a jurisdiction's population figure — and the available pool of diverse and cutting-edge litigation — is an important consideration,<sup>20</sup> but the data suggest it is far from determinative. Other considerations may include, for example, the ratio of population to caseloads, opinions per judge, or opinions per court. Our Essay sketched various reasons why some jurisdictions may generate more "follows" than others.<sup>21</sup> We continue to believe that a very important factor in this regard is the "culture" of the court and its resulting written decisions.<sup>22</sup> Are the opinions short and summary, with little probing analysis? If so they are less likely to be influential, or to be followed. Are the decisions analytical and cogent, surveying the field? If so they are more likely to be perceived by other courts as both carefully considered and well reasoned — and hence more likely to be followed. Our data demonstrate that even jurisdictions relatively low in population (with a correspondingly small pool of litigation) can produce influential decisions that serve as useful guides for other courts.

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<sup>20</sup> Dear & Jessen, *supra* note 1, at 703 ("A populous jurisdiction with dynamic and diverse social, cultural, and economic conditions is most likely to produce a wealth of litigation capable of yielding leading decisions.").

<sup>21</sup> Dear & Jessen, *supra* note 1, at 703-07 (discussing (a) depth of inventory and focused review selection system; (b) style and "culture" of high court opinions; (c) regionalism and "borrowed sources"; and (d) other possibly relevant factors, such as reputation, professionalism, and "legal capital").

<sup>22</sup> Dear & Jessen, *supra* note 1, at 704-05.