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Upskirting, BitCoin, and Crime, Oh My: Judicial Resistance to Applying Old Laws to New Crimes – What is a Legislature to Do?

MICHAEL WHITEMAN*

INTRODUCTION

As technology continues to advance at a break-neck speed, legislatures often find themselves scrambling to write laws to keep up with these advances. Prosecutors are frequently faced with the prospect of charging a defendant with a crime based on an existing law that does not quite fit the circumstances of the defendant's actions. Judges, cognizant of the fact that legislatures, and not the judiciary, have the primary responsibility for creating crimes, have pushed back. Judges routinely refuse to convict a defendant if the statute does not fairly criminalize the defendant's actions. To determine if a defendant's actions fit within a criminal statute, judges look to the plain meaning of the statute, often relying on dictionaries and other interpretive tools, because legislative histories are scant at the state level, in an attempt to discern if the law covers the defendant's actions. If the plain meaning will not encompass the "new" crime, judges often send a message to the legislature: by refusing to convict, that message is that it is time to draft a new law. This Article through an analysis of some recent cases, reviews the current state of affairs, looking at how the judiciary attempts to address "new" crimes when defendants are charged under "old" laws. It is hoped that this Article will encourage legislatures to act to curb "new tech" criminal behavior without relying on the courts to try and fit new crimes into old laws.

I. BACKGROUND TO THE PROBLEM

In 2010, a defendant in Boston was arrested for allegedly secretly photographing or videotaping a person "who [was] nude or partially nude" in violation of Massachusetts law.¹ The defendant's actions, known as "upskirting," involved surreptitiously aiming "his cellular telephone camera at the crotch area of a seated female passenger and attempt[ing] secretly to photograph or videotape a visual image of the area"²

The prosecutor charged the defendant under the existing "Peeping Tom" statute³ because that was the only criminal statute that appeared to cover this activity. The defendant did not deny engaging in the accused-of activity, rather, defense counsel relied on a tried-and-true defense: the statutory language did not encompass the activity the defendant was accused of undertaking.

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1. Mass. Gen. Laws ch. 272, § 105(b) (2014).

2. Commonwealth v. Robertson, 5 N.E.3d 522, 523 (Mass. 2014).

3. ch. 272, § 105(b).

When the case arrived at the Supreme Judicial Court, the Court tried its best to examine the current law and determine how it might fit the accused's actions. In the end, the Court found, as many other similarly-situated courts have found, that the prosecution's rationale for wanting to criminalize the activities of the accused were well intentioned; however, the defendant's conduct simply did not fit within the language of the statute the defendant was charged with violating.⁴

The *Robertson* opinion highlights the problem that many courts are facing in our highly evolving technological world: a defendant's conduct that on first impression appears wrong but does not actually violate a current criminal statute. Rather than wait for a legislature to step in and criminalize the activity, prosecutors attempt to use existing laws to punish the otherwise legal conduct. This is not a new problem; prosecutors have faced this challenge ever since we moved from a criminal justice system that was based on the common law to one that is statute-based.

For example, in *Keeler v. Superior Court*, the defendant was originally convicted of murder for the death of an unborn, but viable, fetus.⁵ The Court was asked to decide whether a viable fetus fit within the definition of a "human being" because Penal Code Section 187 provided that murder was the unlawful killing of a "human being" with malice aforethought. The prosecution argued the following:

[T]he sciences of obstetrics and pediatrics have greatly progressed since 1872, to the point where with proper medical care a normally developed fetus prematurely born at 28 weeks or more has an excellent chance of survival, i.e., is "viable"; that the common law requirement of live birth to prove the fetus had become a "human being" who may be the victim of murder is no longer in accord with scientific fact, since an unborn but viable fetus is now fully capable of independent life; and that one who unlawfully and maliciously terminates such a life should therefore be liable to prosecution for murder under section 187.⁶

While the court was sympathetic to the prosecutor's arguments (and certainly the defendant was no boy scout; he allegedly told the victim he was going to stomp the fetus out of her), the Court nevertheless felt bound by the fact that under California law, no acts are criminal except those that are "prescribed or authorized by this Code."⁷ The Court then reminded the reader (presumably prosecutors and legislatures) that the Court will not create laws; in essence, common law crimes are rejected. The Court also proceeded to quote Justice Marshall in his exhortation against courts punishing behavior by analogous statutes:

Chief Justice Marshall warned long ago, "It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief

4. The Court concluded that "[a]t the core of the Commonwealth's argument . . . is the proposition that a woman, and in particular a woman riding on a public trolley, has a reasonable expectation of privacy in not having a stranger secretly take photographs up her skirt. The proposition is eminently reasonable, but § 105 (b) in its current form does not address it." *Commonwealth*, 5 N.E.3d at 529.

5. 470 P.2d 617 (Cal. 1970).

6. *Id.* at 624.

7. *Id.*

of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.”⁸

The Court then went on to exhort against judicial legislation:

For a court to simply declare, by judicial fiat, that the time has now come to prosecute under section 187 one who kills an unborn but viable fetus would indeed be to rewrite the statute under the guise of construing it. Nor does a need to fill an asserted “gap” in the law between abortion and homicide—as will appear, no such gap in fact exists—justify judicial legislation of this nature: to make it “a judicial function ‘to explore such new fields of crime as they may appear from time to time’ is wholly foreign to the American concept of criminal justice” and “raises very serious questions concerning the principle of separation of powers.”⁹

The *Keeler* decision highlights the current problem surrounding the growth in potential criminal activity that has emerged in the digital age. Like the *Keeler* Court, courts today are faced with prosecutions under criminal provisions that might govern the defendant’s conduct, but only if the court is willing to stretch the definition of the offense. How are courts to deal with these issues, while remaining true to the fact that the American criminal justice system follows the rule that legislatures, not the courts, create criminal law?

The courts have used many of the tried-and-true techniques to try and determine if a particular action fits within a specific statute. Specifically, courts have used plain meaning, turning to common sense interpretation, usually by looking at a dictionary, or if available, the legislative history of a provision. When that fails, appellate courts have sent a message back to the legislature—usually by refusing to apply an old law to a new crime—with the hopes that the legislature will legislate in response to a “new” crime.

In California, the legislature received the *Keeler* Court’s decision loud and clear. After the *Keeler* decision was handed down, the California legislature amended Penal Code section 187 to include the word “fetus” within the definition of murder.¹⁰

Given the hesitancy courts have to interpret criminal statutes broadly,¹¹ the next section of this Article will explore how courts have attempted to use the standard

8. *Id.* at 625 (citing *United States v. Wiltberger* (1820) 18 U.S. (5 Wheat.) 76, 96, 5 L.Ed. 37.). Some legislatures have specifically enacted legislation prohibiting “extending by analogy.” For example in Louisiana §14.3 of the Louisiana Criminal Code says “The articles of this Code cannot be extended by analogy so as to create crimes not provided for herein; however, in order to promote justice and to effect the objects of the law, all of its provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision.” La. Stat. Ann. § 14.3 (2019).

9. *Keeler*, 470 P.2d at 625–26 (cleaned up).

10. Cal. Penal Code § 187(a) (West 2019) (“Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.”).

11. *See Connally v. General Constr. Co.*, 269 U.S. 385, 393 (1926) (“The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held

methods of interpreting statutes to try to get at the plain meaning of a criminal statute and apply it in circumstances where new technologies are being forced to fit in “old laws.” As we shall see, these methods are often ill-equipped to meet the challenges posed by new technologies, and they often lead to inconsistent results, further strengthening the need for legislatures to enact legislation specifically addressed to new technologies.

II. COURTS’ ATTEMPTS AT USING EXISTING STATUTES TO FIT “NEW CRIMES.”

Traditionally, legislatures call upon courts to look to the plain language of a statute in order to give it the ordinary meaning that would be understood by the public at large.¹² This is especially true in the criminal context, where the rule of lenity¹³ calls for a strict construction of statutes,¹⁴ usually in favor of the defendant.¹⁵ Drafting statutes in as plain a manner as possible aids the courts in their interpretation of statutes. Yet, even with such rules in force, courts are often left with the challenge of determining how a particular statute should, or should not, apply to a defendant’s actions in a given case. While many different methods of statutory construction may be used, two of the most consistently-applied methods are (1) using a dictionary to seek the ordinary meaning of the words found in the statute, and (2) looking at the intent behind the statute by examining the statute’s legislative history. As we shall see, neither of these methods are well-designed to deal with the issues that arise when

to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.”

12. *See* Mich. Comp. Laws Ann. § 8.3a (West 2018) (“All words and phrases shall be construed and understood according to the common and approved usage of the language”); Ohio Rev. Code Ann. § 1.42 (LexisNexis 2018) (“Words and phrases shall be read in context and construed according to the rules of grammar and common usage.”); Tex. Gov’t Code Ann § 311.011(a) (West 2018) (“Words and phrases shall be read in context and construed according to the rules of grammar and common usage.”).

13. “The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.” *United States v. Santos*, 553 U.S. 507, 514 (2008) (citing *United States v. Gradwell*, 243 U.S. 476, 485 (1917); *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *United States v. Bass*, 404 U.S. 336, 347-49 (1971)).

14. “The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.” *United States v. Wiltberger*, 18 U.S. 76, 95 (1820).

15. *See, e.g.*, Ohio. Rev. Code. Ann. § 2901.04(A) (LexisNexis 2017) (“Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.”).

a court is forced to look at purported crimes that arise, in part, because of evolving technologies.

Enshrined in most states' statutes is a dictate that courts are to use common sense when interpreting a statute.¹⁶ Some common-sense language practices used by legislatures to guide courts are "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage,"¹⁷ and "[w]ords and phrases shall be construed according to the common and approved use of the language."¹⁸ How then should courts determine what common usage is? Many courts turn to an ordinary dictionary of the English language to help guide them.

While not every legal scholar¹⁹ or judge²⁰ may agree on the wisdom of using dictionaries to determine plain meaning or common usage, the fact is that they are being used by judges in an attempt to interpret statutes in ways that do not invent or create new law. The United States Supreme Court, and many lower courts, frequently use dictionaries to determine the plain meaning of a word.²¹

16. *See supra* note 12

17. Colo. Rev. Stat. Ann. § 2-4-101 (West 2019).

18. Ariz. Rev. Stat. Ann. § 1-213 (2019).

19. "[W]hen faced with what they take to be a lexical problem, some justices and judges resort to dictionaries in what, as will become clear, is generally a vain attempt to find the correct statutory meanings. The first mistake these justices and judges, and many legal scholars for that matter, make is blithely to assume that dictionaries are sound sources for word meanings, although the fact dictionaries often differ should have given them pause. In contrast, linguistic scholars who specialize in lexical semantics appear to be unanimously agreed that dictionaries are not reliable sources for word meanings. Anyone who takes the time to work out the meaning of a word along the principles outlined by Paul Ziff, Anna Wierzbicka, and other experts in lexical semantics can confirm that fact for themselves. So we are treated to the truly absurd spectacle of august justices and judges arguing over which unreliable dictionary and which unreliable dictionary definition should be deemed authoritative." J. Gordon Christy, *A Prolegomena to Federal Statutory Interpretation: Identifying the Sources of Interpretive Problems*, 76 Miss. L.J. 55, 64-66 (2006).

20. "Dictionary definitions of the word 'licensing' are, as the majority points out, broad enough to include virtually any permission that the State chooses to call a 'license.' But neither dictionary definitions nor the use of the word "license" in an unrelated statute can demonstrate what scope Congress intended the word "licensing" to have *as it used that word in this federal statute*. Instead, statutory context must ultimately determine the word's coverage." *Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582, 612 (2011) (Breyer, J. dissenting) (emphasis in original) (cleaned up). See also "I want to reemphasize what should be obvious. 'Plain meaning' as a way to understand language is silly. In interesting cases, meaning is not 'plain'; it must be imputed; and the choice among meanings must have a footing more solid than a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures." Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994).

21. A number of studies have been conducted with the purpose of tracking how often the courts turn to dictionaries in their judicial opinions. One such study found that the Supreme Court cited to dictionaries 58 times in the Court's October 2010 term. Bezalel Stern, *Nonlegal Citations and the Failure of Law: A Case Study of the Supreme Court 2010-11 Term*, 35 WHITTIER L. REV. 79, 101 (2013). An earlier study found that the Supreme Court cited to general dictionaries 271 times in the 1989-1998 terms. John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 LAW LIBR. J. 427, 432 (2002). This

As courts are more frequently being asked to interpret statutes as they apply to new and evolving technologies, courts are often left with little guidance from the legislatures that are often far behind in dealing with technological change. Turning to reliable sources, such as dictionaries, is one way for a court to use common sense in its efforts to align current law with new activities. Yet even then, as we will see below in the *Espinoza* case, courts within the same jurisdiction can come to opposite conclusions of what the “plain language” of a penal statute means, thus reinforcing the need for legislatures to address new crimes, rather than leave that function to the courts.

In *State v. Espinoza*,²² the court was faced with a defendant who was charged with unlawfully engaging in business as a money-services business and of money laundering. The defendant engaged in trading in the virtual currency Bitcoin, and he claimed that his use of Bitcoin did not fall under either of the statutes prosecutors charged him with violating.²³ Because the court was called upon to interpret the statutes (which, of course, did not mention or anticipate Bitcoin when they were drafted), the court looked first to general canons of statutory construction. Following the traditional approach, the court opined that “[w]hen construing the meaning of a statute, the courts must first look to its plain language.”²⁴

The court was stuck wrestling with whether a seller of Bitcoin fell under the definition of a “money transmitter” within the statute’s meaning. The court used Black’s Law Dictionary to determine what the term “transmit” meant, deciding that the dictionary definition of the term did not encompass the defendant’s conduct. In a not-so-subtle message to the legislature, the court concluded the section of the opinion dealing with the regulation of “money services business” with the following admonition: “The Florida Legislature may choose to adopt statutes regulating virtual currency in the future. At this time, however, attempting to fit the sale of Bitcoin into a statutory scheme regulating money services businesses is like fitting a square peg in a round hole.”²⁵

While the trial court looked to a dictionary to ascertain the plain meaning of the statute, which clearly was not designed to cover virtual currencies, the appellate court decided the matter a different way.²⁶ The appellate court began its decision with an acknowledgment that the Florida statutes did not mention virtual currencies or Bitcoin anywhere in the relevant sections; however, the appellate court, in looking at the relevant statute, decided that defendant’s acts were covered by the governing statutes:

author ran the following search in the LexisNexis database for all federal cases that cited a dictionary in 2019 and found that courts had cited dictionaries 848 times: “oxford english dictionary” or (webster’s /s dictionary) or (“random house” /s dictionary) or “merriam-webster’s”.

22. *State v. Espinoza*, No. F2014-002923, 2016 WL 11613849, at *4 (Fla. Cir. Ct. July 25, 2016).

23. Fla. Stat. Ann. § 560.125(a) and § 896.101(5)(a)–(b) (West 2019).

24. *Espinoza*, 2016 WL 11613849, at *4.

25. *Id.* at *5.

26. *State v. Espinoza*, 264 So. 3d 1055 (Fla. App. 3d 2019).

The issue for our determination under Count 1 is whether, based on the undisputed facts, Espinoza was acting as a payment instrument seller or engaging in the business of a money transmitter, either of which require registration as a money services business under Florida law. Given the plain language of the Florida statutes governing money services businesses and the nature of Bitcoin and how it functions, Espinoza was acting as both.²⁷

In rejecting the lower court's decision that Bitcoin did not qualify under the statute, the appellate court looked at federal cases that had considered how to treat Bitcoin. Once again, we see the courts attempting to look at plain meaning, and using dictionaries to determine said meaning. The appellate court quoted from a federal district court, that itself quoted from the Merriam-Webster's Collegiate Dictionary when trying to define what qualified as "money" under federal law.²⁸

The *Espinoza* cases provide a good example of the deficiencies of leaving it up to courts to pigeonhole new activities into existing criminal statutes. Try as they might, the "plain language" of statutes, even with the use of aids like dictionaries, do not lead to consistent results.

The *Robertson* case, mentioned in Part I of this Article, provides another useful example of a court trying to use the plain meaning of a statute, coupled with a dictionary, to fit a "new" activity into an existing criminal statute. At issue in *Robertson* was whether G. L. c. 272, § 105 (b) (§ 105 [b]), which prohibits secretly photographing or videotaping a person "who is nude or partially nude" in certain circumstances, includes 'upskirting.'²⁹ The defendant was accused of aiming his cellular telephone camera at the crotch area of a seated female passenger and attempted secretly to photograph or videotape a visual image of the area in violation of § 105 (b). The defendant's contention was that the statute did not criminalize his conduct. At the time, the statute section read as follows:

Whoever willfully photographs, videotapes or electronically surveils another person who is nude or partially nude, with the intent to secretly conduct or hide such activity, when the other person in such place and circumstance would have a reasonable expectation of privacy in not being so photographed, videotaped or electronically surveilled, and without that person's knowledge and consent, shall be punished by imprisonment in the house of correction for not more than 2 1/2 years or by a fine of not more than \$5,000, or by both such fine and imprisonment.³⁰

The defendant admitted that he attempted to photograph a person with his cellular telephone camera, he did so secretly with the intent to hide such conduct, and he did so without the knowledge or consent of the victim. The defendant's main argument turned on the other elements of the crime, including that the victim was not "nude or

27. *Id.* at 1062.

28. *Id.* at 1067 (quoting *United States v. Faiella*, 39 F. Supp. 3d 544, 545 (S.D.N.Y. 2014)).

29. *Commonwealth v. Robertson*, 5 N.E.3d 522, 523 (Mass. 2014).

30. Mass. Gen. Laws Ann. ch. 272, § 105(b) (West 2009).

partially nude,” and that the MBTA train was not a place where the victim had a reasonable expectation of privacy not to be “so photographed.” The court was left trying to fit the defendant’s conduct into the statute currently in place. The court looked to the plain meaning of the words of the statute to see if it could fit the defendant’s actions into the statute’s words.

Turning first to the language of the statute, “[a]nother person who is nude or partially nude,” the court reminded the reader that when determining what a statute means, the focus should be on the actual meaning of the language used by the legislature.³¹ Looking at Section 105(a), where the legislature defined “[p]artially nude” as “the exposure of the human genitals, buttocks, pubic area or female breast below a point immediately above the top of the areola,” the court noted that:

“Exposure” is not defined in the statute, but is generally defined as “an act of exposing,” “a condition or instance of being laid bare or exposed to view.” Webster’s Third New International Dictionary 802 (2002). “Expose,” in turn, means “to lay open to view; lay bare; make known,” with “display” and “exhibit” noted as synonyms. *Id.* See American Heritage Dictionary of the English Language 626 (4th ed. 2006) (defining “expose” as “to make visible”).³²

With these definitions, the court then looked to the word “is” and reviewed the canons of statutory construction to determine how to understand “is” in the context of the legislation:

[T]his person who is partially nude should be defined with reference to the other category of person included in the same sentence, namely, “a person who is nude.” See 2A N.J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 47:16, at 352-353 (7th ed. 2007) (“ordinarily the coupling of words denotes an intention that they should be understood in the same general sense”). See also *Commonwealth v. Brooks*, 366 Mass. 423, 428, 319 N.E.2d 901 (1974) (“words in a statute must be considered in light of the other words surrounding them”). Just as “a person who is nude” is commonly understood to mean a person who is not wearing any clothes, so, in this context, we understand “a person who is . . . partially nude” to denote a person who is not wearing any clothes covering one or more of the parts of the body listed in the definition of that term.³³

Based on this reading of the statute, the court determined that the defendant had not photographed someone who was partially nude, as the victim still had clothing on over her genital area.

Next, the defendant argued that he did not violate the section of the statute that stated “[i]n such place and circumstance [where the person] would have a reasonable

31. The court cites *International Fid. Ins. Co. v. Wilson*, 443 N.E.2d 1308 (Mass. 1983) (“the primary source of insight into the intent of the Legislature is the language of the statute”). *Commonwealth v. Robertson*, 5 N.E.3d 522, 526-27.

32. *Id.*

33. *Id.* at 527-28.

expectation of privacy in not being so photographed.” The court referred back to its analysis of “a person who . . . is partially nude,” to point out that the victim in this case was not “partially nude.” Once again, the court was left to determine, based on the exact language of the statute, whether the defendant’s conduct fell within the statute’s purview:

However, we discuss briefly the fourth statutory element of the crime, namely, that the person being photographed “in such place and circumstance would have a reasonable expectation of privacy in not being so photographed.” The defendant argues that this language means that the person must be in a private place or a location where a person “would normally have privacy from uninvited observation.” As such, because the MBTA is a public transit system operating in a public place and uses cameras, the two alleged victims here were not in a place and circumstance where they reasonably would or could have had an expectation of privacy. The Commonwealth argues that the defendant’s proffered interpretation restricts § 105 (b)’s application to private places, and there is no such limiting language in the statute. It reads the statutory phrase, “reasonable expectation of privacy in not being so *photographed*” (emphasis added), as focusing less on the location where the photographing occurs than the location on the body that is the subject of that photograph. It argues that because a female MBTA passenger has a reasonable expectation of privacy in not having the area of her body underneath her skirt photographed, which she demonstrates by wearing the skirt, the defendant’s conduct falls within § 105 (b).

We disagree with the Commonwealth’s reading. The word “so” in the phrase, “so photographed,” clearly is used referentially—that is, it serves to refer back to preceding language in the subsection addressing or describing the act of photographing. The preceding descriptive language in the section is the following: “Whoever willfully photographs . . . another person who is nude or partially nude, with the intent to secretly conduct or hide such activity” G. L. c. 272, § 105 (b). See *Commonwealth v. Daley*, 463 Mass. 620, 624, 977 N.E.2d 536 (2012) (applying rules of grammar to interpret statute). Thus, it follows that the “so photographed” language in connection with the “place and circumstance” language requires that the person being photographed be in a state of complete (“nude”) or partial (“partially nude”) undress, and present in a place, private or not, where in the particular circumstances she would have a reasonable expectation of privacy in not being willfully and secretly photographed while in that state.³⁴

The court acknowledged that the purpose of the statute was to proscribe what was once called “Peeping Tom” behavior, especially as enhanced by newer technologies. The court even expressed sympathy for what the prosecutors were trying to do:

[a]t the core of the Commonwealth’s argument to the contrary is the proposition that a woman, and in particular a woman riding on a public

34. *Id.* at 528–529.

trolley, has a reasonable expectation of privacy in not having a stranger secretly take photographs up her skirt. The proposition is eminently reasonable, but § 105 (b) in its current form does not address it.³⁵

In a footnote, the court went further and sent an explicit message to the legislature. In the concluding footnote of the opinion, the court wrote:

Other States, recognizing that women have such an expectation of privacy, have enacted provisions specifically criminalizing the type of upskirting the defendant is alleged to have attempted. See, e.g., Fla. Stat. § 810.145(2)(c) (2013) (“A person commits the offense of video voyeurism if that person . . . [f]or the amusement, entertainment, sexual arousal, gratification, or profit of oneself or another, or on behalf of oneself or another, intentionally uses an imaging device to secretly view, broadcast, or record under or through the clothing being worn by another person, without that person’s knowledge and consent, for the purpose of viewing the body of, or the undergarment worn by, that person”); N.Y. Penal Law § 250.45(4) (McKinney 2008) (“A person is guilty of unlawful surveillance in the second degree when . . . [w]ithout the knowledge or consent of a person, he or she intentionally uses or installs, or permits the utilization or installation of an imaging device to surreptitiously view, broadcast or record, under the clothing being worn by such person, the sexual or other intimate parts of such person”).

We note, without analysis of them, that in the past legislative session, proposed amendments to § 105 were before the Legislature that appeared to attempt to address the upskirting conduct at issue here. See 2013 Senate Doc. No. 648; 2013 House Doc. No. 1231.³⁶

The court’s not-so-subtle message to the legislature that it would not legislate to create new crimes by fitting new behavior into existing statutes was heard by the legislature, which subsequently amended Section 105 by adding language that “plainly” covered upskirting.³⁷

While the Massachusetts Legislature acted to criminalize upskirting, other jurisdictions have been much slower to amend their criminal codes to keep up with new technologically-enabled crimes. In Connecticut, for example, the legislature, in response to the *Robertson* decision, attempted to amend its statutes to criminalize upskirting. In looking at the issue (along with other criminal acts that technology is

35. *Id.* at 529.

36. *Id.* at 529 n.17.

37. The following paragraph was added to section 105(b) a year after the *Robertson* opinion was decided: “Whoever willfully photographs, videotapes or electronically surveils, with the intent to secretly conduct or hide such activity, the sexual or other intimate parts of a person under or around the person’s clothing to view or attempt to view the person’s sexual or other intimate parts when a reasonable person would believe that the person’s sexual or other intimate parts would not be visible to the public and without the person’s knowledge and consent, shall be punished by imprisonment in the house of correction for not more than 2 1/2 years or by a fine of not more than \$5,000, or by both fine and imprisonment.” Mass. Gen. Laws Ann. 272, § 105(b) (West 2019).

making easier to perpetrate), the Joint Judiciary Committee commented that the “new language reflects the ongoing development of technology.”³⁸ Yet, despite the support, the legislature failed to act in the 2014 legislative session and re-raised the issue in 2015.³⁹ Once again, however, the legislation did not pass, and it did not reappear until 2019. At that time, it finally passed the legislature and was signed by the Governor.⁴⁰ Presumably, a court looking at the legislative history of the law in effect prior to 2019 would have been of no help to the court in deciding whether it covered “upskirting,” thus leaving the courts to try and fend for themselves in determining whether “upskirting” fit under the existing “Peeping Tom” statutes.

Conversely, in New Jersey, a defendant attempted to use *Robertson* to argue that the New Jersey statute under which he was charged did not cover upskirting.⁴¹ In that case, the defendant showed that certain members of the New Jersey legislature introduced bills to clarify that upskirting was indeed a crime in New Jersey. That legislation failed to pass the legislature, and the defendant therefore argued that this indicated that upskirting was not covered by the statute under which he was charged.⁴²

The court pushed back, ruling that failure to amend a statute does not, in and of itself, prove that a piece of legislation does not already cover the at-issue activity. The court reasoned that “[a]lthough the failure to adopt an amendment can, at times, indicate a conscious decision to reject the amendment’s provisions, such inaction conversely may signal that the law as written already achieves the sought-after objective.”⁴³

Once again, we see the court trying to determine the meaning of an existing statute by resorting to a dictionary, even when the legislature tried, unsuccessfully, to amend the statute so courts would not need to resort to statutory interpretation to fit newer

38. H.B. 5586 (Conn. 2014).

39. H.B. 6921 (Conn. 2015).

40. Raised B. 1100, Gen. Assemb. (Conn. 2019).

41. *State v. Nicholson*, 169 A.3d 990 (N.J. Super. Ct. App. Div. 2017). “Defendant first cites a failed attempt in the 216th Legislature to amend *N.J.S.A. 2C:14-9(b)* (2004) in response to *Robertson*. In 2014, a senator introduced a bill which sought to add a third-degree offense penalizing the photographing or filming of “the image of another person’s intimate parts under or around the person’s clothing” and to provide that the definition of “intimate parts” applied “whether clothed or unclothed.” *S. Bill No. 1847*, 216th Leg., at 3–4 (Mar. 24, 2014). The senator’s statement accompanying the bill stated: “This bill clarifies that it is a crime under this State’s invasion of privacy law to secretly photograph underneath a person’s clothing. Referred to as ‘upskirting,’ this practice occurs when perpetrators use their cell phones to take pictures and record video under the skirts and dresses of unsuspecting victims[.]” *Statement to S. Bill No. 1847*, 216th Leg., at 5 (Mar. 24, 2014) (emphasis added). The senator stated: In response to a court decision ruling that upskirting was not illegal, a state law was recently enacted in Massachusetts criminalizing the practice. It is the sponsor’s intent to similarly protect women in this State from the vile and degrading practice of upskirting by making it clear that it constitutes an invasion of privacy under criminal and civil law.” *Id.* at 998-99.

42. *Nicholson*, 169 A.3d at 999 (“We reject defendant’s claim that the unsuccessful bills show *N.J.S.A. 2C:14-9(b)* (2004) did not already prohibit upskirting where the victim’s intimate parts were visible.”)

43. *Id.* at 18 (citation omitted).

crimes into existing laws.⁴⁴ Ultimately, the court found no ambiguity and ruled that upskirting was covered by the plain language of the existing statutes. While the legislature was unsuccessful in amending its statute to specifically address the new crime of upskirting, it should be applauded for moving in the right direction and not simply allowing the courts to fend for themselves in figuring out the “plain” meaning of the statute as it applied to newer technologies and the law.

III. BACK TO THE COMMON LAW AS AN ANSWER?

In Australia, the courts have taken a different approach to the slow response of legislatures in criminalizing new, technology-enhanced crimes. While this response may work in Australia, it is not one that this author recommends as a solution in the United States. In Australia, the courts have appeared to be more willing to stretch the interpretation of statutes in order to encompass emerging technologies without waiting for the legislature to act. As technology evolves and as the world changes, the Australian High Court offered a way for courts to look at new, tech-enabled crimes and interpret statutes in a way that meets the intent of the legislature, even if the statute’s words do not appear to cover a defendant’s conduct.

In *Project Blue Sky Inc. v Australian Broadcasting Authority*, the High Court of Australia, in interpreting a statute, wrote the following:

[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.⁴⁵

The court went on to reference *Statutory Interpretation*, by Francis Bennion, quoting:

The distinction between literal and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern. If that were right, there would be little need for books on statutory interpretation. Indeed, so far as concerns law embodied in statute, there would scarcely be a need for law books of any kind. Unhappily this state of being able to rely on grammatical meaning does not prevail in the realm of statute law; nor is it likely to. In some cases

44. “Thus, the 2016 amendment extended the coverage of N.J.S.A. 2C:14-9(b) by making it a fourth-degree offense to photograph or film ‘undergarment-clad intimate parts’ without requiring they be visible. N.J.S.A. 2C:14-9(b)(2) (2016); see Merriam-Webster’s Collegiate Dictionary, (defining ‘clad’ as ‘being covered or clothed’).” *Id.* at 19 (cleaned up).

45. (1998) 194 CLR 355, 384 (Austl.).

the grammatical meaning, when applied to the facts of the instant case, is ambiguous. Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with.⁴⁶

While the Australian model may give courts some latitude in addressing the problem of fitting new crimes into old laws, it pushes back against the bedrock of the American criminal justice system and takes the pressure off of legislatures to do their job—that is, create law to regulate society. The better solution is to remain with our legal system and the separation between courts and legislatures, maintain the harmony of balance within our criminal system, and force legislatures to remedy problems that new technologies introduce into the criminal system.

IV. CONCLUSION

Technology will continue to rush forward, and those with ill intent will seek to use technology to pursue their own ends. The criminal justice system must deal with these criminals, and law enforcement must use the laws in force at the time of the purported offense in order to do so. As we have seen above, using the traditional elements of statutory interpretation, courts are both ill equipped to interpret and unwilling to stretch the meaning of existing laws to cover new technology-enabled wrongdoing.

The courts are correct in standing (largely) firm behind the rule of law that puts the creation of criminal laws in the hands of the legislatures. Unless we are willing to either return to the days of common law crimes or expand the interpretation powers of the courts, legislatures must enact new laws that encompass the activities associated with new technologies. Only the legislature can, and should, be tasked with creating these laws. The judiciary is, rightly so, loathe to step in and create new crimes, and even when it sees wrongdoing, the interpretive tools available to the courts do not lend themselves to pigeonholing new, tech-enhanced crimes into old laws.

46. 3rd ed (1997), pp 343-344.