

Should Lawyers Punctuate?

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Should lawyers punctuate? The answer, I believe, is “yes, but carefully.” The first part of that answer may seem obvious, but it was not always so, nor is it unanimously accepted even today. English-speaking lawyers and judges have wrangled for centuries over the proper role of punctuation in legal documents. As recently as 1989, the United States Supreme Court split 5-4 over the significance of a “capricious comma” in the middle of a federal statute.¹

This article addresses just why English-speaking lawyers came to distrust punctuation, then makes two recommendations. First, lawyers should punctuate legal documents according to ordinary English usage. Second, judges should create a rebuttable presumption that legal documents have been punctuated according to ordinary English usage, and judges should use punctuation as a guide to meaning.

Drafting Without Punctuation in England

My curiosity about legal punctuation was piqued at a recent legal-writing seminar in England. The participants were English law-teachers and solicitors. One of the writing exercises required the participants to listen to a business negotiation between two parties and then to draft a joint-venture contract that would satisfy both parties. Near the close of the seminar, a model contract was passed out for discussion; the model contained almost no punctuation. The contractual provisions were clearly divided into paragraphs and subpara-

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1. United States v. Ron Pair Enter., 109 S. Ct. 1026 (1989); *see infra* text at notes 48-52.

graphs, but the sentences ended without periods and contained almost no commas or other punctuation marks.

The dearth of punctuation in the model contract provoked disagreement among the solicitors. About half of them argued that the contract should be punctuated in accordance with ordinary English usage. The other half liked it the way it was. Punctuation, the latter half said, is more likely to create ambiguities than to avoid them. The meaning of a contract, real-estate document, or similar legal instrument ought to be clear from its words alone, without resort to punctuation. Punctuation is unreliable, they argued, because it can capriciously disappear (as when a legal secretary has a momentary lapse of concentration) or appear (as when a fly explores the page and deposits something that could pass for a comma). Further, they observed, centuries of common-law tradition underlie the solicitor's art of drafting legal documents with little or no punctuation.

Fledgling solicitors learn the art of punctuation-less drafting "in articles" (that is, during apprenticeship) and from books of precedents (legal forms) that are commonly used as guides in drafting real-estate documents, commercial agreements, and the like.² Some precedents use punctuation in the ordinary way, but others use little or none. For example, here is a patent license provision that states the licensee's duties concerning improvements. Note that it contains one lonely comma and a period at the end:

2. Letter of December 1, 1989, to the author from British Law Commissioner Trevor M. Aldridge; letter of December 15, 1989, to the author from Richard Castle, a solicitor; letter of February 12, 1990, to the author from M.J. Ross, a solicitor. These letters are on file with the editor of *The Scribes Journal of Legal Writing*. See L. SHURMAN, *THE PRACTICAL SKILLS OF THE SOLICITOR* 69-70 (1981), containing a queer mixture of advice on punctuation in legal documents, culminating with the suggestion that commercial documents ought to contain more punctuation than conveyancing (real-estate) documents, because the former are more likely to be read by lay clients.

The Licensee shall to the extent that it is not prohibited by law by any undertaking given by the Licensee to others or by considerations relating to the securing of a patent forthwith and from time to time during the subsistence of this Agreement communicate to the Licensor information relating to any Improvement or development of the invention or devising of any improved Manufacturing Techniques at any time owned or controlled by the Licensee or in respect of any letters patent granted therefor where it shall be entitled to grant or call for the granting of licenses or in the case of secret processes or techniques be entitled to make disclosure and subject as aforesaid whether or not the subject-matter of letters patent or application therefor PROVIDED THAT where such information, invention or process is obtained by the Licensee only on payment of a royalty or other consideration the Licensee shall not be obliged to transmit the same to the Licensor except against reimbursement.³

Distrust of Punctuation in the United States

The distrust of punctuation in legal instruments is not confined to England.⁴ In 1923, an article in the *American Bar Association Journal* discussed the punctuation habits of American lawyers.⁵ (The author was a male, and his comments reveal as much about the sex-bias of the age as about punctuation.) Most lawyers, he wrote, care little about punctuation and leave it to the “temperamental mercies” of the stenographer.⁶ Most stenographers are women, and “the using of punctuation is essentially feminine.”⁷ Instead of a

3. L. MELVILLE, PRECEDENTS ON INTELLECTUAL PROPERTY AND INTERNATIONAL LICENSING 38, pars. 1-47 (2d ed. 1972).

4. India, for example, seems to have inherited a distrust of punctuation as part of its common-law heritage. See A. CHATTERJEE, INTERPRETATION OF STATUTES 233-36 (1983).

5. Lavery, *Punctuation in the Law*, 9 A.B.A. J. 225 (1923).

6. *Id.*

7. *Id.*

“rugged and bold reliance on words to convey meaning, which would be the masculine way of doing things,” lawyers let their stenographers dress sentences “with the lace and ruffles of punctuation.”⁸ One consequence is that punctuation is a poor guide to the intended meaning of a legal instrument.⁹

Even currently, Reed Dickerson, one of the most respected authorities on legal drafting in the United States, cautions lawyers to be wary of punctuation as a guide to meaning. Professor Dickerson observes that modern courts often rely on punctuation (together with other evidence) in interpreting legal instruments, but that punctuation is “low in relative persuasiveness.”¹⁰ The careful draftsman, he says, should use punctuation as a “finishing device,” but “should not rely solely on it to do what an arrangement of words can do.”¹¹

Punctuation Can Affect Meaning

Maligned though it may be, punctuation can affect the meaning of an English sentence. Consider, for example, the fifth amendment’s due process clause.¹² As punctuated by its drafters, it reads: “[No person shall] be deprived of life, liberty, or property, without due process of law”¹³ Guided by the punctuation, our eyes quickly tell us that the phrase “due process of law” modifies the verb “be deprived.” Thus, the fifth amendment requires due process if one is to be deprived of

8. *Id.*

9. *Id.* at 226; see also *Punctuation in the Eye of the Law*, 51 ALBANY L.J. 76 (1895).

10. R. DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 188 (2d ed. 1986).

11. *Id.*

12. U.S. CONST. amend. V.

13. *Resolution of the First Congress Submitting Twelve Amendments to the Constitution*, March 4, 1789, reprinted in *DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES* 1064 (1927).

life, liberty, or property. But suppose the drafters had omitted the comma after "property." That would permit a lawyer to argue (in defiance of the provision's long history) that "without due process" modifies only "property." Thus, the fifth amendment would forbid deprivation of property without due process and would absolutely forbid both incarceration and the death penalty. Such is the power of a comma.

A more humble example comes from a British probate case in which a testator's homemade will gave several people small legacies between £25 and £250.¹⁴ The will then said: "Any residue remaining to be divided between those beneficiaries who have only received small amounts." As it turned out, the residue was £14,300, a princely sum compared with the size of the individual legacies. The court had to interpret the phrase "who have only received small amounts." If that phrase described all the legatees, then all would share equally in the residue. If, on the other hand, the phrase was restrictive and referred only to those who received the smallest legacies, then only they would share in the residue (thus causing the least favored to become the most favored). The court observed that the testator did not use commas to set off the phrase "who have only received small amounts," but he did start the phrase on a new line, even though he had plenty of room to start it on the line above. This created a gap, a "comma substitute," and the court interpreted the gap to mean that the phrase was nonrestrictive. The testator intended to describe all of the legacies as small, and therefore all the legatees were entitled to share in the unexpectedly large residue. In short, the court reached a fair result by conjuring up a bit of imaginary punctuation and then using it as a guide to the testator's intended meaning.

14. *Re Steel's Will Trusts*, 122 Sol. J. 148 (Ch. 1978).

How Our Present System of Punctuation Evolved

As English-speakers at the threshold of the 21st century, we are accustomed to a system of punctuation that affects meaning, but our system would have seemed odd to an English-speaker in the early 17th century. The punctuation used in those days had evolved from even earlier systems of dots and slash marks used by the Greeks and Romans.¹⁵ The Greek and Roman systems were not syntactic; that is, the punctuation marks were not intended to affect meaning and were not based on grammar, as our marks are today.¹⁶ Rather, the Greek and Roman marks served a rhetorical function (by dividing segments of discourse according to formal rhetorical patterns) and an elocutionary function (by indicating where to pause and breathe when reading the text aloud).¹⁷ As in the Greek and Roman systems, the punctuation used by English-speakers in the early 17th century was not syntactic. Its function was primarily rhythmic and elocutionary. For example, Simon Daines, an English grammarian writing in 1640, described punctuation marks as having time values, like musical notes and rests.¹⁸ A comma, with a

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15. See ROBERTSON, AN ESSAY ON PUNCTUATION 1-14 (1785), reproduced in facsimile, ENGLISH LINGUISTICS 1500-1800, No. 168 (1969); R. PETERS, A LINGUISTIC HISTORY OF ENGLISH 298-99 (1968); see also 29 NEW ENCYCLOPAEDIA BRITANNICA 1006-07 (15th ed. 1985).
 16. NEW ENCYCLOPAEDIA BRITANNICA, supra note 15, at 1006-07.
 17. Id.; see also McGovern, *Unnoticed Punctuation in the Exeter Book*, 52 MEDIUM AEVUM 90, 95-6 (1983) (discussing recently discovered Latinate virgules added to the Exeter Book of Old English poems).
 18. S. DAINES, ORTHOEPIC ANGLICANA 70-73 (1640), reproduced in facsimile, ENGLISH LINGUISTICS 1500-1800, No. 31 (1967). Simon Daines was not the first English author to assign time values to punctuation marks. *The Arte of English Poesie*, published in 1589 and attributed to George Puttenham, describes a similar time value scheme for the comma, the colon, and the period. G. PUTTENHAM, THE ARTE OF ENGLISH POESIE 74 (Willcock & Walker ed. 1936). For an explanation of

time value of one, "hath its place at the foot of the line and is marked with a femi-circular forme like an halfe Moone."¹⁹ The comma, Daines said, is used only in long sentences:

in the moft convenient places to make a fmall paufe for the neceffity of breathing; or in Rhetorical fpeeches (where many words are ufed to one effect) to make a kinde of Emphafis and deliberation for the greater majesty or ftate of the Elocution.²⁰

The comma-colon (Daines's term for the semicolon) has a time value of two and calls for the reader to pause twice as long as for a comma. The comma-colon, he said, is used especially by rhetoricians, who "in their long winded fentences, and reduplications, have it as a conftant pack-horfe, to make fome fhort deliberation as it were of little fentences."²¹ In Daines's scheme, the colon is used chiefly to dividè sentences; it has a time value of three and calls for a pause three times as long as for a comma.²² A period, said Daines, is the mark used to close a sentence or a speech.²³ A period marking the end of a sentence in the middle of a paragraph has a time value of six. If the period also marks the end of a paragraph, its time value is doubled to twelve—in

Puttenham's punctuation scheme, see M. TREIP, MILTON'S PUNCTUATION AND CHANGING ENGLISH USAGE 1582-1676, 27-28 (1970).

19. S. DAINES, *supra* note 18, at 70.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 71. Ben Jonson and James Shirley, the playwrights, also took time out to write grammar books, and each of them describes rhythmic and elocutionary punctuation systems somewhat similar to Daines's. See B. JONSON, ENGLISH GRAMMAR 83-84 (1640), reproduced in facsimile, ENGLISH LINGUISTICS 1500-1800, No. 349 (1972); J. SHIRLEY, GRAMMATICA ANGLO-LATINA 11-12 (1651), reproduced in facsimile, ENGLISH LINGUISTICS 1500-1800, No. 193 (1969).

other words, it requires the reader to make a long, distinct pause.²⁴

Although early 17th-century English punctuation served primarily rhythmical and elocutionary purposes, writers of the time recognized that garbled punctuation could distort meaning. About 1595, Shakespeare intentionally garbled the punctuation of a speech to poke fun at one of his comic characters in *A Midsummer Night's Dream*.²⁵ As the 17th century progressed, the connection between punctuation and meaning grew stronger. For example, in the *Treatise of Stops*, published in 1680, an anonymous London teacher cautioned that

the mifplacing of any [punctuation marks] in Writing, or in Print; or the neglect of keeping them (i.e. of giving them the du time prefcribed to each of them in Reading) will much pervert the Senf, and tru meaning of a Sentence.

If to each Stop, you gib the time that's du
The Senf will then appear both plain, and tru.
If any of them by you be neglected,
The Senf of what you Read, can't be expected.²⁶

Many other features of the English language (spelling, for example) were also changing during the 17th century:

24. S. DAINES, *supra* note 18, at 71.

25. See Act 5, scene 1, lines 108-17. The speech is Quince's prologue to the play within a play. Quince's garbled punctuation (points and stops) turns the prologue into a stream of foolishness and provokes this response from members of his audience: "This fellow doth not stand upon points He hath rid his prologue like a rough colt; he knows not the stop." Mellinkoff cites the prologue and response as "direct evidence that Shakespeare was keenly aware that meaning was shaped by punctuation." D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 156 (1963).

26. *THE TREATISE OF STOPS, POINTS, OR PAUSES* 7 (1680), reproduced in *facsimile*, *ENGLISH LINGUISTICS* 1500-1800, No. 65 (1968).

Regularity, uniformity, and grammar were taking over.²⁷ One authority describes the changes thus:

The period between about 1580-1680 . . . witnessed a particularly marked evolution away from rhythmical and oratorical, or sometimes theatrically dramatic, concepts of syntactical design . . . toward more logically and grammatically oriented views. The approach was increasingly to the ideal of "correctness" in writing: toward regulating all aspects of composition according to universal and logically fixed standards. Altered practices in punctuation are among the features which reflect these changes.²⁸

During the late 17th century, our present system of punctuation (called the syntactic system) began to develop in England.²⁹ The syntactic system uses punctuation marks as guides to the grammatical construction, and thus to the meaning, of a passage.³⁰ The syntactic system does not ignore rhythm and elocution; shifts in syntax tend to coincide with pauses for breath and emphasis in oral delivery, and modern punctuation thus tends to reflect the patterns and rhythms of speech.³¹

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27. See A. BAUGH & T. CABLE, *A HISTORY OF THE ENGLISH LANGUAGE* 253-94 (3d ed. 1978); B. STRANG, *A HISTORY OF ENGLISH* 104-55 (1970); see also R. MCCRUM, W. CRAN & R. MACNEIL, *THE STORY OF ENGLISH* 91-106, 128-36 (1986).
28. M. TREIP, *supra* note 18, at x-xi.
29. See R. PETERS, *A LINGUISTIC HISTORY OF ENGLISH* 304 (1968); 29 *NEW ENCYCLOPAEDIA BRITANNICA*, *supra* note 15, at 1006-09.
30. See Creaser, *Editorial Problems in Milton*, 35 *REV. ENG. STUD.* 45 (1984). The first systematic exposition of the new system of punctuation was that of J. ROBERTSON, *supra* note 15.
31. See C. TIMPERLEY, *THE PRINTERS' MANUAL* 5 (1838) ("Punctuation may be considered . . . as it directs to such pauses, elevations, and depressions of the voice, . . . as . . . mark the sense of the sentence . . .").

Sources of Lawyers' Distrust of Punctuation

Lawyers' distrust of punctuation as a guide to meaning has at least three sources: The first was the uncertain state of English punctuation in the late 17th century and well into the 18th, when the syntactic system was developing. That was also the period when the English language finally replaced Latin and law French as the language used in legal matters.³² The syntactic system of punctuation did not spring forth full-grown, nor did every writer adopt it overnight.³³ For a time, some writers punctuated for rhythmic and elocutionary effect, others punctuated syntactically, and still others did a little of both.³⁴ During this formative period, punctuation was indeed an uncertain guide to meaning.

The second source of lawyers' distrust of punctuation was the role played by printers. Before the printing press, important documents (statutes, for example) were handwritten by professional scribes; and scribes trained by different masters developed diverse customs about capitalization, spelling, and punctuation.³⁵ The printing press was introduced into England in 1476; by the mid-1600s, books and materials printed in English had become commonplace. Along with printing came a push toward uniformity. Over the years literary scholars have charged printers with distorting poets'

32. The story of how English replaced Latin and law French is told in D. MELLINKOFF, *supra* note 25, at 81-82, 98-101, 111-116, 122-135.

33. See Maynor, *Punctuation and Style in Vanity Fair: Thackeray versus His Compositors*, 22 ENG. LANGUAGE NOTES 48 (Dec. 1984) (discussing Thackeray's use of rhythmic, elocutionary punctuation in the mid-19th century).

34. *Id.*; M. TREIP, *supra* note 18, at 16-17, 35-53; see also D. MELLINKOFF, *supra* note 25, at 164-67.

35. B. STRANG, *supra* note 27, at 107-110, 157-59.

and playwrights' meters and meanings by adding or deleting punctuation to make the work conform to a standard.³⁶

The law was not immune from the printers' urge for uniformity. David Mellinkoff describes the printing of the early English statutes:

The printers of statutes could not slough off questions of punctuation. The penman might hedge with an ambiguous squiggle, but the cutting of type involved decision and art, and the setting of type was not a casual act. Individual notions of punctuation varied. The raw materials the printers worked with were neither uniformly organized or punctuated . . . Each printer according to his own lights attempted to bring order to the disorder of the handwritten statutes, numbering sections, making marginal notes, and improving on the punctuation. These were all labors of typographical composition and not legislation, yet the statutes as fancied up by the printers were the only statutes ordinarily available to the profession.³⁷

In this context, Mellinkoff explains, punctuation became suspect as a guide to meaning; in short, "what the printer did could not change the law."³⁸

The third source is entwined with the second, the printers' role, but it deserves special mention because it is so often invoked to justify disregard of punctuation. It is the old tale that English statutes were traditionally unpunctuated.³⁹ More than 25 years ago, Mellinkoff exposed the tale as a

36. See, e.g., P. SIMPSON, SHAKESPEARIAN PUNCTUATION 7-15 (1911); M. TREIP, *supra* note 18, at 14-34; Creaser, *supra* note 30, at 45; Maynor, *supra* note 33, at 48.

37. D. MELLINKOFF, *supra* note 25, at 163.

38. *Id.*

39. See, e.g., the statement of Lord Esher, M.R., in *Duke of Devonshire v. O'Connor* [1890] 24 Q.B.D. 468, 478: "[I]t is perfectly clear that in an Act of Parliament there are no such things as brackets any more than there are such things as stops."

falsehood,⁴⁰ but it is occasionally still cited in support of a supposed rule that judges can ignore punctuation when they interpret statutes (at least old ones).⁴¹ Mellinkoff patiently examined the best sources available and concluded that “English statutes have been punctuated from the earliest days.”⁴² The old punctuation is not like ours; it is often sparse and inconsistent, but it is there.⁴³

Mellinkoff explains that, even though the early English statutes were in fact punctuated, lawyers in later centuries had good reason to distrust the punctuation they found in printed versions of those statutes.⁴⁴ The original handwritten parchments were in many cases unavailable for comparison, and the printed collections “differed in the words, clauses, and even sentences Translations were inaccurate and inconsistent. Some statutes were entirely omitted.”⁴⁵ This disorder, coupled with the printers’ penchant for fiddling with punctuation, helped produce lawyers’ distrust of punc-

40. D. MELLINKOFF, *supra* note 25, at 157-164.

41. *See, e.g.*, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47.15 (4th ed. 1984) (“Parliamentary enactments originally were not punctuated and thus it was a necessary conclusion that the punctuation subsequently inserted was no part of the act.”); 44 HALSBURY’S LAWS OF ENGLAND 498, par. 820 (1983) (“It appears to be established that punctuation marks are not to be treated as forming part of a statute, and that they must therefore be disregarded for the purpose of construing it.”); G. DWORKIN, ODGERS’ CONSTRUCTION OF DEEDS AND STATUTES 313 (1967). For a refreshing contrast with these repetitions of the old tale, see F. BENNION, STATUTORY INTERPRETATION 594-600 (1984), which cites Mellinkoff’s research and re-examines prior authority in light of it.

42. D. MELLINKOFF, *supra* note 25, at 159.

43. *Id.* at 161-64. I am grateful to Professor Mellinkoff for lending me photocopies of some of the handwritten statutes he examined. With a magnifying glass and a little patience, one can indeed find the dots, lines, and slashmarks that served as punctuation in times past. *See, e.g.*, 18 Geo. III, ch. 60, § 4 (1778); 25 Edw. III, ch. 2, § 5 (1352).

44. D. MELLINKOFF, *supra* note 25, at 162-63.

45. *Id.* at 163.

tuation generally.⁴⁶ And the distrust has lasted for centuries. Only partly in jest did Sir Noel Hutton, Q.C., and First Parliamentary Counsel, write in 1966: "The only law about commas is that you pay no attention to them"⁴⁷

What Judges Say About Punctuation

Judicial decisions on both sides of the Atlantic yield a rich assortment of conflicting slogans and admonitions about punctuation as a guide to meaning. For instance, the United States Supreme Court recently split 5-4 over the interpretation of part of the Bankruptcy Act of 1978.⁴⁸ At the heart of the case was a comma. One lower federal court had called it a "capricious" comma,⁴⁹ and another had called it an awfully "small hook on which to hang a [substantial] change in the law."⁵⁰ The majority of five Supreme Court Justices, with no apology, relied partly on the comma to conclude that the statute was clear on its face.⁵¹ The four dissenting Justices, on the other hand, tried to obliterate the comma with a blast of quotations from earlier cases: Punctuation is "minor, and

46. *Id.* at 163-64.

47. Hutton, *The Citation of Statutes*, 82 LAW Q. REV. 24, 24 (1966).

48. *United States v. Ron Pair Enter.*, 109 S. Ct. 1026 (1989).

49. *In re Dan-Ver Enter.*, 67 Bankr. 951 (W.D. Pa. 1986).

50. *In re Newbury Cafe*, 841 F.2d 20, 22 (1st Cir. 1988), *vacated and remanded sub nom.* *Massachusetts v. Gray*, 109 S. Ct. 1305 (1989). The bankruptcy statute in question was 11 U.S.C. § 506(b) (1988), concerning oversecured claims. The relevant part states: "[T]here shall be allowed to the holder of such [oversecured] claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." The issue was whether this clumsy wording would allow a creditor to receive postpetition interest on a nonconsensual oversecured claim. In other words, the Court had to decide whether the comma after "interest on such claim" was enough to insulate it from the modifying phrase at the end of the sentence. For an analysis of this type of ambiguity, see R. DICKERSON, *supra* note 10, at 101-04.

51. *Gray*, 109 S.Ct. at 1031.

not . . . controlling"; it is "not decisive"; it is "a most fallible standard by which to interpret a writing"; and it can be "change[d] or ignore[d] to effectuate congressional intent."⁵²

The House of Lords faced a similar comma problem in *Hanlon v. Law Society*.⁵³ Lord Lowry's opinion sets out two schools of thought about using punctuation to interpret statutes. The "old doctrine" was that punctuation could not be used: "Before 1850 Acts of Parliament were not punctuated," he said, "and even after that the punctuation was sometimes not reliable enough to use as a tool of statutory construction."⁵⁴ The modern view makes more sense, Lord Lowry said. Modern bills are punctuated when they are introduced in Parliament, and without punctuation they would be "unintelligible to the legislators, who pass them into law as punctuated."⁵⁵

[N]ot to take account of punctuation disregards the reality that literate people, such as parliamentary draftsmen, punctuate what they write, if not identically, at least in accordance with grammatical principles. Why should not other literate people, such as judges, look at the punctuation in order to interpret the meaning of the legislation as accepted by Parliament?⁵⁶

One can find recent case law in the United States to support almost any view of punctuation. Here is a sample:

52. *Id.* at 1035.

53. [1980] 2 All E.R. 199.

54. *Id.* at 221.

55. *Id.*

56. *Id.*; see also Megarry, *Copulatives and Punctuation in Statutes*, 75 LAW Q. REV. 29 (1959), cited in the same author's opinion in *Slaney v. Kean*, [1970] 1 All E.R. 434, 441 (Ch. D.) (criticizing the English view that punctuation is of no use in construing statutes, and praising the more rational Scottish rule that allows punctuation to be considered).

- A lack of punctuation can be ignored. Despite the lack of a comma preceding the modifying phrase that followed a series of items, the court held that the phrase modified all the items in the series, not just the last item.⁵⁷
- Punctuation is not the “end-all of issues” in statutory construction. The lack of a comma was “strong” but not “indisputable” evidence that a modifying phrase at the end of a series was intended to modify only the last item in the series.⁵⁸
- Punctuation is not decisive in the construction of a statute, but when it reaffirms conclusions drawn from the words themselves, it can provide “useful confirmation.”⁵⁹
- Punctuation is the most fallible guide by which to interpret a writing. It never prevails over a meaning that emerges plainly from the entire document.⁶⁰
- Punctuation can be used as an aid in interpreting a contract. The commas around a modifying phrase helped to show that it was a description, not a limitation.⁶¹
- The “technicalities of punctuation” are not important unless “they make clear what is otherwise obscure.” A court should pay attention to the “intention of the parties, and not to the technical verbiage used to express it.”⁶²
- Punctuation and grammar can be used to conclude that a criminal statute is unambiguous and therefore need not

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57. See *United States v. Bass*, 404 U.S. 336, 340 n.6 (1971) (construing a federal criminal statute).
58. See *United States v. Horak*, 833 F.2d 1235, 1250 (7th Cir. 1987) (construing a forfeiture provision of RICO).
59. See *United States v. Naftalin*, 441 U.S. 768, 774 n.5 (1979) (construing part of the Securities Act of 1933).
60. See *Clayman v. Goodman Prop., Inc.*, 518 F.2d 1026, 1031 n.24 (D.C. Cir. 1973) (construing a real-estate contract).
61. See *Plymouth Mut. L. Ins. Co. v. Illinois Mid-Continent L. Ins. Co.*, 378 F.2d 389, 391-92 (3d Cir. 1967) (construing a settlement agreement between two insurance companies).
62. See *Marathon Oil Co. v. Kleppe*, 556 F.2d 982, 985 (10th Cir. 1977) (construing an oil royalty agreement and related federal regulation).

be construed leniently in favor of the criminal defendant.⁶³

Three lessons emerge from these and similar cases. First, judges (like other readers) are accustomed to using punctuation marks to guide their eyes and minds as they read. It is distracting and annoying if a reader must mentally supply punctuation to make sense of a passage.⁶⁴ Drafting without punctuation is no way to make friends on the bench.

Second, in interpreting legal documents, judges are affected by punctuation marks, even if only subconsciously.⁶⁵ Drafting without punctuation is no solution. Mellinkoff puts it tersely: "If you don't punctuate, a reader will do it for you, in places you never wanted it."⁶⁶

Third, commas (or the lack of them) cause more trouble than all the other punctuation marks put together. A common trouble-maker is the presence or absence of a comma preceding a modifying phrase that follows a series. For example, suppose that a statute prohibits "making, using, or selling in interstate commerce."⁶⁷ Does the commerce provi-

63. See *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir. 1989) (Edwards, J., dissenting).

64. See, e.g., *In re Drummond's Settlement* [1988] 1 All E.R. 449 (C.A.). In this rule-against-perpetuities case, the court had to construe a 344-word unpunctuated sentence. Before it could begin the analysis, the court had to break the sentence down into numbered clauses and subclauses. *Id.* at 451.

65. See D. MELLINKOFF, *supra* note 25, at 368; Megarry, *supra* note 56, at 29, 31.

66. D. MELLINKOFF, *LEGAL WRITING: SENSE & NONSENSE* 57 (1982).

67. This type of syntactic ambiguity has caused trouble for centuries. See R. DICKERSON, *supra* note 10, at 101-104. Compare *Bass*, 404 U.S. 336 (1971) (concerning a 1968 federal firearms statute), with *Rex v. Casement* [1917] 1 K.B. 98 (1916) (concerning a 1351 treason statute). The story of *Rex v. Casement* is engagingly told in D. MELLINKOFF, *supra* note 25, at 167-70.

sion modify only "selling," or does it modify "making" and "using" as well? The lack of a comma after "selling" might mean that the commerce provision modifies only "selling," not "making" or "using." Then again, it might mean that the drafter was simply careless about commas. Punctuation cannot solve every drafting problem, and this particular problem is best solved by adding or shifting a few words. For instance, to make the commerce provision modify "selling" only, one could shift the words to read: "selling in interstate commerce, or making, or using."

Conclusion

I agree with those who recommend that lawyers should punctuate legal documents carefully, in accordance with ordinary English usage.⁶⁸ At least three reasons support this view. First, as previously argued, legal documents that are punctuated in accordance with ordinary English usage are less likely to puzzle other lawyers and judges. Second, such documents are easier for clients and other nonlawyers to understand, a desirable goal for both populist and economic reasons.⁶⁹ Third, such documents are easier to translate accurately into other languages, an advantage that will become

68. See T. GOLDSTEIN & J. LIEBERMAN, *THE LAWYER'S GUIDE TO WRITING WELL* 171-75 (1989); B. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 448-51 (1987); LAW REFORM COMMISSION OF VICTORIA (AUSTRALIA), *GUIDELINES FOR DRAFTING IN PLAIN ENGLISH: A MANUAL FOR LEGISLATIVE DRAFTERS* 60 (1987); D. MELLINKOFF, *supra* note 66, at 56-58; E. PIESSE, *THE ELEMENTS OF DRAFTING* 86-88, 90-91 (6th ed. 1987); D. MELLINKOFF, *supra* note 25, at 373-74.

69. The economic reasons are discussed in Report No. 9 of the LAW REFORM COMMISSION OF VICTORIA (AUSTRALIA), *PLAIN ENGLISH AND THE LAW* 59-62 (1987). The populist reasons are discussed in M. CUTTS & C. MAHER, *THE PLAIN ENGLISH STORY* 9-23 (1986).

increasingly important as business and law grow more transnational.⁷⁰

Further, I believe that judges should cast aside their tangle of conflicting maxims and warnings about the use of punctuation to construe legal documents.⁷¹ Instead, they should create a rebuttable presumption that legal documents have been punctuated in accordance with ordinary English usage,⁷² and they should use the punctuation, along with all of the other guides to meaning, when they interpret legal documents.

70. Great Britain's membership in the European Economic Community makes language translation a matter of increasing importance to British lawyers. It has been said that "language is the greatest non-tariff barrier in the Community and a major obstacle to European unity." J. DREW, *DOING BUSINESS IN THE EUROPEAN COMMUNITY* 46 (2d ed. 1983).

71. See *supra* text at notes 50-65; see also 2A SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 43, § 47.15, at 156-60; G. DWORKIN, *supra* note 43, at 313-14.

72. For guidance in punctuating legal documents in accordance with ordinary English usage, see T. GOLDSTEIN, *supra* note 68, at 171-75; B. GARNER, *supra* note 68, at 448-51; T. BERNSTEIN, *THE CAREFUL WRITER* 356-73 (1981); H. W. FOWLER, *A DICTIONARY OF MODERN ENGLISH USAGE* 586-72 (Gowers 2d ed. 1965).