

“Standards of punctuation have become a popular subject, in part because punctuation is a fluid, complex matter that is profoundly important to written texts.”

Matters of Punctuation: Open or Close

By **Martha Faulk**

Martha Faulk is a former practicing attorney and English instructor who teaches legal writing seminars through The Professional Education Group, Inc. She is co-author with Irving Mehler of The Elements of Legal Writing (1994). She is a regular contributor to the Writing Tips column in Perspectives.

Poor punctuation did not prevent Alon Mizrahi from being refused entry into the United States. It did, however, prompt the U.S. Court of Appeals for the Second Circuit to chide Congress for incompetent drafting of a federal statute relating to drug crimes.¹ Mizrahi pled guilty to solicitation of the sale of controlled substances and received a sentence of probation. He left the United States to visit Israel, and, when he returned to this country, he was denied admittance because he had been convicted of a crime related to trafficking in controlled substances.

Interpreting the Statute

In his case challenging the decision, Mizrahi argued that the federal statute specifically mentioned two inchoate crimes associated with drug-related offenses. The law applied to any person who “has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance.”² Mizrahi’s theory was that the “disjunctive parenthetical” identified conspiracy and attempt as crimes falling within the statute, but because solicitation did not appear in the enumeration, it was excluded from the prohibited conduct.

The Second Circuit rejected the argument, but in doing so, the court’s opinion made crucial

observations about legal writing. Citing an earlier precedent, the court said: “In the provision at issue in *Bronsztejn*, the disjunctive reference to ‘conspiracy’ was set off by commas. This court has previously recognized that such punctuation may indicate that a disjunctive phrase was not intended to have a distinct meaning from, but rather to illustrate or stand in apposition to, preceding language.”³ In other words, had Congress written “a violation of, or a conspiracy, or attempt, to violate . . . ,” the meaning would have been clear. The original text, unfortunately, allowed for alternative meanings, including the interpretation that only conspiracy and attempt supported inadmissibility.

Congress Could Have Been Clearer

Using other aids to construction, the court held that Mizrahi’s argument was not persuasive and that Congress did not intend to exclude solicitation from inchoate offenses. But, the court added, “That being said, Congress certainly could have used clearer language and punctuation in § 1182(a)(2)(A)(i)(II) if its intent was to use the disjunctive form merely to illustrate the broad scope of the phrase ‘a violation . . . of any law . . . relating to a controlled substance.’”⁴ Even though it was able to reach the appropriate result, the court made clear that more attention to the proper use of language through correct punctuation would have eliminated the expenditure of costly judicial resources in dealing with this issue. Defining correct punctuation, however, is not a simple task.

Standards of Punctuation

Standards of punctuation have become a popular subject, in part because punctuation is a fluid, complex matter that is profoundly important to

¹ Mizrahi v. Gonzales, 492 F.3d 156 (2d Cir. 2007).

² *Id.* at 160.

³ *Id.* at 165.

⁴ *Id.* at 166.

written texts. In 2003, Lynne Truss published her best-selling book, *Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation*. Truss' thesis is that, at least in the United Kingdom, "standards of punctuation are abysmal."⁵ David Crystal, world authority on language and author of *The Cambridge Encyclopedia of the English Language*, comments that he "agree[s] totally with her underlying message, which is to bring the study of punctuation back into the centre of the educational stage." But he disagrees strongly with the "zero tolerance" approach because it "does not allow for flexibility." He observes further "that no rule of punctuation is followed by all of the people all of the time."⁶ That, precisely, is the problem with punctuation, and the nature of the problem can only be understood in a historical context.

Origins of Punctuation

Early classical texts were unpunctuated, lacking even spaces between words. The first punctuation marks were added as guidelines for orators "when reading aloud was a prestigious and professional activity."⁷ The advent of printing in the 15th century gave impetus to the formation of standard language, spelling, and punctuation. But, observes Crystal, "punctuation never achieved the same degree of rule-governed consistency as appears in spelling."⁸ Yet, legal writers have a compelling need for consistency and certainty. Terri LeClercq, now retired from teaching legal writing at the University of Texas, notes that "[i]n the segment of society controlled by stare decisis and detail-oriented judges, legal writers necessarily lean toward a narrower, more traditional sense of punctuation because the consequences of a loose or sloppy construction are so grim."⁹

But, what exactly is "traditional" punctuation? Crystal observes that "[s]cribes and publishing houses have always varied in their practices, and even today punctuation remains to some extent a matter of personal preference." Of course there are many reference books detailing rules of grammar and punctuation, and most college courses and some law firms and other organizations require the use of a specific reference book for matters of grammar. Citation to authority in a legal context is made easier by the many examples provided in *The Bluebook*.¹⁰

Two Basic Styles

Another and perhaps more useful way to think about punctuation guidelines is to consider what Crystal identifies as "heavy versus light styles." The light style, in contrast to the heavy style, is "simpler, less cluttered." Crystal prefers the light style in letters and other informal documents and uses the heavy or formal style in books and other written texts.¹¹ These contrasting styles are also described as "close," or sometimes called "closed," and "open." Russell Baker, an essayist and Pulitzer Prize-winning journalist, writes in *How to Punctuate* that "[t]here are two basic systems of punctuation" which he describes in the following way:

1. The loose or open system, which tries to capture the way body language punctuates talk.
2. The tight, closed structural system, which hews closely to the sentence's grammatical structure.

He adds that "[m]ost writers use a little of both."¹²

Most legal writers probably use a little of both styles, too. E-mail messages, letters, newsletters, and magazine articles may seem more readable and less formal without many commas, unless those commas are essential to the reader's understanding. Formal legal documents such as briefs, contracts,

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⁵ Lynne Truss, *Eats, Shoots & Leaves* xx (2003).

⁶ David Crystal, *The Fight for English* 132, 133 (2006).

⁷ David Crystal, *The Cambridge Encyclopedia of the English Language* 278 (1995).

⁸ *Id.*

⁹ Terri LeClercq, *Expert Legal Writing* 149 (1995).

¹⁰ *The Bluebook: A Uniform System of Citation* (18th ed. 2005).

¹¹ Crystal, *supra* note 7, at 278.

¹² Baker's essay is widely reproduced. It is available online at <www.harmonize.com/Probe/aids/manual/punctuate.htm>.

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appeals, and other agreements will be best served—and perhaps avoid litigation over ambiguity—by proper placement of punctuation. To illustrate, we can consider a particularly contentious rule regarding the placement of commas.

The Serial Comma

Perhaps there is no more disputed piece of punctuation than the serial comma. The rule advises writers to “[u]se commas to separate words, phrases, and clauses in a series.”¹³ It is a rule that is easily stated and of long usage, but modern trends have led to uncertainty about its correctness.

Legal writers may prefer to keep the serial comma before the conjunction *and* because they feel it is safer to do so, and because their readers expect to see the comma there. Keeping the comma before the conjunction is an example of *close* or *heavy* punctuation.

However, many writers, and some editors, routinely omit the comma before *and* in a series of words unless the omission would cause a misreading. The quoted sentence that follows illustrates *open* punctuation. “His practice was limited to wills, estates and taxation.” Although there is little chance of misreading this example, legal writers usually

conform to close punctuation and insert the comma before *and*.¹⁴ That practice eliminates the possible meaning that his practice is limited to the way governments extract revenue from inheritances depending on how a will is written.

The End of the Matter

Mizrahi’s argument about what Congress said and what its words meant forced the Second Circuit to engage in a sophisticated analysis of how language is understood. Without its elaborate apparatus of past precedent, contextual implication, and legislative purpose, the court could not reasonably have upheld Mizrahi’s denial of admittance. After all, Congress specified that the offense was a *violation of or a conspiracy or attempt to violate a drug law*. For the average reader unschooled in the complexities of legal reasoning, it makes little sense to add some other unmentioned element to this bare statement—the fact is that Mizrahi neither violated nor conspired to nor attempted to violate a drug law. Thanks to a skilled judicial interpreter, however, the intent of the statute was upheld.

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Another Perspective

“Take another look at the Fifth Amendment. Look carefully. If you read it with an eye toward punctuation, you will notice that the Amendment itself is one long and complex sentence; you will notice that it contains a number of restrictions on governmental power and that those restrictions seem to be independent and separated by three semicolons.”

—Michael Nardella, *Knowing When to Stop: Is the Punctuation of the Constitution Based on Sound or Sense?*, 59 Fla. L. Rev. 667, 668 (2007).

¹³ For a discussion, see Martha Faulk & Irving Mehler, *The Elements of Legal Writing* 69 (1994).

¹⁴ *Id.*