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Plain Meaning and Linguistics—A Case Study

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PLAIN MEANING AND LINGUISTICS—A CASE STUDY

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Linguistics and law intersect in their common concern with semantics. 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 (ordinary English) meaning of words and sentences is part of any plausible theory of how judges should interpret legal texts such as statutes.[1] Semantics is thus the locus of a potentially fruitful co-operation between linguists and lawyers. Yet one of the pervasive dangers in interdisciplinary work is that the urge to integrate the insights of one discipline with the tasks of another often causes a warping of the latter in order to make it more receptive to the proposed integration. Such I fear is the case with the linguistics expertise proffered to the United States Supreme Court recently, via an amicus brief by the Law and Linguistics Consortium.[2]

The case was *United States v. X-Citement Video, Inc.*[3] The interpretive issue in *X-Citement Video* involved 18 U.S.C. § 2252, which provides that "Any person who knowingly transports . . . any visual depiction, if (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct . . . shall be punished . . . ."[4] The legal issue was whether an accused must know not only that he is transporting a visual depiction in order to be convicted under the act—must he also know that what he is transporting depicts sexually explicit conduct by a minor?

Justice Scalia in his dissent would have that legal issue turn on the

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1. For a separation of semantics and pragmatics, and a discussion of the place of the former in an overall theory of statutory and constitutional interpretation, see Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985).

2. Brief *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. 93-723).

3. United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994). The case was one of our problems at the symposium. *See Problems*, 73 WASH. U. L.Q. 795, 796-97 (1995).

4. 18 U.S.C. § 2252 (1982).

linguistic question of whether, according to ordinary English syntax, the adverb "knowingly" could be said to modify clauses (A) and (B) following the word "if." Scalia, finding *"the only grammatical reading"* of section 2252 to be one whereby "knowingly" does not modify these clauses,[5] would have interpreted the statute so that knowledge that the sexually explicit conduct of a child was depicted would not be required for conviction.

Let me creep up on the linguistic issue (that Scalia finds determinative of the legal issue in *X-Citement Video)* by stepping back to some more general concerns. Notice that section 2252, like most criminal statutes, requires that some of its words do double duty. Take "transports . . . any visual depiction."[6] To be guilty under this statute, a defendant must actually do some transporting of some visual depictions. This is part of the *actus reus* requirement for this statute.

The *actus reus* requirement is satisfied if and only if: (a) the defendant did *some* sort of action, which on my theory of action requires that the actor successfully willed a movement of his body; and (b) the willed bodily movement in question has the causal or other properties required to instantiate the type of action, transporting visual depictions.[7] Secondly, that defendant must think of the action he is doing as being describable as "transporting visual depictions." The actor must represent what he is doing, in other words, under the description, "transporting visual depictions." this is part of the *mens rea* requirement of this statute. A defendant satisfies this *mens rea* requirement independently of satisfying the *actus reus* requirement; that is, just because a defendant does an act that amounts to a transporting of a visual depiction does not mean that is how he represents his act to himself, and conversely, even if a defendant did no act of transporting he may well represent some act of his as a transporting of a visual depiction, and this will satisfy the *mens rea* requirement.

This usage of the same words to do double duty is not an invention of the law. In ordinary, idiomatic English we often collapse statements like, "Jones transported a visual depiction while he knew that he was transporting a visual depiction," into the shorter, "Jones knowingly transported a visual depiction." Legislators are like other users of idiomatic English in

5. X-Citement Video, 115 S. Ct. at 473.

6. 18 U.S.C. § 2252 (1982).

7. On the *actus reus* requirement of criminal statutes, and its separation from the *mens rea* requirement of those statutes, see MICHAEL S. MOORE, ACT AND CRIME: THE IMPLICATIONS OF THE PHILOSOPHY OF ACTION FOR CRIMINAL LAW 169-77 (1993).

this respect, so that they often write criminal statutes preferring the shorter version.

What is crucial here is to see that this familiar ordinary and legal usage is elliptical in the way that the longer phrasing is not. An ellipsis occurs when one collapses two different senses of the same word into one usage, as in: "Both bad comedians and our mothers bore us." Since "bore" has two distinct senses, and since both senses are meant in the quoted statement, the statement is an ellipsis for: "Bad comedians bore us, and our mothers bore us"—where each sense of "bore" is represented by its own separate use of the word "bore." Such longer paraphrases of elliptical statements are essential if we are to grasp their meaning, for no language can be truth conditional if the terms in its statements are irreducibly dual in their reference.

Since the multi-vocality of "transports a visual depiction" is not nearly so obvious as the above usage of "bore," let me be as clear as possible about the two distinct referents of the phrase.[8] When used as part of the statute's *actus reus* requirement, the phrase refers to a type of action, an abstract universal. Any act-token[9] done by a particular defendant at a particular time that instantiates this type of action will satisfy this part of the *actus reus* requirement of the statute. When used as part of the *mens rea* requirement, by contrast, the phrase refers to a way of representing or describing this type of action, not (or at least, not *directly)* to the type of action itself.[10] What is thus required to satisfy the *mens rea* requirement of this statute is not that the defendant do a particular act-token that instantiates this act-type; nor is it even that the defendant believe that he is doing that very act-token; rather, the defendant must represent to himself that very act-token in the way required by the statute. He must think of the act he knows himself to be doing under the representation, "transporting visual depictions."[11]

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8. I use "refer" and "referent" rather broadly, to include predicates and their extensions, and not simply singular terms and their denotations.

9. *Act-token* is a term of art for particular acts that people do; the contrast is with *act-types*, which are not spatio-temporally located particulars but are rather abstract universals. "Killing another person" is an *act-type*; "Jones' killing of Smith yesterday" is an *act-token*. For further discussion of the distinction, see Moore, *supra* note 7, at 80-81.

10. A great deal of philosophically complicated and controversial detail is glossed here. For an introduction, see Michael S. Moore, *Foreseeing Harm Opaquely, in* ACTION AND VALUE IN CRIMINAL LAW 125 (Stephen Shute et al. eds., 1993).

11. Because knowledge of law is not required for a defendant to have *mens rea*, an accused's mistakes of legal interpretation (as opposed to mistakes of non-linguistic fact) do not prevent him from having the *mens rea* required by criminal statutes. This means that the criminal law's *mens rea*

This dual reference (to a type of action, and to a representation of that type of action) by the same bit of language is easily missed if one focusses on the surface grammar of the statutory sentence. For it might seem that "transports . . . any visual depiction" refers univocally to a type of action, and that the adverb "knowingly" picks out a this type of action. In such a case "knowingly" would function like "slowly": both adverbs would narrow the type of action to which the statute refers, but they would not require a construction whereby "transports . . . any visual depiction" elliptically refers to two different sorts of things.

However, this analogy to standard uses of adverbs like "slowly" cannot be true of mental state terms like "knowingly." Since philosophers of action have considered this point mostly with regard to another apparent adverb, "intentionally," let me pursue the point with this example. In an important paper on the "logical structure" of English sentences describing actions, Donald Davidson years ago urged that it was only a "superficial grammar" that would treat "intentionally" as an adverb.[12] The true grammar (Davidson's "logical structure") of such sentences was different. He found it to be "obvious . . . that the adverbial form must be in some way deceptive; intentional actions are not a class of actions, or, to put the point a little differently, doing something intentionally is not a manner of doing it."[13] Contrast this with the true adverb, "slowly." To drive slowly is a way of driving (as it is to drive awkwardly, hastily, stupidly, dangerously, etc.). Slow driving is a subtype of the act-type, driving. But intentionally driving is not.

According to Davidson, this is because "to say someone did something intentionally is to describe the action in a way that bears a special relation to the beliefs and attitudes of the agent . . . "[14] Davidson's point is better put this way: to say someone did some action A intentionally is to say two quite distinct things: it is to say that that actor in fact performed an action accurately described (by the speaker, in retrospect) as an A-ing; and it is to say that A-ing was one of the descriptions of that action under which the actor represented his act to himself as he acted.

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requirement is satisfied by mental states whose content consists of representations somewhat removed from the precise language of the statute in question. A defendant who believes that he is transporting a video tape but does not believe that video tapes are a kind of visual depiction, represents his action as a transporting of visual depictions for purposes of the criminal law.

12. DONALD DAVIDSON, *On the Logical Form of Action Sentences*, *in* ESSAYS ON ACTIONS AND EVENTS 106 (1980).

13. *Id.* at 121.

14. *Id.*

Consider Davidson's example, the action of Oedipus in seeking the slayer of Laius (who, unbeknownst to Oedipus, is himself).[15] If we were simply describing the action of Oedipus, without characterizing it as having been done intentionally or knowingly, then we might equally well describe the action as:

(1) Oedipus sought the slayer of Laius, or (2) the slayer of Laius sought the slayer of Laius. As descriptions of the action, these are equally accurate, because "Oedipus" and "the slayer of Laius" are two equally accurate expressions for picking out the very same person, Oedipus. But what Oedipus did intentionally or knowingly is not equally well described by (1) and (2). As Davidson enigmatically puts it: "It was intentional of Oedipus, and hence of the slayer of Laius, that Oedipus sought the slayer of Laius [description (1) above], but it was not intentional of Oedipus (the slayer of Laius) that the slayer of Laius sought the slayer of Laius [description (2) above]."[16] What is done intentionally is a description of what is done that is in some sense peculiarly the actor's own description. Since Oedipus did not represent his action as the seeking of a slayer by the very same slayer, that is not what he did intentionally or knowingly (although that is what he in fact did).

The upshot is that "knowingly" never functions like a true adverb. It is misleading (even if idiomatic) English to say that someone knowingly or intentionally did some action of type A. Such constructions should be analyzed as we should analyze the much less idiomatic "adverbalization" of other mental state verbs such as "desire" or "believe." Statements such as, "Jones did A desiringly," or "Smith did A believingly," are deviant usages. The meaning they should be assigned is that the actors did A, and that they desired to A, or believed that they were A-ing, as the case may be. Analogously, statements that one knowingly did some action A have to be paraphrased to the dual statements the one A3d and that one knew one was A-ing. It is a defect in ordinary English that "knowingly" does not sound as deviant as is "believingly" or "desiringly," but the analysis of all such purported adverbs should not differ.

There are thus two interpretive questions for the very same language of section 2252, as for all criminal statutes requiring a *mens rea* of knowledge: (1) what type of action is prohibited; and (2) what representations of that action must the defendant have had in mind as he did the type of

15. DAVIDSON, *supra* note 12, at 122, 127.
16. *Id.* at 122.

action prohibited? *X-Citement Video* becomes easier if we take these interpretive issues one at a time, even though only the second is explicitly at issue in the case.

If we focus on the *actus reus* requirement only, we can drop the adverb "knowingly." We should now regiment the statutory sentence so as to separate the operative facts from the legal remedy.[17] This we do by replacing the verb "to be" with the "if . . . then" form. Our regimentation is then:

(1) If [any person transports any visual depiction, if (the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct)], then that person shall be punished.

Doing this reveals that the second "if" cannot be construed to create a second logical relationship in addition to that created by the first "if" in (1). To see this, replace "transports any visual depiction" with "A," replace "the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct" with "B," and replace "that person shall be punished" with "C." We may represent the sentence as:

(2) If [A if B,] then C.

This is equivalent to:

(3) If (if B, then A) then C.

Yet if we give both "if's" the reading they have in logic (of the material conditional), then (3) is equivalent to:

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17. "Operative facts" was Hohfeld's term for those facts that some legal rule made dispositive of the appropriateness of some legal remedy. W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1919). The fact that someone was negligent, for example, is an operative fact in tort law because that fact (together with certain others) justifies the application of tort damages. The idea of regimenting sentences is a philosphical one. See W. V.O. QUINE, WORD AND OBJECT (1960); and DAVIDSON, *supra* note 12, at 137-46. Briefly, the idea is that some nuances of usage have to be ignored if we are to systemetize in the way demanded by some theory. In contemporary philosophy, that theory has been a theory of truth and of logic that demands a truth-conditional semantics. In contemporary legal philosophy a more specific regimentation of legal utterances is demanded in order to exhibit the logical structure of legal reasoning. Paraphrasing all authoritative legal utterances into the "if . . . then . . . " form of a hypothetical imperative is one way to do this. For an example, see NEIL MACCORMICK, LEGAL SYSTEMS AND LEGAL REASONING ch. II (1978). For the best known advocacy of the view that all legal norms are to be recast into hypothetical imperatives directing judges in the use of legal sanctions, see HANS KELSEN, GENERAL THEORY OF LAW AND STATE 63 (1945).

(4) If (A or not-B), then C.

Sentence (4) says that someone should be punished if either they transported a visual depiction *or* the producing of a visual depiction involved the use of a minor engaging in sexually explicit conduct and such visual depiction was of such conduct. That is an absurd reading of section 2252, for on such a reading one could be punished without doing any transporting. Section 2252 plainly requires *both* that one transport a depiction *and* that the depiction transported be of sexually explicit conduct of a minor. The structure of the *actus reus* requirement of section 2252 is thus not that given by (3) and (4); rather, it is:

(5) If (A *and* B), then C.

The second "if" in (1) and (2) is misleading insofar as it suggests that there is a conditional relationship between A and B; the statute's structure is better revealed when the second "if" is replaced with the conjunctive, "and."

This is the same sort of regimentation we perform on English sentences such as, "If you go downtown—if you are not angry—you may have an ice-cream." To get our grouping indicators correctly placed, we paraphrase to: "If (you go downtown and you are not angry), then you may have an ice-cream." In such cases we treat the second "if" as creating a conditional relationship, but not between A and B; rather, the second "if" only makes clear the extended scope of the first "if," so that the conditional relationship extends between (A and B) and C.

On this point, I think that I and the present views of the Law and Linguistics Consortium are in rough agreement. The Consortium presently construes the second "if" as introducing a parenthetical expression and denies that that "if" creates a genuine conditional. This is fine, so long as one recognizes that there is nonetheless a genuine logical relation between A and B, even though not a conditional relation. There is no permissible reading of § 2252 under which an accused could be punished if the visual depiction he transported did not involve a minor engaged in sexually explicit conduct. Such involvement is a necessary condition of punishability under any conceivable reading of this statute. Therefore, a conjunctive logical relation between A and B must be created by the second "if" in § 2252.

Now focus on the *mens rea* requirement embedded in section 2252. Given the double duty of the language, one should start where we started with the *actus reus* requirement, by regimenting the statute into an

"if . . . then" form so as to separate the operative facts from the legal remedy.
This gives us:

> (1a) If [any person knowingly transports any visual depiction, if (the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct)], then that person shall be punished.

Let "K" stand for "knowingly." If we were to take the second "if" again to create a true conditional relationship, then we get:

(2a) If [K (A) if B], then C

This, again, is equivalent to both:

(3a) If [if B, then K (A)], then C.

And

(4a) If [K (A) or not-B], then C.

(4a) is just as absurd as (4), for it would say that the *mens rea* requirement was satisfied either if the defendant knowingly transported a visual depiction *or* it was not the case that the depiction was that of a child engaged in sexually explicit conduct.

As before, the second "if" cannot be taken to create a conditional relationship between B and K(A). It is the conjunctive, "and," that states the *mens rea* requirement. This gives us:

(5a) If [K (A) and B], then C.

Yet once one sees that the second "if" does not name any truly conditional relationship in addition to that implicit in all criminal statutes, that "if" also loses any ability to act as a grammatical barrier to "knowingly" modifying B as well as A. The *mens rea* requirement then could be:

(5b) If K [A and B], then C.

That is the way the majority of the Court in *X-Citement Video* construed section 2252.

One might well object that an adverb like "knowingly" cannot modify clauses (A) or (B) in section 2252 even if the "if" is replaced with an "and" in the way I have suggested. If "knowingly" is used as a true adverb, the objection would have force; for "knowingly . . . the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct" in truth is pretty poor English. As an adverb, *knowingly* would be

modifying the verb, *involves*, yet the grammatical subject of *involves* does not refer to a person who could know, but to an action (*i.e.*, the producing) that cannot know anything. However, as we have seen, the nominal adverb, "knowingly," has to be paraphrased to its corresponding verb, "to know," anyway in order to eliminate the hidden ellipsis and to mark the distinction between types of action done from representations by the actor of the types of actions he is doing. So the nominally adverbial nature of "knowingly" has to be discarded anyway, and cannot stand as a linguistic objection to the Supreme Court's interpretation of section 2252. Once we make this necessary paraphrase, the English is fine: "[K]nowing (or knows) that the producing of such risual depiction involves the use of a minor engaged in sexually explicit conduct" is perfectly acceptable English, as is "knowing (or knows) that such visual depiction is of such conduct."

I have presented the foregoing as an argument within semantics, a subdiscipline within linguistics, as to how section 2252 should be read. In truth, even if the semantics of section 2252 did not permit the reading of the majority of the Supreme Court, the Court correctly interpreted section 2252 anyway. This is because semantics is only one ingredient in the theory of statutory interpretation of any judge. 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.[18] In *X-Citement Video*, it would impose far too much strict liability on a defendant if all he had to know was that he was transporting a visual depiction of something. That the something depicted is sexually explicit conduct of a minor is far too much the gravamen of the evil section 2252 seeks to prevent and to punish for that element to be left out of the *mens rea* required for conviction. In the interests of justice, the Court had good reason to construe section 2252 as it did.

It is, of course, more difficult for a court to use its moral knowledge to *overrule* the ordinary meaning of statutory words than it is for a court to use its moral knowledge to *pick between* different but equally acceptable ordinary meanings. The main burden of this short comment is to indicate why the Court did not have to make the greater showing necessary to overrule the ordinary meaning. For despite Justice Scalia, and despite the aid given him by the Law and Linguistics Consortium, the ordinary meaning of section 2252's sentences do *not* make difficult the morally

18. *See* Moore, *supra* note 1, at 383-88; Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 277-81 (1981).

desirable reading.

I am aware that many academics in linguistics will resist this conclusion. To the extent such resistance is not based on a flat disagreement with my linguistic analysis, it is probably based on an unwillingness to call my analysis "linguistic." For I twice heavily regimented the actual language of section 2252 into something else, and some might think that this is not linguistics but social policy at work. Yet such regimentation is an essential part of any fruitful linguistic analysis. One cannot analyze the meaning of language independently of views about the facts such language could be about. If one believes as I do that mental states have propositional content, that act-tokens are those spatio-temporally located particulars that we call events, and that act-types are abstract universals that are not identical to either act-tokens or to propositions about them, then one is driven to the linguistic conclusion that constructions using "knowingly" or "intentionally" are always elliptical and that paraphrase to the corresponding verbs is always required. If one believes as I do that judges when interpreting criminal statutes must always take such statutes to be directions to judges to sanction the behavior such statutes prohibit, and also believes that judges use standard deductive logic in applying such statutes to particular cases, then one is driven to the linguistic conclusion that all criminal statutes must be paraphrased into conditional statements with the operative facts in the antecedent clause and the description of the remedy in the consequent clause. These systematic regimentations I would call part of linguistics, and the results of doing them, part of the ordinary or plain meaning of the statute in question. That is what allows me to say that the morally desirable reading of section 2252 is also a *linguistically permissible* reading. Whatever one wants to call such analyses, they are certainly not part of the moral enquiry into whether or not it is fair to convict someone who lacks knowledge of some material elements of the *actus reus*. Judges attached to plain meaning interpretive methods thus have no reason to eschew such analyses, fearful that it cuts into the legislative prerogative in the way (on their view) that a moral analysis does.