

HOW TO DO THINGS WITH LEGAL DOCTRINE:
EXERCISES

PIERRE SCHLAG AND AMY J. GRIFFIN

TABLE OF CONTENTS

INTRODUCTION	1
CHAPTER 2: FRAMES AND FRAMING	2
EXERCISE 1	2
EXERCISE 2	2
EXERCISE 3	3
EXERCISE 4	5
CHAPTER 3: BASELINES	8
EXERCISE 1	8
EXERCISE 2	8
EXERCISE 3	10
EXERCISE 4	10
EXERCISE 5	14
EXERCISE 6	16
EXERCISE 7	19
EXERCISE 8	19
EXERCISE 9	22
EXERCISE 10	22
EXERCISE 11	24
EXERCISE 12	28
CHAPTER 4: THE LEGAL DISTINCTION	35
EXERCISE 1	35
EXERCISE 2	36
EXERCISE 3	37
EXERCISE 4	38
EXERCISE 5	39
EXERCISE 6	39
EXERCISE 7	40
EXERCISE 8	41
EXERCISE 9	41
EXERCISE 10	42
EXERCISE 11	43
CHAPTER 5: RULES AND STANDARDS	55
EXERCISE 1	55
EXERCISE 2	55
EXERCISE 3	56
EXERCISE 4	59

EXERCISE 5	59
EXERCISE 6	60
EXERCISE 7	61
EXERCISE 8	62
EXERCISE 9	62

CHAPTER 6: RESOLVING REGIME CONFLICTS **63**

EXERCISE 1	63
EXERCISE 2	64
EXERCISE 3	65
EXERCISE 4	66
EXERCISE 5	67
EXERCISE 6	69
EXERCISE 7	70
EXERCISE 8	71
EXERCISE 9	71

CHAPTER 7: INTERPRETATION **72**

EXERCISE 1	72
EXERCISE 2	73
EXERCISE 3	74
EXERCISE 4	74
EXERCISE 5	74
EXERCISE 6	75
EXERCISE 7	76
EXERCISE 8	77
EXERCISE 9	77
EXERCISE 10	78
EXERCISE 11	79
EXERCISE 12	80

CHAPTER 8: CLUSTER LOGIC **103**

EXERCISE 1	103
EXERCISE 2	105

COMPREHENSIVE EXERCISES: WHOLE BOOK **108**

EXERCISE 1	108
EXERCISE 2	109
EXERCISE 3	109

Introduction

While our book is not a traditional teaching text, we've always thought of it as a potentially powerful teaching tool. We wrote it for a diverse audience, but we certainly always thought of students as one of the primary components of that audience. The exercises are not an afterthought; in fact, we originally contemplated including exercises in the book itself. The book could be used in an advanced legal writing class, or as a supplement in a substantive law course, or in a course on legal theory—in any of those circumstances we think you'll find some exercises here that will suit your needs.

We've given you lots of options. Some of the exercises are quite short, designed to be used to spark in-class conversation. Others are quite long and would require significant time for reading and reflection—those might be used as writing assignments. Many of the exercises could be used either way—to generate discussion or as the basis for a writing assignment. The exercises are based on real cases, but in places where we didn't quote the opinion we've chosen not to provide the case citation. We did so to encourage students to think about the scenarios independently, without relying on what a court might have said. All case citations are available in the teacher's guide.

If you do plan to use the exercises for teaching, please reach out to us for our written guidance on the exercises—a teacher's manual of sorts. We ask that you not make the teacher's guide available to students, but we're happy to provide it to anyone teaching from the book. And of course, if you have feedback on the book or these exercises as a teaching tool, we'd love to hear from you.

—Pierre Schlag and Amy Griffin
Boulder, Colorado 2020

CHAPTER 2 EXERCISES

Frames and Framing

Exercise 1. The Habitual Offender

Ernest Johnson crossed the center line and collided with another car on a highway outside Tacoma. The driver of the other car, Evelyn Hart, was killed. Johnson was intoxicated at the time of the collision. He pleaded guilty to negligent homicide.

Johnson possessed a valid driver's license at the time of the collision. The Washington State Department of Licensing had reinstated that license a year earlier, after it had been revoked for one year. Prior to Mrs. Hart's death, Johnson had been arrested multiple times for intoxicated driving. In these circumstances, under the Washington Habitual Offenders Act, his license should have been revoked for 5 years. Mr. Johnson offered an affidavit stating that if the state had revoked his license he would not have been driving.

Mrs. Hart's husband and minor children sued the state for negligence based on its failure to revoke Johnson's license. The State argued that Johnson's negligent driving was the cause in fact of the accident; his driving was an intervening cause breaking any causal connection with the failure to revoke.

Discuss (or draft) possible framing strategies for arguments on both sides, based on what you've read in Chapter 4.

Exercise 2. WanderGuard

Mrs. Edwards, a resident of the LifeCare Center nursing home died from injuries sustained when she fell down the front steps while trying to leave the facility in her wheelchair. She should have been wearing a security bracelet ("WanderGuard") that set off an alarm and locked the front doors once Mrs. Edwards approached the exit. Mrs. Edwards was not wearing the WanderGuard, though her doctor had ordered that she wear it at all times. The Commonwealth of Massachusetts charged LifeCare with involuntary manslaughter.

- Mrs. Edwards suffered from brain damage and dementia, among other ailments.
- Mrs. Edwards twice attempted to leave the LifeCare facility, and at least two nursing home employees were aware of her attempts to leave.
- A physician ordered that she wear a WanderGuard signaling device at all times.
- Each month, physician orders were transcribed onto a piece of paper. Every day, the nurse carrying out the treatment was to check a box for each part of the treatment given. The sheet required the nurse to check Mrs. Edwards' WanderGuard once each day to be sure it was operational.

- Each month, to prepare the new sheet of orders, two nurses independently ensured that the physician's orders had been transcribed correctly onto the new monthly sheet.
- The Director of Nursing at LifeCare asked a temporary administrative employee to "clean up" all of the residents' treatment sheets.
- The administrative employee removed various orders from the treatment sheets that he viewed as not medically required, including Mrs. Edwards' WanderGuard order.
- The two nurses who reviewed the next month's treatment sheets did not notice the changes.
- The next month only one nurse reviewed the treatment sheet and she did not catch the changes either.
- For two months prior to Mrs. Edwards' death she had no WanderGuard order. She did have a regular nurse who knew she was supposed to wear the WanderGuard. The WanderGuard was not in place during this time period.
- On the day of Mrs. Edwards' death, a substitute nurse did not check for WanderGuard on Mrs. Edwards because her treatment sheet did not list it as a requirement. Thus, Mrs. Edwards, after being wheeled to the nurses' station by the front entry, left the nursing home in her wheelchair and fell down the stairs to her death.

Legal Doctrine:

- Under the theory of respondeat superior, a corporation is responsible for the acts and the omissions of any one of its employees within the scope of employment. A corporation acts with a given mental state if an employee who acts or fails to act possesses the requisite mental state.
- Involuntary manslaughter is "an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct. Wanton or reckless conduct generally involves a willful act that is undertaken in disregard of the probable harm to others that may result."

You are a prosecutor, and your supervisor has already filed the charge of involuntary manslaughter against LifeCare. How will you frame the facts to most effectively argue that LifeCare acted recklessly? What additional facts would help you to make your case? What would you emphasize if you were representing the defense?

Exercise 3. An Industrial Injury

Bill Huxley sustained an industrial injury to his lower back in 2014. He filed an application for industrial insurance benefits with the Department of Labor and Industries, and was compensated. His claim was closed by the Department of Labor in 2015; at the time he was only taking ibuprofen.

In 2017, Mr. Huxley was found dead. The day before he died, he went to work as usual. That evening he helped his neighbor chop wood and then returned home and went to bed. He never woke up.

It is undisputed that his cause of death was caused by combined use of alcohol and prescription medications, including opioids, to treat pain for his industrial injury. The level of alcohol in Mr. Huxley's blood was .07 grams per 100 ml, just below the state-presumed intoxication level of .08. The level of some drugs was higher than normal dosing but not toxic. Neither the drugs nor the alcohol alone would have killed him. There is no evidence that Mr. Huxley committed suicide; the parties agree his death was accidental. Medical experts from both sides agree that the combination of drugs and alcohol suppressed his respiration and gag reflex, causing him to suffocate.

Mr. Huxley had a single doctor, Dr. Dunkirk, from the time of the industrial injury to the time of his death. The doctor testified that he had prescribed the medications for back pain and depression that were "causally related to" the industrial injury. The doctor also testified that he had likely counseled Mr. Huxley not to mix alcohol and medications.

Mrs. Huxley filed for survivor benefits under the Industrial Insurance Act.

- Under the Industrial Insurance Act, benefits are payable to the surviving spouse of a deceased worker only if the death "results from the industrial injury." For a worker to recover benefits under the Industrial Insurance Act, the industrial injury must be a proximate cause of the alleged death for which benefits are sought.
- The first prong of proximate cause is cause in fact. Cause in fact concerns 'but for' causation: if but for the negligent act, the injury would not have occurred, then cause in fact test is established.
- A superseding cause is an intervening act that breaks the sequence and relieves a defendant from liability. Intervening acts are not reasonably foreseeable.
- Legal causation, the second prong of proximate causation, is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. The focus in legal causation analysis is on whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. This inquiry depends upon mixed considerations of logic, common sense, justice, policy, and precedent.
- There may be one or more proximate causes of death.

Draft the most persuasive argument you can for each side, addressing the question of whether Mrs. Huxley is entitled to survivor benefits. Include additional plausible facts to support each argument; you can invent any facts you like as long as they are consistent with the facts provided above.

Exercise 4. Mr. X's Art Collection

Over a fifteen-year period, Glafira Rosales provided an Art Gallery with dozens of unknown “masterworks” by well-known Abstract Expressionist artists such as Jackson Pollock, Mark Rothko, and Willem de Kooning. The Gallery sold them to its customers. All of the paintings are forgeries. All of the paintings were sold by a Gallery employee, Kate Fleming. Rosales obtained all of the paintings from a Chinese painter in Queens, who returned to China after the forgeries were discovered. Both the Gallery and its employee, Fleming, were sued by multiple parties who had purchased one of the Rosales paintings. The case highlighted here is the case brought by Dominick and Celeste De Caro, a New York couple who purchased a painting purportedly painted by Mark Rothko. Among other claims, the De Caros sued Fleming and the Gallery for fraud.

- From 1994 and 2008 the Gallery sold 32 paintings it acquired from Glafira Rosales, a Long Island Art dealer.
- Rosales told Fleming and the Gallery that the works were created by well-known Abstract Expressionist Artists (collectively the Rosales paintings).
- It is undisputed that all of the Rosales paintings are forgeries.
- The Gallery was founded in 1846 and operated continuously for the next 165 years.
- Until it closed, the Gallery was highly respected as one of New York City's most venerable galleries.
- Kate Fleming was hired in 1977 as the director of contemporary art, and she became president of Gallery, Inc., the Gallery's corporate entity.
- Fleming was introduced to Rosales by a longtime Gallery employee.
- Rosales told Fleming she had access to a collection of previously undiscovered works by well-known Abstract Expressionist artists.
- Rosales only ever identified the owner as “Mr. X.”
- Over the next 15 years, Rosales provided the Gallery with dozens of previously unknown “masterworks,” and the Gallery sold them to its customers.
- In 1998, Fleming and the Gallery asked Rosales for more details. She told them that as a child in Mexico she met a couple who were Jewish emigres from Europe. The husband made his purchases of artwork directly from painters in the United States during business trips from the late 1940's to early 1970's. The couple died in the early 1990's and left the paintings to their children — “Mr. X” was the couple's son, who was not interested in art and sought to sell the works gradually.
- Rosales refused to sign a statement representing that the paintings were authentic.
- Rosales' account of the size of Mr. X's collection was inconsistent over time.
- In late 2001, a Rosales painting purportedly by Jackson Pollock was sold subject to review by the International Foundation for Art Research (IFAR). The IFAR report on the Pollock—prepared over several months in consultation with experts—noted strongly negative opinions from experts on the authenticity of the work, and the lack of documentation or other evidence of prior ownership. IFAR refused to accept the

painting as Pollock's work. The Gallery refunded the purchase price and took back the painting.

- In the fall of 2004 the De Caros viewed paintings at the Gallery identified as paintings by Jackson Pollock and Mark Rothko.
- Dealers are not required to tell buyers the identity of the seller.
- Fleming told the De Caros that both works were owned by a Swiss collector who was a client of the Gallery. She said he had died and his son had decided to sell the paintings.
- De Caros had a "professional art advisor" James Kelly. De Caros hired Kelly to determine whether the price was fair.
- The De Caros asked Fleming to put everything she'd told them about the painting in writing. She did, including a statement that, "The painting has been viewed by a number of eminent scholars on Rothko as well as specialists on the Abstract Expressionist movement." The names that followed include a dozen individuals including Rothko's son, the Director of the National Gallery, and numerous art scholars.
- Rothko's son, Christopher Rothko, viewed the work four times and did not express any concerns.
- Neither Kelly nor the De Caros reached out to any of the experts on the list.
- The experts later said they had not been asked to authenticate the painting, and most said they never authenticate works of art. Christopher Rothko said he has a policy of never authenticating his father's work. Rothko told Fleming he thought the fake Rothko was "beautiful," but he was not prepared to document that it was also real.
- Kelly negotiated a price of \$8.3 million, purchased the Rothko himself, and then resold it to the De Caros for \$8.4 million.
- Rosales collection works were exhibited all over the world, at prestigious art museums and galleries.
- Rosales sold the Rothko to the Gallery for \$950,000.
- The De Caros have collected art for decades and own over 100 works of art worth over \$25 million.
- Dominick De Caro is a Harvard-educated lawyer, and has held the position of Chairman at Gucci, followed by a leadership position at Tom Ford.
- His wife, a former IBM executive, is the Chair of the Aspen Art Museum National Council, a member of the Board of Visitors at the Savannah College of Arts, and a member of the Women's Committee at the Smithsonian.
- Fleming spent hundreds of thousands of dollars of her own money on Rosales works.
- Fleming's base salary was \$300,000, and she received a profit sharing percentage of 15%.
- Fleming and the Gallery now claim that they are entitled to summary judgment on the De Caro's fraud claim, because there is no evidence that Fleming acted with intent to defraud and they have not shown that their reliance was justifiable.

Legal Doctrine:

Fraud: Plaintiff must establish, by clear and convincing evidence: (1) material misrepresentation or omission of fact; (2) made by defendant with knowledge of its falsity;

(3) and intent to defraud; (4) reasonable reliance on the part of the plaintiff; and (5) resulting damage to the plaintiff.

Clear and convincing evidence is evidence that makes the fact to be proved “highly probable.” But it may be “circumstantial” even on summary judgment. Defendants have the burden of demonstrating an absence of clear and convincing evidence substantiating Plaintiffs’ claims.

Intent to deceive can be satisfied by providing evidence of recklessness. Recklessness is behavior that is highly unreasonable—an extreme departure from the standards of ordinary care. The danger must either have been known to defendants or so obvious that defendant must have been aware of it—an egregious refusal to see the obvious.

Reliance: “New York takes a contextual view, focusing on the level of sophistication between the parties, the relationship between them, and the information available at the time of the operative decision.”

“Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant’s misrepresentation.”

Factors courts will consider: whether the plaintiff received any clear and direct signs of falsity, had access to relevant information, received a written confirmation of the truthfulness of the representations at issue and whether the plaintiff is sophisticated.

Summary Judgment: “Even where state of mind is at issue, summary judgment may be proper where a plaintiff has failed to make a showing of wrongful intent on the part of the defendant sufficient for a reasonable jury to find for plaintiff on that issue.”

Analyze this case based on the material in this chapter. In addition to any broad and narrow time frames, segmented and continuous transactions, and action versus omission, analyze this event in theatrical terms—action, agent, instrumentality, scene, and purpose. Consider which elements you might emphasize for each party. Identify any additional facts you would like to know to help your strategic planning.

CHAPTER 3 EXERCISES

Baselines

Exercise 1. Grizzly Bears Self-Defense

A Montana landowner shot and killed a grizzly bear that was harassing his horses in a pasture next to his rural home. He was convicted of violating the Endangered Species Act (ESA), which prohibits the killing of Grizzly bears except in self-defense or in the defense of others. Self-defense requires that the landowner have been acting to protect himself or other individuals from bodily harm from any endangered or threatened species.

1. *Should the court analyze whether he acted in self-defense using a subjective or objective standard? Recall that a subjective standard is satisfied when a defendant actually, even if unreasonably, believes his actions are necessary to protect himself. An objective standard is satisfied when the defendant's beliefs were objectively reasonable.*
2. *If the court decides to use an objectively reasonable standard, what relevant factors should be taken into consideration? The age, weight, gender, familiarity with guns, time spent in rural environment, or other characteristics of the landowner?*
3. *Which factors should be irrelevant? In other words, how much individuation makes sense in this situation? Is there anything about this particular offense—violation of the Endangered Species Act—that supports more or less individuation than a crime against a person? Why or why not?*
4. *What problems do you see, if any, with a purely subjective standard?*

Exercise 2: Defense Baselines Self-Defense

Consider the following hypothetical taken from a real case, *State v. Wanrow*, 559 P.2d 548, 558–59 (Wash. 1977), included in many criminal law casebooks:

The defendant, Yvonne Wanrow, was a 5' 4", 120-lb, Native American woman and single mother. She shot and killed William Wesler, a drunk sixty-year old white man over six feet tall who had entered—over the objections of the homeowner—the home where Wanrow and her children were staying.

An abbreviated version of the complicated facts leading up to the shooting¹: Wanrow was staying at her friend Shirley Hooper's house in an effort to help protect Hooper and her children from Wesler, who lived next door. That day Hooper had called Wanrow in a panic,

¹ These facts taken from CRIMINAL LAW STORIES 226-235 (Donna Coker & Robert Weisberg eds., 2013).

because Wesler had tried to grab Hooper's son. The night before, her bedroom window screen had been slashed and Hooper had seen a man crouching near the home. When she saw Wesler, who followed her son home to say he hadn't touched the boy, she recognized him as the crouching man from the night before. Her seven-year old daughter, at that moment, identified Wesler as the man who had molested her months before. Hooper called the police, who took her statement, but refused to arrest Wesler. This led to Wanrow's decision to stay at the Hooper home to help her friend. They were so concerned about Wesler that they called other friends to come as well, leading to four adults and eight children in the home.

Early the next morning, a drunken Wesler came over to the house with a friend, and walked in, ignoring Hooper's screams that she didn't want him there and loud demands that he "get out." Wesler approached a sleeping child and then moved toward Wanrow, who shot him. Wanrow was subsequently convicted of first-degree assault and second-degree murder.

Review the jury instruction from the trial court:

[A defendant] has no right to repel a threatened assault with naked hands, by the use of a deadly weapon in a deadly manner, unless he believes, and has reasonable grounds to believe, that he is in imminent danger of death or great bodily harm.

Consider the baseline incorporated into this jury instruction. Under this rule:

1. *In what circumstances may a person use a deadly weapon in a deadly manner?*
2. *What roles do a person's subjective beliefs play?*
3. *In deciding what are "reasonable grounds" to believe there is a threat of imminent danger, does the instruction indicate anything about the relevance or irrelevance of:*
 - a. *the gender identities of the parties?*
 - b. *past history between the parties?*
 - c. *the age, race, weight, strength, or height of the parties?*
 - d. *Should it indicate the relevance of any of these factors?*
4. *Assume for a moment that a court decides only that the gender aspect of the instruction is problematic, and thus refuses to otherwise modify the instruction—is there nonetheless a way for the defendant's counsel to argue the particulars in terms of self-defense to the jury?*
 - a. *This problem is known as individuation. How much should an instruction (or rule or standard) contain individualized determinations within itself?*
5. *What arguments or considerations would you bring to bear in formulating jury instructions?*

Exercise 3. Car Privacy Fourth Amendment

Much of Fourth Amendment law rests on a concept of a person's reasonable expectation of privacy. In 2018, the Supreme Court considered whether a driver has a reasonable expectation of privacy in a rental car if he is not listed as an authorized driver on the rental agreement. *Byrd v. U.S.*, 138 S. Ct. 1518 (2018).

The Court concluded that the answer was yes.

Read the court's opinion and explain the baseline-related moves made by the Court in reaching this decision.

Exercise 4. Measuring Hostility Civil Rights Act/Employment Law

Review the following doctrine on a hostile work environment claim:

Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1).

When the workplace is permeated with “discriminatory intimidation, ridicule, and insult,” 477 U.S., at 65, 106 S.Ct., at 2405, that is “sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,” *id.*, at 67, 106 S.Ct., at 2405 (internal brackets and quotation marks omitted), Title VII is violated.

* * *

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

* * *

This is not, and by its nature cannot be, a mathematically precise test. . . . But we can say that whether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological

well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–23 (1993).

We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." *Harris, supra*, at 23, 114 S.Ct., at 371. In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998).

Now draft strategies for both sides in the following three factual scenarios. How might you try to individualize (or not) the "reasonable person" baseline used in this area of law? What facts would you emphasize to support either the plaintiff or the defendant in each of these scenarios? How do the scenarios affect your strategy, and why?

Scenario 1: Plaintiffs are both African-Americans who were employed at all relevant times as caretakers at a housing project. On March 17, 1997, Gregory Williams entered the office of his white supervisor, Kevin Burns, to turn in a leave of absence form and discuss a paycheck. Gregory Williams noticed a noose hanging on the wall behind Burns' desk and then left the office without speaking to him.

Gregory Williams, and several co-workers, later confirmed that the noose remained on display in Burns' office. In the afternoon of the following day, March 18, 1997, Leroy Williams entered Burns' office and also noticed the noose. The following morning, March 19, 1997, Gregory Williams went to Burns' office and asked Burns why the noose was hanging on the wall. Burns, visibly uncomfortable in the face of the confrontation, immediately removed the noose and stated: "you know I'm not like that," adding, "It was a joke," and "I apologize if it offended you."

Scenario 2: Plaintiff Ruth Rojas Duarte is a Hispanic woman who has—from birth—suffered from a hearing disability in both of her ears. She has a master's degree in social work. From 2007 until her termination on August 6, 2014, Plaintiff was employed by St. Barnabas Hospital, a not-for-profit community hospital located in the Bronx, as a clinician in the CSP, providing mental health services, treatment, and therapy sessions to children and adolescents and their families.

Plaintiff offered evidence that—during weekly staff meetings with other clinicians—Edgardo Quinones, her supervisor, repeatedly made demeaning and degrading remarks concerning her hearing disability. For example, Plaintiff testified that when she asked a question or asked Quinones to repeat himself during a staff meeting, Quinones would call her “deaf” or ask, “Are you deaf? Are you deaf, Ruth?” Quinones also told Plaintiff at the start of staff meetings, and in reference to her amplifier, to “[p]ut that thing on because you're deaf and you're not going to be able to hear what I have to say.” There is evidence that Quinones made such comments “more than 20 [times]” and perhaps as many as 100 times “[o]ver the course of [six] years.”

Plaintiff also testified that, during the same staff meetings, “[i]f she said a word in English [and] ... the pronunciation did not appear to be correct,” Quinones “would repeat it, would correct [her], and everybody would laugh.” Quinones also publicly corrected Plaintiff's misspelling of English words in notes she took during staff meetings. Quinones also “told [Plaintiff that she] needed to go back to school because [she] did not know how to speak English and [that her] accent was so bad clients could not understand [her].” Quinones also “called [Plaintiff] an immigrant and repeatedly made fun of [her] immigration status [He] constantly told [her] to ‘go back to Ecuador.’”

Scenario 3: Anson Dorrance has served as head coach of the women's soccer team at the University of North Carolina at Chapel Hill since 1979. Melissa Jennings was a member of the women's soccer team and a student at the University from August 1996 until May 1998.

Amy Steelman, who was on the team from the fall of 1995 through the fall of 1996, submitted a declaration stating that “[w]hen Anson Dorrance was around, he would encourage and participate in sexual discussions, sexual jokes, sexual talk, sexual banter, and sexual innuendos. A typical Monday afternoon included queries and discussions with Anson Dorrance into the team members' sexual... exploits...” JA 1452.

According to Jennings, Dorrance would frequently participate in conversations at practice 1238–45, 1281–83, 1585. Dorrance allegedly would ask some team members with whom they were sleeping and encouraged discussion on other related topics. *See* JA 1452. Dorrance's remarks were often crude. For example, one player informed the team that she had had sex with one man, climbed out of his window, and then climbed into the window of another man's apartment to have sex with him. JA 1055, 1058. Dorrance was present and

asked the player if she knew her sexual partners' names or whether she took tickets. He also referred to this player's sexual partner as the "f*** of the week."

In addition, according to Jennings, Dorrance would sometimes make comments about team members' bodies, including comments about team members' weight, legs, or chests. JA 1275–79. For example, Dorrance once said that a "top heavy" woman has a more difficult time playing soccer, and once described a woman's chest as her "rack." Dorrance called another player "fat a**," told another player she had nice legs, and commented on another player's "cute dimples," JA 1229.

Jennings also testified that while coaching the team in 1996 and 1997, Dorrance used profanity, including using the words "f***" and "unf***ing-believable" and the phrases "what the f**," "f***ing brilliant," and "f***ing stupid." For example, he would use such phrases when he believed that a player was out of position or made a poor pass. JA 1231. Dorrance admits that he sometimes used the word "f***" while coaching.

Jennings also complains that during a water break at practice, Jennings overheard Dorrance and Bill Prentice (a University athletic trainer) speaking. They were not speaking to Jennings. According to Jennings, Dorrance and Prentice made a comment which included the phrase "Asian threesome." Jennings interpreted the comment to be a description of a fantasy involving two teammates and one of the men. JA 1284–86. After the phrase "Asian threesome" was used, Jennings overheard Dorrance "kind of chuckle" and say "oh, yeah." JA 1285. That was the only time that Jennings heard Dorrance use the phrase "Asian threesome." JA 1286.

Women's college soccer culminates in a tournament for the national championship. In December 1996, the soccer team was in California for the Final Four. According to Jennings, that weekend, Dorrance individually met with each player (including Jennings) in his hotel room for a routine end-of-year meeting. Jennings understood the meeting's purpose was to give each player a performance evaluation as an individual player, a student, and a team member.

After the player before Jennings had finished her meeting with Dorrance, Dorrance told Jennings to come in and have a seat at a table in his hotel room. Dorrance also took a seat at the table. After some small talk, Dorrance talked about Jennings' need to improve her grades because her grade point average ("GPA") was below 2.0 on a 4.0 scale. Jennings believed that she was in danger of losing her athletic eligibility due to poor grades. Dorrance told Jennings that her grades were not acceptable and that she needed to bring them up. Dorrance then asked if she had been attending academic tutoring sessions. Jennings said that she had been attending the tutoring sessions. *Id.*

As part of the conversation about her grades, Dorrance then asked Jennings about whether her social life was adversely affecting her grades. As part of that inquiry, Jennings testified

that Dorrance specifically asked Jennings, “Who are you f***ing?” and whether it was adversely affecting her grades. Although Jennings testified that Dorrance used the word “f***” a lot during practice, the question took her aback. Jennings immediately told Dorrance that her personal life was “none of his g** d*** business.”

Exercise 5. Feel Free to Leave Fourth Amendment

Consider the Supreme Court’s decision in *J.D.B. v. North Carolina*, 564 U.S. 261 (2011), where the Court concluded that “a child’s age properly informs the *Miranda* custody analysis.” *Id.* at 265. Whether a suspect is “in custody” so as to trigger *Miranda* warnings is an objective inquiry. A court must ask what the circumstances were surrounding the interrogation, and whether a reasonable person would have felt free to leave.

The Court, in an opinion authored by Justice Sotomayor, reasoned that “a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.” *Id.* at 272.

Rather than demarcate a limited set of relevant circumstances, we have required police officers and courts to “examine all of the circumstances surrounding the interrogation,” *Stansbury*, 511 U.S., at 322, 114 S.Ct. 1526, including any circumstance that “would have affected how a reasonable person” in the suspect’s position “would perceive his or her freedom to leave,” *id.*, at 325, 114 S.Ct. 1526. On the other hand, the “subjective views harbored by either the interrogating officers or the person being questioned” are irrelevant. *Id.*, at 323, 114 S.Ct. 1526. The test, in other words, involves no consideration of the “actual mindset” of the particular suspect subjected to police questioning. *Alvarado*, 541 U.S., at 667, 124 S.Ct. 2140; see also *California v. Beheler*, 463 U.S. 1121, 1125, n. 3, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) (*per curiam*).

The benefit of the objective custody analysis is that it is “designed to give clear guidance to the police.” *Alvarado*, 541 U.S., at 668, 124 S.Ct. 2140. But see *Berkemer*, 468 U.S., at 441, 104 S.Ct. 3138 (recognizing the “occasional[ly] ... difficulty” that police and courts nonetheless have in “deciding exactly when a suspect has been taken into custody”). Police must make in-the-moment judgments as to when to administer *Miranda* warnings. By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect’s position would understand his freedom to terminate questioning and leave, the objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person’s subjective state of

mind. See *id.*, at 430–431, 104 S.Ct. 3138 (officers are not required to “make guesses” as to circumstances “unknowable” to them at the time); *Alvarado*, 541 U.S., at 668, 124 S.Ct. 2140 (officers are under no duty “to consider ... contingent psychological factors when deciding when suspects should be advised of their *Miranda* rights”).

J.D.B. v. North Carolina, 564 U.S. 261, 270–71 (2011).

First, brainstorm about arguments on the other side. What objections can you think of to the approach Justice Sotomayor dictates? Next, read the dissenting opinion written by Justice Alito.

J.D.B. v. North Carolina, 564 U.S. 261, 284–98, 131 S. Ct. 2394, 2410–18, 180 L. Ed. 2d 310 (2011).

1. *Which argument is more persuasive? Why? Use the material you read in the Baselines chapter to evaluate the two different arguments for an appropriate baseline.*
2. *For example, the dissent, in part, argues that age should not be singled out as the only personal characteristic to be considered. Do you agree? Why or why not?*
3. *The dissent also values the “clarity and ease of application” of an entirely objective standard. What is the best response to this argument?*

Exercise 6. The Reasonable Observer Establishment Clause

The First Amendment provides that “Congress shall make no law respecting an establishment of religion.” The Supreme Court previously used a “reasonable observer” test to determine whether a challenged government action violated the Establishment Clause. The test asked whether a reasonable observer would conclude that the government’s action constituted an endorsement of religion, and it generated explicit debate about the baseline description of such an observer.

In *Capitol Square Review & Advisory Bd. v Pinette*, 515 U.S. 753 (1995), Justice O’Connor wrote a separate concurrence, in part pointing out that the justices attributed different amounts of knowledge to the “reasonable observer.” “In my view, proper application of the endorsement test requires that the reasonable observer be deemed more informed than the casual passerby postulated by Justice Stevens.” *Id.* at 779.

I therefore disagree that the endorsement test should focus on the actual perception of individual observers, who naturally have differing degrees of knowledge. Under such an approach, a religious display is necessarily precluded so long as some passersby would perceive a governmental endorsement thereof. In my view, however, the endorsement test creates a more collective standard to gauge “the ‘objective’ meaning of the [government's] statement in the community,” *Lynch, supra*, at 690, 104 S.Ct., at 1368 (O’CONNOR, J., concurring). In this respect, the applicable observer is similar to the “reasonable person” in tort law, who “is not to be identified with any ordinary individual, who might occasionally do unreasonable things,” but is “rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.” W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 175 (5th ed. 1984). Thus, “we do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion.” *Americans United*, 980 F.2d, at 1544. Saying that the endorsement inquiry should be conducted from the perspective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share neither chooses the perceptions of the majority over those of a “reasonable non-adherent,” cf. L. Tribe, *American Constitutional Law* 1293 (2d ed. 1988), nor invites disregard for the values the Establishment Clause was intended to protect. It simply recognizes the fundamental difficulty inherent in focusing on actual people: There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.

It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the

religious display appears. As I explained in *Allegheny*, “the ‘history and ubiquity’ of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.” 492 U.S., at 630, 109 S.Ct., at 3121. Nor can the knowledge attributed to the reasonable observer be limited to the information gleaned simply from viewing the challenged display. Today’s proponents of the endorsement test all agree that we should attribute to the observer knowledge that the cross is a religious symbol, that Capitol Square is owned by the State, and that the large building nearby is the seat of state government. See *post*, at 2461–2462 (SOUTER, J., concurring in part and concurring in judgment); *post*, at 2469 (STEVENS, J., dissenting). In my view, our hypothetical observer also should know the general history of the place in which the cross is displayed. Indeed, the fact that Capitol Square is a public park that has been used over time by private speakers of various types is as much a part of the display’s context as its proximity to the Ohio Statehouse. Cf. *Allegheny, supra*, 492 U.S., at 600, n. 50, 109 S.Ct., at 3104, n. 50 (noting that “[t]he Grand Staircase does not appear to be the kind of location in which all were free to place their displays for weeks at a time”). This approach does not require us to assume an “‘ultrareasonable observer’ who understands the vagaries of this Court’s First Amendment jurisprudence,” *post*, at 2469 (STEVENS, J., dissenting). An informed member of the community will know how the public space in question has been used in the past—and it is that fact, not that the space may meet the legal definition of a public forum, which is relevant to the endorsement inquiry.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779–81, 115 S. Ct. 2440, 2455–56, 132 L. Ed. 2d 650 (1995).

Justice Stevens’ dissent in *Capitol Square*:

At least when religious symbols are involved, the question whether the State is “appearing to take a position” is best judged from the standpoint of a “reasonable observer.” It is especially important to take account of the perspective of a reasonable observer who may not share the particular religious belief it expresses. A paramount purpose of the Establishment Clause is to protect such a person from being made to feel like an outsider in matters of faith, and a stranger in the political community. *Ibid.* If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display. No less stringent rule can adequately protect nonadherents from a well-grounded perception that their sovereign supports a faith to which they do not subscribe.⁵

Footnote 5: Justice O’CONNOR agrees that an “endorsement test” is appropriate and that we should judge endorsement from the standpoint of a reasonable observer. *Ante*, at 2455. But her reasonable observer is a legal fiction, “a personification of a community ideal of

reasonable behavior, determined by the [collective] social judgment.’ ” *Ante*, at 2455. The ideal human Justice O’CONNOR describes knows and understands much more than meets the eye. Her “reasonable person” comes off as a well-schooled jurist, a being finer than the tort-law model. With respect, I think this enhanced tort-law standard is singularly out of place in the Establishment Clause context. It strips of constitutional protection every reasonable person whose knowledge happens to fall below some “‘ideal’ ” standard. Instead of protecting only the “‘ideal’ ” observer, then, I would extend protection to the universe of reasonable persons and ask whether some viewers of the religious display would be likely to perceive a government endorsement.

Justice O’CONNOR’s argument that “[t]here is always *someone*” who will feel excluded by any particular governmental action, *ante*, at 2455, ignores the requirement that such an apprehension be objectively reasonable. A person who views an exotic cow at the zoo as a symbol of the government’s approval of the Hindu religion cannot survive this test.

* * *

The existence of a “public forum” in itself cannot dispel the message of endorsement. A contrary argument would assume an “ultrareasonable observer” who understands the vagaries of this Court’s First Amendment jurisprudence. I think it presumptuous to consider such knowledge a precondition of Establishment Clause protection. Many (probably most) reasonable people do not know the difference between a “public forum,” a “limited public forum,” and a “non-public forum.” They *do* know the difference between a state capitol and a church. Reasonable people have differing degrees of knowledge; that does not make them “obtuse,” see 30 F.3d 675, 679 (CA6 1994) (quoting *Doe v. Small*, 964 F.2d 611, 630 (CA7 1992) (Easterbrook, J., concurring)); nor does it make them unworthy of constitutional protection. It merely makes them human. For a religious display to violate the Establishment Clause, I think it is enough that *some* reasonable observers would attribute a religious message to the State.

Majority opinion (footnote 3) in *Capitol Square*, authored by Justice Scalia:

And if further proof of the invited chaos is required, one need only follow the debate between the concurrence and Justice STEVENS’ dissent as to whether the hypothetical beholder who will be the determinant of “endorsement” should be *any* beholder (no matter how unknowledgeable), or the *average* beholder, or (what Justice STEVENS accuses the concurrence of favoring) the “ultra-reasonable” beholder. See *post*, at 2454–2456 (O’CONNOR, J., concurring in part and concurring in judgment); *post*, at 2469–2470 (STEVENS, J., dissenting). And, of course, even when one achieves agreement upon that question, it will be unrealistic to expect different judges (or should it be juries?) to reach consistent answers as to what any beholder, the average beholder, or the ultrareasonable beholder (as the case may be) would think. It is irresponsible to make the Nation’s legislators walk this minefield.

Consider the varied approaches to a reasonable observer in this context. Which of the approaches is best? Why?

Exercise 7. Comparing Reasonable People

In *Exercise 2*, the court considered the degree of force a reasonable person would believe was necessary to defend herself for the purposes of a self-defense claim. In *Exercise 4*, the question was whether a reasonable person would find a work environment hostile abusive. In *Exercise 5*, the court considered whether a reasonable person would have felt free to leave to determine whether that person was in the custody of the police. And in *Exercise 6*, Supreme Court Justices considered whether a reasonable observer would understand a particular display as advancing or endorsing religion.

Consider the differences in baselines in each of these situations. The fields range from criminal law to employment law to constitutional law. What differences do you expect to see? Why? Should a reasonable person be the same in each field? What level of individualization is justified in each field? Why? What are the arguments on each side?

Exercise 8. Voluntary Searches Fourth Amendment

Critique the court's reasoning in the following excerpt, using what you learned in the Baselines chapter.

Turning to the particular facts and circumstances presented, our independent review of the record leads us to conclude that Stone's consent to search was voluntary. Defendants' appeal focuses on two principal points. First, they contend the trial court disregarded a critical circumstance that allegedly rendered the environment inherently coercive, to wit, Stone's observation from the police cruiser of defendants' being forced to the ground at gunpoint, handcuffed, and patted down. The trial court found in this regard that "n[o] evidence was presented at the evidentiary hearing to substantiate that this is why Stone gave consent to search his vehicle or that he considered this in any way," and the court declined to "speculate" that "this set of circumstances is what caused Stone to give consent to search the vehicle." As we have explained, however, the question here is not what subjectively motivated Stone to give consent, but whether a reasonable person in his position would have felt so threatened by the armed subjugation of his colleagues that any subsequent consent to search could not be freely given. *Sprague*, 2003 VT 20, ¶ 28, 175 Vt. 123, 824 A.2d 539.⁸

Viewing the officer with his gun drawn outside of the police cruiser might have seemed intimidating to Stone, sitting inside of the cruiser. Nevertheless, we are persuaded by all of the surrounding facts and circumstances that his consent to search was voluntary. Display of a weapon, shouting, and forcibly subduing or handcuffing a suspect does not per se vitiate a

subsequent consent to search that the record otherwise shows to be uncoerced and freely given. See, e.g., *United States v. Brown*, 563 F.3d 410, 413, 416 (9th Cir.2009) (upholding consent to search after suspect was initially ordered to ground at gunpoint, handcuffed, and patted down); *United States v. Jones*, 523 F.3d 31, 38 (1st Cir.2008) (rejecting claim that circumstances of consent to search were “inherently coercive” where it was preceded by officers' forcible entry with guns drawn and defendant was handcuffed and removed to separate room); *United States v. Kimoana*, 383 F.3d 1215, 1226 (10th Cir.2004) (although officers entered room with guns drawn and raised voices, subsequent consent to search was voluntary where guns were holstered and “calm” had been restored); *State v. Sokolowski*, 344 N.C. 428, 474 S.E.2d 333, 336 (1996) (upholding consent to search from suspect earlier disarmed at gunpoint, *Mirandized*, and in custody); *Sole*, 2009 VT 24, ¶ 24, 185 Vt. 504, 974 A.2d 587 (observing that “it is settled that consent may be properly deemed voluntary even when a suspect is handcuffed and under arrest”).

Stone's observation of the officers' display of force may have been unsettling, but it was not specifically directed at him, and there was nothing about the encounter to suggest that Stone's capacity to reason should have been unhinged or his ability to consent overborne. See *United States v. Taylor*, 31 F.3d 459, 464 (7th Cir.1994) (observing that, “[t]hough certainly unpleasant,” officers' forced entry at gunpoint, display of weapons and badges, and forcible restraint of defendant were “commonly used” tactics to protect officer safety and did not vitiate voluntariness of subsequent consent). The conversation leading to Stone's consent occurred about five minutes after the incident, in the trooper's vehicle and in an atmosphere of relative calm. In that discussion, the officer assured Stone several times in a level and conversational tone that he was not required to consent to a search of his car. He stated, “I want to make it abundantly clear to you that you don't have to allow this.” Although we have held that the police are not required to advise a suspect of his or her right to withhold consent, the giving of such advice supports the conclusion that the consent was voluntary. *Sprague*, 2003 VT 20, ¶ 29, 175 Vt. 123, 824 A.2d 539; see also *United States v. Mendenhall*, 446 U.S. 544, 558–59, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (although Constitution did not require it, fact that suspect was twice informed of her right to withhold consent to search “was highly relevant to the determination that there had been consent”). Stone also signed a consent-to-search form, which—while not dispositive—also supports a finding of voluntariness. See *Taylor*, 31 F.3d at 463 (fact that suspect signed consent-to-search form “weighs heavily toward finding that his consent was valid”).

It is true that the officer also cautioned Stone that a refusal to give consent would result in the officer's “attempting to obtain a search warrant from a judge.” We have explained, however, that statements indicating an intent by the police to apply for a warrant merely “describe what will occur in the event of a refusal” and do not undermine a subsequent consent to search. *State v. Pitts*, 2009 VT 51, ¶ 30, 186 Vt. 71, 978 A.2d 14. Nor, contrary to defendants' assertion, do the additional circumstances that Stone expressed a desire to get back to his young daughter, that the stop occurred late at night on the side of the road, or that a number of officers were present—viewed individually or in combination—

demonstrate an environment so inherently coercive that Stone could not freely give consent to the search.

Second, defendants assert that Stone was indisputably in police custody—indeed that he was effectively under arrest without probable cause—thereby rendering his consent to search involuntary and “tainting” any evidence obtained therefrom. See *Sprague*, 2003 VT 20, ¶¶ 31–33, 175 Vt. 123, 824 A.2d 539 (holding that illegal seizure tainted defendant's subsequent consent to search); *State v. Chapman*, 173 Vt. 400, 403, 800 A.2d 446, 449 (2002) (recognizing that an investigative detention may become so intrusive as to become “the functional equivalent of a formal arrest”). Even if the circumstances supported defendants' claim that Stone was under de facto arrest, however, it would not necessarily render his consent involuntary or the evidence inadmissible. First, “custody alone has never been enough in itself to demonstrate a coerced confession or consent to search.” *United States v. Watson*, 423 U.S. 411, 424, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976). Indeed, as noted earlier, this and other courts have consistently held that “consent may be properly deemed voluntary even when a suspect is handcuffed and under arrest.” *Sole*, 2009 VT 24, ¶ 24, 185 Vt. 504, 974 A.2d 587; accord *Jones*, 523 F.3d at 38–39 (upholding voluntariness of consent of suspect who had been handcuffed, *Mirandized* and questioned in custody); *Taylor*, 31 F.3d at 463–64 (finding that consent to search was voluntary after defendant was detained and read his *Miranda* rights); *State v. Harmon*, 910 P.2d 1196, 1208 (Utah 1995) (upholding voluntariness of consent from suspect who was under arrest and in handcuffs). Although Stone was in detention, nothing in the record suggests that he was subjected to any form of police coercion in granting consent to search the vehicle.

Furthermore, that the circumstances may—arguably—have elevated Stone's detention to the level of a de facto arrest does not invariably “taint” Stone's subsequent consent to search. Based on his initial observation of what he believed, in his experience, to be marijuana flakes, the investigating officer had at least a reasonable suspicion of wrongdoing sufficient to justify Stone's initial brief detention in the cruiser. See *State v. Ford*, 2007 VT 107, ¶ 4, 182 Vt. 421, 940 A.2d 687 (holding that reasonable and articulable suspicion of wrongdoing may support brief detention and questioning into circumstances that gave rise to suspicion). Defendants contend, however, that the initial detention, which lasted several minutes, was custodial in nature and therefore required not simply reasonable suspicion, but actual probable cause to arrest. See *Sole*, 2009 VT 24, ¶ 18, 185 Vt. 504, 974 A.2d 587 (while mere placement of driver in police cruiser does not render questioning custodial, further questioning about drug possession “turned what might have remained a simple roadside inquiry during a routine traffic stop into an interrogation under circumstances approximating arrest”).

Whatever the merits of this claim, the facts establish no causal nexus between Stone's brief initial detention and his later consent to search. As noted, the record shows that Stone denied any illegality; that the officer then left the cruiser to speak with the remaining passengers in the vehicle about what he believed to be marijuana, where he observed the

cocaine and related packaging materials; and that he then returned to the cruiser, informed Stone about the contraband, and received consent to search during the subsequent colloquy. Nothing that occurred during the initial detention, therefore, appears to have caused the officer to approach and question the other passengers, observe the cocaine, or return to question Stone. We thus discern no basis to conclude that the initial detention led to or “tainted” the later consent. To the extent that there was any connection, however, we are satisfied that it was sufficiently attenuated by the several intervening events. See *Sprague*, 2003 VT 20, ¶ 32, 175 Vt. 123, 824 A.2d 539 (consent to search may be upheld where intervening significant events vitiate any taint arising from illegal detention).

State v. Weisler, 35 A.3d 970, 985–88 (Vt. Sup. Ct. 2011) (footnotes omitted).

Exercise 9. Clearly Inappropriate Criminal Procedure

(1) Jointly charged defendants shall be tried jointly unless the court concludes before trial that it is clearly inappropriate to do so and orders that a defendant be tried separately. In reaching its conclusion the court shall strongly consider the victim's interest in a joint trial.

Or. Rev. Stat. Ann. § 136.060 (West)

What should the baseline be for “clearly inappropriate” in this context? Why? What sorts of factors should be used to give content to this baseline? Cultural values? Theories of criminal justice? Empirical data on joint trials?

Exercise 10. Too Much Ice in My Coffee Consumer Rights

The Ninth Circuit concluded in 2018 that “no reasonable consumer would think (for example) that a 12-ounce “iced” drink, such as iced coffee or iced tea, contains 12 ounces of coffee and tea and no ice.” Forouzesh v. Starbucks Corp., 714 Fed. Appx. 776 (2017). Read the following excerpt from the opinion.

Claims of UCL, FAL, and CLRA are governed by the “reasonable consumer test.” *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). Under this test, a plaintiff must show that “members of the public are likely to be deceived” by the defendant's conduct. *Freeman Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995). “Likely to be deceived” means that “it is probable that a significant portion of the general consuming public or of target consumers, acting reasonably in the circumstances, could be misled.” *Lavie v. Procter & Gamble Co.*, 105 Cal App. 4th 496, 508 (2003). The California Supreme Court has recognized “that these laws

prohibit ‘not only advertising which is false, but also advertising which [,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.’” *Williams*, 552 F.3d 938 (quoting *Kasky v. Nike, Inc.* 27 Cal.4th 939, 951, 119 Cal.Rptr.2d 296, 45 P.3d 243 (2002)).

Simply stated, as the district court observed, “young children learn, they can increase the amount of beverage they receive if they order ‘no ice.’ If children have figured out that including ice in a cold beverage decreases the amount of liquid they receive, the Court has no difficulty concluding that a reasonable consumer would not be deceived into thinking that when they order an iced tea ... some portion of the drink will be ice rather than whatever liquid beverage they ordered.” (ER 4.)

The district court properly concluded that Forouzesh's claims fail as a matter of law because no reasonable consumer would be misled by the representations at issue. As Forouzesh concedes, his claims under the UCL, FAL, and CLRA are governed by the “reasonable consumer test.” (AOB 6.) Claims under these statutes are properly dismissed where a plaintiff fails to plausibly plead that “members of the public are likely to be deceived” by the allegedly misleading statement. *Freeman v. Time, Inc.*, 68 F.3d 285, 289-90 (9th Cir. 1995). This requires “more than a mere possibility” that a statement “might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner.” *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (citing *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496 (2003)). Rather, it “requires a probability ‘that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.’” *Id.*

The same reasoning applies here. A reasonable consumer would not be misled by the representations that a Tall Cold Drink is 12 fluid ounces, a Grande Cold Drink is 16 fluid ounces, a Venti Cold Drink is 24 fluid ounces, or a Trenta Cold Drink is 30 fluid ounces. (ER 90, ¶ 27.) Just as a reasonable consumer understands the general mechanisms of a lip balm tube, a reasonable consumer ordering an *iced* beverage, like iced tea, understands that the beverage will contain both ice and tea. No reasonable consumer ordering a Grande iced tea would expect to receive sixteen fluid ounces of tea, plus ice. This is particularly true because Starbucks serves its Cold Drinks in clear cups, and its menu boards state the size of its “beverages,” not the amount of “drinkable liquid” in each beverage. As the district court noted, “When a reasonable consumer walks into a Starbucks and orders a Grande iced tea, that consumer knows the size of the cup that drink will be served in and that a portion of the drink will consist of ice.” (ER 5.)²

Alexander FOROUZESH, Plaintiff and Appellant, v. STARBUCKS CORPORATION, Defendant and Appellee., 2017 WL 1757565 (C.A.9), 9-10

What sort of baseline does the court seem to use here? Is it defined by custom? Expectations? Common sense? Might this baseline change over time? If you wanted to argue that a different baseline should apply, what source would you use? Why?

**Exercise 11. It was my Smartphone's Fault
Negligence**

Read the following opinion and consider whether and how baselines should change when technology changes. Meador v. Apple, Inc., 911 F.3d 260 (5th Cir. 2018) (cert. denied 2019).

STEPHEN A. HIGGINSON, Circuit Judge:

This case asks us to decide whether, under Texas law, a driver's neurobiological response to a smartphone notification can be a cause in fact of a car crash. Because answering in the affirmative would entail an impermissible innovation or extension of state law, we answer in the negative. Accordingly, we AFFIRM.

I

According to Appellants' amended complaint, Ashley Kubiak was driving her pick-up truck on April 30, 2013 when she received a text message on her iPhone 5. Appellants allege that Kubiak looked down to read the text, after which she turned her attention back to the road. At that point it was too late to avoid colliding with a vehicle carrying two adults and a child. The adults died, while the child survived but was rendered paraplegic. Kubiak was convicted of two counts of criminally negligent homicide.

In 2008, Apple had secured a patent covering "[l]ock-out mechanisms for driver handheld computing devices."¹ The patent included the following language:

Texting while driving has become a major concern of parents, law enforcement, and the general public. An April 2006 study found that 80 percent of auto accidents are caused by distractions such as applying makeup, eating, and text messaging on handheld computing devices (texting). According to the Liberty Mutual Research Institute for Safety and Students Against Destruct[ive] Decisions, teens report that texting is their number one distraction while driving. Teens understand that texting while driving is dangerous, but this is often not enough motivation to end the practice.

New laws are being written to make texting illegal while driving. However, law enforcement officials report that their ability to catch offenders is limited because the texting device can be used out of sight (e.g., on the driver's lap), thus making texting while driving even more dangerous. Texting while driving has become so widespread it is doubtful that law enforcement will have any significant effect on stopping the practice.²

Apple did not implement any version of a “lock-out mechanism” on the iPhone 5, which Kubiak was using at the time of the accident.

Representatives of the victims of Kubiak’s accident sued Apple in federal court. They asserted claims under Texas common law for general negligence and strict products liability. They alleged that the accident was caused by Apple’s failure to implement the patent on the iPhone 5 and by Apple’s failure to warn iPhone 5 users about the risks of distracted driving. In particular, the plaintiffs alleged that receipt of a text message triggers in the recipient “an unconscious and automatic, neurobiological compulsion to engage in texting behavior.” They supported this allegation with various studies and reports, including a proposed expert report. The plaintiffs’ complaint also extensively analyzed the hazards of distracted driving.

Apple moved to dismiss the complaint for failure to state a claim,³ and a magistrate judge issued a report and recommendation that the motion be granted. Following objections, supplemental briefing, and a thorough hearing, the district court issued an opinion granting the motion to dismiss, denying the plaintiffs’ motion for leave to amend, and dismissing the complaint with prejudice. This appeal followed.

II

We review the grant of a motion to dismiss under Rule 12(b)(6) de novo, “accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs.” *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) (quotation omitted). A complaint survives a motion to dismiss only if it “pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Denial of a motion to amend is reviewed for abuse of discretion. *Stem v. Gomez*, 813 F.3d 205, 209 (5th Cir. 2016). When an amended complaint would still fail to survive a Rule 12(b)(6) motion, it is not an abuse of discretion to deny the motion. *Id.* at 216.

III

When our jurisdiction is based on diversity, we apply the substantive law of the forum state. *James v. Woods*, 899 F.3d 404, 408 (5th Cir. 2018) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)). When evaluating issues of state law, we look to the decisions of the state’s highest court. *In re Franchise Servs. of N. Am., Inc.*, 891 F.3d 198, 209–10 (5th Cir. 2018). If no decision of that court resolves the matter, we make an “*Erie* guess” as to how the court would. *Id.* at 210. We may also look to the state’s intermediate appellate courts, unless we have reason to think the state’s highest court would decide the issue differently. *Id.*

If guidance from state cases is lacking, “it is not for us to adopt innovative theories of recovery under state law.” *Mayo v. Hyatt Corp.*, 898 F.2d 47, 49 (5th Cir. 1990). “Even in the

rare case where a course of Texas decisions permits us to extrapolate or predict with assurance where that law would be had it been declared, we should perhaps—being out of the mainstream of Texas jurisprudential development—be more chary of doing so than should an inferior state tribunal.” *Rhynes v. Branick Mfg. Corp.*, 629 F.2d 409, 410 (5th Cir. Unit A 1980).

Negligence and products liability claims both require proof of causation. Under Texas law, “[n]egligence requires a showing of proximate cause, while producing cause is the test in strict liability.” *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995), *abrogated on other grounds by Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007). “Proximate cause consists of both cause in fact and foreseeability.” *Id.* “Cause in fact means that the defendant’s act or omission was a substantial factor in bringing about the injury which would not otherwise have occurred.” *Id.* “Producing cause” has the same meaning as cause in fact, with no showing of foreseeability required. *See Ledesma*, 242 S.W.3d at 46 (defining “producing cause” as “a substantial factor in bringing about an injury, and without which the injury would not have occurred”); *Union Pump*, 898 S.W.2d at 775 (“[F]oreseeability is an element of proximate cause, but not of producing cause.”).

Causation for both negligence and products liability therefore turns on whether an alleged cause of an injury may be recognized as a “substantial factor.” The Texas Supreme Court has found the following passage from the Restatement instructive:

The word “substantial” is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called “philosophic sense,” which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called “philosophic sense,” yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Restatement (Second) of Torts § 431, cmt. a (1965) (quoted in *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471–72 (Tex. 1991)). With its references to reasonable persons, popular meanings, and ordinary minds, Texas law makes clear that the identification of substantial factors is meant to be “a practical test, [a] test of common experience.” *Union Pump*, 898 S.W.2d at 775 (quotations omitted). Ultimately, the Texas Supreme Court has said, this inquiry “mandates weighing of policy considerations.” *City of Gladewater v. Pike*, 727 S.W.2d 514, 518 (Tex. 1987).

Appellants focus their briefing on issues of concurrent and superseding causation, arguing that Appellee’s device and Kubiak’s negligence were concurrent causes of the accident. But such issues arise when more than one legally recognized cause is present. *See Stanfield v. Neubaum*, 494 S.W.3d 90, 97–98 (Tex. 2016). We must first determine whether Texas law would recognize a smartphone’s effect on its user as a cause at all.

No Texas case has addressed whether a smartphone manufacturer should be liable for a user's torts because the neurobiological response induced by the phone is a substantial factor in her tortious acts. To our knowledge, informed by submissions to us, no court in the country has yet held that, and numerous courts have declined to do so.⁴ As such, no authority indicates to us that Texas courts, contemplating reasonable persons and ordinary minds, would recognize a person's induced responses to her phone as a substantial factor in her tortious acts and therefore hold the phone's manufacturer responsible.

The Texas cases on which Appellants rely make clear that acceptance of their causation theory would work a substantial innovation in Texas law. These cases present garden-variety theories of causation that ordinary minds would readily accept, so they have little to say about the present case. One is *Dover Corp. v. Perez*, which concerned a heater pumping carbon monoxide into an apartment due to its negligent manufacture and installation. 587 S.W.2d 761, 763–64 (Tex. Civ. App.—Corpus Christi 1979). No useful analogy exists between a smartphone's effect on users and a heater generating carbon monoxide. Others are *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 449–50 (Tex. 2006), about a worker who fell through an opening in an oil derrick platform left unprotected, and *Rio Grande Regional Hospital, Inc. v. Villareal*, 329 S.W.3d 594, 603–04 (Tex. App.—Corpus Christi 2010), about a nurse who left a psychiatric patient unattended with razor blades. No worthwhile analogies suggest themselves here either. Appellants also cite a case about Ford's decision not to install a seatbelt for the middle seat in the Ford Bronco's rear row. *Ford Motor Co. v. Cammack*, 999 S.W.2d 1, 8–9 (Tex. App.—Houston [14th Dist.] 1998). An analogy may perhaps be drawn between a distracting phone and a car seat without a seatbelt, but it does not get us very far. A user of the former can make it safe for driving by silencing or switching it off; no such simple fix exists for the latter.⁵

To our minds, the closest analogy offered by Texas law is so-called dram shop liability: the liability of commercial purveyors of alcohol for the subsequent torts or injuries of the intoxicated customers they served. See Tex. Alco. Bev. Code §§ 2.01–03; *Smith v. Sewell*, 858 S.W.2d 350 (Tex. 1993). Under that law, a person remains liable for her own negligent acts, but the incapacitating qualities of the product, which contribute to the person's negligence, can subject the seller to liability as well.

The recognition of dram shop liability in Texas came about in a noteworthy way. The common law did not make an alcohol seller liable for harms caused by intoxicated patrons, but, noting developments in other states, the Texas Supreme Court saw it as its duty “to recognize the evolution” in the law. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 310 (Tex. 1987). It held that “an alcoholic beverage licensee owes a duty to the general public not to serve alcoholic beverages to a person when the licensee knows or should know the patron is intoxicated.” *Id.* at 314. Concurrently, the Texas Legislature passed the Dram Shop Act, which created a cause of action with different contours. See *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 683–84 (Tex. 2007) (explaining the history). In the years that followed, a productive exchange between judicial and legislative branches unfolded,

gradually resolving various further questions, large and small. *See* H.B. 2868, 79th Leg. Sess. (Tex. 2005); *Reeder v. Daniel*, 61 S.W.3d 359 (Tex. 2001); *Smith v. Merritt*, 940 S.W.2d 602 (Tex. 1997); *Graff v. Beard*, 858 S.W.2d 918, (Tex. 1993); *Smith v. Sewell*, 858 S.W.2d 350 (Tex. 1993). The result was a comprehensive regulatory scheme reflecting the two branches’ extensive deliberations and considered judgments.

That is the form of state law development contemplated by *Erie*, under which “the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word” on state law. 304 U.S. at 79, 58 S.Ct. 817 (quotation omitted). To the extent there is a meritorious analogy between smartphone manufacturers and dram shops, it is for the state to explore, not us.⁶

With the state not yet speaking directly to this issue, we note that the debilitating effects of alcohol have been recognized much longer than the effects of smartphones, and the proper regulation of the former has been debated much longer than the latter. Moreover, the law development that has occurred places the onus of distracted driving on the driver alone. *See* Tex. Transp. Code § 545.4251; H.B. 62, 85th Leg. Sess. (Tex. 2017) (making it a criminal offense to read, write, or send a text message while driving).

We therefore cannot say that Texas law would regard a smartphone’s effect on a user as a substantial factor in the user’s tortious acts. To say otherwise would be an innovation of state law that *Erie* does not permit us to make. Because we decline to consider “neurobiological compulsion” a substantial factor under Texas law, we conclude that the iPhone 5 could not be a cause in fact of the injuries in this case. Consequently, it is unnecessary to consider the issues of concurrent and superseding causation on which Appellants have focused their arguments.

IV

The district court was correct to dismiss Appellants’ claims and to deny Appellants’ motion for leave to amend. The judgment of the district court is AFFIRMED.

Meador v. Apple, Inc., 911 F.3d 260, 262–67 (5th Cir. 2018), cert. denied, 139 S. Ct. 2649, 204 L. Ed. 2d 285 (2019)

Exercise 12. Sex Baselines Title IX and the Equal Protection Clause

Read the following excerpts from the judicial opinion and amicus briefs related to the case of Ashton (“Ash”) Whitaker, who sued his school district because it prohibited him from using the boys’ bathroom. Ashton is a transgender student who identifies as male, though his birth certificate designates him as “female.”

Ash filed the action based on Title IX and the Equal Protection clause. The parties disagreed over whether a transgender student who alleges discrimination on the basis of his transgender status can state a claim of sex discrimination under Title IX. Analogizing to Title VII, the court noted that the Supreme Court had recognized a cause of action under Title VII when an adverse action was taken because of an employee's failure to conform to sex stereotypes. Is requiring a transgender person who identifies as male to use the women's bathroom sex-stereotyping?

Under the Equal Protection clause, a sex-based classification is subject to heightened scrutiny. The School District argued that it treated all boys and girls the same. The School District also argued that its bathroom policy was justified based on its interest in protecting the bathroom privacy rights of its students.

What are the baseline issues presented by these arguments?

Excerpt from Judicial Opinion

As Ash documented to the District Court with uncontested evidence, his sex is male as a practical and scientific matter.

Everyone has a *gender identity*: one's internal sense of his or her own sex. SA118; SA164. Gender identity is immutable and fixed at an early age. SA118; SA166. A growing body of medical evidence establishes that an individual's gender identity has a biological basis, "influenced significantly by genes and by the prenatal environment." SA166; *see also* DSM-5 at 451 ("[B]iological factors are seen as contributing, in interaction with social and psychological factors, to gender development.").

Most people's gender identity is congruent with their *assigned sex* - the designation of "male" or "female" at birth, typically based on cursory examination of an infant's external genitalia. SA164. Individuals with an incongruence between gender identity and assigned sex are *transgender*. SA119; SA164.

From a medical perspective, gender identity is the most accurate and appropriate determinant of a person's sex. SA119; SA165. Thus, examination of genitalia is insufficient to determine a transgender individual's sex. SA119; SA164-65 ("No assessment other than gender identity can provide an accurate measure of an individual's sex" and "[a]ttempting to rely on any other sex-related feature would raise intractable problems.") "[M]edical science now recognizes that when an individual's gender identity does not align with the sex assigned at birth, the only effective and ethical treatment is to reclassify the person's sex to correspond to the person's gender identity." SA167.

When transgender people are barred from living in accordance with their gender identity, and forced to instead live as the wrong sex some or all of the time, they are at high risk of experiencing exacerbated symptoms of Gender Dysphoria. A2-3; SA119-20, SA122; SA167. These symptoms may include “‘serious and debilitating’ psychological distress (including anxiety, depression, and even self-harm or suicidal ideation),” A3, and “impairment in social, occupational, [and] educational ... functioning.” SA121. Transgender adolescents are particularly vulnerable to these harms: they experience depression, anxiety, self-harm, and suicidal ideation at rates two to three times higher than their peers do. SA127. For students, Gender Dysphoria symptoms can also contribute to educational harms and social isolation. SA199-202.

Whitaker v. Kenosha Unified School Dist., 858 F.3d 1034 (2017).

Excerpts from Amicus Briefs submitted in the case:

1) Brief of Alliance Defending Freedom Excerpts:

Human reproductive nature establishes what sex is, and that nature gives rise to the human right of bodily privacy, the protection of which is consistent with Title IX objectives.

A person's sex is determined at conception¹¹ and may be ascertained at or before birth, being evidenced by objective indicators such as gonads, chromosomes, and genitalia. *See* Am. Psychological Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) (“DSM-5”) (sex “refer [s] to the biological indicators of male and female (understood in the context of reproductive capacity), such as in sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia.”). As a sexually reproducing¹² species, we are equipped with gonads and genitalia - our “privates” - which facilitate the reproductive act, and the human sensitivities surrounding sex (whether used as a noun or a verb) and our privates give rise to personal privacy needs and correlated rights - specifically, the right to bodily privacy.

That right is evidenced through many areas of law. For example, females “using a women's restroom expect[] a certain degree of privacy from ... members of the opposite sex.” *State v. Lawson*, 340 P.3d 979, 982 (Wash. Ct. App. 2014). Similarly, teenagers are “embarrass[ed] ... when a member of the opposite sex intrudes upon them in the lavatory.” *St. John's Home for Children v. W. Va. Human Rights Comm'n*, 375 S.E.2d 769, 771 (W. Va. 1988). Allowing opposite-sex persons to view adolescents in intimate situations, such as showering, risks their “permanent emotional impairment” under the mere “guise of equality.” *City of Phila. v. Pa. Human Relations Comm'n*, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973).

These privacy interests are why a girls' locker room has always been “a place that by definition is to be used exclusively by girls and where males are not allowed.” *People v. Grunau*, No. H015871, 2009 WL 5149857, at *3 (Cal. Ct. App. Dec. 29, 2009).¹³ As the Kentucky Supreme Court observed, “there is no mixing of the sexes” in school locker rooms

and restrooms. *Hendricks v. Commw.*, 865 S.W.2d 332, 336 (Ky. 1993); *McLain v. Bd. of Educ. of Georgetown Cmty. Unit Sch. Dist. No. 3 of Vermilion Cty.*, 384 N.E.2d 540, 542 (Ill. App. Ct. 1978) (refusing to place male teacher as overseer of school girls' locker room). And the right is reciprocal - what holds true for placing a male in girls' private facilities is no less true for placing a female in boys' private facilities.

The professed transgender students' claims are rooted in gender identity and enforcing their demand to have their self-perceived “sex” affirmed is inconsistent with the purpose of Title IX.

Once the federal mandate came down, implausibly insisting that sex now included gender identity, students who professed a sex different than their birth sex began asserting a right to enter sex-specific facilities based exclusively upon their gender identity. But unlike sex (which is binary, fixed, objectively discerned, and rooted in human reproduction), gender identity is a subjectively-determined fluid continuum ranging from male to female to something else:

Other categories of transgender people include androgynous, multigendered, gender nonconforming, third gender, and two-spirit people. Exact definitions of these terms vary from person to person and may change over time but often include a sense of blending or alternating genders. Some people who use these terms to describe themselves see traditional, binary concepts of gender as restrictive.

Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity and Gender Expression 2* (3rd ed. 2014), <http://www.apa.org/topics/lgbt/transgender.pdf>; see also Asaf Orr et al., *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* (2015) at 5 (describing gender identity as falling on a “gender spectrum”) and 7 (defining “gender identity” as “a personal, deeply-felt sense of being male, female, both or neither”), <http://bit.ly/2di0ltr> (last visited Oct. 24, 2016).¹⁴

This subjective perception of gender identity - a self-perceived “sex,” also divorces that claimed “sex” from humans' primary sex characteristics - the gonads, genitalia, and related physiological systems which fulfill either the male or female reproductive role. This was brought home in our *Highland Local School District* case, when the court sought to confirm that the intervening, professed male-to-female student had male genitalia - to which the student's counsel responded that it was “inappropriate to label any part of [the student's] body as male.”¹⁵ See Ex. 3, Highland Oral Arg. Transcript at 61. And that divorce of sex from humanity being a sexually reproducing species robs “male” and “female” of any real meaning: the *reductio ad absurdum* of the federal mandate is that every sex-related characteristic becomes merely a stereotype, with gender identity being the sole determinant of what “sex” a person is.

Because gender identity is divorced from the real physical differences between men and women, when the professed transgender students demand access to opposite sex facilities, there is no basis for them to advance a bodily privacy claim. Instead, as consistently seen in their affidavits, their claim is that they must access communal facilities of the opposite sex so that their perceived “sex” is affirmed as real by school authorities and fellow students.¹⁶ And that is an interest that is nowhere to be found in the text, legislative history, or plain meaning of Title IX and its implementing regulations.

(2) Excerpts from Brief Amicus Curiae of the Foundation for Moral Law in Support of Petitioners:

II. The idea that one's sex can be changed is a myth.

Oral argument before the Seventh Circuit⁹ began as follows:

Q: Does the district take the position that there is no such thing as a transgender person? In other words, does the district disagree that any such person exists?

A: No. Transgender people certainly exist, and nobody has ever claimed from our side that transgender students don't exist.

That was a fatal concession. Men cannot become women nor can women become men. They can only pretend to do so. Daily dosing on hormones and disfiguring surgery do not change the reality that sex chromosomes are determined at conception. Females are XX and males are XY. The human egg has an X chromosome and the male contributes either an X or a Y, thus irreversibly defining the sex of the new human being at the instant of conception.

Although the newly conceived human being grows through cell division and specialization, the DNA in the nucleus of every cell in the body contains the same sex chromosomes as the original cell.¹⁰ Thus, no person can change his sex but can only mutilate and distort the endowment bestowed at conception. The DNA in young Whitaker's cells does not change simply because she wears male clothes, daily swallows male hormones, or eventually surgically alters her body. In scientific terminology, superficial changes to the phenotype have no effect on the genotype.

Surgical alteration of one's sexual organs does not and cannot change the basic DNA with which a person was born. “It is physiologically impossible to change a person's sex, since the sex of each individual is encoded in the genes - XX if female, XY if male. Surgery can only create the *appearance* of the other sex.”¹¹ Dr. George Burou, a surgeon who has performed over 700 sexual reassignment surgeries, stated, “I don't change men into women. I transform male genitals into genitals that have a female aspect. All the rest is in the patient's mind.”¹²

This Court should not encourage a delusional and tragic journey into unreality by people, often unhappy with life, who falsely imagine that rejecting their God-given identity will somehow make their problems go away. Life is challenging in a fallen world where sin abounds on every side and a lying spirit is the god of this world. *John* 8:44, *2 Corinthians* 4:4. But to imagine that a Frankenstein-style transmogrification into the opposite sex will make life better is a sad delusion. When those who journey down this path find that life is no better on the other side of the hormone bottle, the redoubled anguish prompted by their folly only magnifies the self-loathing that prompted the experiment.

This Court, with no authority to do so in the Constitution or any statute, should refrain from encouraging such misguided behavior. Neither Title IX nor *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), contemplated that treating the sexes equally required educational institutions to bow to the subjective desire to reject one's birth sex.¹³ Telling a young woman that she is not a man is not “sex stereotyping” but a simple acknowledgement of reality. The authors of Title IX and the ratifiers of the Equal Protection Clause did not intend to create protected classes of men parading in dresses or women growing beards, phenomena formerly associated with circus sideshows.¹⁴

Excerpt from a Tenth Circuit decision; you might compare the reasoning in this opinion to the material above.

Scientific research may someday cause a shift in the plain meaning of the term “sex” so that it extends beyond the two starkly defined categories of male and female. *See Schroer v. Billington*, 424 F.Supp.2d 203, 212–13 & n. 5 (D.D.C.2006) (noting “complexities stem[ming] from real variations in how the different components of biological sexuality ... interact with each other, and in turn, with social psychological, and legal conceptions of gender”); *cf. Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir.1995) (stating that the possibility that sexual identity may be biological suggests reevaluating whether transsexuals are a protected class for purposes of the Equal Protection Clause). At this point in time and with the record and arguments before this court, however, we conclude discrimination against a transsexual because she is a transsexual is not “discrimination because of sex.” Therefore, transsexuals are not a protected class under Title VII and Etsitty cannot satisfy her prima facie burden on the basis of her status as a transsexual.² *See Plotke*, 405 F.3d at 1099 (requiring plaintiff to show she belonged to a protected class as part of her prima facie showing).

* * *

Title VII's prohibition on sex discrimination, however, does not extend so far. It may be that use of the women's restroom is an inherent part of one's identity as a male-to-female transsexual and that a prohibition on such use discriminates on the basis of one's status as a transsexual. As discussed above, however, Etsitty may not claim protection under Title VII

based upon her transsexuality *per se*. Rather, Etsitty's claim must rest entirely on the *Price Waterhouse* theory of protection as a man who fails to conform to sex stereotypes. However far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes. *Cf. Nichols*, 256 F.3d at 875 n. 7 (explaining that not all gender-based distinctions are actionable under Title VII and that “there is [no] violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards”).

The critical issue under Title VII “is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” *Oncale*, 523 U.S. at 80, 118 S.Ct. 998 (quotation omitted). Because an employer's requirement that employees use restrooms matching their biological sex does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes, UTA's proffered reason of concern over restroom usage is not discriminatory on the basis of sex. Thus, it is not “facially prohibited by Title VII” and may satisfy UTA's burden on the second part of the *McDonnell Douglas* framework.

Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224–25 (10th Cir. 2007).

CHAPTER 4 EXERCISES
The Legal Distinction

Exercise 1. Gift Giving
Property Law

Under longstanding common law principles, “a gift is a voluntary, immediate transfer of property without consideration from one person (the *donor*) to another person (the *donee*).² Under traditional rules, a valid gift requires intent, delivery, and acceptance.

1. *Consider the requirement of delivery. At one time this meant actual delivery—the donor has physically transferred the item to the donee. What is the purpose of this requirement?*
2. *How does actual delivery fare as a legal distinction under the three ideal characteristics of conceptual intelligibility, practicality, and normative appeal?*
3. *Now consider the concept of “constructive delivery,” which aims to make up for the shortcomings of a rule that allows only actual physical delivery—what should be acceptable when actual physical delivery is impossible or impracticable? Under this concept, delivery of a key would suffice to meet the delivery requirement. Evaluate this distinction for its conceptual intelligibility, practicality, and normative appeal. What are the tradeoffs that have been made in moving away from actual, physical delivery?*
4. *Most jurisdictions now also permit “symbolic delivery”—something delivered to the donee that symbolizes the gift, such as an informal writing. What are the advantages and disadvantages of this approach?*
5. *How would you evaluate the “gift” category as a legal distinction in a jurisdiction that eliminated delivery as a requirement altogether?*
6. *Consider the following examples. How does the legal distinction work when applied to:*
 - a. *a screenplay;*
 - b. *a Boeing 747;*
 - c. *a bearer bond;*
 - d. *gold;*
 - e. *livestock;*
 - f. *a farm?*

² Understanding Property Law at 46.

Exercise 2. Intended or Incidental? Contract Law

In some circumstances, a third party, not originally involved in a contract, has the right to enforce the terms of the contract. An intended beneficiary may enforce a contract, but an incidental beneficiary cannot.

The Restatement of Contracts summarizes the doctrine this way: “a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and. . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.” Restatement (Second) of Contracts § 302. The fact that a third party is to receive some benefit through the performance is not sufficient.

Evaluate the distinction between “intended” and “incidental” beneficiaries. Is the distinction conceptually intelligible? Practical? Does it have normative appeal? Use the following hypotheticals to support or inform your analysis.

- 1. A person slips and falls on a sidewalk outside of a pharmacy. The pharmacy has a contractual obligation in its lease to remove snow and ice from the sidewalk. Can the person sue the pharmacy for breach of contract as a third-party beneficiary? Is the person an intended or incidental beneficiary? Why or why not?*
- 2. A police officer was injured in a self-defense class required for his training. He sued the college and instructor who taught the class for failing to use safety mats during the class. The contract at issue was between the college and the city to provide an officer training program. Assuming there was a breach, should the police officer have a right to enforce it as a third party beneficiary? Is the officer an intended or incidental beneficiary?*
- 3. A prison inmate sued a private company to enforce a contract between that company and the state. The inmate claimed that the company had failed to provide adequate kosher food as agreed in the contract. Should the inmate be able to sue as an intended beneficiary?*
- 4. Deceased father's daughter sued divorce attorney for failing to finalize father's divorce before he died, causing father's widow to inherit money she would not have inherited if divorce were final. Is she an intended or incidental beneficiary of the attorney-client contract?*
- 5. A Guardian ad litem (GAL), sued a state agency on behalf of two minor children and a proposed class of children who were in the legal custody of that state agency. The children had been placed in foster care. The GAL sued both the agency and the corporation that operated the state foster care system pursuant to a contract with the agency, alleging, among other things, that children were third-party beneficiaries of the*

contract between the agency and the corporation. Should the children be deemed intended beneficiaries of the contract? Why or why not?

Exercise 3. The Good Faith Exception The Exclusionary Rule (Criminal Procedure)

The principal remedy for unreasonable searches and seizures is the exclusionary rule, which allows courts to exclude unlawfully seized evidence in a criminal prosecution. But doctrine holds that the exclusionary rule should only be invoked if it furthers the purpose of the rule—which is to deter police misconduct. This has led to the “good-faith” exception to the exclusionary rule—if the police acted in good faith it wouldn’t make sense to exclude the evidence, because they didn’t mean to act unlawfully and their actions would not have been deterred by the prospect of exclusion. The doctrinal test for the good-faith exception then, asks whether officers acted with the objectively reasonable belief that their conduct was lawful.

1. *Is this formulation of the good-faith exception conceptually intelligible: if what matters, given the deterrence objective, is the officer’s subjective state of mind, why are we talking about “reasonable belief?” Is the distinction practical? Think about the officer trying to master the Fourth Amendment. Does this distinction have normative appeal? How well does “reasonable belief” mesh with the deterrence objective of the exclusionary rule? What tradeoffs are being made by crafting a good faith exception in this way?*

2. *Consider the following fact scenario:*

A police officer used Google Translate to communicate with a defendant he had pulled over on I-70 in Kansas. At one point, the officer typed into Google Translate “Can I search the car?” According to the officer, the defendant said yes. The officer searched the car and found illegal drugs. An expert later testified that when “Can I search the car” is typed into Google Translate, it translates to a phrase in Spanish that means “Can I find the car?” The officer had live interpreters available to him if needed. Video and audio recordings of the stop showed no affirmative acts by the defendant showing that he understood the questions asked of him. The defendant claimed he did not understand the questions asked and the evidence supported his contention.

Assume that a court would conclude that the defendant did not properly consent to the search, and that the search therefore violated the Fourth Amendment. Should the good-faith exception apply in this case? Why or why not? What arguments could you use to suggest that the good-faith exception should not include this situation? Does applying the exception in this case render the exception conceptually unintelligible, impractical, or normatively unappealing? How so?

Exercise 4. Knowingly? Criminal Law

§ 2.02. General Requirements of Culpability, Model Penal Code § 2.02

(7) Requirement of Knowledge Satisfied by Knowledge of High Probability. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

The Model Penal Code thus defines knowledge to include what is sometimes referred to as “willful blindness” or “deliberate ignorance.”

Federal law makes it a crime to “knowingly....possess with intent to manufacture, distribute, or dispense, a controlled substance.” 21 U.S.C. 841(a)(1).

Now imagine you are defending a woman who was caught driving a car with 350 pounds of marijuana in the trunk. The marijuana was surrounded by dryer sheets. The woman had borrowed her aunt’s car to drive her mother back to the United States from Mexico. She noticed a detergent smell in the car, which her aunt explained was the result of a Downey fabric softener spill. The defendant–driver did not investigate any further. On the road, her mother appeared nervous, and the defendant–driver admitted she began to suspect the possibility of drugs in the car. But she was unable to exit the highway before driving through a checkpoint where the drugs were then discovered.

The prosecution wants to provide the following deliberate ignorance instruction to the jury.

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that drugs were in the vehicle driven by the defendant and deliberately avoided learning the truth. You may not find such knowledge, however, if you find that the defendant actually believed that no drugs were in the vehicle driven by the defendant, or if you find that the defendant was simply careless.

1. *What are the boundaries of this distinction? At what point does it create a duty to investigate? How might the distinction be crafted so that a defendant has no such duty to investigate?*
2. *Suppose as prosecutor that you have to defend this distinction: what will you emphasize—practicality or normative appeal? Why?*
3. *Why might you argue that the jury instruction should include something that explains that the government must present evidence that the defendant purposely contrived to avoid learning the facts?*

Exercise 5. Wild Animals Property Law

Under the common law “capture rule,” the first person to kill or capture a wild animal acquires title. The landmark case on this issue is *Pierson v. Post*, an 1805 New York case. Post was hunting a fox when Pierson killed it to prevent Post from catching it.

Who was entitled to the value of the fox? Should it have been Post, who would likely have caught the fox if Pierson hadn't intervened? What should determine the result? In terms of setting up a property regime (in cases of wild animals or wild resources), what policy factors support a 'probable capture' standard versus an 'actual capture' rule? What is sufficient to 'capture' a wild animal? Is an animal captured if it has a small chance of escape? How small? What are the strengths of the capture rule? The weaknesses?

Exercise 6. What's Fair in Housing? Fair Housing Act

Under the Fair Housing Act it is unlawful “To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.” 42 U.S.C.A. § 3604.

1. *Consider the scope of this phrase: “in the provision of services or facilities in connection therewith.” What sort of conduct does it cover? Do you see any problems with this phrase as a legal distinction?*

Consider, for example, whether the FHA applies to the provision of water, gas, and electricity services. Plaintiffs in one case lived in a place where the city was the sole provider of water, gas, and electricity services. The plaintiffs alleged that the city's policies for opening utility accounts had a disproportionate, discriminatory impact on black and Hispanic residents, and thus violated the FHA. The city argued that the FHA did not apply to the provision of utility services, in part because the utility services were provided after a person acquired housing.

2. *Now think about the term “familial status” in the statute. What problems do you see with this as a legal distinction? Keeping the term “familial status” in mind, consider the following scenarios:*

- a. *The Connor Group placed an ad on Craigslist for an apartment in Dayton, Ohio:*

599/1br—Great Bachelor Pad! (Centerville)

Our one bedroom apartments are a great bachelor pad for any single man looking to hook up. This apartment includes a large bedroom, walk in closet, patio, gourmet kitchen, washer dryer hook up and so much more...

b. Next consider the following excerpt from the rules and regulations of an apartment complex:

(1) “Tenants are responsible for the supervision of other occupants and their guests at all times. Supervision problems will be grounds for eviction. All children 10 and under must be supervised by an Adult while outside.”

Should the term include these two scenarios? What arguments might you make if you were defending the Connor Group in scenario 1? Why isn’t this discrimination based on familial status? And scenario 2? What arguments might you make to argue that this rule doesn’t discriminate based on familial status? After considering these two examples, consider again whether “familial status” sets up an effective legal distinction.

Exercise 7. Reckless Texting Criminal Law

Consider the case of Michelle Carter, who encouraged her boyfriend to commit suicide in numerous text exchanges and phone calls. She was charged with involuntary manslaughter. The state argued that Carter’s wanton or reckless conduct was the cause of the victim’s death. Carter argued that the charge should be dismissed because her conduct was limited to words, and that verbal encouragement alone could never constitute wanton or reckless conduct. She was, in fact, miles away from the victim when he committed suicide. The court concluded that a physical act was not required:

Because wanton or reckless conduct requires a consideration of the likelihood of a result occurring, the inquiry is by its nature entirely fact-specific. The circumstances of the situation dictate whether the conduct is or is not wanton or reckless. We need not—and indeed cannot—define where on the spectrum between speech and physical acts involuntary manslaughter must fall. Instead, the inquiry must be made on a case-by-case basis.

Com. v. Carter, 52 N.E.3d 1054, 1062-63 (Mass. 2016).

What are the values that support the court’s decision to include verbal acts in the definition of wanton or reckless conduct? What counter arguments could you make? What are the problems with including verbal acts within “wanton or reckless conduct?” What problems could you imagine with excluding verbal acts from “wanton or reckless conduct?”

Exercise 8. Of Public Concern First Amendment

Under First Amendment doctrine, the speech of a government employee is protected if the employee spoke as a citizen on a matter of public concern.

What difficulties can you see in defining what counts as a matter of public concern? Is it a practical distinction? Is it conceptually intelligible? What factors should a court consider to decide whether an employee speaks on a matter of public concern? What does “public” mean in this context? What are the values that should be considered when deciding whether something is a matter of public concern? How difficult is it to draw the line between something that is a matter of public concern and something that is not?

Consider the following hypothetical when assessing the effectiveness of the “matter of public concern” distinction:

A Director of Athletics for a public school district was fired for writing a letter in support of his nephew. The nephew had pled guilty to criminal charges based on video recordings he made of women without their consent and an inappropriate video that he recorded of a minor. During the sentencing proceedings, the athletic director wrote a letter in support of his nephew, asking the judge to consider his nephew’s good character in the sentencing decision. The letter was written on letterhead that the Director of Athletics had himself created using the school logo. He wrote a second letter later on when the nephew sought to reduce his sentence. Though his performance as Director of Athletics was undisputedly excellent, the director was fired when the nephew’s early release from prison received negative media attention.

How might you characterize the speech to put it in the category of “matter of public concern?” The opposite?

Exercise 9. Expert vs. Lay Evidence Law

The Federal Rules of Evidence separate “lay” opinions from “expert” opinions. Opinions by lay witnesses are limited to those that are “not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Federal Rules of Evidence Rule 701, Opinion Testimony by Lay Witnesses.

The purpose of this distinction is to prevent expert testimony that does not meet the requirements of 702 from coming in via the lay opinion rule.

The category of “specialized knowledge” thus has import: If testimony is based on specialized knowledge, it must meet the requirements for expert witnesses:

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702

1. *What are the normative reasons for subjecting “expert” opinions to stricter requirements than “lay” opinions? How does this arguably create a false dichotomy between various sorts of opinions?*
2. *In assessing the effectiveness of this distinction, consider the following hypothetical:*

A Drug Enforcement Agency (DEA) Special Agent testifies about the content of recorded calls between suspected drug dealers. The agent interpreted the language used, like “the good stuff” to mean pure, non-cut cocaine. The DEA agent had 16 years of experience working on illegal narcotics investigations. Is his knowledge “specialized” under Rule 702? What arguments might you make on either side of this issue?

Exercise 10. Regulatory Takings Constitutional Law

The Takings Clause of the Fifth Amendment provides that private property shall not “be taken for public use, without just compensation.”

Read *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), which addresses what sort of government regulation constitutes a taking under the takings clause (a “regulatory taking”). In other words, in what circumstances is a regulatory action “functionally equivalent to the classic taking in which a government directly appropriates private property or ousts the owner from his domain”? *Lingle*, 544 U.S. at 539. In *Lingle*, the Supreme Court considered the validity of a test used by some courts to decide whether a regulatory taking had occurred—regulation that “does not substantially advance legitimate state interests” was deemed a regulatory taking.

Using the terms and concepts you learned in the Legal Distinction chapter, explain the reasons why the Supreme Court rejected this “substantially advances” test. Do you agree? Why or why not? What other flaws do you see in this definition of a regulatory taking?

Exercise 11. The Special Relationship Tort Law

For a more complex example of a legal distinction in operation, consider the “special relationship”—a longstanding distinction in tort law.

The Supreme Court of California recently concluded that universities have a “special relationship” with their students, imposing a duty of care within the context of that relationship. The “special relationship” is a longstanding legal distinction in tort law, described in § 40 of the Restatement (Third) of Torts,³ and traditionally applied to relationships such as an innkeeper and its guests, a landlord with its tenants, and a school with its students. In *Regents of the University of California v. Superior Court*, 413 P.3d 656 (2018), the California Supreme Court considered whether UCLA was responsible for protecting one student from a knife attack by another. The facts of the case are straightforward and were not in dispute.

Damon Thompson enrolled at UCLA as a transfer student in the fall of 2008, and over the course of the next year his behavior led to numerous engagements with the school’s professors, administrators, and counselors. He heard voices, talked to himself frequently, and complained about mistreatment by other students. He was diagnosed with possible schizophrenia and major depressive disorder, but took medication only intermittently and would not submit to voluntary hospitalization as recommended by a psychiatrist. Thompson admitted thinking about harming others, and he was eventually expelled from university housing when he pushed another student for making too much noise. In the fall of 2009, he continued to complain to professors and psychologists about harassment by other students. In October of that year, he attacked another student, Katherine Rosen, with a kitchen knife in chemistry lab. She suffered life-threatening injuries but survived. She sued the university for negligence, alleging that UCLA had a special relationship with her which imposed a duty to take reasonable measures to protect her from violence.

The Court of Appeals concluded that UCLA has no such special relationship with its students, holding that “colleges and universities generally owe no duty of care to protect students from third party misconduct.” The Supreme Court reversed, concluding that colleges and universities do have a “special relationship” with their students “while they are engaged in activities that are part of the school's curriculum or closely related to its delivery of educational service.”

Excerpts from the majority and concurring opinions appear below.

³ Restatement (Third) of Torts: Phys. & Emot. Harm § 40 Duty Based on Special Relationship with Another (2012).

1. *In reading the excerpts, consider how well “special relationship” works as a legal distinction. Does it satisfy the three criteria of conceptual intelligibility, operational efficacy, and normative appeal? Is it just a factual decision masked with a “legal distinction”? In other words, does the distinction itself do any real work, or is it completely malleable to the facts of this particular case? How does the legal distinction before this case differ from the legal distinction which exists after this case? What tactics does the court use to justify its use of the category?*
2. *Is this legal distinction—the special relationship—creating a different legal regime that attaches a different legal consequence? Or has it become so fact-specific that as a distinction it has lost its meaning? The existence of a special relationship is said to be an issue of law—does a duty exist?—but note the extent to which the particular facts drive the ‘legal’ decision.*
3. *What are the normative factors that favor the imposition of a ‘special relationship’ and accompanying duty here? How do you get put into the special relationship box?*

Regents v. Superior Court, 413 P.3d 656 (Cal. 2018).
CORRIGAN, J.

II. DISCUSSION

1. *College-Student Special Relationship Supports a Limited Duty*

Whether UCLA was negligent in failing to prevent Thompson's attack depends first on whether a university has a special relationship with its students that supports a duty to warn or protect them from foreseeable harm. The determination whether a particular relationship supports a duty of care rests on policy and is a question of law. (Rest.3d Torts, Liability for Physical and Emotional Harm, § 40, coms. e & h, pp. 41-42.)

a. *Features of a Special Relationship*

The Restatement Third of Torts identifies several special relationships that may support a duty to protect against foreseeable risks. In addition to the common carrier and innkeeper relationships previously mentioned, the list includes a business or landowner with invited guests, a landlord with tenants, a guard with those in custody, an employer with its employees, and “a school with its students.” (Rest.3d Torts, Liability for Physical and Emotional Harm, § 40, subd. (b).) The Restatement does not exclude colleges from the school-student special relationship. However, the drafters observe that reasonable care varies in different school environments, with substantially different supervision being appropriate in elementary schools as opposed to colleges. (*Id.*, § 40, com. 1, p. 45.) State courts have reached different conclusions about whether colleges owe a special relationship-based duty to their students. (*Id.*, § 40, com. 1, reporter's notes, p. 57.) We have not previously addressed the question.

Relationships that have been recognized as “special” share a few common features. Generally, the relationship has an aspect of dependency in which one party relies to some degree on the other for protection. (See *Baldwin v. Zoradi* (1981) 123 Cal.App.3d 275, 283, 176 Cal.Rptr. 809 (*Baldwin*); *Mann v. State of California* (1977) 70 Cal.App.3d 773, 779-780, 139 Cal.Rptr. 82.) The Restatement authors observed over 50 years ago that the law has been “working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.” (Rest.2d Torts, § 314A, com. b, p. 119.)

The corollary of dependence in a special relationship is control. Whereas one party is dependent, the other has superior control over the means of protection. “[A] typical setting for the recognition of a special relationship is where ‘the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff’s welfare.’ [Citations.]” (*Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 245-246, 85 Cal.Rptr.3d 371.) One court observed that “the epitome” of such a special relationship exists between a jailer and prisoner. (*Id.* at pp. 250-251, 85 Cal.Rptr.3d 371.) Common carriers and their passengers present another quintessential example. In *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 789, 221 Cal.Rptr. 840, 710 P.2d 907, we held this special relationship gives common carriers a duty to protect passengers from onboard violence, noting that passengers are sealed together in a moving vehicle, with the means of entry and exit under the exclusive control of the driver. “Thus, passengers have no control over who is admitted on the bus and, if trouble arises, are wholly dependent upon the bus driver to summon help or provide a means of escape.” (*Ibid.*)

Special relationships also have defined boundaries. They create a duty of care owed to a limited community, not the public at large. We have held that police officers are not in a special relationship with the citizens in their jurisdiction (see *Williams v. State of California*, *supra*, 34 Cal.3d at pp. 27-28, 192 Cal.Rptr. 233, 664 P.2d 137), even when officers are aware of risks to a specific potential victim (see *Davidson*, *supra*, 32 Cal.3d at pp. 208-209, 185 Cal.Rptr. 252, 649 P.2d 894). Nor is a government entity in a special relationship with all citizens who use its facilities. (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1130, 119 Cal.Rptr.2d 709, 45 P.3d 1171.) In declining to find a duty of care owed to courthouse visitors, we observed that a “county, ‘as with all public entities,’ has the responsibility to ‘exercise reasonable care to protect all of its citizens’ [citation], but does not thereby become liable to each individual for all foreseeable harm.” (*Id.* at p. 1131, 119 Cal.Rptr.2d 709, 45 P.3d 1171.) Because a special relationship is limited to specific individuals, the defendant’s duty is less burdensome and more justifiable than a broad-ranging duty would be. (See Rest.3d Torts, Liability for Physical and Emotional Harm, § 40, com. h, p. 43.)

Finally, although relationships often have advantages for both participants, many special relationships especially benefit the party charged with a duty of care. (Rest.3d Torts, Liability for Physical and Emotional Harm, § 40, com. h, p. 43.) Retail stores or hotels could not successfully operate, for example, without visits from their customers and guests.

b. *The College Environment*

* * *

Considering the unique features of the college environment, we conclude postsecondary schools *do* have a special relationship with students while they are engaged in activities that are part of the school's curriculum or closely related to its delivery of educational services.

Although comparisons can be made, the college environment is unlike any other. Colleges provide academic courses in exchange for a fee, but a college is far more to its students than a business. Residential colleges provide living spaces, but they are more than mere landlords. Along with educational services, colleges provide students social, athletic, and cultural opportunities. Regardless of the campus layout, colleges provide a discrete *community* for their students. For many students, college is the first time they have lived away from home. Although college students may no longer be minors under the law, they may still be learning how to navigate the world as adults. They are dependent on their college communities to provide structure, guidance, and a safe learning environment. “In the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime.” (*Peterson, supra*, 36 Cal.3d at p. 813, 205 Cal.Rptr. 842, 685 P.2d 1193.)

Colleges, in turn, have superior control over the environment and the ability to protect students. Colleges impose a variety of rules and restrictions, both in the classroom and across campus, to maintain a safe and orderly environment. They often employ resident advisers, mental health counselors, and campus police. They can monitor and discipline students when necessary. “While its primary function is to foster intellectual development through an academic curriculum, the institution is involved in all aspects of student life. Through its providing of food, housing, security, and a range of extracurricular activities the modern university provides a setting in which every aspect of student life is, to some degree, university guided.” (*Furek v. University of Delaware* (Del. 1991) 594 A.2d 506, 516.) Finally, in a broader sense, college administrators and educators “have the power to influence [students'] values, their consciousness, their relationships, and their behaviors.” (de Haven, *The Elephant in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability* (2009) 35 J.C. & U.L. 503, 611 (hereafter de Haven).)

The college-student relationship thus fits within the paradigm of a special relationship. Students are comparatively vulnerable and dependent on their colleges for a safe environment. Colleges have a superior ability to provide that safety with respect to activities they sponsor or facilities they control. Moreover, this relationship is bounded by the student's enrollment status. Colleges do not have a special relationship with the world at large, but only with their enrolled students. The population is limited, as is the relationship's duration.

Of course, many aspects of a modern college student's life are, quite properly, beyond the institution's control. Colleges generally have little say in how students behave off campus, or in their social activities unrelated to school. It would be unrealistic for students to rely on their college for protection in these settings, and the college would often be unable to provide it. This is another appropriate boundary of the college-student relationship: Colleges are in a special relationship with their enrolled students only in the context of school-sponsored activities over which the college has some measure of control. (Cf. *Avila, supra*, 38 Cal.4th at p. 163, 41 Cal.Rptr.3d 299, 131 P.3d 383 [“school-supervised” athletic events]; *Patterson v. Sacramento City Unified School Dist.* (2007) 155 Cal.App.4th 821, 830, 66 Cal.Rptr.3d 337 [“school-sponsored” community service project].) As commentators have observed, while there is an “emerging trend” of courts recognizing a special relationship between colleges and their students (Sokolow, *supra*, 34 J.C. & U.L. at p. 323), this relationship supports a duty of care only with respect to “risks that arise within the scope of the school-student relationship.” (*Id.* at pp. 323-324; see Peters, *Protecting the Millennial College Student* (2007) 16 S. Cal. Rev. L. & Soc. Just. 431, 459-460; Dall, *Determining Duty in Collegiate Tort Litigation: Shifting the Paradigms of the College-Student Relationship* (2003) 29 J.C. & U.L. 485, 485-487.)

...

The special relationship we now recognize is similarly limited. It extends to activities that are tied to the school's curriculum but not to student behavior over which the university has no significant degree of control. The incident here occurred in a chemistry laboratory while class was in session. Education is at the core of a college's mission, and the classroom is the quintessential setting for curricular activities. Perhaps more than any other place on campus, colleges can be expected to retain a measure of control over the classroom environment. Although collegiate class attendance may not be as strictly monitored as in secondary school, this distinction is not especially significant. All college students who hope to obtain a degree must attend classes and required laboratory sessions. It is reasonable for them to expect that their schools will provide some measure of safety in the classroom.

2. Policy Considerations Support Recognizing a Limited Duty

As discussed, there is generally no duty to protect others from the conduct of third parties. The “special relationship” doctrine is an exception to this general rule. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235, 30 Cal.Rptr.3d 145, 113 P.3d 1159; *Tarasoff, supra*, 17 Cal.3d at pp. 435-436, 131 Cal.Rptr. 14, 551 P.2d 334; Rest.3d Torts, Liability for Physical and Emotional Harm, § 40.) Accordingly, as a consequence of the special relationship recognized here, colleges generally owe a duty to use reasonable care to protect their students from foreseeable acts of violence in the classroom or during curricular activities.

Whether a new duty should be imposed in any particular context is essentially a question of public policy. “The existence of ‘[d]uty’ is not an immutable fact of nature ‘but only an expression of the sum total of those *considerations of policy* which lead the law to say that the particular plaintiff is entitled to protection.’ ” (*Parsons* [, *supra*,] 15 Cal.4th [at p.] 472

[63 Cal.Rptr.2d 291, 936 P.2d 70].)” (*Avila, supra*, 38 Cal.4th at pp. 160-161, 41 Cal.Rptr.3d 299, 131 P.3d 383.) As relevant here, the California Constitution “declare[s] that the right to public safety extends to public and private primary, elementary, junior high, and senior high school, and community college, California State University, University of California, and private college and university campuses, where students and staff have the right to be safe and secure in their persons.” (Cal. Const., art. I, § 28, subd. (a)(7).) College students “have the inalienable right to attend campuses which are safe, secure and peaceful.” (*Id.*, § 28, subd. (f)(1).) Even assuming the constitutional provision is not self-executing (see *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1236-1237, 271 Cal.Rptr. 72), it clearly expresses a “fundamental public policy favoring measures to ensure the safety of California’s public school students.” (*William S. Hart, supra*, 53 Cal.4th at p. 870, fn. 3, 138 Cal.Rptr.3d 1, 270 P.3d 699.)

The court may depart from the general rule of duty, however, if other policy considerations clearly require an exception. (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1143, 210 Cal.Rptr.3d 283, 384 P.3d 283 (*Kesner*); *Cabral, supra*, 51 Cal.4th at p. 771, 122 Cal.Rptr.3d 313, 248 P.3d 1170; see also *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 344, 173 Cal.Rptr.3d 662, 327 P.3d 774 (conc. opn. of Werdegar, J.)) We have identified several factors that may, on balance, justify excusing or limiting a defendant’s duty of care. These include: “the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.” (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113, 70 Cal.Rptr. 97, 443 P.2d 561 (*Rowland*)). These factors must be “evaluated at a relatively broad level of factual generality.” (*Cabral*, at p. 772, 122 Cal.Rptr.3d 313, 248 P.3d 1170.) In considering them, we determine “not whether they support an exception to the general duty of reasonable care on the facts of the particular case before us, but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy.” (*Ibid.*) In other words, the duty analysis is categorical, not case-specific. (See *Kesner*, at p. 1144, 210 Cal.Rptr.3d 283, 384 P.3d 283.)

The *Rowland* factors fall into two categories. The first group involves foreseeability and the related concepts of certainty and the connection between plaintiff and defendant. The second embraces the public policy concerns of moral blame, preventing future harm, burden, and insurance availability. The policy analysis evaluates whether certain kinds of plaintiffs or injuries should be excluded from relief. (*Kesner, supra*, 1 Cal.5th at p. 1145, 210 Cal.Rptr.3d 283, 384 P.3d 283.) We conclude that violence against students in the classroom or during curricular activities, while rare, is a foreseeable occurrence, and considerations of public policy do not justify categorically barring an injured student’s claims against the university.

a. Foreseeability Factors

“The most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care ... is whether the injury in question was *foreseeable*.” (*Kesner, supra*, 1 Cal.5th at p. 1145, 210 Cal.Rptr.3d 283, 384 P.3d 283, italics added; see *Tarasoff, supra*, 17 Cal.3d at p. 434, 131 Cal.Rptr. 14, 551 P.2d 334.) In examining foreseeability, “the court's task ... ‘is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed” (*Cabral, supra*, 51 Cal.4th at p. 772, 122 Cal.Rptr.3d 313, 248 P.3d 1170; accord *Parsons, supra*, 15 Cal.4th at p. 476, 63 Cal.Rptr.2d 291, 936 P.2d 70.)

Phrased at the appropriate level of generality, then, the question here is not whether UCLA could predict that Damon Thompson would stab Katherine Rosen in the chemistry lab. It is whether a reasonable university could foresee that its negligent failure to control a potentially violent student, or to warn students who were foreseeable targets of his ire, could result in harm to one of those students. Violent unprovoked attacks by and against college students, while still relatively uncommon, are happening more frequently. (See *de Haven, supra*, 35 J.C. & U.L. at p. 510.) One example occurred on April 16, 2007 at Virginia Polytechnic Institute and State University (Virginia Tech), when an emotionally disturbed underclassman barred the doors to a classroom building, then walked the halls shooting people, killing five professors and 24 students. (See *id.* at pp. 554-566.) He left over a dozen more wounded before taking his own life. (*Id.* at p. 566.) Although mass shootings on college campuses had occurred before, the record demonstrates that the Virginia Tech tragedy prompted schools to reexamine their campus security policies. A January 2008 report of the University of California Campus Security Task Force recommended several improvements in student mental health services, emergency communications, preparedness, and hazard mitigation across all campuses. In April 2008, almost exactly one year after the Virginia Tech shootings, a special review task force of the International Association of Campus Law Enforcement Administrators published a “Blueprint for Safer Campuses,” with several recommendations for assessing and responding to potential threats. Colleges across the country, including the public universities of California, created threat assessment protocols and multidisciplinary teams to identify and prevent campus violence. Thus, particularly after the Virginia Tech shootings focused national attention on the issue, colleges have been alert to the possibility that students, particularly those with mental health issues, may lash out violently against those around them. Even a comparatively rare classroom attack is a foreseeable occurrence that colleges have been equipping themselves to address for at least the past decade.

Whether a university was, or should have been, on notice that a *particular* student posed a foreseeable risk of violence is a case-specific question, to be examined in light of all the surrounding circumstances. Any prior threats or acts of violence by the student would be relevant, particularly if targeted at an identifiable victim. (See *Mullins v. Pine Manor College, supra*, 449 N.E.2d at p. 337.) Other relevant facts could include the opinions of

examining mental health professionals, or observations of students, faculty, family members, and others in the university community. Such case-specific foreseeability questions are relevant in determining the applicable standard of care or breach in a particular case. They do not, however, inform our threshold determination that a duty exists.

The second factor, “the degree of *certainty* that the plaintiff suffered injury” (*Rowland, supra*, 69 Cal.2d at p. 113, 70 Cal.Rptr. 97, 443 P.2d 561, italics added), may come into play when the plaintiff’s claim involves intangible harm, such as emotional distress. (*Kesner, supra*, 1 Cal.5th at p. 1148, 210 Cal.Rptr.3d 283, 384 P.3d 283.) Here, however, we are addressing claims for physical injuries that are capable of identification. (See *ibid.*)

The third factor is “the *closeness of the connection* between the defendant’s conduct and the injury suffered.” (*Rowland, supra*, 69 Cal.2d at p. 113, 70 Cal.Rptr. 97, 443 P.2d 561, italics added.) “Generally speaking, where the injury suffered is connected only distantly and indirectly to the defendant’s negligent act, the risk of that type of injury from the category of negligent conduct at issue is likely to be deemed unforeseeable. Conversely, a closely connected type of injury is likely to be deemed foreseeable.” (*Cabral, supra*, 51 Cal.4th at p. 779, 122 Cal.Rptr.3d 313, 248 P.3d 1170.) The negligence alleged here is the failure to prevent a classroom assault, either by controlling the perpetrator or warning the potential victim. Although the immediate cause of injury in such cases will be the perpetrator’s violent outburst, we have explained that the existence of an intervening act does not necessarily attenuate a defendant’s negligence. Rather, “the touchstone of the analysis is the foreseeability of that intervening conduct.” (*Kesner, supra*, 1 Cal.5th at p. 1148, 210 Cal.Rptr.3d 283, 384 P.3d 283.) When circumstances put a school on notice that a student is at risk to commit violence against other students, the school’s failure to take appropriate steps to warn or protect foreseeable victims can be causally connected to injuries the victims suffer as a result of that violence. Although a criminal act is always shocking to some degree, it is not completely unpredictable if a defendant is aware of the risk. (See, e.g., *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1077-1078, 60 Cal.Rptr.2d 263, 929 P.2d 582; cf. *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 758, 167 Cal.Rptr. 70, 614 P.2d 728 [crime committed after release of a potentially dangerous offender “is statistically foreseeable”].)

b. Policy Factors

Although *Rowland*’s foreseeability factors weigh in favor of recognizing a duty of care, we must also consider whether public policy requires a different result. (See *Kesner, supra*, 1 Cal.5th at pp. 1149-1150, 210 Cal.Rptr.3d 283, 384 P.3d 283; *Cabral, supra*, 51 Cal.4th at p. 781, 122 Cal.Rptr.3d 313, 248 P.3d 1170.) “A duty of care will not be held to exist even as to foreseeable injuries ... where the social utility of the activity concerned is so great, and avoidance of the injuries so burdensome to society, as to outweigh the compensatory and cost-internalization values of negligence liability.” (*Merrill v. Navegar, Inc., supra*, 26 Cal.4th at p. 502, 110 Cal.Rptr.2d 370, 28 P.3d 116; see *Parsons, supra*, 15 Cal.4th at p. 476, 63 Cal.Rptr.2d 291, 936 P.2d 70.)

(1) Some measure of *moral blame* does attach to a university's negligent failure to prevent violence against its students. “We have previously assigned moral blame, and we have relied in part on that blame in finding a duty, in instances where the plaintiffs are particularly powerless or unsophisticated compared to the defendants or where the defendants exercised greater control over the risks at issue.” (*Kesner, supra*, 1 Cal.5th at p. 1151, 210 Cal.Rptr.3d 283, 384 P.3d 283.) With the decline of colleges' in loco parentis role, adult students can no longer be considered particularly powerless or unsophisticated. “While the college will take a lead role in campus security and safety issues, ‘babysitting’ would defeat the proper role of most colleges in most instances. Most often the proper student/college relationship is one of *shared* responsibility.” (Lake, *supra*, 64 Mo. L.Rev. at p. 26.) Nevertheless, compared to students, colleges will typically have access to more information about potential threats and a superior ability to control the environment and prevent harm. This disparity in knowledge and control tips the balance slightly in favor of duty.

30(2) “The overall *policy of preventing future harm* is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible. The policy question is whether that consideration is outweighed, for a category of negligent conduct, by laws or mores indicating approval of the conduct or by the undesirable consequences of allowing potential liability.” (*Cabral, supra*, 51 Cal.4th at pp. 781-782, 122 Cal.Rptr.3d 313, 248 P.3d 1170, italics added.) UCLA argues imposing a duty of care would discourage colleges from offering comprehensive mental health and crisis management services. Rather than become engaged in the treatment of their mentally ill students, colleges would have an incentive to expel anyone who might pose a remote threat to others. We understand that the recognition of a duty of care will force schools to balance competing goals and make sometimes difficult decisions. The existence of a duty may give some schools a marginal incentive to suspend or expel students who display a potential for violence. It might make schools reluctant to admit certain students, or to offer mental health treatment. But colleges' decisions in this area are restricted to some extent by laws such as the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.). In addition, the market forces that drove colleges across the country to adopt sophisticated violence prevention protocols in the wake of the Virginia Tech incident would likely weigh against the dismantling of these protections. Colleges and universities also may have options short of expelling or denying admission to deal with potentially violent students. What constitutes reasonable care will vary with the circumstances of each case. On the whole, however, if such steps can avert violent episodes like the one that occurred here, recognizing a duty serves the policy of preventing future harm.

UCLA also predicts that legal recognition of a duty might deter students from seeking mental health treatment, or being candid with treatment providers, for fear that their confidences would be disclosed. To a large extent, however, the conditions that might influence student perceptions about confidentiality already exist. Psychotherapists' duty to warn about patient threats is well established in California. Indeed, despite fears that this duty would deter people from seeking treatment and irreparably damage the psychotherapist-patient relationship (see, e.g., *Tarasoff, supra*, 17 Cal.3d at pp. 458-460, 131 Cal.Rptr. 14, 551 P.2d

334 (dis. opn. of Clark, J.)), empirical studies have produced “no evidence thus far that patients have been discouraged from coming to therapy, or discouraged from speaking freely once there, for fear that their confidentiality will be breached” (Buckner & Firestone, “*Where the Public Peril Begins*” 25 Years After Tarasoff, 21 J. Legal Med. 187, 221. Moreover, as the record in this case demonstrates, threat assessment and violence prevention protocols are already prevalent on university campuses. Recognizing that the university owes its students a duty of care under certain circumstances is unlikely to appreciably change this landscape.

(3) Which leads to the next policy factor: the *burden* that recognizing a tort duty would impose on the defendant and the community. (See *Rowland*, *supra*, 69 Cal.2d at p. 113, 70 Cal.Rptr. 97, 443 P.2d 561.) UCLA and some amici curiae place considerable weight on this factor, arguing it would be prohibitively expensive and impractical to make university professors and administrators the “insurers” of student safety. But the record shows that UCLA, like other colleges across the country, has *already* developed sophisticated strategies for identifying and defusing potential threats to student safety. The school created multidisciplinary teams of trained staff members and professionals for this very purpose. Indeed, one of these teams was closely monitoring Thompson's behavior. UCLA also expressly marketed itself to prospective students, and their parents, as “one of the safest campuses in the country.” These enhanced safety measures came at a price, but students paid the bill. In 2007, schools in the University of California system raised mandatory registration fees 3 percent to improve student mental health services, and they planned further increases to implement all of the violence prevention measures recommended by the Campus Security Task Force. Because the record reflects that colleges have already focused considerable attention on identifying and responding to potential threats, and have funding sources available for these efforts, it does not appear that recognizing a legal duty to protect students from foreseeable threats would pose an unmanageable burden.

The duty we recognize here is owed not to the public at large but is limited to enrolled students who are at foreseeable risk of being harmed in a violent attack while participating in curricular activities at the school. Moreover, universities are not charged with a broad duty to prevent violence against their students. Such a duty could be impossible to discharge in many circumstances. Rather, the school's duty is to take *reasonable* steps to protect students when it becomes aware of a *foreseeable* threat to their safety. The reasonableness of a school's actions in response to a potential threat is a question of breach.

* * *

Accordingly, an examination of the *Rowland* factors does not persuade us to depart from our decision to recognize a tort duty arising from the special relationship between colleges and their enrolled students. Specifically, we hold that colleges have a duty to use reasonable care to protect their students from foreseeable violence during curricular activities.⁷ We emphasize that a duty of care is not the equivalent of liability. Nor should our holding be read to create an impossible requirement that colleges prevent violence on their campuses. Colleges are not the ultimate insurers of all student safety. We simply hold that they have a

duty to act with reasonable care when aware of a foreseeable threat of violence in a curricular setting. Reasonable care will vary under the circumstances of each case. Moreover, some assaults may be unavoidable despite a college's best efforts to prevent them. Courts and juries should be cautioned to avoid judging liability based on hindsight.

* * *

III. DISPOSITION

The decision of the Court of Appeal is reversed. The case is remanded for further proceedings consistent with this opinion.

CONCURRING OPINION BY CHIN, J.

CHIN, J.

I agree with the majority that universities have a duty to warn or protect their students from foreseeable acts of violence “in the classroom.” (Maj. opn., *ante*, at 230 Cal.Rptr.3d at p. 424, 413 P.3d at p. 663.) However, for several reasons, I do not join the majority opinion insofar as it would extend this duty beyond the classroom, to encompass more broadly “curricular activities” (*ibid.*) and activities “closely related to [the] delivery of educational services” (*id.* at 230 Cal.Rptr.3d at 429, 413 P.3d at p. 667).

First, we need not decide whether the duty extends beyond the classroom, because the attack in this case occurred in a classroom and, as the majority states, “[t]he negligence alleged here is the failure to prevent a *classroom* assault.”

* * *

Second, in terms of the various factors courts apply to determine whether to impose a duty as a matter of public policy, activities outside the classroom differ in potentially significant ways from activities inside the classroom. As the majority explains, among the relevant factors is the extent of the defendant's control in the particular setting over the environment and third party behavior. (Maj. opn., *ante*, at 230 Cal.Rptr.3d at pp. 429-431, 434-435, 413 P.3d at pp. 668-669, 672.) As the majority also explains, “[p]erhaps more than any other place on campus, colleges can be expected to retain a measure of control over the classroom environment.” (*Id.* at 230 Cal.Rptr.3d at p. 431, 413 P.3d at p. 669.) Implicit in this statement is recognition that the extent of a university's control over the environment and student behavior is likely to be considerably less outside of the classroom. Indeed, the extent of a university's control in a nonclassroom setting varies considerably depending on the particular activity and the particular setting. It may be that, as to any given nonclassroom activity, a university's control is sufficient, from a public policy perspective, to impose a duty to protect or warn. But I would leave that question for a case that presents the issue on concrete facts, rather than broadly conclude, in a case involving *classroom* activity, that a university's control in nonclassroom settings is sufficient to impose a duty to protect or to warn.

Finally, the majority's conclusion seems likely to create confusion, because the majority offers no guidance as to which nonclassroom activities qualify as either “curricular” (maj. opn., *ante*, at 230 Cal.Rptr.3d at pp. 423-424, 413 P.3d at p. 663.) or “closely related to [the]

delivery of educational services” (*id.* at 230 Cal.Rptr.3d at p. 429, 413 P.3d at p. 667.), or what factors are relevant to this determination. This omission no doubt results from the circumstance, as already noted, that this case involves classroom activity, and that the majority is thus deciding the duty question as to nonclassroom activities in the abstract, without any concrete facts to guide its analysis. For this reason, and the others mentioned above, although I concur in the judgment, I do not join the majority's conclusion that a university's duty to warn or protect extends beyond the classroom, to encompass more broadly “curricular activities” (*id.* at 230 Cal.Rptr.3d at p. 424, 413 P.3d at p. 663) and activities “closely related to [the] delivery of educational services” (*id.* at 230 Cal.Rptr.3d at p. 429, 413 P.3d at p. 667).

CHAPTER 5 EXERCISES
Rules and Standards

Exercise 1. Judicial Pastures

Consider a bright-line rule which prohibits a person 70 years or older from being elected or appointed to judicial office.

For example, under the Michigan Constitution, “[n]o person shall be elected or appointed to a judicial office after reaching the age of 70 years.” Mich. Const. art. VI, § 19(3).

Likewise, the applicable Michigan statute provides, in relevant part, that “[a] person shall not be eligible to the office of judge of the circuit court unless . . . , at the time of election, [the person] is less than 70 years of age.” Mich. Comp. Laws § 168.411(1).

What are the downsides of such a rule? What are its advantages? Draft something more like a standard in its place.

Exercise 2. The Ambiguity of Best Family Law

In most if not all states, child custody determinations are guided by a “best interests of the child” standard. For example, a Colorado statute provides that “[t]he court shall determine the allocation of parental responsibilities, including parenting time and decision-making responsibilities, in accordance with the best interests of the child”

Colo. Rev. Stat. Ann. § 14-10-124 (West).

1. *What are the reasons for adopting a standard in these circumstances instead of a rule? Its disadvantages?*
2. *What would be the advantages and disadvantages of a rule presuming that joint custody is best for every child (but allowing that presumption to be challenged)?*
3. *Can you imagine any scenarios in which you, as an advocate, might prefer that a child custody determination be governed by a ‘rule’ instead of this standard?*
4. *When a standard is followed by a list of relevant factors (see below for an example), does it change the nature of the standard, making it more rule-like? Why might a legislature include such a list of factors?*

The Colorado statute, for example, provides that “In determining the best interests of the child for purposes of parenting time, the court shall consider all relevant factors, including:

- (I) The wishes of the child's parents as to parenting time;
- (II) The wishes of the child if he or she is sufficiently mature to express reasoned and independent preferences as to the parenting time schedule;
- (III) The interaction and interrelationship of the child with his or her parents, his or her siblings, and any other person who may significantly affect the child's best interests;
- (IV) The child's adjustment to his or her home, school, and community;
- (V) The mental and physical health of all individuals involved, except that a disability alone shall not be a basis to deny or restrict parenting time;
- (VI) The ability of the parties to encourage the sharing of love, affection, and contact between the child and the other party; except that, if the court determines that a party is acting to protect the child from witnessing domestic violence or from being a victim of child abuse or neglect or domestic violence, the party's protective actions shall not be considered with respect to this factor;
- (VII) Whether the past pattern of involvement of the parties with the child reflects a system of values, time commitment, and mutual support;
- (VIII) The physical proximity of the parties to each other as this relates to the practical considerations of parenting time;
- (IX) Repealed by Laws 2013, Ch. 218, § 2, eff. July 1, 2013.
- (X) Repealed by Laws 2013, Ch. 218, § 2, eff. July 1, 2013.
- (XI) The ability of each party to place the needs of the child ahead of his or her own needs.” Colo. Rev. Stat. Ann. § 14-10-124 (West)

Exercise 3. Effective Assistance Sixth Amendment

Under the Sixth Amendment, a defendant has the right to the “assistance of counsel for his defense.” In applying this right, the Supreme Court has held that “[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The Court explained:

More specific guidelines are not appropriate. The Sixth Amendment refers simply to “counsel,” not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See *Michel v. Louisiana*, 350 U.S. 91, 100–101, 76 S.Ct. 158, 163–164, 100 L.Ed. 83 (1955). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See *Cuyler v. Sullivan*, supra, 446 U.S., at 346, 90 S.Ct., at 1717. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See *Powell v. Alabama*, 287 U.S., at 68–69, 53 S.Ct., at 63–64.

These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) (“The Defense Function”), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See *United States v. Decoster*, 199 U.S. App. D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle v. Isaac*, 456 U.S. 107, 133–134, 102 S.Ct. 1558, 1574–1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.” See *Michel v. Louisiana*, supra, 350 U.S., at 101, 76 S.Ct., at 164. There are countless ways to provide effective assistance in any

given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See *Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299, 343 (1983).

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland v. Washington, 466 U.S. 668, 687–90, 104 S. Ct. 2052, 2064–66 (1984).

1. *What values are competing here?*
2. *Consider the following excerpts from the judicial opinion. What objectives are served by each of these arguments? What are the best counterarguments you can think of in response to these arguments?*
 - a. “Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.”
 - b. “The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges.”
 - c. “Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel,

discourage the acceptance of assigned cases, and undermine the trust between attorney and client.”

3. *Use table 5.3 to make delegation-related arguments about the use of a standard in this context. Does this standard effectively delegate responsibility for the role of the counsel in the criminal context?*

Exercise 4. Defining Outrageousness

Torts

A claim for intentional infliction of emotional distress requires that the defendant’s conduct be “extreme and outrageous.” The Restatement (Third) of Torts defines extreme and outrageous conduct as that which is “beyond the bounds of human decency such that it would be regarded as intolerable in a civilized society.” § 46. As one court argued, “[t]he tort is as limitless as the human capacity for cruelty.”

1. *Analyze the advantages and disadvantages of this sort of broad standard for a tort. What are the reasons for defining the tort in this way?*
2. *Is optimal deterrence best served by a standard here? Might it be better served by a rule? Use the argument shown in table 5.2 in this context.*
3. *Make an argument that flexibility is more important than uniformity in this instance. Could you make the reverse argument as well?*
4. *Can you think of a way to draft something more like a rule that would be effective for this tort?*

Exercise 5. Criminal Preparations

Criminal Law

In criminal law, a defendant may be punished for an “attempt” to commit a crime. In most jurisdictions, a person is guilty of criminal attempt if he engages in conduct which constitutes a “substantial step” toward the commission of the crime. Courts have long struggled with what distinguishes “mere preparation” from a “substantial step.”

Can you describe this doctrine as a “rule”? As a “standard”?

In describing what constitutes a substantial step, the Model Penal Code provides that “[w]ithout negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:”

- (a) lying in wait, searching for or following the contemplated victim of the crime;
- (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
- (c) reconnoitering the place contemplated for the commission of the crime;
- (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
- (e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;
- (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
- (g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

§ 5.01. Criminal Attempt., Model Penal Code § 5.01

1. *What purposes are served by setting forth these specific examples of a “substantial step”?*
2. *What are the possible reasons why many states have not chosen to adopt these enumerated categories?*
3. *Can you think of any ways in which this rule/standard arguably serves the objective of deterring crime? In other words, how might a broader or more specific definition of attempt deter crime?*
4. *How might you use the values of flexibility and individualization, or uniformity and certainty, to support the broad formulation of this doctrine? To support a more rule-like formulation?*

Exercise 6. Categorizing Relationships
Domestic Violence

A domestic violence statute prohibits “intentionally inflicting bodily harm against a family or household member.” The definition of a “family or household member” includes someone with whom the defendant has had a “significant romantic or sexual relationship.” Penalties for committing this crime are harsher than typical assault statutes.

1. *Consider how you might choose to interpret the term “significant romantic or sexual relationship” if you were a judge. What are the advantages of creating a highly specific rule to define the term? The disadvantages?*

2. *In fact, the statute specifies the following factors as relevant to the determination:*

- The length of time of the relationship
- The type of relationship;
- Frequency of interaction between the parties;
- If the relationship has terminated, length of time since termination

Is this list of factors sufficient? Are there disadvantages to naming specific factors?

3. *Consider violence which occurs between two unrelated people who live together in a home for recovering addicts. They are roommates but have no other relationship. If one roommate intentionally inflicts harm on the other, should this statute apply?*

4. *Consider violence which occurs between two people who do not live together but have had an on-again-off-again sexual relationship for a period of more than a year. Should the statute apply? Why or why not?*

5. *What do you imagine are the underlying purposes of the statute? Why do you think its scope might be limited in the ways identified above? How are its objectives better served by a rule? By a standard?*

Exercise 7. Jury Composition

Equal Protection

Consider the rule prohibiting discrimination in selecting members of a jury. *In Batson v Kentucky*, the Supreme Court held that a trial court should use a three-step burden-shifting analysis to determine whether the prosecutor engaged in discrimination. First, the party opposing the strike of a juror must make out a prima facie case of discrimination. Then, the party who struck the juror must come forward with a racially neutral reason for the strike. Third, the defendant must show that the discrimination was purposeful. *Batson v. Kentucky*, 476 U.S. 79, 95-98 (1984).

1. *Think about the first element of a Batson challenge—the requirement that the defendant make out a prima facie case of discrimination. In ‘rules and standards’ terms, think about the possible ways you might define that prima facie requirement. Would it be advantageous to specify particular acts that meet the requirement? For example, if the prosecution were to strike a racial minority from the jury? Only if that juror was the same race as the defendant? Only if the juror was the only racial minority of that type on the jury? And so on. What are the reasons that support using a rule for this analysis and those that support leaving it as a broad standard?*
2. *What objectives are served by this part of the doctrine? How does a rule versus a standard—in this context—further the objective of deterrence? Is one form more likely to deter discrimination by prosecutors than another? Why or why not?*

Exercise 8. Fatal Felonies

Criminal Law

Under common law felony murder doctrine, a killing that occurs in the commission or attempted commission of a felony can be punished as murder, even if the killing is unintentional. The term “in the commission of” has been developed in some jurisdictions to mean that the death and the felony must be closely connected in time, place, and causal relation.

1. *Analyze the felony murder rule using what you’ve learned in the rules and standards chapter. In what way does this doctrine operate like a “rule”? And in what ways like a “standard”?*
2. *Can you draft a more “standard-like” version of doctrine for punishing defendants for these sorts of deaths? A more “rule-like” version?*
3. *How does the felony-murder rule deter potential criminals? How does a rule or a standard better serve the deterrence objective?*

Exercise 9. Probabilities

Fourth Amendment

Read the Supreme Court’s opinion in Illinois v. Gates, 462 U.S. 229 (1983). Explain why the Court rejected a “two-part test” and instead adopted a “totality-of-the-circumstances” approach for evaluating probable cause. For example, the Court states that “Rigid legal rules are ill-suited to an area of such diversity. One simple rule will not cover every situation.” Do you agree with the Court’s reasoning? Why or why not?

CHAPTER 6 EXERCISES
Resolving Regime Conflicts

Exercise 1. Criminal Speech
First Amendment and Criminal Law

Consider the conflict between principles of free speech contained in the First Amendment and public safety policies and considerations.

1. *Under the “true threat” doctrine, threats of violence are not protected by the First Amendment. In determining whether speech falls into the category of a ‘true threat’ courts are thus determining when the value of free speech is outweighed by safety concerns—the need to protect people. What techniques might a court use to determine when one should be elevated over the other?*

*Suppose you represented a defendant—a racial minority—who has been convicted of crimes for making terrorist threats and witness intimidation based on his rap lyrics. The rap song is titled “F**k the Police,” and was uploaded to YouTube by a third party. The lyrics express hatred toward the Pittsburgh police and contained descriptions of killing police informants and police officers.*

What facts would you want to know to support an argument that the free speech value of the song outweigh its danger? Or to support the opposite argument? What would a resolution of the issue look like under the conflict resolution techniques identified in the Regime Conflicts chapter? Are any of them inappropriate in the context of this case? If so, why?

2. *Consider the case of Michelle Carter, who repeatedly encouraged her boyfriend to commit suicide. Carter was convicted of involuntary manslaughter based on her verbal conduct—mostly via texts to her boyfriend—that was deemed to be the “but for” cause of his death. On appeal, Carter’s defense attorneys argued that her involuntary manslaughter conviction violated her right to free speech under the First Amendment. Why didn’t this argument succeed? Think about it in terms of regime conflicts. What principles, policies, doctrines, or other considerations are in opposition here? Which conflict resolution techniques seem appealing? Which do not? Why?*
3. *What makes either one of these cases potentially difficult? If we value human life over free speech, why isn’t this sort of conflict easy to resolve?*

Exercise 2. Extent of Religious Freedom First Amendment/Free Exercise Clause

In 2012, the Supreme Court recognized the existence of a “ministerial exception” to employment discrimination laws. Lower courts had already held that the exception, “grounded in the First Amendment, [] precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188, 132 S. Ct. 694, 705–06 (2012). The Supreme Court reasoned in part, as follows:

We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

* * *

The EEOC and Perich also contend that our decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), precludes recognition of a ministerial exception. In *Smith*, two members of the Native American Church were denied state unemployment benefits after it was determined that they had been fired from their jobs for ingesting peyote, a crime under Oregon law. We held that this did not violate the Free Exercise Clause, even though the peyote had been ingested for sacramental purposes, because the “right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *Id.*, at 879, 110 S.Ct. 1595 (internal quotation marks omitted).

It is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. See *id.*, at 877, 110 S.Ct. 1595 (distinguishing the government's regulation of “physical acts” from its “lend [ing] its power to one or the other side in controversies over religious authority or dogma”). The contention

that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 188–90, 132 S. Ct. 694, 706–07 (2012)

1. *What techniques (whether explicit or implicit) is the Court using to resolve the conflict between the First Amendment and federal employment discrimination laws?*
2. *Consider other techniques you might use as a judge to reach the opposite result. Think broadly about conflicts between the Constitution and federal legislation—what techniques can be used to push the conflict past the simple ‘Constitution over statute’ hierarchy?*
3. *In considering this issue, think about Cheryl Perich, a former teacher who was the subject of the Hosanna-Tabor case. She alleged that the school fired her in violation of the Americans with Disabilities Act (ADA) after she was diagnosed with narcolepsy. Or consider Kristin Biel, fired from her fifth-grade teaching position at a Catholic school after she told her employer she had breast cancer and had to miss work to undergo chemotherapy. She also tried to bring an action under the ADA. Or the teacher at a Jewish primary school who was fired after she was diagnosed with a brain tumor, and brought an action under the ADA. All three of these teachers were involved in teaching some religious curriculum. How might you use these instances to support a different means of resolving the regime conflict?*
4. *The Court frames employment discrimination laws as “imposing an unwanted minister” on a religious institution. How could you reframe the issue to make a stronger case for no ministerial exception?*
5. *Compare the framing here to the framing in the peyote case (Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990)), which the Court distinguishes in the excerpt above. How does that framing alter the resolution of the regime conflict?*

Exercise 3. Digital Privacy Fourth Amendment

In 2014, the Supreme Court considered whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473 (2014).

At the time the Court considered this issue, existing precedent had established a ‘search incident to arrest’ exception justifying warrantless searches. Under that doctrine, an arresting officer can search a person arrested in order to remove any weapon and seize any

evidence on the arrestee's person. See, for example, the Supreme Court's description of the doctrine in *United States v. Robinson*, 414 U.S. 218, 235, 94 S. Ct. 467, 477, 38 L. Ed. 2d 427 (1973):

The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.

In *Riley*, the Supreme Court considered whether to apply that "categorical rule" to data stored on cell phones.

1. *What artifacts (values, principles, doctrines, considerations, etc.) are in conflict in this situation?*
2. *You may already be aware of the Court's conclusion in Riley that a cell phone does not fall within the 'search incident to arrest' exception. Without reviewing that opinion, think about what techniques the Court might have used, or the defendant's attorneys might have used, to exclude cell phones found on the person of an arrestee from the search incident to arrest exception. You can follow up by looking at the opinion to see what techniques the Court did use. If you do, consider what regime conflict technique the Court uses to reject options proposed by the United States and California as the prosecutors in the case (which consolidated a federal and state case).*
3. *If you were the prosecution, what techniques might you have used to argue that the cell phone was covered by the search incident to arrest exception?*
4. *Can you think of instances where a particular technology has influenced a change in regime conflict resolution techniques?*

Exercise 4. Challenges to Paternity Family Law

Consider the conflict between (1) the common law presumption of legitimacy, which presumes that a husband is the father of a child whose biological mother is the husband's wife (a child born into the marriage); and (2) the interests of the biological father.

A 2011 appellate court in Florida held as follows:

Florida law is very specific regarding who may bring paternity suits. The statutes governing paternity contain language indicating biological fathers may not challenge the paternity of children born to intact marriages. For example, section 742.011, Florida Statutes (2010), states paternity suits may be brought only “to determine the paternity of the child when paternity has not been established by law or otherwise.” Paternity is “otherwise” established when the child is born to an intact marriage and recognized by the husband as his own child. *See G.F.C. v. S.G.*, 686 So.2d 1382, 1385 (Fla. 5th DCA 1997). In such circumstances, the husband is considered to be the child's “legal” father, regardless of whether he is the biological father. *See Lander v. Smith*, 906 So.2d 1130, 1131 n. 1 (Fla. 4th DCA 2005) (noting the mother's husband at the time of a child's birth is the “legal” father). In addition, section 742.10, Florida Statutes (2010), states paternity proceedings should be brought only to determine the “paternity for children born out of wedlock.”

Reading these provisions together, they indicate a child born to an intact marriage cannot be the subject of a paternity proceeding brought by a biological father. This interpretation is supported by caselaw.

* * *

Here, it is undisputed that the child was born during the mother's marriage to the legal father. Accordingly, despite the fact that the legal father was not the child's biological father, this paternity suit is not a cognizable cause of action.

1. *Specifically identify the values that are in tension here. How does the court resolve the tension between these values?*
2. *Suppose you represent a biological father in Florida who seeks to establish paternity over his child. The trial court held that the opinion quoted above barred your client's paternity suit. The case is now on appeal before the Florida Supreme Court. What regime conflict resolution strategies will you suggest on appeal to contest this decision (beyond the fact that the Florida Supreme Court is not bound by the appellate court's decision)? Policy judgment? Balancing? Etc.*

Exercise 5. Yahoo!

Wills/Stored Communications Act

John, a 43-year old man, died in a bicycle accident. He did not have a will. The personal representatives of his estate—his siblings—sued Yahoo! for access to the contents of his email account. John had left no instructions regarding treatment of the account. Yahoo! declined to provide access to the account, claiming that it was prohibited from doing so by certain requirements of the Stored Communications Act (SCA), 18 U.S.C. §§ 2701 et seq. Yahoo! also maintained that the terms of service governing the e-mail account provided it with discretion to reject the personal representatives' request. The trial court ruled that

disclosure of the account was prohibited by the terms of the SCA. The SCA restricts the disclosure of stored communications and prohibits entities like Yahoo! from voluntarily disclosing the contents unless certain exceptions apply.

At issue here is the “lawful consent” exception (a provider may divulge a record with the lawful consent of the customer or subscriber), and whether such consent can be implied under the circumstances. In other words, John gave no actual consent for his siblings to access his email, but can consent be implied when his siblings are the personal representatives of his estate?

On appeal, the Supreme Judicial Court of Massachusetts reasoned as follows:

We thus are confronted with the novel question whether lawful consent for purposes of access to stored communications properly is limited to actual consent, such that it would exclude a personal representative from consenting on a decedent's behalf. We conclude that interpreting lawful consent in such a manner would preclude personal representatives from accessing a decedent's stored communications and thereby result in the preemption of State probate and common law. Absent clear congressional intent to preempt such law, however, there is a presumption against such an interpretation. See *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001) (“[R]espondents emphasize that the Washington statute involves both family law and probate law, areas of traditional [S]tate regulation. There is indeed a presumption against pre-emption in areas of traditional [S]tate regulation such as family law”); *United States v. Texas*, 507 U.S. 529, 534, 113 S.Ct. 1631, 123 L.Ed.2d 245 (1993) (“[s]tatutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident” [citation omitted]). The statutory language and legislative history of the lawful consent exception in the SCA do not evidence such a congressional intent.

Presumption against preemption. In interpreting a Federal statute, we presume that Congress did not intend to intrude upon traditional areas of State regulation or State common law unless it demonstrates a clear intent to do so. See *Egelhoff*, 532 U.S. at 151, 121 S.Ct. 1322; *Texas*, 507 U.S. at 534, 113 S.Ct. 1631; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977) (“we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress” [citation omitted]); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 96 L.Ed. 1294 (1952) (“Statutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident”). This presumption ensures that the “[F]ederal-[S]tate balance ... will not be disturbed unintentionally by Congress or unnecessarily by the courts” (citation omitted). See *Jones*, *supra*.

Congress enacted the SCA against a backdrop of State probate and common law allowing personal representatives to take possession of the property of the estate. To construe lawful consent as being limited to actual consent, thereby preventing personal representatives from gaining access to a decedent's stored communications, would significantly curtail the ability of personal representatives to perform their duties under State probate and common law. Most significantly, this interpretation would result in the creation of a class of digital assets—stored communications—that could not be marshalled. Moreover, since e-mail accounts often contain billing and other financial information, which was once readily available in paper form, an inability to access e-mail accounts could interfere with the management of a decedent's estate. See Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 *Fordham L. Rev.* 799, 811 (2014) (noting importance of access to online accounts to individuals trying to manage deceased person's estate).

Nothing in the statutory language or the legislative history of the SCA evinces a clear congressional intent to intrude upon State prerogatives with respect to personal representatives of a decedent's estate.

Ajemian v. Yahoo!, Inc., 478 Mass. 169, 177–80, 84 N.E.3d 766, 773–75 (2017) (footnotes omitted).

1. *What policies, principles, doctrines, or considerations are in conflict here?*
2. *What conflict resolution techniques is the court using to decide this issue?*
3. *If you were an advocate for Yahoo!, what arguments might you have made to persuade the court to reach the opposite conclusion?*
4. *How does the court rely on traditional state versus federal roles to help resolve the conflict?*

Exercise 6. Sentencing Quandary

Criminal Procedure

The Federal Rules of Criminal Procedure give the district court judge the power to accept or reject a plea agreement. The court has “broad discretion” to accept or reject a plea agreement and is not required to accept any agreement between the parties. The Federal Rules provide no additional guidance.

Defendant was charged with three counts of distributing heroin, two counts of distributing fentanyl, and one count of being a felon in possession of a firearm. He had a long history of criminal activity, convicted seven times as a juvenile and eighteen times as an adult, and many of those convictions were drug-related. The

defendant reached an agreement with the prosecution to plead guilty to one count of heroin distribution only, and the remaining charges were dropped.

1. *What values (or policies, principles, etc.) are at stake in this sentencing decision? Identify specific regimes in conflict with one another here.*
2. *Now imagine you are a judge faced with accepting or rejecting this plea agreement. You think that the agreement was made purely out of convenience, and that it is too lenient, particularly in light of the current opioid crisis and the defendant's past criminal record. What techniques might you use to justify rejecting the plea agreement?*

Exercise 7. Reunification Parental Rights

In some jurisdictions, courts use a “cost-benefit analysis” to determine whether the state, through its social services agency, has made reasonable efforts to reunify a parent with a child in foster care.

Suppose that you represent a father who wants to be reunited with his young child. The father is currently incarcerated as a sex offender, due to be released in a year. The family court ruled that he had not made “sufficient progress to make it possible for the ward to return safely home,” despite reasonable efforts by the state agency (DHS). The court noted, in particular, that he needed a psychosexual examination to determine whether he would pose a danger to the child. Without that examination, the court granted DHS’s request to delay reunification. The father argues that DHS did not make reasonable efforts toward reunification. But the costs of fully evaluating and treating the father were extremely high, and DHS argued those costs justified providing full services only after his release from prison.

1. *What are the “costs” and “benefits” the court should consider? How might your answer differ if you were representing DHS as opposed to the father? For example, what information would you want in order to support an argument that under these circumstances, the cost-benefit analysis favors the father?*
2. *Evaluate whether it is appropriate to use a ‘cost-benefit’ analysis in these circumstances.*
3. *Assume that the costs of providing in-prison services are extremely high, that the father’s chances of recovering sufficiently to be a capable parent are low, and that the child is currently placed in a stable, loving foster home. What arguments might you make to convince an appellate court that the cost-benefit analysis is improper? What other sort of test (other than cost-benefit) might you suggest that would better protect the rights of parents?*

Exercise 8. Drug Policies

Fourth Amendment

Read the Supreme Court's decision in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), where the Court concludes that a school's suspicion-less drug testing policy (where student athletes are randomly tested for drug use) is constitutional.

What are the "regimes" at odds in this case? What techniques does the court use to resolve the conflicts between those competing principles, policies, doctrines, values, and other considerations? Is the opinion persuasive? What techniques might you have used to persuade the Court to reach a different decision?

Exercise 9. Surrogacy

Family Law

For a deeper look at regime conflict resolution, read the cases addressing the validity of surrogacy contracts. These cases seek to reconcile contract law, state statutory law, and public policy. *See e.g., In re Baby*, 447 S.W.3d 807 (Tenn. 2014); *In re the Paternity of F.T.R.*, 833 N.W.2d 634 (2013); *Matter of Baby M.*, 537 A.2d 1227 (1988).

CHAPTER 7 EXERCISES
Interpretation

Exercise 1. Miles and Miles
Family Law

Two parents were in the process of divorce and custody proceedings when the mother moved with their child to a new residence. The father filed an objection to the “unauthorized relocation.” Under the state’s relocation statutes, under certain circumstances notice is required before a child can be moved:

This Subpart shall apply to a proposed relocation when any of the following exist:

* * *

(2) There is no court order awarding custody and there is an intent to establish the principal residence of a child at any location within the state that is at a distance of more than seventy-five miles from the domicile of the other parent.

The father objected when the mother moved with the child from New Orleans to Baton Rouge. The Court then had to determine whether the move to Baton Rouge was covered by the state’s relocation statute. The mother argued that the move was under seventy-five miles and thus did not trigger the relocation act requirements, while the father argued that the move was over seventy-five miles. The disagreement rested on the interpretation of “miles.” Does it refer to miles “as the crow flies,” or calculated by roadway miles using the shortest route available? By road, the distance was over seventy-five miles, but by direct line on a map the distance was less.

1. *How would you frame the essential interpretive challenge here?*
2. *How do these facts shape the process of interpretation of the term “miles” here? Are there any other facts you’d like to know?*
3. *What argument would you make about the purpose of this statute, and how it supports the roadway measurement if you represented the father? To support the ‘crow flies’ measurement if you represented the mother?*
4. *How might your arguments differ if you used a textualist approach to interpretation?*
5. *What policies support each side of the argument?*
6. *Think about individuation, as discussed in this chapter. How would using just the word, a phrase, or the full sentence affect interpretation of the statute?*

Exercise 2. Deadlines

Consider a statute that requires an action “before December 31.” First, imagine a client who completed the action on December 31. Without any context, what arguments can you think of that would support your client’s argument that her December 31 action complied with the statute? What facts would you like to know to help support your argument?

Now consider how those arguments might be different in the following situation:

- The Federal Land Policy and Management Act (FLMPA) (1976) requires that mining claims located prior to its enactment be initially recorded with the Bureau of Land Management (BLM) within three years of the enactment, and then “prior to December 31” of every year after that, the claimant must file a notice of intention to hold the claim. Failure to complete this requirement results in an abandonment of the claim.
- Before the FLMPA was enacted in 1976, it was estimated that more than 6 million unpatented mining claims existed on public lands other than National Forests, and more than half the land in the National Forest System was thought to be covered by such claims. There was no simple way to determine which public lands were subject to valid mining claims. The FLMPA established a federal recording system designed to eliminate stale mining claims and provide federal land managers with updated information about the status of public lands.
- The plaintiffs purchased 10 mining claims on public lands in 1966, valued at several million dollars at the time of litigation. They satisfied the FLMPA’s initial recording requirement and put their claim on record. However, at the end of 1980, their first year they were obligated to file the annual notice of intention to hold the claim, the plaintiffs waited until December 31 to file it.
- They subsequently received a letter from the BLM telling them their claims had been declared abandoned and void due to the late filing.
- Plaintiffs alleged that a BLM employee had told them the filing could be made on or before December 31.
- An older version (1978) of a BLM pamphlet stated that filings had to be made “on or before December 31.” That was revised to say “on or before December 30” in later pamphlets.

How might textualism and purposivism lead you to different interpretations? Which interpretive approach would you favor if you represented the claimant? The government? How does a more lenient interpretation affect the purpose of the statute?

Exercise 3. Ninja Criminal Law

A man living in a group home for recovering addicts accidentally killed his roommate while practicing martial arts moves in the bedroom with his ninja knife. The men shared a room but were not related to each other; the home provided a sober living environment for men in recovery. The man pled guilty to criminally negligent homicide. During the sentencing phase, the court applied a statutory aggravator that allows sentencing above the presumptive range if the offense was a felony and “was committed against a spouse, a former spouse, or a member of the social unit made up of those living together in the same dwelling as the defendant.” On appeal, the defendant argued that the aggravator should not apply to his situation.

1. *What interpretive challenges do you see here?*
2. *Draft an argument in defense of the defendant. Why shouldn't the statute apply to his situation? What are the various interpretive techniques that best suit your argument? What are the purposes of this statute? Does the application here serve those purposes? Why or why not?*
3. *What other facts would you want to know to make the best argument possible for the defense? For the prosecution?*

Exercise 4. Junk Art Interpretation of town ordinance

A town ordinance prohibits real property owners from “leav[ing] or allow[ing] to remain on the property any motor vehicle which is [an] abandoned, junked, or hazardous motor vehicle.” A property owner claims that the vehicle on his property is a “lawn ornament” that does not fall within the ordinance.

What interpretive problems do you see with his claims? What are the best arguments/strategies you can think of that might support his position? What directives work in the property owner's favor, if any? Which text, policies, or principles? What facts or other information might make a difference to your analysis?

Exercise 5. How Dangerous? Criminal Law

Under criminal statutes in multiple jurisdictions, assault with a “dangerous weapon” carries a higher penalty than simple assault. Similarly, some sentencing provisions allow a sentence to be enhanced if a “dangerous weapon” was used.

1. *What are the interpretive challenges posed by the term here? What are the tensions and conflicts?*
2. *What's the likely purpose of this sort of enhanced penalty?*
3. *How broadly should "dangerous weapon" be interpreted? Why?*
4. *Consider the following:*
 - a. *A defendant who was HIV positive bit two officers. Should his teeth be considered a "dangerous weapon"? Does that correspond to the purposes of the statute? Why or why not? Does it make a difference whether the defendant knew he was HIV positive? Why?*
 - b. *What about tennis shoes? One defendant wearing tennis shoes kicked and punched a victim, continuing to kick the victim once the victim was on the ground, kicking his head with full force and stomping on the victim's head with the bottom of his shoe. Does a weapon need to be inherently dangerous to qualify? Why or why not? Do tennis shoes fit the purpose of the statute? Fit its text?*
 - c. *Can a defendant's hands be a "dangerous weapon"? Courts disagree on whether or not body parts can be considered dangerous weapons. What possible arguments support each side?*
 - d. *What about a sharpened pencil? Does it fit the text or the purpose of the school code below? A high school student was suspended for possession of a weapon on school property. She stabbed a classmate with a sharpened pencil in the neck, causing serious injuries. The School Code prohibited possession of any weapon, and defined the term weapon as including but not limited to "any knife, cutting instrument, cutting tool, explosive, mace, nunchaku, firearm, shotgun, rifle, and any other tool, instrument or implement capable of inflicting serious bodily injury." Does the context here make a difference? In other words, if this were not a school code but a general statute, would that change the outcome? Why or why not?*

Exercise 6. Killer Whales Endangered Species Act

Consider the Endangered Species Act, which protects listed endangered species and makes it unlawful to "take any such species within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1)(B). It further provides that "the term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." § 1532(19).

Lolita is an 8,000 pound killer whale who has lived at the Miami Seaquarium since 1970. She is about twenty feet long and lives in a tank about eighty feet wide and twenty feet deep. She was captured off the coast of Washington state when she was between three and six years old and she has already exceeded the median life expectancy for her species. Her species was recognized as endangered in 2005; in 2015 a “captive member” exception was removed from the ESA. Shortly thereafter, People for the Ethical Treatment of Animals (PETA) sued Seaquarium, arguing that it is perpetuating an unlawful “take” by harming and harassing Lolita, in violation of the ESA.

1. *What interpretive challenges do you see in this situation? What conflicts or tensions? Policy, principle, text, intent of the drafters?*
2. *What facts would you want to know that might affect your analysis? Does Lolita’s present quality of life matter in the analysis of whether she has been ‘taken’ under the act? Do her age and expected date of death?*
3. *How might a textualist approach lead you to a different conclusion than a purposivist approach?*
4. *Is it even possible to define the word “take” without considering the context of the taking? How much context do you need?*
5. *What would you want to know about other parts of the ESA to help you interpret this term?*

Exercise 7. The Definition of Sex Civil Rights Act

Title VII of the Civil Rights Act (passed in 1964) prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin,” leaving the courts to determine what is meant by the term “sex.”

In 2017, the Seventh Circuit held that a person who alleges employment discrimination on the basis of their sexual orientation has stated a claim for sex discrimination under Title VII. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017). Other courts had concluded that the Title VII’s prohibition against sex discrimination is distinct from discrimination based on sexual orientation; that discrimination claims based on sexual orientation were not cognizable under Title VII.

Read the majority opinion written by Chief Judge Wood, the concurring opinion of Judge Posner, and the dissenting opinion written by Judge Sykes. Identify the interpretive challenges posed by this issues: what are the biggest conflicts and tensions? Identify the

interpretive techniques used by each opinion. What does Judge Posner add to the majority opinion? Why? What does the dissent rely upon to support its analysis?

*Next, you might read and compare Justice Gorsuch's opinion in *Bostock v. Clayton County, Georgia*, --- U.S. ---- (2020), decided just as these exercises were being finalized.*

Exercise 8. Jury Tampering

One state's jury tampering statute provides that, "A person commits jury tampering if, with intent to influence a juror's vote, opinion, decision, or other action in a case, he attempts directly or indirectly to communicate with a juror other than as part of the proceedings of the trial of the case."

Two people stood outside a courthouse in a major city and asked people entering the courthouse whether they were reporting for jury duty. If they answered yes, the two would hand them a brochure discussing the concept of jury nullification. The brochure defined jury nullification as the process by which a jury in a criminal case acquits the defendant regardless of whether he has broken the law in question. The pair were charged with jury tampering under the statute above. The term "juror" in the statute defined as including "any person who has been drawn or summoned to attend as a prospective juror."

The defendants argued they weren't trying to influence jurors in any particular case and thus were not guilty of jury tampering under the statute.

1. *What are the defendants' best statutory interpretation arguments?*
2. *What are the interpretive challenges?*
3. *What conflicts or tensions?*
4. *What do you imagine the purpose of the statute to be? Is there more than one? How do the purpose(s) affect your analysis of this situation?*
5. *How might textualism lead you to a different interpretation than purposivism?*

Exercise 9. Death by Mosquito Insurance Contract

Melton was bitten by a mosquito carrying West Nile Virus and subsequently died. His wife, Gloria, claimed accidental death benefits under a life insurance policy, but the company denied her claim. The policy provided coverage "only when your death results, directly and independently from all other causes, from an accidental bodily injury which was unintended, unexpected and unforeseen."

- The mosquito bite occurred in Texas where mosquitoes are common.
 - The certified death certificate listed West Nile Encephalitis as the immediate cause of death.
 - The certified death certificate listed M's death as "natural."
1. *Is a mosquito bite "an accidental bodily injury"? How about contracting West Nile virus? What interpretative challenges do you see here? What additional information would you want to know to decide?*
 2. *What are the best arguments on each side?*
 3. *How might purposivism lead you to a different conclusion than textualism?*

Exercise 10. Whose Car?

Under a state statute, it is unlawful to carry a loaded firearm (of certain types) in any place open to the public, but there is an exemption—it does not apply to:

Any person who may lawfully possess a firearm and is carrying a handgun while in a personal, private motor vehicle or vessel and such handgun is secured in a container or compartment in the vehicle or vessel.

The defendant was charged under the statute with carrying a loaded firearm, which was found in the center console of the car he was found in. The state did not dispute that the defendant was lawfully permitted to possess a firearm and that it was secured in a compartment in the vehicle. The defendant did not dispute that the firearm was loaded and of the type prohibited by the statute. The disagreement was over whether the car defendant was sitting in was "a personal, private motor vehicle." The car was stolen.

1. *What are the interpretive challenges here? The best arguments on both sides?*
2. *What is the purpose of the exemption? What are the arguments that the defendant here meets the purpose of the exemption? What are the arguments that the defendant's actions do not fit the purpose of the exemption?*
3. *What textual clues might you use to interpret the term?*

Exercise 11. Do Painted Flags Fly?

The Maritime Drug Enforcement Law Act grants the United States extraterritorial jurisdiction over vessels without nationality. Under the Act, a vessel is without nationality if the master fails to make a claim of nationality for that vessel. One of the three ways to make such a claim is by “flying its nation’s ensign or flag.” If the master of a vessel makes a claim of foreign nationality that is affirmed by the asserted nation, the United States must ordinarily obtain consent from that nation before exercising jurisdiction over the vessel.

The United States Coast Guard stopped a vessel in international waters on suspicion of drug trafficking. The Coast Guard boarded the vessel and arrested crew members. The crew members later argued that the painted Colombian flag on the vessel constituted a claim of nationality and because the United States did not seek consent from Colombia, it did not have jurisdiction over the vessel. The district court did not agree, and the crew members conditionally pleaded guilty. On appeal, the First Circuit held:

Because a painted flag does not fly, we affirm.

1. *Do you agree? What are the interpretive challenges here? What conflicts and tensions do you see? What other information would you want to know?*
2. *How might the following pieces of information affect your analysis?*
 - i. Webster’s New International Dictionary defines “fly” as “[t]o cause to fly or to float in the air as a ... flag,” and it offers the illustrative phrase of “the ship flew the flag of Spain.” *Fly, Webster’s New International Dictionary* 976 (2d ed. 1961) (emphasis omitted). Webster’s Third New International Dictionary gives a nearly identical definition. *Fly, Webster’s Third New International Dictionary* 879 (3d ed. 1993) (“[T]o cause to fly or float in the air (as a bird, a flag)...”). The Oxford English Dictionary defines “fly” as, “[t]o set (a flag) flying; to *carry at the mast-head; to hoist.*” *Fly, Oxford English Dictionary* (online ed.) (emphasis added).
 - ii. A procedural guide published by the United States Navy offers extensive instructions for “hoisting and lowering” the flag. Department of the Navy, NTP 13(B), Flags, Pennants & Customs 3-1 (1986). It also explains that a vessel’s crew must “haul[] [the ensign] down” after sunset, *id.* at 3-1, and that a vessel may “dip” its flag to salute another vessel, *id.* at 3-1 to 3-2. Its discussion of painted symbols is limited to non-flag “emblems,” such as the medical cross. *Id.* at 17-11. It also specifically forbids service members from “paint[ing]” “[s]tars or *replicas* of personal flags ... on vehicles,” *id.* at 14-1 (emphasis added). A Navy protocol handbook explains that “[t]he national ensign shall be displayed during daylight from the gaff (or from the triatic stay ...)” and speaks in dynamic terms of “the hoisting, lowering[,] or flying of the

ensign.” Department of the Navy, 1710.7A, Social Usage and Protocol Handbook J-19 (2001); *see also id.* at J-20 (discussing “[d]ipping the national ensign” and “[h]alf-masting the national ensign”). A flag guide published by a civilian group provides that even motorboats without a mast or rigging should still have a means of hoisting a flag. *See* United States Power Squadrons, *Flag Etiquette*, http://www.usps.org/f_stuff/etiquett.html (last visited May 31, 2018) (discussing the “United States Ensign”).

- iii. The crew members cite idioms that suggest that the phrase “[f]lying the flag” refers to a general invocation of a vessel’s “association with a nation.” They cite the Cambridge Idioms Dictionary, which defines “fly/show/wave the flag” as “to support or to represent [one’s] country,” *Flag, Cambridge Idioms Dictionary* 145 (2006), and the Farlex Dictionary of Idioms, which defines the phrase “fly the flag” as to “represent or demonstrate support for [one’s] country,” *Fly the Flag, Farlex Dictionary of Idioms*, <https://idioms.thefreedictionary.com/Flying+the+Flag> (last visited May 31, 2018). They also cite the Oxford Living Dictionaries, which defines “fly the flag” “of a ship” as to “be registered in a particular country and sail under its flag.” *Fly the Flag, Oxford Living Dictionaries*, https://en.oxforddictionaries.com/definition/fly_the_flag (last visited May 31, 2018).
 - a. *Is the information cited relevant? Useful? Why or why not? What other information would you like to have?*
 - b. *How might purposivism and textualism lead you to different interpretations?*

Exercise 12. Commas

State statute interpretation

“For want of a comma, we have this case.”

So begins the opinion in *O’Connor v. Oakhurst Dairy*, 851 F.3d 69 (1st Cir. 1970). The crux of the issue in the case is whether delivery drivers were entitled to the protections of a statute governing overtime—a statute that requires employers to pay one and a half times the regular hourly rate for all hours actually worked in excess of forty in a week. The dispute concerned a particular exception—Exemption F—which stated that the protection of the overtime law does not apply to:

The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of:

- (1) Agricultural produce;
- (2) Meat and fish products; and

(3) Perishable foods.

Delivery drivers argued that the words “packing for” modified both “shipment” and “distribution,” so that the statute did not cover employees who simply distributed, but did not pack, perishable foods.

Read the delivery drivers’ argument, the Dairy’s argument, and then the court’s opinion. What are conflicts and tensions in this interpretive argument? Which argument is most convincing? Why? What interpretive techniques can you identify? Which arguments, if any, emphasize purpose over text? Which do the opposite? Mark up the arguments, showing where the author relies on text, purpose, or other interpretive techniques.

DELIVERY DRIVERS’ ARGUMENT

Argument

The State Law Agricultural Exemption Does Not Apply to Oakhurst's Delivery Drivers.

Defendants cannot meet their burden of demonstrating that Maine's agricultural exemption unambiguously extends to all delivery drivers who distribute any agricultural or other perishable product. Under Maine's agricultural exemption, enacted with the original 1965 state overtime law, the overtime requirement does not apply to:

F. The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of:

- 1) Agricultural produce;
- 2) Meat and fish products; and
- 3) Perishable foods.

26 M.R.S.A. § 664(3)(F)(2014).

It is settled under federal and state law that all statutory exemptions to the minimum wage and overtime laws. “are to be narrowly construed against the employers seeking to assert them and their application ... limited to those [subjects] plainly and unmistakably within their terms and spirit.” *Bolduc v. Nat’l Semiconductor Corp.*, 35 F. Supp. 2d 106, 114 (D. Me. 1998) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, (1960)).

The Law Court has spoken clearly on the need to construe Maine's “remedial” overtime laws “liberally” in favor of employees. *Director of Bureau of Labor Standards v. Cormier*, 527 A.2d 1297, 1300 (Me. 1987). In pronouncing this canon of statutory interpretation specifically for the overtime laws, Maine's highest Court emphasized the State's strong public policy to ensure fair compensation to its workers:

It is the declared public policy of the State of Maine that workers employed in any occupation should receive wages sufficient to provide adequate maintenance and to protect their health, and to be fairly commensurate with the value of the services rendered.

Id. (quoting 26 M.R.S.A. 661); *see also Connelly v. Franklin Memorial Hospital*, 1993 Me. Super LEXIS 243 (Andro. Sup. Ct. Oct. 1, 1993)(management “exemption” to state and federal overtime law “is construed narrowly, with employers claiming exemption having the burden of proof that employees fit plainly and unmistakably within the exemption.”).

The only phrase listed in the agricultural exemption that Defendants argue applies to Plaintiff delivery drivers is “packing for shipment or distribution of.” It is undisputed that Plaintiffs were engaged in the distribution of milk and other dairy products, but that they were not engaged in the packing of milk or any other product. In interpreting this statutory exemption in Maine's overtime law, this Court should consider the most applicable canons of statutory construction, a more recent and more specific Maine legislative enactment regarding overtime for truck drivers, and the only Law Court precedent discussing the agricultural exemption. All of these sources strongly support the conclusion that the agricultural exemption was not intended to broadly exempt all drivers engaged in “distribution” of such products, but instead was intended to exempt only employees engaged in “packing for shipment” or “packing for distribution.” Moreover, to the extent the Court finds that the statutory exemption is ambiguous despite these clarifying sources, it still must be narrowly construed and any doubts about its application must be resolved in favor of the employees who the overtime law is designed to protect. *See Cormier*, 527 A.2d at 1300.

A. The relevant canons of statutory construction and basic rules of grammar all support Plaintiffs' construction of the agricultural exemption.

The most natural and logical reading of the agricultural exemption is that “distribution” is not a stand-alone exception; instead, the qualifier “packing for” modifies both “shipment” and “distribution.” **First**, interpreting the term “distribution” as a stand-alone activity unmoored from the modifying phrase “packing for” would violate the series-qualifier canon of statutory construction. The series-qualifier canon states that “a modifier at the beginning or end of a series of terms modifies all the terms,” and the canon “applies where the modifying clause undeniably applies to at least one [term], and ... makes sense with all.” *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 2014 U.S. Dist. LEXIS 184081, at *20 (W.D. Tenn. Dec. 9, 2014) (internal quotation marks and citations omitted); see also *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920) (“[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.”).

For example, in the familiar constitutional phrase “unreasonable search and seizures,” the final term “seizures” does not stand alone but is modified by the antecedent term “unreasonable.” Here, the series-qualifier canon applies because the modifying clause “packing for” undeniably applies to “shipment” and makes sense with “distribution,” and there is no grammatical separation (such as a comma) between “shipment” and “distribution.” Thus, the final term “distribution” does not stand alone but is modified by the prepositional phrase “packing for.”

In addition, the term “distribution” differs grammatically from all of the prior items in the list. Each of the exempt activities (“canning,” “processing,” “preserving,” “packing,” etc.) are gerunds, all verbal nouns ending in “ing.” The term “distribution,” by contrast, is a non-verbal noun. Thus, the term “distribution” is not grammatically parallel to any of the exempt activities in the list, all of which are gerunds. Instead, “distribution” is grammatically parallel

to “shipment,” which is also a nonverbal noun and an object of the prepositional phrase “packing for.” Had the Legislature intended “distribution” to be parallel to all of the other exempt activities, it could simply have used the gerund “distributing,” which would align “distributing” with each of the prior “ing” actions listed. It did not do so.

Second, Defendants' broad proposed interpretation is directly contrary to the Supreme Court's recent interpretation of a statutory list of items. *See Yates v. United States*, 135 S.Ct 1074 (2014). In *Yates*, the Supreme Court applied two fundamental statutory canons of construction to conclude that the statutory term “tangible object” must be read contextually in light of the prior items in the statutory list, which begins “record, document ...”, to refer not to all tangible objects but only to the much narrower subset of tangible objects involving records or documents. *Id.* at 1085-86.

As in *Yates*, Defendants' proffered interpretation would violate the basic statutory canon of *noscitur a sociis* (“a word is known by the company it keeps”), a principle that “avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words,” and would contravene the related canon of *ejusdem generis*, which requires that “[w]here general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” *Id.*

The statutory canons relied on by the Supreme Court in *Yates* apply with equal force to cabin the meaning of the term “distribution” in Maine's agricultural exemption. The term “distribution” must be read in the context of the prior items in the list, all of which are highly specific and closely tied to agriculture. Activities such as “canning,” “processing,” “preserving,” “freezing,” “storing,” “packing,” etc., all involve close interaction with the agricultural products and take place at or near the site of agricultural production. Interpreting “distribution” as a stand-alone activity, rather than an object of the phrase by “packing for,” would broadly exempt every truck driver transporting any agricultural or perishable product and thus would ascribe one word “a meaning so broad that it is inconsistent with its accompanying words.” *Id.*

Third, the absence of a comma before “distribution” would violate the basic rule of grammar requiring a serial comma before the last item in a list to avoid ambiguity. The leading authorities on writing style agree that “when a conjunction joins the last two elements in a series of three or more, a comma should appear before the conjunction” because “it prevents ambiguity.” *The Chicago Manual of Style* p. 312, § 6.18 (16th ed. 2010); *accord*: Bryan A. Garner, *The Elements of Legal Style*, p. 15, § 2.1 (2nd ed. 2002) (“The reason for preferring the final comma is that omitting it may cause ambiguities.”); Strunk, Jr. and E.B. White, *The Elements of Style*, p. 2, § 2 (3rd Edition 1979). If the Legislature had intended to exempt employees engaged in “distribution” as a stand-alone activity, it would have included a comma after “shipment” so that the statute read “packing for shipment, or distribution”⁴

The absence of a final serial comma before the word “distribution” is significant because it indicates that “shipment or distribution” belong to the same element, and “packing of” modifies both “shipment” and “distribution.” *See Estate of Braden v. Arizona*, 266 P.3d 349,

352 & n.2 (Ariz. 2011) (en banc) (basing interpretation of statute in part on serial comma rule of grammar even when legislative drafting manual stated contrary rule). Likewise, if the Legislature had intended to exempt all jobs involving “distribution” of agricultural and other perishable foods, it would have inserted a determinative such as “the” before the word distribution to denote that “distribution” was a stand-alone activity and not modified by the word “packing.” Thus, if Defendants' interpretation were correct, the agricultural exemption would read “packing for shipment, or the distribution of.” See, e.g., Randolph Quirk & Sidney Greenbaum, *A University Grammar of English*, § 9.37, at 270 (1973).

Although the Legislature's current drafting guidelines recommend that a serial comma not be used in a simple list, those guidelines are inapplicable here for several reasons. The guidelines were first drafted in 1990, a full 25 years after the 1965 agricultural exemption was enacted, and therefore could not have informed the Legislature's drafting of that exemption. See Manual, <http://www.maine.gov/legis/ros/manual/Draftman2009.pdf>. Moreover, although the drafting manual discourages the final serial comma in a simple list of nouns such as “Trailers, semitrailers and pole trailers,” when the lack of a serial comma creates no ambiguity, the drafting manual expressly qualifies this advice in cases where, as here, an item in the series is modified, because in such cases the absence of the serial comma can create ambiguity. See *id.* at pp. 113-114 (cautioning, “Be careful if an item in the series is modified. [¶] For example: Trailers, semitrailers and pole trailers of 3,000 pounds gross weight or less are exempt from licensing provisions. [¶] Does the 3,000-pound limit apply to trailers and semitrailers or only to pole trailers?”, and suggesting alternative ways to draft this provision to avoid ambiguity). Finally, even if the drafting guidelines were applicable here, they are far from dispositive given the other factors indicating that the Legislature did not intend to separately exempt “distribution.” See, e.g., *Estate of Braden*, 266 P.3d at ¶12, n.2 (applying serial comma rule to interpret statute even where the governing legislative style manual expressly advised that a comma should not be inserted before the conjunction “or” at the end of a series of items).

B. The Legislature's later and more specific 2003 enactment clarified that the agricultural exemption does not apply to drivers.

Effective September 1, 2003, the Maine Legislature amended the original 1965 state overtime law, 26 M.R.S.A. § 664, to expressly guarantee that “drivers” be paid overtime or compensation “reasonably equivalent” to overtime. 26 M.R.S.A. § 664(3)(H).⁵ That provision remained in effect until September 1, 2012, when it was repealed to instead incorporate the federal Motor Carrier Act (MCA) exemption for truck drivers. See “An Act to Conform Maine Law to Federal Law Regarding Payment of Overtime to Truck Drivers and Driver's Helpers,” *codified at* 26 M.R.S.A. § 664(3)(K) (2014).

In 2003 when it enacted Section 664(3)(H), the Legislature directly and specifically addressed whether truckers were exempt from overtime under state law, and answered that question in the negative. This more specific and more recent enactment in 2003 clarifies that the correct interpretation of Maine's overtime law, including its original 1965 exemption for agricultural activities, requires overtime compensation for drivers. See *West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83, 100-01 (1990) (when a statutory term is ambiguous, it should be

construed in the manner which fits “most logically and comfortably” with “subsequently enacted law”); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070-71 (2012) (citing the “well-established canon of statutory interpretation” that that when two pieces of legislation touching upon the same subject matter are in tension, “the specific governs the general”).

C. Defendant's proposed interpretation would have far-reaching adverse consequences for workers and would render other statutory provisions superfluous.

The Law Court has interpreted ambiguities in Maine's overtime law to avoid undermining its protections for Maine workers. *Cormier*, 527 A.2d at 1297. Thus, Maine's highest court rejected an employer's proposed interpretation of the overtime law “to require proof of overt compulsion” because that interpretation of an ambiguous statutory term “would seriously undermine the underlying remedial purposes of the overtime law expressed in *section 664.*” *Id.*⁶ Defendants' construction of the agricultural exemption would lead to unreasonable results that would undermine the remedial goals of the overtime statute. If Defendants' broad interpretation were adopted, then every driver who distributed any agricultural, meat, fish, or other perishable products (arguably any product with a “sell by” date) would be deprived of overtime protection. This exemption would cover everyone from local pizza and Chinese take-out delivery drivers to delivery drivers restocking vending machines or convenience stores. Such a broad reading of the agricultural exemption would remove overtime protections for many Maine employees who have *never* been considered exempt under the FLSA or Maine law.

If the Legislature had intended to create such a broad overtime exemption for delivery drivers, it would have done so clearly and definitively, not obliquely by inserting a single word at the end of a long list. *See Yates*, 135 S.Ct. at 1083 (reasoning that if Congress had intended the statutory term “tangible object” to be read as broadly as the government contended, “one would have expected clearer expression of that intent.”). As in *Yates*, this Court should reject a “boundless reading’ of a statutory term given [the] ‘deeply serious consequences’ that reading would entail.” *Id.* at 1087 (citation omitted).

Moreover, Defendants' broad interpretation of the agricultural exemption would violate the canon against surplusage because it would render the state Motor Carrier Act exemption within the same statutory section largely superfluous. *See Yates*, 135 S.Ct at 1085 (the Court “resist[ed] a reading” that would render another provision within the same statutory scheme largely superfluous, noting that interpreting the term “tangible object” literally would create “significant[] overlap” with another provision in the same statute). Under Defendants' broader reading, many truckers in Maine would be exempt as “distributors” of goods under the agricultural exemption, Section 664(3)(F). This exemption in the agricultural subsection would substantially overlap with the MCA exemption for truckers, Section 664(3)(K), enacted in 2012.

In other words, if the agricultural exemption already exempted truckers from overtime, then the state MCA exemption would be largely superfluous, duplicative, and unnecessary. Such a reading must be resisted, particularly when the two provisions are part of the same statutory scheme and indeed part of the same subsection. See *id.* (“[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.” (citation omitted)).

Although the Maine Legislature has amended the state MCA exemption specifically applicable to truckers on multiple occasions (most recently in 2003 and 2012), nothing in the legislative history of these state-law MCA enactments suggests that the Legislature believed that most truckers were already exempt as “distributors” of goods under the 1965 agricultural exemption.⁷

D. The only Law Court precedent regarding the agricultural exemption supports Plaintiffs' interpretation.

In 2004, the Law Court addressed the question whether interstate truck drivers engaged in delivering products including agricultural produce to Shaw's supermarkets were exempt from Maine's overtime law in effect in 2002. *Thompson v. Shaw's Supermarkets, Inc.*, 2004 ME 63, 864 A.2d 406. The Law Court examined the text of the agricultural exemption and concluded that the issue whether the truckers were exempt from overtime “cannot be resolved by examining the plain meaning of the statutory language” in section 664(3)(F).⁸ *Id.* at 409. Therefore, the Court turned to other legislative provisions bearing on that issue. *Id.* at 409.

The Law Court refused to rely on Maine's agricultural exemption, Section 664(3)(F), as a basis for finding the plaintiff truckers exempt. Moreover, the *Thompson* Court's reasoning for finding the Shaw's truckers exempt as of 2002 is entirely inapplicable to this case. In 2003 the Legislature reversed its longstanding approach to interstate drivers' overtime and repealed Section 664(3)(G), the statutory provision relied on by the Law Court in *Thompson*. It replaced that provision with Section 664(3)(H), requiring that interstate truckers must be paid either overtime or its “reasonabl[e] equivalent.” 26 M.R.S.A. § 664(3)(H) (2014). In short, although the longstanding history and legislative enactments prior to 2003 supported (indeed compelled) *Thompson's* conclusion that interstate drivers were exempt, the State's 2003 legislative enactments regarding interstate driver exemptions point in precisely the opposite direction.

Conclusion

The most logical reading of the agricultural exemption is that it exempts employees involved in “packing for shipment or distribution,” and not all employees engaged in “distribution.” Moreover, under binding Law Court precedent, this state law exemption must be construed narrowly against the employer and any doubts about its scope must be resolved in favor of

the workers whom the overtime law aims to protect. Plaintiffs respectfully request that the Court grant their motion for partial summary judgment on this affirmative defense.

Christopher O'CONNOR, et al., Plaintiffs, v. OAKHURST DAIRY, et al., Defendants., 2015 WL 11121050 (D.Me.)

DAIRY'S ARGUMENT

Plaintiffs' motion seeking summary judgment under 26 M.R.S.A. § 664.3.F should be denied as a matter of law because the relevant overtime exemption (1) should not be construed as narrowly¹ as Plaintiffs suggest, and (2) is entirely consistent with a later-adopted truck drivers exemption and the Maine Supreme Court's opinion in *Thompson v. Shaw's Supermarkets, Inc.* Instead, the exemption's legislative history, basic canons of statutory construction, and the lone case interpreting the exemption support a single conclusion—*i.e.*, Plaintiffs are exempt from Maine's overtime requirements because they distributed milk.

A. The Perishable Foods Exemption Should Not Be Construed to Defy its Legislative History.

Plaintiffs argue the perishable foods overtime exemption is ambiguous. Additionally, Plaintiffs claim the exemption should be narrowly construed, so much so their strained argument requires the Court to ignore its legislative history, which reveals the exemption's underlying purpose—*i.e.*, the exemption applies to the *distribution* of perishable foods.

Even if the exemption were facially ambiguous, which it is not, the Court would first look to the legislature's intent and purpose. *Thompson v. Shaw's Supermarkets, Inc.*, 847 A.2d 406, 409 (Me. 2004) (Discussing the exemption at issue here and stating “[w]hen construing a statute, we seek to give effect to the legislative intent by examining the plain meaning of the statutory language. If the plain meaning of the text does not resolve an interpretive issue raised, we then consider the statute's history, underlying policy, and other extrinsic factors to ascertain legislative intent.”). Here, legislative history reveals the perishable foods exemption was expressly meant to cover the *distribution* of perishable foods. In fact, even before Maine's overtime law was enacted in 1965, similar language about “processing (other than canning), marketing, freezing, storing or *distributing*” certain perishable aquatic animal and vegetable products appeared in Maine's minimum wage law. L.D. 1537 (1961). As evidenced by the following language, Maine's minimum wage laws excluded from its coverage:

Any individual employed in the catching, taking, harvesting, cultivating or farming of any kind of fish, shellfish, crustacea, sponges, seaweed or other aquatic forms of animal and vegetable life, including ... processing (other than canning), marketing, freezing, storing or *distributing* the above products...

Id. (emphasis added).

When Maine adopted overtime requirements in 1965, its minimum wage statute was amended so that individuals employed in the “processing (other than canning), marketing, freezing, storing or *distributing* the above products,” were no longer excluded from its protections. L.D. 1504 (1965) (emphasis added). Although the Legislature expanded Maine's minimum wage law to cover employees engaged in processing, marketing, storing, or *distributing* perishable goods, it also exempted *those same employees* from the state's new overtime provisions:

The overtime provision of this section shall not apply to the canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of herring as sardines, of perishable foods, of agricultural produce, and meat and fish products, nor to the canning of perishable goods, nor to nursing homes and hospitals.

House Amendment “B” to Senate Amendment “B” to S.P. 526, L.D. 1504 (May 27, 1965). In the debates over L.D. 1504, Representative Brewer explained the amendment as follows:

Mr. BREWER: Mr. Speaker, in this amendment as proposed by the gentleman from Portland, Mr. Cottrell, under G it exempts the packing of products for shipment, processing other than canning, marketing, freezing, curing, storing *or distributing* the above products or by products thereof, or any individual employed as a smoked fish worker.

L.R. 2870 (June 1, 1965) (emphasis added). Consequently, the exemption is meant to apply to employees involved in the distribution of perishable products.

Moreover, the perishable foods exemption recognizes the urgency associated with getting perishable foods from the farm, ranch, or fishery to the consumer in an expedient manner due to these products' short shelf-life. And distribution is certainly as necessary to this process as canning, processing, preserving, freezing, drying, marketing, storing, and packing for shipment. *See Thompson v. Shaw's Supermarkets, Inc.*, No. Civ.A. CV-02-036, 2002 WL 31045303 (Me. Sup. Ct. Sept. 5, 2002) (finding that “distribution of the named items is as essential as its canning, processing, preserving, freezing or drying”).

The exemption's legislative history only points to one conclusion: individuals who distribute perishable products are exempt from Maine's overtime requirements.²

B. Plaintiffs Incorrectly Apply the Canons of Construction and Overstate Basic Rules of Grammar.

No canon of construction should trump the Maine Legislature's intent when adopting the perishable foods exemption, which was to exempt employees from overtime when they distribute perishable foods. Moreover, the canons of construction cited by Plaintiffs do not undermine this conclusion.³

Plaintiffs argue the “series-qualifier” canon requires the phrase “packing for shipment or distribution” to be read as one unit. By way of example, Plaintiffs point to the “familiar constitutional phrase ‘unreasonable search and seizures’” when arguing the word unreasonable modifies both search and seizure. Doc. 97 at 7. Since the terms “search” and “seizure” have different meanings, it is entirely reasonable to read the word unreasonable as qualifying the dissimilar terms. On the other hand, the words “shipment” and “distribution” are synonymous, *see Thompson v. Shaw's Supermarkets, Inc.*, No. Civ.A. CV-02-036, 2002 WL 31045303, *2 (Me. Sup. Ct. Sept. 5, 2002) (“... it is not at all clear how packing for shipment would be different from packing for distribution.”) and reading the word packing as qualifying both words would render the latter redundant and superfluous, thus violating the canon against surplusage. *Cent. Maine Power Co. v. Devereux Marine, Inc.*, 68 A.3d 1262, 1266 (Me. 2013). *See also Corley v. United States*, 556 U.S. 303, 314-15 (2009) (stating “one of the most basic interpretive canons” is that “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant”); *Lopez-Soto v. Hawayek*, 175 F.3d 170, 173 (1st Cir. 1999) (“It is a time-honored tenet that [a]ll words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant, or superfluous.”).⁴

Relying on *Yates v. United States*, 135 S. Ct. 1074 (2014), Plaintiffs next argue Defendant's interpretation of the perishable foods exemption would somehow be inconsistent, or out of context, with the rest of the exemption. However, the context is entirely clear—the exemption is focused on *all* of the steps necessary to get foods from farms, fisheries or ranches to consumers. Consequently, it entirely logical *distribution* would be included, not excluded, from an exemption applicable to these processes. Accordingly, the context of the underlying exemption commands the conclusion it includes distribution of perishable food items.

Finally, Plaintiffs argue that basic rules of grammar require a serial comma. Although Plaintiffs dismiss Defendant's reliance on Maine's own Legislative Drafting Manual (which instructs against the use of a serial comma) as being drafted after the relevant exemption, Plaintiffs rely solely on various non-Maine style guides and a single non-Maine case, *all of which were drafted after 1965*, to show that grammar rules require a serial comma. Furthermore, it is entirely logical Maine's Legislative Drafting Manual codified Maine's long standing (dating back to 1965 and beyond) principles applicable to crafting statutes. Indeed, regardless of Plaintiffs' preference for a serial comma, a cursory review of Maine's own minimum wage law, as it existed in 1965, shows the 1965 Maine Legislature eschewed the serial comma. *See*, Exhibit 1, 1965 Maine Minimum Wage Law.

C. The 2003 Amendment to Maine's Overtime Law and the 2012 Adoption of the MCA Exemption Do Not Undermine Defendant's Interpretation of the Perishable Foods Exemption.

Maine's perishable foods exemption covers truck drivers who distribute perishable foods products. But Plaintiffs argue a “more specific 2003 enactment” of 26 M.R.S.A. § 664.3.H⁵ and the 2012 enactment of 26 M.R.S.A. § 664.3.K (Maine's version of the Motor Carrier Act Exemption)⁶ contradict this conclusion. Their argument is deeply flawed.

That the Maine Legislature decided in 2003 to make many truck drivers eligible for overtime did not abrogate the pre-existing, *more specific* perishable foods exemption. It is presumed Maine's legislature was aware of the perishable foods exemption when it made other truck drivers non-exempt from the state's overtime requirements in 2003, meaning it could have expressly stated the 2003 amendments trumped the perishable foods exemption. *Bowler v. State*, 108 A.3d 1257, 1261 (Me. 2014) (“The Legislature is presumed to be aware of the state of the law and decisions of this Court when it passes an act.”). But it did not. And Plaintiffs point to nothing in the legislative history of the 2003 amendment indicating otherwise.⁷

Second, Defendants' interpretation of the perishable foods exemption would not render the 2012 enactment of Maine's Motor Carrier Act exemption superfluous. Indeed, if this Court interprets the perishable foods exemption as Defendants urge, many of Maine's truck drivers (*i.e.*, those who do not distribute perishable goods) would have, without enactment of 26 M.R.S.A. § 664.3.K in 2012, remained eligible for overtime. Moreover, Plaintiffs' arguments are based on a false premise—*i.e.*, the Maine Motor Carrier Act is redundant with the federal Motor Carrier Act. Although it is true that a condition precedent to the applicability of 26 M.R.S.A. § 664.3.K is that drivers within its purview must also be subject to 49 U.S.C. § 31502 (the federal Motor Carrier Act), it logically follows that drivers distributing perishable foods in Maine who are not subject to the federal Motor Carrier Act fall outside the bounds of Maine's Motor Carrier Act.⁸

D. Maine's Appellate Jurisprudence—Particularly *Thompson v. Shaw Supermarkets, Inc.*—Has Not Addressed the Perishable Foods Exemption.

Plaintiffs contend that in *Thompson v. Shaw's Supermarkets, Inc.*, 847 A.2d 406 (Me. 2004) the Maine Law Court not only addressed the proper interpretation of the perishable foods exemption, but rejected Defendant's interpretation. This is untrue. The only remark the Law Court made about the perishable foods exemption is entirely consistent with Defendants' arguments in this matter—its interpretation “cannot be resolved by examining the plain meaning of the statutory language.” *Id.* at 409. In other words, it is necessary to consider the context of the exemption and its legislative history. The Law Court, reviewing the case *de novo*, and relying on different grounds, affirmed summary judgment in favor of the defendant-employer, thus obviating the need to construe the perishable foods exemption. *Id.*

at 410. By doing so, the Law Court did not “disapprov[e] of the trial court's reasoning,” *See* Doc. 97 at fn. 8, as Plaintiffs mistakenly argue.

The only jurisprudence analyzing Maine's perishable foods exemption is the lower court's summary judgment order in *Thompson*, 2002 WL 31045303. As the *Thompson* lower court correctly noted, in *dicta*, the exemption must be read to include distribution of perishable foods “as the distribution of the named items is as essential as its canning, processing, preserving, freezing or drying and as it is not at all clear how packing for shipment would be different from packing for distribution.” *Id.* at *2.

Conclusion

For these reasons, as well as the reasons explained in Defendants Oakhurst Dairy and Dairy Farmers of America's cross-motion for summary judgment, Defendants respectfully request the Court's deny Plaintiffs' motion for summary judgment.

Christopher O'CONNOR, Kevin O'Connor, and James Adam Cox, Michael Fraser, and Robert McNally, on behalf of themselves and all others similarly situated, Plaintiffs, v. OAKHURST DAIRY and Dairy Farmers of America, Inc., Defendants., 2015 WL 11121065 (D.Me.)

Court Opinion

For want of a comma, we have this case. It arises from a dispute between a Maine dairy company and its delivery drivers, and it concerns the scope of an exemption from Maine's overtime law. 26 M.R.S.A. § 664(3). Specifically, if that exemption used a serial comma to mark off the last of the activities that it lists, then the exemption would clearly encompass an activity that the drivers perform. And, in that event, the drivers would plainly fall within the exemption and thus outside the overtime law's protection. But, as it happens, there is no serial comma to be found in the exemption's list of activities, thus leading to this dispute over whether the drivers fall within the exemption from the overtime law or not.

1The District Court concluded that, despite the absent comma, the Maine legislature unambiguously intended for the last term in the exemption's list of activities to identify an exempt activity in its own right. The District Court thus granted summary judgment to the dairy company, as there is no dispute that the drivers do perform that activity. But, we conclude that the exemption's scope is actually not so clear in this regard. And because,

under Maine law, ambiguities in the state's wage and hour laws must be construed liberally in order to accomplish their remedial purpose, we adopt the drivers' narrower reading of the exemption. We therefore reverse the grant of summary judgment and remand for further proceedings.

I.

Maine's wage and hour law is set forth in Chapter 7 of Title 26 of the Maine Revised Statutes. The Maine overtime law is part of the state's wage and hour law.

The overtime law provides that “[a]n employer may not require an employee to work more than 40 hours in any one week unless 1 1/2 times the regular hourly rate is paid for all hours actually worked in excess of 40 hours in that week.” 26 M.R.S.A. § 664(3). The overtime law does not separately define the term, “employee.” Instead, it relies on the definition of “employee” that the Chapter elsewhere sets forth.

That definition, which applies to the Chapter as a whole, provides that an “employee” is “any individual employed or permitted to work by an employer,” *id.* at § 663(3). However, the definition expressly excludes a few categories of workers who are specifically defined not to be “employee[s],” *id.* at § 663(3)(A)-(L).

The delivery drivers do not fall within the categories of workers excluded from the definition. They thus are plainly “employees.” But some workers who fall within the statutory definition of “employee” nonetheless fall outside the protection of the overtime law due to a series of express exemptions from that law. The exemption to the overtime law that is in dispute here is Exemption F.

Exemption F covers employees whose work involves the handling—in one way or another—of certain, expressly enumerated food products. Specifically, Exemption F states that the protection of the overtime law does not apply to:

The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of:

- (1) Agricultural produce;
- (2) Meat and fish products; and
- (3) Perishable foods.

26 M.R.S.A. § 664(3)(F). The parties' dispute concerns the meaning of the words “packing for shipment or distribution.”

The delivery drivers contend that, in combination, these words refer to the single activity of “packing,” whether the “packing” is for “shipment” or for “distribution.” The drivers further contend that, although they do handle perishable foods, they do not engage in “packing” them. As a result, the drivers argue that, as employees who fall outside Exemption F, the Maine overtime law protects them.

Oakhurst responds that the disputed words actually refer to two distinct exempt activities, with the first being “packing for shipment” and the second being “distribution.” And because the delivery drivers do—quite obviously—engage in the “distribution” of dairy products, which are “perishable foods,” Oakhurst contends that the drivers fall within Exemption F and thus outside the overtime law's protection.

The delivery drivers lost this interpretive dispute below. They had filed suit against Oakhurst on May 5, 2014 in the United States District Court for the District of Maine. The suit sought unpaid overtime wages under the federal Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., and the Maine overtime law, 26 M.R.S.A. § 664(3).¹ The case was referred to a Magistrate Judge, and the parties filed cross-motions for partial summary judgment to resolve their dispute over the scope of Exemption F. After hearings on those motions, the Magistrate Judge ruled that Oakhurst's reading of Exemption F was the better one and recommended granting Oakhurst's motion. The District Court agreed with the Magistrate Judge's recommendation and granted summary judgment for Oakhurst on the ground that “distribution” was a stand-alone exempt activity.²

²The delivery drivers now appeal that ruling. They raise a single legal question: what does the contested phrase in Exemption F mean? Our review on this question of state law interpretation is *de novo*. See *Manchester Sch. Dist. v. Crisman*, 306 F.3d 1, 9 (1st Cir. 2002).

II.

The issue before us turns wholly on the meaning of a provision in a Maine statute. We thus first consider whether there are any Maine precedents that construe that provision.

Oakhurst identifies one: the Maine Superior Court's unpublished opinion in *Thompson v. Shaw's Supermarkets, Inc.*, No. Civ.A. CV-02-036, 2002 WL 31045303 (Me. Sup. Ct. Sept. 5, 2002). In that case, the Superior Court ruled that Exemption F “is clear that an exemption exists for the distribution of the three categories of foods,” *id.* at *3, as a matter of both text and purpose, *id.* at *2.

But, a Superior Court decision construing Maine law would not bind the Maine Law Court, and thus does not bind us. See generally *King v. Order of United Commercial Travelers of Am.*, 333 U.S. 153, 159–62, 68 S.Ct. 488, 92 L.Ed. 608 (1948) (rejecting an unreported state trial court decision as binding on federal courts); *Keeley v. Loomis Fargo & Co.*, 183 F.3d 257, 269 n.9 (3d Cir. 1999) (finding a state trial court decision to be “at most persuasive but nonbinding authority,” with the federal court instead “look[ing] to the plain language of the statute and our own interpretation ... in predicting how the state supreme court” would rule). Moreover, the Superior Court's decision in *Thompson* was appealed to the Maine Law Court, which declined to follow the Superior Court's approach and instead decided the case on different grounds altogether. See *Thompson v. Shaw's Supermarkets, Inc.*, 847 A.2d 406, 409 (Me. 2004).

Nevertheless, the reasons that the Superior Court decision in *Thompson* gave—even if not adopted by the Maine Law Court—figure prominently in the arguments that Oakhurst now presents to us on appeal. We thus consider those reasons in the course of our analysis, to which we now turn.

III.

Each party recognizes that, by its bare terms, Exemption F raises questions as to its scope, largely due to the fact that no comma precedes the words “or distribution.” But each side also contends that the exemption's text has a latent clarity, at least after one applies various interpretive aids. Each side then goes on to argue that the overtime law's evident purpose and legislative history confirms its preferred reading.

We conclude, however, that Exemption F is ambiguous, even after we take account of the relevant interpretive aids and the law's purpose and legislative history. For that reason, we conclude that, under Maine law, we must construe the exemption in the narrow manner that the drivers favor, as doing so furthers the overtime law's remedial purposes. See *Dir. of Bureau of Labor Standards v. Cormier*, 527 A.2d 1297 (Me. 1987). Before explaining our reasons for reaching this conclusion, though, we first need to work our way through the parties' arguments as to why, despite the absent comma, Exemption F is clearer than it looks.

A.

First, the text. See *Harrington v. State*, 96 A.3d 696, 697–98 (Me. 2014) (“Only if the statute is reasonably susceptible to different interpretations will we look beyond the statutory language...”). In considering it, we do not simply look at the particular word “distribution” in isolation from the exemption as a whole. We instead must take account of certain linguistic conventions—canons, as they are often called—that can help us make sense of a word in the context in which it appears. Oakhurst argues that, when we account for these canons here, it is clear that the exemption identifies “distribution” as a stand-alone, exempt activity rather than as an activity that merely modifies the stand-alone, exempt activity of “packing.”

Oakhurst relies for its reading in significant part on the rule against surplusage, which instructs that we must give independent meaning to each word in a statute and treat none as unnecessary. See *Stromberg-Carlson Corp. v. State Tax Assessor*, 765 A.2d 566, 569 (Me. 2001) (“When construing the language of a statute ... [w]ords must be given meaning and not treated as meaningless and superfluous.”). To make this case, Oakhurst explains that “shipment” and “distribution” are synonyms. For that reason, Oakhurst contends, “distribution” cannot describe a type of “packing,” as the word “distribution” would then redundantly perform the role that “shipment”—as its synonym—already performs, which is to describe the type of “packing” that is exempt. See *Thompson*, 2002 WL 31045303 at *2 (“[I]t is not at all clear how packing for shipment would be different from packing for distribution.”). By contrast, Oakhurst explains, under its reading, the words “shipment” and

“distribution” are not redundant. The first word, “shipment,” describes the exempt activity of “packing,” while the second, “distribution,” describes an exempt activity in its own right.

Oakhurst also relies on another established linguistic convention in pressing its case—the convention of using a conjunction to mark off the last item on a list. See *The Chicago Manual of Style* § 6.123 (16th ed. 2010) (providing examples of lists with such conjunctions).

Oakhurst notes, rightly, that there is no conjunction before “packing,” but that there is one after “shipment” and thus before “distribution.” Oakhurst also observes that Maine overtime law contains two other lists in addition to the one at issue here and that each places a conjunction before the last item. See 26 M.R.S.A. § 664(3) (“The regular hourly rate includes all earnings, bonuses, commissions and other compensation ...” (emphasis added)); *id.* at § 664(3)(A) (exempting from overtime law “automobile mechanics, automobile parts clerks, automobile service writers and automobile salespersons as defined in section 663” (emphasis added)).

Oakhurst acknowledges that its reading would be beyond dispute if a comma preceded the word “distribution” and that no comma is there. But, Oakhurst contends, that comma is missing for good reason. Oakhurst points out that the Maine Legislative Drafting Manual expressly instructs that: “when drafting Maine law or rules, don't use a comma between the penultimate and the last item of a series.” Maine Legislative Drafting Manual 113 (Legislative Council, Maine State Legislature 2009), <http://maine.gov/legis/ros/manual/Draftman2009.pdf> (“Drafting Manual”); see also *Jacob v. Kippax*, 10 A.3d 1159, 1166 (Me. 2011) (invoking the Drafting Manual to help resolve a statutory ambiguity). In fact, Oakhurst notes, Maine statutes invariably omit the serial comma from lists. And this practice reflects a drafting convention that is at least as old as the Maine wage and hour law, even if the drafting manual itself is of more recent vintage. See, e.g., Me. Stat. tit. 26, § 663(3)(G) (1965) (“processing, canning or packing”); Me. Stat. tit. 26, § 665(1) (1965) (“hours, total earnings and itemized deductions”).

B.

If no more could be gleaned from the text, we might be inclined to read Exemption F as Oakhurst does. But, the delivery drivers point out, there is more to consider. And while these other features of the text do not compel the drivers' reading, they do make the exemption's scope unclear, at least as a matter of text alone.

The drivers contend, first, that the inclusion of both “shipment” and “distribution” to describe “packing” results in no redundancy. Those activities, the drivers argue, are each distinct. They contend that “shipment” refers to the outsourcing of the delivery of goods to a third-party carrier for transportation, while “distribution” refers to a seller's in-house transportation of products directly to recipients. And the drivers note that this distinction is, in one form or another, adhered to in dictionary definitions. See *New Oxford English American Dictionary* 497, 1573-74 (2001); *Webster's Third New International Dictionary* 666, 2096 (2002).

Consistent with the drivers' contention, Exemption F does use two different words (“shipment” and “distribution”) when it is hard to see why, on Oakhurst's reading, the legislature did not simply use just one of them twice. After all, if “distribution” and “shipment” really do mean the same thing, as Oakhurst contends, then it is odd that the legislature chose to use one of them (“shipment”) to describe the activity for which “packing” is done but the other (“distribution”) to describe the activity itself.

The drivers' argument that the legislature did not view the words to be interchangeable draws additional support from another Maine statute. That statute clearly lists both “distribution” and “shipment” as if each represents a separate activity in its own right. See 10 M.R.S.A. § 1476 (referring to “manufacture, distribution or shipment”). And because Maine law elsewhere treats “shipment” and “distribution” as if they are separate activities in a list, we do not see why we must assume that the Maine legislature did not treat them that way here as well. After all, the use of these two words to describe “packing” need not be understood to be wasteful. Such usage could simply reflect the legislature's intention to make clear that “packing” is exempt whether done for “shipment” or for “distribution” and not simply when done for just one of those activities.³

Next, the drivers point to the exemption's grammar. The drivers note that each of the terms in Exemption F that indisputably names an exempt activity—“canning, processing, preserving,” and so forth on through “packing”—is a gerund. By contrast, “distribution” is not. And neither is “shipment.” In fact, those are the only non-gerund nouns in the exemption, other than the ones that name various foods.

Thus, the drivers argue, in accord with what is known as the parallel usage convention, that “distribution” and “shipment” must be playing the same grammatical role—and one distinct from the role that the gerunds play. See *The Chicago Manual of Style* § 5.212 (16th ed. 2010) (“Every element of a parallel series must be a functional match of the others (word, phrase, clause, sentence) and serve the same grammatical function in the sentence (e.g., noun, verb, adjective, adverb).”). In accord with that convention, the drivers read “shipment” and “distribution” each to be objects of the preposition “for” that describes the exempt activity of “packing.” And the drivers read the gerunds each to be referring to stand-alone, exempt activities—“canning, preserving...”

By contrast, in violation of the convention, Oakhurst's reading treats one of the two non-gerunds (“distribution”) as if it is performing a distinct grammatical function from the other (“shipment”), as the latter functions as an object of a preposition while the former does not. And Oakhurst's reading also contravenes the parallel usage convention in another way: it treats a non-gerund (again, “distribution”) as if it is performing a role in the list—naming an exempt activity in its own right—that gerunds otherwise exclusively perform.⁴

Finally, the delivery drivers circle back to that missing comma. They acknowledge that the drafting manual advises drafters not to use serial commas to set off the final item in a list—despite the clarity that the inclusion of serial commas would often seem to bring. But the

drivers point out that the drafting manual is not dogmatic on that point. The manual also contains a proviso—“Be careful if an item in the series is modified”—and then sets out several examples of how lists with modified or otherwise complex terms should be written to avoid the ambiguity that a missing serial comma would otherwise create. See *Drafting Manual* at 114.

Thus, the drafting manual's seeming—and, from a judge's point of view, entirely welcome—distaste for ambiguous lists does suggest a reason to doubt Oakhurst's insistence that the missing comma casts no doubt on its preferred reading. For, as the drivers explain, the drafting manual cannot be read to instruct that the comma should have been omitted here if “distribution” was intended to be the last item in the list. In that event, the serial comma's omission would give rise to just the sort of ambiguity that the manual warns drafters not to create.⁵

Still, the drivers' textual points do not account for what seems to us to be Oakhurst's strongest textual rejoinder: no conjunction precedes “packing.” Rather, the only conjunction in the exemption—“or”—appears before “distribution.” And so, on the drivers' reading, the list is strangely stingy when it comes to conjunctions, as it fails to use one to mark off the last listed activity.

To address this anomaly, the drivers cite to Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (2012), in which the authors observe that “[s]ometimes drafters will omit conjunctions altogether between the enumerated items [in a list],” in a technique called “asyndeton,” *id.* at 119. But those same authors point out that most legislative drafters avoid asyndeton. *Id.* And, the delivery drivers do not provide any examples of Maine statutes that use this unusual grammatical device. Thus, the drivers' reading of the text is hardly fully satisfying.⁶

IV.

The text has, to be candid, not gotten us very far. We are reluctant to conclude from the text alone that the legislature clearly chose to deploy the nonstandard grammatical device of asyndeton. But we are also reluctant to overlook the seemingly anomalous violation of the parallel usage canon that Oakhurst's reading of the text produces. And so—there being no comma in place to break the tie—the text turns out to be no clearer on close inspection than it first appeared. As a result, we turn to the parties' arguments about the exemption's purpose and the legislative history. See *Berube v. Rust Eng'g*, 668 A.2d 875, 877 (Me. 1995) (“Our purpose in construing a statute is to give effect to the legislative intent as indicated by the statute's plain language, and we examine other indicia of legislative intent, such as its legislative history, only when the plain language is ambiguous.”).

A.

Oakhurst contends that the evident purpose of the exemption strongly favors its reading. The whole point of the exemption, Oakhurst asserts (albeit without reference to any directly

supportive text or legislative history), is to protect against the distorting effects that the overtime law otherwise might have on employer decisions about how best to ensure perishable foods will not spoil. See *O'Connor v. Oakhurst Dairy*, No. 2:14-CV-192-NT, 2016 WL 1179252, at *5 (D. Me. Jan. 26, 2016) (Magistrate Judge's conclusion that “the purpose of the exemption for employees engaged in the production and distribution of perishable foods can only be to achieve the most efficient possible production and delivery given the nature of the product”). And, Oakhurst argues, the risk of spoilage posed by the distribution of perishable food is no less serious than is the risk of spoilage posed by the other activities regarding the handling of such foods to which the exemption clearly does apply.

Oakhurst then goes on to argue that legislative history supports this supposition about what the legislature must have intended in crafting the exemption. Oakhurst points out that the overtime law, which was enacted in 1965, piggybacks on the definition of “employee” set forth in the wage and hour law, which had been enacted four years earlier. Oakhurst then notes that this pre-existing definition of “employee” contained a carve-out that excluded workers involved in the handling of “aquatic forms of animal and vegetable life” but that in all other respects looks a lot like what became Exemption F. In particular, that carve-out applied to workers “employ[ed] in loading, unloading or packing ... for shipment or in propagating, processing (other than canning), marketing, freezing, curing, storing or distributing” various “aquatic forms of animal and vegetable life.” P.L. 1961, ch. 277, § 3(F).

Oakhurst thus argues that Exemption F clearly was intended to expand upon the existing carve-out by adding activities (such as “canning”) and goods (namely, meats, vegetables, and “perishable foods” more generally). And, for that reason, Oakhurst contends that it makes no sense to read Exemption F, as the delivers drivers do, to have deleted an activity—“distributing”—that the carve-out had included.

B.

We are not so sure. Any analysis of Exemption F that depends upon an assertion about its clear purpose is necessarily somewhat speculative. Nothing in the overtime law's text or legislative history purports to define a clear purpose for the exemption.

Moreover, even if we were to share in Oakhurst's speculation that the legislature included the exemption solely to protect against the possible spoilage of perishable foods rather than for some distinct reason related, perhaps, to the particular dynamics of certain labor markets, we still could not say that it would be arbitrary for the legislature to exempt “packing” but not “distributing” perishable goods. The reason to include “packing” in the exemption is easy enough to conjure. If perishable goods are not packed in a timely fashion, it stands to reason that they may well spoil. Thus, one can imagine the reason to ensure that the overtime law creates no incentives for employers to delay the packing of such goods. The same logic, however, does not so easily apply to explain the need to exempt the activity of distributing those same goods. Drivers delivering perishable food must often inevitably spend long periods of time on the road to get the goods to their destination. It is thus not at all clear that

a legal requirement for employers to pay overtime would affect whether drivers would get the goods to their destination before they spoiled. No matter what delivery drivers are paid for the journey, the trip cannot be made to be shorter than it is.

Of course, this speculation about the effect that a legal requirement to pay overtime may or may not have on increasing the risk of food spoilage is just that. But such speculation does make us cautious about relying on what is only a presumed legislative purpose to generate a firm conclusion about what the legislature must have intended in drafting the exemption.

Moreover, insofar as the legislative history does shed light on that purpose, it hardly supports Oakhurst's account in any clear way. Significantly, Exemption F does not simply copy the language from the carve-out in the 1961 definition of "employee" that bears on whether "distribution" is an exempt activity. Instead, the legislature made some seemingly significant changes to the language of that carve-out—changes that Oakhurst overlooks.

The relevant language in the 1961 definition of "employee" reads: "employment in the ... packing of such products for shipment" and "in ... distributing" the products. By using two prepositions, "for" and "in," the text of that carve-out clearly separated the activities of packing products for shipment and of distributing those products, with the consequence that each activity was plainly excluded from the definition of "employee." Exemption F, however, deletes the second preposition, "in," and thereby strips the new language of the clarity of the old with respect to whether the activity of "distribution" is a stand-alone exempt activity or not. And Exemption F also changes the word "distributing" to the word "distribution," and thereby makes the activity of "distribution" parallel in usage to "shipment," which, of course, modifies the exempt activity of packing and does not name an exempt activity on its own.

If Oakhurst's understanding of the legislative history were right, then there would have been no reason for the legislature to have made these revisions. After all, these revisions change the old language in ways that only serve to sow doubt as to whether the activity of "distributing" that plainly had been excluded from the definition of "employee" was intended to name a standalone, exempt activity in Exemption F.

Moreover, the legislature actually revised the 1961 definition of "employee" just months after enacting the overtime law and thus Exemption F. And the legislature made that revision in a manner that runs contrary to Oakhurst's account. For while the 1961 version of the definition of "employee" excluded workers engaged in "packing ... for shipment" and "in ... distributing" "aquatic animal and vegetable life" products, see Me. Laws 1961, c. 277, § 3(F), the revised version removed the reference to "distributing" altogether, see Me. Laws 1965, c. 410, § 663(3)(G). The result was thus to draw the very distinction between those workers who were engaged in packing products and those workers who were engaged in distributing them that Oakhurst contends we should presume the legislature could not possibly have intended to make in crafting Exemption F.

Of course, Exemption F, unlike this revised version of the carve-out from the definition of “employee,” refers not just to “packing,” or even just to “packing for shipment.” It refers to “packing for shipment or distribution.” But if Exemption F is indeed modeled on the 1961 definition of “employee”—as Oakhurst contends—then we would expect Exemption F at least to use the gerund form of the word “distribution” in referring to that activity. That is the form that the legislature used in the exemption from the earlier definition of “employee” and that the legislature has used to refer to all the other exempt activities in Exemption F.

C.

To be clear, none of this evidence is decisive either way. It does highlight, however, the hazards of simply assuming—on the basis of no more than supposition about what would make sense—that the legislature could not have intended to craft Exemption F as the drivers contend that the legislature crafted it. Thus, we do not find either the purpose or the legislative history fully clarifying. And so we are back to where we began.

V.

⁴We are not, however, without a means of moving forward. The default rule of construction under Maine law for ambiguous provisions in the state's wage and hour laws is that they “should be liberally construed to further the beneficent purposes for which they are enacted.” *Dir. of Bureau of Labor Standards v. Cormier*, 527 A.2d 1297, 1300 (Me. 1987). The opening of the subchapter of Maine law containing the overtime statute and exemption at issue here declares a clear legislative purpose: “It is the declared public policy of the State of Maine that workers employed in any occupation should receive wages sufficient to provide adequate maintenance and to protect their health, and to be fairly commensurate with the value of the services rendered.” 26 M.R.S.A. § 661. Thus, in accord with *Cormier*, we must interpret the ambiguity in Exemption F in light of the remedial purpose of Maine's overtime statute. And, when we do, the ambiguity clearly favors the drivers' narrower reading of the exemption.

Oakhurst counters that this default rule of construction does not apply when the question concerns whether a wage and hour law means to create an exemption at all. Rather, Oakhurst argues, the rule applies only when the issue concerns the scope of an exemption that does exist. See, e.g., *Marzuq v. Cadete Enters.*, 807 F.3d 431, 438 (1st Cir. 2015) (“The burden is on the employer to prove an exemption from the FLSA's requirements, and the remedial nature of the statute requires that [its] exemptions be narrowly construed against the employers seeking to assert them.” (alteration in original) (citation omitted)); *Connelly v. Franklin Mem. Hosp.*, 1993 Me. Super. LEXIS 243, *3 (Me. Super. Ct. Oct. 1, 1993) (“[An] exemption from overtime pay requirements is construed narrowly, with employers claiming exemption having the burden of proof that employees fit plainly and unmistakably within the exemption.”). Thus, Oakhurst contends that the rule has no application here, as the dispute centers on whether “distribution” is exempted, and not what constitutes “distribution.”

But we see no basis for so confining the application of this maxim of Maine law. Cormier did not by terms set forth that limit on the potential application of the rule that it announced. And, in fact, Cormier itself applied the maxim to resolve an ambiguity that did not concern the scope of an exemption at all. Cormier instead applied it to determine whether, for purposes of Maine overtime law, the word “employer” should be construed to treat closely related entities operating under common ownership as a single “employer” under 26 M.R.S.A. § 664(3). 527 A.2d at 1298.

Oakhurst also argues that this default rule of construction applies only when courts apply law to facts and so does not apply to a purely legal question about whether “distribution” describes an exempt activity or is an exempt activity that is at issue here. But, in construing “employer,” Cormier was not simply making—as Oakhurst would have it—a factual judgment as to “whether economic reality and the totality of the factual circumstances supports a finding that multiple companies could be treated as one employer.” Rather, Cormier first resolved a purely legal dispute over the meaning of “employer,” and it did so with reference to this rule of construction.

Specifically, the defendants in that case were challenging a ruling that various corporate and partnership entities controlled by a single family—collectively known as Funtown USA—constituted a single “employer.” 527 A.2d at 1297-99. That designation mattered because it meant that overtime would have to be paid to any employee who worked forty hours a week for Funtown USA as a whole, even if the employee did not work that many hours for any one of Funtown USA’s various entities. The defendants contended “that the ‘joint employer’ concept is foreign to Maine law, and is not set forth or described in any state statute” and thus that “once it is established that the entities are legally distinct and not shams, the inquiry should end.” 527 A.2d at 1299.

The Superior Court in Cormier ruled, however, that the term “employer” in the overtime law did encompass the joint-employer concept. *Id.* And the Maine Law Court agreed, holding that the Superior Court’s “balancing of the several factors that resulted in its ultimate conclusion was a logical, coherent and legally sufficient mode of analysis.” *Id.* at 1300. And it was in the course of embracing that legal conclusion regarding the proper resolution of the ambiguous term “employer” that Cormier deployed the canon: “Remedial statutes should be liberally construed to further the beneficent purposes for which they are enacted.” *Id.*

To be sure, once Cormier answered the legal question about the meaning of “employer” under § 664(3), Cormier did go on to apply law to fact. In particular, Cormier analyzed whether the particular legal entities at issue in the case were in fact properly characterized as constituting a “joint employer” given their ties to one another. *Id.* at 1301–02. But there is no indication that, in concluding that the various entities that comprised “Funtown USA” were in fact a joint employer, *id.* at 1297-98, Cormier held that that the rule of liberal construction may be deployed only to resolve questions pertaining to the application of law to fact.

Because Cormier does not state the rule of liberal construction as if it is one that may be used to resolve only some ambiguities in Maine's wage and hour laws, and because Cormier itself applies the rule to resolve a purely legal question, we see no basis for concluding that we are free to ignore this rule of construction in resolving the ambiguity that we confront. Thus, notwithstanding the opacity of the text and legislative history, we do not believe certification of a question regarding the proper resolution of the ambiguity in Exemption F would be the appropriate course. See *Maurice v. State Farm Mut. Auto. Ins. Co.*, 235 F.3d 7, 10 (1st Cir. 2000) (“Our practice ... has been to refrain from certification of state-law issues when we can discern without difficulty the course that the state's highest court likely would follow.”). Rather, in accord with Cormier, we adopt the delivery drivers' reading of the ambiguous phrase in Exemption F, as that reading furthers the broad remedial purpose of the overtime law, which is to provide overtime pay protection to employees.

Given that the delivery drivers contend that they engage in neither packing for shipment nor packing for distribution, the District Court erred in granting Oakhurst summary judgment as to the meaning of Exemption F. If the drivers engage only in distribution and not in any of the standalone activities that Exemption F covers—a contention about which the Magistrate Judge recognized possible ambiguity—the drivers fall outside of Exemption F's scope and thus within the protection of the Maine overtime law.

VI.

Accordingly, the District Court's grant of partial summary judgment to Oakhurst is **reversed**.

O'Connor v. Oakhurst Dairy, 851 F.3d 69, 70–81 (1st Cir. 2017)

CHAPTER 8 EXERCISES
Cluster Logic

Exercise 1. Storm Damage

Tort Law

The opinions in Ploof v. Putnam, 81 Vt. 471 (1908) and Vincent v. Lake Erie, 109 Minn. 456 (1910) involve torts that occur during storms. The two cases, which are often juxtaposed in torts casebooks, share at least one major structural distinction in common. Here are the relevant portions of the opinion. In terms of the structural distinction at issue, can you reconcile the two opinions or not?

Ploof v. Putnam:

It is alleged as the ground on recovery that on the 13th day of November 1904, the defendant was the owner of a certain island in Lake Champlain, and of a certain dock attached thereto, which island and dock were then in charge of the defendant's servant; that the plaintiff was then possessed of and sailing upon said lake a certain loaded sloop, on which were the plaintiff and his wife and two minor children; that there then arose a sudden and violent tempest, whereby the sloop and the property and persons therein were placed in great danger of destruction; that, to save these from destruction or injury, the plaintiff was compelled to, and did, moor the sloop to defendant's dock; that the defendant, by his servant, unmoored the sloop, whereupon it was driven upon the shore by the tempest, without the plaintiff's fault; and that the sloop and its contents were thereby destroyed, and the plaintiff and his wife and children cast into the lake and upon the shore, receiving injuries. This claim is set forth in two counts—one in trespass, charging that the defendant by his servant with force and arms willfully and designedly unmoored the sloop; the other in case, alleging that it was the duty of the defendant by his servant to permit the plaintiff to moor his sloop to the dock, and to permit it to remain so moored during the continuance of the tempest, but that the defendant by his servant, in disregard of this duty, negligently, carelessly, and wrongfully unmoored the sloop. Both counts are demurred to generally...

It is clear that an entry upon the land of another may be justified by necessity, and that the declaration before us discloses a necessity for mooring the sloop. But the defendant questions the sufficiency of the counts because they do not negative the existence of natural objects to which the plaintiff could have moored with equal safety. The allegations are, in substance, that the stress of a sudden and violent tempest compelled the plaintiff to moor to defendant's dock to save his sloop and the people in it. The averment of necessity is complete, for it covers not only the necessity of mooring to the dock; and the details of the situation which created this necessity, whatever the legal requirements regarding them, are matters of proof, and need not be alleged. It is certain that the rule suggested cannot be held applicable irrespective of circumstance, and the question must be left for adjudication upon proceedings

had with reference to the evidence or the charge.

Vincent v. Lake Erie.

The steamship Reynolds, owned by the defendant, was for the purpose of discharging her cargo on November 27, 1905, moored to plaintiff's dock in Duluth. While the unloading of the boat was taking place a storm from the northeast developed, which at about 10 o'clock p. m., when the unloading was completed, had so grown in violence that the wind was then moving at 50 miles per hour and continued to increase during the night. There is some evidence that one, and perhaps two, boats were able to enter the harbor that night, but it is plain that navigation was practically suspended from the hour mentioned until the morning of the 29th, when the storm abated, and during that time no master would have been justified in attempting to navigate his vessel, if he could avoid doing so. After the discharge of the cargo the Reynolds signaled for a tug to tow her from the dock, but none could be obtained because of the severity of the storm. If the lines holding the ship to the dock had been cast off, she would doubtless have drifted away; but, instead, the lines were kept fast, and as soon as one parted or chafed it was replaced, sometimes with a larger one. The vessel lay upon the outside of the dock, her bow to the east, the wind and waves striking her starboard quarter with such force that she was constantly being lifted and thrown against the dock, resulting in its damage, as found by the jury, to the amount of \$500.

We are satisfied that the character of the storm was such that it would have been highly imprudent for the master of the Reynolds to have attempted to leave the dock or to have permitted his vessel to drift away from it.... Nothing more was demanded of them than ordinary prudence and care, and the record in this case fully sustains the contention of the appellant that, in holding the vessel fast to the dock, those in charge of her exercised good judgment and prudent seamanship...

The appellant contends by ample assignments of error that, because its conduct during the storm was rendered necessary by prudence and good seamanship under conditions over which it had no control, it cannot be held liable for any injury resulting to the property of others, and claims that the jury should have been so instructed...

The situation was one in which the ordinary rules regulating property rights were suspended by forces beyond human control, and if, without the direct intervention of some act by the one sought to be held liable, the property of another was injured, such injury must be attributed to the act of God, and not to the wrongful act of the person sought to be charged. If during the storm the Reynolds had entered the harbor, and while there had become disabled and been thrown against the plaintiffs' dock, the plaintiffs could not have recovered. Again, if while attempting to hold fast to the dock the lines had parted, without any negligence, and the vessel carried against some other boat or dock in the harbor, there would be no liability upon her owner. But here those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and,

having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.

Exercise 2. Child Abuse Constitutional Law

Identify the structural distinctions at work the opinion of DeShaney v. Winnebago County, 489 U.S. 189 (1989). Here is the relevant part of the opinion:

Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived. Respondents are social workers and other local officials who received complaints that petitioner was being abused by his father and had reason to believe that this was the case, but nonetheless did not act to remove petitioner from his father's custody. Petitioner sued respondents claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We hold that it did not.

The facts of this case are undeniably tragic. Petitioner Joshua DeShaney was born in 1979. In 1980, a Wyoming court granted his parents a divorce and awarded custody of Joshua to his father, Randy DeShaney. The father shortly thereafter moved to Neenah, a city located in Winnebago County, Wisconsin, taking the infant Joshua with him. There he entered into a second marriage, which also ended in divorce.

The Winnebago County authorities first learned that Joshua DeShaney might be a victim of child abuse in January 1982, when his father's second wife complained to the police, at the time of their divorce, that he had previously "hit the boy causing marks and [was] a prime case for child abuse." App. 152–153. The Winnebago County Department of Social Services (DSS) interviewed the father, but he denied the accusations, and DSS did not pursue them further. In January 1983, Joshua was admitted to a local hospital with multiple bruises and abrasions. The examining physician suspected child abuse and notified DSS, which immediately obtained an order from a Wisconsin juvenile court placing Joshua in the temporary custody of the hospital. Three days later, the county convened an ad hoc "Child Protection Team"—consisting of a pediatrician, a psychologist, a police detective, the county's lawyer, several DSS caseworkers, and various hospital personnel—to consider Joshua's situation. At this meeting, the Team decided that there was insufficient evidence of child abuse to retain Joshua in the custody of the court. The Team did, however, decide to recommend several measures to protect Joshua, including enrolling him in a preschool program, providing his father with certain counselling services, and encouraging his father's girlfriend to move out of the home. Randy DeShaney entered into a voluntary agreement with DSS in which he promised to cooperate with them in accomplishing these goals.

Based on the recommendation of the Child Protection Team, the juvenile court dismissed the child protection case and returned Joshua to the custody of his father. A month later,

emergency room personnel called the DSS caseworker handling Joshua's case to report that he had once again been treated for suspicious injuries. The caseworker concluded that there was no basis for action. For the next six months, the caseworker made monthly visits to the DeShaney home, during which she observed a number of suspicious injuries on Joshua's head; she also noticed that he had not been enrolled in school, and that the girlfriend had not moved out. The caseworker dutifully recorded these incidents in her files, along with her continuing suspicions that someone in the DeShaney household was physically abusing Joshua, but she did nothing more. In November 1983, the emergency room notified DSS that Joshua had been treated once again for injuries that they believed to be caused by child abuse. On the caseworker's next two visits to the DeShaney home, she was told that Joshua was too ill to see her. Still DSS took no action.

In March 1984, Randy DeShaney beat 4-year-old Joshua so severely that he fell into a life-threatening coma. Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time. Joshua did not die, but he suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded. Randy DeShaney was subsequently tried and convicted of child abuse.

Joshua and his mother brought this action.... against respondents Winnebago County, DSS, and various individual employees of DSS. The complaint alleged that respondents had deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known. The District Court granted summary judgment for respondents....

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." Petitioners contend that the State¹ deprived Joshua of his liberty interest in "free[dom] from ... unjustified intrusions on personal security," by failing to provide him with adequate protection against his father's violence. The claim is one invoking the substantive rather than the procedural component of the Due Process Clause...

But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression...."

It may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger. See Restatement (Second) of Torts § 323 (1965) (one who undertakes to render services to another may in some circumstances be held liable for doing so in a negligent fashion); see generally W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on the Law of Torts* § 56 (5th ed. 1984) (discussing “special relationships” which may give rise to affirmative duties to act under the common law of tort). But the claim here is based on the Due Process Clause of the Fourteenth Amendment, which, as we have said many times, does not transform every tort committed by a state actor into a constitutional violation.

Can you rework the structural distinctions in a persuasive way so as to reach the opposite outcome? Write out a short opinion and then identify your own moves.

Comprehensive Exercises Whole Book

Exercise 1. The Nature of Golf Statutory interpretation of the ADA

A professional golfer, Casey Martin, sued the PGA, a non-profit professional golf association, challenging the PGA rule prohibiting the use of golf carts in certain tournaments. Martin alleged that the rule violated the Americans with Disabilities Act (ADA). Martin suffered from a degenerative circulatory disorder. The disorder resulted in severe pain and atrophy in his right leg, and he was unable to walk for extended periods of time, risking fracturing or hemorrhaging if he did. Martin sought to use a golf cart during PGA Tour events, rather than walking the course.

Another professional golfer, Ford Olinger, also suffered from a degenerative condition that significantly impaired his ability to walk. He sued the United States Golf Association (USGA) under the ADA for the right to ride in a cart during a professional golf tournament—the U.S. Open.

Under the ADA,

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. . . . [D]iscrimination includes failure to make reasonable modifications in policies, practices, or procedures. . . unless the entity can demonstrate that making such modifications would fundamentally alter the nature of the good, service, facility, privilege, advantage or accommodation being offered or would result in an undue burden.

Thus, a plaintiff has the burden of proving that a modification has been requested and that it is reasonable. Defendant must then make the requested modification unless it meets the burden of proving that the requested modification **would fundamentally alter the nature of its public accommodation.**

Read the Seventh Circuit opinion, Olinger v. U.S. Golf Ass'n, 205 F.3d 1001 (7th Cir. 2000), in which the court found that using a golf cart would fundamentally alter the nature of the game of golf, and then the Supreme Court opinion, PGA Tour, Inc. v. Martin, 121 S. Ct. 1879 (2001) (and/or the Ninth Circuit opinion, Martin v. PGA Tour, Inc., 204 F.3d 994 (9th Cir. 2000)), in which the court(s) found that the use of a golf cart would not fundamentally alter the nature of the game. In each opinion, focus on the analysis of the “fundamentally alter the nature of” issue. Use any of the analytical techniques in this book to compare the opinions. What techniques did each court use to come to its conclusion on this issue?

Which of the legal doctrine topics play a role in the opinions? How so? Which techniques might they have used more effectively?

Exercise 2. Cell Phones and Suspects

Fourth Amendment

The Fourth Amendment only protects property in which the defendant has a “reasonable expectation of privacy.” A defendant relinquishes that expectation of privacy when he “abandons” a piece of property. Key to abandonment is the idea that property has been voluntarily discarded.

Numerous courts have grappled recently with whether a defendant has abandoned his cell phone (typically at the scene of a crime) if he doesn’t try and get it back. Courts almost uniformly concluded that defendants have no reasonable expectation of privacy in the cell phone because they’ve “abandoned” it. For example, one court concluded that the defendant’s “decision to forego looking for his phone demonstrates he did not expect to maintain his privacy in the information stored on his phone.” But, of course, in these circumstances a defendant cannot recover the phone without incriminating himself.

Use what you’ve learned in HOW TO DO THINGS WITH LEGAL DOCTRINE to discuss the nuances of this problem.

Exercise 3. Suicide and Proximate Cause

Criminal Law

Read (1) the opinion of the Supreme Judicial Court of Massachusetts in *Commonwealth v. Carter*, 115 N.E. 3d 559 (Mass. 2019); and (2) the defendant’s brief in that case, available at 2018 WL 4154835.

Using what you’ve learned in HOW TO DO THINGS WITH LEGAL DOCTRINE, discuss the techniques used by the authors of the opinion and the brief. Are they effective? Why or why not? What different choices might the authors have made, and why?