

That and Which

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A quick multiple choice question:

The distinction between *that* and *which* is:

- A. A prime example of the trivia on which legal-writing courses waste their time.
- B. A helpful but inessential device for clearer communication, only occasionally observed outside the offices of law reviews.
- C. An essential prerequisite to literacy.
- D. A distinction rarely comprehended by first-year law students.
- E. A debatable point, though people who disagree vehemently about A, B, and C agree unanimously that D is true.

The best answer is E; I think that B and D are also true. I went to grade school in the days when they still taught rigorous prescriptive grammar. I was drilled endlessly on the difference between restrictive and nonrestrictive clauses, but I am certain I never heard of the distinction between *that* and *which* until the first year of law school. When I encountered it there, I had no idea what my writing instructor was talking about. He could not offer clear examples of correct and incorrect usage on which one could base a generalization. I am quite sure he never said the magic words I would have understood: He never mentioned restrictive and nonrestrictive clauses.

I encountered the distinction again when I began to write for law reviews and deal with their editors. Among their other annoying habits, they changed *which* to *that* in seemingly random patterns. Eventually I figured out what they were doing, and once

I understood it, I liked it. My ear became attuned to it; an incorrect *which* grates on me now. For a brief period of fanaticism, I treated it as a prescriptive grammar rule for my seminar students, who rarely understood what I was talking about. Eventually I got tired of explaining the same thing over and over; I wrote out an explanation and put it in the syllabus. That explanation has circulated informally among writing instructors over the years.

It is hard to claim that the distinction between *that* and *which* is critical when many otherwise good writers pay no attention to it and many highly skilled writing teachers outside law schools have never heard of it. Prescription does not control the use of language; the rule about *that* and *which* is a convention that never got fully established and may be dying from disuse. However helpful a convention might be if widely used, it is not much help if most writers fail to use it and most readers fail to recognize it. *That* and *which* may be a lost cause.

Even so, I am not quite ready to give up on it. I continue to teach it to my students because it may help communication among a small group of legal writers who are careful to observe the usage, and because it can clarify a writer's thought processes even if few readers pay attention. The distinction between *that* and *which* may survive longest in legal writing because it focuses attention on an essential part of the lawyer's task.

Lawyers are constantly classifying things into sets and subsets, and the distinction between *that* and *which* focuses our attention on those classifications and on the relationships among them. There is a fundamental logical difference between describing a whole class that has already been defined and defining a new subclass. Lawyers should always know which they are doing. *That* and *which* are a pair of labels for this basic distinction. The paragraphs that follow contain a slightly expanded version of the explanation I give my students.

Does It Matter?

The distinction between *that* and *which* is helpful but not essential. One of the ways in which it is helpful is that it focuses your attention on the distinction between restrictive and nonrestrictive clauses, which is essential.

A restrictive clause modifies a sentence in a quite different way than an identically worded nonrestrictive clause. All competent users of English agree that nonrestrictive clauses must be set off with commas and that restrictive clauses must not be set off with commas. All competent users of English also agree that *that* cannot be used to introduce a nonrestrictive clause. Many careful legal writers also observe the converse rule: They never use *which* to introduce a restrictive clause.

This restriction on the use of *which* is not generally observed outside legal writing, and reference works differ on how much it matters. Most books on usage recommend that *which* be confined to nonrestrictive clauses but acknowledge that many writers ignore this advice.¹ Dictionaries agree that *which* may introduce either restrictive or nonrestrictive clauses; they disagree on whether to recommend as better usage that it be confined to nonrestrictive clauses.² I think careful use of *which* matters, and I mark it on

¹ See BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 481 (1987); ROBERT CLAIBORNE, SAYING WHAT YOU MEAN: A COMMONSENSE GUIDE TO AMERICAN USAGE 236-38 (1986); H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 625-28 (2d ed. 1965); WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 59 (3d ed. 1979).

² See AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1333, 1459 (1969) (*which*, definitions 3a and 3c; Usage Note at *that*); OXFORD ENGLISH DICTIONARY 3756 (compact ed. 1971) (*which*, definitions 7 and 8); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2165 (2d ed. 1987) (*which*, definition 3); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2603 (1981) (*which*, second entry, definition 3). The *OED* and the American Heritage Usage Panel recommend that *which* generally be confined to nonrestrictive clauses. *Webster's Third* makes no recommendation, and *Random House* emphatically states that there is "no basis in fact" for any "rule" that *which*

student drafts, but I would not put it near the top of my list of important writing problems.

Both for you and your reader, distinguishing *which* and *that* conveys important meaning that must otherwise depend on a comma. If you tell me you cannot be bothered distinguishing *which* and *that*, I have no confidence that you will be bothered distinguishing when to use and not to use a comma. And if you do not make that distinction, you cannot communicate clearly.

Correctly using *which* and *that* eliminates ambiguity, but only if you consistently use them correctly even when the reader could guess your meaning anyway because only one meaning makes sense. If you use *which* and *that* interchangeably, or always use *which*, no reader can rely on your usage when it matters.

Restrictive and Nonrestrictive Clauses

Restrictive and nonrestrictive clauses generally explain, describe, or identify a thing or category of things that has been named in the sentence. They are two different kinds of modifying clauses.

A restrictive clause identifies a subcategory of the thing described and narrows the sentence to that subcategory. A nonrestrictive clause describes the entire category that has already been named. Some sources say that nonrestrictive clauses are not essential to the sentence.³ That explanation, however, can mislead.

is confined to nonrestrictive clauses. *Random House* reports that in edited prose, three-quarters of the uses of *which* are in restrictive clauses.

³ See GARNER, *supra* note 1, at 481 ("Restrictive (or defining) clauses are essential to the grammatical and logical completeness of a sentence. Nonrestrictive (or nondefining) clauses, in contrast, are so loosely connected with the essential meaning of the sentence that they might be omitted without changing the essential meaning."); WILMA R. EBBITT & DAVID R. EBBITT, INDEX TO ENGLISH 224-25 (8th ed. 1990) ("An adjective (or relative) clause or adjective phrase that can be dropped from a sentence without changing or blurring the meaning is nonrestrictive and should be set off by a comma or commas."); BERNICE RANDALL, WEBSTER'S NEW WORLD GUIDE TO CURRENT AMERICAN USAGE 251 (1988) ("[I]f the clause is nonrestrictive — that is, if it describes a quality or a condition of the noun in the

Nonrestrictive clauses are not essential to a grammatically complete sentence, but neither are restrictive clauses. Writers generally have a complete sentence without a modifying clause of either type. But either type of modifying clause conveys information, and that information may be quite important to the substance of the communication. The information may be equally important whether it describes the whole class — a nonrestrictive clause — or defines a subclass — a restrictive clause.

The test is whether the clause describes the entire category previously mentioned or describes only part of it and limits the sentence to that subcategory. Whether your clause is restrictive or nonrestrictive may depend on whether you have already sufficiently limited your category.

Examples

Consider these sentences:

1. A whole new approach to water law had to be developed in the states that couldn't support agriculture without irrigation.
2. A whole new approach to water law had to be developed in the western states, which couldn't support agriculture without irrigation.
3. A whole new approach to water law had to be developed in the western states that couldn't support agriculture without irrigation.

Sentence 1 says that some states needed irrigation and some did not, and those that needed irrigation also needed a new approach

main clause but could be omitted without drastically affecting the meaning of the sentence — it should be introduced by *which* and set off by commas . . .").

to water law. The restrictive clause — *that* and no comma — narrows the states mentioned to only those that needed irrigation.

Sentence 2 says that all the western states needed a whole new approach to water law, and that all of those states needed irrigation. The nonrestrictive clause — *which* following a comma — describes all the states mentioned, all the western states. The class of all states has been limited to all western states before you get to the nonrestrictive clause.

Sentence 3 says that even in the West, some states needed irrigation and some did not, and that only those that needed irrigation also needed a new approach to water law. The restrictive clause — *that* and no comma — narrows the states mentioned to only those that needed irrigation. Only the western states have been mentioned, and the restrictive clause narrows that group further.

Thus, these three sentences have three quite different meanings. All competent users of English agree that the presence or absence of the comma is critical to the meaning. Observing the distinction between *which* and *that* is not critical, but it helps reinforce the presence or absence of a comma. It focuses the writer's attention on whether the comma is necessary, and it gives the reader a more visible cue to what the writer meant.

Now consider these sentences:

4. A whole new approach to water law had to be developed in the states which couldn't support agriculture without irrigation.
5. A whole new approach to water law had to be developed in the western states which couldn't support agriculture without irrigation.

The reader has to guess what these sentences mean. The lack of a comma suggests that the modifying clauses are restrictive; *which* suggests that they are nonrestrictive. In sentence 4, the reader who knows anything about geography or water law will know that not all the states needed irrigation and that not all developed a whole new approach to water law. So that reader will figure out that the

clause must be restrictive — the statement about developing a whole new approach to water law applies only to those states that could not support agriculture without irrigation. But readers should not have to deduce your meaning when there is a way to express it clearly.

In sentence 5, the reader cannot deduce the meaning. Maybe the writer is asserting that all the western states needed irrigation and a new approach to water law. Or maybe the writer is claiming only that some of the western states — those that needed irrigation — needed a whole new approach to water law. If this is the intended meaning, the writer is implicitly acknowledging that there are some western states that did not need irrigation and a whole new approach to water law. For a nonexpert reader, neither meaning is obviously impossible. Maybe all the western states needed irrigation and a new approach to water law; maybe most of them did but not all of them. What about Hawaii and Alaska? The reader who does not already know has no way to figure it out. The percentage play for the reader is to assume that the writer used commas correctly but failed to observe any distinction between *that* and *which*. If the writer is also careless with commas, the reader — wholly lost — can only guess at the meaning.

Here is another set of examples in which misusage would be ambiguous:

6. The court always affirms damage judgments that turn on the facts.
7. The court always affirms damage judgments, which turn on the facts.
8. The court always affirms damage judgments which turn on the facts.

Sentence 6 says that the court affirms only some damage judgments — those that turn on the facts. Sentence 7 says that the court affirms all damage judgments and that all damage judgments

turn on the facts. Both sentences are clear and grammatically correct, but they mean quite different things.

Sentence 8 is fatally ambiguous. *Which* suggests the meaning of sentence 7, but the lack of a comma suggests the meaning of sentence 6. The context does not resolve the ambiguity. The meaning of sentence 6 seems more likely; surely some damage judgments turn on points of law. But nearly all damage judgments do depend heavily on facts, and the writer might be making a general claim. There is no way to tell.

Most important, if you use *which* and *that* interchangeably, and especially if you are also careless with commas, sentences 6 and 7 become ambiguous as well. The reader has no reason to believe you were careful this time, when everything appears clear, if you were plainly careless at other times when you produced serious ambiguity. Similarly, if you are careful only when the reader cannot deduce your meaning from context, and ignore the distinction when it seems harmless, the reader cannot rely on your usage even when it matters and you were careful.

Rules of Thumb

The best way to choose between *which* and *that* is to think carefully about what you mean. If you cannot tell whether your clause is restrictive or nonrestrictive, you probably do not know what you want to say. Even so, some people do better with rules of thumb, and there are two.

Some writers have trouble with *which* and *that* but have internalized when to use commas. For them, *which* always follows a comma and *that* never does. The reason is that the rule for commas is the same as the rule for *which* and *that*.

The second rule of thumb is not as reliable, but it usually works and requires you to know almost nothing: Never use *which* and a comma unless *that* without a comma is plainly wrong. This works because writers rarely say *that* when they mean *which*. If

you have read and spoken standard English for much of your life, your ear will usually tell you when *that* is wrong.

Unfortunately, this rule of thumb is most likely to break down precisely in the cases that are most important — in sentences like 2 and 3 or 6 and 7, where either usage makes sense but each gives the sentence a very different meaning. In a profession that requires you to communicate fine distinctions, rules of thumb will not always substitute for understanding what you are saying and how to say it.

This second rule of thumb does have one other advantage. It avoids any need to agonize in the frequent case in which the clause may be either restrictive or nonrestrictive. For example:

9. The court set aside the verdict that she had worked so hard for.
10. The court set aside the verdict, which she had worked so hard for.

Either is clear and correct, and in most contexts both sentences would mean the same thing. Sentence 9 assumes that there are millions of verdicts in the world, but there is only one that she has worked so hard for, and that is the one the court set aside. The *that* clause limits the sentence to the particular verdict she worked so hard for.

Sentence 10 assumes that readers already know what verdict you are talking about, and tells them (or reminds them) that she worked so hard for it. The sentence is limited to the particular verdict by the definite article — “the verdict” — and by the context and the information already given in earlier sentences or even earlier communications. As long as there is only one verdict under discussion, it does not matter whether the grammatical work of limiting the sentence is done at the front of the sentence or at the end.

The choice between *which* and *that* would matter only if you had just been discussing two verdicts, one of which she worked so hard for. If she got one verdict after a hard-fought trial and

months of preparation, and another verdict without breaking a sweat or spending a single night at the office, the “worked so hard” clause would be essential to identify the verdict that was set aside. Sentence 9 would be correct, and sentence 10 would be incorrect, although a reader could probably figure out what you meant.

That can sometimes be omitted. This is most likely to be true when the clause that follows is a short complete sentence. Thus, sentence 9 could be written:

11. The court set aside the verdict she had worked so hard for.

That would specify the relationship between the two clauses of the sentence, but the relationship is obvious from the structure of the sentence, and the sentence does not sound awkward without the *that*. Omitting *that* saves an unnecessary glue word and lets your sentence flow a little more quickly. But when in doubt, keep the *that*. *That* at the beginning of a clause immediately signals the relationship between the clause and what came before. This signal is essential if the clause is long.

Unlike *that*, *which* can never be omitted from a sentence in which it would be properly used. I think this is just conventional, but the convention serves a purpose. Sentence 11 works because readers supply the *that*. If readers were equally free to supply *which*, they would not know which word to infer in any given sentence. The convenience of leaving the connector implicit requires agreement about what relationship to imply between the two clauses, and the convention has grown up that the clause is implicitly restrictive.

We could depend on the comma to tell readers what the connection is, but for whatever reason, speakers and writers of English do not do that. Two clauses separated by a comma require a connector of some sort to specify the relationship between them. Consider sentence 10 without the *which*:

12. The court set aside the verdict, she had worked so hard for.

If your ear does not tell you there is something wrong with that sentence, you have not been reading much or listening to the people around you.

