Gluing Qualifiers with a Knife: Another Look at Why a List Might Backfire

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Is robbery piracy?

On the Fourth of July, 1817, John Palmer, Thomas Wilson, and Barney Calloghan celebrated the United States' 41st birthday in an unusual way: they boarded a ship on the high seas, pointed pistols at the crew, and stole cargo worth $92,000, which equals about $1,758,000[1] today. They didn't celebrate for long; they were soon arrested in Massachusetts and tried under a law against piracy:

> [I]f any person . . . commit, upon the high seas, . . . murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death . . . every such offender . . . shall suffer death.[2]

This statute bedeviled the trial court. The defendants had committed robbery, but that wasn't a capital offense on land. So they hadn't committed a crime that, if committed on land, would be *punishable with death*. But the court wasn't sure whether the piracy statute required *robbery* to be *punishable with death* for guilt to attach. The court's two choices:

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1 *Inflation Calculator*, U.S. Official Inflation Data, Alioth Finance, June 5, 2019, https://www.officialdata.org/.

2 Act for the Punishment of Certain Crimes Against the United States, ch. 9, sec. 8, 1 Stat. 112 (1790); *United States v. Palmer*, 16 U.S. 610, 636 (1818).

- The qualifier *punishable with death* applied to only the last list item: *any other offense*. Therefore, the three were guilty of piracy by robbing on the high seas even though robbery wasn't *punishable with death* on land.
- The qualifier applied to every list item: *murder or robbery, or any other offence*. Therefore, the defendants were not guilty of piracy because robbery wasn't *punishable with death* on land.

Three lives hung on the court's answer.

The trial judge asked his colleagues in the circuit for their opinions. This was before the courts of appeals were established. At the time, the Justices of the United States Supreme Court would ride circuits to lead the district courts. (This is where the name *circuit* came from.) Led by Justice Joseph Story, the circuit judges couldn't agree on which interpretation was correct. They were so "opposed"[3] that the trial judge gave up and certified the question to the Supreme Court. The trial judge, in essence, appealed the case — not the defendants.

In the Supreme Court's opinion, Justice Marshall said of the losing argument, "This argument is entitled to great respect on every account."[4] But he decided that the drafters had no reason to list offenses if any offense punishable by death on land qualified as piracy. If that had been the goal, he reasoned, the words *murder* and *robbery* would've been unnecessary; they'd have been surplusage. If the drafters' intention had been to make all death-penalty offenses on land death-penalty offenses at sea, they could've said simply that *any offense punishable by death on land is punishable by death at sea*. Thus, the Court held that robbery on the high seas was piracy regardless of whether it was a capital crime on land.

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[3] *Palmer*, 16 U.S. at 612.

[4] *Id*. at 628.

The cause of all this analytical angst? The statute was ambiguous because it contained a qualifier after a list.

Is a rifle deadly?

After drinking heavily, Martin J. McPherson entered a dormitory lobby at the University of Colorado. Pointing a rifle at the night clerk, he asked her how to get to the roof. She didn't answer, so he ordered her to the elevator. When it opened, two people looked out. Confounded by this development, he ordered all three outside. Once outside, one of the hostages ran. As McPherson watched the person's back recede into the night, something dawned on him: he was frightening these people. So he repented: "I'm sorry I scared you. I was looking for someone else."[5] As he turned to leave, something else dawned on him: he could get into a wee bit of trouble. So he warned, "I have a high-powered rifle here, and if anyone touches that phone, I'll blow a hole right through you."[6] It was an empty threat; the rifle wasn't loaded.

McPherson was convicted of felony menacing with a deadly weapon. Yet the deadly-weapon definition also had a qualifier after a list, and it too caused problems. He was guilty of felony menacing, but was he guilty of using a deadly weapon? When he appealed his conviction, it was overturned because *deadly weapon* was defined as

> any firearm, knife, bludgeon, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or intended to be used *is capable of producing death or serious bodily injury*.[7]

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[5] *People v. McPherson*, 619 P.2d 38, 38 (Colo. 1980).

[6] *Id*.

[7] Colo. Rev. Stat. § 18-1-901 (1973; 1978 repl. vol. 8) (emphasis added); *McPherson*, 619 P.2d at 39.

Did each listed item (including the first item, *firearm*) need to be *capable of producing death or serious bodily injury*? If so, then McPherson wasn't guilty because shooting an unloaded firearm isn't deadly. The appellate court ruled that the qualifier applied to each item in the list and overturned the conviction.[8]

The Colorado Supreme Court disagreed:

> [T]he phrase "which in the manner it is used . . ." modifies only the last antecedent, "other weapon, device, instrument, material, or substance, whether animate or inanimate."[9]

Did you notice the quirk in the court's logic? If you look back at the statute, you'll see that there are actually two lists. The whole list contains eight items: *firearm, knife, bludgeon, or other weapon, device, instrument, material, or substance*. Yet the phrase *or other* introduces a second catchall list that is subsumed within the whole list, and that second list has five items itself: *other weapon, device, instrument, material, or substance*. The supreme court applied the rule of the last antecedent, concluding that the trailing qualifier modified only the last list item. Yet it treated the entire second list as that last list item. So as a practical matter, the court applied the trailing qualifier to five of eight items on the whole list.

The upshot of this, according to the supreme court, was that the trailing qualifier did not reach the initial three list items, which included *firearm*, and therefore McPherson's unloaded gun was a deadly weapon even though it was not *capable of producing death or serious bodily injury*.

True, treating only the eighth list item as the last antecedent, and applying the qualifier only to that eighth item, wouldn't have made any sense. Reading the list's seventh (and penultimate) item without the qualifier makes this clear: *"Deadly weapon" means*

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[8] *People v. McPherson*, 601 P.2d 355 (Colo. Ct. App. 1979).

[9] *McPherson*, 619 P.2d at 39.

any . . . material . . . . Not every material is a deadly weapon. So there was some logic to the court's treatment of the five-item second list as if it were a single, self-contained final list item. But isn't it a weird reading to apply the qualifier to five of eight items on a list?

One senses that the Colorado Supreme Court applied the last-antecedent rule only to support the court's intuition about the legislature's intent. But the court's intuition was wrong. In fact, the decision riled up the legislature so much that it passed a bill rejecting not only the holding but also the last-antecedent rule that had led to the holding:

> The general assembly hereby finds and declares that the rule of statutory construction expressed in the Colorado supreme court decision entitled People v. McPherson, 200 Colo. 429, 619 P.2d 38 (1980), which holds that ". . . relative and qualifying words and phrases, where no contrary intention appears, are construed to refer solely to the last antecedent with which they are closely connected . . ." has not been adopted by the general assembly and does not create any presumption of statutory intent.[10]

So the legislature wanted the qualifier to apply to each item on the list. Again, we see that a qualifier following a list causes problems.

Does effort count?

A qualifier after a list likewise led the California Legislature to overturn the California Supreme Court. And this led a lower court to overturn a higher court with nary a by-your-leave.

Renee J. had a drug problem, and a court terminated her parental rights. Despite attempts at sobriety, Renee did not complete the court-ordered substance-abuse program in time to be

[10] Colo. Rev. Stat. § 2-4-214 (1981); *McPherson*, 619 P.2d at 39.

reunified with her children. Then Renee had another child. This time, she was able to kick the drug habit. But having no money, she turned to crime. She was jailed and lost her parental rights again.

After squaring herself away, she asked for reunification, but the court denied the motion under a statute allowing denial if

> (A) the court ordered termination of reunification services for any siblings . . . because the parent . . . failed to reunify with the sibling . . . after the sibling . . . had been removed from that parent . . . or (B) the parental rights of a parent . . . over any sibling . . . of the child had been permanently severed, and that, according to the findings of the court, this parent . . . has not . . . made a reasonable effort to treat the problems that led to removal of the sibling . . . .[11]

Does the trailing *reasonable effort* clause apply to the tests in both (A) and (B)? Renee had permanently lost her parental rights with her other children because of her drug problem. Yet she had finally managed to get off the drugs. So she had made a *reasonable effort*. If the *reasonable effort* qualifier applied to part (A), the court could not deny reunification based only on her history.

This statute also bedeviled the courts. The trial court held that the trailing modifier did not reach back to part (A). But the appellate court held that it did. The California Supreme Court agreed with the trial judge, holding that the modifier didn't apply to part (A). And yet again, a legislature passed an act to correct a high court's mistake.

After the trial court applied the California Supreme Court's holding and the legislature had amended the statute, Renee appealed the case again. On appeal, the appellate court, in essence, overturned the California Supreme Court:

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[11] Cal. Welf. & Inst. Code § 361.5 (2000); *Renee J. v. Superior Court*, 28 P.3d 876, 878 (Cal. 2001).

> Renee J. petitions for extraordinary relief from the trial court's order terminating her reunification services with her daughter . . . . She contends the trial court erred in applying the California Supreme Court's interpretation of Welfare and Institutions Code section 361.5, subdivision (b)(10) . . . because the California Legislature almost immediately overrode that interpretation by amending the statute. In the unusual (to say the least) circumstances of this case, we agree.[12]

From a court's appealing its own case to a lower court's overturning the ruling of a higher court, the problems created by placing a qualifier after a list are in a class all their own.

Does knife glue help?

If you want to apply a qualifier to each item on a list, Jabez Sutherland explained the common solution back in 1891:

> Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.[13]

Ken Adams and Joseph Kimble wrote about this, with some skepticism, in volume 16.[14]

In my experience, most lawyers follow this advice. But the word *comma* comes from the Greek word *κομμα*, which means

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[12] *Renee J. v. Superior Court*, 96 Cal. App. 4th 1450, 1454–55 (2002).

[13] J.G. Sutherland, *Statutes and Statutory Construction* § 267, at 349 (1891).

[14] Ken Adams, *Bamboozled by a Comma: The Second Circuit's Misdiagnosis of Ambiguity in* American International Group, Inc. v. Bank of America Corp., 16 Scribes J. Legal Writing 45 *passim* (2014–2015); Joseph Kimble, *The Doctrine of the Last Antecedent, the Example in* Barnhart*, Why Both Are Weak, and How Textualism Postures*, 16 Scribes J. Legal Writing 5 *passim* (2014–2015).

"piece cut off."[15] A comma is a knife; it separates ideas. Here's an old grammarian's joke:

- Let's eat, Mom!
- Let's eat Mom!

In the first, the child is inviting his mom to eat. In the second, Mom is the main course. The difference is that, in the first, the word *Mom* has been separated — or cut away — from the word *eat*. The comma's normal usage is to cut or separate ideas from each other. But the comma trick is used to join ideas, gluing not with glue, but with a knife.

When using a comma, drafters sometimes mean to separate ideas and sometimes mean to join ideas. Isn't it a problem that a comma may have two exact opposite meanings?

Here's another problem: when we start using a comma to join ideas, nearly every phrase tends to be surrounded by commas. Let's look at the piracy statute again:

> or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death . . . .[16]

Look at all those commas! If you use commas to glue elements together, you often place a comma after each element. To set a phrase off by commas requires two commas: one before it, and one after it. Is the comma before *be punishable with death* there to set off *be punishable with death*? Or is the comma there to set off *by the laws of the United States*? Either could be true.

The *McPherson* case presents the same doubt. The deadly-weapon statute also has a comma before the qualifier:

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[15] *Random House Unabridged Dictionary*, "comma," http://dictionary.reference.com/browse/comma (accessed June 6, 2019).

[16] *Quoted in Palmer*, 16 U.S. at 636.

> material, or substance, whether animate or inanimate, which in the manner it is used or intended to be used is capable of producing death or serious bodily injury.[17]

Is the comma before *which* there to set off *whether animate or inanimate*? Or is the comma there to set off *which in the manner it is used*? It could be either.

Central to drafting is the hope that the drafter can predict how language will be interpreted. A drafter can't make such a prediction based on the comma trick. Knife glue is an unreliable guide.

Run away!

I try to avoid the issue. Here are some suggestions.

1. If it won't be missed, simplify the list.

Lawyers love lists. That love is unrequited.

The list is often a redundant doublet or triplet, such as *sale and transfer*, *null and void*, and *give, devise, and bequeath*. These are usually nothing more than historical remnants, poetic repetition, or galumphing nonsense. If so, the list isn't needed. We can avoid the problem altogether by simplifying a list into one word or phrase.

Take the doublet *sale and transfer*. *Black's Law Dictionary* explains that the word *transfer* "embraces every method — direct and indirect, absolute or conditional, voluntary or involuntary — of disposing or parting with property or an interest in property . . . ."[18] In other words, it's every way you can stop owning something. And you can stop owning something by selling it. The word *transfer* includes a *sale*. So *sale and transfer* is redundant.

Imagine a contract or statute that says:

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[17] *Quoted in McPherson*, 619 P.2d at 39–40.

[18] *Black's Law Dictionary* 1503 (Bryan A. Garner ed., 7th ed. 1999).

> To comply with this section, assets must not be sold or transferred to a family member.

The question arises whether the trailing qualifier *to a family member* applies to *sold*. Does the provision prohibit all selling? Or does it prohibit selling only to a family member? If we are worried about family shenanigans, striking *sale* solves the problem.

Doublets and triplets aren't the only types of redundant lists. Lawyers draft all sorts of unnecessary lists. An example is the list in *McPherson*'s deadly-weapon statute:

> any firearm, knife, bludgeon, or other weapon, device, instrument, material, or substance . . . .[19]

The first list, *firearm, knife, bludgeon*, is redundant with the second list, *other weapon, device, instrument, material, or substance*. A *firearm*, a *knife*, or a *bludgeon* is both a weapon and an instrument.

And the second list has many redundancies:

- A weapon is an instrument;
- A device is an instrument; and
- A material is a substance.

This leaves us with *instrument* and *substance*. I'd bet that if the statute had used only *instrument* and *substance*, the problem we saw in *McPherson* would have been avoided. Yet the drafter meant to cover anything that is capable of producing death or serious injury, so why not just write that?

> "Deadly weapon" means an object that is capable of producing death or serious bodily injury in the manner in which it is used or intended to be used.

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[19] *Quoted in McPherson*, 619 P.2d at 39.

Wouldn't a court applying this definition normally conclude that an unloaded rifle isn't a deadly weapon?

Simplifying a list is often clearer. So always ask yourself, "Do I really need that list?"

2. To avoid a quagmire, move the qualifier.

Imagine (with a nod to Dr. Seuss) that your mom told you, "To get dessert, you must eat ham and eggs that are green." You might think that green ham sounds awful. So you ask, "Does the ham need to be green?" If not, Mom might rephrase it: "To get dessert, you have to eat eggs that are green and ham." If she were to put it in writing, she would make it clear by breaking it up with a vertical list and tucking the ambiguous modifier into the item it modifies (if intended to modify just that item):

> To get dessert, you must eat:
> (1) eggs that are green; and
> (2) ham.

If she meant for everything to be green, she could signal that idea by keeping the modifier in the lead-in language, above the list:

> To get dessert, you must eat green:
> (1) eggs; and
> (2) ham.

This also works for qualifiers placed before a list. Although a qualifier before a list does not appear to cause as many problems, it can have the same ambiguity. If she says, "To get dessert, you must eat green eggs and ham," you may ask, "Does the ham need to be green? Can I eat green eggs and normal ham?" If the ham doesn't need to be green, she might say, "To get dessert, you must eat ham and green eggs."

3. To avoid a glitch, use each of which.

Imagine that your father told you, "To get dessert, you must eat ham and eggs that are green." You ask whether the ham must be green. If the ham must be green, your father might say, "To get dessert, you must eat eggs and ham, both of which must be green," or "To get dessert, you must eat eggs and ham, each of which must be green."

Add *both of which*, *each of which*, or something similar to clarify. It's longer, but it comes in handy when you can't break up the list.

4. Don't retreat in defeat; simply repeat.

If those suggestions don't work, repeat the qualifier each time. It's longer, but it avoids the problem:

> To get dessert, you must eat:
> (1) green eggs; and
> (2) green ham.

If the qualifier phrase begins with a preposition, you need not repeat the entire qualifier; you need only repeat the preposition. Your mom says, "To get dessert, you must eat eggs and ham of greenness." You ask, "Do the eggs have to be green?" If so, she could repeat the preposition: "To get dessert, you must eat eggs of and ham of greenness." This shows your intention that the eggs be green.

I've shoehorned this last example into the green-eggs-and-ham bit, but it reads a bit quirky, so here is a more natural example from a United States Supreme Court case. In the case, the Court was construing a statute that authorized the following defendants to remove a lawsuit to federal court:

> Any officer of the United States or any agency thereof . . . .[20]

May an officer of an agency remove the case to federal court? Or does the agency need to remove the case? The list was ambiguous because it could be read in either of these two ways:

- an officer of a U.S. agency or an officer of the U.S.; or
- an agency of the U.S. or an officer of the U.S.

The Court decided that Congress meant an officer of an agency. If so, the drafter would have avoided the issue simply by repeating the preposition *of*:

> Any officer of the United States or of an agency thereof . . . .

Better still, repeat the preposition and eliminate the stuffy *thereof*:

> Any officer of the United States or of a United States agency . . . .

There are other ways to avoid the problem. But don't think that knife glue will help. And when you see draft language with a list, comma, and qualifier, remember that the list is like a coiled body, the comma is like a rattling tail, and the qualifier is like bared fangs. Step carefully.

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[20] *Int'l Primate Prot. League v. Tulane Educ. Fund*, 500 U.S. 72, 79 (1991) (quoting 28 U.S.C. § 1442(a)(1)) (Court's brackets and lowercasing removed).