United States v. X-Citement Video, Inc.: Stretching the Limits of Statutory Interpretation?

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I. INTRODUCTION

During the 1980’s, X-Citement Video, Inc., and its owner, Rubin Gottesman, became targets of a pornography investigation by the Los Angeles police and the Federal Bureau of Investigation (FBI). During the course of the investigation, an undercover police officer, posing as a pornographic retailer, informed Gottesman that he was interested in acquiring pornographic films starring the minor, Traci Lords. Gottesman sold the officer forty-nine tapes featuring Lords, all of which were produced before her eighteenth birthday. In addition, eight tapes were shipped to a FBI mail drop in Hawaii.

The Government charged Gottesman with violating Section 2252 of the Protection of Children Against Sexual Exploitation Act of 1977 (the Act) which prohibits any person from knowingly engaging in the interstate transportation, shipping, receipt, distribution, or reproduction of visual depictions of minors engaged in sexually explicit conduct. The defense claimed that Section 2252 was unconstitutional because to prove guilt the Government had to only show that the defendant knowingly transported, shipped, received, distributed or reproduced visual depictions and not that the defendant knew the films starred

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1. At this time, the media had recently released stories that Traci Lords was a minor when she was filmed in many pornographic films. United States v. X-Citement Video, Inc., 115 S. Ct. 464, 465 (1994).
3. Section 2252 provides in relevant part:
   (a) Any person who—
      (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, 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;
      (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce through the mails if—
         (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
         (B) such visual depiction of such conduct;

   shall be punished as provided in subsection (b) of this section.

underage performers. The United States District Court for the Central District of California rejected the defendant’s argument and convicted him of violating the Act. On appeal, the Ninth Circuit held that under the First Amendment, a defendant must possess knowledge of the minority age of at least one performer in a pornographic film. Thus, because the same circuit in United States v. Thomas had previously held that “knowingly,” as used in the statute, did not extend to the sexually explicit nature of materials or the minority of the performers, Section 2252 was found unconstitutional on its face. Nevertheless, the Supreme Court reversed the Ninth Circuit and upheld the constitutionality of Section 2252 based on traditional rules of statutory construction. Held: “Knowingly” as used in the Protection of Children Against Sexual Exploitation Act extends to the sexually explicit nature of the materials as well as to the minority of performers.

This note focuses on the Supreme Court decision in United States v. X-Citement Video. Parts II and III examine the legislative history of the Protection of Children Against Sexual Exploitation Act and the case law prior to X-Citement Video. The reasoning of the majority and the dissent in this decision is discussed in Part IV. Finally, Part V analyzes why X-Citement Video was correctly decided based on rules of statutory interpretation and prior case law and points out the potential problems associated with this Supreme Court decision.

II. LEGISLATIVE HISTORY

In 1977, Congress responded to the growing problem of child pornography with the Protection of Children Against Sexual Exploitation Act. The Act took many different forms before Congress passed the final version. The first proposal only included Section 2251, designed to prevent the production of child pornography. However, a second provision, Section 2252, was proposed to
reach distributors and recipients of child pornography. Both Sections 2251 and 2252 originally included a mental element of "knowingly."

Commenting on the Act, the Assistant Attorney General, Patricia M. Wald, recommended the Senate Judiciary Committee delete the word "knowingly" in Section 2251. She stated the inclusion of "knowingly" in this section would require the Government to prove the defendant knew the exact age of the child. In contrast, Assistant Attorney General Wald stated that the use of "knowingly" in the next section of the Act, Section 2252, "is appropriate 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 they are transporting."

Congress eventually deleted "knowingly" from Section 2251. However, the bill adopted by the Senate Judiciary Committee, following the Justice Department's comments, excluded Section 2252 from the Act altogether. Thus, whether the House of Representatives and the Senate adopted the views of the Justice Department in later versions of Section 2252 remains unclear.

In response to the Senate's elimination of Section 2252, Senator Roth proposed a new version of the statute. This version of Section 2252 provided in part:

(a) No person may—

(1) knowingly transport, ship, 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, photo-

13. Id.
14. Id.
16. Id. at 28-29. Assistant Attorney General Wald stated, "We assume that it is not the intention of the drafters to require the Government to prove that the defendant knew the child was under age sixteen but merely to prove that the child was, in fact, less than age sixteen." Id. at 29.
17. Id. at 29.

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 . . . 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.
Two senators clearly explained their intentions regarding “knowingly” in this version of Section 2252. Senator Percy proffered that to act “knowingly,” “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 mere inadvertence or negligence would not alone be enough to render his actions unlawful.” Senator Roth, in reply, stated this version “insures that only those sellers or 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.”

The Conference Committee adopted Senator Roth’s version with some changes. This version of Section 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 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 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.

Because prior jurisprudence dealing with pornography had always required the materials to be “obscene,” an obscenity requirement was included to allay fears that the Roth proposal would not withstand a constitutional challenge. The

21. Id.
23. Id.
committee included the requirements that "the producing of such visual or print medium involve[ ] the use of a minor engaged in sexually explicit conduct" and that "such material or print medium depict[ ] such conduct," but placed these two requirements in new subclauses (A) and (B). This revision resulted in the word "minor" being further removed from the word "knowingly." Unfortunately, the Senate and House Conference Reports offer no additional assistance in detecting the intended reach of "knowingly" in Section 2252. Since "knowingly" was not part of the subclause referring to the minority age of the child, it remained unclear whether "knowingly" actually referred to this language in the statute.

Congress amended the Act in 1984. These amendments were sparked by the Supreme Court decision, New York v. Ferber, which held that a law prohibiting non-obscene child pornography did not violate the First Amendment. Reacting to this decision, Congress subsequently eliminated the obscenity requirement found in Section 2252. In addition, Congress deleted the requirement that the distribution of videotapes be for commercial purposes and raised the age of majority from sixteen to eighteen years of age. Again, Congress gave no indication of their intent regarding the use of "knowingly" in the statute. Thus, the final version of Section 2252 considered by the X-Citement Video Court provides in relevant part:

majority of the Court agreed that a “state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” 413 U.S. 15, 24, 93 S. Ct. 2607, 2615 (1973).


28. The Conference Report states 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.


30. Id. Although the phrase “non-obscene child pornography” may seem to be a contradiction in terms, the rationale behind this decision is to offer greater protection to children by not demanding the Government prove the child pornography meets the legal definition of “obscene.” See infra note 86.


33. Id. at § 5(a)(1).

34. Id.
(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, 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;

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

(A) the producing of such visual depictions 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.  

III. PRIOR CASE LAW

To better understand the Court's reasoning in X-Citement Video, the prior case law dealing with traditional principles of statutory construction must be examined. Additionally, it is important to see how these principles have been extended to cases concerning 1) scienter requirements in general; 2) scienter requirements in obscenity cases; and 3) scienter requirements in child pornography cases.

A. Traditional Principles of Statutory Construction

Prior case law illustrates the Court's consistent rejection of constitutional challenges to federal legislation. For example, in Yates v. United States, the defendants claimed that the Smith Act, which forbids teaching or advocating the overthrow of the Government, prohibited constitutionally protected speech, such as expressing opinions. The Court, however, rejected the defendants' argument, relying on the well established principle of statutory construction that

legislation is presumed to be constitutional. This reasoning was reiterated in *Debartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*:

The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality. This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

In interpreting statutes, the Court has also considered whether a particular reading of a statute will produce absurd results. In *United States v. Turkette*, the Court considered whether the term “enterprise” as used in the statute, Racketeer Influenced and Corrupt Organizations (RICO), encompassed both legitimate and illegitimate enterprises. The defendant argued RICO was only intended to protect legitimate enterprises from infiltration by racketeers and that RICO “does not make criminal the participation in an association which performs only illegal acts and which has not infiltrated [or] attempted to infiltrate a legitimate enterprise.” The Court noted that if the language of the statute is clear and unambiguous, the inquiry into construction is usually over. The Court, however, further stated it will avoid absurd results and internal inconsistencies. Therefore, RICO was held to apply to both legitimate and illegitimate enterprises.

Finally, in *Public Citizen v. Department of Justice*, the Court stated that looking beyond the text is proper when the statute’s result is inconsistent with Congressional intent. The Department of Justice routinely aided the President in appointing federal judges and regularly enlisted the help of the American Bar Association (ABA) for potential nominees. The World Legal Foundation (WLF) asserted that the ABA was an “advisory committee” under the Federal Advisory Committee Act (FACA) and, thus, must release all of its records.

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38. *Id.* at 318, 77 S. Ct. at 1076.
40. *Id.* at 575, 108 S. Ct. at 1397-98.
42. *Id.*
43. *Id.* at 580, 101 S. Ct. at 2527.
44. *Id.*
45. *Id.*
46. *Id.* at 593, 101 S. Ct. at 2533-34.
48. *Id.*
49. *Id.* at 441, 109 S. Ct. at 2559.
including any names of potential nominees for federal judges, to the public.\textsuperscript{50} The Court, however, dismissed the complaint, holding that the application of FACA to the ABA committee would unconstitutionally interfere with the President's Article II power to nominate federal judges and the doctrine of separation of powers.\textsuperscript{51} Examining the congressional history of FACA, the Court found that the Act was not intended to apply to the Justice Department's communications with the ABA.\textsuperscript{52}

\textbf{B. Principles of Statutory Construction Applied to Scienter Requirements}

\textbf{1. Scienter Requirements Generally}

Traditional principles of statutory construction are pervasive in cases concerned with scienter requirements. As the Supreme Court has stated, the theory that the commission of a crime requires intent is as "universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."\textsuperscript{53} Therefore, in the past, the courts have not interpreted Congressional silence as dispensing with a scienter requirement.\textsuperscript{54} Rather, the courts have recognized "that intent was so inherent in the idea of the offense that it required no statutory affirmation."\textsuperscript{55}

The United States Supreme Court applied these principles of statutory construction in the landmark case, \textit{Morissette v. United States}.\textsuperscript{56} Morissette was convicted of converting property belonging to the United States. The defendant argued he lacked criminal intent because he reasonably believed the property was abandoned. The Government asserted that the position of "knowingly" in the federal conversion statute only extended to the verb "converts."\textsuperscript{57} Thus, the prosecution would not need to prove that the defendant knew the property belonged to the United States.

The \textit{Morissette} Court, however, rejected the prosecution's argument. Although the Court recognized that some crimes, typically known as public

\begin{itemize}
  \item 50. \textit{Id}.
  \item 51. \textit{Id}.
  \item 52. \textit{Id} at 457, 109 S. Ct. 2568.
  \item 54. \textit{Id} at 252, 72 S. Ct. at 244.
  \item 55. \textit{Id}.
  \item 56. \textit{Id} at 246, 72 S. Ct. at 240.
  \item 57. 18 U.S.C.A. § 641 (1994) provides in part: Whoever embezzles, steals, purloins, or \textit{knowingly converts} to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof . . . Shall be fined . . . . (emphasis added).
welfare offenses,\textsuperscript{58} do not require a mental element, the majority felt that the federal conversion statute did not appropriately fit into this classification.\textsuperscript{59} The Court reasoned that, typically, public welfare offenses do not involve direct or immediate injury to persons or property. Instead, the violations only create the possibility of direct or immediate injury and the penalties attached are light in nature.\textsuperscript{60} In contrast, the crime of conversion, which was at issue in Morissette, directly injures the community by creating feelings of insecurity.\textsuperscript{61} In addition, the penalties under the statute at issue were harsh and could rise to felony status. Therefore, the Court concluded that Congress omitted intent in the federal conversion statute “in light of an unbroken course of judicial decision in all constituent states of the Union holding intent inherent in this class of offense, even when not express in the statute.”\textsuperscript{62}

The Sherman Antitrust Act\textsuperscript{63} and the Food Stamp Act\textsuperscript{64} have also withstood constitutional challenges.\textsuperscript{65} In United States v. United States Gypsum Co., the Court held that the absence of an intent requirement in the antitrust statute would not be construed as eliminating that element of the crime.\textsuperscript{66} “[I]nstead, Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor...”\textsuperscript{67} In Liporota v. United States, the Court held that a federal statute dealing with food stamp fraud contained a mens rea requirement.\textsuperscript{68} Therefore, the Government must prove the defendant knew he acquired food stamps in an unauthorized manner. The Court reasoned that to interpret the statute otherwise would criminalize innocent conduct and that crimes without a mens rea requirement are generally disfavored. The Court also noted ambiguity in a statute should be construed in favor of lenity.\textsuperscript{69}

As recently as 1994, the Court affirmed the reasoning of Morissette in Staples v. United States.\textsuperscript{70} The defendant, convicted of possessing a semi-
automatic weapon in violation of the National Firearms Act, argued he lacked knowledge of the characteristics of his gun that made it violative of the statute. The Court began its analysis with the language of the statute, noting that the absence of a scienter requirement in the statute did not by itself show Congress intended to delete a mental element as part of the crime. Rather, Congress must expressly or implicitly indicate the intent to dispense with the conventional mental element requirement. In an analysis reminiscent of Morissette, the Court also refused to characterize the National Firearms Act as a public welfare offense. This interpretation would be incorrect because "it would mean easing the path to convicting persons whose conduct would not even alert them to the probability of strict regulation in the form of a statute such as Section 5861(d)." In addition, the Court recognized that, unlike public welfare offenses, this crime had a harsh penalty with the possibility of imprisonment for ten years.

2. Scienter Requirements in Obscenity Cases

The Court has also applied the principles of statutory interpretation regarding scienter requirements to federal statutes prohibiting obscenity. Because obscenity and child pornography cases deal with similar types of materials, it is helpful to track the Court’s analyses in the obscenity area.

The Court first held that obscenity laws require a mental element in Smith v. People of the State of California. In Smith, the defendant was arrested for selling obscene books. The defendant, however, had no knowledge the books were obscene. Recognizing the importance of protecting free speech under the First Amendment, the Court stated that a public welfare offense interpretation would be inappropriate. The Government feared that the defendant could always escape conviction by feigning ignorance of the obscenity. In finding the statute had a scienter requirement, however, the Court decided the Government could rectify this situation by showing circumstances proving the defendant was "aware" of what the book contained. Later, in Hamling v. United States, the Court similarly upheld

72. Staples, 114 S. Ct. at 1796.
73. Id. at 1797.
74. Id. at 1802.
75. Id.
76. "Obscene" materials were definitively defined in Miller v. California as works which the average person applying contemporary standards would find, when taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value. 413 U.S. 15, 24, 93 S. Ct. 2607, 2615 (1973).
78. Id. at 150, 80 S. Ct. at 217.
79. Id. at 152-53, 80 S. Ct. at 218-19.
80. Id.
a federal obscenity statute requiring the Government to prove the defendant knew
the contents of the materials distributed and the nature and character of those
materials. However, the Government did not have to prove the defendant knew
the materials were legally classified as obscene.

3. Scienter Requirements in Child Pornography Cases

The first major Supreme Court case concerning child pornography laws was
New York v. Ferber. The defendant, a bookstore owner, was convicted of
knowingly promoting a filmed sexual performance by a child under sixteen years
of age in violation of a New York statute. The Court held that criminal
responsibility could not be imposed under child pornography laws without a
scienter requirement. The New York statute met this requirement because it
expressly included the mental element of "knowingly." In addition, the Court
held that non-obscene child pornography was not entitled to First Amendment
protection. This denial of First Amendment protection to child pornography
was justified because states have more leeway in the regulation of pornographic
depictions of children.

Finally, in Osborne v. Ohio, the Court addressed legislation prohibiting
private possession of child pornography. The Court recognized that since the
Ferber decision, most distributors and producers of child pornography had gone
underground. Thus, to effectively eradicate child pornography, many states
wanted to prohibit private possession of these materials. Again facing the
issue of scienter, the Court noted the Ohio statute in question did not expressly
include a mental element as part of the crime. The Court, however, relied on
another Ohio statute which applied a default mens rea requirement of "reckless-
ness" to statutes not specifying a scienter requirement. Thus, relying on the
default provision, the Court held the statute did contain a mental element as
required by Ferber.

82. Id. at 121, 94 S. Ct. at 2911.
84. Id. at 764-65, 102 S. Ct. at 3358-59.
85. Id. at 763, 102 S. Ct. at 3357.
86. Id. at 756-64, 102 S. Ct. at 3354-57. The Court offered the following reasons to support
this premise. First, advertising and selling child pornography provides an economic motive for the
production of such materials. Second, child pornography has an extremely negative impact on the
wellfare of children. Third, the Court has traditionally sustained legislation aimed at protecting
children, even when those laws operated in sensitive areas of constitutionally protected rights.
Finally, the Court found a casual relationship between the distribution of child pornography and the
sexual abuse of children. Because the materials are a permanent record of the child's pornography,
the harm to the child is prolonged by the circulation of those materials. The distribution of child
pornography must be stopped if the production of child pornography is to be effectively controlled.
88. Id. at 110, 110 S. Ct. at 1696.
89. Id. at 115, 110 S. Ct. at 1699.
IV. THE X-CITEMENT VIDEO OPINION

A. The Majority Opinion

The majority opinion, written by Chief Justice Rehnquist, first addressed the holding of the appellate court which found Section 2252 unconstitutional on its face for lack of a scienter requirement. The majority found the reading of Section 2252 by the appellate court improper for two reasons. First, the reading of the statute by the Ninth Circuit would lead to absurd results. Second, the Court found the holding of the appellate court inconsistent with the principle of statutory construction which establishes a presumption of scienter even when not expressed in the statute.

The Ninth Circuit held that knowingly in Section 2252 only modified the verbs transporting, shipping, distributing, receiving and reproducing and did not modify the language in the statute referring to the sexually explicit nature of the materials or the minority age of the performers. Chief Justice Rehnquist found this interpretation to yield an “odd result.” According to the majority, if this were the intent of Congress, the law would distinguish between someone who knowingly ships materials and someone who unknowingly ships materials. Under this interpretation of the law, knowledge of the contents of the materials would be irrelevant. Continuing this analysis, Chief Justice Rehnquist felt this reading could lead to an absurd result—the conviction of persons who did not know they were dealing with sexually explicit materials. To illustrate this point, the Court offered the example of a druggist who routinely develops film, later finding out that some of the film was sexually explicit. Citing United States v. Turkette and Public Citizen v. Department of Justice, the Court concluded that it would not presume Congress intended the absurd results that would follow from this example and other similar examples.

The Court then reviewed its prior decisions addressing statutes that arguably lacked a necessary mental element. Applying the principles of statutory construction utilized in Morissette, Liparota, and Staples to Section 2252, the

91. Id. at 467.
92. Id.
93. Id. at 466.
94. Id. at 466.
95. Id. at 467.
96. Id.
97. Id.
100. X-Citement Video, 115 S. Ct. at 467.
101. In Morissette, the Supreme Court declined to find the federal conversion statute unconstitu-
majority first rejected a public welfare offense classification for the statute because most people do not believe that film and magazines are subject to strict regulations by the Government.\(^\text{102}\) In addition, this statute provided the harsh penalty of the possibility of ten years in prison.\(^\text{103}\) Concluding that Section 2252 should contain a scienter requirement, the Court noted that a mental element should generally apply to all elements of a crime. Because non-obscene materials depicting persons over the age of seventeen are constitutionally protected, "the age of the performers is the crucial element separating legal innocence from wrongful conduct."\(^\text{104}\) To further support this conclusion, the Court noted that criminal responsibility could not be imposed without scienter because to do so would raise serious constitutional questions.\(^\text{105}\) Thus, under principles of statutory construction, the Court can properly eliminate these doubts if the elimination is not contrary to Congressional intent.\(^\text{106}\)

In the next step of the analysis, to determine Congressional intent, the Court examined the legislative history of Section 2252. Chief Justice Rehnquist acknowledged that the numerous revisions to Section 2252 made it hard to discern Congressional intent concerning its use of "knowingly."\(^\text{107}\) He reasoned, however, that Congress was aware of the 1959 decision Smith v. California\(^\text{108}\) in which the Supreme Court struck down an obscenity statute for lack of a mental element.\(^\text{109}\) Thus, Congress must have been aware that the Constitution demands a scienter requirement when it passed Section 2252.\(^\text{110}\) Chief Justice Rehnquist further stated that if Congress was not aware of the Smith decision, the Court would not conclude that Congress intended to draft unconstitutional legislation.\(^\text{111}\)

\(^{102}\) X-Citement Video, 115 S. Ct. at 467-69.
\(^{103}\) Id. at 469.
\(^{104}\) Id.
\(^{105}\) Id. at 467.
\(^{106}\) Id. at 472.
\(^{107}\) Id. at 469.
\(^{109}\) Id.
\(^{110}\) X-Citement Video, 115 S. Ct. at 469.
\(^{111}\) Id.
Analyzing separately the sexually explicit nature of materials and minority requirements in the statute, the Court first considered the effect of "knowingly" on the language in Section 2252 referring to the sexually explicit nature of materials. Before the 1984 amendment to Section 2252, the statute included an obscenity requirement. Therefore, the Court summarized that if Congress was aware of Smith, "knowingly" was at least intended to modify "obscene." After the deletion of the obscenity requirement in 1984, the other elements defining the character and content of the materials remained in subsections (1)(A) and (2)(A). Yet, Congress did not express an intent to eliminate the scienter requirement that had extended to the character and content of the materials via the word "obscene." The Court's next inquiry was the effect of the word "knowingly" on the phrase "use of a minor" in the statute. The defendant argued that the Justice Department's comments on a proposed version of the Act, particularly that the age of the child was not an element of the crime, proved Congressional intent to eliminate a scienter requirement in the statute. The Court, however, refused to consider as persuasive any Congressional history of the first version of Section 2252 which was not adopted by Congress. Yet, the Court did pay particular attention to the statements made by Senators Roth and Percy concerning Roth's version of Section 2252. In addition, the majority found it significant that the changes in Senator Roth's version of Section 2252 led to the minority requirement being placed in a newly created subclause.

In conclusion, the legislative history of Section 2252 persuaded the Court that Congress intended "knowingly" to extend to the sexually explicit nature of material. Thus, the Court extended the use of "knowingly" found in subsection (a)(1) and (a)(2) to subsections (a)(1)(A) and (a)(2)(A). Because the sexually explicit requirement is found in the same clause as the minority age requirement, the Court found it grammatically inconsistent to apply the mental element to one requirement in the clause and not the other. Therefore, to

112. See supra text accompanying note 35 for language of Section 2252.
114. X-Clement Video, 115 S. Ct. at 470.
116. Id. Subsection (1)(A) and (2)(A) provide that the "producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct. . . ."
117. X-Clement Video, 115 S. Ct. at 470.
118. See supra text accompanying note 35 for language of Section 2252.
119. X-Clement Video, 115 S. Ct. at 470.
120. Id.
121. Id. at 470-71.
122. Id.
123. Id.
124. See supra text accompanying note 35 for language of Section 2252.
125. X-Clement Video, 115 S. Ct. at 471-72.
correct this internal inconsistency, "knowingly" was extended to apply to the minority age requirement.\textsuperscript{126}

\textbf{B. The Dissent.}

Justice Scalia, writing in dissent,\textsuperscript{127} recognized that the Court reasonably and permissibly imparted a mental element into the statutes at issue in \textit{Morissette} and \textit{Liparota}.\textsuperscript{128} The dissent, however, argued that applying the principles used in those cases to the statute at issue in \textit{X-Citement Video} would contradict the plain language of the statute.\textsuperscript{129} The dissent opined that the Court should only read a mental element into a statute if Congress had not addressed the question of a mental element or if Congress was ambiguous regarding the intent required in the statute.\textsuperscript{130}

The dissent also noted that the Court had previously denied certiori in \textit{United States v. Thomas},\textsuperscript{131} in which the lower court held Section 2252 did not include a scienter requirement.\textsuperscript{132} Justice Scalia felt the interpretation by the \textit{Thomas} court was the correct grammatical reading of the statute.\textsuperscript{133} If Congress did intend "knowingly" to apply only to the enumerated verbs in Section 2252 and not to the sexually explicit nature of the materials or the minority of the performers, "it would be impossible to construct a sentence structure that more clearly conveys that thought, and that thought alone."\textsuperscript{134} Justice Scalia supported this conclusion by noting that the word "knowingly" was not in a distant phrase, as in other cases considered by this Court, but was placed in a separate clause from the sexually explicit nature of materials and minority of performers requirements.\textsuperscript{135} Based on a plain reading of Section 2252, the dissent concluded that the statute is unambiguous and unconstitutional.\textsuperscript{136}

The legislative history of the statute reinforced the dissent's conclusion that Section 2252 lacked a scienter requirement. While the majority refused to give weight to the Justice Department's comments on the first version of Section 2252, Justice Scalia relied heavily on these statements in his analysis. Particularly, the dissenting opinion recited the Justice Department's comments that the "bill is not intended to apply to innocent transportation with no knowledge of the nature or character of the material involved" and that "[t]he

\begin{itemize}
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} Justice Scalia was joined in dissent by Justice Thomas. \textit{Id.} at 473.
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} 893 F.2d 1066 (9th Cir.), cert. denied, 498 U.S. 826, 111 S. Ct. 80 (1990).
\item \textsuperscript{132} \textit{Id.} at 1070.
\item \textsuperscript{133} \textit{X-Citement Video}, 115 S. Ct. at 473.
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id.}
\end{itemize}
defendant's knowledge of the age of the child is not an element of the offense.\textsuperscript{137} The combination of these two statements, as applied to the final version of Section 2252, led to the dissent's opinion that Congress intended the scienter requirement to extend to the sexually explicit nature of materials but not to the minority of the performers requirement.\textsuperscript{138}

The dissent rejected the majority's analysis of the statute for two reasons. The majority stated it was grammatically inconsistent to extend "knowingly" to one element in a subclause and not to the other element.\textsuperscript{139} Justice Scalia, however, argued that based on traditional principles of statutory construction "knowingly" should not be extended to either element.\textsuperscript{140} The majority further argued that "[a] statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts."\textsuperscript{141} Justice Scalia disagreed with this contention by the majority, reasoning it would not be improper for Section 2252 to be written as a strict liability crime.\textsuperscript{142} Supporting this assertion, the dissent noted that the Court had consistently stated that these materials are afforded less protection than other speech.\textsuperscript{143} Thus, in \textit{Young v. American Mini Theaters,}\textsuperscript{144} the Court stated:

\begin{quote}
[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different and lesser magnitude than the interest in untrammeled political debate. . . .\textsuperscript{145}
\end{quote}

In addition, the \textit{Ferber} Court had recognized the important governmental objective of preventing the sexual exploitation and abuse of children.\textsuperscript{146}

Finally, Justice Scalia expressed his concern that the invalidation of the statute "[would] cause Congress to leave the world's children inadequately protected against the deprivations of the pornography trade."\textsuperscript{147} Nevertheless, he found that correctly construed, Section 2252, was unconstitutional, "since, by imposing criminal liability upon those not knowingly dealing in pornography, it establishes a severe deterrent, not narrowly tailored to its purposes, upon fully

\textsuperscript{137.} Id. at 474.
\textsuperscript{138.} Id.
\textsuperscript{139.} Id.
\textsuperscript{140.} Id.
\textsuperscript{141.} Id.
\textsuperscript{142.} Id.
\textsuperscript{144.} 427 U.S. 50, 96 S. Ct. 2440 (1976).
\textsuperscript{145.} Id. at 69, 96 S. Ct. at 2452.
\textsuperscript{146.} \textit{X-Citement Video}, 115 S. Ct. at 475 (citing \textit{New York v. Ferber}, 458 U.S. 747, 102 S. Ct. 3348 (1982)).
\textsuperscript{147.} Id.
protected First Amendment activities." According to Justice Scalia, this finding of unconstitutionality prevented the Court from reinterpreting the statute to say something the plain language of the statute does not impart to the reader. Justice Scalia stated:

Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it. Otherwise, there would be no such thing as an unconstitutional statute.

V. ANALYSIS

The majority opinion in X-Citement Video was consistent with traditional rules of interpretation and prior case law. From Morissette\(^1\) in 1952 to Staples\(^2\) in 1994, the Court has shown its reluctance to invalidate federal legislation. Therefore, based on precedent, this decision was correctly decided. The practitioner, however, should consider the following questions which arise because of the Court's analysis and decision in X-Citement Video.

A. Does X-Citement Video Represent an Extension of Prior Case Law?

The X-Citement Video opinion raises interesting philosophical questions regarding the Court's ability to correct legislative ambiguity or error. Specifically, after this decision, it is unclear what type of statute will be held unconstitutional for lack of a scienter requirement. In Morissette and Liparota, "knowingly" was extended to phrases within the same paragraph. Thus, X-Citement Video is an extension of the analyses in these cases because in X-Citement Video, the Court extended "knowingly" to elements in separate subclauses of the statute.

As Justice Scalia noted, if Congress intended no scienter requirement in those subclauses, it could hardly have written the statute differently to better express that intent. The legislative history of Section 2252 offers some

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148. Id.
149. Id.
150. Id. at 476 (citing Commodity Futures Trading Comm'n v. Shor, 478 U.S. 833, 841, 106 S. Ct. 3245, 3251 (1986)) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 515, 84 S. Ct. 1659, 1668 (1964)).
155. Id. at 473.
proof, although not definitively, that Congress did intend for the statute to have a mental element. In future cases, however, the legislative history of some statutes may not provide evidence as to Congressional intent regarding scienter requirements. How far will the Court go to read in a scienter requirement without evidence as to Congressional intent? What must Congress do to exclude a scienter requirement from federal legislation? Will Congress have to expressly state that it intends a statute to have no mental element? Considering these questions, one can certainly appreciate Justice Scalia's concern that the \textit{X-Citement Video} opinion may lead to the possibility that no statute will be construed as unconstitutional.

\textbf{B. Did the X-Citement Video Court Impart the Correct Level of Scienter into Section 2252?}

\textit{1. A Strict Liability Interpretation}

Importantly, the Court imparted a scienter requirement of "knowledge" into Section 2252, rejecting the possibility of a public welfare offense classification. A public welfare offense or strict liability crime is defined by Black's Law Dictionary as "unlawful acts whose elements do not contain the need for criminal intent or mens rea."

Justice Scalia's dissent raised the point that child pornography is not protected by the First Amendment and that the governmental objective of protecting children from sexual exploitation is extremely important. Arguably, a strict liability interpretation of Section 2252 would be justified by the extreme harm to children caused by child pornography. Three factors are inherent in strict liability crimes. First, the crime is part of a regulatory scheme. The Government does regulate child pornography as evidenced by the Protection of Children Against Sexual Exploitation Act. Another factor is that requiring proof of mens rea would impede the implementation of

\begin{itemize}
  \item 156. 123 Cong. Rec. 33,050 (1977).
  \item 157. \textit{X-Citement Video}, 115 S. Ct. at 475.
  \item 159. \textit{X-Citement Video}, 115 S. Ct. at 475.
  \item 162. \textit{id.} at 254, 72 S. Ct. at 245.
\end{itemize}
legislative purpose. A requirement of “knowledge” in Section 2252 may produce a heavy burden for the Government in cases against those allegedly violating the Act. Many defendants will argue they did not know the film contained a child actor or that the mature appearance of the child did not alert them to the minority age of the child. Finally, strict liability crimes usually involve light penalties. Section 2252 provides a harsh penalty. Thus, this factor is not met and cannot be met unless Congress changes the punishment.

Although technically two of three factors are met, policy considerations make a public welfare classification inappropriate for Section 2252. A strict liability standard may lead to the conviction of persons who are not the target of Section 2252. Because non-obscene, sexually explicit materials involving persons over the age of seventeen are protected by the First Amendment, one can assume that Section 2252 was designed to target those individuals that deal with child pornography, not adult pornography. The facts of X-Citement Video provide a useful example of how some individuals who are not the target of Section 2252 would be convicted under a strict liability interpretation. Traci Lords and her husband misrepresented to producers of adult pornography that she was over eighteen. This scheme was aided by a fake California driver’s license, a fake United States passport and a fake birth certificate. She was then photographed in an adult magazine, Penthouse, and in many adult films. Under a strict liability interpretation, individuals who purchased adult materials featuring the minor, Traci Lords, would be criminally liable. Perhaps the only way for a person to avoid conviction would be to stop purchasing adult pornography, a constitutionally protected act. Considering that the purpose of Section 2252 is to deter persons from dealing with child pornography and that adult pornography is constitutionally protected, a strict liability interpretation of Section 2252 would be inappropriate.

2. Recklessness

The Court also rejected a recklessness standard for Section 2252. The Model Penal Code defines recklessness as follows:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known

164. Morissette, 342 U.S. at 257, 72 S. Ct. at 247.
165. Id. at 256, 72 S. Ct. at 246.
to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.\textsuperscript{168}

In \textit{Osborne v. Ohio},\textsuperscript{169} the Court found that a child pornography statute lacked a mental element but saved the statute by reading in a standard of "recklessness."\textsuperscript{170} At least one commentator, arguing that the "knowledge" standard imposes a heavy burden on the Government, urged the Court to follow \textit{Osborne}.\textsuperscript{171} With a recklessness standard, the defendant could be convicted once he disregarded a substantial risk that the film contained child actors. Judge Kozinski, who dissented in the Ninth Circuit opinion of \textit{X-Citement Video}, also supported this analysis.\textsuperscript{172} He stated that the Ninth Circuit's reliance on obscenity cases was improper and that the court should have relied solely on child pornography cases.\textsuperscript{173} Thus, the \textit{Osborne} decision, in which the Court read a recklessness requirement into a child pornography statute, was his authority for reading a recklessness requirement into Section 2252.\textsuperscript{174}

This analysis, however, presents two problems. First, importing a "recklessness" standard into Section 2252 would be textually inconsistent because "knowingly" was expressly written into the statute. Additionally, in oral argument, the Supreme Court seemed to accept the prosecution's rejection of the "recklessness" standard. Arguing before the Supreme Court, Solicitor General Days stated that a "recklessness" standard was inappropriate because "knowingly" was already in the statute and should be consistently applied to all of the elements of the offense unless Congress suggested something to the contrary. Additionally, he argued the legislative history supported the prosecution's view that "knowingly" was the intended requirement in the statute.\textsuperscript{175}

A second problem that recurs under the "recklessness" standard is the potential convictions of persons who are not the target of Section 2252. For example, consider an individual who goes to an adult video store and chooses to buy what he believes to be an adult film. Assume, also, that the packaging of the film in no way alerts the individual that the film contains a child actor. This individual has no way of knowing of the "risk" of child actors in the film. By the time the person watches the film and sees a child actor, he can no longer avoid the "risk" because criminal liability has already attached.

\textsuperscript{168.} Model Penal Code § 2.02(2)(c) (1962).
\textsuperscript{170.} \textit{Id}.
\textsuperscript{171.} Robert F. Schwartz, \textit{Federal Child Pornography Law's Scien}
\textsuperscript{172.} \textit{United States v. X-Citement Video}, 982 F.2d 1285 (1992) (Kozinski, J., dissenting).
\textsuperscript{173.} \textit{Id}.
\textsuperscript{174.} \textit{Id}.
\textsuperscript{175.} Transcript of Oral Argument at 3-4, \textit{X-Citement Video} (1994 WL 665284).
C. What Exactly Does the Government Need to Show to Prove "Knowledge" in Section 2252?

Considering the difficulties with reading Section 2252 as a strict liability crime or as including a "recklessness" standard, it appears that the "knowledge" standard was correctly extended to all of the elements in the statute. Not only is a "knowledge" standard textually consistent with the language of the statute, but in addition, under this standard, those persons who have no intent to deal with child pornography will not be swept into the ambit of the statute. This decision, however, may still present an immediate problem for the Government when prosecuting persons under Section 2252. Specifically, the Court failed to establish what precisely the defendant must "know" to be criminally liable under this statute.

Several hypotheticals help to illustrate this problem. Must the defendant know the exact age of the child or simply that the child was under eighteen? In light of the legislative history, the Court would not require "knowledge" of the exact age of the child. A defendant, however, who ordered a film marketed as child pornography, that did not actually contain minor actors would not be liable under this Act. Although conviction of this person would further the purpose of Section 2252, to deter persons from dealing with child pornography, this hypothetical would not meet the requirements of X-Citement Video. Although the defendant would know of the sexually explicit nature of the materials, the film would not actually contain child actors. Thus, the defendant could not have knowledge of child actors in the film.

Extending this hypothetical, can a defendant successfully escape conviction by stating that he could not tell the child was a minor because of his mature appearance? Section 2252 is aimed at protecting all children under the age of eighteen. Remember, however, the photos of Traci Lords in Penthouse. Could a reasonable person discern that she was seventeen, which violates Section 2252, as opposed to eighteen years of age which is not in violation of this statute? Arguably, a mistake of age defense should be allowed under a "knowledge" standard for Section 2252. If not, the statute would revert to a strict liability standard, where a defendant with no knowledge of the minority status of a child actor would be criminally liable. Yet, in light of the policies to protect all minor children, the courts should apply an objective standard to this defense and require the defendant to prove by clear and convincing evidence that a reasonable person could not have discerned the actor was a minor.

VI. Conclusion

Child pornography is a serious problem in America today\textsuperscript{178} and arguably the Government should use all avenues constitutionally available to stop this crime. The Protection of Children Against Sexual Exploitation Act represents the legislature's attempt to thwart the growth of the child pornography industry.\textsuperscript{179} This legislation, however, also represents the struggle encountered by the legislature in drafting precise and constitutional legislation. In \textit{X-Citement Video}, the Supreme Court had to rule upon the constitutionality of Section 2252 considering complicated and arguably unclear legislative history, the policies against invalidating legislation, and the strong policies associated with ending child pornography.\textsuperscript{180}

While prior case law had extended a scienter requirement to all elements within the same phrase or paragraph of a statute, the Supreme Court in \textit{X-Citement Video}, for the first time, extended a mental element to separate subclauses of a statute.\textsuperscript{181} This extension of prior case law by the Court was logical considering the facts and legislative history surrounding this case.\textsuperscript{182} The holding of \textit{X-Citement Video}, however, should not be construed as granting unlimited power to the courts to save all ambiguous legislation. Courts in the future, keeping the doctrine of separation of powers in mind, should be wary of stretching the limits of statutory interpretation any further. This may not prove to be an easy task. In light of \textit{X-Citement Video}, the courts will now have to walk a fine line between constitutionally interpreting ambiguous legislative history and judicially rewriting legislation.\textsuperscript{183}

\textit{Patricia A. Burke}

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\textsuperscript{178} See supra note 168.


\textsuperscript{180} \textit{X-Citement Video}, 115 S. Ct. 464.

\textsuperscript{181} \textit{Id.} at 471.

\textsuperscript{182} See supra text accompanying notes 90-126.

\textsuperscript{183} "Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it." Commodity Futures Trading Comm'n v. Shor, 478 U.S. 833, 841, 106 S. Ct. 3245, 3251 (1986) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 515, 84 S. Ct. 1659, 1668 (1964)).