

Statutory Interpretation in the Age of Grammatical Permissiveness: An Object Lesson for Teaching Why Grammar Matters

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“[T]he so-called Oxford comma (also known as the serial comma) ... is a lot more dangerous than its exclusive, ivory-tower moniker might suggest. There are people who embrace the Oxford comma, and people who don’t, and I’ll just say this, never get between these people when drink has been taken.”¹

“Do we really need to place a comma after the second item in a three-item series?” one of your students, perhaps a former journalist, might inquire. Many style guides, including that of the *New York Times*, advise against such use.² Other manuals, while generally recommending against using the serial comma, allow for its use in cases where it would help to resolve ambiguity.³ Legal writing style guides take a different approach: although they often recognize that the serial comma may be considered optional in other writing contexts, they advise that its use be mandatory in legal writing. Bryan Garner’s *Redbook* for example, begins with the following rule: “Use a comma to separate words or phrases

¹ Lynne Truss, *Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation* 84 (2004) (emphasis removed).

² See Allan M. Siegal & William G. Connolly, *The New York Times Manual of Style and Usage* 74 (rev. 1st ed. 1999).

³ See University of Oxford, University of Oxford Writing and Style Guide, <http://www.ox.ac.uk/branding_toolkit/writing_and_style_guide/punctuation.html> (last visited Aug. 25, 2009).

grouped in a series of three or more, and include a comma before the conjunction.”⁴ Another text issues less of a serial-comma mandate, but does counsel that “legal writers should make it a habit to include it.”⁵ In fact, the style sheet for this very publication requires the use of the serial comma.⁶

So how do we explain to students why serial commas are mandatory in legal writing when their use is not encouraged in other types of writing? One answer, of course, is that legal writing values—indeed, demands—clarity in a way that other forms of writing do not. And more often than not, adding the serial comma adds clarity to a sentence’s meaning. When given a choice, legal writers should choose against ambiguity (unless, of course, there are good reasons to choose to be ambiguous). This answer may well satisfy the former journalist, who is accustomed to thinking about writing choices in terms of audience and purpose. We can expect such a student quickly to understand that the legal writer’s need for clarity, along with her audience’s expectations of such clarity, might require different “rules” for legal writing.

Many of our students, however, especially those who tend to resist any

⁴ Bryan A. Garner, *The Redbook: A Manual on Legal Style* 3 (2d ed. 2002).

⁵ Anne Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* 245 (2d ed. 2005) (The book wisely follows its own advice in its subtitle!).

⁶ See Perspectives: Teaching Legal Research and Writing, Author’s Guide and Style Sheet (2008-2009), <<http://west.thomson.com/signup/newsletters/perspectives/perstyle.aspx>> (last visited Aug. 25, 2009) (“In a series consisting of three or more elements, the elements are separated by commas. When a conjunction joins the last two elements in a series, a comma is used before the conjunction, e.g., Attending the conference were Boxx, Smith, and Jones.”).

discussion of grammar and style, may be wondering why they should even care. Comma or no comma, *New York Times* style rules or *Perspectives* style rules, the meaning will be clear enough, won't it? I propose that there is a better way to answer these students, a way that not just *explains* the importance of avoiding ambiguity, but one that uses a case example as an object lesson. One of the many benefits of using a case example is that it focuses students on the expectations of an important legal reader: the judge who may be using her own understanding of grammar rules to interpret language in a statute. In cases interpreting statutory language, where the interpretation can sometimes turn on a single punctuation mark, what can happen if the legislators who draft the statutes and the courts who interpret them may be operating with different sets of rules—in this case, rules of grammar? *People v. Walsh*,⁷ an unpublished City of New York Criminal Court decision interpreting New York's animal cruelty statute, provides an illustration of just such a case.

There are, of course, many other statutory interpretation cases that turn on the placement or absence of a comma.⁸ Among these many options, the *Walsh* case presents a good choice for an effective object lesson for several reasons. First, a number of other punctuation-rules-as-statutory-interpretation cases

⁷ 2008 WL 724724 (N.Y. Crim. Ct. Jan. 3, 2008).

⁸ *See generally*, Lance Phillip Timbreza, The Elusive Comma: The Proper Role of Punctuation in Statutory Interpretation, 24 *QLR* 63 (2005).

involve language and substantive law that might be overly complex for first year students. In *United States v. Ron Pair Enterprises, Inc.*,⁹ for example, “the Supreme Court relied almost entirely on the placement of a comma to resolve a highly contested issue of statutory interpretation in a bankruptcy case.”¹⁰ While this case has received a good deal of critical attention,¹¹ the area of bankruptcy law and the complexity of the language in question could easily detract first-year students from the goals of the lesson.¹² Part of what is appealing about *People v. Walsh* is that the clause in question is fairly straightforward and the substantive issue—what constitutes animal neglect under New York law—is an accessible one for first-year students.

Another appeal of *Walsh* is the way in which the interpretation of the statutory language turns on the judge’s certainty that her understanding of the serial comma rule is the only one there is. While there may be some groups of

⁹ 489 U.S. 235 (1989).

¹⁰ Gregory Germain, Discharging Income Tax Liabilities in Bankruptcy: A Challenge to the New Theory of Strict Construction for Scrivener’s Errors, 75 *UMKC L. Rev.* 741, 768 (2007).

¹¹ See, e.g., *id.*; Timbreza, *supra* note 8.

¹² In *Ron Pair*, the Supreme Court addressed the question of whether the following language in the bankruptcy code authorized post-petition interest on nonconsensual over-secured claims: “[T]here shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.” 489 U.S. at 241. The disagreement between Blackmun’s majority opinion and O’Connor’s dissent essentially hinged on the placement of the comma after the phrase “interest on such claim.” Apparently Blackmun found the comma’s inclusion more meaningful than O’Connor did. See *id.* at 249-50 (O’Connor, J., dissenting).

people debating which of the serial comma rules is the better one,¹³ the judge who penned *People v. Walsh* does not appear to recognize that there are different rules that writers and readers may be applying. As this judge presents her opinion, there is only one rule—a rule that requires the use of a serial comma—and therefore she sees only one way to read the contested language in the statute. Her interpretation fails to recognize that numerous style manuals, from the *New York Times* to the *University of Oxford Writing and Style Guide*, are advising writers against the use of serial commas. Our students would be well advised to understand that judges, whose ideas about grammar and writing style is likely to be heavily influenced by what is considered proper *legal* writing, are readers whose preferences should matter.

The case *People v. Walsh* involved the interpretation of New York’s animal cruelty statute. The defendant was charged with failing to seek veterinary care for his ailing cat; he defended the charge, in part, by arguing that the statute did not require him to provide veterinary care to his animal.¹⁴ The relevant language prohibits animal owners from “depriv[ing] any animal of necessary sustenance, food or drink.”¹⁵ The defendant argued that this language, particularly the words, “necessary sustenance,” did not include medical care. In responding to

¹³ See *supra* note 1 and accompanying quotation.

¹⁴ See *Walsh*, 2008 WL 724724, at *1.

¹⁵ N.Y. Agric. & Mkts. Law § 353 (2004).

the People’s counter-argument that “sustenance” is meant to refer to more than food or drink, the court embraced the mandatory serial comma rule:

The grammatical construction of the clause “or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink” indicates that “necessary sustenance” is “food or drink.” ... Was [sic] the statute intended to list three separate types of deprivation it would have read “... sustenance, food, or drink ...” For example, in an author’s dedication “to my parents, the Pope and Mother Theresa”, the absence of a comma between “Pope” and “and” indicates that the author’s parents are the Pope and Mother Theresa and not that a separate dedication was being made to each of the three. “Three or more items in a series should be separated by commas.” Evidently, the clause “... necessary sustenance, food or drink, or ...” is not a series or a list.¹⁶

There are several interesting points that can be drawn from this excerpt to make it an effective object lesson in a Legal Writing class. One might start by presenting the students with the statute’s language and asking how they would interpret it. Perhaps this conversation might draw from students their own understanding of serial comma “rules” and how that understanding influences their interpretation of the language. (In the best of worlds, this discussion might actually generate a debate between students with different understanding of whether the lack of a comma implies that the clause is not meant to be a list.) As part of the discussion, the students might be presented with the various versions of the serial comma rule as a way of emphasizing the different positions that legal writing style guides take. The students could next be given the *Walsh* excerpt and

¹⁶ *Walsh*, 2008 WL 724724, at *2 (footnote omitted) (quoting R. Lederer & J. Shore, *Comma Sense* 29-30 (2005); Elisabeth Chesla, *Grammar Source* 319 (2005)).

asked to comment on the judge's reading of the language in question and the extent to which her choice of grammar rules influences the interpretation.

One interesting point to draw out is the judge's failure to recognize that "necessary sustenance, food or drink" could in fact be a list of three items, written by someone who subscribes to the permissive use of the serial comma. Such a reading is certainly a plausible one, given the context. One might argue, for example, that the term "sustenance" can be read as superfluous if, as the judge interprets, "'food or drink' in this instance are what is known as Appositives since they serve to give additional information about the immediately preceding word, in this case 'sustenance', and are set off from the rest of the clause with commas."¹⁷ In that case, one might imagine that the drafters would have chosen to use "sustenance" or "food or drink" but not both. Of course, statutes with superfluous language are drafted all of the time; what is interesting here is that the judge does not even allow for a different interpretation.

Another point on which students might be engaged in the *Walsh* excerpt is the use of the example that the judge cites from the Lederer & Shore text to illustrate her position on the meaning of the missing comma: "in an author's dedication 'to my parents, the Pope and Mother Theresa', the absence of a comma between 'Pope' and 'and' indicates that the author's parents are the Pope and Mother Theresa and not that a separate dedication was being made to each of the

¹⁷ *Id.* at *2 n.2.

three.”¹⁸ Students might be prompted to think about the following questions: Would a dedication “to my parents, the Pope and Mother Teresa” in fact *indicate* that the author’s parents were the Pope and Mother Teresa, or would such a construction perhaps create ambiguity as to whether the author was listing two or four dedicatees? And even if we recognize that inclusion of serial commas are indicated when they can reduce ambiguity, perhaps any potential ambiguity in the above phrase might be resolved by the *context* of the language. Since anyone reading the dedication would know that the author’s parents could not possibly be the Pope and Mother Teresa, it could be argued that the use of a serial comma in this instance is optional, since there is really no ambiguity to resolve.¹⁹

¹⁸ *Id.* at 2.

¹⁹ Interestingly, a similar example has been cited in Wikipedia’s discussion of the serial comma debate to illustrate when including a serial comma can sometimes *create* ambiguity (and while part of me cringes at the thought of citing Wikipedia, this example is too good to pass up):

Use of the serial comma can introduce ambiguity. An example would be a book dedication reading:

To my mother, Ayn Rand, and God

The serial comma after *Ayn Rand* creates ambiguity about the writer’s mother, because the proper-noun phrase *Ayn Rand* could be read as in apposition to *my mother* (with the commas fulfilling a parenthetical function), resulting in the interpretation “To my mother (who is Ayn Rand) and to God” Without a serial comma this would read:

To my mother, Ayn Rand and God

This is unambiguous, as background knowledge prevents the misinterpretation “To my mother, who is both Ayn Rand and God.”

Wikipedia, Serial Comma, <http://en.wikipedia.org/wiki/Serial_comma> (last visited Aug. 25, 2009).

There are, of course, a number of other teaching points that one could draw from this simple excerpt of statutory language. The lesson could, for example, be expanded into a broader one about the language of the statute and how it creates ambiguity. The paragraph that the judge in *Walsh* was interpreting, which was last amended in 2005, is actually a single sentence that contains 145 words with numerous embedded clauses. Its structure alone makes it an exceedingly difficult sentence to follow:

A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who wilfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a class A misdemeanor and for purposes of paragraph (b) of subdivision one of section 160.10 of the criminal procedure law, shall be treated as a misdemeanor defined in the penal law.²⁰

There are lessons here about writing more clearly and breaking down long sentences into more sensible parts. Students could, for example, be challenged to rewrite this statute in plain English, breaking this long sentence down into several smaller ones. Another flaw in the statute's language is that (again within the same long sentence) it variously uses the terms, "necessary sustenance, food or drink,"

²⁰ N.Y. Agric. & Mkts. Law § 353 (2004).

“such sustenance or drink,” and “necessary food or drink.” Whether all three of these terms are intended to have the same meaning is not clear. A useful object lesson here could focus on the risks of choosing “elegant variation”²¹ in legal writing and the unintended consequences of altering meaning.

There are some good reasons, however, to use this statute and *Walsh* for the sole purpose of illustrating different understandings of the serial comma rule. Having students read even this short case excerpt demonstrates that grammar does matter, and that in some instances it might be especially important to understand how legal readers are likely to use rules of grammar to interpret meaning of statutes or contracts. We should take every opportunity to remind our students that the goal of writing so that no reader can misunderstand, while an ambitious task, is one worth aiming for.

²¹ Henry Fowler Watson, *The Dictionary of Modern English Usage* 130 (1926).