CRIMINAL LAW — STATUTORY INTERPRETATION — WISCONSIN SUPREME COURT APPLIES SEXUAL ASSAULT STATUTE TO ATTEMPTED SEXUAL INTERCOURSE WITH A CORPSE. — *State v. Grunke*, 752 N.W.2d 769 (Wis. 2008).

An overarching principle in criminal law is that legislatures, and not courts, should define the contours of criminal prohibitions.[1] A prominent expression of this principle is the rule of lenity in statutory construction, which requires that judges resolve textual ambiguities in criminal statutes in favor of defendants.[2] The rule tends to promote "values of near-constitutional stature," such as fair notice, controlled discretion, and nondelegation of the definition of criminal conduct.[3] Recently, in *State v. Grunke*,[4] the Wisconsin Supreme Court held that the state's sexual assault statute[5] unambiguously criminalized sexual intercourse with a corpse even when the defendant did not cause the death of the victim.[6] This application of a criminal statute to conduct that the legislature probably did not intend to criminalize is in tension with the nondelegation principle underlying the rule of lenity. However, because the *Grunke* court found the text of the statute to be unambiguous, it did not even consider applying the rule of lenity. The rule of lenity should be expanded to allow for the consideration of extratextual evidence of ambiguity in order to ensure that criminal definition is confined to the legislative branch.

On September 2, 2002, Nicholas Grunke, Alexander Grunke, and their friend Dustin Radke attempted to excavate a female corpse at a local cemetery so that Nicholas could engage in sexual intercourse with the corpse.[7] The Grunkes and Radke brought excavation tools, a tarp, and condoms to the cemetery, and proceeded to dig a hole into the body's gravesite.[8] The three men managed to expose the top of the corpse's vault, but fled after being unable to open the vault and hear-

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[1] *See, e.g.*, United States v. Bass, 404 U.S. 336, 348 (1971) ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.").

[2] *See, e.g.*, United States v. Santos, 128 S. Ct. 2020, 2025 (2008); State v. Quintana, 748 N.W.2d 447, 465 (Wis. 2008); State v. Cole, 663 N.W.2d 700, 703 (Wis. 2003).

[3] Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345–46; *see also Bass*, 404 U.S. at 348 (articulating the notice and nondelegation arguments in favor of the rule of lenity). Although Professor Dan Kahan advocates abolition of the rule of lenity and its replacement with a more general system of federal common law, Kahan, *supra*, at 348, he acknowledges that the rule is meant to achieve constitutionally relevant objectives, *id.* at 345–46.

[4] 752 N.W.2d 769 (Wis. 2008).

[5] WIS. STAT. ANN. § 940.225 (West 2005).

[6] *Grunke*, 752 N.W.2d at 771.

[7] *Id.*

[8] *Id.*

ing another car driving into the cemetery.[9] A police officer subsequently arrived at the cemetery in response to a call reporting a suspicious vehicle on the grounds.[10] The officer encountered Alexander Grunke, noticed his supplies, and placed him in custody.[11]

The Grunkes and Radke were charged in a Wisconsin state court with damage to cemetery property, attempted criminal damage to property, and attempted third-degree sexual assault.[12] The sexual assault statute prohibits "sexual intercourse with a person without the consent of that person."[13] The statute provides, in relevant part, that "'[c]onsent' . . . means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact,"[14] and establishes a presumption that mentally ill persons[15] or persons "unconscious or for any other reason . . . physically unable to communicate unwillingness to an act"[16] are incapable of consent. Finally, section 940.225(7) states that the statute "applies whether a victim is dead or alive at the time of the sexual contact or sexual intercourse."[17]

The trial court dismissed the attempted third-degree sexual assault counts, holding that the sexual assault statute did not criminalize necrophilia.[18] The court of appeals affirmed.[19] The court rejected the prosecution's argument that section 940.225(7) indicates that the statute was intended to cover acts with a corpse even if the defendant had not caused the death of the victim. Although the court admitted that "this argument is appealing on its face,"[20] it concluded that "viewing the entire statute in context and in light of its purpose of protecting bodily security, . . . the statute is ambiguous."[21] As a result, the court

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9 *Id.*
10 *Id.*
11 *Id.*
12 State v. Grunke, 738 N.W.2d 137, 139 (Wis. Ct. App. 2007).
13 WIS. STAT. ANN. § 940.225(3) (West 2005).
14 *Id.* § 940.225(4).
15 *Id.* § 940.225(4)(b).
16 *Id.* § 940.225(4)(c).
17 *Id.* § 940.225(7).
18 State v. Grunke, 738 N.W.2d 137, 139 (Wis. Ct. App. 2007).
19 *Id.*
20 *Id.* at 140.
21 *Id.* at 142. First, the court observed that the statute is contained within a compilation entitled "Crimes Against Life and Bodily Security," suggesting that the criminalized conduct poses a threat to living persons. *Id.* at 140–41. Next, the court reasoned that, since section 940.225(4) provides a presumably exhaustive list of circumstances — including intoxication and mental illness — in which a victim could be presumed incapable of consent, the legislature contemplated a distinction between straightforward nonconsent and lack of capacity to consent. Yet the list in section 940.225(4) does not include the circumstance that the victim is dead, despite the fact that a dead person cannot give consent. *Id.* at 141. To the court, the interaction between the exclusion

examined the legislative history of the provision.[22] It concluded that the provision was passed as a response to *State v. Holt*,[23] as indicated by the timing of the amendment and its accompanying drafting comments.[24] In *Holt*, the Wisconsin Court of Appeals suggested that the prosecutor in a murder-rape case was required to prove that the victim was still alive when the sexual assault took place.[25] The court of appeals in *Grunke* therefore concluded that section 940.225(7) was intended only to prevent frustration of murder-rape prosecutions and not as a ban on sexual intercourse with an exhumed corpse.[26]

The Wisconsin Supreme Court reversed. Writing for the majority, Justice Roggensack concluded that section 940.225 criminalized sexual activity with a dead victim even in cases where the defendant did not cause the victim's death.[27] First, the court rejected the respondents' argument that section 940.225(3)'s requirement that sexual activity take place "'without the consent' of the victim"[28] is incompatible with necrophilia because a corpse is "incapable of consent."[29] The court observed that the state needed only to "prove that there was no affirmative consent" and did not need to demonstrate "that the victim withheld consent."[30] The court likewise concluded that the fact that "dead victim[s]" were not included in the "list of circumstances in which consent is 'not an issue'" did not indicate a legislative intent to keep necrophilia out of section 940.225's scope.[31]

Next, the court turned to the defendants' argument that the court's interpretation of section 940.225(7) produced the "absurd prospect of four degrees of sexual assault of a dead person."[32] The court observed that the absurdity doctrine is limited to contexts in which an interpretation would render a statute internally inconsistent or "confound the statute's clearly stated purpose," and held that the state's interpretation did not fall under either category.[33] Finally, turning to the def-

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of dead persons from section 940.225(4) and their inclusion in section 940.225(7) "creates an ambiguity." *Id.* at 142.

22 *Id.* at 142.

23 382 N.W.2d 679 (Wis. Ct. App. 1985).

24 *Grunke*, 738 N.W.2d at 142.

25 *See Holt*, 382 N.W.2d at 685. The court nonetheless upheld Holt's sexual assault conviction, holding that "the jury may reasonably infer . . . that the victim was alive during the sexual assault, at least in the absence of evidence of necrophilic tendencies on the part of the accused." *Id.*

26 *Grunke*, 738 N.W.2d at 143.

27 *Grunke*, 752 N.W.2d at 771.

28 *Id.* at 776 (quoting WIS. STAT. ANN. § 940.225(3) (West 2005)).

29 *Id.* at 775.

30 *Id.* at 776 (emphasis omitted).

31 *Id.* (quoting WIS. STAT. ANN. § 940.225(4)).

32 *Id.*

33 *Id.* at 777.

endants' reliance on legislative history,[34] the court insisted that the statute's plain language did not limit its application to murder-rape cases. The court offered additional legislative history to support this interpretation.[35]

Chief Justice Abrahamson wrote a brief concurrence. The Chief Justice rejected the majority's methodological claim that the statute's plain terms could be read to cover the conduct being prosecuted.[36] Reviewing the statute's legislative history, she argued, was a necessary step in concluding that the sexual assault charges were valid.[37]

Justice Bradley dissented.[38] Arguing that the majority was "reach[ing] a desired result through an undesirable analysis," she agreed with the court of appeals's conclusion "that the language of the statute was ambiguous and . . . the legislature . . . did not intend" to criminalize necrophilia.[39] She argued that "it is always suspicious . . . when an opinion asserts that the meaning [of a statute] is plain and then proceeds to spend a multitude of pages explaining it."[40] Examining the text of the statute, Justice Bradley contended that third-degree sexual assault charges rely on the element of consent, which cannot be coherently applied to cases involving corpses.[41] She pointed out that if the majority was correct in arguing that the consent element would be "merely 'simple to prove' in the case of a corpse," section 940.225(7) would be superfluous.[42] Finally, she concluded that the statute's legislative history supported the defendants' position that the addition of section 940.225(7) was motivated by a desire to facilitate the prosecution of murder-rape cases in which the sequence of events was unclear.[43] The ambiguous statutory language, coupled with the legislative history, led Justice Bradley to conclude that the statute "appl[ied] to cases involving murder and sexual assault, and not to cases of necrophilia."[44]

Even if textual interpretation alone would produce the conclusion that section 940.225 is unambiguously applicable to sexual intercourse with a corpse, a more substantive application of the nondelegation

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[34] *Id.* at 778. The defendants cited the subsection's title, "Death of Victim," to support their claim that it was targeted toward the party or parties responsible for the death. *Id.* at 778 n.14.

[35] *Id.* at 778–79.

[36] *Id.* at 780 (Abrahamson, C.J., concurring).

[37] *Id.*

[38] Justice Bradley was joined by Justice Butler.

[39] *Grunke*, 752 N.W.2d at 780 (Bradley, J., dissenting).

[40] *Id.* at 781.

[41] *Id.*

[42] *Id.* (quoting *id.* at 776 (majority opinion)).

[43] *Id.* at 782.

[44] *Id.*

principle[45] encapsulated by the rule of lenity[46] should have motivated dismissal. The *Grunke* court should have considered, in addition to the clarity of the statutory text, the actual intent of the Wisconsin legislature with respect to the conduct at issue. By limiting criminal punishment to conduct intentionally prohibited by the legislature, the court could have endorsed an interpretive rule that adhered more closely to the legality principle.[47]

The principle of nondelegation in defining crimes enjoys broad support. Straightforward judicial crime creation, although never explicitly proscribed by the U.S. Supreme Court,[48] has largely fallen into disuse,[49] suggesting that judges no longer assume that they are empowered to punish *malum in se* conduct without a corresponding statutory prohibition. The rule of lenity functions as an effective means of policing such values as fair notice and uniform application of the law by enforcing legislative specificity in the authoring of criminal statutes and judicial restraint in the interpreting of statutes.[50] As a result, existing doctrine prevents courts from either *creating* new crimi-

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[45] The existing formulation of the rule of lenity is supported by the rule's notice function in addition to its nondelegation function. *See* United States v. Bass, 404 U.S. 336, 347–48 (1971) (summarizing both rationales). This comment sets aside the issue of whether this proposed expansion of lenity is supported by the notice rationale in addition to the nondelegation rationale. However, because this proposed expansion would enable legislative history only to *narrow* the scope of a criminal statute, this expansion would clearly not undermine notice. Furthermore, various Justices have acknowledged that the notice rationale is a fiction. *See, e.g.*, United States v. R.L.C., 503 U.S. 291, 309 (1992) (Scalia, J., concurring in part and concurring in the judgment) ("It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction . . . ."); McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.); *see also* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 907 (2004) (arguing that the notice rationale for the rule of lenity is unpersuasive).

[46] Admittedly, the court in *Grunke* did not explicitly mention the rule of lenity and did not claim to be applying it. However, the rule is good law in Wisconsin. *See, e.g.*, State v. Quintana, 748 N.W.2d 447, 465 (Wis. 2008). Additionally, because the court *did* reach its disposition by determining that the statute's text was unambiguous and discounting its legislative history, it seems clear that the proposed alteration to the rule — allowing legislative history to narrow the scope of a criminal statute even if its text is clear — would have altered the court's approach to the facts of *Grunke* if given effect.

[47] *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190 (1985) ("The principle of legality forbids the retroactive definition of criminal offenses. It is condemned because it is retroactive and also because it is judicial — that is, accomplished by an institution not recognized as politically competent to define crime. Thus, a fuller statement of the legality ideal would be that it stands for the desirability in principle of advance *legislative* specification of criminal misconduct." (emphasis added)); *cf.* Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 340–41 (2005) (discussing reasons to abolish "common law penal rules").

[48] The Supreme Court has held that *federal* courts have no jurisdiction over non-statutory crimes. *See* Jeffries, *supra* note 47, at 192 n.9 (citing United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812)).

[49] *Id.* at 195 ("Judicial crime creation is a thing of the past.").

[50] *See* Price, *supra* note 45, at 886–87.

nal prohibitions based on their own moral sensibilities or *expanding* those prohibitions beyond the statutory text. It does not, however, address situations in which the statutory text itself defines a prohibition beyond the scope intended by the enacting legislature.

The current formulation of the rule of lenity requires a court to examine a statute's text to determine whether the statute is ambiguous. If there is sufficient ambiguity, the statute is construed narrowly, in favor of the defendant.[51] Some applications of the rule's current formulation require "reasonable doubt [to] persist[] about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute";[52] absent this doubt, lenity is inapplicable. Other articulations of the rule allow textual ambiguity alone to trigger lenity even if "the legislative history might tip in the [prosecution's] favor."[53] Under either formulation, application of the rule of lenity requires an initial determination that the text of a statute is ambiguous; if no such determination can be made, the inquiry ends and the statute's text is straightforwardly applied. In this respect, the rule's current role as a limit on delegation is constrained by the extent to which a statute's text matches legislative intent. Consequently, the rule of lenity in its current form does not allow legislative history to *contract* the scope of a criminal statute's text, even though it arguably allows the intended scope of a criminal prohibition to be *expanded* by overly broad statutory text.

The result in *Grunke* illustrates a deficiency of the rule of lenity with respect to its nondelegation function.[54] Section 940.225(7)'s inclusion within Wisconsin's general sexual assault statute, rather than its adoption as an independent anti-necrophilia statute, suggests that it was not enacted as a general necrophilia prohibition.[55] Similarly, sec-

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[51] *See* United States v. Santos, 128 S. Ct. 2020, 2025 (2008) (noting that in cases where an interpretation favorable to the defendant is no less persuasive than others, "the tie must go to the defendant").

[52] Moskal v. United States, 498 U.S. 103, 108 (1990) (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980)).

[53] United States v. Bass, 404 U.S. 336, 347 (1971); *see also* United States v. R.L.C., 503 U.S. 291, 307 (1992) (Scalia, J., concurring in part and concurring in the judgment) ("[I]t is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history."); *id.* at 311 (Thomas, J., concurring in part and concurring in the judgment) ("[T]he use of legislative history to construe an otherwise ambiguous penal statute against a criminal defendant is difficult to reconcile with the rule of lenity.").

[54] *See* Kahan, *supra* note 3, at 350 ("Lenity promotes . . . legislative supremacy not just by preventing courts from covertly undermining legislative decisions, but also by forcing Congress to shoulder the entire burden of criminal lawmaking even when it prefers to cede some part of that task to courts.").

[55] Other states have enacted criminal prohibitions of necrophilia within independent statutes. *See, e.g.*, ALA. CODE § 13A-11-13 (2006); NEV. REV. STAT. § 201.450 (2007); OHIO REV. CODE ANN. § 2927.01 (West 2006); 18 PA. CONS. STAT. ANN. § 5510 (West 2000). This distinction is salient: several of these statutes focus on the effects of the proscribed conduct on the victim's

tion 940.225(7)'s legislative history offers fairly conclusive evidence that the legislature intended merely to render irrelevant the order of events in a murder-rape scenario.[56] Although relevant drafting documents do mention Wisconsin's lack of a general necrophilia prohibition,[57] they do so only to explain why the then-existing legal regime did not adequately facilitate the prosecution of individuals guilty of a concurrent rape and murder. As a result, the situation presented in *Grunke* presents a rare problem for the rule of lenity. Although the rule is generally intended to advance its underlying nondelegation rationale in situations where a statute's text is ambiguous, it is ineffectual in situations in which the apparent clarity of a statute is undermined by extratextual evidence that no criminal prohibition on the behavior was intended. *Grunke*'s fact pattern provides an example of when a statute's plain language might encompass behavior *beyond* the intended scope of criminal legislation.

Judicial application of the rule of lenity already suggests that a legislature should explicitly make the judgment to criminalize a particular type of conduct before a court can impose penalties for its commission.[58] However, further examination of legislative history can help a court determine the actual legislative preferences motivating a criminal statute.[59] To use an improbable example, if a legislature had not previously prohibited rape and subsequently enacted a statute labeled as a rape statute but whose text proscribed "all involuntary violations of bodily integrity," a court should be willing to examine the statute's history, structure and title to dismiss a prosecution under the statute for a nonsexual assault. This expanded rule of lenity would therefore function as a check against delegation during the examination of both a statute's text and its intended scope. If legislative history introduces sufficient ambiguity regarding a legislature's intent to criminalize some

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family, whereas sexual assault statutes focus on the effects of the criminal conduct on the person assaulted.

[56] *Grunke*, 752 N.W.2d at 782 (Bradley, J., dissenting).

[57] *Id.* at 779 (majority opinion).

[58] *See* Jeffries, *supra* note 47, at 202 ("As the branch most directly accountable to the people, only the legislature could validate the surrender of individual freedom necessary to formation of the social contract. The legislature, therefore, was the only legitimate institution for enforcing societal judgments through the penal law." (footnote omitted)). This argument does not require that a legislature have considered a specific means of committing a crime before criminal sanctions can be imposed. Although structural considerations would not support judicial criminalization of necrophilia through a sexual assault statute because necrophilia and sexual assault are conceptually distinct crimes, they would not require inquiry into whether, for instance, the legislature intended to criminalize a specific, creative means of murdering another person when they enacted a murder statute.

[59] *See* Stephen Breyer, *The 1991 Justice Lester W. Roth Lecture: On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 850–51 (1992) (discussing the value of legislative history in resolving legislative drafting errors in criminal statutes).

type of conduct, courts should be willing to invoke the nondelegation rationale to resolve the interpretive question in favor of a defendant, even if the statute's text is otherwise clear.

This more exacting approach to criminal statutory interpretation would substantially constrain the ability of legislatures to pass expansive criminal statutes that punt much of the responsibility of crime definition to the judiciary. By forcing legislative crime definition to remain strictly coextensive with community preferences, expansion of the nondelegation principle would ensure that "criminal punishment . . . represents the moral condemnation of the community."[60] If the nondelegation rationale for the current rule of lenity is taken seriously, some level of statutory rigidity is a necessary component of furthering that goal.

Importantly, this expanded scrutiny into legislative intent need not impose an additional initial burden on prosecutors. In *Grunke*, for instance, the court's recognition of section 940.225's lack of textual ambiguity would not immediately end the interpretive inquiry in the state's favor. Instead, that decision would be vulnerable to a demonstration by the respondents that the state's theory of criminal liability fell outside the legislatively contemplated scope of criminality. The *Grunke* respondents could assert that section 940.225's designation as a sexual assault statute, coupled with the context of its enactment in response to the Wisconsin Court of Appeals's dicta in *Holt*, casts sufficient doubt on legislative intent to trigger the rule of lenity. It would not be appropriate to apply this kind of scrutiny outside the context of criminal law because that would undermine legislatures' ability to enact flexible statutes intended to address unforeseen situations. However, the value of nondelegation, which this approach would strengthen, is of particular importance in the realm of criminal prohibitions.

Undoubtedly, the defendants in *Grunke* attempted to engage in "heinous conduct";[61] as the dissent noted, "good public policy would indicate that this conduct should be criminalized."[62] However, the courts have often recognized, with good reason, that the definition and scope of criminal prohibitions should be fully contemplated, developed, and established by a constituency's elected representatives. When confronted with the anomalous situation in which a statute's text encompasses conduct beyond the contemplated scope of social condemnation, the courts should apply the rule of lenity and curb the scope of possibly unambiguous text.

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[60] United States v. Bass, 404 U.S. 336, 348 (1971).
[61] *Grunke*, 752 N.W.2d at 780 (Bradley, J., dissenting).
[62] *Id.*