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Factors

Scott Rempell

South Texas College of Law Houston

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Factors

SCOTT REMPELL†

CONTENTS

INTRODUCTION	1757
I. FACTOR CATEGORIES AND CONCEPTUAL	
HIERARCHIES.....	1767
A. <i>The Vertical Dimension</i>	1770
B. <i>The Horizontal Dimension</i>	1775
C. <i>Category Inclusiveness and Multi-Tiered</i> <i>Factors</i>	1780
II. THE WORKINGS OF A FACTOR.....	1785
A. <i>Form and Scope</i>	1785
B. <i>Operation</i>	1788
1. Dichotomous Operations and Spectrums.....	1789
2. Operational Combinations and Blends	1793
3. Protean Factor Operations and the Limits of Language	1801
C. <i>Significance</i>	1806
1. Potential As-Applied Significance Range....	1807
2. Inherited Significance	1812
3. Reconciling Inherent and As-Applied	

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Significance	1816
III. ATTRIBUTES OF FACTOR TESTS.....	1819
A. <i>Exhaustiveness and Related Matters</i>	1819
B. <i>Analytical Units and Inter-Factor Operations</i>	1822
C. <i>Steps and Sequences</i>	1827
IV. ORIENTING THE FRAME OF REFERENCE	1830
CONCLUSION	1832

INTRODUCTION

This Article concerns the meaning and properties of factors in law. In its most inclusive sense, a factor is a consideration a decisionmaker must or may take into account to determine an outcome. The focus here is on factors of general application. Consequently, a variable that *factors* into the holding of a discrete case is only relevant to the extent it is a factor of general application or potentially contributes to the creation or development of a factor of general application.

Factors are one of the foundational units in law.¹ They are also ubiquitous. Most directly, they comprise the units of inquiry in formalized factor tests that facilitate, in some way, the resolution of a legal issue.² They can also be present in almost any rule or legal test that provides at least some judgmental discretion. In a legal test comprised of elements,

1. The other main foundational unit is an element. Other formalized structures tend to blend these foundational units with certain relational attributes or progressive steps. See LAUREL CURRIE OATES ET AL., THE LEGAL WRITING HANDBOOK 663 (8th ed. 2021) (discussing parts, steps, and prongs as test features). A different classification scheme might segment legal directives into rules and standards—that is, determinate rules that more clearly dictate in advance how they will be applied, as compared to more discretionary standards like *reasonableness* that acquire most of their meaning during application. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–62 (1992). Rules and standards are conceptually distinguishable categories but more accurately represent a continuum. See Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 961 (1995). Factors may take on characteristics that appear more rule-like or standard-like. Even though this Article is not using rules and standards as its grounding frame, the literature on this topic very much informs this Article’s discussion of factor forms and operational qualities.

2. There are many examples. Among other sources, they can be prescribed in a statute or regulation, or created by courts. *E.g.*, CAL. FAM. CODE § 4320 (West 2022) (factors to assess spousal support); 33 C.F.R. § 320.4(a)(1) (2021) (factors relevant to a permitting process); *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (factors to determine if there is a violation of defendant’s right to a speedy trial).

for example, each element presents as a discrete binary unit. However, they frequently require an assessment of factors at a subsidiary operational level.³ Also falling within the broad factor concept are considerations that only probabilistically qualify as a factor of general application. In the absence of expressly recognized factors, those who assess or apply law often consciously or reflexively seek to identify relevant patterns in prior authoritative sources—patterns that allow one to synthesize considerations that do or could explain the relevant body of prior decisions.⁴

As factors are a foundational and ubiquitous concept in law, there is, unsurprisingly, an extensive body of literature that discusses factors in some way. There are many

3. This would include elements that set out an abstract standard like the duty element of negligence claims, *e.g.*, *In re Certified Question from Fourteenth Dist. Ct. of Appeals of Tex.*, 740 N.W.2d 206, 211 (Mich. 2007) (listing four factors), and it would include most mens rea elements like premeditation and deliberation in first-degree murder, *e.g.*, *People v. Young*, 105 P.3d 487, 506–07 (Cal. 2005) (identifying three general factors).

4. One could also try to infer factors of general application from a single authoritative source, though almost assuredly such inferences would be probabilistic. On the general concept of synthesis, see Jane Kent Gionfriddo, *Thinking Like a Lawyer: The Heuristics of Case Synthesis*, 40 TEX. TECH L. REV. 1 (2007). The reflexive draw to identify patterns and categorize stems from people's need to organize properties of their environment to preserve cognitive economy and facilitate reasoning, decision-making, and efficient communication. See Lance J. Rips et al., *Concepts & Categories: Memory, Meaning, and Metaphysics*, in THE OXFORD HANDBOOK OF THINKING AND REASONING 177, 178 (Keith J. Holyoak & Robert G. Morrison eds., 2012) [hereinafter OXFORD HANDBOOK] (reviewing the subordinate functions of categorization). Consequently, categories that do or may explain a series of inputs do not cease to be potentially relevant simply because they have not been expressly acknowledged or systematized—which, regarding factor categories, a court might decline to do for a variety of reasons. Compare *United States v. Duncan*, 308 F. App'x 601, 611 (3d Cir. 2009) (Chagares, J., concurring) (proposing a taxonomy to systematize potentially relevant factors), with *id.* at 622 (Pollak, J., concurring) (arguing against an express factor list).

assessments of discrete substantive legal issues that concern factors. By design, these discussions primarily focus not on factors as a whole, but rather on the nuances associated with the factor test they are analyzing or proposing.⁵ Jurisprudence scholarship regularly touches on factors in broader discussions of the utility of various forms of legal directives—from crisp determinate rules to more discretionary standards.⁶ These explorations often subsume factor inquiries and include many general observations that certainly apply to a broader assessment of factors.⁷ Nevertheless, factors are not the central frame of reference nor is a comprehensive overview of factors the ultimate goal of these explorations.⁸ Legal analysis and communication texts often recognize the need to review forms and components of rules and legal tests like factors and factor tests.⁹ These discussions, however, are necessarily cursory

5. *E.g.*, Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581 (2006); Ryan Vacca, *Work Made for Hire – Analyzing the Multifactor Balancing Test*, 42 FLA. STATE U. L. REV. 197 (2014); Aaron D. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521, 542–95 (1982) (advocating certain factors to assess duty in product liability cases).

6. *See* Sunstein, *supra* note 1, at 963–64, 998–1003; Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 28 (2000).

7. *See* Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CALIF. L. REV. 447, 489 (2016); Korobkin, *supra* note 6, at 28–30; Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 61 (1992); Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823, 835–36 (1991).

8. To the extent there exists an aberration of this general claim, it could be the recent work of Kevin Clermont. Kevin M. Clermont, *Rules, Standards, and Such*, 68 BUFF. L. REV. 751, 773–74 (2020); *see also infra* note 127 (discussing Professor Clermont's article).

9. *See, e.g.*, LINDA H. EDWARDS, *LEGAL WRITING AND ANALYSIS* 49–51 (5th ed. 2019); MARY BETH BEAZLEY & MONTE SMITH, *LEGAL WRITING FOR*

because of the volume of material the texts must cover to further their ultimate objective, which is the external communication of one's legal analysis.¹⁰

The contribution of this Article, then, is to focus directly on factors and provide a comprehensive overview of their form, function, and operation. Their prevalence in myriad express forms and as implicit units of inquiry itself renders an understanding of their attributes important. Equally important is that they form the construct for so many secondary functions. Factors are, in many ways, even more metaphorically atomistic than elements.¹¹ Among other secondary functions, the workings of factors can facilitate forms of reasoning and scaffold organizational principles related to external communication.¹²

In addition to factors' ubiquity and the secondary functions they support, the breadth of properties and features that can apply to factors also support the need for a

LEGAL READERS 49–54 (2d ed. 2019); CHARLES R. CALLEROS & KIMBERLY HOLST, LEGAL METHOD AND WRITING I 59 (8th ed. 2018); DEBORAH A. SCHMEDEMANN & CHRISTINA L. KUNZ, SYNTHESIS: LEGAL READING, REASONING, AND COMMUNICATION 20–21 (5th ed. 2017); DANIEL L. BARNETT & JANE KENT GIONFRIDDO, LEGAL REASONING AND OBJECTIVE WRITING 97–99 (2016).

10. See sources cited *supra* note 9.

11. One may consider factors more foundational than elements for several reasons, including the fact that factors can subsume the more limited properties associated with elements, *see infra* Section II.B.2, and that more abstract elements can require an assessment of factors, *see supra* note 3 and accompanying text. Of course, a unit's acontextual foundational nature can only be a generalization because ultimately it depends on one's frame of reference. *See infra* Part IV. A factor could, for instance, be comprised of elements at a subsidiary level of operation.

12. See KEVIN BENNARDO, THINKING AND WRITING ABOUT LAW 23–24 (2020) (linking factor induction to analogical reasoning). For an example of how the features perceived to apply to factor inquiries can alter the organizational principles that inform how to structure and externally communicate legal analysis, see OATES ET AL., *supra* note 1, at 243–50, and see also BEAZLEY & SMITH, *supra* note 9, at 104 (framing organizational principles around discrete units of discourse).

comprehensive overview. The scope of these potential attributes is not always recognized, which can cause overly narrow assumptions about the qualities that may apply to factors. One may, for instance, conceive of a factor test as a list of non-dispositive considerations that must all be considered, or a guiding framework that ultimately affords a decisionmaker considerable discretion, or a balance between considerations favoring one side and those favoring the other.¹³ Such statements may be correct for a particular inquiry,¹⁴ just like in some instances it may be correct to think of individual factor operations as more akin to an element's binary operational structure.¹⁵ But the possibility that any of these conceptions are accurate in certain contexts does not mean that they accurately convey the properties of all factors or the assessment framework that applies to all multifactor inquiries. Indeed, they do not.¹⁶ As such, a detailed assessment can also shed light on assumptions about factors that one could more accurately describe as generalizations at best.¹⁷

13. See, e.g., Michael R. Smith, *Elements v. Factors*, WYO. LAW., Apr. 2016, at 46 (stating that individual factors are not dispositive); CALLEROS & HOLST, *supra* note 9, at 59 (analogizing factors to general guidelines); James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. STATE L.J. 773, 800 (1995) (stating that factor tests require courts to balance factors).

14. Courts regularly convey that no single factor is dispositive, e.g., *Rindfleisch v. Gentiva Health Sys., Inc.*, 752 F. Supp. 2d 246, 250 (E.D.N.Y. 2010), though such statements may not even be universally true for the limited doctrine to which they apply, see *infra* Section II.C.3.

15. See JOHN C. DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD 76 (6th ed. 2017) (describing the binary properties of elements and introducing factors as a subset of elements).

16. See, e.g., *infra* Sections II.B (discussing binary and spectral operations for factors along with hybrids), II.C.1 (reviewing factors that can be dispositive), II.C.2 (discussing prescriptive targeted significance that could impact a decisionmaker's discretion), and III.B (reviewing multifactor operations).

17. An additional benefit of using factors as the frame of reference is

This Article will proceed in four parts. Part I will provide an orienting framework for how to consider the nature of factor formation, meaning, and operation. Drawing on cognitive psychology literature, it will conceive of factors as goal-oriented categories nesting within a broader classification framework.¹⁸ Part I will discuss the vertical and horizontal dimensions of factor categories, which concern, respectively, the level of generality at which to represent a factor and how each factor in a collection of factors can impact the meaning and function of the others.¹⁹ Also relevant is the scope of what one chooses to label as a factor from the various options that the broader surrounding taxonomy provides.²⁰ This review lays a foundation for the rest of the Article because it foreshadows the category-

that it can help to bridge relevant literature that is ordinarily segmented and tailored to a discreet discourse community. The characteristics of a discourse community include “mechanisms of intercommunication among its members,” use of “its participatory mechanisms primarily to provide information and feedback,” and the acquisition of “some specific lexis.” John Swales, *The Concept of Discourse Community*, in *GENRE ANALYSIS: ENGLISH IN ACADEMIC AND RESEARCH SETTINGS* 21, 24–26 (Carol A. Chappelle & Susan Hunston eds., 1990). The definition of lexicon to which lexis applies is “the vocabulary of a language, an individual speaker or group of speakers, or a subject.” *Lexicon*, MERRIAM-WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/lexicon>. Within the broader legal community, there are many possible subsidiary discourse communities, including the legal academy and practicing attorneys. See Teri A. McMurtry-Chubb, *Toward A Disciplinary Pedagogy for Legal Education*, 1 SAVANNAH L. REV. 69, 71 (2014). Within the legal academy, there exists subsidiary discourse communities that assess factor-related information for a particular purpose and with a particular audience in mind, such as jurisprudence scholars and legal writing scholars. The lexis of the former most often frames discussions around rules and standards, while the latter more often uses factors and elements—which could give the impression of entirely distinct inquiries.

18. See Rips et al., *supra* note 4, at 186–87 (noting that categories are often formed to “accomplish some function or goal” and reviewing supporting studies).

19. *Infra* Section I.A–B.

20. *Infra* Part C.

centric processes that emerge throughout the subsequent assessment of factors, as well as inter-factor operations that could rely on the broader classification structure that encompasses the relevant factors.²¹

With that general framework in place, Part II will focus on the potential properties of a discrete factor. After a review of the various forms a factor might take and the varied substantive and process-oriented content it may concern,²² Part II will assess the potential ways in which a discrete factor may operate.²³ A factor's operation could mimic the dichotomous structure of an element's operation, where a law-applier determines whether a condition has or has not been established.²⁴ Alternatively, a factor could operate on more of a spectrum, where a law-applier assesses where the factor falls within a natural or more artificial range or space.²⁵ Thus, a factor could query whether certain conduct was or was not sufficiently harmful, or it could simply determine the extent of harm suffered and assess the implications. A factor can also operate in various hybrid

21. *E.g., infra* Sections II.B, III.B. For example, in a progressive step of a multifactor inquiry, a law-applier might consider the subset of factors that all fall within a unifying superordinate category. *See, e.g.,* Regents of Univ. of Cal. v. Superior Ct., 413 P.3d 656, 670–74 (Cal. 2018) (considering all the factors related to the superordinate foreseeability category then considering factors subsumed under the public policy category); Ohio Valley Env't Coal., Inc. v. U.S. Army Corps of Eng'rs, 890 F. Supp. 2d 688, 695 (S.D.W. Va. 2012) (operation for factors that concern hardship).

22. *Infra* Section II.A.

23. *Infra* Section II.B.

24. *See* Mueller v. Wells, 367 P.3d 580, 584 (Wash. 2016) (holding that a fiduciary relationship did exist); Kitsap Bank v. Denley, 312 P.3d 711, 718–20 (Wash. Ct. App. 2013) (finding insufficient evidence of a confidential or fiduciary relationship).

25. *See* Streamline Prod. Sys., Inc. v. Streamline Mfg., Inc., 851 F.3d 440, 453–54 (5th Cir. 2017) (assessing the strength of a trademark rather than whether the mark was or was not strong); *see also* Clermont, *supra* note 8, at 753 (linking factors to scalar operations).

forms based on operational structures that combine the perceived benefits of rigid binary categories and more flexible spectrums.²⁶ One could, for instance, recognize an inquiry as spectral but identify along the spectrum dichotomous subcategories that guide both how one would assess the relevant information and how to determine its significance in the inquiry.²⁷

After analyzing factor operations, Part II will shift to a discussion of factor significance.²⁸ This section will review the potential significance range that could conceivably apply to a factor devoid of context; the outer parameters of this range are singular factors that are outcome determinative on the one hand, and those that do not impact the outcome at all on the other.²⁹ Abstractly, a factor might have any potential level of significance, but the nature of a discrete inquiry can limit the significance range for a particular factor. A factor's significance may also be dictated, narrowed, or otherwise guided by prior authorities; seldom will a decisionmaker not have to take into account how precedent impacts its assessment of a factor's significance.³⁰ Part II's discussion of factor significance will therefore cover how binding authority can impact the extent to which a factor's significance (and general operation) has been systematized, which speaks to the range of attributes one might associate with the analytical units that can be labelled as factors.³¹

26. *Infra* Section II.B.2.

27. *See* *United States v. Oliva*, 909 F.3d 1292, 1303–04 (11th Cir. 2018) (reviewing subcategories like intent and negligence for reasons-for-delay factor in claimed violation of right to speedy trial).

28. *Infra* Section II.C.

29. *Infra* Section II.C.1.

30. *See* *United States v. Niggemann*, 881 F.3d 976, 981–82 (7th Cir. 2018) (basing assessment of factor significance on similarities between case facts and past authority); *Commonwealth v. Perez*, 97 A.3d 747, 755 (Pa. 2014) (same).

31. *Infra* Section II.C.2–3.

Part II's factor-specific assessment will lead into Part III's focus on multifactor inquiries. Part III will first discuss the scope of factors that are potentially on the table to consider, which subsumes the question of whether a factor list is exhaustive or non-exhaustive.³² Part III will then focus on inter-factor assessment processes in a multifactor inquiry.³³ These processes could involve multiple operations among different groupings of analytical units. A particular operation could involve a broad assessment of all the factors holistically, but it could also pertain to a more limited number of factors. Discrete operations tend to either be more aggregative or more comparative.³⁴ Given the possibility of multiple operations, Part III will also review whether and to what extent law-appliers must or may consider the various inter-factor operations in a particular sequence.³⁵

The manner by which one conceives of the properties of a factor inquiry can depend on one's frame of reference.³⁶ Therefore, Part IV will review three orienting principles related to frames of reference. These include the scope of a decisional framework one chooses to assess to define its properties, and how the particulars of a discrete inquiry can impart situationally specific meanings onto abstract

32. *Infra* Section III.A.

33. *Infra* Section III.B.

34. An aggregative operation focuses on the combined significance of multiple factors, such as when Factor A and Factor B are collectively sufficient to support a certain outcome. *See* *People v. Robinson*, 657 N.E.2d 1020, 1029 (Ill. 1995) (reviewing factors that are collectively sufficient to establish requisite intent). A comparative operation more directly considers factors against each other, such as when Factor A is "balanced" against Factor B. *See* *FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852–53 (10th Cir. 2003) (balancing harm factors in stay request).

35. *Infra* Section III.C.

36. *See* Arthur B. Markman, *Knowledge Representation*, in OXFORD HANDBOOK, *supra* note 4, at 36, 47–48 (discussing embodied and situated cognition).

concepts.

This Article shows that the concept of factors is quite broad and the membership attributes and properties that can apply to factors are concomitantly extensive. The factor concept does not, however, refer to a category with rigid boundaries defined by fixed properties for membership. Rather, it is one with members sharing what can be thought of as a “family resemblance,” in which category members are related to one another even if they do not have a set group of consistent attributes and properties that necessarily define their membership.³⁷ Certainly there are gradations, and some attributes and properties feel more prototypical.³⁸ Nevertheless, the factor concept also encompasses members with structures and operational qualities that one could see in units of inquiry not considered factors.³⁹ The collection of all these features and qualities portends the malleable factor concept that plays such a foundational and prevalent role in law and legal reasoning.

37. GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 16 (U. Chi. Press 1987) (reviewing Ludwig Wittgenstein’s use of the category *game* to illustrate how category members can be united by “family resemblances” rather than discrete common properties).

38. *See, e.g., supra* text accompanying notes 11–13; *see also* LAKOFF, *supra* note 37, at 12 (defining centrality and membership gradience); Eleanor Rosch, *Principles of Categorization*, in *COGNITION AND CATEGORIZATION* 27, 36 (Eleanor Rosch & Barbara B. Lloyd eds., 1978) (discussing category prototypes).

39. *Compare* *United States v. Cabral*, 979 F.3d 150, 157 (2d Cir. 2020) (threshold inquiry labelled a factor), *and* *Ross v. U.S. Bank Nat’l Ass’n*, 542 F. Supp. 2d 1014, 1021 (N.D. Cal. 2008) (describing a threshold consideration as a dispositive factor), *with* *Montgomery v. Pinchak*, 294 F.3d 492, 498–99 (3d Cir. 2002) (distinguishing a threshold consideration from the factor test that follows). *See generally* Louis Kaplow, *On the Design of Legal Rules: Balancing Versus Structured Decision Procedures*, 132 *HARV. L. REV.* 992, 993–94 (2019) (describing structured decision procedures that include threshold considerations).

I. FACTOR CATEGORIES AND CONCEPTUAL HIERARCHIES

Concepts are mental representations of thoughts and ideas; they are also referential, “and what they refer to are categories.”⁴⁰ Categories allow people to attach meaning to units of information and leverage category knowledge for many functional uses, including predictions and drawing inferences more generally.⁴¹ A category’s utility can also come from the broader classification structure of which it is a part. By thinking of a category as a component of a broader classification structure and not just an isolated entity, one can leverage all the potentially relevant conceptual relations.⁴²

The functional utility of categories and hierarchies certainly applies to factor inquiries.⁴³ Each factor represents a category and each of these factor categories exist within a larger conceptual hierarchy—potentially numerous hierarchies, in fact.⁴⁴ Factors are a particular type of category. Specifically, they are goal-driven categories.⁴⁵ A

40. Rips et al., *supra* note 4, at 177.

41. *Id.* at 178.

42. *Id.* (noting that such conceptual relations support inductive and deductive reasoning); *see also* Steven M. Smith & Thomas B. Ward, *Cognition and the Creation of Ideas*, in OXFORD HANDBOOK, *supra* note 4, at 456, 457 (describing concept representations as hierarchical from a functional perspective).

43. *See generally* Barbara A. Spellman & Frederick Schaur, *Legal Reasoning*, in OXFORD HANDBOOK, *supra* note 4, at 719, 725–26 (noting how one may think of legal categories as the application of ordinary reasoning principles to “law-created content and categories”); Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1154 (2002) (“[I]n law, as in ordinary life, people’s thinking is *category-bound*.”) (emphasis in original).

44. *See infra* Section III.B (discussing potential *ad hoc* superordinate categories based on inter-factor operations).

45. *See* Rips et al., *supra* note 4, at 186–87; *cf.* Eugenio Gorla, *The Discursive Construction of Categories: Categorisation as a Dynamic and Co-operative Process*, LANGUAGE SCIENCES, at 2–5 (2019) (reviewing

factor creator presumably conceives of a factor category because the category is believed to contribute to some objective, at least potentially so.⁴⁶ For instance, if an overarching inquiry objective is to determine spousal support that is “just and reasonable,”⁴⁷ relevant categories would presumably include considerations that facilitate a decision about just and reasonable support.⁴⁸ If an objective is to determine whether a defendant possessed a particular mental state, relevant categories would often include the conditions from which to infer such a mental state was or was not present to a degree of certainty.⁴⁹

Factor inquiry objectives are relevant because they limit the universe of potentially viable categories. The objectives could be multifaceted and dynamic; additionally or concurrently, they could be underdeveloped, probabilistic, or disputed.⁵⁰ These qualities could impact the number of

short-term goal-driven categories that are constructed for a particular interaction “and dismissed immediately after their use”).

46. See Lawrence W. Barsalou, *Deriving Categories to Achieve Goals*, in 27 THE PSYCHOLOGY OF LEARNING AND MOTIVATION: ADVANCES IN RESEARCH AND THEORY 1, 41–43 (Gordon H. Bower ed., 1991) (reviewing the link between frames and potential goal-driven categories as well as the distinction between feasible categories and optimal categories); see also FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 26 (1991) (linking justification to chosen factual predicates). See generally BENNARDO, *supra* note 12, at 35 (discussing assessment of purpose as a guide to discerning law).

47. CAL. FAM. CODE § 4330(a) (2020).

48. *Id.* (prescribing factors); see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985) (reviewing considerations to assess whether asserting jurisdiction would be reasonable based on the objective of “fair play and substantial justice”); 17 U.S.C. § 107 (prescribing factors to assess whether the use of copyrighted work is “fair”).

49. *E.g.*, *Helwig v. Vencor, Inc.*, 251 F.3d 540, 551–52 (6th Cir. 2001) (factors for scienter in securities fraud); *State v. Williams*, 548 S.E.2d 802, 805 (N.C. Ct. App. 2001) (factors for whether murder was premeditated).

50. One reason some of these qualities might exist is because the

potentially viable categories, but only marginally in relation to the number of acontextual category options that even a general frame of reference would preclude—often so obviously so that it is easy to take for granted.⁵¹ For instance, even if one believes the purposes of the minimum contacts test for personal jurisdiction are underdeveloped and ambiguous,⁵² the nature of the inquiry necessarily renders irrelevant countless factor categories, from the average winter temperatures in various jurisdictions to the gender of politicians elected during a designated time period.⁵³

Even though objectives limit the number of viable categories, often there remains many possible options and means of expressing those options in the form of a factor. Consider, for instance, how decisionmakers might determine if an informant tip justifies certain types of investigatory stops.⁵⁴ One could identify the factors abstractly as the

factor inquiry develops more organically over a period of time. *See* SCHAUER, *supra* note 46, at 26 (distinguishing logically equivalent generalizations and the subset of those generalizations that flow from a given justification while acknowledging the possibility that generalizations precede justification).

51. Barsalou provides an example of categories relevant to the simple act of “planning a vacation,” which includes “an indefinitely large number of goal-derived categories, well beyond the billions” without any contextual constraints or optimization efforts. Barsalou, *supra* note 46, at 22–24, 43; *see also* Covey, *supra* note 7, at 489 (noting that whether one does so *ex ante* or *ex post*, rules and standards both require the identification of relevant categories from the “infinite array” of possibilities).

52. *See* Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward A Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 193–94, 209–14 (1998) (identifying factors and exploring the purposes of the minimum contacts test).

53. *See* Sunstein et al., *supra* note 43, at 1171 (linking optimal categories to appropriate frames of reference, which could negate the relevance of categories like “things that are not Julius Caesar”).

54. *See* *Alabama v. White*, 496 U.S. 325, 325–32 (1990) (reviewing whether an anonymous tip that was subsequently corroborated justified a vehicle stop).

quantity of the information and the *quality* of the information.⁵⁵ Conversely, one could create more descriptive factor categories to frame the inquiry, like whether the informant exposed themselves to liability for a false report and whether the officer corroborated the information the informant provided.⁵⁶ Both category lists could stem from the same objectives, despite the differing classification structures.

In short, envisioning factors through a category-based lens can shed light on how factors are formed, what they mean, and how they operate. The surrounding context might limit the number of factor categories that could apply, but there are still many ways to conceptualize and express the factors that will or may be relevant. With that overview in mind, Section A will address the vertical dimension of factor categories by reviewing the various levels of generality one may use to represent a factor. Section B will focus on the horizontal dimension, namely how factor categories can influence and interact with other factors on the same conceptual plane. Section C will discuss the scope of hierarchical levels that may be subsumed within the category identified expressly as a discrete factor, and the benefits and drawbacks of subsuming multiple levels.

A. *The Vertical Dimension*

A factor could be something as general as *conduct*.⁵⁷ Such a general category could just push to a subsidiary plane in the conceptual hierarchy the more operational subcategories of which the general factor is concerned.⁵⁸ But

55. See *State v. Miller*, 815 N.W.2d 349, 358–59 (Wis. 2012).

56. See *State v. Pratt*, 951 P.2d 37, 42–43 (Mont. 1997).

57. See *People v. Roberts*, 636 N.E.2d 86, 90 (Ill. App. Ct. 1994) (conveying the potential need to assess “actions, declarations, or conduct” to infer knowledge).

58. Among others, subsidiary categories in this example could relate to more specific types of conduct, see *infra* text accompanying notes 62

like the abstract categories of *quality* and *quantity* mentioned above in the informant reliability context, a generalized expression may have utility. Consider, for instance, the test for stays pending appeal, which includes the fairly general factor of *where the public interest lies*.⁵⁹ There is a wide range of prospective interests that may flow from the highly varied substantive issues underlying cases. That, in turn, could support the utility of a general concept capable of encompassing all these variations.⁶⁰

Factors do not have to be so general.⁶¹ Working off the above *conduct* example as a relativistic reference point, one may instead describe a factor less generally as *evasive conduct*.⁶² This category provides a more directed type of conduct to orient the factor inquiry. It focuses the inquiry but is broad enough to embody a targeted cohort of case-specific circumstances.⁶³ It represents a different tradeoff of category

and 65, or time periods during which the conduct is relevant, *see* Hubbard v. Commonwealth, 59 S.E.2d 102, 103 (Va. 1950).

59. *See* Nken v. Holder, 556 U.S. 418, 435 (2009).

60. *Compare* Concerned Pastors for Soc. Action v. Khouri, 844 F.3d 546, 550 (6th Cir. 2016) (public interest in safe drinking water), *with* Thapa v. Gonzales, 460 F.3d 323, 336–37 (2d Cir. 2006) (public interest “in enforcing bargains between aliens and the government”).

61. *Cf.* Hanoch Dagan, *Doctrinal Categories, Legal Realism, and the Rule of Law*, 163 U. PA. L. REV. 1889, 1911 (2015) (noting the potential utility of narrower legal categories that “can be more normatively coherent”).

62. *See, e.g.*, United States v. Griffin, 684 F.3d 691, 696 (7th Cir. 2012) (listing evasive conduct as a factor in constructive possession assessment); United States v. Morris, 977 F.2d 617, 619–20 (D.C. Cir. 1992) (same).

63. Examples of these targeted circumstances include running up the stairs after seeing officers at the front door, *see* United States v. Littlejohn, 489 F.3d 1335, 1339 (D.C. Cir. 2007), and gesturing toward a weapon “immediately following an evasive turn of the car when confronted by a police cruiser,” United States v. Hernandez, 780 F.2d 113, 120 (D.C. Cir. 1986). For an example in a different context, *see* Rothwell v. Singleton, 257 S.W.3d 121, 125 (Ky. Ct. App. 2008) (listing as a factor in an undue influence assessment “efforts by the principal

attributes as compared to the superordinate *conduct* category. Higher generality fosters category inclusiveness, perhaps overly so, while greater specificity provides more focus but runs the risk of excluding potentially relevant inputs.⁶⁴ The actual effect of the generality level is necessarily dependent on the context of the inquiry and the broader classification framework of which any one factor category may be a component—which would include other relevant factors as Section B will review.

While factors can be expressed at various levels of abstraction and generality, there is a point at which a category is too specific to pragmatically qualify as a factor. For instance, as opposed to *evasive conduct*, an inquiry is unlikely to describe as a factor *whether a defendant made furtive hand movements while backing away slowly and heading for an open window*.⁶⁵ Expressions pegged to this level of specificity could create an unwieldy number of categories and thus diminish the usefulness that factor categories are supposed to provide. It would fight against natural tendencies to preserve cognitive economy. Hierarchical category structures preserve cognitive economy by allowing one to chunk related pieces of information and activate the superordinate and subordinate information only when needed⁶⁶—and these principles of economy could apply to the dissemination of information as well, in the form of a

beneficiary to restrict contacts between the testator and the natural objects of his bounty” rather than trying to list out distinct types of efforts (quoting *Bye v. Mattingly*, 975 S.W.2d 451, 455 (Ky. 1998)).

64. For a general discussion of rule under- and over-inclusiveness, see SCHAUER, *supra* note 46, at 31–33.

65. Such a circumstance could *factor* into a court’s assessment, but that does not make it a factor of general application.

66. Robert L. Goldstone et al., *Concepts and Categorization*, in 2 HANDBOOK OF PSYCHOLOGY 610–11 (Alice F. Healy & Robert W. Proctor eds., 2012) (noting how concepts foster cognitive economy regarding memory storage and learning); Barsalou, *supra* note 46, at 40 (linking subcategories to organizational efficiency).

judicial opinion or otherwise.⁶⁷

To be sure, there is no fixed maximum number of factors that may be included along a single conceptual plane.⁶⁸ Certainly tests exist that have a considerable number of factors, particularly prescriptive inquiries promulgated by legislatures and administrative agencies, and especially for highly technical subject matters.⁶⁹ But factor inquiries often have ten or fewer factors operating on any horizontal plane and much less often exceed twenty.⁷⁰ Consequently, there is a natural tendency to avoid a taxonomic structure with dozens of factor categories on a horizontal plane.

Specificity, of course, is a matter of degree, perspective, and context.⁷¹ If a person is told to take a seat in *the chair*, this level of generality would be appropriate if the request was made in a room containing one chair.⁷² Conversely, if a

67. On categories facilitating efficiency in communication, see Goldstone et al., *supra* note 66, at 610, and Lila Gleitman & Anna Papafragou, *Language and Thought*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING 633, 637 (Keith J. Holyoak & Robert G. Morison eds., 2005) [hereinafter CAMBRIDGE HANDBOOK].

68. While contextually relevant here, the number of factors on a conceptual plane most directly applies to Section B's discussion of the horizontal dimension.

69. *E.g.*, 33 C.F.R. § 320.4(a)(1) (2021) (providing over twenty potentially relevant considerations for the Department of the Army to review for certain water-related permits); Rev. Rul. 87-41, 1987-1 C.B. 296, 298-301 (listing twenty factors to determine employment status of taxpayer).

70. *E.g.*, *Salinas v. Starjem Rest. Corp.*, 123 F. Supp. 3d 442, 463 (S.D.N.Y. 2015) (four factors to assess employment status); *Alliantgroup, L.P. v. Feingold*, 803 F. Supp. 2d 610, 625 (S.D. Tex. 2011) (three factors to assess whether customer list is trade secret).

71. See Steven A. Sloman & David A. Lagnado, *The Problem of Induction*, in CAMBRIDGE HANDBOOK, *supra* note 67, at 95, 99 (noting how concepts typically arise within a larger system, which can impact the meaning of linguistic predicates "like 'is small'").

72. See Rosch, *supra* note 38, at 42 (using a comparable example to illustrate the role of context in generality appropriateness).

person enters a furniture store and expresses a desire to buy *the chair*, the category may be too general if the store contains dozens of objects that could fall within the *chair* category—and therefore a description potentially including considerable details about the chair might very well be appropriate or even necessary. Concomitantly, whether a category is too specific to express as a factor very much depends on the nature and context of the inquiry. Consider the factors a jurisdiction might use to assess whether the defendant acted with the requisite premeditation and deliberation for first-degree murder. The frequency of such inquiries and recurring patterns provide courts with opportunities to isolate fairly detailed but generalizable criteria. A factor may simply be “the manner and nature of the killing,”⁷³ but one can also find more particularized categories like whether the defendant fatally struck the victim after the victim “has been felled and rendered helpless.”⁷⁴ Though the latter is more specific, it is not necessarily too specific to express as a factor in this context.

Specificity can also be appropriate because the goal-oriented objectives of the inquiry, as applied to the particular context in which one is assessing those goals, suggest one or several targeted evaluative tasks or frameworks. For example, when deciding whether to defer to state court proceedings, a federal court may consider “the order in which the concurrent forums obtained jurisdiction.”⁷⁵ This might not feel specific in the same way that running away can feel more specific than evasive conduct. That is simply because factor categories are generally based on a classification system commensurate with their goals. Thus, the applicable

73. *State v. Wright*, 2009 SD 51, ¶ 60, 768 N.W.2d 512, 532.

74. *State v. Williams*, 548 S.E.2d 802, 805 (N.C. Ct. App. 2001) (internal quotation marks omitted).

75. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983); *Edge Inv., LLC v. District of Columbia*, 927 F.3d 549, 553 (D.C. Cir. 2019).

frame of reference grounds the relativistic concept of specificity.⁷⁶

B. *The Horizontal Dimension*

The content and abstraction level of a factor category can also be influenced by other factors. In a multifactor inquiry, a single factor is part of a collective of considerations working in some sort of (desirably) cohesive and coherent manner. For this reason, factor categories should presumably have a certain amount of distinctiveness from other factors; more particularly, each should have distinctiveness in relation to a purpose that it serves in the inquiry—some type of prescribed or inferable utility, at least potentially so.⁷⁷ To illustrate, a factor courts might use to decide whether to grant a request to appoint counsel is “the plaintiff’s capacity to retain counsel on his or her own behalf.”⁷⁸ If the requester’s capacity to retain counsel is understood to necessarily require a decisionmaker to assess the requester’s financial position, it may not make sense to include the plaintiff’s financial position as a separate factor.⁷⁹ Neither individual factor is inherently problematic in isolation if they both further the objectives of the inquiry. It is only when the content and scope of each is considered in conjunction with

76. See Sloman & Lagnado, *supra* note 71, at 99.

77. See Arthur B. Markman & Brian H. Ross, *Category Use and Category Learning*, 129 PSYCHOL. BULL. 592, 594 (2003) (noting people’s sensitivities to category distinctions and the role that plays in reasoning); see also *Ingram v. Deere*, 288 S.W.3d 886, 900 (Tex. 2009) (interpreting the scope of a factor narrowly as to not overlap with other factors and impact distinctiveness).

78. *Montgomery v. Pinchak*, 294 F.3d 492, 499, 505 (3d Cir. 2002).

79. See *generally id.* at 505 (reviewing the litigant’s “financial situation”). For potential reasons why largely indistinguishable considerations might be identified as distinct factors, see *infra* text accompanying notes 93–94, and consider *State v. Misenheimer*, 282 S.E.2d 791, 796 (N.C. 1981) (listing defendant’s conduct and statements as a factor and listing defendant’s threats as another).

the other that the potential category distinction problem emerges.

An example of complete categorical overlap illustrates why the creation of a factor category may need to account for other factors on the same horizontal plane in the inquiry as well as the superordinate or subordinate categories of the factors on the same horizontal plane. A factor's complete overlap with another factor in all instances, however, does not reflect the more central role that gradations of distinctiveness can play in factor inquiry composition—and by extension the design of individual factors.

Distinctiveness gradations are an issue because complete distinctiveness among factor categories is not always achievable or desirable.⁸⁰ To truly obtain complete distinctiveness, the nature of the inquiry would have to permit the creation of factor categories that occupy unique conceptual and as-applied space and still manage to cover or account for all of the germane or potentially germane considerations.⁸¹ Beyond whatever thought processes factor creators may use to conceptualize these distinct categories, they must then take those conceptions and determine the linguistic expressions that would adequately convey their meaning and scope to those who will interpret and apply them—an underappreciated task,⁸² to be sure, particularly

80. On categories not needing fixed boundaries to be meaningful, see *supra* notes 37–38 and accompanying text. Since categories do not need to have fixed boundaries, it might not be desirable to create factor categories that necessarily avoid any inter-factor boundary crossing in all instances.

81. A factor inquiry can account for potentially germane considerations it does not cover by making the test non-exhaustive. See *infra* Section III.A (discussing exhaustive and non-exhaustive factor tests).

82. See Gleitman & Papafragou, *supra* note 67, at 638 (“[L]anguage is a relatively impoverished and underspecified vehicle of expression that relies heavily on inferential processes outside the linguistic system for reconstructing the richness and specificity of thought.”).

under time constraints.⁸³ Even if factor creators manage to accomplish these objectives, the categories they create are still subject to dynamic external circumstances that may reorient the context from which one assesses a factor category's meaning and boundaries at any point in the future.⁸⁴

Because these criteria can be hard to achieve, factor category composition often requires tradeoffs in which a certain amount of distinctiveness is sacrificed—by design or unintentionally so—to ensure relevant considerations are included in the larger factor inquiry. The factor category overlap could occur in well-defined and targeted circumstances. For instance, in addition to considering the public interest, another factor courts use to assess stays pending appeal is the injury to the party opposing the stay if it is granted.⁸⁵ These factor categories generally concern fairly distinguishable matters. If the government is the opposing party, however, then these two factors merge.⁸⁶ Despite the categorical overlap in these situations, one might sensibly prefer to keep the basic architecture and simply account for the overlap in the targeted instances in which it arises, rather than trying to construct factor categories that would be distinct in all circumstances.

One can find comparable tradeoffs in other factor tests

83. See Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 407–09 (2013) (reviewing courts' swelling dockets and the impact that has on resource allocation).

84. See Ronald J. Allen, *Rationality and the Taming of Complexity*, 62 ALA. L. REV. 1047, 1060 (2011) (describing the legal system as “a bubbling cauldron of messy, complicated, organic, evolutionary processes”); see also Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 405 (1985) (“No . . . piece of text[] can control or determine the context within and from which it is interpreted.”).

85. *Nken v. Holder*, 556 U.S. 418, 434 (2009).

86. *Id.* at 435.

where individual factors are often assessed distinctly but some might merge and be assessed jointly in limited ad hoc instances.⁸⁷ By contrast, in some factor inquiries the overlap among two or several factors is not so limited. Consider two of the factors the Second Circuit identified to determine if certain defendants were the plaintiffs' joint employer. In *Zheng v. Liberty Apparel Co. Inc.*, the court considered whether certain defendants "had a business that could or did shift as a unit from one putative joint employer to another," and whether those defendants "worked exclusively or predominantly" for other defendants.⁸⁸ The court recognized that these two factors "overlap[] substantially,"⁸⁹ and subsequent decisions in the Second Circuit's jurisdiction characterize the factors as having an "almost inverse relationship"⁹⁰—such as, analogically, *evidence of heads* and *evidence of tails*. Even though the Second Circuit recognized the substantial overlap between these two, it justified treating them as separate factors by describing some of the situational nuances that could impact the significance of one of the factors but not the other.⁹¹ Thus, each category's

87. See, e.g., *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 224 (3d Cir. 2003) (reviewing jointly, to determine if a case should be dismissed for failure to prosecute, whether there was a "history of dilatoriness" and whether the party's actions were "willful" and in "bad faith"); *Famiglietta v. Ivie-Miller Enterprises, Inc.*, 1998-NMCA-155, 126 N.M. 69, 966 P.2d 777, 782–84 (N.M. Ct. App. 1998) (discussing together in its assessment of whether a contract breach was material "the likelihood that the breaching party will cure his or her failure to perform under the contract" and "whether the breaching party's conduct comported with the standards of good faith and fair dealing").

88. *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003).

89. *Id.* at 75 n.12; see also *State v. Rushton*, 395 P.3d 92, 103 & n.17 (Utah 2017) (responding to the concurrence's belief that a particular factor "double-count[s]" part of the inquiry by noting that "a degree of overlap is not the same thing as double-counting").

90. *Chen v. St. Beat Sportswear, Inc.*, 364 F. Supp. 2d 269, 281 n.14 (E.D.N.Y. 2005).

91. *Zheng*, 355 F.3d at 75 n.12.

ability to “capture different aspects of a business relationship’s ‘economic reality’” trumped the significant categorical overlap.⁹²

For factor inquiries that include some factors with limited discernable distinctiveness between them, the overlapping factors might be expressed as distinct factors but treated more as a single conceptual or analytical unit. Several circumstances could create these types of scenarios. For instance, cases may continue to relay past authorities’ factor lists even though more recent assessments have come to expressly treat some factors as part of a single analytical unit.⁹³ Alternatively, it could stem from a desire to ensure that a particularly relevant and discrete point of inquiry is identified as a factor and not merely subsumed within a more general factor category.⁹⁴ Even if such factors are not perceived to have any distinction in fact from other factors on the same horizontal plane, the desire to emphasize it discretely and have it assessed separately might serve as the express or implicitly proffered utility in treating it as a distinct factor.

92. *Id.*

93. *See* Dorsen v. U.S. Sec. & Exch. Comm’n, 15 F. Supp. 3d 112, 120–21 (D.D.C. 2014) (noting distinct factors that courts list separately even though they generally subsume the factors under one unifying concept for assessment purposes).

94. An example would be any of the cases assessing the voluntariness of consent where a defendant’s knowledge of a right to refuse consent is listed as a distinct factor even though such information could technically be subsumed entirely by other factor categories like prior experience, education, and intelligence. *Compare* United States v. Sallis, 920 F.3d 577, 582 (8th Cir. 2019) (listing expressly knowledge of right to refuse), *with* State v. Rolfe, 2018 S.D. 86, 921 N.W.2d 706, 712 (S.D. 2018) (relaying intelligence and experience as relevant without expressly noting knowledge of right to refuse). Conversely, a court might decline to further parse out factors because the court believes the delineated factors are already “sufficiently capacious.” State v. Callahan, 979 S.W.2d 577, 582–83 (Tenn. 1998).

C. *Category Inclusiveness and Multi-Tiered Factors*

The previous sections focused on the various levels of abstraction and generality one may use to define a factor category and the impact of other factors on the same conceptual horizontal plane and elsewhere. The discussion implied that decisions of what to express as a factor require a factor creator to assess discrete levels of generality and then settle on one.⁹⁵ A factor creator could, however, conceive of a factor and express it in any manner that seems situationally beneficial. This flexibility means that the scope of what gets identified and expressed as a distinct factor does not have to be limited to one hierarchical level.

For instance, factors can be presented at multiple levels of generality by linking a relatively abstract concept to examples that specifically illustrate the more abstract concept.⁹⁶ In *Foster Logging, Inc. v. United States*, the Eleventh Circuit noted that factors to consider when planning and executing a controlled burn include the “specific level of safety measures to take during the controlled burn, *such as* how many employees and how much equipment to use and where to use it in monitoring the execution of the controlled burn.”⁹⁷ Such constructions concurrently leverage some of the benefits of both abstraction and specificity.⁹⁸ The express examples better

95. Of course, each factor does not have to be represented at the same level of generality as other factors—even assuming a commensurate generality gauge exists.

96. This type of structure resembles what Gideon Parchomovsky and Alex Stein describe as a catalog, though they review the concept in a broader assessment of the rules versus standards debate. Gideon Parchomovsky & Alex Stein, *Catalogs*, 115 COLUM. L. REV. 165, 166–70, 181–82 (2015) (advocating the use of catalogs as a policy tool and discussing their benefits over rules and standards).

97. *Foster Logging, Inc. v. United States*, 973 F.3d 1152, 1164 (11th Cir. 2020) (emphasis added).

98. For additional examples, see 8 C.F.R. § 208.15 (2021) (listing non-

define the more abstract concept and make clear potentially relevant areas of inquiry even though the examples do not encapsulate everything the abstract concept might apply to.⁹⁹ Essentially, then, it is a factor-specific corollary to the broader multifactor design feature of making a factor test non-exhaustive.¹⁰⁰

Whether that which is identified as a factor spans multiple hierarchical levels could be less than certain. The uncertainty could stem from the (presumably reasoned) artificiality in what one labels as a factor. Since what could be labeled a factor is part of a larger conceptual structure from which one assesses and acts on information, multiple points within the hierarchy could be relevant to discuss. If multiple reference points could be relevant to discuss, then each could potentially take on the functional role of a factor in a particular context. If each could take on such a functional role, that could lead to different representations of the category that makes up the factor in different opinions. If no one representation has obtained the status as being *the* stable representation, then binding authority might point to multiple representations. And some of those representations

exhaustive examples that show a refugee received permission to own property and enjoy other rights), and *United States v. Berry*, 670 F.2d 583, 598–601 (5th Cir. 1982) (listing as a factor to assess airport stops “unusual itinerary, such as rapid turnaround time for a very lengthy airplane trip”), and *Smith v. Monongahela Power Co.*, 429 S.E.2d 643, 652 (W. Va. 1993) (including several multi-tiered factors when assessing whether a settlement was made in good faith).

99. See Parchomovsky & Stein, *supra* note 96, at 171–72 (noting how difficult it would be for law creators to “accurately represent every possible contingency in all future states of the world”). Though the authors focus on the utility of catalogs as a prescriptive law-making technique for legislatures, the premise of future uncertainty applies more generally to the various temporal planes of factor creation and application.

100. Non-exhaustive factor inquiries allow the analyzer to consider additional factors. See *infra* Section III.A (discussing exhaustive and non-exhaustive factor tests).

can subsume multiple hierarchical levels in what is expressly or implicitly being presented as a factor category.¹⁰¹

Normatively, whether there should be multiple levels is based on the utility of treating them all as a discrete conceptual or analytical unit—or at least recognizing expressly a broader portion of the taxonomic architecture that guides and informs the assessment.¹⁰² Expressly prescribed multilevel factor units can mitigate instances where the meaning of a factor or its relationship to other factors is unclear because the body of case law applying the factor inquiry does not provide a consistent taxonomic structure.¹⁰³ With a more concrete multilevel expression, attempts by a decisionmaker to modify the express framework would have to reconcile and explain any modification that could otherwise appear to alter the categories and inter-category relationships.¹⁰⁴

101. *Compare* *People v. Young*, 105 P.3d 487, 507 (Cal. 2005) (listing three relevant factors), *with* *People v. Santiago Enriquez*, No. B275995, 2018 WL 5603511, at *3 (Cal. Ct. App. Oct. 30, 2018) (subsuming example of third factor in general description of the factors).

102. *See supra* note 99.

103. For instance, to assess whether a person voluntarily consented to a search, the First Circuit has identified the person's "vulnerability" as a superordinate category that includes the "individualized factors" of "age, education, experience, intelligence, and knowledge of the right to withhold consent." *United States v. Barnett*, 989 F.2d 546, 555 (1st Cir. 1993); *see also* *United States v. Casey*, 825 F.3d 1, 13 (1st Cir. 2016). In a different case, under the more general superordinate category of "whether consent was voluntarily given," the court listed some of the relevant factors as "age, demeanor, intelligence, education, experience, knowledge of the right to refuse consent, and possibly vulnerable subjective state." *United States v. Mumme*, 985 F.3d 25, 36 (1st Cir. 2021) (internal quotation marks omitted). The seminal case on voluntariness of consent is *Schneckloth v. Bustamonte*, which grounded its assessment in prior voluntariness jurisprudence related to confessions for purposes of the Fourteenth Amendment. *Schneckloth v. Bustamonte*, 412 U.S. 218, 223–26 (1973).

104. Certainly, one could achieve these objectives without expressly

Additionally, a factor that includes multiple levels of generality can make clear when a category fosters greater utility as a prototype for a more general concept. For purposes here, one can think of a prototype as a salient instance that comes to mind when internalizing the concept of a factor category.¹⁰⁵ Consider the factors a court might use to determine whether a suspect in custody may be questioned pursuant to the public safety exception, such that officers' failure to secure a *Miranda* waiver will not bar use of the statement at trial.¹⁰⁶ To determine whether objective evidence exists of a threat to the public or officers, some jurisdictions consider whether the suspect was handcuffed.¹⁰⁷ One could think of handcuffs as a prototype of a more general restraint-related concept,¹⁰⁸ as handcuffs are

labelling as a factor multiple hierarchical levels. Embedding multiple levels within what is expressed as a factor simply increases the chances that the decisional framework will be more consistently transmitted throughout the game of taxonomic telephone that can underlie caselaw development over time. Such efforts might not be desirable in all instances for several reasons, including resource allocation issues that stem from the written constructions of the potentially detailed information that multiple taxonomic levels could require a court to produce. *Cf.* Gleitman & Papafragou, *supra* note 67, at 636–38 (reviewing tradeoff between expressiveness and time allocations).

105. *See* Rosch, *supra* note 38, at 36 (defining prototypes as “the clearest cases of category membership defined operationally by people’s judgments of goodness of membership in the category”); *see also* LAKOFF, *supra* note 37, at 45 (noting the link between prototypes and reasoning because prototypes act as cognitive reference points).

106. *See* *New York v. Quarles*, 467 U.S. 649, 655–56 (1984) (creating the public safety exception).

107. *United States v. Jones*, 567 F.3d 712, 715 (D.C. Cir. 2009) (surveying relevant factors from other jurisdictions, including whether a defendant is handcuffed). Separately, handcuffs can also be a factor related to general custody determinations. *See, e.g.,* *People v. Holt*, 233 P.3d 1194, 1197 (Colo. 2010) (en banc).

108. *See* *Spain v. Procunier*, 600 F.2d 189, 198 (9th Cir. 1979) (discussing mechanical restraints other than handcuffs in a different context); *People v. King*, 16 P.3d 807, 810 (Colo. 2001) (distinguishing physical restraint and use of handcuffs).

the characteristic that often applies when decisionmakers assess the significance of a restrained or secured defendant in the public safety exception context.¹⁰⁹ If a factor like *whether handcuffed* is understood to be indicative of some more general restraint concept (which it need not be), then expressing the factor on two levels—“restraint, such as handcuffs . . .”—might identify more clearly the overarching utility of the category and other potentially relevant component examples.

The value of expressing a category as a prototype of a more general concept, however, can involve tradeoffs. The subsidiary category is likely a prototype because it is prevalent in relevant case assessments. Defining it as the factor could provide a more straightforward and efficient means of communicating and assessing it.¹¹⁰ Additionally, the parameters of an abstract higher order concept could be less clear than its subsidiary prototype. Thus, one may determine that the potential under-inclusiveness of the subsidiary concept (such as *whether handcuffed*) still offers greater utility than a multitiered factor expression that includes a potentially over-inclusive and unclearly defined abstract concept (such as *whether restrained*), especially if the factor test is non-exhaustive.¹¹¹ Courts can reference handcuffs, the category would be quite clearly defined, its application in most instances would be straightforward, and

109. See, e.g., *United States v. Brathwaite*, 458 F.3d 376, 382 n.8 (5th Cir. 2006) (reviewing the public safety exception in circumstances when defendant was handcuffed); *United States v. Liddell*, 517 F.3d 1007, 1009–10 (8th Cir. 2008) (same).

110. See Rosch, *supra* note 38, at 39 (discussing “substitutability into sentences” based on prototypicality ratings); cf. LAKOFF, *supra* note 37, at 84 (discussing metonymic models, wherein a subsidiary concept is used to represent the entirety of a larger category because, among other reasons, it is easier to identify and understand).

111. See *United States v. Patayan Soriano*, 361 F.3d 494, 502 (9th Cir. 2004) (identifying a relevant factor that was not part of the established factor list because the express factor list included narrow categories like “guns drawn” rather than more abstract categories like “coerciveness”).

the significance of other types of restraint can be assessed ad hoc in the more limited instances in which they arise.

II. THE WORKINGS OF A FACTOR

A factor is often conceived as a component of a broader multifactor inquiry. It is appropriate to consider the larger context in which a factor functions, but doing so exclusively can overshadow an understanding of the potential properties that may apply to a discrete factor. As a foundation for Part III's focus on broader factor tests, Part II will use individual factors as the frame of reference. It will first review the forms a factor might take and the variable content a factor might incorporate. Next, Part II will focus on the potential operational structures of a factor. It will then discuss the range of significance a factor might have in an inquiry and variables that can impact a factor's actual or potential significance.

A. *Form and Scope*

A factor can be phrased neutrally, merely identifying the parameters of a particular inquiry, or it can be framed to support a specific conclusion or outcome.¹¹² Thus, for instance, it may direct a decisionmaker to consider a defendant's "intelligence"¹¹³ or it may focus on whether the defendant has "low intelligence."¹¹⁴ A factor may also suggest an internal operational structure for subsidiary components, such as when the factor is constructed to balance competing interests against each other.¹¹⁵ Factors can also take on less

112. Compare CAL. FAM. CODE § 4320(h) (West 2022) (considering generally the "health" of the parties), with *Govan v. Brown*, 228 A.3d 142, 151 (D.C. 2020) (looking for evidence of an "illness").

113. *United States v. Gonzales*, 79 F.3d 413, 421 (5th Cir. 1996).

114. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

115. An example would be a factor courts assess to determine whether certain noncapital sentences amount to cruel and unusual punishment

formal structures, like when they are expressed in the form of a question.¹¹⁶

If a factor is expressed as a single word or a short phrase, context will often narrow the plausible range of meanings that could apply to that word or phrase. Consider a factor concerned with the “characteristics” of a person or group of people. The meaning of the word is narrowed when employing it in the context of “the history and characteristics of the defendant” for sentencing purposes,¹¹⁷ as opposed to assessing the “characteristics of expected user groups” when looking at the adequacy of product warnings in a products liability case.¹¹⁸

Factors do not have to be expressed as a singular word or phrase. The same relaxed expressive norms that accept more informal forms like a question also apply to the length of content that can be subsumed within what is conceived of as a singular factor. Part I’s review of factors expressed at multiple levels of generality illustrates this point.¹¹⁹ Additionally, what is labeled a factor can be a longer description that potentially includes within it detailed substantive or process-related information that may otherwise appear in accompanying declarations that more expressly convey its meaning and function.¹²⁰

What follows from the fact that a factor might include

in violation of the Eighth Amendment, which entails a proportionality assessment between the offense and penalty. *United States v. Niggemann*, 881 F.3d 976, 981 (7th Cir. 2018).

116. *Andrews v. Rutherford*, 832 A.2d 379, 384 (N.J. Super. Ct. Ch. Div. 2003); *McKissic v. Bodine*, 201 N.W.2d 333, 335–36 (Mich. Ct. App. 1972).

117. 18 U.S.C. § 3553(a)(1).

118. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (AM. L. INST. 1998).

119. *Supra* Section I.C.

120. *See* LA. CIV. CODE ANN. art. 134(a)(12) (2018) (laying out both the conditions of a factor, an exception to the factor’s application, and the standard for showing that the exception applies).

process-related information is that the description of a factor is not limited to a substantive consideration. Since factors are permitted to serve the role of decision-making facilitator, the content can be anything perceived to do just that. A factor can dictate its own manner of operation or application, or the manner of operation or application of the more general inquiry of which it is a component.¹²¹ It can direct an inquiry to a particular source of information, such as a prior decision or the opinion of an expert or interested party, or it can put parameters on the time or circumstances under which one may assess relevant information.¹²² A factor can also explain its significance or the significance of other factors within an inquiry, like when it directs a decisionmaker to give due weight “to those factors which most favorably effectuate the objectives of the statute in question.”¹²³ In addition to direction and significance, a factor can provide policy objectives expressly¹²⁴ rather than simply using an underlying policy consideration to inform an assessment of the factor.¹²⁵ In short, a factor can concern the *what*, but also the *why*, *how*, *who*, *when*, and *where*, and it can do so in a

121. FLA. STAT. § 39.810(1) (2022) (setting parameters on suitability of certain custody arrangements).

122. *Id.* § 39.810(11) (guardian’s opinion as factor); *In re Estate of Torgersen*, 711 N.W.2d 545, 552 (Minn. Ct. App. 2006) (time parameters and experts as factors); *cf.* *Govan v. Brown*, 228 A.3d 142, 151 (D.C. 2020) (discussing time parameters in a declarative statement accompanying a distinct list of factors).

123. *McKissic v. Bodine*, 201 N.W.2d 333, 336 (Mich. Ct. App. 1972).

124. *Foster Logging, Inc. v. United States*, 973 F.3d 1152, 1164–65 (11th Cir. 2020) (listing factors such as “the need to encourage ecological development”); *Rakowski v. Sarb*, 713 N.W.2d 787, 795 (Mich. Ct. App. 2006) (listing as a factor the “policy of preventing future harm”).

125. *Compare In re Discipline of Dorothy*, 2000 S.D. 23, 605 N.W.2d 493, 498 (S.D. 2000) (discussing the underling policy goal of “deterrence of like conduct by other attorneys” in a review of the factors relevant to assessing the reasonableness of attorney’s fees), *with* 18 U.S.C. § 3553(a)(2)(B) (listing “the need for the sentence imposed . . . to afford adequate deterrence” as a factor in sentencing decisions).

variety of formal and informal forms of various length.

B. *Operation*

Given the wide array of forms a factor may take, and the functions it might serve in an inquiry, sometimes a factor cannot be assessed as a discrete unit. An example mentioned previously would be a factor that simply dictates or suggests the weight a decisionmaker should give other factors.¹²⁶ However, most factors do concern one or several actual or potentially substantive units of inquiry, or act as a more abstract categorical marker that embodies more tangible subsidiary units of inquiry.

Factors embody a variety of operational frameworks, but many of them fall within—or represent a permutation of—one or both of two general frameworks, which this Article will refer to as dichotomous and spectral.¹²⁷ Section B.1 will provide an overview of these two frameworks. Section B.2 will illustrate how factor operations can involve blends and combinations of dichotomous frameworks and spectrums. Section B.3 will then explore circumstances in which factor-apppliers might not use a consistent operational framework.

Since the focus here is on factor operations, an explanation of what this means may be useful. Within all the varieties of how a factor might function in an inquiry, as a general starting point one can conceptualize three *potential*

126. *McKissic*, 201 N.W.2d at 336.

127. Though it was not the origin of this framework, recent scholarship by Kevin Clermont assuredly contributed to its refinement. See Clermont, *supra* note 8. Professor Clermont challenges the conventional formulation of rules and standards by proposing an alternative (though complementary) framework that segments directives by, among other things, whether they are binary or scalar. *Id.* at 762–66. His framework generally equates scalar measures to “factorial decision making.” *Id.* at 779. This Article subsumes within its conception of a factor all those properties that apply to the units of inquiry described as a factor of general application in legal discourse.

considerations or stages: internal operation, internal significance, and inter-factor significance. Internal operation refers to what the factor directs one to consider and how the factor directs one to consider it. Internal significance refers to how to gauge the significance of the factor based on the output of its operation. Inter-factor significance refers to the next step where the significance of the factor is assessed, not just in and of itself, but also in a relational way to some or all of the other factors relevant to the inquiry.

The nature of a particular inquiry could fold some of these steps into each other or render certain steps inconsequential.¹²⁸ These steps and their functions are, therefore, merely a guiding reference point. With that framework and its caveats in mind, Section B will focus on internal operation most directly, but it will incorporate and reference matters of significance where relevant to a factor's operation.

1. Dichotomous Operations and Spectrums

To illustrate how a factor may operate, a useful starting point is to consider the more limited operational structures of an element. One may generally think of an element as something that must be satisfied to trigger a consequence.¹²⁹ By extension, an element test would generally concern a collection of elements where each must be satisfied to trigger a result—such as the elements of a civil claim like negligence, or a crime like burglary. The breadth of what one

128. On operations potentially aligning with significance gauges, see, for example, *infra* Section II.B.2.iii. An example of more discrete steps would be a binary operation where the output does not necessarily yield the same significance level.

129. See OATES ET AL., *supra* note 1, at 232 (describing an element as “something that must be established”); CHRISTINE COUGHLIN ET AL., *A LAWYER WRITES* 60 (2d ed. 2013) (defining an element as a “condition that must be proved”); KRISTEN KONRAD ROBBINS-TISCIONE, *RHETORIC FOR LEGAL WRITERS* 147 n.10 (1st ed. 2009) (describing elements as the “components of the claim that must be proved”).

may call an element can vary for many reasons. If nothing else, the concept of an element could be interpreted to encompass constituent parts of a broader inquiry that do not always need to be satisfied to trigger a result because some or all are disjunctive. Regardless of whether the definition of an element is perceived to depend on its impact on a consequent,¹³⁰ part of an element's internal operational structure is quite consistent: it requires one to assess whether it has or has not been satisfied (or proved, or established, or met, among others).¹³¹ Thus, an element requires a dichotomous decision.

Though elements require a decision as to whether they have or have not been satisfied, they do not have to concern concrete subject matters.¹³² A law could prohibit driving a vehicle *above sixty miles per hour* or a law could prohibit driving a vehicle at an *unreasonable speed*. Reasonableness is more abstract than a specified speed,¹³³ but they can both be constituent parts of a broader element test. Ultimately, if they are being treated as elements they will still operate dichotomously: the driver did or did not go above sixty miles per hour, the driver did or did not travel at an unreasonable speed.¹³⁴

130. See EDWARDS, *supra* note 9, at 49 (distinguishing mandatory elements from disjunctive subparts).

131. Many of the words one may choose to convey a threshold that must be crossed can be used interchangeably. In certain circumstances, or flowing from certain linguistic expressions, some might be more apt than others.

132. See RICHARD K. NEUMANN, JR. ET AL., LEGAL REASONING AND LEGAL WRITING 20 (8th ed. 2017) (describing a broad range of element types that include actions, statuses, states of mind, and "abstract qualities").

133. See Kaplow, *supra* note 1, at 559–62 & n.2 (reviewing the commonly described differences between rules and standards in debates about law formulation).

134. Of course, the threshold for the dichotomous decision could be pegged to a specified level of certainty.

To be sure, one could conceive of an abstract element's operation as more continuum-based than dichotomous based on subsidiary operations that take on such qualities.¹³⁵ Such conceptions are not inherently wrong, but their accuracy depends on one's frame of reference.¹³⁶ To decouple abstract elements from binary operations, one could conceive of the binary determination as the consequence. If viewed as such, then the conditions one assesses to determine the consequence would provide the frame of reference for internalizing the inquiry's operational qualities; if applicable, one could even conceive of such inquiries as factor tests.¹³⁷ For purposes here, the frame of reference is the default conception applicable to elements, in which elements are the conditions (the *if* clause) and the consequence is the result of the ultimate binary determinations related to those conditions (the *then* clause).¹³⁸

In this more prototypical manner of conceptualizing a unit as an element based on its status as a condition, the binary operational structure does have to apply to elements. From this vantage point, a factor's operation may resemble an element because a factor could require a binary assessment of whether a condition has been met, proved, or satisfied. To determine whether to invalidate a will because of undue influence, for instance, a court may assess factors

135. See *supra* notes 3–4 and accompanying text.

136. See Sunstein et al., *supra* note 43, at 1170–73 (reviewing frames of reference). The need to consider frames of reference is itself an important component of the overarching schematic framework that applies to factor assessments and more broadly. See *infra* Part IV (discussing frames of reference in greater detail); see also Keith J. Holyoak, *Analogy*, in CAMBRIDGE HANDBOOK, *supra* note 67, at 117, 130–31 (discussing schemas and schema development).

137. Thus, based on an assessment of multiple factors serving as the conditions, one would render a dichotomous decision about a consequence that happens to be attached to an element.

138. On if-then structures generally, see NEUMANN ET AL., *supra* note 132, at 9–13.

such as whether a fiduciary relationship between the testator and beneficiary did or did not exist.¹³⁹

Though a factor may be constructed or applied in a binary manner, factors are not constrained to operate within dichotomous frameworks like elements. Rather, factors often leverage the finer gradations within a relevant conceptual space—a conceptual space of varying abstractness, referred to here as a spectrum.¹⁴⁰ For instance, to assess the likelihood of consumer confusion in a trademark infringement claim, one of the factors is the strength of the mark.¹⁴¹ The inquiry is not solely concerned with a binary determination of whether the mark is or is not strong; instead, decisionmakers may assess degrees of strength on a spectrum.¹⁴² Another example concerns whether a legislature intended a strict liability crime when the statute does not specify a mens rea element.¹⁴³ A potential factor courts may assess is “the extent to which a strict liability reading of the statute would encompass seemingly entirely

139. *Mueller v. Wells*, 367 P.3d 580, 584 (Wash. 2016) (holding that a fiduciary relationship did exist); *Kitsap Bank v. Denley*, 312 P.3d 711, 718–20 (Wash. Ct. App. 2013) (finding no “clear, cogent, and convincing evidence” of a confidential or fiduciary relationship); *see also* *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 224 (3d Cir. 2003) (assessing whether or not there was a history of dilatoriness when considering dismissal for failure to prosecute).

140. Though this Article uses dichotomous and binary interchangeably, it chose “spectrum” in a perhaps vain attempt to find a word that would encapsulate a conceptual space that accommodates natural and defuzzied continuums and more multi-dimensional conceptual spaces. The secondary ghost-related meaning of a spectral quality may, therefore, conjure an apt metaphor.

141. *Car-Freshner Corp. v. Am. Covers, LLC*, 980 F.3d 314, 326–27 (2d Cir. 2020).

142. *Id.* at 329; *see also* *Streamline Prod. Sys., Inc. v. Streamline Mfg., Inc.*, 851 F.3d 440, 453–54 (5th Cir. 2017), *modified*, 2017 U.S. App. LEXIS 4708 (5th Cir.).

143. *See generally* *Staples v. United States*, 511 U.S. 600, 604–20 (1994).

innocent conduct.”¹⁴⁴ The issue is not simply whether the statute would or would not encompass innocent conduct but rather the extent of innocent conduct along a continuum that a strict liability reading would subsume.¹⁴⁵

2. Operational Combinations and Blends

Even if a factor is expressed as a binary inquiry, often the factor is operating within—or can be framed to operate within—a potentially relevant spectrum. Thus, many factors present the possibility of either operational structure because many factors are inherently spectral.¹⁴⁶ Such would be the case for the reasonableness of a vehicle’s speed, where degrees of reasonableness do not cease to exist simply because one chooses to demark all situational speeds as reasonable or not. The converse holds true as well. Oftentimes spectral operations could be converted to some sort of binary inquiry.

Binary operations have the potential advantage of structural simplicity and can leverage all the subsidiary cognitive functions that categorizing provides.¹⁴⁷ These types of operational structures can be particularly useful for inquiries that lend themselves to straightforward

144. *State v. Bash*, 925 P.2d 978, 983 (Wash. 1996).

145. *See State v. Flores*, 492 P.3d 184, 190 (Wash. Ct. App. 2021) (stating “the offense would implicate a significant amount of innocent conduct” (quoting *State v. Warfield*, 80 P.3d 625, 630 (Wash. 2003))).

146. For examples of factors that do not have a clear inherent spectrum, see *United States v. Berry*, 670 F.2d 583, 599 (5th Cir. 1982) (whether suspect used an alias), and *Breit v. St. Luke’s Mem’l Hosp.*, 743 P.2d 1254, 1257 (Wash. Ct. App. 1987) (“whether . . . licensed to practice medicine”). One could conceivably discern potential gradations in either of these in very limited instances. *See Clermont*, *supra* note 8, at 772 (noting how “even seemingly crisp facts involve uncertainty”).

147. *See supra* notes 41–42 and accompanying text. *See generally* Sunstein, *supra* note 1, at 976 (linking clear rules to predictability); Schlag, *supra* note 84, at 384 (reviewing the proffered benefit of deterrence when there is “a sharp line between forbidden and permissible conduct”).

determinations of whether something is or is not a category member. Binary operations are also useful when the utility of a factor assessment's output can generally be segmented into two spheres even if numerous gradations exist within an underlying spectrum.¹⁴⁸ A purely spectral operation may not afford the same category-based subsidiary benefits that binary operations may provide. In some instances, this potential deficiency could actually demonstrate one advantage of spectral operations. Decisions about category membership at the margins may be artificial.¹⁴⁹ In such instances, a binary structure that forces decisionmakers to state definitively whether something does or does not fall within a category could be arbitrary. Spectral assessments, by contrast, can more precisely account for finer gradations and distinctions, and avoid the potential artificiality of labelling all inputs as either within a category or not.¹⁵⁰

Though not exhaustive, this list of the two operations' potential utility illustrates that both binary and spectral operations could have benefits and drawbacks. The previous section reviewed how a factor's operation can be dichotomous or spectral. It is true that a factor could operate either way. But putting aside any authoritative constrictions pertaining to a specific inquiry, as a general matter there are no rigid rules or norms that preclude a factor-applier from applying *both* binary and spectral operations to a factor or integrating features of binary and spectral operations into a hybrid operational form. In fact, whether deliberately or not,

148. See, e.g., *Briscoe v. Klaus*, 538 F.3d 252, 260–62 (3d Cir. 2008) (distinguishing dilatoriness from the minimum pattern of dilatoriness that underlies the purpose of the factor).

149. See Kristen Osenga, *A Penguin's Defense of the Doctrine of Equivalents: Applying Cognitive Linguistics to Patent Law*, 6 N.Y.U. J.L. & LIBERTY 313, 338–40 (2011).

150. See Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO STATE L.J. 423, 442 (2013) (reviewing how pattern recognition can increase the utility of crafting more rigid rules).

decisionmakers often do so. This section introduces three representative ways that factor operations combine or blend binary and spectral qualities.

i. Discrete Binary and Spectral Sequences

A factor can distinctly operate dichotomously and on a spectrum within different stages of an inquiry. Consider the test courts employ to determine whether a pretrial delay violated a defendant's right to a speedy trial under the Sixth Amendment.¹⁵¹ The test contains four factors, one being the length of the delay.¹⁵² The inquiry initially requires a dichotomous decision as to whether the length of the delay is or is not presumptively prejudicial.¹⁵³ If the length of the delay is presumptively prejudicial, then a reviewing court will consider the length of the delay along with the other factors.¹⁵⁴ Whereas in the first step the difference between a two and ten-year delay would not matter if both lengths of time were presumptively prejudicial, in the spectral operation that follows such distinctions in duration could be relevant.¹⁵⁵

Even when a test does not formally express a progression from a dichotomous operation to a spectral one, the factors may functionally operate in that manner. Arkansas' test to determine whether an organization is entitled to charitable immunity illustrates such an operational framework. Even though some of the factors are inherently spectral, the courts

151. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”).

152. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

153. *Doggett v. United States*, 505 U.S. 647, 651–52 (1992), *vacated*, 972 F.2d 1258 (11th Cir.).

154. *See* *United States v. Cabral*, 979 F.3d 150, 157 (2d Cir. 2020); *United States v. Myers*, 930 F.3d 1113, 1119 (9th Cir. 2019).

155. *Doggett*, 505 U.S. at 652 (noting the need to consider “the extent to which the delay stretches beyond the bare minimum”); *see also Cabral*, 979 F.3d at 157 (analyzing the delay “in the context of the other factors” after finding the duration presumptively prejudicial).

structure their initial assessment as a binary inquiry into the number of factors that meet the *exact* criteria laid out in the factor framework and thus have been “satisfied.”¹⁵⁶ However, for the inherently spectral factors that are not technically satisfied, adjudicators then assess the factors on more of a spectrum. For instance, one of the factors adjudicators consider is “whether the organization earned a profit.”¹⁵⁷ An entity that does not earn a profit has “satisfied” this factor, since a lack of profits is what supports an entity’s charitable status. If, however, the entity earns a profit, the court does consider the extent of the profit on more of a spectrum and acts on that information accordingly.¹⁵⁸

The substance of the charitable immunity test and the specific ways the factors operate are distinct from the Sixth Amendment example in many ways. But factors in both tests highlight how inquiries can structure a factor’s operation to distinctly incorporate dichotomous and spectral frameworks.¹⁵⁹

ii. Variable Binary Thresholds Within a Spectrum

A factor might require one to determine if the factor has been satisfied through a binary lens even though the threshold for that binary determination is not rigidly fixed.

156. *E.g.*, *Anglin v. Johnson Reg’l Med. Ctr.*, 289 S.W.3d 28, 32 (Ark. 2008) (starting with the number of factors that are “clearly established”); *George v. Jefferson Hosp. Ass’n*, 987 S.W.2d 710, 713 (Ark. 1999) (same).

157. *George*, 987 S.W.2d at 713.

158. *Compare Gain, Inc. v. Martin*, 485 S.W.3d 729, 733 (Ark. Ct. App. 2016) (limited or zero profits each year), *with Progressive Eldercare Servs.-Saline, Inc. v. Krauss*, 2014 Ark. App. 265, at 4, 2014 Ark. App. LEXIS 330, at 5 (Apr. 30, 2014) (assessing the significance of 4.26% profit off of millions in revenue), *reh’g granted*, 2014 Ark. LEXIS 434 (July 31, 2014).

159. Even if an operation appears distinctly binary, it could also include a more spectral component if a decisionmaker takes spectral gradations into account when assessing the factor’s significance—though such an assessment process might not be done expressly.

In essence, then, the binary trigger could appear at different points within the factor's inherent spectrum. For example, to determine whether a citizen informant's tip is sufficiently reliable to justify certain stops, the Montana Supreme Court considers three factors, the third being "whether the officer's own observations corroborated the informant's information."¹⁶⁰ The court frames the inquiry for the factors dichotomously, assessing whether each factor has or has not been "met."¹⁶¹ The criteria for finding a factor is established, however, is not always the same. The type and level of corroboration required to satisfy the third factor, for instance, can vary based on the court's assessment of the other two factors.¹⁶² Thus, the third factor does not fix the dichotomous threshold one needs to establish to demonstrate that this factor has been satisfied.

One may see a similar factor construction in several iterations of the tests that courts employ to decide whether to grant a preliminary injunction or stay request. In *Standard Havens Prod., Inc. v. Gencor Indus., Inc.*, one of the factors the Federal Circuit assessed was "whether the stay applicant has made a strong showing that he is likely to succeed on the merits."¹⁶³ The court noted that, depending on the strength of other factors, the likelihood of success factor may require a "*substantial case on the merits*" rather than a strong likelihood of success.¹⁶⁴

In both examples, the factor is inherently spectral: the

160. *State v. Pratt*, 951 P.2d 37, 42–43 (Mont. 1997).

161. *City of Missoula v. Tye*, 372 P.3d 1286, 1290–92 (Mont. 2016).

162. *Id.* at 1291.

163. *Standard Havens Prod., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990), *vacated in part, aff'd in part*, 935 F.2d 1360 (Fed. Cir. 1991).

164. *Id.* at 513 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 778 (1987)). On developments and inconsistencies among the tests employed in different jurisdictions, see Portia Pedro, *Stays*, 106 CALIF. L. REV. 869 (2018).

extent of corroboration and the likelihood of success, respectively. Nevertheless, the operational frames seek to inure some benefits of a binary frame while simultaneously incorporating the flexibility of a spectral operation by making the binary thresholds flexible.¹⁶⁵

iii. Spectrums Segmented by Categories

A factor's operation could also adhere to a generally spectral framework but carve out categories within the spectrum. Those categories could essentially function as a series of potentially binary or binary-esque inquiries, in which a decisionmaker expressly or implicitly determines whether the circumstances of the case do or do not fall within each category. To be sure, these types of factors may overlap conceptually with the variable dichotomous thresholds discussed in the previous section, since those variable thresholds could be based on categories as well. The main difference is that the ones in the previous section expressly frame the inquiry around a dichotomous question, whereas the ones in this section are more generally framed around a spectrum.

The previously discussed strength of the mark factor in trademark infringement claims provides an example of categories used to segment a spectrum.¹⁶⁶ To determine the strength of the mark, courts typically assess its inherent distinctiveness.¹⁶⁷ The continuum is chunked by categories

165. Since hybrid forms like this involve tradeoffs, one may reasonably question the nature and effect of the tradeoffs that a factor's operation embodies. See Clermont, *supra* note 8, at 800 (criticizing the alternatives test for preliminary injunctions because "it tries to capture what is inherently a sliding scale by stating as alternatives the min-max and max-min conditions for the two variables of chance of success and balance of harms"); cf. Kaplow, *supra* note 39, at 1060–61 (analyzing the perceived utility of categorical threshold steps that may preclude balancing).

166. See *supra* notes 141–42 and accompanying text.

167. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).

that each represent a level of distinctiveness, from generic to arbitrary or fanciful.¹⁶⁸ The categories represent an effort to take an abstract continuum and attach relevant attributes to delineated segments to leverage the functional benefits of meaning and effect that category membership assessments provide.¹⁶⁹ Even if these categories are not rigidly distinct at the margins, they are generally accepted as distinct enough to accommodate binary assessments in most instances because of the utility often associated with doing so.¹⁷⁰ Thus, decisionmakers can generally assess the mark against the properties of each category and determine whether the mark does or does not fall within each.¹⁷¹ Because there is a shared general understanding associated with each category, an operation geared toward this series of binary decisions can also provide a frame of reference for assessing significance.¹⁷²

Operational structures are often tied to significance, as gauging the significance of a factor is an objective of assessing it in the first place. For this reason, many spectral

168. *Car-Freshner Corp. v. Am. Covers, LLC*, 980 F.3d 314, 329 (2d Cir. 2020) (identifying the categories on the continuum as “(1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful”); *Streamline Prod. Sys., Inc. v. Streamline Mfg., Inc.*, 851 F.3d 440, 451, 453–54 (5th Cir. 2017) (providing a comparable list with arbitrary and fanciful separated out), *modified*, 2017 U.S. App. LEXIS 4708 (5th Cir.); *Freedom Card, Inc. v. JPMorgan Chase & Co.*, 432 F.3d 463, 472 (3d Cir. 2005) (providing examples of each category).

169. *See Solmetex, LLC v. Dentalez, Inc.*, 150 F. Supp. 3d 100, 109 (D. Mass. 2015) (describing the continuum as engendering “a taxonomical classification”).

170. *Vision Ctr. v. Opticks, Inc.*, 596 F.2d 111, 115 (5th Cir. 1979) (“Although these categories are meant to be mutually exclusive, they are spectrum-like and tend to merge imperceptibly from one to another.”).

171. *See, e.g., Star Indus., Inc. v. Bacardi & Co.*, 412 F.3d 373, 385–86 (2d Cir. 2005) (finding the mark suggestive); *Sec. Ctr., Ltd. v. First Nat. Sec. Ctrs.*, 750 F.2d 1295, 1300 (5th Cir. 1985) (finding the mark descriptive).

172. *See Vision Center*, 596 F.2d at 117–18.

factors comprised of categories include categories that are defined or influenced by their ability to facilitate significance determinations. Consider again the factor test courts employ to determine whether a defendant's right to a speedy trial has been violated.¹⁷³ One of those factors is the reasons for the delay.¹⁷⁴ Regarding delays attributable to the government, the Supreme Court stated in *Barker v. Wingo* that deliberate attempts to delay a trial "should be weighted heavily against the government," more neutral reasons weigh less heavily, and valid reasons "should serve to justify appropriate delay."¹⁷⁵ Since deliberateness, more neutral reasons, and justifiable reasons are proffered to lead to different significance in the assessment, courts often identify these three categories as spectral markers.¹⁷⁶ And since membership in one category as opposed to the other can impact the factor's significance, decisionmakers may have to assess the parameters of the categories closely to determine which category the conduct belongs in.¹⁷⁷ Even though there are distinct categories within the spectrum and courts assess whether the circumstances do or do not fall within each, the circumstances that may fall within a particular category

173. See *supra* notes 151–55 and accompanying text.

174. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

175. *Id.* at 531.

176. *E.g.*, *United States v. Cabral*, 979 F.3d 150, 158 (2d Cir. 2020) (providing the categories of "deliberate government misconduct," "government negligence," and "legitimate government purpose"); *United States v. Myers*, 930 F.3d 1113, 1119 (9th Cir. 2019) (reviewing the categories of "bad faith," "negligence, overcrowded courts, or failure of court-appointed counsel," and "good-faith, reasonable justification"); *Ex parte Walker*, 928 So. 2d 259, 265 (Ala. 2005) (distilling the categories of "(1) deliberate delay, (2) negligent delay, and (3) justified delay").

177. See, *e.g.*, *United States v. Oliva*, 909 F.3d 1292, 1300, 1303–04 (11th Cir. 2018) (basing significance on distinction between grossly negligent and intentional conduct); *United States v. Muhtorov*, 20 F.4th 558, 643 (10th Cir. 2021) (finding a justifiable reason for government delay but noting it was "a close question").

need not be treated uniformly.¹⁷⁸

Within a spectral space, binary assessments of category membership could simply guide an inquiry in some less rigid way. Treating them as binary could merely be suggestive, since categories do not have to have rigid or static boundaries to be useful.¹⁷⁹ The derivations of how such categories might guide an inquiry are as varied as the reasons one formulates and uses categories in any circumstance. What each of the examples in the previous three subsections show is that the architecture of a factor's operation can take the attributes of binary and spectral decision-making, and combine or blend them in any way that makes sense prescriptively or develops organically.

3. Protean Factor Operations and the Limits of Language

The previous section reviewed representative examples of frameworks a decisionmaker could employ to combine or integrate dichotomous and spectral operations. Though decisionmakers in a jurisdiction may regularly apply the same framework to a factor—binary, hybrid, or otherwise—they may not always consistently adhere to the same operational structure.

Whether frameworks that might appear inconsistent are actually inconsistent can be hard to discern in many instances. For one, there are no expressive norms—canons of factor construction, so to speak—that affirmatively link a particular linguistic expression to a manner of operation.¹⁸⁰

178. For instance, negligence and gross negligence of the government could be treated differently even though they both fall within the more-neutral-reasons category. *See Oliva*, 909 F.3d at 1300.

179. *See supra* note 37; *see also* *Taylor v. ProMedica Mem'l Hosp.*, 95 N.E.3d 909, 914–16 (Ohio 2017) (finding that a result follows from all factors being met but noting that the result does not always require that all factors be met).

180. Which is not to say that a factor inquiry could not be situated within a statute that has its own canons of construction that could

Certain words or phrases might appear to suggest a certain operation. The *extent* to which something exists might seem to more readily imply a spectral operation, as could degree, level, strength, depth, gravity, range, likelihood, and magnitude, among others.¹⁸¹ In contrast, *whether* something exists might more readily imply a threshold associated with a binary inquiry.¹⁸² The actual uses of such verbiage, however, appear to correlate weakly to any default operational form.¹⁸³ Verbiage often associated with the operation of an element, like *satisfied* or *established*, may also be perceived to signify a factor that operates

interact with this Article's analysis in ways that warrant further exploration, such as *ejusdem generis*, *expressio unius*, and the *surplusage* canon. (My thanks to Dru Stevenson for bringing this observation to my attention.)

181. *See, e.g.*, 12 U.S.C. § 5323(a)(2)(1)(A) (considering “the extent of the leverage of the company” as factor when assessing the supervision level of a foreign nonbank financial company); *Ferraro v. Hewlett-Packard Co.*, 721 F.3d 842, 846 (7th Cir. 2013) (considering the “strength of consumer expectations regarding the product” and “magnitude and probability of the foreseeable risks of harm” as factors in products liability risk-utility test); *Perreira v. State*, 768 P.2d 1198, 1209 (Colo. 1989) (weighing the “magnitude of the burden of guarding against the injury” to assess existence and scope of legal duty).

182. For examples of factors using such constructions, see *Shelter Mut. Ins. Co. v. Jones*, 343 F.3d 925, 926 n.2 (8th Cir. 2003) (examining “whether or not the parties believe they are creating the relation of master and servant” and “whether the principal is or is not in business” as factors to distinguish employees from independent contractors), and *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1182 (5th Cir. 1987) (considering “whether the plaintiff will be significantly injured if the amendment is not allowed” to assess joinder request that would defeat subject matter jurisdiction).

183. *Compare* RESTATEMENT (SECOND) OF CONTRACTS § 241(b) (AM. L. INST. 1979) (listing as a factor to determine whether a breach is material “the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived”), *with* *Famiglietta v. Ivie-Miller Enters., Inc.*, 1998-NMCA-155, ¶ 18, 126 N.M. 69, 966 P.2d 777, 782 (describing the factor as “whether the injured party can be adequately compensated in damages for the breach”).

dichotomously. But even here that is not always the case, because those types of words have been used simply to convey that a factor supports a position—weighing in favor, more conventionally—even if the factor’s operation is more spectral.¹⁸⁴

It is not entirely surprising that certain expressions do not always portend a specific type of operation. As previously reviewed, an operation might combine dichotomous and spectral attributes.¹⁸⁵ In such cases, a word or phrase might only be able to convey the overarching operational structure from a targeted reference point. The language a factor-applier uses could, therefore, be more of a categorical marker meant to signpost a more nuanced application.¹⁸⁶ Decisionmakers might substitute words or phrases at different points of application because none are perfect and they are all perceived as a means to signal the same consistently employed underlying operational structure.¹⁸⁷

In addition to a factor’s actual verbiage, accompanying declarations that seek to explain a factor, or the operation of the more general inquiry of which the factor is a part, might also provide the basis for potential operational inconsistency. Such a statement could, for instance, relay the sufficiency of factor combinations in a way that implies a binary operation is applicable to each factor.¹⁸⁸ The link between such statements and the variety of applications could make it

184. See *Sharma v. Vinmar Int’l, Ltd.*, 231 S.W.3d 405, 424–25 (Tex. App. 2007).

185. *Supra* Section II.B.2.

186. This is a natural byproduct of the “sketchy” nature of language in any circumstance. See *Gleitman & Papafragou*, *supra* note 67, at 636–37 (distinguishing the sketchiness of language from the richness of thought).

187. See *id.* at 636 (describing language as “guideposts to hearers” that require the hearer to reconstruct what the speaker meant within a particular discourse context).

188. *E.g.*, *United States v. Griffin*, 684 F.3d 691, 696 (7th Cir. 2012) (stating that “evidence” of two factors “is sufficient”).

uncertain whether one particular framework consistently governs the factor's operation.¹⁸⁹

To the extent the operational inconsistencies are real, this raises the question of whether such divergences are justifiable. On the one hand, shifting operations could be viewed as an understandable response to the perceived needs of the circumstance.¹⁹⁰ After all, the process of decision-making in any context often requires decisionmakers to invoke and adapt their category knowledge (and subsidiary uses of that category knowledge) to the needs of the circumstance to which they are being applied.¹⁹¹ For law-related decision-making, one might understand (which is not to say agree with) the perceived utility if, for instance, factor-appliers invoke a binary frame when it makes sense to do so but switch to a more spectrum-based frame when a truly binary operation does not appear as useful—such as a set of circumstances teetering at the margins of a binary threshold.¹⁹²

189. To illustrate why the language in explanatory statements might yield operational uncertainty, compare *United States v. Gibbs*, 904 F.2d 52, 56 (D.C. Cir. 1990) (noting that two factors “may” be sufficient), with *United States v. Morris*, 977 F.2d 617, 619–20 (D.C. Cir. 1992) (stating without explaining the change that a combination of two factors “is” sufficient), *invalidated by United States v. Bailey*, 36 F.3d 106 (D.C. Cir. 1994).

190. *See generally* Dagan, *supra* note 61, at 1890–91 (expressing a view of legal realism grounded in accommodating inherent tensions underlying conceptions of law).

191. *See* Smith & Ward, *supra* note 42, at 458, 463–64.

192. *Compare* *Curtis T. Bedwell & Sons, Inc. v. Int'l Fid. Ins. Co.*, 843 F.2d 683, 693 (3d Cir. 1988) (finding personal responsibility factor “met”), *and* *Great W. Funding, Inc. v. Mendelson*, 158 F.R.D. 339, 345, 348 (E.D. Pa. 1994) (finding factor “met” when party personally responsible “to at least a certain extent”), *with* *Herrman v. Allstate Ins. Co.*, 450 F. Supp. 2d 537, 542 (E.D. Pa. 2006) (finding party did not “bear the bulk of the responsibility” and thus “this factor does not weigh strongly for or against”), *and* *Nebroskie v. Ameriline Trucking Inc.*, No. 3:19-CV-00705, 2019 WL 6118370, at *2–3 (M.D. Pa. Nov. 18, 2019) (finding the party did not bear most of the responsibility and therefore the factor is “at best

On the other hand, one might reasonably question whether factor-appliers should use a malleable frame that can modify an assessment framework's parameters, at least without making clear that operational variability is a feature of the framework. One could invoke any number of system-based principles in support of this position.¹⁹³ The most direct would be the fact that such operational differences could, conceivably, impact the outcome.¹⁹⁴

Actual or perceptible operational variations could also be the product of a factor inquiry's stage of development. Section II.B's discussion of operations is not meant to imply that a fully developed and stable operational framework will necessarily exist. To a certain extent, one may characterize all or almost all operations as at least potentially incomplete in the sense that they are constantly subject to change by future changes in values, social contexts, and situations that may arise and were not previously contemplated. While this may be true in some ways, some factor operations are fairly stable because they have been so refined over time that many of their properties are well-solidified, at least at a general operational level.¹⁹⁵ Others, however, are simply not as developed.¹⁹⁶ As a result of this lack of development, or

neutral").

193. See Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625, 1646–54 (2013) (summarizing justifications for following precedent).

194. For instance, one could decide whether a factor has or has not been established but still attribute varying significance in those situations where the factor has been established. Conversely, one could make a binary determination as to whether a factor is or is not satisfied and afford the same weight to the factor based on the binary output. See *Great W. Funding*, 158 F.R.D. at 345, 347 (demarking as the only relevant consideration whether the circumstances crossed the minimum threshold the factor requires).

195. An example could be the factor test that applies to a defendant's right to a speedy trial, which has a long history of case law development and refinement. See sources cited *supra* notes 151–55.

196. See Lammon, *supra* note 150, at 443–44 (discussing the

perhaps the manner in which it has developed, a factor's perceived operational structure might be probabilistic.¹⁹⁷ In such circumstances, the potentially protean nature of a factor's operation might not be entirely surprising.

C. Significance

As prefaced in Section II.B, one may conceive of factor operation and significance as discrete considerations or steps, but certainly there can or will exist conceptual blending between the two.¹⁹⁸ For instance, the categories embedded within a factor's assessment structure can control or guide how a factor-applier gauges a factor's significance. Conceptual overlaps notwithstanding, Section III.C will use significance as the frame of reference to highlight and explore issues that are better informed from such a vantage point.

Section 1 will illustrate the outer parameters of a factor's potential significance as applied in a discrete inquiry. By its nature, a particular factor may not have the capacity to produce every significance gradation that is theoretically possible in an acontextual way. Aside from its inherent properties, a factor's significance can also be constricted by binding authority that exists prior to application. Section 2 will discuss the impact of prior authority on factor

evolutionary process of standard-like directives that take time to become clearer).

197. Consider, for instance, the previously referenced test to determine whether a legislature intended a strict liability crime, which includes "the harshness of the penalty" as a factor. *Staples v. United States*, 511 U.S. 600, 616 (1994). If a jurisdiction has only assessed crimes with certain penalty ranges, then the significance and manner of assessing crimes in different penalty ranges—and that impact on the overall operational framework for the factor—might not be as fully developed. *E.g.*, *State v. Anderson*, 5 P.3d 1247, 1251–52 (Wash. 2000) (assessing five-year maximum term); *see also State v. Warfield*, 80 P.3d 625, 630 (Wash. Ct. App. 2003); *State v. Williams*, 148 P.3d 993, 998 (Wash. 2006).

198. *See supra* pp. 1788–1806.

significance. Section 3 will then review the potential tension that might exist between the level of significance prior authorities suggest or mandate, and the as-applied significance a factor actually has in a given inquiry.

1. Potential As-Applied Significance Range

Contextual constrictions aside, a factor could theoretically have almost any level of significance in application. On one side of the spectrum are factors that may be dispositive—that is, the factor can itself trigger a particular consequence. On the other side are factors that do not have any significance, insofar as they do not have any bearing on the outcome. To illustrate the potential range of a factor's significance, this section will explore these outer parameters.

There are at least two categories of factors that fall within the dispositive concept. The first are factors that can be independently dispositive regardless of any other factors relevant to the inquiry.¹⁹⁹ For instance, consider the factor test courts may employ when deciding whether to permit an appeal of a district court's grant or denial of class action certification.²⁰⁰ Some appellate courts assess factors that include "whether the district court's certification decision contains a substantial weakness."²⁰¹ In certain instances, courts have found this factor dispositive without a need to consider any other factors.²⁰² Similarly, if a jurisdiction designates a requisite relationship as a factor when assessing whether a duty exists and disposes of the case

199. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (holding that the "reasonable investment-backed expectations" factor of the regulatory takings inquiry itself disposed of certain claims).

200. *See* FED. R. CIV. P. 23(f) (providing courts discretion whether to grant such an appeal).

201. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144 (4th Cir. 2001); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274–76 (11th Cir. 2000).

202. *Lienhart*, 255 F.3d at 146.

because it determines no relationship exists, one could rightfully refer to the relationship factor as potentially dispositive—and dispositive in fact as applied in that circumstance.²⁰³

The second category of factors that fall within the dispositive concept are not truly dispositive in and of themselves. Rather, their assessment produces inferences or value judgments that are strong enough to support an outcome if there is nothing in the record to negate or sufficiently diminish them.²⁰⁴ As such, they are more accurately described as presumptively dispositive factors—at least potentially so.²⁰⁵ There are several other derivations of what could fall under the dispositive concept and the procedural posture of the case could also impact what it

203. *In re Certified Question from Fourteenth Dist. Ct. of Appeals of Tex.*, 740 N.W.2d 206, 211–12 (Mich. 2007).

204. *See generally* *United States v. Stein*, 233 F.3d 6, 17 n.6 (1st Cir. 2000) (distinguishing between certainty and “adverse inferences” that “might be overcome by other factors”).

205. *Universal City Studios, Inc. v. Nintendo Co.*, 746 F.2d 112, 117 (2d Cir. 1984) (finding the dissimilarity between the marks indicative of a lack of consumer confusion and determining that a contrary finding would require a strong showing related to another factor: “actual confusion or a survey of consumer attitudes under actual market conditions”). Another example is an inquiry into whether a defendant had the requisite intent to distribute a controlled substance. A court might label the packaging of a controlled substance as a factor. *People v. Robinson*, 657 N.E.2d 1020, 1026–27 (Ill. 1995). A court can state that packaging alone might be sufficient to establish the requisite intent to deliver. *People v. Ballard*, 805 N.E.2d 656, 663–64 (Ill. App. 2004). The packaging itself, however, will seldom be independently dispositive as applied without an assessment of other factors or evidence. *See Robinson*, 657 N.E.2d at 1029 (noting quantity, drug types, “and other circumstantial evidence” in addition to packaging); *People v. Oliver*, 2013 IL App (1st) 113467-U, ¶ 14 (factoring cash in a safe along with packaging and quantity of controlled substance); *People v. Fowler*, 2019 IL App (1st) 163418-U, ¶ 29 (factoring packaging, quantity, and officer observations).

means for something to be considered dispositive.²⁰⁶ Nevertheless, the above examples illustrate the general idea that a factor can potentially be outcome determinative.

The other end of the significance spectrum is where a factor as applied has no bearing on the outcome. There are several circumstances when this might occur,²⁰⁷ but a preliminary observation is in order. The factors described here as having no significance are assumed to be those identified as potentially relevant at the time of the decision. Factors expressly delineated as such would certainly qualify, just as considerations specifically designated as *not* relevant would not (or should not) qualify.²⁰⁸ Between these two express designations, there can be less certainty as to whether something qualifies as a relevant or potentially relevant factor.²⁰⁹

With that qualification in mind—and thus presupposing an ability to identify the factors that are at least potentially relevant—a factor might have no significance because a condition (or the lack of a condition) is required to turn it

206. Additional derivations include factors that can be partially dispositive. For example, a judge's unavailability can itself constitute a satisfactory explanation for a delay in obtaining a judicial seal of wiretap evidence. *E.g.*, *United States v. Pedroni*, 958 F.2d 262, 266 (9th Cir. 1992). If the judge's unavailability only accounted for part of the delay, then this criterion would only provide a satisfactory explanation for part of the delay.

207. One could simply be the natural consequence of the previous discussion of potentially dispositive factors. If a factor is independently dispositive and a decisionmaker does not have to consider any other potentially relevant factors, then these other potentially relevant factors do not have any significance in that particular application.

208. *See* FLA. STAT. § 39.810(1) (2021) (discussing a factor that cannot be considered); *S.Y. v. Superior Ct.*, 240 Cal. Rptr. 3d 137, 149 (Cal. Ct. App. 2018) (reviewing irrelevant factors).

209. *See Foster-Miller, Inc. v. Babcock & Wilcox Can.*, 46 F.3d 138, 150 (1st Cir. 1995) (determining that a factor considered by the district court was irrelevant to the minimum contacts assessment, even though the expressly delineated factors were labeled as non-exhaustive).

from potentially relevant to relevant, and that condition has not been triggered.²¹⁰ The Maryland Family Code provides an example of an express condition. When ruling on a petition for guardianship of a child, a decisionmaker considers “the extent to which a local department and parent have fulfilled their obligations under a social services agreement,” but only “if any” such agreement existed.²¹¹ Minnesota’s testamentary capacity factor test illustrates an implicit condition.²¹² One of the factors is “expert testimony about the testator’s physical and mental condition.”²¹³

210. 12 C.F.R. § 1026.43(c)(2)(ii) (2021) (requiring creditors to factor into their underwriting determinations “[c]urrent employment status,” but only “if the creditor relies on employment income to determine repayment ability”); *Foster Logging, Inc. v. United States*, 973 F.3d 1152, 1164–65 (11th Cir. 2020) (noting additional factors the U.S. Forestry Branch must consider when assessing controlled burns, but only when the burn takes place near a military base).

211. MD. CODE ANN., FAM. LAW § 5-323(d)(1)(iii) (West 2021); *see also* MODEL RULES OF PRO. CONDUCT r. 1.5(a)(2) (AM. BAR ASS’N 2021) (listing a factor that is only relevant “if apparent to the client”); *Matter of C-V-T-*, 22 I.&N. Dec. 7, 11 (BIA 1998) (assessing the “nature, recency, and seriousness” of a criminal record, but only if one exists). Credibility determinations in certain immigration proceedings provide an example of an express court-created condition. To assess an asylum applicant’s credibility, factors a decisionmaker may consider include inconsistencies. 8 U.S.C. § 1158(b)(1)(B)(iii). The Ninth Circuit had determined that immigration judges may only consider inconsistencies that go to the heart of the applicant’s asylum claim and enhance it. *Marcos v. Gonzales*, 410 F.3d 1112, 1117 (9th Cir. 2005) (stating that an inconsistency that fails to enhance an applicant’s persecution claim has “no bearing on credibility” (internal quotation marks omitted)). If an inconsistency did not meet the condition of going to the heart of the claim, it is necessarily not relevant and could not be a factor in support of an adverse credibility determination. (Congress has since amended the Immigration and Nationality Act to permit adjudicators to consider inconsistencies that do not go to the heart of the claim or enhance it. 8 U.S.C. § 1158(b)(1)(B)(iii); *see Singh v. Holder*, 699 F.3d 321, 328 (4th Cir. 2012) (collecting cases that recognize the effects of this amendment).)

212. *See In re Estate of Torgersen*, 711 N.W.2d 545, 552 (Minn. Ct. App. 2006).

213. *Id.*

Though it does not expressly list this factor as conditional, the natural implication is that an adjudicator will not consider this factor if there is no expert opinion in the case.²¹⁴

In addition to preconditions, a relevant or potentially relevant factor may also have no bearing on an outcome because the factor as applied simply does not support a particular result—such that the factor may be described as “neutral” or something analogous.²¹⁵ Since they are not themselves significant, such neutral factors could typically only be significant indirectly.²¹⁶ In certain instances, one may perceive neutrality as a mid-point on the continuum of a factor’s possible significance that spans strong support for one outcome on one end and strong support for a different outcome on the other.²¹⁷ Distinctly, significance neutrality could be the result of a binary or hybrid operational structure where, for instance, the presence or degree of presence of a factor is significant but the converse does not support the opposite outcome to a meaningful degree, if at all.²¹⁸ Such

214. *Cf. Houser v. Folino*, 927 F.3d 693, 700 (3d Cir. 2019) (determining the district court did not need to consider factors such as whether the claims were “likely to require extensive discovery and compliance with complex discovery rules” because the party “had already completed discovery”); *Nakash v. Marciano*, 882 F.2d 1411, 1415 & n.6 (9th Cir. 1989) (assuming that “whether either court has assumed jurisdiction over a *res*” is only a relevant factor to determine whether proceedings should be stayed if either court had assumed such control).

215. *See Crawford v. ITW Food Equip. Grp., LLC*, 977 F.3d 1331, 1344 (11th Cir. 2020); *Mays v. Dir., Off. of Workers’ Comp. Programs*, 938 F.3d 637, 646 (5th Cir. 2019).

216. For instance, when one assesses all factors collectively, it might make the non-neutral factors more significant because there are fewer factors individually favoring one outcome or another. *See Ticketmaster-N.Y., Inc. v. Alioto*, 26 F.3d 201, 212 (1st Cir. 1994) (noting the one factor that “stands out from the crowd”).

217. *E.g., Car-Freshner Corp. v. Am. Covers, LLC*, 980 F.3d 314, 326–34 (2d Cir. 2020) (weighing factors as such); *State v. Burch*, 389 P.3d 685, 691–95 (Wash. Ct. App. 2016) (same).

218. *See generally supra* Section II.B (reviewing binary and hybrid

can be the case when a court assesses whether the government provided a satisfactory explanation for a delay in obtaining a judicial seal of wiretap evidence.²¹⁹ The judge's unavailability can be a potentially dispositive factor, itself providing a satisfactory explanation for a delay. A judge's availability, by contrast, does not support a similarly consequential inference and is closer to neutral.²²⁰ This is distinct from operational structures that are more likely to generate some level of significance regardless—based on the nature of the inquiry, the framing of the factors, the procedural posture of the case, or some combination of these.²²¹

2. Inherited Significance

The previous section reviewed that a factor may be capable of having any level of significance from being outcome determinative to none at all. That is merely meant to illustrate the breadth of the as-applied potential range. It is not meant to suggest that such a range would necessarily apply to all factors; indeed, it does not.

Several considerations narrow a factor's actual significance in a specific context. One of those considerations is the extent to which binding authorities have constrained the significance range or framed how one assesses a factor's significance. At the moment in time when an analyzer assesses a factor's significance, one can think of the content of all past relevant authority as collectively comprising the factor's *inherited significance*. It is being labeled as such because it represents the significance-related requirements

operational structures).

219. See 18 U.S.C. § 2518(8)(a).

220. See *United States v. McGuire*, 307 F.3d 1192, 1203–04 (9th Cir. 2002); *United States v. Pedroni*, 958 F.2d 262, 265–66 (9th Cir. 1992).

221. See *Smith v. First Marblehead Corp.*, 55 F. Supp. 3d 223, 231–32 (D. Mass. 2014) (finding significant the absence of factors relevant to its scienter determination based on the pleadings standards applicable at the time).

and guidelines that an analyzer “inherits” from precedent and other authoritative sources.²²² No such authoritative sources need exist, but typically they will.²²³

Inherited significance can be general or targeted. General inherited significance encompasses the generalizable pronouncements that presumably inform one’s understanding of a factor’s acontextual significance. For instance, in trademark infringement claims that assess the likelihood of consumer confusion, courts regularly describe “similarity of the mark” as the most important factor or one of the most important factors.²²⁴ One can regularly find a factor described analogously as “key,” especially “significant,” “critical,” and the like.²²⁵ While a significance gauge might focus on the importance of a factor, it may also note the relative unimportance of the factor as compared to other factors.²²⁶ General inherited significance gauges may

222. The idea of inherited significance is a derivation of a framework found in several legal analysis and communication texts. *See generally* LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, & ORGANIZATION* (7th ed. 2018); *see also* BEAZLEY & SMITH, *supra* note 9, at 41 (referencing Edwards’ framework). Linda Edwards conceptualizes an inherited rule as “the legal principle the court takes from prior authorities,” which she distinguishes from the “processed rule” that emerges from the court’s analysis of the rule and its application to the circumstances of the case. EDWARDS, *supra*, at 67.

223. *See* Allen, *supra* note 84, at 1067 (explaining that sources outside of precedential cases inform judicial lawmaking).

224. *E.g.*, *Maker’s Mark Distillery, Inc. v. Diageo N. Am., Inc.*, 679 F.3d 410, 424 (6th Cir. 2012); *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 898 (7th Cir. 2001).

225. *E.g.*, *Nken v. Holder*, 556 U.S. 418, 434 (2009) (describing a factor as “critical”); *Combs v. Fla. Dep’t of Corr.*, 461 F. Supp. 3d 1203, 1211 (N.D. Fla. 2020) (describing a “key” factor); *Neil Bros. v. World Wide Lines, Inc.*, 425 F. Supp. 2d 325, 329 (E.D.N.Y. 2006) (relaying the “single most important factor”); *Consol. Brands, Inc. v. Mondy*, 638 F. Supp. 152, 156 (E.D.N.Y. 1986) (describing the typically “most significant” factor).

226. *Buczowski v. McKay*, 490 N.W.2d 330, 333 (Mich. 1992) (describing other factors as “usually . . . more important”).

also leave the particular significance undefined but cabin the significance range that may apply to a factor in a given context. Most often, such declarations purport to cabin the significance range by stating that a factor (or each among a collection of factors) simply cannot be dispositive.²²⁷

Inherited significance is targeted when it applies to a subset of a factor's operational range or otherwise requires a condition to trigger its targeted prescribed significance level or range.²²⁸ The factors a court may consider to determine whether it would be in the interests of justice and party convenience to transfer venue provide an illustration of targeted significance. Among the factors a court might consider is "the plaintiff's choice of forum."²²⁹ Generally courts describe the plaintiff's choice of forum as entitled to "great weight."²³⁰ However, courts have also prescribed targeted conditions that either diminish the significance of this factor or negate it entirely, such as a choice of forum that is not the plaintiff's residence.²³¹ Another example is the charitable immunity test described above,²³² where one of the factors is whether the officers and directors receive compensation.²³³ Courts have minimized the inherited significance of sizable officer salaries for certain nonprofits

227. See *Rindfleisch v. Gentiva Health Sys., Inc.*, 752 F. Supp. 2d 246, 250 (E.D.N.Y. 2010); *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.*, 142 F. Supp. 3d 1, 9 (D.D.C. 2015).

228. *E.g.*, *State v. One 1995 Silver Jeep Grand Cherokee*, 2006 SD 29, ¶¶ 7–9, 712 N.W.2d 646, 650–51 (noting the potentially dispositive effect of the value-of-property-forfeited factor within certain circumstances when assessing the constitutionality of a civil forfeiture under the Excessive Fines Clause).

229. *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 106–07 (2d Cir. 2006).

230. *Id.* at 107; *Rindfleisch*, 752 F. Supp. 2d at 251.

231. See *Rindfleisch*, 752 F. Supp. 2d at 251.

232. See *supra* notes 156–58 and accompanying text.

233. *Gain, Inc. v. Martin*, 2016 Ark. App. 157, at 3–4, 485 S.W.3d 729, 732.

like hospitals.²³⁴ The lesser significance is prescribed for this factor but only for a targeted subset of nonprofits where administrative complexities presumably require officers who need adequate compensation for their unique skill sets.

A factor might also have targeted significance that is conditioned on other factors. Consider the factors a court might assess to determine whether the evidence is sufficient to establish constructive possession. Proximity and evasiveness are among the factors a court may consider.²³⁵ Neither is sufficient by itself, but in some jurisdictions the combination of the two is at least described as sufficient to establish constructive possession.²³⁶ Thus, the evasiveness factor is an inherently dispositive component, but only in those targeted circumstances when it has been established and the proximity factor is established in some impliedly binary manner.

The examples in this section generally concern express significance gauges where authoritative sources provide significance points in the form of declaratory statements. A factor's significance can also be more implicit, based on what one perceives authorities to stand for even when the authorities have not encapsulated this information in an overtly declarative form.²³⁷ The inferences one may draw

234. *E.g.*, *George v. Jefferson Hosp. Ass'n*, 987 S.W.2d 710, 714 (Ark. 1999) (developing the targeted significance gauge for large and complex non-profits); *Scamardo v. Sparks Reg'l Med. Ctr.*, 289 S.W.3d 903, 908–09 (Ark. 2008) (minimizing salaries as high as \$350,000 based on *George*).

235. *See United States v. Morris*, 977 F.2d 617, 619–20 (D.C. Cir. 1992), *invalidated by United States v. Bailey*, 36 F.3d 106 (D.C. Cir. 1994); *State v. Dawson*, 205 A.3d 662, 671 (Conn. App. Ct. 2019), *aff'd in part, rev'd in part*, 263 A.3d 779 (Conn. 2021).

236. *See Griffin*, 684 F.3d at 696 (noting factors that are sufficient when combined with proximity, including evasiveness). On potential disconnects between language and application, see *supra* Section II.B.3 and *infra* Section II.C.3.

237. *See HELENE S. SHAPO ET AL.*, *WRITING AND ANALYSIS IN THE LAW* 130–32 (6th ed. 2013) (reviewing analytical steps for assessing implicit

may not ultimately be correct, but they are nevertheless probabilistic significance gauges at a particular moment in time. Certainly, future decisions might shift the calculus based on additional decisional data that could alter the probabilities of any implicit significance gauges, including express declarations that confirm or alter the previously implicit information.²³⁸ Inherited significance is always based on what happens to be in the past at that moment in time when analyzers assess what they know about the factors prior to the as-applied assessment in a particular case.

3. Reconciling Inherent and As-Applied Significance

Several conditions inform how one assesses a factor's as-applied significance in a discrete scenario, including the nature of the category that comprises it, the role the factor plays in the larger inquiry, and the facts and circumstances of the case. As reviewed in the previous section, typically this assessment does not take place without relevant inputs from prior authoritative sources—that is, often a factor will expressly or implicitly inherit information that informs its significance in the inquiry.²³⁹ A factor's inherited and as-applied significance can facially align. Past authorities could,

factors); *see also* Emily Sherwin, *Judges As Rulemakers*, 73 U. CHI. L. REV. 919, 924–25 (2006) (noting how implicit rules stem from explanatory statements and background facts). For instance, if a court uses a particular factor to justify several holdings that reach the same outcome, one may be able to infer that the factor is fairly significant generally or in targeted circumstances. If several holdings reach the same outcome where a binary factor has not been satisfied, one may likewise infer less significance in general or in targeted circumstances.

238. *See* SCHAUER, *supra* note 46, at 184–85 (discussing the tensions between inductive processes and certainty).

239. If, however, a factor does not have any inherited significance, the significance of the factor as-applied could create general or targeted significance that future factor assessments would inherit. *See, e.g., In re Marriage of Schu*, 211 Cal. Rptr. 3d 413, 417 (Ct. App. 2016) (finding dispositive a unique set of circumstances that fell under the statute's catch-all factor).

for instance, characterize a factor as important and the factor could be important to the disposition of the case in which it is assessed.²⁴⁰

Even when the two do not facially align, inherited and as-applied significance can still be potentially congruent and thus reconcilable. A factor with high inherited significance, for instance, can continue to be perceived as such even though its application in a particular circumstance happens to only nominally impact the outcome.²⁴¹ Even in situations where the as-applied significance appears to contradict the generally prescribed inherited significance, the two can still be reconcilable if the circumstances as-applied are perceived as an exception, considered an additional targeted significance gauge, or otherwise recognized as a prospectively applicable abrogation.²⁴²

In many ways, then, the reconciliation process concerning factor significance is a derivative of the general analytical processes of rule and case synthesis that are always present when one must try to coalesce information from disparate sources.²⁴³ There is, however, a particular

240. *See* Hornady Mfg. Co. v. Doubletap, Inc., 746 F.3d 995, 1008 (10th Cir. 2014). Inherited and as-applied significance could facially align in any number of ways unique to the nature of the inquiry. *See, e.g.*, Commonwealth v. Perez, 97 A.3d 747, 755 (Pa. 2014) (recognizing a targeted inherited significance level for a factor, finding the facts of the case fell within that targeted circumstance, and applying that targeted significance to the matter before it); *see also* United States v. Niggemann, 881 F.3d 976, 981–82 (7th Cir. 2018) (analogizing to precedent to determine the significance of a factor when assessing whether a criminal sentence violated the Eighth Amendment).

241. *See supra* notes 215–18 and accompanying text (reviewing factors with little as-applied significance because they are closer to neutral in the matter at issue).

242. *See supra* notes 228–34 and accompanying text (providing examples of recognized targeted significance gauges).

243. *See* Gionfriddo, *supra* note 4, at 8–16 (discussing the process of synthesizing express and implicit ideas from a collection of cases); EDWARDS, *supra* note 9, at 40–43 (reviewing reconciliation as it pertains

reconciliation issue applicable to factor significance that appears frequently enough to warrant mentioning. The issue concerns general significance gauges employed at the earlier stages of a factor inquiry's development that are carried over in subsequent opinions despite a factor inquiry's growing systemization over time. For example, a court might continue to declare that no single factor is dispositive even though case law at some point provided or suggested targeted instances in which a single factor might be controlling.²⁴⁴

Similar notions might stem from statements that relate to the multifactor inquiry more generally, which could indirectly pertain to any of the individual factors within the general inquiry. Potential examples include representations that assessments are largely ad hoc or that they ultimately come down to the totality of the circumstances in any given case.²⁴⁵ Aside from truly unanchored assessments, any statement implying a lack of systemization that actually

to seemingly inconsistent rules and results).

244. Compare *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.*, 142 F. Supp. 3d 1, 6 (D.D.C. 2015) ("No one factor is dispositive."), with *Dorsen v. SEC*, 15 F. Supp. 3d 112, 121 (D.D.C. 2014) ("[I]n some circumstances the final factor may be dispositive."). Regarding assessments of a right to speedy trial under the Sixth Amendment, see *United States v. Medina*, 918 F.3d 774, 780–81 (10th Cir. 2019) (stating that "[n]o single factor is determinative," but noting subsequently that a defendant's failure to cross a threshold for a particular factor will, in most circumstances, "eviscerate the defendant's claim").

245. The potential meanings of *totality of the circumstances* are actually quite varied and raise many interesting questions that are beyond the scope of this Article, including the levels of distinction (if any) between factor inquiries and those based on the totality of the circumstances. Compare *State v. Kazanas*, 375 P.3d 1261, 1277–78 (Haw. 2016) (characterizing a totality inquiry "as sweeping in any circumstance, without limitation"), with *Greenidge v. Ruffin*, 927 F.2d 789, 791–92 (4th Cir. 1991) (limiting the scope of facts to consider in totality inquiry), and *Hatchett v. Swanson*, 889 N.E.2d 1141, 1148 (Ill. App. Ct. 2008) (reviewing a circumstance that precedent precludes the court from considering in its totality inquiry).

exists runs the risk of masking operational or significance-based constrictions that do control or guide the inquiry.²⁴⁶ The only way to reconcile such declarations is to conceive of them as accurate in all instances other than those in which they are not, or to recognize them as statements that are simply byproducts of broader inherent institutional tensions.²⁴⁷

III. ATTRIBUTES OF FACTOR TESTS

The workings of a factor test necessarily subsume the qualities and operations of the individual factors that collectively comprise the factor test. Building on Part II's factor-centric discussion, Part III will cover more directly the features of multifactor inquiries that concern the relations among multiple factors. Section A will review whether a list of factors is exclusive and whether a decisionmaker must consider each factor. Section B will explore the inter-factor operational features that can apply in a factor test. Since a factor test can include multiple operations related to individual factors and factor groupings, Section C will review whether a factor inquiry requires or suggests that these steps proceed in a particular sequence.

A. *Exhaustiveness and Related Matters*

As a general demarcation, one could label factor tests as exhaustive or non-exhaustive. An exhaustive test lists in full the relevant or potentially relevant factors, whereas non-

246. See *Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P.*, 593 S.W.3d 732, 741 (Tex. 2020) (determining that an agreement to not have binding or enforceable obligations renders irrelevant the other factors normally assessed under the “totality-of-the-circumstances test” to determine whether a partnership exists).

247. See Dagan, *supra* note 61, at 1890, 1897–98 (speaking of law conception as needing to accommodate “three constitutive yet irresolvable tensions: power and reason, science and craft, and tradition and progress”).

exhaustive tests allow analyzers to assess the listed factors and other considerations.²⁴⁸ A test that expressly states other factors may be considered most facially aligns with non-exhaustive factor inquiries.²⁴⁹ There exists a cohort of factor inquiries where the test expression does not expressly state whether it is exhaustive or non-exhaustive. If the test does not expressly prohibit adjudicators from considering additional information, such tests are most aptly considered non-exhaustive absent evidence to the contrary.²⁵⁰

The basic distinction between exhaustive and non-exhaustive tests is easy to identify. As applied, the distinction can be less consequential than the acontextual labels might suggest. For one, even if a factor test is technically exhaustive, the inquiry might include very general factor categories that subsume almost any potentially relevant input.²⁵¹ Moreover, a facially non-exhaustive test might be regularly acknowledged as such, but in practice decisionmakers almost always limit their

248. *Compare In re Creative Fin. Ltd.*, 543 B.R. 498, 525 (Bankr. S.D.N.Y. 2016) (noting the four factors historically considered to assess whether to issue a stay while an appeal is pending), *and Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 482–83 (Cal. 1998) (reviewing the three factors regularly applied regarding publication of private facts), *with Harper ex rel. Daley v. Toler*, 884 So. 2d 1124, 1130–31 (Fla. Dist. Ct. App. 2004) (recounting a “nonexclusive” list of factors to assess whether an employment relationship exists).

249. *See, e.g., Energy Transfer Partners, L.P.*, 593 S.W.3d at 738; *Elias v. Davis*, 535 S.W.3d 737, 745–46 (Mo. Ct. App. 2017).

250. *See Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1300–01 (11th Cir. 2003) (discussing the less formalized factor inquiry applicable to claims of collusive price fixing). This presumption would certainly apply to developing factor inquiries and factor groupings that are at least partially implicit, where uncertainty about the factors themselves would suggest they could not possibly be view as exhaustive.

251. Sunstein, *supra* note 1, at 964; *see also In re Est. of Torgersen*, 711 N.W.2d 545, 552 (Minn. Ct. App. 2006) (referring to “conduct” during a period of time rather than any particular type of conduct).

assessments to the prescribed list of factors.²⁵²

Related to the exhaustiveness issue is whether and how an adjudicator must consider each factor in the complete or partially prescribed list. Relevant language may state that all the factors “must” or “shall” be considered.²⁵³ Even when such declarations exist, as discussed previously express or implicit conditions may soften the actual effect of such language in application.²⁵⁴ Other contexts make clear or imply that an adjudicator need not consider or find relevant all the factors in an inquiry.²⁵⁵ For instance, courts may describe the factor list as merely a guiding framework or portray the list as observational or descriptive of past practices rather than conveying an obligatory normative framework.²⁵⁶ Descriptions portraying a factor test as a guiding framework might not fully capture how the factors actually get assessed and applied in practice.²⁵⁷ A purportedly guiding framework could, for example, represent

252. When additionally relevant factors do emerge, often they are incorporated into the prospective list that subsequent decisions will review. *See, e.g.*, *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983); *Harper*, 884 So. 2d at 1131–32.

253. *E.g.*, 17 U.S.C. § 107 (“shall”); *Floyd v. Dep’t of Corr.*, No. CV 3:16-0278, 2016 WL 6609464, at 1 (M.D. Pa. Nov. 7, 2016) (“must”); *see also* *Rothwell v. Singleton*, 257 S.W.3d 121, 124–25 (Ky. Ct. App. 2008) (factors “courts are required to examine”).

254. *See supra* notes 210–14.

255. *See* *Houser v. Folino*, 927 F.3d 693, 700 (3d Cir. 2019) (finding the district court did not err even though it did not review all potentially relevant factors); *Ross v. U.S. Bank Nat’l Ass’n*, 542 F. Supp. 2d 1014, 1022 (N.D. Cal. 2008) (determining it did not need to consider two factors).

256. *See* *People v. Young*, 105 P.3d 487, 507 (Cal. 2005) (noting a guiding framework that is “descriptive, not normative,” and reflects the court’s attempt “to do no more than catalog common factors that had occurred in prior cases”).

257. Though surely they may. *See Houser*, 927 F.3d at 700 (assessing any perceived error from the premise that the relevant factor test is merely a “guidepost”).

the way courts do assess the factor test in nearly every case.²⁵⁸

B. *Analytical Units and Inter-Factor Operations*

As a collection of considerations taking on various forms, multifactor inquiries are comprised of analytical units that will or may apply in a given inquiry. Individual factors can typically be a discrete analytical unit, since the reason the factor category exists is often linked to one or several contemplated functions, at least generally.²⁵⁹ To be sure, a discrete factor can involve its own subset of intra-factor operations.²⁶⁰ The reference point for this section, however, is the operation among factor units.

A multifactor inquiry may not concern inter-factor operations if one factor dictates the outcome. When inter-factor operations are applicable, they generally require that analyzers consider factors *in relation to* other factors. A relevant relational quality can generally be conceived as more aggregative or comparative. These two broad qualities have plenty of potential overlap, but there is utility in the conceptual distinction between them.

As a general concept, aggregative relations refer to the effect of considering the collective significance of multiple analytical units in some sort of cumulative way. An example would be the strength of an inference one may draw by collectively considering relevant information that stems from

258. See *Scamardo v. Sparks Reg'l Med. Ctr.*, 289 S.W.3d 903, 908 (Ark. 2008) (describing the prescribed factors to assess charitable immunity as “illustrative”); *supra* notes 156–58, 232–34 and accompanying text (reviewing charitable immunity cases that almost always adhere to the “illustrative” factors).

259. See *supra* note 126 and accompanying text (providing an example when a factor would not be a discrete analytical unit).

260. See *supra* Section II.B–C (reviewing factor-specific operations and significance).

multiple factors.²⁶¹ Comparative operational qualities refer to some way in which one or several factors are considered *against* one or several others, in a manner that embodies some common conceptions of balancing.²⁶² Comparative qualities in an operation can concern all the factors that are relevant to the inquiry, where the factors favoring one outcome are considered against the factors favoring a different outcome.²⁶³ Like aggregative relations, a particular comparative operation can apply to a limited number of the relevant factors. When courts review stay requests, for instance, they may at a certain point discretely assess the extent of harm to one party as compared to the other.²⁶⁴

As suggested by the fact that a stay request might at one

261. Inquiries assessed under a sufficiency of the evidence standard of review often bear this quality. *See, e.g.*, *People v. Robinson*, 657 N.E.2d 1020, 1029 (Ill. 1995) (finding sufficient evidence of intent to deliver based on the combination of quantity, packaging, and several other considerations); *see also* *United States v. Griffin*, 684 F.3d 691, 696 (7th Cir. 2012) (noting factor combinations that can be collectively sufficient to establish constructive possession, such as proximity and evasiveness).

262. In some instances, the inquiry could be framed as an assessment of competing interests, where certain factors relevant to one interest are distinctly balanced against certain factors relevant to the competing interest. *E.g.*, *United States v. Weikert*, 504 F.3d 1, 11 (1st Cir. 2007) (balancing privacy and government interests). The distinction between interests and factors is tenuous without a particular frame to define whether and how interests and factors have distinct properties. *See* *United States v. Amerson*, 483 F.3d 73, 83–84 (2d Cir. 2007) (listing an interest as a factor); *supra* Section II.A (reviewing the broad scope of that which may be defined as a factor).

263. *See* *Car-Freshner Corp. v. Am. Covers, LLC*, 980 F.3d 314, 334 (2d Cir. 2020) (balancing the individual assessments of each factor to determine the viability of a trademark infringement claim); *State v. Burch*, 389 P.3d 685, 694–95 (Wash. Ct. App. 2016) (balancing factors to determine whether a legislature intended a strict liability crime).

264. *See* *Ohio Valley Env't Coal., Inc. v. U.S. Army Corps of Eng'rs*, 890 F. Supp. 2d 688, 695 (S.D.W. Va. 2012); *see also* *F.T.C. v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003) (balancing harms to the parties and the public).

point balance two factors, in addition to possible discrete operations for each individual factor, an inquiry can involve several actual or potential inter-factor operations. Within a single inquiry, certain operations could be more aggregative, and others could take on a more comparative quality.²⁶⁵ Washington's undue influence test illustrates such a combination. Courts first assess in more of an aggregative sense whether the plaintiff can demonstrate that a combination of factors are collectively sufficient to establish a presumption of undue influence.²⁶⁶ If the plaintiff establishes such a presumption, the court then considers the extent to which the defendant can negate the cumulative significance of those factors.²⁶⁷ One may describe this latter step—as some courts do—as somewhat of a comparative balance that pits the cumulative strength of the evidence supporting the presumption against the countervailing negating evidence.²⁶⁸

The potentially dominant quality of an operation could vary based on the context in which it is applied. For instance, a particular operation in an assessment of factors may appear more comparative when a court considers the factors favoring one outcome against the factors favoring a different

265. One may characterize certain applications of prototypical factor balancing tests this way. All the factors favoring one side are aggregated, the factors favoring the other side are aggregated, and then the cumulative values of each side are balanced. *E.g.*, *Opta Sys., LLC v. Daewoo Elecs. Am.*, 483 F. Supp. 2d 400, 404–06 (D.N.J. 2007); *Burch*, 389 P.3d at 694–95. This is, of course, a potentially stark oversimplification. To the extent it applies to the general assessment framework of a given multifactor inquiry, it would likely only be viable at a very high conceptual level. *See Car-Freshner Corp.*, 980 F.3d at 334 (eschewing overly mechanical conceptualizations of the balancing process).

266. *Mueller v. Wells*, 367 P.3d 580, 584–86 (Wash. 2016) (applying the factors first developed in *Dean v. Jordan*, 79 P.2d 331 (Wash. 1938)).

267. *Id.* at 586.

268. *Id.* (looking for evidence to “balance the scales and restore the equilibrium”).

outcome. A subsequent application of those same factors can appear more aggregative based on, for instance, a more analogistic assessment driven by the collective similarities between recent precedent and the case at hand.²⁶⁹ The temporal dimension of factor assessments can always impact how one perceives of factors' operational qualities, because of the potential for greater systemization and the requirements of precedent reconciliation.²⁷⁰

Though not outside the purview of aggregative and comparative relational qualities, factor-appliers expressly or implicitly invoke the sliding scale concept frequently enough to warrant a few words about it. In a sliding scales inquiry, certain analytical units are considered in relation to others: the more of one that exists, the less of the other is needed.²⁷¹ As such, there is a comparative feeling to the assessment that may embody the more metaphorical visual depiction of balancing on a scale. At the same time, the way sliding scales are employed may not really be based on the variable that has the greater value, but rather whether the combined value is sufficient in a more conceptually aggregative way. In this respect, the factors need not be inversely proportionate in the sense that more of one necessarily *causes* there to be less of the other; instead, more of one would simply require that less of the other exists for them to collectively produce a particular outcome.

269. See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987) (advocating a conception of balancing that is distinct from "primarily analogical" reasoning).

270. On reconciliation, see *supra* Section II.C.3.

271. See Frederic L. Kirgis, *Fuzzy Logic and the Sliding Scale Theorem*, 53 ALA. L. REV. 421, 422–23, 423 n.3 (2002). Kirgis provides several examples of variables assessed on a sliding scale that he sometimes refers to as elements, though his examples appear to more naturally qualify as factors. Compare *id.* at 428 (describing as elements what adjudicators consider to determine if a liquidated damages clause is enforceable), with RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. b (AM. L. INST. 1979) (labeling such considerations as factors).

Prototypical sliding scale operations concern two variables assessed in relation to each other. For example, to determine whether to permit the use of summary tools “to clarify complex testimony and evidence for a jury,” a court may weigh “the volume and complexity of the materials”; the assessment of these two variables could be on a sliding scale, wherein “as either the volume or complexity increases, relatively less is required of the other factor.”²⁷²

The two-variable structure of a sliding scale does not limit the assessment to two factors. If there are more than two factors involved, then a two-variable structure can be created by one or two superordinate unifying concepts that subsume multiple factors. The superordinate concept can more naturally stem from the taxonomic hierarchies related to factor creation reviewed in Part I. Such is the case in some courts’ assessments of hostile work environment claims under the Civil Rights Act of 1964,²⁷³ where several factors related to a superordinate harm concept are assessed on a sliding scale against the frequency of the harmful conduct.²⁷⁴ Alternatively, the overarching express or implicit concept could be a distinct higher order category developed more ad hoc for purposes of the comparative operation.²⁷⁵

272. *United States v. Appolon*, 695 F.3d 44, 61 (1st Cir. 2012) (internal quotation marks omitted); *see also* FED. R. EVID. 1006.

273. *See* 42 U.S.C. § 2000e-2(a)(1).

274. *See Arshakyan v. X17, Inc.*, No. CV 16-04305, 2019 WL 10097455, at 9 (C.D. Cal. June 21, 2019) (stating that the first factor is inversely related to the second and third factors); *see also* *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (listing factors that include “the frequency of the discriminatory conduct; its severity; [and] whether it is physically threatening or humiliating, or a mere offensive utterance”).

275. Perhaps the most abstract superordinate concept is when a grouping of factors is simply defined by what they are not. Such may be the case when courts state that the evidence pertaining to a particularly important factor is assessed on a sliding scale against evidence pertaining to all the other factors. *E.g.*, *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144 (4th Cir. 2001).

One does not need to only have two variables to invoke the sliding scale concept. However, the additional discrete variables compound the number of interrelated points of assessment, which may make it harder to internalize the utility of its comparative or aggregative qualities without any prescribed operational systematization.²⁷⁶

In sum, inter-factor operations can take on relational qualities that are more aggregative or comparative, though the quality that best describes an operation can be contextually dependent. Relevant contextual matters include the type of issue being assessed and external situational considerations related to the previous body of law informing the assessment. An inquiry can involve several inter-factor operations and those operations can concern all the factors or a more limited number of them. Inter-factor operations might also expressly or implicitly leverage superordinate concepts within the broader taxonomic framework in which the factors reside. Additionally, it is possible that a single factor or certain inter-factor operations will determine the outcome. As such, an inquiry might not address all the inter-factor operations that could conceivably apply to that factor test in other contexts.

C. Steps and Sequences

The previous section reviewed how a factor inquiry could have many analytical units that will or may be assessed. Stemming from this possibility, this section will review whether the potential need to assess multiple analytical units requires or suggests a particular assessment sequence. As a threshold matter, it should be noted that the same analytical unit can be relevant at various stages of an inquiry in different ways. This even applies to an analytical unit defined as a discrete factor. As reviewed previously, for

276. *See* *People v. Young*, 105 P.3d 487, 506–07 (Cal. 2005) (laying out generally sufficient sliding scale combinations in the absence of evidence pertaining to all three factors).

example, the length-of-delay factor in claimed violations of a defendant's right to a speedy trial can be relevant as an initial dichotomous inquiry and then later when assessed more spectrally in conjunction with other factors.²⁷⁷

To varying degrees, multifactor inquiries often operate within express or implicit constraints related to their assessment sequence. These sequences may be fixed or suggestive, at least partially or conditionally so. For an entire sequence or certain steps to truly be fixed, one or several analytical units would have to depend on an earlier assessment of other units such that it would be difficult (if not impossible) to assess them out of order—at least without making assumptions about the previous steps. For instance, it is not likely plausible to assess rebuttal evidence of undue influence prior to assessing whether the germane factors establish a presumption of undue influence to begin with.²⁷⁸ Even if the sequence in a multi-factor inquiry is not truly fixed in the sense of later steps being dependent on former steps, it may functionally be fully or partially fixed because precedent or other authoritative declarations seemingly mandate a particular order.²⁷⁹

Regarding suggestive sequences, the difference between these and fixed sequences is not one of form; rather, it is simply a matter of the degree to which the sequence must be followed. For suggestive sequences, the test is not locked into a prescribed progression, but a certain progression might

277. See *supra* Section II.B.2.i.

278. See *Mueller v. Wells*, 367 P.3d 580, 584–86 (Wash. 2016); *supra* notes 265–67 and accompanying text.

279. See *Legacy Classic Furniture, Inc. v. United States*, 35 Ct. Int'l Trade 1754, 1755 (2011) (stating that a decisionmaker must find that a certain list of factors is not dispositive before assessing other factors); see also *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017) (following the progressive steps of a factor test laid out in precedent); *Ross v. U.S. Bank Nat'l Ass'n*, 542 F. Supp. 2d 1014, 1021–22 (N.D. Cal. 2008) (finding it proper to consider several non-dispositive factors only after its assessment of a potentially dispositive threshold factor).

make sense for all or part of the inquiry. One reason could be the relative inherited significance of a factor, such as the relationship factor of the duty element of a negligence claim, in which a court separately labeling the requisite relationship as a distinct factor might ordinarily consider it first because of its potentially dispositive effect.²⁸⁰ Though not entirely distinct from inherited significance, another reason could be the default order in which the factors are sequenced in a statute, regulation, or precedent case—either because the prescribed sequence has an inherent logic to its progression or because it is perceived to.²⁸¹ Suggestive sequences may also stem from inquiries that have focal point factors. Such factors are often the hub from which one evaluates other factors. The other factors can be labelled or essentially function as “plus factors,” which naturally leads one to conceptualize the hubs as the starting point, even if doing so is not prescribed as mandatory.²⁸²

The corollary to sequences being suggestive is that a particular circumstance may suggest a different sequence. The as-applied context could do so for a variety of reasons, such as when a factor with little inherited significance is particularly important in an as-applied context.²⁸³ Finally,

280. *In re Certified Question from Fourteenth Dist. Ct. of Appeals of Tex.*, 740 N.W.2d 206, 211–12 (Mich. 2007).

281. *See Regents of Univ. of Cal. v. Superior Ct.*, 413 P.3d 656, 670 (Cal. 2018) (generally followed sequence for both superordinate categories and factors); *Car-Freshner Corp. v. Am. Covers, LLC*, 980 F.3d 314, 326–34 (2d Cir. 2020); *Wampler v. Higgins*, 752 N.E.2d 962, 978–79 (Ohio 2001) (adhering to the sequence laid out in previous caselaw, but noting that the factor assessment need not “be undertaken in a rigid lock-step fashion”); *cf. Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 72 (2d Cir. 2003) (noting that the factors are “listed in no particular order”).

282. *See State v. Dawson*, 205 A.3d 662, 671 (Conn. App. Ct. 2019) (proximity as hub factor for constructive possession assessment); *see also State v. Rodriguez*, 560 P.2d 1238, 1240 (Ariz. 1977) (entry and theft as potential hub factors to establish inference of intent for burglary).

283. *See In re Marriage of Schu*, 211 Cal. Rptr. 3d 413, 417 (Cal. Ct. App. 2016) (finding a statute’s catch-all factor particularly germane

near the edge of one side of the suggestiveness continuum are inquiries with analytical units that have little to no preconceived operational sequence.²⁸⁴

IV. ORIENTING THE FRAME OF REFERENCE

The previous parts outlined the broad properties that do or could apply to factor inquiries and the discrete factor components within a broader inquiry. Though it provided examples and illustrations, the meaning and functional qualities of the framework are necessarily influenced by one's frame of reference.²⁸⁵ This Part will discuss three orienting principles that could impact how one internalizes the general framework for factors that this Article presented.²⁸⁶

The first orienting principle concerns the scope of what one chooses to assess when determining the properties and operational qualities that apply to a given factor inquiry. Whatever acontextual conception one may have of factors and inquiry operations, to determine the nature of a particular factor inquiry (or possibly just an inquiry containing factors), an analyzer must decide which conceptual level to start on, and how many levels to

because of the facts in the case).

284. Consider the groupings of factors a court might review to determine whether a defendant voluntarily consented to a search. *Compare* United States v. Magallon, 984 F.3d 1263, 1281–82 (8th Cir. 2021) (reviewing police behavior before personal characteristics), *with* United States v. Willie, 462 F.3d 892, 896–97 (8th Cir. 2006) (reviewing personal characteristics before police behavior). *But cf.* Ric Simmons, *Not “Voluntary” but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 779 (2005) (describing the irrelevance of the subjectivity requirement as “an open secret”).

285. *See* Markman, *supra* note 36, at 47–48.

286. *See id.* at 48 (noting how the study of situated cognition has shown that representations can influence thinking); *see also* STANLEY FISH, *DOING WHAT COMES NATURALLY* 1–2, 295–96 (Frederic Jameson ed., 1989) (reviewing the link between context and meaning).

subsume.²⁸⁷ For instance, if an analyzer focuses on a horizontal level that includes several factors operating on a spectrum, the factors could be described as spectral. Assume that the spectrum for some of these factors includes several categories that involve dichotomous determinations. If the frame of reference subsumes that more particular information as well, then how an analyzer assesses or describes the operational qualities could be different. Thus, the scope of one's reference frame could produce different assessments of relevant properties and operations. The distinctions between potential assessment frameworks are not necessarily about right and wrong. More important for purposes here is the recognition that unaligned referential scopes can impact conceptual congruity.

The second orienting principle also concerns scope, but it focuses more directly on the parts of a factor inquiry (or an inquiry that contains factors) that are relevant in a specific situation—though, of course, one need not assess a factor inquiry for the purpose of applying it to a specific situation. Consider, for instance, the previously reviewed four-factor test courts use to assess a defendant's claimed violation of a right to a speedy trial.²⁸⁸ The second factor, reasons for the delay, could concern a delay caused by the federal government's decision to wait while a state pursues concurrent charges.²⁸⁹ If such a reason does not apply to the specific situation one is assessing, then any express or implicit factors related to that discrete issue do not have to inform how one conceptualizes the nature of the overarching factor inquiry in that limited instance.²⁹⁰

287. See *supra* text accompanying notes 135–38 (discussing how one's frame of reference impacts the properties one attributes to elements).

288. See *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *supra* Section II.B.2.

289. See *United States v. Myers*, 930 F.3d 1113, 1120–21 (9th Cir. 2019).

290. See *United States v. Seltzer*, 595 F.3d 1170, 1178–79 (10th Cir.

The potential limiting effect of a situational application is particularly relevant to consider in light of many of the operation and significance-based points that this Article explored.²⁹¹ For example, several of the discussed inherited and as-applied significance levels were conditional and thus their effect only applies if a condition occurs.²⁹² Characterizing the nature of an inquiry based on all the components and operations that may apply is quite distinct from the more limited situationally relevant aspects that can be more manageable to internalize and communicate. Both are among the potential framing options one might use. Thus, the scope of what is perceived as situationally relevant can also orient a frame of reference.

A third orienting principle concerns how the nature of a specific factor inquiry imparts meaning onto some of the more abstract explanatory concepts that this Article used to review the features and attributes of factor inquiries. As an example, Section III.B described inter-factor operations as potentially being more aggregative or comparative. These labels were necessarily abstract as to cover the derivations that different types of factor inquiries produce.²⁹³ Reviewing factors to assess proof of a state of mind, for instance, need not produce the same conception of aggregative or comparative qualities that other types of factor inquiries might produce.²⁹⁴ Consequently, the particulars of a discrete

2010) (reviewing what could be construed as factors, including the extent of a charge's complexity).

291. *E.g.*, *supra* Sections II.C.1–2 & III.B–C.

292. *See supra* Section II.C.1–2.

293. The meaning of a spectrum would be another example. *See supra* note 140.

294. *Compare* *Dougherty v. Esperion Therapeutics, Inc.*, 905 F.3d 971, 981–82 (6th Cir. 2018) (scienter), *and* *State v. Hollis*, 342 S.W.3d 43, 53 (Tenn. Crim. App. 2011) (premeditation), *with* *Montgomery v. Pinchak*, 294 F.3d 492, 499 (3d Cir. 2002) (appointment of counsel), *and* *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993) (stay request). That is not to say that one could easily segment inquiries by general type and

factor inquiry orient any general meaning that more abstract concepts of factor structure and operations could impart.

CONCLUSION

Part I explored factor inquiries by conceiving of factors as categories within broader taxonomic structures. But the general subject matter of this Article—factors of general application—is itself a concept that refers to a category. It is a category that encompasses many different forms, properties, and functions. A factor can concern something that needs to be assessed dichotomously or it can point to a more spectral assessment. It can take on both operational qualities at different stages in the inquiry or blend them together. A factor might inform a decision or it could potentially dictate the outcome. Sometimes a factor can join with other factors to become conceptual or analytical units for a particular operation, which can involve a subset of the factors or all of them. Among each analytical unit, be it a factor or a grouping of factors, there may be an assessment sequence that is at least partially or conditionally fixed or suggestive.

The scope of the factor concept subsumes all these potential attributes and qualities. The category to which the factor concept refers is not, however, overly rigid. Rather, as prefaced above, it is a category with members sharing a family resemblance.²⁹⁵ Certain attributes or qualities may be more common (or perceived as such), but categories are not limited to their prototypes or exemplars.²⁹⁶ By reviewing their attendant qualities and characteristics, this Article has sought to provide a greater understanding of factors. Simply put, they are the ubiquitous units of implicit thought and external expression that formally and informally guide and

find within them a consistent manner of operation that would convey the meaning of abstract terms in some uniform way.

295. See *supra* note 37 and accompanying text.

296. Rips et al., *supra* note 4, at 180, 183–84.

facilitate decision making.