[J-10-2022]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

BAER, C.J., TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ.

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,
v.	:	reconsideration denied March 17,
	:	2021, affirming the Judgment of
	:	Sentence of the Dauphin County
CARL GAMBY,	:	Court of Common Pleas, Criminal
	:	Division, at No. CP-22-CR-0002561-
Appellant	:	2019 dated September 12, 2019.
	:	
	:	ARGUED: March 9, 2022

OPINION

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

In this appeal by allowance, we consider whether the unwanted kissing of a person's neck constitutes the touching of "sexual or other intimate parts" for purposes of the crime of indecent assault.[1] For the reasons that follow, we determine that "other intimate parts" are 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 relations

[1] 18 Pa.C.S. § 3126. As discussed below, a conviction for indecent assault depends upon a finding of "indecent contact," 18 Pa.C.S. § 3101, which, as written, expresses two distinct concepts which must be proven. First, indecent contact requires the touching of "sexual or other intimate parts" of the person, and, second, such touching must be for the purpose of arousing or gratifying sexual desire. 18 Pa.C.S. § 3101. This appeal focuses on the former requirement.

or intimacy. Applying this meaning, we conclude that the neck is an intimate part of the body, and thus, we do not disturb the jury's finding that Appellant, Carl Gamby, by grabbing the victim, K.A., from behind and kissing her neck for the purpose of sexual gratification, committed indecent assault. Accordingly, we affirm the order of the Superior Court.

The facts underlying this matter, as set forth by the trial court, are as follows:

> March 28, 2019, was [Appellant's] second day at a new job working for the Econo Lodge on Eisenhower Boulevard in Swatara Township, Dauphin County. It was also the first time that he met [K.A., the victim], an experienced employee who was to help train [Appellant] as they worked together during the evening shift. (N.T. 9/11 & 12/19 p. 14). From 4:00 p.m. to approximately 7:30 p.m., [Appellant] interacted professionally with [K.A.]. At 7:30 p.m. [Appellant] excused himself to ostensibly take a cigarette break. (N.T. 9/11 & 12/19 pp. 15-16). He next went to the restroom where he injected himself with what he testified was likely fentanyl and bath salts. (N.T. 9/11 & 12/19 p. 60).
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> [K.A.] immediately suspected something was wrong when [Appellant] stumbled out of the restroom. [Appellant] then grabbed [K.A.] from behind with his arm around her neck and kissed [K.A.] on her neck. (N.T. 9/11 & 12/19 pp. 16-17). Next, he proceeded to take off his shirt. As [K.A.] tried to text her boss for help, [Appellant] inserted himself between the desk and [K.A.] and repeatedly requested to kiss her. (N.T. 9/11 & 12/19 p. 18).
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> [K.A.] stood up and attempted to get away from [Appellant] as he advanced and tried to touch [K.A.]. She yelled, "You need to get away from me. Stop. Don't touch me." (N.T. 9/11 & 12/19 p. 19). When she had an opportunity, [K.A.] left the lobby area and went outside to her car at the same time she was calling 911. (N.T. 9/11 & 12/19 pp. 19-20). The Commonwealth played for the jury a videotape of this series of interactions that occurred inside the Econo Lodge. (Commonwealth's exhibit 1; N.T. 9/11 & 12/19 pp. 22-24). As [K.A.] was leaving, [Appellant] said to her, "[b]efore you leave, I just want to show you something. And that's when he started to take his pants off." (N.T. 9/11 & 12/19 p. 24).

> As video footage from outside the hotel documented, [Appellant] ran after [K.A.] when she fled to her car. (Commonwealth's exhibit 1). [K.A.] locked herself in her vehicle and attempted to leave. [Appellant], now totally naked, pressed himself against the car. (N.T. 9/11 & 12/19 pp. 25-26). He shook [K.A.'s] car and demanded, "[y]ou have to stay. You have to come out and talk to me." (N.T. 9/11 & 12/19 p. 26). [Appellant] continued to hold onto the car as [K.A.] drove away. (N.T. 9/11 & 12/19 p. 26). [K.A.] drove to the police station, which is a short distance away at the Swatara Township building. When Officer Neve met her, he observed that [K.A.] was extremely frightened. (N.T. 9/11 & 12/19 p. 49). Neve noted and photographed handprints on the driver's side windows. (Commonwealth's exhibits 3 & 4). When the police arrested [Appellant], it was noted that he had an abrasion on his penis like a "road rash." (N.T. 9/11 & 12/19 p. 51). The police also documented that [Appellant's] clothes were left across the floor of the hotel lobby, and that he had left a syringe on the restroom sink. (Commonwealth's exhibits 5, 6, & 7).

Trial Court Opinion, 12/9/19, at 1-3. Appellant was charged with indecent assault without consent,[2] indecent exposure,[3] use or possession of drug paraphernalia,[4] and public drunkenness and similar misconduct.[5]

As the crime of indecent assault is central to this appeal, we turn to the Pennsylvania Crimes Code, which sets forth the crime of indecent assault, in relevant part, as follows:

> **Offense defined.--**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:

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[2] 18 Pa.C.S. § 3126(a)(1).

[3] 18 Pa.C.S. § 3127(a).

[4] 18 Pa.C.S. § 780-113(a)(32).

[5] 18 Pa.C.S. § 5505.

(1) the person does so without the complainant's consent.

18 Pa.C.S. § 3126(a)(1) (emphasis added). Further, the term "[i]ndecent contact," as used above, is defined as "[a]ny touching of the *sexual or other intimate parts* of the person for the purpose of arousing or gratifying sexual desire, in any person." 18 Pa.C.S. § 3101 (emphasis added). The meaning of the phrase "sexual or other intimate parts," which is not statutorily defined, lies at the core of this matter.

At his jury trial, Appellant, who testified on his own behalf, freely admitted to injecting himself with what he thought was heroin, but which he later believed to be fentanyl and bath salts. The charges of possession of drug paraphernalia and indecent exposure also were essentially conceded at trial. However, Appellant maintained that he was not guilty of indecent assault, as he did not touch an intimate part of the victim's body. Ultimately, the jury found Appellant guilty on the first three of the crimes charged, including indecent assault.[6] Thereafter, Appellant filed a post-sentence motion challenging the sufficiency of the evidence to support his conviction for indecent assault. The court denied the motion, determining, *inter alia*, that, by wrapping his arm around the victim's neck and "kiss[ing] the intimate part of her neck," there was sufficient evidence to support Appellant's conviction for indecent assault. Trial Court Opinion, 12/9/19, at 5.

Appellant appealed to the Superior Court contending that his kissing of the victim's neck did not satisfy the statutory element of touching the "sexual or other intimate parts" of the victim. Writing for a unanimous three-judge panel, Judge Jacqueline Shogan affirmed Appellant's judgment of sentence based primarily on the Superior Court's prior

[6] The trial court sentenced Appellant to 11 months and 15 days to 23 months imprisonment for the indecent assault conviction, and a consecutive term of 24 months of probation for the indecent exposure conviction. The court imposed no further penalty for the use of possession of drug paraphernalia conviction. As a result of his convictions and the circumstances underlying them, Appellant also was required to register as a sexual offender.

decisions, noting that the court previously has held that "areas of the body other than the genitalia, buttocks, or breasts can be intimate parts of the body as contemplated by the indecent assault statute when touched for sexual gratification." *Commonwealth v. Gamby*, 2021 WL 99749, *3 (Pa. Super. filed Jan. 12, 2021) (citing *Commonwealth v. Fisher*, 47 A.3d 155 (Pa. Super. 2013) (holding evidence sufficient to sustain indecent assault conviction where defendant licked backs of victim's legs from her ankles to just below her buttocks for the purpose of sexual gratification); *Commonwealth v. Provenzano*, 50 A.3d 148 (Pa. Super. 2012) (affirming indecent assault conviction where defendant exchanged passionate kisses with mentally challenged minor victim who sat on his lap); *Commonwealth v. Evans*, 901 A.2d 528 (Pa. Super. 2006) (holding evidence was sufficient to convict defendant of indecent assault where he wrapped his arms around victim and inserted his tongue into her mouth because act would not occur outside of sexual or intimate situation); *Commonwealth v. Capo*, 727 A.2d 1126 (Pa. Super. 1999) (upholding indecent assault conviction where defendant kissed victim's face and neck, and rubbed her shoulders, back, and stomach)).

In rejecting Appellant's argument that the neck does not constitute an intimate part of the body, the Superior Court further relied upon its decision in *Commonwealth v. Hawkins*, 614 A.2d 1198 (Pa. Super. 1992), in which it reasoned that the broad language of the statute arose from "a concern for the outrage, disgust, and shame engendered in the victim rather than because of physical injury to the victim." *Id*. at 1201. As the *Hawkins* court explained, "[d]ue to the nature of the offenses sought to be proscribed by the indecent assault statute, and the range of conduct proscribed, the statutory language does not and could not specify each prohibited act." *Id*.

The Superior Court herein reasoned, *inter alia*, that Appellant's wrapping of his arm around the victim's neck, and kissing her neck, as found by the trial court, were

intrusive gestures, and, as a result, that the victim suffered the outrage, disgust, and shame that it deemed Section 3126 sought to prevent. Thus, the Superior Court concluded that the evidence, when viewed in the light most favorable to the Commonwealth as verdict winner, supported the jury's determination that Appellant committed indecent assault by touching the victim on an intimate part of her body for the purpose of arousing or gratifying sexual desire, and, in doing so, the court rejected Appellant's argument that the incidental contact of a single kiss to the victim's neck was insufficient. *Gamby*, 2021 WL 99749, at *5.

We granted allocatur to address whether the kissing of the victim's neck, without the victim's consent, constituted the touching of the "sexual or other intimate parts" of the victim sufficient to sustain Appellant's conviction for indecent assault under 18 Pa.C.S. § 3126(a)(1). As Appellant raises a pure question of law involving statutory interpretation, our scope of review is plenary and our standard of review is *de novo*. *Commonwealth v. Foster*, 214 A.3d 1240, 1247 (Pa. 2019); *Commonwealth v. McClintic*, 909 A.2d 1241, 1245 (Pa. 2006).[7]

Appellant submits that his only physical contact with the victim was placing a single kiss on the back of her neck while his arm was around her neck and shoulder area, and argues that this was insufficient to establish the touching of the "sexual or other intimate

[7] We note that Appellant did not raise a constitutional challenge on the basis of vagueness, nor is it contained in our grant of allocatur, and, thus, this issue is not before us. *Commonwealth v. Diodoro,* 970 A.2d 1100, 1104 n.5 (Pa. 2009) (defendant waived argument that possession of child pornography statute was unconstitutionally vague by failing to raise this issue in trial court); *In re F.C. III*, 2 A.3d 1201, 1212 (Pa. 2010) (finding waiver of void for vagueness claim); *Commonwealth v. Bavusa,* 832 A.2d 1042, 1051-52 (Pa. 2003) (deeming constitutional challenges waived where appellant had preserved only statutory interpretation issue); *see generally* Pa.R.A.P. 302(a).

parts" of a person under Section 3126.[8] Appellant's Brief at 14. Initially, addressing the decisions relied on by the Superior Court, Appellant contends that, while *Capo*, *Evans*, *Fisher*, and *Provenzano* interpreted the phrase "other intimate parts" to encompass body parts other than the genitals and the breasts, they are distinguishable, as they involved conduct that was more intrusive and prolonged than Appellant's conduct in this matter. Furthermore, according to Appellant, those decisions interpreted the phrase "intimate parts" too broadly, and inconsistently with the Model Penal Code ("MPC") and the rules of statutory construction.

Specifically, Appellant observes that the offense of indecent assault found in Section 1326 is derived from Section 213.4 of the MPC. Appellant offers that the MPC's definition of "sexual contact" is identical to the definition of "indecent contact" found in 18 Pa.C.S. § 3101, and, according to Appellant, rejects an expansive interpretation of the term "intimate" to mean all body parts.[9] Appellant stresses the concerns expressed by the MPC drafters regarding criminalizing mere familial contacts or affections, and its explanation that "sexual misbehavior should not be based on wholly equivocal conduct," but requires "some more demonstrative act, such as fondling of a woman's breast, manipulation of male genitals, or digital penetration of vagina or anus." MPC § 213.4, comment, n.11. Consistent therewith, Appellant presses the view espoused by Judge Cirillo in his dissent in *Capo*, wherein he opined that the phrase "sexual or other intimate parts" meant the sexual parts of the penis, vagina, anus, and the female breasts. *Capo*,

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[8] As an aside, Appellant stresses that the Commonwealth did not proceed in the alternative under an attempted indecent assault theory and that the trial court did not charge the jury on that offense. Nor does the Commonwealth assert such a theory before us.

[9] The MPC, and certain other states consistent therewith, use the phrase "sexual contact" as an element of the crime of "sexual assault," whereas Pennsylvania's Crimes Code refers to "indecent contact" as an element of "indecent assault."

727 A.2d at 1129 (Cirillo, J. dissenting). According to Appellant, if the General Assembly had intended indecent contact to include *any* part of the body, as long as the motive was sexual gratification, then it could have drafted language to that effect. Appellant's Brief at 22.

Instead, Appellant highlights the offense of invasion of privacy, 18 Pa.C.S. § 7507.1, which defines "[i]ntimate part" as "[a]ny part of: (1) the human genitals, pubic area or buttocks; and (2) the nipple of a female breast." Appellant's Reply Brief at 5-6 (quoting 18 Pa.C.S. § 7507.1). According to Appellant, Sections 3126 and 7507.1 should be read *in pari materia*, and the term "intimate parts" should be given the same meaning in both statutes. Consistent therewith, Appellant submits that the phrase "intimate parts" is ambiguous, implicating the rule of lenity and a more circumscribed interpretation. Therefore, Appellant maintains that the placing of a single kiss on the victim's neck while placing his arm around her did not constitute the touching of an "intimate part" and, thus, could not support a conviction for indecent assault.

The Commonwealth responds that, contrary to Appellant's contention, the decisions relied on by the Superior Court below do not announce a sweeping rule that *all* body parts constitute "sexual or other intimate parts," but, rather, only "those that are the subject of sexual contact." Commonwealth's Brief at 8. To the extent the phrase is ambiguous, the Commonwealth offers that, in the phrase "sexual or other intimate parts," "intimate parts" cannot refer solely to genitalia, as such a construction would ignore the distinction between "sexual" and "other intimate parts," and render the latter redundant. Moreover, the Commonwealth contends that the phrase cannot be limited to the breasts, as such an interpretation would be inconsistent with the legislative intent underlying the statute which, it submits, concerns "the shame, outrage, and disgust engendered in the victim, rather than . . . any physical injury to the victim." Commonwealth's Brief at 10

(quoting *In the Interest of J.R.*, 648 A.2d 28, 34 (Pa. Super. 1994)). According to the Commonwealth, the phrase "other intimate parts" must be construed in accord with its common and accepted usage. 1 Pa.C.S. § 1903. In the Commonwealth's view, this means a part of the body that is the subject of sexual contact or relations, citing Merriam-Webster's definition of "intimate" as "engaged in, involving, or marked by sex or sexual relations." Commonwealth's Brief at 11 (quoting Merriam-Webster's Online Dictionary, http://www.merriamwebster.com/dictionary/intimate).

Rejecting Appellant's reliance on the rule of lenity as necessitating a narrow interpretation of the phrase "sexual or other intimate parts," the Commonwealth offers that courts are not required to give language employed in a criminal statute its narrowest meaning or disregard the legislature's intent regarding the meaning of a statute. Furthermore, according to the Commonwealth, Appellant's reliance upon the MPC in support of his narrow reading of the statute is misplaced. While acknowledging that the MPC was concerned with excluding from the sweep of indecent assault common expressive familial or friendly affection, the Commonwealth asserts that the kissing and touching of one's neck should not be construed as such familial or friendly affection but, rather, as an act which would happen only in a sexual or intimate context. In sum, the Commonwealth urges that we find that Appellant's kissing of the victim on her neck was a sexual advance which involved an intimate body part, evidence of which was sufficient to support Appellant's conviction for indecent assault.

Our interpretation of the phrase "sexual or other intimate parts" is guided by the polestar principles set forth in the Statutory Construction Act, 1 Pa.C.S. § 1501 *et seq*., which has as its paramount tenet that "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." *Id.* § 1921(a). As we have often recognized, "[t]he General Assembly's intent is best expressed

through the plain language of the statute." *Commonwealth v. Brown*, 981 A.2d 893, 897 (Pa. 2009); *Commonwealth v. McCoy*, 962 A.2d 1160, 1166 (Pa. 2009). Therefore, when the terms of a statute are clear and unambiguous, they will be given effect consistent with their plain and common meaning. 1 Pa.C.S. § 1921(b); *Commonwealth v. Kelley*, 801 A.2d 551, 554 (Pa. 2002). We ascertain the plain meaning of a statute by ascribing to the particular words and phrases the meaning which they have acquired through their common and approved usage, and in context. 1 Pa.C.S. § 1903. Only in instances where the words of a statute are not explicit, or are ambiguous, do we consider the construction factors enumerated in 1 Pa.C.S. § 1921(c). *McCoy*, 962 A.2d at 1166; *Commonwealth v. Fithian*, 961 A.2d 66, 74 (Pa. 2008); *see also* 1 Pa.C.S. § 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.").

Concomitant with these considerations, the Statutory Construction Act sets forth certain presumptions which are to be applied when ascertaining legislative intent. In particular, when interpreting a statutory provision, we must presume that the legislature does not intend a result that is unreasonable, absurd, or impossible of execution, 1 Pa.C.S. § 1922(1) and intends the entirety of the statute to be certain, *id.* § 1922(2). Additionally, since Section 3126 is a penal statute, it must be strictly construed. *Id.* § 1928(b)(1). Likewise, under the rule of lenity, an ambiguous penal statute must be strictly construed in favor of the defendant. *Commonwealth v. Cousins*, 212 A.3d 34, 39 (Pa. 2019). However, this principle does not require that our Court give the words of a statute their "narrowest possible meaning," nor does it "override the 'general principle that the words of a statute must be construed according to their common and approved usage.'" *McCoy*, 962 A.2d at 1168 (quoting *Commonwealth v. Booth*, 766 A.2d 843, 846 (Pa. 2001)). Where "doubt exists concerning the proper scope of a penal statute, it is the

accused who should receive the benefit of such doubt." *Brown*, 981 A.2d at 898 (internal quotation marks omitted).

Finally, the Crimes Code itself instructs how its provisions should be construed: "The provisions of this title shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this title and the special purposes of the particular provision involved." 18 Pa.C.S. § 105.

With these principles in mind, we return to the text of the Crimes Code setting forth the crime of indecent assault, as well as the definition of indecent contact, which we quote again for ease of discussion:

> **Offense defined.--**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:
>
> (1) the person does so without the complainant's consent.

18 Pa.C.S. § 3126 (emphasis added). Again, "indecent contact," as used above, 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.

18 Pa.C.S. § 3101 (emphasis added).

The phrase "sexual or other intimate parts," the meaning of which is the sole issue before our Court, is not defined in the Crimes Code. Although not defined, this does not *ipso facto* render the phrase ambiguous. Rather, as noted above, the Statutory Construction Act instructs the judiciary to interpret terms according to their common and

approved usage. 1 Pa.C.S. § 1903.[10] To discern the legislative meaning of words and phrases, our Court has on numerous occasions engaged in an examination of dictionary definitions. *See, e.g., Greenwood Gaming & Entertainment, Inc. v. Commonwealth*, 263 A.3d 611, 620-21 (Pa. 2021) (consulting dictionary definitions to ascertain meaning of phrase "personal property"*)*; *Chamberlain v. Unemployment Compensation Board of Review*, 114 A.3d 385, 394 (Pa. 2015) (determining meaning of term "incarcerated" by use of dictionaries); *Bruno v. Erie Insurance Co*., 106 A.3d 48, 75 (Pa. 2014) (offering that, in determining a term's meaning, it is proper to consult dictionaries); *Commonwealth v. Hart,* 28 A.3d 898, 909 (Pa. 2011) (exploring meaning of "lure" through review of various dictionaries); *Fogle v. Malvern Courts, Inc.,* 722 A.2d 680, 682 (Pa. 1999) (approving of use of dictionaries to determine common and approved usage of a term).

Dictionary definitions of the term "intimate," as used in this context, reveal a largely consistent definition over a significant period of time, including those from around 1972 when the Crimes Code was enacted.[11] Indeed, dictionary definitions over time have consistently and broadly defined the adjective "intimate" to mean something that is

[10] As Justice Felix Frankfurter observed, "legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 618 (1944).

[11] In defining a statutory term, we strive to determine its meaning at the time the General Assembly enacted the legislation. *See Wisconsin Central Ltd. v. United States,* 138 S.Ct. 2067, 2074 (2018). "After all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 536 (2019) (citing *INS v. Chadha,* 462 U.S. 919 (1983)). Additionally, we would risk, too, upsetting reliance interests in the settled meaning of a statute. *Cf*. Singer & Singer, 2B Sutherland on Statutes and Statutory Construction § 56A:3 (7th ed. 2012). Because of the consistent dictionary definitions of the term "intimate" over the last 50 years, we have no such concerns in this matter.

personal and private in nature, commonly associated with sexual relations, and these definitions persist today.

For instance, Webster's Third New International Dictionary from 1961 defines "intimate," as relevant here, as "marked by or appropriate to very close personal relationships," "of, relating to, or befitting deeply personal (as emotional, familial, or sexual) matters," and "engaged in or marked by sexual relations." Webster's Third New International Dictionary (1961). Similarly, the 1980 version of Webster's New Collegiate Dictionary defines "intimate," in relevant part, as "belonging to or characterizing one's deepest nature" and "of a very personal or private nature." Webster's New Collegiate Dictionary (1980). Most recently, in its on-line edition, Merriam-Webster defines "intimate" as "belonging to or characterizing one's deepest nature," "marked by very close association, contact, or familiarity" and "of a very personal of private nature." *Intimate,* Merriam-Webster, https://www.merriam-webster.com/dictionary/intimate. Further, the Britannica Dictionary defines "intimate" consistently: "very personal or private." https://www.britannica.com/dictionary/intimate. Finally, the Oxford Learner's Dictionary[12] defines the term "intimate" as "private and personal, often in a sexual way." https://www.oxfordlearnersdictionaries.com/us/definition/english/intimate_1?q=intimate.

Indeed, this last articulation of the definition of "intimate" – "private and personal, often sexual in nature" – fits particularly comfortably in the context of the statute when read as a whole. *See*, *e.g.*, 1 Pa.C.S. § 1903(a), (b) ("Words and phrases shall be construed according to rules of grammar and according to their common and approved usage . . . . General words shall be construed to take their meanings and be restricted

[12] We note that there exist other dictionary definitions, distinct from the more common definitions cited above, such as another version of the Oxford English Dictionary which includes as one of its definitions of "intimate," "Pertaining to or involving the sexual organs or bodily orifices". The New Shorter Oxford English Dictionary 1402 (4th ed. 1993).

by preceding particular words"); *In re J.W.B.*, 232 A.3d 689, 699 (Pa. 2020) ("When interpreting a statute, 'we must always read the words of a statute in context, not in isolation, and give meaning to each and every provision' and 'our interpretation must not render any provision extraneous.'").

More specifically, the term "intimate parts" is a component of the phrase "sexual or other intimate parts of the person." Thus, "intimate parts" are clearly more than "sexual parts," and so cannot solely relate to the genitalia, as such a construction would ignore the manifest distinction between "sexual" and "other intimate parts," and would make the latter term superfluous. By including the words "or other," the legislature made clear that "sexual" is a subset of the category of "intimate parts" – that is, "intimate" is broader than "sexual." Therefore, we reject Appellant's suggestion that "intimate parts" can be cabined solely to the sexual body parts, as the statute, by its very terms, is more broadly applicable. Conversely, we also reject the Commonwealth's suggestion that that the phrase "sexual or other intimate parts" constitutes *any* body part, as the qualifiers "sexual" and "intimate" plainly narrow the focus. In that regard, the statute's reference to sexual and other intimate parts refers to areas of the person that implicate sexual autonomy, rather than offensive touch generally, which would be the subject of a mere battery.

Appellant rightly draws our attention to the MPC, as our indecent assault statute, found in Section 3126, is derived from, although not identical to, Section 213.4 of the MPC, entitled "Sexual Assault." *See* 18 Pa.C.S. § 3126, Jt. St. Govt. Comm. Comment – 1967; *Commonwealth v. Mumma*, 414 A.2d 1026, 1029 (Pa. 1980). While not identical, Section 3101's definition of "indecent contact" is virtually the same as the MPC's definition of "sexual contact." Thus, it is entirely reasonable to look to the MPC in interpreting the meaning of "sexual or other intimate parts." Indeed, we recently emphasized that "[i]t would be extraordinary for lawmakers to attempt to impose a materially different

connotation on borrowed terminology [from the MPC] without saying so. This is particularly so when the plain language adopted by the General Assembly is wholly consistent with [the MPC] authors' developed explanation." *Commonwealth v. H.D.*, 247 A.3d 1062, 1067 n.5 (Pa. 2021).

Initially, we note that the MPC, like our statute, does not provide a definition of the phrase "sexual or other intimate parts." The comment to the MPC's definition of sexual assault discusses "sexual contact," but fails to provide any background as to the body parts envisioned to constitute "sexual or other intimate parts." Instead, the comment's center of attention in this regard focuses exclusively on the nature of the contact and conduct involved, *i.e.*, the type of touching and by whom.

The drafters raise a concern about properly criminalizing a purposeful invasion of one's personal dignity, while not sweeping in casual expressions of affection:

> Together, the limitation on the range of conduct included in the offense and the requirement of purpose differentiate invasion of personal dignity from the casual expression of affection or approval. The basketball coach who pats his players on the bottom is merely fulfilling a ritual of congratulation. Even if such contact proves unwelcome to the recipient, the actor may not be held liable for this offense.

MPC § 213.4, comment 2, "Sexual Contact" (footnote 11 omitted). This concern, however, goes to the requirement that the touching be for the purpose of sexual arousal or gratification, rather addressing which parts are intimate.

In footnote 11 to this MPC comment, the drafters expand upon this concern regarding the criminalization of casual expressions of affection or approval, but again focus on the type of conduct or touching at issue. Specifically, they initially note that a prior tentative draft of the MPC "did not limit the contact to the touching of the sexual or other intimate parts of the person or another, but covered any contact for the stated

purpose [of sexual gratification]," while expressly excluding "acts commonly expressive of familial or friendly affection." *Id*. comment 2, n.11 (citing MPC § 207.6, T.D. 4 at 293-94 (1955)). The drafters go on to explain, however, that the "purpose of the original exclusion of familial or friendly affection is retained by the more restrictive definition [focusing on 'sexual or other intimate parts'] now included in Section 213.4." *Id.*[13] They emphasize that basing liability on a "kiss or hug would place too much weight on the ability of the judge or jury to distinguish affection from passion." *Id*. The drafters also offered an example of an "elderly gentleman who kisses a pretty girl or pats her on the bottom" and asserts that such elder "should not be subjected to prosecution as a sex offender on the theory that he was securing sexual gratification by such conduct." *Id*. Finally, consistent with the theme of the footnote, the drafters submit that liability should not be "based on wholly equivocal conduct," but requires "some more demonstrative act, such as fondling a woman's breast, manipulation of male genitals, or digital penetration of vagina or anus." *Id*. Throughout, however, the drafters were concerned with the type, and evidently degree, of touching and by whom, all at least implicitly related to the purpose of the touching, for sexual gratification, and not what constitutes an intimate part of the victim.

We stress the distinct elements of conduct constituting "indecent contact" / "sexual contact": (1) the touching of a sexual or other intimate part and (2) the touching for the purpose of arousing or gratifying sexual desire. 18 Pa.C.S. § 3101; MPC § 213.4. The MPC comments spoke to the latter. Thus, based upon the above, we conclude that the

[13] While it appears the drafters concluded that the addition of the phrase "sexual or other intimate parts" protected familial or friendly affections from the sweep of the definition of indecent assault, unfortunately, they did not provide further guidance as to what body parts they envisioned were encompassed within the language "sexual or other intimate parts," as the commentary focuses exclusively on the type and circumstances of the unwanted touching.

MPC provides no dispositive, or even helpful, commentary on the narrow question before us.[14]

Appellant's specific, and somewhat confusing, argument concerning the MPC is much more limited. The thrust of Appellant's contention regarding the MPC commentary is that it rejects an expansive interpretation of the term "intimate parts," pointing out, as noted above, that the MPC's definition of "sexual contact" is more restrictive than one appearing in a tentative draft which would have envisioned *any* contact for the stated purpose of arousing or gratifying sexual desire. According to Appellant, an expansive interpretation of the phrase "other intimate parts," to the point of sweeping in "any part of the body," is inconsistent with the MPC commentary. Appellant's Brief at 20-22. As explained above, we agree, as neither the plain language of Section 3101's definition of "intimate contact" nor the MPC commentaries, allow for such breadth.

However, Appellant also appears to rely on the MPC and Judge Cirillo's dissent in *Capo* to interpret the phrase "intimate parts" as limited only to those related to sexual contact – *i.e.*, a woman's breast, the genitals, or anus. Specifically, Appellant points to Judge Cirillo's dissent in *Capo*, in which he cited a single dictionary definition for the proposition that intimate parts referred "only to those parts of the body that are the subject of sexual contact or relations." *Capo*, 727 A.2d at 1129 (Cirillo, J. dissenting). The dissent also looked to the MPC and the commentaries analyzed above. Based upon the drafter's discussion in footnote 11 requiring "some more demonstrative act, such as fondling of a woman's breast, manipulation of male genitals, or digital penetration of vagina or anus," the dissent leapt to the conclusion that indecent contact was limited to "a person's sexual

[14] Consistent therewith, we are not persuaded that our interpretation of the phrase "intimate parts," as set forth below, conflicts with the MPC.

parts including the penis, vagina or anus; and 'other intimate parts' limited exclusively to the breasts." *Id*. at 1130.

Initially, the dictionary definitions offered above do not commonly limit the term "intimate" only to areas pertaining to sexual contact or relations. Furthermore, the MPC's suggestion that liability should not be "based on wholly equivocal conduct," and requires "some more demonstrative act, such as fondling a woman's breast, manipulation of male genitals, or digital penetration of vagina or anus," concerned the conduct, and type and degree of touching, at issue; they were not offered as examples of sexual or intimate parts. To the extent Judge Cirillo equated the two, we reject that view, and reject Appellant's attempt to limit the meaning of "intimate parts" to those mentioned in the MPC commentaries.

We also reject Appellant's contention that the phrase "intimate parts" should be read *in pari materia* with the offense of invasion of privacy. That offense prohibits, *inter alia*, the photographing or videotaping of "intimate parts," whether or not covered by clothing, "of another person without that person's knowledge and consent and which intimate parts that person does not intend to be visible by normal public observation." 18 Pa.C.S. § 7507.1(a)(2). It defines "intimate part" as "[a]ny part of: (1) the human genitals, pubic area or buttocks; and (2) the nipple of a female breast." *Id*. § 7507.1(e).

Statutes which are applicable to the same persons or things or the same class of persons or things are considered to be *in pari materia*, and, as such, should be read together where reasonably possible. The concept has long been recognized in our decisional law, *see Commonwealth v. Trunk*, 182 A. 540, 541 (Pa. 1936), and it is codified in the Statutory Construction Act, *see* 1 Pa.C.S. § 1932(a) ("Statutes or parts of statutes are *in pari materia* when they relate to the same persons or things or to the same class of persons or things.").

Rather than relating to the same class of persons or things, however, we find the indecent assault statute's prohibition on the *touching* of an intimate part to be qualitatively distinct from the privacy statute's prohibition on the *recording or photographing* of intimate parts, parts "not intend[ed] to be visible by normal public observation." 18 Pa.C.S. § 7507.1(a)(2). The two statutes plainly do not relate to the same class of persons or conduct. Furthermore, in our view, to import the circumscribed definition of intimate parts in the privacy statute dealing with the unwanted photographing of certain body parts to the indecent assault statute would too greatly limit the clearly intended protections against unwanted sexual touching. While we recognize that the same phrase is used in two different sections of the Crimes Code (and also defined in the privacy statute), this does not compel the adoption of the invasion of privacy statute definition into the indecent assault statute. Indeed, as eloquently offered by the late Justice Ruth Bader Ginsberg, "[i]n law as in life . . . the same words, placed in different contexts, sometimes mean different things. We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Yates v. United States*, 574 U.S. 528, 537 (2015). More to the point, "[w]here the subject matter to which the words refer is not the same in the several places where [the words] are used, or the conditions are different . . . the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed." *Id*. at 538. Thus, we decline Appellant's invitation to read the phrase "intimate parts" *in pari materia* with the invasion of privacy statute, and thereby we reject a definition of "intimate parts" limited solely to the genitals, pubic area, buttocks, or nipple of the female breast.

Finally, we observe that, while the common law made no special prohibition for indecent sexual contact – treating such conduct as a form of assault and battery – all 50 states have enacted criminal laws that prohibit offensive sexual touching, albeit they vary in their approach and degree of protection. These laws, like Pennsylvania's indecent assault statute, are typified by the two requirements: first, the unwanted touching of certain body parts, and, second, sexual intent, *i.e.*, touching for the purpose of arousing or gratifying sexual desire.

Certain jurisdictions detail a specific list of the physiological parts that are included in the crime of sexual contact. *See*, *e.g.*, Alaska Stat. Ann. § 11.81.900(61) ("'sexual contact' means . . . the defendant's (i) knowingly touching, directly or through clothing, the victim's genitals, anus, or female breast"); D.C. Code Ann. § 22-3001(9) ("'Sexual contact' means the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."); S.D. Codified Laws § 22-22-7.1 ("As used in this chapter, the term, sexual contact, means any touching, not amounting to rape, . . . of the breasts of a female or the genitalia or anus of any person with the intent to arouse or gratify the sexual desire of either party.").

Other jurisdictions define sexual contact as the unwanted touching of "sexual or other intimate parts", but specifically define the term "intimate parts" by a cataloguing of certain body parts. *See*, *e.g.*, Cal. Penal Code § 243.4(1) ("'Intimate part' means the sexual organ, anus, groin, or buttocks of any person, and the breast of a female"); Colo. Rev. Stat. Ann. § 18-3-401(2) ("'Intimate parts' means the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person."); Conn. Gen. Stat. Ann. § 53a-65(8) ("'Intimate parts' means the genital area or any substance

emitted therefrom, groin, anus or any substance emitted therefrom, inner thighs, buttocks or breasts."); Ga. Code Ann. § 16-6-22.1(a) ("For the purposes of this Code section, the term 'intimate parts' means the primary genital area, anus, groin, inner thighs, or buttocks of a male or female and the breasts of a female."); Mich. Comp. Laws Ann. § 750.520a(f) ("'Intimate parts' includes the primary genital area, groin, inner thigh, buttock, or breast of a human being."); Tex. Penal Code Ann. § 21.16 ("'Intimate parts' means the naked genitals, pubic area, anus, buttocks, or female nipple of a person."); Wis. Stat. Ann. § 939.22(19) ("'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being."); Wyo. Stat. Ann. § 6-2-301(ii) ("'Intimate parts' means the external genitalia, perineum, anus or pubes of any person or the breast of a female person.").

In contrast to these jurisdictions, the Pennsylvania General Assembly, like several other state legislatures, chose not to define the phrase "sexual or other intimate parts" by providing an inventory of body parts, leaving such interpretation for the judiciary. *See*, *e.g.*, Ala. Code § 13A-6-60 (3) ("SEXUAL CONTACT. Any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party."); Mont. Code Ann. § 45-2-101(67) ("'Sexual contact' means touching of the sexual or other intimate parts of the person of another, directly or through clothing, in order to knowingly or purposely: (a) cause bodily injury to or humiliate, harass, or degrade another; or (b) arouse or gratify the sexual response or desire of either party."); N.Y. Penal Law § 130.00 (McKinney) ("'Sexual contact' means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed."); Or. Rev. Stat. Ann. § 163.305(5)

("'Sexual contact' means any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party."); Wash. Rev. Code Ann. § 9A.44.010 (13) ("'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.").

The legislative decision by the Pennsylvania General Assembly not to define the phrase by listing the specific body parts that constitute "other intimate parts," however, does not render the undefined term ambiguous. The legislature may articulate prohibited conduct in broad terms even in the criminal context, within constitutional boundaries. Even though some states have legislated a definitive list of body parts, our legislature was free to use broader language, and it remains our duty to interpret "other intimate parts" in accord with its common and approved usage, and its fair import. *See* 1 Pa.C.S. § 1903; 18 Pa.C.S. § 105.

Taking our guidance from the common usage discussed above, the context in which the phrase is employed by the legislature, and the mandate that we construe statutory language according to its common and approved usage, we conclude that the meaning of the phrase "sexual and other intimate parts" is not ambiguous.[15] Further, we

[15] Appellant contends that the rule of lenity should apply in this matter. The rule of lenity provides that, where a statute is penal and the language of the statute is ambiguous, the statute must be construed in favor of the defendant, and against the government. *Commonwealth v. Cousins*, 212 A.3d 34, 39 (Pa. 2019) ("Under the rule of lenity, when a penal statute is ambiguous, it must be strictly construed in favor of the defendant."). The rule of lenity, though it has its origins in common law, is consistent with our rules of statutory construction, which require that provisions of a penal statute be construed strictly. *See* 1 Pa.C.S. § 1928(b) ("All provisions of a statute of the classes hereafter enumerated shall be strictly construed: (1) Penal provisions . . . ."). However, strict construction, as noted above, does not require that the words of a penal statute be given their narrowest meaning or that legislative intent should be disregarded. It does mean, however, that, if an ambiguity exists in a penal statute, such language should be

hold that, as used in 18 Pa.C.S. § 3101, the phrase is not limited to only sexual body parts,[16] but rather, was also 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.[17]

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interpreted in the light most favorable to the accused – that is, where doubt exists concerning the proper scope of a penal statute, it is the accused who should receive the benefit of such doubt. *See Fithian*, 961 A.2d at 73-74. As made clear above, however, we do not find the phrase "other intimate parts" to be ambiguous in light of the common and approved usage of that phrase. 1 Pa.C.S. § 1903. Thus, the rule of lenity does not apply.

[16] While an issue of first impression for our Court, the Superior Court has previously addressed the meaning of "intimate parts." While at this juncture we have no occasion to speak to whether the body parts at issue in these decisions are properly considered "intimate parts" under our analysis today, the decisions interpreted the phrase "other intimate parts" to encompass more than sexual organs. For example, in *Capo*, *supra*, the Superior Court interpreted "other intimate parts" to include the shoulders, neck, and back. Similarly, then-Judge, now Justice Wecht in *Fisher*, *supra*, opined that "[t]he backs of the legs can be intimate parts of the body, just as the shoulders, neck, and back were in *Capo,* . . . ." *Fisher*, 47 A.3d at 158; *see also Evans*, *supra* (holding evidence was sufficient to convict defendant of indecent assault where defendant wrapped his arms around victim and inserted his tongue into victim's mouth because such act would not occur outside of sexual or intimate situation).

[17] We emphasize that the definition of "indecent contact," as written, expresses two distinct concepts which must be proven: first, the touching of a sexual or other intimate part of the person, and, second, such touching being for the purpose of arousing or gratifying sexual desire. 18 Pa.C.S. § 3101. Courts, however, sometimes conflate these two elements. For this reason, we reject the approach embraced by certain courts, in analyzing whether a part is "intimate," to focus not only on the area that is touched, but also on the manner of touching, and the circumstances surrounding the touching. *See, e.g., People v. Sene*, 877 N.Y.S.2d 8, 9 (N.Y. Supreme Court 2009); *People v. Graydon*, 492 N.Y.S.2d 903, 906 (Crim. Ct. New York Cty. 1985). Under our statute, the manner and circumstances of the touching go to the second element of whether the touching was for sexual gratification or desire. For this same reason, we reject Appellant's argument that prior Superior Court decisions are distinguishable from the matter *sub judice* because those decisions involved conduct that was more "intrusive and prolonged" than Appellant's conduct in this matter. Appellant's Brief at 15.

Applying this interpretation of the phrase "sexual or other intimate parts," we must decide whether the neck constitutes an intimate part of the body for purposes of the definition of "indecent contact." 18 Pa.C.S. § 3101. We find that, in ordinary social interaction, the neck is a personal and private body part. Similarly, we find that an adult does not usually touch or kiss the neck of another adult outside of personal or intimate relationships. Finally, we observe that a person's neck is routinely associated with sexual relations or intimacy. Indeed, we note that the term "necking," while broadly meaning "the act or practice of kissing and caressing amorously," https://www.merriam-webster.com/dictionary/necking, is, as its name suggests, also specifically identified with the sexual kissing of the neck.[18] [19] Thus, we hold that the neck is an intimate body part for purposes of Section 3126.

In offering a distinct interpretation of the phrase "sexual or other intimate parts," Justice Donohue, in her dissent, provides an uncertain standard largely based upon fashion mores — that is, by defining an intimate body part as one "customarily [] hidden from public view due to its personal and private nature." Dissenting Opinion (Donohue, J.) at 1, 4 (emphasis added). Justice Donohue accuses us of allowing conduct to be a relevant consideration in interpreting the phrase "intimate part," and claims that its standard avoids any examination of conduct; however, her proffered standard itself implicates conduct, as it describes an intimate body part as one that is "hidden" or "normally shielded" from public view. *Id*. at 1, 2. Justice Donohue's dissent also suggests

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[18] See, "Necking" in Wikipedia, https://en.wikipedia.org/wiki/Necking ("making out, a term for heavy kissing of the neck or petting of that area"); "Necking" in Urban Dictionary, https://www.urbandictionary.com/define.php?term=Necking (defining "necking" as "[k]issing, biting, or licking of the neck during sex, or foreplay").

[19] While not utilizing the same analysis that we embrace today, we note that other states interpreting the same statutory language, which was likewise derived from the MPC, have also found the neck to constitute an intimate part of the body. *See*, *e.g.*, *State v. Meyrovich*, 129 P.3d 729, 733 (Or. App. 2006).

that we have effectively expanded the meaning of intimate part to include "*any* body part." *Id*. at 2, 3 (emphasis added). But far from a "freewheeling" approach, *id*. at 3, our interpretation conceptualizes a narrow class of body parts limited to only those personal and private parts ordinarily allowed to be touched by those in a personal relationship, and which are commonly associated with sexual relations. *Id*. at 1. Indeed, in questioning whether the toe could be an intimate part of the body due to a foot fetish, Justice Donohue's dissent makes our point: a fetish, by definition, is uncommon, whereas the neck, as demonstrated above, is commonly associated with sexual relations.

Related thereto, Justice Donohue claims that our definition of intimate part includes how the touching is conducted evinces a basic misunderstanding of our decision today. We have made clear that what is an intimate body part is independent of *how* a body part is touched, which goes to the sexual gratification component of the definition of "indecent contact." *See supra* page 16 (stressing that there are two distinct elements constituting indecent contact "(1) the touching of a sexual or other intimate part and (2) the touching for the purpose of arousing or gratifying sexual desire."); *id*. at 23 n.17 (same). Thus, whether a part of the body was kissed, stroked, slapped, or poked does not inform whether the body part is intimate, but does speak to whether the touching was for sexual gratification. An example sharpens the point: if someone were to flick a bee off of a woman's breast, he would have touched what is reasonably considered to be an intimate part of her body, but the manner and purpose — a flicking done to prevent the person from being stung — goes to whether the touching was for sexual gratification. It is this later component, concerning the type and purpose of touching, that the MPC drafters exclusively focused on in comment 2 and footnote 11 to Section 213.4. *See supra* pages 15-16. In that vein, while we agree with Justice Donohue that indecent contact concerns invasions of personal dignity, Dissenting Opinion at 5, we strongly disagree with her

unsupported contention that "the neck as a body part is surely not closely associated with personal dignity in the same way as clearer cases like the buttocks." *Id*. at 5-6. While the neck may be adorned with jewelry, so may the upper breast. Indeed, Justice Donohue's approach raises more questions than it answers, fails to provide the "yes-or-no answer" test that it purportedly strives for, *see id*. at 2, and greatly limits what might be commonly considered intimate body parts. For example, the top of a woman's breasts, often revealed through an evening dress, tank top, low-cut blouse, or bikini, are body parts that are not "ordinarily" hidden, and, thus, would seemingly be excluded under her approach. Perhaps only a portion of the breast is considered to be intimate under Justice Donohue's standard? Similarly, the inner thigh and at least part of the buttocks seemingly would be omitted from her definition of intimate part, as "short shorts," miniskirts, or thong bikini bottoms do not hide or shield these parts of the body. While we do not need to opine as to whether any of these parts are intimate parts, the examples illustrate the shortcomings and uncertain application of Justice Donohue's fashion-driven approach.

Finally, Justice Donohue criticizes the standard set forth today as potentially leading to "unreasonable results," and offering a "hand to neck" example in support. *Id*. at 7, 9. Rather than being unreasonable, albeit perhaps uncommon, a perpetrator forcing a victim's hand to touch his neck for purposes of sexual gratification would, in our view, offend a victim's sense of personal dignity. Whether a jury finds the touching of the neck to be for sexual gratification, the second element necessary to find indecent contact, however, is a separate fact-specific determination. To be clear, not every contact with the neck will constitute indecent contact, as the element of sexual gratification must still be proven to constitute indecent contact, and, ultimately, indecent assault. Regardless, we take comfort in knowing that, if our understanding of the phrase "intimate part" is

contrary to the intent of the General Assembly, it may amend the statute to give our courts additional guidance.

Justice Wecht's dissent is even more troubling, as it misuses traditional tools of statutory construction to raise and resolve significant constitutional issues *sua sponte* — issues that lie far beyond the limited one on which our Court granted allowance of appeal. In doing so, the dissent takes the imprudent step of injecting and settling constitutional questions under the guise of statutory construction, an approach which would allow for judicial decisions on an endless number of constitutional issues, all without advocacy from the parties. At its core, Justice Wecht's dissent constitutes a thinly veiled resolution of an unpreserved void-for-vagueness challenge, finding any attempt to define the term "intimate" as "futile" and "undefinable." Dissenting Opinion (Wecht, J.) at 12, 23. Indeed, the dissent's shoehorning of an unpreserved constitutional issue into a pure statutory claim is made manifest, not only by his failure to offer his own interpretation of the statutory language at issue, but also by granting Appellant relief without applying any interpretation of the statute to the facts of this case — relief entirely consonant with a successful constitutional void-for-vagueness claim.

Initially, Justice Wecht evidently misapprehends our interpretation of the General Assembly's intent. Indeed, Justice Wecht misstates our understanding of the meaning of the statutory language. Rather than "'personal and private,' *or* . . . those [parts] that involve sexual activity," Dissenting Opinion (Wecht, J.) at 4 (emphasis added), our interpretation contains four required aspects: a body part; that is personal and private; which a person ordinarily allows to be touched only by other individuals with whom the person has a close personal relationship; and which parts are commonly associated with sexual relations or intimacy. These criteria are not disjunctive as asserted by the dissent.

Rather than suggesting any body part, they reflect a limited number of parts of the body for which all four criteria are satisfied.

Furthermore, while Justice Wecht must acknowledge that Appellant failed to raise a constitutional void-for-vagueness challenge, he nonetheless reaches this constitutional question by performing an end-run around our well established decisional law which commands a waiver of the constitutional claim in these instances. Specifically, while not argued or even mentioned by Appellant, Justice Wecht relies upon our rule of statutory construction that "the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth" when promulgating legislation, 1 Pa.C.S. § 1922(3), to reach a void-for-vagueness claim.

The difficulty with Justice Wecht's invocation of Section 1922(3) is that it is not implicated under our analysis, and is imprudent. Initially, we remind that, "[a]lthough we must presume that the legislature does not intend to violate the Constitution, we do not invoke that presumption where the [statutory] language is clear." *Commonwealth v. Omar*, 981 A.2d 179, 185 (Pa. 2009); *see also Tri-Cnty. Landfill, Inc. v. Liberty Twp. Bd. of Supervisors*, No. 175 C.D. 2013, 2014 WL 97316, at *16 (Pa. Cmwlth. filed Jan. 9, 2014) ("Tri–County's argument is premised on the principle of statutory construction that: 'In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: ... (3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.' 1 Pa.C.S. § 1922(3) . . . Here, however, as explained above, the unambiguous language of the zoning ordinance can be reasonably read to encompass landfills within its broad definition of 'structures.' Thus, it is unnecessary to resort to legislative intent here."). Because we find the term "intimate" to be clear and unambiguous, we do not reach this aspect of statutory construction.

Furthermore, our Court has specifically and wisely eschewed the use of Section 1922(3) in the manner employed by the dissent in the context of statutory interpretation, based upon concepts of waiver and the absence of advocacy.[20] As discussed in *Tannenbaum v. Nationwide Insurance Co.*, 992 A.2d 859 (Pa. 2010):

> We do note that some jurisdictions have found that similar efforts on the part of state legislatures violate constitutional norms. *See, e.g., Carson v. Maurer,* 120 N.H. 925, 424 A.2d 825, 836 (1980), *overruled in part by Cmty. Res. for Justice, Inc. v. City of Manchester,* 154 N.H. 748, 917 A.2d 707, 721 (2007). Nevertheless, the constitutional arguments are not presented here. Furthermore, in light of the lack of advocacy and the complexity of the issues, we decline to attempt to address such questions via the presumption, in statutory interpretation, that the Legislature did not intend an unconstitutional result. *See* 1 Pa.C.S. § 1922(3).

Id. at 868 n.12.

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[20] To the extent Section 1922(3) has been utilized, caselaw shows that it is employed in two instances — invoked as a presumption where a party makes a constitutional challenge to a statute, including a void-for-vagueness challenge, see *Commonwealth v. Ludwig*, 874 A.2d 623, 628 (2005), and when the parties offer two competing, but reasonable, statutory interpretations, and the court is tasked with choosing between them. *See Commonwealth, Department of Transportation v. McFarren*, 525 A.2d 1185, 1188 (1987) ("The legislature has also instructed us that in enacting a statute it 'does not intend to violate the Constitution of the United States or of this Commonwealth.' 1 Pa.C.S. § 1922(3). Therefore, if one interpretation results in conflict with another statute, or violation of the Federal or State Constitution, such interpretation cannot be accepted. . . . Under the interpretation suggested by the Appellee and followed by the police in this case, the legislature would be delegating unbridled power to the police, resulting in a violation of Art. 1, § 8 of the Constitution of this Commonwealth."); *see also Wolf v. Scarnati*, 233 A.3d 679, 696 (Pa. 2020) (referencing Section 1922(3) and emphasizing that if a statute is susceptible of two reasonable interpretations, we will interpret the statute in such a manner so as to avoid a finding of unconstitutionality."); *Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017) ("Under the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not, we adopt the latter construction."). Limiting the use of Section 1922(3) in these situations avoids the serious concerns regarding waiver and advocacy voiced by our Court in *Tannenbaum*, *infra*.

To sharpen the point, Justice Wecht's application of Section 1922(3) in these circumstances undermines our special role as an allocatur court, which grants review over specific issues. It vitiates well established law regarding the necessity of parties to preserve constitutional questions. Most importantly, it deprives the parties, and our Court, of advocacy on an unanswered, and waived, constitutional question. As we have noted, our courts should be cautious in the extreme in assuming the role of advocate. *See, e.g., Commonwealth v. Baumhammers*, 960 A.2d 59, 75 (Pa. 2008) (collecting cases which instruct that judges are not litigants and should not raise additional arguments on behalf of parties). This is because there may be uncontemplated consequences when courts *sua sponte* raise and resolve important constitutional issues without advocacy. In this vein, Justice Wecht's invocation of Section 1922(3) not only brings the constitutionality of the indecent assault statute before us into question, but other statutes which utilize the term "indecent contact" (for which the phrase "intimate parts" is a component), or the term "intimate." *See*, *e.g.*, 18 Pa.C.S. § 3124.2 (institutional sexual assault); 18 Pa.C.S. § 3124.3 (sexual assault by sports official, volunteer or employee of a nonprofit association); 18 Pa.C.S. § 3131 (unlawful dissemination of an intimate image); 18 Pa.C.S. 6312 (sexual abuse of children); 42 Pa.C.S. § 5533 (infancy, insanity, or imprisonment – civil action by minor for sexual abuse). A party in the future may bring a due process or a void-for-vagueness challenge, but we should not sidestep the time-honored process for consideration of such questions, including requiring a party to raise such a constitutional issue in the first instance.

Finally, to the extent Justice Wecht believes that the General Assembly's use of the term "intimate" is not explicit enough, and while we believe it improper to speak to an unpreserved constitutional void-for-vagueness challenge, we simply note that the General Assembly could have offered a list of body parts that it believed to be intimate.

It did not. Rather, it left the task to the judiciary. The failure to catalog parts that it believed to be intimate, however, does not mean that the statute which it in fact drafted is unconstitutionally vague or ambiguous. *See Commonwealth v. Davidson*, 938 A.2d 198, 207-08 (Pa. 2007).

For the reasons set forth above, we conclude that the Superior Court properly determined that, for purposes of the crime of indecent assault, the phrase "sexual or other intimate parts" includes a victim's neck, and thus that Appellant's unwanted grabbing of the victim from behind and kissing her neck for the purpose of sexual gratification constituted indecent assault. Accordingly, we affirm the order of the Superior Court.

Order affirmed. Jurisdiction relinquished.

Chief Justice Baer and Justices Dougherty, Mundy and Brobson join the opinion.

Justice Donohue files a dissenting opinion.

Justice Wecht files a dissenting opinion.