

ECHOES FROM THE PAST: WILL THE CURRENT ILLINOIS SUPREME COURT REFLECT THE GENERALLY LIFE-AFFIRMING VOICE OF ITS PREDECESSORS?

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Change alone is unchanging.² The Illinois Supreme Court (“Court”) has undergone a major upheaval in recent years, with six of its seven members joining the Court since 2000. Additionally, since Illinois voters elect the justices in partisan elections, the future composition of the Court is unpredictable. This paper attempts to discern the Court’s future jurisprudence relating to life-related issues and its restrained or activist approach to the law by looking at its historical approach. Although many of the seminal cases in these areas were decided before 2000, more recent cases offer a glimpse of what the future may hold.

I. LIFE ISSUES

In light of the dramatic change in the composition of the Court since 2000, it is difficult to predict with any degree of certainty the stance the Court will take when life-related issues come before it. However, the Court’s jurisprudential history in relation to such issues has generally taken on a life-affirming tone. The Court has followed precedent when bound **and** has restrained itself by declining to find new, unenumerated rights in the state constitution and by deferring to the Legislature’s ~~and its~~ policy of esteeming life. In addition, by agreeing to create rules for an abortion parental consent law, the court may have hinted at the approach it will take to life issues in the future.

Abortion

The first abortion case the Court heard after *Roe v. Wade*³ was *People v. Frey*.⁴ The case involved the appeals of two men who were prosecuted under the Illinois abortion statute for

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² Quotation attributed to Heraclitus.

³ 410 U.S. 113 (1973).

⁴ 294 N.E.2d 257 (Ill. 1973).

performing abortions, which provided that a person convicted of performing an abortion would be imprisoned one to ten years.⁵ It allowed an affirmative defense if the abortion was necessary to preserve a woman's life. The Court held the statute was unconstitutional, because it did not follow *Roe*'s framework of mandating that abortions be allowed through the first and second trimesters.⁶

One of the next significant abortion cases, *The Village of Oak Lawn v. Marcowitz*, was heard by the Court eight years later.⁷ In that case, the village of Oak Lawn had enacted an ordinance requiring a license for medical centers that performed one or more abortions. The ordinance required a twenty-four-hour waiting period between the initial examination of a patient and the performance of her abortion. Marcowitz, a doctor charged with operating a center without a license, moved to dismiss his indictment, arguing the ordinance was unconstitutional.

The Court held the licensing requirement violated equal protection under the United States Supreme Court's abortion jurisprudence.⁸ The Court held there was no rational relationship to a legitimate state interest for applying the ordinance to a class of doctors and pregnant women because they are involved with abortion surgery but not applying it to those involved with other surgeries, even though such surgeons may be more hazardous.⁹ The Court further held that part of the ordinance "severely restricts the fundamental privacy right to secure a first-trimester abortion."¹⁰

The Court proceeded to analyze the constitutionality of the ordinance's requirement of a twenty-four-hour waiting period between the initial exam and the abortion. The Court discussed the well-settled federal case law, including that in the First, Sixth, Seventh, and Eighth Circuits, holding that waiting periods are unconstitutional, because they unduly burden a woman's right to an abortion.¹¹ The Court noted that these courts have emphasized the burden upon the woman of

⁵ *Id.* at 258-59.

⁶ *Id.* at 259.

⁷ 427 N.E.2d 36 (Ill. 1981).

⁸ *Id.* at 42.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 43-44.

having to make two trips or having to pay for an overnight stay and agreed that a burden would be placed on the woman seeking the abortion.¹²

However, the Court did not adopt the reasoning of the federal courts and held the waiting period constitutional. Even though there were valid concerns that the statute imposed a burden on women, the Court held that it did not place an impermissible burden on a woman's decision to have an abortion. The Court said: "there is a tendency to minimize the importance of the countervailing considerations,"¹³ including that abortion decisions should be informed, voluntary, and considered. "A decision to abort or not to abort is of an extraordinary character and once executed, is irrevocable. It may have far reaching consequences."¹⁴ The state's interest in "assuring the integrity of that decision is compelling".¹⁵

A scathing dissent noted that because the Seventh Circuit had invalidated an Illinois statute requiring a twenty-four-hour waiting period, any federal court in Illinois would enjoin the ordinance at issue in the case. The dissent called the majority's decision "unmistakably anti-abortion."¹⁶ The majority did not bother to respond to the dissent, written by Justice Simon and joined by none.

Although the current Court has not ruled on any substantive abortion cases, it has made a dramatic move in the abortion arena. The Illinois General Assembly passed a law in 1995 called the "Parental Notice of Abortion Act."¹⁷ The law provides that the doctor or his or her agent has to give notice to an adult family member forty-eight hours before the abortion. The law contains exceptions to this requirement, including medical emergencies or if the minor is the victim of abuse by an adult family member. The law also provides a procedure for judicial waiver of notice. The act "requested [the Supreme Court] to promulgate any rules and regulations

¹² *Id.* at 44.

¹³ *Id.* at 45.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 47 (Simon, J., dissenting).

¹⁷ 750 ILL. COMP. STAT. 70/1 (2007).

necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner.”¹⁸

The law was innocuous enough that the Governor at the time, Jim Edgar, who favored abortion rights, signed the bill into law. Subsequently to enactment, the Court refused to promulgate the rules. In 1996, a federal district court enjoined the law, stating the act could not be adjudicated until the Court issued rules governing waiver of notice appeals and noted the Supreme Court of Illinois has advised that no additional rules will be promulgated under the 1995 Act.¹⁹ As a result of the Court’s refusal, the federal district court held the act was incomplete and could not be implemented, permanently enjoining the state from enforcing it.²⁰

Surprisingly, the Court issued an announcement in September 2006 that it would promulgate rules for the eleven-year-old law, and two days later did so. The rules allow a girl that is afraid to tell family members of her imminent abortion to ask a judge to waive the notice requirement. If a judge rules against her, she could quickly appeal to the appellate court and then the Court, with a court-appointed lawyer. Interestingly, the decision to promulgate the rules was a unanimous decision by the justices. Enforcement of the law now depends on Attorney General Lisa Madigan, who must go back to Court and ask for the injunction to be overturned. Madigan, who is an abortion rights supporter, has not done so, as of the date of this paper.

The Court’s decision to issue the rules after more than a decade and the fact that it was a unanimous decision may be a harbinger of this Court’s abortion jurisprudence in future cases.

Protection of the Unborn from Criminal Violence

In *Seef v. Sutkus*,²¹ the Court held the state wrongful death act and state case law supported its holding that parents may recover damages for loss of their stillborn child’s society.²² The statute permits a civil cause of action for death caused by a wrongful act or neglect and provides that the state of gestation or development of the victim does not limit or prohibit such an action. The Court reasoned that parents of a minor are entitled to damages for

¹⁸ *Id.*

¹⁹ *Hope Clinic v. Ryan*, 995 F. Supp. 847 (N. D. Ill. 1998).

²⁰ *Id.*

²¹ 583 N.E.2d 510 (Ill. 1991).

²² *Id.* at 511.

the death of a minor child, so damages should be available “where the nearly full-term child dies before birth.”²³

The same year, the Illinois Appellate Court considered the constitutionality of a state statute criminalizing injurious acts toward an unborn child,²⁴ and the Court denied appeal in the case.²⁵ That statute provides, *inter alia*, that a person who commits the offense of intentional homicide of an unborn child, knowing his acts created a strong possibility of death or great bodily harm to the pregnant woman or her unborn child and knowing the woman was pregnant, is guilty of fetal homicide.²⁶

The ~~accused~~ defendant argued the statute violated equal protection, as it did not distinguish between viable and nonviable fetuses.²⁷ The defendant also argued that, under Roe, a woman can terminate her nonviable fetus lawfully, but if the defendant does so, she faces criminal punishment.²⁸ The Court rejected her argument, reasoning that a woman who chooses to terminate her pregnancy and a defendant that assaults a pregnant woman are not similarly situated.²⁹ The woman has a privacy interest in terminating her pregnancy, while the defendant does not. The Court noted the statute neither affects a fundamental right nor discriminates against a suspect class.³⁰ Thus, only a rational basis was necessary for the Court to find the statute constitutional. The Court held there is a valid legitimate purpose of the statute in “protecting the potentiality of human life,” and the distinction made between pregnant women and third parties, is rationally related to this purpose.³¹

In addition, the statute was not vague, as it did not require one to decide when life begins and when death occurs and it was “unnecessary to prove the unborn child is a person or human

²³ *Id.* at 512.

²⁴ *People v. Ford*, 581 N.E.2d 1189 (Ill Ct. App. 1991).

²⁵ *People v. Ford*, 587 N.E.2d 1019 (Ill. 1992).

²⁶ 581 N.E.2d 1189, at 1198.

²⁷ *Id.*

²⁸ *Id.* at 1199.

²⁹ *Id.*

³⁰ *Id.* at 1200.

³¹ *Id.*

being” under the statute.³² Rather, it only required proof that “whatever the entity within the mother’s womb is called, it had life and, because of the act of the defendant, it no longer does.”³³

The Illinois General Assembly has provided civil remedies and criminal punishment for injury to or death of an unborn child and the Court has upheld this protection as discussed in the foregoing cases.

Wrongful Birth and Wrongful Life Actions

In *Siemieniec v. Lutheran General Hospital*,³⁴ the plaintiff had a family history of hemophilia. She conceived and sought genetic counseling regarding the risk of her child being afflicted with the disease. A doctor opined the risk was very low, so the plaintiff decided to proceed with her pregnancy. Unfortunately, the child was born with hemophilia. The parents filed suit on their own behalf, alleging wrongful birth, and on behalf of their son, claiming damages for wrongful life. The question presented for review was whether the complaint stated legally cognizable causes of action.³⁵

The Court held a child’s claim for wrongful life should not be recognized in Illinois absent “clear legislative guidance.”³⁶ It noted the majority of jurisdictions have rejected such claims, based on two rationales: unwillingness to find a child has suffered injury by being born as opposed to not being born and difficulty in measuring damages.³⁷

The Court relied heavily on public policy considerations in arriving at its decision. The Court noted that the Illinois Abortion Act of 1975 “evinces Illinois’ strong public policy of preserving the sanctity of human life, even in its imperfect state.”³⁸ The Court quoted a portion of that law in its opinion:

[It is] the longstanding policy of the State that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child’s right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds

³² *Id.* at 1201.

³³ *Id.*

³⁴ 512 N.E.2d 691 (Ill. 1987).

³⁵ *Id.* at 694.

³⁶ *Id.* at 702.

³⁷ *Id.* at 697.

³⁸ *Id.* at 701.

and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only (*italics*) because of the decisions of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life, shall be reinstated.³⁹

Recognizing a child's right not to be born would "undermine this legislatively expressed policy favoring childbirth over abortion."⁴⁰

The Court allowed the parents' wrongful birth cause of action, although it did so reluctantly. The defendants argued that the same public policy considerations applicable to wrongful birth claims applied in the wrongful life analysis. The Court noted the defendants' argument was "compelling" but stated that the "great weight of authority to the contrary . . . force[d]" it to agree with the majority of courts and commentators in allowing wrongful birth actions.⁴¹

Assisted Suicide

*In re Estate of Longeway*⁴² was a case in which a guardian of an incompetent patient asked the Court for permission to withdraw her hydration and nutrition delivered through a surgically implanted gastrostomy. The Court agreed with the "consensus opinion" that artificial nutrition and hydration, such as feeding through a tube, differs from spoon-feeding and bottle-feeding.⁴³ Artificial nutrition and hydration is medical treatment, so the critical question is whether the patient has a right to refuse unwanted medical treatment.⁴⁴ The Court remarked that other courts have found the right to refuse treatment in the constitutional right to privacy.⁴⁵ However, it declined to find the right in the United States Constitution's right to privacy absent

³⁹ *Id.* at 701 (emphasis added by Court).

⁴⁰ *Id.*

⁴¹ *Id.* at 705-06.

⁴² 549 N.E.2d 292 (Ill. 1989).

⁴³ *Id.* at 296.

⁴⁴ *Id.*

⁴⁵ *Id.*

guidance from the USSC.⁴⁶ The Court also would not expand the privacy provision in the state constitution to encompass the right, as there was no clear expression of intent from the drafters of the 1970 Illinois Constitution.⁴⁷ Instead, the Court found a right to refuse medical treatment, including artificial nutrition and hydration, in the state’s common law and the Illinois Probate Act.⁴⁸

Under the common law, consent is required for administration of medical treatment.⁴⁹ Because the consent in this case was through a surrogate, the Court looked to the state Probate Act and found that it implicitly authorizes a guardian the exercise the right to refuse medical treatment, including artificial nutrition and hydration, on the patient’s behalf.⁵⁰

Although finding nutrition and hydration could be lawfully withdrawn, the Court made sure it articulated safeguards for the patient. First, the incompetent patient must be terminally ill. The Court stated it “wish[ed] to state emphatically that we do not condone suicide or active euthanasia in this State.”⁵¹ Therefore, only a patient whose condition is irreversible and whose death is imminent qualifies.⁵² Second, the patient must be irreversibly comatose or in a persistently vegetative state.⁵³ Third, the diagnosis must be confirmed by the attending physician along with at least two other consulting physicians.⁵⁴ Finally, although express intent of the patient is not necessary, the surrogate must substitute her judgment for the patient’s, based upon clear and convincing evidence of the patient’s intent.⁵⁵ Finally, even though the majority of courts do not require court order to withdraw artificial life support, the court held that court order is necessary for several reasons, including Illinois’ “strong public policy of preserving the

⁴⁶ *Id.* at 297.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 297-98.

⁵¹ *Id.* at 298.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

sanctity of human life, even if in an imperfect state” and the existence of a presumption favoring life.⁵⁶

The Court also deferred to the Legislature and invited it to address the issue and to change or overrule the requirements set out by the Court if it so desired, stating, “The Legislature is the appropriate forum for the ultimate resolution of the questions surrounding the right to die.”⁵⁷

Healthcare Rights of Conscience

The Abortion Performance Refusal Act provides that physicians, nurses, or other individuals that refuse to recommend, perform, or assist in an abortion shall not be liable to any person for damages resulting from the refusal.⁵⁸ The act also protects medical personnel from having their licenses suspended or revoked for refusing involvement in abortion.⁵⁹ Civil damages are provided against those who discriminate against any person based on the person’s refusal to recommend, perform, or assist in performance of an abortion.⁶⁰

The Illinois Right of Conscience Act states:

It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons . . . who are . . . engaged in the delivery of medical services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, accept or deliver medical services and medical care.⁶¹

“Conscience,” as used in the Act, is defined as: “a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, obtains from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths.”⁶²

⁵⁶ *Id.*

⁵⁷ *Id.* at 301.

⁵⁸ 745 ILCS 30/1(a).

⁵⁹ 745 ILCS 30/1(d).

⁶⁰ 745 ILCS 30/1(c).

⁶¹ Ill. Rev. Stat. 1985, ch. 111 1/2, par. 5302.

⁶² *Id.* at 5303(e).

“[T]he public policy mandated [by the language of the Act] is that hospital personnel will not be discriminated against for refusing to perform medical services as they relate to their religious beliefs. This contemplates morally controversial issues such as euthanasia, sterilization or abortion.”⁶³

Surprisingly, there is a dearth of cases involving the Illinois Right of Conscience Act. In one of the only opinions discussing the act, the Illinois Court of Appeals recently considered its application when it dismissed a cause of action brought by pharmacists challenging an administrative rule requiring pharmacies to dispense levonorgestrol, also known as the “morning after pill.”⁶⁴ The plaintiffs asserted that the rule, which required pharmacies to dispense prescribed contraceptives, including the morning-after pill, violated their moral and religious beliefs. They maintained the morning-after pill can destroy human life, because it can keep an embryo from implanting in the uterus. The court held the plaintiffs lacked standing, because they failed to plead that they had been presented with a prescription for the pill since the rule took effect. The plaintiffs cited multiple cases supporting their argument that they should not be forced to violate the rule before having standing to challenge it in court. The court distinguished those cases on the basis that they challenged statutes or ordinances, not administrative rules, citing “the judiciary’s traditional reluctance to get involved in administrative determinations” like the one before it.⁶⁵

The court noted there are situations when judicial intervention is warranted due to the hardship the plaintiff would suffer if the case were not litigated. The cases it cited for this proposition involved plaintiffs who felt “a direct effect on the[ir] day-to-day business”⁶⁶ operations and plaintiffs that had “an immediate financial stake” in resolution of the lawsuit.⁶⁷ In

⁶³ Free v. Holy Cross Hospital, 505 N.E.2d 1188, 1190 (Ill. Ct. App. 1987) (holding that nurse’s refusal to follow superior’s orders resulted from ethical considerations, not sincerely held moral convictions arising from religious beliefs as required by the Illinois Right of Conscience Act).

⁶⁴ Morr-Fitz, Inc. v. Blagojevich, 371 Ill. App. 3d 1175 (Ill. App. Ct., 2007).

⁶⁵ *Id.* at 1181.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1183.

the court's view, the plaintiffs challenging the rule requiring them to dispense the pill was "not nearly as compelling."⁶⁸

Justice Turner, in dissent, cited section 2 of the Right of Conscience Act, which provides in relevant part that it is the public policy of the state to protect the right of conscience of individuals involved in healthcare services from adverse consequences for refusing to act contrary to their convictions in providing services.⁶⁹ The dissent found plaintiffs' case compelling and worthy of consideration. It pointed out that Governor Blagojevich made statements directly contradicting the Act, promising the State would vigorously protect a woman's right to access to birth control and stating that pharmacists "are not free to let [religious] beliefs stand in the way" and "must fill prescriptions without making moral judgments."⁷⁰

The other case discussing the Act, *Free v. Holy Cross Hospital*,⁷¹ dismissed the plaintiff's action for retaliatory discharge under the Act, because she acted according to ethical concerns, rather than sincerely-held moral convictions arising from religious beliefs, as contemplated in the Act, when she failed to follow her superior's order to refuse treatment to an arrestee.

Cloning

The issue of cloning has not come before the Court.

Destructive Embryo Research

In 2005, Governor Blagojevich issued Executive Order 2005-6, creating the Illinois Regenerative Institute for Stem Cell Research. The Institute awards grants to medical research facilities for stem cell research. No funds may be used for research involving cloning of a human being, fetuses from induced abortions, or to create embryos solely for the purpose of research, and no funds may be awarded to any person who buys or sells embryonic or fetal tissue for research purposes. The Institute provides funding for stem cell research involving adult stem

⁶⁸ *Id.* at 1184.

⁶⁹ *Id.* at 1185

⁷⁰ *Id.*

⁷¹ 505 N.E.2d 1188 (Ill. Ct. App. 1987).

cells, cord blood stem cells, pluripotent stem cells, totipotent stem cells, progenitor cells, the product of somatic cell nuclear transfer, or any combination of those cells.

The Governor issued the order after a bill proposing a referendum on financing embryonic stem-cell research with a billion dollars in bonds over ten years and a six percent tax on elective cosmetic surgery failed.⁷² He issued the order while the General Assembly was not in session, angering some who believed the proper entity to call for funding research was the Legislature.⁷³

According to the Governor, the federal government's choice "to stall the medical advancements that will come with stem cell research" prompted him to issue the order.⁷⁴ Illinois Comptroller Dan Hynes commented, "We could either refuse to acknowledge the inevitability and worth of scientific progress, or we could embrace and find a measure to harness it for the betterment of our citizens. We could be timid and reactionary, or bold and visionary. We chose to be bold."⁷⁵

The Court has not had the opportunity decide a case relating to embryonic stem cell research.

In summary, the jurisprudence of the Illinois Supreme Court in cases involving life-related issues has been by-and-large life-friendly. The Court has followed United States Supreme Court precedent in these areas but has not felt compelled to follow rulings from other state and federal jurisdictions, even when the sheer weight of authority would make following attractive. The Court has restrained itself from finding new rights in its state constitution and has expressed deference to the Legislature and the legislative policy valuing life. Overall, the Court has, thus far, upheld the value of human life in its opinions.

⁷² Ruethling, Gretchen, *Illinois to Pay for Cell Research*, N.Y. TIMES, July 13, 2005, available at <http://www.nytimes.com/2005/07/13/health/13illinois.html?ex=1278907200&en=52b31f459f47cb25&ei=5088&partner=rssnyt&emc=rss>.

⁷³ *Id.*

⁷⁴ Ill. Dept. of Health, *Governor Blagojevich, Comptroller Hynes Announce \$10 Million Stem Cell Research Program to Fund Medical Cures*, IRMI, July 12, 2005, available at http://www.idph.state.il.us/irmi/news_071205.html.

⁷⁵ *Id.*

Although most of the significant life-related cases were decided in the 1980s and early 1990s, the current Court has hinted at its future abortion jurisprudence by agreeing to formulate rules for the parental consent law that has languished for eleven years due to the former Court justices' refusal to do so. In addition, the Court's opinions from the last two decades expressing the state's policy of valuing life may set the tone when the current Court is called upon to decide other life-related issues, such as cloning and embryonic stem-cell research, for the first time.

II. JUDICIAL RESTRAINT

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.⁷⁶

In *Osborn v. Bank of United States*, the United States Supreme Court, in discussing the nature of the judicial authority said that the proper role of the judiciary is one of restraint, not activism, deciding cases in accordance with the law, not in furtherance of the court's will. The level of a court's adherence to this proposition can be ascertained by considering whether it defers to the plain language of statutes and the state and federal constitutions, whether it looks to public policy as expressed by the Legislature, not by the court, whether it binds itself to *stare decisis*, and whether it shows respect to the legislative and executive branches. The Illinois Supreme Court has shown an increasing trend toward restraint.

In *Best v. Taylor Machine Works*,⁷⁷ the Court invalidated wholesale the Legislature's attempt to enact a comprehensive statutory package that would reform state tort law. The Court held that the provisions it struck down were "core provisions, which were inseparable from the

⁷⁶ *Osborn v. Bank of United States*, 22 U.S. 738, 866 (1824).

⁷⁷ 689 N.E.2d 1057 (Ill. 1997).

remainder”⁷⁸ of the act and, thus, invalidated the entire statutory scheme. The Court held the following provisions violated the Illinois Constitution: 1) a \$500,000 limit on damages for noneconomic injury, 2) abolition of joint and several liability, 3) third-party tortfeasor credit against liability in the amount of contribution for which the plaintiff’s employer is found liable to the tortfeasor, and 4) a provision mandating that personal injury plaintiffs consent to disclosure of all medical records, even those not relevant to their lawsuit, or suffer dismissal of their suit.

The legislative purposes of the Act included reducing health care costs and promoting accessibility to health care, promoting consistency in awards, establishing parameters for noneconomic damages, and reducing the systemic costs of litigation.⁷⁹ The plaintiffs introduced affidavits of scholars opining that the General Assembly was mistaken in its findings of fact. The Court stated that, while it was permissible for the plaintiffs to introduce this type of evidence, it would not determine the accuracy of the Legislature’s findings, because its task was limited to deciding whether the legislation was constitutional, not whether it was wise.⁸⁰ The Court further commented that the “legislative fact-finding authority is broad and should be accorded great deference by the judiciary.”⁸¹

In spite of this language of restraint, the Court held the \$500,000 noneconomic damages cap was unconstitutional. The Court analyzed whether the cap violated the state constitution’s special legislation clause, which provides that the General Assembly shall pass no special law when a general law can be made.⁸² The Court decided that the cap created different classes that violated the special legislation clause: plaintiffs whose noneconomic damages were below the cap and were, therefore, fully compensated versus plaintiffs with noneconomic damages higher than the cap, who were not fully compensated.⁸³

The Court also relied heavily on factual scenarios that demonstrated, in its view, the arbitrary nature of the cap. For example, it considered a situation in which a jury could award

⁷⁸ *Id.* at 1104.

⁷⁹ *Id.* at 1067.

⁸⁰ *Id.* at 1069.

⁸¹ *Id.*

⁸² ILL. CONST. , art. IV, §13.

⁸³ *Id.* at 1075.

two separate plaintiffs \$100,000 each for noneconomic damages, even though one was moderately injured and the other was severely injured. The Court concluded that, in such a situation, the legislative goal of providing consistency of awards was not met by the cap.⁸⁴

The dissent criticized the majority for testing the cap “against specially selected hypothetical cases that are obviously designed to illustrate defects in the statute,”⁸⁵ and noted that the Court has “never before required legislation under rational basis scrutiny to qualify under a standard as rigorous as that applied by the majority.” Instead of presuming the legislation was constitutional, as the majority claimed it would do,⁸⁶ it instead picked apart the law, focusing on a few hypotheticals of what could occur under the law. The dissent defined the standard the majority should have used: “A legislative classification will be upheld if any set of facts can be reasonably conceived which justify distinguishing the class to which the law applies from the class to which the statute is inapplicable.”⁸⁷

The Court also based its decision on a separation of powers analysis, “hoping to persuade the reader by prolixity, if not by force of reasoning.”⁸⁸ The majority characterized the damages cap as a “legislative remittitur”⁸⁹ that improperly delegated to the Legislature the power to remit judgments, thus usurping the judicial branch’s authority to do so. However, the cap did not prohibit a court from reducing a damages award where it deemed appropriate.⁹⁰ Such an argument was simply a “strawman” and its broad holding leads to the logical conclusion that the Legislature may never enact a damages cap.⁹¹

The Court set up a false dichotomy between statutory causes of action and those rooted in the common law. The Court explained that certain types of damages could be limited by the Legislature, such as damages recovered in statutory causes of action.⁹² However, the Court failed

⁸⁴ *Id.*

⁸⁵ *Id.* at 1109.

⁸⁶ *Id.* at 1063.

⁸⁷ *Id.* at 1108 (Miller, J., dissenting).

⁸⁸ *Id.* at 1110 (Miller, J., dissenting).

⁸⁹ *Id.* at 1080.

⁹⁰ *Id.* at 1110 (Miller, J., dissenting).

⁹¹ *Id.*

⁹² *Id.* at 1081.

to supply a rationale for distinguishing between actions grounded in common law or created by statute. Such a statement by the Court was unnecessary for its decision and was overreaching.

The Court struck down the Act's abolition of joint and several liability. Although the act did contain seemingly contradictory sections in which joint and several liability was abolished in general but allowed to remain in medical malpractice cases in the event the cap on noneconomic damages was found unconstitutional, the heart of the Court's decision resulted from its belief that joint and several liability is superior to holding defendants liable only to the extent of their proportion of fault. The Court quoted approvingly the following: "In situations in which the defendants are held jointly and severally liable neither defendant is merely 50% negligent or responsible. Such statements make as much sense as saying that someone is 50% pregnant."⁹³

The Court also held that the act's mandatory requirement that plaintiffs in personal injury lawsuits allow unlimited disclosure of their medical history or have their case dismissed was unconstitutional, because the provisions trampled on the judiciary's authority to issue a protective order limiting the scope of discovery and its discretion to impose its choice of discovery sanctions.⁹⁴

Although the majority began its opinion setting out the Court's restrained role in judging the constitutionality of legislation and explaining that its task was not to "judge the prudence" of the Act nor "balance the advantages and disadvantages of reform,"⁹⁵ this was precisely what it proceeded to do. The *Best* opinion was striking for its willingness to invalidate an entire statutory scheme. However, the case was decided in 1997, and six of the seven justices on the Court at that time have been replaced. Justice McMorrow, the author of the majority opinion, no longer sits on the Court. Therefore, more recent decisions may be a better indicator of the Court's activist or non-activist jurisprudence. After *Best*, the Court has taken a more restrained approach.

For example, in *Burger v. Lutheran General Hospital*, the Court distinguished its holding in *Best*. The General Assembly passed legislation that allowed a hospital's medical staff to communicate at any time with the hospital's legal counsel regarding a patient's medical care.

⁹³ *Id.* at 1087 (citation omitted).

⁹⁴ *Id.* at 1092-94.

⁹⁵ *Id.* at 1063.

The circuit court held the provisions violated the separation of powers doctrine under *Best*, because they infringed on the court's authority to oversee discovery and because they violated a patient's privacy interest.

The Court reversed, explaining that the General Assembly "has wide regulatory power with respect to the health-care profession." Also, the Court held the provision did not regulate discovery but rather regulated intrahospital communication; therefore, they did not infringe the judiciary's authority to oversee discovery matters.

The Court took a non-activist role by showing the executive branch deference in *People ex rel. Madigan v. Snyder*. In that unanimous opinion, authored by now chief justice Thomas, the Illinois Attorney General sought to prevent entry of commutation orders by former governor George Ryan granting "blanket clemency" for all inmates who were sentenced to death.

The complaint alleged, *inter alia*, that the governor could not commute sentences to unspecified terms, because resentencing would be left to the courts, amounting to an improper delegation of the executive's commutation powers to the judiciary. The Court held there was no separation of powers problem, because the Illinois Constitution gives the Governor power to "suspend or commute any sentence imposed by the judiciary." Although the Court disapproved of the grant of blanket clemency, stating "[o]ur hope is that Governors will use the clemency power in its intended manner -- to prevent miscarriages of justice in *individual* cases," it nevertheless, deferred to the governor's decision.

Because of the changed composition of the Court, it is difficult, at best, to predict where the current Court will fall in the spectrum between judicial activism and judicial restraint. However, the Court's tendency toward restraint in recent years may be a telling indication of its future jurisprudence.

III. THE COURT

There are seven justices on the Illinois Supreme Court, elected on a partisan basis from five districts.⁹⁶ Three justices are elected at large from the first district, which consists of Cook County, and the other four are elected, one each from the remaining four districts.⁹⁷ The length of the justices' initial term is ten years, after which they stand for retention by election.⁹⁸ They must receive 60% or more affirmative votes to be retained. Subsequent terms are also ten years.⁹⁹ In the event of an interim vacancy, the Court justices fill it.¹⁰⁰ Recommendations of prospective justices are usually made in a conference of the justices and four of them must approve the recommendation. Typically, if one justice steps down during a term, he or she suggests a replacement, with four justices required to approve. The justice selected to fill the vacancy must run for election in the next general election to keep his or her seat. The Court justices also fill interim vacancies in the appellate and circuit courts.¹⁰¹ The chief justice is selected by peer vote and serves as chief justice for a term of three years. The current chief justice is Robert Thomas, chosen in 2005.

The partisan election system has been a matter of debate in Illinois. In 1970, a proposition was submitted to voters, offering them the choice between partisan election of judges or judicial merit selection.¹⁰² Voters chose partisan elections.¹⁰³ A group of organizations, including the Illinois State Bar Association, the Chicago Bar Association, and the League of Women Voters of Illinois formed a committee that sponsored a merit selection resolution in each session of the Legislature from 1973 to 1986.¹⁰⁴ The resolutions received a floor vote only twice and failed each time.¹⁰⁵ A 1996 Senate measure providing for appointment of Court justices by

⁹⁶ ILL. CONST. art. VI, § 1 et al.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² American Judicature Society, *History of Judicial Selection Reform*, 2003, available at http://www.ajs.org/js/IL_history.htm.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

the Governor with Senate consent was defeated.¹⁰⁶ Partisan elections, at least for the time, are here to stay, albeit it with some disapproval.

The Court has undergone drastic change in recent years, with six of the seven justices taking their seats in the year 2000 or later. Charles Freeman, the lone justice on the Court before 2000, was elected in 1990 and retained in 2000. Thomas Fitzgerald, Robert Thomas, and Thomas Kilbride were elected in 2000. Rita Garman was appointed in 2001 and elected in 2002. Lloyd Karmeier was elected in 2004, and Anne Burke was appointed in 2006. The Court has not heard any cases of substance relating to life issues since the change of the Court’s composition. As a result, it is difficult to predict how the Court will handle such cases in the future, although a look at prior opinions should be helpful, given the doctrine of *stare decisis* and the Court’s avowal of adherence to the doctrine.¹⁰⁷

Biographical information of the current justices of the Illinois Supreme Court

Member	Elected or Appointed by/ Year	Term Expires	Miscellaneous
Robert R. Thomas	Elected, 2000	2010	-Biographical information: B.A. from the University of Notre Dame in 1974; J.D. from Loyola University School of Law in 1981; Judge on the Circuit Court in DuPage County from 1989 to 1994; Judge on the Appellate Court for the Second District from 1994 to 2000; Chosen chief justice in September 2005; -Professional/social affiliations: Republican; -Notable Opinions: Thomas has achieved some notoriety for pursuits outside his judicial role. He sued the Kane County Chronicle in 2004, alleging the paper libeled him in a series of columns. Thomas received a \$7 million jury verdict that has

¹⁰⁶ *Id.*

¹⁰⁷ *Tuite v. Corbitt*, 224 Ill. 2d 490, 498, (Ill. 2006) (citations omitted) (“[A]ny departure from *stare decisis* must be specially justified. Prior decisions of this court should not be overruled absent good cause or compelling reasons. This court will not depart from precedent merely because the court might have decided otherwise if the question were a new one.”).

Member	Elected or Appointed by/ Year	Term Expires	Miscellaneous
			<p>been appealed. Thomas' deposition in the case revealed he may not have plans to stay on the Court long-term. Becoming a partner at a major Chicago law firm and aspiring to a federal judgeship are two career paths he indicated he has thought of exploring when his term expires in 2010.</p> <p>-Other: Thomas may be best known to the public for his non-judicial role as a former Chicago Bears kicker.</p>
Charles E. Freeman	Elected in 1990 Retained in 2000	2010	<p>-Biographical information: B.A. from Virginia Union University, 1954; J.D. from John Marshall Law School, 1962; Served as assistant attorney general, assistant state's attorney and attorney for the Board of Election Commissioners; Appointed as an arbitrator to the Illinois Industrial Commission from 1965 to 1973; Appointed to serve as a commissioner on the Illinois Commerce Commission from 1973 to 1976; Served on the Cook County Circuit Court and the Illinois Appellate Court;</p> <p>-Professional/social affiliations: Democrat; Member of the Cook County and DuPage County Bar Associations, the Illinois Judicial Council, the Illinois and American Judges' Associations and the American Judicature Society</p> <p>-Other: First African-American to serve on the Court</p>
Thomas R. Fitzgerald	Elected 2000	2010	<p>-Biographical information: B.A. from Loyola University; Graduated from John Marshall Law School after he left the Navy; Began his law career as a prosecutor in the Cook County State's Attorney's office; 1976 elected Cook County judge; 1989 presiding judge of Cook County's Criminal Courts and Illinois' first statewide grand jury; 1989 to 1996 taught at John Marshall Law School, Chicago-Kent College of Law as assistant coordinator of the trial advocacy program;</p> <p>-Professional/social affiliations: Democrat;</p>

Member	Elected or Appointed by/ Year	Term Expires	Miscellaneous
			Served as president of the Illinois Judges' Association, chairman of the Illinois Supreme Court Special Committee on Capital Cases, chairman of several committees of the Illinois Judicial Conference, and chairman of the Chicago Bar Association's Constitutional Law and Long-range Planning Committees
Thomas L. Kilbride	Elected 2000	2010	<p>-Biographical information: B.A. from St. Mary's College in Winona, Minnesota, 1978; Law degree from Antioch School of Law, now University of the District of Columbia D. Clarke School of Law-1981; Withdrew from college in 1972 to work for George McGovern's presidential campaign; Stayed in Chicago after Nixon's victory to work for the United Farm Workers before moving to San Diego for three years to help organize local unions there; Began his legal career working for legal services and then became a solo practitioner for the next twenty years in a small Illinois town, engaging in the general practice of law and specializing in child abuse and juvenile cases;</p> <p>-Professional/social affiliations: Democrat; Past board member, president and vice-president of the Illinois Township Attorneys Association, a past volunteer lawyer and charter member of the Illinois Pro Bono Center; Member of the Illinois State Bar and Rock Island County Bar Associations; Served as volunteer legal advisor for the Community Caring Conference, the charter chairman of the Quad Cities Interfaith Sponsoring committee, volunteer legal advisor to Quad City Harvest, Inc., and a past member of the Rock Island Human Relations Commission</p>
Rita B. Garman	Appointed 2001 Retained 2002	2012	-Biographical information: B.S. from the University of Illinois; J.D. from the University of Iowa College of Law in 1968; Assistant state's attorney from 1969-1973 and associate circuit judge for twelve years; Circuit judge in the Fifth

Member	Elected or Appointed by/ Year	Term Expires	Miscellaneous
			<p>Judicial Circuit from 1986-1995 and presiding circuit judge from 1987-1995; Assigned to the Appellate Court in 1995 and elected to the position in November 1996;</p> <p>-Professional/social affiliations: Republican; Member of the Vermilion County, Illinois, and Iowa Bar Associations, and the Illinois Judges' Association; Served as a member of the Illinois Judicial Conference and the Executive Committee from 1990 to 2001; Member of the Judicial Education Committee during that time, serving as chairperson from 2000 to 2001</p> <p>-Judicial evaluations: Rated as "highly recommended" by the Illinois State Bar Association Judicial Evaluation Committee in her race for the Court.</p>
Lloyd A. Karmeier	Elected 2004	2014	<p>-Biographical information: B.S in 1962 and J.D. in 1964 from the University of Illinois; Clerked for Illinois Supreme Court Justice Byron O. House from 1964 to 1968, State's Attorney, 1968-1972; Clerked for United States District Court Judge James Foreman from 1972-1973, General law practice, 1964-1986; Resident circuit judge of Washington County, 1986-2004;</p> <p>-Professional/social affiliations: Republican; Member of the Illinois Judges Association, the Washington County, St. Clair County, East St. Louis and Illinois Bar Associations; Past member of the American Bar Association and American Judicature Society; Member of the Assembly of the Illinois State Bar Association, 1996-2002; Past chair of the Bench and Bar Section Council; served on the Illinois Supreme Court Committee on Pattern Jury Instructions in Criminal Cases, and chaired that Committee from 2003 to 2004; Member of the Southern Illinois American Inn of Court and elected president of the Executive Committee in 2003</p>
Anne M. Burke	Appointed 2006	2008	-Biographical information: B.A. from DePaul

Member	Elected or Appointed by/ Year	Term Expires	Miscellaneous
			<p>University, 1976; J.D. from IIT/Chicago-Kent College of Law, 1983; Republican Governor James Thompson appointed her judge to the Court of Claims in 1983 and, in 1991, she was reappointed by Republican Governor Jim Edgar; Appointed special counsel to the Governor for Child Welfare Services in April 1994; Appointed to the Appellate Court in 1995 and elected to the Court in 1996;</p> <p>-Political/social affiliations: Democrat;</p> <p>-Notable opinions: Burke’s selection illustrates the politics sometimes involved in selecting justices and judges in Illinois. Burke is married to Chicago Alderman Edward M. Burke, a member of the Cook County Democratic Central Committee that was involved with McMorrow’s Court race in 1992.¹⁰⁸ Fourteen years later, she was chosen by McMorrow to succeed her. Justice Burke dismissed those who were concerned that being married to a powerful Democratic Chicago alderman helped her obtain her seat on the Court, reminding them she was elected to the Appellate Court in 1996.¹⁰⁹</p> <p>-Judicial evaluations: Chicago Council of Lawyers commented on Burke’s “excellent temperament,” her “impressive” list of civic activities and her commitment to public interest causes, but said she was “not qualified” because she did not have “sufficient experience” to be an appellate court judge; the Council disapproved of the way in which Burke was appointed, expressing concern that she would serve over two years before Illinois voters decided whether or not she should have the Court seat; in contrast, the Chicago Bar Association and the Illinois State Bar</p>

¹⁰⁸Christi Parsons, *First Female Justice Resigns*, CHICAGO TRIBUNE, April 6, 2006, http://www.chicagocouncil.org/press/press_040606_ChicagoTribune.htm.

¹⁰⁹ *Id.*

Member	Elected or Appointed by/ Year	Term Expires	Miscellaneous
			Association each gave her their highest rating.

CONCLUSION

The Court has undergone drastic changes in recent years, with six of the seven justices taking their seats in the year 2000 or later. The current Court has not heard any substantive life-related cases since this drastic change in its composition. Thus, predicting its life-issues jurisprudence is speculative. However, the Court's historical approach to these issues generally has been positive. Of course, the Court has followed United States Supreme Court precedent where bound to do so, but it has refused to follow the decisions of other jurisdictions when those opinions have been contrary to the State's policy of valuing life. The current Court recently indicated its willingness to uphold this life-affirming policy by formulating rules that would allow a law requiring parental consent for abortion to take effect. That decision may be a harbinger of the direction this Court will take when a life-related issue comes before it.