

Summer 1996

Level of Scienter Required for Child Pornography Distributors: The Supreme Court's Interpretation of Knowingly in 18 U.S.C. 2252

Christina Egan
Northwestern University School of Law

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Christina Egan, Level of Scienter Required for Child Pornography Distributors: The Supreme Court's Interpretation of Knowingly in 18 U.S.C. 2252, 86 J. Crim. L. & Criminology 1341 (1995-1996)

This Supreme Court Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

LEVEL OF SCIENTER REQUIRED FOR CHILD PORNOGRAPHY DISTRIBUTORS: THE SUPREME COURT'S INTERPRETATION OF "KNOWINGLY" IN 18 U.S.C. § 2252

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

CHRISTINA EGAN*

I. INTRODUCTION

In *United States v. X-Citement Video, Inc.*,¹ the United States Supreme Court held that § 2252,² a statute criminalizing the distribution of child pornography, required the government to prove that a distributor had knowledge of the sexually explicit nature of the materials and the age of the performers.³ The dissent disagreed with the majority's interpretation of the statute, arguing that the grammatical structure of the provision precluded reading the statute to require scienter.⁴ Without a scienter requirement, a distributor would be held

* Law Clerk for The Honorable John F. Grady, United States District Court for the Northern District of Illinois; J.D. Northwestern University School of Law, 1995.

¹ 115 S. Ct. 464 (1994).

² 18 U.S.C. § 2252(a) (1988) provides:

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computers or mails, any visual depiction, if—

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce by any means including by computer or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section.

³ *X-Citement Video*, 115 S. Ct. at 472.

⁴ *Id.* at 473-74 (Scalia, J., dissenting).

strictly liable for distribution of child pornography regardless of his knowledge of the contents of the materials he distributed. Justice Scalia found that the word "knowingly" only applied to the verbs in the statute and did not extend to the elements regarding the nature of the materials and the age of the performers.⁵ He concluded that because the statute lacked a scienter requirement, it established a severe deterrent to constitutional activities and was not narrowly tailored to its purpose.⁶

The defendant in *X-Citement Video* was charged with distributing pornographic video tapes depicting a minor engaged in sexually explicit conduct in violation of § 2252.⁷ He argued that the statute was unconstitutional on its face because it did not require scienter as to minority.⁸ The United States Supreme Court reversed the ruling of the Ninth Circuit Court of Appeals agreeing with the defendant, holding that § 2252 was constitutional because the word "knowingly" extended to both the sexually explicit nature of the materials and to the age of the performers.⁹

This Note argues that the majority's approach was correct. The dissent's approach, which focuses solely on the plain meaning of the text of the statute, was wrong. Given the fact that the most natural grammatical reading of the statute would lead to absurd results, the majority deferred to legislative intent and canons of construction to discern a sensible interpretation. However, the majority's analysis was not entirely correct. The majority assumed that the statute required knowledge as the applicable level of scienter. It failed to evaluate alternative levels of scienter. The majority should have considered recklessness as an applicable scienter level. Interpreting the statute to require recklessness, rather than knowledge, would have lessened the prosecutorial burden, more significantly promulgating Congress' desire to eradicate the distribution of child pornography, while still staying within the boundaries of First Amendment jurisprudence.

II. BACKGROUND

A. THE FIRST AMENDMENT AND PORNOGRAPHY

The First Amendment does not protect all forms of speech absolutely. When determining the degree of protection to grant speech,

⁵ *Id.* (Scalia, J., dissenting).

⁶ *Id.* at 476 (Scalia, J., dissenting).

⁷ *Id.* at 466.

⁸ Brief for Respondent at 5, *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994) (No. 93-723).

⁹ *X-Citement Video*, 115 S. Ct. at 472.

courts weigh the value of the speech itself against the harm it causes.¹⁰ In 1942, the Court considered the constitutional rights of those involved in pornography and held that obscene speech was excluded from the protection of the First Amendment.¹¹ The Court set forth the guidelines for determining what constituted obscenity in 1973 in *Miller v. California*.¹² Under *Miller*, obscene materials are works which: (1) "the average person, applying contemporary community standards" would find "taken as a whole, appeal to the prurient interest in sex"; (2) "portray sexual conduct in a patently offensive way"; (3) "taken as a whole do not have serious literary, artistic, political, or scientific value."¹³ Thus, non-obscene pornography retains First Amendment protection. However, when Congress enacts statutes prohibiting speech which approaches protected First Amendment areas, the possibility of chilling protected expression arises.¹⁴ A chilling effect occurs when individuals refrain from exercising the constitutionally protected right of speech for fear of prosecution.¹⁵ Even though their speech is protected by the Constitution, speakers act as if it were illegal, unprotected speech. Therefore, the First Amendment does not permit onerous criminal sanctions to be imposed on the basis of strict liability where doing so would seriously chill protected speech.¹⁶

B. LEGISLATIVE HISTORY OF THE ENACTMENT OF § 2252

Congress passed the Protection of Children Against Sexual Exploitation Act of 1977¹⁷ (the 1977 Act) as a response to the growing national concern over child pornography. Section 2252 of the 1977 Act targeted the distributors and recipients of child pornography.¹⁸

¹⁰ Paul Fuhrman, Note, *United States v. X-Citement Video: The Pariah Opinion*, 47 LOY. L.A. ENT. L.J. 85, 88 (1994).

¹¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

¹² 413 U.S. 15 (1973).

¹³ *Id.* at 24.

¹⁴ Robert R. Strang, "She Was Just Seventeen. . . And the Way She Looked Was Way Beyond [Her Years]": *Child Pornography and Overbreadth*, 90 COLUM. L. REV. 1779, 1784 (1990).

¹⁵ *Id.*

¹⁶ Ralph Drury Martin, *When Pornography Involves a Minor*, NEW JERSEY L.J., Oct. 10, 1991, at 20.

¹⁷ Protection of Children Against Sexual Exploitation Act of 1977, Pub.L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251-2257 (1994)).

¹⁸ The original text of § 2252(a) read:

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce or mails, for the purpose of sale or distribution for sale, any obscene visual or print medium, if—

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium depicts such conduct; or

Congress considered several bills before passing the ultimate version of § 2252.

1. Senate Efforts to Regulate Child Pornography Distributors

The earliest version of § 2252 was initially introduced by Senator Roth.¹⁹ Senator Roth believed that the initial Senate bill aimed at regulating child pornography, which was directed only at the producers of child pornography, had a serious shortcoming because it failed to include a strong provision against the distributors and sellers of child pornography.²⁰ Senator Roth stated that to eliminate abuse by producers, it was necessary for the bill to cover those who distribute and sell the producers' work.²¹ Thus, he proposed an amendment—commonly referred to as the “Roth amendment”—covering distributors as well.²²

A discussion between Senator Roth and Senator Percy focused on the use of the word “knowingly” in the Roth amendment. Senator Percy asked:

Would [the amendment as drafted] not mean that the distributor or seller must have either, first, actual knowledge that the materials do contain child pornographic depictions, or, second, circumstances must be such that he should have had such actual knowledge, and that the mere inadvertence or negligence would not alone been enough to render his actions unlawful?²³

(2) knowingly receives for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale, any obscene visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, if—

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium depicts such conduct; shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2252(a) (1977).

¹⁹ S. 1011, 95th Cong., 1st Sess. (1977). Senator Roth proposed adding § 2252 to amend S. 1585, 95th Cong., 1st Sess. (1977), the principal portion of the 1977 Act.

²⁰ 123 CONG. REC. 33,047 (1977) (statement of Sen. Roth).

²¹ *Id.* at 33,048.

²² *Id.* at 33,047. The original text of Senator Roth's amendment provided in relevant part:

(a) No person may—

(1) knowingly transport, ship, or mail in interstate or foreign commerce for the purpose of sale or distribution for sale any film, photograph, negative, slide, book, magazine, or other print or visual medium depicting a minor engaged in sexually explicit conduct; or

(2) knowingly receive for the purpose of sale or distribution for sale, or knowingly sell or distribute for sale, any film, photograph, negative, slide, book, magazine, or other print or visual medium depicting a minor engaged in sexually explicit conduct which has been transported, shipped, or mailed in interstate or foreign commerce.

S. 1011, 95th Cong. 1st Sess. (1977).

²³ *Id.* at 33,050 (statement of Sen. Percy).

Senator Roth responded:

That is absolutely correct. This amendment, limited as it is by the phrase 'knowingly,' insures that only those sellers and distributors who are consciously and deliberately engaged in the marketing of child pornography and thereby are actively contributing to the maintenance of this form of child abuse are subject to prosecution under this amendment.²⁴

The Roth Amendment was passed seventy-three to thirteen.²⁵ The Senate bill with the Roth amendment language included was passed eighty-five to one²⁶

2. *House Efforts to Regulate Child Pornography Distributors*

In the House, the initial attempt to regulate child pornography was H.R. 6693. Section 9(a) of the bill was a provision aimed at attacking distributors of child pornography.²⁷ Some House members voiced two concerns about the constitutionality of the provision.²⁸ The first was the lack of an obscenity requirement.²⁹ However, other members questioned whether that was a valid concern; they believed that the amendment did not need an obscenity requirement to withstand a constitutionality test.³⁰

²⁴ *Id.* (statement of Sen. Roth).

²⁵ 123 CONG. REC. 33,057 (1977).

²⁶ *Id.* at 33,061 (1977).

²⁷ 123 CONG. REC. 30,927 (1977). Section 9(a) provides in relevant part:

(a) Any person who—

(2) knowingly transports or ships through, or in such manner to affect, interstate commerce or foreign commerce or knowingly mails any photograph, printed matter containing such photograph, film, or electronic visual image depicting a child engaging in a prohibited sexual act or in the simulation of such an act, for the purpose of sale or resale;

(3) knowingly receives for the purpose of selling or knowingly sells any photograph, printed matter containing such photograph, film, or electronic visual image which has been shipped or transported through, or in such manner as to affect, interstate commerce or foreign commerce or has been mailed and which depicts a child engaging in a prohibited sexual act or in the simulation of such an act[.]

H.R. 6693, 95th Cong., 1st Sess. § 9(a) (1977).

²⁸ *See id.* at 30,932-36.

²⁹ *See* 123 CONG. REC. 30,932-34 (1977) (statement of Rep. Conyers). Rep. Conyers stated that, by enacting the amendment without an obscenity requirement: "We are going to be furnishing an obvious out to any lawyer who has read the string of decisions on obscenity and child pornography. He will be able to allude specifically to the legislative history knowing we have stated time and time again that obscenity cannot be defined by statute and unless that test is made in that or other court cases, we are not going to be able to get around it." *Id.* at 30,934.

³⁰ *See id.* at 30,934-36 (statements of Rep. Ashbrook, Rep. Jeffords, Rep. Murphy, and Rep. Brademas). Rep. Jeffords stated that the lack of an obscenity requirement in the bill did not pose a constitutional problem: "[W]e are not talking about obscenity. This is important. We are talking about the abuse of children. . . . That raises different questions, standards which have not been tested regarding constitutional questions, standards which give us an opportunity in this area to make the law more specific and to take care of

The second concern involved the word "knowingly" as used in § 9(a).³¹ House members supporting the amendment, however, clarified that the bill was intended to prosecute only those distributors and sellers who know that the material they are transporting is child pornography.³² The House passed the bill by a vote of 375 to 12.³³

Later, the House considered a version of the bill passed by the Senate, but without the language of the Roth amendment covering distributors of child pornography.³⁴ Some House members argued for a motion to include the language of the Roth amendment, observing that without the Roth language, the bill accomplished little.³⁵ Other House members argued strongly against that motion because the Roth amendment lacked an obscenity requirement, noting that the Department of Justice opposed the language of the Roth amendment for that reason on constitutional grounds.³⁶ Despite the controversy, the motion to include the Roth amendment language passed by a vote of 358 to 54.³⁷

problems which might not be possible under the more general law with respect to pornography. This bill is another standard for controlling abusive child labor, a sound constitutional base." *Id.* at 30, 934. *See also id.* at 35,031 (statement of Rep. Ashbrook).

³¹ *Id.* at 30,935-36 (statement of Rep. Jeffords).

³² *See id.* at 30,935-36 (statements of Rep. Jeffords, Rep. Murphy, and Rep. Brademas). Rep. Jeffords stated: "It is true that regarding the problem of transportation the definition ought to be clear. We are talking about people knowing that it is the kind of stuff we are talking about, not knowing they are just transporting a piece of material. It is intended that they have knowledge of the type of material being transported, that it contains the type of material proscribed by the bill." *Id.* at 30, 935. Rep. Murphy stated: "This bill is specifically directed to anyone who is the cause of or participates in, dealer or processor of such materials which depict the sexual abuse of a child and which thereby contributes to the destruction of that child's life." *Id.* Rep. Brademas stated: "Not only did we carefully determine who would be affected by this legislation, we also made quite certain to protect those who should not be subject to its provisions. The bill quite clearly focuses on the pornographers and protects, for example, the truck driver who has no knowledge or control over the magazines he delivers." *Id.* at 30,936.

³³ *Id.* at 30,938-39.

³⁴ *Id.* at 35,030 (statement of Rep. Ashbrook). The bill was H.R. 8059, 95th Cong., 1st Sess. (1977).

³⁵ *Id.* at 35,033 (statements of Rep. Jeffords and Rep. Ashbrook). Rep. Ashbrook (who introduced the amendment to H.R. 6693 dealing with the distribution and sale of child pornography) objected to the House version of S. 1585 because it did not include the Roth amendment. *Id.* at 35,031. Rep. Ashbrook stated that he believed the Supreme Court would uphold the Roth language "particularly in light of the fact that distributors and purveyors of child pornography, of child sexual movies, are a source of greed and profit." *Id.* at 35,033. Rep. Jeffords stated that the Roth amendment was crucial in order to "shut off the market," noting that if producers could not sell the material, they would not produce it. *Id.* at 35,033.

³⁶ *Id.* at 35,031-32 (statement of Rep. Conyers).

³⁷ *Id.* at 35,033.

3. *Legal Debate Surrounding the Proposed Legislation Regulating Child Pornography Distributors*

Several government bodies considered the proposed Senate and House bills regulating child pornography. In particular, these government bodies addressed two issues regarding the provisions pertaining to distributors: (1) the lack of an obscenity requirement and (2) the use of "knowingly."

a. Lack of an obscenity requirement

In reviewing provisions covering distributors of child pornography, the Department of Justice stated that the material targeted by laws aimed at producers and distributors would have to meet the obscenity test so that non-obscene materials protected by the First Amendment would remain unregulated.³⁸

Considering the lack of an obscenity requirement, the Committee on the Judiciary for the Senate distinguished between the treatment of producers and distributors, stating that it could not extend federal law to make illegal the sale and distribution of materials whose production involved the use of minors in sexually explicit conduct because of First Amendment considerations.³⁹ Thus, it proposed merely amending existing obscenity laws to provide for more severe penalties for the sale and distribution of obscene materials depicting children in sexually explicit conduct.⁴⁰

³⁸ *Sexual Exploitation of Children: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 309 (1977) (statement of John Keeney, Deputy Assistant Attorney General, U.S. Department of Justice). "It would have to be found that the film, the photograph, the magazine appealed to prurient interest and otherwise met the tests of *Miller*, which would require that it really have no social, artistic, scientific, or politically redeeming features." *Id.* at 309-10.

See also S. REP. NO. 438, 95th Cong., 1st Sess. 24-27 (1977) (letter from Assistant Attorney General Patricia M. Wald to Chairman for the Senate Committee on the Judiciary James O. Eastland considering S. 1011, stating: "In the face of the strong constitutional protection accorded material which is not obscene, we cannot say with certainty that the proposed legislation would withstand constitutional scrutiny").

See also *Protection of Children Against Sexual Exploitation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 85 (1977) (statement of Donald Nicholson, Staff Attorney, Criminal Division, Department of Justice) (noting the clash of interests exemplified by Supreme Court decisions striking down statutes that deal with material that is not obscene and decisions of the Court recognizing the interest in protecting the welfare of children). Peter Flaherty, Deputy Attorney General, U.S. Department of Justice, stated: "If the bill was clearly limited in its coverage to the use of children in producing materials which were themselves obscene, there would be no problem at all as far as we see it." *Id.*

³⁹ S. REP. NO. 438, 95th Cong., 1st Sess. 17 (1977).

⁴⁰ *Id.* See *id.* at 20-21 (proposing amendments to 18 U.S.C. § 1461 (prohibiting the mailing of obscene or crime-inciting matter), 18 U.S.C. § 1462 (prohibiting the importation or interstate transportation of obscene matters), and 18 U.S.C. § 1465 (prohibiting the inter-

b. Use of "knowingly"

The Department of Justice considered the use of the word "knowingly" in both the provision covering producers of child pornography and the provision covering distributors. It recommended that "knowingly" be stricken from the provision governing producers in order to prevent an interpretation that the government must prove that the defendant knew the child was a minor. The Department stated that the term "knowingly" was appropriate in the section covering distributors "to make it clear that the bill does not apply to common carriers or other innocent transporters who have no knowledge of the nature or character of the material involved."⁴¹ However, the Department of Justice advised: "To clarify the situation, the legislative history might reflect that the defendant's knowledge of the age of the child is not an element of the offense but that the bill is not intended to apply to innocent transportation with no knowledge of the nature or character of the material involved."⁴²

The Committee on the Judiciary for the Senate also considered the use of the word "knowingly" in provisions governing producers and distributors of child pornography.⁴³ The Committee stated that by including the word it intended to "require that the person charged under these provisions have knowledge or reason to know the purpose for which the minor was being used in the production of the material in question."⁴⁴

Taking the opposite position, the Committee on the Judiciary for

state transportation of obscene matters for sale or distribution)).

⁴¹ H.R. REP. NO. 696, 95th Cong., 1st Sess. 22 (1977) (statement of John Keeney, Deputy Assistant Attorney General, Criminal Division, considering H.R. 8059 §§ 8, 9(a)(1)). See also S. REP. NO. 438, 95th Cong., 1st Sess. 24, 28 (1977) (letter from Assistant Attorney General Patricia M. Wald to Chairman for the Senate Committee on the Judiciary James O. Eastland, considering S. 1011 §§ 2251, 2252(a)(1)).

⁴² See *id.*

⁴³ S. REP. NO. 438, 95th Cong., 1st Sess. 15 (1977) (considering S. 1585 as passed with the Roth amendment). The Committee offered an amendment of S. 1585 in the nature of a substitute and recommend that the bill, as amended, pass. *Id.* at 1. The only constitutional concerns noted by the Committee involved vague definitions and the lack of an obscenity requirement. *Id.* at 11-12.

⁴⁴ *Id.* at 15. S.1011 § 2251, covering producers of child pornography provides, in relevant part:

(a) It shall be unlawful for any person knowingly to employ, use, persuade, induce, entice, or coerce any minor to engage in, or to have a minor assist any other person to engage in, any sexually explicit conduct for the purpose of promoting any film, photography, negative, slide, book, magazine, or other print or visual medium, if such person knows or has reason to know that such film, photograph, negative, slide, book, magazine, or other print or visual medium will be mailed or otherwise transported in interstate or foreign commerce.

See *id.* at 2.

the House of Representatives addressed the removal of the word "knowingly" from that provision. The committee report explained: "The bill is no longer subject to an interpretation requiring the Government to prove the defendant's knowledge of everything that follows the word 'knowingly', including the age of the child. . . . It is not the intention of the committee to require the Government to prove the defendant knew the child was under age 16."⁴⁵

4. *Conference Committee Resolution on Legislation Regulating Child Pornography Distributors*

Despite the passage of bills containing the language of the Roth amendment in both the Senate and the House, the version of the provision covering distributors that emerged from the Conference Committee altered the language of the Roth amendment in two ways.⁴⁶ First, the final version included an obscenity requirement.⁴⁷ Second, the requirement that the material involve "a minor engaging in sexually explicit conduct" was broken off into a separate subclause introduced by the word "if" in the final version, unlike the Roth version which included that requirement in the same paragraph with "transport" or "ship." The legislative history does not reflect any discussion among members of Congress regarding this change. It is clear, however, that members of Congress, reviewing the final version of § 2252,

⁴⁵ H.R. REP. NO. 696, 95th Cong., 1st Sess. 12 (1977).

⁴⁶ The adopted version of § 2252(a) provides:

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce or mails, for the purpose of sale or distribution for sale, any obscene visual or print medium, if—

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium depicts such conduct; or

(2) knowingly receives for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale, any obscene visual or print medium that has been transported or shipped in interstate commerce or foreign commerce or mailed, if—

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium depicts such conduct; shall be punished as provided in subsection (b) of this section.

See H.R. REP. NO. 811, 95th Cong., 1st Sess. 2 (1977); S. REP. NO. 601, 95th Cong., 1st Sess. 2 (1977).

⁴⁷ See 123 CONG. REC. 37,135 (1977) (statements of Sen. Mathias and Sen. Roth). Senator Mathias supported the inclusion of the obscenity requirement: "The modification, incorporating the Supreme Court test for obscenity as laid down in *Miller v. California*, 413 U.S. 445 (1973), guarantees in my opinion the constitutionality of the legislation." *Id.* Senator Roth, however, expressed his disappointment that the conferees had "chosen to weaken" the amendment by inserting the obscenity requirement and questioned the ability of the conference to make such a change in view of the 73 to 13 vote in the Senate passing the amendment and an instruction in the House by a vote of 358 to 54 to adopt the Roth amendment. *Id.* at 37,135-36.

regarded the inclusion of the obscenity requirement as the only significant change from the Roth amendment language.⁴⁸

The Conference Report from the Committee of Conference gave little explanation for the changes.⁴⁹ The Committee accepted the House version of the provision covering producers which did not contain an express requirement that the crime be committed "knowingly"; it accepted this provision "with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child."⁵⁰

The Committee adopted the Senate version of the provision covering distributors, which modified the provision to require that the visual depiction be obscene.⁵¹ The Committee did not directly address the issue of the use of the word "knowingly" in that section, stating only that:

It is the intent of the conference committee that if a minor has engaged in this sexually explicit conduct and there was a production of material using any printed or visual medium depicting such conduct that persons who knowingly transport, ship, or mail for the purpose of sale or distribution, or knowingly thereafter receive for sale or distribution, or knowingly thereafter sell or distribute for sale any such material are liable whether or not they have contact with the minor or the original production of the material.⁵²

⁴⁸ 124 CONG. REC. 526-28 (1978) (statements of Rep. Conyers and Rep. Ashbrook). Rep. Ashbrook stated: "The Roth language which came before the Congress was not accepted specifically as it was adopted in the Senate. It was modified then to include the word 'obscene.' I believe this does reduce some of the value and strength of the Roth amendment. I think, in all fairness, we have about 90 percent of the Roth amendment." *Id.* at 527-28. Rep. Conyers stated that the new sections added to Title 18 would "go after the distributors and transporters. . . . That we do by adding the language of the so-called Roth amendment with an obscenity standard which has been established by a line of Supreme Court decisions." *Id.* at 527.

⁴⁹ See H.R. REP. NO. 811, 95th Cong., 1st Sess. 5-7 (1977); S. REP. NO. 601, 95th Cong., 1st Sess. 5-7 (1977) [hereinafter Conference Reports].

⁵⁰ Conference Reports, *supra* note 49, at 5. The adopted version of § 2251 provided that:

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished as provided in subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed, or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

See Conference Reports at 1-2.

⁵¹ Conference Reports, *supra* note 49, at 6-7.

⁵² Conference Reports, *supra* note 49, at 7.

C. *NEW YORK V. FERBER* AND THE ELIMINATION OF THE OBSCENITY REQUIREMENT

In 1982, the Supreme Court decided *New York v. Ferber*.⁵³ In *Ferber*, the Court held that a New York statute prohibiting persons from knowingly promoting a sexual performance by a child under the age of sixteen by distributing material depicting such a performance did not violate the First Amendment.⁵⁴ The statute prohibited distribution of materials that did not qualify as obscene—materials previously considered within the scope of First Amendment protection.⁵⁵ In holding the statute constitutional, the Court recognized child pornography as a category of material outside the protection of the First Amendment.⁵⁶ It reasoned that because child pornography “bears so heavily and so pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these material as without the protection of the First Amendment.”⁵⁷ However, the Court cautioned: “as with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant.”⁵⁸

As a result of the *Ferber* decision, Congress eliminated the obscenity requirement when it amended the 1977 Act in 1984 (the 1984 Act).⁵⁹ Congress recognized that an obscenity requirement could

⁵³ 485 U.S. 747 (1982).

⁵⁴ *Id.* at 750.

⁵⁵ *Id.*

⁵⁶ *See id.* at 756-64.

⁵⁷ *Id.* at 764. In reaching its conclusion, the Court considered the following: (1) a state's interest in protecting the well-being of children is clearly “compelling”; (2) the distribution of photographs and films depicting children engaged in sexual activity is intrinsically related to the sexual abuse of children; (3) the advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials; (4) the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis; (5) recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with earlier decisions. *Id.* at 756-64.

However, the Court limited the category of child pornography, noting that “the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.” *Id.* at 764-65.

⁵⁸ *Id.* at 765 (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)).

⁵⁹ S. REP. NO. 169, 98th Cong. 1st Sess. 6-7 (1983); H.R. REP. NO. 536, 98th Cong. 1st Sess. 1-2 (1983). *See* Protection of Children Against Sexual Exploitation Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251-2256 (1984)). Congress did not change the placement of the word “knowingly” in § 2252, and the issue of scienter as to either the age of the minor or to the nature of the materials was not raised.

serve as an impediment to conviction and therefore removed the obscenity requirement to maximize the protection of federal law to minors.⁶⁰

D. CONSIDERATION OF "KNOWINGLY" IN THE 1986 AMENDMENTS

The Child Sexual Abuse and Pornography Act of 1986 (the 1986 Act) added a provision to the text of the 1977 Act banning the production and use of advertisements for child pornography.⁶¹ That section rendered illegal the conduct of any individual who "knowingly makes, prints, or publishes" an advertisement offering to receive any visual depiction involving the use of a minor engaged in sexually explicit conduct.⁶² Congress explained its intention in using the word "knowingly": the "government must prove that the defendant knew the character of the visual depictions as depicting a minor engaging in sexually explicit conduct, but need not prove that the defendant actu-

⁶⁰ S. REP. NO. 169 at 7; H.R. REP. NO. 536 at 1. The other significant change in § 2252 was the elimination of the commercial purpose requirement. S. REP. NO. 169 at 6; H.R. REP. NO. 536 at 1. As amended by the 1984 Act, § 2252(a) provided:

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce or mails, for the purpose of sale or distribution for sale, any visual or print medium, if—

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium depicts such conduct; or such visual or print medium is obscene and depicts such conduct; or

(2) knowingly receives, sells or distributes any visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, if—

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium depicts such conduct or such visual or print medium is obscene and depicts such conduct; shall be punished as provided in subsection (b) of this section.

⁶¹ Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510 (1986). See H.R. REP. NO. 910, 99th Cong. 2d Sess. 1 (1986).

⁶² *Id.* The 1986 Act amended 18 U.S.C. § 2251 in relevant part by inserting subsection (c) which provides:

(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such depiction involves the use of a minor engaged in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit by or with any minor for the purpose of producing a visual depiction of such conduct; shall be punished as provided under subsection (d).

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be transported in interstate commerce or mailed; or

(B) such notice or advertisement is transported in interstate commerce or mailed;

Id. at 1-2.

ally knew the person depicted was in fact under 18 years of age or that the depictions violated Federal law.”⁶³

E. SUPREME COURT DECISIONS INTERPRETING SCIENTER REQUIREMENTS
IN REGULATING PORNOGRAPHY DISTRIBUTION

The Supreme Court considered the level of scienter required for laws regulating pornography distributors in three major decisions prior to *X-Citement Video*. In *Smith v. California*, the Court held that obscenity laws must contain a scienter requirement.⁶⁴ The Court invalidated a California obscenity statute that imposed strict liability on distributors of obscene material stating: “[T]he constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a [strict liability] requirement on the bookseller.”⁶⁵ The Court did not define, however, what degree of scienter was required.⁶⁶

In *Hamling v. United States* the Court evaluated the scienter requirement in a federal statute criminalizing the mailing of obscene materials.⁶⁷ The Court held that the government was not required to prove that the defendant had knowledge of the legal status of the materials involved, so long as the defendant had some knowledge of their contents. “It is constitutionally sufficient that the prosecution show that the defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials.”⁶⁸

While *Smith* and *Hamling* discussed scienter with respect to pornography, illegal because it was obscene, in *Osborne v. Ohio* the Court examined what level of scienter was required for a law regulating child pornography, illegal because it depicted minors.⁶⁹ The Court reviewed an Ohio state statute criminalizing the possession of child pornography that had no scienter requirement.⁷⁰ An Ohio default statute provided that recklessness was the appropriate *mens rea* where a statute does not specify culpability or indicate a purpose to impose strict liability.⁷¹ The Court concluded that, although on its face the statute lacked a *mens rea* requirement, “that omission brings into play

⁶³ *Id.* at 6.

⁶⁴ 361 U.S. 147 (1959).

⁶⁵ *Id.* at 152-53.

⁶⁶ *Id.*

⁶⁷ 418 U.S. 87 (1974).

⁶⁸ *Id.* at 123. The Ninth Circuit, in *Ripplinger v. Collins*, interpreted *Hamling* as requiring a distributor of obscene materials know only the character of the materials distributed and not the specific content. *Ripplinger v. Collins*, 868 F.2d 1043, 1055-56 (9th Cir. 1989).

⁶⁹ 495 U.S. 103 (1990).

⁷⁰ *Id.* at 106 (citing Ohio Rev. Code Ann. § 2907.323(A)(3) (Supp. 1989)).

⁷¹ *Id.* at 114 n.9 (citing Ohio Rev. Stat. Ann. § 2901.21(B) (1987)).

and is cured by [the default statute] that plainly satisfies the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter.”⁷²

F. NINTH CIRCUIT AND OTHER LOWER COURT DECISIONS INTERPRETING § 2252

Decisions evaluating whether § 2252 requires scienter in the Ninth Circuit and other lower courts have varied. The Ninth Circuit in *United States v. Moncini* found that under § 2252, a defendant needed to have knowledge regarding the nature of the contents mailed to be liable.⁷³ Other lower courts have also found § 2252 contains a scienter requirement.⁷⁴ However, a later Ninth Circuit decision rejected the notion that § 2252 contained a scienter requirement as to the age of the minor and, without addressing the constitutional-

⁷² *Id.* at 115.

⁷³ 882 F.2d 401, 404 (9th Cir. 1989) (rejecting defendant's claim that § 2252 required the government prove that he knew the material he mailed was actually illegal).

⁷⁴ See, e.g., *United States v. Knox*, 977 F.2d 815, 825 (3d Cir. 1992) (defendant must be aware of the general nature and character of the materials but need not know they are illegal), vacated and remanded, 114 S. Ct. 375 (1993); *United States v. Osborne*, 935 F.2d 32, 34 n.2 (4th Cir. 1991) (common sense meaning of 'knowing receipt' is that the defendant know he ordered child pornography); *United States v. Brown*, 862 F.2d 1033, 1036 (3d Cir. 1988) (holding that a recipient must know that the materials received are child pornography); *United States v. Marchant*, 803 F.2d 174, 176 (5th Cir. 1986) (government must prove defendant knowingly received child pornography); *United States v. Duncan*, 896 F.2d 271, 278 (7th Cir. 1990) (holding that titles of videos ordered were enough evidence for jury to conclude that defendant knew videos depicted children engaged in sexually explicit acts); *United States v. Garot*, 801 F.2d 1241, 1247 (10th Cir. 1986) (finding certain exhibits relevant for proof of scienter under § 2252); *United States v. Maday*, No. CR-88-145E, 1989 WL 53023, *3 (W.D.N.Y. May 18, 1989) (reading in knowledge requirement); *United States v. Sherin*, No. 86-CR-480, 1987 WL 6146, *7 (S.D.N.Y. Jan. 28, 1987) (government must prove distributors knew underage status of performers).

Several courts of appeals considered and rejected the Ninth Circuit's decision in *X-Citement Video* holding that § 2252 did not contain a scienter requirement. Brief for Petitioner at 12, *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994) (No. 93-723). See, e.g., *United States v. Brurian*, 19 F.3d 188, 191 (5th Cir. 1994) (interpreting the statute to require actual knowledge or reckless disregard of a performer's minority); *United States v. Colavito*, 19 F.3d 69, 71 (2d Cir. 1994) (provision can be fairly read to require that defendant know he is receiving items that depict child pornography); *United States v. Gendron*, 18 F.3d 955, 957 (1st Cir. 1994) (finding that "knowingly" modifies not only the word "receives" but also the statute's description of the received material's pornographic content); *United States v. Gifford*, 17 F.3d 462, 472 (1st Cir. 1994) (reading "knowingly" to modify not only the word "receives" but also the entire paragraph including age and conduct and finding that "knowingly" can refer to recklessness rather than actual knowledge); *United States v. Cochran*, 17 F.3d 56, 60 (3d Cir. 1994) (provision requires knowledge that one or more of the performers is underage).

Several district courts also rejected the Ninth Circuit's holding in *X-Citement Video*. See, e.g., *United States v. Edwards*, No. 92-CR-884, 1993 WL 453461 (N.D. Ill. Nov. 4, 1993); *United States v. Long*, 831 F. Supp. 582 (W.D. Ky. 1993); *United States v. Kempton*, 826 F. Supp. 386 (D. Kan. 1993); *United States v. Prytz*, 822 F. Supp. 311 (D.S.C. 1993).

ity of the statute, found that the statute only required that the defendant knowingly transported and received the material.⁷⁵ Other lower courts have also ignored constitutional issues and interpreted § 2252 as a strict liability statute.⁷⁶

G. SCIENTER AND CRIMINAL OFFENSES

Criminal offenses generally must contain a scienter requirement; intent is almost always an indispensable element in a criminal statute.⁷⁷ The Court disfavors strict liability offenses.⁷⁸ Even where a statute does not specify a *mens rea* component, the rule of lenity⁷⁹ directs courts to read a state of mind element into the offense.⁸⁰ The Court has explained: "Although the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time-honored interpretive guideline when the congressional purpose is unclear."⁸¹

⁷⁵ *United States v. Thomas*, 893 F.2d 1066, 1069-70 (9th Cir.), *cert. denied*, 498 U.S. 826 (1990). Another Ninth Circuit opinion, *United States v. United States District Court for the Central District of California*, addressed § 2251, the provision governing liability of producers of child pornography. 858 F.2d 534 (9th Cir. 1988). Judge Kozinski, writing for the majority, concluded that, under *Smith v. California*, the section may not make defendants strictly liable because it restricts speech. *Id.* at 358-41. To save the statute from being found unconstitutional, he engrafted an affirmative mistake of age defense onto § 2251. *Id.* at 540-43. The opinion did not address § 2252 directly but did distinguish between producers and distributors stating that because distributors are not in a position to learn the ages of the individuals involved, a higher degree of scienter would be necessary to find them liable. *Id.* at 544.

⁷⁶ See, e.g., *United States v. Kleiner*, 663 F. Supp. 43, 44 (S.D. Fla. 1987) (concluding that a shipper of child pornography need not know age of performers to be held liable although not specifically considering constitutional issues); *United States v. Reedy*, 632 F. Supp. 1415, 1423 (W.D. Okla. 1986) (in reviewing a § 2251 conviction, found the provision to contain no constitutional requirement regarding knowledge of performers age), *aff'd*, 845 F.2d 239 (10th Cir. 1988), *cert. denied*, 489 U.S. 1055 (1989); *United States v. Tolczeki*, 614 F. Supp. 1424, 1429 (N.D. Ohio 1985) (upholding § 2252 against a constitutional challenge despite finding that it contains no scienter requirement).

⁷⁷ *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978). A general rule of American criminal law is that every crime must include a *mens rea* and an *actus reus*—the "concurrence of an evil-meaning mind with an evil-doing hand." Fuhrman, *supra* note 10, at 97 (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952)).

⁷⁸ *United States Gypsum Co.*, 438 U.S. at 437-38. However, in limited circumstances, Congress has created and the Court has recognized strict liability offenses. *Id.* at 437.

⁷⁹ This is the common law tradition that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States Gypsum Co.*, 438 U.S. at 437 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

⁸⁰ *Id.* Where intent is absent from the statute, "Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and 'absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them.'" *Id.* (quoting *Morissette*, 342 U.S. at 263).

⁸¹ *Liparota v. United States*, 471 U.S. 419, 427 (1985) (holding that, despite the absence of a *mens rea* requirement in the relevant statute, the Government must prove that

However, public welfare offenses are the exception to the general rule requiring scienter. These offenses dispense with the conventional *mens rea* requirement for criminal conduct.⁸² Cases recognizing such offenses typically involve conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten community health or safety and involve statutes that regulate potentially harmful or injurious items.⁸³ The Court relies "on the nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional *mens rea* requirements."⁸⁴

III. FACTS AND PROCEDURAL HISTORY

In June of 1986, Los Angeles Police Officer Steven Takeshita and FBI Special Agent Nellie Magdaloyo, posing as pornography distributors, met with defendant-petitioner Rubin Gottesman at the business premises of X-Citement Video, which Gottesman owned.⁸⁵ Officer Takeshita purported to own a video store in Hawaii that Agent Magdaloyo supposedly managed.⁸⁶ At the meeting, Gottesman agreed to ship videotapes showing adults engaging in sexually explicit conduct to the store in Hawaii.⁸⁷ Officer Takeshita returned to X-Citement Video the following month and again spoke with Gottesman.⁸⁸ Gottesman mentioned that he was keeping some tapes at his residence because of the Traci Lords investigation.⁸⁹

defendant had knowledge that his conduct was performed in a manner unauthorized by statute, although the Government need not show that the defendant had any knowledge of specific regulations governing the conduct).

⁸² *Staples v. United States*, 114 S. Ct. 1793, 1797 (1994). In *Staples*, the Court determined that a statute regulating possession of an automatic rifle was not a public welfare offense, holding that the government was required to prove that the defendant knew of the automatic firing features that brought it within the scope of the regulatory requirement. *Id.* at 1804.

⁸³ *Liparota*, 471 U.S. at 433. In those situations, as long as the defendant knows that he is dealing with a dangerous item, he should be alerted to the probability of strict regulation, and it is his burden to determine whether his conduct is crossing the boundaries of the law. *Staples*, 114 S. Ct. at 1798.

⁸⁴ *Staples*, 114 S. Ct. at 1798. See generally *Morissette*, 342 U.S. at 252-60.

⁸⁵ Brief for Petitioner at 4, *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994) (No. 93-723).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* Traci Lords first professional appearance was in the September 1984 issue of *Penthouse* magazine when she was sixteen. Brief for Respondent at 4, *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994) (No. 93-723). She was considered one of the top adult film actresses in the country and made about 75 sexually explicit movies and videos before she was eighteen years old. *Id.* Lords provided prospective employers with a

Officer Takeshita returned six months later to purchase additional videotapes.⁹⁰ He stated that he wanted tapes that Traci Lords had made when she was under the age of eighteen.⁹¹ He was shown forty-nine tapes featuring Lords, two of which were identified as her earliest films.⁹² Gottesman said that he would accept only cash for the tapes because he did not want to create any record of the transactions.⁹³ He declined to ship the tapes to Hawaii because he was under federal investigation.⁹⁴ Takeshita returned to pick up the tapes the next day; Gottesman warned him that anyone willing to pay over \$50 for the tapes was probably a police officer and advised him that it was probably safe to sell the tapes in Hawaii because the government did not prosecute the sale of child pornography there.⁹⁵

Officer Takeshita returned to X-Citement Video on February 13, 1987.⁹⁶ Gottesman informed him that he had fifty-six additional Lords tapes available.⁹⁷ Takeshita asked Gottesman to ship the tapes to Hawaii.⁹⁸ Although initially Gottesman declined the request—noting that because Lords was a minor, interstate shipment of the films would be unlawful—two months later he eventually agreed to ship the tapes to Hawaii.⁹⁹

The initial sale of a box of forty-nine tapes directly to the police officer formed the basis for the charge that Gottesman had distributed child pornography in violation of 18 U.S.C. § 2252(a)(2).¹⁰⁰ The second sale of a box of eight tapes sold to the police officer and sent to Hawaii formed the basis of the charge that Gottesman shipped child pornography in violation of 18 U.S.C. § 2252(a)(1).¹⁰¹

A federal grand jury indicted Gottesman for distributing, shipping, and conspiring to distribute and ship child pornography in violation of 18 U.S.C. 2252 §§ (a)(1) and (a)(2),¹⁰² along with one count of conspiracy to do the same under 18 U.S.C. § 371.¹⁰³ In a bench

California drivers license, a U.S. passport, and a birth certificate giving a date of birth of November 17, 1962. *Id.*

⁹⁰ Petitioner's Brief at 4, *X-Citement Video* (No. 93-723).

⁹¹ *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1286 (9th Cir. 1992).

⁹² Petitioner's Brief at 4, *X-Citement Video* (No. 93-723).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 5.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *United States v. X-Citement Video*, 982 F.2d 1285, 1286 (9th Cir. 1992).

¹⁰³ See *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 466 (1994). The indictment also charged six counts of violating federal obscenity statutes and two racketeering

trial in the United States District Court for the Central District of California, Gottesman testified that he knew of the rumors that Lords was under eighteen when she made the tapes but that he believed she was over eighteen at that time.¹⁰⁴ Gottesman knew Lords personally, having met with her between forty and fifty times over a three year period.¹⁰⁵ He testified that he believed she falsely floated the rumor that she was under eighteen when the tapes were made to drive the tapes from the market so that a new film she was in the process of making at that time would be more valuable.¹⁰⁶

At the close of the government's case and at the close of all of the evidence, Gottesman moved for acquittal based on the following arguments: (1) § 2252 is unconstitutional on its face because it does not require scienter as to minority; (2) the indictment is constitutionally defective because it does not allege that respondents knew Lords was under eighteen; (3) the Lords tapes were not "child pornography."¹⁰⁷ The district court rejected these arguments.¹⁰⁸ The court concluded that § 2252 implies a scienter as to minority requirement and that the government was required to prove and did prove scienter by showing that Gottesman knew that the person depicted in the videotapes was under eighteen years of age.¹⁰⁹ The court stated: "It is axiomatic that to know the nature and character of child pornography, almost by definition, one must know that it depicts children."¹¹⁰ Gottesman was convicted on all counts brought under § 2252, and the district court sentenced him to twelve months incarceration and ordered him to pay a \$100,000 fine.¹¹¹

After Gottesman filed a notice of appeal, the Ninth Circuit decided *United States v. Thomas*,¹¹² holding that the word "knowingly" in § 2252 "does not require that [the defendant] knew that the pornography he transported, mailed and received involved a minor. The section requires only that [the defendant] knowingly transported and received the material."¹¹³ The *Thomas* court did not address whether

counts involving the same; Gottesman was acquitted of these charges. *Id.* at 466 n.1.

¹⁰⁴ Respondent's Brief at 4, *X-Citement Video* (No. 93-723).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 5. Lords made about a million dollars from an adult movie she appeared in shortly after the newspaper articles appeared. *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Petitioner's Brief at 5-6, *X-Citement Video* (No. 93-723); Respondent's Brief at 5-6, *X-Citement Video* (No. 93-723).

¹¹⁰ *Id.*

¹¹¹ *United States v. X-Citement Video*, 982 F.2d 1285, 1286 (9th Cir. 1992).

¹¹² 893 F.2d 1066 (9th Cir.), *cert. denied*, 498 U.S. 826 (1990).

¹¹³ *Thomas*, 893 F.2d at 1070. See Petitioner's Brief at 6, *X-Citement Video* (No. 93-723); Respondent's Brief at 6, *X-Citement Video* (No. 93-723).

§ 2252, as so construed, was constitutional.¹¹⁴ Gottesman requested and received a remand to district court for reconsideration in light of *Thomas*.¹¹⁵ On remand, Gottesman argued that because *Thomas* ruled that § 2252 lacked a requirement that a defendant know that he is distributing or shipping child pornography, the statute on its face violates the First and Fifth Amendments.¹¹⁶

Considering Gottesman's arguments on remand, the district court modified its earlier conclusion that the government met its burden under § 2252 by showing that Gottesman knew Lords was a minor when she made the videotapes.¹¹⁷ It changed its interpretation of the scienter requirement in the statute, finding that the government met its burden "when it proved that defendant had knowledge of the 'character and contents' of the material."¹¹⁸ However, the court did not retract its earlier finding that Gottesman knew that Traci Lords was a minor when she made the films.¹¹⁹

The district court considered the constitutionality of § 2252 and held that it was constitutional.¹²⁰ However, the court apparently did not believe the statute contained a scienter requirement: the court stated that "Congress specifically omitted a mens rea requirement for conviction under the statute in order to establish a per se rule making it illegal for persons to knowingly transport, ship, receive or distribute . . . the prohibited material involving sexual exploitation of minors."¹²¹

On appeal to the Ninth Circuit, Gottesman contended that § 2252 is unconstitutional on its face because it does not require scienter.¹²² In response, the government argued that § 2252 did require scienter because it required that the defendant have general knowledge as to the nature of the contents of the materials—that they depict child pornography—just as obscenity statutes required the defendant have knowledge that the materials are obscene.¹²³

The Ninth Circuit reversed Gottesman's conviction, holding that § 2252 is unconstitutional on its face because it does not require scien-

¹¹⁴ Petitioner's Brief at 6, *X-Citement Video* (No. 93-723).

¹¹⁵ *Id.*; Respondent's Brief at 6, *X-Citement Video* (No. 93-723).

¹¹⁶ *United States v. X-Citement Video*, 982 F.2d 1285, 1286 (9th Cir. 1992).

¹¹⁷ Petitioner's Brief at 6, *X-Citement Video* (No. 93-723).

¹¹⁸ Respondent's Brief at 6, *X-Citement Video* (No. 93-723).

¹¹⁹ Petitioner's Brief at 7, *X-Citement Video* (No. 93-723).

¹²⁰ *Id.* at 6-7. The court found that § 2252 "does not impermissibly chill the distribution of constitutionally protected material" and is "sufficiently specific and definite to give fair notice to potential offenders so as not to be deemed void for vagueness." *Id.*

¹²¹ Respondent's Brief at 6, *X-Citement Video* (No. 93-723).

¹²² *United States v. X-Citement Video*, 982 F.2d 1285, 1286-87 (9th Cir. 1992).

¹²³ Respondent's Brief at 7, *X-Citement Video* (No. 93-723). The government did not argue that the statute required knowledge as to the age of the minor depicted. *Id.*

ter as to minority.¹²⁴ Applying the Supreme Court's reasoning in *Hamling v. United States*,¹²⁵ the court determined that at a minimum, the government must prove the defendant knew one of the performers depicted was a minor.¹²⁶ The court also relied on *Smith v. California*¹²⁷ and *New York v. Ferber*¹²⁸ to support its position that for a statute prohibiting the distribution of prohibited materials to be constitutional, it must require the defendant have some knowledge of the contents of the materials.¹²⁹

Although in a previous decision the Ninth Circuit held that the Constitution did not require knowledge of the minority of the performer where the defendant was a producer,¹³⁰ it explained that distributors are in a far different position.¹³¹ The court reasoned that producers are in a position to know or learn the ages of their employees while distributors are not: to hold sellers to the same standard would require them to learn the ages of actors with whom they have had no direct contact.¹³² This would chill protected speech, violating the First Amendment.¹³³ Thus, without a scienter requirement, § 2252 was unconstitutional.

The court examined whether it could construe § 2252 to save its constitutionality.¹³⁴ The court determined that in light of *Thomas* it could not: *Thomas* ruled squarely that scienter of the minority of the performer was not an element of the crime defined by § 2252.¹³⁵ The

¹²⁴ *X-Citement Video*, 982 F.2d at 1287.

¹²⁵ 418 U.S. 87 (1974). In *Hamling*, the Court held that it is constitutionally sufficient that the prosecution show a defendant had knowledge of the contents of the materials he distributed and the nature of those contents. *Id.* at 123. The Ninth Circuit previously had applied *Hamling* in *Ripplinger v. Collins*, 868 F.2d 1043, 1055-56 (9th Cir. 1989), where it found a statutory definition unconstitutional on its face because it did not require actual knowledge of the contents of the pornographic material, indicating that a statute must require such knowledge in order to pass constitutional muster. *X-Citement Video*, 982 F.2d at 1290 (citing *Ripplinger*, 868 F.2d at 1056). See *supra* note 68.

¹²⁶ *X-Citement Video*, 982 F.2d at 1291.

¹²⁷ 361 U.S. 147 (1959). The Court held that the First Amendment prohibits prosecution of a book distributor for possession of an obscene book unless the distributor knows the contents of the book. *Id.* at 154.

¹²⁸ 485 U.S. 747 (1982). The Court held that the defendant in a child pornography case must have some element of scienter before criminal responsibility can be imposed. *Id.* at 765. See *infra* part II.C.

¹²⁹ *X-Citement Video*, 982 F.2d at 1290.

¹³⁰ *United States v. United States District Court for the Central District of California*, 858 F.2d 534 (9th Cir. 1988). See *supra* note 75.

¹³¹ *X-Citement Video*, 982 F.2d at 1291.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 1292.

¹³⁵ *Id.* The court found the case at bar distinguishable from *United States District Court*, where the court engrafted an affirmative defense on to § 2251(a) in order to save it from being found unconstitutional; it reasoned that engrafting an element of the crime onto a

majority held that the statute was unconstitutional and accordingly reversed Gottesman's conviction.¹³⁶

Judge Kozinski dissented in part. While he agreed with the majority that a child pornography statute must contain a *mens rea* requirement, he did not agree that Gottesman must have known the videos he sold depicted pornography: recklessness would have sufficed.¹³⁷ Furthermore, he found that under traditional rules of construction, the court can read a mental state of recklessness into the statute in order to bring it in line with the Constitution.¹³⁸ Judge Kozinski relied on *Osborne v. Ohio*¹³⁹ for support.¹⁴⁰

Additionally, Judge Kozinski rejected the majority's contention that *Thomas* decided the issue. He reasoned that *Thomas* did not consider or exclude the possibility that a lower level of scienter might apply as a matter of constitutional interpretation: *Thomas* merely decided that the word "knowingly" in the statute does not apply to the age of the depicted children.¹⁴¹ Thus, he concluded that because *Thomas* could not be read to foreclose the issue, it was the court's duty to save § 2252(a) by reading into it a requirement that the defendant acted recklessly as the age of the minor.¹⁴²

statute comes much closer to judicial rewriting. *Id.* Furthermore, the court noted that the *Thomas* court was fully aware of *United States District Court* and its rationale, yet declined to analogize to *United States District Court* to find that scienter was an element of the crime in § 2252. *Id.* The court declined to rely, as the government asked, on *United States v. Moncini*, 882 F.2d 401 (9th Cir. 1989) which stated that § 2252 required the government to prove that the defendant have knowledge of the nature of the contents of the visual depictions and that the depictions were to be transported or shipped but that no more was required. *X-Citement Video*, 982 F.2d at 1289-90 (citing *Moncini*, 882 F.2d at 404). The court reasoned that the statement was dictum and unnecessary to the ruling. *Id.* at 1290. The court determined that *Thomas*, therefore, was the only precedent in the Ninth Circuit resolving the question of whether § 2252 requires scienter of the minority of the performers. *Id.*

¹³⁶ *X-Citement Video*, 982 F.2d at 1292.

¹³⁷ *X-Citement Video*, 982 F.2d at 1292 (Kozinski, J., dissenting).

¹³⁸ *Id.* (Kozinski, J., dissenting). Judge Kozinski noted: "It is inconceivable that given the choice between no statute at all and a statute that contains a requirement of recklessness, those involved in passing the child pornography statute would have chosen the former rather than the latter." *Id.* at 1297.

¹³⁹ 495 U.S. 103 (1990).

¹⁴⁰ *X-Citement Video*, 982 F.2d at 1292-93 (Kozinski, J., dissenting). *Osborne* upheld an Ohio statute that outlawed the possession of child pornography where the defendant either knew the performers were underage or was at least reckless as to that fact, although the statute itself failed to specify a scienter. 495 U.S. at 114 n.9. Ohio law provided that recklessness was the appropriate *mens rea* where a statute neither specified culpability nor plainly indicated a purpose to impose strict liability. *Id.* See *infra* part II.E.

¹⁴¹ *X-Citement Video*, 982 F.2d at 1295 (Kozinski, J., dissenting) (citing *United States v. Thomas*, 893 F.2d 1066, 1070 (9th Cir.), *cert. denied*, 498 U.S. 826 (1990)).

¹⁴² *Id.* at 1296 (Kozinski, J., dissenting).

The United States Supreme Court granted certiorari¹⁴³ to determine whether the term "knowingly," as used in § 2252, modifies the noun phrases which separate criminal from innocent conduct or whether it modifies only the surrounding verbs.

IV. SUMMARY OF OPINIONS

A. MAJORITY OPINION

In an opinion written by Chief Justice Rehnquist,¹⁴⁴ the Court held that the term "knowingly" in § 2252 extends both to the sexually explicit nature of the materials and to the age of the performers.¹⁴⁵ Justice Rehnquist began his analysis by discussing the anomalies that would result from the most natural grammatical reading adopted by the Ninth Circuit.¹⁴⁶ Under such a reading, the word knowingly modifies only the surrounding verbs—transports, ships, receives, distributes, or reproduces—and not 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.¹⁴⁷ The Court explained that certain applications of this reading would produce absurd results: "For instance, a retail druggist who returns an uninspected roll of developed film to a customer 'knowingly distributes' a visual depiction and would be criminally liable if it were later discovered that the visual depiction contained images of children engaged in sexually explicit conduct. . . . We do not assume that Congress, in passing laws, intended such results."¹⁴⁸

The Court next used three of its prior decisions to support the presumption that the scienter requirement should apply broadly to each of the statutory elements, even where the statute itself does not contain them.¹⁴⁹ First, in *Morissette v. United States*¹⁵⁰ the Court con-

¹⁴³ *United States v. X-Citement Video, Inc.*, 114 S. Ct. 1186 (1994).

¹⁴⁴ *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994). Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined in the opinion. Justice Stevens filed a concurring opinion in which he argued that under a normal, common sense reading of the statute, "knowingly" modifies each element of the offense contained in the subsection, noting that in other cases the court has gone much farther than merely requiring proof of scienter for each element of the offense. *Id.* at 472 (Stevens, J., concurring) (citing *Staples v. United States*, 114 S. Ct. 1793 (1994) (imposing a scienter requirement on an offense that never contained one in the first place)).

¹⁴⁵ *Id.* at 472.

¹⁴⁶ *Id.* at 467.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 467-68.

¹⁴⁹ *Id.* at 468-69.

¹⁵⁰ 342 U.S. 246 (1952). The statute at issue in that case, 18 U.S.C. § 641, read in relevant part: "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,

cluded that to be held liable under the statute at issue, the defendant had to have knowledge as to the criminal element in the statute.¹⁵¹ The Court determined that the word “knowingly” modified the phrase defining property of the United States—meaning that a defendant must know that the property at issue belongs to the United States—despite the fact that its isolated position suggested that it only attached to the verb “converts.”¹⁵² The Court supported its position by applying the background presumption of evil intent which requires scienter to impose criminal liability.¹⁵³

Second, in *Liparota v. United States*¹⁵⁴ the Court invoked the background principle set forth in *Morissette* to hold that, in a federal statute prohibiting certain actions with respect to food stamps, “knowingly” modified not only the verbs immediately adjacent but also the phrase “in any manner not authorized by [the statute],” which was significantly removed from the word “knowingly.”¹⁵⁵

Third, in *Staples v. United States*¹⁵⁶ the Court applied the same analysis in concluding that—despite the fact that Congress had not expressly imposed any *mens rea* requirement in the provision criminalizing the possession of a firearm in the absence of proper registration—to be criminally liable, a defendant must know that his weapon possessed the automatic firing capability so as to make it a machine gun requiring proper registration.¹⁵⁷

Analyzing these decisions, the Court stated that § 2252 is like the common law offenses found in the three cases.¹⁵⁸ Common law offenses presume a scienter requirement in the absence of express contrary intent.¹⁵⁹ *Morissette*, reinforced by *Staples*, instructs that a scienter requirement should apply to each of the statutory elements which criminalize otherwise innocent conduct.¹⁶⁰ Since non-obscene, sexually explicit materials involving persons over the age of seventeen are protected by the First Amendment, one would reasonably expect to be free from regulation when trafficking in those materials.¹⁶¹ Thus,

or thing of value of the United States . . . [s]hall be fined.” *Id.* at 248 n.2.

¹⁵¹ *Id.* at 270.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ 471 U.S. 419 (1985).

¹⁵⁵ *Id.* at 433.

¹⁵⁶ 114 S. Ct. 1793 (1994).

¹⁵⁷ *Id.* at 1804. See *supra* note 82.

¹⁵⁸ *United States v. X-Citement Video*, 115 S. Ct. 464, 469 (1995).

¹⁵⁹ *Id.* By contrast, a public welfare offense does not require a scienter requirement because people “harbor settled expectations” that the offense is “generally subject to stringent regulation.” *Id.* at 468. See *infra* part II.G.

¹⁶⁰ *X-Citement Video*, 115 S. Ct. at 469.

¹⁶¹ *Id.*

"knowingly" must apply to the age of the performers, because it is the crucial element separating legal innocence from wrongful conduct.¹⁶²

The Court also relied on the legislative history of the statute, finding two aspects most persuasive. First, when Congress amended the statute in 1984 to broaden the spectrum of prohibited materials from merely obscene materials to include non-obscene, sexually explicit materials involving children, it did not express any intent to eliminate the *mens rea* requirement that had previously attached to the character and content of the material through the word "obscene."¹⁶³ Second, in an exchange during the debate over the Roth amendment¹⁶⁴—the initial version of the provision covering distributors of child pornography—Senator Percy inquired if a distributor or seller must have had knowledge of circumstances which were such that he should have had actual knowledge to render his actions unlawful.¹⁶⁵ Senator Roth replied that this was correct, adding that "knowingly" insures that only those deliberately engaged in the marketing of child pornography would be subject to prosecution.¹⁶⁶ Analyzing this legislative history, the Court concluded that Congress intended "knowingly" apply to the requirement that the depiction be of sexually explicit conduct.¹⁶⁷ Although the Court acknowledged that it was less clear from Committee Reports and floor debates that Congress intended "knowingly" to extend also to the age of the performers, the Court reasoned that if "knowingly" applied to the sexually explicit conduct depicted element, it was emancipated from merely modifying the verbs and must, therefore, modify the age of minority element as well.¹⁶⁸

The Court also relied on a canon of statutory construction to support the reading that the term "knowingly" applies to both elements.¹⁶⁹ It reasoned that several prior decisions suggest that a statute entirely lacking a scienter requirement as to the age of the performers would raise serious constitutional doubts.¹⁷⁰ Therefore, the Court concluded that it must read the statute to eliminate those doubts as long as such a reading is not plainly contrary to the intent of Congress.¹⁷¹

¹⁶² *Id.*

¹⁶³ *Id.* at 470. See *infra* part II.C.

¹⁶⁴ See *supra* note 22.

¹⁶⁵ *X-Citement Video*, 115 S. Ct. at 470-71. See *supra* notes 23-24 and accompanying text.

¹⁶⁶ *X-Citement Video*, 115 S. Ct. at 470-71. See *supra* notes 23-24 and accompanying text.

¹⁶⁷ *Id.* at 471.

¹⁶⁸ *Id.* at 471-72.

¹⁶⁹ *Id.* at 472.

¹⁷⁰ *Id.* (citing *Osborne v. Ohio*, 495 U.S. 103(1990); *New York v. Ferber*, 485 U.S. 747 (1982); *Hamling v. United States*, 418 U.S. 87 (1974); and *Smith v. California*, 361 U.S. 147 (1959)).

¹⁷¹ *Id.* (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction*

The Supreme Court reversed the Ninth Circuit and remanded for further proceedings.¹⁷²

B. JUSTICE SCALIA'S DISSENT

In his dissent, Justice Scalia¹⁷³ agreed with the Ninth Circuit's interpretation of § 2252 as requiring knowledge of neither the fact that the visual depiction portrays sexually explicit conduct, nor the fact that a participant in that conduct was a minor.¹⁷⁴ Justice Scalia reasoned that the Ninth Circuit's reading of the statute is the only grammatical reading permissible: there is no ambiguity that "knowingly" applies only to the transportation or shipment of the visual depiction in interstate or foreign commerce.¹⁷⁵

According to Justice Scalia, none of the decisions cited by the majority supported the conclusion that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct, even when the plain text of the statute says otherwise.¹⁷⁶ Furthermore, Justice Scalia found that the dominant view expressed in the legislative history was that the term "knowingly" applied to the element of the crime that the depiction be of "sexually explicit conduct," but not to the element that the depiction "involv[e] the use of a minor engaging" in such conduct.¹⁷⁷

The dissent also rejected the majority's argument that the statute without a scienter requirement would raise constitutional doubts. Justice Scalia believes that the statute as written only addresses fully proscribable obscenity, not mere pornography, and therefore should not need a scienter requirement as to the age of the individual depicted.¹⁷⁸ Justice Scalia advocated holding purveyors and receivers of

Trades Council, 485 U.S. 568 (1988)).

¹⁷² *Id.* The Court remanded to the Ninth Circuit to decide whether the indictment was fatally defective because it did not contain a scienter requirement on the age of minority. *Id.* See *United States v. X-Citement Video*, 77 F.3d 491 (table), 1996 WL 5314 *1 (9th Cir. Jan. 5, 1996) (mem.) (determining on remand that the indictment was not fatally defective).

¹⁷³ Justice Thomas joined in Justice Scalia's dissent.

¹⁷⁴ *X-Citement Video*, 115 S. Ct. at 473 (Scalia, J., dissenting).

¹⁷⁵ *Id.* at 473-74 (Scalia, J., dissenting).

¹⁷⁶ *Id.* at 473 (Scalia, J., dissenting).

¹⁷⁷ *Id.* at 474 (Scalia, J., dissenting) (citing 18 U.S.C. §§ 2252 (a)(1)(A) and (a)(2)(A)). Justice Scalia relies on the Department of Justice statement that: "[T]he defendant's knowledge of the age of the child is not an element of the offense but . . . the bill is not intended to apply to innocent transportation with no knowledge of the nature or character of the material involved." *Id.* (quoting S. REP. NO. 438, 95th Cong., 1st Sess. 29 (1977)).

¹⁷⁸ *Id.* at 474-75 (Scalia, J., dissenting). Justice Scalia bases his conclusion on the fact that "sexually explicit conduct" as defined in the statute does not include mere nudity, but only conduct that consists of "sexual intercourse . . . between persons of the same or opposite sex," "bestiality," "masturbation," "sadistic or masochistic abuse," and "lascivious exhibi-

this material absolutely liable for supporting the exploitation of minors, stating that he doubted this would deter any activity the Constitution was designed to protect.¹⁷⁹ He expressed his policy concern that the majority's suggestion that such absolute liability was unconstitutional would hinder the ability of Congress to enact laws providing greater protection for children against the child pornography trade.¹⁸⁰

However, Justice Scalia concluded that he found the statute unconstitutional since, reading it as it is written to impose liability upon those not knowingly dealing in pornography, it establishes a severe deterrent—not narrowly tailored to its purposes—to constitutionally protected activities.¹⁸¹ The dissent opined that, although every reasonable construction must be resorted to to save a statute from unconstitutionality,¹⁸² there is no reasonable construction of § 2252 other than the one evident from the plain import of its language.¹⁸³

V. ANALYSIS

The majority in *X-Citement Video* held that the government must prove that a distributor had knowledge of the sexually explicit nature of the materials he distributes and the age of the performers to be liable under § 2252. The dissent disagreed, arguing that the grammatical structure of the provision precluded reading the statute to require scienter. Therefore, the dissent found that the statute was unconstitutional, as it established a severe deterrent to constitutionally protected activities and was not narrowly tailored to its purpose.

The majority's approach, deferring to legislative intent and canons of construction, was correct. However, the majority's analysis was flawed. Although the majority correctly found that § 2252 contained a scienter requirement, it assumed that knowledge was the appropriate level of scienter. The majority then employed a textual approach—the same approach it had previously rejected when confronting the existence of a scienter requirement—to extract meaning from the statute's grammatical structure. Instead, the majority should have considered other lower levels of scienter and analyzed the issue under the rubric of congressional intent. Interpreting the statute to

tion of the genitals or pubic area." *Id.* at 475 (quoting 18 U.S.C. § 2256(2)).

¹⁷⁹ *Id.* at 475 (Scalia, J., dissenting).

¹⁸⁰ *Id.* (Scalia, J., dissenting). Justice Scalia charged the majority with "putting in place a relatively toothless child-pornography law that Congress did not enact" and "rendering congressional strengthening of the new law more difficult." *Id.* at 476.

¹⁸¹ *Id.* at 475 (Scalia, J., dissenting).

¹⁸² *Id.* at 476 (Scalia, J., dissenting) (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988)).

¹⁸³ *Id.* (Scalia, J., dissenting).

require recklessness, rather than knowledge, would have more closely addressed the dual congressional concerns of curbing the distribution of child pornography and adhering to the confines of the First Amendment.

A. APPROACHES TO STATUTORY INTERPRETATION

The Court has never adopted a clear rule which could guide statutory interpretation with regards to mental culpability.¹⁸⁴ Scholars have suggested several possible models of statutory interpretation:¹⁸⁵ (1) an adverb of mental culpability modifies only the first immediate verb following the adverb and says nothing about the noun part of the statute; (2) an adverb of mental culpability modifies all verbs but says nothing about the noun parts of the statute;¹⁸⁶ (3) an adverb modifies all critical parts of the statute, at least unless a contrary legislative purpose is clear from the wording of the statute;¹⁸⁷ (4) an adverb modifies all "material elements" of the statute, unless a contrary legislative purpose is clear from the wording of the statute or from the legislative history.¹⁸⁸

B. JUSTICE SCALIA'S APPROACH WAS WRONG

Justice Scalia followed the second approach. He reasoned that under the only grammatically correct reading of the statute, "knowingly" only modified the verbs in the statute.¹⁸⁹ This approach focuses solely on the plain meaning of the text of the statute. Applying this method of interpretation, he read § 2252 as unconstitutional because, without a scienter requirement, it imposed liability on those not knowingly dealing in child pornography.

¹⁸⁴ Richard G. Singer, *Porn Case Highlights Statutory Interpretation*, NEW JERSEY L. J., Oct. 17, 1994, at 10 (1994).

¹⁸⁵ *Id.*

¹⁸⁶ This the result of Justice Scalia's approach.

¹⁸⁷ This proposal is the approach taken by the Model Penal Code in Section 2.02 which requires that the mental culpability portion of the statute apply to every important element of the offense. The rule requires Congress to do its job—speaking clearly and unequivocally as to its intent in criminal statutes—and only allows courts to result to legislative history where the legislature has been insufficiently clear. Singer, *supra* note 184.

The majority basically used this model; finding no contrary legislative purpose clear from the wording of the statute, it applied "knowingly" to all elements.

¹⁸⁸ This Note argues that the majority should have invoked the idea of the fourth model instead. It should have looked to the legislative history to determine if it should extend the adverb "knowingly" to each element of the statute.

¹⁸⁹ *United States v. X-Citement Video*, 115 S. Ct. 466, 473-74 (1995) (Scalia, J., dissenting). See *infra* part IV.B.

1. *Pure Linguistic Analysis Supports Scalia's Approach*

Justice Scalia would have the legal issue turn on the linguistic question of whether, according to ordinary English syntax, the adverb "knowingly" could be said to modify the clauses requiring the depiction involve the use of a minor engaging in sexually explicit conduct which follow the word "if."¹⁹⁰ Thus, under Justice Scalia's approach, the linguistic question determines the legal issue.

Justice Scalia's approach is supported by linguists.¹⁹¹ Linguists adhere to grammatical rules which account for linguistic phenomena within the context of a complete theory of grammar.¹⁹² Applying a linguistic approach, § 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."¹⁹³ Because of the way modification operates, "knowingly" modifies only the verb "distributes" and cannot apply to the meaning of the "if" clause.¹⁹⁴

Under a linguistic analysis, basic principles of communication also warrant a finding that knowledge of the minority status of the performer is not required under § 2252. Linguists reason that Congress could have written the statute to state a knowledge requirement in relation to all the elements of the *actus reus*; because it did not, basic principles of communication indicate that Congress did not intend to require knowledge of all the elements.¹⁹⁵

¹⁹⁰ Michael S. Moore, *Plain Meaning and Linguistics — A Case Study*, 73 WASH. U. L. Q. 1253, 1254 (1995).

¹⁹¹ Linguistics experts voiced their position in an amicus brief filed by the Law and Linguistics Consortium: "[W]e care deeply about adverbial syntax, and about what other courts have said and what this Court may say about syntax in the course of reaching and explaining its decision here. As experts, we seek to address the theory of interpreting statutory language that the Court will employ and articulate in this case. On arguments concerning what knowingly means here, insofar as they are about ordinary language and syntax, we can speak better than anyone else." Marc R. Poirier, *On Whose Authority?: Linguists' Claim of Expertise to Interpret Statutes*, 73 WASH. U. L. Q. 1025, 1026 (1995) (citing Brief for Amicus Curiae of the Law and Linguistics Consortium in Support of Respondents, *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994) (No. 93-273)).

Several articles have considered a linguistic analysis of § 2252 and the *X-Citement Video* decision. See Craig Hoffman, *When Worldviews Collide: Linguistic Theory Meets Legal Semantics in United States v. X-Citement Video, Inc.*, 73 WASH. U. L. Q. 1215 (1995); Jefferey P. Kaplan & Georgia M. Green, *Grammar and Inferences of Rationality in Interpreting the Child Pornography Statute*, 73 WASH. U. L. Q. 1223 (1995); Moore, *supra* note 190; Marc R. Poirier, *On Whose Authority?: Linguists' Claim of Expertise to Interpret Statutes*, 73 WASH. U. L. Q. 1025 (1995); Lawrence M. Solan, *Judicial Decisions and Linguistic Analysis: Is There a Linguist in the Court?*, 73 WASH. U. L. Q. 1069 (1995).

¹⁹² Hoffman, *supra* note 191, at 1221.

¹⁹³ Kaplan & Green, *supra* note 191, at 1233.

¹⁹⁴ *Id.* at 1235.

¹⁹⁵ *Id.* at 1249.

Policy considerations also concern linguists when courts deviate from strictly grammatical statutory interpretation. They maintain that when courts take advantage of inelegant language to write opinions which, on analysis, are not in keeping with the language at all, this faulty linguistic analysis leads to a confusing jurisprudence which is only propagated by virtue of stare decisis.¹⁹⁶

2. *Courts Should Not Apply Pure Linguistic Analysis in Interpreting Statutes*

Despite support from the linguistic discipline, courts should not as a rule apply a pure grammatical approach when attempting to divine the meaning of a problematic statute. Putting blinders on to every influence but grammar compromises the interests of justice. One cannot analyze the meaning of language independently of views about the facts such language could be about.¹⁹⁷ Semantics is only one ingredient in the theory of statutory interpretation.¹⁹⁸ Instead of being limited by the forces driving linguists, judges should also make use of their moral knowledge in interpreting statutes, asking whether the standard English meaning of some statutory sentence is too unjust to be countenanced.¹⁹⁹

Instead of allowing objective syntactic analysis to trump legal principles, one more appropriate alternative would allow the two to work together to form an integrated interpretation of the statute.²⁰⁰ This approach would begin with an objective syntactic analysis of the statute and then assign an interpretation to it by applying semantic elements.²⁰¹ By analyzing a statute in this way, meaning, derived from the syntactic structure, and interpretation, derived from contextual information, would be integrated.²⁰² Judges have a responsibility to pay attention to a broad spectrum of considerations. Justice Scalia's approach is flawed because it acts as a mere mouthpiece for a linguistic approach to statutory interpretation rather than taking into account other important forces that should govern judicial statutory

¹⁹⁶ Solan, *supra* note 191, at 1072.

¹⁹⁷ Moore, *supra* note 190, at 1261-62 (reasoning that a morally desirable reading of § 2252 is also a linguistically permissible reading).

¹⁹⁸ Linguists care about semantics because the meaning of words and sentences is part of any plausible theory of how we communicate with one another: Lawyers care about semantics because the meaning of words and sentences is part of any plausible theory of how judges should interpret legal texts such as statutes. Moore, *supra* note 190, at 1253.

¹⁹⁹ Moore, *supra* note 190, at 1261-62.

²⁰⁰ Hoffman, *supra* note 191, at 1218-20.

²⁰¹ *Id.* at 1218-20. Legislative history could be helpful in determining the content of the semantic elements.

²⁰² *Id.*

interpretation.

C. THE MAJORITY'S FINDING THAT § 2252 REQUIRED SCIENTER WAS CORRECT

The majority was correct in determining that generally, a statute governing distributors of child pornography required some level of scienter because: (1) imposing strict liability would chill protected speech; and (2) precedent requires scienter. The majority was also correct to find that, specifically, § 2252 contained a scienter requirement because: (1) the avoidance doctrine supports a scienter requirement; and (2) legislative history demonstrates that Congress intended a scienter requirement.

1. *The Majority Was Correct in Finding that the Statute Necessitated Scienter*

a. Imposing strict liability would chill protected speech

The majority was correct to conclude that the provision governing distributors of pornography required scienter as to the age of the minority. The First Amendment does not permit Congress to impose onerous criminal sanctions on the basis of strict liability where doing so would chill protected speech.²⁰³ Imposing a strict liability standard would effectively require pornography distributors to examine every book and videotape to determine if the materials possibly contained images of a minor engaged in sexually explicit conduct.²⁰⁴ This would chill protected pornography because purveyors would only sell those materials that they had inspected, regardless of whether the uninspected materials were devoid of child pornography.²⁰⁵

Furthermore, under a strict liability standard, distributors could even be at risk for those materials they examined and thought did not portray minors. Unlike producers who arrange for minors to appear in sexually explicit materials, distributors merely handle the images of the individuals involved; it is not possible to view such media and be absolutely sure that an actress or actor who is youthful in appearance is not a minor.²⁰⁶ Thus, a strict liability standard would require distributors to learn not only the content of the materials they carry, but the ages of every performer in those materials.²⁰⁷ This would imper-

²⁰³ Martin, *supra* note 16. See *infra* part II.A.

²⁰⁴ Timothy W. Mungovan, Comment, *Constitutional Law - Protection of Children Against Sexual Exploitation Act Chills Constitutionally Protected Speech* - United States v. X-Citement Video, Inc., 982 F.2d 1285 (9th Cir. 1992), 27 SUFFOLK U. L. REV. 221, 228 (1993).

²⁰⁵ *Id.*

²⁰⁶ Martin, *supra* note 16.

²⁰⁷ *Id.* If strict liability were imposed, the only conceivable protection for a distributor

missibly chill speech protected by the First Amendment. Imposition of a scienter requirement was therefore correct.

b. Precedent requires scienter in regulating distributors of pornography

Under certain circumstances, the Court can uphold a statute as constitutional even though it does not contain a scienter requirement. However, the Court's history of determining when such circumstances exist demonstrates that no clear rule emerges regarding when it will find that a statute requires scienter.²⁰⁸ Public welfare (or regulatory) offenses, those regulating potentially harmful or injurious items, do not require the government to prove scienter.²⁰⁹ These statutes are constitutional even where they do not contain a scienter element. Common law crimes, by contrast, require proof of the defendant's *mens rea*.²¹⁰ Thus, the type of crime should determine the interpretive rule that the Court will apply.²¹¹ But, as case law demonstrates, the dichotomy between the common law and regulatory offenses is rather amorphous.²¹² The majority found that the statute required (and contained) a scienter element, implicitly determining that the offense was a common law crime. Yet, given the absence of a clear interpretive rule, one might just as easily assume that the overwhelming safety issue inherent in protecting minors could classify the transportation of child pornography within the realm of public welfare offenses, requiring no scienter element.²¹³

However, precedent evaluating statutes covering pornography

would be a contract with the producer requiring him to attach copies of birth certificates to all materials or otherwise guarantee the age of participants. Strang, *supra* note 14, at 1801 n.165. However, this would still force the distributor to entrust her criminal liability to the producers honesty and diligence—little comfort to a distributor facing imprisonment. *Id.*

²⁰⁸ Daniel S. Jonas, *The Circuit Split Over Instructing the Jury Specifically On the Good Faith Defense: A Consequence of Superlegislation by Courts or the Standards of Appellate Review?*, 46 SYRACUSE L. REV. 61, 69 (1995).

²⁰⁹ *Id.* at 70. See *infra* part II.G.

²¹⁰ *Id.* (noting the landmark case *Morissette v. United States*, 342 U.S. 246 (1952)).

²¹¹ *Id.* at 69.

²¹² *Id.* at 72. The Court has concluded that the possession of an automatic rifle is a common law offense requiring knowledge; it analogized that offense to the unauthorized use of food stamps, requiring knowledge that the defendant knew his conduct was illegal, and distinguished it from the possession of unregistered hand grenades, an offense containing no knowledge requirement. *Id.* (citing *Staples v. United States*, 114 S. Ct. 1793, 1799-1800, 1804 (1994)). See *Liparota v. United States*, 471 U.S. 419 (1985); *United States v. Freed*, 401 U.S. 601 (1971). The Court seems to be creating distinctions where none exist.

²¹³ *Id.* at 73. Scalia suggests as much, stating that he believes distributors could be held strictly liable under the Constitution. *X-Citement Video*, 115 S. Ct. at 475 (Scalia, J., dissenting).

distributors supports the majority's conclusion that scienter is required.²¹⁴ The Court has previously held: that obscenity laws governing distributors must contain a scienter requirement;²¹⁵ that the government must prove that distributors of obscenity had knowledge of the contents of the materials;²¹⁶ and that recklessness would be a sufficient level of scienter for possession of child pornography.²¹⁷ These cases demonstrate that the Court has repeatedly taken the position that a pornography distributor must have some level of awareness of the contents he is distributing in order to be held liable.²¹⁸ Thus, the Court was correct to find that § 2252 required scienter to be constitutional.

2. *The Majority Was Correct to Find that § 2252 Contained a Scienter Element*

a. The avoidance canon supports finding a scienter requirement

General avoidance doctrine supports the majority's interpretation of § 2252 as requiring scienter. The avoidance canon requires courts to uphold a statute whenever a constitutional construction is possible: "When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."²¹⁹ The primary justifications for the rule are: to prevent absurd results; to promote legislative efficiency; and to facilitate judicial deference to legislative intent.²²⁰ In its narrowest form the avoidance canon is used

²¹⁴ See *infra* part II.E.

²¹⁵ *Smith v. California*, 361 U.S. 147 (1959).

²¹⁶ *Hamling v. United States*, 418 U.S. 87 (1974).

²¹⁷ *Osborne v. Ohio*, 495 U.S. 103 (1990).

²¹⁸ However, some scholars believe that courts should not rely on obscenity decisions when analyzing child pornography cases because the state interests at stake with child pornography—protection of children from extreme emotional harm—are more substantial than those at stake with obscenity regulation. See Fuhrman, *supra* note 10, at 96; Strang, *supra* note 14, at 1798. Child pornography laws differ from obscenity laws in that they address a particularized harm to the children involved in the production. *Id.* Thus, a scienter requirement is less compelling for child pornography statutes. *Id.*

²¹⁹ *Child Pornography—Statutory Interpretation*, 109 HARV. L. REV. 279, 285 (1995) (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936)).

²²⁰ *Id.* See also *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989) ("We are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils"); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) (Unless there is evidence of a contrary meaning, the Court will assume that Congress drafted a statute within the boundaries of the Constitution: "Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"). But see *Child Pornography*, *supra* note 219, at 286

to correct a "scrivener's error"—a drafting error that produces an absurd result when the true meaning of the statute is absolutely clear.²²¹ A more liberal application dictates that when the plain meaning of the statute is unreasonable, courts should look to the legislative history to determine whether the meaning comports with the drafters intent.²²²

When read literally, § 2252 renders distributors liable merely because they knew that they were transporting materials, without requiring knowledge as to what the materials were. This plain meaning is unreasonable. Thus, under a liberal interpretation of the avoidance canon, the majority was correct to turn to the legislative history to determine Congress' intent.²²³ Since the majority determined that Congress intended the statute to require scienter, it was correct to read the statute accordingly.

b. Legislative history supports a scienter requirement

A review of the legislative history demonstrates that Congress intended the statute to require some level of scienter.²²⁴ Discussion be-

n.1336 (citing Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 CHI.-KENT L. REV. 481 488 (1990)) (reasoning that because courts are often hesitant to assume that Congress intended to pass an unconstitutional statute, they ignore the fact that Congress usually does not consider a statute's constitutional ramifications)).

²²¹ *Child Pornography*, *supra* note 219, at 285.

²²² *Id.* at 286. There are several notable criticisms of this application of the canon. First, committee reports, committee hearings, floor debates, and statements by sponsors or drafters of legislation are all subject to the influence of artful lobbying. *Id.* at 286 n.1339. Second, the liberal application is problematic when there is ambiguity as to Congressional intent because this leads to more than one interpretation. *Id.* at 286.

Some scholars urge only selectively applying legislative history to unreasonable interpretations, using it only when two competing constructions are of relatively equal plausibility or when there is actual evidence that Congress thought about the constitutional difficulty and tried to avoid it. *Id.* (citing Marshall, *supra* note 220; at 491-92). A slightly different approach would allow the Court to allow departure from the plain meaning of the statutory language upon "only the most extraordinary showing of contrary intentions" in the legislative history. *Id.* at 287 (citing *United States v. Albertini*, 472 U.S. 675, 680 (1985)).

²²³ However, scholars caution that several far reaching problems can arise when courts turning to legislative history to rescue a statute whose plain meaning is unconstitutional: (1) it encourages lower courts to adopt their own interpretations under these same circumstances which undermines legislative supremacy; (2) Congress does not always approve of the Court's reinterpretation and might in some circumstances prefer invalidation over judicial interpretation; (3) judicial bending essentially creates a judge-made constitutional penumbra because of Congress' general inability or unwillingness to reject a judicial misconstruction of one of its statutes; (4) saving statutes in this way discourages Congress from taking care in drafting its statutes; and (5) upholding dubious statutes precludes Congress from facing constitutional issues and rewriting statutes in a way that clearly expresses its own view of the Constitution. *Id.* at 287-89.

²²⁴ See *infra* part II.B.

tween Senators Roth and Percy demonstrates that, in drafting the provision applying to distributors of child pornography, Senator Roth intended to only hold those distributors liable who knew that the materials they were distributing portrayed children engaged in sexually explicit conduct.²²⁵ Discussion in the House addressed concerns over the scienter required under the Roth amendment. House members supporting the bill explicitly stated that the bill was intended to cover only those distributors aware that the materials were child pornography, resolving any constitutional concerns on that point.²²⁶

Furthermore, the Department of Justice did not voice any First Amendment concerns regarding scienter. The only constitutional concern addressed by the Department in its review of the language of the Roth amendment pertained to the lack of an obscenity requirement.²²⁷ In fact, the Department stated that it believed retention of the word "knowingly" in the provision regulating distributors was proper to make it clear that the bill did not apply merely to common carriers.²²⁸

Additionally, when the Committee on the Judiciary for the Senate considered the use of the word "knowingly" in the provision governing producers, it stated that the word was intended to require the producers to know the purpose for which the minors involved were being used.²²⁹ The Committee on the Judiciary for the House of Representatives emphasized this point when, in addressing the removal of the word from the provision covering producers, it stated that the government was no longer required to prove the defendant's knowledge of everything following the word knowingly—including the age of the child.²³⁰ Both of these analyses indicate that, by retaining the word "knowingly" in § 2252, Congress must have known that it would require the government to prove scienter as to everything following the word "knowingly"—including the age of the child.

In its report accompanying the final draft of § 2252, the Conference Committee gave no explanation for why it rearranged the structure of the provision covering distributors from the original language of the Roth amendment.²³¹ This demonstrates that by rearranging the provision, Congress did not deliberately eliminate the scienter re-

²²⁵ See *supra* notes 23-24 and accompanying text.

²²⁶ See *supra* notes 31-32 and accompanying text.

²²⁷ See *supra* note 38 and accompanying text.

²²⁸ See *supra* note 41 and accompanying text. However, the Department also stated that the legislative history should clarify that the defendant's knowledge of the age of the child is not an element of the offense. See *supra* note 42 and accompanying text.

²²⁹ See *supra* note 44 and accompanying text.

²³⁰ See *supra* note 45 and accompanying text.

²³¹ See *supra* notes 49-52 and accompanying text.

quirement—which was clearly intended to apply in the Roth amendment. The only discussion regarding the word “knowingly” concerned the provision covering producers, stating that it eliminated the word because the government need not prove the defendant knew the age of the child.²³² This further supports the position that Congress knew how to eliminate a scienter requirement when it did not intend to include *mens rea*—and knew how to preserve it when it did.

Finally, the absence of any discussion surrounding the scienter requirement, or lack thereof, in the legislative history accompanying the 1984 and 1986 amendments also indicates that Congress was not concerned with any constitutional problems regarding scienter. The only constitutional issue raised during the redrafting of § 2252 in the 1984 amendments pertained to the striking of the obscenity requirement.²³³ In 1986, when Congress added a provision covering the production of advertisements, it placed the word “knowingly” in the exact position as in § 2252.²³⁴ Congress explained that under the new provision, the government must show that the defendant knew the materials depicted minors engaging in sexually explicit conduct.²³⁵ Congress clearly intended that provision to require scienter; since that provision mirrored § 2252, the same scienter rationale should apply. Thus, the majority correctly concluded that the legislative history demonstrates that Congress drafted the statute intending to include a scienter requirement.²³⁶

D. THE MAJORITY'S FAILURE TO CONSIDER ALTERNATIVES TO KNOWLEDGE WAS WRONG

In determining what level of scienter to apply, the majority basically followed the third approach to statutory interpretation, assuming that based on the language of the statute “knowingly” modified all material elements. Like Justice Scalia, the majority, in determining

²³² See *supra* note 52 and accompanying text.

²³³ See *supra* notes 59-60 and accompanying text.

²³⁴ See *supra* notes 61-62 and accompanying text.

²³⁵ See *supra* note 63 and accompanying text.

²³⁶ Justice Scalia found to the contrary. Scalia opined that the legislative history demonstrated that, at best, Congress intended “knowingly” apply only to the fact that the material involves sexually explicit conduct, but not to the fact that it involves the use of a minor engaging in that conduct. *United States v. X-Citement Video*, 115 S. Ct. 464, 474 (1995) (Scalia, J., dissenting).

Likewise, commentators have also interpreted the legislative history as demonstrating that Congress did not intend to include a scienter requirement. One scholar reasoned that since Congress seemed aware of the scienter question while drafting the statute, it would have included a scienter requirement had it intended there to be one and that its failure to consider the constitutional implications of not including one does not justify the majority's imposition of scienter on the statute. *Child Pornography*, *supra* note 219, at 286.

the level of scienter, focused narrowly on the pure text of the statute. This approach was wrong for the same reasons as Justice Scalia's approach: in assuming that knowledge was the correct level of scienter based on the presence of the word "knowingly" in the statute, the Court failed to acknowledge other considerations, the most important of which is Congressional intent.

1. *The Court's Analysis Invoking a Scienter Level of Knowledge Was Flawed*

After determining that § 2252 required scienter, the majority concluded that, although due to its isolated position "knowingly" appeared to modify only the verbs in the statute, it in fact applied to each element, including the age of the minority.²³⁷ The majority's analysis is flawed. While the decision carefully explained its reasons for interpreting § 2252 as requiring scienter,²³⁸ it gave no basis for imposing knowledge as the appropriate level of *mens rea*.

The Court appears to have reasoned that since "knowingly" was the word used in the statute, the defendant was therefore required to have knowledge as to the age of the minority.²³⁹ The Court should not have leapt to this conclusion. None of the three main bases relied on by the majority in reaching its decision mandate applying knowledge as the requisite level of scienter. First, the Court relied on precedent in applying statutory interpretation. While precedent has extended the word "knowingly" from modifying only the verbs in the statute to require knowledge as to the other elements of an offense, the rule which can be drawn from the line of cases relied on by the majority is not so narrow. Read broadly, the rule instructs courts to apply scienter to each statutory element which criminalize otherwise innocent conduct; it does not speak to the specific *mens rea* level.²⁴⁰ Second,

²³⁷ *X-Citement Video*, 115 S. Ct. at 469-72. Having decided that, based on the legislative history, "knowingly" should apply to the requirement that the depiction be of sexually explicit conduct, the Court reasoned that "knowingly" was emancipated from merely modifying the verbs and could apply to the age of minority element as well. *Id.* at 471-72.

²³⁸ See *infra* parts IV.A. and V.A.

²³⁹ This creates a somewhat perverted result when compared to cases delineating the appropriate level of scienter for obscenity distributors. In *Hamling v. United States*, the Court stated that a defendant would be held liable if he had knowledge of the nature of the obscene materials he distributed. 418 U.S. 87, 123 (1974). Requiring child pornography distributors to have knowledge not only of the nature of the materials but the age of the performers involved, provides greater protection to child pornography distributors than to obscenity distributors. See Mungovan, *supra* note 204, at 229.

²⁴⁰ See *infra* part IV.A. The Court relied on *Morissette v. United States* and *Liparota v. United States* which both extended the word "knowingly," modifying only the verbs in the statute, to apply to the element separating criminal from innocent conduct. However, the Court also relied on *Staples v. United States* where the Court employed knowledge as the appropriate level of scienter despite the fact that the statute did not include any words

the Court relied on legislative history. Taken as a whole, the legislative history does not demonstrate specifically that Congress intended that the defendant have knowledge; rather it demonstrates generally that Congress intended a scienter element to apply.²⁴¹ Furthermore, Congress' elimination of the obscenity requirement in the 1984 Act following the *New York v. Ferber* decision demonstrates that Congress intended to prohibit child pornography distribution to the fullest extent permitted under the Constitution. A scienter level of knowledge falls short of this goal. Third, the Court relied on canons of statutory construction. The avoidance canon instructs courts to employ a constitutional interpretation where possible; employing a level of scienter other than knowledge would still satisfy this purpose.

Although nothing precluded the Court from applying knowledge as the appropriate level of *mens rea*, neither was the Court prohibited from considering other alternatives. After previously rejecting a purely grammatical approach to give credence to congressional intent and read in a scienter requirement, the Court should not have then flip flopped, disregarding intent in favor of applying grammatical maxims.

2. *The Court Should Have Considered Alternatives to Knowledge*

The modern interpretation of criminal statutes involves an element by element analysis recognizing that different states of mind may apply to different elements of the crime.²⁴² The elements of a statute can be separated into three classes: conduct; surrounding circumstances; and prohibited result.²⁴³ If an element is classified as conduct, only the mental state of knowledge may apply.²⁴⁴ However, if an element is classified as a surrounding circumstance or a prohibited result, any level of *mens rea* may apply.²⁴⁵ The surrounding circumstance in § 2252 is the fact that the material is child pornography.²⁴⁶

A determination of which level of *mens rea* to apply should involve

indicating *mens rea*. Thus, the general rule of these cases does not direct the Court to apply whatever level of scienter is present elsewhere in the statute; rather, the rule instructs the Court to presume a scienter requirement in the absence of contrary congressional intent.

²⁴¹ However, Senator Roth, stating that he only intended those deliberately engaged in the distribution of child pornography to be subject to prosecution, clearly intended knowledge to be the requisite level. See *supra* note 24 and accompanying text. But see Fuhrman, *supra* note 10, at 97 (reasoning that there was clear legislative intent to exclude knowledge from the content element of the statute).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 97-98.

balancing First Amendment rights with the importance of protecting the victims of child pornography.²⁴⁷ A knowledge standard places too high of a burden on the government and is not necessary under First Amendment doctrine.²⁴⁸ Given the gravity of harm to the children involved, the Court should have at least considered alternatives to knowledge that would have provided greater protection to the child victims.²⁴⁹

a. An alternative to *mens rea*: mistake of age defense²⁵⁰

With a mistake of age defense, *mens rea* is still a factor in determining whether the statute has been violated, but the burden of proof is on the defendant.²⁵¹ Application of this defense is not difficult; age is an objectively verifiable fact.²⁵² This defense permits a defendant to prevail if he could prove that he honestly and reasonably believed that none of the videotapes he distributed contained child pornography.²⁵³

²⁴⁷ *Id.* at 98. Studies have shown that sexually exploited children have difficulty developing healthy, affectionate relationships later in life and have a tendency to become sexual abusers as adults. *Id.* (citing Ulrich C. Schoettle, M.D., *Child Exploitation: A Study of Child Pornography*, 19 J. AM. ACAD. CHILD PSYCHIATRY 289, 296 (1980)).

²⁴⁸ Robert F. Schwartz, *Recent Development: Federal Child Pornography Law's Scienter Requirement — United States v. X-Citement Video, Inc.*, 28 HARV. C.R.-C.L. L. REV. 585, 598 (1993). Under a knowledge standard, a pornography distributor is free to sell or rent a performer's films even after learning through a series of news stories that the performer was probably underage when she made the films and that an investigation was underway. *Id.* Thousands of copies of that tape might be purchased by collectors of material featuring underage performers in the meantime. *Id.* A distributor would not be liable until the performer's age had been established beyond dispute. *Id.*

²⁴⁹ A contrary view reasons that the rule of lenity requires courts to construe the statute as containing the highest degree of scienter that is not beyond the ambiguity inherent in the statute and that does not defeat the obvious intention of the legislature. *Id.* at 596-97. Another view takes the position that *mens rea* for some elements will be presumed to apply to every element of the offense unless a clear legislative intent to the contrary exists. Fuhrman, *supra* note 10, at 97.

²⁵⁰ In his dissent in the Ninth Circuit opinion in *X-Citement Video*, Judge Kozinski pointed out that engrafting a mistake of age defense onto a statute is something "far more exotic" than merely reading in a scienter requirement. *United States v. X-Citement Video*, 982 F.2d 1285, 1296 (9th Cir. 1992) (Kozinski, J., dissenting).

²⁵¹ Fuhrman, *supra* note 10, at 99. Under this defense, the trier of fact should determine whether a reasonable distributor would have known or should have investigated whether the sexually explicit material he was selling depicted a minor. Strang, *supra* note 14, at 1802.

²⁵² *Id.* at 1797. However, a mistake of criminality, where a defendant argues that she was under a mistaken belief about what was considered illegal, is not a defense. *Id.*

²⁵³ Fuhrman, *supra* note 10, at 99. The Ninth Circuit employed a mistake of age defense in a case involving § 2251, the provision governing producers. *United States v. United States District Court for the Central District of California*, 858 F.2d 534, 542 (9th Cir. 1988) (finding the statute unconstitutional because it lacked a scienter requirement but saving it by invoking a mistake of age defense). However, producers are in a much better position than distributors to know and have control over who is portrayed in their video, making it

Some believe that this defense strikes the appropriate balance of providing First Amendment protection for innocent distributors without going unnecessarily beyond the constitutional minimum.²⁵⁴ The mistake of age defense would encourage the diligence of distributors, as opposed to knowledge, which encourages ignorance.²⁵⁵ Engrafting a mistake of age defense onto the statute instead of requiring scienter runs the risk of causing a chilling effect because it would require affirmative action by the distributor to at least attempt to ascertain all of the ages of every performer involved in the entire stock of materials distributed.

b. Negligence

A criminal negligence standard shifts the risk to those engaging in the activity and punishes those who act carelessly by applying a reasonable person test.²⁵⁶ Negligence is not a state of mind; it is a standard of conduct a defendant is expected to maintain regardless of his state of mind.²⁵⁷ Under a negligence standard, a defendant will be found liable if his lack of awareness falls below that of a reasonable person.²⁵⁸ A negligence standard might also place too great a burden on a defendant, running the risk of a chilling effect, because the applicable reasonable man standard might require a distributor to try to ascertain all of the ages of the performers depicted in the videos.

c. Recklessness

The alternative scienter level closest to knowledge is recklessness.²⁵⁹ Under a recklessness standard, a distributor would be liable if he consciously disregards a substantial and unjustifiable risk that a

fair to place the burden on the defendant. Fuhrman, *supra* note 10, at 100.

²⁵⁴ Strang, *supra* note 14, at 1802.

²⁵⁵ *Id.* at 1801-02. Some argue that it is unfair, however to place this heavy burden of proof on the defendant, who, although innocent, may not be able to meet the onerous evidentiary requirements. Additionally, to relieve the government from having to prove all of the elements of the offense would in theory violate the presumption of a defendant's innocence. Fuhrman, *supra* note 10, at 100-01.

²⁵⁶ *Id.* at 98.

²⁵⁷ *Id.* at 98-99.

²⁵⁸ *Id.*

²⁵⁹ Judge Kozinski suggested that recklessness was the proper level of scienter in his dissent in *X-Citement Video*. See *United States v. X-Citement Video*, 982 F.2d 1285, 1292-97 (9th Cir. 1992) (Kozinski, J., dissenting). Judge Kozinski believed that the traditional rules of construction supported reading in a recklessness requirement in order to bring it in line with the Constitution. *Id.* at 1297. He believed that Congress deleted a knowledge requirement in drafting the statute but did not read this to preclude all scienter requirements. *Id.* Judge Kozinski relied heavily on congressional intent, reasoning that Congress would have preferred to pass § 2252 with a recklessness requirement than not pass it at all. *Id.* at 1296. See *infra* part III.

performer in a film he distributed was a minor.²⁶⁰ This would require distributors to take reasonable precautions if they became aware of a substantial risk that a particular performer was a minor or that a particular film or publication contained minors.²⁶¹

Supreme Court precedent supports invoking recklessness as the appropriate level of scienter. The Court implicitly approved a recklessness standard in *Osborne v. Ohio*, holding that it was a constitutionally permissible standard in state criminal laws prohibiting possession of child pornography.²⁶² *Osborne* is distinguishable in that it addresses possession, not distribution; yet, the distinction would, if anything, favor granting greater protection to the private possession of, versus the interstate distribution of, such materials.²⁶³ Under this analysis of *Osborne*, recklessness would be a constitutionally acceptable level of scienter to impose on distributors.²⁶⁴ However, complete reliance on *Osborne* is not justified. *Osborne* cannot be applied as precedent for the proposition that recklessness is the appropriate scienter standard for statutes regulating child pornography distributors. The constitutional challenge addressed in that case was that the statute at issue contained no scienter level at all, not that recklessness was a constitutionally deficient standard.²⁶⁵

On balance however, *Osborne* does help bolster the position that recklessness would suffice as a viable level of scienter for the regulation of child pornography distributors. From a policy standpoint, a recklessness standard would best accomplish Congress' goal of deterring the distribution of child pornography without impermissibly chilling pornography involving adults. It would place the burden on the distributor to be aware of the materials he distributes and attuned to any rumors that performers involved are minors. A recklessness standard would not require distributors to take the exorbitant measures required by the alternative standards. But neither would it allow distributors the freedom to close their eyes and ears to information that minors are being sexually exploited in materials they are distributing. Thus, a recklessness standard best satisfies the goal of attacking child pornography to the fullest extent without treading on First Amendment boundaries.

²⁶⁰ Schwartz, *supra* note 248, at 598-99.

²⁶¹ *Id.*

²⁶² 495 U.S. 103. See *infra* part II.E.

²⁶³ Fuhrman, *supra* note 10, at 95.

²⁶⁴ Additionally, the Court has held that recklessness was a constitutionally sufficient *mens rea* in libel cases, a context much closer to the heart of the First Amendment than pornography. Schwartz, *supra* note 248, at 599 (citing *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

²⁶⁵ *Id.* at 599.

VI. CONCLUSION

The Court's decision in *United States v. X-Citement Video*²⁶⁶ held that the word "knowingly" in § 2252 extends both to the sexually explicit nature of the materials and to the age of the performers. Looking beyond a mere grammatical reading of the statute, the Court applied other considerations to read in a scienter requirement and uphold the statute as constitutional. In contrast, the dissent's interpretation of the word "knowingly" looked only to the plain meaning of the text. It found that under the sole permissible grammatical reading of the statute, "knowingly" applied only to the verbs and not to any of the noun phrases separating innocent from criminal conduct.

While a linguistic analysis would support Justice Scalia's reasoning, a purely textual approach to statutory interpretation is wrong. Rather than limiting interpretation to what is said on the face of a statute, judges should incorporate other considerations, such as legislative intent, in attempting to ascertain meaning. Faced with a statute whose plain meaning would lead to absurd results, the majority correctly looked to congressional intent. Based on that intent, among other considerations, it found that § 2252 required scienter and upheld the statute.

However, the majority incorrectly assumed that the level of scienter required under the statute was knowledge. The Court failed to even consider lower levels of scienter, and instead extended the word "knowingly," which modified only the verbs, to apply to the noun phrases as well. The majority had already discarded a strict grammatical interpretation in favor of considering congressional intent. Having determined that the statute did not say what Congress intended it to say, the majority should not have returned to a textual approach and attempted to extract meaning from the statute's grammatical structure. The Court should have considered other alternatives to a knowledge standard and analyzed the question of scienter level within the framework of congressional intent. A recklessness standard would have most appropriately integrated Congress' goals of regulating the distribution of child pornography to the fullest extent possible while remaining abreast of the limits of the First Amendment.

By upholding the statute as constitutional, the Court did not give Congress an open door—as striking it down would have done—to redraft § 2252 and clarify its meaning in the words of the statute. The Court's imposition of knowledge as the applicable level of scienter bound the government to meet this stringent standard in prosecuting

²⁶⁶ 115 S. Ct. 464 (1994).

all future convictions. Having determined to approach statutory interpretation from the vantage point of "what Congress intended to say," the Court should have continued to adhere to its method and more carefully considered Congress' intent in determining the applicable scienter level rather than merely assuming knowledge applied. Instead, the Court engrafted a scienter level Congress may not have intended while discouraging Congress from redrafting the legislation. The majority should have followed its initial approach through the entire analysis. By stopping short, the majority verged on impermissible judicial legislating. The Court should take heed in the future to consider carefully congressional intent at all levels of its analysis when interpreting a problematic statute.