Statutory Interpretation in State Courts — A Study of Indiana Opinions

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I. HISTORICAL BACKGROUND

Prior to 1980, statutory interpretation seemed to be a moribund academic field. The dominant academic approach was established by the Hart & Sacks Legal Process materials,[1] which reconciled the traditional creative power of common law courts with the policy of deference to legislation. The Legal Process "solution" was to presume that statutes were texts with a purpose, that the purpose was what reasonable people would pursue, and that courts, sharing in that reasonable vision, could apply that purpose to resolve uncertainties within statutory gaps. Statutes therefore set the framework within which courts engaged in reasoned elaboration of legislative purpose. This system preserved both legislative supremacy and judicial creativity.

Wide acceptance of the Legal Process solution appeared to end academic debate about statutory interpretation. Except for Reed Dickerson's efforts to keep the subject alive,[2] the literature was sparse. That changed in the last decade, and statutory interpretation became a subject of intense academic interest. In retrospect, it appears that the Legal Process solution matured around the time when new legislative tensions were beginning to render its vision of the legislative process obsolete. The romanticized idea of a reasonable legislature whose purpose(s) the court discerns now seems almost quaint after the recent political turmoil over civil rights, income redistribution, budgets, and deregulation. By the 1980s, the literature on statutory interpretation began to catch up with the reality of the legislative process and to put forth new visions of the judicial role.[3]

Two modern academic movements undermined the Legal Process perspective. The Law and Economics perspective described the legislative process as anything but reasonable and purposive. Instead, it depicted the legislative process as one of bargaining by private interests producing

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1. H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958).

2. His basic work is R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975).

3. For a review of the literature, see Frickey & Eskridge, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987).

a document with no underlying purpose except that of limiting the other side's advantage.[4] This undermined the notion that courts could be creative in elaborating purpose and still be faithful to the statute.[5]

The main rival to the Law and Economics movement is the Law and Literature movement. It also undermined the Legal Process approach, but from a different point of view. While the Law and Economics perspective pulled the judge away from creative elaboration of legislative purpose, the Law and Literature perspective emboldened the judge to interpret statutory texts creatively.[6] Unlike the Legal Process approach, however, judicial creativity did not fit snugly within the gaps set by historical legislative purpose. Instead a statute was embedded in the broader legal framework, consisting of evolving background norms that were critical to the judge's attribution of statutory meaning.[7]

In this untidy, post-Legal Process world, not everyone shares these perspectives on statutory interpretation. Both the Economics and the Literature perspectives are vulnerable to two contrasting objections. First, as perspectives on *legal* interpretation, they underestimate the power relationships that law privileges, sharing some of the complacency of the Legal Process approach. The feminist critique of statutory interpretation is the most articulate expression of this point of view.[8]

Second, rather than being too complacent about law, "Law and" perspectives pay insufficient attention to the traditional legal values of commitment to the statutory text and legislative intent. The legislative text and historical legislative purpose are realities the interpreter cannot neglect, even though their meaning cannot be perfectly recreated by the judicial reader. An interpretive process that takes these traditional legal values seriously will be different from one that freely indulges interpretive presumptions about private interest legislative bargaining or evolutionary background norms.

Many advocates of "Law and" approaches are coming to recognize the importance of traditional concerns with legislative text and intent.

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4. *See* Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

5. Critiques of the Law and Economics description of the legislative process appear in Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63 (1990). *See also* Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.[-]KENT. L. REV. 123 (1989).

6. A recent review and critique of the Law and Literature movement appear in Weisberg, *The Law-Literature Enterprise*, 1 YALE J. L. & HUM. 1 (1988).

7. *See* Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

8. *See* West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 YALE J. L. & HUM. 129 (1988).

For example, in the Law and Economics school, Judge Posner now leans toward the traditional Legal Process view that the judge's task is to imaginatively reconstruct legislative purpose.[9] And some commentators, who would be sympathetic with the Law and Literature movement, have shied away from its more radical implications, which appear to disregard, or at least minimize, the role of the text and legislative intent. They instead search for ways in which text and intent can constrain the judge without denying a creative judicial role.[10]

The tempering of "Law and" perspectives to take account of traditional concerns with text and intent has led to the development of another school of thought based on legal pragmatism and practical reason.[11] In this view, no single approach to statutory interpretation is acceptable, whether it is a presumption of private bargaining, evolutionary interpretation, or single-minded commitment to text and intent. The importance of one or another criterion of interpretation varies with the area of law and the statutory text; and, further, depends on what the interpreter learns about statutory meaning from her encounter with the facts of the case.[12]

State court cases have not appeared prominently in the recent literature on statutory interpretation. Three reasons may account for this neglect. First, the arena for politically contentious legislation has shifted to Congress. Law reform, once predominantly the domain of state legislation (as in Workers' Compensation and the Uniform Commercial Code), is now largely dealt with by federal statutes (such as securities law, replacing state fraud law; environmental law, superceding state nuisance law; and civil rights law, supplanting state contract law). Redistribution law is now either addressed by federal statute or by state statutes complying with federal standards (as in tax, welfare, and social insurance law).

Second, scholars interested in state law have traditionally focused on the common law rather than statutory interpretation.[13] And, third, state judicial opinions appear less self-conscious about interpretive theory than federal opinions, tending instead toward black letter canons

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9. R. Posner, The Federal Courts: Crisis and Reform 286-93 (1985).

10. *See* Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321, 353-62 (1990).

11. *See* Eskridge & Frickey, *supra* note 10; Posner, *The Jurisprudence of Skepticism*, 86 Mich. L. Rev. 827 (1988); Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. Cal. L. Rev. 543 (1988).

12. *See generally* Eskridge, *Gadamer/Statutory Interpretation*, 90 Colo. L. Rev. 609 (1990).

13. A major exception is G. Calabresi, A Common Law for the Age of Statutes (1982).

of construction. This approach appears to leave little room for academic comment, except to repeat the traditional criticism of these canons.[14]

The neglect of state statutory interpretation is unfortunate. Two of the issues prominent in contemporary literature can be profitably explored in the context of state cases. First, the reliance on black letter canons in state court decisions is a symptom of an emphasis on the statutory text and legislative intent.[15] If we are experiencing a revival of traditional interest in text and intent in statutory interpretation, state court cases are a good place to consider its advantages and pitfalls. Second, the fact that state court opinions tend to be innocent of interpretive theory makes them fertile ground for observing how judges actually make interpretive choices, including whether they behave in the manner predicted by any of the "Law and" approaches to statutory interpretation.

Part IIA of this Article will explain how Indiana decisions apply traditional concerns for the statutory text and legislative intent. Part IIB will analyze the cases for what they reveal about the process of judicial choice to determine statutory meaning. The primary source material was a Westlaw search of opinions specifying the West Statute Keynote (number 361) during the period from 1980 to July 1990. The prior and later history of each case was also examined. This revealed a potential shortcoming in gathering data because the statute keynote number was not always used by West even though the case involved an interesting interpretive issue.[16]

One note of caution is in order before we begin examining Indiana cases. Judicial rhetoric about statutory interpretation is often unhelpful. Responding to the need to speak authoritatively and yet be deferential to the legislature, courts will refer to a litany of interpretive criteria including plain meaning of the text and legislative intent,[17] with little

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14. The classic criticism is Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950).

15. There is a cautious revival of interest in the canons. *See* Eskridge, *supra* note 12, at 662-64; Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 451-54 (1989).

16. The first citation in the following cases does not refer to the statute key number, but the second citation does. Koske v. Townsend Eng'g Co., 551 N.E.2d 437 (Ind. 1990), *rev'g*, 526 N.E.2d 985 (Ind. Ct. App. 1988); Wallis v. Marshall County Comm'rs, 531 N.E.2d 1223 (Ind. Ct. App. 1988), *rev'd*, 546 N.E.2d 843 (Ind. 1989); Community Hosp. v. McKnight, 482 N.E.2d 280 (Ind. Ct. App. 1985), *rev'd*, 493 N.E.2d 775 (Ind. 1986); Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170 (Ind. 1983), *rev'g*, 437 N.E.2d 78 (Ind. Ct. App. 1982); Indiana Dep't of Revenue v. Glendale-Glenbrook Assocs., 404 N.E.2d 1178 (Ind. Ct. App. 1980), *rev'd.* 429 N.E.2d 217 (Ind. 1981).

17. *See, e.g.*, *In re* Middlefork Watershed Conservancy Dist., 508 N.E.2d 574, 577

apparent concern for the complexity of the underlying concepts or whether they have any explanatory power in deciding a case. It is therefore sometimes necessary to separate what the court says from what it does.

In one respect, the rhetoric in Indiana cases is especially misleading. Indiana courts often state that a text with a plain meaning blocks statutory interpretation.[18] The image of a text as a barrier to interpretation fails to capture the practical reasoning process by which judicial readers explicate a text. A text is more accurately viewed, not as a barrier, but as a starting point and as one of many interpretive criteria. The judge makes an initial pass at the relevant text (narrowly defined to be just one or a few words), and, considering the facts, makes a tentative judgment about whether the facts obviously come within the text. Then begins the back and forth process of deciding whether the tentative judgment should prevail. Evidence of legislative intent and a consideration of important background values may place pressure on the initial text-based conclusion. The statutory language is examined again and may be expanded to include more words within the relevant statute and other statutes. If this back and forth process converges to a single meaning, the temptation to say that the meaning is plain and to describe the text as a barrier may be irresistible. But the barrier would be breached in an appropriate case and is, in fact, tentatively breached as the interpretive process unfolds, perhaps unconsciously.[19]

(Ind. Ct. App. 1987) (intent; goals, reasons and policy; context; plain meaning of text; presumption against illogical or absurd meaning; etc.); Alvers v. State, 489 N.E.2d 83, 89 (Ind. Ct. App. 1986) (statute not viewed in isolation; words given plain meaning; look to subsequent enactments; presumption against illogical or absurd meaning; narrow construction of criminal statute; etc); Herbert v. State, 484 N.E.2d 68, 70 (Ind. Ct. App. 1985) (clear language barrier to interpretation; legislative intent fundamental); Jones v. Hendricks County Plan Comm'n, 435 N.E.2d 82, 83-84 (Ind. Ct. App. 1982) (is language uncertain; if so, determine legislative intent; primarily use language; rely on plain, ordinary meaning); Indiana Alcoholic Beverage Comm'n v. Osco Drug, Inc., 431 N.E.2d 823, 833-34 (Ind. Ct. App. 1982) (will not interpret unambiguous language; if ambiguous look at intent, with spirit prevailing over letter of law; legislature presumed aware of existing statutes; statutes interpreted *in pari materia*; specific prevails over general; change of text implies change of meaning; and legislative inaction implies acquiescence).

18. Well over 40 of the 333 opinions examined contained this statement. *See, e.g.*, Heltzel v. Thomas, 516 N.E.2d 103, 106 (Ind. Ct. App. 1987) (may not interpret language plain on its face).

19. Occasionally a decision will acknowledge this complexity: "[I]t is not the clarity or ambiguity of the words used in a statute that determine whether judicial construction of the statute is appropriate; rather it is the clarity or ambiguity of *the meaning* those words give to the statute as a whole." Winona Memorial Found. v. Lomax, 465 N.E.2d 731, 737 (Ind. Ct. App. 1984) (emphasis in original).

II. Criteria for Statutory Interpretation

A. The Statutory Text and Legislative Intent

1. Conception of the text.—A court that is determined to rely on the statutory text must still decide what the relevant text is. It can focus narrowly on the plain meaning of a word or two, on the statute as a whole, on the entire body of statute law, or on changes in statutory language over time. This section considers Indiana courts' conception of the statutory text.

a. Plain meaning, common understanding, and literalism

Judges often claim to focus on the plain meaning of one or two key words in a statutory text,[20] but there is a right and a wrong way to do this. The right way is to identify the audience intended by the legislative author and to determine whether that audience and the statute's likely public audience share a common understanding about what the words mean. When these two meanings converge, there is a common understanding between author and reader, and the text can be said to have a plain meaning.[21]

Another form of "plain meaning" interpretation goes by the pejorative label "literalism." This is the wrong way to go about interpreting texts. The literalist is not really concerned with how an audience understands language but instead disregards what the audience is likely to understand. Indiana courts usually avoid literalism in this sense of the term.[22]

Literalism can occur in two ways. First, the court disregards the text's intended and likely audience. This often has the effect of privileging colloquial usage over technical meaning. For example, in *Indiana Department of State Revenue v. Food Marketing Corp.*,[23] the issue was the meaning of "cost of goods sold" for determining the amount deductible in computing taxable gross income. The dissent appealed to the colloquial meaning of the term,[24] which, in its view, included not much more than the price paid for the product sold. The majority

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20. *See, e.g.*, Herbert v. State, 484 N.E.2d 68, 70 (Ind. Ct. App. 1985) ("may" implies discretion).

21. The most common way in which the intended and the likely public audience can differ is when an old statute contains terms whose meaning changes over time.

22. The term "literalism" is not always used to describe the approach to interpretation that I have criticized. Sometimes it is used as a synonym for plain meaning in the sense of common understanding.

23. 403 N.E.2d 1093 (Ind. Ct. App. 1980).

24. *Id.* at 1098 (Staton, J., dissenting).

adopted the more technical accounting meaning that included various indirect overhead costs attributable to the goods purchased for resale.[25] The majority's reading made more sense in a tax statute aimed at a technically sophisticated audience,[26] and therefore deserves to be characterized as an effort to identify plain meaning in the correct sense of "common understanding."

Second, "literalism" emphasizes the grammar of the text with little regard for how language is actually used and understood. Examples include treating use of the singular or plural as dispositive, assuming that the disjunctive "or" always means an alternative, and according conclusive weight to punctuation. English language writers are not always grammatically precise, and a literal "grammatical" approach may therefore be unfaithful to how meaning is communicated. Realizing this, Indiana courts are reluctant to adopt too grammatical an approach to statutory interpretation.[27]

b. Statute as a whole

A text-based alternative to focusing on one or two words of a statute is to consider the text of the whole statute, as Indiana courts frequently do.[28] The instinct to examine the entire text is well entrenched

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25. *Id.* at 1096-97. See also Foremost Life Ins. Co. v. Dep't of Ins., 274 Ind. 182, 186-87, 409 N.E.2d 1092, 1097 (1980), in which the majority appealed to a technical distinction in the industry between insurance and reinsurance to define the statutory language, and determined that "reinsurance" was not "insurance." The dissent relied on a more colloquial meaning of the statutory terminology ("insurance," "insurer," and "insured"), and applied what it considered an ordinary definition of "insured" to include reinsurance contracts, *Id.* at 1098-99 (Stanton, J., dissenting).

26. The majority actually claimed that it was adopting the ordinary rather than the technical meaning of the phrase "cost of goods sold," *Food Mktg. Corp.*, 403 N.E.2d at 1096, but the dissent correctly characterizes the majority opinion as adopting a technical definition. *Id.* at 1098 (Stanton, J., dissenting).

27. *Singular and plural*: *see, e.g.*, Watkins v. Alvey, 549 N.E.2d 74, 77 (Ind. Ct. App. 1990) (plural not relied on); Northwest Ind. Educ. Assoc. v. School City of Hobart, 503 N.E.2d 920, 922 (Ind. Ct. App. 1987) (singular not relied on).

Disjunctive "or": *see, e.g.*, Dague v. Piper Aircraft Corp. 418 N.E.2d 207, 210 (Ind. 1981) (reading "or" as providing for alternatives would defeat obvious legislative intent).

Punctuation: *see, e.g.*, Hill v. State, 488 N.E.2d 709, 710 (Ind. 1986) (punctuation not dispositive), *rev'g.* 482 N.E.2d 492, 494 (Ind. Ct. App. 1985) (relying on ordinary meaning of punctuation). *But cf.* Spears v. State, 412 N.E.2d 81, 83 (Ind. Ct. App. 1980) (court relied on the literal use of commas to block consideration of legislative intent).

28. *See e.g.*, Kinder v. Doe, 540 N.E.2d 111, 114-15 (Ind. Ct. App. 1989) (court looked to all sections dealing with immunity and confidentiality in child abuse reporting situations to determine when identity of a news reporter could be obtained); Sears & Roebuck & Co. v. Murphy, 511 N.E.2d 515, 516 n.2 (Ind. Ct. App. 1987) (statute construed so language consistent with other parts of the statute); Selmeyer v. Southeastern Ind. Vocational

in some of the traditional canons of construction such as *ejusdem generis* (general words embrace things similar to prior specific references) and *expressio unius est exclusio alterius* (reference to one thing excludes others; or, as Indiana courts often put it, "what is unsaid is as important as what is said").[29] Using the *expressio* canon, however, is often as misguided as being literalist, by attributing to an omission from the text the same sanctity that the literalist accords to a single word or "rule" of grammar without regard to what the statute's audience would infer.[30] The main objection to the *expressio* canon is that the legislature will often specify a result about facts to which it has paid attention, without prejudging situations about which it is silent. The basic instinct of the Indiana courts to look at the *whole* statute is sound, however, whatever the execution.

c. Other statutes

The frequency with which Indiana courts consider the entire body of statute law to help interpret a particular statute was an unexpected finding, based on prior familiarity with federal cases. It is not known whether the Indiana pattern is typical of other states, but there are two plausible reasons for possible differences between state and federal approaches. First, state law encompasses more subjects than federal law, even though the impact of state law is now politically less dramatic. The potential for several statutes covering the same issue is therefore greater. Second, legislative history in the conventional sense of com-

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School, 509 N.E.2d 1150, 1152 (Ind. Ct. App. 1987) (two sections read together to limit applicability of first section); Gary Community Mental Health Center, Inc. v. Indiana Dep't of Pub. Welfare, 507 N.E.2d 1019, 1022 (Ind. Ct. App. 1987) (in light of other provisions requiring "hospital care," the court interpreted statute requiring services to be performed "in a hospital" to mean services provided "by a hospital"); Indiana Tele. Ass'n. v. Public Serv. Comm'n 477 N.E.2d 911, 916-17 (Ind. Ct. App. 1985) (words in one part of statute construed to have same meaning in other parts of the act); Edward Rose of Ind. v. Fountain, 431 N.E.2d 543, 545 (Ind. Ct. App. 1982) (because none of surrounding sections pertaining to notice referred to tenant obligations, statutory notice provision interpreted to apply only to landlords); Suburban Homes Corp. v. Harders, 404 N.E.2d 629, 632 (Ind. Ct. App. 1980) (reference in preceding section to constructed drain indicates that another section does not apply to "natural" watercourse).

29. Health & Hosp. Corp. of Marion County v. Marion County, 470 N.E.2d 1348, 1355, 1356 (Ind. Ct. App. 1984) (reference to *expressio* canon); Metropolitan Dev. Comm'n of Marion County v. Villages, Inc., 464 N.E.2d 367, 369 (Ind. Ct. App. 1984) (what is not said is important; also reference to *expressio* canon); *In re* Turrin, 436 N.E.2d 130, 132 (Ind. Ct. App. 1982) (what statute does not say is important).

30. *See, e.g.*, Seymour Nat'l Bank v. State, 422 N.E.2d 1223, 1227 (Ind. 1981) (exception for false arrest and imprisonment implies no other exceptions); Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170 (Ind. 1983) (exclusion of certain employees implies inclusion of university athletes), *rev'd*, 437 N.E.2d 78, 84 (Ind. Ct. App. 1982).

mittee reports is often unavailable at the state level, and clues to statutory meaning must be found elsewhere, such as in the texts of other statutes.[31]

There are several ways in which multiple statutes are considered by Indiana courts. First, similar language in statutes with a common purpose (statutes *in pari materia*) is interpreted in the same way.[32] It is also a short step from inferring that the use of the same language in different statutes implies a common result to assuming that different language implies different results. Although the court will make that assumption in many cases,[33] mechanical application of this approach

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31. Testimony of the legislative drafter occasionally substitutes for traditional legislative history. *See* Irmscher v. McCue, 504 N.E.2d 1034, 1037 (Ind. Ct. App. 1987) (testimony by one of statute's drafters); Indiana Dep't of Revenue, Ind. Gross Income Tax Div. v. Glendale-Glenbrook Assoc., 429 N.E.2d 217, 219 n.1 (1981) (testimony by state legislator about statutory purpose). *See also* Winona Memorial Found. of Indianapolis v. Lomax, 465 N.E.2d 731, 739-40 n.7 (court cited law review articles written by drafters who lobbied for medical practitioners in support of a position contrary to their interest).

Another form of legislative history is the change in text as the statute works its way through the bill drafting process. *See* Gallagher v. Marion County Victim Advocate Program, Inc., 401 N.E.2d 1362, 1365-66 (Ind. Ct. App. 1980) and *id.* at 1370-71 (Chipman, J., dissenting) (both majority and dissent relied on changes made during the drafting process, but they disagreed about their significance).

32. *In re* Paternity of Joe, 486 N.E.2d 1052, 1055 n.1 (Ind. Ct. App. 1985) ("best interests of child" given same meaning in contexts of visitation and child custody under paternity and divorce statutes); Beasley v. Kwatnez, 445 N.E.2d 1028, 1031 (Ind. Ct. App. 1983) ("vending machine" given same definition in property tax and gross retail sales tax laws); Barr v. Sun Exploration Co., Inc., 436 N.E.2d 821, 825 (Ind. 1982) ("operation for oil and gas" given same meaning in two statutes). *Cf.* Tobias v. Violent Crime Compensation Div., 470 N.E.2d 105, 108 (Ind. Ct. App. 1984) (pecuniary loss concept, developed by cases under workers' compensation, has same meaning when in Victims Compensation Act).

Common law and statutory rules may also be harmonized. *See* DeHart v. State, 471 N.E.2d 312, 315 (Ind. Ct. App. 1984) (statutory violation inferred on basis of analogy to common law nuisance law).

State statutes may be given the same meaning as similar federal statutes. Alvers v. State, 489 N.E.2d 83, 87-89 (Ind. Ct. App. 1986) (Indiana's anti-racketeering statute and federal RICO statute); United Steelworkers of Am., AFL-CIO-CLC v. Northern Ind. Pub. Serv. Co., 436 N.E.2d 826, 829 n.2 (Ind. Ct. App. 1982) (Indiana's Anti-Injunction Act and federal Norris LaGuardia Act); *In re* CTS Corp., 428 N.E.2d 794, 798-99 (Ind. Ct. App. 1981) (Indiana's Business Take-Over Act and federal Williams Act); *In re* City Investing Co., 411 N.E.2d 420, 427 (Ind. Ct. App. 1980) (same); Indiana Dep't of State Revenue, Inheritance Tax Div. v. Estate of Wallace, 408 N.E.2d 150, 157 (Ind. Ct. App. 1980) (Indiana and federal estate tax law). *But see* Flynn v. Klineman, 403 N.E.2d 1117, 1122 (Ind. Ct. App. 1980) (state and federal securities law interpreted differently).

33. *See* Blood v. Poindexter, 534 N.E.2d 768, 771 (Ind. T.C. 1989) (language of Trust Code and Probate Code varies); Minton v. State, 400 N.E.2d 1177, 1179 (Ind. Ct. App. 1980) (language of two criminal statutes differs with reference to inclusion of guilty pleas). *Cf.* Lake County Beverage Co. v. 21st Amendment, Inc., 441 N.E.2d 1008, 1012-13 (Ind. Ct. App. 1982) (language and interpretation of Indiana statute and federal Robinson-Patman Act differ).

is as misguided as mechanical application of the *expressio* canon. Language differences are not routinely indicative of differences in meaning. For example, language may be added to clarify one statute,[34] not to differentiate its meaning from another statute. The court may even be justified in incorporating the approach indicated by the text of one statute into another law, despite language differences.[35]

Second, two statutes that deal with same subject must be harmonized (also sometimes referred to as statutes *in pari materia*).[36] The canon that specific statutes prevail over general statutes is usually applied without controversy,[37] implementing the idea that the text that is more focused on the facts of the case should prevail. The specific prevails even when the general statute is the later-passed law,[38] despite the

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34. *See* Lincoln Nat'l Bank v. Review Bd. of Ind. Employment Sec. Div., 446 N.E.2d 1337, 1339-40 (Ind. Ct. App. 1983) (language was added to a statute to affirm an interpretation reached in a case; the interpreted language also appeared unamended in another statute, which the court interpreted in the same way, even though it had not been amended).

35. Holland v. King, 500 N.E.2d 1229, 1235-37 (Ind. Ct. App. 1986) (statute omits reference to "last known address," which appears in another statute; the court concluded that both statutes require mailing to last known address).

36. Hines v. Behrens, 421 N.E.2d 1155, 1159 (Ind. Ct. App. 1981) (stay of execution statute and foreclosure statute); *In re* Lemond, 413 Ind. 228, 245-46, 413 N.E.2d 228, 245-46 n.15 (1980) (Uniform Child Custody Jurisdiction Act and Child in Need of Services Act).

37. *See, e.g.*, Wayne Township of Allen County v. Hunnicutt, 549 N.E.2d 1051, 1053 (Ind. Ct. App. 1990); Ferguson v. Modern Farm Sys. Inc., 555 N.E.2d 1379, 1383-84 (Ind. Ct. App. 1990); Southwest Forest Indus., Dunlap Div. v. Firth, 435 N.E.2d 295, 297 (Ind. Ct. App. 1982); *In re* Waltz' Estate, 408 N.E.2d 558, 560-61 (Ind. Ct. App. 1980).

When a general statute prevails over a specific statute, there is usually a sound textual basis. *See, e.g.*, K-mart Corp. v. Novak, 521 N.E.2d 1346, 1350-51 (Ind. Ct. App. 1988) (Violent Crimes Compensation Act cross references Workers' Compensation statute, implying that more specific Crimes Act did not supercede Workers' Compensation law); Citizens Action Coalition of Ind., Inc. v. Public Serv. Comm'n of Ind., 425 N.E.2d 178, 184-85 (Ind. Ct. App. 1981) (general statute prevails because it contains a provision that it applies unless "expressly provided by statute"). *See also* State *ex rel.* Indiana Life & Health Ins. Guar. Assoc. v. Superior Court of Marion County, Room No. 7, 272 Ind. 421, 426-27, 399 N.E.2d 356, 359 (Ind. 1980) (prior enabling act granting jurisdiction to the superior court survives passage of later special proceeding act requiring certain claims to be filed in the circuit court, when prior law expressly provides for concurrent and co-extensive jurisdiction within the circuit court).

It is usually easy to tell which is the more specific statute. *But see* Gilbert v. State, 411 N.E.2d 155, 157 (Ind. Ct. App. 1980) ("private road" more specific than "not a part of a through highway," on the ground that latter phrase might include more than a private roadway).

38. Johnson v. LaPorte Bank & Trust Comm'rs, 470 N.E.2d 350, 355 (Ind. Ct. App. 1984); County Council of Bartholomew County v. Department of Pub. Welfare of Bartholomew County, 400 N.E.2d 1187, 1191 (Ind. Ct. App. 1980).

Often the opinion is silent as to which statute is earlier. *See* Sanders v. State, 466 N.E.2d 424, 428 (Ind. 1984); Bell v. Bingham, 484 N.E.2d 624, 627-28 (Ind. Ct. App. 1985);

presumption that a later statute usually takes priority in cases of conflict over an earlier law.[39]

In other instances, several statutes may deal with the same general area of law but there is no more specific text to prevail over the more general language of another law. The court, in such cases, must work out a sensible pattern to harmonize the statutes.[40]

A number of theories might explain the courts' purpose in consulting several statutory texts to interpret one of them.[41] One theory is that examining several statutes implements legislative intent because the drafter is likely to have the entire body of law in mind when writing statutes.[42] This cannot, however, explain all of the cases in which multiple statutory texts are considered. The refusal to allow a general statute to take precedence over a specific law rests on the assumption that the legislative drafter did *not* focus carefully on the specific statute, but that the legislature would have wanted the specific law to survive if it had paid attention. Moreover, when later law influences the meaning of *prior* law,[43] the court is not likely to be making a genuine inference about what an omnipotent legislative drafter intended.

Hoage v. State, 479 N.E.2d 1362, 1363-64 (Ind. Ct. App. 1985); State v. Souder, 444 N.E.2d 891, 893 (Ind. Ct. App. 1983); Sexton v. Johnson Suburban Utils., 422 N.E.2d 1293, 1296 (Ind. Ct. App. 1981); Wagner v. Kendall, 413 N.E.2d 302, 304-305 (Ind. Ct. App. 1980).

39. Blood v. Poindexter, 524 N.E.2d 824, 825 (Ind. T.C. 1988).

40. *See, e.g.*, McClaskey v. Bumb & Mueller Farms, Inc., 547 N.E.2d 302, 304 (Ind. Ct. App. 1989) (Marketable Title Act relieves the covenants imposed by a warranty deed only to the extent that a claim is extinguished by the Act, thereby harmonizing the Act with another statute governing warranties of title); State v. Magnuson, 488 N.E.2d 743, 751 (Ind. Ct. App. 1986) (Department of Safety and Police Department statutes dealing with statistics gathering were harmonized by concluding that earlier statute imposing obligation to gather statistics was not impliedly repealed by later law dealing with same general subject); Wright v. Gettinger, 428 N.E.2d 1212, 1219-20 (1981) (voting procedure statutes harmonized to determine that prior law requiring clerk to sign ballots survives in part after passage of Electronic Voting System Act); County Council of Monroe County v. State *ex rel.* Monroe County Bd. of Pub. Welfare, 402 N.E.2d 1285, 1288-91 (Ind. Ct. App. 1980) (agency powers harmonized under State Personnel Act, Welfare Act of 1936, and county council statutes).

41. This discussion may also apply to language in the same statute, if the drafter does not consider carefully how the portions of the text interact. Moreover, if different parts of the same statute are not passed during the same session, the text resembles two statutes passed at different times. *See, e.g.*, Indiana Tel. Assoc. Inc. v. Public Serv. Comm'n, 477 N.E.2d 911, 914 (Ind. Ct. App. 1985) (parts of the Public Service Commission Act passed in 1913 and 1951).

42. Indiana cases incorporate this idea when the courts state that the legislature is presumed to be aware of prior law. *See* Wayne Township of Allen County v. Hunnicutt, 549 N.E.2d 1051, 1054 (Ind. Ct. App. 1990); Blood v. Poindexter, 534 N.E.2d 768, 771 (Ind. T.C. 1989).

43. *See, e.g.*, Gallagher v. Marion County Victim Advocate Program, Inc., 401 N.E.2d 1362, 1368 (Ind. Ct. App. 1980) (the language "required . . . by any rule or regulation of

A second theory explaining why courts examine the entire body of statute law is that sophisticated readers will consider this body of law when deciphering the meaning of any one statute. However, this explanation also seems farfetched because it rests on the possibly unwarranted assumption that the text is being read by very sophisticated readers.

Much as courts dislike admitting it, judicial reliance on the text of multiple statutes may not implement legislative intent *or* the understanding reached by sophisticated readers. Instead, examining multiple statutes may achieve a number of institutional goals, such as forcing the legislature to pay closer attention to what it writes, encouraging lawyers to read the entire body of statute law, and discouraging judges from excessively creative speculation about legislative purpose. Finally, the examination of multiple statutes may simply be a judicial method for dealing with an absence of legislative history to provide concrete evidence of legislative intent.

d. Change in statute over time

Indiana courts also rely on the relationship between several statutory texts when there is a change in statutory language over time. They often presume that a change in language implies a change in meaning[44]

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any administrative body or agency" contained in a 1953 statute was read in light of a 1969 statute specifying how an agency makes rules). The dissent questioned how a later law could be used to interpret a prior statute. *Id.* at 1369 n.1 (Chipman, J., dissenting).

44. *Relevant events in cases arose after passage of the second statute*: Wallis v. Marshall County Comm'r, 546 N.E.2d 843, 844 (Ind. 1989); Bonge v. Risinger, 511 N.E.2d 1082, 1084 (Ind. Ct. App. 1987); Second Nat'l Bank of Danville v. Massey-Ferguson Credit Corp., 478 N.E.2d 916, 918 (Ind. Ct. App. 1985); Metropolitan School Dist. of Martinsville v. Mason, 451 N.E.2d 349, 352 (Ind. Ct. App. 1983); Ware v. State, 441 N.E.2d 20, 22-23 (Ind. Ct. App. 1982); Aeronautics Comm'n of Ind. v. State *ex rel.* Emmis Broadcasting Corp., 440 N.E.2d 700, 709 (Ind. Ct. App. 1982); Landers v. Pickering, 427 N.E.2d 716, 718 (Ind. Ct. App. 1981); Froberg v. Northern Ind. Constr. Inc., 416 N.E.2d 451, 453-54 (Ind. Ct. App. 1981); Indiana Dep't of State Revenue, Inheritance Tax Div. v. Lees, 418 N.E.2d 226, 228 (Ind. Ct. App. 1980).

Relevant events in cases probably arose after passage of the second statute: Lake County Beverage Co., v. 21st Amendment, Inc., 441 N.E.2d 1008, 1011 (Ind. Ct. App. 1982); Tarver v. Dix, 421 N.E.2d 693, 698 (Ind. Ct. App. 1981); *In re* Wisely's Estate, 402 N.E.2d 14, 16 (Ind. Ct. App. 1980).

Relevant events in cases arose before passage of the second statute: State v. Page, 472 N.E.2d 1271, 1273 (Ind. Ct. App. 1985); Wright v. Fowler, 459 N.E.2d 386, 389-90 (Ind. Ct. App. 1984); Pierce Governor Co. v. Review Bd. of Ind. Employment Sec. Div., 426 N.E.2d 700, 702-03 (Ind. Ct. App. 1981); Van Orman v. State, 416 N.E.2d 1301, 1305 (Ind. Ct. App. 1981).

unless the better explanation for the change is an attempt to clarify the law.[45] Perhaps the inference that legislative drafters have prior statutes in mind is more plausible when statutory texts are changed than in other cases in which statutory texts are interpreted as part of an integrated body of law.

When changes in later law are used to infer the meaning of *prior* law, as happened in a number of the cases cited above,[46] two problems arise. First, the intent of a later legislature is often very doubtful evidence of what the legislature adopting the prior statute meant.[47] The influence of later law on the meaning of a prior statute is therefore an example of retroactive legislation, which runs counter to the usual presumption against retroactive statutes.[48] Second, the retroactive impact may be unfair if the events are governed by the earlier statute and arise prior to passage of the second statute. There is no way the affected parties can draw inferences about the meaning of prior law from statutes not passed when the events occur.[49]

This is not to suggest that the use of a later statutory text to influence the meaning of prior law is necessarily wrong. Retroactive texts are very familiar when they occur in the form of common law opinions. Perhaps the use of later statutes to interpret prior law is an

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45. The relevant events in the following cases arose *before* passage of the clarifying statute. Watkins v. Alvey, 549 N.E.2d 74, 77 (Ind. Ct. App. 1990) (statute explicitly states it is a clarification); Alvers v. State, 489 N.E.2d 83, 88-89 (Ind. Ct. App. 1986); Pike County v. State, 469 N.E.2d 1188, 1194 (Ind. Ct. App. 1984) (some events before and some after second statute); Indiana State Highway Comm'n v. Bates & Rogers Constr., Inc., 448 N.E.2d 321, 325 (Ind. Ct. App. 1983); Marsym Dev. Corp. v. Winchester Economic Dev. Comm'r, 447 N.E.2d 1138, 1144 (Ind. Ct. App. 1983); H.W.K. v. M.A.G., 426 N.E.2d 129, 134 (Ind. Ct. App. 1981).

46. *See supra* notes 44-45.

47. *See* Wechter v. Indiana Dep't of State Revenue, 544 N.E.2d 221, 223 (Ind. T.C. 1989) *aff'd.* 553 N.E.2d 844 (1990)(later law bad evidence of original intent); Bailey v. Menzie, 505 N.E.2d 126, 128 (Ind. Ct. App. 1987) (intent of a later legislature is unreliable evidence of intent of legislature that passed earlier statute). *See also* Hobbs v. State, 451 N.E.2d 356, 359 (Ind. Ct. App. 1983) (the court rejected a statement in a preamble about the meaning of prior law). When the second law is passed during the same legislative session, however, the second statute may reflect the intent of those enacting the prior law. *Cf.* H.W.K. v. M.A.G., 426 N.E.2d 129, 134 (Ind. Ct. App. 1981) (the fact that a change occurred within five months of original passage supports the view that the second law was a clarification).

48. *See* Appendix § V.

49. The retroactive impact of a later statute is not unfair if the events precede the effective date of the later law but follow the passage of the statute. This occurred in American Underwriters Group, Inc. v. Williamson, 496 N.E.2d 807, 809 n.3 (Ind. Ct. App. 1986); State Farm Fire & Casualty Co. v. Strutco Div., King Seeley Thermos Co., 540 N.E.2d 597, 597-98 (Ind. 1989), *rev'g*, 530 N.E.2d 116, 119 (Ind. Ct. App. 1988) (treating addition of language as change in law). As long as the events follow passage, there is notice of the later statute on which the parties can rely.

unacknowledged example of the assimilation of statute law to a pattern of lawmaking long familiar in the common law.

e. Summary

In sum, Indiana cases are rarely literalist in their approach to the statutory text: quite the opposite. They are committed to a broad definition of the text, often placing great weight on the use of language in other statutes and in earlier and later versions of the same statute. Defining the text broadly may not, however, serve the public reliance values that are usually associated with judicial deference to the text. Courts may instead be looking at the entire body of statutory law to force legislatures and lawyers to think of statutes as an integrated body of law, in much the same way that the common law has traditionally been viewed as a seamless web.

2. Conflict Between Text and Intent.—

a. Defining the problem

The concept of legislative intent is as complex as the concept of a "text."[50] One meaning of "intent" is the broad concept of legislative purpose, such as "favoring social insurance claimants." Those who object to creative judicial elaboration of legislative intent usually have this concept in mind because judicial speculation about purpose may exaggerate one of several purposes (often one side of a legislative bargain) or underestimate the extent to which an overbroad statute was purposely adopted.[51] The better definition of legislative intent, and the

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50. The values supported by deference to legislative intent are not the same as those served by deference to the text. Adherence to a fairly narrow definition of the text (excluding other statutes, for example) will usually preserve reliance interests by adhering to the most straightforward reading of the text, reduce discretion in interpreting the law, and preserve the integrity of political language. Adherence to legislative intent (assuming it can be identified with some confidence) implements legislative supremacy. When the evidence of the text's meaning and legislative intent points to the same result, as they often do, there is no tension between these two criteria. But tensions between the meaning of the text and legislative intent sometimes appear and must be resolved.

These generalizations about the effect of relying on text and intent require some qualification. If the text is given an expansive definition, its meaning becomes less certain, undermining the ability of deference to the text to protect reliance interests and discourage interpretive creativity. It is often asserted that judicial speculation about legislative intent is a common means by which interpreters exercise discretion, as observations about actual intent shade off into plausible intent and, finally, into speculation that the legislature would pursue good policy. But sticking to the text may also give rein to interpretive discretion when a choice must be made between narrower and broader definitions of the relevant text.

51. *See, e.g.*, M & K Corp. v. Farmers State Bank, 496 N.E.2d 111, 112-13 (Ind. Ct. App. 1986) (statute conclusively presumes that the risk of loss for employee forgery rests on employer and does not allow proof that a negligent bank was better able to prevent loss in a particular case).

one we will be concerned with here, is specific intent in the sense that the legislature would have wanted a particular result on the facts of the case.

A judge often has difficulty guessing what the legislature's specific intent would be. Translating general purpose into specific intent is often very difficult. Background values such as the presumption that statutes are not in derogation of the common law and the liberal interpretation of social legislation are not sufficiently persuasive in most cases to be confidently equated with legislative intent.[52] Nonetheless, an honest attempt to identify legislative intent will sometimes produce the conviction that intent and text conflict, requiring a judicial resolution. When such a conflict occurs, judicial rhetoric is available to permit trumping the text with intent. Thus, an absurd interpretation of the text is to be avoided and absurdity is often determined by reference to presumed legislative intent.[53] The court can also invoke background values in support of legislative intent, even in the weak form of preserving "public convenience."[54]

b. Specific legislative intent

Two Indiana cases in which specific legislative intent clearly trumped the text involve tax issues. In both, the Indiana Supreme Court reversed the lower court's adherence to the letter of the law. One decision imposed a tax, counter to the traditional pro-taxpayer presumption, and the other permitted an exemption in contradiction of the presumption against tax exemptions.[55] In *Park 100 Development Co. v. Indiana Department of State Revenue*,[56] the court considered a statute taxing partnerships with a corporate partner. The intent of the statute was to prevent corporate taxpayers from avoiding the corporate tax by forming partnerships. The state tried to tax a partnership with three

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52. Other problems with determining specific legislative intent include determining how evolutionary the author's intent might be, regardless of the document's historically contingent context, and deciding whose intent counts (the intent of a legislative committee, for example).

53. Hill v. State, 488 N.E.2d 709, 710 (Ind. 1986) (absurd to read statute as allowing exempt retail sales of fireworks, given legislative intent). *See also* U.S. Steel Corp. v. Northern Ind. Pub. Serv., Inc., 486 N.E.2d 1082, 1084 (Ind. Ct. App. 1985) (literal reading of "public utility" rejected because it would include homeowner engaged in backyard gardening in the definition); Vickery v. City of Carmel, 424 N.E.2d 147, 149-50 (Ind. Ct. App. 1981) (court corrects textual anomaly that would exempt property outside city from eminent domain procedure applicable to property in city).

54. *See, e.g.*, State *ex rel.* Stream Pollution Control Bd. v. Town of Wolcott, 433 N.E.2d 62, 65 (Ind. Ct. App. 1982) (prevent absurdity and hardship and favor public convenience); Sidell v. Review Bd. of Ind. Employment Sec. Div., 428 N.E.2d 281, 284 (Ind. Ct. App. 1981); Walton v. State, 398 N.E.2d 667, 671 (Ind. 1980) (same).

55. *See* Appendix § IV.

56. 429 N.E.2d 220 (Ind. 1981), *rev'g*, 388 N.E.2d 293 (Ind. Ct. App. 1979).

partners, one of which was a partnership that itself had a corporate partner. The corporate partner was attempting to avoid the statute by interposing a partnership between it and another partnership. The court of appeals applied the letter of the law, permitting the use of the intervening partnership to avoid tax. The supreme court applied statutory intent to impose tax.[57]

Indiana Department of Revenue, Indiana Gross Income Tax Division v. Glendale-Glenbrook Associates[58] dealt with the same statute taxing partnerships with a corporate partner. The facts of the case, however, involved an otherwise exempt corporation (an insurance company) that was a partner. The supreme court upheld the exemption, overruling the lower court's decision to impose tax by relying on the statutory text.[59]

Another case of intent trumping text runs counter to an even more hallowed presumption — the narrow construction of criminal law. In *Hill v. State*,[60] a semicolon in the wrong place made the text appear to permit retail sales of fireworks if a retail buyer affirmed his intent to ship the fireworks out of state. The court, however, invoked legislative intent to permit only wholesale sales, reversing the lower court's decision that the criminal accused was entitled to the letter of the law.[61]

c. Background values

Another way a court can prefer legislative intent over the text is by appealing to background values in the light in which the legislature is presumed to have acted. Statutory interpretation cases abound with such substantive presumptions, such as: narrowly interpreting statutes in derogation of the common law, and its antidote, the liberal interpretation of welfare statutes; strict interpretation of criminal law; nar-

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57. *Id.* at 222-23. Another case in which the taxpayer was denied the benefit of plain meaning is Indiana State Bd. of Tax Comm'rs v. Ropp, 446 N.E.2d 20, 25 (Ind. Ct. App. 1983) (notice of hearing amounted to substantial compliance with statutory requirements because any error did not prejudice the taxpayers).

58. 429 N.E.2d 217 (Ind. 1981), *rev'g*, 404 N.E.2d 1178 (Ind. Ct. App. 1980).

59. *Id.* at 218-19 (the statute clearly intended to close a loophole that the taxpayer was not attempting to exploit).

60. 488 N.E.2d 709, 710 (Ind. 1986), *rev'g*, 482 N.E.2d 492 (Ind. Ct. App. 1985). *See also* Watkins v. Alvey, 549 N.E.2d 74, 77 (Ind. Ct. App. 1990) (intent of criminal law prevails over literal construction of statute dealing with pyramid schemes).

61. Effective after this case, the Indiana legislature amended the statute to exempt retail sales if the fireworks were shipped out of state within five days of purchase. Apparently, a written signed statement from the purchaser will protect the seller. IND. CODE ANN. § 22-11-14-4(a)(1)(B), (b)(4) (Burns 1986) (as amended by Pub. L. No. 229-1985 § 2, April 19, 1985). Whether this means that the court misread the enacting legislature's intent or that the fireworks industry now had sufficient political clout to get its way is unclear.

row construction of taxing statutes; and, looking in the other direction, construing tax exemptions against the taxpayer; and, the presumption that statutes are prospective unless they are remedial or procedural. It is usually a mistake to assume that these presumptions implement legislative intent in any realistic sense of the term. A presumption serves that purpose only when the reader can confidently say that the legislature's failure to incorporate the presumption into the text is an obvious oversight, that applying the presumption "goes without saying." Instead, these presumptions are usually obsolete generalities. At best, they have little predictive value for the results of a case.[62] This is documented in the Appendix to this Article, reporting Indiana cases that both follow and refuse to follow the presumptions traditionally invoked to justify specific statutory interpretations. At worst, judicial discussion of a presumption obstructs analysis, as when the judge speculates about whether a tax deduction should be subject to the presumption disfavoring tax exemptions,[63] or the majority invokes the presumption against taxation and the dissent invokes the maxim discouraging tax exemption.[64] The best course would be for the court not to invoke the substantive presumptions at all, a trend that may be discernible in at least some tax cases.[65]

The only presumption with much explanatory power for predicting judicial decisions is that favoring the accused. Many of the cases on this issue, cited in Section III of the Appendix, gave the accused the benefit of the doubt, even to the point of allowing the appellate court

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62. *See* Llewellyn, *supra* note 14.

63. Indiana Dep't of State Revenue v. Endress & Hauser, Inc., 404 N.E.2d 1173, 1176 (Ind. Ct. App. 1980) (it is not clear whether deductions are strictly construed, like exemptions; but, in any event, the case did not deal with a deduction *per se* because the issue was whether a deduction that was clearly allowed under the federal income tax is allowed under the Indiana income tax); Indiana Dep't of State Revenue v. Food Mkt. Corp., 403 N.E.2d 1093, 1101-02 (Ind. Ct. App. 1980) (Staton, J., dissenting) (deductions are strictly construed, like exemptions).

64. Indiana Dep't of State Revenue v. Food Mktg. Corp., 403 N.E.2d 1093 (Ind. Ct. App. 1980) (majority says tax statute should be interpreted in favor of taxpayer, *id.* at 1096, and Judge Staton, in dissent, says deductions are like exemptions, to be interpreted against taxpayer, *id.* at 1101-02); Dep't of State Revenue v. National Bank of Logansport, 402 N.E.2d 1008 (Ind. Ct. App. 1980) (majority says no ambiguity so no room to apply presumption against tax exemption; in any event, should interpret tax law in favor of taxpayer, *id.* at 1010, and Judge Buchanan, in dissent, applies a presumption against tax exemption, *id.* at 1011).

65. For example, no presumption was mentioned in the following tax cases: Blood v. Poindexter, 534 N.E.2d 768 (Ind. T.C. 1989); Matter of Souder's Estate, 421 N.E.2d 12 (Ind. Ct. App. 1981); Matter of Waltz' Estate, 408 N.E.2d 558 (Ind. Ct. App. 1980); Matter of Wisely's Estate, 402 N.E.2d 14 (Ind. Ct. App. 1980).

to reverse a trial court's finding on a question of fact.[66] In a few criminal cases, the background value favoring strict construction may explain the court's reading of the *mens rea* requirement into the text.[67]

It is possible that another reader of Indiana opinions would uncover other cases in which intent appears to trump a clear text, but the effort would not be worthwhile. The statutory text can be defined in so many ways by expanding and contracting the relevant language that a plausible claim of textual uncertainty can often be made. Intent can also be identified in different ways, so that at least one plausible definition will coincide with a text-based argument. Clear conflict between text and intent is therefore unusual; probably only in a small number of cases there would be agreement that such a conflict existed.

In the meantime, more interesting statutory interpretation problems might be neglected. These problems concern how to interpret statutes with a complex text and with different types of evidence of legislative intent and background considerations, all of which must be filtered through the judge's perspective on which criteria of statutory meaning are most important. The following Part IIB turns to these issues.

B. Judicial Choice and Statutory Interpretation

How do Indiana courts make choices about what weight should be attributed to different criteria of statutory meaning and whether to apply any of the "Law and" approaches to statutory interpretation? Section IIB1 discusses cases in which the court appears to choose the plain meaning of the text as the dominant interpretive criterion, but in which there is evidence that policy considerations are driving the court's decision to defer to the text. The back and forth process of evaluating statutory language, legislative intent, and background considerations may eventually alight on the text, but the decision to favor the text over non-text based interpretive criteria seems influenced by the particular values served by this result.

Section IIB2 examines Indiana decisions to determine whether the "Law and" approaches to statutory interpretation have had any impact. Some evidence exists that the Law and Economics perspective, which

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66. *See* Sheppard v. State, 484 N.E.2d 984, 988 (Ind. Ct. App. 1985) (the appellate court rejected a finding of fact by the trial court that phone calls were "coercive" and therefore constituted obstruction of justice).

67. State v. Keihn, 542 N.E.2d 963, 965-68 (Ind. 1989), *rev'g*, 530 Ind. App. 747 (Ind. Ct. App. 1988); Miller v. State, 496 N.E.2d 592, 593 (Ind. Ct. App.), *vacated*, 502 N.E.2d 92, 94 (Ind. 1986).

expects private interest bargaining to underlie a statute, has sometimes prevailed. The evolutionary approach to statutory interpretation is also occasionally adopted, but the courts are loathe to admit it. In any event, "Law and" perspectives are selectively applied, in keeping with a pragmatic and practical reasoning approach to statutory interpretation, rather than in the spirit of a devotee wholeheartedly committed to a particular "Law and" perspective.

1. Judicial "Choice" to Rely on the Text.—The judicial decision to rely on the text appears deferential, but we should not necessarily take judicial rhetoric at face value. The text may sometimes be chosen as part of a complex interpretive process whereby text, legislative intent, and background considerations interact to determine statutory meaning. This process can be observed in a group of Indiana cases dealing with law enforcement, means-tested welfare, and land use control by property owners. These areas of law raise difficult and contentious policy issues, and the court will often argue that it is simply deferring to the plain meaning of the text, eschewing policy concerns. There is no easy way to determine whether deference to the text is a neutral principle or whether the court defers to the text because it serves a particular policy objective, that remains unstated. However, we are entitled to be suspicious about the claim that deference to the text is a neutral principle if the text is *rejected* in other cases to implement the very same policies which were served by deference to the text in another case. This suspicion is reinforced if those policies are favored in deciding a case in which the statutory text is unclear. Policy choices, in other words, may sometimes drive the decision to defer to the text.

a. Lawsuits involving law enforcement

Two cases seem to apply the statutory text's plain meaning to prevent lawsuits that might disrupt law enforcement. In *Seymour National Bank v. State*,[68] the statute provided governmental immunity, as follows: a "governmental entity or an employee acting within the scope of his employment is not liable if a loss results from . . . the adoption and enforcement of, or failure to adopt and enforce, a law, . . . unless the act of enforcement constitutes false arrest or false imprisonment."[69] A plaintiff injured in a high speed police chase sued the state. The plain meaning of the text indicated that the defendant was immune and the majority agreed, stating that the statute granting immunity for "enforcement of . . . law" was clear.

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68. 422 N.E.2d 1223 (Ind.), *reh'g granted*, 428 N.E.2d 203 (Ind. 1981).
69. *Id.* at 1223-24 (quoting IND. CODE § 34-4-16.5-3(7) (1974) (as amended in 1976)).

The dissenting judges thought that granting complete immunity to police officers engaged in law enforcement was harsh[70] and unreasonable.[71] Justice Hunter rejected the view that the legislature intended a literal application of the statutory language, and invoked the image of a police car crashing into a playground.[72]

On rehearing,[73] the majority adhered to its view that the text was clear, but then qualified its earlier opinion to preclude immunity if the acts were "so outrageous as to be incompatible with the performance of the duty undertaken. . . . Such acts, whether intentional or willful or wanton, are simply beyond the scope of employment."[74] The court did nothing to dispel the idea that plowing into a playground might be within the scope of employment and, therefore, immune.

In *Burks v. Bolerjack*, the plaintiff sued a sheriff for false imprisonment.[75] The statute protected government employees from suit, as follows: "A judgment rendered with respect to or a settlement made by a governmental entity bars an action by the claimant against an employee whose conduct gave rise to the claim resulting in the judgment or settlement."[76] A claim against the government arising from the same facts had been dismissed because the plaintiff failed to provide timely notice, and a subsequent suit against a sheriff was then dismissed under the statute on the ground that the statutory text's plain meaning barred the suit.

The court of appeals considered this result "absurd,"[77] and the supreme court's dissent deemed it "arbitrary and inequitable."[78] The lower court concluded that the claim would not have been barred if the plaintiff had sued the sheriff directly, without first suing the government. It therefore made no sense to bar the plaintiff from suing the government employee just because its suit against the government was not timely.[79] The supreme court's dissent interpreted the statute to apply only when the suit against the government was resolved on

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70. *Id.* at 1227 (DeBruler, J., dissenting).

71. *Id.* at 1228 (Hunter, J., dissenting).

72. *Id.* at 1227-28 (Hunter, J., dissenting).

73. Seymour Nat'l Bank v. State, 428 N.E.2d 203 (Ind. 1981).

74. *Id.* at 204. At the same time, however, the majority admitted that immunity was unnecessary when acts were beyond the scope of employment because the government would not then be liable, and said nothing to dispel the impression that the state would not be liable if a police car engaging in a high speed chase crashed into a playground. *Id.*

75. 427 N.E.2d 887, 888 (Ind. 1981).

76. *Id.* at 889 (citing IND. CODE ANN. § 34-4-16.5-5 (Burns Supp. 1980).

77. Burks v. Bolerjack, 411 N.E.2d 148, 151 (Ind. Ct. App. 1980)).

78. *Burks*, 427 N.E.2d at 891 (DeBruler, J., dissenting).

79. *Burks,* 411 N.E.2d at 151.

the merits, in effect extending the government's res judicata claim to employees.[80]

The opinions in these two cases could be analyzed as simply a conflict between the statutory text and the potentially harsh policy implications of applying its clear meaning. In this view of the interpretive process, the harsh policy implications of tort immunity were irrelevant. The text simply prevailed. Another decision suggests, however, that policy concerns about disrupting law enforcement played a significant role in the court's decision to rely on the text.

Gallagher v. Marion County Victim Advocate Program, Inc.[81] dealt with access to public records. The statute made available to the public "any writing in any form necessary, under or required, or directed to be made by any statute or by any rule or regulation . . . ."[82] The writings at issue were material prepared by police officers at the scene of a crime or accident setting forth the location, time, and description of the event, with names of victims, witnesses, or suspects. These writings were sought by an association whose purpose was to aid victims of violent crime.[83]

The text-based arguments marginally favored disclosure. As the dissent noted, the statute explicitly required a liberal construction of its provisions favoring disclosure,[84] and explicit exceptions from disclosure in other statutes did not mention the type of records in this case.[85] The dissenting judge also could not accept the dramatic consequences of barring disclosure, which left public access to routine police records at the unfettered discretion of the police department.[86]

The majority decided, however, that these records were kept in accordance with discretionary police practice, which did not fall within the statute mandating disclosure of records "required" by "statute, rule or regulation."[87] The court took the somewhat unusual position

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80. *Burks*, 427 N.E.2d at 891 (DeBruler, J., dissenting).

81. 401 N.E.2d 1362 (Ind. Ct. App. 1980).

82. *Id.* at 1363 (citing IND. CODE ANN. § 5-14-1-2(1) (Burns Supp. 1976)).

83. *Id.*

84. *Id.* at 1369-70 n.2 (Chipman, J., dissenting).

85. The majority dealt satisfactorily with the fact that a special exception from disclosure of police records had been deleted as the bill passed through the legislature. The draft from which this was deleted contained a broad definition of publicly available records. The final bill both deleted the exception and narrowed the definition. *Id.* at 1366. According to the majority, the combination of the deletion and the narrowing of the definition precluded any inference about disclosure of police records in the final statute. The dissent made much of the deletion, arguing that the deletion of an exception for police records implied a "conscious legislative decision to include police records within the definition of public records." *Id.* at 1370 (Chipman, J., dissenting).

86. *Id.* at 1369, 1371.

87. *Id.* at 1367-68.

that a later statute determining how agency rules were to be adopted defined what constituted a "rule" under the prior statute, even though the legislature whose intent was at issue could not have been aware of the later provision about adopting agency rules.[88]

The majority was quite aggressive in asserting its disinterest in policy concerns, stating that "[i]n the construction of statutes, we have nothing to do with questions of policy and political morals; such matters are for the consideration of the Legislature. . . . Consideration of hardships cannot properly lead a court to broaden a statute beyond its legitimate limits."[89] The majority protested too much. Certainly, nothing in the statute's text forced or even strongly indicated a decision one way or the other. If anything, the text favored disclosure. It is hard to imagine that the court reached its decision without making a policy judgment that law enforcement might be too disrupted by permitting access to police records. We may, therefore, infer that the decisions relying on the text to provide inmunity from suits that might interfere with law enforcement[90] were also influenced by the fact that deference to the text served the same goals.[91] This inference is further reinforced by the fact that Indiana courts in *non*law enforcement contexts do *not* favor sovereign immunity.[92]

b. Means-tested welfare

Indiana Department of Public Welfare v. Guardianship of McIntyre[93] involved a Welfare Department claim to recoup government payments of medical expenses from a welfare recipient's subsequent

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88. *Id.* at 1368. The dissent explicitly disagreed with this analysis. *Id.* at 1369 n.1 (Chipman, J., dissenting).

89. *Id.* at 1364.

90. *See supra* notes 68-81 and accompanying text.

91. Justice Hunter's opinion on rehearing in Seymour Nat'l Bank v. State, 428 N.E.2d 203, 205 (Ind. 1981) (Hunter, J., dissenting in part, concurring in part), also illustrates how text-based arguments are sensitive to policy concerns. Confronted with the majority's concession that the most extreme cases of wanton and willful misconduct did not constitute "enforcement of law" and were therefore not immune, *id.* at 204, he shifted the grounds of his dissent (which was unfavorable to immunity) to argue that the "enforcement of a law" language was ambiguous, rather than that its literal meaning should not be applied. *Id.* at 205-06 (Hunter, J., dissenting).

92. For example, in Indiana State Highway Comm'n v. Indiana Civil Rights Comm'n, 424 N.E.2d 1024 (Ind. Ct. App. 1981), the statute permitted suits against "persons." Despite a tradition against interpreting the statutory term "person" to include the state, the court permitted the suit, using very strong anti-immunity language. *Id.* at 1032 ("The logic of the law today does not support the use of sovereign immunity to bring the State outside a statute, when the statute strongly implies otherwise.").

93. 471 N.E.2d 6 (Ind. Ct. App. 1984).

tort recovery. The statute gave the government a lien against tort recoveries "to the extent of the amount paid by the department,"[94] in effect according the government a right of subrogation based on the financial aid it provided the tort victim. The court held that this language clearly gave the state a first claim to the entire tort recovery.

An initial pass at this language seems to support the majority's conclusion that the statute "clearly" gives the government first claim. According to the dissent, however, policy considerations suggested that the funds should be allocated in accordance with the court's discretion.[95] Insurance ceilings and defendant insolvency made recoveries inadequate and the plaintiff often had additional injury-related expenses that could be paid out of some portion of the recovery, if the government did not get it all. Without a clear statement in the statute, the dissent concluded that the statute incorporated the traditional judicial practice of exercising equitable discretion when distributing recoveries to holders of subrogation rights.

As for the statutory language, the dissent compared the language of the Indiana law to a Wisconsin statute[96] which stated that, after attorney fees, the money "paid by the state should be deducted next and the remainder paid to the public assistance recipient."[97] *That* was clear language giving the government first claim to the tort recovery.

Under pressure from the dissent's policy concerns and traditional equitable discretion practice, the majority was not so certain that the statute's text was clear. It justified its result by expanding the relevant text to include a prior statute that had used the word "subrogation" and had been interpreted to give courts equitable discretion.[98] However, the term "subrogation" had been deleted from the statute by the time this case arose, which suggested that the discretionary judicial power to qualify the government's recoupment rights had been withdrawn.[99]

The majority did not explicitly reinforce its commitment to the text with policy justifications for not allowing judicial apportionment of tort recoveries, even though a concern for protecting government revenue was a strong candidate. Should we therefore assume that such policy concerns played no part in the decision? Was the text the most important criterion, with other considerations playing only a tangential role? Or was the text a convenient way to implement the policy of protecting government revenue?

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94. *Id.* at 8.
95. *Id.* at 10 (Young, J., dissenting).
96. *Id.*
97. *Id.* at 9.
98. *Id.* at 8.
99. *Id.* at 8-9.

The decision in another welfare case involving eligibility for a state medical assistance program covering hospital treatment[100] suggests that the text is not the dominant criterion the court might have us believe. The statute made eligibility dependent on the claimant being "financially unable to defray" medical costs.[101] The administering agency decided to use the financial standards in the federal-state Aid to Dependent Children (ADC) program. Because the claimant had too much income to receive ADC, she was not considered "unable to defray" medical costs. The court allowed the agency to use that standard to determine eligibility for state medical assistance, thereby making the claimant ineligible and forcing the hospital to seek recovery of the costs from the claimant.[102]

No one would pretend that the statutory phrase "unable to defray" costs was clear, but the dissenting opinion favoring the welfare claimant seemed to have the better text-based argument. The dissent noted another statute that stated that the Welfare Department "may" recover medical expenses from a recipient who is able to repay medical costs over a period of time.[103] This would have provided a mechanism by which the claimant could have received medical assistance from the state and paid it back out of funds in excess of the ADC financial eligibility level. The majority resisted treating this statutory mechanism as a reason for precluding agency use of ADC standards for threshold eligibility. It interpreted the statute's text as applying only to future recoveries by the claimant after receipt of medical assistance, not to assets held at the time the medical help was provided.[104] The dissent objected to this distortion of the text, noting that the statutory repayment mechanism said nothing about payment only out of "future" recoveries but provided for execution of repayment contracts *whenever* the welfare department determined that repayment was possible.[105]

The dissent also called attention to the strange policy effects created by the majority's decision. If the case involved the federal-state Medicaid program rather than a state aid program, the excess income would *not* have disqualified the claimant. Instead, any "excess" over minimum income levels for ADC eligibility would have been used to reimburse the government for the medical assistance. The state was therefore depriving the claimant of medical benefits by borrowing a federal-state

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100. Trustees of Ind. Univ. v. County Dep't of Pub. Welfare of Kosciusko County, 426 N.E.2d 74 (Ind. Ct. App. 1981).

101. *Id.* at 75.

102. *Id.* at 76.

103. *Id.* at 77 (Staton, J., dissenting).

104. *Id.* at 76.

105. *Id.* at 77 (Staton, J., dissenting).

ADC income standard that the federal-state Medicaid program itself would not have used.[106] Finally, the effect of the majority's decision was to encourage claimants to defer purchase of medical help, which in the long run increases medical costs.[107]

The dissent's discussion explicitly called attention to a theme the majority never acknowledged — that the real issue was how strongly to protect government revenues by making the hospital, rather than the government, seek reimbursement of medical costs out of any excess income.[108] Given the fact that the dissent had the better text-based argument, the suspicion arises that a concern with government revenues strongly influenced the majority's decision to place the financial burden on the hospital. This also supports the suspicion that relying on the text to give the government first claim to recoup medical costs from subsequent tort recoveries was influenced by the fact that it preserved government revenue.[109]

c. Land use by property owners

Another example of a text-based opinion probably influenced by policy considerations is *Adult Group Properties, Ltd. v. Imler*.[110] The case questioned whether a residential facility for the developmentally disabled could be excluded from a subdivision by a covenant limiting use to residential purposes, on grounds that the facility was run as a business. The majority read the statutory text very closely to favor the property owner's power to make land use decisions with minimal restraints.

The statute contained two sections, one limiting *zoning* laws hostile to residential facilities for the developmentally disabled, and the other limiting *private covenants* hostile to such facilities for both the disabled and mentally ill. The court compared the two sections. The *zoning* section stated that a zoning ordinance could not exclude a residential

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106. *Id.* at 76 (Staton, J., dissenting).

107. *Id.* at 77 (Staton, J., dissenting).

108. *Id.* Compare Gary Comm. Mental Health Center, Inc. v. Indiana Dep't of Pub. Welfare, 507 N.E.2d 1019 (Ind. Ct. App. 1987), in which the court limited government aid to medical services provided "by a hospital." The statute provided for aid for services "in" a hospital but other portions of the statute referred to the services being provided "by" the hospital.

But see State *ex. rel.* Van Buskirk v. Wayne Township, Marion County, 418 N.E.2d 234 (Ind. Ct. App. 1981), in which the township trustee tried to limit welfare shelter benefits to renters, not owners. The court denied the trustee this power, observing that this would encourage mortgage default and homelessness. The consequence of the decision was, however, to deny discrimination between renters and homeowners, not necessarily to increase costs.

109. *See supra* notes 94-100 and accompanying text.

110. 505 N.E.2d 459 (Ind. Ct. App. 1987).

facility for the developmentally disabled "solely because the residential facility is a business." The *covenant* section used different language.[111] It stated that a covenant could not both allow residential use *and* prohibit a residential facility for the developmentally disabled and mentally ill. It failed to say that the covenant prohibition could not be based on the ground that the facility was a business. The court took this to mean that any business could be excluded by a covenant, including residential facilities for the developmentally disabled.[112] The majority also concluded that the residential facility was a business because of the landlord's profit-making motive, rather than the activities of those living in the house.[113]

This was a very close reading of the statute indeed given the statute's obvious purpose, noted by the dissent,[114] of mainstreaming the developmentally disabled.[115] Admittedly, there *was* a difference in the language of the zoning and covenant sections. However, it is more than likely that the statement in the zoning section, that a residential facility for the developmentally disabled cannot be zoned out on the ground that it is a business, applied to both the zoning *and* the covenant section. The drafting could have been more careful, but it is the majority's reading of the text that seems strange given the statutory purpose of mainstreaming the developmentally disabled.[116] It also seems unlikely that the real estate developers and their advisors who are the likely audience for this statute would read it to permit private covenants to prohibit residential facilities that zoning laws could not prohibit. A policy preference for protecting a property owner's right to choose his neighbors almost certainly influenced the majority's decision to adopt a close text-based reading.[117]

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111. The court emphasized that the sections were drafted the same year, reinforcing its argument that the difference was purposive. *Id.* at 462-63.

112. *Id.* at 463-64.

113. *Id.* at 469, 474 n.4 (Miller, J., dissenting).

114. *Id.* at 467 (Miller, J., dissenting).

115. *Id.* at 473-74 (Miller, J., dissenting).

116. After this decision, the Indiana legislature retroactively prohibited private covenants from excluding residential facilities for the developmentally disabled and mentally ill from residential areas on the ground that the residents are unrelated or for any other reason. Ind. Code § 16-13-21-14 (1988). The retroactive impact of this statute was upheld in Minder v. Martin Luther Home Found., 558 N.E.2d 833 (Ind. Ct. App. 1990), *rev'g*, Clem v. Christole, Inc., 548 N.E.2d 1180 (Ind. Ct. App. 1990). The opinion was written by Judge Miller, who had dissented in *Adult Group Properties, Ltd.*, 505 N.E.2d 459.

117. The court noted that the covenant limiting use to residential purposes was important to the property owners. *Adult Group Properties, Ltd.*, 505 N.E.2d at 461. The court also noted that any other reading of the statute would permit an unconstitutional taking of the landowner's property. *Id.* at 464-65.

2. "Law and" Theories.—We have said little in this review of Indiana cases about the "Law and" perspectives that appear so prominently in the current literature on statutory interpretation. There is a good reason for this. "Law and" perspectives provide only a partial description of the interpretive process. Despite the rhetoric, their purpose is to assure that a particular point of view receives some attention, not to completely explain the interpretive process. Thus, the Law and Economics perspective is an antidote for judges who engage in too freewheeling an extrapolation of statutory purpose, especially when that would undermine the text. And evolutionary perspectives brought by the judicial reader to the statute suggest that judges can sometimes update legislation, contrary to the common law view of statutes as static, time-bound documents.

There are, not surprisingly, some Indiana cases that look closely for the private interest bargain struck by the statute and others that consider the need to update statutes under certain circumstances. These cases are described in this section. There is no evidence, however, that these approaches are applied with a single-minded commitment.

a. Implementing the bargain

There are several ways the law and economics perspective on legislative bargaining can provide insight into statutory meaning. First, it can call attention to the possibility that the legislative intent consisted of a bargain. This occurred in a case in which a statute allocated service areas to electricity providers.[118] A rural electric cooperative and investor-owned company filed a joint petition allocating a service area to the cooperative pursuant to the statutory procedures that required petitions to be filed by a certain date. The Utility Regulatory Commission failed to meet its statutory deadline for approving or disapproving the petition. After the specified time limits, the investor-owned company filed a petition to modify, which the Commission approved.[119] The question was whether the statutory time limits were mandatory or whether the Commission could approve a modification after those limits had expired.

The court held that the time limits were mandatory, so that the Commission was not authorized to approve a petition to modify after the deadline.[120] It supported its conclusion with an explanation of the background for the statutory deadlines which was one of endless dis-

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118. United Rural Elec. Membership Corp. v. Indiana & Mich. Elec. Co., 549 N.E.2d 1019 (Ind. 1990), *rev'g*, 515 N.E.2d 1135 (Ind. Ct. App. 1987).

119. *Id.* at 1020.

120. *Id.* at 1023-24.

putes over service areas. The court observed that both rural electric cooperatives and investor-owned companies supported the legislation to bring these disputes to a halt,[121] strongly implying that the deadlines were the product of an agreement between these two contesting interest groups. Permitting a later petition by the investor-owned company to challenge the prior petition filed in accordance with the statutory guidelines would unsettle the statutory bargain.

Second, the Law and Economics perspective can highlight the fact that a bargain omits certain groups. For example, the supreme court rebuffed an effort by a lower court to treat athletes as "employees" for Workers' Compensation.[122] Its opinion rested on a text-based argument about the meaning of the language "contract of employment."[123] But the court also could have noted how unlikely it was that university athletes were included in the bargain underlying Workers' Compensation whereby a plaintiff gives up potentially large tort claims in exchange for certain but limited Workers' Compensation benefits.[124]

Third, the Law and Economics perspective counsels against favoring one of the interests represented in the statutory bargain. Other interests, pushing in the other direction, may have negotiated limits to the statute's impact. Thus, favoring employees who apply for unemployment insurance when they are indirectly involved in a labor dispute may improperly displace the concerns of employers, who are also parties to the governing statute.[125]

The use of the Law and Economics approach as an antidote to "liberal" interpretation of one of several conflicting legislative purposes[126] is both a strength and potential weakness. It is important to recognize statutory limits, but equally important to understand the role of judicial choice in defining those limits. Two interests may bargain to a statutory result, but identifying where the point of equipoise lies when the statute

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121. *Id.* at 1021.

122. Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170 (Ind. 1983), *rev'g*, 437 N.E.2d 78 (Ind. Ct. App. 1982).

123. *Id.* at 1172-73.

124. A complete argument about the statutory bargain would examine the state of the law when the Workers' Compensation statute was passed. If state university employees could not sue in tort, it is unlikely that they were part of the statutory bargain because they had nothing to give up in exchange. If student athletes can now sue in tort, an evolutionary approach to statutory interpretation might include them in the statute.

125. *See, e.g.*, Aaron v. Review Bd. of Ind. Employment Sec. Div., 416 N.E.2d 125, 132-33 (Ind. Ct. App. 1981) (court held that when nonstriking employees of a multi-plant employer are laid off as a result of a selective strike of that employer, they are directly interested in the labor dispute and therefore not eligible for unemployment benefits, if the nonstriking employees are in the same bargaining unit as the striking employees).

126. *See* Appendix § II.

is applied to specific cases depends on the strength and weakness of the values each interest group contributes to the statute. Defining that point requires policy judgments concerning those values, which is not mandated by what the legislature has done. An example from the Indiana cases concerns the interpretation of the Medical Malpractice Act, which requires choosing between protection of medical care providers and tort plaintiffs.

The Medical Malpractice Act was passed to protect health care providers from medical malpractice claims so that medical insurance would not drive them out of business. It is therefore readily understood as a private interest bill, protecting a group of potential defendants from common law liability. But how much protection should they receive?

"Malpractice" is defined as any "tort . . . based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient."[127] "Health care" is defined as any "act or treatment performed or furnished, or which should have been performed or furnished, by a health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement."[128] The statute established a panel of doctors to review claims, and permitted its conclusions about standard of care to be admitted into evidence.[129] It also imposed damage ceilings[130] and a special statute of limitations.[131]

In two cases, the court invoked the Act's policy of protecting health care providers as support for a broad definition of those covered by the statute. For example, the statute covered suits by a "patient or his representative." Representative was defined by the statute to include the patient's "parents." The parents were therefore subject to the act even when they sued on their own behalf, not for their child.[132] Additionally, a plaintiff who had been committed to an institution at his wife's request by a doctor who did not examine him was still a "patient" under the statute.[133] The court determined that the statute did not require the plaintiff to have a contract with the doctor, as long as his wife had one.

When the courts reached the question of the type of activity covered by the statute, however, they had more trouble interpreting the law.

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127. IND. CODE ANN. § 16-9.5-1-1(h) (Burns 1990).

128. *Id.* § 16-9.5-1-1(i).

129. *Id.* § 16-9.5-9-1 to -10.

130. *Id.* § 16-9.5-2-2.

131. *Id.* § 16-9.5-3-1.

132. Sue Yee Lee v. Lafayette Home Hosp. Inc., 410 N.E.2d 1319, 1323-24 (Ind. Ct. App. 1980).

133. Detterline v. Bonaventura, 465 N.E.2d 215, 217-19 (Ind. Ct. App. 1984).

In the 1982 case of *Methodist Hospital of Indiana, Inc. v. Rioux*, the plaintiff fell and broke a hip, alleging that the health care provider had "negligently . . . failed to provide appropriate care to prevent said fall and injury."[134] The court made the case sound simple, stating that the very broad language of the statute did not need construction, and that the "duty to provide a safe environment" was within the Medical Malpractice Act.[135] This construction favored the statute's pro-defendant purpose.

Two years later, however, the same district had second thoughts in *Winona Memorial Foundation of Indianapolis v. Lomax*, another "slip and fall" case.[136] The plaintiff alleged that the defendant was negligent in not maintaining the floor properly, causing her to trip on a protruding floorboard. Now the court thought that the statute needed construction,[137] and looked closely at the statutory purpose. It found that the statute applied only to "classic" medical malpractice, not liability for ordinary nonmedical accidents,[138] even though the statute's broad language defined "health care" as "any act . . . by a health care provider." The court looked at the text of the entire statute and pointed out that other provisions required an expert medical panel to give its opinion on whether the health care provider met customary standards of care. The panel's expertise seemed important only if the behavior being judged was medical malpractice.[139] *Rioux* was distinguished on the ground that the plaintiff in that case had alleged failure to provide appropriate care, and not, as in *Lomax*, negligence in maintaining the floor.[140]

As a result of these decisions, the plaintiff's ability to proceed to settlement negotiations without the Act's limitations depends on careful drafting of the pleadings.[141] The plaintiff who alleges negligence in

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134. 438 N.E.2d 315, 316 (Ind. Ct. App. 1982).

135. *Id.* at 317 n.2.

136. 465 N.E.2d 731 (Ind. Ct. App. 1984).

137. *Id.* at 737-38.

138. *Id.* at 738-39. The court referred to statements by the statute's drafters, who represented the medical profession, that failed to mention general negligence claims as causing an insurance crisis for the profession. *Id.* at 739-40 n.7.

139. *Id.* at 735.

140. *Id.* at 741-42.

141. See also Ogle v. St. John's Hickey Memorial Hosp., 473 N.E.2d 1055 (Ind. Ct. App. 1985) in which a hospital patient admitted because of suicidal tendencies was raped. Her claim was within the Act because she asserted that the hospital negligently failed to provide her with proper security, which the court interpreted to mean a failure to properly confine her, even though the reason why confinement was necessary was her suicidal tendencies, not a concern with being sexually assaulted. Presumably, if she had alleged negligent supervision of the rapist, her claim would not have been for malpractice and would be outside the Act.

building maintenance avoids the Act, at least at the initial stages of the lawsuit before the facts are developed, but a plaintiff who alleges improper medical care falls within the statute. This obviously creates significant liability exposure for medical care providers. The court's decision to accept this risk depends on its policy judgment about where to locate the point of statutory equipoise between the concerns of negligence plaintiffs and defendant health care providers.

The court explicitly accepted these implications later in *Methodist Hospital of Indiana, Inc. v. Ray*,[142] in which a patient contracted Legionnairre's disease while in a hospital. The plaintiff alleged that faulty maintenance of the premises, rather than a nonsterile environment, was responsible for contracting the disease. The court held that this was sufficient to prevent the Act from applying at the outset of the case, but acknowledged that the Act might apply if the development of the facts subsequently demonstrated that medical malpractice was really at issue.[143]

The shift in the court's attitude from *Rioux* to *Lomax* and *Methodist Hospital* toward permitting the plaintiff's pleadings to avoid initial coverage by the Medical Malpractice Act demonstrates a shift in the court's view of the appropriate balance between the statute's pro-defendant purpose and the plaintiff's traditional common law negligence claims. This balance is not determined by the statute, even a statute with strong private interest antecedents, but depends on the court's choice about how to balance the conflicting policies that underlie the statute.

b. Evolutionary interpretation

The common law always has been associated with evolutionary change, but courts have a much harder time justifying evolutionary interpretation of statutes. Except for some statutes with the appropriate

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But see Reaux v. Our Lady of Lourdes Hosp., 492 So. 2d 233, 234 (La. Ct. App. 1986) (Louisiana medical malpractice act does not cover case in which health care provider failed to provide security from intruders).

142. 551 N.E.2d 463 (Ind. Ct. App. 1990).

143. *Id.* at 468-69. A conflict between the Act's reach and limits was also resolved in Collins v. Thakkar, 552 N.E.2d 507, 511 (Ind. Ct. App. 1990). A doctor performed a nonconsensual abortion incident to an examination for pregnancy on a patient with whom he had had an affair. Because the doctor's action was an intentional tort not performed to provide medical services, it did not come within the Act. The dissent, *id.* at 512 (Sullivan, J.), determined that the Act applied to intentional torts performed in the defendant's capacity as a medical care provider, and was not limited to cases of medical negligence. *See also* Midtown Community Mental Health Center v. Estate of Gahl, 540 N.E.2d 1259, 1262 (Ind. Ct. App. 1989) (Medical Malpractice Act does not apply to suit against doctor for failing to warn decedent that a former patient was dangerous).

text and legislative intent (the classic example is the "restraint of trade" language in the antitrust laws),[144] courts are reluctant to admit that they update statutes, even when their opinions are best explained in evolutionary terms.[145]

Courts have the easiest time updating statutes when the statute incorporates a common law power, but even then, judges seem unwilling to admit to what they are doing. They instead describe the exercise of this power as an application of the statute. An Indiana case dealing with the "open and obvious danger" defense to a strict liability tort claim illustrates this approach.[146]

The plaintiff in *Koske v. Townsend Engineering Co.*, had been injured by a machine. The 1978 Product Liability Act explicitly stated that

> the common law of this state with respect to strict liability in tort is codified and restated as follows: (a) One who sells any product in a defective condition unreasonably dangerous to any user or consumer or to his property is [liable under some circumstances].[147]

In *Bemis Co. v. Rubush*[148] and later cases, Indiana common law was held to include the "open and obvious danger" defense. Nonetheless, in *Koske* the supreme court did not incorporate the common law doctrine into the statute, despite this statutory language. The court instead focused on other parts of the statutory text and found

> the implication unmistakable that the open and obvious danger rule, as developed in *Bemis* and its progeny, was excluded from the Act's codification and restatement of the law of strict liability in tort. The Act not only employed the language of Restatement (Second) of Torts § 402A without explicitly incorporating the words open and obvious, or requiring that a defect be latent or concealed, but it also expressly delineated the allowable defenses to strict liability in tort to include eval-

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144. *See* United States v. Associated Press, 52 F. Supp. 362, 370 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

145. In one case, reluctance to admit a judicial power to change law led the court to insist that separation of powers required deferring to legislative intent when the legislature failed to reverse a long line of cases. The concurring judge got it right, however, when he affirmed the judge's power to decide whether its own decisions remained valid. *Cf.* Miller v. Mayberry, 506 N.E.2d 7, 11 (Ind. 1987) *with id.* at 12 (Shephard, C.J., concurring).

146. Koske v. Townsend Eng'g Co., 551 N.E.2d 437, 442 (Ind. 1990), *rev'g*, 526 N.E.2d 985 (Ind. Ct. App. 1988).

147. *Id.* at 441-42 (citing IND. CODE § 33-1-5.1-3 (1988)).

148. 427 N.E.2d 1058 (Ind. 1981), *cert. denied*, 459 U.S. 825 (1982).

uation of the product user's conduct only by a subjective rather than an objective standard.[149]

Rejection of the common law "open and obvious danger" defense was a reasonable application of the common law *as of 1990* but a forced reading of the 1978 statutory text. The court of appeals, which had felt compelled to apply the common law rule because of the statutory language stating that the law was a codification and restatement of the common law, noted the current "trend away from rigid application of the rule."[150] If the statute incorporated an evolving common law, however, the court was free to reject the open and obvious danger rule in 1990. Only an unwillingness to admit a surviving evolutionary common law power[151] can explain the court's forced reading of the statutory text.[152]

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149. *Koske*, 551 N.E.2d at 442.

150. Koske v. Townsend Eng'g Co., 526 N.E.2d 985, 989 (Ind. Ct. App. 1988). Actually, the statute did not *compel* incorporation of the *Bemis* rule because that case was decided in 1981, *after* passage of the 1978 statute, and *Bemis*, therefore, was not part of the statute's context.

151. This decision seems aberrational when compared to a 1989 case affirming liability to bystanders under the 1978 statute. State Farm Fire & Casualty Co. v. Strutco Div., King Seeley Thermos Co., 540 N.E.2d 597, 597-98 (Ind. 1989). The court emphasized the statute's incorporation of the common law, which covered bystanders. It shunted aside the statute's silence about bystanders, contrary to its approach in *Koske*, *supra* notes 148-50 and accompanying text, in which silence about the "open and obvious" rule was stressed as a factor excluding the defense. The only way to reconcile the two cases is on the ground of a judicial power to develop the common law that survives passage of the statute.

152. The court's reluctance to admit an evolutionary power sometimes extends to cases in which a common law power parallels statutes that deal partially with a particular problem. For example, in Clipp v. Weaver, 451 N.E.2d 1092 (Ind. 1983), a guest asserted an ordinary negligence claim against a boat operator. Indiana statutes provide limited liability for guests of car and aircraft operators (since 1929 and 1951 respectively). *Id.* at 1093-94, 1094 n.1. The common law also provides limited liability to landowners, but that rule has been under severe attack within legislatures and courts as unconstitutional denials of equal protection under state constitutions. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 216-17 (1984). The common law today would almost certainly favor ordinary negligence rules.

The court properly applied ordinary negligence standards to boat guests in what can be best understood as an updating of the common law. But it did not rely entirely on the common law. It cited a statute that boat owners were supposed to behave in a "careful and prudent manner, having due regard for the rights, safety and property of other persons." *Clipp*, 451 N.E.2d at 1094. Instead of just stating that it was using a statute as evidence of the common law standard of care, the court asserted that the "legislature has determined that a boat operator owes a duty of reasonable care to *all* persons, including guests," *Id.* (emphasis in original), thereby minimizing the appearance of an exercise of independent judicial power.

When a statute deals specifically with a problem, it may be difficult to know whether a parallel common law power survives. *See generally* G. CALABRESI, A COMMON LAW FOR

When the statute does not incorporate a common law power, the court's authority to update a statute is more problematic. The court appeared to exercise such authority, however, in a case where the court adapted statutory rights to general welfare assistance to modern values.[153] *Van Buskirk v. Wayne Township* involved a decision by the township trustee administering general assistance to provide shelter assistance only to renters, not homeowners. The statute specified that "[p]ublic aid by an overseer of the poor may include and shall be extended only when the personal effort of the applicant fails to provide one or more of the following items: . . . shelter . . . ."[154] Township trustees traditionally had great discretion in deciding how to help the poor. Because of this history, an interpretation of the statute to create mandatory duties to the poor was very questionable.[155] Nonetheless, the court held that the statute required provision of shelter and prohibited discriminating between homeowners and renters.[156] Despite a

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THE AGE OF STATUTES 36-37 (1982). A court reluctant to admit it has such a power may find ways to disguise its exercise. *See, e.g.*, Call v. Scott Brass, Inc., 553 N.E.2d 1225 (Ind. Ct. App. 1990), in which a common law wrongful discharge claim against an employer for firing an employee who performed jury duty survived passage of a 1979 statute providing for the same cause of action with a shorter statute of limitations than the common law claim. The problem the court encountered was that under Indiana law, statutory rights are exclusive if they *create* a right. *Id.* at 1227. The court held that the plaintiff's right predated 1979, even though it was based on a 1988 case, because the 1988 case evolved from a 1973 decision protecting a plaintiff who was discharged for filing a Workers' Compensation claim. The more straightforward holding would have been that the court had an evolving common law power which survived the 1979 statute.

An alternative holding almost said as much. The court stated that the statute did not provide an exclusive remedy, *even if* the case law cause of action postdated the 1979 law. *Id.* at 1229. The reasoning, however, still concealed the exercise of a surviving common law power because the court emphasized the statute's failure to state that the remedy was exclusive. But surely the court was not arguing for a new rule that all statutory remedies are *non*exclusive, absent a specific statutory statement. The court must have been exercising an evolving common law power to decide on a case by case basis that employer retaliation against employees may be actionable. The court tipped its hand in this respect when it explicitly noted the important values underlying jury duty. *Id.* ("the jury is an indispensable part of our system of justice . . .").

153. Van Buskirk v. Wayne Township 418 N.E.2d 234 (Ind. Ct. App. 1981).

A change in values should be distinguished from cases of changing facts, to which the values implicit in an old statute might apply. *See, e.g.*, State v. McGraw, 480 N.E.2d 552, 554-55 (Ind. 1985) (computer use did not involve a "taking" when the user did not deprive the owner of anything), *rev'g*, 459 N.E.2d 61 (Ind. Ct. App. 1984). The distinction between fact and value, however, can be overdone. Judges may learn about the meaning of old values by applying them to new facts.

154. *Van Buskirk*, 418 N.E.2d at 240 (citing IND. CODE § 12-2-1-10(b) (1976)).

155. *See* Rosenberg, *Overseeing the Poor: A Legal-Administrative Analysis of the Indiana Township Assistance Program*, 6 IND. L. REV. 385, 385-86, 388-90 (1973).

156. *Van Buskirk*, 418 N.E.2d at 243.

few half-hearted text-based arguments,[157] the core of the decision was that providing benefits only to renters encouraged owners to default and become homeless.[158] It is hard to disagree with this policy and equally hard to justify the result in terms of traditional township trustee powers. The court was updating the statute to take account of modern sensibilities.[159]

Conclusion

Our review of Indiana statutory interpretation cases helps to explain why this area of law is so complex. The decisions involve many factors that are easy to identify, but whose role in specific cases is hard to evaluate.

In any multi-factor analysis, there are two concerns — the weight and the value of particular variables. First, what weight does each factor have. In statutory interpretation, for example: Is the text very important, or just of modest weight? The same question can be asked about legislative intent and background considerations. Second, what value does a particular factor have on the facts of a particular case. Thus, the text may have little value in a particular case because it is obviously uncertain. And particular background considerations may have different values for different judges.

Weight and value can interact in complex ways. A factor may have a high value, such as concern for criminal or welfare claimants. But that factor's weight may be low because an advocate of text-based statutory interpretation does not believe that such concerns should ever be weighty in determining statutory meaning.[160] To complicate matters, judicial rhetoric is notoriously misleading in explaining multi-factor decisions, especially so in statutory interpretation cases, where the appearance of deference to plain meaning or legislative intent seems to implement legislative supremacy.

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157. *Id.* at 241. As evidence that the legislature did not intend to limit "shelter" to renters, the court cited the detailed rule requiring the provision of "medical supplies for minor injuries and illness" as an example of when the legislature intended a provision to be precisely limited. The court also referred to the statutory policy favoring a "liberal" interpretation. *Id.* at 240-41 (citing Ind. Code. § 12-2-1-34 (1976)).

158. *Id.* at 241-42 n.6.

159. *See also* Indiana State Highway Comm'n v. Indiana Civil Rights Comm'n, 424 N.E.2d 1024, 1030-32 (Ind. Ct. App. 1981) (civil rights statute permitting cease and desist order against "persons" applies to government defendants, to implement the strong statutory policy; traditional rule exempting government from suits not apply in light of the decline of sovereign immunity as a common law doctrine).

160. A text-based interpreter may use substantive concerns, such as reliance interests, to support commitment to the text, but not care about their value in a particular case.

The reality of statutory interpretation is far more complex than claims of deference to plain meaning or legislative intent imply. The text and legislative intent are themselves complex concepts. Moreover, the judge's policy judgments inevitably play a role in shaping the ultimate decision about what the statute means. At least that is what the decisions (if not the rhetoric) in the Indiana cases show.

Appendix - Interpretive Presumptions

The indeterminacy of substantive background presumptions, despite their frequent invocation by courts, is well established. Although they may play some role in the back and forth process of working out statutory meaning, any general claim that they have predictive value is misleading, as the following citation of Indiana cases indicate.

I. *Narrow Interpretation of Statutes in Derogation of Common Law*

Followed - Wallis v. Marshall County Comm'rs, 546 N.E.2d 843, 844 (Ind. 1989) (mentions presumption), *rev'g*, 531 N.E.2d 1223 (Ind. Ct. App. 1988); State Farm Fire & Casualty Co. v. Strutco Div., King Seeley Thermos Co., 540 N.E.2d 597, 598 (Ind. 1989) (mentions presumption), *rev'g*, 530 N.E.2d 116 (Ind. Ct. App. 1988); Johnson v. Johnson, 460 N.E.2d 978, 979 (Ind. Ct. App. 1984) (mentions presumption); Thomas v. Eads, 400 N.E.2d 778, 780 (Ind. Ct. App. 1980) (mentions presumption).

Not followed - Koske v. Townsend Eng'g Co., 551 N.E.2d 437, 442 (Ind. 1990) (presumption not mentioned), *rev'g*, 526 N.E.2d 985 (Ind. Ct. App. 1988); Seymour Nat'l Bank v. State, 422 N.E.2d 1223 (1981) (majority did not mention presumption, but Justices DeBruler and Hunter in dissent did; *Id.* at 1227, 1229), *modified*, 428 N.E.2d 203, 204 (1981).

II. *Liberal Interpretation of Social Legislation*

A. *Unemployment insurance*

Followed - USS, a Div. of USX Corp. v. Review Bd. of Ind. Employment Sec. Div., 527 N.E.2d 731, 737 (Ind. Ct. App. 1988) (mentions presumption); Holmes v. Review Bd. of Ind. Employment Sec. Div., 451 N.E.2d 83, 86 (Ind. Ct. App. 1983) (mentions presumption). *Cf.* Sidell v. Review Bd. of Ind. Employment Sec. Div., 428 N.E.2d 281, 285 (Ind. Ct. App. 1981) (trade readjustment benefit statute - mention presumption).

Not followed - Aaron v. Review Bd. of Ind. Employment Sec. Div., 416 N.E.2d 125 (Ind. Ct. App. 1981) (presumption not mentioned); Jeffboat, Inc. v. Review Bd. of Ind. Employment Sec. Div., 464 N.E.2d 377 (Ind. Ct. App. 1984) (presumption not mentioned).

B. *Means-tested welfare*

Followed - Wilson v. Stanton, 424 N.E.2d 1042, 1045 (Ind. Ct. App. 1981) (mentions presumption).

Not followed - Gary Community Mental Health Center v. Ind. Dep't of Pub. Welfare, 507 N.E.2d 1019 (Ind. Ct. App. 1987) (presumption not mentioned).

III. *Strict Construction of Criminal Law*

Followed - Cook v. State, 547 N.E.2d 1118, 1119 (Ind. Ct. App. 1989) (mentions presumption); Douglas v. State, 484 N.E.2d 610, 613

(Ind. Ct. App. 1985) (mentions presumption); Sheppard v. State, 484 N.E.2d 984, 988 (Ind. Ct. App. 1985) (mentions presumption); State v. McGraw, 480 N.E.2d 552, 553 (Ind. 1985) (mentions presumption), *rev'g*, 459 N.E.2d 61 (Ind. Ct. App. 1984); Doyle v. State, 468 N.E.2d 528, 533-34 (Ind. Ct. App. 1984) (mentions presumption); Gore v. State, 456 N.E.2d 1030, 1033 (Ind. Ct. App. 1983); Och v. State, 431 N.E.2d 127, 131 (Ind. Ct. App. 1982) (mentions presumption); Pennington v. State, 426 N.E.2d 408, 410 (Ind. 1981) (mentions presumption); Warren v. State, 417 N.E.2d 357, 359 (Ind. Ct. App. 1981) (mentions presumption); Lasko v. State, 409 N.E.2d 1124, 1127 (Ind. Ct. App. 1980) (mentions presumption).

Not followed - McAnalley v. State, 514 N.E.2d 831, 833-34 (Ind. 1987) (mentions presumption); Hill v. State, 488 N.E.2d 709 (Ind. 1986) (presuumption not mentioned), *rev'g*, 482 N.E.2d 492 (Ind. Ct. App. 1985); Whitley v. State, 553 N.E.2d 511 (Ind. Ct. App. 1990) (presumption not mentioned); Alvers v. State, 489 N.E.2d 83, 89 (Ind. Ct. App. 1986) (mentions presumption); Hanic v. State, 406 N.E.2d 335, 338 (Ind. Ct. App. 1980) (mention presumption).

IV. *Tax Law*

A. *Interpret tax law in favor of taxpayer*

Followed - Indiana Dep't of Revenue v. Estate of Eberbach, 535 N.E.2d 1194, 1196 (Ind. 1989) (mentions presumption); Wechter v. Indiana Dep't of Revenue, 544 N.E.2d 221, 224 (Ind. T.C. 1989) (mentions presumption), *aff'd*, 553 N.E.2d 844 (1990); Indiana Dep't of State Revenue v. Food Mktg. Corp., 403 N.E.2d 1093, 1096 (Ind. Ct. App. 1980) (mention presumption).

Not followed - Indiana State Bd. of Tax Comm'rs v. Ropp, 446 N.E.2d 20, 24 (Ind. Ct. App. 1983) (mention presumption).

B. *Interpret tax exemptions against taxpayer*

Followed - Indiana Dep't of State Revenue, Inheritance Tax Div. v. Estate of Wallace, 408 N.E.2d 150, 154 (Ind. Ct. App. 1980) (mentions presumption).

Not followed - Indiana Dep't of State Revenue v. Indianapolis Pub. Transp. Corp., 550 N.E.2d 1277, 1278 (Ind. 1990) (mentions presumption); Beasley v. Kwatnez, 445 N.E.2d 1028, 1030 (Ind. Ct. App. 1983) (mentions presumption). *Cf.* Ind. Dep't of State Revenue v. National Bank of Logansport, 402 N.E.2d 1008, 1010 (Ind. Ct. App. 1980) (majority says no ambiguity so no room to interpret statute strictly against the taxpayer).

V. *Rule That Statutes Are Prospective Unless They Are Remedial or Procedural*

Followed - Bailey v. Menzie, 505 N.E.2d 126, 129 (Ind. Ct. App. 1987) (statute providing new visitation rights in grandparents after adoptive parents sever the status held by natural parents is prospective);

Cardinal Indus. v. Schwartz, 483 N.E.2d 458, 460 (Ind. Ct. App. 1985) (statute removing the Board's jurisdiction is remedial and therefore retroactive); Tarver v. Dix, 421 N.E.2d 693, 696 (Ind. Ct. App. 1981) (statute which codifies common law presumption about who is biological father is procedural and retroactive). *Cf.* Wooley v. Comm'r of Motor Vehicles, 479 N.E.2d 58, 61 (Ind. Ct. App. 1985) ("substantive change" allowing habitual traffic offender to be eligible for probationary license applied retroactively).

Followed but with some definitional uncertainty about whether statute is remedial or procedural - Mounts v. State, 496 N.E.2d 37, 39 (Ind. 1986) (procedural statute retroactive; dissent, *id.* at 40, and lower court, 489 N.E.2d 100, 102 (Ind. Ct. App. 1986), labelled the statute "substantive" as applied to the facts and therefore prospective); Arthur v. Arthur, 519 N.E.2d 230, 232-33 (Ind. Ct. App. 1986) ("substantial change in policy" regarding property rights was prospective), *aff'd*, 531 N.E.2d 477 (Ind. 1988) (overruling court of appeals decision in Sable v. Sable, 506 N.E.2d 495, 496-97 (Ind. Ct. App. 1987), which had labeled the statute "remedial" and retroactive).

Not followed - even remedial and procedural statutes can be prospective - Gosnell v. Indiana Soft Water Serv., Inc., 503 N.E.2d 879, 880 (Ind. 1987) (allowing punitive damages is remedial but prospective); State *ex rel* Indiana State Bd. of Dental Examiners v. Judd, 554 N.E.2d 829, 832 (Ind. Ct. App. 1990) (new statute requiring lapsed licensee to take examination rather than pay fee impairs property rights; statute labelled remedial but given prospective effect); Turner v. Town of Speedway, 528 N.E.2d 858, 863 (Ind. Ct. App. 1988) ("remedial" statute prospective because creates new "right").

Decision on retroactivity made without labels - the case of statutes of limitations - A statute can shorten the period of limitations, but the courts engraft on the statute a "reasonable time" provision within which plaintiffs can sue. *See* Kemper v. Warren Petroleum Corp., 451 N.E.2d 1115, 1117 (Ind. Ct. App. 1983). The courts also prohibit revival of expired defendant liability, Indiana Dep't of State Revenue v. Puett's Estate, 435 N.E.2d 298, 301-02 (Ind. Ct. App. 1982), but this tidy "rule" will sometimes be violated. For example, a statute passed after expiration of the two-year statute of limitations on the mother's paternity cause of action permitted a child to sue for a paternity determination until his twentieth birthday. R.L.G. v. T.L.E., 454 N.E.2d 1268, 1270-71 (Ind. Ct. App. 1983). The decision applied the statute granting the child a cause of action retroactively, even though the mother's cause of action had expired before the statute took effect. Undoubtedly the court was influenced because the best interests of the child were involved. *See* Bailey v. Menzie, 542 N.E.2d 1015, 1018-19 (Ind. Ct. App. 1989) (parent did not have a vested

constitutional right in avoiding statutes promoting the best interests of the child, so statute could be applied retroactively).

VI. *Legislative Acquiescence in Agency Rules.*

The presumptions reviewed above are substantive in that they make assumptions about what substantive impact the legislature is likely to have intended. Another presumption — that the legislature intended to acquiesce in agency rules — is institutional in the sense of allocating rulemaking responsibility.

No clear rationale for this presumption is presented in the cases. The three most prominent are that longstanding rules should be followed, that the agency rule was contemporaneous with adoption of the statute, and that the agency has expertise. These rationales are grounded in different policy considerations. Longstanding rules are likely to have been relied on and to reflect considered agency judgment. Contemporaneous rules are supposed to reflect the intent of the legislature adopting the governing statute. Agency expertise supports deference to rules regardless of when and how long they have been in effect. The courts are not only unable to agree on which rationale(s) to rely on, but also fail to observe that none of them has anything to do with legislative intent by the acquiescing legislature. Judicial appeal to legislative acquiescence appears to be another example of judicial rhetoric that forces judgments into a legislative intent mold when the decision is based on other grounds.

Legislative acquiescence, even if it is an independent reason to defer to agency rules, is also a thin reed on which to rest a decision. Inaction by the legislature may be attributed to many reasons, having nothing to do with its approval or disapproval of an agency rule. And, in any event, legislative intent should be manifest through adoption of a statute, not silence.

There is a fourth rationale for judicial deferrence to an agency rule. If the legislature is aware of the rule and does not reject it, the court might place the burden of inaction on the legislature by upholding the rule. This is not a theory of legislative acquiescence, however, but of legislative responsibility, for which there is also some evidence in the Indiana cases.

The reliability of any of these rationales for deferring to agency rules is, somewhat puzzlingly, called into question by judicial statements that the court should not defer if the rule is "*wrong*" or "*incorrect.*" *See* Indiana State Bd. of Tax Comm'rs v. Fraternal Order of Eagles, Lodge No. 255, 521 N.E.2d 678, 680 (Ind. 1988); Board of Trustees of Pub. Employees' Retirement Fund v. Baughman, 450 N.E.2d 95, 96 (Ind. Ct. App. 1983); Lake County Beverage Co. v. 21st Amendment, Inc., 441 N.E.2d 1008, 1014 (Ind. Ct. App. 1982); Beer Distrib. of Ind. v. State *ex rel.* Alcoholic Beverage Comm'n, 431 N.E.2d 836,

840 (Ind. Ct. App. 1982); Anderson v. Review Bd. of Ind. Employment Sec. Div., 412 N.E.2d 819, 822 (Ind. Ct. App. 1980); Indiana Dep't of State Revenue, Gross Income Tax Div. v. Commercial Towel & Uniform Serv. Inc., 409 N.E.2d 1121, 1123-24 n.6 (Ind. Ct. App. 1980).

The following cases contain language advocating one or more of the above rationales for assuming that the legislature has acquiesced in an agency rule, although the cases vary in deciding whether the agency rule should be followed.

A. *The rule is longstanding*

Fraternal Order of Eagles Lodge No. 255 v. Indiana State Bd. of Tax Comm'rs, 512 N.E.2d 491, 495-96 (Ind. T.C. 1987), *rev'd*, 521 N.E.2d 678 (Ind. 1988); Lake County Beverage Co. v. 21st Amendment, Inc., 441 N.E.2d 1008, 1014 (Ind. Ct. App. 1982); Beer Distrib. of Ind. v. State *ex rel.* Alcoholic Beverage Comm'n, 431 N.E.2d 836, 840 (Ind. Ct. App. 1982); Astral Indus. v. Indiana Employment Sec. Bd., 419 N.E.2d 192, 198 n.6 (Ind. Ct. App. 1981); Indiana Dep't of State Revenue, Gross Income Tax Div. v. Commercial Towel & Uniform Serv., 409 N.E.2d 1121, 1123-24 n.6 (Ind. Ct. App. 1980); Indiana Dep't of State Revenue v. Endress & Hauser, Inc., 404 N.E.2d 1173, 1174 (Ind. Ct. App. 1980).

B. *The rule is contemporaneous with adoption of statute*

Fraternal Order of Eagles Lodge No. 255 v. Indiana State Bd. of Tax Comm'rs, 512 N.E.2d 491, 495 (Ind. T.C. 1987), *rev'd*, 521 N.E.2d 678 (Ind. 1988); Lake County Beverage Co. v. 21st Amendment, Inc., 441 N.E.2d 1008, 1014 (Ind. Ct. App. 1982); Beer Distrib. of Ind. v. State *ex rel.* Alcoholic Beverage Comm'n, 431 N.E.2d 836, 840 (Ind. Ct. App. 1982); Indiana Dep't of State Revenue, Gross Income Tax Div. v. Commercial Towel & Uniform Serv., 409 N.E.2d 1121, 1123-24 n.6 (Ind. Ct. App. 1980); Indiana Dep't of State Revenue v. Endress & Hauser, Inc., 404 N.E.2d 1173, 1174 (Ind. Ct. App. 1980).

C. *The agency is knowledgeable*

In re CTS Corp., 428 N.E.2d 794, 798 (Ind. Ct. App. 1981) (specialized agency function requires deference). *Cf.* Indiana Bell Tel. Co. v. Boyd, 421 N.E.2d 660, 667 (Ind. Ct. App. 1981) (construction by agency charged with implementation); Aaron v. Review Bd. of Ind. Employment Sec. Div., 416 N.E.2d 125, 139 (Ind. Ct. App. 1981) (same).

D. *The legislature is aware of the rule or had an opportunity to amend the statute to reject the rule and did nothing*

Fraternal Order of Eagles Lodge No. 255 v. Indiana State Bd. of Comm'rs, 512 N.E.2d 491, 496 (Ind. T.C. 1987), *rev'd*, 521 N.E.2d 678 (Ind. 1988). *Cf.* Department of Revenue v. United States Steel Corp., 425 N.E.2d 659, 662 (Ind. Ct. App. 1981) (legislature presumed

to approve *court's* interpretation of law when it failed to take action rejecting it); Thomas v. Eads, 400 N.E.2d 778, 783 (Ind. Ct. App. 1980) (same, when legislature made other amendments but did not reject court's interpretation).