

SURVEY OF ILLINOIS LAW: STATUTORY INTERPRETATION

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The field of statutory interpretation has risen in prominence as a subject of sustained attention in recent years thanks in part to both the legal academy and prominent members of the bench. It is fitting that this Law Journal should publish its first survey of statutory interpretation as it applies in Illinois courts. Although the following article is written in the spirit of the annual Survey of Illinois Law, i.e., focused on recent development in the case law, it necessarily adds some context to the topic to better situate Illinois practice within the larger study of statutory interpretation and the legislative process.

The Supreme Court of Illinois has issued a number of important statutory interpretation opinions over the past year. However, it is far from clear that the Court has a deliberate method for resolving many recurrent issues. On the one hand, the Court seems to rely on the recitation of mantras of interpretation, rarely citing the same authority for the same principle, and then conducting the practice of interpretation in a rather intuitive manner. On the other hand, the Court does have a basic framework (at least in theory) for interpreting statutes, but one that is rather skeletal. This Survey examines the recent statutory interpretation cases and begins with a brief introduction to the topic. The cases are divided by the primary interpretive principle at work in the case. I begin with cases that focused on the plain meaning of a statute, then move to cases that involved conflicting statutes, followed by cases employing legislative history in non-ambiguous settings. Finally, I consider cases in which the Court dealt with ambiguous statutes or absurd results.

I. THE DISCIPLINE OF STATUTORY INTERPRETATION

Last year witnessed the publication of Justice Antonin Scalia's co-authored book on statutory interpretation, *Reading Law*.¹ Judge Richard Posner reviewed the work in *The New Republic*,² offering a scathing

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1. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).
2. Richard A. Posner, *The Spirit Killeth, But the Letter Giveth Life*, NEW REPUBLIC, Sept. 13, 2012, at 18. Although all future citations will be to the print version, this article was also posted on *The New Republic's* website under a more provocative title: Richard A. Posner, *The Incoherence of Antonin Scalia*, Aug. 24, 2012, NEW REPUBLIC, <http://www.newrepublic.com/article/magazine/>

critique that subsequently led to a back-and-forth argument played out on several blogs.³ For those interested in statutory interpretation, the public dialogue was a welcome event. Justice Scalia and co-author, Brian Garner, claimed to make the case for textualism, their preferred method of interpretation, the primary virtue of which is its supposed non-ideological nature.⁴ By contrast, Posner explained that textualism provides no such stability and objectivity. Indeed, Posner convincingly argued that textualism is predisposed to yielding ideologically conservative outcomes.⁵

The point of this article is not to suggest one method of interpretation over another, or even to characterize the work of the Illinois courts as textualist or purposivist (although such adjectives may occasionally slip in). Instead, I hope to show that many of the statutory interpretation problems faced in Illinois need not be treated in a haphazard manner because the study of legislation has led to the availability of many useful tools to aid in the task.

II. RECITING THE MANTRA

The Illinois Supreme Court almost always begins the enterprise of statutory interpretation with a paragraph setting out the applicable canons of construction and the aspirations of the interpretive process. The cases cited as authority for each proposition appear to be the most recent cases in which the Court had previously employed the same principle.⁶ This section will consider the list of interpretive principles most often recited.

books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism. Much of the article is included in Posner's new book, RICHARD A. POSNER, *REFLECTIONS ON JUDGING*, ch. 7 (2013).

3. See Bryan A. Garner & Richard A. Posner, *How Nuanced is Justice Scalia's Judicial Philosophy? An Exchange*, NEW REPUBLIC, Sept. 10, 2012, <http://www.newrepublic.com/article/politics/107001/how-nuanced-justice-scalias-judicial-philosophy-exchange>; Eileen Shim, *Yet Another Round of the Scalia-Posner Fight*, NEW REPUBLIC, Sept. 18, 2012, <http://www.newrepublic.com/blog/plank/107429/scalia-posner-fight-supreme-court>; Richard A. Posner, *Richard Posner Responds to Antonin Scalia's Accusation of Lying*, NEW REPUBLIC, Sept. 20, 2012, <http://www.newrepublic.com/article/107549/richard-posner-responds-antonin-scalias-accusation-lying>.
4. SCALIA & GARNER, *supra* note 1, at 16–17.
5. See POSNER, *supra* note 2, at 179 (“In form, textual originalism is a celebration of judicial passivity; in practice, it is a rhetorical mask of political conservatism.”).
6. This practice is not that unusual among state or federal courts. However, one downside to this practice is that it makes the process of locating the original cases more difficult than it should be. Frequently, the cases cited as authority do no more than reiterate the interpretive canon. If we wanted to understand the original reason for a particular canon or rule of law, more research is unnecessarily required.

The ostensible reason for this practice is to show continued adherence to a particular holding and to reinforce the consistency demanded by *stare decisis*. Yet, when the authority cited does no more than itself cite a bare canon or rule without any rationale to support it, the apparent consistency within the line of cases is more superficial than substantive.

The fundamental goal of statutory interpretation in Illinois is “to ascertain and give effect to the intent of the legislature.”⁷ The Court accomplishes that objective through the use of several tools. First, the Court looks to the “plain and ordinary meaning” of the words of the statute.⁸ An important qualification to this primary rule is that individual words should not be taken out of context and, therefore, a court must consider “the statute in its entirety.”⁹ Bearing in mind the whole-statute principle, the Court further tells us that no part of the text should be “rendered meaningless or superfluous.”¹⁰ With these principles in mind, once a court arrives at the plain meaning of the statute, it must give effect to the text as written because that is how the legislature would have wanted it.

In the event the method just described yields “more than one reasonable construction,” the court then deems the statute “ambiguous” and turns to “extrinsic aids to construction.”¹¹ What permissible extrinsic aids are available to Illinois courts is less clear. Legislative history is certainly one such aid, and the one the Illinois Supreme Court seems to use most often. Besides legislative history, there is a slew of substantive or policy-based canons that might occasionally help a court determine the meaning of an ambiguous statute.

Finally, the prefatory paragraph to the statutory analysis usually begins or ends with a statement of the standard of review. “Because statutory construction is an issue of law,” appellate review is *de novo*.¹² Hence, the reviewing court gives no deference to a lower court’s own interpretation of the statutory text.

III. PLAIN AND ORDINARY MEANING

The term “plain meaning” is deceptively simple, but it is the Illinois Supreme Court’s starting point as well as the basis of Scalia and Garner’s first semantic canon. As Scalia and Garner put it, “Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.”¹³ They caution, however, that this presumption will not always yield the easy answer since many words have multiple common meanings. Hence, the importance of “contextual and idiomatic clues” as to which of the ordinary meanings a particular word bears.¹⁴

7. *People v. Eppinger*, 2013 IL 114121, ¶ 21.

8. *Id.* See also *People v. Lloyd*, 2013 IL 113510, ¶ 25.

9. *Eppinger*, 2013 IL 114121, ¶ 21.

10. *Lloyd*, 2013 IL 113510, ¶ 25.

11. *Eppinger*, 2013 IL 114121, ¶ 21.

12. *Id.* See also *Lloyd*, 2013 IL 113510, ¶ 25.

13. SCALIA & GARNER, *supra* note 1, § 6, at 69.

14. *Id.* at 70.

Not infrequently, courts will turn to dictionaries to ascertain the plain meaning of a statutory term. Thus, some lawyers refer to “dictionary meaning” interchangeably with “plain meaning.”¹⁵ Indeed, Scalia and Garner offer an appendix to their book dedicated to instructing readers on the use of dictionaries.¹⁶ Yet, as Neil Duxbury warns, judges should be wary of relying on dictionaries as interpretive aids because dictionaries alone are unable to provide “a sense of the meaning that words might be taken to bear in the context of a particular statute.”¹⁷ Although dictionaries might assist in the clarification of a particular word, Duxbury reminds us that judges engaged in statutory interpretation are not merely construing statutory words; rather, they are “trying to establish the plain meaning of statutory language.”¹⁸

Let us consider two recent cases from the Illinois Supreme Court in which the plain meaning of a statutory term was at issue. Both cases involve the use of a dictionary, but only one case turns out to be straightforward.

A. *People v. Dominguez*

In *People v. Dominguez*, the Court confronted the meaning of the word “substantially.” *Dominguez* dealt with a criminal defendant who entered a negotiated plea of guilty to “predatory criminal sexual assault of a child.”¹⁹ The issue was whether the trial court complied with Supreme Court Rule 605(c) in admonishing Dominguez as to his right to appeal.²⁰ The rule requires the trial court, upon entering judgment on a guilty plea, to “advise the defendant substantially as follows.”²¹ What follows is a list of six points concerning the right to appeal and conditions attached to that right. Dominguez’s appeal was dismissed in the appellate court because he failed to file a post-plea motion in the trial court within thirty days of his sentencing.²² As written, the 605(c) admonishment advised of this requirement. However, the trial court specifically told Dominguez that he had to “return to the courtroom within 30 days to file motions,” when, in fact, no physical presence in the courtroom was required to properly file post-plea motions.²³

15. NEIL DUXBURY, *ELEMENTS OF LEGISLATION* 140–41 (2013).

16. See SCALIA & GARNER, *supra* note 1, app. A, at 415–24.

17. DUXBURY, *supra* note 15, at 142.

18. *Id.* at 143. See also POSNER, *supra* note 2, at 179–82, 200 (criticizing the use of dictionaries by textualists).

19. *People v. Dominguez*, 2012 IL 111336, ¶ 1.

20. *Id.* ¶ 10.

21. ILL. SUP. CT. R. 605(c).

22. *Dominguez*, 2012 IL 111336, ¶ 8.

23. *Id.* ¶ 5.

Essentially, the Court had to determine whether “substantially” advising the defendant required a verbatim reading of Rule 605(c), which had not occurred in this case. Because Illinois courts apply the rules of statutory interpretation “with equal force to supreme court rules,” the Court began by examining the plain meaning of “substantially.”²⁴ As the Court explained, “In determining the plain, ordinary, and popularly understood meaning of a term, it is entirely appropriate to look to the dictionary for a definition.”²⁵ The Court’s dictionaries of choice were the tenth edition of *Merriam-Webster’s Collegiate Dictionary* and the ninth edition of *Black’s Law Dictionary*.²⁶ The meaning of “substantial” in *Merriam-Webster* was “largely but not wholly that which is specified.” *Black’s* defined “substance” as “the essence of something.”²⁷ Putting those two definitions together, the Court concluded that Rule 605(c) merely required the trial court to “impart to a defendant largely that which is specified in the rule, or the rule’s ‘essence,’ as opposed to ‘wholly’ what is specified in the rule.”²⁸

Justice Rita Garman authored the majority opinion in *Dominguez*, which is noteworthy because Justice Garman appears to take a more methodical approach to the enterprise of statutory interpretation than other members of the Court, as we will see throughout this Survey. This careful attention to interpretive method is obvious in *Dominguez* itself from the fact that Justice Garman employs any formal method in a rather simple case. Even the dissenting opinion did not fault the majority’s statutory interpretation. Instead, the three dissenters disagreed with the application of the rule to the trial judge’s admonitions. More fundamentally, the dissent advocated an amendment to the rule that would require a trial judge to read the admonishments verbatim, thus implicitly agreeing with the majority’s understanding of what the language of the rule as written actually required.²⁹

B. *Gaffney v. Board of Trustees*

Shortly after *Dominguez*, the Illinois Supreme Court issued an opinion interpreting the word “emergency” in a far more contentious case in which Justice Garman found herself authoring a dissenting opinion as to the Court’s statutory interpretation.³⁰ *Gaffney* concerned the payment of health insurance premiums for catastrophically injured firefighters under the

24. *Id.* ¶ 16.

25. *Id.* ¶ 18.

26. *Id.* ¶ 18.

27. *Id.*

28. *Id.* ¶ 19.

29. *See id.* ¶ 59 (Burke, J., dissenting).

30. *Gaffney v. Bd. of Trs.*, 2012 IL 110012.

Public Safety Employee Benefits Act (“Act”).³¹ Section 10 of the Act requires the public employer to “pay the entire premium of the employer’s health insurance plan for the injured employee” if the employee meets one of several conditions.³² The only condition at issue in this case was whether the firefighters sustained their qualifying injuries in “what is reasonably believed to be an emergency.”³³ If the answer to that question is “no,” then the disabled firefighters must pay their own insurance premiums.

Two cases were consolidated in the *Gaffney* opinion—claims by firefighters Michael Gaffney and Brian Lemmenes arising out of separate sets of facts. Both Gaffney and Lemmenes were injured while participating in routine training exercises with their respective fire departments.³⁴ Gaffney injured his shoulder while moving a loveseat in order to free a hose that had become trapped underneath it as the firefighting crew was advancing up a stairwell.³⁵ Because this was a live-fire exercise, the safety of fellow firefighters was in danger since the water supply from the hose had been cut off due to the entanglement.³⁶ In Lemmenes’s situation, he injured his knee while attempting to extricate a simulated downed firefighter from an unknown obstacle.³⁷ Although the conditions of Lemmenes’s exercise were intended to replicate an actual supermarket fire, including blacked-out facemasks to emulate smoke, no live fire was actually used. The Court determined that Gaffney was involved in an “emergency,” while Lemmenes was not.³⁸

The majority opinion, delivered by Chief Justice Kilbride, began the interpretation of § 10(b) of the Act by approving the appellate court’s use of a dictionary to define “emergency.”³⁹ The key trigger for the Court’s approval of dictionary use seems to be the absence of a statutory definition of the disputed term contained within the Act itself. This time, the Court resorted to *Webster’s Third New International Dictionary* to define “emergency.” In examining three definitions of “emergency,” the Court concluded that, while the term “includes an element of urgency and the need for immediate action,” which is how the appellate court understood the term, another important factor was that “it involves an unforeseen circumstance or event requiring that immediate action.”⁴⁰

31. 820 ILL. COMP. STAT. 320 (2006).

32. *Id.*

33. *Gaffney*, 2012 IL 110012, ¶ 5.

34. *Id.* ¶¶ 15, 20.

35. *Id.* ¶ 8.

36. *Id.*

37. *Id.* ¶ 22.

38. *Id.* ¶ 77.

39. *Id.* ¶ 59.

40. *Id.* ¶ 62.

The Court “conclude[d] that the plain and ordinary meaning of the term ‘emergency’ in section 10(b) is an unforeseen circumstance involving imminent danger to a person or property requiring an urgent response.”⁴¹ Applying this interpretation to Gaffney’s case, the Court determined that he was involved in an emergency since his injury occurred “in response to something that went wrong in the training exercise.”⁴² The hose becoming entangled was not a preplanned part of the simulation.⁴³ By contrast, in Lemmenes’s situation “no unexpected or unforeseen developments arose during this drill,” nor was anyone “in imminent danger during the exercise.”⁴⁴

Justice Garman, joined by two other members of the Court,⁴⁵ dissented as to the statutory interpretation announced by the majority because it was “not consistent with our responsibility to give effect to the intent of the legislature.”⁴⁶ The better interpretation would have been that of the appellate court, which omitted the “unforeseen” requirement and merely required urgency to qualify as an emergency.⁴⁷ Justice Garman’s specific objection was to the majority’s misuse of the dictionary, in effect, treating one particular definition of “emergency” “as if they were the words of the legislature.”⁴⁸ Her criticism is worth quoting at length: “This mechanical approach to statutory interpretation treats the words chosen by the editors of a dictionary as if they were the words of the statute itself and creates a new statutory requirement that was not intended by the legislature—a requirement that may have far-reaching effects in future cases.”⁴⁹

When Justice Garman accuses the majority of employing a “mechanical approach,” she is reiterating the warnings sounded by scholars of statutory interpretation.⁵⁰ In other words, the *Gaffney* majority forgets that it is trying to establish the meaning of statutory *language* and, instead, mechanically focuses upon a single *word*. By contrast, Justice Garman urges a contextual approach that takes heed of “the entire statutory scheme.”⁵¹ In performing this contextual analysis of the statutory language, the tools and canons of interpretation are especially helpful explanatory devices.

41. *Id.* ¶ 64.

42. *Id.* ¶ 67.

43. *Id.*

44. *Id.* ¶ 77.

45. Justice Thomas and Justice Karmeier.

46. Gaffney, 2012 IL 110012, ¶ 85 (Garman, J., dissenting).

47. *Id.* at 92.

48. *Id.*

49. *Id.*

50. See *supra* text accompanying notes 13–18.

51. Gaffney, 2012 IL 110012, ¶ 96.

A contextual analysis requires acknowledging that the statutory language at issue—the language triggering receipt of insurance benefits—is but one trigger listed in a series of four circumstances. As Justice Garman explains, “If we are to give effect to the intent of the legislature, we must read [the circumstance at issue] in a manner consistent with the other three.”⁵² That is to say, determining the statutory meaning of “emergency” requires close attention to the surrounding words and phrases of the same subsection. This technique has a name: *noscitur a sociis* (trans.: “known by its associates”). Even though Justice Garman herself did not name the interpretive canon, it is worth noting because it reemphasizes the deliberate, rather than intuitive, nature of statutory interpretation. Linda Jellum points out that “judges intuitively apply the canon whether they say they are applying it or not.”⁵³ Likewise, Frank Cross notes, “most basic linguistic canons are so unexceptional that they are typically unstated.”⁵⁴ However, because the majority failed to pay close attention to the statutory text, it is especially important to spell out where and how the misreading occurred.

The relevant language of the Public Safety Employee Benefits Act reads as follows:

In order for the law enforcement, correctional or correctional probation officer, firefighter, spouse, or dependent children to be eligible for insurance coverage under this Act, the injury or death must have occurred as the result of the officer’s response to fresh pursuit, the officer or firefighter’s response to what is reasonably believed to be an emergency, an unlawful act perpetrated by another, or during the investigation of a criminal act. Nothing in this Section shall be construed to limit health insurance coverage or pension benefits for which the officer, firefighter, spouse, or dependent children may otherwise be eligible.⁵⁵

Understanding what “emergency” means, in context, requires careful examination of the text associated with the relevant provision. The relevant associated words against which “emergency” gains specific meaning are “fresh pursuit,” “unlawful act,” and “criminal act.” When read in context, it is clear that the common theme holding this series of circumstances together is that all four instances occur when a public safety employee is “carrying out his professional duties,” as Justice Garman observed.⁵⁶

Yet another interpretive technique put to good use by Justice Garman, although again, not named as such, is the related-statutes canon—*in pari materia* (“in a like matter”). This canon recognizes that the relevant

52. *Id.* ¶ 97.

53. LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 135 (2d ed. 2013).

54. FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 86 (2009).

55. 820 ILL. COMP. STAT. 320/10(b) (2006).

56. Gaffney, 2012 IL 110012, ¶ 99.

language under interpretation is not only part of a larger statute; it is also “part of an entire *corpus juris*.”⁵⁷ Applying this insight requires that we read “emergency” with the understanding that the Illinois Pension Code and the Insurance Code also provide benefits to catastrophically injured firefighters. Under the relevant provisions of those statutes, such a firefighter is entitled to a disability pension and insurance coverage at the prevailing group rate.⁵⁸ As Justice Garman explains, § 10(b) “is designed to provide additional benefits to a limited subset of firefighters who are injured in the line of duty.”⁵⁹ Reading § 10(b) harmoniously with statutes *in pari materia* helps to reinforce that the textual reading of “emergency” is the correct one.

Finally, Justice Garman points out how the majority’s interpretation of “emergency” leads to unreasonable outcomes in a *reductio ad absurdum* (reduction to the absurd) argument. Consider two hypotheticals.⁶⁰ First, a firefighter is catastrophically injured when a piece of equipment unexpectedly falls on him at the stationhouse. Second, a firefighter, who was on standby at a controlled burn of a wooded area, is similarly injured while fighting a fire that results from escaping flames. If we apply the majority’s requirement that an “emergency” be “unforeseen” and the lack of a requirement that it occur in the line of duty, then the firefighter in the first scenario would receive benefits, but the firefighter in the second would not. The firefighter on duty in the second scenario would not be eligible under the majority’s interpretation because the whole reason such firefighters are on standby is because it is foreseen that sometimes controlled burns become out of control.

Applying the dissent’s interpretation of “emergency” to the facts of both Gaffney’s and Lemmenes’s cases, Justice Garman concludes that the results should be the same, namely, § 10(b) applies to neither case. “[B]oth Lemmenes and Gaffney understood that they were roleplaying” and since neither was acting in the line of duty to protect the public, neither was entitled to the special insurance benefits granted under the Act.⁶¹ Applying the lessons of statutory interpretation to *Gaffney*, this indeed seems to be the correct conclusion.

C. *People v. Lloyd*

In an even more recent instance, the Court properly harmonized statutes *in pari materia*, largely by employing *reductio ad absurdum*

57. SCALIA & GARNER, *supra* note 1, § 39, at 252.

58. Gaffney, ¶ 100 (citing 40 ILL. COMP. STAT. 5/4-110 (2006) and 215 ILL. COMP. STAT. 5/367(f) (2006)).

59. *Id.* ¶ 100.

60. *Id.* ¶¶ 102–03.

61. *Id.* ¶ 117.

arguments. In *People v. Lloyd*, the Court was required to interpret § 12-13(a) of the Criminal Code.⁶² Terry Lloyd, an adult male, was charged with criminal sexual assault for digitally penetrating and performing oral sex upon a thirteen-year-old girl.⁶³ The relevant provision of the statute defined “criminal sexual assault” as “an act of sexual penetration” in which “the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent.”⁶⁴ The primary evidence presented at trial to prove either the victim’s lack of understanding or lack of consent was her age and Lloyd’s knowledge of her age.⁶⁵

The State’s argument was fairly straightforward and appealing from a literalist perspective. Since a minor, like the thirteen-year-old victim, is incapable of legally consenting to sexual penetration in Illinois, it follows that Lloyd’s knowledge of her age proved that he knew she “was unable to give knowing consent” to the sex acts in which they engaged.⁶⁶ According to the Court, however, the State’s argument “is flawed, unworkable, and inconsistent with the legislative structure defining sex offenses in Illinois.”⁶⁷ The majority offered five reasons why this was so. There was also a special concurrence, authored by Justice Robert Thomas for himself and two other members of the Court. Unfortunately, neither opinion is a model of clarity, yet all agree that the convictions had to be reversed.

Justice Mary Jane Theis’s majority opinion is a mix of textual and purposivist analysis. The textualist analysis is by far the most convincing part of the opinion as written. Justice Theis explains that the State’s proposed interpretation “would cause havoc to our statutory scheme.”⁶⁸ This is an *in pari materia* argument because it implicitly acknowledges that the Court should treat the Criminal Code as one that is rationally constructed with no inconsistent parts. If mere knowledge of a sex partner’s minority were sufficient to trigger § 12-13(a)(2), then “a 17 year old girl who has sexual intercourse with her willing 16 year old boyfriend,” assuming that she knew his age, could be prosecuted under the statute.⁶⁹ According to the same statute, the hypothetical girl would be guilty of a Class 1 felony.⁷⁰ However, the legislature has already provided for such scenarios in another section of the Criminal Code, popularly known as a

62. The provision at issue in *Lloyd*, 720 ILL. COMP. STAT. 5/12-13(a) (2008), was renumbered as 720 ILL. COMP. STAT. 5/11-1.20(a) (2010). All references will be to the superseded provision, since that was the one under interpretation by the Court.

63. *Lloyd*, 2013 IL 113510, ¶ 3.

64. 720 ILL. COMP. STAT. 5/12-13(a)(2) (2008) (renumbered as 720 ILL COMP. STAT. 5/11-1.20(a)(2) (2012).

65. *Lloyd*, 2013 IL 113510, ¶ 18.

66. *Id.* ¶ 31.

67. *Id.* ¶ 32.

68. *Id.* ¶ 38.

69. *Id.*

70. See 720 ILL COMP. STAT. 5/11-1.20 (2012).

Romeo and Juliet statute.⁷¹ A violation of this statute only results in a Class A misdemeanor. As the Court concludes, “Our legislature could not have intended such a result that would require a court to impose a sentence of years for conduct it has specifically determined elsewhere in the Code constitutes a misdemeanor.”⁷²

A related *in pari materia* argument used by the Court is that there exists within the Criminal Code a statute that better fits the facts and evidence presented by the State.⁷³ That statute is the criminal sexual abuse statute, which prohibits “an act of sexual penetration or sexual conduct with a victim who is at least 13 years of age but under 17 years of age and the person is at least 5 years older than the victim.”⁷⁴ As the Court notes, “[u]nfortunately, the State chose not to charge him with that offense.”⁷⁵

As previously mentioned, the majority in *Lloyd* also employed some non-textual rationales for concluding that § 13(a)(2) did not apply in the instant case, the most convincing of which is the lack of reported cases resembling the facts of *Lloyd*. Cases in which “the victim was unable to understand the nature of the act or was unable to give knowing consent” were typically those where the victim was “severely mentally disabled, highly intoxicated, unconscious, or asleep.”⁷⁶ In this instance, the Court recognizes that a statute can take on meaning from a past course of executive conduct.⁷⁷

IV. CONFLICTING STATUTES

What happens when there are two statutes that appear to conflict, one upon which the plaintiff rests his case, the other upon which the defendant does the same? On the one hand, there is a principle of statutory construction that says, “a later-enacted statute that contradicts an earlier one effectively repeals it.”⁷⁸ However, there is also a canon of construction that tells us as between a general statute and a specific statute that potentially conflict, the specific one should control because it “comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence.”⁷⁹ As Scalia and Garner explain, “legislators are

71. See 720 ILL. COMP. STAT. 5/11-1.50(c) (2012) (“A person commits criminal sexual abuse if that person commits an act of sexual penetration or sexual conduct with a victim who is at least 13 years of age but under 17 years of age and the person is less than 5 years older than the victim.”).

72. *Lloyd*, 2013 IL 113510, ¶ 38.

73. See *id.* ¶ 45.

74. 720 ILL. COMP. STAT. 5/11-1.60(d) (2012). In *Lloyd*, the statute was referred to as 720 ILL. COMP. STAT. 5/12-16(d) (2008). *Lloyd*, 2013 IL 113510, ¶ 45.

75. *Lloyd*, 2013 IL 113510, ¶ 45.

76. *Id.* ¶ 39.

77. See *id.*

78. SCALIA & GARNER, *supra* note 1, § 28, at 185.

79. *Id.* at 183.

often—despite the presumption to the contrary—unfamiliar with enactments of their predecessors,” and thus, “[t]hey unwittingly contradict them.”⁸⁰

A. *Harris v. Thompson*

The case of *Harris v. Thompson* presents an unfortunate set of facts. Steven Thompson was an ambulance driver for the Massac County Hospital who was responding to an emergency call to pick up a patient from a nursing home and then transport the patient to the hospital.⁸¹ On his way to the nursing home, Thompson proceeded through a stop sign without stopping and collided with the Harris family’s vehicle at the intersection.⁸² Thompson admitted that he did not have his siren turned on when he went through the intersection, although there was dispute about whether he briefly blasted the siren as he approached the intersection.⁸³ As relevant here, the Harris family sued Thompson and the hospital district for negligence. Harris relied on the Vehicle Code to establish liability, while Thompson relied on the Tort Immunity Act to invoke immunity from suit.⁸⁴

The relevant portion of the Local Governmental and Governmental Employees Tort Immunity Act provides as follows:

Except for willful or wanton conduct, neither a local public entity, nor a public employee acting within the scope of his employment, is liable for an injury caused by the negligent operation of a motor vehicle or firefighting or rescue equipment, when responding to an emergency call, including transportation of a person to a medical facility.⁸⁵

The language in the Act was adopted in 1965 and clearly seems to apply to Thompson’s situation. He was a public employee acting within the scope of his employment while responding to an emergency call.

The section of the Vehicle Code upon which Harris relied provides:

(b) The driver of an authorized emergency vehicle, when responding to an emergency call . . . may exercise the privileges set forth in this Section, but subject to the conditions herein stated.

(c) The driver of an authorized emergency vehicle may: . . .

80. *Id.* at 185.

81. *Harris v. Thompson*, 2012 IL 112525, ¶ 3.

82. *Id.* ¶ 4.

83. *Id.* ¶ 37.

84. *Id.* ¶ 9.

85. 745 ILL. COMP. STAT. 10/5-106 (2002).

2. Proceed past a red or stop signal or stop sign, but only after slowing down as may be required and necessary for safe operation...

(d) The exceptions herein granted to an authorized emergency vehicle, other than a police vehicle, shall apply only when the vehicle is making use of either an audible signal when in motion or visual signals meeting the requirements of Section 12-215 of this Act.

(e) The foregoing provisions do not relieve the driver of an authorized emergency vehicle from the duty of driving with due regard for the safety of all persons, nor do such provisions protect the driver from the consequences of his reckless disregard for the safety of others.⁸⁶

Based upon this statute, Harris seemed to have a strong case. While someone in Thompson's position was explicitly permitted to proceed through a stop sign without stopping, the legislature attached specific conditions to such action. The most relevant condition being that an ambulance driver was not relieved of "the duty of driving with due regard for the safety of all persons."⁸⁷ It was precisely Harris's claim that Thompson drove through the intersection without such regard in a negligent fashion. This provision of the Vehicle Code was added in 1970.⁸⁸

The appellate court concluded that there was a conflict between the two statutes.⁸⁹ It then held that the Governmental Immunity Act was "more general in nature," and the Vehicle Code provisions "were more specific."⁹⁰ Additionally, the appellate court noted, "the Vehicle Code provisions are more recent in origin than the Governmental Immunity Act." Thus, applying the General/Specific Canon and the Implied Repeal Canon, the appellate court sided with Harris.⁹¹ Chief Justice Kilbride largely agreed with the reasoning of the appellate court, but he was the only member of the Supreme Court to do so.⁹²

A majority of the Supreme Court refused to find the two statutes in conflict. Writing for the Court, Justice Freeman explained, "A court must construe statutes relating to the same subject matter with reference to one another so as to give effect to the provisions of each, if reasonable."⁹³ Relying on a previous decision, the Court then employed what I will refer

86. 625 ILL. COMP. STAT. 5/11-205 (2002).

87. Harris, 2012 IL 112525, ¶ 21.

88. See Harris v. Thompson, 2011 WL 10500884, ¶ 6 (Ill. App. Ct.).

89. *Id.* ¶ 3.

90. *Id.* ¶ 6.

91. *Id.*

92. Harris v. Thompson, 2012 IL 112525 (Kilbride, C.J., dissenting).

93. *Id.* ¶ 25.

to as a “spheres analysis.”⁹⁴ According to the Court, each of the two statutes “stands in its own sphere,” and “the statutes each address different actors under different circumstances. . . . Thus the statutes are not in conflict.”⁹⁵ In particular, the Vehicle Code applies to “both public and private employees who operate emergency vehicles.”⁹⁶ By contrast, the Tort Immunity Act “does not apply to private employees, but provides immunity only to public employees absent willful and wonton conduct.”⁹⁷ “Therefore,” the Court concluded, “these sections of the Vehicle Code do not abrogate the Tort Immunity Act.”⁹⁸

That short analysis is rather baffling. It is true that the Vehicle Code provision regarding emergency vehicles applies to both government employees and private employees of an emergency service that contracts with a local government. It is also true the Tort Immunity Act applies only to government employees. But so what? The Court’s analysis does not explain why the Vehicle Code, which it concedes applies to public employees, has no effect in this case. All the Illinois Supreme Court has done is ignore a glaring conflict.

However, the General/Specific Canon, which the appellate court and the Chief Justice’s dissent put to use, also fails to push the analysis very far. If all the Tort Immunity Act said was, “no public employee acting within the scope of his employment, is liable for an injury caused by his negligence,” then it would truly be a general statute. However, the actual provision at issue refers specifically to the immunity of an emergency vehicle driver engaged in emergency response work. It is hard to imagine a more specific form of immunity. Likewise, the Vehicle Code provisions are equally specific, mandating a duty of care while responding to an emergency call. Therefore, it seems that we have two specific statutes in irreconcilable conflict.

Such a situation seems to call for the Implied Repeal Canon alone—“a provision that flatly contradicts an earlier-enacted provision repeals it.”⁹⁹ In *Harris*, that would mean that the 1970 Vehicle Code implicitly repealed the relevant provision of the 1965 Tort Immunity Act. Another relevant, but perhaps unstated concern of the Court, was the presumption against waiver of sovereign immunity.¹⁰⁰ Although this was a standard presumption at the time of Blackstone, as Scalia and Garner explain, “the interpretive rule

94. *Id.* ¶¶ 23–24 (citing and relying upon the analysis from *Henrich v. Libertyville High Sch.*, 186 Ill.2d 381, 712 N.E.2d 298 (Ill. 1998)).

95. *Harris*, 2012 IL 112525, ¶¶ 24–25 (adopting a lower court’s reasoning as its own).

96. *Id.* ¶ 25.

97. *Id.*

98. *Id.*

99. SCALIA & GARNER, *supra* note 1, § 55, at 327.

100. For a discussion of the interpretive canon regarding sovereign immunity, see *id.* § 46, at 281.

disfavoring waivers of sovereign immunity has abated—rightly so.”¹⁰¹ The Illinois Supreme Court itself abolished the “sovereign immunity of municipalities for tort-based claims.”¹⁰² Perhaps the present Court is hesitant to impose governmental liability unless the legislature has made its intentions abundantly clear. If so, the Court should itself clearly indicate that one of its operative interpretive canons is to loosely construe immunity statutes, or to strictly construe waivers of immunity.

B. *McFatridge v. Madigan*

The next case allows us to see clearly when the General/Specific Canon is inapplicable. In *McFatridge v. Madigan*,¹⁰³ the Court construed the State Employee Indemnification Act.¹⁰⁴ McFatridge served as State’s Attorney for Edgar County and led the prosecution of an individual whose conviction was later overturned.¹⁰⁵ That individual then filed a civil rights lawsuit against McFatridge for malicious prosecution, false imprisonment, and intentional infliction of emotional distress.¹⁰⁶ The question was whether the Indemnification Act allowed for reimbursement of McFatridge’s legal fees arising from his defense of the suit.¹⁰⁷

The State Employee Indemnification Act directs the Attorney General to appear on behalf of a state employee who is sued for action occurring within the scope of his employment.¹⁰⁸ However, the statute also gives the Attorney General the authority to deny representation if the source of potential liability was “intentional, willful or wanton misconduct,”¹⁰⁹ which the Attorney General did in McFatridge’s case. However a second, undesignated paragraph of § 2(b) of the Immunity Act provides, “In the event that the defendant . . . is an elected State official . . . the elected State official may retain his or her attorney. . . . In such case the State shall pay the elected official’s court costs, litigation expenses, and attorneys’ fees, to the extent approved by the Attorney General as reasonable, as they are incurred.”¹¹⁰ McFatridge claimed that this second paragraph of § 2(b) should be read to state a special rule for the indemnification of elected officials—a rule not subject to the section’s previous paragraph concerning the authority of the Attorney General to deny representation and

101. *Id.* at 284.

102. *Harris v. Thompson*, 2011 WL 10500884, ¶ 6 (Ill. App. Ct.) (citing *Molitor v. Kaneland Cmty. Unit Dist. No. 302*, 18 Ill.2d 11, 163 N.E.2d 89 (Ill. 1959)).

103. 2013 IL 113676.

104. 5 ILL. COMP. STAT. 350/2(b) (2010).

105. *McFatridge*, 2013 IL 113676, ¶ 3.

106. *Id.* ¶ 5.

107. *Id.* ¶ 6.

108. 5 ILL. COMP. STAT. 350/2(a) (2010).

109. 5 ILL. COMP. STAT. 350/2(b).

110. *Id.*

indemnification for intentional, willful, or wanton conduct.¹¹¹ The appellate court agreed with McFatrige that the second paragraph concerning elected officials stated a separate rule removing the Attorney General's discretion.¹¹² The Supreme Court reversed and focused on the appellate court's misreading of the statutory structure.¹¹³

The appellate court had treated the two paragraphs as though they were conflicting, with the first stating the general rule and the second stating a specific rule.¹¹⁴ The first paragraph, which applied to all state employees, provided for Attorney General discretion to deny representation and indemnification for willful or wanton conduct.¹¹⁵ The second paragraph, which applied to only elected officials, made no mention of Attorney General discretion, and in fact, required that "the State shall pay" litigation expenses subject only to a reasonableness determination.¹¹⁶ Hence, the appellate court concluded, the legislature intended to treat a subcategory of employees—elected officials—differently. But, as the Supreme Court explained, "This analysis is flawed . . . because the two provisions do not relate to the same subject."¹¹⁷

According to the Supreme Court, "the most natural reading" of the two paragraphs of § 2(b) was to treat the second paragraph as operative only after the Attorney General had decided that the alleged conduct was not willful or wanton.¹¹⁸ Thus, the second paragraph merely states that elected officials are entitled to select their own attorney to defend them in civil suits rather than relying on state provided counsel.¹¹⁹ In harmonizing the two paragraphs, the Court reaffirmed "the well-established principle that we will not read language into a statute which conflicts with the clearly expressed legislative intent."¹²⁰ Moreover, the Court pointed to the next designated subsection, § 2(c), which applied to the representation and indemnification of judges and, similar to the second paragraph of § 2(b), did not contain language giving the Attorney General the discretion to consider whether the judge's actions were intentional, willful, or wanton.¹²¹ However, § 2(c) began with the admonition, "Notwithstanding any other provision of this Section."¹²² Therefore, the Court concluded, had the legislature intended to exclude all elected officials from the Attorney

111. See *McFatrige v. Madigan*, 2011 IL App (4th) 100936, ¶ 27.

112. *Id.* ¶ 36.

113. *McFatrige v. Madigan*, 2013 IL 113676, ¶ 21.

114. *Id.* ¶ 19.

115. *Id.*

116. *Id.* ¶¶ 20-21.

117. *Id.* ¶ 23.

118. *Id.*

119. *Id.*

120. *Id.* ¶ 24.

121. *Id.* ¶ 25.

122. 5 ILL. COMP. STAT. 350/2(a) (2010).

General's discretionary authority, it would have used the same "notwithstanding" language.¹²³

In *McFatrige*, the Illinois Supreme Court went out of its way to chide the appellate court for basing its conclusion on policy determinations rather than "[c]onstruing the Act as a whole."¹²⁴ The appellate court had justified its treating of elected officials, State's Attorneys in particular, differently from all other state employees with the observation that prosecutorial decisions should not easily give rise to the threat of bankruptcy—a threat that presumably loomed over every State's Attorney who was sued if the state did not provide indemnification for legal fees.¹²⁵ However, the Act's language and structure provided a clear answer to the interpretive question that was presented. The appellate court's invocation of the General/Specific Canon ultimately proved to be a mask for a policy decision the Supreme Court concluded was inappropriate. The case provides a good lesson in appreciating the value of knowing when to reject a canon of construction as inapplicable.

V. LEGISLATIVE HISTORY

The use of legislative history as an aid to statutory interpretation is much debated, not only in the academic literature, but in the courts as well. Mostly commonly, legislative history is used to resolve statutory ambiguity. That is, when a statute admits of two equally plausible interpretations, the legislative history is consulted to break the tie.

However, it appears that the Illinois Supreme Court turns to legislative history for reasons beyond the resolution of ambiguity. Whether one can find a theme that links the various uses of legislative history in the non-ambiguous cases is up for debate. It seems that it takes some particular statutory anomaly to justify its use. The following cases concern instances where there are potential constitutional problems, changes in the common law, major alterations to the statutory language, or the legislative borrowing of a uniform act.

A. *Sandholm v. Kuecker*

In *Sandholm*, a high school basketball coach sued a group of parents for defamation after they complained about him to the school board.¹²⁶ Sandholm's defamatory complaint arose from the parents complaining that

123. *McFatrige*, 2013 IL 113676, ¶ 25.

124. *Id.* ¶ 27.

125. See *McFatrige v. Madigan*, 2011 IL App (4th) 100936, ¶¶ 33–34.

126. *Sandholm v. Kuecker*, 2012 IL 11143, ¶ 3.

his coaching style amounted to child abuse.¹²⁷ The defendants moved to dismiss Sandholm's complaint based on the Illinois Citizen Participation Act.¹²⁸ The Citizen Participation Act is a form of anti-SLAPP (Strategic Lawsuit Against Public Participation) legislation designed to prevent lawsuits aimed at chilling citizen participation in the political process. The relevant provision provides for dismissal of a claim that "is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government."¹²⁹ In *Sandholm*, the defendants claimed that the lawsuit was based on their efforts to petition the school board to fire Sandholm and thus was covered by the anti-SLAPP law.¹³⁰ The trial court and the appellate court agreed with the defendants, but the Supreme Court reversed.

In a unanimous opinion by Justice Burke, the Court held that § 15 of the Act implicitly contained the word "solely" prior to its description of a covered claim that is "based on, relates to, or is in response to" the exercise of a political participation right.¹³¹ "It is clear from the express language of the Act," the Court said, "that it was not intended to protect those who commit tortious acts and then seek refuge in the immunity conferred by the statute."¹³² This clarity arose from reading § 15 "in the context of the purposes described in the public policy section" of the Act, which explained that its goal was to dismiss meritless and retaliatory suits.¹³³ The Act simply did not permit a defendant to get away with defamation so long as the defamatory statements were made in the context of petitioning the government. However, despite the Court's claim that the statutory language, when read in context of the whole act, was clear, the opinion's subsequent reliance on legislative history somewhat belies the claim of clarity.

If the broad reading of § 15 sought by defendants and given by the lower courts were upheld, the result would have been "to radically alter the common law."¹³⁴ By this, the Court meant that there would have essentially been a new qualified privilege to defame so long as it was done within the context of political petitioning. The Court then turned to an examination of the legislative history of the Citizen Participation Act in

127. *Id.* ¶ 53.

128. 735 ILL. COMP. STAT. 110/1 (2008).

129. 735 ILL. COMP. STAT. § 110/15 (2008).

130. *Sandholm*, 2012 IL 11143, ¶ 21.

131. *Id.* ¶ 21.

132. *Id.* ¶ 45.

133. *Id.* ¶¶ 43-44.

134. *Id.* ¶ 50.

order to support the contention that the legislature “did not intend to establish a new absolute or qualified privilege for defamation.”¹³⁵

The examination of the legislative history began with consideration of the sponsors’ statements.¹³⁶ The Court quoted the Senate sponsor, Senator Cullerton, and the House Sponsor, Representative Franks, giving examples of the sort of suit they envisioned the Act covering.¹³⁷ Both mentioned situations in which the lawsuit was meritless—the senator’s example included advice about a zoning project and the House member’s example concerned multiple filing in a case that was repeatedly dismissed as meritless.¹³⁸ The Court observed, “There was no discussion in the legislative debates about establishing a new privilege for defamation.”¹³⁹ This use of legislative history is what might be called an invocation of the “Dog Does Not Bark” Canon.¹⁴⁰ In other words, legislative silence speaks volumes particularly when one would expect a thorough discussion of a major policy change, like immunizing a certain class of defamations. The Court treats this canon as merely confirmatory of otherwise “clear” language, thus downplaying it as a deciding factor.

B. *Julie Q. v. Department of Children and Family Services*

Another instance in which the Illinois Supreme Court turned to legislative history without facing ambiguity was *Julie Q.*¹⁴¹ In this case the Department of Children and Family Services (“DCFS”) promulgated an allegation of child neglect against a mother based upon its own regulations that defined neglect to include an “environment injurious” to the child’s health and welfare.¹⁴² The interpretive problem arose from the statutory language of the Abused and Neglected Child Reporting Act,¹⁴³ which defined “neglected child” as “including” four circumstances, none of which were relevant to the instant case.¹⁴⁴ DCFS asserted that when the legislature uses the word “including” to introduce a list of circumstance, that list is not exhaustive.¹⁴⁵ Indeed, the Court agreed with that general principle.¹⁴⁶ The problem, however, is that the statutory list of circumstances constituting a neglected child once included “an environment

135. *Id.*

136. *See id.*

137. *Id.*

138. *Id.*

139. *Id.* ¶ 51.

140. *See* JELLUM, *supra* note 53, at 219.

141. *Julie Q. v. Dep’t of Children & Family Servs.*, 2013 IL 113783.

142. *Id.* ¶ 1.

143. 325 ILL. COMP. STAT. 5/1 (2008).

144. *Julie Q.*, 2013 IL 113783, ¶ 22.

145. *Id.* ¶ 26.

146. *Id.* ¶ 27.

injurious to the child's welfare."¹⁴⁷ That language was deleted by the legislature in 1980.¹⁴⁸ To understand this legislative change, the Court examined the 1980 legislative history.¹⁴⁹

The Court began its examination of the legislative history by noting the existence of the rebuttable presumption that when the legislature amends an existing statute, it intends "a material change in the law."¹⁵⁰ The floor statement of the amendment's House sponsor indicated that the deletion of the language was due to "the concern over the interpretation of what environment injurious may mean."¹⁵¹ A Senate floor statement indicated that the language was removed at the DCFS's own request.¹⁵² The Court concluded that the removal of the term was not just a "tightening up" of the language; instead, it was a material change.¹⁵³

Furthermore, the legislature subsequently changed the statute to re-include an injurious environment. In fact, the re-inclusion occurred as a result of the DCFS's loss at the appellate court level in this very case.¹⁵⁴ The DCFS tried to argue that the subsequent legislative history indicated that the legislature never intended to deprive the agency of the power to include harmful environments in the definition of conditions of child neglect.¹⁵⁵ However, the Court viewed the re-inclusion as another substantive change in the statute.

It is worth noting that this use of legislative history also worked to defeat an *in pari materia* argument made by the DCFS. The agency pointed out that a provision of the Juvenile Court Act,¹⁵⁶ which imposes certain mandatory reporting requirements of suspected instances of child neglect, defined a neglected minor to be one who is in an injurious environment.¹⁵⁷ The DCFS argued that the two related acts should be read to employ the same meaning of neglected child.¹⁵⁸ However, the Court concluded that the two acts "serve different purposes" and that the legislature "intended different results."¹⁵⁹

147. *Id.* ¶ 22.

148. *Id.*

149. *Id.* ¶¶ 25-29.

150. *Id.* ¶ 30 (quoting *In re K.C.*, 186 Ill.2d 542, 714 N.E.2d 491 (Ill. 1999)).

151. *Id.* ¶ 31 (quoting 81st Ill. Gen. Assem., House Proceedings, June 22, 1979, at 100 (statements of Rep. Peters)).

152. *Id.* ¶ 33.

153. *Id.*

154. *See id.*

155. *Id.* ¶ 33-34.

156. 705 ILL. COMP. STAT. 405/2-3(1)(b) (2010).

157. Julie Q., 2013 IL 113783, ¶ 19.

158. *Id.*

159. *Id.* ¶¶ 39, 41.

C. In re Parentage of J.W.

In a very recent case, the Supreme Court turned to a uniform act's comments section to provide clarity while interpreting a provision of the Illinois' Marriage and Dissolution of Marriage Act ("Act").¹⁶⁰ In *J.W.*, a biological father petitioned for visitation rights to his daughter.¹⁶¹ According to § 14(a)(1) of the Parentage Act, visitation "shall be determined in accordance with the relevant factors set forth in the Illinois Marriage and Dissolution of Marriage Act . . . to guide the court in a finding in the best interests of the child."¹⁶² The petitioning father—who had never been married to the mother—argued that the "relevant factors" from the Act included § 607(a), which places the burden on the custodial parent to prove that visitation by the noncustodial parent would amount to an endangerment to the child.¹⁶³ However, as the Court pointed out, the Parentage Act does not specifically refer to § 607.¹⁶⁴ In order to determine whether § 607 was "relevant" within the meaning of § 14(a)(1) of the Parentage Act, the Court looked to the purpose behind § 607.¹⁶⁵

Since the General Assembly "substantially adopted" the Uniform Marriage and Divorce Act as its own Marriage Act, the Court turned to the comments section of the uniform act to understand why the endangerment standard was chosen for visitation actions. According to the official comments, the drafters selected a standard more stringent than the best interest standard in order to prevent visitations decision from turning upon "moral judgments about parental behavior."¹⁶⁶ From that comment the Court concludes, "In a postdissolution setting, the legislature has presumed it to be in the child's best interests to maintain a continued, meaningful relationship with both parents after the dissolution."¹⁶⁷ It is far from clear that this meaning follows naturally from the quoted portion of the comments.

VI. AMBIGUITY, ABSURDITY, AND THEIR RESOLUTION

Perhaps surprisingly, in all of the case discussed thus far, the Illinois Supreme Court has determined, sometime after much analysis and disagreement, that the meaning of the contested statutory words and phrases was clear or plain. That is, the Court has held that only one meaning of

160. 750 ILL. COMP. STAT. 5/607(a) (2008).

161. *In re Parentage of J.W.*, 2013 IL 114817.

162. 750 ILL. COMP. STAT. 45/14(a)(1) (2010).

163. 750 ILL. COMP. STAT. 5/607(a).

164. *J.W.*, 2013 IL 114817, ¶ 44.

165. *Id.*

166. *Id.* ¶ 45 (quoting Unif. Marriage and Divorce Act § 407, 9A U.L.A. 398–99, cmt. (1998)).

167. *Id.*

each term is the correct meaning based solely upon the text, context, and, in some instances, the enactment history of the statute. The analyses in the cases discussed in Parts III and IV above have turned almost entirely upon intrinsic aids to construction. Now we move on to cases in which the Court has determined that a contested statutory term is equally capable of more than one reasonable meaning. In such cases, the Court will frequently turn to extrinsic aids to decide which of those reasonable meanings was the intended meaning.

A judicial declaration of ambiguity is a significant event in the interpretive process because the court is sending a clear signal that the statute was drafted with less than ideal care. More often than not, as evidenced by the previous sections, courts go out of their way to avoid declaring a statute “ambiguous.” Part of the reason might be that, as William Popkin has noted, “‘Ambiguity’ is ambiguous.”¹⁶⁸ Or, as Linda Jellum has explained, “ambiguity is not consistently defined across jurisdictions.”¹⁶⁹ Most frequently, however, ambiguity refers to “an uncertainty in meaning based not on the scope of a word or phrase but on a semantic dichotomy that gives rise to any of two or more quite different but almost equally plausible interpretations.”¹⁷⁰

In the cases I discuss below, the Illinois Supreme Court generally agrees that ambiguity exists when a statute can reasonably have more than one meaning in a given case.¹⁷¹ Thus, the Court has found ambiguity where “the statute is not a model of clarity, and the reading of the statute advocated by [each party] has merit.”¹⁷² Once an Illinois court has determined that a statute is ambiguous, “it may look beyond the statutory language and consider extrinsic aids to construction in order to ascertain legislative intent.”¹⁷³

A. *In re Marriage of Mathis*

In *In re Marriage of Mathis*, the Supreme Court had to interpret § 503 of the Dissolution of Marriage Act.¹⁷⁴ Section 503(f) reads: “In a proceeding for dissolution of marriage . . . the court, in determining the value of the marital and non-marital property for purposes of dividing the

168. WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 11 (2007).

169. JELLUM, *supra* note 53, at 87.

170. SCALIA & GARNER, *supra* note 1, app. B, at 425.

171. See JELLUM, *supra* note 53, at 87 (explaining that a common understanding of statutory ambiguity is that a statute “has more than one meaning when applied to the facts of a particular case”).

172. *People v. Eppinger*, 2013 IL 114121, ¶ 31. See also *In re Marriage of Mathis*, 2012 IL 113496, ¶ 52 (Garman, J., dissenting) (explaining that a statute is ambiguous “because it is reasonably capable of more than one meaning”).

173. *Eppinger*, 2013 IL 114121, ¶ 32.

174. *In re Marriage of Mathis*, 2012 IL 113496.

property, shall value the property as of the date of trial or some other date as close to the date of trial as is practicable.”¹⁷⁵ In this case, the trial court entered an order dissolving the marriage in August 2004.¹⁷⁶ However, as of 2010, the trial court was still handling ancillary matters and set the date for the valuation of the husband’s businesses and partnerships for December 31, 2010, and the valuation date for all other property for a date “as close as practicable to the first date of any continued ancillary hearing.”¹⁷⁷ Because the husband’s property values had increased since 2004, he argued that “the date of trial” was the date of the dissolution of the marriage in August 2004. However, the wife argued that “the date of trial” was when the trial court hears the ancillary matters concerning property distribution, which had still not occurred.

Because there was no statutory definition of “trial” in the Act itself, the Illinois Supreme Court consulted two dictionaries—*Webster’s Third New International Dictionary* and *Black’s Law Dictionary*—“to reveal” the term’s “plain meaning.”¹⁷⁸ However, after consulting the dictionaries, the Court concluded that the definition of “trial” could reasonably refer to either the hearing on the grounds for dissolution or the hearing on the division of property.¹⁷⁹ Thus, the statute was ambiguous and the Court “must go beyond the statute itself and engage so-called extrinsic aids to construction.”¹⁸⁰ Additionally, to resolve the ambiguity, the Court may consider “the purpose of the statute, as well as the policy concerns that led to its passage.”¹⁸¹

The first extrinsic tool the Court used to resolve the ambiguity in the meaning of “trial” was a canon that might be called the Prior-Construction Canon.¹⁸² According to this rule of construction, when a word has been given “a uniform interpretation by inferior courts . . . a later version of that act perpetuating the wording is presumed to carry forward that interpretation.”¹⁸³ According the Court, there had been “a long and consistent line of cases” holding that property valuation was to occur on the date of the dissolution of the marriage.¹⁸⁴ Because the legislature had amended § 503 of the Act at least ten times in the past twenty years without changing § 503(f), the Court presumed that the legislature acquiesced in those prior judicial interpretations of the statutory language.¹⁸⁵ As the

175. 750 ILL. COMP. STAT. 5/503(f) (2010).

176. Mathis, ¶ 7.

177. *Id.* ¶ 12.

178. *Id.* ¶ 23.

179. *Id.*

180. *Id.* ¶ 20.

181. *Id.*

182. See SCALIA & GARNER, *supra* note 1, § 54.

183. *Id.* at 322.

184. Mathis, 2012 IL 113496, ¶ 24.

185. *Id.* ¶ 25.

Court explained, “We assume not only that the General Assembly acts with full knowledge of previous judicial decisions, but also that its silence on this issue in the face of decisions consistent with those previous decisions indicates its acquiescence to them.”¹⁸⁶ However, the Court, like most academic commentators, recognizes that legislative acquiescence, on its own, is not the strongest of arguments upon which to resolve ambiguity.¹⁸⁷ Thus, the Court looked to “strong policy considerations” as well.¹⁸⁸

The Court determined that “the date of trial” referred to the date of dissolution, in part, because this rule “encourages the parties to stop litigating . . . and discourages gamesmanship.”¹⁸⁹ The *Mathis* case itself was an example of protracted litigation—litigation that had been in the courts for twelve years—motivated by the desire to delay the valuation of the marital property. Thus, the Court’s resolution “served the purpose of and the policy behind the Act, and accordingly the legislature’s intent.”¹⁹⁰

Justice Garman offered a highly persuasive dissent in *Mathis*, joined by the Chief Justice and Justice Thomas, in which she took into account the evolution of the statutory scheme in question, paying careful attention to when particular sections came into effect and why, how they changed over time, and how those sections interacted with appellate court precedent. The analysis is necessarily complex, and unfortunately goes unanswered by the majority. . . .

B. *People v. Eppinger*

In *Eppinger*, a *pro se* defendant who refused to leave his holding cell to participate in the *voir dire* process claimed that he had a statutory entitlement to appointed counsel to represent him in his absence.¹⁹¹ Dominick Eppinger was charged with, *inter alia*, attempted murder.¹⁹² After dismissing two public defenders, Eppinger decided to represent himself.¹⁹³ However, on the morning his trial was set to begin, Eppinger changed his mind and requested the appointment of counsel.¹⁹⁴ The trial

186. *Id.*

187. As Linda Jellum explains, “The most common legislative response to a judicial interpretation of a statute is silence.” JELLUM, *supra* note 53, at 242. Therefore, there must be some reason other than mere silence to presume acquiescence to prior judicial interpretations. As Scalia and Garner caution, “this canon applies only to presumed legislative approval of prior judicial . . . interpretations.” The mere failure to take action is not “a sound basis for believing that the legislature has ‘adopted’ them.” SCALIA & GARNER, *supra* note 1, at 326.

188. *Mathis*, 2012 IL 113496, ¶ 26.

189. *Id.* ¶ 30.

190. *Id.*

191. *People v. Eppinger*, 2013 IL 114121.

192. *Id.* ¶ 1.

193. *Id.* ¶¶ 10–11.

194. *Id.* ¶ 10.

court denied the request because the initial waiver of counsel had been “intelligent and knowing” and the new request had been made “for the purpose of delay.”¹⁹⁵ Upon the court’s refusal to appoint counsel, Eppinger refused to leave his holding cell to attend the beginning of his trial.¹⁹⁶ In his absence, the court conducted *voir dire* and empanelled a jury.¹⁹⁷

Eppinger relied on § 115-4.1(a) of the Code of Criminal Procedure to argue that he was entitled to be represented by counsel while he was absent from the courtroom.¹⁹⁸ That section of the Code reads as follows: “When a defendant after arrest . . . fails to appear for trial, . . . the court may commence trial in the absence of the defendant. . . . The absent defendant must be represented by retained or appointed counsel.”¹⁹⁹ However, that same subsection of the code also guarantees all constitutional rights to criminal defendants, “the same as if the defendant were present in court and had not either forfeited his bail bond or escaped from custody.”²⁰⁰ Further, the subsection directs the clerk to “send to defendant, by certified mail at his last known address indicated on his bond slip,” notice of his new trial date.²⁰¹ Both the State and Eppinger relied on the “plain language” of the statute, but they disagreed as to which language was controlling.²⁰²

Specifically, the State maintained that the subsequent language in the subsection referring to defendants who escaped from custody qualified the entire subsection, including the notion of “absence.”²⁰³ That is, a defendant who is absent from trial is limited to one who is absent because of his escape from custody.²⁰⁴ By contrast, Eppinger claimed that the subsequent discussion of escaped defendants did not control the initial sentence, which discussed “absence” in the abstract.²⁰⁵ The Court agreed that “both interpretations of section 115-4.1(a) are reasonable, albeit for different reasons, and that the statute is ambiguous.”²⁰⁶ Thus, the Court turned to legislative history to resolve the ambiguity.

According to the Court’s examination of the legislative history, the intent of the legislature in adopting the relevant language was to address bail jumpers.²⁰⁷ The Court quoted at length the House sponsor of the bill as well as one member each of the House and Senate during general debate on

195. *Id.*

196. *Id.*

197. *Id.* ¶ 15.

198. *Id.*

199. 725 ILL. COMP. STAT. 5/115-4.1(a) (2010).

200. *Id.*

201. *Id.*

202. Eppinger, 2013 IL 114121, ¶ 24.

203. *Id.* ¶ 25.

204. *Id.*

205. *See id.* ¶¶ 25, 29.

206. *Id.* ¶ 32.

207. *Id.* at 37.

the bill.²⁰⁸ That history, combined with the fact that the Court had already interpreted a related statute, which, combined with the present statute formed “part of a larger statutory scheme,” resolved the ambiguity in favor of the State.²⁰⁹

Justice Burke dissented in *Eppinger*, joined by Justice Freeman.²¹⁰ She argued that although the legislative history indicated a concern with bail jumpers, as the majority stated, it did not indicate “that the legislation was intended to apply *exclusively* to bail jumpers.”²¹¹ Because the legislative debates on the bill never address the defendant’s situation—an in-custody defendant who refused to appear at his trial—Justice Burke would not have inferred anything from that silence.²¹² Therefore, other extrinsic aids are required, in particular, the presumption that the legislature “did not intend absurd, inconvenient, or unjust results.”²¹³ The dissent’s basic point is that the majority reached an “unreasonable” result.²¹⁴ As Justice Burke concluded, “the majority has concluded that the legislature intended to afford *greater* protections to those defendants who jump bail than those who remain in-custody. This cannot possibly be correct.”²¹⁵

In essence, the dissent invokes the doctrine of absurdity to reject the State’s reading of the statute.²¹⁶ Absurdity, in the interpretive context, “like ambiguity, is not consistently defined in the jurisprudence.”²¹⁷ At its narrowest, the doctrine requires that the “absurdity must consist of a disposition that no reasonable person could intend.”²¹⁸ As Justice Burke explained, the Court has previously held “that a trial at which neither the defendant nor defense counsel is present is unconstitutional.”²¹⁹ Therefore, she concludes, it is reasonable to think that the legislature would have wanted to grant the same level of constitutional protection to in-custody, but intransigent, defendants, as is granted to bail jumpers.²²⁰ Perhaps, Justice Burke also had the Constitutional Avoidance doctrine in mind, preferring to assume that the legislature would want capacious, rights-protecting, language to apply in close cases.

208. *Id.* ¶¶ 36–37.

209. *Id.* ¶ 23.

210. *Id.* ¶ 47.

211. *Id.* ¶ 50 (Burke, J., dissenting).

212. *Id.*

213. *Id.* ¶ 51.

214. *Id.* ¶ 55.

215. *Id.*

216. *Id.* ¶ 59 (“[c]onstruing the statute to exclude in-custody defendants leads to absurd results”).

217. JELLUM, *supra* note 53, at 91.

218. SCALIA & GARNER, *supra* note 1, § 37, at 237.

219. *Eppinger*, 2013 IL 114121, ¶ 56.

220. *Id.*

C. In re S.B.

S.B., a minor, was accused of aggravated criminal sexual abuse when he, at age fourteen, “touched the vagina” of a four-year-old girl “for the purpose of sexual arousal.”²²¹ After evaluation, the circuit court determined that S.B. was unfit to stand trial because he suffered from mild mental retardation and had the mental capacity of a seven or eight year-old child.²²² At his discharge hearing,²²³ the court determined that the State had presented evidence that S.B. had committed the crime beyond a reasonable doubt and the court entered a finding of “not not guilty,” which is a refusal to enter a judgment of acquittal.²²⁴ After fifteen months of outpatient evaluation, the court found that S.B. was still unfit to stand trial, but not a threat to public safety, and so denied the State’s motion to compel further treatment.²²⁵ However, the State was successful in getting the circuit court to order S.B. to register as a sex offender—an order that the appellate court reversed.²²⁶

The Sex Offender Registration Act (“SORA”) makes special reference to juveniles only twice, and in both instances refers only to those adjudicated delinquent. According to § 2(A)(5) of SORA, a “sex offender” includes any person “adjudicated a juvenile delinquent as the result of committing or attempting to commit an act, which if committed by an adult, would constitute any of the offenses [covered elsewhere in the Section].”²²⁷ Because S.B. was not an adjudicated delinquent, this section of SORA did not apply to him.

Another section of SORA defines a “sex offender” as one who “is the subject of a finding not resulting in an acquittal at a hearing conducted pursuant to § 104-25(a) of the Code of Criminal Procedure of 1963 for the alleged commission or attempted commission of [a covered sex offense].”²²⁸ Because S.B.’s discharge hearing was conducted pursuant to §104-25(a) of the Code of Criminal Procedure, the State argued that he was required to register as a sex offender.²²⁹ The interpretive problem is that the Juvenile Court Act does not refer to mental fitness determinations. As such, S.B. argued that discharge hearings were not specifically authorized

221. *In re S.B.*, 2012 IL 112204, ¶ 3.

222. *Id.* ¶ 4.

223. The Court describes a “discharge hearing” as “an ‘innocence only’ proceeding that results in a final adjudication of charges only if the evidence fails to establish the defendant’s guilt beyond a reasonable doubt (resulting in the defendant’s acquittal) or the defendant is found not guilty by reason of insanity.” *Id.* ¶ 5.

224. *Id.* ¶ 9.

225. *Id.* ¶ 11.

226. *Id.* ¶¶ 12–13.

227. 730 ILL. COMP. STAT. 150/2(A)(5) (2010).

228. 730 ILL. COMP. STAT. 150/2(A)(1)(d).

229. *In re S.B.*, 2012 IL 112204, ¶ 1.

for juveniles.²³⁰ However, the Illinois Supreme Court held that because discharge hearings existed to protect defendants' due process rights, and because juveniles were entitled to the same procedural protections as adults, "section 104-25(a) is incorporated into the Juvenile Court Act," thus validating the trial court's finding of "not not guilty."²³¹

S.B.'s second argument was that because SORA references juveniles only once, in § 2(A)(5), the other sections were specifically intended to apply only to adults, including § 2(A)(1)(d) referencing discharge hearings.²³² S.B.'s argument was a form of the interpretive canon *expressio unius est exclusio alterius*, meaning that the expression of one thing is the equivalent of excluding another.²³³ Here, because SORA expressly mentioned juveniles who had been adjudicated delinquent, the Act implicitly excluded all other juveniles from having to register as sex offenders. According to the Court, however, "[t]his argument cannot be reconciled with the plain language of section 2(A)(1)(d)."²³⁴ This conclusion appears to be based upon a literal reading of this subsection in complete isolation from the other provisions.

Other interpretive problems arise, however, specifically with the provisions of SORA that allow for the termination of sex-offender registration. SORA § 3-5(c) specifically allows for "a minor adjudicated delinquent" to specially petition for termination of his term of registration.²³⁵ The problem arises when one tries to apply § 2(A)(1)(d) to minors because such a minor would not possess a similar statutory right to petition for termination of registration. In fact, the appellate court recognized this occurrence and thus declared the State's interpretation of SORA "absurd" because juvenile delinquents would have greater rights than juveniles found "not not guilty."²³⁶ Moreover, one would have thought that § 3-5(c) reinforced S.B.'s *expressio unius* argument, indicating that the legislature really only intended SORA to apply to juveniles adjudicated delinquent.

Indeed, the Court agrees that such a reading of § 3-5(c) would be absurd and that "the legislature cannot have intended to exclude juveniles found 'not not guilty' from its reach."²³⁷ However, quite stunningly, the Court fails to realize that this absurdity is a result, not of the legislature's making, but of its own. Section 3-5(c) would not be absurd if SORA was limited to include only juveniles found to be delinquent. Nevertheless, the

230. *Id.* ¶ 20.

231. *Id.* ¶ 21.

232. *Id.* ¶ 22.

233. See SCALIA & GARNER, *supra* note 1, § 10, at 107.

234. *In re S.B.*, 2012 IL 112204, ¶ 22.

235. 730 ILL. COMP. STAT. 150/3-5(c) (2010).

236. *In re S.B.*, 2012 IL 112204, ¶¶ 14–15.

237. *Id.* ¶ 26.

Court goes to great lengths to correct “the illogic in the statutory scheme.”²³⁸

The judicial correction of SORA involves the act of adding words to the statute “where omission of the words makes the statute absurd.”²³⁹ In sum, the Court holds “that section 3-5 should be read to include juveniles for whom a finding of ‘not not guilty’ has been entered following a discharge hearing.”²⁴⁰ Moreover, the Court invokes a constitutional avoidance argument, suggesting that this reading of § 3-5(c) is necessary to avoid addressing the equal protection and due process arguments that would be made in the anomalous situation where a juvenile delinquent is provided greater rights than a juvenile who is not mentally competent to stand trial.²⁴¹

Justice Garman was the lone dissenting voice in *S.B.*, once again proving the value of serious engagement with the task of statutory interpretation. Justice Garman implicitly recognized *S.B.*’s *expressio unius* argument by acknowledging that “[o]nly category (5) [of § 2 of SORA] expressly applies to juveniles.”²⁴² “The meaning of section 2 is plain,” she explained.²⁴³ While agreeing with the majority that it was appropriate to approve the use of discharge hearings in the juvenile court context, she would not have gone out of her way, as the majority did, to bring those juveniles found “not not guilty” within the reach of SORA. More troubling for Justice Garman, “The majority’s approach, aside from ignoring the plain language of section 2(A) of SORA, renders paragraph (5) mere surplusage.”²⁴⁴ This surplusage occurs because any minor who is adjudicated delinquent will also fit into one of the categories covering convicted adult offenders. Justice Garman’s dissent allows us to see the poor methodology employed by the majority, which was fraught with logical errors.

In solving a statutory interpretation problem, a court should render as little damage to the statutory structure as possible. In *S.B.*, the Court seemed bent on requiring *S.B.* to register as a sex offender, regardless of the violence it caused to the statute’s integrity. One can only assume that this was the result of the juvenile’s actions of sexualizing a four-year-old girl. Instead of respecting the legislative process, the Court decided it needed to address the underlying policy problem itself.

238. *Id.* ¶ 27.

239. *Id.* ¶ 28.

240. *Id.* ¶ 31.

241. *See id.* ¶ 33.

242. *Id.* ¶ 53 (Garman, J., dissenting).

243. *Id.* ¶ 57.

244. *Id.* ¶ 58.

VII. CONCLUSION

The Illinois Supreme Court, not to mention the trial courts and appellate courts, deal with statutory interpretation on very frequent basis. This Survey has only examined the most important cases, methodologically speaking, of the past year. Much more work needs to be done to fully understand the ability and desirability of regularizing the state's statutory interpretation process. Work has begun in this area among scholars.²⁴⁵ It is highly likely that the benefits of continued studies will have payoffs, not only for legal academics, but practical payoffs for the bench and the bar as well.

245. See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010); Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010).