

Terms of Art

Occasional Dispatches from the Intersection of Language & the Law

Worth a Doit

David Franklin

IN CASE YOU HAVEN'T BEEN paying attention, dictionaries are in. Ever since the advent of textualism on the Supreme Court a decade or so ago, many a wag has observed that the Webster to emulate in oral argument is not Daniel but Noah. A Court-watcher from the *Harvard Law Review* calculated that during the 1992 Term one Justice or another referred to a dictionary in twenty-eight percent of the cases decided by published opinion.

This is not to say that judicial notice-taking of dictionaries is a new phenomenon. In the 1893 case of *Nix v. Hedden*, for example, the Supreme Court tackled the age-old question whether a tomato is a fruit or a vegetable (for purposes, in that case, of the Tariff Act of 1883). After noting that Webster's and Worcester's dictionaries classified the tomato as a fruit, the Court went its own way. Citing one of the Court's earlier decisions involving

beans, Justice Gray said of tomatoes, "[a]s an article of food on our tables, whether baked or boiled, or forming the basis of soup, they are used as a vegetable, as well when ripe as when green. This is the principal use to which they are put. Beyond the common knowledge which we have on this subject, very little evidence is necessary, or can be produced." In other words: Put away your dictionaries; we know a vegetable when we see one.

Although the *Nix* Court may not have known it, just two years earlier a new specialized dictionary had been born: *A Law Dictionary, containing Definitions of the Terms and Phrases of American and English Jurisprudence*, by Henry Campbell Black, M.A., better known to generations of initiates as *Black's Law Dictionary*. The Court soon caught on to *Black's*, and to date it has resorted to the compendium in a total of 147 opinions, beginning in 1901 when it cited the first edition's definition of *common law*.

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Over the course of six editions and one hundred years of massive changes in law and language alike, that original 73-word definition of *common law* has changed by precisely one word. And therein lies the charm of *Black's*. While most dictionaries undergo a kind of agronomic evolution from edition to edition, plowing old words under as new ones rise to the surface, *Black's* rarely bothers to revise or delete old entries, no matter how archaic or obscure. The result calls to mind a fantastic museum warehouse where old and new curiosities lie piled atop one another: *gibbet law* (mob justice in the parish of Halifax, England) next to *Gideon v. Wainwright*; *patruus maximus* ("A great-grandfather's father's brother") hard by *pattern of racketeering activity*.

For many of us, a hardbound copy of *Black's* was one of the first investments we made upon entering law school. And I suspect that for many of us *Black's* is the one law book that we think nothing of trundling from office to office, or from residence to residence, as the years since law school lengthen inexorably. We keep it handy because it stares down at us from the shelf in a solid and reassuring way, and because once in a while we need to look up *nunc pro tunc*. Yet few of us actually take the time simply to enjoy its polyglot charms.

They are enjoyable indeed. Leafing through the pages of *Black's* can cast one back to the feudal English countryside as vividly as any historical novel – and it can be educational to boot. Those of us who thought that a *borg* was a Swedish tennis-playing extraterrestrial from the latest version of *Star Trek* learn that it is instead "[i]n Saxon law, a pledge, pledge giver, or surety." We learn too that a Saxon outlaw was known as a *frendlesman*, because the law considered him bereft of friends. (His former friends would indeed think twice before harboring him, lest they be slapped with a fine known as *frendwite*.) In old English law, *Black's* informs us, an *objurgatrix* was a scold or "unquiet woman" who was punished with the

cucking-stool. And a *doit* was "a base coin of small value prohibited by Henry the Fifth." For those of you scoring at home, the *doit* was banned in 1416. But, says *Black's*, "[w]e still retain the phrase, in the common saying, when we would undervalue a man, that he is not worth a *doit*."

Yet *Black's* is not completely Anglo- or Saxon-centric. We learn there that a *blumba* is a certifying metal tag attached to kosher meat; that a *gomashia* is a Hindu steward or factotum; that a *hui* is a Hawaiian landowners' association – and that *grass* is a "[j]argon name for marihuana." Disappointingly, *Black's* chose to exclude my favorite word of Greek extraction, *ucalegon*, defined in *Webster's* as "a neighbor whose house is on fire."

Of course, *Black's* can be criticized on a number of fronts – and it has been. David Mellinkoff, author of his own *Dictionary of American Legal Usage*, complains in a 1983 law review article that *Black's*, and its somewhat lesser known competitor *Ballentine's*, are stuffed with useless padding. He singles out four categories of filler: pointless Latin and French maxims; "[c]laptrap from the feudal system," such as our friend the *doit*; a miscellany of terms from "Anglo-Saxon law, Hindu, Japanese, Jewish, Greek, Spanish, French, Roman, canon, ecclesiastical, civil, and something called 'Old European' law"; and ordinary English words like "garden" and "horse power" whose appearance in a law dictionary is hard to justify.

Professor Ellen Aprill also raises the fair criticism that the latest (1990) edition of *Black's* persists in referring to the "reasonable man" standard in tort law rather than the "reasonable person" standard. Similarly, the editors might do well to delete entries like this one for *dulocracy*: "A government where servants and slaves have so much license and privilege that they domineer." And Mellinkoff is no doubt correct that many everyday words defined in *Black's* have no business being included in a law

dictionary. But even some of these entries contain marvelous digressions. Consider the *Black's* definition of *whale*: "A royal fish, the head being the king's property, and the tail the queen's." Or this, the entire entry for *Hell*: "The name formerly given in England to a place under the exchequer chamber, where the king's debtors were confined."

Concluding his article, Mellinkoff wonders whether *Black's* hasn't become little more than "a dilettante's encyclopedia of curiosities." *Terms of Art* can only agree – and add, Thank heaven for it.

In closing, here's a recommendation for lawyers seeking yet another way to alienate non-lawyers at parties. Many readers of *Terms of Art* will be familiar with "The Dictionary Game." (In my family we called it "Fictionary.") The game requires a group of four to seven people, a fairly comprehensive dictionary, pencils and paper. Each contestant takes a turn being the "reader." The reader locates a word in the dictionary whose meaning is unknown to the group. She then writes down the actual definition while the others compose plausible-sounding definitions of their own. When all the definitions are in, the reader reads them aloud and players vote for the one they think is genuine. One point is awarded for each correct vote; one point is awarded for each vote one's false definition manages to attract; and the reader receives a bounty of, say, three points if she fools everybody.

The lawyer's variant would be to play this game using *Black's Law Dictionary*. Readers are

urged to try it and report their results to *The Green Bag*. You can send an email to TermsOfArt@greenbag.org. To get you started, here are a few words gleaned from the pages of *Black's*. In each case, one of the four definitions is accurate. Can you guess which? Answers are listed below.

1. GAMALIS

- a) One who serves as a temporary governor while the permanent one is away at war.
- b) A child born to betrothed but unmarried parents.
- c) A boor required to work for his lord two days a week.
- d) The provider of wine to a nobleman.

2. HYSTEROPOTMOI

- a) Servants who work for multiple masters.
- b) Wild rivers, unsuitable for establishing boundaries.
- c) Freemen who deliver themselves to the protection of a more powerful person in order to avoid military service.
- d) Returning soldiers, long feared dead, who are required to reenter their houses through a hole in the roof.

3. EQUULEUS

- a) A kind of rack for extorting confessions.
- b) A tax paid on horses.
- c) A ritual of spiritual marriage involving the tossing of green herbs.
- d) The ancient ceremony whereby a debtor's body is cut to pieces and distributed *pro rata* to his creditors.

[To inhibit peeking, the answer to no. 1 follows the answer to no. 3 by one letter in the alphabet, but precedes the answer to no. 2 by two letters. Ed.] 