PALTRY, GENERAL & ECLECTIC: WHY THE OREGON SUPREME COURT SHOULD SCRAP *PGE V. BUREAU OF LABOR & INDUSTRIES*

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On October 22, 2007 the Oregon Supreme Court granted review in *State v. Gaines*,[1] a run-of-the-mill criminal case interpreting the statute establishing the obstruction of government or judicial administration.[2] What made the grant of review remarkable is the question certified by the court; a question which, depending on the answer, could spell the end of the three-step paradigm[3] of *PGE v. Bureau of Labor & Industries*.[4] That question was:

> Whether ORS 174.020 requires the Oregon courts to consider evidence of legislative history presented by a party when engaging in *PGE* analysis.[5]

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1. 155 P.3d 61 (Or. 2007), *adh'd to on recons.*, 159 P.3d 1291 (Or. Ct. App. 2007).

2. OR. REV. STAT. § 162.235(1) ("A person commits the crime of obstructing governmental or judicial administration if the person intentionally obstructs, impairs, or hinders the administration of law or other governmental or judicial function by means of intimidation, force, physical or economic interference or obstacle.").

3. The Supreme Court has referred to the *PGE* framework as a "paradigm" on several occasions. *See e.g.*, State v. Johnson, 116 P.3d 879, 882 (Or. 2005) ("The state's argument presents an issue of statutory construction to be considered under the paradigm set out in *PGE*.") (internal citation omitted).

4. 859 P.2d 1143 (Or. 1993) [hereinafter

An affirmative answer to this question would make *Gaines* a watershed case,[6] and the Court should be commended for putting the question to the parties so directly, a welcome change from the court's usual practice of grafting methodological declarations onto otherwise routine cases.[7] *PGE* looms over the legal landscape of Oregon like no other decision; it is easily the most cited by Oregon's two appellate courts,[8] and its rigidly sequential nature and its rejection of legislative history at the first level of analysis have made reliance upon dictionaries and statutory "context" the dominating features of statutory interpretation in Oregon.[9] In light of the grant of review in *Gaines*, this Comment provides a needed reevaluation of *PGE*.

This Comment surveys all the cases decided under the *PGE* paradigm between 1999 and 2006[10]

published by the supreme court citing *PGE*, only nine[12] reached the second "step" of the *PGE* analysis and considered legislative history, and no decision reached the third step of the paradigm. On the sixty-one occasions where the court has seen fit to reverse the court of appeals, it reached step two of *PGE* a mere five times,[13] and in the only instance of third step analysis to be addressed by both courts between 1999 and 2006,[14] the interpretation of competing constructions of Oregon's venue statute[15] in *State v. Werdell*,[16] the court of appeals was reversed on the basis of its first-step analysis of the underlying criminal statute[17] with no comment from the supreme

note 6, at 44 (finding that "not all of [the Oregon Supreme Court's] prior decisions adhere to the rule that the reviewing court must declare statutory language ambiguous to enable it to look at legislative history").

12. See Table 1 for all figures dealing with numbers of cases and their dispositions as well as an explanation of the methodology by which they were derived. Johansen, surveying the supreme court's use of *PGE* between 1993 and 1998, found that "of the 137 statutory issues addressed using the *PGE* approach, 104 were resolved at level one." *See* Johansen, *supra* note 10, at 221 n.9. One important caveat to this data is that those cases where the court has interpreted statutes, but not cited to *PGE*, are not included. While I have not read every case decided by the Oregon Supreme Court between 1999 and 2006, it is my impression that such cases are rare.

13. *See* Tharp v. Psychiatric Sec. Review Bd.,110 P.3d 580 (Or. 2005) (reversing an affirmance without opinion by the court of appeals, 72 P.3d 1011 (Or. Ct. App. 2003); State v. Barnes, 986 P.2d 1160 (Or. 1999) (reversing in part a decision by the court of appeals which *did not* cite *PGE*, 945 P.2d 627 (Or. Ct. App. 1997); State v. Edson, 985 P.2d 1253 (Or. 1999) (reversing in part a decision by the court of appeals which *did not* cite *PGE*, 912 P.2d 423 (Or. Ct. App. 1996); State v. Murray, 136 P.3d 10 (Or. 2006) (reversing in part an affirmance without opinion by the court of appeals, 117 P.3d 297 (Or. Ct. App. 2005); State v. Wolleat, 111 P.3d 1131 (Or. 2005) (reversing an affirmance from the bench by the court of appeals, 75 P.3d 469 (Or. Ct. App. 2003). Note that in all of these instances, which comprise more than half the cases in which the supreme court reached step two of *PGE*, the court of appeals either provided no explanation whatever, or did not cite *PGE*.

14. Contrast this with Johansen's finding that, between 1993 and 1998 the court, in one third (11 out of 33) of the cases in which it examined legislative history found that history useless and proceeded to step three. Johansen, *supra* note 9, at 244 n.169.

15. OR. REV. STAT. § 131.315(10) (2007).

16. 122 P.3d 86 (Or. Ct. App. 2005), *rev'd.,* 136 P.3d 17 (Or. 2006). The court of appeals continues to reach step three of the *PGE* analysis on occasion. *See e.g.*, State v. Stamper, 106 P.3d 172, 178 (Or. Ct. App. 2005), *rev denied*, 119 P.3d 790 (Or. 2005) (stating, with admirable candor, that "[u]ltimately, our interpretation of the statute is a judgment call based on our best estimation of what the legislature intended." 106 P.3d at 179.)

17. OR. REV. STAT. § 162.325 (establishing the crime of hindering prosecution). The court of appeals construed the meaning of the words "discovery" and "apprehension" in that statute at the first step of the *PGE* framework, employing *Webster's Third New International Dictionary* (unabridged ed. 2002). *See* Werdell, 122 P.3d at 89. The bulk of the court of appeals' analysis focused on the separate question of "whether the legislature intended for the conduct, or, instead, the status of the underlying offender to constitute the element at issue here." *Id.* at 90. That question implicated the venue statute because if the *status* of the offender

Table One: *PGE v. Bureau of Labor & Industries,* 1999–2006

Case Data[22]	
Total Cases, 1999–2006	150
Cases Resolved at Level One	141*
Cases Resolved at Level Two	9
Cases Resolved at Level Three	0
Total Dissenting Opinions	9
Dissents Resolved at Level One	6
Dissents Resolved at Level Two	1
Dissents Resolved at Level Three	0
**Note: 94% of all cases were resolved at level one, 6% were resolved at level two.*	
Dictionary Citations	
Total Citations: 61 (40% of all cases)	
Citations by Dictionary:	
Webster's New Third International, 3d ed. 1993	50*
Black's Law Dictionary	8
Bouvier's Law Dictionary:	1
Dictionary of Modern American Usage	1
Diagnostic Statistical Manual III	1
Note: 81.9% of all citations were to Webster's, 13% were to Black's Law Dictionary.	

22. This data was derived by entering in the citation from *PGE v. Bureau of Labor & Industries*, 859 P.2d 1143, into Westlaw and conducting a "keycite©" search. This search, conducted on March 11, 2007, generated 1753 results from all categories of materials; of those materials, 1221 were cases from the Oregon courts at both the state and federal district court level. The search was restricted to those Oregon Supreme Court cases issued between 1999 and 2006 in order to have a manageable level of cases; moreover, the last article published on *PGE* dealt only with pre-1999 cases. *See* Johansen, *supra* note 10. This restriction generated a set of 150 cases citing *PGE.* I then examined each case to determine what level of the *PGE* analysis the court reached, whether a dictionary was employed, whether the court was reversing the court of appeals, whether there was a dissent, and what level of the *PGE* analysis, if any, the dissenting opinion reached.

Supreme Court cases reversing the Court of Appeals	
Total cases	62
Reversing Cases Resolved at Level One	57
Reversing Cases Resolved at Level Two	5[23]
Reversing Cases Resolved at Level Three	0
Cases Reversing the Court of Appeals which cited Dictionaries	29
Reversed Cases Resolved by the Court of Appeals at Level One	15[24]
Reversed Cases Resolved by the Court of Appeals at Level Two	7
Reversed Cases Resolved by the Court of Appeals at Level Three	1
Reversed Cases Not Citing *PGE*	28[25]
Reversed Cases Resolved by Summary Disposition	9[26]

23. What is striking is that reversals of the court of appeals constitute over half of the court's level two cases.

24. This category includes one case, State ex rel. Dept. of Human Servs. v. Rardin, 110

"To do that," the court wrote, "the court examines both the text and the context of the statute. That is the first level of our analysis."[33] While text and context are combined at the first level, "the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent."[34] This favoring of text, when viewed in light of the combination of text and context in level one, has been a source of persistent ambiguity within the *PGE* paradigm; in some subsequent cases context has been allowed to control

construction the court had in mind were those contained in ORS chapter 174, and those "found in the case law, including, for example, the rules that words of common usage typically should be given their plain, natural and ordinary meaning."[38]

Alongside text at "the first level of analysis, the court considers the context of the statutory provision at issue, which includes other provisions of the same statute and related statutes."[39] Emphasizing the linkage between text and context, the court wrote that it "utilizes rules of construction that bear on the interpretation of the statutory provision in context," again finding those rules both in ORS chapter 174 and in the case law.[40] To this point the opinion had been mostly a gathering of prior precedents, arranged in much the same way as the opinion of the court of appeals.[41] What was new was the striking two line paragraph at page 1146: "If the legislature's intent is clear from the above described inquiry into text and context, further inquiry is unnecessary."[42] Later opinions would see "unnecessary" morph into "improper,"[43] as the court's citations to legislative history dwindled in comparison to its citations to *Webster's New Third International Dictionary*.[44] This abrupt division in the sequence stood in contrast to the court of appeals' opinion, which had examined legislative history in order to support its textual finding presumably because the parties had raised the issue. "To the extent that there is any ambiguity," the court of appeals' majority wrote, (clearly suggesting there was no ambigu-

38. *PGE*, 859 P.2d at 1146 (internal citations omitted). It is interesting to note that, while the words "plain, natural, and ordinary" meaning have a certain rhythm to them, the court has settled upon the appellation of "ordinary" for statutory terms which will be defined by reference either to a dictionary or by invocation of "common usage."

39. *Id.* (internal citations omitted).

40. *Id.* (internal citations omitted).

ity), "the legislative history supports BOLI's and our reading."[45]

Decisions of the Supreme Court of the United States concerning the Federal Rules of Civil Procedure, that predat[e] the adoption of the Oregon counterpart inform us as to the intent of the Oregon lawmakers.[52]

[W]e do not lightly disregard the legislature's choice of verb tense, because we assume that the legislature's choice is purposeful. In most cases, we best effectuate the legislative intention by giving effect to the plain, natural and ordinary meaning of the verb tense chosen by the legislature.[53]

[W]ords in a statute that have a well-defined legal meaning are to be given that meaning in construing the statute.[54]

[W]hen this court has construed a statute, that construction becomes part of the statute as if written into it.[55]

[T]he inclusion of one is the exclusion of the other (

> The *entire text* of the statute is the legislature's definition . . . .[59]

> Statutory context includes other provisions of the same statute and other related statutes, as well as the preexisting common law and the statutory framework within which the statute was enacted.[60]

> [W]e do not look at one subsection of a statute in a vacuum; rather, we construe each part together with other parts in an attempt to produce a harmonious whole.[61]

> [T]his court assumes that, when the legislature includes a provision in one section of an act, but omits it from another, it does so intentionally.[62]

> Because some background is necessary to a proper understanding of the text . . . we address, briefly, the historical context of the statute.[63]

> Under the principle of *noscitur a sociis*, terms in a list are interpreted in light of the common characteristics of other terms in the same list.[64]

> [T]he context of the statutory provision at issue . . . includes . . . the pre-existing common law and the statutory framework within which the law was enacted.[65]

> The application clause contained in § 5 was not codified . . . . However, because that clause is part of the law enacted by the 1993 legislature, we focus upon § 5, as part of our contextual analysis. . . .[66]

59. Errand v. Cascade Rolling Mills, Inc., 888 P.2d 544, 548 (Or. 1995) (emphasis in original).

60. Fresk v. Kraemer, 99 P.3d 282, 286 (2004).

> It is evident that, in referring to specific provisions of the criminal procedure code in ORS 810.410(3), the legislature intended that certain legal terms that are common to both the vehicle code and the criminal procedure code . . . would carry the same meaning and be interpreted in the same manner, unless otherwise provided.[67]

With each of these cases, the court brought within the *PGE* paradigm a pre-existing rule of construction either created by statute, or, most commonly, developed by the court in its pre-*PGE* statutory construction jurisprudence. The breadth of pre-*PGE* methodology that was imported into the paradigm not as legal precedent, but as background rules of statutory construction, blunts any assertion that *PGE* has wrought a fundamental revolution in Oregon statutory interpretation, at least as it applies to the first level analysis of text and context. The true revolution has come at levels two and three [68] in the form of a near total rejection of legislative history,[69] and an aggressive enforcement of that rejection with regard to court of appeals' opinions that venture past the text and context.[70]

The second step of *PGE*, as laid out in the court's opinion, reinforces the paradigm's sequential and cumulative nature. "Legislative history," the court wrote, is "considered along with text and context to determine whether all of those together make the legislative intent clear."[71] Like the first level, once any ambiguity is resolved, "the court's inquiry into legislative intent and the meaning of the statute is at an end and the court interprets the statute to have the meaning so

67. State v. Toevs, 964 P.2d 1007, 1012–13 (Or. 1998).

68. *See* Roy Pulvers & Wendy Willis, *Revolution and Evolution: What is Going on with Statutory Interpretation in the Oregon Courts?* 56 OR. ST. B. BULL. 13, 13 (Jan. 1996) ("The revolutionary change announced in *PGE v. BOLI* is the court's stated adherence to a singe interpretive method and its refusal to consider legislative history or other extrinsic matters if the statutory text and context clearly answers the question before the court.").

69. Legislative history continues to be used by the court of appeals, and with greater frequency and with fewer prerequisites to use than in the supreme court. *See, e.g.,* Jensen v. Bevard, 168 P.3d 1209, 1211–1214 (Or. Ct. App. 2007) (finding that where the statutory text "provides little guidance" and precedent, "while [the text was] strongly suggestive," it did not resolve the question of legislative history—although it did "not directly address the issue before us" it did "point decisively to one conclusion."). *Jensen* illustrates both the greater willingness of the court of appeals to reach legislative history and the uncertainties inherent in do- implic0.8(tngnes and[illegible]

determined."[72] This tying together of the inquiry's first and second steps, considering legislative history alongside the text and context, raises the question of which is to be considered determinative. As will be seen below, often the court's use of legislative history does no more than confirm their reading of the text and context at the first level;[73] in other instances legislative history is employed in order to fill a legislative silence, in contrast to the court's frequent recourse to negative inference when the legislature has failed to address an issue. The interaction of legislative history with other features of the paradigm has also been a source of confusion. A pair of cases, where the court was faced with interpreting the asportation requirement in the kidnapping statute,[74] provide an interesting picture of the inconsistent treatment of prior constructions and legislative history that sohere the

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ute was not mentioned, and this omission is startling given that *Murray* was decided after *Morales v. SAIF*, where the court had re-examined a prior construction solely because it had been decided prior to the articulation of the *PGE* approach.[80] That the court used a *discussion* of legislative history *as* legislative history at step two of the paradigm is only important because it deviates from the sequence laid out in *PGE*; the decision to place evidence of legislative intent labeled "first level" (a prior construction) in the "second level" of the analysis is an example of the kind of eclecticism which takes place under the paradigm and this move would likely have passed unnoticed but for the court's self-created methodology.

In *State v. Wolleat*, by contrast, the court interpreted another part of the asportation requirement (the phrase "intent to interfere substantially with [the victim's] personal liberty") in the context of a first-degree kidnapping.[81] The court found the term to be ambiguous, and examined its prior construction from *Garcia* at the first level of the paradigm, as it "provide[d] guidance."[82] Finding the intent of the legislature to still be ambiguous, the court then went to the Commentary on the Proposed Criminal Code and the Minutes of the Criminal Law Revision Commission, which, when considered alongside statements from then-Attorney General Lee Johnson, resolved the ambiguity.[83]

Reading these two cases alongside one another is a useful exercise for anyone wondering what *PGE* has done to the style of appellate decision writing in Oregon. The reasoning of both cases is open to attack, be it the court labeling an element in a criminal statute a "metaphysics problem," or the court's finding in *Murray* of ambiguity in what was, at first blush, clear statutory text. But more important is that the style of each opinion reveals the distortion generated by adherence to the *PGE* approach. That the court first had to find an ambiguity in order to look to the convincingly dispositive, and unusually comprehensive, evidence of legislative intent that accompanied the Oregon criminal code can only be explained by *PGE*. That the court's reliance on *Garcia* at "level one" was in any way remarkable—it was, after all, simply an application of precedent—comes only from measuring the opinion against the artificial edifice of the paradigm.

While step two of *PGE* has virtually disappeared—with only

nine cases treating legislative history between 1999 and 2006—it is unclear whether that is cause for lament. The court has never articulated a clear justification for either using or ignoring legislative history.[84] One possibility for their rejection might be that, given the paucity of materials in Oregon and the prevalence of non-legislator testimony in the materials that are available,[85] the court simply finds little in the legislative history that is of aid in their analysis; they have noted as much on occasion.[86] This should come as no surprise, as Oregon is not unique among the states in having little formal legislative history, such as committee reports, staff analyses or the like.[87] What legislative history does exist is often in the form of tape re-

cordings, which can be costly and time consuming to perscrutate.[88] Moreover, once the celluloid depths are plumbed and some tidbit has been found, a litigant's frustrations are not at an end because *PGE* "does not distinguish between types of legislative history," so deciding what is relevant, or whose recorded voice will carry the most weight, is a shot in the dark.[89] Nevertheless, step two remains part of the paradigm and therefore litigants would do well to marshal what support they can from the legislative history because it is difficult to predict either whether or when such history truly is "unnecessary."[90]

The third step of the *PGE* paradigm is reached "if, after consideration of text, context and legislative history, the intent of the legislature remains unclear" and consists of "general maxims of statutory construction" that "aid in resolving the remaining uncertainty."[91] Those maxims, like the rules of construction for text and context, "may be statutory" but "more commonly may be found in the case

88. *See, e.g.,* Johansen, *supra* note 10, at 226 (noting cost of researching legislative history).

89. Landau, *supra* note 6, at 48.

90. And litigants should remember that legislative history is likely to receive a warmer reception in the court of appeals. One fascinating subtext running through the cases decided under *PGE* is the stricter adherence to the paradigm at the supreme court as compared to the often visible chafing under the paradigm's strictures in the court of appeals. This can be best seen by examining the supreme court's markedly frequent reversal of court of appeals decisions grounded in legislative history. In *American Bankers Ins. Co. v. State*, 72 P.3d 666 (Or. Ct App. 2003), for example, the court of appeals looked to the legislative history of ORS 59.925(2) to determine who would be entitled to a bond under the statute; finding that history dispositive, the court affirmed the trial court's grant of summary judgment. *Id.* at 670. On review, the supreme court reversed by looking to the various legislative definitions provided in the section and finding that "the legislative intent becomes evident. Accordingly, we find no reason to look beyond the text and context of ORS 59.925." American Bankers Ins. Co. v. State, 92 P.3d 117, 159 (Or. 2004). No mention was made of the contrary legislative history examined by the court of appeals, and no justification was given for not venturing beyond the "text and context." *See also* V.L.Y. v. Board of Parole & Post-Prison Supervision, 72 P.3d 993 (Or. Ct App. 2003), *rev'd*, 106 P.3d 145 (Or. 2005) (reversing an interpretation based on legislative history in favor of one drawn from *Webster's* dictionary); Smoldt v. Henkels & McCoy, Inc., 7 P.3d 638 (Or. Ct App. 2000), *rev'd*, 53 P.3d 443 (Or. 2002) (reversing construction based on legislative history in favor of one based on the definition of "otherwise" in *Webster's*); Duvall v. McLeod, 984 P.2d 287 (Or. Ct App. 1999), *rev'd*, 21 P.3d 88 (Or. 2001) (reversing construction based on legislative commentary on ORCP 71 in favor of one based on *Webster's* definition of "accompany"); *State ex rel.* Dept. of Trans. v. Stallcup, 97 P.3d 1229 (Or. Ct App. 2004), *rev'd*, 138 P.3d 9 (Or. 2006) (reversing Court of Appeals' first-level construction of term "appraisal," which had been confirmed by legislative history, in favor of a definition drawn from a separate statutory chapter); State v. Pine, 45 P.3d 151 (Or. Ct App. 2002), *rev'd*, 82 P.3d 130 (Or. 2003) (reversing interpretation based on "dispositive" legislative history in favor of definition from *Webster's* dictionary). Eighth member of the court indeed. *See* Landau, *supra* note 9.

91. *PGE*, 859 P.2d 1143, 1146 (Or. 1993).

law."[92] The court gave as an example of one such general maxim: "where no legislative history exists, the court will attempt to determine how the legislature would have intended the statute to be applied had it considered the issue."[93] Not surprisingly, this has become one of the more controversial aspects of the paradigm, perhaps accounting for why step three has not been utilized by the supreme court in recent years. Johansen argued that "[i]n reality, at level three the court does one of two things: Where the statute is truly ambiguous, the court relies solely on its own judgment to derive meaning; in other cases. . . the court relies on level three merely to reinforce the meaning that was already evident."[94] Judge Landau, parsing the court's third-level opinions in *Westwood Homeowners Ass'n v. Lane County.*,[95]

II. UNANSWERED QUESTIONS

The Court's opinion in *PGE* left two important questions unanswered. The first unresolved issue is whether the inquiry is one of text then context, or text and context: that is, may the "context" of a statute control over the text of the statute itself? Is step one actually two steps where the court must first find an ambiguity in the text before examining the context, or is it a single step where context may be examined without first finding an ambiguity in the text? As will be seen, the court's cases from the past seven years demonstrate little more than inconsistency. The second unanswered question was whether statutory constructions decided prior to *PGE* remained viable, or whether a litigant could gain a reversal of a prior construction based on nothing more than that the court had not applied *PGE*. This was not an idle question, and has only recently been answered.

The court was clear in *PGE* that the statutory text is the "best evidence of the legislature's intent."[108] This favoring of text over context seemed to indicate a two-step inquiry at step one. First, the court would look to the text to resolve an ambiguity; second it would look to context. But that has not been the court's practice. Indeed, in a number of cases the "best evidence" has not been examined at all.

For example, *Dockins v. State Farm Insurance Co.*[109] presented the court with the question of what content the term "proof of loss" contained in ORS 742.061 was to have. After helpfully pointing out that "the term 'proof of loss' . . . is not self-defining," the court went directly to the context of the statute.[110] In this instance the context was "case law," which "establishes that the term encompasses more than the ordinary, policy-based meaning."[111] No parsing of the language and no citations to *Webster's* were employed; nor was the rule of prior construction invoked—as it could have been—given that the court's entire discussion focused upon its previous interpretations of the statute.

The same approach was taken in *State v. Barrett*[112] in order to determine the meaning of "two or more statutory provisions" as the term had been used in *former* ORS 161.062(1). Though the statute "itself d[id] not define specifically either 'statutory provision' or

108. *PGE*, 859 P.2d 1143, 1146 (Or. 1993) (internal citations omitted).
109. 985 P.2d 796 (Or. 1999).
110. *Id.* at 799.
111. *Id.*
112. 10 P.3d 901 (Or. 2000).

'separate statutory violation,'" the court "ha[d] discussed the meaning of 'statutory provision' in two prior cases."[113] The court used those prior constructions as context (rather than as text) to determine that a separate statutory provision is one that addresses a "*separate and distinct legislative concern*."[114] Therefore, the fact that the aggravated murder statute Barrett was charged under contained thirty-two aggravating factors did not make any of those factors a separate crime because the statute defined aggravated murder "as murder 'committed under, or accompanied by, *any*' of various aggravating circumstances."[115] Taking the definition of "any" from *Webster's*, the court held that "any or all of the enumerated circumstances simply serve to prove the single essential element of 'aggravation,'"[116] and therefore Barrett's multiple life sentences arising out of his murder of one victim were inappropriate and required a remand for re-sentencing.[117] *Ahern v. Oregon Public Employees Union*[118] dealt with the issue of whether text is to be considered before context in a swifter manner; after a single paragraph reciting the relevant statute, the court declared "we turn to statutory context."[119]

At other times, rather than being allowed to create an ambiguity in what would otherwise have been clear statutory text, context is allowed to control in the face of that text. For example, in *State ex rel. Click v. Brownhill*,[120] the court interpreted ORS 10.215(1). That statute provided that "any jury list containing names selected from a source list shall not be used for any purpose other than the selection and summoning of persons for service as jurors."[121] The court found the statutory language clear in denying a murder defendant access to the list for which he had filed a subpoena *deuces tecum* in order to support his theory that the jury pool did not represent a fair cross-section of Clatsop County.[122] Despite that clear text, however, the court looked beyond it to the context of the statute, first examining ORCP 57A(2), which provided for disclosure of jury-related docu-

113. *Id.* at 904.
114. *Id.* (emphasis in the original).
115. *Id.* at 905 (emphasis in the original).
116. *Id.*
117. *Id.* at 906.
118. 988 P.2d 364 (Or. 1999).
119. *Id.* at 367.
120. 15 P.3d 990 (Or. 2000).
121. *Id.* at 991.
122. *Id.* at 991–92.

word in the phrase . . . as employer would have us do, is at odds with, and indeed may defeat, the purpose of the notice statute" as the court had set it out in a prior interpretation.[134] In each of these cases, context controlled in the face of an admittedly clear statute, and while the court nodded to the truism that words ought not to be read in isolation, no mention was made of why the "best evidence" of the legislature's intent should have been given anything less than decisive weight.

What brings these cases into relief is the traditional use of context under the paradigm as a method for resolving ambiguities found in the text. For example, in deciding whether "victim" in ORS 163.160(3)(c) would include child witnesses to spousal abuse in *State v. Glaspey*,[135]

plained.[146] The words "in such circumstances" may seem to indicate a sequencing of text and context; *viz.,* that text is to control unless the "circumstances" of circularity, possible lost meaning or difficulty of operation, are present in the text of the statute. That is a weak inference, however, in the face of the court's practice of going to context before text and allowing context to control over a clear statute. More likely than not, the court's statement in *Johnson* was a make-weight; but make-weight though it may be, it is odd that a court operating under an ostensibly clear paradigm would have need of such statements.

The other question that was neither asked nor answered in the original *PGE* opinion was whether the new methodology rendered interpretations of statutes decided prior to *PGE* vulnerable to attack on the basis that they were not decided under it. Subsequent cases prior to *Mastriano v. Board of Parole & Post Prison Supervision*[147] did little to settle this question, and in fact exacerbated the uncertainty. For example the supreme court, reversing the court of appeals' holding that Rule 503 of the Oregon Evidence Code "codified certain aspects of the work-product doctrine," in *State v. Riddle*, wrote that "the first point, even if true, necessarily relies on cases that do not purport to

that sentence with a footnote stating "[b]oth *Korbut* and *Western Helicopter Service* were decided before *PGE v. Bureau of Labor &*

the aggravated murder statute at issue,[162] Judge DeMuniz concluded that both *Hessel* and *Burnell* were wrongly decided, but declared that because "the Supreme Court has not revisited the issue of multiple convictions and sentences since our decisions . . . for now, our precedents stand." On review, the supreme court applied *PGE*, reached the same conclusion, and reversed without commenting on the issue of pre- and post-*PGE* interpretations.[163]

The lack of comment was no indication that the supreme court was unaware of the ambiguous status of pre-*PGE* constructions. In

court, both parties agreed that the court's 1984 interpretation of the statute was "on point," and "directly addressed and resolved" the issue presented by Mastriano's appeal.[190]

firmation of the validity of pre-*PGE* constructions only raises the more fundamental question of what *PGE* really does: to claim that it has not wrought a transformation in the court's practice of statutory interpretation would be inaccurate, but the conclusion that it has rests uneasily alongside the court's description of the paradigm as merely a synthesis of prior practice, organized more "coherently."

III. THE DISAPPEARANCE OF LEGISLATIVE HISTORY

This section analyzes the few cases decided where the supreme court has reached the second step of the *PGE* paradigm and considered legislative history. What will emerge from the cases considered in this section is an uncertainty as to how much of what the court needs to reach step two of the paradigm. In some cases ambiguity—being reasonably susceptible to two or more constructions—is enough. In other cases competing constructions need be only "plausible," and in one case the court declined to go to step two because the result of the construction derived at step one was not "inherently irrational."[196] It is also uncertain whether the ambiguity must be in the text, the context, or both; in some cases contextual ambiguity has

what precisely is a "prior construction?" *State v. Sandoval*, 156 P.3d 60 (Or. 2007) dealt with whether the jury instructions for self-defense under ORS 161.209 and 161.219 required an instruction on the duty of retreat. The court had previously ruled that such an instruction was required in *State v. Charles*, 647 P.2d 897 (Or. 1982), but the *Sandoval* court, rather than applying that prior construction under the rule in *Bohlman*, interpreted the statutes anew and ruled contrary to the holding in *Charles*. *Sandoval,* 156 P.3d at 64. The court's rationale for doing so was straightforward: though *Charles* purported to interpret the self-defense statutes the holding had actually been based on principles drawn from Oregon case law and therefore "ha[d] nothing to contribute to our present effort, which is to discern what the *legislature* intended with respect to the 'duty of retreat' question." *Id. State v. Murray*, 162 P.3d 255 (Or.

overridden a clear reading of the text. The cases will also show the court filling in legislative silences in the text with evidence from legislative history, contrary to the court's frequent practice of using negative inference where the legislature is silent.

The court in *PGE* wrote that "[i]f, but only if, the intent of the legislature is not clear from the text and context inquiry, the Court will then move to. . . consider legislative history."[197] What substance the word "clear" would have was not laid out in that opinion. Some indication of the content the court has recently given to the term "clear" was shown in *Tharp v. Psychiatric Security Review Board*,[198] where the court found that "[b]oth petitioner's and the board's interpretations of 'personality disorder' are

sentencing.[214]

1959, which had been "amended by removing the words 'unless good cause to the contrary is shown' and by requiring that a defendant be tried within a 'reasonable period of time,'" the court concluded that "there is no reason to believe that the 1959 legislature was imparting any particular content to the term 'reasonable.'"[222] That was not the end of the inquiry, however, because, the court continued, "on the other hand, the legislature's choice to remove the final phrase . . . 'unless good cause to the contrary is shown'—is enigmatic. *We can only guess* that the legislature removed the 'good cause' phrase because the phrase was unnecessary."[223] Wrapping up their historical review, the court rejected the state's contention that the statute granted the trial court discretion and concluded that "the court must decide the issues that arise under [ORS 137.747 and ORS 137.750] as a matter of fact and law, rather than discretion."[224] In a footnote, the court added that "the [1959] legislature's clear overall purpose in enacting the amendments was to remove references to term-based scheduling. There is no hint anywhere in the statute that the legislature had any other purpose in mind."[225] Yet if there was no hint of any contrary intent, why did the court have to *guess* that the "good cause" phrase was removed because it was unnecessary? What this case appears to show is an instance in which the interaction of two statutes rendered their application to the facts ambiguous—that is, susceptible to two or more plausible constructions. The court recognized this ambiguity and purported to resolve it at the first level by examining context, but that contextual inquiry generated only a "guess" as to the legislature's intent, and a footnote asserting no contrary intent had been found. Why the court did not examine the legislative history, if any, was left unexplained.

The second instance of the cour

against *ex post facto laws*."[227] The Board appealed, asking the supreme court to decide whether Bollinger, who had been convicted prior to the enactment of ORS 144.245(3) and thus was not subject to its provisions, was "entitled to reject the Board's decision to release him" on parole.[228] The court began its inquiry by looking to a contextual statute, ORS 144.050, which, when Bollinger committed his crimes, had read "the State Board of Parole may *authorize any inmate. . . to go upon parole. . ..*"[229] Finding the definition of "authorize" in *Webster's New Third International Dictionary* to "connote choice on the part of the person authorized to act or refrain from acting," the court held that the statute "appears to contemplate that inmates will take an active role in determining whether [their going out on parole] will occur."[230] Despite that plain text reading, the court entertained the Board's proffered interpretation "derived from a more holistic analysis of the parole statutes"[231] which argued that "it is impossible to believe that the legislature intended inmates to be permitted to nullify the Board's decision to grant parole by refusing to accept that parole."[232]

Though this construction clearly conflicted with the plain-text reading the court had just adopted, the Board's construction arguably created an ambiguity in the statute; at the very least the construction was "plausible" (or "tenable") such that an inquiry into legislative history might have been useful. No, said the court; the plain text reading of the statute was not negated by the Board's alternate construction because "there is nothing *inherently irrational* in endowing the Board with broad authority to determine whether, when, and under what conditions an inmate may be paroled, while at the same time requiring voluntary acceptance oa271 0 T(a)0.8(te)-53028lwas e was not 8w4.189ized 59ized 7esaiR.9

within the paradigm because without a finding of ambiguity the court will refuse to examine legislative history, even if that history is dispositive.

One example of where potentially dispositive legislative history was ignored, or at least not mentioned, by the majority opinion is *Thompson v. TLAT, Inc*.[234] In *Thompson*, the court of appeals was asked to determine whether a judgment, which had been rendered unappealable by the filing of a motion for new trial or JNOV, nevertheless remained enforceable.[235] This required the majority to construe ORS 18.082(1),[236] which it did, applying the *PGE* paradigm.[237] The majority began by looking to contextual statutes and rules of civil procedure and, construing those provisions "in harmony with each other," held that the "enforceability and appealability of a judgment are separate and distinct concepts."[238] Accordingly, the plaintiff's appeal, which had been dismissed for lack of jurisdiction,[239] was reinstated.[240] The majority observed in a footnote that, though "the legislature may not have intended for appealability and enforceability to be severable. . . . we nevertheless are led to our conclusion *by [our] principles of statutory construction*. Without further guidance from the legislature, we cannot hold otherwise."[241]

But there was further guidance from the legislature: the legislative history of ORS 18.082(1) which Chief Judge Brewer, writing in

234. 134 P.3d 1099 (Or. Ct. App. 2006).

235. *Id.* at 1100.

236. OR. REV. STAT. § 18.082(1) (2007). Oregon's statute provides:

(1) Upon entry of a judgment, the judgment:

(a) Becomes the exclusive statement of the court's decision in the case and governs the rights and obligations of the parties that are subject to the judgment;

(b) May be enforced in the manner provided by law;

(c) May be appealed in the manner provided by law;

(d) Acts as official notice of the court's decision; and

(e) May be set aside or modified only by the court rendering the judgment or by another court or tribunal with the same or greater authority than the court rendering the judgment.

237. *Thompson*, 134 P.3d at 1101.

238. *Id.* at 1101–02.

239. *Id.* at 1101. The court of appeals previously dismissed Thompson's appeal because it found that the trial court had lacked jurisdiction to sustain the defendant's challenge to the writ of garnishment Thompson had attempted to enforce. Because the court of appeals held that the trial court retained the power to enforce the judgment despite the filing of a motion for new trial or JNOV, Thompson could appeal the trial court's decision to sustain the defendant's challenge to that writ.

240. *Id.* at 1102.

241. *Id.* at 1102 n.5 (emphasis added).

preted to permit expert discovery if it is (1) relevant and (2) not privileged."[248] That indeed is the plain reading of ORCP 36B(1), but, the court continued, "text should not be read in isolation, but must be considered in context. In this case, context cuts in a different direction."[249] The context consulted included the federal counterpart to Oregon's rule, FRCP 26, which included a provision for expert discovery, a counterpart of which had been introduced and rejected by the legislature when it amended ORCP 36 in 1979.[250] "At minimum," the court held "this legislative action undercuts the suggestion that the phrase 'any matter' in ORCP 36B(1) necessarily includes expert witnesses."[251] Having found the statute ambiguous, but having announced early in the opinion their conclusion regarding the meaning of the rule, the court examined the legislative history, found it supported their already-declared conclusion and "agree[d] with petitioner that the legislature did not intend to authorize pretrial disclosure of . . . the expert's testimony."[252]

Context was found to undermine the clear reading of the statute in *State v. Shaw*[253] as well. There, the court conjured up a "context" of statutes ostensibly showing a legislative concern for speedy trial vio-

quired of the court in order for it to reach the legislative history that merely reinforced its reading of the statute at the first step of the paradigm. Rather than assembling all available evidence of legislative intent at the outset and declaring a conclusion based upon it (as the court of appeals' majority had done in *PGE*[264]), the paradigm requires the court to jump through a series of hoops, each contingent on a finding of "ambiguity." If those hoops produced progressively finer-grained explanations of the rationale behind each holding, then adherence to the paradigm would be laudable. Unfortunately, as *Shaw* demonstrates, at times they do not.

State v. Ferman-Velasco[265] is another example of contextual ambiguity. At issue was whether the "statutory [exemption] in ORS 161.665(1) also encompasses those expenses associated with the defendant's right to meet witnesses face to face, such as the prosecution's witness fees . . . ."[266] ORS 161.665(1), like ORCP 36B(1), was an unequivocal statute which in 2002 read "costs shall not include expenses inherent in providing a constitutionally guaranteed jury trial . . . ."[267] When considered in context, however, the court found that it was "apparent that the legislature, at the least, did not intend that exception [to] apply [to] expenses associated with *all* constitutional rights that protect a defendant at trial."[268] The context referred to was ORS 161.665(1) which "specifically excludes from the exception those expenses associated with payment of court appointed counsel—expenses that clearly are associated with the right to assistance of counsel, which . . . serves to protect a criminal defendant during a trial."[269] Because of this context, the court could not conclude that the statutory phrase "'expenses inherent in providing a constitutionally guaranteed jury trial' necessarily encompasses expenses associated with the right to meet witnesses face to face.'"[270]

Accordingly, the court examined the legislative history of the statute, including the commentary on the Oregon Criminal Code,[271] the commentary on the Michigan Criminal Code[272] from which Ore-

264. 842 P.2d 419, 422 (Or. Ct. App. 1992).
265. 41 P.3d 404 (Or. 2002).
266. *Id.* at 415.
267. *Id.* at 414 (citing OR. REV. STAT. § 161.665(1) (2001)).
268. *Ferman-Velasco*, 41 P.3d at 415.
269. *Id.*
270. *Id.*
271. *Id.* at 415 n.16.
272. *Id.* at 415.

gon's was derived, and a 1941 case from the Michigan Supreme

In two out of nine of the cases in the past seven years where the court considered legislative history, that history was used to fill in a "silence" found in the law by the court and attributed to legislative oversight. This contrasts with the court's usual treatment of the silences it finds, which is to treat them as indicative of negative intent. What explains this variation in the treatment of silences has been left unexplained by the court; given the limited legislative history the court will treat as determinative,[277] the cases where the court has used negative inference in the face of silence cannot be explained by arguing that no legislative history was available. As the cases considered below will demonstrate, this style of argumentation does little for the coherence of the *PGE* paradigm.

Stevens v. Czerniak,[278] treated above, saw the court claiming not to be filling a legislative silence by fince by48 -1.1(nc.3(a)0.45Ttdo2 byeby argu-)]TJ0 -1.1302 3D-0.

the exemption was not explained,[282] though that was the ultimate holding the court reached.[283]

The court's usual approach to legislative silence was neatly set out in *Barackman v. Anderson*,[284] where the court was faced with the question of whether the legislature intended a personal injury protection (PIP) arbitration to have a preclusive effect in any future lawsuit.[285] Applying *PGE* to the ORS 742.522(1), the court declared that "the statutory context demonstrates that the legislature has known for some time how to prevent arbitration proceedings from having a preclusive effect," and "in this instance, plaintiff has failed to demonstrate that the words of ORS 742.522(1) reflect a legislative intent to prohibit courts in this state from applying the doctrine of issue preclusion to arbitration decisions."[286] "It is true, of course," the court wryly continued, "that the statute also does not indicate that the legislature *intended* to authorize the preclusive use of PIP arbitrations. But that fact only establishes that the statute is neutral on the issue."[287] And a showing that the statute was neutral was not enough; the court wanted "something more" from the plaintiff.[288] What that was, or how a future litigant could bring it before the court, was left unsaid.[289]

Though they are not considered true context because they cannot demonstrate the previous enacting legislature's intent,[290] subsequent enactments have been used by the court as "strong evidence"[291] when

282. The court did just the opposite with the legislative silence it encountered in *Rico-Villalobos v. Giusto*, 118 P.3d 246, 250 (Or. 2005). *Rico-Villalobos* required the court to construe OEC 101(4)(g) so as to determine whether a trial court could consider, at a pre-trial release hearing, evidence that could not be considered at a grand jury hearing. In answering that question in the affirmative, the court reasoned:

We agree that the legislature's decision expressly to *exclude* evidence that would not be admissible at trial from a grand jury proceeding, but not expressly to exclude such evidence from a pretrial release hearing, supports the inference that we draw from OEC 101(4)(g) that the legislature did not intend any such exclusion.

Id. at 250 (emphasis in original).

283. *Ferman-Ve to -8.3(legisTT9p in or4 4Tf1.0450TD-0 Tc)-1.4(eredvy,.4(eredv-)0302TD97Tc*

phrases 'limits of liability' and 'liability limits,' we think that, if the legislature had intended the phrase 'any amount payable under the terms of this coverage' in ORS 742.504(7)(c) to mean the insurer's

courts, whose practice in retrospect seems so consistent, might have been least in search of consistency. Recall the discussion of the court of appeals' majority opinion in *PGE* at the opening of this Comment.[314] The sequence of interpretation, though not particularly ele-

that *PGE* has become can be seen when looking to what this Comment has not done: this Comment has not questioned the merits of the court's conclusions in the cases decided under *PGE*. The court may have been correct that the legislature did not intend the defendant in *Perry* to be covered by the exception granted to his employer for the carrying of concealed weapons; and the court in *Johnson* may well have guessed correctly that the legislature intended speedy trial decisions to be reviewed as a matter of law. But, regardless of the merits of those conclusions, those cases remain open to attack because of the methodology employed. Because the court in *Perry* reasoned from legislative silence rather than proceeding to "step two" of the paradigm, and because the court in *Johnson* "guessed" rather than examining legislative history, future litigants facing similar questions will be tempted to argue them anew. They will do so not because those decisions are wrong, but because they were decided in "the wrong way": that is, "the wrong way" under the Court's self-imposed paradigm.

Why use a paradigm at all? The historian of science Thomas Kuhn, in his path-breaking work on paradigms, wrote that "[p]aradigms gain their status because they are more successful than Johnson