APPEALS COURTS: REPORTS OF THE COMMA'S DEMISE ARE GREATLY EXAGGERATED

Ryan Marth and Steve Safranski

In this era of texts, IM, tweets, and hashtags, it is becoming easier to dismiss the importance of mere punctuation in conveying meaning. Some have even predicted the eventual phase-out or slow death of the comma in standard English.[1] And what about the much-debated Oxford comma, or serial comma? This is the comma used after the penultimate thing in a list of three or more, right before the "and" or the "or" (e.g., "paper, pens, and pencils"). This comma is already shunned by most newspapers, and some style guides, including the University of Oxford Style Guide (but not Fowler or Strunk & White), now deem it optional or generally unnecessary.[2]

"Not so fast," says the U.S. Court of Appeals for the First Circuit. In a triumphant moment for grammatical traditionalists, the Oxford comma took center stage in *O'Connor v. Oakhurst Dairy*, a class-action dispute over Maine's overtime pay statute, causing the *New York Times* to declare, "Lack of Oxford Comma Could Cost Maine Company Millions in Overtime Dispute." At issue was a dispute between Maine dairy-truck drivers who sought millions in unpaid overtime and the defendant dairy that invoked a statutory exemption to the overtime requirement. The Oxford comma—or lack thereof—was central to resolving the dispute.

That statute exempted several job duties from overtime pay, specifically: "the canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of" various food products. The central question in the appeal: Does the phrase "packing for shipment or distribution" convey two exempted activities or one? Slip Op. at 4. The dairy contended that the phrase referred to two separate activities, "packing for shipment" and "distribution." Because the drivers were "distributing" dairy products, the argument goes, they were exempt from the law. *Id.* at 4. The district court agreed. *Id.* at 1. The drivers appealed, arguing that the language in question referred to only one activity, namely "packing" materials that are intended for either shipment or distribution.

The First Circuit agreed with the drivers, relying on the absence of an Oxford comma, which if present, would have clearly conveyed an intent to list "distribution" of food as its own exempted activity. Even though Maine statute-drafting guides actually instructed the legislature not to include the Oxford comma in lists of three or more items, the court was persuaded by the drivers' rejoinder that the same drafting manual also instructs the legislature to include the comma if omitting it would create ambiguity. *Id.* at 15. If the Maine legislature actually intended distribution to be a separate exempted activity, the failure to use an Oxford comma was a costly mistake.

While the First Circuit found that the lack of an Oxford comma prevented "distribution" from being read as an activity separate from packing, it is important to keep in mind that punctuation was only part of the interpretive analysis. The court weighed other textual arguments, such as the dairy's argument that the "or" in the clause, "packing for shipment or distribution"—the only "or" in the list—signaled that "distribution" was a new item in the list. It was also persuaded by the drivers' argument that the "pack*ing*" set off a new item but "distribution" did not because all other items were gerunds—*i.e., "ing"* words. After weighing the textual arguments on both sides the court conceded that raw textual analysis "has not gotten [it] very far. *Id.* at 17. To "break the tie" that it found was created by the text, the court resorted to the statute's legislative history and the canon that wage-and-hour laws are interpreted in favor of employees.

In short, although the court's focus on the missing Oxford comma grabbed headlines, it was hardly the end of the court's analysis. While O'Connor is (for what it's worth) the most high-profile example of punctuation's role in the interpretation of legal texts, it is by no means alone.

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United States v. Lara-Ruiz

The Eighth Circuit has also placed punctuation in a prominent position in parsing legal texts. With echoes of the First Circuit's analysis in *O'Connor*, the Eighth Circuit in *United States v. Lara-Ruiz*, relied on the lack of a comma to adopt an expansive interpretation of an exception to a nonprosecution clause in a plea agreement. 681 F.3d 914 (8th Cir. 2012).

As part of a plea agreement for methamphetamine possession, federal prosecutors had agreed "not to bring any additional charges against the defendant" for related offenses. This nonprosecution agreement contained an exception, though:

> for an act of murder or attempted murder, an act or attempted act of physical or sexual violence against the person of another, or a conspiracy to commit any such acts of violence or any other criminal activity of which the United States Attorney … has no knowledge.

When the prosecutors charged the defendant Lara-Ruiz with firearms offenses that they knew about at the time of the plea agreement, the defendant argued that such prosecution was barred, reasoning that they charged "acts or attempted acts of physical or sexual violence against another," and that the "no knowledge" language limited each of the exceptions to the nonprosecution agreement, including this one.

The Eighth Circuit disagreed, relying almost entirely on commas to side with the government:

> All the clauses in the exception are separated by commas and the last clause is separated from the previous clauses by the disjunctive "or." Also, there is not a comma before the words "of which" in the last clause. As such, the paragraph at issue plainly contains multiple independent clauses and the phrase "no knowledge" only applies to the last clause.

681 F.3d at 919. Apparently, placing a comma before the "no knowledge" phrase could have pulled it out of the last clause and made it an overarching limitation on the entire series of exceptions.

All was not lost for the defendant, however, because the Eighth Circuit applied the "plain error" doctrine to find another reason that the exception to the nonprosecution agreement did not apply. Commas or no commas, possession of a firearm simply did not constitute "an act or attempted act of physical . . . violence against the person of another," requiring the reversal of the defendant's conviction.

United States v. Rigas

Every student of punctuation at some point asks, what is the difference between a comma and a semicolon? When do you use one versus the other? In *United States v. Rigas*, the Third Circuit sitting en banc answered that the difference and punctuation choice can mean as much as five years in federal prison. 605 F.3d 194 (3d Cir. 2010).

Rigas involved the federal conspiracy statute, which provides that a criminal conspiracy occurs "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof" and one of those persons commits an act in furtherance of that conspiracy. 18 U.S.C. § 371. The statute thus prohibits two types of conspiracies—those to commit any offense against the United States, and also those to defraud the United States or any of it agencies. But successive prosecutions of the same person

for violating both parts of the statute raised an interesting question under the Double Jeopardy Clause of the U.S. Constitution—one that was partially answered by the rules of punctuation and the difference between a semicolon and a comma.

John and Anthony Rigas, former officers and directors of the bankrupt Adelphia Communications cable company, were tried and convicted in the U.S. District Court for the Southern District of New York for violating § 371 by conspiring to commit an offense against the United States—namely bank fraud and wire fraud. Then a grand jury in the Middle District of Pennsylvania indicted the Rigases for violating the other part of § 371; they allegedly conspired to defraud the United States through tax evasion. The double-jeopardy issue turned on whether the two prongs of § 371 constitute different means of committing one offense, which cannot be prosecuted twice, or constitute two distinct offenses, which can.

To answer this question, the en banc majority turned to the statutory text, including its punctuation. The majority observed that "[w]hen Congress crafts a statute to create distinct offenses, it typically utilizes multiple subsections or separates clauses with semicolons to enumerate the separate crimes." 605 F.3d at 209. But "unlike most statutes that create multiple offenses § 371 is a single sentence, divided only by *commas." Id.* This punctuation choice was influential to the court's decision that § 371 creates only a single offense, but not the chief reason behind it. What was most persuasive to the court was the use of the word "either" to introduce the ways in which a conspiracy could violate the statute: this word "demonstrates that these objects provide alternative means of creating a single type of offense rather than creating separate offenses." *I*d. at 208. The punctuation served to underscore the meaning conveyed in the words that Congress used.

NACS v. Board of Governors of the Federal Reserve System

Sometimes words and punctuation pull the reader in opposite directions along the interpretive spectrum. That was the case in *NACS v. Board of Governors of the Federal Reserve Systems*, where the D.C. Circuit considered a legal challenge to Federal Reserve Board regulations capping the debit-card transaction fees that merchants pay to issuing banks. 746 F.3d 474, 480 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 1170 (2015). The validity of the regulations turned on the interpretation of a provision of the enabling legislation, the Dodd-Frank Financial Reform Act, which directed the Federal Reserve Board in setting transaction fee caps not to consider "other costs incurred by an issuer which are not specific to a particular electronic debit transaction." *Id.* at 483 (citation omitted). Defending its regulation from a challenge by retailers arguing the caps should be lower, the Board argued that the clause beginning with "which" should be read restrictively, limiting this category of costs that the Board was prohibited from including to those that are not specific to a particular transaction. The retailers argued the opposite: that the dependent clause should be read descriptively and all "other costs incurred by an issuer" were off-limits to being included in the cap.

The statutory interpretation question presented a face-off between the word "which" and the absence of a preceding comma—both of which are ordinarily used to introduce a descriptive clause. As the appeals court recognized, good writers ordinarily use the word "which" to describe and the word "that" to restrict. Id. at 486. But the Court was unwilling to disregard the absence of a comma, which those same good writers use to set apart a descriptive phrase:

> The idea that we should entirely ignore punctuation would make English teachers cringe. … Following

> the merchants' advice and stuffing punctuation to the bottom of the interpretive toolbox would run the risk of distorting the meaning of statutory language. After all, Congress communicates through written language, and one component of written language is grammar, including punctuation.

Id. at 486. Relying on well-known style guides, the appeals court found that punctuation was more important than word choice: "the absence of commas matters far more than Congress's use of the word 'which' rather than 'that.' Widely-respected style guides expressly require that commas set off descriptive clauses, but refer to descriptive 'which' and restrictive 'that' as a style preference rather than an ironclad grammatical rule." *Id.* at 487 (citing The Chicago Manual of Style 250 (14th ed. 2003), and William Strunk, Jr. & E.B. White, The Elements of Style 3-4 (4th ed. 2000)). Ultimately, using Chevron deference, the court found that the Board's interpretation was reasonable.

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Punctuation's pivotal role in interpreting legal text—statutes, contracts, and patents for instance—is nothing new. As a Supreme Court justice famously observed nearly 200 years ago, "men's lives may depend on a comma." *United States v. Palmer*, 16 U.S. (3 Wheat) 610, 611 (1818) (Johnson, J., dissenting) (placement of comma pivotal in defining the offense of piracy). Rarely will the outcome of a case depend on punctuation, but for courts, advocates, and readers alike, "stuffing punctuation to the bottom of the interpretive toolbox" would be a mistake. *NACS*, 746 F.3d at 486. Words, periods, commas, and semicolons all form part of a single textual fabric that underlies any exercise in textual interpretation.

1 *See* Daily Mail, "The death of the comma? U.S. academic claims punctuation mark could be abolished from English language with 'little loss of clarity'," www.dailymail.co.uk/news/article-2554549/U-S-academic-claims-punctuation-mark-abolished-English-language-little-loss-clarity.html (Feb. 8, 2014).

2 University of Oxford Style Guide at 13 (2014), www.ox.ac.uk/sites/files/oxford/media_wysiwyg/University%20of%20Oxford%20Style%20Guide.pdf. Often, the Oxford comma is unnecessary to avoid ambiguity. One can order a "hamburger with lettuce, tomatoes, and onions" with little risk of being misunderstood. But omitting the Oxford comma from "while in Chicago, I saw my parents, Rahm Emmanuel, and Oprah Winfrey," could produce ambiguity or strange meanings.

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