GRAMMAR AND INFERENCES OF RATIONALITY IN INTERPRETING THE CHILD PORNOGRAPHY STATUTE

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I. INTRODUCTION

On November 29, 1994, the U.S. Supreme Court decided *United States v. X-Citement Video, Inc.*,[1] a case which sharply divided participants at the symposium conference.[2] Our discussion here re-constitutes the linguistic analysis which was reduced to a summary in the amicus brief filed by the Law and Linguistics Consortium in that case,[3] and explores the issues which the conclusion of that analysis raised at the symposium.

In 1988, Rubin Gottesman, operator of X-Citement Video, a Los Angeles "adult" videostore, was convicted following a bench trial of distributing child pornography in violation of 18 U.S.C. § 2252(a)(2),[4] one sub-part of a 431-word sentence that contains multiple subordination and coordination. Although the full textual context is important, for ease of reference we will quote the statute in a form reduced to this operative sentence: "Whoever

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This work owes a great deal to Clark Cunningham, who not only is the inspiration and guiding force behind the entire effort represented in this issue, but also contributed significantly to the preparation of the first two sections of this essay. Naturally, he is not reponsible for what we say here.

1. 115 S. Ct. 464 (1994).

2. *See Law and Linguistics Conference*, 73 WASH. U. L.Q. 785, 797 (1995).

3. Brief Amicus Curiae of the Law and Linguistics Consortium, United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994) (No. 93-723) (on file with authors). The Law & Linguistics Consortium is an association of lawyers and linguists interested in applications of linguistics to legal problems; one goal of the consortium is to make available to courts faced with questions of statutory interpretation information about how a statutory provision would be understood as a matter of ordinary language. *Id.* at 2. In addition to the authors, other contributors to the amicus brief were Clark D. Cunningham, Judith N. Levi, and Lawrence Solan. The influence of their work on what we say here is pervasive. Of course, they are not responsible for what we say here.

4. United States v. X-Citement Video, Inc., 115 S. Ct. 464, 466 (1994).

knowingly . . . distributes . . . any visual depiction . . . if (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct . . . shall be punished . . . "[5]

The conviction was based on evidence that Gottesman sold an undercover police officer forty-nine videotapes featuring Traci Lords. Although Lords[6] is a well-known performer in "adult" videotapes, the government charged that she was under eighteen when she was filmed in the tapes at issue.[7] The undercover officer made a point of asking for tapes produced when Lords was only fifteen years old.[8] At trial Gottesman testified that although the officer did specifically ask for performances of Lords as a minor, Gottesman did not believe that Lords was in fact under eighteen when the films were produced.[9] The district court assumed that knowledge that the performer was a minor was a necessary element of the charge, and found that Gottesman did have the requisite knowledge.[10] Gottesman was acquitted on other counts of distributing obscene materials; the district judge found that the videotapes, although sexually explicit (as required for conviction under section 2252), were not obscene.[11]

On appeal to the Ninth Circuit, Gottesman employed a kind of legal jujitsu, arguing successfully that the district judge was wrong in interpreting section 2252 to require proof that a distributor knew the depicted performer was a minor.[12] Because the court of appeals agreed with this interpretation, it also went on to agree with Gottesman's conclusion that section 2252 violated the First Amendment because of the "chilling effect" such strict

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5. 18 U.S.C. § 2252(a)(2) (1988).

6. 115 S. Ct. at 466.

7. *Id.*

8. 982 F.2d 1285, 1286 (9th Cir. 1992). Shortly before the first time the undercover officer contacted Gottesman, newspaper articles appeared reporting that Lords had appeared in pornographic films while still a minor. Brief for Petitioner at 4, *X-Citement Video*, 115 S. Ct. 464 (No. 93-723).

9. Gottesman testified that he knew Lords personally, and had even loaned her $3,000 at one time. He was aware of "rumors" at the time of the sale that Lords was under 18 when these tapes were made, but did not believe them. He advanced the interesting theory that "Lords falsely floated the rumor . . . to drive the tapes from the market so that the new film she was in the process of making would be more valuable." Brief for Respondent at 4-5, *X-Citement Video*, 115 S. Ct. 464 (No. 93-723).

10. 115 S. Ct. at 466 (quoting district court Findings of Fact: "Defendant knew that Traci Lords was underage when she made the films"). *See also* Brief for Respondent, at 6 (district court assumed that knowledge of minority was necessary element of charge).

11. 115 S. Ct. at 466 n.1 (defendant acquitted of six obscenity charges).

12. 982 F.2d at 1289-90.

liability would have on distributors of magazines and videotapes.[13] Unlike producers of sexually explicit materials, distributors are not in the position to know or learn the ages of depicted performers. Therefore, distributors should not be subject to prosecution for distributing materials that would be legal except for a fact unknown to them, the minority status of the subject.[14]

Judge Kozinski dissented in part.[15] He agreed with Gottesman that the language of the statutory text imposed strict liability on distributors, but argued that the court should "add" a knowledge requirement to "save" the statute from invalidation.[16] Adding this knowledge requirement would not, for him, be "statutory interpretation," which he defined as "an attempt to divine the meaning of the statute as passed by Congress and signed by the President."[17] Rather, he urged his colleagues to undertake "constitutional narrowing" by adding "a constraint to the statute that its drafters plainly had not meant to put there," a requirement that the distributor had been at least "reckless" as to the age of the performer.[18] He offered the following justification for such an exercise of judicial power: "Would Congress, if given the choice, have passed section 2252(a) with a recklessness requirement as to the age of the minor, or not passed it at all? . . . To pose the question is to answer it."[19] Judge Kozinski's assumption that Congress would want judges to rewrite laws rather than declare them unconstitutional leads to an extraordinary declaration of judicial power: "[W]e may come up with any interpretation we have reason to believe Congress would not have rejected."[20]

The Supreme Court granted the government petition for certiorari on February 28, 1994,[21] amidst a sudden flurry of opinions from other circuits, all energetically disagreeing with the Ninth Circuit about the "literal" meaning of the statutory text. The first attack on the Ninth Circuit position came on February 2, 1994 from the Third Circuit. That court, in

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13. *Id.* First Amendment law allows a defendant to challenge a statute on such a "chilling effect" theory even if the government satisfied the constitutionally required standard of proof in the defendant's particular case, as it did for Gottesman. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-32 at 1035 (2d ed. 1988).

14. 982 F.2d at 1290-92.

15. *Id.* at 1292 (Kozinski, J., concurring).

16. *Id.*

17. *Id.* at 1295 n.6.

18. *Id.*

19. *Id.* at 1296.

20. *Id.* at 1295 n.6.

21. 115 S. Ct. 49 (1994).

United States v. Cochran,[22] announced that "[s]ection 2252 *mandates* knowledge of the nature and contents of the proscribed materials" including the fact that one or more of the performers is underage.[23] A striking feature of the *Cochran* opinion is the way the court quotes section 2252 in the course of its analysis: "section 2252(a)(2) provides that 'any person who knowingly receives . . . any visual depiction . . . involv*[ing]* the use of a minor engaging in sexually explicit conduct' shall be criminally liable."[24] By strategic elision and changing "involves" to "involving" the *Cochran* court converts an *if*-clause, not modified by *knowingly*, into a participial phrase ("involving the use of a minor") that is modified by *knowingly*. What is striking is that the court apparently felt the need to change the syntax of the statute to support its decision, and that the court failed to acknowledge that it was literally rewriting the statute.[25]

On February 24, 1994 the First Circuit filed its decision in *United States v. Gifford*,[26] courteously describing the Ninth Circuit opinion as "something of a pariah" among courts.[27] It then went on to say: "We read the term 'knowingly,' as used in the statute, to modify not only 'receives,' but also the entire paragraph, including age and conduct."[28] Four days later (on the date the Court granted review in *X-Citement Video*), a different panel of the First Circuit filed its decision in *United States v. Gendron*,[29] concluding "that . . . *knowingly* applies to age as well as to conduct."[30] The opinion in *Gendron* is of particular interest because it was authored by then Chief Judge Stephen Breyer, who, of course, participated in the Supreme Court decision in *X-Citement Video* later that year. Justice Breyer took the *Gendron* opinion as an opportunity to discuss at some length his views about the importance of context to statutory interpretation,[31] using an example we analyze below.

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22. 17 F.3d 56 (3d Cir. 1994).

23. *Id.* at 60 (emphasis added).

24. *Id.* at 59 (emphasis added).

25. In an earlier point in the opinion, the *Cochran* court does quote the statute verbatim and then comments, in contrast to its later confident use of the verb "mandates," that the statute "does not plainly indicate whether 'knowingly' extends to the use of a minor." *Id.* at 58.

26. United States v. Gifford, 17 F.3d 462 (1st Cir. 1994).

27. *Id.* at 472.

28. *Id.*

29. 18 F.3d 955 (1st Cir. 1994).

30. *Id.* at 960.

31. *Id.* at 958.

On March 10, 1994 the Second Circuit joined the increasingly one-sided fray, filing its decision in the *Colavito* case.[32] It said:

> Section 2252(a) can be *fairly read* to *require* that the defendant know he is receiving items that depict child pornography. Under this reading, the phrase 'knowingly receives' means that the violator must know not only that he is receiving material through interstate commerce, but also that it contains sexually explicit depictions of minors.[33]

Like the Third Circuit in *Cochran*, the Second Circuit apparently felt a need to change the syntax of the statute in order to give it a "fair reading": "Section 2252(a) penalizes any person who 'knowingly receives' through interstate commerce 'any visual depiction . . . of a minor engaging in sexually explicit conduct.'"[34] This elided quotation conveniently omits the troublesome *if* that separates *knowingly receives* from *of a minor*, thus creating a misleading impression that *knowingly* and *minor* are part of the same phrase in the statute.

Finally, on April 7, 1994, the Fifth Circuit joined the chorus of Ninth Circuit critics, saying somewhat obscurely that it was "declin[ing] to follow *X-Citement*."[35] Instead, the court followed decisions of its "sister circuits interpreting the statute to require actual knowledge or reckless disregard of a performer's minority."[36]

II. THE SUPREME COURT'S DECISION AND OPINION

In a 7-2 decision, the Supreme Court reversed the Ninth Circuit.[37] Writing for the majority, Chief Justice Rehnquist, after quoting the statute, identified the key question as a grammatical one: "The critical determination which we must make is whether the term knowingly in subsections (1) and (2) modifies the phrase the use of a minor in subsections (1)(A) and (2)(A)."[38] Immediately after this statement, the Court implied that the Ninth Circuit's reading is only one of some number of possible readings:

> The most natural grammatical reading, adopted by the Ninth Circuit, suggests that the term "knowingly" modifies only the surrounding verbs: transports,

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32. United States v. Colavito, 19 F.3d 69 (2d Cir. 1994).
33. *Id.* at 71 (emphasis added).
34. *Id.*
35. United States v. Burian, 19 F.3d 188 (5th Cir. 1994).
36. *Id.* at 191.
37. United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994).
38. *Id.* at 467.

> ships, receives, distributes, or reproduces. Under this construction, the word "knowingly" would not modify the elements of the minority of the performers, or the sexually explicit nature of the material, because they are set forth in independent clauses separated by interruptive punctuation.[39]

Then, having identified the grammatical question as the "critical determination" that must be made, the opinion proceeds to treat this question as less important than other factors:

> But we do not think this is the end of the matter, both because of anomalies which result from this construction, and because of the respective presumptions that some form of scienter is to be implied in a criminal statute even if it is not expressed, and that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions.[40]

These points, fleshed out, constitute the thrust of the argument in the Court's opinion.[41]

Apparent support for applying to the *X-Citement Video* statute the policy of inferring a knowledge requirement where one is unexpressed in a criminal statute comes from three key cases. But this support is only apparent. In two of the cases the crucial statutory sentences are ambiguous, and for each a reading is available in which the knowledge requirement derives from the presence in the sentence of the adverb *knowingly*. The third case involves a statute that contains language that we will suggest is crucially different from that of 18 U.S.C. § 2252 in another way.

The opinion first cites *Morissette v. United States*,[42] which hinged upon the interpretation of the following statutory language: "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States . . . shall be fined."[43] With reference to this statute, Justice Rehnquist writes,

> [T]he word "knowingly" in its isolated position suggested that it only attached to the verb "converts," and required only that the defendant intentionally assume dominion over the property. But the Court used the

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39. *Id.*

40. *Id.*

41. By invoking "anomalies," Justice Rehnquist implicitly likens the case to Rector, Holy Trinity Church v. United States, 143 U.S. 457 (1892). ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.")

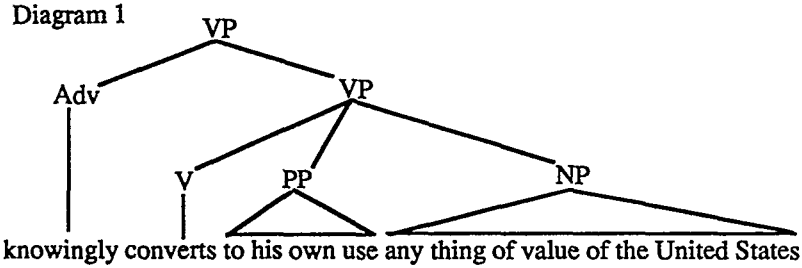
42. 342 U.S. 246 (1952).

43. 18 U.S.C. § 641 (1988).

> background presumption of evil intent to conclude that the term 'knowingly' also required that the defendant have knowledge of the facts that made the taking a conversion—i.e., that the property belonged to the United States.[44]

This statement does not recognize that because of the syntax of the statutory sentence, *knowingly* applies to *any . . . thing of value of the United States*. To show that this is the case as a matter of grammar, we first examine a reduced version of the statutory sentence which simplifies it while preserving its structure: *Whoever . . . knowingly converts to his use . . . any . . . thing of value of the United States . . . shall be fined.* The relevant part of the structure of this reduced sentence is as follows:

Diagram 1



(Notation: VP=verb phrase, PP=prepositional phrase, NP=noun phrase.) The NP *any . . . thing . . . United States*, as the direct object of the verb *converts*, appears within the same verb phrase as that verb. *Knowingly* is an adverb, one kind of modifier. At least in English (and in many other languages), a modifier combines with an expression of a certain type to form a larger expression of that same type.[45] As a modifier, *knowingly* combines with the verb phrase *converts to his own use any thing of value of the United States* to form the larger verb phrase *knowingly converts to his own use any thing of value of the United States*, in which *knowingly* modifies the interior verb phrase *converts . . . United States*. In this structure, the noun phrase *any thing of value of the United States* is part of what *knowingly* modifies, because that noun phrase is within the verb phrase that *knowingly* combines with to form the larger verb phrase.

When a word or phrase X thus modifies some other word or phrase Y, the meaning of the longer phrase containing them both is affected in a

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44. United States v. X-Citement Video, Inc., 115 S. Ct. 464, 468 (1994).

45. JAMES D. MCCAWLEY, EVERYTHING THAT LINGUISTS HAVE ALWAYS WANTED TO KNOW ABOUT LOGIC BUT WERE AFRAID TO ASK 17 (1993).

particular way (technically, in such a way that the meaning of X is applied as a function on the meaning of Y).[46] As a result, one interpretation of a sentence like the statutory one is that the referent of its subject knows that what he converts to his own use is a thing of value of the United States.[47] The fact that this understanding of the statutory sentence is possible means that the Court could, because of the common law role of mens rea in the criminal law, reasonably select that reading as the relevant one for the interpretation of the statute.

Second, the opinion cites *Liparota v. United States*,[48] which hinged on the interpretation of the following statutory language:"Whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter, shall, if such coupons or authorization cards are of a value of $100 or more, be guilty of a felony . . . ."[49]

At issue in this case was whether, in order to be convicted, the defendant had to know that his use of a coupon was not authorized.[50] The expression *in any manner not authorized by this chapter or the regulations issued*

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46. DAVID DOWTY, ET AL., INTRODUCTION TO MONTAGUE SEMANTICS 232-234 (1981).

47. The only thing that prevents this interpretation from being the only interpretation is the fact that *knowingly* creates an opaque context. An opaque context is one in which substitution of one co-referring expression for another does not necessarily preserve truth value. WILLARD V.O. QUINE, WORD AND OBJECT 141-156 (1960); B.H. PARTEE ET AL., MATHEMATICAL METHODS IN LINGUISTICS 403-413 (1990). For example, suppose that Jones is the chairman of the physics department. The sentences *Smith knows that Jones is a Democrat* and *Smith knows that the chairman of the physics department is a Democrat* are sure to have the same truth value only if Smith in fact knows that Jones is the chairman of the physics department. Opaque contexts are created by adverbs and verbs which encode attitudes toward propositions: knowledge, belief, hope, expectation, and the like. Saying that a person holds an attitude toward a proposition is accurate only if the person would recognize that he or she holds that attitude. In our statutory sentence, because of the opacity created by *knowingly*, there is an interpretation according to which the referent of the subject only knows that he converts some thing, not that it is something that belongs to the United States. But the other interpretation, the one that Justice Rehnquist attends to, of course is available as well.

48. 471 U.S. 419 (1985).

49. 7 U.S.C. § 2024(b) (1988).

50. 471 U.S. at 421.

pursuant to this chapter is modified by *knowingly*,[51] so a meaning of the statutory sentence exists according to which the defendant must know this, to be convicted; but the opacity created by *knowingly*[52] gives rise to a meaning according to which the defendant need not know this, to be convicted.[53] The Court's majority recognized the ambiguity, and chose as the relevant reading the understanding of the statutory sentence according to which the defendant must have knowledge that his use is unauthorized.[54] The Court chose this understanding both because of the rule of lenity and because of the common law presumption that mens rea is required as part of a criminal prohibition.[55] Again, the reading selected by the Court is one that is permitted by the syntax of the statutory language.

The third case the opinion invokes is *Staples v. United States*.[56] The

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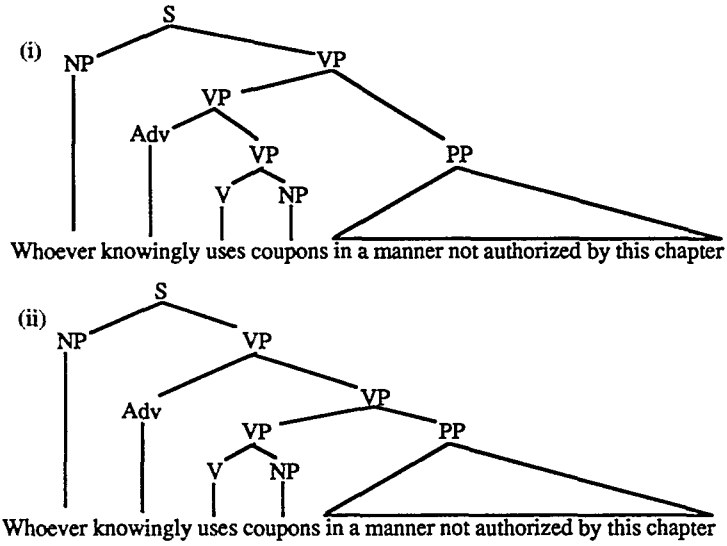
51. Actually, the syntactic picture is complicated by the fact that this sentence is syntactically ambiguous, that is, it is actually two sentences, each with a distinct phrase structure; in only one of them does *knowingly* syntactically (and thus semantically) modify the *authorized* expression. In tree (ii) below, but not in tree (i), *knowingly* modifies the PP *in any manner not authorized . . .*



52. *See supra* note 47.

53. There are thus two sources for the ambiguity: the different phrase structures, *see supra* note 51, and the opacity created by the adverb *knowingly*.

54. 471 U.S. at 425.

55. *Id.* at 427.

56. 114 S. Ct. 1793 (1994).

statute in question in *Staples*, 26 U.S.C. § 5861, does not contain *knowingly*,[57] but the indictment in the case did, giving rise to just the kind of ambiguity we have seen exemplified in *Morissette* and *Liparota*.[58] The majority opinion in Staples focussed on the law embodied in the statute and the common law, not the indictment.[59] The Court held that a mens rea requirement should be understood even though the statute does not explicitly include it:

> [Statutory] silence . . . by itself does not necessarily suggest that Congress intended to dispense with a conventional mens rea requirement, which would require that the defendant know the facts that make his conduct illegal . . . . On the contrary, we must construe the statute in light of the background rules of the common law . . . in which the requirement of some mens rea for a crime is firmly embedded.[60]

Despite occasional locutions such as "we must construe the statute"[61] and "confirms our reading of the Act,"[62] which suggest that what is going on is a determination of what the language of the statute means, the majority opinion is about public policy, not the meaning of statutory words. The argument of the majority can be summarized as follows: A mens rea is assumed as an element of every crime, except regulatory ones that affect public welfare. The crime prohibited in section 2252 is not a public welfare crime. Even if the statute defining the crime does not mention it, the mens rea requirement should be inferred.

Thus, in two of the three cases cited by Justice Rehnquist as precedents for reading a requirement of mens rea into a statute which omits explicit mention of it, there is a semantic interpretation of the operative statutory language which contains the mens rea requirement, so there is no "silence" that requires a "reading in" from the common law. Later, we offer evidence

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57. The operative sentence is as follows: "It shall be unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." 26 U.S.C. § 5861(d).

58. The indictment charged that Staples "knowingly received and possessed firearms, described as follows: a. Inland Model M1 .30 caliber carbine, serial number 5222984; b. SGW Model XM1, .223 caliber rifle, serial number X2606 both of which had been modified so as to be machineguns, and neither of which was registered to" him. Brief for Respondent at 3 n.1, Staples v. United States, 114 S. Ct. 1793 (1994) (No. 92-1441).

59. The concurrence by Justice Ginsburg focussed on the indictment. *Id.* at 1806 (Ginsburg, J., concurring).

60. *Id.* at 1797.

61. *Id.*

62. *Id.* at 1802.

that the statutory language at issue in *X-Citement Video*, unlike that in *Morissette* and *Liparota*, does not gramatically allow a reading which applies a mens rea requirement to the key element in the case. We will also suggest that the move made in *Staples* is not appropriate in the case of *X-Citement Video*.

Joined by Justice Thomas, Justice Scalia sharply criticized the majority's conclusion that the language of the statute supported its importing of the knowledge requirement.

> To say, as the Court does, that [the Ninth Circuit's] interpretation is "the most grammatical reading," . . . or "[t]he most natural grammatical reading" . . . is understatement to the point of distortion—rather like saying that the ordinarily preferred total for 2 plus 2 is 4 . . . . The equivalent [to the statute], in expressing a simpler thought, would be the following: "Anyone who knowingly double-parks will be subject to a $200 fine if that conduct occurs during the 4:30-to-6:30 rush hour." It could not be clearer that the scienter requirement applies only to the double-parking, and not to the time of day.[63]

Justice Scalia concluded that he would read the statute literally, and, because it imposed criminal penalties on innocent behavior, find it unconstitutional. He excoriated the majority for "sav[ing] one conviction by putting in place a relatively toothless child-pornography law that Congress did not enact, and by rendering congressional strengthening of that new law more difficult."[64]

III. SYNTAX AND MEANING: THE STRUCTURE OF THE STATUTORY LANGUAGE

The long and cumbersome operative sentence in section 2252 can be edited to reveal its structure as follows:

> Any person who knowingly distributes a depiction
> if producing the depiction involves use of a minor engaging in sexually explicit conduct
> shall be punished.

As Justice Rehnquist recognized, the linguistic issue is whether, in this sentence, the *if*-clause is part of what is modified by *knowingly*, or outside of what is modified by *knowingly*; that is, whether, under the rules of

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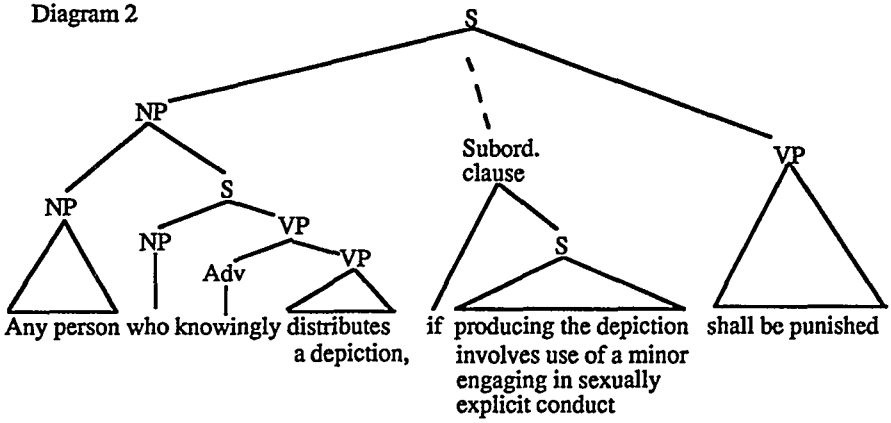
63. United States v. X-Citement Video, Inc., 115 S. Ct. 464, 473-74 (1994) (Scalia, J., dissenting).
64. *Id.* at 476.

English, *knowingly* modifies the words in the *if*-clause. The syntactic structure of the sentence can be represented in the following diagram:

Diagram 2



In this diagram, it can be seen that the *if*-clause is not part of the verb phrase that contains *knowingly*—the words *knowingly distributes a depiction*. One piece of empirical syntactic evidence for the correctness of this representation is the fact that *if*-clauses do not attach to noun expressions; if they could, speakers would not unanimously reject such putative sentences as **The if he leaves man will be sorry*. (Putting the *if*-clause between the article and the noun ensures that it is inside the noun phrase, resulting in ungrammaticality, indicated by the asterisk. Putting the *if*-clause after the noun results in grammaticality: *The man, if he leaves, will be sorry*, because the *if*-clause is now outside the noun expression.) Thus it is reasonable to conclude that the *if*-clause in the statutory sentence is outside the noun phrase *Any person who knowingly distributes a depiction*. Moreover, an *if*-clause cannot easily occur inside a verb phrase, as can be seen from the oddity of an example like **John should throw, if he can, the ball farther*.[65] (Putting the *if*-clause between the verb *throw* and its direct object *the ball* ensures that it is inside the VP, resulting in oddness.) Therefore we conclude that the *if*-clause is outside the VPs *knowingly distributes a depiction* and *distributes a depiction*.

In the statutory sentence, regardless of how the *if*-clause syntactically

65. The reason for the hedge is that an *if*-clause can sometimes, albeit uncomfortably, occur within a VP (as in *John will send the money, if he can, to Mom*). When one does, its meaning applies to the whole sentence, rather than to the VP.

attaches to the rest of the sentence,[66] it is functionally—that is, in terms of its semantic relations to other parts of the sentence—a parenthetical expression. As such, it is understood as material whose factuality is not part of the main assertion.[67] Semantically, the meaning of an *if*-clause applies to a proposition, not to the meaning of a verb phrase. For example, in the sentence *We will be late if it rains*, the *if*-condition applies to the whole proposition of our being late, not to some part of it (such as the subject *we* or the adjective *late*).[68] Because of this, we recognize the *if*-clause in the sentence at issue as a parenthetical, stuck in the middle of a sentence at a point where it has no syntactic attachments.

Because there is no evidence that the *if*-clause is syntactically part of the verb phrase *distributes a depiction*, and its meaning does not apply to the meaning of just that verb phrase, the meaning of *knowingly* cannot apply to the meaning of the *if*-clause, because of the way modification works in English. As mentioned earlier, in English (and many other languages), a modifying word or phrase combines with an expression of type X to create a larger expression of the same type (X); this syntactic pattern is what allows the modifier to affect the meaning of the modified expression. This syntactic-semantic nexus can be termed the "modification rule." A simple example which demonstrates the working of this syntactic-semantic rule is the expression *very comfortable little house*, in which *very* does not modify *little*, but only *comfortable*, although in other phrases *very* can modify *little* (e.g., *very little house*). Representing the syntax of this expression in a diagram illustrates how *very* modifies only *comfortable*, not *little*, because *very* combines only with *comfortable*, not with a phrase that contains the adjective *little*:

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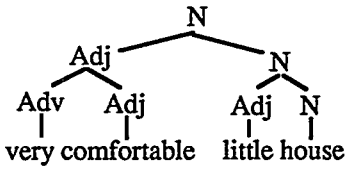
66. In Diagram 2, the *if*-clause is attached by a dotted, rather than solid, line. This is meant to indicate that the nature of its syntactic connection to the rest of the sentence is unclear, because of its odd medial placement.

67. J.O. Urmson, *Parenthetical Verbs*, 61 Mind 480 (1952); Joan B. Hooper, *On Assertive Predicates*, 4 SYNTAX & SEMANTICS 91 (John P. Kimball ed., 1975).

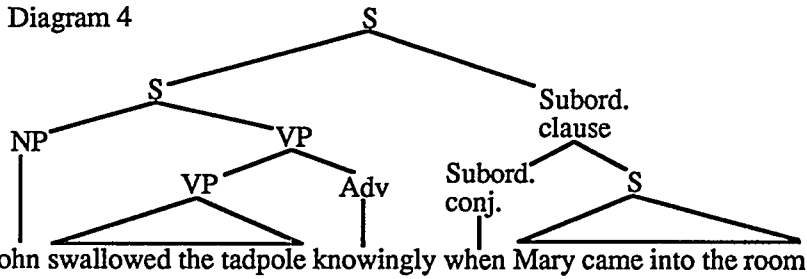
68. In formal logical systems, conditionals are part of propositional logic, where they connect sentences, relating one clause to another, not part of predicate logic, defining properties. JENS ALLWOOD ET AL., LOGIC IN LINGUISTICS (1977); HANS REICHENBACH, ELEMENTS OF SYMBOLIC LOGIC (1947).

Diagram 3



Very comfortable does modify the nominal expression *little house*, however, and so the phrase denotes a little house that is very comfortable, but not necessarily very little. As a modifier, *knowingly* is subject to the rule, as can be seen in the following example: *John swallowed the tadpole knowingly when Mary came into the room.* This sentence entails that John knew that he swallowed the tadpole, but not that he knew that Mary came into the room. The meaning of *knowingly* applies only to the meaning of the verb phrase *swallowed the tadpole* because it modifies only that phrase, as can be seen in the tree diagram:

Diagram 4



Any number of similar examples can easily be constructed.

Consequently, there is good evidence that the *if*-clause is both syntactically outside of what *knowingly* modifies and semantically incapable of applying just to the meaning of what *knowingly* modifies. On the basis of this evidence, the meaning of the statutory sentence cannot be represented as follows:

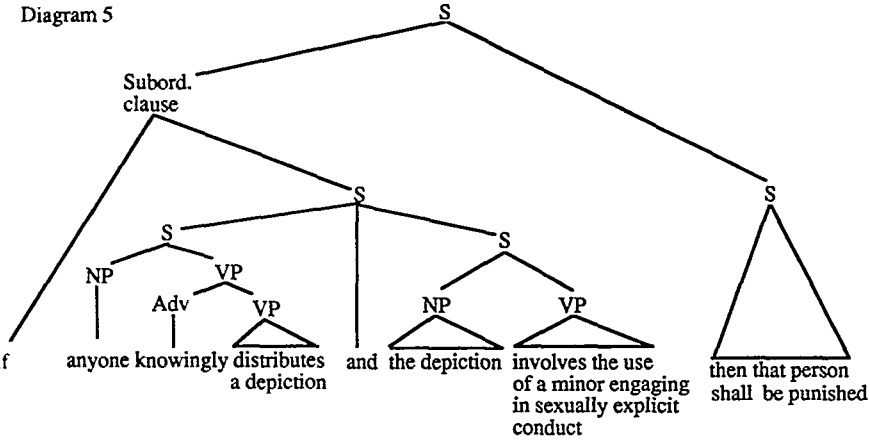
> Any person who knowingly transports a depiction, and knows that producing the depiction involves the use of a minor engaging in sexually explicit conduct, shall be punished.

The peculiar placement of the *if*-clause in the statute may lead to confusion in interpreting the entire unwieldy sentence, if one is misled by its interior position into believing that its modification relations are similarly interior rather than peripheral. *If*-clauses are not the only internal

clauses which parenthetically modify the main clause of a sentence which they interrupt. Co-ordinate clauses can be parenthetical, as in this example:

> If anyone knowingly distributes a depiction, and the depiction involves the use of a minor engaging in sexually explicit conduct, then that person shall be punished.

The structure of this sentence can be represented as follows:



This sentence contains two embedded conjoined clauses, the second of which (*the depiction . . . conduct*) is not part of the phrase modified by *knowingly*. Because the latter clause is not part of the phrase modified by *knowingly*, it is not part of what the meaning of *knowingly* applies to.

Another type of parenthetical expression whose meaning applies to a whole clause, not to some part of the clause it interrupts is a "non-restrictive" relative clause, such as the one italicized in the following example:

> (1) John knows that people speak Spanish in Tegucigalpa, *which is the capital of Honduras.*

This very example was offered by the court in *U.S. v. Gendron*[69] to support the relevance of context to ascertaining meaning. In order to see that this example does not have the significance which that court attributed

69. 18 F.3d 955 (1st Cir. 1994). The majority opinion was authored by then Judge Stephen Breyer.

to it, it is necessary to look at some details of the semantics of relative clauses.

Non-restrictive clauses (also called appositive clauses) are so named because they do not restrict, or constrain, the reference of the phrase to which they are attached. In the noun phrase *my only child, whom I love dearly*, the relative clause *whom I love dearly* does not narrow down the interpretation of *my only child*, whose referent is clearly and sufficiently specified without the relative clause. Rather than restricting the nominal phrase, a non-restrictive relative clause merely adds a semantically independent comment or observation. Non-restrictive relative clauses are ALWAYS parenthetical, and therefore always semantically independent of the clause that contains them.[70]

The *Gendron* court claimed that example (1) showed how context affected meaning, saying,

> [O]ne cannot know automatically, *simply from the position of the words in the sentence*, just which of the words following "knowingly" the word "knowingly" is meant to modify. However, that linguistic fact simply reflects the more basic fact that statements, and parts of statements, quite often derive their meaning from context . . . [T]aken by itself, [example (1)] leaves us uncertain whether or not John knows that Tegucigalpa is the capital of Honduras; but, the context of the story in which the sentence appears, a context that includes other sentences, may clear up our uncertainty and leave us with no doubt at all.[71]

But while context (beliefs and assumptions, including those derived from preceding text) might indeed indicate to a reader or hearer of example (1) whether in fact John knows that Tegucigalpa is the capital of Honduras, context will not change what the sentence says, which does not include the proposition that John knows that fact. The reason is that the *which*-clause is a non-restrictive relative clause, which like other parentheticals, does not affect the meaning of the rest of the sentence. A non-restrictive relative clause always expresses an assertion by the speaker of the sentence, not a belief (or any other attitude) on the part of the referent of the subject of the sentence (in example (1), John). If example (1) is uttered in a context in which we know that John knows Central American geography well, this

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70. *Gendron*, 18 F.3d at 958.

71. *See* Jerry L. Morgan, *Some Remarks on the Nature of Sentences*, *in* PAPERS FROM THE PARASESSION ON FUNCTIONALISM 433-449 (Robin E. Grossman et al. eds., 1975); Sandra Thompson, *The Deep Structure of Relative Clauses*, *in* STUDIES IN LINGUISTIC SEMANTICS 78-79 (Charles J. Fillmore & D. Terence Langendoen eds., 1971).

distinction may well go unnoticed, because the speaker's assertion and John's knowledge happen to coincide. But the distinction is real nonetheless.

The semantics of non-restrictive relative clauses contrasts with the semantics of restrictive relatives. Restrictive relatives are so named because their function is, literally, to restrict the range of things to which the nominal expression refers. For example, in the phrase, *the coffee that he spilled*, we are not talking about just any coffee; instead, we are restricting our reference to some particular coffee, namely, just that coffee that he spilled. Similarly, in the phrase, *a depiction whose production involved the use of a minor*, we are not talking about just any depiction, but are instead restricting our reference to a particular depiction, namely, one whose production involved the use of a minor.

The *Gendron* court's example (1) thus contrasts can be contrasted with the following example:

> (2) John knows that people speak Spanish in the city which is the capital of Honduras.

In contrast to example (1), example (2) can properly be understood as reflecting that John knows that some city is the capital of Honduras. Despite the fact that they both start with relative pronouns (e.g., *which*), restrictive and non-restrictive relative clauses are different semantically and syntactically, as well as in orthography (a comma sets off a non-restrictive, but not a restrictive, relative clause) and in pronunciation (non-restrictive relative clauses are normally spoken with a different intonation pattern from that given restrictive relative clauses). Unlike restrictive relative clauses, which modify and qualify nominal phrases, and which narrow down the range of reference of those phrases, the utterance of a non-restrictive relative clause represents a speech act independent of the rest of the utterance. This is what allows the same relative clause identifying the capital of Honduras to appear in a question about where people speak Spanish, without losing any of its force as an assertion, as in the question *Do people speak Spanish in Tegucigalpa, which is the capital of Honduras?* This contrast explains why example (2) can be interpreted as attributing to John the knowledge that people speak Spanish in the city which is the capital of Honduras,[72] but example (1) cannot.

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72. Of course, example (2) is ambiguous. It can also mean only that John knows that the people speak Spanish in some particular city, without knowing that that city is the capital of Honduras. This ambiguity arises because the verb *knows* creates an opaque context. *See supra* note 47. While the

Because of its syntactic structure, and the semantic-syntactic modification rule that a modifier applies to an expression it is a syntactic part of, the statutory sentence cannot literally mean that a person is liable under the statute if he lacks knowledge that the person depicted was a minor.

IV. AN ALTERNATIVE: THE LANGUAGE OF LAW HAS DIFFERENT RULES FROM ENGLISH

What if the foregoing analysis is beside the point, because the grammar governing sentences in criminal law statutes, or, perhaps, in all statutes in Anglo-American law, is different from the grammar of English generally? In particular, what if the syntactic-semantic principle of modification identified above does not apply? There is no doubt that varieties of English exist that differ grammatically: regional dialects,[73] usages that are dependent on social groupings associated with the age of the speaker,[74] varieties of English associated with race,[75] and, as has been shown by one of the authors of this paper, a different area of the law: in property law, there are narrowly limited syntactic-semantic rules that are not part of the rules of English as a whole, rules which refer to a consistent syntactic difference between sentences granting vested remainders and sentences granting contingent remainders.[76] So it would not be unheard of for there

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restrictive example is ambiguous, the *Gendron* court's example is not; it cannot be understood as saying that John knows that Tegucigalpa is the capital of Honduras.

73. For example, in the American southeast, double modals are grammatical, so sentences like *I might could help you* are spontaneously produced and understood without negative reaction. *See, e.g.*, Ronald R. Butters, *Acceptability Judgements for Double Modals in Southern English, in* NEW WAYS OF ANALYZING VARIATION IN ENGLISH 277 (Charles-James N. Bailey & Roger W. Shuy eds., 1973); E. Bagby Atwood, *A Survey of Verb Forms in the Eastern United States, in* 2 STUDIES IN AMERICAN ENGLISH (1953).

74. For example, in eastern New England, pre-teen children learn and use a form of the "inverted *so*" construction which contains a meaningless negative element: *You like tuna and so don't I*; they stop using this form by the time they enter their 20s.

75. So-called "Black English" is characterized by several grammatical differences from standard English, for example, the rule of *be*-deletion: A present tense form of *be* is optionally absent in all environments where it is contractible, but not where it is not, so *She is leaving* is related to *She's leaving* which is related in turn to *She leaving*, but *I know where she is* cannot be contracted to form **I know where she's*, which in turn cannot be further reduced to form the equally impossible **I know where she. See* William Labov, *Contraction, Deletion, and Inherent Variability of the English Copula*, 45 Language 715 (1969).

76. *See* Jeffrey P. Kaplan, *Syntax in the Interpretation of Property Law: The Vested vs. Contingent Distinction in Property Law*, 68 AM. SPEECH 58 (1993). Here is an example of a sentence granting a vested remainder: *Owner conveys Blackacre to A for life, then to B, but if B does not survive A, to B's children.* Here is what would appear to a layperson to be a paraphrase of that sentence: *Owner conveys Blackacre to A for life, then, if B survives A, to B, and if B does not survive A, to B's children.* As

to be a syntactic-semantic difference between English generally and the "language" of the criminal law (or the law generally).

What would the difference be? We see two possibilities: One would be that the syntactic-semantic modification rule identified earlier would not be part of the rules governing sentences in criminal statutes. The second would leave the modification rule intact, but treat the phrase structure of the operative sentence as different from the representation given in Diagram (1), so that *knowingly* and the *if*-clause were structurally related in such a way that *knowingly* could modify the *if*-clause.

The first possibility is unsupported. We know of no variety of English in which the modification rule does not operate. Of course, this does not mean that it is impossible for such a variety to exist, but it makes us skeptical, especially since the rule unquestionably applies to sentences in the criminal code. The federal bribery statute is a case in point:

> Whoever, directly or indirectly, corruptly gives . . . any thing of value to any public official . . . , with intent . . . to influence any official act . . . shall be fined . . . .[77]

This sentence contains three modifiers, *directly or indirectly*, *corruptly*, and *with intent to influence any official act. Corruptly* modifies the phrase *gives any thing of value to any public official.* The diagram for the sentence shows that the adverb *corruptly* combines with the verb phrase *gives any thing of value to any public official* to form a larger verb phrase:

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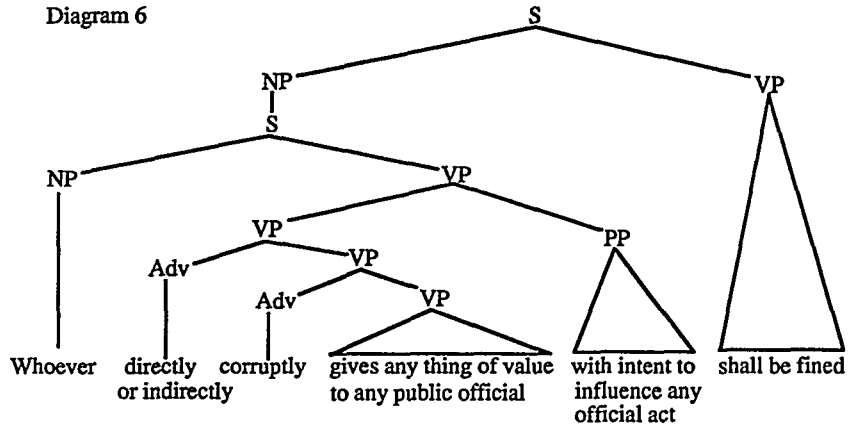
anyone knows who has enjoyed wrestling with this distinction in the standard first year law school course in property, these are not paraphrases. The second grants a contingent, not vested remainder—a semantic distinction. The semantic distinction is associated with a syntactic distinction, which can be captured in a fairly complicated rule based on Gray's formulation "Whether a remainder is vested or contingent depends on the language employed. If the conditional element is incorporated into the description of, or into the gift to, the remainderman, then the remainder is contingent, but if after words giving a vested interest, a clause is added divesting it, the remainder is vested." JOHN GRAY, THE RULE AGAINST PERPETUITIES 95 (4th ed., 1942). This rule is peculiar to property law, and is not part of the rules governing English sentences generally.

77. 18 U.S.C. § 201(b) (1988).



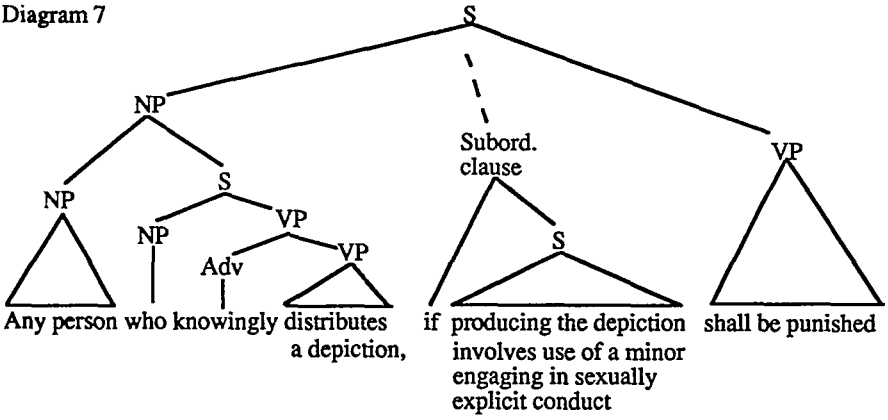
Thus the meaning of *corruptly* applies to the meaning of the verb phrase *gives any thing of value to any public official.* A person who NON-corruptly gives any thing of value to a public official with intent to influence an official act is not criminally liable under the statute. *Directly or indirectly*, as Diagram (6) makes clear, modifies the verb phrase *corruptly . . . official.* So the corrupt giving may be direct or indirect; either way, a defendant is criminally liable. Neither *corruptly* nor *directly or indirectly* modifies *with intent to influence any official act.* Rather, that expression, according to Diagram (6), modifies the large VP *directly . . . official.* There is no reading of the statute in which any of the modifiers are understood as applying to *shall be fined . . . .* This is obvious not only to a student of criminal statutes, but to any native speaker of English. The impossibility of any of these modifiers modifying the verb phrase *shall be fined* follows from the phrase structure as shown in Diagram (6). Because none of the modifiers combines with that verb phrase to form a larger phrase, none of them modifies that verb phrase.

It is apparent that, if the statutory sentence is interpretable as an English sentence, the modification rule must govern its interpretation. The modification rule appears to be so ubiquitously relevant that we suspect it affects nearly every sentence in every statute, because it operates in every sentence of English that contains a modifier.

At this point, an objection might be raised that the difference between the grammar governing the sentences making up criminal statutes and that of English as a whole is specific to the interpretation of *if*-clauses. Let us

return to section 2252[78] to examine this possibility. Repeating the diagram which we have assumed represents the structure of the operative sentence of section 2252:

Diagram 7



If the syntactic-semantic rules governing criminal statute sentences permit *knowingly* to modify *producing the depiction involves use of a minor engaging in sexually explicit conduct*, it is appropriate to ask what the principle of modification is that permits this. The rule would have to permit modification to extend to the *if*-clause, but NOT to the main VP, *shall be punished*. We see no principled way to identify a rule permitting the right modification and disallowing the wrong one, if the right modification includes the *if*-clause but not the VP—assuming that the phrase structure given above is right.

The second alternative is that the structure of sentences in criminal law statutes is different from what it is when those sentences are used in ordinary English, in such a way that the *if*-clause in the operative sentence in section 2252 is modified by *knowingly*. This possibility could be supported if the sentences of criminal statutes were sentences in a free word order language and word- and phrase-order provided no constraints on modification relations. But English as a whole is what is known as a fixed word-order language, which means that, while variation in order is permitted, the variation is highly constrained, and that many significant grammatical relations are signaled by the position of words and phrases

78. 18 U.S.C. § 2252 (1988).

relative to each other: subjects precede verb phrases, direct objects follow verbs, and so forth. Ancient Latin and Greek, by contrast, were "free word order" languages, in which the words of a simple sentence could occur in essentially any order, because the words' relationships to each other was not signaled by their order, but by their form: endings on nouns, verbs, and adjectives. This is illustrated in a sentence of Ovid's:

Parva necat morsū spatiōsum vīpera taurum
small kill with-a-bite big snake bull
'A small snake kills a big bull with a bite.'[79]

In this example, the adjective *parva* modifies the noun *vīpera*, but it is not obvious that they form a phrase together, and the adjective *spatiōsum* modifies the noun *taurum*, but again it is not obvious that they form a phrase together. The connections between modifier and modifiand is carried by the endings: *-a* on *parva* and *vīpera*, *-um* on *spatiōsum* and *taurum*.

Of course the sentences of criminal statutes do not have free word order; statutes like *If distributes anyone pornography shall child fined he be* do not get enacted. Carrying out the argument to its conclusion, if the language represented in criminal statutes were a free word order language, what can modify what would have to be signalled somehow in the grammar of that language. Without some indication, language users—judges, prosecutors, citizens—would not be able to tell what modifies what, including whether *knowingly* modifies a clause about the age of performers or not. If word order and phrase structure don't carry this burden, one would expect some properties of the form of words to, as endings do in Latin. But there are no special word parts (such as endings) connecting modifier and modified element in criminal statute sentences. Moreover, the discovery that sentences in another area of law (property law) are MORE sensitive to hierarchical phrase structure[80]—what expressions are grouped into phrases with what other expressions—than is English as a whole makes it highly unlikely that the language of criminal law statutes could differ from English as a whole in the opposite way. For example, it is extremely unlikely that another area of statutory law comprises statutes whose sentences have a non-hierarchical ("flat") type of phrase structure.

We conclude that the second putative difference between the language of criminal law statutes and the rules of English in general is very unlikely

79. P. OVID NASONIS, AMORES MEDICAMINA FACIE: FEMINEAE ARS AMATORIA REMEDIA AMORIS 421 (E.J. Kenney ed., 1973).

80. *See supra* note 76.

to be real.

Consequently, it appears likely that sentences in criminal law statutes are not different in syntax or semantics from the sentences of English as a whole in such a way that either the modification rule does not apply or that those sentences are structured in such a way that *knowingly* can modify the *if*-clause in section 2252.

V. THE ROLE OF BACKGROUND ASSUMPTIONS AND INFERENCES FROM EXPECTATIONS OF RATIONALITY

A general principle of Anglo-American criminal law is that conviction of a crime requires proof of both a guilty act ("actus reus") and a guilty mind ("mens rea"), and further that a finding of mens rea requires knowledge by the accused of each fact that is an element of the actus reus. If the commission of a guilty act without an accompanying guilty state of mind suffices for conviction, then the crime is described as a strict liability crime; there is a strong presumption in the criminal law against interpreting a statute as creating a strict liability crime. Several legal scholars at the conference and in this issue have suggested that this background presumption justifies reading section 2252 as if the mens rea required knowledge of every element of the actus reus, including the sexually explicit nature of the depiction and the minor age of the performer.[81] We agree that in all communication (treating legislation as communication for this discussion), the message that is conveyed is partially determined by shared knowledge, or, at least, assumptions about shared knowledge or beliefs, including beliefs about what the topic of a discourse is.[82] But we respond to this suggested rationale for the Supreme Court's majority opinion by suggesting that the background assumption about mens rea by law-trained readers does not operate in isolation but along with other extra-grammatical factors that

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81. This also seems to be the thrust of Justice Stevens' brief concurrence in *X-Citement Video*. 115 S. Ct. at 472.

82. Such shared assumptions can disguise the ambiguity of a sentence. For example, one interpretation of *the children are ready to eat* is selected (or may be the only one noticed) because of our shared assumptions, in this case that children are eaters, not food. Shared assumptions can influence choice of referents of noun expressions, as the referent of the capitalized expression in THE PRESIDENT *will make an announcement about budget cuts*, will vary depending on whether the topic is assumed to be national or university politics. They can even contribute to metaphorical rather than literal understandings: *The sea is raging* is literally false, but is used to communicate that the sea has some properties usually associated with raging; the metaphor arises via our shared knowledge that only sentient beings, not seas, can rage, and via the assumption that a person would not, in cooperative language use, utter something obviously false without some good reason to (such as to metaphorize).

influence utterance understanding, particularly general principles embodying expectations of rationality.

The majority opinion does contain a powerful argument based on the expected rationality of the "speaker" of the statute, Congress. Chief Justice Rehnquist states that "the most grammatical reading" produces results that are "positively absurd": if *knowingly* only modifies *distributes* then retail druggists who handle film for processing or package couriers who deliver boxes labeled "film" can be prosecuted even if they had no idea what was on the film they "*knowingly* distributed."[83] Assuming that Congress could not have intended such absurd (and patently unjust) results, the Chief Justice then infers that *knowingly* must at least modify *depiction . . . of . . . sexually explicit conduct.*[84] The next step in his reasoning is that, if *knowingly* modifies at least these five words of the *if*-clause, then it must modify the entire clause, including *involves the use of a minor.*[85]

The intent which the majority imputes to Congress may appear plausible, but nothing linguistic supports their inference. Linguistic principles for ascribing meaning based on inferences derived from normal expectations about the rationality of the speaker always depend on the interpreter starting from what was plainly said. Further inferences about what the utterer must have meant by saying that thing in that way follow a logic described by H.P. Grice.[86] The expectation of rationality amounts to

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83. 115 S. Ct. at 467.

84. The majority opinion later bolsters this inference by reviewing the legislative history and coming to the conclusion that "it persuasively indicates that Congress intended that the term 'knowingly' apply to the requirement that the depiction be of sexually explicit conduct." *Id.* at 471.

85. In his dissent, Justice Scalia criticizes the majority's three step rationale for ignoring grammar to conclude that knowingly modifies the *if*-clause but then invoking grammar to argue that *knowingly* must modify everything within the *if*-clause. *Id.* at 474

86. Grice's account of communicated meaning, H. Paul Grice, *Logic and Conversation,* 3 SYNTAX & SEMANTICS 41 (Peter Cole & Jerry L. Morgan, eds., 1975) is a natural extension of his earlier account of meaning in general. *See* H. Paul Grice, *Meaning,* 66 PHIL. REV. 377 (1957). *Cf.* GEORGIA M. GREEN, PRAGMATICS AND NATURAL LANGUAGE UNDERSTANDING (2d ed. forthcoming 1996) (manuscript on file with author); Georgia M. Green, *The Universality of Gricean Interpretation,* PROCEEDINGS OF THE 16TH ANNUAL MEETING OF THE BERKELEY LINGUISTICS SOCIETY (Kira Hall et al., eds., 1990); Stephen Neale, *Paul Grice and the Philosophy of Language,* 15 LINGUISTICS & PHIL. 509 (1992). *Logic and Conversation* characterizes meaning as inherently intentional: recognizing an agent's intention is essential to recognizing what act she is performing (*i.e.*, what she meant by her act). Speaker and hearer are constantly involved in interpreting (usually not consciously) what each other's goals must be in saying what they say. Disambiguating structurally or lexically ambiguous expressions like *old men and women,* or *ear* (*i.e.*, of corn, or to hear with), inferring what referent a speaker intends to be picked out from her use of definite noun phrase like *the coffee place,* and inferring what a speaker meant to implicate by an utterance that might seem unnecessary or irrelevant all depend equally on the assumptions that the speaker did intend something to be conveyed by her utterance that was sufficiently

individuals believing that everyone believes that individuals act in accordance with their goals. Grice described four categories (Quantity, Quality, Relevance and Manner) of special cases of this expectation, that is, applications of it to particular kinds of requirements, and gave examples of their application in both linguistic and non-linguistic domains. These are better understood[87] from general, declarative paraphrases than from Grice's own language-specific, imperative formulations,[88] which he termed "maxima," and are fairly represented as follows:

QUANTITY: I: An actor will do as much as is required for the achievement of the current goal.
II: An actor will not do more than is required.

QUALITY: Actors will not deceive co-actors. Consequently, an actor will try to make any assertion one that is true.
I: An actor will not say what she believes to be false.
II: An actor will not say that for which she lacks adequate evidence.

RELATION: An actor's action will be relevant to and relative to an intention of the actor.

MANNER: An actor will make her actions perspicuous to others who share a joint intention.
I. Actors will not disguise actions from co-actors. Consequently, actors will not speak obscurely in attempting to communicate.
II. Actors will act so that intentions they intend to communicate are unambiguously reconstructible.
III. Actors will spend no more energy on actions than is necessary.
IV: Actors will execute sub-parts of a plan in an order that will maximize the perceived likelihood of achieving the goal.

Grice's account derives its explanatory power from what it predicts will happen when behavior appears not to conform to the maxims. Even when

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specific for the goal of the utterance, that she intended the addressee to recognize this intention, and BY MEANS OF RECOGNIZING THE INTENTION, to recognize what the speaker intended to be conveyed. Grice, *Logic and Conversation*, *supra*, at 52.

For application of Gricean pragmatics to legal analysis, see M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373 (1985); Peter M. Tiersma, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CAL. L. REV. 189 (1986); Peter Tiersma, *The Language of Perjury: 'Literal Truth,' Ambiguity, and the False Statement Requirement*, 63 S. CAL. L. REV. 373 (1990); Peter Tiersma, *Nonverbal Communication and the Freedom of "Speech,"* 1993 WIS. L. REV. 1525 (1993). For arguments that legislation is not communication, see Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945 (1990).

87. *Cf.* Neale, *supra* note 86; Georgia M. Green, *Rationality and Gricean Inference*, 9 BECKMAN INST. 1 (1993).

88. *Cf.* Green, *supra* note 87.

speech behavior appears inconsistent with the maxims, hearers assume that the speaker is behaving rationally—to do otherwise would be to assume that the speaker is irrational and unpredictable, and cannot be expected to participate in rational discourse. Assuming that the speaker is then behaving rationally, and expecting to be perceived that way, the hearer must adopt a strategy of interpreting the speaker's behavior as being in maximal conformance with the maxims, and considering what propositions must be assumed to make it evident that it is. One of Grice's best known examples is the damning-with-faint-praise letter of recommendation for a candidate for an academic job, which says: "Dear Sir, Mr. Smith's command of English is excellent, and he always attended class regularly. Sincerely, etc."[89] Clearly the writer intends to communicate something more than he literally says. The way he accomplishes this is by apparently blatantly violating the maxims of Quantity and Relation, so that the reader will have to seek some non-superficial way that the writer is actually acting in accordance with the expectation of rationality. A reasonable inference from the dearth of information provided and its lack of relevance is that the writer can find nothing more in Mr. Smith's qualifications to recommend him for an academic job. If the writer is rational, he must have expected the reader to understand this, and has therefore implied, but not literally said, that Mr. Smith is in fact unqualified for the job.

Hearers regularly rely on the maxims to infer information from what is literally said. For example, Jane's announcing that she ate some of the cake is literally true even if she ate all of it. But her telling us that she ate some of it will lead to the inference that she didn't eat all of it, on the basis of the first maxim of Quantity. That is, given the assumption that the speaker, Jane, will say everything that is relevant, we can assume that Jane provided enough information, and that if she had eaten all of the cake, she would have said so. Since she didn't, we may infer that Jane left some of the cake uneaten. Thus, on the basis of one of the maxims, a reader (or listener) may legitimately infer more than what is literally entailed by an utterance.[90] What is more, the Gricean assumption of rationality predicts that, since Jane knows that a rational listener will expect rational behavior from her, she knows that we will draw this inference. Consequently, in saying that she ate some of the cake she has intentionally implied that she didn't eat it all. The Gricean term for the kind of implying just exemplified is

89. *Logic and Conversation*, *supra* note 86, at 52.

90. However, such an inference is subject to cancellation by the speaker: if Jane appended to her announcement: "in fact, I ate it all," then the inference we would otherwise draw is not legitimate.

"implicate," with the noun form "implicature."

This second effect of the maxim of Quantity is helpful in analyzing judicial opinions that presume the rationality of Congress as "speaker." How much information is enough is partially determined by what is salient in the discourse. If a mother asks her teenage son, "Have you finished your homework and put your books away?" and he responds, "I have finished my homework," the most reasonable understanding of his response is that he has not put his books away, but does not wish to say so explicitly. Because the question of putting the books away is salient to him (from the mother's question), it is not rational to infer that he omitted reference to that question by mistake. Rather, the rational inference is that failure to answer the second half of the question implicates "No."

Applying these basic principles of rational communication to section 2252, we note that the statute explicitly requires (for conviction) a defendant's knowledge of one element of the actus reus: that he or she distributed some thing. Thus the question of defendant's knowledge is salient (the enactors, if rational, must be assumed to have been aware of it), and not automatically inferable from the common law background (if it were, why bother to mention it?). Congress' failure to state a knowledge requirement as to other elements of the actus reus, those contained within the *if*-clause, (by structuring the sentence so as to place these elements outside the modification range of *knowingly*) would also be treated as salient. Because the statute could have been written to state a knowledge requirement in relation to all the elements of the actus reus, but was not, basic principles of communication indicate that the speaker (Congress) did not intend to require knowledge of all the elements.

In the example about finishing the homework and putting away the books, the implicature that the teenager has not put the books away arises even if it is common knowledge that he usually puts his books away. Similarly, the Gricean assumptions of rationality in communication would lead to the inference that in the statute, the knowledge requirement does not attach to the *if*-clause about child pornography even if it is common knowledge that a mens rea requirement is generally a part of criminal laws.

By way of contrast, let us return to *United States v. Staples*.[91] Recall that the statute[92] in question in *Staples* makes no reference to a defendant's knowledge. The Court's decision is completely consistent with

91. 114 S. Ct. 1793 (1994).
92. 26 U.S.C. § 5861 (1988).

the principles of rational communication. The Court, because of the common law presumption (a shared background assumption), inferred that what the enactors of the statute intended to convey by and in their enactment included the proposition that, for conviction, the prosecution would have to prove that a defendant knew the key element of the actus reus, that the weapon was capable of multiple-firing and thus must be registered.[93] However, unlike the statute in *Staples*, section 2252 is not totally silent on the issue of knowledge. Thus, if the Court was assuming that Congress was communicating in a rational way, expecting to be understood in a world described by the Gricean maxims, and so providing just necessary information (and no more and no less), the best inference from the omission of a "knowledge" modifier from the *if*-clause is that no knowledge requirement as to the minority of the performer was intended to form part of the law. As illustrated above, when something relevant is omitted or not said, consequences follow. One consequence, here, is that since knowledge of the minority status of the performer was not stated to be required of the minority of the performer, that knowledge is not required.

VI. CONCLUSION

The efforts of the circuit courts (other than the Ninth), the Supreme Court majority, and various legal scholars to make sense of section 2252 do violence to the statutory text. As a matter of English grammar, *knowingly* cannot modify the *if*-clause, and a hypothetical grammatical analysis under which the grammar governing sentences in criminal statutes is different from the grammar of English as a whole in a way which would allow it to do so is not tenable. Under the assumption that when Congress enacts a statute, it does so as a rational communicative act, statutory interpretation is influenced by both shared knowledge and expectations of rationality in communication. Under the assumption that Congress enacted the statute rationally, then, even in the context of a background assumption that a mens rea requirement is generally part of a criminal prohibition, section 2252 must be understood as applying no knowledge requirement to the contents of the *if*-clause. The jurisprudential problem presented by the

93. Compare: A hearer of "The President will be making an announcement about budget cuts" will infer that the speaker intended to convey, by and in uttering that sentence, that the intended referent of the president is the university president, the President of the United States, the corporation president, or whatever president it is most rational to assume the speaker intended in the context. *See supra* note 82.

X-Citement Video case, consequently, is not what the statutory text means (which is plain), but what a court is to do when that meaning is plainly absurd. The Supreme Court decision in *X-Citement Video* would have been a far more valuable contribution to the body of American law had it confronted this fundamental issue head on.