No. 12-17-00346-CR

IN THE TWELFTH COURT OF APPEALS
OF THE STATE OF TEXAS

Ex parte Jordan Bartlett Jones, Appellant

Appeal from Smith County

* * * * *

STATE PROSECUTING ATTORNEY'S

MOTION FOR REHEARING

* * * * *

STACEY M. SOULE
State Prosecuting Attorney
Bar I.D. No. 24031632

JOHN R. MESSINGER
Assistant State Prosecuting Attorney
Bar I.D. No. 24053705

P.O. Box 13046
Austin, Texas 78711
512/463-1660 (Telephone)
512/463-5724 (Fax)
information@spa.texas.gov

TO THE HONORABLE TWELFTH COURT OF APPEALS:

Section 21.16 of the Penal Code was carefully crafted to prevent "revenge porn" and other damaging invasions of privacy while avoiding the First Amendment problems present in laws struck down by the Court of Criminal Appeals. This Court's misconstruction of the statute makes a finding of unconstitutionality inevitable. A proper reading shows it is a content-neutral statute that satisfies intermediate scrutiny and is not overbroad.

POINTS ON REHEARING

1. **This Court ignored basic rules for statutory construction when it determined TEX. PENAL CODE § 21.16(b) criminalizes the innocent disclosure of prohibited visual material.**

2. **Properly construed, the statute satisfies any level of constitutional scrutiny and is not overbroad.**

ARGUMENT AND AUTHORITIES

I. This Court misconstrued the statute.

The first step in deciding the constitutionality of a statute is to construe it.[1] This Court did not mention any rules for statutory construction or apply the most relevant ones when it construed subsection (b)(2). Charlie, this Court's hypothetical defendant, would be in no danger if the offending subsection were properly

[1] *Ex parte Ingram*, 533 S.W.3d 887, 895 (2017) (beginning an overbreadth analysis).

interpreted according to established rules.

Law

A statute should be construed in accordance with the plain meaning of its text unless the language is ambiguous or the plain meaning leads to absurd results that the Legislature could not have possibly intended.[2] The words should be read in context, applying rules of grammar and giving effect to every word, if reasonably possible.[3] A statute is ambiguous when it may be understood by reasonably well-informed persons in two or more different senses.[4] Conversely, "a statute is unambiguous when it reasonably permits no more than one understanding."[5] In the event of ambiguity, it is a reviewing court's duty to construe the statute in a manner consistent with the assumption that the Legislature intended to enact a constitutional statute.[6] This canon enhances the statutory presumption that "compliance with the constitutions of this state and the United States" was intended by the Legislature.[7]

---

[2] *Id*.

[3] *Id*.

[4] *State v. Schunior*, 506 S.W.3d 29, 34-35 (Tex. Crim. App. 2016) (internal quotations and citation omitted).

[5] *Id*. at 35.

[6] *State v. Edmond*, 933 S.W.2d 120, 124 (Tex. Crim. App. 1996).

[7] TEX. GOV'T CODE § 311.021(1).

Application

Section 21.16(b)(2) requires that "the visual material was obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private[.]"[8] This Court holds that this language is unambiguous and written disjunctively,[9] compelling a finding that a person who discloses a prohibited image without knowledge of the circumstances surrounding its creation could be prosecuted.[10] In context, its interpretation of (b)(2) breaks down thus:

> (b) A person commits an offense if:
>
> > (1) without the effective consent of the depicted person, the person intentionally discloses visual material . . .; [and]
> >
> > (2) the visual material was:
> >
> > > (A) obtained by the person; or
> > >
> > > (B) created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private.

This interpretation is unreasonable for two reasons.

---

[8] TEX. PENAL CODE § 21.16(b)(2).

[9] Slip op. at 7.

[10] Slip op. at 8.

First, it deprives the phrase "obtained by the person" of any meaning. The statute already requires that the person disclose the material. A person cannot disclose material without having first obtained it. It makes no sense for "obtaining" to be a stand-alone element, as it would "do no work."[11] An interpretation of a statute that nullifies a portion of it should trigger prompt reconsideration.

Second, this Court's construction ignores the grammatical rule that a modifier normally applies to the entire series of nouns or verbs it precedes or follows. As Justice Scalia and Bryan Garner explained, it is "a matter of common English" that, "[i]n the absence of some other indication, the modifier reaches the entire enumeration."[12] For example, the use of "unreasonable" in the Fourth Amendment phrase "unreasonable searches and seizures" naturally modifies both "searches" and "seizures."[13] It can get trickier with postpositive modifiers, but the general rule should apply unless the modifying phrase is positioned earlier in the series or a

---

[11] *See Ex parte Perry*, 483 S.W.3d 884, 913 (Tex. Crim. App. 2016) (striking a statute as overbroad in part because, "If the so-called legitimate applications of a challenged statute are covered by other statutes, then arguably the challenged statute does 'no work.'"); TEX. GOV'T CODE § 311.021(2) ("In enacting a statute, it is presumed that . . . the entire statute is intended to be effective.").

[12] Antonin Scalia & Bryan Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 147 (2012). The entire chapter on series-qualifier canon is appended.

[13] *Id*.

determiner shows it applies only to the last in the series.[14] Neither applies here.

In context,[15] the only reasonable interpretation of (b)(2)—the one that follows the rules of grammar and gives all the words meaning—is:

> (b) A person commits an offense if:
>
> > (1) without the effective consent of the depicted person, the person intentionally discloses visual material . . .; [and]
> >
> > (2) the visual material was:
> >
> > > (A) (i) obtained by the person; or
> > > (ii) created;
> > >
> > > (B) under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private.

Not only is this the better interpretation under the usual rules of statutory construction, it addresses the problem perceived by this Court. By applying the "under circumstances" clause to both obtaining and creating the material, it requires that the disclosing person know or have notice that the depicted person had a reasonable expectation of privacy in the material. In the Court's example, then, Charlie could *not* be convicted because Adam gave Charlie the image without comment and Charlie did not recognize the depicted person. As the Court said,

---

[14] *Id*. at 149-50.

[15] *Id*. at 150 (explaining that context usually prevails when dealing with modifiers).

"Charlie was not aware of Barbara's conditions posed to Adam immediately prior to the photograph's creation, nor did he receive the photograph with any commentary from Adam that would make him aware of this privacy expectation on Barbara's part."[16] Because Charlie did not know Barbara, Charlie had no reason to believe the image was not obtained by Adam from a public website.[17] As a result, any expectation Barbara had that Charlie would not share it would be unreasonable. In the words of the statute, the image was not "obtained by [Charlie] . . . under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private."

Even if the Court's interpretation were also reasonable, making the statute ambiguous, this construction is the only one that avoids an unconstitutional result.

II. The statute is not subject to strict scrutiny.

In two sentences, the Court holds that section 21.16(b) is a content-based restriction on speech because it "penalizes only a subset of disclosed images."[18] As a result, it applies the strict scrutiny test. In fairness, the Court of Criminal Appeals has summarized the test in one sentence: "If it is necessary to look at the content of

---

[16] Slip op. at 7.

[17] Slip op. at 7.

[18] Slip op. at 4.

the speech in question to decide if the speaker violated the law, then the regulation is content-based."[19] This statement is both over-simplistic and inaccurate, as it ignores the purpose of the First Amendment and the defining characteristics of a "content-based" statute. Proper consideration shows that review under the lesser "intermediate scrutiny" standard is appropriate.

Strict scrutiny is reserved for core violations of the First Amendment.

As the Supreme Court said in *Reed v. Town of Gilbert*, "it is well established that [t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."[20] Justice Alito, speaking for three of the *Reed* majority's six Justices, added,

> Content-based laws merit this protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its "topic" or "subject" favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth.[21]

---

[19] *Ex parte Thompson*, 442 S.W.3d 325, 345 (Tex. Crim. App. 2014) (quoting *Ex parte Lo*, 424 S.W.3d 10, 15 n.12 (Tex. Crim. App. 2013) (orig. op.)).

[20] 135 S. Ct. 2218, 2230 (2015) (internal quotation and citation omitted).

[21] *Id*. at 2233 (Alito, J., concurring).

And Justice Kagan, speaking for another three Justices, pointed out that the First Amendment serves to keep "the marketplace of ideas . . . free and open" by preventing "an attempt to give one side of a debatable public question an advantage in expressing its views to the people."[22] This threat is avoided by application of the most demanding constitutional test: strict scrutiny.

But that threat is not always "realistically possible," and so clinging to strict scrutiny any time content is implicated is unwise:

> To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.[23]

And that is the point here. Non-consensual invasions of reasonable expectations of privacy advance no core First Amendment purpose. There is no "debatable public question" about an ex-girlfriend's breasts. There are no competing viewpoints about a "dick pic" requested by a lover but later posted on the internet. Preventing the public shaming that follows the release of a sex tape does not threaten "democratic self-government" or any "search for truth." And the only "status quo" being

---

[22] *Id*. at 2237-38 (Kagan, J., concurring) (citations and quotations omitted).

[23] *Id*. at 2238 (Kagan, J., concurring).

advocated is a First Amendment that is applied with some measure of common sense to "speech" that has little, if any, legitimate value. Nothing covered by the statute deserves the protection of strict scrutiny.

Considering content does not make a statute content-based.

Even if a "revenge porn" statute should not get intermediate scrutiny on principle, it should because it is not content-based. "Content-based laws—those that *target* speech based on its *communicative* content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[24] The words "target" and "communicative" frame *Reed*'s subsequent statements of law:

- "Government regulation of speech is content based if a law applies to particular speech *because of the topic discussed or the idea or message expressed*."[25]
- "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions *based on the message a speaker conveys*."[26]
- "[D]istinctions drawn *based on the message a speaker conveys* .

---

[24] *Reed*, 135 S. Ct. at 2226 (emphasis added).

[25] *Id*. at 2227 (emphasis added).

[26] *Id*. (emphasis added).

. . are subject to strict scrutiny."[27]

- "[L]aws that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government *because of disagreement with the message* [*the speech*] *conveys* . . . must also satisfy strict scrutiny."[28]

- "A regulation that *targets* a sign *because it conveys an idea about a specific event* is no less content based than a regulation that *targets* a sign *because it conveys some other idea*."[29]

The threshold question is: Does the statute at issue 1) restrict communication of a message or idea for its own sake, or 2) prevent a harm that is collateral to the speech but requires, out of necessity, some reference to the speech incidentally prohibited? It is the very question posed by the "secondary-effects" doctrine.[30]

In *Renton v. Playtime Theatres*,[31] the Supreme Court upheld a zoning ordinance that prohibited adult movie theaters within 1,000 feet of certain buildings.[32]

---

[27] *Id*. (emphasis added).

[28] *Id*. (emphasis added) (bracketed material in original) (internal quotations and citations omitted).

[29] *Id*. at 2231 (emphasis added).

[30] *Reed* did not discuss secondary effects due to the facts of that case. Because "[t]he restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign"—its categories included "ideological signs," "political signs," and "qualifying event" signs, the latter of which included religious assembly—there was "no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny." *Id*. at 2224-25, 2227.

[31] 475 U.S. 41 (1986).

[32] *Id*. at 47-48.

Enforcement necessitated case-by-case consideration of what movies were shown at a given theater to determine if the "speaker"—the theater owner—violated the ordinance. [33] "Nevertheless," the Supreme Court concluded, "the Renton ordinance is aimed not at the content of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community."[34] The ordinance "by its terms" was designed to prevent crime, protect the city's retail trade, maintain property values, and generally preserve quality of life, "not to suppress the expression of unpopular views."[35] Whether analyzed as a form of time, place, and manner regulation, or as a not-quite-content-based ordinance focused on secondary effects,[36] looking at the content of the speech, on its own, was not enough to require strict scrutiny.

The CCA recognizes the Supreme Court's application of secondary effects.

In *Ex parte Thompson*, the Court of Criminal Appeals held the "improper photography or visual recording" statute facially unconstitutional.[37] It cited *Renton*

---

[33] *Id*.

[34] *Id*. at 47 (emphasis in original).

[35] *Id*. at 48.

[36] *Id*. at 46-47.

[37] *See* former TEX. PENAL CODE § 21.15(b)(1) (amended by Acts 2015, 84th Leg., SB 1317, eff. Jun. 18, 2015).

and discussed "secondary effects" as an application of intermediate scrutiny:

> In some situations, a regulation can be deemed content neutral on the basis of the government interest that the statute serves, even if the statute appears to discriminate on the basis of content. These situations involve government regulations aimed at the "secondary effects" of expressive activity. In this type of situation, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." The government regulation at issue need only be justified without reference to the content of the regulated speech.[38]

The Court thus contradicted its plain statement, *supra*, that a law is content-based if it is necessary to look at the content of the speech to determine a violation.

Thompson also explained how the Legislature can ruin what is otherwise a valid secondary-effects statute. That Court recognized two content-neutral interests raised by the improper-photography statute: lack of consent and privacy.[39] It held that the former was not served by the statute because it penalized only photography "which [wa]s done with the intent to arouse or gratify sexual desire."[40] "By discriminating on the basis of the sexual thought that underlies the creation of photographs or visual recordings, the statute discriminates on the basis of content."[41]

---

[38] *Ex parte Thompson*, 442 S.W.3d at 345-46 (citations omitted).

[39] *Id.* at 346-48.

[40] *Id*. at 347.

[41] *Id*.

And the statute was not tailored to serve a privacy interest because it applied to all non-consensual photography or visual recording (even where no expectation of privacy could be justified), did so based on the "requisite sexual intent," and "contain[ed] no language addressing privacy concerns."[42] "[T]he only sense in which the statute *necessarily* protects privacy is by protecting an individual from being the subject of someone else's sexual desires."[43]

The Legislature learned the lesson of Thompson.

The statute at issue in this case appears designed to pass every test the improper photography statute failed:

- Subsection (b)(1) explicitly requires that the disclosure be without the depicted person's consent.
- Subsection (b)(2) explicitly protects only reasonable expectations of privacy, which was only implicitly and incidentally served by the statute in *Thompson*. It thus goes no further than necessary to protect what courts have long accepted as a compelling societal interest.
- The requirements of harm and the revelation of the depicted person's identity give substance to the State's driving interest in protecting the victim and narrow the statute's application.
- Unlike the improper-photography statute, it does so without reference to the speaker's thoughts, message, or desires; the only mental state is that attached to the act of disclosure.

---

[42] *Id*. at 348.

[43] *Id*. (emphasis in original).

The statute thus effectively serves two content-neutral purposes without any of the drawbacks described in *Thompson*.

Can it be wrong to punish less speech?

Importantly, focusing on a specific type of non-consensual invasion of privacy does not forfeit the content-neutrality of the statute. If a State can lawfully prohibit a certain class of speech, it should be able to prohibit only parts of that class so long as it does not discriminate based on viewpoint or message. This was explained in *R.A.V. v. St. Paul*, in which the Supreme Court addressed discrimination within an exempt class of speech:

> When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.[44]

For example, government may prohibit only that obscenity which is "the most patently offensive *in its prurience* -- *i. e.*, that which involves the most lascivious displays of sexual activity," but it may not prohibit only that obscenity which includes offensive political messages.[45] And it may criminalize only those threats of violence

---

[44] 505 U.S. 377, 388 (1992).

[45] *Id*. (emphasis in original).

that are directed against the President, but it may not criminalize only those threats against the President that mention his policy on aid to inner cities.[46] In both cases, a prohibition on speech that otherwise fell without the First Amendment would be invalid because of a content-based focus. The Supreme Court extended this reasoning to commercial speech, the regulation of which is subject to intermediate scrutiny.[47] For example, government may regulate price advertising in one industry but not in others because the perceived risk of fraud is greater there, but it may not prohibit only that commercial advertising that depicts men in a demeaning fashion.[48]

There is no reason not to apply this rationale to other regulations of speech that are subject to intermediate scrutiny, such as content-neutral regulations with the secondary effect of impacting protected speech. If the State has any substantial or compelling interest in preventing the harm that results from non-consensual disclosures of private matters without regard to the actor's message or thoughts, it must be able to focus on the violations it deems most harmful. The alternative would effectively prevent the State from protecting potential victims. On one hand, as the Court of Criminal Appeals intimated in *Thompson*, a statute prohibiting non-

---

[46] *Id*.

[47] *Id*. at 388-89.

[48] *Id*.

consensual disclosures of any type would be entitled to intermediate scrutiny but be so broad as to fail it.[49] On the other hand, narrowing its coverage to the worst offenses would make it content-based and thus subject to a level of scrutiny that is rarely satisfied. If that is the case, the test set out in *Thompson* to qualify for intermediate scrutiny is pointless and the promise of protection for would-be victims is illusory.

III. The statute satisfies intermediate scrutiny.

Under intermediate scrutiny, the statute will be upheld if it promotes a substantial (rather than compelling) interest and "the means chosen are not *substantially* broader than necessary to achieve the government's interest."[50] As shown above, the State's interest in protecting the individual from non-consensual invasions of reasonable expectations of privacy is compelling, not just substantial.[51] And the means selected to protect that interest are not substantially broader than necessary. In fact, they are the least restrictive means available.

Subsection (b) covers only what is justified by the compelling interest it serves:

- It applies only to intentional disclosure; no amount of knowledge of likely

---

[49] *Ex parte Thompson*, 442 S.W.3d at 346-47.

[50] *Id*. at 345 (citations and internal quotations omitted, emphasis added).

[51] *Id*. at 348 ("Privacy constitutes a compelling government interest when the privacy interest is substantial and the invasion occurs in an intolerable manner.").

disclosure or carelessness will suffice. A speaker need not fear that accidental disclosure—a lost phone, an errant e-mail—will result in criminal sanctions.

- It requires lack of consent and that the visual material was obtained or created under circumstances evincing a reasonable expectation of privacy. The speaker is thus put on actual and constructive notice that intentional or knowing disclosure is forbidden and could cause harm.

- It requires actual harm, presumably from the identity of the depicted person being revealed directly or as a result of its disclosure. The speaker could intentionally disclose visual material otherwise prohibited by the statute if the depicted person is not identified or identifiable.

By including all of these requirements, the Legislature has ensured that it restricts the speaker only to the extent the compelling interest is served. For the same reasons, if the statute is content-based it satisfies strict scrutiny as well.[52]

IV. Any protected speech incidentally prohibited is unsubstantial in relation to the statute's plainly legitimate sweep.

A statute that is constitutional under a normal facial analysis and would plainly cover the actions of the complaining defendant might still be unconstitutionally overbroad. This statute is not.

As the Court notes, it is only when a statute is not facially unconstitutional—usually because it could lawfully prohibit the defendant's

---

[52] *Ex parte Thompson*, 442 S.W.3d at 344 (statute will be upheld under strict scrutiny if it uses the least restrictive means of achieving the government's compelling interest).

actions—that overbreadth comes into play.[53] And it is at this point that *the defendant* would have the burden of proving a realistic probability that a substantial amount of protected speech is prohibited in relation to the statute's plainly legitimate sweep.[54] Appellant has failed to do so.

Properly construed, the legitimate sweep of the statute is plain and provides no realistic probability that it chills protected speech. The requirements of consent and "visual material," as that term is defined, removes from consideration all of the other types of communication and media swept up by the statute in *Ex parte Lo* that rendered it overbroad.[55] The consent requirement further ensures that no "legitimate" pornographers are chilled. Any other hypothetical situations involving injured third parties are more fanciful. Pictures of little children taken at bath time by their parents and posted on Facebook, for example, could scarcely cause harm to the depicted person and, regardless, would be disclosed by someone with the ability to consent on

---

[53] Slip op. at 8; *see State v. Johnson*, 475 S.W.3d 860, 864-65 (Tex. Crim. App. 2015) ("[U]nder the First Amendment's 'overbreadth' doctrine, a law may be declared unconstitutional on its face, even if it may have some legitimate application and even if the parties before the court were not engaged in activity protected by the First Amendment.").

[54] *Ex parte Thompson*, 442 S.W.3d at 349-50.

[55] 424 S.W.3d at 20 (detailing the vast array of art, literature, and entertainment throughout world history included in the Court's interpretation of the statute at issue).

the child's behalf.[56] This is not a promise of non-enforcement[57]—this is the plain language of the statute.

V. Conclusion

Section 21.16(b) is narrowly written to prevent the harm that comes from non-consensual privacy violations of the most intimate kind. The speech that is incidentally restricted deserves reduced First Amendment protection, both on principle and according to established law. The statute satisfies intermediate scrutiny and appellant cannot show it is overbroad. This is all because the Legislature followed the direction of the Court of Criminal Appeals in *Ex parte Thompson*. This Court should, too.

---

[56] *Ex parte Thompson*, 442 S.W.3d at 346 ("even when a particular person cannot consent, because of an actual or legal lack of capacity, someone else generally has the right or duty to consent on his behalf.").

[57] *Johnson*, 475 S.W.3d at 879-80 (raising and rejecting the argument that police and prosecutors will notice the glaring unconstitutionality of a statute and decline to apply it, thereby reducing any real chilling effect).

PRAYER

WHEREFORE, the State prays that the Court grant this motion for rehearing, withdraw its opinion, and, after reconsideration, find TEX. PENAL CODE § 21.16(b) constitutional.

Respectfully submitted,

STACEY M. SOULE
State Prosecuting Attorney
Bar I.D. No. 24031632

/s/ John R. Messinger
JOHN R. MESSINGER
Assistant State Prosecuting Attorney
Bar I.D. No. 24053705
P.O. Box 13046
Austin, Texas 78711
512/463-1660 (Telephone)
512/463-5724 (Fax)
information@spa.texas.gov

CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4, this document contains 4,183 words according to WordPerfect X7's "word count" tool.

CERTIFICATE OF SERVICE

The State Prosecuting Attorney's Motion for Rehearing has been eFiled with the Court on the 8th day of May, 2018, and served on each of the following:

Kevin Hayes
Michael J. West
Smith County District Attorney
4th Floor, Courthouse
100 North Broadway
Tyler, Texas 75702
mwest@smith-county.com

Mark W. Bennett
Bennett & Bennett
917 Franklin Street
Fourth Floor
Houston, Texas 77002
MB@ivi3.com

Courtesy Copy Provided:
Texas Solicitor General Scott A. Keller
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711
scott.keller@oag.texas.gov
andrew.davis@oag.texas.gov

/s/ John R. Messinger
JOHN R. MESSINGER
Assistant State Prosecuting Attorney

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).