The California Supreme Court, 1940-2005: A Preliminary Measure of Influence

BY JAKE DEAR AND EDWARD W. JESSEN

THE SOCIETY'S 2006 PANEL PROGRAM

The Society's annual panel program, held at the California State Bar's Annual Meeting on October 7, 2006, in Monterey, California, was titled "California — Laboratory of Legal Innovation." (See color insert to this Newsletter; see also the Society's home page, www.cschs.org/images_features/cschs_monterey-2006.pdf.) The program was moderated by Elwood Lui, former Associate Justice, California Court of Appeal, and currently Partner-in-Charge in San Francisco, Jones Day. Panelists were California Supreme Court Associate Justice Kathryn Mickle Werdegar; Joseph R. Grodin, former Associate Justice, Supreme Court of California, and currently Distinguished Professor Emeritus, U.C. Hastings College of the Law; Harry N. Scheiber, Riesenfeld Professor of Law and History, and Director, Institute for Legal Research, Boalt Hall School of Law, U.C. Berkeley; Robert F. Williams, Distinguished Professor of Law, and Associate Director, Center for State Constitutional Studies, Rutgers University School of Law, Camden; and Gerald F. Uelmen, Professor and former Dean, Santa Clara University School of Law.

After California Supreme Court Associate Justice Kathryn Mickle Werdegar was asked to participate in the Historical Society's annual panel program in October 2006, we met with her and other court staff and began to reflect on some leading cases that the court has decided, and potentially similar cases the court will confront in the near future.

During the course of our exchanges we began to consider generally the meaning of legal "innovation," and specifically, how one could assess or measure any given court's innovation. We posited that one way of measuring innovation (or at least *influence* — an aspect of innovation) might be by examining the frequency with which the decisions of various state supreme courts have been adopted or relied upon by state courts of other jurisdictions.

This in turn led us eventually to a body of "citation analysis" literature. Citation analysis long has been employed in related contexts to examine questions such as the nature and type of authorities relied upon by a court, and even to measure the relative sway of law review articles and prestige of law school faculties. We also found a few relevant studies that looked at comparative influence of courts, by measuring how frequently various courts are cited by others. Nevertheless, as the studies candidly acknowledged, when used to compare the work of *courts,* citation analysis can be problematic because of the basic overinclusiveness of citations: A later decision may cite a case to distinguish, criticize or even disagree with it; or it may cite to a collateral matter unrelated to the case's main holding; or it may cite a case as one of many in a bare "string citation" without any special acknowledgment of the merits or value of the cited case.

For these reasons, among others, some studies criticize citation analysis while simultaneously employing that method as the only reasonably objective game in town. But although we found a few recent comparative influence studies of the United States federal courts (and also of the Canadian and Australian courts), we were unable to locate any study published in the past two decades addressing the comparative influence of state high courts. Mindful of these problems and yet hoping to build constructively upon the prior methodologies, we set about to see if we could collect relevant state court data that would provide a more reliable indicator of state high court influence. That led to this research.

"Followed" Cases, 1940-2005: A Preliminary Report

Shepard's Citation Service for more than 100 years has analyzed every decision filed by every appellate court in every state to determine its subsequent "treatment" — that is, whether it has been, among other things, "criticized," "distinguished," "limited," "overruled," "questioned," or *"followed."* Through its staff of professional editors, Shepard's has continuously applied its "followed" designation when *"[t]he citing opinion relies on the case . . . as controlling or persuasive authority."* In other words, if an earlier opinion from, for example, the Nebraska Supreme Court is cited and treated as persuasive authority in a subsequent decision by the Ohio Supreme Court, the independent editors at Shepard's provide a notation in its published history of the Nebraska decision, showing a legal researcher that it has been "followed" by the Ohio decision. As observed in one prior study, Shepard's classification system is "widely used in the legal community to evaluate the status of existing precedents" and, "with appropriate qualifications," Shepard's "constitutes a relevant data source that ought to be used in studying judicial behavior."

Working with LexisNexis, the current provider of Shepard's Citation Service, we identified all opinions since 1940, for each of the 50 state high courts, that Shepard's has designated as having been followed by a state court outside the originating jurisdiction, and the number of times each such case has been followed. The data reflects nearly 24,400 state high court decisions that

were followed at least once — and most only once — by out-of-state courts during the 66 years under review.

Preliminarily, however, we emphasize that the raw number of Shepard's "follows" generated by a case often represents only the tip of the iceberg in terms of any particular decision's real-life influence. For example, in the area of business law, a state high court opinion may quickly prophylactically affect business practices in the home state and nationwide so that the underlying issue is unlikely to arise in a similar context in another state. Such decisions may have far-reaching impact but result in few measurable "follows." Accordingly, the number of "followed" cases is not a definitive measure of the impact of a particular court's cases, but instead a device useful in confirming and discerning trends.

As explained below, the data reveals that the California Supreme Court has been, and continues to be, the most "followed" state high court in the nation. This result is consistent with the prior citation analysis studies that were published in the early 1980's and based on data from 30 to 35 years ago. The data also shows the positions of the other 49 states; some of those differ significantly from the results of the prior citation-analysis studies.

DESCRIPTION OF THE PRELIMINARY DATA

Graph 1 shows, for all 50 states, the number of decisions that have been followed at least once by an out-of-state court during the 66-year period of the study (1940-2005). As a general matter, state high courts during this period produced roughly the same number of full written opinions each year. California is the clear leader. Washington and Colorado are next, followed by Iowa, Minnesota and Kansas.

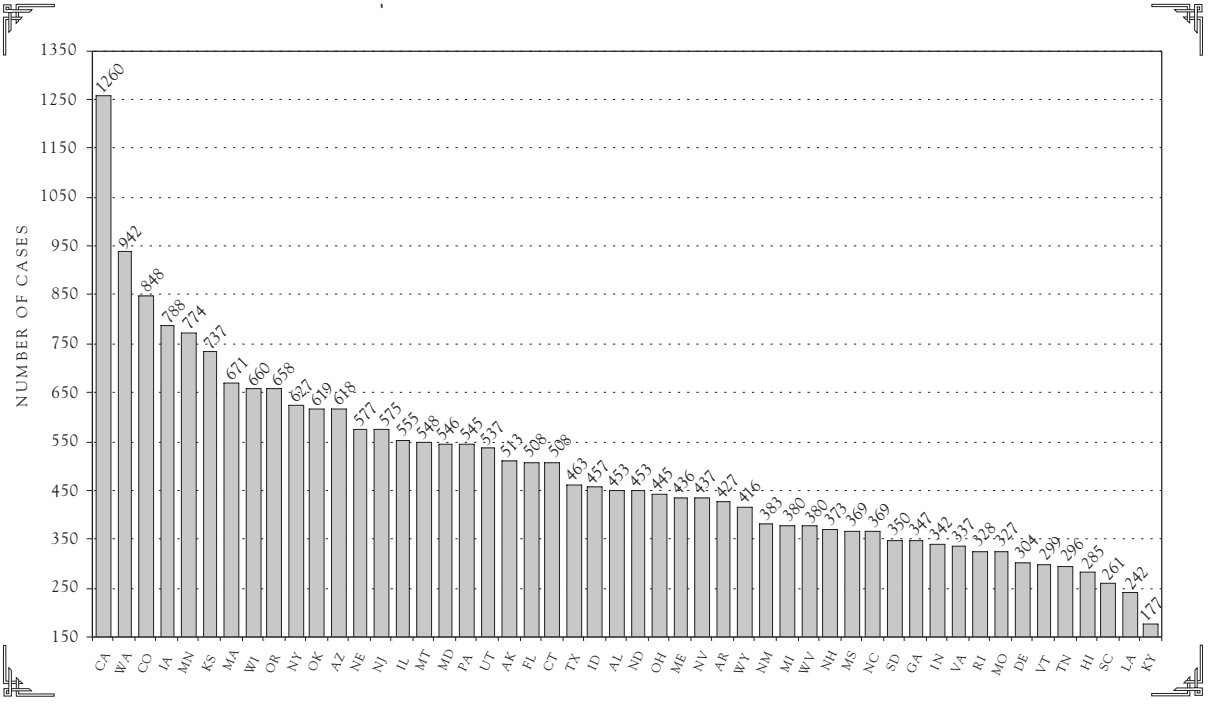
That a decision is voluntarily followed one time by a single state court of another jurisdiction is of interest, but a more telling measure of the impact of any given decision may be disclosed by whether the decision has been voluntarily followed *multiple* times by state courts of other jurisdictions. Graph 2 depicts that information.

Graph 2, shows, for all 50 states, the number of decisions that have been followed *three or more times* by out-of-state courts. California is again the clear leader. In this graph, Washington is again second and New Jersey is third, followed by Kansas, Minnesota, and Massachusetts.

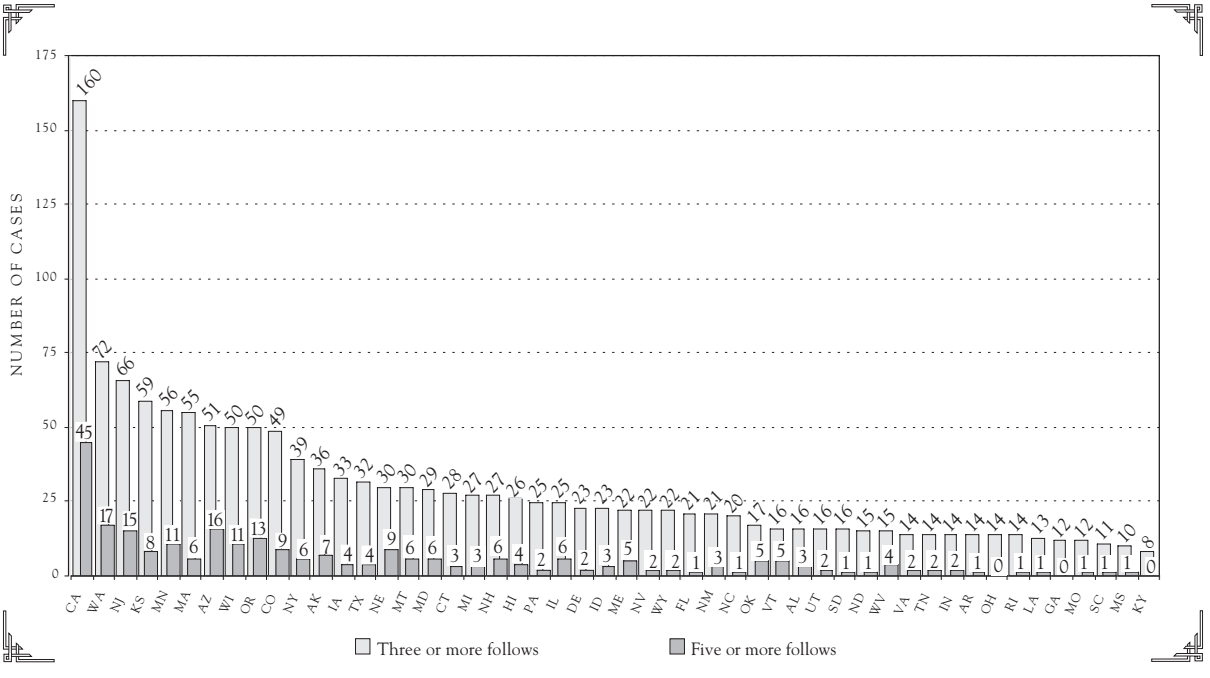
Graph 2 also depicts, as a subcategory of each state's group of cases, the number of decisions that have been followed *five or more times* by out-of-state courts. California clearly leads, Washington and Arizona are second and third; then come New Jersey, Minnesota and Wisconsin.

In addition to looking at this cumulative 66-year picture, we focused on the most current data. Graph 3 depicts the number of decisions that have been followed at least three times by out-of-state courts during the most recent 20-year period of the study (1986-2005). California is the leader, Washington is second, and Massachusetts is third, followed by Kansas and New Jersey.

Finally, Graph 3 also shows, as a subcategory, the number of decisions that have been followed at least



GRAPH 1: NUMBER OF DECISIONS THAT HAVE BEEN FOLLOWED AT LEAST ONCE BY AN OUT-OF-STATE COURT, BY STATE, 1940–2005



GRAPH 2: NUMBER OF DECISIONS THAT HAVE BEEN FOLLOWED AT LEAST THREE TIMES BY OUT-OF-STATE COURTS, BY STATE, 1940–2005

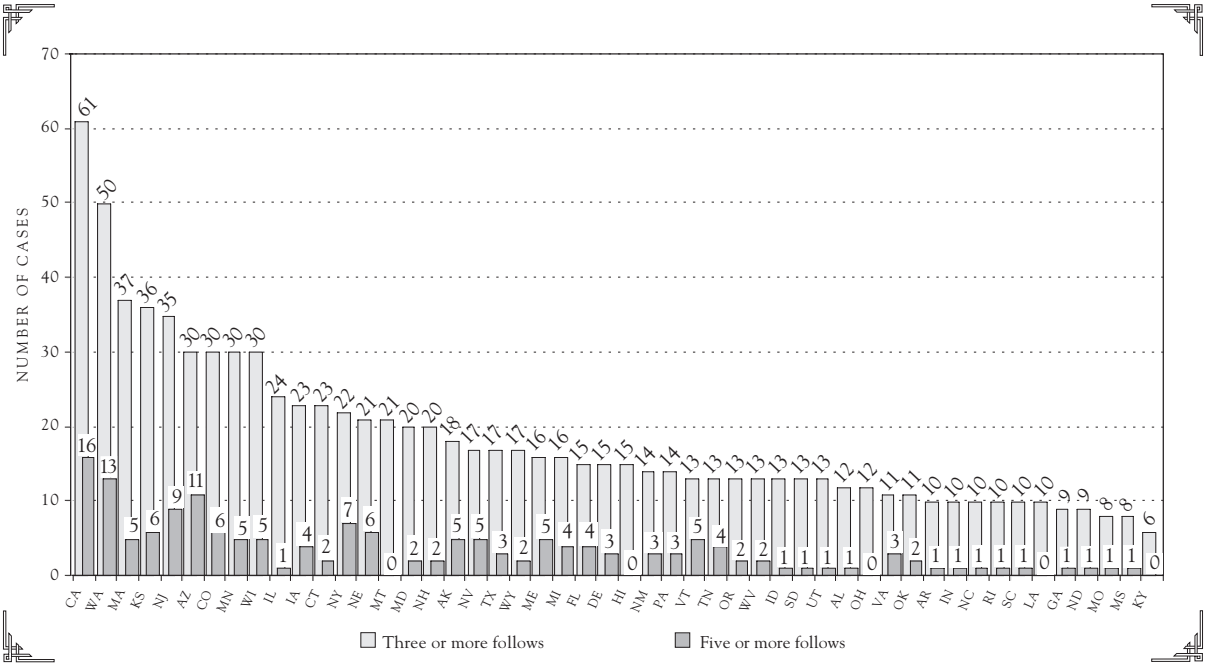
five times by out-of-state courts during the most recent 20 years. The order again is California, Washington, and Arizona, followed by New Jersey and New York.

The results set forth in these first three graphs are, in one significant respect, consistent with the decades-old citation-analysis literature mentioned earlier, which consistently placed California at the top of all influence rankings. But our results differ significantly from the prior studies with respect to the next tier of rankings. The earlier studies that were based on citation data ending 30 to 35 years ago showed the second and third jurisdictions as New York and New Jersey, and the fourth and fifth states as either Pennsylvania and Massachusetts, or Illinois and Texas. Our current data shows that Washington has replaced New York in the second position, and that New Jersey and Massachusetts have generally maintained their positions.

The last graph, number 4, takes a California-only look at the 66-year data. This graph shows the annual average number of decisions that have resulted in at least three "follows" by out-of-state courts, based on cases generated during the terms of the six most recent California Chief Justices. In other words, we determined the total numbers of "three-or-more" (and "five-or-more") opinions filed during the period in which each Chief Justice led the court, then divided that total by the number of years in that term.

Just as it can be problematic to compare baseball players of different eras, so too can comparisons of courts over different eras be problematic. With this caveat in mind, we turn to a preliminary look at the data. Graph 4 shows the term with most "followed" decisions to have been that of Chief Justice Malcolm M. Lucas (Feb. 1987 to Apr. 1996) — the court produced on average five such opinions per year that have, so far, been followed at least three times. Closely following the Lucas court era is the term of Chief Justice Donald R. Wright (Apr. 1970 to Feb. 1977) — the court produced on average almost five opinions each year that have, so far, been followed at least three times.

The court under Chief Justice Roger J. Traynor (Sept. 1964 to Feb. 1970) annually produced more than three decisions that have been followed at least three times. The court under Chief Justice Rose Elizabeth Bird (Mar. 1977 to Jan. 1987) likewise annually produced slightly more than three decisions that have been followed at least three times. (As also shown in Graph 4, when measuring decisions followed at least five times or more, the Traynor court outperformed the Bird court by a margin of more than 2 to 1.) The figures for the court under Chief Justice Ronald M. George are, of course, quite preliminary. There often is a gestation period of many years before a given decision is followed multiple times, but indications are that the current court is on track with the California Supreme Court's historic rates. By contrast, the long tenure of Chief Justice Phil S. Gibson (June 1940 to Aug. 1964) — despite being a period during which the court first developed a reputation for leading and innovative rulings — annually produced fewer than one opinion that has since been followed three or more times.



GRAPH 3: NUMBER OF DECISIONS THAT HAVE BEEN FOLLOWED AT LEAST THREE TIMES BY OUT-OF-STATE COURTS, BY STATE, 1986–2005

PRELIMINARY ANALYSIS OF THE DATA

What accounts for the role of the California Supreme Court — and, as shown above, Washington and other states — in producing more followed decisions than other state jurisdictions? We offer some possibilities:

1. *Depth of inventory, and a focused review selection system.* 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. If the highest appellate court of such a state possesses and carefully exercises review discretion in order to grant hearings in significant cases that may have broad impact, that court may well produce opinions that will be followed in other jurisdictions.

California's highest court certainly has a large and rich inventory of cases from which to select — the court considers approximately 5,400 petitions for review and 3,000 requests for original writs annually — but at least two other related factors also may be at work in producing significant opinions.

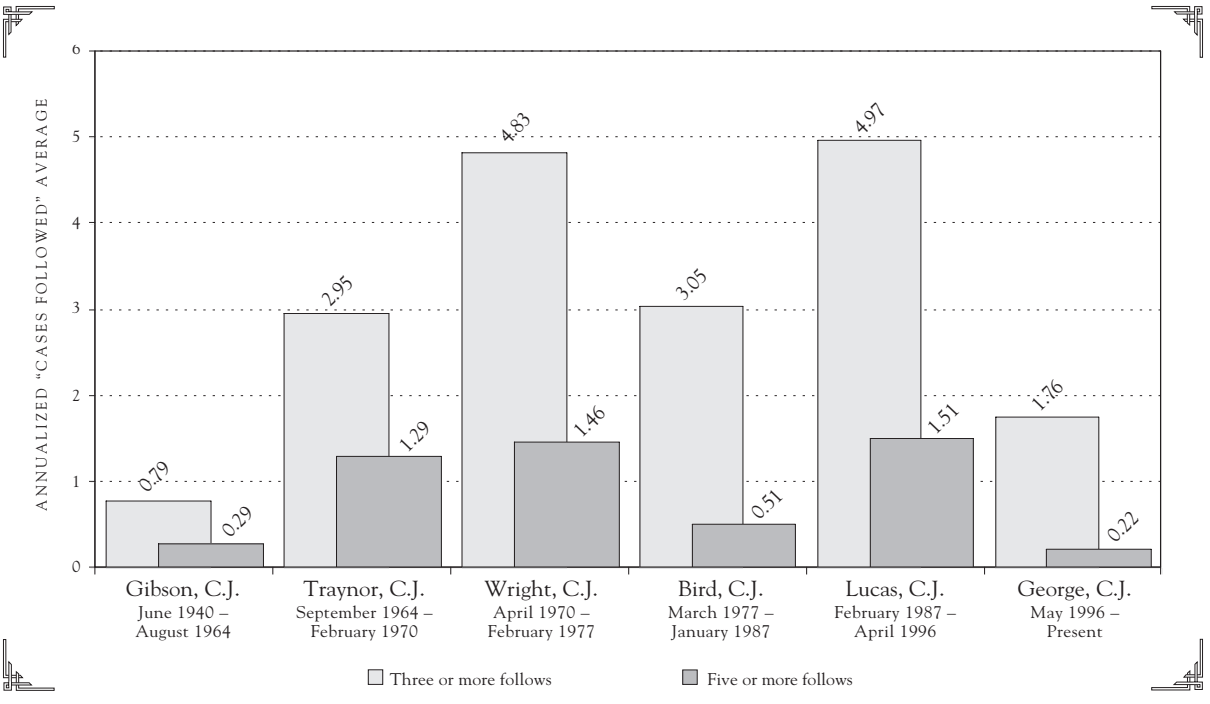
First, in most instances, matters come to the California Supreme Court on a petition for review from a written decision of the state's intermediate Court of Appeal, whose three-justice panels operate under an apparently rather unusual state constitutional provision requiring that all decisions be "in writing with reasons stated." These resulting intermediate appellate decisions are of generally high quality, and serve to focus the issues for the high court's consideration.

Second, the California Supreme Court employs professional legal central staffs (civil and criminal), whose primary task is to analyze intermediate appellate court decisions upon which review is sought, and to make recommendations to the court. The resulting internal memoranda frequently survey and note trends in appellate decisions, which greatly assists the court in carefully selecting the most appropriate vehicle for review of particular issues.

2. *Style and "culture" of high court opinions.* Another factor that may affect the rate at which a court's opinions are followed may be the type of opinion produced and the culture of the court that produces it.

There are, at the extremes, two contrasting ways to write an opinion that resolves a thorny or novel legal issue: (1) a concise approach that contains only minimal analysis before announcing a conclusion, or (2) a more extensive, explanatory and analytical approach. As a general matter — and for better or worse (mostly better we believe) — California Supreme Court decisions (and those of a number of other states) filed in the past 66 years tend to fall in the latter camp rather than the former.

3. *Regionalism and borrowed sources.* Some have been suggested that states grouped in the legal publisher West's seven regional reporters (Atlantic, Northeastern, Northwestern, Pacific, Southwestern, Southern and Southeastern) traditionally have had easier physical access to each other's cases, and have been more likely to cite and follow them for related reasons. Perhaps this may have been a significant factor many decades ago, but we doubt that in the computer age this point accounts for much.



GRAPH 4: ANNUAL AVERAGE NUMBER OF CALIFORNIA SUPREME COURT DECISIONS THAT HAVE BEEN FOLLOWED AT LEAST THREE TIMES BY OUT-OF-STATE COURTS, BY TERMS OF CALIFORNIA CHIEF JUSTICES, 1940–2005

All figures, including those for the continuing term of George, C.J. are based on data ending December 2005

A somewhat more likely explanation for perceived regional trends may relate to borrowed sources. That is, many states have over time adopted similar constitutional or statutory provisions, and some borrow from another state that happens to be located in the same West's region. Pursuant to traditional rules of interpretation, courts will, in appropriate circumstances, follow persuasive judicial constructions of provisions whose language or phrasing is similar to those construed in decisions of jurisdictions with similar provisions. Although this possible explanation for the comparative follow rates of various state high courts warrants further examination, from our review of the California cases decided 1940-2005 it does not appear that such decisions constitute a significant percentage of the follows generated. Indeed, as observed below, the "most followed" California cases are essentially common law decisions, not statutory-based decisions.

4. *Other possibly relevant factors: Reputation, professionalism, and "legal capital."* A number of additional factors have been discussed in the literature, and some bear further study. First, it is frequently suggested that certain cases are more likely to be followed because of perceptions concerning the reputation or prestige of a decision's author or of the authoring court generally. The same might be said of invoking the identity of certain appellate courts.

The literature also discusses a somewhat related concept, "judicial professionalism," defined as reasonable remuneration for judicial officers, modernized selection and organization processes, and some level of insulation from partisan politics. It has been suggested that high courts having those attributes may be positioned to produce decisions that are more principled and less political, and hence more likely to be followed.

Other factors discussed in the literature strike us as less likely to be major influences on follow rates. For example, some have emphasized each jurisdiction's stock of "legal capital" — the comparative number of decisions produced in the past and hence available to be cited or followed. In our view, the existence of a large inventory of decided cases, per se, is not a significant factor; as we have suggest above, of much greater significance is the existence of a possibly smaller inventory of decisions that have been carefully selected from a large and diverse pool of litigation.

EXAMPLES OF SOME "MOST FOLLOWED" CALIFORNIA CASES

Of course, numbers alone do not tell the full story, and so we will briefly review some of the prominent California "followed" cases alluded to above. Many of the most followed California decisions address difficult issues of broad application — that is, novel questions likely to arise in other jurisdictions — and some are probably quite familiar.

The earliest case of note in the California data, the 1942 decision in *Bernhard v. Bank of America* (19

Cal.2d 807), concerned collateral estoppel, and was followed six times by courts in other states. The most recent case also to be followed six times is the 1999 decision in *Temple Community Hospital v. Superior Ct.* (20 Cal.4th 464), which declined to recognize a new proposed common law tort of intentional third party spoliation of evidence.

In between those dates we find, from 1968, *Dillon v. Legg* (68 Cal.2d 728), which allowed limited bystander recovery for negligent infliction of emotional distress for close relatives of the direct victim. *Dillon* has been followed 20 times, more than any other opinion from any other state jurisdiction, and most recently was followed in a New Jersey decision in 2006.

Close behind *Dillon* comes the 1976 decision in *Tarasoff v. Regents of University of California* (17 Cal.3d 425), the landmark case regarding the duty of a mental health professional to protect others against reasonably foreseeable serious danger posed by a patient. This opinion has been followed by 17 out-of-state decisions and, like *Dillon,* is relied upon still and followed today, most recently by two 2004 decisions.

Many of the most followed California decisions involve tort liability. In addition to *Dillon* and *Tarasoff,* other landmark opinions include the 1988 decision in *Foley v. Interactive Data* (47 Cal.3d 654), concerning employment termination in violation of public policy, followed 15 times; the 1965 decision in *Seely v. White Motor Co.* (63 Cal.2d 9), holding that strict liability does not extend to recovery for purely economic loss, followed 10 times; the 1978 decision in *Barker v. Lull* (20 Cal.3d 413), concerning product design defect liability, followed 9 times; the 1977 decision in *Ray v. Alad* (19 Cal.3d 22), concerning successor-corporation liability, followed 13 times; the 1968 decision in *Rowland v. Christian* (69 Cal.2d 108), concerning premises liability and duty of care, followed 6 times; and the 1961 decision in *Lucas v. Hamm* (56 Cal.2d 583), allowing beneficiaries of wills to pursue a professional negligence action despite lack of privity, also followed six times.

Other notable most followed civil decisions involve the interpretation of insurance coverage, such the 1966 case of *Gray v. Zurich Ins. Co.* (65 Cal.2d 263), concerning a liability insurer's duty to defend, followed six times; the 1973 decision in *Gruenberg v. Aetna Ins. Co.* (9 Cal.3d 566), first recognizing the tort of insurance bad faith, also followed six times; and the 1995 decision in *Waller v. Truck Ins. Exchange* (11 Cal.4th 1), finding no duty to defend allegations of incidental emotional distress damages caused by the insured's noncovered economic or business torts, followed five times.

The most followed decisions involving criminal law or procedure include the 1978 case of *People v. Wheeler* (22 Cal.3d 258), prohibiting use of peremptory challenges to exclude prospective jurors on the basis of race. *Wheeler* has been followed 10 times, and also was followed in substantial part by the United States Supreme Court in 1986. *In re Alvernaz* (2 Cal.4th 924), a 1992 decision concerning ineffective assistance of counsel in the guilty plea context, has been followed seven times. *People v. Leahy* (8 Cal.4th 587), a 1994 case, imposed limitations on the use of a certain type of field sobriety test, and has been followed five times.

California Cases Likely to be Followed in the Near Future, and Pending and Impending Issues

recent cases likely to be followed

Most cases decided in the past 10 years are too recent to have generated substantial numbers of follows. Note, for example, that the leading cases of *Dillon* (followed 20 times since 1968) and *Tarasoff* (followed 17 times since 1976), discussed above, were each followed for the first time 10 years after the case was decided; indeed, more than half of *Dillon*'s follows have occurred *after* that decision's 20th anniversary in 1988, and two-thirds of *Tarasoff*'s follows have occurred *after* that decision's 20th anniversary in 1996.

With this in mind, and recognizing that reasonable minds may differ concerning which cases are likely to be found persuasive by other courts, we attempt to identify cases from the past few years that address novel questions likely to arise in other jurisdictions and in the future may join the ranks of California's most followed cases. Among those cases are some that already have been followed at least once: the 2000 decision in *Armendariz v. Foundation Health* (24 Cal.4th 83), concerning the test for determining unconscionability of mandatory employment arbitration agreements (followed twice); the 2002 decision in *San Remo Hotel v. San Francisco* (27 Cal.4th 643), rejecting a regulatory takings challenge to an ordinance designed to preserve residential housing stock (followed three times); and the 2003 decision in *People v. Batts* (30 Cal.4th 660), construing the California double jeopardy clause as more protective than the federal Constitution (followed once so far). Cases that have generated no follows as yet, but may be expected to do so, include the 2004 decision in *In re Marriage of Lamusga* (32 Cal.4th 1072), setting forth a test for determining a request by a custodial parent to move away from the area where the noncustodial parent lives; the 2005 decision in *Miller v. Department of Corrections* (36 Cal.4th 446), holding that widespread favoritism in the workplace can constitute actionable sexual harassment; and, most recently, the 2006 decision in *People v. Wilson* (38 Cal.4th 1237), addressing the "relevant population" for DNA statistical purposes.

PENDING AND IMPENDING ISSUES

A look at the court's docket and beyond suggests other interesting issues that may well produce decisions of interest to courts of other states. On docket presently are, among other issues, whether the proprietor of a mobile home park can be required to provide security guards or take other security measures to prevent gang-related violence on the premises (*Castaneda v. Olsher,* S138104); whether a physician has a constitutional right to refuse on religious grounds to perform a medical procedure (in vitro fertilization) for a patient because of the patient's sexual orientation (*North Coast Women's Care Med. v. Superior Ct.,* S142892); whether federal law preempts and precludes a state from prohibiting importation and trade of wildlife that has been delisted under the federal Endangered Species Act and thus is not currently regulated by federal law (*Viva! Intl. Voice for Animals v. Adidas,* S140064); whether an arbitration provision that prohibits employee class actions for violation of wage and hour laws is enforceable (*Gentry v. Superior Ct.,* S141502); and whether an inventor is entitled only to contract damages (and not tort damages, including punitive damages) following another's breach of an arrangement to develop or commercially exploit an invention (*City of Hope National Med. Center v. Genentech,* S129463).

Other issues and themes on the horizon for the California Supreme Court and other state high courts (in addition to the obvious one of same-sex marriage) include: use of eminent domain and zoning for social goals; mandatory identity card/ security issues; drug and related testing of student and professional athletes; jurisdictional issues relating to suits against Internet sites and service providers; liability of Internet sites for defamation and other torts; animal rights; cloning and biotech issues; use of genetic predisposition information as evidence in civil and criminal trials; and legal problems related to immigration and changing demographics.

CONCLUSION

Over several decades, many decisions of the California Supreme Court have been followed by the appellate courts of other states. That trend continues today, and will continue in the near future. At the same time, a number of other states, most notably Washington, have produced similar cases of importance to other jurisdictions. A full review of the complete data that we have collected would be interesting and useful. Specifically, we would like to see a more focused analysis of trends over decades and within other states, and whether the types of cases that have been followed differ significantly from one state to another. We hope that such studies will be undertaken in the near future, using our data or similar data.

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An Interview with Phil Gibson

Continued from page 1

mid-day as one is likely to encounter, chatting with The Chief and the vivacious Mrs. Gibson (herself a lawyer) in their lovely Carmel home. It provided a heady brew of good company, good conversation, pointed insight, vintage anecdote and fine Champagne — all of it too much for the recollective and reportorial capacities of an awed lawyer. The *Journal* must therefore, apologize for the shortcomings of its recounting of the provocative and evocative conversation.

CHIEF: Well, it certainly is an important subject you're working on, something I'm glad to see people thinking about. It takes real talent and effort to do a good job of handling an appeal.

JOURNAL: I think there are a lot of us who think that if you're a good trial lawyer, you're automatically going to be a good appellate lawyer.

CHIEF: No, that's not true. You take Jerry Giesler, for example. He was one of the best trial lawyers I ever knew, specialized in criminal practice and studied the whole law, but he wasn't an outstanding appellate lawyer. He didn't present his points on appeal nearly as well as he did in trial practice.

One of the best appellate lawyers in my experience, in the criminal field, was a deputy attorney general in Los Angeles some years ago. He was particularly good in oral argument. He never tried to kid the court; he laid it right on the line. If the case was against him, he said so; if he thought it could be distinguished, he tried to distinguish it, and if he didn't do that, he said it should be overruled because it was wrong — and he told us why. He never tried to fool the court by presenting a tricky argument and the court appreciated it. Time after time, I remember the members of the court leaving the bench after an argument and complimenting that man.

JOURNAL: That reminds me of one of the things I wanted to ask you about. There's been a lot of talk and writing lately about whether we should even have