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State of Washington
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER BACON, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Does the mens rea “circumstances evincing an intent,” with the disjunctive conjunction “or” used between the phrases “to use or employ” or “allow the same to be used or employed,” modify both phrases under RCW 9A.56.063?

2. If “circumstances evincing an intent” is a necessary mental element for the additional elements/phrases “to use or employ” or “allow the same to be used or employed,” was the information charging Bacon with making or possessing motor vehicle theft tools under RCW 9A.56.063 constitutionally insufficient?

3. If the information charging the defendant with making or possessing motor vehicle theft tools is constitutionally insufficient, is the proper remedy to dismiss that charge without prejudice to allow the State to refile?

II. STATEMENT OF THE CASE

Christopher Bacon was charged by information with felony possession of a stolen motor vehicle and with the gross misdemeanor making or possessing a motor vehicle theft tool, a gross misdemeanor. CP 6. Bacon was convicted as charged by a jury. RP 313; CP 30-31. Bacon does not challenge his possession of a stolen motor vehicle conviction.

On May 10, 2019, Victoria Laurent lived in an apartment located at 9322 East Montgomery Avenue, in Spokane. RP 180. She had parked her 1991 white Honda Accord¹ on North Locust Road, which adjoined the apartment complex. RP 180. The vehicle had been locked and Laurent had the only set of keys for the vehicle. RP 180. Laurent reported her Honda as stolen the following morning on May 11, 2019. RP 180.

On May 15, 2019, Bacon joined Kendra Mitchell at a Motel 6; he arrived in a white Honda Accord; Bacon had previously remarked the Accord was his vehicle. RP 238-39, 240. After leaving the motel, Bacon drove the Honda and Mitchell sat in the passenger seat. RP 241. Bacon was tired, so Mitchell drove the Honda and Bacon then sat in the passenger seat. RP 241. During that same day, Spokane Police Officer Juan Rodriguez was driving an undercover police vehicle. RP 181, 184. He was parked near the intersection of Myrtle and Jackson. RP 185. Rodriguez observed the white Honda approach and park near his vehicle; Mitchell was driving and Bacon was the passenger. RP 185, 195, 237-38. Both Mitchell and Bacon surveyed the area. RP 187. Mitchell and Bacon drove away from the area. RP 187.

¹ An unforeseen negative effect of early 1990s Honda cars is that, over time and with use, the tumblers for both the ignition and door locks loosen which allows other vehicle keys to operate both the ignition and door locks. RP 187-92.

Rodriguez confirmed the Honda's license plate and determined the vehicle was stolen. RP 187-89. Rodriguez followed the Honda as it made numerous turns in a residential neighborhood; ultimately the Honda stopped. RP 187, 192-93, 221. Both Mitchell and Bacon were ordered out of the car. RP 194-95. Bacon was patted down for officer safety. RP 196. Rodriguez felt what appeared to be an ice pick in Bacon's right front pocket. RP 196. As the officer removed the object, he identified it as a brass-colored punch. RP 196. Bacon spontaneously identified the object as an engraver. RP 196. After further review, Rodriguez determined the object was a "spring-loaded brass punch," which is normally used to place a divot in an object to enable drilling a hole in it. RP 199-200. Brass punches are also used by individuals to shatter the glass of a vehicle very quickly during a vehicle theft. RP 200.

At the scene, Rodriguez also felt what he believed to be a key in Bacon's rear pant pocket. RP 201. After Bacon was placed under arrest, he was again searched and Rodriguez located a shaved, modified Chevy key in Bacon's rear pant pocket. RP 203, 216. In addition, five different, shaved keys, attached to a key ring, were found on the Honda's passenger seat.²

² An individual attempting to steal a car will use several different shaved keys to start the vehicle. RP 215. Shaved keys are used for no purpose other than to steal a vehicle. RP 217. Sandpaper or a file is used to modify a key for stealing a vehicle. RP 233, 267.

RP 203, 214-16, 266. Moreover, a modified, shaved General Motors key was found in the Honda's ignition.³ RP 203, 211-14, 268-69.

III. ARGUMENT

THE DOCUMENT CHARGING BACON WITH MAKING OR POSSESSING MOTOR VEHICLE THEFT TOOLS WAS CONSTITUTIONALLY DEFICIENT AS IT OMITTED THE NECESSARY MENTAL STATE FOR THAT CRIME.

Bacon was charged with a gross misdemeanor⁴ of making or possessing motor vehicle theft tools under count two of the information.

Count two alleged:

COUNT II: MAKING OR POSSESSING A MOTOR VEHICLE THEFT TOOL, committed as follows: That the defendant, CHRISTOPHER BACON, in the State of Washington, on or about May 15, 2019, did possess a motor vehicle theft tool or implement that has been adapted, designed or is commonly used in the commission of motor vehicle related theft, to-wit: a SHAVED KEYS, allowing the motor vehicle theft tool to be used or employed in the commission of motor vehicle theft.

CP 6.

Bacon alleges that the language used to charge the crime of making or possessing a motor vehicle theft tool, under count two of the information, was defective as it did not inform him of “the requisite intent of the crime *i.e.* circumstances evincing *an intent* to use or employ, or allow it to be used or employed, in the commission of motor vehicle theft *or with knowledge*

³ Probable cause did not exist to arrest Mitchell at the scene. RP 253.

⁴ RCW 9A.56.063(4).

the tool is intended to be used for this purpose.” Appellant’s Br. at 6 (emphasis in the original). The State agrees as discussed below.

Standard of review.

An appellate court reviews a purportedly deficient charging document de novo. *State v. Goss*, 186 Wn.2d 372, 376, 378 P.3d 154 (2016). An information is constitutionally defective if it fails to list the essential elements of a crime. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). The essential elements rule provides that an information must allege sufficient facts to support each element of the crime charged. *State v. Kjorsvik*, 117 Wn.2d 93, 98, 108, 812 P.2d 86 (1991). In a challenge to the sufficiency of an information, a reviewing court must first decide whether the allegedly missing element is, in fact, an essential element. *See State v. Tinker*, 155 Wn.2d 219, 220, 118 P.3d 885 (2005). If so, and where the defendant challenges, as here, the sufficiency of the information for the first time on appeal, the court must then “liberally construe the language of the charging document in favor of validity.” *Zillyette*, 178 Wn.2d at 161.

Liberal construction requires that the court determine whether the information contains, in some form, language that can be construed as

giving notice of the essential elements.⁵ *State v. Moavenzadeh*, 135 Wn.2d 359, 362-63, 956 P.2d 1097 (1998). The reviewing court is not required to examine each count in isolation. *State v. Laramie*, 141 Wn. App. 332, 339, 169 P.3d 859 (2007). A court should be guided by common sense and practicality in construing the language. *State v. Nonog*, 169 Wn.2d 220, 230-31, 237 P.3d 250 (2010). “Even missing elements may be implied if the language supports such a result.” *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992). A liberal standard of review is used to discourage “sandbagging” – where the defendant recognizes a defect in the information but declines to raise it before trial when a successful objection would result in the court allowing the State to amend the information. *Kjorsvik*, 117 Wn.2d at 97. If the information contains language that can be considered as giving notice, the court then considers whether the defendant was “nonetheless actually prejudiced by the inartful language which caused a lack of notice.” *State v. Williams*, 162 Wn.2d 177, 185, 170 P.3d 30 (2007).

In the present case, to determine whether the information contained the essential elements of the crime of making or possessing motor vehicle

⁵ If the information cannot be construed as giving notice of the essential elements, “the most liberal reading cannot cure it.” *State v. Campbell*, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995).

theft tools as defined under RCW 9A.56.063, this Court needs to determine the meaning of the statute. An appellate court reviews a statute's meaning de novo. *State v. Budik*, 173 Wn.2d 727, 733, 272 P.3d 816 (2012)

A court first reviews the relevant statute to determine the elements of the crime. *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005). When interpreting a statute, an appellate court's objective is to determine and give effect to the legislature's intent. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). In that regard, a court attempts to determine the plain meaning of the statute. *Id.* "In determining the plain meaning of a provision, [an appellate court looks] to the text of the statutory provision in question, as well as the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Id.* (internal quotation marks omitted).

RCW 9A.56.063(1), making or possessing motor vehicle theft tools, states:

Any person who makes or mends, or causes to be made or mended, uses, or has in his or her possession any motor vehicle theft tool, that is adapted, designed, or commonly used for the commission of motor vehicle related theft, under circumstances evincing an intent to use or employ, or allow the same to be used or employed, in the commission of motor vehicle theft, or knowing that the same is intended to be so used, is guilty of making or having motor vehicle theft tools.

A plain reading of RCW 9A.56.063(1) shows that there are two alternative means of committing the crime, with different mental states requiring either: (1) circumstances evincing an *intent* to use, employ, or allow the tool to be used or employed or (2) *knowing* that the tool is intended to be used in the theft of a motor vehicle. RCW 9A.56.063(2) gives guidance on how this Court should construe the statute and for the proposition that there are two alternative means and the necessary mens rea by which an individual can commit the crime. That statute states:

(2) For the purpose of this section, motor vehicle theft tool includes, but is not limited to, the following: Slim jim, false master key, master purpose key, altered or shaved key, trial or jiggler key, slide hammer, lock puller, picklock, bit, nipper, any other implement *shown by facts and circumstances that is intended to be used in the commission of a motor vehicle related theft, or knowing that the same is intended to be so used.*

RCW 9A.56.063(2) (emphasis added).

Under the “series-qualifier canon” of statutory construction, “[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.” *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348, 40 S.Ct. 516, 518, 64 L.Ed. 944 (1920).⁶ Stated differently, “[w]hen there is a straightforward,

⁶ See also *PeaceHealth St. Joseph Medical Center v. Department of Revenue*, 9 Wn. App. 2d 775, 782, 449 P.3d 676 (2019), *affirmed sub. nom.*, ---Wn.2d---,

parallel construction that involves all nouns or verbs in a series, a prepositive⁷ or postpositive⁸ modifier normally applies to the entire series.” Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 147 (2012).⁹ The “series-qualifier canon” may be applicable where the text of a statute is a “flowing sentence that lacks any distinct separations”; is “unbroken by numbers, letters, or bullets”; and is not written in a “divided grammatical structure” demonstrated by double-dashes opening a list or semicolons separating each listed noun. *In re Amy Unknown*, 701 F.3d 749, 763 (5th Cir. 2012), *rev’d sub. nom on other grounds by Paroline v. United States*, 572 U.S. 434, 447, 134 S.Ct. 1710, 1721, 188 L.Ed.2d 714 (2014).

Likewise, “the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only

No. 97557-4, 2020 WL 4516799 (Wash. Aug. 6, 2020) (a similar discussion of the rule).

⁷ A modifier positioned before what it modifies in a sentence. For example, “[w]illfully damage or tamper with – held, that *willfully* modifies both *damage* and *tamper with*.” Scalia & Garner, *supra* at 148 (emphasis in original).

⁸ A modifier positioned after what it modifies in a sentence. For example, “[*a*] *wall or a fence that is solid* (the wall as well as the fence must be solid).” Scalia & Garner, *supra* at 148 (emphasis in original).

⁹ Attached are excerpts of the pages for the ease of the Court and counsel.

the immediately preceding one.”¹⁰ *Matter of Mahrle*, 88 Wn. App. 410, 413, 945 P.2d 1142 (1997) (discussing the “last antecedent” rule). Justice Antonin Scalia and Bryan Garner offer the following example: “You will be punished if you throw a party, or engage in any other activity, that damages the house.” Scalia & Garner, *supra* at 161. The comma after “activity” signals that the phrase “that damages the house” modifies both “party” and “any other activity.” *Id.* at 162. Absent the comma after “activity,” the last-antecedent rule would be triggered and the phrase “that damages the house” would modify only “any other activity.” *Id.* at 161. Here, the statute is clear that “in the commission of a motor vehicle theft” applies equally and modifies both antecedents “under circumstances evincing an intent to use or employ,” “or allow the same to be used or employed.” RCW 9A.56.063(1) (emphasis added).

Also helpful is the general rule of syntax that “an initial modifier will tend to govern all elements in the series unless it is repeated for each element.” *Wash. Educ. Ass’n v. Nat’l Right to Work Legal Def. Found., Inc.*, 187 Fed. Appx. 681, 682 (9th Cir. 2006). For example, in *Long v. United*

¹⁰ See also *In re Smith*, 139 Wn.2d 199, 204, 986 P.2d 131, 133 (1999) ([t]he “last antecedent” rule of statutory construction provides that, unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent. A corollary to the rule is that “the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one.” (Internal quotation marks and citations omitted.)

States, 199 F.2d 717 (4th Cir. 1952), the defendant was convicted of violating a statute that provided: “Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person.” *Id.* at 718 (quoting 18 U.S.C. § 111). The Fourth Circuit explained that “[t]he use of the adverb ‘forcibly’ before the first of the string of verbs, with the disjunctive conjunction used only between the last two of them, shows quite plainly that the adverb is to be interpreted as modifying them all.” *Id.* at 719.

As construed by the Kentucky Supreme Court:

Where several things are referred to in the statute, they are presumed to be of the same class when connected by a copulative conjunction¹¹ unless a contrary intent is manifest. It is also widely accepted that an adjective at the beginning of a conjunctive phrase applies equally to each object within the phrase. In other words, the first adjective in a series of nouns or phrases modifies each noun or phrase in the following series unless another adjective appears.

Lewis v. Jackson Energy Co-op Corp., 189 S.W.3d 87, 92 (Ky. 2005) (citations omitted).

Applying the series-qualifier canon and syntax rule here, “circumstances evincing an intent” (the necessary mens rea) modifies both “to use or employ” and “or allow the same to be used or employed.” *See* RCW 9A.56.063(1). The compound modifier “circumstances evincing an intent,” with the disjunctive conjunction used between “to use or employ” *or* “allow the same to be used or employed,” should be interpreted as

¹¹ In the present case, the disjunctive conjunction “or” is used in RCW 9A.56.063.

modifying and applying to both phrases or elements as each phrase is a definitional equivalent. *See* Scalia & Garner, *supra* at 122.

All essential elements of a crime, statutory or otherwise, must be included in the information to give notice to an accused of the nature and cause of the accusation against him or her. *Kjorsvik*, 117 Wn.2d at 97; *see also State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985) (“[t]he omission of any statutory element of a crime in the charging document is a constitutional defect which may result in dismissal of the criminal charges”).

The information in the present case failed to state the required mens rea “circumstances evincing an intent” under count two, regarding the making or possessing motor vehicle theft tools crime. If this Court determines the information was inadequate regarding the possessing motor vehicle theft tools conviction, the remedy is to reverse that conviction without prejudice to allow the State to refile the information. *State v. Vangerpen*, 125 Wn.2d 782, 792, 888 P.2d 1177 (1995); *State v. Mendoza-Solorio*, 108 Wn. App. 823, 833, 33 P.3d 411 (2001).

IV. CONCLUSION

For the reasons stated herein, the charge of making or possessing motor vehicle theft tools was constitutionally deficient as it did not include the necessary mens rea “circumstances evincing an intent.”

Dated this 13 day of August, 2020.

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APPENDIX

APPENDIX

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Reading Law

The Interpretation of Legal Texts

Antonin Scalia & Bryan A. Garner

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12. Conjunctive/Disjunctive Canon 116

***And* joins a conjunctive list, or a disjunctive list—but with negatives, plurals, and various specific wordings there are nuances.**

The conjunctions *and* and *or* are two of the elemental words in the English language. Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives. Competent users of the language rarely hesitate over their meaning. But a close look at the authoritative language of legal instruments—as well as the litigation that has arisen over them—shows that these little words can cause subtle interpretive problems. Although these conjunctions can appear in countless constructions, we have identified six types of sentences in which they most frequently appear in legal instruments.

#1: *The Basic Requirement*

CONJUNCTIVE	DISJUNCTIVE
You must do A, B, and C.	You must do A, B, or C.

With the conjunctive list, all three things are required—while with the disjunctive list, at least one of the three is required, but any one (or more) of the three satisfies the requirement. Hence in the well-known constitutional phrase *cruel and unusual punishments*,¹ the *and* signals that cruelty or unusualness alone does not run afoul of the clause: The punishment must meet both standards to fall within the constitutional prohibition.² The same point holds true

1 U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

2 See *Harmelin v. Michigan*, 501 U.S. 957, 967 (1991) (Scalia, J., plurality opinion) (“As a textual matter . . . a disproportionate punishment can perhaps always be considered ‘cruel,’ but it will not always be (as the text also requires) ‘unusual.’”). See also Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?* 87 Wash. U. L. Rev. 567, 605 (2010) (“[F]or the ‘and’ to have meaning, the Clause must be interpreted as prohibiting only punishments that are both cruel and unusual.”).

for the phrase *necessary and proper*³ in Article I of the Constitution. 117

A common interpretive issue involves the conjunction *and*, which (if there are two elements in the construction) entails an express or implied *both* before the first element. Here it is implied: “Service shall be made upon the District of Columbia by delivering . . . or mailing . . . a copy of the summons, complaint and initial order to [both] the Mayor of the District of Columbia (or designee) and the Corporation Counsel of the District of Columbia (or designee).”⁴ A plaintiff sued the District for injuries suffered when a fire truck struck her car, but her complaint was dismissed for failure to comply with the rule just quoted because she had not served the mayor.⁵ She contended that the purpose of the statute was substantially satisfied by service on the corporation counsel; since that officer was a statutory agent of the mayor, service on him or her was, in legal effect, service on the mayor. The D.C. Superior Court correctly held that what the rule says, it says (see § 2 [supremacy-of-text principle]), and the *and* means that service must be effected on both corporation counsel and the mayor.⁶

Sometimes huge amounts of money can depend on these little words. In *OfficeMax, Inc. v. United States*,⁷ the federal tax code imposed certain taxes on “toll telephone service,” including “a telephonic quality communication for which . . . there is a toll charge which varies in amount with the distance and elapsed transmission time of each individual communication.”⁸ In 1965, when Congress enacted the relevant provision, AT&T was the

3 U.S. Const. art. I, § 8, cl. 18 (“To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”). See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 275 (1993) (“The [Necessary and Proper Clause] specifies that any laws enacted under its authority must be both necessary and proper—in the conjunctive.”).

4 D.C. Super. Ct. Civ. P.R. 4(j)(1).

5 *Thompson v. District of Columbia*, 863 A.2d 814, 815–16 (D.C. 2004).

6 See *id.* at 818.

7 428 F.3d 583 (6th Cir. 2005).

8 26 U.S.C. § 4252(b)(1).

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only telephone-service provider in the United States that offered long-distance calling, and it imposed a toll on long-distance calls based on variations in *both* the time and distance of the call. In the 1990s, other operators started charging long-distance rates based on time only, and AT&T adopted this approach in 1997. If the tax code required variation based on both time and distance, then no telephone-service consumers would be subject to the tax. The Government contended that the tax applied whenever toll charges varied in amount based on *either* time or distance. OfficeMax argued that the tax applied only when toll charges varied in amount based on *both* time and distance. Relying in part on dictionaries and usage guides, the Sixth Circuit correctly held that *and* is conjunctive and that the toll must therefore vary on both bases.⁹

When there is a multi-element construction with an *and* between the last two elements only, the rhetorical term for the construction is *syndeton*. Some drafters, perhaps through abundant caution, put a conjunction between all the enumerated items, as here:

The seller shall provide:

- (a) a survey of the property; and
- (b) the surveyor's sworn certificate that the survey is authentic and, to the best of the surveyor's knowledge, accurate; and
- (c) a policy of title insurance showing the boundaries of the property; and
- (d) a plat showing the metes and bounds of the property.

This technique is called *polysyndeton*. It is a rhetorical technique merely; it does not convey a meaning different from that of the identical phrasing minus the *ands* at the end of (a) and (b). And it should be avoided by legal drafters lest, over time, it cast doubt on the meaning conveyed by the use of *syndeton*.

⁹ 428 F.3d at 588-89.

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Sometimes drafters will omit conjunctions altogether between the enumerated items, as here:

The seller shall provide:

- (a) a survey of the property;
- (b) the surveyor's sworn certificate that the survey is authentic and, to the best of the surveyor's knowledge, accurate;
- (c) a policy of title insurance showing the boundaries of the property;
- (d) a plat showing the metes and bounds of the property.

This technique is termed *asyndeton*, and it is generally considered to convey the same meaning as the syndetic or polysyndetic formulation: It is as though *and* were inserted between the items. But because such a construction could be read as a disjunctive formulation, most drafters avoid it.

#2: The Basic Prohibition

CONJUNCTIVE	DISJUNCTIVE
You must not do A, B, and C.	You must not do A, B, or C.

With the conjunctive list, the listed things are individually permitted but cumulatively prohibited. With the disjunctive list, none of the listed things is allowed.

After a negative, the conjunctive *and* is still conjunctive: *Don't drink and drive*. You can do either one, but you can't do them both. But with *Don't drink or drive*, you cannot do either one: Each possibility is negated. This singular-negation effect, forbidding doing *anything* listed, occurs when the disjunctive *or* is used after a word such as *not* or *without*. (The disjunctive prohibition includes the conjunctive prohibition: Since you may not do any of the prohibited things, you necessarily must not do them all.) The principle that "not A, B, or C" means "not A, not B, and not C" is part of what is called *DeMorgan's theorem*.

#3: *The Negative Proof*

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CONJUNCTIVE	DISJUNCTIVE
To be eligible, you must prove that you have not A, B, and C.	To be eligible, you must prove that you have not A, B, or C.

With the conjunctive negative proof, you must prove that you did not do all three. With the disjunctive negative proof, what must you prove? If you prove that you did not do one of the three things, are you eligible? Suppose the statute says:

To be eligible for citizenship, you must prove that you have not (1) been convicted of murder; (2) been convicted of manslaughter; or (3) been convicted of embezzlement.

An applicant proves #3—that he has never been convicted of embezzlement—but fails to prove that he has not been convicted of both murder and manslaughter. Is he eligible? (No.) Is the requirement that he not have done one of these things, or that he have done none? (He must have done none.)

Consider a case involving two provisions of the Comprehensive Drug Abuse Prevention and Control Act¹⁰ that gave an innocent-owner defense to forfeiture of a vehicle used in a drug crime. An owner's vehicle could not be declared forfeited "by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner."¹¹ Oscar Goodman was given a Rolls-Royce that had been used in drug activity. He had not consented to the earlier drug activity, but may have known about it at the time he took title to the car.¹² Could Goodman successfully raise the innocent-owner defense? Goodman contended that the innocent-owner defense should be read *disjunctively* to protect any owner who can prove a lack of knowledge, lack of consent, or lack of willful blindness. The Government contended that a disjunctive interpretation would lead to an absurd result that would allow

10 21 U.S.C. § 881(a)(4) (West Supp. 1994).

11 *Id.* § 881(a)(4)(C) (emphasis added).

12 *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 803 (3d Cir. 1994).

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every post-illegal-act transferee to escape the forfeiture statute by merely claiming lack of consent, regardless of his knowledge at the time of the illegal act or at the time of the transfer.¹³ The Third Circuit incorrectly held that even if you knew about the illegal act, if you did not consent your car cannot be forfeited.¹⁴ It neglected to apply DeMorgan's theorem.¹⁵

#4: *Introduced with each or every*

CONJUNCTIVE	DISJUNCTIVE
Every husband and father must report annually.	Every husband or father must report annually.
Each husband and father must report annually.	Each husband or father must report annually.

With the conjunctive *and*, proper usage would assign the adjectives *every* and *each* to both of the following nouns, so that "Every (each) husband and father" means "Every (each) husband and every (each) father." (See § 19 [series-qualifier canon].) But it is easy to mistake the meaning for "Every (each) husband-and-father"—easy enough, in fact, that the conjunctive uses here illustrated might be considered ambiguous. If the husband-and-father meaning is intended, the sentence should be recast that way, or perhaps as "Every (each) husband who is a father." In the disjunctive instances, of course, the problem of ambiguity does not arise because *husband or father* includes not only men who fall into either category but also fathers who are also husbands and husbands who are also fathers.

#5: *Introduced with an Indefinite Article*

CONJUNCTIVE	DISJUNCTIVE
A husband and father must report annually.	A husband or father must report annually.

13 *Id.* at 813.

14 *Id.* at 814.

15 *See id.* at 815 n.19.

With the conjunctive wording, only someone who fits both descriptions must comply. With the disjunctive wording, someone who fits either description must comply.

#6: *The Synonym-Introducing or*

“The award of exemplary or punitive damages is the exception, not the rule.”

“An interpretation can be novel, or innovative.”

In these sentences, the *or* introduces a definitional equivalent. The second item is nonrestrictive (i.e., the sentence is complete without it), so it is typically (as in the second example just quoted) set off by commas.

#7: *Variant Wordings and Variant Lead-Ins*

The wording of the lead-in may be crucial to the meaning. If the introductory phrase is *any one or more of the following*, then the satisfaction of any one element, or any combination of elements, will suffice. The introductory phrase *each of the following* is equivalent to *all the following*. But notice how the surrounding words can affect the sense:

- The member may select a remedy from among *all the following*: (Choose one, even if the listing uses *ands*.)
- Among the cumulative options available to a member are *all the following*: (Choose as many as you like [because of the word *cumulative*], even if the listing uses *ors*.)
- The sole option available to a member is the choice of *any one or more of the following*: (Choose as many as you like [because of the phrase *or more*], even if the listing uses *ors*.)
- *Each of the following* remedies is available to a member: (Choose one—probably. The phrasing is ambiguous, whether the listing uses *and* or *or*.)

- A member may select from among *the following remedies*: (Choose one—probably. The phrasing is ambiguous, whether the listing uses *and* or *or*.)

The blackletter rule in the main heading of this section covers the vast majority of wordings. But as with so many other interpretive issues, there is a vast array of possible permutations in phrasing. In one case, the Wyoming Supreme Court had to grapple with a statute that began with polysyndetic *ors* but then dropped the *or* between the last two enumerated items—in a provision that was ungrammatical to boot.¹⁶ The statute allowed for a child to be adopted “without the written consent of the parent” if the nonconsenting mother or father:

- (a) has been adjudged guilty by a court of competent jurisdiction of cruelty, abuse, or mistreatment of the child; or
- (b) has been judicially deprived of parental rights or had parental rights terminated with respect to the child; or
- (c) who [sic] has willfully abandoned such child;
- (d) if it is proven to the satisfaction of the court that said father or mother, if able, has not contributed to the support of said child during a period of one (1) year immediately prior to the filing of the petition for adoption¹⁷

Notice the absence of the conjunction *or* between subsections (c) and (d).

The child in this case had been adopted without the written consent of his father. The trial court found that the father had not provided support for the child during the period of one year before the adoption proceeding (the requirement set forth in subsection (d)), but it did not find willful abandonment (the requirement set forth in subsection (c)). The father contended that because subsections (c) and (d) are not joined by the conjunction *or*, they must be read together as a single requirement, so that that provision ((d) without (c)) was no proper basis for allowing the adoption. The

¹⁶ *Voss v. Ralston (In re Voss's Adoption)*, 550 P.2d 481 (Wyo. 1976).

¹⁷ 1957 Wyo. Sess. Laws § 1-710.2.

adopting parent contended that since the first three subsections were connected by *or*, subsection (d) should be construed as if it were connected by *or* as well. Ruling for the father, the court held that subsections (c) and (d) must be read together. So adoption of a child without the father's consent required proof of both lack of support and willful abandonment.

That decision was correct. As we have said, asyndeton (absence of conjunction) is normally equivalent to syndeton (use of the conjunction *and*). Textually, there was no serious question that subsection (d) was cumulative. The only real question was whether it was cumulative with (c) alone or with (a) through (c). That did not matter for purposes of the case at hand, but the court got that right as well. Contextually, the requirement fits well with (c) but not (a) and (b). The grammar in the statute was abysmal, containing one inadvertency after another in subsections (c) and (d): The *who* in (c) is all wrong, and (d) is hopelessly unparallel. Yet the statute is intelligible, and the court's unflinching approach to interpretation was laudable. The court complied with our § 8 (omitted-case canon) by stating:

The omission of words from a statute must be considered intentional on the part of the legislature. Words may not be supplied in a statute where the statute is intelligible without the addition of the alleged omission. Words may not be inserted in a statutory provision under the guise of interpretation.¹⁸

And it followed the presumption of consistent usage (§ 25):

Where the legislature has specifically used a word or term in certain places within a statute and excluded it in another place, the court should not read that term into the section from which it was excluded. A word or words appearing in one section of a statute cannot be transferred into another section. Since the word "or" is absent we must now conclude that (c) and (d) are not separate and not alternatives. The series of alternatives was interrupted by its absence and so joinder of (c) and (d) must have been intended.¹⁹

18 550 P.2d at 485 (citations omitted).

19 *Id.* (citations omitted).



What remains here is to say a word about the unfortunate hybrid *and/or*—a drafting blemish that experts often warn against²⁰ but legal drafters nevertheless use. The literal sense of *and/or* is “both or either,” so that *A and/or B* means (1) “A,” (2) “B,” or (3) “both A and B.”²¹ So if you must do “A and/or B,” you have those three choices. Although one can envision situations in which this result is desired by the drafter, that unusual consequence is obscured (and is perhaps not meant) by use of the sloppy *and/or*. When that is meant, careful drafters would say *A or B or both*—or, if several items were to be listed, they would introduce the list with *any one or more of the following*.

20 See, e.g., *Garner's Dictionary of Legal Usage* 57–58 (3d ed. 2011); E.L. Piesse, *The Elements of Drafting* 85 (J.K. Aitken & Peter Butt eds., 10th ed. 2004) (“*And/or* is best discarded. It does not significantly improve brevity and it sometimes makes a passage harder to follow.”); Garner, *Legal Writing in Plain English* 112–13 (2001) (“Replace *and/or* wherever it appears.”); Dwight G. McCarty, *That Hybrid “and/or,”* 39 Mich. B.J. 9, 17 (1960) (“[T]he only safe rule to follow is not to use the expression in any legal writing, document, or proceeding, under any circumstance.”); E.A. Driedger, *The Composition of Legislation* 79 (1957) (“If *or* is used, no one would seriously urge that if one enumerated duty or power is performed or exercised, the remainder vanish; and if *and* is used, no one would say that an enumerated duty or power cannot be exercised except simultaneously with all the others.”). For an amusing essay on *and/or*, see R.E. Megarry, *A New Miscellany-at-Law* 223 (2005).

21 *Local Div. 589, Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618, 627 (1st Cir. 1981) (per Breyer, J.) (“the words ‘and/or’ commonly mean ‘the one or the other or both’”).

even though she was physically capable of doing the work required by such a job. The Court rightly rejected the argument. The restrictive relative clause (*which exists in the national economy*) modified only *substantial gainful work*; it did not reach all the way back to *previous work*.⁹

The very first recital of the canon by the Supreme Court of the United States involved the demonstrative adjective *such*—in a case that arose in 1799.¹⁰ A Virginia statute provided that “no person, his heirs or assigns, . . . shall hereafter be admitted to any warrant [entitling compensation] for . . . military service, unless he, she, or they, produce . . . a proper certificate of proof made before some court of record within the commonwealth, by the oath of the party claiming, or other satisfactory evidence that such party was bona fide an inhabitant of this commonwealth.” In a footnote, Chief Justice Oliver Ellsworth stated: “The rule is, that ‘such’ applies to the last antecedent, unless the sense of the passage requires a different construction.”¹¹ Here, he said, *such party* “must, in order to preserve the sense of the context,” refer to the donee of the warrant, his heirs, or assigns, referred to earlier in the passage.¹²

One caveat. The last-antecedent canon may be superseded by another grammatical convention: A pronoun that is the subject of a sentence and does not have an antecedent in that sentence ordinarily refers to the subject of the preceding sentence. And it almost always does so when it is the word that begins the sentence. For example: “The commission may find that discrimination has occurred. It must be clear and explicit.” The nearest potential antecedent of *it* is *discrimination*, but without some other indication of meaning its proper referent is *The commission*.

⁹ 540 U.S. at 26.

¹⁰ *Sims's Lessee v. Irvine*, 3 U.S. (3 Dall.) 425 (1799) (per Ellsworth, C.J.).

¹¹ *Id.* at 444 n.*.

¹² *Id.*

19. Series-Qualifier Canon

When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.

The Fourth Amendment begins in this way, with a prepositive (pre-positioned) modifier (*unreasonable*) in the most important phrase: “The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable searches and seizures*, shall not be violated”¹ The phrase is often repeated: *unreasonable searches and seizures*. Does the adjective *unreasonable* qualify the noun *seizures* as well as the noun *searches*? Yes, as a matter of common English. A similar question arises with the Impeachment Clause’s reference to *high crimes and misdemeanors*. And the answer is the same: The misdemeanors must be “high” no less than the crimes. In the absence of some other indication, the modifier reaches the entire enumeration.² That is so whether the modifier is an adjective or an adverb.³

Consider application of the series-qualifier canon to the following phrases:

- *Charitable institutions or societies*—held, that *charitable* modifies both *institutions* and *societies*.⁴

¹ U.S. Const. amend. IV (emphasis added).

² See, e.g., *Lewis v. Jackson Energy Coop. Corp.*, 189 S.W.3d 87, 92 (Ky. 2005) (“[A]n adjective at the beginning of a conjunctive phrase applies equally to each object within the phrase.”); *Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 7 Cal. Rptr. 3d 844, 849 (Ct. App. 2003) (“Most readers expect the first adjective in a series of nouns or phrases to modify each noun or phrase in the following series unless another adjective appears.”).

³ See, e.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994) (per Rehnquist, C.J.) (holding that the “most natural grammatical reading” of a statute is that an initial adverb modifies each verb in a list of elements of a crime).

⁴ *In re Schleicher's Estate*, 51 A. 329, 329–30 (Pa. 1902).

- *Internal personnel rules and practices of an agency*—held, that *internal personnel* modifies both *rules* and *practices*, and *of an agency* held to modify both nouns as well.⁵
- *Intentional unemployment or underemployment*—held, that *intentional* modifies both nouns.⁶
- *Intoxicating bitters or beverages*—held, that *intoxicating* modifies both *bitters* and *beverages*.⁷
- *Forcibly assaults, resists, opposes, impedes, intimidates, or interferes with*—held, that *forcibly* modifies each verb in the list.⁸
- *Willfully damage or tamper with*—held, that *willfully* modifies both *damage* and *tamper with*.⁹

Similar results obtain with postpositive modifiers (that is, those “positioned after” what they modify) in simple constructions:

- *Institutions or societies that are charitable in nature* (the institutions as well as the societies must be charitable).
- *A wall or fence that is solid* (the wall as well as the fence must be solid).
- *A corporation or partnership registered in Delaware* (a corporation as well as a partnership must be registered in Delaware).

The typical way in which syntax would suggest no carryover modification is that a determiner (*a, the, some, etc.*) will be repeated before the second element:

- *The charitable institutions or the societies* (the presence of the second *the* suggests that the societies need not be charitable).

5 *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 764 (D.C. Cir. 1978).

6 *Iliff v. Iliff*, 339 S.W.3d 74, 80 (Tex. 2011).

7 *Ex parte State ex rel. Attorney Gen.*, 93 So. 382, 383 (Ala. 1922).

8 *Long v. United States*, 199 F.2d 717, 719 (4th Cir. 1952).

9 *In re John R.*, 394 A.2d 818, 819 n.1 (Md. Ct. Spec. App. 1978).

- *A solid wall or a fence* (the fence need not be solid).
- *Delaware corporations and some partnerships* (the partnerships may be registered in any state).
- *To clap and to cheer lustily* (the clapping need not be lusty).¹⁰

With postpositive modifiers, the insertion of a determiner before the second item tends to cut off the modifying phrase so that its backward reach is limited—but that effect is not entirely clear:

- *An institution or a society that is charitable in nature* (any institution probably qualifies, not just a charitable one).
- *A wall or a fence that is solid* (the wall may probably have gaps).
- *A corporation or a partnership registered in Delaware* (the corporation may probably be registered anywhere).

To make certain that the postpositive modifier does not apply to each item, the competent drafter will position it earlier:

- *Societies that are charitable in nature or institutions.*
- *A fence that is solid or a wall.*
- *A partnership registered in Delaware or a corporation.*

A case exemplifying the simple construction contemplated by the blackletter canon arose in Minnesota.¹¹ A state statute allowed medical professionals access to certain hospital records if they were “requesting or seeking through discovery data, information, or records relating to their medical staff privileges [etc.]”¹² In 1997, two doctors at Saint Cloud Hospital requested such information about themselves, and they were denied. The question was how to read the phrase *through discovery*—as modifying just *seeking* or also *requesting*. Did the statute mean “medical professionals requesting—or seeking through discovery—data, infor-

10 See Randolph Quirk & Sidney Greenbaum, *A University Grammar of English* § 9.37, at 270 (1973).

11 *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379 (Minn. 1999).

12 Minn. Stat. § 145.64(2) (1998).

mation, or records [etc.]”? Or did it mean “medical professionals requesting or seeking—through discovery—data, information, or records [etc.]”? The Minnesota Supreme Court correctly held that the latter interpretation controlled.¹³

Sometimes the syntax gets trickier. In *United States v. Pritchett*,¹⁴ the United States Court of Appeals for the District of Columbia Circuit had to determine the reach of the adverbial phrase *when on duty*. The District of Columbia Code prohibited carrying a concealable pistol or dangerous weapon,¹⁵ but the prohibition did not apply to “jail wardens, or their deputies, policemen or other duly appointed law enforcement officers, or to members of the Army, Navy, or Marine Corps of the United States or of the National Guard or Organized Reserves *when on duty*.”¹⁶ A deputy jail warden was convicted of carrying a pistol when he was not on duty. The appellate court reversed the conviction because the statute did not apply to jail wardens, whether or not they were on duty: “[H]ad the drafters of the statute intended the phrase ‘when on duty’ to modify the earlier portion of the Act referring to deputy jail wardens, they could have . . . omitted the ‘or’ preceding members of the ‘Army, Navy, or Marine Corps,’ etc., and inserted a comma before the phrase ‘when on duty’ so as to separate it from the clause immediately preceding.”¹⁷ The court was right about the result and about the comma, but it was the *to* rather than the *or* that set the last phrase apart.

Perhaps more than most of the other canons, this one is highly sensitive to context. Often the sense of the matter prevails: *He went forth and wept bitterly* does not suggest that he went forth bitterly. And like all the other canons (and perhaps more than most), it is subject to defeasance by other canons. In *Phoenix Control Systems, Inc. v. Insurance Co. of North America*,¹⁸ an insurer (INA) provided a policy that covered the insured (PCS) for the defense of all law-

13 598 N.W.2d at 388 (with added support from other contextual factors).

14 470 F.2d 455 (D.C. Cir. 1972).

15 D.C. Code § 22-3204 (1953).

16 *Id.* § 22-3205 (1932) (emphasis added).

17 470 F.2d at 459.

18 796 P.2d 463 (Ariz. 1990).

suits resulting from “any infringement of copyright or improper or unlawful use of slogans *in your advertising*.”¹⁹ When PCS was sued for copyright infringement in the preparation of a business proposal, INA declined to defend on grounds that the infringement had not occurred in advertising. The Arizona Supreme Court held that the modifier *in your advertising* did not reach back to *infringement of copyright*. This would seem to contradict the canon here under discussion, but the holding was justified by the rule that ambiguities in contracts will be interpreted against the party that prepared the contract (*contra proferentem*).

19 *Id.* at 465 (emphasis added).

which it said would be frustrated because so few statutes had as an element the use of force “by a current or former spouse, parent, or guardian of the victim.”

For its part, Chief Justice Roberts’s dissent relied on:

- location of the crucial phrase in the indented subsection (ii) (the canon currently under discussion);
- the nearest-reasonable-referent canon (*use of force* rather than *offense*) (§ 20); and
- the rule of lenity, which interprets ambiguous provisions to favor the criminal defendant (§ 49).

The Chief Justice wrote pointedly:

[T]he “committed by” phrase in clause (ii) is best read to modify the preceding phrase “the use or attempted use of physical force, or the threatened use of a deadly weapon.” By not following the usual grammatical rule [of the nearest reasonable referent], the majority’s reading requires jumping over two line breaks, clause (i), a semicolon, and the first portion of clause (ii) to reach the more distant antecedent (“offense”). Due to the floating “that” after “offense,” if “committed by” modified “offense” the text would read “offense that committed by.”⁸

All in all, and on both sides, the case represents admirable use of the canons. Your judicial author joined the dissent, but the case was unquestionably close.

⁸ *Id.* at 431 (Roberts, C.J., dissenting, joined by Scalia, J.) (internal citations omitted).

23. Punctuation Canon

Punctuation is a permissible indicator of meaning.

“[T]he meaning of a statute will typically heed the commands of its punctuation.”

United States Nat’l Bank of Oregon v. Independent Ins. Agents of America, Inc.,
508 U.S. 439, 454 (1993) (per Souter, J.).

No helpful aid to interpretation has historically received such dismissive treatment from the courts as punctuation—periods, semicolons, commas, parentheses, apostrophes. The original reason was understandable enough. Punctuation was considered of small account because it was thought to be “the work of the engraving clerk or the printer.”¹ And, again in days of yore, it was held that because many legislators voted only on the basis of bills that they heard read aloud—without seeing the printed page—they could take no notice of the punctuation marks.² But some modern commentators have extended that justification to posit that “[p]unctuation and other marks of emphasis are not part of the English language.”³ Perhaps not, but they are a part of our system of writing. As the title of a recent best-selling book makes amusingly clear, punctuation can even change the meaning of words. It can convert nouns into verbs, and change a description of a panda bear (“Eats shoots and leaves”) into a description of Jesse James (“Eats, shoots, and leaves”). No intelligent construction of a text can ignore its punctuation.

Punctuation in a legal text will rarely change the meaning of a word, but it will often determine whether a modifying phrase or clause applies to all that preceded it or only to a part. Properly placed commas would cancel the last-antecedent canon in the example given earlier (see § 18): If the parents’ note read, “You will be punished if you throw a party, or engage in any other activity, that damages the house,” the added punctuation would make it

¹ *Morrill v. State*, 38 Wis. 428, 434 (1875).

² James DeWitt Andrews, “Statutory Construction,” in 14 *American Law and Procedure* 1, 47 (James Parker Hall & James DeWitt Andrews eds., rev. ed. 1948).

³ Roland Burrows, *Interpretation of Documents* 47 (1943).

clear that the final clause modified not just *activity* but *party* as well. (Nonharmful parties are allowed.) Periods and semicolons insulate words from grammatical implications that would otherwise be created by the words that precede or follow them, and parentheses similarly isolate the material they contain.

Commentators have often said that “[p]unctuation is never permitted to control, vary, or modify the plain and clear meaning of the language of the body of the act.”⁴ This must be a remnant of the former denigration of punctuation that had not been adopted by the legislature; in modern times, we see no rational basis for such a rule. As is the case with other indications of meaning, the body of a legal instrument cannot be found to have a “clear meaning” without taking account of its punctuation. There is no reason to exclude punctuation from this stage of the inquiry. And we disagree with the position that the use of punctuation as an interpretive aid should be relied on only “when all other means fail.”⁵

Punctuation is often integral to the sense of written language. In one famous instance, the U.S. Tariff Act of 1872⁶ contained a tariff exemption in which a misplaced comma cost the United States Treasury some \$1 million. A provision in that statute was supposed to exempt from tariffs the importation of semitropical and tropical fruit plants. But at some point during enactment, a comma after *fruit plants* was repositioned between those words, so that the statute referred to “fruit, plants tropical and semitropical.”⁷ Soon various fruit importers contended that all fruit could be brought into the United States duty-free. At first the Treasury Department overruled these contentions, but then it

4 Francis J. McCaffrey, *Statutory Construction* 54 (1953).

5 *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 250 (1989) (O’Connor, J., dissenting) (quoting *Ewing’s Lessee v. Burnet*, 36 U.S. (11 Pet.) 41, 54 (1837) (per Baldwin, J.)).

6 42 Cong., ch. 315, June 6, 1872, 17 Stat. §§ 230–58.

7 *Id.* ch. 315, § 5, 17 Stat. § 235.

reversed its position and decided they had merit.⁸ The statute was soon amended—in 1874—to close the loophole.⁹

A comma nearly cost a Canadian company \$2.13 million. Rogers Communications Inc. contracted with Aliant Inc. to string miles of Rogers’s cable lines across thousands of utility poles in the Maritimes for an annual fee of \$9.60 per pole. Rogers contended that this price held good for at least the first five years, but Aliant contended that the contract’s termination clause could be invoked at any time. It all came down to the effect of the second comma in a provision stating that the agreement

shall continue in force for a period of five years from the date it is made, and thereafter for successive five-year terms, unless and until terminated by one year’s prior notice in writing by either party.¹⁰

If the second comma had not appeared, the adverbial *unless*-clause would modify only the provision about the successive five-year terms. But with the comma, the phrase *and thereafter for successive five-year terms* becomes a parenthetical element, and the *unless*-clause becomes part of the main sentence. When the issue came before the Canadian Radio-Television and Telecommunications Commission, it properly concluded that “based on the rules of punctuation,” the second comma “allows for the termination of the [contract] at any time, without cause, upon one year’s written notice.”¹¹ The Commission reversed its decision after Rogers produced an equivalent French-language copy of the contract,

8 United States Department of the Treasury, *Synopsis of Sundry Decisions of the Treasury Department* 192 (1874).

9 Tariff Act of 1872, amended by 43 Cong., Sess. I, May 9, 1874, ch. 163, 18 Stat. § 43 (moving comma to its correct position). See also United States Department of the Treasury, *Synopsis of Sundry Decisions of the Treasury Department* 241 (1875). For a whole series of sentences in which punctuation fundamentally affects meaning, see S.H. Clark, *Interpretation of the Printed Page* 200–26 (1915).

10 Grant Robertson, “The \$2 Million Comma,” *Globe & Mail*, 7 Aug. 2006, at B1 (we have corrected other aspects of the punctuation by adding a hyphen and a possessive).

11 *Id.*

which had only one possible interpretation, the one favorable to Rogers.¹²

But hostility to punctuation persists. In *Hill v. Conway*,¹³ the Vermont Supreme Court confronted a provision of state law dealing with the suspension of drivers' licenses. The provision said that "the suspension period for a conviction for first offense . . . of this title shall be 30 days; for a second conviction 90 days and for a third or subsequent six months, . . . but if a fatality occurs, the suspension shall be for a period of one year."¹⁴ The Commissioner of Motor Vehicles suspended Randall Hill's driver's license for "365 days following his first offense conviction on a charge of careless and negligent operation with death resulting."¹⁵ Hill contended that because the 30-day punishment for a first offense is set apart from the one-year fatality provision by a semicolon, 30 days should have been the limit of his suspension.

The Vermont court held that the semicolon should not prevail. The punctuation of a statute, it said, will not be more important to interpretation than the legislative intent. (See § 67.) Leaping to the most general description of legislative purpose, the court said that the statute was meant to preserve public safety and remove irresponsible drivers from the road. To bar the state from suspending for more than 30 days the license of a driver whose first offense resulted in a death would be "an absurd and irrational result, and inconsistent with the legislative objective as we construe it to be."¹⁶ In short, the court abused the absurdity doctrine (see § 37) and disregarded the rule of lenity (see § 49). Such are the slighting indignities to which semicolons are often subjected.

Punctuation is tiny. So there must be added to the number of those who do not know the rules of punctuation the even greater number of those who are careless. Perhaps more than any other indication of meaning, punctuation is often a scrivener's error,

12 Catherine McLean, "Rogers Comma Victory Found in Translation," *Globe & Mail*, 21 Aug. 2007, at B2.

13 463 A.2d 232 (Vt. 1983).

14 Vt. Stat. Ann. tit. 23, § 2506.

15 463 A.2d at 233.

16 *Id.* at 234.

overcome by other textual indications of meaning. So in the case quoted at the beginning of this section, the Supreme Court, after noting that "[t]he unavoidable inference from familiar rules of punctuation" pointed in one direction, concluded that "all of the other evidence from the statute points the other way."¹⁷

Against the overwhelming evidence from the structure, language, and subject matter of the 1916 Act there stands only the evidence from the Act's punctuation, too weak to trump the rest. . . . [W]e are convinced that the placement of the quotation marks in the 1916 Act was a simple scrivener's error, a mistake made by someone unfamiliar with the law's object and design. Courts, we have said, should "disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute."¹⁸



One punctuation convention merits special mention: the serial comma—that is, the comma after the penultimate item in a series and just before the conjunction (a, b, and c). Authorities on English usage overwhelmingly recommend using the serial comma to prevent ambiguities.¹⁹ Let us say that a testator bequeaths the residue of his enormous estate to "Bob, Sally, George and Jillian." Do the devisees take equal fourths, or do George and Jillian have to

17 *United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 454, 455 (1993) (per Souter, J.).

18 *Id.* at 462 (quoting *Hammock v. Loan & Trust Co.*, 105 U.S. 77, 84–85 (1881) (per Harlan, J.) (internal quotation marks and citation omitted)).

19 See, e.g., *Garner's Modern American Usage* 676 (3d ed. 2009) ("[O]mitting the final comma may cause ambiguities, whereas including it never will."); *The Chicago Manual of Style* § 6.18, at 312 (16th ed. 2010) ("Chicago strongly recommends this widely practiced usage, blessed by Fowler and other authorities, since it prevents ambiguity"); Kate L. Turabian, *A Manual for Writers of Term Papers, Theses, and Dissertations* §§ 3.68, 3.70, at 50–51 (5th ed. 1987) ("A series of three or more words, phrases, or clauses (like this) takes a comma between each of the elements, and before a conjunction separating the last two."); Patricia T. O'Conner, *Woe Is It* 137 (1996) ("[M]y advice is to stick with using the final comma."); Joseph Gibaldi, *MLA Style Manual* § 3.42b, at 67 (2d ed. 1998) ("Use a comma to separate words, phrases, and clauses in a series."); H.W. Fowler, *A Dictionary of Modern English Usage* 24 (1926) ("The only rule that will obviate . . . uncertainties is that after every item, including the last unless a heavier stop is needed for independent reasons, the comma should be used.").

split a third? If Bob and Sally become avaricious, they might argue that they take thirds, not quarters, as shown by the punctuation.

Despite the well-known semantic hazards of omitting the serial comma, some legal drafters omit it anyway. And some legislative-drafting manuals, as a matter of style, actually adopt the newspaper convention of omitting it.²⁰

So although the better practice is to use the serial comma, courts should not rely much if any on its omission. The Arizona Supreme Court made this mistake in interpreting the word *enterprise*,²¹ which was statutorily defined as “any corporation, partnership, association, labor union or other legal entity.”²² The court erroneously latched onto the wording *labor union or other legal entity* as a single item in the enumeration because of the lack of a comma, reasoning that “[t]he absence of a comma after the phrase ‘labor union’ makes a difference,”²³ so that the *other legal entity* must be one similar to a labor union and could not include the state. While the outcome seems correct for other reasons, the absence of a comma assuredly did not “make a difference.” Nor did the absence affect meaning earlier in the same statute in the phrases *neglect, abuse or exploitation*²⁴ (*abuse or exploitation* is not a single category) or in the relative clauses *that has been employed to provide care, that has assumed a legal duty to provide care or that has been appointed by a court to provide care*²⁵ (a better style would be to put a comma before the *or*). The court did not seem to notice that the serial comma was consistently omitted in the statute—as required by the state’s drafting manual—and wrongly attributed meaning to this fact in a particular instance.

20 See, e.g., *Arizona Legislative Bill Drafting Manual* 83 (2011–2012).
21 *Estate of Braden v. Arizona*, 266 P.3d 349, 352 (Ariz. 2011) (en banc).
22 Ariz. Rev. Stat. § 46–455(Q).
23 266 P.3d at 352.
24 Ariz. Rev. Stat. § 46–455(B).
25 *Id.*

Contextual Canons

24. Whole-Text Canon

The text must be construed as a whole.

“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”

K Mart Corp. v. Cartier, Inc.,
486 U.S. 281, 291 (1988) (per Kennedy, J.).

Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts. Sir Edward Coke explained the canon in 1628: “[I]t is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers.”¹ Coke added: “If any section [of a law] be intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of the other.”² In more modern terms, the California Civil Code states, with regard to private documents: “The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”³

Context is a primary determinant of meaning. A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides the context for each of its parts. When construing the United States Constitution

1 1 Edward Coke, *The First Part of the Institutes of the Laws of England, or a Commentary upon Littleton* § 728, at 381a (1628; 14th ed. 1791). See Herbert Broom, *A Selection of Legal Maxims* 440 (Joseph Gerald Pease & Herbert Chitty eds., 8th ed. 1911) (“the construction must be made upon the entire instrument, and not merely upon disjointed parts of it”).
2 Coke, *First Part of the Institutes of the Laws of England* at 381a.
3 Cal. Civ. Code § 1641.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent/Appellant,

v.

CHRISTOPHER BACON,

Appellant/Respondent,

NO. 37232-4-III

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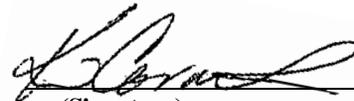
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