[J-10-2022] [MO: Todd, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 62 MAP 2021
	:	
Appellee	:	Appeal from the Order of the Superior Court at No. 1813 MDA 2019 dated January 12, 2021, reconsideration denied March 17, 2021, Affirming the Judgment of Sentence of the Dauphin County Court of Common Pleas, Criminal Division, at No. CP-22-CR-0002561-2019 dated September 12, 2019.
v.	:	
CARL GAMBY,	:	
Appellant	:	
	:	
	:	ARGUED: March 9, 2022

DISSENTING OPINION

JUSTICE WECHT **DECIDED: September 29, 2022**

The crime of indecent assault requires, among other things, that a person have "indecent contact" with another person.[1] The General Assembly has defined "indecent contact" as any "touching of the sexual or *other intimate parts* of the person for the purpose of arousing or gratifying sexual desire, in any person."[2] The General Assembly has left the phrase "other intimate parts" undefined. That task now falls to this Court, as we are asked in this case to decide whether the neck is an "intimate part" for purposes of indecent assault. In attempting to clarify the phrase, the Majority adds further confusion, stating that it refers to "those parts of the body that are personal and private, and which a person ordinarily allows to be touched only by other individuals with whom the person has a close personal relationship, and which are commonly associated with sexual

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1 18 Pa.C.S. § 3126(a)(1).

2 18 Pa.C.S. § 3101 (emphasis added).

relations or intimacy."[3] Because the Majority's virtually boundless definition of "other intimate parts" muddles the criminal law more than clarifies it, I cannot endorse its use.

"Intimate" is an ambiguous term. In the context of this criminal case, it cannot be defined in a straightforward, singular way, nor in a way that comports with our canons of statutory construction and our Constitutions. I have attempted at length to craft my own definition of the term within those boundaries. I have been unable to do so. Nonetheless, this case still must be resolved. The rule of lenity compels the conclusion that the neck is not an "intimate" body part for purposes of indecent assault.[4] Because the Majority holds otherwise, I respectfully dissent.

Statutory interpretation is often a complicated task. That is particularly true in a case involving a term like "intimate," which can be understood in a multitude of ways. However, that our inquiry is difficult does not mean that it is boundless. To the contrary, interpreting courts are circumscribed by the rules and objectives of the Statutory Construction Act.[5] First and foremost, pursuant to the Act, an interpreting court's primary objective is "to ascertain and effectuate the intention of the General Assembly."[6] In pursuing this objective, "[e]very statute shall be construed, if possible, to give effect to all

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3 *See* Maj. Op. at 1-2.

4 *See Commonwealth v. Scolieri*, 813 A.2d 672, 678 (Pa. 2002) ("[W]here doubt exists concerning the proper scope of a penal statute, it is the accused who should receive the benefit of such doubt.") (citation omitted).

5 *See* The Statutory Construction Act of 1972, codified at 1 Pa.C.S. §§ 1501-1991 (the "Act").

6 *Id*. § 1921(a).

its provisions,"[7] and that "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage."[8]

The first step in any exercise of statutory interpretation asks whether the contested statutory term is ambiguous. A "statute is ambiguous when there are at least two reasonable interpretations of the text."[9] We begin with ambiguity, because "[w]hen the words of a statute are clear and free from all ambiguity," that plain language controls, even if doing so contravenes the General Assembly's putative intent. Indeed, the Act mandates that "the letter of [the statutory language] is not to be disregarded under the pretext of pursuing its spirit."[10]

Today's Majority determines that "intimate" is unambiguous.[11] That is because, according to the Majority, "intimate" can only be interpreted in one reasonable way. To divine the term's "common and approved usage,"[12] the Majority draws heavily upon dictionary definitions and asserts that these have "consistently and broadly" defined "intimate" to "mean something that is personal and private in nature, commonly associated with sexual relations."[13] This articulation of what "intimate" means not only fails to demonstrate that the term is unambiguous, but it actually renders the term even more imprecise and even more susceptible to divergent understandings.

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[7] *Id.*

[8] *Id.* § 1903(a).

[9] *A.S. v. Pennsylvania State Police*, 143 A.3d 896, 905-06 (Pa. 2016).

[10] 1 Pa.C.S. § 1921(b).

[11] *See* Maj. Op. at 22.

[12] *Id.* at 11-12; 1 Pa.C.S. § 1903.

[13] Maj. Op. at 12-13.

The main problem with the Majority's formulation is that it contains (at least) two dissimilar components. The Majority cannot seem to decide whether "intimate" refers to those aspects of life that are "personal and private," or to those that involve sexual activity. Instead of recognizing the tension between the two reasonable uses of "intimate," the Majority amalgamates the two into a single hybridized definition and then announces that this fusion eliminates any ambiguity.

To be sure, both aspects of the Majority's understanding of "intimate" can claim some dictionary support. As the Majority recounts, Webster's Third New International Dictionary from 1961 states that "intimate" can refer to actions or feelings associated with "very close personal relationships." It also can pertain to those "deeply personal (as emotional, familial, or sexual) matters," or "engaged in or marked by sexual relations."[14] Other dictionaries cited by the Majority reveal similar variations. Those sources describe "intimate" as "characterizing one's deepest nature," of "a very personal or private nature," something "personal and private, often in a sexual way," or "marked by very close association, contact, of familiarity."[15] However, those same sources define "intimate" in ways that differ substantively from those relied upon by the Majority. For instance, Merriam-Webster's online dictionary also defines "intimate" as "marked by a warm friendship developing through long association," "suggesting informal warmth or privacy,"

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[14] *Id.* at 13 (quoting Webster's Third New International Dictionary (1961)).

[15] *Id.* (citations omitted).

and "a very close friend or confidant."[16] The Oxford Learner's Dictionary provides various other definitions, such as "having a close and friendly relationship" and "very detailed."[17]

Confronted with such disparate definitions, an appellate court must consider the context in which the term appears in order to ascertain the "common usage" of a term, and must then determine whether that term is ambiguous. As the Supreme Court of the United States explained in *Yates v. United States*,[18]

> "[w]hether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words." Rather, "the plainness or ambiguity of statutory language is determined [not only] by reference to the language itself," but also by considering "the specific context in which that language is used, and the broader context of the statute as a whole. Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things."[19]

Here, the statutory context in which we consider the term "intimate" is the human body. Even in this limited context, the term remains ambiguous. If that were not so, each and every human body part readily could be categorized as either "intimate" or "not intimate." Obviously, that is not the case. The variations between what might be considered "intimate" would differ widely, and would be substantially affected by factors such as age, gender, social and religious beliefs, etc. A twenty-eight-year-old member of

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16 *Intimate*, Merriam-Webster, https://www.merriam-webster.com/dictionary/intimate (last visited Aug. 17, 2022).

17 *Intimate*, Oxford Learner's Dictionary, https://www.oxfordlearnersdictionaries.com /us/definition/ english/intimate (last visited Aug. 16, 2022).

18 574 U.S. 528 (2015).

19 *Id.* at 537 (cleaned up); *see also A.S.*, 143 A.3d at 906 (explaining that a term still can be unambiguous if the context in which it is used provides the necessary clarity.).

a kink community[20] likely would disagree with an eighty-year-old member of an Amish[21] community as to what falls within the definition of an "intimate" part. That is the difficulty with interpreting this term—neither of those two individuals' understanding of the term would be unreasonable. The term is capable of being understood in nearly countless ways.

Even in this context, the Majority's attempt to support the purported absence of ambiguity with terms such as "commonly associated with sexual relations," "private," and "personal" actually operates to the opposite effect. These terms are susceptible to a myriad of reasonable interpretations when used in reference to the human body. Even considering the term "intimate" in the limited sexual context does not narrow its ambit. The variables that must be considered if one were to seriously contemplate what is "private" or "personal" with regard to the human body or to sexual encounters, which itself involves a wide range of person-to-person contact, are too vast to condense into a unitary understanding of "intimate." There is no objective line that can be drawn between what is private or personal, and what is not. What is personal or private is unique to each individual, predicated upon the many differing sociological factors that influence a

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20 A "kink community" is one that participates in a "culture or lifestyle outside of the social norm centered around consensual non-egalitarian relationship practices, concepts of monogamy, sexual interactions, sexual activities and/or fantasies as a means for heightened intimacy between partners." Sally M. Yates, & Anita A. Neuer-Colburn, *Counseling the Kink Community: What Clinicians Need to Know*, 1 J OF COUNSELING SEXOLOGY & SEXUAL WELLNESS: RESEARCH, PRACTICE, AND EDUCATION 15 (2019).

21 The Amish "are a group of traditionalist Anabaptist Christian[s] . . . known for simple living, plain dress, Christian pacifism, and slowness to adopt many conveniences of modern technology, with a view neither to interrupt family time, nor replace face-to-face conversations whenever possible, and a view to maintain self-sufficiency." https://en.wikipedia.org/wiki/Amish (last visited Aug. 18, 2022). "The Amish value rural life, manual labor, humility, and Gelassenheit (submission to God's will), all under the auspices of living what they interpret to be God's word." *Id.*

person's own beliefs and preferences. The Majority considers none of these variables before proclaiming that "intimate" has only one reasonable meaning.

Moreover, by using the term "commonly" when connecting the term "intimate" to "sexual relations," the Majority implicitly, but inarguably, holds that "intimate" does not always refer to sexual activities. Naturally, another question arises: how can a term that the Majority insists can be susceptible to only one reasonable meaning refer to sexual activity only *sometimes*? If we keep faith with the Majority's use of the term "commonly," it necessarily follows that, when asked, one reasonable person could say that "intimate" relates to a sexual situation while another equally reasonable person could say that it relates to a non-sexual situation, perhaps to a friendship instead. Not only would both of these people be correct, but their reasonable, though nonetheless opposing, views demonstrate the ambiguity of the term "intimate."

But let us assume for argument's sake that the term necessitates some kind of association with sexual activity. It strains (no, it violates) credulity to conclude that no two reasonable people would understand "sexual relations"—a term that encompasses a wide array of behavior—differently.[22] Simply put, concepts such as "intimacy," "privacy," "sexual relations," and "close personal relationships" are not susceptible to a one-size-fits-all approach, and are readily capable of being understood in myriad reasonable ways. To maintain otherwise is to superimpose upon Twenty-First Century humanity a Victorian (or perhaps pre-Victorian) sensibility. This is of course nonsensical.

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[22] The disparate understandings of that particular term in part led to impeachment proceedings against a sitting United States President, whose understanding of that term differed significantly from that of those who prosecuted him. On January 26, 1998, in response to an allegation of oral sex with a White House intern, President William Jefferson Clinton infamously proclaimed that he "did not have sexual relations with that woman." CNN, *A Chronology: Key Moments in the Clinton-Lewinsky Saga*, https://www.cnn.com/ALLPOLITICS/1998/resources/lewinsky/timeline (last visited Aug. 17, 2022).

For these reasons, it is undeniable that the Majority's interpretation is just one of several reasonable interpretations. And that means that the term is ambiguous. An interpreting court must then attempt to understand the language of the statute by consulting other canons of interpretation.

Even when interpreting an ambiguous term, the court's goal is to define that term in a way that aligns with the General Assembly's intent. "Where the text of the statute is not explicit, we glean the General Assembly's intention by examining various factors such as the occasion for the provision, the context in which it was passed, the mischief it was designed to remedy, and the object it sought to attain."[23]

Unlike many other crimes defined in the Sexual Offenses chapter of the Crimes Code, the crime of indecent assault was not enacted in order to address physical injury or harm inflicted by unwanted sexual contact. Rather, the General Assembly was concerned with the "outrage, disgust, and shame engendered in the victim rather than . . . physical injury to the victim."[24] The criminalization of indecent assault is aimed at protecting against the "invasion of personal dignity."[25]

To effectuate this important objective, the General Assembly could have made it illegal to touch *any* part of another person's body without that person's consent and for the purpose of sexual gratification. That iteration of the offense not only would have been unambiguous, eliminating the need for judicial interpretation, but it also would have avoided many of the constitutional problems that the present version poses. Instead, the General Assembly opted to take an opaque and complicated path.

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23 *Commonwealth v. Cobbs,* 256 A.3d 1192, 1216 (Pa. 2021) (citing 1 Pa.C.S. § 1921(c)).

24 *Commonwealth v. Capers*, 489 A.2d 879, 882 (Pa. Super. 1985).

25 Model Penal Code ("MPC") § 213.4, cmt. 2, "Sexual Contact" (footnote omitted).

The General Assembly set forth the crime of indecent assault as follows:

> A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and . . . the person does so without the complainant's consent.[26]

As noted above, "indecent contact" is defined as any "touching of the sexual or *other intimate parts* of the person for the purpose of arousing or gratifying sexual desire, in any person."[27] By its very terms, the statute creates three distinct categories of body parts: (1) sexual parts; (2) "other intimate parts"; and (3) those parts that are neither sexual nor intimate. The General Assembly has provided no guidance as to which body parts fall into these categories.

Even "sexual parts" presents interpretive challenges. It is beyond dispute that the male and female reproductive organs (penis and scrotum, and vagina) are "sexual parts." That is where any clarity ends. Even if we assume that "sexual" is limited to sexual intercourse, confusion remains because even that term encompasses different acts and different body parts depending upon the orientation or preferences of the participants. No one action constitutes "sexual" acts, and even what constitutes a definitive list of "sexual" body parts may be open to dispute in a future case.

Before delving further into the complexities of defining "intimate," it is helpful to identify the ways in which the term cannot be defined. First, a body part cannot be deemed "intimate" by reference to the idiosyncratic beliefs or actions taken by the particular defendant or based upon the fact that the defendant derived sexual gratification from touching. For purposes of a criminal statute, a body part does not change. It is

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[26] 18 Pa.C.S. § 3126(a)(1).

[27] 18 Pa.C.S. § 3101 (emphasis added).

either "intimate," or it is not. A part does not become an "intimate" part by virtue of either the way that the defendant touches it or the effect that touching the part has on the actor.

For instance, a victim's neck cannot be deemed "intimate," *ipso facto*, because it was kissed, rather than poked. Or consider an elbow, and assume that it is not "intimate" for purposes of indecent assault. The elbow does not become "intimate" under the statute if a defendant, who happens to be sexually stimulated by elbows, touches another person's elbow and is then aroused by it.

The reason that neither the defendant's sexual gratification nor the type of touching can define "intimate" is obvious. If either of those considerations served as the defining feature, then *any* body part could become an "intimate" one. That cannot occur consistently with the statute. If the General Assembly wanted to prohibit the touching of *any* body part, it could have said so. It did not. Instead, it prohibited touching of "sexual" parts and "other intimate" parts. To allow sexual gratification to define the body part would be to render the term "intimate" superfluous. Our job when interpreting a statute is to find the meaning that best comports with the General Assembly's intent. It is not to create an entirely new crime. In this case, that means that the neck cannot be an "intimate" part merely because Gamby appeared to have been aroused by kissing the victim there.

Nor can a body part be deemed "intimate" based upon the subjective feelings or beliefs of the victim. What is "intimate" for purposes of the codified crime of indecent assault cannot shift and slide around based upon the feelings of the individual actors. Due process requires that crimes be defined in a way that provides fair notice to a defendant before he or she commits the crime as to what is, and what is not, criminal.[28] One cannot possess the requisite *mens rea* to commit a crime unless one knows that what one is about to do is a crime. What constitutes a crime cannot change from person

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[28] *Cf. Commonwealth v. Sims*, 919 A.2d 931, 939 (Pa. 2007).

to person, from individual belief to individual belief. For purposes of indecent assault, a defendant cannot be forced to guess as to whether a particular complainant believes that the part the defendant touches is an "intimate" one.

Imagine two defendants. They touch two different complainants on the earlobe. Assume that, in both instances, the touching is unwanted and is undertaken for purposes of sexual gratification. Now, suppose one of those two complainants considers the earlobe to be "intimate" while the other does not. If we permitted a part to be deemed "intimate" based upon the subjective belief of the complainant, one of the defendants here has committed the crime of indecent assault, while the other has not, even though neither had any idea beforehand how the complainant felt about the matter. This is an untenable and unconstitutional construct. What is "intimate" for a criminal statue cannot change from complainant to complainant, lest a defendant's culpability would be left to chance, rather than based upon a proper *mens rea*.

What is "intimate" cannot be determined based upon nothing more than identifying the body part targeted by the defendant, upon whether the part arouses the defendant, or upon the individual, subjective beliefs of the complainant. The term must be defined objectively and in a way that provides fair notice and can be consistently applied. Defining "intimate" in this way would permit this Court to quickly and accurately identify all of the parts of the human body that are "intimate," leaving no confusion going forward. Unfortunately, doing so is not just a herculean task; it is one that is impossible within the confines of the law.

The Oregon Supreme Court has aptly described this difficulty:

> In protecting "intimate areas" of the human body, the statute invokes individual and cultural standards, and perhaps also the social psychology of group decision by a jury asked to agree on what is "intimate" while reacting to the circumstances of one case. No area of the anatomy is intrinsically intimate, for instance, to an X-ray camera. The question is whose sense of intimacy matters. Is the perception that of the person

> touched, of the person who touches, of a third person such as a parent or bystander? Is it that of the legislature, of some identifiable community, or of the factfinder at trial?
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> "Intimate parts" are more than "sexual parts," but in context the words refer to parts that evoke the offensiveness of unwanted sexual intimacy, not offensive touch generally. That does not go far toward solving the problem of subjective or cultural differences, which attach varying meanings to such common social customs as hugging, kissing, holding hands, or linking arms among members of the same sex or of opposite sexes, not to mention unusual or idiosyncratic sexual tastes or inhibitions. Are lips intimate parts? Are knees or feet intimate, hands or elbows not? To hold that these are or are not intimate parts as a matter of law assumes that the lawmakers had in mind a chart or catalogue of "intimate" parts of the human body, which they did not list in the law but expect courts to divine from the word itself. Thus the statute also would fix this chart at the time of enactment, so that if, for instance, skirts at that time had never risen above the ankle, not only the "thigh area" but the shin would be intimate as a matter of law in the age of the miniskirt and the bikini. Sometimes statutes do that kind of thing, but it did not happen here. [29]

As the Oregon Supreme Court observed, the problem is that the questions involve policy judgments, sociological understandings, and factual line-drawing. Those are all jobs for the legislative branch, not for this Court. We are not social scientists. We are not equipped with the skills, experience, resources, and mandate necessary to separate "common social customs" from "idiosyncratic sexual tastes or inhibitions" and from purely prurient actions.[30] We possess no innate ability as jurists to divine an understanding of this broadly used, but nonetheless vague, term in a way that answers all of the questions astutely raised by the Oregon Supreme Court. Any judicial attempt to define the term "intimate" is futile. Even worse, the attempt does more harm than good by confusing the matter further. Unfortunately, that is precisely what the Majority does here.

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[29] *State v. Woodley*, 760 P.2d 884, 886 (Or. 1988).

[30] *Id.*

The Majority holds that the phrase "intimate parts" was "intended to mean a body part that is personal and private, and which the person ordinarily allows to be touched only by people with whom the person has a close personal relationship, and one which is commonly associated with sexual relations or intimacy."[31] This is not a definition at all. It is a mess. A definition provides clarity, setting forth a term that is readily understandable without raising additional questions. What the Majority creates instead is, charitably viewed, a test.[32]

The Majority's choice of this path poses a number of insurmountable problems. First, the Majority apparently only is concerned with providing a framework for use by trial and appellate courts in resolving challenges to indecent assault. The goal of statutory interpretation is to provide clarity to all Pennsylvanians, not just the courts. We cannot reasonably expect citizens to execute a multi-part, vague test in order to understand a statutory term. The citizenry at large is at least as entitled as the judiciary to know what the law means.

This leads to the second, and more important, problem with the Majority's test: it is unconstitutional. Before going any further, it is important to note that Gamby has not raised a due process vagueness challenge to his indecent assault conviction. In fact, he does not make any constitutional arguments. Thus, in this particular case, we have no occasion as a jurisprudential matter to strike down that statute as unconstitutionally vague.[33]

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31 Maj. Op. at 23.

32 The Majority calls it a "standard." *Id.* at 26.

33 *See Steiner v. Markel*, 968 A.2d 1253, 1256 (Pa. 2009) ("This Court has consistently held that an appellate court cannot reverse a trial court judgment on a basis that was not properly raised and preserved by the parties.").

However, the absence of a substantive constitutional claim does not mean that due process considerations are entirely irrelevant in this case. We cannot interpret a statute in a way that violates our Constitutions. Section 1922(3) of the Statutory Construction Act requires a court to presume that the General Assembly does not intend to enact laws that are unconstitutional,[34] and thus instructs courts to construe statutes "whenever possible to uphold their constitutionality."[35] "Therefore, if one interpretation results in . . . violation of the Federal or State Constitution, such interpretation cannot be accepted."[36] Because the Majority's newly-minted "intimate parts" test violates the Due Process Clauses of our Constitutions, it "cannot be accepted."[37]

Initially, it is worth noting that Gamby does not raise this species of constitutional claim either. But Gamby was not required to do so. He cannot be expected to anticipate this Court's ultimate rulings, and then argue that such an anticipated standard is unconstitutional. Gamby could not have anticipated that the Majority would adopt today's standard in lieu of a definition. It would be one thing if the Majority adopted the Commonwealth's suggested interpretation. Gamby would have been on notice of the possibility of such a result, and could have responded to it in a reply brief. But the Commonwealth only argued that "intimate parts" were those "subject to sexual contact or

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34 1 Pa.C.S. § 1922(3).

35 *In re William L.*, 383 A.2d 1228, 1231 (Pa. 1978).

36 *Pa. Dept. of Transp. v. McFarren*, 525 A.2d 1185, 1188 (Pa. 1987).

37 *Id.*

relations."[38] Gamby could not have known that this Court would far exceed that suggestion, and he was under no obligation to respond to an unforeseeable result.[39]

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[38] Brief for the Commonwealth at 11.

[39] The Majority accuses me of a "*sua sponte*" discussion of constitutional questions that exceed this Court's grant of review. Maj. Op. at 27. The Majority insists that, in my "zeal" to address a constitutional question, I overlook principles that purportedly require that we find any constitutional claim to be waived. *Id.* at 29. Finally, the Majority claims that the most "aberrant" aspect of my analysis is that, because it exceeds our grant of review, the parties and this Court are denied advocacy on the issue. *Id.* at 31.

To be clear, I have no particular "zeal" to address any issue. In fact, because I find the statute to be ambiguous, and incapable of a useable definition, I have no need to discuss, let alone analyze, any constitutional question. Left to my own devices, I believe a straightforward statutory construction analysis leads directly to the only canon that can solve today's dilemma: the rule of lenity.

By faulting me for raising constitutional issues *sua sponte*, the Majority obfuscates the fact that the constitutional defect in this case is created entirely by its own chosen construction of the term "intimate." Any discussion of waiver, or the lack of advocacy before this Court, begins and ends with the fact that the Majority chose to interpret the term in a way that was not endorsed or suggested by either party, and thus could not be anticipated by anyone. It was the Majority on its own that elected to thrust upon the people of Pennsylvania an unconstitutional definition of the contested term. Of course Gamby did not (and could not) raise a challenge yesterday to the interpretation selected by the Majority today. And of course there is no advocacy on the topic. No one could have predicted that the Majority would go so far in its analysis, to the point of creating a statute that provides no meaningful notice to anyone on the street seeking to know what the law of indecent assault entails.

Ironically, the Majority's analysis itself demonstrates the inapplicability of the waiver doctrine it champions. The Majority notes that there are two situations in which the constitutional avoidance canon is utilized: (1) when a party makes a facial challenge; and (2) when the parties offer two different interpretations and the Court is asked to choose one. *Id.* at 30 (citations omitted). In those circumstances, it is foreseeable that the canon would be relevant. In the first situation, the constitutionality of the provision is directly in play. In the second situation, it is incumbent upon the parties to raise any and all challenges to the differing interpretations offered in the case. What happened here resembled neither of these scenarios. There is no direct constitutional challenge, and the Court is not choosing between the two interpretations proffered by the parties. Instead, the Majority embarks on its own unpredictable path. The canon of constitutional avoidance was in no way a foreseeable line of argument, and the Majority cannot now hide from criticism because no one enjoyed such foresight earlier.

The Majority's holding runs afoul of the constitutional command that penal statutes cannot be vague. This Court has explained that principle as follows:

> [T]he terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. . . . [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.[40]

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[41]

The Majority's interpretation of "intimate" can satisfy due process only if it provides "reasonable standards" by which a person may gauge his future conduct.[42] The ordinary

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Conspicuously, the Majority does not counter in any meaningful way the substantive claim that its interpretation is unconstitutional. Instead, the Majority chooses to stand on prophylactic procedural considerations that cannot fairly be imposed retroactively upon the parties. It is troubling indeed that this Court *sua sponte* chooses an unconstitutional interpretation and then demands impunity from criticism because no one had a crystal ball allowing them to anticipate that the Court would now venture onto such a wayward path.

To be clear, and the Majority's insistence notwithstanding, I do not at this time assert that, as a substantive constitutional matter, our indecent assault statute is void-for-vagueness. I do, however, state that, by interpreting "intimate" in vague, broad terms, the Majority violates the Due Process Clauses. Despite the Majority's best efforts to toss about inapplicable procedural concerns, the consequence of its decision is inescapable: without being asked to do so, the Majority interprets the crime of indecent assault in a way that will result in countless constitutional violations. I cannot sit idly by while this occurs, nor do so merely because no party anticipated this disastrous result.

40 *Commonwealth v. Heinbaugh*, 354 A.2d 244, 246 (Pa. 1976) (citation omitted).

41 *Commonwealth v. Mikulan*, 470 A.2d 1339, 1342 (Pa. 1983) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

42 *Heinbaugh*, 354 A.2d at 246.

person seeking to know what is prohibited by the indecent assault statute must now grapple with discerning what body parts are "personal and private, and which the person ordinarily allows to be touched only by people with whom the person has a close personal relationship, and one which is commonly associated with sexual relations or intimacy."[43] Even a brief, superficial review of these elements reveals its irredeemable vagueness.

First, the ordinary person must know what it means for a body part to be "personal and private." The Majority does not define either term. Nor does it explain which, and whose, standards are to be applied. As the Oregon Supreme Court noted, these are not universal, easily identifiable standards, but instead require a complex understanding of diverse and changing "individual and cultural standards."[44] What is personal or private to one reasonable person might not be so to another. These are feelings and beliefs unique to particular persons and not susceptible to universal application, particularly in the context of the human body. These concepts substantially are influenced by sociological forces such as age, gender, religion, experiences, relationships, and a galaxy of individual human idiosyncrasies.

By way of example, consider the abdominal region of the body. It is as equally reasonable for a young man raised in a strictly religious household to believe that his abdominal area is personal and private, as it is for an adult woman raised without religion to expose her abdomen in a two-piece bathing suit on a public beach. Under the Majority's test, which of these equally reasonable beliefs would be "personal and private"? More importantly, how is the ordinary person supposed to know if the young man or the adult woman is correct as to whether the abdominal area is "personal or private?" The answer is simple. That person cannot know. The Majority forces the ordinary person to

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[43] Maj. Op. at 23.

[44] *Woodley*, 760 P.2d at 886.

guess as to what is, and what is not, "personal and private." The Majority's very first element violates each of the vagueness standards set forth above.

The constitutional deficiencies do not end there. In order for a touching to be prohibited under the statute, the Majority tells us, it must be on a place that a person "ordinarily" allows to be touched as part of a "close personal relationship." Once again, the Majority does not elaborate on these terms in any substantive way. A person can have a "close personal relationship" with a parent, a sibling, a sports coach, a friend, a minister, rabbi, priest or imam, a grandparent, a co-worker, and so on and so forth. And, who has to be in that relationship? Assume again that the question is whether the abdominal area constitutes an "intimate part." Which of these "close personal relationships" controls? And how often must that body part be touched within the context of that relationship to be considered "ordinary?" Assume the abdomen is touched "ordinarily" in one of these relationships, but not in another. How do we know which one prevails for determining whether the body part is "intimate?" The more important question is: how is the ordinary, everyday person supposed to know?

The final element of the test fares no better. The Majority concludes its standard by asking whether the body part is "one which is commonly associated with sexual relations or intimacy." As mentioned, even the term "sexual relations" creates confusion. The Majority does not tell us what constitutes "sexual relations." It could be sexual intercourse, oral sex, kissing, or any other touching that occurs during a sexual encounter between two people. Even worse, the part does not have to be always associated with "sexual relations." It only has to be "commonly" associated with such relations. Needless to say, the Majority does not explain how often a part has to be used during "sexual relations" to be "commonly" associated therewith. Sexual predilections or preferences vary. There is no objective way for the average citizen to determine what is "common"

and what is not. For some people, touching another person's feet is a "common" part of "sexual relations." For others, it is not. At what point does a body part become "commonly associated with sexual relations?" More importantly, how is the ordinary person supposed to know this about any particular body part? Finally, the Majority concludes its announcement of its new standard with the perplexing addition of the description of an "intimate part" as something that it is "commonly associated with . . . intimacy." This tautology clarifies nothing for the ordinary person seeking to understand what constitutes indecent assault.

The Majority's test offers the following answer to the question of whether a particular body part is an "intimate" one: it depends. It depends on an individual prosecutor. It depends on an individual judge. It depends on an individual jury. The defendant, and the public at large, will just have to wait and see whether a particular judge or jury has a sense that something is sufficiently common, or a sense of what activities sex encompasses, or of what should be deemed private. We will just leave to chance the question of what parts of the body the factfinder feels are able to be touched with or without consent. This is not law. Our Constitutions demand so much more. Due process requires that penal statutes provide clear answers to the ordinary person. The Majority's test misses this mark in every way. Rather than offer clarity, my colleagues require a person to ponder a litany of unanswerable questions. The incorporation into our law of such a faulty "standard" means that a criminal defendant is no more on notice as to what constitutes the crime of indecent assault than he or she was before the Majority attempted to "fix" the problem.

Not only does the Majority's interpretation of the term violate our Constitutions, but its elements are also so vague and so open to debate that the "test" readily can be manipulated to encompass a wide variety of body parts, if not all of them. As a

jurisprudential tool, this simply does not work. It does not produce reliable results. If it did, and if the test was capable of accurately categorizing the relevant body parts into "other intimate parts," then we should be able to pass all of the non-sexual body parts through the test and find out which ones are intimate and which ones are not. We then could provide for potential defendants, the bench and bar, and the citizenry at large the complete list of body parts that the General Assembly neglected to provide. Because the Majority's test is so malleable, we cannot do so.

Take the mouth as an example. At times the mouth is sexual, at others it is not. In some circumstances and situations, the mouth is "personal and private," and can be "commonly associated with sexual relations or intimacy." But it can also be commonly associated with friendly greetings or familial love or eating a sandwich. A mother kisses her child on the mouth. In some places, people greet each other by using their mouth to kiss one another on both cheeks. How can a court, let alone a potential criminal defendant, know whether the mouth is a part that a person "ordinarily allows to be touched only by other individuals with whom the person has a close personal relationship" when the best answers to the question are "it depends" or "sometimes?" When those are the best answers emanating from a legal test, the test has failed its purpose. It is no test at all.

One more example drives the point home. Consider the top, center area of the thigh. The first question is whether that area is "personal or private." It depends. Many people wear shorts that expose that area to public view, and nearly all female swimsuits expose that area. For these individuals, the mid-thigh would not be "private."[45] However,

[45] In Justice Donohue's view, whether the body part typically is exposed for public view is the predominant factor in determining whether that part is "intimate." *See* Dissenting Op. at 1 (Donohue, J.). While I agree with Justice Donohue that this is relevant, it cannot be the only consideration. An "intimate" part cannot change from person to person, depending upon their sartorial choices.

others dress more conservatively, preferring instead modest wear that covers the thigh. For such persons, the thigh is a "private" area of the body. The Majority's test does not teach us how to choose between two equally reasonable beliefs as to what is private. Even if we assume that the thigh overcomes the first aspect of the test, it faces similar problems with the "close personal relationship" element. What type of relationship should we consider? A marriage? A grandparent-granddaughter relationship? In the former, the thigh "ordinarily" may be touched in sexual and non-sexual ways. In the latter, one easily can envision the grandfather lovingly, but not sexually, patting his granddaughter on the thigh. However, in a clergy-parishioner relationship, which undoubtedly can be a "close personal relationship," there will be almost no physical contact, let alone thigh-touching. Of these three relationships, only one of them would involve touching the thigh for purposes of "sexual relations." Does that make it "commonly associated with sexual relations?" There are no clear answers.

Depending upon what perspective one chooses when asking these questions, the test can be used to classify nearly any non-sexual body part as "intimate." That result is untenable because it contradicts the statutory language that, as noted earlier, does not apply to all body parts, but instead creates three distinct categories of parts. We cannot create a test that would allow for that which the General Assembly unequivocally chose not to adopt.

But let us suspend disbelief for a moment and assume that the test is a constitutionally useable device. The Majority does not wrestle with the complexities that attend the questions that its test poses. Instead, the Majority announces, without analysis, that the neck is a "personal and private" body part. What makes the neck "personal and private"? The Majority does not say, aside from proclaiming that it is so "in

ordinary social interaction."[46] However, in "ordinary social interaction," the neck is almost always exposed for public view and is often adorned with jewelry. The Majority disregards these factors as "fashion-driven"[47] features, immaterial to the notion of privacy. This dismissal hardly is persuasive given that the Majority does not even attempt to explain why the neck is "personal or private." Bald judicial decree does not suffice to establish social norms, particularly when we interpret a criminal statute. Nor can unsupported proclamations by judges serve to dismiss what, in fact, are reasonable factors in ascertaining what the ordinary person would consider to be private. That the neck is almost always seen by the public and is often decorated are, at a minimum, relevant considerations.

The Majority also declares that "an adult does not usually touch or kiss the neck of another adult outside of personal or intimate relationships."[48] The Majority does not expound upon this conclusion, Nor does it explain how it knows what "usually" occurs in these relationships. The Majority does not tell us which relationships it is referring to, nor how it has decided that only those relationships are relevant for purposes of this analysis. Of course, this omission harkens back to the Majority's failure to define "close personal relationships" when it announced the test. Since we do not know what constitutes such relationships, how can we know how people in those relationships "usually" behave? The Majority expects us simply to take its word for it. I am unwilling to do so.

Finally, the Majority concludes that the neck is "routinely associated with sexual relations."[49] To support this broad assumption, the Majority offers nothing but dictionary

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[46] Maj. Op. at 24.

[47] *Id.* at 26.

[48] *Id.* at 24.

[49] *Id.*

definitions of the term "necking."[50] Needless to say by this point, the Majority does not explain what is required for something to become a "routine" part of "sexual relations." Nonetheless, the Majority performs a simple extrapolation, inferring from this existence of the definition that the neck is "routinely" associated with "sexual relations." Maybe it is. Maybe it is not. However, the mere appearance of the term in the Urban Dictionary or on Wikipedia does not prove that it is a "routine" part of "sexual relations."

While offering no substantive support for its pronouncements relating to the neck, the Majority swiftly dismisses Justice Donohue's query of whether the foot or toe is an "intimate" part of the body.[51] The Majority seizes upon the term "foot fetish," and distinguishes that predilection from the neck, which it announces is "routinely associated with sexual relations."[52] The Majority's attempt to draw this distinction is wholly unpersuasive. It offers no guidance for ascertaining what it means to be "commonly associated with sexual relations." Nor is use of the term "fetish" conclusive of anything. It is fair to say that incorporating feet into sexual activity is not rare, and that not everyone who does so has a "foot fetish." The only way to know whether the foot is an "intimate" part is to give it the same individual consideration that any other body part would warrant.

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[50] Consistent with its generally antiquarian approach, the Majority relies heavily on the old-timey term "necking." *See* Ashley Astrew, "*Hey, Boo! Do You Remember These 15 Old Dating Slang Words?*" https://www.dictionary.com/e/old-dating-slang/ (published February 11, 2022) ("What people might call making out today used to be known as necking…. [O]ne of the earliest recorded uses of necking to mean 'kissing' actually occurred as early as 1825." (italics in original)).

[51] *See id.* at 25; *see also* Dissenting Op. at 3 (Donohue, J.).

[52] Maj. Op. at 24. Notably, "foot fetish" is defined both on Wikipedia and in the Urban Dictionary, two sources that the Majority relies upon in concluding that "necking" means that the neck is an "intimate" part. *See* https://en.wikipedia.org/wiki/Foot_fetishism (last visited Aug. 16, 2022) & https://www.urbandictionary.com/define.php?term=foot%20 fetish (last visited Aug. 16, 2022).

Without a reliable mechanism to determine what is common, I agree with Justice Donohue that there is no reliable way to “draw the line,” and that this indisputably will lead to “uncertain application.”[53] I have labored to define the term “intimate” in a way that comports with the canons of statutory interpretation and due process, so as to eliminate this uncertainty. It is not possible to do so. No judicial formulation of the term “intimate” can provide the clarity required in a penal statute. Only the General Assembly can solve this dilemma, and it can do so only by either making it a crime to touch without permission “any” part of the body for the purposes of sexual gratification or by providing a clear list of the body parts that it believes to be “intimate.”

That the term is undefinable does not mean that this case must go unresolved. Despite my disagreement as to the test the Majority creates, it is reasonable for the Majority to conclude that the neck is an “intimate” part. However, as Justice Donohue demonstrates, it is just as reasonable to conclude that it is not. In such circumstances, the rule of lenity applies. The rule requires penal provisions to be strictly construed. Thus, we are bound to hold that the neck is not an “intimate” part. Hence, I would vacate Gamby’s indecent assault conviction.

I respectfully dissent.

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53 Dissenting Op. at 3 (Donohue, J.).