always Appealing: Washington's Supreme Court Continues to Write Influential Decisions

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Fourteen years ago, researchers observed that the Washington Supreme Court authored the second most decisions that were later followed by a court from another state. This article updates that research to learn whether other states continue to look to decisions from our Supreme Court as guidance and concludes the answer is a resounding "yes." In particular, our Supreme Court has been a leader on issues of racial bias in the judicial system, although its influence extends beyond those issues.

In their article, "Followed Rates" and Leading State Cases, 1940–2005, Jake Dear and Edward Jessen reviewed 65 years of decisions authored by the high courts of all 50 states and then ranked which states issued the most "followed" decisions, i.e., those relied on "as controlling or persuasive authority" by another state.1 Dear and Jessen found that the California Supreme Court, which presides over the most populous state in the country, led the country with 1,260 "followed" decisions, while the Washington Supreme Court issued the second most with 942. Dear and Jessen also looked at the number of decisions that had been followed five or more times by out-

of-state courts, and three or more times by out-of-state courts.2 Again, California was first and Washington was second in both categories. Dear and Jessen concluded that "Washington has become the dominant second-ranked court."3

The cases reviewed by Dear and Jessen were all issued before 2006. That left me wondering: Has the Washington Supreme Court continued to issue influential decisions? After researching the last decade of our Supreme Court's jurisprudence, I believe it has.4 Below is a brief overview of the decisions issued by our Supreme Court that have influenced other states:

Peremptory Juror Strikes. Perhaps the most important area of influence for our Supreme Court is in addressing racial bias in the use of peremptory strikes of potential jurors. Courts and scholars have long been dissatisfied with the test formulated by the U.S. Supreme Court in Batson v. Kentucky5 for determining whether a peremptory strike unconstitutionally discriminates based on race. Among other problems, Batson was only intended to root out purposeful discrimination, not unconscious bias. For this reason, in State v. Saintcalle,6 our Supreme Court took the "opportunity to examine whether our Batson procedures are robust enough to effectively combat race discrimination in the selection of juries" and concluded "that now is the time to begin the task of formulating a new, functional method to prevent racial bias in jury selection."7

After various stakeholders submitted competing rules based on Saintcalle, the Court formed a workgroup to determine whether a consensus could be reached on a rule. This workgroup eventually proposed GR 37, which the Supreme Court adopted in 2018. The purpose of the rule "is to eliminate the unfair exclusion of potential jurors based on race or ethnicity."8

Although the Saintcalle decision itself has not been followed by other states, Connecticut's Supreme Court found "it most prudent to follow the Washington Supreme Court's approach" of convening a workgroup to address the seemingly intractable issue of racial bias in jury selection.9 And significantly, those advocating for reform to the jury selection process in other states cite GR 37 as proof that courts need not blindly follow Batson simply for lack of better alternatives.10 The Arizona Supreme Court is also currently considering whether to adopt a new rule governing jury selection modeled after Washington's GR 37.11 After the Arizona Supreme Court invited him to share his thoughts on Washington's experience thus far under GR 37, Chief Justice Gonzalez submitted a letter observing that "[o]ur state's experience with General Rule 37 has been positive in multiple intersecting ways."12

Public Records on Private Devices. Other states have also looked to our Supreme Court for guidance in determining the contours of their public records statutes. For example, modern life created a thorny issue for public records requests — is work product created for a public agency

on employee-owned devices a public record? The Washington Supreme Court held it was in Nissen v. Pierce Cty.13 Addressing the same issue, and reaching the same conclusion, California, Illinois, and Vermont courts all cited Nissen as persuasive.14

A Potpourri. While our Supreme Court's recent influence is most noticeable in jury selection and public records cases, its decisions have had an impact in a number of other diverse areas, including the constitutionality of "anti-SLAPP" laws,15 the definition of "collapse" under a homeowners' insurance policy,16 and the interpretation of federal statutes and case law.17

Looking Forward. Our Supreme Court has also issued a more recent decision whose influence has likely not yet fully manifested. Three years ago, in State v. Gregory,18 the Supreme Court held that Washington's death penalty scheme violated article I, section 14 of Washington's Constitution — which bars "cruel punishment" — because it was administered in an "arbitrary and racially biased manner."19 In doing so, our Supreme Court became the first American court to declare the death penalty unconstitutional based primarily on statistical evidence of racial bias in sentencing.20 By accepting this innovative theory, Washington will help test the validity of the concerns cited by the U.S. Supreme Court as grounds for refusing to abolish the federal death penalty based on evidence of racial bias in its implementation.21 As one commentator noted, "Gregory is an example of how judges who care about discrimination can in fact respond to what is of concern to our diverse society."22 Only time will tell whether Gregory will make the same impact as our Supreme Court's other decisions. I hope it does.

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1 Jake Dear & Edward W. Jessen, "Followed Rates" and Leading State Cases, 1940-2005, 41 U.C. Davis L. Rev. 683, 690 (2007).

2 Dear & Jessen, supra, 41 U.C. Davis L. Rev. at 696-97.

3 Dear & Jessen, supra, 41 U.C. Davis L. Rev. at 697.

4 My research was nowhere near as rigorous or exhaustive as Dear and Jessen's. I researched only decisions from the Washington Supreme Court (not all 50 states), and, unlike Dear & Jessen, I did not have the Shepard's Citations Service database to aid me. Nonetheless, as discussed below, I believe there is ample support for the conclusion that Washington's Supreme Court has continued to have a significant influence on other states.

5 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

6 178 Wn.2d 34, 309 P.3d 326, cert. denied, 571 U.S. 1113 (2013).

7 Saintcalle, 178 Wn.2d at 35, 52.

8 GR 37(a).

9 State v. Holmes, 334 Conn. 202, 221 A.3d 407, 434-35 (2019).

10 See, e.g., State v. Rashad, 484 S.W.3d 849, 860 (Mo. Ct. App. 2016) (Amburg, C.J., concurring); People v. Bryant, 40 Cal. App. 5th 525, 548, 253 Cal. Rptr. 3d 289, 310 (2019) (Humes, P.J., concurring), rev. denied (Jan. 29, 2020); see also State v. Veal, 930 N.W.2d 319, 355 (Iowa 2019) ("The Washington experience suggests that Batson jurisprudence may be on the verge of reformulation in state courts."), reh'g denied (July 15, 2019).

11 See R-21-0008 Petition to Amend the Arizona Rules of Supreme Court to Adopt New Rule 24 on Jury Selection, available at https://www.azcourts.gov/Rules-Forum/aft/1196 (last visited July 10, 2021).

12 See Letter from Chief Justice Steven Gonzalez (April 29, 2021), available at https://www.azcourts.gov/Rules-Forum/aft/1196 (last visited July 9, 2021).

13 183 Wn.2d 863, 357 P.3d 45 (2015).

14 See City of San Jose v. Superior Ct., 2 Cal. 5th 608, 628, 389 P.3d 848, 860 (2017); Toensing v. Att'y Gen., 2017 VT 99, ¶ 34, 206 Vt. 1, 19, 178 A.3d 1000, 1012 (2017); Better Gov't Ass'n v. City of Chicago, 2020 IL App (1st) 190038, ¶¶ 22-23.

15 Leiendecker v. Asian Women United of Minnesota, 895 N.W.2d 623, 636 (Minn. 2017) (citing Davis v. Cox, 183 Wn.2d 269, 351 P.3d 862 (2015) as persuasive authority for its holding that Minnesota's anti-SLAPP law violated its constitutional right to a jury trial).

16 Karas v. Liberty Ins. Corp., 335 Conn. 62, 89, 228 A.3d 1012, 1028 (2019) (agreeing with the definition of "collapse" set forth in Queen Anne Park Homeowners Ass'n v. State Farm Fire & Casualty Co., 183 Wn.2d 485, 352 P.3d 790 (2015)).

17 Colombo v. BRP US Inc., 230 Cal. App. 4th 1442, 1471-72, 179 Cal. Rptr. 3d 580, 606-07 (2014); McWilliams v. Exxon Mobil Corp., 111 So. 3d 564, 579 (La. App. 3 Cir. 4/3/13), writ denied 125 So. 3d 451 (La. 11/8/13) (both citing Clausen v. Icicle Seafoods, Inc., 174 Wn.2d 70, 272 P.3d 827, cert. denied, 568 U.S. 823 (2012), as support for holding that Exxon Shipping Co. v. Baker, 554 U.S. 471, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008), did not establish a bright-line rule limiting punitive damages to the amount of compensatory damages); Tillman v. Raytheon Co., 2013 Ark. 474, 430 S.W.3d 698, 704 (2013) (agreeing with the interpretation of the General Aviation Revitalization Act of 1994 ("GARA"), Pub. L. No. 103–298, 108 Stat. 1552 (1994), in Burton v. Twin Commander Aircraft LLC, 171 Wn.2d 204, 254 P.3d 778 (2011)).

18 192 Wn.2d 1, 427 P.3d 621 (2018).

19 192 Wn.2d at 5.

20 See generally Note, Washington State Supreme Court Declares Death Penalty Unconstitutional in Washington, 132 Harv. L. Rev. 1764, 1767 (2019).

21 Washington State Supreme Court, supra, 132 Harv. L. Rev. at 1769. As discussed in the Harvard note, in McCleskey v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262, reh'g denied, 482 U.S. 920 (1987), the U.S. Supreme Court rejected an argument virtually identical to the one accepted in Gregory while expressing concern that striking down the death penalty based on evidence of bias would "throw[] into serious question the principles that underlie our entire criminal justice system." 481 U.S. at 318.

22 Neil M. Fox, The Struggle Against the Death Penalty Moves Forward in Washington State: Reflections on State v. Gregory, 75 Nat'l Law. Guild Rev. 176, 186 (2018).