CANONS OR COIN TOSSES: TIME-TESTED METHODS OF INTERPRETING STATUTORY LANGUAGE

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"[L]aw *is* language and, therefore, for law to be clear, the language of the law must be clear."[1] The individuals who draft statutes are held to a high standard of clarity because their choice of language creates the law.[2] It is, however, impossible for anyone to anticipate every question that word choice or syntax can raise.[3] What, then, does a lawyer, a judge, or a justice

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1 Terri LeClercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 2 LEGAL WRITING INST. 81 (1996).

2 *Id.* at 85.

3 *Id.*

do when a statute is not clear?

The United States Supreme Court recently explained that the proper starting point for a court in a statutory interpretation dispute "lies in a careful examination of the ordinary meaning and structure of the law itself."[4] If that examination "yields a clear answer, judges must stop,"[5] lest the legislative history "be used to 'muddy' the meaning of 'clear statutory language.'"[6]

Similarly, the Supreme Court of New Jersey has said, "[w]e begin with the statute's plain language, which is the 'best indicator' of legislative intent."[7] Generally, the "words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language."[8]

A given act may consist of "many different words, passages, provisions, and sections."[9] Courts "must determine whether a particular word, passage, provision, or section is relevant to and probative of an act's construction" and "how much of a statute's context is relevant to and probative of the final determination of legislative intent or statutory meaning."[10]

If the plain language of the statute leads to a "clear and unambiguous result," then the court's interpretive process is over.[11] If, however, there is ambiguity in the statute, the plain reading leads to an absurd result, or the overall statutory scheme is at odds with the plain language, then a court may resort to extrinsic evidence.[12]

A court does not conclude that an ambiguity exists solely on the basis that there is a disagreement about what the words convey. Instead, the court must assess the reasonableness of the positions of the parties based on its own review of the language in question.[13] Once a court determines that statutory interpretation is required, it may employ a number of different

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[4] Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019) (citing Schindler Elevator Corp. v. United States ex rel. Kirk, 131 S. Ct. 1885 (2011)).

[5] *Id.* (citing Hughes Aircraft Co. v. Jacobson, 119 S. Ct. 755 (1999)).

[6] *Id.* (citing Milner v. Department of Navy, 131 S. Ct. 1259 (2011)).

[7] State v. Rodriguez, 238 N.J. 105, 113–14 (2019) (citing DiProspero v. Penn, 183 N.J. 477, 492 (2005)).

[8] N.J.S.A. § 1:1-1 (West 2019).

[9] NORMAN SINGER & SHAMBIE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:2 (7th ed. 2019).

[10] *Id.* (footnote omitted).

[11] State v. Rodriguez, 238 N.J. 105, 113–14 (2019) (citing Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 386 (2016) (quoting Richardson v. PFRS, 192 N.J. 189 (2007))).

[12] *Id.* (citing *DiProspero*, 183 N.J. at 492–93 (quoting Cherry Hill Manor Assocs. v. Faugno, 182 N.J. 64 (2004))).

[13] State v. Gandhi, 201 N.J. 161, 178–79 (2010).

techniques. They are not universally embraced.

It has, for example, been suggested that canons of statutory interpretation provide only limited assistance in the search for the meaning of a statute, and that there exist "canons, both in Latin and in English, which will support almost any approach to interpretation which a court wishes to adopt."[14] Karl Llewellyn has long been cited for the proposition that for each and every canon, there is an equal and opposite canon.[15]

The question fairly arises: are the details of statutory construction, and the canons of statutory interpretation, of interest only to those toiling in the relative obscurity of statutory drafting?

In early 2018, national news sources reported that the family-owned independent Oakhurst Dairy, located in Portland, Maine, had settled an overtime dispute with its truck drivers by agreeing to pay $5 million to the drivers in a dispute "that hinged entirely on the lack of an Oxford comma in state law."[16] The dispute gained "international notoriety" when the United States Court of Appeals for the First Circuit determined that the missing comma created sufficient uncertainty to side with the drivers.[17] It was noted that the resolution of the matter by the parties meant that "there will be no ruling from the land's highest courts on whether the Oxford comma—the often-skipped second comma in a series like 'A, B, and C'—is an unnecessary nuisance or a sacred defender of clarity, as its fans and detractors endlessly debate."[18]

Other recent cases, decided by both federal and New Jersey state courts, received far less attention than the Oakhurst Dairy matter, but they served as frequent examples of the enduring viability of the canons of statutory interpretation.

We examine below selected examples of statutory interpretation using "intrinsic" sources: review and analysis of the words and the syntax, a consideration of the plain or technical meaning of the words, as well as punctuation and grammar rules. We also examine selected examples of interpretation using "extrinsic" sources: a review of aspects of the legislative process pertaining to the enactment of the statute under consideration, the circumstances before and during enactment, as well as post-enactment

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[14] Morris-Sussex Area Co. v. Hopatcong Borough, 15 N.J. Tax 438, 443 (1996) (citation omitted).

[15] Karl N. 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) (listing twenty-eight canons of statutory interpretation and their opposites).

[16] Daniel Victor, *Oxford Comma Dispute is Settled as Maine Drivers Get $5 Million*, N.Y. TIMES (Feb. 9, 2018), https://www.nytimes.com/2018/02/09/us/oxford-comma-maine.html.

[17] *Id.*

[18] *Id.*

events and interpretations.

The following pages certainly do not, nor could they, contain an exhaustive review of this area. Instead, we focus on issues of statutory interpretation that arose in the ordinary course of the recent work of the New Jersey Law Revision Commission, whose statutory mandate requires that it promote and encourage the clarification and simplification of New Jersey's law, its better adaptation to present social needs, and secure the better administration of justice.[19]

I. INTRINSIC AIDS TO INTERPRETATION

> "Intrinsic" aids for interpretation relate to the language of a statute itself. Courts have called intrinsic aids "technical rules of statutory construction," and aids which "arise from the composition and structure of [an] act." However they are described, intrinsic aids generally are the first resource to which courts turn to construe an ambiguous statute . . . . These "intrinsic" aids for construction focus attention on a statute's text, and properly reflect the primacy of the legislature's own use of language. [footnotes omitted][20]

A. The Doctrine of the Last Antecedent

As both English syntax and the law have become more complicated, so too has the problem of ascertaining the intent or meaning of a statute.[21] Linguists have observed that the English language has a tendency to "cluster," or "group," words next to each other that can be interpreted by readers to form a unit of thought.[22] In the late 1880's, Jabez Gridley Sutherland analyzed complicated and litigated statutes in an attempt to resolve future problems of statutory interpretation.[23] One result of Sutherland's work was his creation of a grammar and punctuation rule that would become known as the doctrine of the last antecedent.[24] That doctrine provides, in relevant part, that,

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19 N.J.S.A. § 1:12A-8 (West 2019).

20 SINGER & SINGER, *supra* note 9, § 47:1.

21 LeClercq, *supra* note 1, at 86.

22 *Id.* at 87. (citing Lyn Frazier, *Syntactic Complexity*, in NATURAL LANGUAGE PARSING 135 (David Dowty et. al. eds., 1985)).

23 *Id.* at 86–87. Jabez Sutherland authored SUTHERLAND ON STATUTORY CONSTRUCTION (1st ed. 1891).

24 *Id.* at 87. This doctrine is also known as "the last antecedent rule," "the rule of last antecedent," and *ad proximum antecedens fiat relatio nisi impediatur sententia origin* (relative words must ordinarily be referred to the last antecedent, the last antecedent being the last word which can be made an antecedent so as to give a meaning).

> [r]eferential and qualifying phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is the "last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence." Thus a proviso usually applies to the provision or clause immediately preceding it . . . .[25]

Although the doctrine is not the law and is not uniformly accepted, its strength as an interpretive tool is attributed to the fact that "the last antecedent rule is merely another aid to [the discovery of] . . . intent or meaning [of a statute], *and* [that it] is not inflexible and uniformly binding."[26]

The doctrine provides that, "where the sense of an entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the qualifying word or phrase is not restricted to its immediate antecedent . . . ."[27] The flexibility incorporated in the doctrine has been viewed by some as one of its fundamental weaknesses.[28] Critics have remarked that, "[b]ecause the question of whether to apply [the doctrine] essentially amounts to a coin toss, it seems implausible to rely on it as a method of inferring actual congressional intent or meaning."[29] Despite its detractors, use of the doctrine increases in the United States Supreme Court, the federal Circuit Courts,[30] and the New Jersey Judiciary.[31]

Beginning in 1799, when the United States Supreme Court interpreted statutes that included a list of terms followed by a limiting clause, the Court referred in passing to the interpretive strategy known as "the doctrine of the last antecedent."[32] In 2003, however, the doctrine seemingly achieved an

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[25] SINGER & SINGER, *supra* note 9, § 47:33 (7th ed. 2019) (footnotes omitted).

[26] *Id.* (emphasis added) (citing Borenstein v. Comm'r of Internal Revenue, 919 F.3d 746 (2d Cir. 2019) and Barnhart v. Thomas, 540 U.S. 20 (2003) ("[t]he last antecedent rule is not absolute and can assuredly be overcome by other indicia of meaning, but construing a statue in accord with the rule is quite sensible as a matter of grammar."); *and see* LeClercq, *supra* note 1, at 89 (discussing that linguistic principles are neither rules nor the law; rather, the principles of linguistics help readers infer meaning).

[27] SINGER & SINGER, *supra* note 9, § 47:33. (citing U.S. v. Babbit, 66 U.S. 55 (1861); Allstate Ins. Co. v. Mun, 751 F.3d 94 (2d Cir. 2014); In re Federal-Mogul Global Inc., 684 F.3d 355 (3d Cir. 2012); Shendock v. Dir., Office of Workers' Comp. Programs, 893 F.2d 1458 (3d Cir. 1990); U.S. v. Brandenburg, 144 F.2d 656 (C.C.A. 3d Cir. 1944)).

[28] Joseph Kimble, *The Doctrine of the Last Antecedent, the Example in Barnhart, Why Both are Weak, and How Textualism Postures*, 16 SCRIBES J. LEGAL WRITING 5, 8 (2014–15) (quoting Jeremy Ross, *A Rule of Last Resort: A History of the Doctrine of the Last Antecedent in the United States Supreme Court*, 39 SW. L. REV. 325, 336 (2009)).

[29] *Id.*

[30] *Id.* at 8.

[31] *See, e.g.*, State v. Gelman, 195 N.J. 475, 484 (2008); and, C.R. v. M.T., No. A-0139018T4, 2019 N.J. Super LEXIS 158, at *7–9 (App. Div. Nov. 13, 2019).

[32] Lockhart v. United States, 136 S. Ct. 958, 963 (2016) (citing Sims Lessee v. Irvine, 3 Dall. 425 (1799); FTC v. Mandel Brothers Inc., 359 U.S. 385, 389 n. 4 (1959); Barnhart v. Thomas, 540 U.S. 20, 26 (2003)).

increase in status when it was announced as a grammatical rule in *Barnhart v. Thomas*.[33]

In *Barnhart*, the Supreme Court interpreted the federal Social Security Income ("SSI") statutes, determining whether an applicant was eligible for benefits.[34] For purposes of collecting SSI, 42 U.S.C. §§ 423(d)(2)(A) and 1382c(a)(3)(B) provide that a person is disabled "only if his physical or mental impairment . . . [is] of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy."[35]

The Court, after analyzing the syntax, determined that the statutes establish two requirements.[36] An impairment must render the individual "unable to do his previous work" and must also preclude the individual from "engag[ing] in any other kind of substantial gainful work."[37] Invoking the "rule" of the last antecedent, the Court found that the clause "which exists in the national economy" qualifies the latter requirement.[38] Pursuant to this newly announced "rule:"

> A limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows . . . . While *this rule* is not an absolute and can assuredly be overcome by other indicia of meaning, we have said that construing a statute in accord with the rule is "quite sensible as a matter of grammar."[39]

Doing so "reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it."[40]

Thirteen years after the *Barnhart* decision, in *Lockhart v. United States*, the Supreme Court considered a case in which the defendant pled guilty in federal court to the possession of child pornography.[41] The defendant had a prior state conviction for first-degree sexual abuse involving his adult girlfriend.[42] His pre-sentence report concluded that he was subject to a ten-year mandatory minimum sentence.[43] The report also noted that a statutory

33 *Barnhart*, 540 U.S. at 26.
34 *Id.* at 20.
35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.*
39 Barnhart v. Thomas, 540 U.S. 20, 26 (2003) (emphasis added).
40 Lockhart v. United States, 136 S. Ct. 958, 963 (2016).
41 *Id.*
42 *Id.* at 960.
43 *Id.*

sentence enhancement was triggered by the defendant's prior state convictions for crimes "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct *involving a minor or ward.*"[44]

The defendant argued that the limiting phrase, "*involving a minor or ward*," applied to all three crimes.[45] The District Court disagreed.[46] The Second Circuit affirmed, and the Supreme Court granted certiorari.[47] After examining the internal logic of the statute, its place in the overall statutory scheme, and the legislative history, the Supreme Court concluded that the doctrine of the last antecedent was well supported by the context and structure of the statute.[48]

Although the last New Jersey Supreme Court case discussing the doctrine of the last antecedent was *State v. Gelman*,[49] decided in 2008, the New Jersey Appellate Division has considered more recent cases invoking the doctrine. Since the Court in *Gelman* ultimately resolved the statutory ambiguity in favor of the defendant under the doctrine of lenity,[50] consideration of recent Appellate Division decisions follows.

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[44] *Id.* (emphasis added). The italicized portion of the statute is commonly referred to as the "limiting phrase," "limiting clause," or the "qualifying phrase."

[45] *Id.* (emphasis added).

[46] Lockhart v. United States, 136 S. Ct. 958, 960.

[47] *Id.* at 960. The Eighth Circuit interpreted the qualifying phrase "involving a minor or ward" to apply to each of the offenses.

[48] *Id*. at 960, 968.

[49] State v. Gelman, 195 N.J. 475 (2008). This doctrine was subsequently discussed by the Appellate Division in Mountain Hill, L.L.C. v. Zoning Bd. of Adjustment of Twp. of Middletown, 403 N.J. Super. 201 (App. Div. 2008) (confirming that where no contrary intention appears, qualifying words refer solely to the last antecedent); Alexander v. Bd. of Rev., 405 N.J. Super. 408 (App. Div. 2009) (explaining that if the modifier is intended to relate to more than the last antecedent, a "comma" is used to set off the modifier from the entire series); Maccarone v. State, 2011 WL 2478636 (App. Div. Jun. 23, 2011) (finding that the use of a semicolon indicates an intention on the part of the legislature to separate the first group in the statutory list from those set forth in the modifying clause); Mahwah Realty Assoc. v. Twp. of Mahwah, 430 N.J. Super. 247 (App. Div. 2013) (noting that in the absence of intrinsic or extrinsic evidence to the contrary, the court must logically interpret a statute according to its literal wording and natural connotation); and, Kamienski v. State, Dept. of Treas., 451 N.J. Super. 499 (App. Div. 2017) following State v. Gelman, 195 N.J. 475, 484 (2008) (the doctrine of last antecedent holds that unless a contrary intention otherwise appears, a qualifying phrase within a statute refers to the last antecedent phrase). In addition, the doctrine was most recently discussed by the Tax Court in Bentz v. Twp. of Little Egg Harbor, 30 N.J. Tax 530 (Tax 2018) (noting that the general rule of statutory construction is that the modifying phrase applies to the last antecedent phrase, absent contrary intent and the use of a comma to separate a modifier from an antecedent phrase indicates an intent to apply the modifier to all previous antecedent phrases).

[50] *Gelman*, 195 N.J. at 497 (noting that Justice Rivera-Soto dissented, adopted an interpretation of the statute similar to the one proffered by the State).

In *State v. Malik*, the defendant was convicted by a jury of first-degree aggravated sexual assault and sentenced to a ten-year prison term subject to the "No Early Release Act" (NERA).[51] The defendant appealed.[52] He argued that he had asked the trial court judge to charge the jury with the definition of "mentally incapacitated" set forth in N.J.S.A. 2C:14-1(i).[53] He withdrew the request after the trial court said that it did not see how it would assist him and that the State had not charged mentally incapacitated in the indictment.[54] The Appellate Division, however, discussed this defined term in its opinion.

The Appellate Division observed that the indictment was predicated upon the fact that the defendant "knew" or "should have known" that the victim was "physically helpless."[55] The State offered evidence that the victim had voluntarily consumed alcohol and proffered that her intoxicated state proved that she met the definition of "physically helpless" and not "mentally incapacitated."[56] In considering the propriety of a "mental incapacitation" charge, the court examined the definition set forth in N.J.S.A. 2C:14-1(i),[57] which defines "mentally incapacitated" as "that condition in which a person is rendered temporarily incapable of understanding or controlling his conduct due to the influence of a narcotic, anesthetic, intoxicant, or other substance *administered to that person without his prior knowledge or consent* . . . ."[58]

The court determined that "[t]here was no evidence that [the victim] ingested any substance without her knowledge or consent, or under any situation of which she did not have knowledge or control."[59] Absent such proof, the court determined that it would have been improper and confusing to the jury to include this definition in a jury charge.[60] The court also determined that the phrase "administered to that person without his prior knowledge or consent" qualified all four statutory terms: narcotics,

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[51] State v. Malik, No. A-2683-16T2, 2018 N.J. Super. Unpub. LEXIS 2697, at *1 (Super. Ct. App. Div. Dec. 10, 2018).

[52] *Id.*

[53] *Id.* at *9. The defendant raised seven points in his appellate brief. Only point IV, however, is germane to the discussion raised herein. The other six points raised in the defendant's brief have been omitted from this discussion.

[54] *Id.*

[55] *Id.* at *10.

[56] *Id. See* N.J.S.A. 2C:14-1(h) (defining "physically helpless" as a "condition in which a person is unconscious or is physically unable to flee or is physically unable to communicate unwillingness to act").

[57] State v. Malik, No. A-2683-16T2, 2018 N.J. Super. Unpub. LEXIS 2697, at *1, *28 (Super. Ct. App. Div. Dec. 10, 2018).

[58] *Id.* (emphasis added).

[59] *Id.* at *28–*29.

[60] *Id.* at *29.

anesthetics, intoxicants and other substances.[61] This reading of the statute limits the term "mentally incapacitated" to victims that are rendered temporarily incapable of understanding or controlling their conduct *only* when they are administered substances without their prior knowledge or consent.

Eleven months later, the Appellate Division examined the same statute, and the result was an entirely different interpretation.[62] In *C.R. v. M.T.*, the plaintiff commenced an action under the Sexual Assault Survivor Protection Act (SASPA) to restrain the defendant from having any communication or contact with her.[63] The parties did not dispute that sexual contact occurred.[64] After hearing the testimony of the parties, the trial court found the parties' competing versions of the events to be "equally plausible," determining, as a result, that the plaintiff failed to prove that her version was more likely true than defendant's.[65] The plaintiff appealed.[66]

The Appellate Division noted that the "factual dispute about consent turned on whether there was a ground upon which it could be found [that the] plaintiff was incapable of consenting."[67] A sexual assault victim is "one whom the actor knew or should have known was," among other things, "mentally incapacitated."[68]

The court in *C.R.* recognized that one reading of the statute "might suggest a requirement that the alleged victim prove her *involuntary* intoxication, that is, that she ingested intoxicants administered to [her] without [her] prior knowledge or consent."[69]

The court "engage[d] the doctrine of the last antecedent" after noting that the Legislature listed the substances that could generate mental incapacity and followed them with a qualifying phrase.[70] The court emphasized the absence of a comma after the last antecedent "other substance."[71] It determined that the absence of this comma, in conjunction with the doctrine of last antecedent, "requires our conclusion that the

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61 *See* Lockhart v. United States, 136 S. Ct. 958, 970; *see also Series Qualifier Canon*, BLACK'S LAW DICTIONARY (10th ed. 2014). This method of interpretation is predicated upon the "Series Qualifier Canon."

62 C.R. v. M.T., 461 N.J. Super. 341 (App. Div. Nov. 13, 2019).

63 *Id.* at 343; *see also* N.J.S.A. §§ 2C:14-13 to 21.

64 *C.R.*, 461 N.J. Super. at 343.

65 *Id.* at 346.

66 *Id.* at 343.

67 *Id.*

68 *Id.* (citing N.J.S.A. 2C:14-2(a)(7)).

69 *Id.* at 347; *see also* State v. Malik, No. A-2683-16T2, 2018 WL 6441507, at *1 (App. Div. Dec. 10, 2018).

70 C.R. v. M.T., 461 N.J. Super. 341, 348 (App. Div. Nov. 13, 2019).

71 *Id.*

qualifying phrase applies only to 'other substances' and not [the term] 'intoxicant.'"[72] The court further reasoned that the Legislature intended to place the comma where it was.[73] Although the comma is "a mere punctuation mark to be sure, [its presence] would grammatically call for a different result."[74] The court "confidently conclude[d] that the Legislature's omission of a comma after 'other substance' was intended to invoke the doctrine of the last antecedent in the construction of N.J.S.A. 2C:14-1(i), thereby conveying the Legislature's intent that the phrase would qualify only 'other substance.'"[75]

Textual analysis of the term "mentally incapacitated," as defined in N.J.S.A. 2C:14-1(i), is subject to competing, plausible interpretations. One would find that an individual was mentally incapacitated only if he or she was administered a narcotic, anesthetic, intoxicant, or other substance without their prior knowledge or consent. The other would find the same individual mentally incapacitated if he or she was rendered temporarily incapable of understanding or controlling their conduct because they either voluntarily ingested a narcotic, anesthetic, or an intoxicant *or* was administered a substance without their prior knowledge or consent.

Arguably, the ambiguity created by the two diametrically opposed interpretations of the statute by two separate appellate courts suggests that statutory revision might more clearly express the intent of the Legislature.

B. In Pari Materia as an Intrinsic Interpretive Aid

"When attempting to discover the legislative intent, the statute must be read in light of the old law, the mischief sought to be eliminated and the proposed remedy."[76] One method of analyzing a statute is to read it *in pari materia.* Translated from Late Latin, *in pari materia* literally means "[u]pon the same matter or subject."[77] When employed as a means of statutory construction, this canon provides that, "[s]tatutes that deal with the same matter or subject should be read [. . .] and construed together as a unitary and harmonious whole."[78]

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[72] *Id.*

[73] *Id.* ("To convey some other meaning, the Legislature would have had to insert a comma after 'other substance.'").

[74] *Id.*

[75] *Id.*

[76] Correa v. Grossi, 458 N.J. Super. 571, 580 (App. Div. 2019) (citing Bd. of Ed. of Sea Isle City v. Kennedy, 196 N.J. 1, 13 (2008)).

[77] *In Pari Materia*, BLACK'S LAW DICTIONARY (5th ed. 1979); *see also* 2A SUTHERLAND STATUTORY CONSTRUCTION § 51.3 (7th ed. 2007) (statutes are *in pari materia*, pertain to the same subject matter, when they relate to the same person, thing or to the same class of persons or things).

[78] Marino v. Marino, 200 N.J. 315, 330 (2009).

The first reference to *in pari materia* by the New Jersey Judiciary seems to have been in 1793.[79] The Supreme Court of Judicature of New Jersey analyzed two statutory sections, enacted at different times, concerning the monetary amount of a suit required to permit the collection of costs.[80] The question before the court "depend[ed] altogether upon the construction of the acts of assembly upon this subject, and in forming our opinion we must be guided by the designs and intentions of the legislature, so far as they are to be gathered from expressions which they have employed."[81] The court noted, "[t]hese statutes being made *in pari materia*, are to be construed together."[82] According to the court, because there was "no clause in the latter repealing the former, we must consider it as operating to raise the sum within which costs are not recoverable."[83] The former statute was regarded by the court as "reflecting light upon the other, and explanatory of its meaning."[84] Finding that the second suit was necessitated by the result of the first, the court allowed the plaintiff to recover his full cost.[85]

In the recent case of *Collas v. Raritan River Garage, Inc.*, in the context of an attorney fee award to a former employee's spouse, who received a compensation award of dependent benefits until death or remarriage, the court acknowledged, "we often read statutes *in pari materia* to give effect to the Legislature's will enacting separate laws on the same subject matter . . . ."[86] Where the court cannot discern a link between the proffered statutes, the court will not infer one.[87] In fact, New Jersey courts have expressly cautioned against the "over-reliance on maxims of statutory construction," noting that "[t]he adventitious occurrence of like or similar phrases, or even of similar subject matter, in laws enacted for wholly different ends will normally not justify applying the rule of *in pari materia* construction."[88]

Along those lines is the court's treatment of *in pari materia* in the case of *Air Brook Limousine, Inc. v. Director, Division of Taxation*.[89] In *Air Brook*, the court addressed a tax dispute concerning a car service company.

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79 Baracliff's Ex'r v. Griscom's Adm'r, 1 N.J.L. 193, 195 (1793).

80 *Id.*

81 *Id.* at 194.

82 *Id.* at 195.

83 *Id.*

84 *Id.*

85 Baracliff's Ex'r v. Griscom's Adm'r, 1 N.J.L. 193, 195–96 (1793).

86 Collas v. Raritan River Garage, Inc., 460 N.J. Super. 279, 283 (App. Div. 2019).

87 *Id.* (finding no link that tethers the 450-week period in N.J.S.A. 34:15-12 and portions of N.J.S.A. 34-15-13 to the calculation of counsel fees governed by N.J.S.A. 34:15-64).

88 Marino v. Marino, 200 N.J. 315, 331 (2009) (quotations omitted).

89 Air Brook Limousine, Inc. v. Dir., Div. of Taxation, No. A-3861-10T3, 2012 WL 3166607, at *10 (App. Div. 2012), *certif. denied*, 213 N.J. 568, 65 A.3d 835 (2013).

It was the position of Air Brook that it was not required to pay sales and use tax on its vehicles.[90] The Tax Court and Appellate Division disagreed, finding that Air Brook's vehicles—sedans and limousines—did not qualify as a "bus" for tax exemption.[91] N.J.S.A. 54:32B-8.28 reads, in pertinent part:

> Receipts from *sales of buses for public passenger transportation, including repair and replacement parts and labor therefor, to bus companies whose rates are regulated by the Interstate Commerce Commission or the Department of Transportation* or to an affiliate of said bus companies or to common or contract carriers for their use in the transportation of children to and from school are exempt from the tax imposed under the Sales and Use Tax Act.[92]

The Sales and Use Tax ("SUT") Act does not define the term "bus."[93] Air Brook took the position that the exemption contained in the SUT Act should be read *in pari materia* with definitions contained in Title 39 (Motor Vehicles and Traffic Regulation) and Title 48 (Public Utilities).[94]

Title 39 defines "omnibus" as a "motor vehicle used for the transportation of passengers for hire, except commuter vans and vehicles used in ridesharing arrangements and school buses."[95] Title 48 defines "autobus" as "any motor vehicle or motorbus operated over public highways or public places in this State for the transportation of passengers for hire in intrastate business, whether used in regular route, casino, charter or special bus operations, notwithstanding such motor vehicle or motorbus may be used in interstate commerce."[96] Although the SUT Act's bus exemption was enacted almost a decade before the Title 48 "autobus" definition, both statutory sections were later subject to technical corrections in the same bill.[97]

In 1990, the Legislature added a SUT Act tax exemption for limousines,[98] which cross-referenced the Title 39 definition of "limousine," but left the bus exemption untouched. Other SUT Act exemptions make specific cross-reference to definitions found in other statutes.[99] All of the

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90 *Id.* at *1.

91 *Id.* at *1 and *11.

92 N.J.S.A. § 54:32B-8.28 (emphasis added).

93 Air Brook Limousine, Inc. v. Dir., Div. of Taxation, No. A-3861-10T3, 2012 WL 3166607, at *5 (App. Div. 2012), *certif. denied*, 213 N.J. 568, 65 A.3d 835 (2013).

94 *Id.* at *6 and *9.

95 N.J.S.A. § 39:1-1.

96 N.J.S.A. § 48:4-1.

97 Air Brook Limousine, Inc. v. Dir., Div. of Taxation, No. A-3861-10T3, 2012 WL 3166607, at *8 (App. Div. 2012), *certif. denied*, 213 N.J. 568, 65 A.3d 835 (2013).

98 N.J.S.A. § 54:32B-8.52 (citing N.J.S.A. 39:3-195).

99 *See N.J.S.A. §* 54:32B–8.6 (referring to the definition of "manufactured home" in

vehicles in question in the *Air Brook* case were registered with the State Motor Vehicle Commission ("MVC") as "omnibus" vehicles, all bore omnibus license plates, and all carried $1.5 million in insurance as required by the MVC for buses.[100]

The *Air Brook* court, however, declined to apply an *in pari materia* reading of the three statutes. The court said that while the "SUT bus exemption and Titles 39 and 48 may all deal with buses, [. . .] that superficial overlap does not mean that they are *in pari materia.*"[101] The court said that "[g]iven the risk of impinging on the legislative function, our courts consider it 'better to wait for necessary corrections by those authorized to make them, or, in fact, for them to remain unmade, however desirable they may be.'"[102]

Finally, within the Local Land and Building Laws ("LLBL"), there are two statutes that permit a governmental entity to lease property to private individuals.[103] N.J.S.A. 40A:12-14 provides, in relevant part, that:

> Any county or municipality may lease any real property, capital improvement or personal property not needed for public use as set forth in the resolution or ordinance authorizing the lease, other than county or municipal real property otherwise dedicated or restricted pursuant to law, and except as otherwise provided by law, all such leases shall be made in the manner provided by this section.
>
> (a) In the case of a lease to a private person, except for a lease to a private person for a public purpose as provided in . . . (C. 40A:12-15), said lease shall be made to the highest bidder by open public bidding at auction or by submission of sealed bids.[104]

N.J.S.A. § 54:4–1.4); *N.J.S.A.* § 54:32B–8.8 (referring to the definition of "motor fuels" in the Motor Fuel Tax Law, *N.J.S.A.* §§ 54:39–101 to –149); *N.J.S.A.* § 54:32B–8.15 (referring to the definition of "farming enterprise" in *N.J.S.A.* § 54:32B–8.16); *N.J.S.A.* § 54:32B–8.16 (defining "farming enterprise"); *N.J.S.A.* § 54:32B–8.45 (referring to the definition of "cigarette" in the Cigarette Tax Act, *N.J.S.A.* §§ 54:40A–1 to –66); *N.J.S.A.* § 54:32B–8.52 (defining "limousine" by reference to *N.J.S.A.* § 39:3– 9.5); *N.J.S.A.* § 54:32B–2(mm) (referring to the definition of "mobile communications services" in 4 *U.S.C.* § 124).

100 Air Brook Limousine, Inc. v. Dir., Div. of Taxation, No. A-3861-10T3, 2012 WL 3166607, at *4 (App. Div. 2012), *certif. denied*, 213 N.J. 568, 65 A.3d 835 (2013).

101 Air Brook Limousine, Inc. v. Dir., Div. of Taxation, No. A-3861-10T3, 2012 WL 3166607, at *10 (App. Div. 2012), *certif. denied*, 213 N.J. 568, 65 A.3d 835 (2013).

102 *Id.* at *7 (quoting R.R. Comm'n v. Grand Trunk Western R. Co., 100 N.E. 852, 855 (Ind. 1913)).

103 *See* N.J.S.A. 40A:12-14 and N.J.S.A. 40A:12-24.

104 N.J.S.A. 40A:12-14.

Historically, this statute was one of the first to mandate public bidding when a governmental unit proposed to lease its property to a private person.[105] Within the same chapter of the LLBL, however, N.J.S.A. 40A:4-24 provides that:

> Every county or municipality may lease for fixed and upon prescribed terms and for private purposes any of the land or buildings or any part thereof not presently needed for public use to the person who will pay the highest rent therefor. The use by the lessee shall be of such character as not to be detrimental to the building or the use of the building or the use of the unleased part of the building.[106]

The origin of this statute can be traced to R.S. 40:60-42, which in turn originated with the Home Rule Act of 1917.[107]

In *Sellitto v. Borough of Spring Lake Heights*, a residential property owner sought injunctive relief to restrain the governmental unit from leasing municipal property adjacent to his land to a cellular telephone communications facility.[108] The plaintiff alleged that the lease was null and void because it did not comply with the competitive bidding requirements set forth in the LLBL.[109] The Borough argued that N.J.S.A. 40A:12-24 allows a municipality to dispense with the public bidding requirement when leasing property to a private person.[110] The Borough contended that if the Legislature had intended otherwise, N.J.S.A. 40A:12-24 would contain express language regarding public bidding much like the language found in N.J.S.A. 40A:12-14.[111] The trial court denied the plaintiffs' applications and concluded that N.J.S.A. 40A:12-24 permitted the lease to be executed without the necessity of public bidding.[112] The plaintiff appealed.[113]

The Appellate Division was confronted with "two statutory provisions which were arguably controlling, both of which were contained within the LLBL and which were enacted on the same day . . . ."[114] The "real question,"

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105 Sellitto v. Borough of Spring Lake Heights, 284 N.J. Super. 277, 285 (App. Div. 1995).

106 N.J.S.A. 40A:4-24.

107 *Sellitto*, 284 N.J. Super. at 285.

108 *Id.*

109 *Id.* at 281–82. The plaintiff also alleged, among other things, that the borough failed to adhere to its own zoning ordinances by allowing a non-permitted use to be constructed in a residential zone. A discussion of these arguments has been omitted from this Report because they exceed the scope of the instant discussion.

110 *Id.* at 286.

111 *Id.* at 285.

112 Sellitto v. Borough of Spring Lake Heights, 284 N.J. Super. 277, 283–84 (App. Div. 1995).

113 *Id.* at 284.

114 *Id.* at 285.

according to the Appellate Division, was whether N.J.S.A. 40A:12-14 or N.J.S.A. 40A:12-40(a) controls these transactions.[115] In the absence of legislative history, the court struggled to determine the reason why two contradictory statutes exist within the same act.[116] The court observed that:

> [O]n the same day and within the same bill[, the Legislature]: (1) enacted a new provision (§ 14) which set forth in considerable detail the procedures which had to be followed by a municipality when it leased its public lands for a private purpose; and, (2) retained an older source provision (§ 24) which merely required the municipality to find the person willing to pay the highest rent for land or buildings not presently needed for public use before leasing the property.[117]

It was "not a question . . . of the more general statute yielding to the more specific; nor [was] it a question of the older statute yielding to the more recent."[118] Instead, the answer lies within the case law interpreting the LLBL and the Local Public Contracts Law ("LPCL").[119] The underlying purpose of the LPCL is to foster openness in local government activities.[120] It was enacted to "secure competition which, in turn, works to protect the public against chicanery and fraud in public office."[121] To achieve the purposes of the Act, the LPCL envisions, with certain exceptions, a system of competitive bidding,[122] the purpose of which is to obtain the best economic result for the public entity and ultimately for the taxpayer.[123]

In *Wasserman's Inc. v. Middletown Twp*., the New Jersey Supreme Court considered whether N.J.S.A. 40A:12-14 should be applied retroactively.[124] The court noted that N.J.S.A. 40A:12-14 specifically replaced N.J.S.A. 40:60-42,[125] but never mentioned N.J.S.A. 40A:12-24,

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115 *Id.* at 286.

116 *Id.*

117 *Id.* at 286–87.

118 Sellitto v. Borough of Spring Lake Heights, 284 N.J. Super. 277, 287 (App. Div. 1995).

119 *See generally* N.J.S.A. 40A:11-1 to 11-49.

120 *See* Closter Service Stations, Inc. v. Comm'rs of Village of Ridgefield Park, 99 N.J. Super. 69, 73 (Super Ct. App. Div. 1968) (noting that the Local Public Contracts Law "guard[s] against favoritism, improvidence, extravagance, and corruption" (citing Hillside Twp. v. Sternin, 25 N.J. 317 (1957)); *see also* Bodies by Lembo, Inc. v. County of Middlesex, 286 N.J. Super. 298 (Super. Ct. App. Div. 1996).

121 *Closter Service Stations*, 99 N.J. Super. at 73.

122 N.J. Stat. § 40A:11-13

123 *Sellitto*, 284 N.J. Super. at 287.

124 Wasserman's Inc. v. Middletown Twp., 137 N.J. 238, 243 (1994).

125 *Id.*

despite the fact that its language is identical to that of N.J.S.A. 40:60-42.[126]

The decision of the Supreme Court in *Wasserman* gave the *Sellitto* court pause while it considered the purpose of N.J.S.A. 40A:12-24. Ultimately, however, the *Sellitto* court made reference to the "rule of construction that statutes which deal with same matter or subject and seek to achieve the same overall legislative purpose should be read *in pari materia* most obviously applies when statutes in question were enacted during same session or went into effect at same time, or where they make specific reference to one another."[127] The court added, "if N.J.S.A. 40:60-42 has been replaced by § 14, we cannot ascertain what purpose the current § 24 serves."[128] The court concluded that, "§ 14 prevails over § 24. Otherwise no public bidding would be required for leasing public land and buildings not presently needed . . . ."[129] With regard to the viability of N.J.S.A. 40A:12-24, the court said, "[w]e cannot reconcile why the Legislature would adopt a statute with conflicting language."[130] The determination of the court appears to support a modification of the statute to address the conflicting language.

Although not uniformly applauded, or applied, the doctrine remains in broad and current use, as is demonstrated by the fact that it has been referenced in more than 1,000 New Jersey cases.[131] Even when the courts do not base their determination on an *in pari materia* reading of multiple statutory sections, the doctrine still seems to serve as a useful analytical paradigm.

II. EXTRINSIC AIDS TO INTERPRETATION

Chief Justice Marshall once noted that:

> "[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived." Consonant with this idea, courts construing an ambiguous statute do not limit their search for legislative intent to sources in the published act, known as "intrinsic"

126 *See Sellitto*, 284 N.J. Super. at 288.

127 *Id.* (citing Mimkon v. Ford, 66 N.J. 426, 433-34 (1975)).

128 *Id.*

129 *Id. See also* N.J. Highlands Coal. v. N.J. Dep't of Envtl. Prot., 236 N.J. 208, 214 (2018) (cautioning that [t]he adventitious occurrence of like or similar phrases, or even of similar subject matter, in laws enacted for wholly different ends will normally not justify applying the rule" of the [in pari materia construction]).

130 *Id.* at 289.

131 Westlaw search on February 25, 2020, for "in pari materia" returned a result of 1,007 cases in New Jersey.

> aids . . . Instead, courts also may consider sources beyond the printed page. These sources from outside a statute's text are known as "extrinsic" aids to interpretation. Extrinsic aids relate to a statute's history, and may be legislative, executive, judicial, or nongovernmental in origin. [footnotes omitted][132]

A. Temporal Analysis

Intrinsic sources of statutory interpretation do not stray from the words of the statute. Reliance solely on this approach, advocated by textualists, attempts to define the statute, and resolve any ambiguities by examining the text itself, without reference to external sources.[133] Other options, such as consideration of legislative intent, are largely discounted.[134]

Intentionalists, on the other hand, examine the purposes statutes were intended to serve by examining extrinsic sources such as legislative histories.[135] The New Jersey Supreme Court has suggested on many occasions that "the goal of statutory interpretation is to ascertain and effectuate the legislature's intent."[136]

Still others claim that neither of those approaches are reliable or sufficiently useful.[137] Critics point out that regardless of the approach, the context of the potential application matters, and even then, "context" itself is a fraught concept which does not yield predictable results.[138]

There is, however, a manner of looking at statutes without limited analysis of the words of the law itself, but that also avoids relying on secondary, perhaps subjective, sources. An inquiry into the timing of a statute exemplifies such an approach and can be useful in statutory interpretation. Examining the timing of a statute may help provide the elusive context, since one literally looks at when the statute was enacted, and how it interacts with other statutes dealing with the same subject.

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[132] § 48:1. *Extrinsic Aids to Interpretation*, 2A SUTHERLAND STATUTORY CONSTRUCTION § 48:1 (7th ed. 2019).

[133] ANTONIN SCALIA., COMMON-LAW COURTS IN A CIVIL-LAW SYSTEM: THE ROLE OF UNITED STATES FEDERAL COURTS IN INTERPRETING THE CONSTITUTION AND LAWS 17 (Princeton University Press 1995) ("It is the *law* that governs, not the intent of the lawgiver." [emphasis in original])

[134] *Id.* at 32 ("But assuming, contrary to all reality, that the search for "legislative intent" is a search for something that exists, that something is not likely to be found in the archives of legislative history.")

[135] J. Clark Kelso & Charles D. Kelso, *Statutory Interpretation: Four Theories in Disarray*, 53 S.M.U. L. REV. 81,86 (2000).

[136] State v. Olivero, 221 N.J. 632, 639 (2015); *see also* State v. Lenihan, 219 N.J. 251, 262 (2014); State in Interest of K.O., 217 N.J. 83, 91 (2014).

[137] *See* Frank H. Easterbrook, "The Absence of Method in Statutory Interpretation," 84 U. OF CHICAGO LAW REV. 81 (2017).

[138] *Id.* at 83.

We consider, on the following pages, the effect of timing when statutes contain conflicting provisions, when an enacted statute might imply repeal of a prior statute, when statutes are intended to apply retroactively, and when statutes are "borrowed" from other jurisdictions or based upon a model or uniform act.

New Jersey courts use a pragmatic approach for resolving potentially conflicting statutes, rather than hewing to a strict ideology. The Appellate Division has said that "[s]tatutes are to be read sensibly rather than literally."[139] The goal of our courts is always to allow for the greatest possible expression of legislative intent.[140] They "are enjoined to reconcile conflicts and read the laws as consistent to give effect to both expressions of the Legislature's purpose."[141] This is so even when there is a conflict involving the same subject.[142] Statutes addressing the same area of law should be read together and construed together, so that neither statute is rendered invalid.[143]

When reconciliation is not possible, courts may look to two possible points of distinction: specific versus general,[144] and later versus earlier.[145] When one statute is specific and the other general, the specific statute will generally govern.[146] Additionally, "[w]here two statutes deal with the same subject matter, the more recent enactment prevails as the latest expression of legislative will."[147] New Jersey courts recognize that where a later act "covers the whole subject" that was addressed by an earlier act, the "inescapable conclusion" is that the Legislature intended for the later act to control.[148] These canons may be employed in a single instance to achieve

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[139] Chicago Title Ins. Co. v. Bryan, 388 N.J. Super. 550, 557 (Super. Ct. App. Div. 2006), citing New Jersey State League of Municipalities v. Dep't of Cmty. Affairs, 310 N.J. Super. 224, 234 (Super. Ct. App. Div. 1998).

[140] New Jersey State League of Municipalities v. Dep't of Cmty. Affairs, 310 N.J. Super. 224, 234 (Super. Ct. App. Div. 1998), ref. State v. Szemple, 135 N.J. 406, 422 (1994) ("[I]n times when plain language creates uncertainties, courts must construe the statute in a manner that best effectuates the Legislature's intent.").

[141] New Jersey State League of Municipalities v. Dep't of Cmty. Affairs, 310 N.J. Super. 224, 234 (App. Div. 1998).

[142] *Id.*

[143] Marino v. Marino, 200 N.J. 315, 330 (2009).

[144] Williams v. American Auto Logistics, 226 N.J. 117, 127 (2016).

[145] Kemp by Wright v. State, County of Burlington, 147 N.J. 294, 306-7 (1997) (quoting NORMAN SINGER, 1A SUTHERLAND ON STATUTORY CONSTRUCTION § 23.09, at 338-39 (5th ed. 1993)).

[146] Scott v. New Jersey Dept. of Corrections, 6 A.3d 476, 480 (N.J. Super. Ct. App. Div. 2010) (citing State v. Cagno, 978 A.2d 921, 952 (App. Div. 2009)).

[147] In re Fed.-Mogul Glob. Inc., 684 F.3d 355, 374 (3d Cir. 2012) (citing NORMAN SINGER & SHAMBIE SINGER, 2B SUTHERLAND ON STATUTORY CONSTRUCTION § 51:2 (7th ed. 2012)).

[148] Kemp by Wright v. State, 687 A.2d 715, 721 (N.J. 1997) (citing State v. Roberts, 123 A.2d 1, 4 (N.J. 1956)).

the overarching goal of effectuating legislative intent. "[T]he more specific statute controls over the more general one, or the newer provision controls as the latest legislative expression[.]"[149]

Even where a court finds one statute to prevail over the other, the court must also take care to avoid finding a repeal by implication, which is universally disfavored.[150] "[A] court may not infer a statutory repeal 'unless the later statute expressly contradict[s] the original act' or unless such a construction is absolutely necessary. . . in order that [the] words [of the later statute] shall have any meaning at all."[151] As the New Jersey Supreme Court has announced, "a repeal by implication requires clear and compelling evidence of legislative intent."[152] Further, "such intent must be free from reasonable doubt."[153] Courts operate under the assumption that the Legislature is familiar with the laws it passes and intends for related laws to work together.[154] Therefore, courts must apply "every reasonable construction" in order to avoid implied repeal.[155]

Perhaps the most fundamental time-based canon of interpretation is that statutory law is presumed to apply prospectively.[156] This principle has been followed since the earliest days of the common law.[157] It is echoed in the Ex Post Facto Clause of our Constitution, which requires that citizens have notice of laws, particularly those which might impair substantive rights, and which limits the government's power to enact "arbitrary and potentially vindictive legislation."[158] The United States Supreme Court holds as "a rule of general application" that retroactivity will not apply "unless such construction is required by explicit language or by necessary implication."[159]

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149 SINGER & SINGER, *supra* note 147.

150 *See, e.g.*, Hui v. Castaneda, 559 U.S. 799, 810 (2010); New Jersey Ass'n of School Adm'rs v. Schundler, 49 A.3d 860, 872 (N.J. 2012).

151 United States v. Sampson, 898 F.3d 287, 302 (2d Cir. 2018) (citing Traynor v. Turnage, 485 U.S. 535, 548 (1988) (internal quotations omitted)).

152 New Jersey Ass'n of School Adm'rs v. Schundler, 49 A.3d 860, 872 (N.J. 2012), citing Mahwah Twp. v. Bergen Cnty. Bd. of Taxation, 98 N.J. 268, 280, 486 A.2d 818, cert. denied, 471 U.S. 1136, 105 S.Ct. 2677, 86 L.Ed.2d 696 (1985).

153 Voss v. Tranquilino, 19 A.3d 470, 471 (N.J. 2011) (citing Twp. Of Mahwah v. Bergen Cty. Bd. Of Taxation, 486 A.2d 818, 825 (N.J. 1985)).

154 *New Jersey Ass'n of Sch. Adm'rs*, 49 A.3d at 872.

155 *Id*.

156 SINGER & SINGER, *supra* note 147, at § 41:4. ("The rule is that statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction.").

157 Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994) (citing Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 842–44, 855–56 (1990)). *See also* Dash v. Van Kleeck, 7 Johns. 477, 503 (N.Y. Sup. Ct. 1811).

158 *Id*. at 266–67 (citing Weaver v. Graham, 450 U.S. 24, 28-29 (1981)).

159 Fernandez-Vargas v. Gonzales, 548 U.S. 30, 37 (2006) (citing United States v. St. Louis, S.F. & T.R. Co., 270 U.S. 1, 3 (1926)).

The New Jersey Supreme Court has long recognized the problematic nature of retroactive statutes, as such an "application of new laws involves a high risk of being unfair."[160] The court declines finding retroactivity "unless such intention of the legislature appear clearly by its terms or by necessary implication."[161] Consequently, there are "well-settled rules" regarding retroactivity, absent clear legislative intent that a statute is to apply only prospectively.[162]

First, and most obviously, a statute will apply retroactively where the Legislature has explicitly intended it.[163] Such an intention may be found in the language of the statute, or in the pertinent legislative history.[164] Second, retroactivity may be impliedly intended when such an approach is necessary to give effect to the statute or to provide a sensible interpretation.[165] If the Legislature is silent on the subject, "a prospective intent 'may be inferred from knowledge that courts *generally* will enforce newly enacted substantive statutes prospectively.'"[166]

Third, retroactivity is appropriate when a statute is "ameliorative or curative."[167] Such a statute "is designed merely to carry out or explain the intent of the original statute" and does not impact "the intended scope or purposes of the original act."[168] An ameliorative or curative statute clarifies an earlier statute, but does not substantively alter it.[169] Lastly, in the absence of a clear expression of legislative intent for it to apply prospectively, considerations like the expectations of the parties may warrant retroactive application.[170] This requires looking at the reasonable expectations of the parties as well as the controlling law.[171]

However, even if a statute is intended to apply retroactively, courts will still decline to do so if such an application would be unconstitutional, or if it would result in "manifest injustice."[172] A manifest injustice analysis

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160 Gibbons v. Gibbons, 432 A.2d 80, 84 (N.J. 1981).

161 Deegan v. Morrow, 31 N.J.L. 136, 138 (Sup. Ct. 1864).

162 *Gibbons*, 432 A.2d. at 84.

163 *Id.*

164 *Id.* (citing, *e.g.*, Howard Savings Institution v. Kielb, 183 A.2d 401, 404-407 (N.J. 1962)).

165 *Id.*

166 Johnson v. Roselle EQ Quick LLC, 143 A.3d 254, 264 (N.J. 2016) (citing Maeker v. Ross, 99 A.3d 795, 802 (N.J. 2014)) [Emphasis in the original.].

167 *Johnson*, 143 A.3d. at 264.

168 *Id.*

169 *Id.* (citing Schiavo v. John F. Kennedy Hosp., 609 A.2d 781, 783 (N.J. Super. Ct. App. Div. 1992)).

170 Gibbons v. Gibbons, 432 A.2d 80, 85 (N.J. 1981).

171 *Johnson*, 143 A.3d. at 265.

172 Oberhand v. Director, Div. of Taxation, 940 A.2d 1202, 1210 (N.J. 2008) (citing Nobrega v. Edison Glen Assocs., 772 A.2d 368, 378 (N.J. 2001)).

involves "matters of unfairness and inequity[,]" specifically, an affected party's reliance on prior law, and the consequences of that reliance.[173]

Modeled and "borrowed" statutes are laws which are copied from other jurisdictions.[174] When construing such statutes, the borrowing jurisdiction generally is assumed to accept their prior judicial interpretations.[175] Other factors, such as the similarity of language between the original and the copy, may also be considered.[176] Model and uniform acts are drafted by the Uniform Law Commission[177] and by the American Law Institute.[178] A uniform act seeks to establish the same law on a subject, and a model act seeks to promote uniformity (but with the understanding that the act may only be adopted in part); such acts strive to achieve uniformity among jurisdictions.[179] Consonant with the idea of promoting uniformity is that courts will construe model and uniform acts as other adopting jurisdictions have done. Courts assume that when the Legislature adopts model or uniform laws, the legislative intent is to accept the interpretation of the parent or sister jurisdictions.[180] As the New Jersey Supreme Court notes, "[t]he very purpose of adoption of a model act is to encourage consistency in approach in the legislative language and its application."[181]

Thus, a temporal analysis of statutes helps shed light on legislative intent, thereby aiding in statutory interpretation when the text of the statute itself is ambiguous. By considering when a statute was enacted and utilizing canons of construction that incorporate time as instructive in a statutory analysis, courts can resolve ambiguities and make the laws more reliable, and useful, to the people governed by them.

B. Post-enactment Legislative History as an Extrinsic Interpretive Aid

Extrinsic aids relate to a statute's history, which can be divided into three chronological categories: pre-enactment history, enactment history, and post-enactment history.[182] Pre-enactment history includes "circumstances and events leading up to a bill's introduction."[183] Enactment

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173 *Id*. (citing In re D.C., 679 A.2d 634, 648 (N.J. 1996) (internal quotations omitted)).

174 SINGER & SINGER, *supra* note 147, at § 52:2.

175 Carolene Products Co. v. U.S., 323 U.S. 18, 26 (1944).

176 *Id.*

177 *Uniform Act*, BLACK'S LAW DICTIONARY (11th ed. 2019).

178 ALI, https://www.ali.org/about-ali/how-institute-works/. (last visited Mar. 23, 2020).

179 *What is a Uniform Act?*, UNIFORM LAW COMMISSION, uniformlaws.org/acts/overview/uniformacts. (last visited Feb. 2, 2020).

180 *Id.*

181 Thomsen v. Mercer-Charles, 901 A.2d 303, 311 (N.J. 2006).

182 SINGER & SINGER, *supra* note 9, § 48:1.

183 SINGER & SINGER, *supra* note 9, § 48:1.

history includes "all actions taken and statements made during legislative consideration of the original bill from the time of its introduction until final enactment."[184] Post-enactment legislative history includes "amendments and any other development relevant to a statute's operation subsequent to enactment,"[185] such as reenactments, legislative acquiescence, and judicial precedents.[186] Courts view subsequent legislative history, or post-enactment history, as less illuminating than enactment history.[187] However, "[w]here the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived."[188]

The legislature's reenactment of a statute can provide extrinsic aid. If the legislature reenacts a statute that contains substantially similar language as the original statute, it is viewed as a continuation of the original act and not a new enactment.[189] Under such circumstances, it is presumed that the legislature is aware of, and has ratified, the judicial interpretations given to the original statute.[190]

In *Darel v. Pennsylvania Manufacturers Association Insurance Company*, a bicyclist was injured as a result of an accident involving an automobile and sought personal injury protection ("PIP") benefits from the automobile's insurer.[191] The New Jersey Supreme Court considered whether the 1983 amendment to New Jersey's No Fault Act (N.J.S.A. 39:6A-4) affected the eligibility requirements and the PIP benefits of the bicyclist.[192] The court determined that the 1983 amendment did not affect the benefits of the bicyclist.[193] According to the court, the amendment affected eligibility requirements for only one class of pedestrians: the named insured's family members who sustained bodily injury caused by the named insured's automobile.[194] This class excluded beneficiaries, like the bicyclist plaintiff,

184 SINGER & SINGER, *supra* note 9, § 48:1.

185 SINGER & SINGER, *supra* note 9, § 48:1.

186 SINGER & SINGER, *supra* note 9, § 48:1.

187 SINGER & SINGER, *supra* note 9, § 48:20; *see also* Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).

188 SINGER & SINGER, *supra* note 9, § 48:1, (quoting Chief Justice Marshall in *U.S. v. Fisher*, 6 U.S. 358 (1805)).

189 SINGER & SINGER, *supra* note 9, § 22:33.

190 Pierce v. Underwood, 487 U.S. 552, 567 (1988).

191 Darel v. Pennsylvania Mfrs. Ass'n Ins. Co., 114 N.J. 416 (1989).

192 *Id.* at 419.

193 *Id.* (citing N.J.S.A. 39:6A-4. The No-Fault Act created two separate classes of pedestrians under the statute. The first class included the named insured or a familial member of the named insured's household who sustains an injury as a result of an accident involving an automobile. The second class of pedestrians, "stranger" pedestrians, who were strangers to the insurance contract, consisted of pedestrians who sustain bodily injury caused by the named insured's automobile or are struck by an object propelled by or from such automobile. The plaintiff fell under the "stranger" pedestrian category).

194 *Id.* at 420–21

who fell under the "stranger" pedestrian category.[195] "The words controlling the status of 'stranger' pedestrians are simply repeated in the amended version of the statute" and the statutory interpretation of the court is held to be valid when the legislature readopts and reenacts the language endorsed in previous judicial decisions.[196]

In addition to reenactments, legislative acquiescence or inaction has been deemed to indicate legislative approval of the application of law by courts and agencies.[197] "The construction of a statute by the courts, supported by long acquiescence on the part of the Legislature, or by continued use of the same language or failure to amend the statute, is evidence that such construction is in accordance with the legislative intent."[198] The presumption of acquiescence can be rebutted by conflicting legislative and judicial history.[199] It may also be asserted that the legislative silence was due to a lack of legislative awareness of the decisions of the courts.

The United States Supreme Court has, however, relied on legislative inaction to interpret a statute's ambiguity in favor of the interpretation and application of the statute by a court or agency.[200] In *Bob Jones University v. United States*, the Supreme Court was faced with the question of whether non-profit private schools that prescribe and enforce racially discriminatory admission standards qualify as tax-exempt organizations under the Internal Revenue Code.[201] In a decision rooted in congressional acquiescence, the Supreme Court affirmed the lower court's decision that such educational institutions do not qualify as tax-exempt organizations under § 501(c)(3).[202] The Court noted that several bills and an amendment to the relevant statute were introduced after IRS rulings regarding § 501(c)(3) in 1970 and 1971,[203] none of which demonstrated any effort by Congress to overturn the IRS

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195 *Id.*

196 Darel v. Pennsylvania Mfrs. Ass'n Ins. Co., 114 N.J. 416, 423 (1989) (citing 1A *Sutherland Statutory Construction* §22.33 (Sands 4th ed. 1985)).

197 William N. Eskridge Jr., *Interpreting Legislative Inaction*, 109 Yale Law School Legal Scholarship Repository (1988).

198 Lemke v. Bailey, 41 N.J. 295, 301 (1963).

199 SINGER & SINGER, *supra* note 9, § 49:08

200 Bob Jones University v. United States, 461 U.S. 574 (1983).

201 *Id.*

202 *Id.* at 623.

203 *Id.* (Section 501(c)(3) of the Internal Revenue Code ("IRC") of 1954 provided that "[c]orporations . . . organized and operated exclusively for religious, charitable. . . or educational proposes" are entitled to tax exemption. However, in 1970 IRS concluded that it could no longer justify allowing tax-exempt status under § 501(c)(3) to private schools that practiced racial discrimination, and in 1971 issued a revenue ruling stating that private schools having racially discriminatory policy toward students will not be seen as "charitable" as defined in § 170 of IRC and 501 (c)(3)).

ruling.[204] The Court concluded that the inaction of Congress left no doubt that Congress was aware of the strong public policy against granting tax exempt status to educational institutions with discriminatory practices.[205]

It is noted that while courts may consider subsequent legislative history including amendments, reenactment, or legislative inaction when interpreting a statute, courts will not consider a legislator's isolated remarks or statements subsequent to a statute's enactment.[206] In *Continental Gypsum Co. v. Director, of Div. of Taxation*, the New Jersey Tax Court observed that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."[207] An individual interpretative statement from a member of the Assembly after the enactment of a statute, however, does not equate to the collective understanding of the entire New Jersey legislature.[208]

Similarly, post-enactment statements of a legislator regarding their own legislative intent when they voted for a specific legislation are not assigned much weight by New Jersey courts.[209] The limited credence is justified by concerns that a legislator's statements may be influenced by interest groups or skewed by his or her own biases, calling into question their credibility.[210] The concept of "strength in numbers" appears to hold true in statutory interpretation since the Courts will give more weight to Assembly Statements and Committee Reports on the bill, as they represent the many voices of legislators involved in drafting and studying proposed legislation, as opposed to a single voice of a legislator.[211]

In addition to subsequent legislative developments, it has been said that "[s]tatutory precedent grows as case precedent grows. First, someone bolder than the rest marks a new course. If the course appears satisfactory, others follow. Legal science calls this the doctrine of *stare decisis*."[212] *Stare decisis* dates back to 18th century English common law and is a Latin term meaning,

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204 *Id*. at 600–01.

205 Bob Jones University v. United States, 461 U.S. 574, 600–01 (1983).

206 Continental Gypsum Co. v. Dir, Div. of Taxation, 19 N.J. Tax 221 (2000).

207 *Id.* at 231. (quoting Red Lion Broadcasting Co., v. FCC, 395 U.S.367, 380–81(1969)).

208 *Id.*

209 *See* New Jersey Coalition of Health Care Professionals, Inc. v. New Jersey Dept. of Banking and Ins., Div. of Ins., 323 N.J. Super. 207 (Super. Ct. App. Div. 1999).

210 SINGER & SINGER, *supra* note 9, § 48:16.

211 Continental Gypsum Co., 19 NJ. Tax at 231. (quoting State v. Yothers, 282 N.J. Super. 86, 105 (1995) (citing Garcia v. United States, 469 U.S. 70, 76 (1984))).

212 SINGER & SINGER, *supra* note 9, § 1:3. *See also* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (The doctrine of stare decisis serve number of policy goals. The doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

"to stand by that which is decided."[213] It refers to the courts' practice of following prior cases when making a ruling on a case with similar facts.[214] This common law principal promotes a respect for judicial decisions, uniformity, stability, and predictability in the development of legal principles.[215] Following precedent also enhances judicial efficiency.[216] Legal questions litigated in the past allow present and future courts to decide similar issues by analogy, rather than by employing fresh analysis each time. It is also a cost-efficient method; both courts and litigating parties save expenses in relitigating similar issues.[217] Courts have "always required a departure from precedent to be supported by some special justification."[218] As Justice Cardozo explained in his treatise on the common law, "[e]very new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered."[219]

Amendment and reenactment of a statute, legislative acquiescence, and judicial precedents are some of the different tools the courts utilize to assist in statutory interpretation. Canons based on extrinsic sources play a crucial role in resolving statutory ambiguity, but the interpretive weight they merit is ultimately entrusted to the courts.

III. CONCLUSION

Although not uniformly embraced, and despite the acknowledgement of contradictory canons, hundreds of years of case law illustrate that the canons of statutory interpretation have been, and continue to be, useful interpretive aids for courts faced with statutory language that fails, on its face, to provide sufficient clarify.

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213 Cong. Res. Serv., *The Supreme Court's Overruling of Constitutional Precedent* (2018).

214 *Id.*

215 State v. Witt 223 N.J. 409, 439 (2015) (citing State v. Shannon, 210 N.J. 225, 226 (2012)).

216 Cong. Res. Serv., *supra* note 213.

217 Cong. Res. Serv., *supra* note 213.

218 State v. Brown, 190 N.J. 144, 157 (2007) (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)).

219 Orientale v. Jennings, 239 N.J. 569, 592 (2019) (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 23 (1921)).