CRIMINAL LAW — CRIMINAL ATTEMPTS — MINNESOTA SUPREME COURT ADOPTS PLAIN MEANING INTERPRETATION OF CRIMINAL ATTEMPT STATUTE, MINIMIZING ROLE OF STATUTORY CONTEXT. — *State v. Degroot*, 946 N.W.2d 354 (Minn. 2020).

Textualism has long been distinguished from "plain meaning," a theory of statutory interpretation that, unlike textualism, ignores not only legislative history but also common understandings of meaning and terms of art that the legislature understood itself to be adopting.[1] The follies of a strictly plain meaning approach have been recently illustrated by a development in Minnesota's criminal attempt law. In *State v. Degroot*,[2] the Minnesota Supreme Court declared that a plain reading of the state's 1963 attempt statute showed that it does not incorporate the elements of an attempt set forth in a 1912 case, *State v. Dumas*.[3] In doing so, the court made a substantial misstep: by ignoring the legislature's implicit adoption of a settled term of art and 108 years of case law precedent in favor of the purely semantic meaning of the statutory text, *Degroot* not only expanded the scope of criminal attempt liability in Minnesota but also illustrated the irrational results of plain meaning as a method of interpretation.

In the fall of 2016, Special Agent John Nordberg of the Internet Crimes Against Children Task Force created decoy profiles of underage boys on online dating apps with the purpose of investigating sexual crimes against children.[4] In February 2017, Darren Degroot began to correspond through one of these apps with Agent Nordberg, who was posing as "Johnny," a fourteen-year-old boy.[5] After Agent Nordberg revealed Johnny's age, "the sexual nature of their conversation quickly escalated."[6] Degroot expressed interest in a sexual encounter with Johnny and agreed to meet him later that afternoon.[7] Degroot then drove to the location indicated by Agent Nordberg, approximately forty miles from his home.[8] He parked in a lot near the location and stepped out of the car, whereupon he was arrested and charged with attempted

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[1] *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 23 (new ed. 2018) (distinguishing "strict constructionism" from "textualism"); RICHARD A. POSNER, HOW JUDGES THINK 191 (2008) (noting that "plain meaning" is roughly synonymous with "strict construction").

[2] 946 N.W.2d 354 (Minn. 2020).

[3] 136 N.W. 311 (Minn. 1912); *see Degroot*, 946 N.W.2d at 360–61. The court supplemented its decision in *Degroot* with comments in *State v. Wilkie*, 946 N.W.2d 348 (Minn. 2020), a separate case relating to criminal attempts decided by the Minnesota Supreme Court on the same day. *See id.* at 352.

[4] *See Wilkie*, 946 N.W.2d at 350; *Degroot*, 946 N.W.2d at 357–58.

[5] *Degroot*, 946 N.W.2d at 358.

[6] *Id.*

[7] *Id.*

[8] *Id.*

third-degree criminal sexual conduct; electronically soliciting a child to engage in sexual conduct; and electronically distributing material, language, or communication that relates to sexual conduct to a child.[9] Degroot was found guilty after a bench trial.[10]

On appeal, Degroot argued that the State's evidence was insufficient to convict him of a criminal attempt, which requires an act that is "a substantial step toward, and more than preparation for" the commission of third-degree criminal sexual conduct.[11] In a majority opinion by Judge Rodenberg, the Minnesota Court of Appeals turned to its recent decision in *State v. Wilkie*,[12] in which the court found that the changes social media has wrought upon how sexual encounters are arranged meant that actions that historically demonstrated a substantial step toward the commission of a sex crime, such as physical contact, are no longer required.[13] Noting the similarity between the fact patterns, the court of appeals concluded that "the facts amounting to a step toward commission of the charged offenses are at least as substantial as those in *Wilkie*."[14] The court of appeals held that, on the basis of the decision in *Wilkie*, Degroot's forty-mile drive "communicating his sexual intent all along the way via electronic communications"[15] was sufficient to prove "a substantial step toward, and more than preparation for, the commission of"[16] third-degree criminal sexual conduct.[17] The court of appeals also ruled that the charge of electronic communication with a child relating to sexual conduct was a lesser-included offense of the electronic solicitation charge,[18] but nevertheless concluded that Degroot could be convicted of both crimes "if the offenses constitute[d] separate criminal acts."[19] The court found they did not, because Degroot's acts took place over a single several-hour period and the acts were motivated by one overarching objective.[20]

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[9] *Id.* at 358–59.

[10] *Id.* at 359.

[11] *Id.* (quoting MINN. STAT. § 609.17, subdiv. 1 (2019)).

[12] 924 N.W.2d 38 (Minn. Ct. App. 2019), *aff'd*, 946 N.W.2d 348 (Minn. 2020); *see* State v. Degroot, No. A18-0850, 2019 WL 1758464, at *3 (Minn. Ct. App. Apr. 22, 2019).

[13] *Wilkie*, 924 N.W.2d at 42. In *Wilkie*, the defendant expressed intent to engage in sex with a fourteen-year-old over text, drove to a house he believed to be the child's, and was arrested when he knocked on the door. *Id.* at 39–40. The court of appeals held that Wilkie's conduct was sufficient to amount to a substantial step. *Id.* at 42.

[14] *Degroot*, 2019 WL 1758464, at *3.

[15] *Id.*

[16] MINN. STAT. § 609.17, subdiv. 1.

[17] *See Degroot*, 2019 WL 1758464, at *3.

[18] *Id.* at *4–5.

[19] *Id.* at *5.

[20] *Id.* at *6.

Chief Judge Cleary dissented from the majority's affirmance of Degroot's conviction for attempted third-degree criminal sexual conduct.[21] Referencing an earlier dissent in *Wilkie*, Chief Judge Cleary opined that the case law governing attempts in felony-level sex crimes involved actions that were conducted in person with the victim.[22] Chief Judge Cleary argued that the majority had "erroneously expanded the legal definition of an 'attempt'" in *Wilkie* and expanded it even further in *Degroot*, where the defendant "never [even] made it onto the property where the criminal conduct was to occur."[23]

The Minnesota Supreme Court affirmed the court of appeals' decision in part and reversed in part. Writing for the majority, Justice McKeig held that the State had presented sufficient evidence to find that Degroot performed a substantial step toward criminal sexual conduct.[24] Degroot pointed to the court's holding in a 1912 Minnesota Supreme Court case, *State v. Dumas*,[25] which held that a substantial step must "be something more than mere preparation, remote from the time and place of the intended crime," and must be "an overt act or acts tending, but failing, to accomplish" that crime.[26] Although the Minnesota attempt statute, passed after *Dumas*, requires only "an act which is a substantial step toward, and more than preparation for, the commission of the crime,"[27] Degroot argued that the phrase "more than preparation for" in Minnesota's attempt law incorporated the findings of *Dumas* and thus required the State to "prove that a substantial step occurred at the time and place of the intended crime."[28]

The court disagreed. Following the reasoning advocated by the State, Justice McKeig determined instead that the court must limit itself to a "plain-language analysis" of the statute unless it was ambiguous.[29] Because a plain reading of the statute did not reveal any ambiguity, the court thus ignored *Dumas* entirely.[30] The court then applied a dictionary definition of "prepare" and determined that the phrase "more than preparation" did not require the State to prove that the substantial step "occurred at the time and place of the intended crime."[31] The court dismissed Degroot's citations to cases in which attempted sexual assault

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[21] *Id.* at *7 (Cleary, C.J., concurring in part, dissenting in part). Chief Judge Cleary concurred in affirming convictions for solicitation and electronic communication with a child describing sexual conduct and concurred in vacating the convictions for lesser-included crimes. *Id.*

[22] *See id.*

[23] *Id.*

[24] *Degroot*, 946 N.W.2d at 364.

[25] *Id.* at 360.

[26] State v. Dumas, 136 N.W. 311, 314 (Minn. 1912).

[27] MINN. STAT. § 609.17, subdiv. 1 (2019).

[28] *Degroot*, 946 N.W.2d at 361; *see id.* at 360–61.

[29] *Id.* at 361.

[30] *Id.*

[31] *Id.*

involved a physical attack as merely examples of what might be sufficient — but not necessary — to amount to an attempt, and affirmed his conviction for attempted third-degree criminal sexual conduct.[32] The court further affirmed the court of appeals' finding that electronic distribution was a lesser-included offense in electronic solicitation,[33] but disagreed with the court of appeals' finding that Degroot's actions were a single behavioral incident, thus reinstating the multiple sentences.[34]

Chief Justice Gildea concurred in the majority's holdings on attempt law but wrote separately to opine that Degroot "engaged in a single behavioral incident because his conduct was motivated by an effort to obtain a single . . . objective."[35] Justice Thissen also concurred in the sufficiency-of-evidence issue but wrote separately to dissent from the majority's holding that two separate sentences were appropriate, reasoning that "[y]ou can only slice and dice the word 'conduct' so much until it turns to mush," and asserted that the majority's approach "need[ed] to work too hard to justify the imposition of two separate sentences."[36]

The Minnesota Supreme Court made a substantial misstep in its reasoning in *Degroot* by disregarding more nuanced methods of statutory interpretation in favor of a narrow plain reading of the statute. *Degroot* is unequivocally a departure from precedent, one in which the court chose to ignore not only 108 years of consistent judicial application of the *Dumas* test to criminal attempt cases but also the implicit codification of that test by the legislature when it used a term of art in the 1963 criminal code revisions. Even if the court had embraced a textualist approach, which generally does not look to legislative history, it still should have given credence to longstanding terms of art that the legislature believed itself to be adopting, rather than applying a plain meaning analysis that leads to irrational results.

At face value, the Minnesota Supreme Court's decision in *Degroot* was a significant departure from precedent. Decided in 1912, *State v. Dumas* held that "to constitute an attempt to commit a crime there must be an intent to commit it, followed by an overt act or acts tending, but

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[32] *Id.* at 362, 364. After concluding that *Dumas* was irrelevant to interpreting the criminal code, Justice McKeig reaffirmed a different part of *Dumas* when applying her own definition of an attempt to the facts of the case. *See id.* at 363 ("What is sufficient in one case might not be sufficient in another. For this reason, we reaffirm that 'no definite rule, applicable to all cases, can be laid down as to what constitutes an [attempt] within the meaning of our statute. Each case must depend largely upon its particular facts and the inferences which the jury may reasonably draw therefrom.'" (alteration in original) (quoting State v. Dumas, 136 N.W. 311, 314 (Minn. 1912))).

[33] *Id.* at 365.

[34] *Id.* at 366–67. Justice McKeig based this conclusion on gaps between communications and the forty-mile change in Degroot's physical location and noted that broad criminal purpose does not unify separate acts into a single criminal incident. *Id.* at 365–67.

[35] *Id.* at 367 (Gildea, C.J., concurring in part and dissenting in part).

[36] *Id.* at 368 (Thissen, J., concurring in part and dissenting in part). Justice Anderson joined Justice Thissen's opinion. *Id.*

failing, to accomplish it."[37] The court in *Dumas* further noted that these acts "must . . . be something more than mere preparation, remote from the time and place of the intended crime" and that only an act that was "not thus remote" was sufficient to warrant a conviction.[38] The Minnesota Supreme Court repeatedly returned to *Dumas* as the test for criminal attempts in the following decades.[39]

In the 1960s, the Minnesota Legislature undertook a broad revision of the state's criminal code, which largely remains in force today.[40] The revised statute describing attempts says merely that the defendant must commit an act "which is a substantial step toward, and more than preparation for, the commission of the crime,"[41] omitting from the text the *Dumas* requirements that there be an overt act that tends to accomplish and is not remote from the intended crime. In its commentary on the proposed legislation, however, Minnesota's Advisory Committee on Revision of the Criminal Law made clear that its intent was nevertheless to codify the law as then understood, including the *Dumas* test, because the phrase "and more than mere preparation" included in the statute was a term of art that encompassed the full holding of *Dumas*.[42]

For nearly six decades, Minnesota courts appeared to respect this strongly recommended legislative adoption of the term of art. *Dumas* was subsequently cited by the Minnesota Supreme Court[43] and was relied upon heavily in lower courts when reviewing sufficiency of evidence in criminal attempt convictions, even as recently as six months before

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[37] *Dumas*, 136 N.W. at 314.

[38] *Id.*

[39] *See, e.g.*, State v. Lowrie, 54 N.W.2d 265, 266–67 (Minn. 1952) ("[M]ere acts of preparation remote from the time and place of the intended crime, unaccompanied by other overt acts performed pursuant to the attempt, are insufficient to constitute . . . an attempt." (citing *Dumas*, 136 N.W. 311)); State v. Lampe, 154 N.W. 737, 738 (Minn. 1915) ("[I]t is uniformly held by the courts that to justify a conviction such overt act or acts must definitely appear . . . [and that m]ere acts of preparation are not sufficient . . . ." (citing *Dumas*, 136 N.W. 311)).

[40] *See generally* Bradford Colbert & Frances Kern, *A Brief History of the Development of Minnesota's Criminal Law*, 39 WM. MITCHELL L. REV. 1441 (2013) (examining the general outlines of Minnesota's criminal code before and after the 1963 revisions).

[41] MINN. STAT. § 609.17, subdiv. 1 (2019).

[42] *See* ADVISORY COMM. ON REVISION OF THE CRIM. L., PROPOSED MINNESOTA CRIMINAL CODE § 609.17 cmt. at 64 (1962) [hereinafter ADVISORY COMM.]. The Advisory Committee noted that the term "substantial step" traces its roots back to the American Law Institute Model Criminal Code, but that the words "and more than preparation for" were then added. *Id.* The Advisory Committee expressed its understanding that "[t]his w[ould] then state the distinction now present in Minnesota cases," and proceeded to quote the court's full definition — including the overtness and remoteness prongs — from *Dumas*. *Id.* The Advisory Committee thus signaled that the revised statute, by adopting the phrase "and more than preparation for," was understood to include *Dumas*'s requirement that the attempt include "overt acts" that were "not . . . remote" from the intended crime, "[we]re done with . . . specific intent," and "directly tend[ed] in some substantial degree to accomplish" that crime. *Id.* (quoting *Dumas*, 136 N.W. at 314).

[43] *See, e.g.*, State v. Dahlstrom, 150 N.W.2d 53, 59 n.5 (Minn. 1967) (listing *Dumas* among cases in Minnesota instructing on attempt law).

Degroot was decided.[44] *Degroot* thus represents the dismissal of 108 years of well-established meaning behind the phrase "and more than preparation"[45] in favor of a semantic "plain meaning" analysis.[46]

Because the court could easily have reached the same conclusion in both *Degroot* and *Wilkie* without overturning *Dumas*, such a reading of the statute was unnecessary simply to uphold the conviction. Although its decisions arguably "greatly expand[ed] the legal definition of 'attempt,'"[47] the Minnesota Court of Appeals was able to sustain a conviction in both cases while still relying on *Dumas* as the relevant test.[48]

Nor does textualism — which typically rejects legislative history — require this result. Even textualism's most ardent proponents emphasize that textualists are "not literalists" who "look exclusively for the 'ordinary meaning' of words and phrases,"[49] but instead "assign common-law terms their full array of common-law connotations."[50] Even a strictly textualist framework requires examining whether the legislature codified a previous understanding in a term of art.[51] When a committee creates a report that cites leading cases that establish the settled meaning of a term of art, it creates "an objective, unmanufactured history of a statute's context" that textualist judges not only can but *should* look to for meaning.[52] This is exactly the kind of objective document that the Minnesota Legislature, through the Advisory Committee on Revision of the Criminal Law, created in 1962, but which was ignored by the court's plain meaning interpretation.

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[44] *See, e.g.*, State v. Byrnes, No. A19-0117, 2020 WL 290440, at *3 (Minn. Ct. App. Jan. 21, 2020) (noting that *Dumas* provides a "general principle" to define attempts); State v. Williams, No. A18-0289, 2019 WL 1430316, at *3–4 (Minn. Ct. App. Apr. 1, 2019) (deciding the case via application of "the *Dumas* principles"); *In re* Welfare of J.D.L., No. A14-1410, 2015 WL 1014079, at *7 (Minn. Ct. App. Mar. 9, 2015) (distinguishing Minnesota's attempt statute from those of other states on the basis of *Dumas*'s "overt act" standard); State v. Swenson, No. A03-6, 2003 WL 22039883, at *3 (Minn. Ct. App. Sept. 2, 2003) (noting that *Dumas*'s "overt act" standard was cited by the Advisory Committee and applying that finding to interpret the meaning of a "substantial step"); *accord* United States v. Smith, 645 F.3d 998, 1005 (8th Cir. 2011) (pointing to *Dumas*'s overt act standard to rebut claim that crime of attempted burglary need not involve act of entering building and can be remote in time from actual event).

[45] MINN. STAT. § 609.17, subdiv. 1.

[46] *See Degroot*, 946 N.W.2d at 360.

[47] State v. Wilkie, 924 N.W.2d 38, 44 (Minn. Ct. App. 2019) (Cleary, C.J., dissenting), *aff'd*, 946 N.W.2d 348 (Minn. 2020).

[48] *See id.* at 42 (majority opinion); State v. Degroot, No. A18-0850, 2019 WL 1758464, at *3 (Minn. Ct. App. Apr. 22, 2019).

[49] John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434 (2005).

[50] *Id.* at 435; *see also id.* at 437 (discussing Justice Scalia's arguments that terms of art should be analyzed not only by their standard dictionary definitions but also by their traditional common law connotations).

[51] *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 731–32 (1997).

[52] *Id.*; *cf. id.* at 707 (distinguishing use in statutory interpretation of legislative history from use of "an old Supreme Court case" that provides the common law definition to a legal term of art).

Justice McKeig elaborated on the Minnesota Supreme Court's rationale in her opinion in *State v. Wilkie*,[53] which was published concurrently with her opinion in *Degroot*, stating that integrating *Dumas*'s proximity requirements would "transform the modified substantial-step standard adopted by [Minnesota's] Legislature."[54] Yet, had Justice McKeig considered the phrase "more than preparation" as a term of art, rather than strictly literally, she would have seen that the statute was already "transform[ed]" by the very text the legislature adopted.[55]

More broadly, plain meaning does not represent a rational interpretive method in and of itself.[56] One need look no further than Minnesota's statutory code itself to see the confusion that consistently adopting a plain meaning technique would wreak. The current Minnesota criminal code was largely the product of an effort to clarify already existing provisions.[57] To this end, the proposed criminal code included extremely detailed comments, many of which referenced past cases, such as *Dumas*, for elaboration on the intent of the vast majority of laws proposed.[58] For example, the 1963 revisions added significant new language to Minnesota's statute on authorized use of force, including a number of reasonability tests.[59] Standing alone, the statute itself provided the court with little guidance on what the legislature believed to qualify as "reasonable," but the notes in the Advisory Committee's report explained that this phrase was a term of art that "state[d] present Minnesota law" as described in previous Minnesota Supreme Court cases.[60] The court reviewed this statute in *State v. Johnson*,[61] where it

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[53] 946 N.W.2d 348 (Minn. 2020).

[54] *Id.* at 352.

[55] *See* ADVISORY COMM., *supra* note 42, § 609.17 cmt. at 64 (noting that the term "substantial step" already appeared in other legal contexts, but that the words "and more than preparation for" were added to "state the distinction *now present* in Minnesota cases[, such as] *State v. Dumas*" (emphasis added)); *see also* Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 13 n.43 (1989) (identifying *Dumas* as a landmark case developing the "physical-proximity" test in attempt law).

[56] *Cf.* Scalia, *supra* note 1, at 23–24 (describing strict constructionism — which Justice Scalia likens to a "literalist" form of statutory interpretation, *id.* at 24 — as "a degraded form of textualism" and arguing that "no one ought to" subscribe to it, *id.* at 23).

[57] *See* Colbert & Kern, *supra* note 40, at 1442 (noting that the intention of the 1963 criminal code revisions was less to revolutionize criminal law and more to make sense of the existing schema); Maynard E. Pirsig, *Proposed Revision of the Minnesota Criminal Code*, 47 MINN. L. REV. 417, 424 (1963) (stating that the Committee largely "operated within the framework of the existing criminal code").

[58] *See generally* ADVISORY COMM., *supra* note 42.

[59] *See* MINN. STAT. § 609.06 (2019); ADVISORY COMM., *supra* note 42, § 609.06 cmt. at 30.

[60] ADVISORY COMM., *supra* note 42, § 609.06 cmt. at 30. The Advisory Committee quoted at length from *State v. Tripp*, 24 S.W. 290 (Minn. 1885). ADVISORY COMM., *supra* note 42, § 609.06 cmt. at 30.

[61] 152 N.W.2d 529 (Minn. 1967).

noted that the term "reasonable force" had not been previously construed by the court.[62] Rather than applying a plain reading, however, the court turned to the Advisory Committee's report and examined the cases mentioned therein.[63] Using this reference point, the court determined that the revised statute's use of "reasonable force" was a term of art that included a duty to retreat, in harmony with the pre-1963 case law.[64] Minnesota courts continue to cite *Johnson* for this duty to retreat.[65] Yet, should the Minnesota Supreme Court apply a plain reading of the statute, it could find no such duty exists, and the standard for authorized use of force could transform overnight.

An even more extreme example could be found in Minnesota's statute on the justifiable taking of life, which states that an actor may intentionally take the life of another "when necessary in resisting or preventing an offense which the actor reasonably believes exposes the actor or another to great bodily harm or death, *or preventing the commission of a felony in the actor's place of abode*."[66] Although courts have traditionally interpreted this statute to be in continuity with the pre-1963 standard that one must be engaged in "the *protection of* one's home,"[67] a plain reading of the statute leaves little ambiguity: an actor may use deadly force to prevent the commission of *any* felony inside his or her home. Surely the Minnesota legislature did not intend to authorize killing to prevent insurance fraud?

Such consistently absurd consequences could easily be avoided if the court rebukes the plain meaning approach it took in *Degroot*.[68] Overturning more than a century of legal history was unnecessary if the goal was simply to sustain the convictions in *Wilkie* and *Degroot*, and was clearly contrary to the implicit adoption of a long-established term of art by the legislature besides. The legislature reformed the state's laws with the understanding that the courts would look to terms' established meaning for guidance, an understanding the courts have respected for nearly sixty years. Nevertheless, the Minnesota Supreme Court ignored all of that in favor of a plain reading analysis, thus taking a substantial misstep that only highlighted the irrational results of plain meaning interpretation as a whole.

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[62] *Id.* at 532.

[63] *Id.*

[64] *See id.*

[65] *See, e.g.*, State v. Carothers, 594 N.W.2d 897, 903 (Minn. 1999) (noting that such duty originated in case law prior to the 1963 revisions and had been reaffirmed by *Johnson*).

[66] MINN. STAT. § 609.065 (2019) (emphasis added).

[67] State v. Pendleton, 567 N.W.2d 265, 269 (Minn. 1997) (emphasis added); *see, e.g.*, *id.* at 268–69.

[68] Admittedly, Dean John Manning — who is cited throughout this piece as an authority on textualism — does not believe that absurd outcomes fundamentally threaten the legitimacy of a method of statutory interpretation. *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392–93 (2003). *But see* Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1025–27 (2006) (responding that an approach to statutory interpretation that facilitates absurd outcomes violates the judicial duty to promote the common good).