No. 08-108

In the Supreme Court of the United States

IGNACIO CARLOS FLORES-FIGUEROA,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

Brief of Professors of Linguistics as Amici Curiae in Support of Neither Party

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Interest of Amici Curiae[1]

Amici Thomas Ernst, PhD.; Georgia M. Green, PhD.; Jeffrey P. Kaplan, PhD.; and Sally McConnell-Ginet, PhD. are professors of linguistics. Their credentials are summarized in Appendix A. Professors Green and Kaplan were amici in *United States v. Hayes*,[2] which was recently argued before this Court. As in *Hayes*, linguistics can offer insights and analytical tools that may be helpful in resolving that the interpretive dispute this case presents.

We take no position on the ultimate legal question before the Court. Instead, we focus solely on questions relating to the ordinary meaning of the statutory language, by which we mean the way that the statute is likely to be understood by an ordinary native speaker of English.

Relevant Statutory Provisions

18 U.S.C. § 1028A(a)(1) provides:

> Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment

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1. No party's counsel authored this brief in whole or in part. No monetary contribution intended to fund the preparation or submission of this brief was made by any party or any party's counsel. Nobody other than amici or their counsel has made any such contribution. Letters evidencing the parties' consent to the filing of this brief have been lodged with the Clerk. Counsel for amici notes that he informally assisted counsel for the defendant in *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008), *pet. for cert. filed* (U.S. Nov 7, 2008) (No. 08-622), in connection with opposing the government's motion in the court of appeals for rehearing en banc.

2. No. 07-608 (U.S argued Nov. 10, 2008).

provided for such felony, be sentenced to a term of imprisonment of 2 years.

18 U.S.C. § 1028(d)(7), which defines the term *means of identification*, is set out in Appendix B.

Introduction and Summary of Argument

Viewed from the standpoint of language rather than law, this case raises questions about what adverbs do and how they work. That subject is much broader and more complicated than most people could imagine; the discussion of adverbs and similar modifiers in the leading reference work on English grammar takes up almost 150 pages.[3] What most of us were taught about the topic in school barely scratches the surface. As a result, the courts that have previously considered how to interpret 18 U.S.C. § 1028A(a)(1) have made several fundamental mistakes.

First, it is a mistake to say that *knowingly* modifies only the statute's verbs. Rather, it modifies the entire predicate consisting of the verbs and their direct object. This is immediately apparent when one looks real-world sentences in which *knowingly* is used. And that empirical evidence is consistent with linguistic theory. The way that *knowingly* contributes to a sentence's meaning is to attribute to one of the actors in the sentence's cast of characters a mental attitude toward the event that the sentence is about. When the verb is transitive, as is the case here, the verb by itself is insufficient to describe the event; the description is incomplete without the direct object. So *knowingly* combines with (and

3. Rodney Huddleston & Geoffrey Pullum, *The Cambridge Grammar of the English Language* 570–95, 665–784(2002).

therefore modifies) the predicate as a whole, not just the verbs.

Second, it is a mistake to say that *knowingly* modifies *transfers, possesses, or uses…a means of identification* but not *transfers, possesses, or uses…a means of identification of another person*. What it modifies is the predicate in its entirety. The prepositional phrase *of another person* is part of the direct object (*a means of identification of another person*), so it is part of the predicate and is therefore part of what *knowingly* modifies.

Third, it is a mistake to say that there is any ambiguity as to what *knowingly* modifies. Although the first two mistakes were made by courts that have ruled against defendants, this one has been made by courts that have ruled in defendants' favor, and it represents these courts' response to the argument that *knowingly* plainly does not modify *of another person*. The courts that have described the statute's grammar as ambiguous have relied on this Court's decision in *Liparota v. United States*,[4] where the Court found a grammatical ambiguity in a statute that is said to be structured similarly to § 1028A(a)(1). But the two structures differ from one another in a crucial respect. So while the statute in *Liparota* was in fact grammatically ambiguous, the statute here is not.

However, that does not end our inquiry. The fact that § 1028A(a)(1) is not ambiguous in its grammatical structure does not rule out the possibility that it is ambiguous in another respect. We therefore conclude this brief by discussing the possibility that despite its unambiguous structure, the statute could be read to allow conviction without proof that the defendant knew

4. 471 U.S. 419 (1985).

that the means of identification belonged to another person. Although we are unable to answer that question definitively, we suggest that if § 1028A(a)(1) is ambiguous, the ambiguity may well be one that exists as a theoretical matter but that plays no role in the everyday process of using and understanding language.

Argument

A. In § 1028A(a)(1), *knowingly* modifies the predicate consisting of the verbs and their direct object.

Several courts, including the Eighth Circuit in this case, have said that as used in § 1028A(a)(1), *knowingly* modifies only the verbs: *transfers*, *possesses*, and *uses*.[5] Indeed, that premise was accepted even by two of the circuits that held against the government, although they ultimately thought the grammatical point not to be decisive.[6]

This notion of what *knowingly* modifies is based on the traditional conception of adverbs, which sees them as modifiers of verbs.[7] But that view oversimplifies matters greatly, and cannot adequately explain how

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5. *E.g.*, *United States v. Mendoza-Gonzalez*, 520 F.3d 912, 915 (8th Cir. 2008), *pet. for cert. filed*, No. 08-5316 (U.S. July 15, 2008); *United States v. Hurtado*, 508 F.3d 603 (11th Cir. 2007) (per curiam), *cert. denied*, 128 S. Ct. 2903 (2008); *United States v. Montejo*, 442 F.3d 213, 215 (4th Cir. 2006).

6. *Villanueva-Sotelo*, 515 F.3d at 1239; *United States v. Godin*, 534 F.3d 51, 56 (1st Cir. 2008).

7. *See, e.g.*, Peter Bullions, *Principles of English Grammar* 65, 117 (1871); Richard Palmer, *The Good Grammar Guide* 58–60 (2003). Even in linguistics, adverbs are sometimes described this way in general discussions or introductory texts. *E.g.*, *The Cambridge Grammar of the English Language*, *supra* note 3, at 526; Robert D. Van Valin, *An Introduction to Syntax* 7 (2001).

adverbs such as *knowingly* actually function in a sentence. The fact is that the scope of such an adverb extends not only to the verb but also to the predicate that the verb is part of.[8]

1. The suggestion that *knowingly* modifies only the verbs does not square with the facts of ordinary English usage. Consider a situation in which someone who keeps kosher eats food she thinks is kosher but that actually contains pork. If adverbs really modified verbs but not their direct objects, this person could be said not only to have knowingly eaten, but to have knowingly eaten pork. But it is hard to believe that anybody would accept the latter statement to be true; on the contrary, they would say that the person had eaten the pork UNknowingly.[9]

Or consider the real-life sentences in the following examples, which were found using Google searches:

(1) "[B]eginning January 1, 2007, every Colorado employer will be required to affirm, within twenty days after hiring a new employee, that…it has not knowingly hired an unauthorized alien."[10]

(2) "U.S. Sen. Ted Stevens, R-Alaska, Tuesday said he 'never knowingly submitted' a false disclosure form, despite being indicted."[11]

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8. *See, e.g.*, *The Cambridge Grammar of the English Language*, *supra* note 3, at 576.

9. *See, e.g.*, Appendix C, examples 1, 2, 5 & 7.

10. Perkins Coie, *New Colorado Immigration Laws: What Employers Need to Know* (Sept. 29, 2006), http://www.perkinscoie.com/news/pubs_Detail.aspx?publication=98c92fb3-ccc4-443a-9e0a-8abddf64467b&RSS=true.

11. United Press International, *Stevens 'never knowingly' filed false form* (July 29, 2008), available at http://www.upi.com/Top

If it were correct to say that adverbs modify only verbs, these sentences would be nonsensical. Sentence (1) would mean that Colorado employers must affirm that they have not knowingly hired (anyone). And (2) would mean that Stevens denied having knowingly submitted (anything). But that is not what these statements mean, and the reason is that *knowingly* modifies more than just the verbs.[12]

2. This pattern of usage is consistent with linguistic theory. *Knowingly* belongs to the class of adverbs that attribute to one of the actors referred to in the sentence (usually the actor referred to by the subject) a particular mental attitude toward the event that the sentence describes.[13] Thus, the sentence *George knowingly used a*

_News/2008/07/29/Stevens_never_knowingly_filed_false_form/UPI-20641217367160/.

12. For additional examples illustrating the point, see Appendix C.

13. *See, e.g.*, Thomas Ernst, *The Syntax of Adjuncts* 9–10, 54–69 (2002); Paul H. Portner, *What is Meaning?* 69–72 (2005); Adam Zachary Wyner, *Subject-Oriented Verbs are Thematically Dependent*, in *Events and Grammar* 333, 333 (Susan Rothstein, ed. 1998). While some analyses do not characterize adverbs of this type as describing the actor's attitude toward an underlying event, the differences in approach are not significant for purposes of this discussion. In some cases the differences are merely matters of terminology or theoretical nuance. *See, e.g.*, *The Cambridge Grammar of the English Language*, *supra* note 3, at 676–79 (referring to "acts" rather than "events"); Donald Davidson, *The Logical Form of Action Sentences*, in *The Logic of Decision and Action* (Nicholas Rescher, ed. 1967) (proposing a formalization such as "'It was intentional of x that p' where 'x' names the agent, and 'p' is a sentence that says the agent did something.") (reprinted in Donald Davidson, *Essays on Actions & Events* 105, 121–22 (1980)). In other cases, the analysis is consistent with ours in that it treats the adverb as modifying a predicate, not just a verb. *E.g.,* Guglielmo Cinque, *Adverbs and Functional Heads: A Cross-Linguistic Perspective*

hammer describes an event consisting of George using a hammer, and it indicates that George knew he was using a hammer.[14] This category of adverbs plays an important role in the law because it includes the mens-rea adverbs such as *intentionally*, *deliberately*, and *willfully*.

Events involve participants: entities (including inanimate objects and even intangibles) that play a role in the event.[15] In *George knowingly used a hammer*, there are two participants: George, who is the user, and the hammer, which is the thing being used. If one or more of the participants is left out of the sentence, the description of the event will be incomplete, as will the sentence itself. This is shown by (3) (the asterisks indicate that the sentence is ungrammatical).

(3) a. * George knowingly used.
b. * Knowingly used a hammer.

Another way of putting this is to say that in a sentence having a transitive main verb, the direct object is necessary to complete the predicate and is therefore essential to the sentence's meaning.[16]

(1999); Sally McConnell-Ginet, *Adverbs and Logical Form: A Linguistically Realistic Theory*, 58 Language 144 (1982).

14. *See, e.g.*, Clark D. Cunningham, Judith N. Levi, Georgia M. Green & Jeffrey P. Kaplan, *Plain Meaning and Hard Cases*, 103 Yale L.J. 1561, 1576 (1994), *cited with approval in Staples v. United States*, 511 U.S. 600, 623 (1994) (Ginsburg, J., concurring in the judgment).

15. *See, e.g.*, *The Cambridge Grammar of the English Language*, *supra* note 3, at 228–233; Terence Parsons, *Events in the Semantics of English* Ch. 5 (1990); Gennaro Chierchia & Sally McConnell-Ginet, *Meaning and Grammar: An Introduction to Semantics* 472–80 (2d ed. 2000).

16. Some verbs can switch back and forth between transitive and intransitive uses:

Indeed, the relationship between a verb and its direct object is such that the object can influence what the verb is taken to mean, as shown in (4) and (5).[17]

(4) a. throw a baseball
b. throw support behind a candidate
c. throw a boxing match
d. throw a party

(5) a. set the table

(a) 1. They ate dinner with us.
2. He always makes a mess when he eats.
(b) 1. Susan read the newspaper quickly.
2. Every night I read for half an hour before I go to bed.

See, e.g., *The Cambridge Grammar of the English Language*, *supra* note 3, at 300–05. But when such a verb is used intransitively, it is intransitive in its syntax but not its semantics. Even without a direct object, the sentence is understood to describe an event that involves the same two types of participants as in the variant that includes a direct object. Thus, the sentence in (a2) is understood to mean *He always makes a mess when he eats food*.

This is possible only because the information that the missing direct object would provide is understood based on the meaning of the verb: "[T]he verb in this variant is understood to have as object something that qualifies as a typical object of the verb." Beth Levin, *English Verb Classes and Alternations* 33 (1993). But *transfer*, *possess*, and *use* don't work the same way, because there is no typical event-type to fall back on as a default if there is no direct object. This means that they require direct objects, except in narrow circumstances in which the missing information can be inferred from the context (for example, in the context of drug addiction, the use of *using* to mean *using drugs*). *See The Cambridge Grammar of the English Language*, *supra* note 3, at 246; Thomas Herbst et al., *A Valency Dictionary of English* 914 (2004); D.J. Allerton, *Valency and the English Verb* 68–70 (1982).

17. Alec Marantz, *On the Nature of Grammatical Relations* 25 (1984).

b. set a broken bone
c. set sail
d. set a watch

In these examples, each event being described is different in kind from all the others. In (4) the events are, respectively, (a) causing a baseball to move by holding it in one's hand, moving one's arm in a certain way, and releasing it; (b) stating a political preference; (c) deliberately losing a sporting event; and (d) calling people together for a social event. In (5) they are (a) putting silverware and dishes on a table; (b) putting a cast or similar device on a part of someone's body; (c) embarking on a voyage by boat; and (d) adjusting a timepiece.

The three verbs used in § 1028A—*transfer*, *possess*, and *use*—are all similarly chameleon-like. The action involved in transferring or possessing a social security card is very different from the action involved in transferring or possessing a car, and both of those actions are very different from the action involved in transferring or possessing real property. And the different types of actions to which the word *use* can be applied are even more varied: using a social security number, using a can opener, using drugs, using the internet, using a telescope, using a bulldozer, using a gun, using electricity, using influence, using restraint, using an opportunity, using a recipe. In each of these cases, the nature of the event described by the predicate is a function, not of the verb alone, but of the verb's interaction with its direct object.

In short, the predicate of a sentence is not only a grammatical unit, it is an integrated unit of meaning. And an adverb such as *knowingly* operates on that unit as a whole.

B. The phrase *of another person* is part of the verbs' direct object and is therefore part of the predicate that *knowingly* modifies.

1. From the proposition that *knowingly* modifies an entire predicate, we move on to the question of identifying what the predicate here comprises. It includes, of course, *a means of identification*, which is the direct object of *transfers, possesses, or uses*—or rather, is PART of the direct object. The full direct object is the noun phrase *a means of identification of another person*, which consists of a noun phrase (*a means of identification*) modified by a prepositional phrase (*of another person*). This is shown visually in (6).[18]

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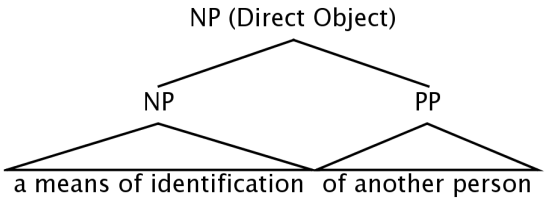
18. Technically, the prepositional phrase is a complement of *means of identification*, not a modifier. However, we refer to it as a modifier because that usage will be more familiar to the Court and because the difference in terminology is irrelevant to the point we are making. Elsewhere in the brief we will similarly depart from customary linguistic terminology and notation when doing so will simplify the discussion.

    We should note here that the structure we have assigned to *a means of identification of another person* differs from the structure described by some courts, in which *of another person* is treated as modifying *identification* rather than *a means of identification*. *E.g.*, *Villanueva-Sotelo*, 515 F.3d at 1238. Although the latter structure would be possible in theory, it is ruled out here for two reasons. First, it does not correspond to what everyone agrees is the intended interpretation of the phrase: 'another person's means of identification.' Rather, it would correspond to the interpretation, 'a means of identifying another person.' Second, *means of identification* has a very specific statutory definition, 18 U.S.C. § 1028(d)(7) (Appendix B hereto). The phrase therefore acts as a stand-in for the list of items in that definition. That function would best be reflected by taking *of another person* to modify *means of identification* as a whole rather than to modify the individual word *identification*.

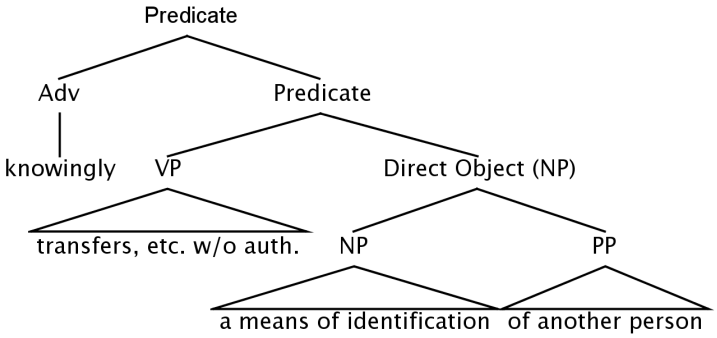
(6)



The fact that *of another person* is part of the direct object is a matter of substance, not just grammatical form. The prepositional phrase combines with the noun phrase to form a larger unit of meaning (much like a verb combines with its direct object to form a larger unit of meaning). Thus, what triggers the application of § 1028A(a)(1) is not simply the unauthorized transfer, possession, or use of a means of identification, but the unauthorized transfer, possession, or use of a means of identification OF ANOTHER PERSON.

This multipart phrase interacts with the verbs, and with the larger predicate, as a single unit:

(7)



As this diagram shows, *of another person* has the same structural relationship to *knowingly* that *a means of identification* does. This means that if *a means of identification* is within the scope of *knowingly*, so is *of another person*.

That conclusion is also supported by the way that *knowingly* is actually used and understood. Consider the sentences in (8)– (11):

(8) "National security adviser Condoleezza Rice, while expressing support for Tenet, said Friday that the CIA had cleared the speech 'in its entirety.' [¶] 'The president did not knowingly say anything that we knew to be false,' she said, en route to Uganda, one stop on Bush's Africa trip."[19]

(9) "'We're extremely disappointed that our institution has been cast in a negative light as a result of our men's basketball scheduling practices the past three years,' Pollard said. 'I honestly believe that Iowa State University did not knowingly do anything wrong as it relates to scheduling these non-conference games.'"[20]

(10) "In the past, Mr. Hamilton has asserted that he did not knowingly do anything illegal and that the contributions advanced the teamsters' goal to help restore Democrats' control of Congress."[21]

(11) [From an administrative decision in a liquor-license proceeding:] "Fat Tuesday [the licensee] did not knowingly allow the purchase of beer by a person under the age of twenty-one…."[22]

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19. Cable News Network, *Tenet admits error in approving Bush speech*, CNN.com (Dec. 25, 2003), http://www.cnn.com/2003/ALLPOLITICS/07/11/sprj.irq.wmdspeech/.

20. Associated Press, *Iowa State to drop scheduling company after report* (March 16, 2006), http://sports.espn.go.com/ncb/news/story?id=2370829.

21. Steven Greenhouse, *Hoffa Gets Clearance to Run, Creating Teamsters Face-Off*, New York Times, April 28, 1998, A1 at A16.

22. Final Order and Decision, *South Carolina Department of Revenue v. Andrew J. Freese, d/b/a Fat Tuesday*, 97-ALJ-17-0507-CC (S.C. Admin. Law Ct. Dec. 31, 1997), http://www.scalc.net/decisions.aspx?q=4&id=6432.

In each example, *knowingly* appears in a context that is grammatically almost identical to that in § 1028A(a)(1): it modifies a verb phrase in which the direct object consists of a noun that is modified by a phrase that follows it. And in each excerpt, the sentence makes sense only if *knowingly* is understood to include the modifier in its scope. Thus, in (8), Dr. Rice was not asserting that the president had not knowingly said anything at all. Similarly, in (9) and (10), Mr. Pollard was not asserting that Iowa State had not knowingly done anything at all, and the New York Times was not reporting that Mr. Hamilton had made any similar claim as to his own conduct. And in (11), the ALJ presumably was not suggesting that the holder of the liquor license had not knowingly allowed the purchase of beer by anyone at all.

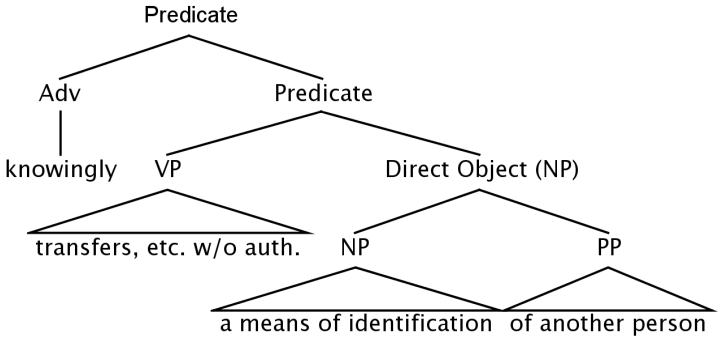
We have previously said that an adverb such as *knowingly* is understood as describing a specified person's state of mind with respect to the underlying event described in the sentence. The examples in (8)–(11), and the additional examples in Appendix C, show that one's understanding of this state of mind is sensitive to the way the event is described in the sentence. For example, the event in (11) is not simply an event of allowing the purchase of beer, but an event of allowing the purchase of beer by someone under 21. The adverb *knowingly* is understood as describing the licensee's state of mind with respect to an aspect of that more narrowly specified event: the purchaser's age.

This phenomenon is not unique to our examples; rather, one would expect to see the same thing wherever *knowingly* is used. So while the interpretation of our examples does not dictate how §1028A(a)(1) would be understood, there is every reason to believe that the statute would be understood in the same way.

2. In concluding that *knowingly* modifies only the verbs *transfers*, *possesses*, and *uses*, the Eight Circuit (following the Fourth and the Eleventh) reasoned that "'[g]ood usage requires that the limiting modifier…be as close as possible to the words which it modifies'"; thus, the placement of *knowingly* immediately before the verbs was taken to indicate "'that "knowingly" modifies those verbs, not the later language in the statute.'"[23] Even if one accepts the Eighth Circuit's view of what good usage requires, the court's conclusion does not follow from its premise.

The scope of an adverb (or adverbial phrase) is not governed solely by its linear position in the sentence. A sentence is not simply a string of words arranged in a particular order; it has a hierarchical structure in which words are grouped into phrases and phrases are grouped into larger phrases.[24] This is shown by the tree-diagram in (7), which we repeat here as (12):

(12)



Thus, while *knowingly* immediately precedes the verbs, it also immediately precedes the entire predicate

23. *Mendoza-Gonzalez*, 520 F.3d at 915 (quoting *Montejo*, 442 F.3d at 215, and *Hurtado*, 508 F.3d at 609).

24. *See, e.g.*, Andrew Carnie, *Constituent Structure* Ch. 2 (2008); *The Cambridge Grammar of the English Language*, *supra* note 3, at 20–21.

transfers, possesses, or uses, without lawful authority, a means of identification of another person.

For a further indication that significance of linear proximity is limited, consider the fact that *knowingly* is preceded in § 1028A(a)(1) by another adverbial: the prepositional phrase *during and in relation to any felony violation enumerated in subsection(c)*[.] This phrase has (correctly) been understood to modify the entire predicate *knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person*. In other words, the unauthorized transfer, possession, or use of another person's means of identification is covered by § 1028A only if it occurs during and in relation to one of the specified predicate offenses.[25] What is significant here is that *of another person* is within the scope of the *during-and-in-relation-to* phrase even though the latter phrase is farther from *of another person* than *knowingly* is.

C. The disputed language in § 1028A is not grammatically ambiguous.

Our discussion so far has been consistent with Petitioner's position and with the conclusion reached by the D.C., First, and Ninth Circuits. However we disagree with those courts on one point. They have described § 1028A(a)(1) as being structurally similar to the statute involved in *Liparota v. United States*[26] and

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25. *See, e.g.*, *United States v. Occident*, 243 Fed. Appx. 777, 778 (4th Cir. 2007); *United States v. Guillen-Perez*, 2007 WL 1455823 at *1 (N.D. Fla. 2007); *United States v. Johnson*, 2006 WL 156712 at *1 (E.D. Mo. 2006). The language of the indictment in this case was consistent with this understanding. (Indictment at 2–3, *United States v. Flores-Figueroa*, No. 07-cr-515 (S.D. Iowa Feb. 15, 2007) (Dkt. No. 10).)

26. 471 U.S. 419 (1985).

therefore as being ambiguous; we believe that the two statutes differ from one another in a crucial respect. While this disagreement does not necessarily affect the ultimate outcome here, we believe that in order to avoid analytical confusion, the Court should understand how and why the two statutes differ.

Like this case, *Liparota* dealt with whether a statutory mens rea requirement applied to a particular element of the crime. The statute in *Liparota* provided, "[W]hoever knowingly uses, transfers, acquired, alters, or possesses coupons or authorization cards in any manner not authorized by [law] shall [be punished.]"[27] In considering this language, the Court said, "'As a matter of grammar the statute is ambiguous; it is not at all clear how far the sentence the word "knowingly" is intended to travel.'"[28] Each of the courts of appeals that has held § 1028A(a)(1) to be ambiguous quoted this statement in support of its conclusion.[29]

The statute in *Liparota* was in fact ambiguous with respect to the scope of *knowingly*. Specifically, two different phrase structures were possible, one of which would give *knowingly* a wide scope (meaning that the government must prove that defendant knew that his use of the coupons was unauthorized) and the other of which would give it a narrow scope (meaning that such proof would be unnecessary). These two possible structures are shown in (13).

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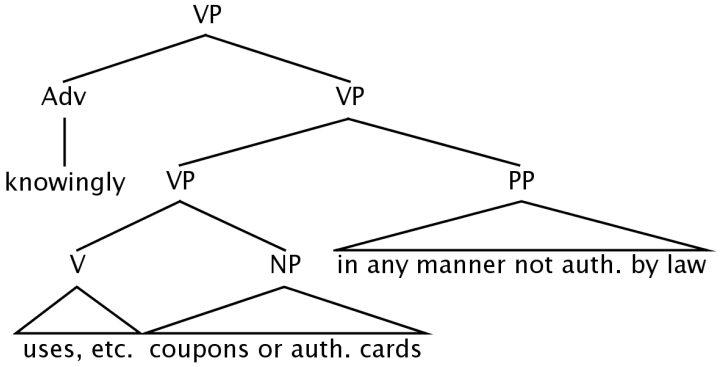
27. 7 U.S.C. § 2024(b)(1) (1977).

28. 471 U.S. at 424 n.7 (quoting Wayne LaFave & Austin Scott, *Criminal Law* § 27 (1972)).

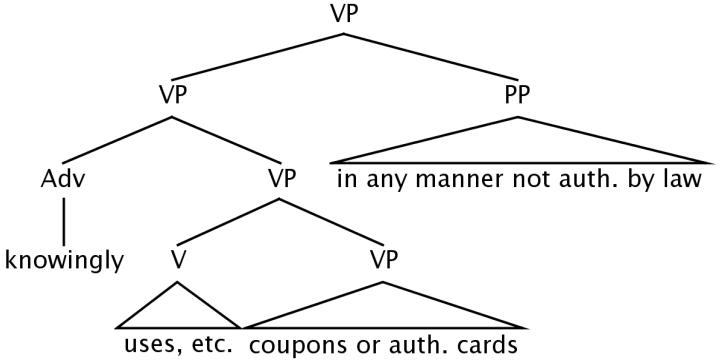
29. *United States v. Miranda-Lopez*, 532 F.3d 1034, 1038 (9th Cir. 2008); *Godin*, 534 F.3d at 58; *Villanueva-Sotelo*, 515 F.3d at 1241.

(13) a. Wide-scope structure:



= 'uses, transfers, acquires, alters, or possesses coupons or authorization cards in a manner not authorized by law, and does so knowingly'

b. Narrow-scope structure:

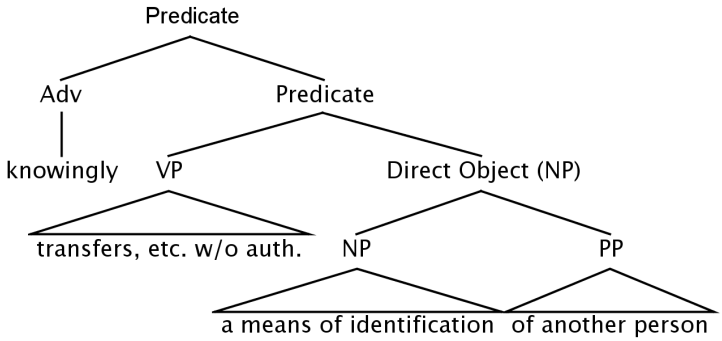


= 'knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards, and does so in a manner not authorized by law'

Note that in each structure, the prepositional phrase *in any manner not authorized by law* combines with a verb phrase and acts adverbially by specifying the manner in which the action in question is performed.

In § 1028A(a)(1), on the other hand, there is only one way in which *of another person* can be integrated into the statutory language. And that is to be combined with *a means of identification* and thereby become part of the direct object of *transfers, possesses, or uses*.

(14)



This is the only structure that reflects an aspect of the statute's meaning on which everyone seems to agree: that the act prohibited by § 1028A(a)(1) (putting aside the question of mens rea) is the unauthorized use of ANOTHER PERSON'S means of identification. In order to encode the relationship of possession or belonging between the other person (the possessor) and the means of identification (what is possessed), the phrase *another person* has to be joined with the phrase *a means of identification*. Doing this requires some syntactic glue, which is provided here by the preposition *of*.[30] Thus, the grammatical structure helps to generate the intended meaning.

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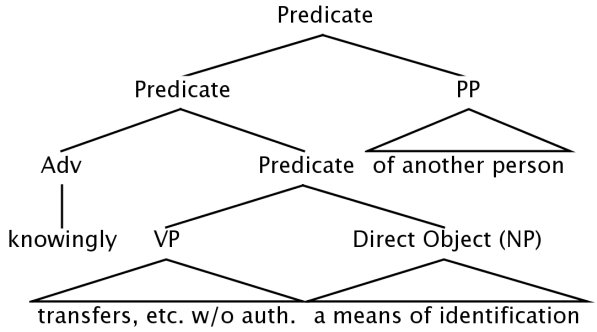
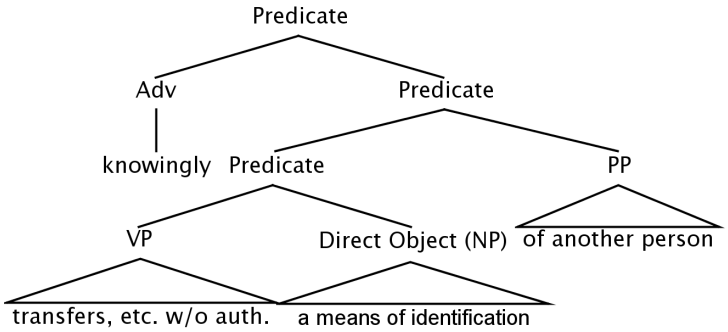
30. *See The Cambridge Grammar of the English Language*, *supra* note 3, at 658; Chris Barker, *Possessives and relational nouns* 6 (draft Aug. 30, 2008), to appear in *Semantics: An International Handbook of Natural Language Meaning* (Claudia Maienborn et al., eds.), *available at* http://barker.linguistics.fas.nyu.edu/Stuff/barker-possessives.pdf.

Unlike the statute in *Liparota*, there is no feasible alternative structure here. The only possibilities would be for *of another person* to adjoin directly to one of the verb phrases, as shown in (15).

(15) a.



b.



But neither of those structures would generate the interpretation adopted by the Eighth Circuit.

Indeed, it is not clear that either one would generate a coherent meaning at all. The problem is that in these structures, *of another person* is forced against its will to function adverbially, since it is combined with a verb phrase. That is not a function it can perform, even under duress.

This is shown by (16) and (17), which represent our attempt to construct sentences in which *of another person* can only be understood as being combined directly

with a verb phrase. The result in each example is something that is not merely ungrammatical, but is so bizarre that fully deciphering it is virtually impossible (hence the exclamation points in addition to the asterisks).

(16) *! The defendant possessed of another person a means of identification that he had gotten from someone who sold fake IDs.

(17) Q: What was the defendant charged with doing with the means of identification?
A: *! Possessing it of another person.
*! Transferring it of another person.
*! Using it of another person.

In each example, one is forced to interpret *of another person* as being combined with the verb phrase because the only other option—combining it with the verb's direct object—is ruled out. It is ruled out in (16) because *of another person* does not fall into the small category of noun-phrase modifiers that can appear at the beginning of the phrase. It is ruled out in (17) because *of another person* does not fall into the even smaller category of noun-phrase modifiers that can appear after a pronoun.[31] But the results of combining it with the verb phrase are also grossly unacceptable. This is a matter of trying to force a square peg into a round hole, and it confirms that there is no alternative structure that could create a *Liparota*-style ambiguity.

31. *See The Cambridge Grammar of the English Language, supra* note 3, at 429–30, 433–39.

D. Although § 1028A(a)(1) is not grammatically ambiguous, it might be possible to find a semantic ambiguity, but only if one looks hard enough and knows what to look for.

Despite the absence of any grammatical ambiguity, there remains a question as to whether § 1028A(a)(1) is ambiguous in a different respect. This possible ambiguity arises from a distinction, little known outside of linguistics and philosophy, between two types of interpretations. Although the distinction can be described in a variety of different ways; we will describe the two types of interpretations as interpretations *de dicto* ("about what is said") and interpretations *de re* ("about the thing").[32]

1. The distinction between interpretations *de dicto* and interpretations *de re* arises with respect to certain kinds of statements, among which are "propositional attitude reports."[33] These are statements reporting a person's mental attitude toward something, such as *Lois Lane thinks Clark Kent can fly*. We will use that

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32. *See, e.g.*, David Crystal, *A Dictionary of Linguistics and Phonetics* 124–25 (5th ed. 2003); Thomas McKay & Michael Nelson, *The De Re/De Dicto Distinction* in *Stanford Encyclopedia of Philosophy* (2005), http://plato.stanford.edu/entries/prop-attitude-reports/dere.html. For discussions of the distinction in the legal literature, see Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 Yale L.J. 992, 1007–22 (2008), and Robert E. Rodes, Jr., *De Re and De Dicto*, 73 Notre Dame L. Rev. 627 (1998).

    At least one of the amici thinks that it would be preferable to say *opaque* instead of *de dicto* and *transparent* instead of *de re*.

33. *See generally, e.g.*, Thomas McKay & Michael Nelson, *Propositional Attitude Reports* in *Stanford Encyclopedia of Philosophy* (2005 rev.), http://plato.stanford.edu/entries/prop-attitude-reports/index.html.

statement as an example to illustrate the distinction between the two readings.

On the *de dicto* reading, *Lois Lane thinks Clark Kent can fly* is understood as describing Lois's belief in a way that she would accept as being accurate. It is therefore roughly equivalent to *Lois Lane believes the following proposition*: *Clark Kent can fly*. On that reading, the statement is false.[34] On the *de re* reading, however, the statement is understood as describing Lois's beliefs from the point of view of a speaker who knows what Lois doesn't: that Clark is really Superman. So on this reading, the statement could be paraphrased as *Lois Lane believes there is a specific person who can fly (Superman), and whether Lois knows it or not, that person is one and the same as Clark Kent*. Understood in this way, the statement is true, regardless of Lois's subjective opinion of Clark.

Although our focus here is on language rather than law, it might be helpful in explaining the distinction between *de dicto* and *de re* to show the distinction in action by using it as a lens through which to look at the Court's prior decisions holding *knowingly* applicable to a particular statutory element.

In almost all of these cases, the Court's holding was consistent with a *de dicto* interpretation of the statute. Take *Morissette v. United States*.[35] The Court there dealt with a statute that prohibited "knowingly convert[ing] to [one's] own use…any…thing of value of the United States."[36] The court of appeals had affirmed Moris-

34. More specifically, it's false if one is talking about what Lois thought before she learned Superman's secret identity.

35. 342 U.S. 246 (1951).

36. 18 U.S.C. § 641.

sette's conviction based on a *de re* reading of the statute: Morissette had knowingly taken property, and whether he knew it or not, that property belonged to the United States. But this Court held that the conviction was invalid unless Morissette was found to have "had knowledge of the facts…that made the taking a conversion."[37] The Court elaborated on this conclusion: "[I]t is not apparent how Morissette could have knowingly or intentionally converted property that he did not know could be converted, as would be the case …if he truly believed it to be abandoned and unwanted property."[38] Both the result and the reasoning are consistent only with a *de dicto* reading of the statute, because the Court required the act of conversion to be viewed from the defendant's perspective rather from the perspective of an observer who knew facts that the defendant was unaware of.

So, too, with respect to *Liparota*,[39] *Dixon v. United States*,[40] *Arthur Andersen LLP v. United States*,[41] *United*

37. 342 U.S. at 270–71.

38. *Id.* at 271.

39. 471 U.S. at 425–28 (statute prohibited knowingly dealing with food stamps in a manner not authorized by law; conviction requires proof that defendant knew that his dealings were unauthorized).

40. 548 U.S. 1, 5–6 (2006) (statute prohibited knowingly making false statements in connection with purchase of firearms; government has burden of proving that defendant "knew she was making false statements in connection with the acquisition of firearms").

41. 544 U.S. 696, 705–06 (2005) (statute prohibited "knowingly… corruptly persuad[ing] another person" to withhold or destroy evidence; conviction requires proof that defendant was conscious of wrongdoing).

States v. X-Citement Video, Inc.,[42] and *Staples v. United States*.[43] In each case, the Court required proof that when the defendant allegedly committed the crime, he knew the facts necessary to satisfy each element that *knowingly* applied to.[44] As in *Morissette*, this is consistent only with a *de dicto* interpretation.

The only exceptions to this pattern are cases such as *United States v. International Minerals & Chemical Corp.*,[45] which involved a statute making it a crime to knowingly violate ICC regulations. The Court held there that the government did not have to prove that the defendant was aware of the regulation. This amounts to a *de re* interpretation because the act is viewed from the perspective, not of the defendant, of an observer who knows the law. In these cases, the Court may have relied at least in part on a factor extrinsic to the statutory language: the principle that ignorance of the law is no excuse.[46]

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42. 513 U.S. 64 (1994) (statute prohibited knowingly transporting a visual depiction in interstate commerce if the depiction is of a minor engaging in sexually explicit conduct; conviction requires proof that defendant knew that the depiction fell into that category).

43. 511 U.S. 600, 608–16 (1994) (statute prohibited unregistered possession of certain types of weapons; conviction requires proof that defendant knew the weapon had the specified characteristics) (dealing with implicit rather than explicit mens rea requirement); *see also id.* at 622–23 (Ginsburg, J., concurring in the judgment).

44. *See also Bryan v. United States*, 524 U.S. 184, 192–93 (1998) (discussing prior cases).

45. 402 U.S. 558 (1971).

46. *International Minerals & Chemical Corp.*, 402 U.S. at 562.

2. With respect to § 1028A(a)(1), a *de dicto* interpretation would require proof that the defendant knew (a) that he was transferring, possessing, or using a means of identification and (b) that the means of identification belonged to another person. A *de re* interpretation, on the other hand, would require proof only that the defendant knowingly did some act, and that whether the defendant knew it or not, the act amounted to transferring, possessing, or using another person's means of identification.

Although the *de re* reading would support the Eighth Circuit's interpretation, it would go further than the Eighth Circuit (or any other court) seems to have gone, in that the government would not have to prove that the defendant knew that what he transferred, possessed, or used was a means of identification. Thus, under the *de re* reading, the statute would reach cases in which the defendant gave someone a sealed envelope that (unbeknownst to the defendant) contained a stolen social security card.[47] The government has so far not advocated such an interpretation; indeed, it has argued against it.[48] The question therefore arises whether § 1028A(a)(1) can be understood a way that combines the two types of interpretations, such that *a means of identification* is read *de dicto* while *of another person* is read *de re*.

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47. *Cf.* Pet. Br. 24–25.

48. *See* Gov't Br. at 11–12 n.8, *Villanueva-Sotelo*, No. 07-3055 (D.C. Cir. filed June 20, 2007) (arguing that the statute requires proof that the defendant knew that what he transferred, possessed, or used was a means of identification). *See also Villanueva-Sotelo*, 515 F.3d at 1258 (Henderson, J., dissenting) (arguing that § 1028A's scienter requirement "is satisfied if the defendant knows that he possesses a 'means of identification' 'without lawful authority'").

Unfortunately, there is no clear answer. In fact, the question may well be unanswerable. We say this because any set of facts that would satisfy the half-and-half reading would also satisfy the full *de re* reading. In other words, any time (18) is true, (19) would be true as well.

(18) The defendant knowingly transferred, possessed, or used a means of identification, and whether he knew it or not the means of identification belonged to another person.

(19) The defendant knowingly performed an act, and whether he knew it or not the act constituted transferring, possessing, or using a means of identification of another person.

This means that if someone understood the statute to authorize Petitioner's conviction in this case, there would be no immediately apparent way to tell whether that understanding was attributable to the half-and-half reading or to the full *de re* reading. While there might be some way to make that determination, we do not know what it is.

Nevertheless, suppose that a half-and-half interpretation is theoretically possible, so that a linguist or philosopher could view § 1028A(a)(1) as being ambiguous. Would that necessarily mean that there was an ambiguity that anyone else would perceive in the course of everyday reading, writing, or conversation?

It would not. One of the amazing things about language is that it is successfully used to communicate despite being pervasively ambiguous.[49] Words often have

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49. *See, e.g.*, Thomas Wasow et al., *The Puzzle of Ambiguity* in *Morphology and the Web of Grammar* 265 (O. Orgun & P. Sells, eds. 2005), available in manuscript for at http://www.stanford.edu/~wasow/Lapointe.pdf.

multiple meanings and can belong to more than one grammatical category. Sentences can have more than one grammatical structure. And so on. But the vast majority of these ambiguities fly under the radar and are never noticed.

For example, when someone tells us that they're going to the bank, we don't ask them, *Which kind of bank do you mean—the place where you get money or the side of a river?* When we read a sentence like *Ron and Amy got married and had children*, we take it for granted that they married each other and that the marriage preceded the children, even though neither conclusion is compelled by the literal language.

This case may present such a situation. There is a good chance that if § 1028A(a)(1) is ambiguous, the ambiguity is resolved automatically, below the level of consciousness. When we read the statute as native speakers of English, rather than as linguists, it seems unambiguous. The possibility that there might be a *de re* interpretation came up only after we consciously focused on the issue of *de dicto* versus *de re* interpretations. And at least one of the amici doesn't think that a *de re* interpretation is even possible.

It is, of course, possible that our intuitions on these points are atypical. But there is some reason to think that they are not. To begin with, one would expect that the members of a language community would exhibit substantial and widespread variation in their understanding of particular sentences, for if such variation existed one would expect to see evidence of it in the form of corresponding difficulties in communication.

Moreover, while it is common for *knowingly* and other mental-attitude adverbs (or negated forms of them) to be used to express a *de dicto* meaning (as in (20), (21), and the examples in Appendix C), we have

been unable to find any examples in which they are seem to be used to express a *de re* meaning.

(20) "In the case of Hoyte vs. Yum! Brands, Inc., filed in June of 2006 in the Superior Court of the District of Columbia, the plaintiff was a retired medical doctor from Maryland who alleged he unknowingly consumed food fried in trans-fats at KFC restaurants."[50] [On a *de re* reading, this statement would mean that the doctor did not know that he was consuming food.]

(21) "Around one in 25 dads could unknowingly be raising another man's child, new research suggests."[51] [On a *de re* reading, this statement would mean that 1 out of 25 fathers did not know that he was raising a child.]

Of course, this isn't conclusive, by any means. But if real-world usage is overwhelmingly weighted toward *de dicto* interpretations, that fact would be hard to dismiss as irrelevant.

One final point. The fact the government's interpretation of § 1028A(a)(1) has been accepted by several courts does not indicate that the statute is ambiguous as a matter of ordinary English usage and comprehension. None of those decisions provides a valid data-point on that issue, because none of them resulted from the sort of spontaneous and unselfconscious interpretive process that underlies our ability to understand language. Rather, each decision was based on the

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50. Mike Petrie, Comment posted Dec. 26, 2007 to David Henderson, *An Edible Quest* on BoomerCafe (Dec. 24, 2007), http://www.boomercafe.com/2007/12/24/an-edible-quest/.

51. *One in 25 dads could unknowingly be raising another man's child, researchers find*, World Science (Aug. 12, 2005), http://www.world-science.net/othernews/050812_dadsfrm.htm.

conscious application of what the court thought was a rule of grammar. Given that those supposed rules were spurious, there is no reason to pay attention to the results that the application of those rules generated.

Conclusion

For these reasons, the Court should interpret the language of § 1028A consistently with our analysis.

Respectfully submitted,

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APPENDIX

Appendix A
Amici Curiae

Thomas Ernst, PhD. is a currently visiting professor of linguistics at Dartmouth College, and beginning in January 2009 he will return to his position as visiting scholar at the University of Massachusetts, Amherst. His interests include syntactic and semantic theory, the syntax and semantics of adverbs, and phrase structure theory. His book on adverbs, *The Syntax of Adjuncts*, was published by Cambridge University Press in 2002.

Georgia M. Green, PhD. is Professor, emerita, of linguistics at the University of Illinois at Urbana-Champaign and Professor, emerita, Beckman Institute. Her research interests include pragmatics, syntactic theory, and language and the law. A partial list of her publications can be found at <http://www.linguistics.uiuc.edu/g-green/>.

Jeffrey P. Kaplan, PhD., J.D. is Professor of linguistics and Chair of the Department of Linguistics and Oriental Languages at San Diego State University. His research interests include discourse-functional syntax; pragmatics; and language and law, in particular, applying principles of grammar, semantics, pragmatics, and discourse structure to legal discourses such as contracts, legislation, wills, and other operative texts. His cv is available at <http://www-rohan.sdsu.edu/~jeff315/JK_CV_2007.html>.

Sally McConnell-Ginet, PhD. is Professor, emerita, of linguistics at Cornell University. Her research interests include on the one hand, formal models of natual-language meaning, including the relation between syntactic structures and semantic interpretation, and on the other, the interaction of language with the social

and cultural contexts in which it is used. Dr. McConnell-Ginet has done work on the semantics of adverbs. She was president of the Linguistic Society of America in 2006 and became a Fellow of that organization in January 2008. She will become a fellow of the American Academy for the Advancement of Science in January 2009. A partial list of her publications can be found at <http://ling.cornell.edu/index.cfm/page/people/mcconell_ginet.htm>.

Appendix B
Text of the definition of a "means of identification"

18 U.S.C. § 1028:

…

(d) In this section and section 1028A—

…

(7) the term "means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any—

(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(C) unique electronic identification number, address, or routing code; or

(D) telecommunication identifying information or access device (as defined in section 1029(e));

…

…

Appendix C
Additional Example Sentences

(1) "In populations in which pork ingestion is proscribed for religious or other reasons, trichinellosis associated with pork ingestion has been rare or non-existent. Nevertheless, outbreaks have been described, in which such populations unknowingly ingested pork. Examples are outbreaks involving hundreds of cases in southern Lebanon, associated with ingestion of ground meat dishes traditionally prepared with lamb but for which pork was substituted."[1]

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(2) "Public awareness of sulfite sensitivity became prominent in the early 1980s, when there were fatalities and near-fatalities relating to acute asthma attacks after asthmatics unknowingly ingested sulfite-treated produce in restaurants."[2]

———

(3) "A prominent Virginia Democrat announced legislation Friday that would fine merchants who knowingly sell defective, recalled toys and would ban their use in day care facilities next year.…The main problem is that retailers are unknowingly, not deliberately, selling the unsafe toys, he said. How-

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1. Peter M. Schantz & Vance Dietz, *Trichenellosis*, in *Principles and Practice of Clinical Parasitology* 521, 526 (Stephen H. Gillespie & Richard D. Pearson, eds. 2001).

2. Susan S. Teuber, *Foods, Additives, and Nonsteroidal Anti-Inflammatory Drugs in Asthma*, in *Bronchial Asthma* 315, 325 (M. Eric Gershwin & Georges M. Halpern, eds. 1994).

ever, the fines would target those that sell products although they know they have been recalled."[3]

———

(4) "Dogs, especially puppies were a common occurrence in the 48th and the 390th. Something to do with the fact that U.S. servicemen did not knowingly eat dogs."[4]

———

(5) "Residents did not knowingly drink sewage-contaminated water, but that is what flowed from faucets in hundreds of homes in the central Louisiana town of Pineville for more than two months."[5]

———

(6) "Although SmallCap Corporate Partners Inc. does not knowingly publish false information, SmallCap Corporate Partners Inc. does not guarantee the accuracy or completeness of any information represented on this web site or in its publications."[6]

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3. Dan Genz, *Bill would fine retailers who knowingly sell defective toys*, The Examiner, Dec. 25, 2007 (internal paragraphing deleted), available at http://www.examiner.com/a-1122837~Bill_would_fine_retailers_who_knowingly_sell_defective_toys.html.

4. Al Bruss, *Puppies and Sunsets May66*, on 390th TC, http://www.390tc.com/6604_Puppies.htm.

5. Cable News Network, *Lawsuits follow after sewage found in Louisiana town's water taps*, CNN.com (March 23, 2000), http://archives.cnn.com/2000/US/05/23/drinking.sewage/.

6. SmallCap Corporate Partners Inc., *Disclosure of Compensation and Interest*, http://www.smallcap.ca/SmallCapDisclosure.htm.

(7) "Tap water is always chlorinated to kill germs and bacteria. We need chlorine but we need not drink the chlorine inside the water. Moreover, there are heavy metals, other contaminants, possible toxins that one is not aware of. In the process of washing, cleansing, cooking and drinking, many have unknowingly consumed dirtied water that might be cancer-causing in the long run."[7]

———

(8) "Maricopa County Attorney Rick Romley defended his prosecution of Ray Krone by saying there was 'strong circumstantial evidence' of his guilt. In response to the conclusive proof that an innocent Ray Krone spent 10-1/2 years in prison, four of which was spent on Arizona's death row, Prosecutor Romley said, 'we will try to do better.' He neglected to mention that the prosecution's concealment of the odontologist's report that cast doubt on Ray's guilt prior to his first trial indicates they may have knowingly prosecuted an innocent man."[8]

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(9) "The world's richest art institution knowingly bought scores of archaeological treasures looted

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7. Lucy Wong Moi, *12 Cancer-Causing "Elements" Found In Our Home!*, EzineArticles.com (Mar. 9, 2007), http://ezinearticles.com/?12-Cancer-Causing-Elements-Found-In-Our-Home!&id=482473>.

8. Hans Sherrer, *Twice Wrongly Convicted of Murder—Ray Krone Is Set Free After 10 Years*, 2 *Justice Denied Magazine* no. 9, available at http://forejustice.org/wc/ray_krone_JD_vol2_i9.htm.

from Italy, it has been alleged. Despite being warned as far back as 1985 that dealers were selling stolen goods, the Getty Museum in Los Angeles continued to buy them…. According to the Los Angeles Times, which has obtained hundreds of pages of memos, purchase agreements and correspondence records from the museum in Malibu, high-ranking staff were complicit or simply turned a blind eye to the plundering of the priceless antiquities."[9]

———

(10) "Knowingly being in the company of anyone who is using illegal drugs is prohibited."[10]

———

(11) "Although the cost of printing and distributing 20,000 copies of the paper free each week is considerable, the Herald does not simply accept advertising for the sake of money. Advertisers are always investigated fully; the Herald does not knowingly publish ads for businesses involved in illegal activities."[11]

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9. Barbara McMahon, *Getty Museum knowingly bought archaeological treasures stolen from Italy, investigation claims*, The Guardian, September 27, 2005 (internal paragraphing deleted), available at http://www.guardian.co.uk/world/2005/sep/27/usa.arts.

10. Northeastern University, *Undergraduate Student Handbook/Planner 2008-2009* at 17 (2008), available at http://www.northeastern.edu/osccr/pdfs/2008-2009_Code.pdf.

11. Shawntaye Hopkins & Katie Hollenkamp, *Letter from the Editor: The Herald is revenue independent from Western; staff screens all ads*, College Heights Herald, Dec. 8, 2005, available at http://media.www.wkuherald.com/media/storage/paper603

ews/2005/12/08/Opinion/Letter.From.The.Editor.The.Herald.Is.Revenue.Independent.From.Western.Staff.Scre-1124913.shtml.