

# Washington University Law Review

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Volume 73

Issue 3 Northwestern University / Washington University Law and Linguistics Conference

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January 1995

## Conference Participants, Annotated Table of Contents, Problems Considered

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### Recommended Citation

*Conference Participants, Annotated Table of Contents, Problems Considered*, 73 WASH. U. L. Q. 785 (1995).

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**NORTHWESTERN UNIVERSITY/WASHINGTON  
UNIVERSITY LAW SCHOOL  
LAW AND LINGUISTICS CONFERENCE  
EVANSTON, ILLINOIS**

**CONFERENCE PARTICIPANTS**

**LEGAL SCHOLARS**

**Robert Bennett, Professor of Law and Dean  
Northwestern University School of Law**

**A.B. Harvard College (1962); LL.B. Harvard Law School (1965); Knox  
Fellow, London School of Economics (1966).**

**Author of several major articles on constitutional interpretation, including  
“The Mission of Moral Reasoning in Constitutional Law” (1985),  
“Objectivity in Constitutional Law” (1984), “Judicial Activism and the  
Concept of Original Intent” (1986) and “Styles of Judging” (1990).  
Teaching focused on contracts, constitutional law and theory, and  
legislation—all involving drafting and interpretation of language. Dean  
of Northwestern Law School 1985-1995; past president of the American  
Bar Foundation; co-founder and past president of the Chicago Council  
of Lawyers; professional arbitrator since 1974.**

**Clark Cunningham, Professor of Law  
Washington University School of Law**

**A.B. Dartmouth College (1975); J.D. Wayne State University Law School  
(1981).**

**The leading expert among American legal scholars on applications of  
linguistics to law. His publications include “The Lawyer as Translator,  
Representation as Text” (1992), “A Tale of Two Clients: Thinking about  
Law as Language” (1989), and “A Linguistic Analysis of the Meanings  
of ‘Search’ in the Fourth Amendment: A Search for Common Sense”  
(1988). The latter won the 1988 Scholarly Paper competition of the  
Association of American Law Schools. Also co-author (with Levi, Green,  
and Kaplan) of “Plain Meaning and Hard Cases” in *Yale Law Journal*  
(1994).**

William N. Eskridge, Jr., Professor of Law

Georgetown University Law Center

B.A. Davidson College (1973); M.A. Harvard University (1974); J.D. Yale Law School (1978).

Author of *Dynamic Statutory Interpretation* (1994), and numerous articles on statutory interpretation including "The New Textualism" (1990). Co-author of *Statutes and the Creation of Public Policy* (with Philip Frickey, 1987), of *Cases and Materials on Constitutional Law* (with Daniel Farber and Philip Frickey, 1993) and "Statutory Interpretation as Practical Reasoning" (with Philip Frickey, 1990).

Kent Greenawalt, University Professor

Columbia Law School

A.B. Swarthmore College (1958); B.Phil. Oxford University (1960); LL.B. Columbia Law School (1963).

Author of *Private Consciences and Public Reasons* (1995), *Fighting Words* (1995), *Law and Objectivity* (1992), *Speech, Crime, and the Uses of Language* (1989) and many articles and chapters on the First Amendment and other issues. Cardozo Professor of Jurisprudence at Columbia University (1979-1990). Visiting Fellow or Visiting Professor at Cambridge, Oxford, Northwestern, Princeton, NYU, Stanford. Past president of the American Society for Political and Legal Philosophy. Fellow, American Academy of Arts and Sciences.

\*Michael Moore, Leon Meltzer Professor of Law and Professor of Philosophy

University of Pennsylvania Law School

A.B. University of Oregon (1964); J.D. Harvard Law School (1967); S.J.D. Harvard Law School (1978).

A leading contemporary natural law theorist, and author of numerous books and articles on jurisprudence, legal philosophy, philosophy of science, and law and psychiatry, including *Law and Psychiatry: Rethinking the Relationship* (1984), *Act and Crime: the Philosophy of Action and its Implications for Criminal Law* (1993), *The Semantics of Judging* (forthcoming), *Placing Blame: A General Theory of the Criminal Law* (forthcoming), "A Natural Law Theory of Interpretation" (1985) and "Intentions and Mens Rea" (1987). Visiting Professor at Iowa, Northwestern, Berkeley, USC, Stanford.

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\* Michael Moore did not attend the Sunday session, due to a prior speaking commitment.

Frederick Schauer, Frank Stanton Professor of the First Amendment  
John F. Kennedy School of Government Harvard University  
A.B. Dartmouth College (1967); M.B.A. Dartmouth College (1968); J.D.  
Harvard Law School (1972).

Author of *The Law of Obscenity* (1976), *Free Speech: A Philosophical Inquiry* (1982), and *Playing by the Rules: A Philosophical Examination of Rule-based Decision Making in Law and in Life* (1991) and *The Philosophy of Law: Readings and Commentary* (with Walter Sinnott-Armstrong, 1995), and numerous articles on legal interpretation including "Constitutional Positivism" (1993), "The Practice and Problems of Plain Meaning" (1992), "Statutory Construction and the Coordination Function of Plain Meaning" (1990) and "Formalism" (1988). Previously Professor of Law, University of Michigan.

\*\*Cass Sunstein, Karl N. Llewellyn Professor of Jurisprudence  
The University of Chicago Law School

A.B. Harvard College (1975); J.D. Harvard Law School (1978).

Author of *After the Rights Revolution: Reconceiving the Regulatory State* (1990), *The Partial Constitution* (1993), *Legal Reasoning and Political Conflict* (forthcoming), and co-author of *Constitutional Law* (1986). Author of numerous articles on legal interpretation including "Political Conflicts and Legal Agreements" (forthcoming), "On Analogical Reasoning" (1993), and "Interpreting Statutes in the Regulatory State" (1989). Vice chair of the American Law Institute. Fellow, American Academy of Arts and Sciences.

#### LINGUISTIC SCHOLARS

Charles Fillmore, Professor in the Graduate School and  
Professor Emeritus of Linguistics (former department chair)  
University of California, Berkeley

B.A. University of Minnesota (1950); Ph.D. (Linguistics) University of Michigan (1961).

One of the foremost lexical semanticists [specialists in word meaning] in the United States, with extensive publications on semantic theory, lexical semantics, English and Japanese grammar, and discourse analysis. Co-editor of *Studies in Linguistic Semantics* (1971) and *Individual Differences in Language Ability* (1979). Invited to lecture on lexical

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\*\* A family emergency prevented Cass Sunstein from attending more than the Friday session.

semantics (most recently) in Czechoslovakia, Denmark, Italy, Sweden, Japan, and Taiwan; gave keynote address at the 1994 annual meeting of the European Association of Lexicography [dictionary writing] in Amsterdam; serving as outside consultant to a European Community dictionary writing team.

Michael Geis, Professor Emeritus of Linguistics

Ohio State University

B.A. Rice University (1961); Ph.D. (Linguistics) Massachusetts Institute of Technology (1970).

Theoretical pragmaticist [specialist in the study of the contributions of context to meaning]. Author of *The Language of Television Advertising* (1981), *The Language of Politics* (1988) and *Speech Acts and Conversational Interaction* (forthcoming—a study of the structural and interactional features of conversation), as well as articles on diverse linguistic subjects, including “Linguistic Deception in Television Advertising” (1980), “Mental Logic and Sentence Comprehension” (1984), and “A Linguistically Motivated Theory of Conversational Sequences” (1990). Has consulted in the areas of trademark law, deceptive advertising, and the language of jury instructions in death penalty cases.

Georgia Green, Professor of Linguistics

Beckman Institute (Cognitive Science group),

University of Illinois/Urbana-Champaign

A.B. (1966); A.M. (1969); Ph.D. (Linguistics) The University of Chicago (1971).

A leading theoretical linguist who has published widely on matters of syntactic theory and on semantic and pragmatic interpretation in natural language understanding. Author of *Pragmatics and Natural Language Understanding* (1989); co-editor of *Linguistic Complexity and Text Comprehension* (1988). Author of numerous articles including “Ambiguity Resolution and Discourse Interpretations,” “Linguistic Analysis of Conversation as [Criminal] Evidence” (1990) and “The Universality of Gricean Interpretation” (1990). Also co-author (with Cunningham, Levi, and Kaplan) of “Plain Meaning and Hard Cases” in *Yale Law Journal* (1994). Consultant in a number of legal cases centering on interpretation of covertly recorded conversations.

Jeffrey P. Kaplan, Associate Professor of Linguistics

San Diego State University

A.B. The University of Chicago (1965); Ph.D. (Linguistics) University of Pennsylvania (1976); J.D. University of San Diego School of Law (1994).

Author of *English Grammar: Principles and Facts*, and numerous linguistic articles on syntax, pragmatics, and sociolinguistics, including "Syntax in the Interpretation of Legal Language: The *vested vs. contingent* Distinction in Property Law" (1993). Also co-author (with Cunningham, Levi, and Green) of "Plain Meaning and Hard Cases" in *Yale Law Journal* 103:6 (1994). Kaplan is one of a handful of linguistic professors in the country with a J.D. degree, and has consulted in a number of legal cases involving the interpretation of the language of legal documents and taped conversations.

Judith N. Levi, Associate Professor of Linguistics (former department chair)

Northwestern University

B.A. Antioch College (1964); M.A. (1972); Ph.D. (Linguistics) The University of Chicago (1975).

The leading expert among American linguists on language and law, an area in which she has been publishing for 15 years. Author of *The Syntax and Semantics of Complex Nominals* (1978) and *Language and Law: A Bibliographic Guide to Social Science Research in the U.S.A.* (1994), and co-editor (with Anne Graffam Walker) of *Language in the Judicial Process* (1990). Her articles and chapters on language and law include "Language as Evidence: The Linguist as Expert Witness in North American Courts" (1994), "Evaluating Jury Comprehension of Illinois Capital Sentencing Instructions" (1993), and "The Study of Language in the Judicial Process" (1990). She is co-author (with Cunningham, Green and Kaplan) of "Plain Meaning and Hard Cases" in *The Yale Law Journal* 103:6 (1994). Has served as consultant and/or expert witness in 25 civil and criminal cases centering on language interpretation.

Jerrold Sadock, Glen A. Lloyd Distinguished Service Professor of Linguistics (former department chair)

The University of Chicago

B.S. (1965); M.A. (1967); Ph.D. (Linguistics) University of Illinois (1969).

A leading theoretical linguist who has published widely in many areas of linguistics, including syntax, semantics, pragmatics, and Scandinavian and Eskimo languages. Author of *Toward a Linguistic Theory of Speech Acts* (1974), *Autolexical Syntax: A Theory of Parallel Grammatical*

*Representations* (1991), and many articles including “Ambiguity Tests and How to Fail Them” (1975), “The Pragmatics of Subordination” (1984), and “The Position of Vagueness Among Linguistic Insecurities” (1986). Has served as consultant in a variety of legal cases concerning language interpretation.

## TABLE OF CONTENTS

<i>Problems Considered</i> .....	797
----------------------------------	-----

<i>Friday, March 31</i> .....	800
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1. <i>Opening Session</i> .....	800
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Following a brief opening session, the conferees divided into groups of four, two linguists and two legal scholars, to work through the discussion problems in three sessions during the rest of the day. These small group discussions were not transcribed.

2. <i>Setting the Agenda</i> .....	817
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On the first evening, the linguists and the legal scholars met separately for an hour to share the small group discussions and to discuss ideas for the agenda for the balance of the conference. The participants then met briefly as a group to discuss agenda setting; This discussion was transcribed.

<i>Saturday, April 1</i> .....	824
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1. <i>The Meaning of Meaning: In Linguistics</i> .....	825
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In this section, the six linguists attempted to explain how linguists view and analyze the term *meaning*. The linguists expressed a preference for the term “conventional meaning” over the more traditional “literal meaning” since the former provides a salutary emphasis on linguists’ view that the meaning of words is best viewed as a function of the conventional patterns of usage for those words in a speech community, rather than as some abstract entity inhering in the words themselves.

Georgia Green expressed her view that words themselves don’t “have” meaning, and that “meaning” is a property of the people using the words, rather than a property of the words themselves. In this view, word meaning becomes more a pragmatic phenomenon (as a function of speakers’ assumptions about a shared audience, and about the audience’s assumptions about the speaker, etc.) than a semantic one (as a function of the language form itself), and we assign meaning to words in a way closely analogous



to the way we assign referents to proper names. This view was not fully shared by the other linguists.

Charles Fillmore and Judith Levi commented on the many dimensions of meaning that are studied in linguistics, and identified the three major contributors to the meaning of an utterance as word meaning (called “lexical semantics”), sentence meaning (called “sentential semantics” or “compositional semantics,” and often “truth-conditional semantics”), and context meaning (called “pragmatics”). They emphasized that any theory of meaning must account for all three dimensions, which in turn are interdependent in interesting ways. One of these is that the newest approach to the study of meaning—pragmatics—has demonstrated that word meaning and sentence meaning are much more dependent on context (the focus of pragmatics) than linguists used to believe. Georgia Green took this demonstration one step further by arguing that the notion of “meaning independent of context” (sometimes said to be the subject of “semantics” in opposition to “pragmatics”) itself is meaningless since every actual utterance of human language is made—and interpreted—in some context.

2. *A Vehicle in the Park By Any Other Name . . . . .* 839

Bill Eskridge asked the linguists to make their theory of meaning concrete by applying it to the “Vehicles in Park” discussion problem, in particular the question of whether the prohibition applied to ambulances entering the park. A very lively discussion ensued during which the linguists maintained that a judicial decision holding that the vehicle prohibition did not apply to ambulances could not be described as an “interpretation” of the “meaning” of the text. The concept of “regulatory variable,” developed by Judith Levi and Bill Eskridge during one of the small group discussions on Friday, was then introduced as a possible explanation for such a judicial decision. If “vehicle” is treated as a regulatory variable, then an agency charged with regulating conduct under that law would have discretion to vary the application of the term beyond the conventions of usage recognized within ordinary language. Fred Schauer thought the concept useful but added that it mattered very much which regulating agencies had authority to treat statutory terms as variables; we might not want to give police officers the same discretion as judges. The linguists gave new life to this hypothetical so familiar to legal scholars by showing how “all” and “prohibited” could receive the same kind of interpretive attention as “vehicle,” and by explaining how “vehicle” presents specific kinds of linguistic features that make it an indeterminate

term. The interpretation challenge would be different if the law stated: "All bicycles are prohibited from the park."

3. *The Meaning of Meaning: In Law* . . . . . 875

Fred Schauer began with an overview of several major approaches to meaning current within American legal scholarship. Michael Moore laid out the 10 elements of legal interpretation that he uses in seminars he leads for judges. The linguists discussed parallels between Moore's 10 elements and linguistic principles of interpretation. Clark Cunningham offered a deliberately tendentious suggestion that "interpretation" and "meaning" are deliberately used by lawyers and judges in an ambiguous way to deceive the lay public into believing that when judges say they are "interpreting the meaning of the law" they are using those words according to the conventional meanings of "interpret" and "meaning" when in fact they are engaging in decisionmaking that is not constrained by the words of the text.

4. *What Makes Linguistics a Science?* . . . . . 898

Judith Levi began by pointing out that Chomsky's extraordinary contributions to linguistics begin with his transforming the discipline into a theory-building science, that is, one that follows rigorous scientific method in formulating hypotheses about testable/falsifiable data, making predictions from those hypotheses, testing those predictions, revising the hypotheses accordingly, and so forth. Charles Fillmore noted that if someone (such as a law professor discussing the sentence with *knowingly* from the *X-Citement Video* case) claims that its syntax works differently from other sentences in English, then a linguist would respond that (1) the nature of linguistic theories is that they are intended to cover the full range of instances of the phenomenon under investigation (such as subordinate clauses like the *if*-clause in that case), and (2) a criticism of a current theory would therefore have to be in the form of an opposing theory that also was intended to cover a similarly broad range of instances of the phenomenon, rather than claiming an ad hoc exception to the patterns accounted for in the theory.

In the discussion that followed, the linguists were concerned with distinguishing between (a) a rule or presumption from the legal world, such as a *scienter* requirement based on general criminal law, that can "trump" the language of a particular statute, and (b) a claim—that the linguists do

not find valid—that the language of a particular statute can isolate empirically discovered syntactic patterns of English. Thus, the linguists would say that the Supreme Court’s decision in *X-Citement Video* can be attributed to a decision of type (a) but cannot be justified by a claim of type (b).

Jerry Sadock then began a direct consideration of linguistics as a science by noting that the word “science” is itself both ambiguous (in a less troublesome way) and vague (in a more troublesome way). The term is vague in that many terms which describe its constituent parts are “fudgeable” to a certain extent, such as “falsifiability” and “prediction.” Nevertheless, he would rate linguistics fairly high as a science—lower than physics but higher than cultural anthropology and legal theories. And he would characterize as “theory” (in linguistics, as elsewhere) “that body of abstract statements which together imply things about the data that we can test directly through experiment.”

Responding to Clark Cunningham’s hypothetical in which two linguists engage in introspection and come up with opposing analyses of the same phenomenon, and to Fred Schauer’s query about how linguists decide whose theory is better, Jerry Sadock explained that the way to decide would be to ascertain the predictions made by each analysis/theory and to test those predictions empirically. Jerry Sadock and Georgia Green explained that sometimes those tests can be accomplished by introspection by trained experts (*i.e.*, linguists). Judith Levi then clarified that different kinds of linguistic predictions may need to be tested by different methods, ranging from introspection to questionnaires for native speakers to analyses of new data bases assembled by computer searches. She also emphasized that the domains of word meaning and syntax are very different, in that the latter shows far more interspeaker agreement than the former.

Michael Geis emphasized that he shared the concern of some of the law professors about overreliance on introspection and intuition, but that Chomsky had long ago pointed out that however one collects one’s data, by surveys or physical equipment or questionnaires, we still must evaluate and refine all of these methods by using our (trained, expert) intuition and/or the intuitions of other native speakers. Charles Fillmore then concurred by pointing out that even with the assistance of data from very large corpora [extensive sets of transcribed natural language data] consisting of millions of words, which have recently become available through computer technology, a native speaker can still have accurate intuitions that permit her to say, “I know that such-and-such is a part, or a sentence, or an expression in English, even though it’s not in the corpus.”

(The reason that no corpus will ever be big enough to embrace all the knowledge that a native speaker can access through introspection is that, as Chomsky showed, the actual set of English sentences is an infinitely extendable one.)

*Sunday, April 2* . . . . . 920

1. *The Case of the Befuddled Bride* . . . . . 922

Chuck Fillmore introduced a pre-nuptial agreement he had been asked to analyze by lawyers for the wife who stood to receive very little in a pending divorce if the agreement were enforced. He suggested that the agreement was so incomprehensible that it should be treated as an “incompetent text” and therefore not a binding contract. He reported that the wife’s lawyers did not identify as incomprehensible provisions that to him and his linguistic colleagues were clearly so. The trial judge refused to hear the linguistic expert testimony.

The legal scholars were able to agree on a meaningful interpretation of a provision that Charles Fillmore offered as particularly incomprehensible. The discussion concluded on the topic of what competence enabled the legal scholars to make sense of this document: Was it ability to understand a special kind of language or was it a set of shared values and understood legal principles?

2. *The Case of the Faithful Servant (Or Dynamic Statutory Interpretation Meets the Regulatory Variable)* . . . . . 940

Bill Eskridge illustrated both his theory of dynamic statutory interpretation and the concept of a regulatory variable (see above), by reworking a famous 19th century hypothetical involving instructions to a servant to “fetch soupmeat every Monday at the corner store.” The legal scholars and linguists worked through a number of variations and generally expressed delight at the explanatory force of the example.

3. *Doubt About Reasonable Doubt* . . . . . 953

The 1994 Supreme Court decision in *Victor v. Nebraska* was used to focus discussion on the problem of jury instruction comprehensibility. The linguists showed a wide variety of ways in which definitions of “reasonable doubt” were confusing or indeterminate. Clark Cunningham concluded by

proposing two empirical experiments to test (1) whether linguists were better than judges at predicting whether jurors would be confused by jury instructions, and (2) whether jury instructions drafted with the assistance of linguists would be significantly more comprehensible than instructions written only by lawyers and judges.

## PROBLEMS CONSIDERED

*The following memorandum was written by Clark Cunningham and distributed to participants prior to the Law and Linguistics Conference.*

The plan is for us to spend most of Friday in small groups of four (two linguists and two lawyers) discussing the following problems. The membership of the discussion group will shift for each problem with the goal that each person from one discipline will have been in small group discussion with every person from the other discipline by the end of the day.

For each problem, the same set of questions can frame discussion:

1. Is the legal text indeterminate as a matter of ordinary English?
2. If the text is indeterminate, does the indeterminacy arise from (a) syntax, (b) semantics, or (c) pragmatics?
3. How can the indeterminacy be resolved in interpreting the text?
4. How do linguists and lawyers differ in analyzing and answering the above three questions?

Last Tuesday I mailed to you materials which should be reviewed for Discussion Problems 2-4. As important as it is for each of us to do our "assigned" background reading in the other discipline for the conference, I think it is even more important that all of us have read carefully the materials for the discussion problems.

Our original hope was that most of the discussion problems would be based on cases to be argued before the Supreme Court next fall. Unfortunately, I have identified only one such case so far. The Court has granted review in very few cases since mid-February, which is the cut-off for when cases will be argued, this term (before May) or next term (starting in October). If the Court grants review in another interesting case next week, we may substitute that case for one of the following discussion problems (probably Two).

### *DISCUSSION PROBLEM ONE*

*A. VEHICLES IN THE PARK (see readings by H.L.A. Hart, Fuller, Moore, Schauer)*

Assume the following city ordinance promulgated by a single person, the Mayor: "ALL VEHICLES ARE PROHIBITED FROM LINCOLN PARK."

Which of the following are prohibited from the park?

- (1) A baby carriage pushed by a mother.
- (2) A bicycle ridden by a 12-year-old boy.

- (3) An ambulance passing through en route to the hospital.
- (4) A fully operational tank mounted as a WWII monument.
- (5) A fully operational airplane mounted as a WWII monument.
- (6) A gasoline powered moped ridden by a 15-year-old boy.
- (7) An electrically powered wheelchair used by a paraplegic.

I encourage you to look up at least three different dictionary definitions of “vehicle” to see if they assist you in your task.

### *B. DOGS ON LEASH*

Assume the following city ordinance promulgated by a single person, the Mayor: “PERSONS WALKING DOGS IN PUBLIC PARKS MUST HAVE THEIR DOGS LEASHED.”

Which of the following persons have violated the ordinance?

- (1) Pauline, who enters the park, and then walks with her dog at the end of a 15-foot leash.
- (2) Quentin, who enters the park, and then starts walking with his dog at the end of a 5-foot leash, but the leash breaks and the dog runs free.
- (3) Olive, who enters the park with her dog on a 5 foot leash, but then sits down on a park bench to read a book and releases her dog to run free.
- (4) Kent, who never enters the park, but releases his dog from his leash while across the street and watches his dog run into the park.

### *C. IMPROVEMENTS*

Assume a historian finds the following fragment of a city ordinance enacted in Chicago in 1895: “ALL IMPROVEMENTS SHALL BE REPORTED TO . . .”

What can “improvements” possibly mean? What cannot possibly be included in the meaning of “improvements” in this ordinance? How do we know?

### *DISCUSSION PROBLEM TWO*

**DOES THE CHILD PORNOGRAPHY ACT REQUIRE PROOF THAT A PERSON WHO DISTRIBUTES A SEXUALLY EXPLICIT VIDEOTAPE OF A MINOR KNEW THE DEPICTED PERFORMER WAS A MINOR IN ORDER TO CONVICT?**

The text at issue is the following provision of the federal child pornography statute:

“(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; . . . shall be punished”

In *United States v. X-Citement Video* (11/29/94), the Supreme Court rejected what it acknowledged as “the most natural grammatical reading”—to interpret the provision so that “knowingly” modifies “involves the use of a minor.” The dissent by Scalia is one of the strongest statements by him on textualism. I expect that the linguists will view this problem as uninteresting as a matter of linguistic analysis. The problem *is* interesting though as a very recent example of how courts wrestle with textualism when a “literal” reading produces an undesired result.

I suggest reading the materials on this problem mailed Tuesday in following order:

(1) NYT article dated 3/1/94 (review granted)

(2) Statute at issue: 18 USC § 2252

(3) NYT article dated 10/6/94 (oral argument)

(4) Other Circuit Court interpretations of 18 USC § 2252

(5) The truly brief amicus brief on behalf of the Law & Linguistics Consortium

(6) NYT article dated 11/30/94 (the decision)

(7) The Court’s opinion