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Supreme Court No. 96694-0  
Court of Appeals No. 49979-7-II

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**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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FIRST STUDENT, INC.,

Appellant/Petitioner,

v.

STATE OF WASHINGTON  
DEPARTMENT OF REVENUE,

Respondent.

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**SUPPLEMENTAL BRIEF OF FIRST STUDENT, INC.**

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## I. INTRODUCTION

The term “for hire” has had a long-standing and consistent usage in the transportation context. Statutes and regulations related to the transportation industry routinely rely on the term “for hire” to distinguish the activities subject to regulation from those that are not. The Legislature has also used the term “for hire” in distinguishing those companies subject to the Public Utility Tax (“PUT”), Ch. 82.16 RCW, and those that are not.

Despite decades of consistent usage of the term “for hire,” the Department of Revenue (“Department”) asserts for the first time in this litigation, that the term “for hire” in RCW 82.16.010(6) and (12) requires the passengers themselves to pay for the transportation, a meaning that has never been applied in United States jurisprudence.

The Department acknowledges that the definition it advances conflicts with the other usages of the term “for hire” in RCW 82.16.010 and the common meaning of “for hire” in ordinary dictionaries. Instead, it seeks refuge in a strained reading of a *Black’s Law Dictionary* definition from 1951. However, even a cursory review of the case law from which the *Black’s Law Dictionary* definition is drawn shows that the reading advanced by the Department is unsupported.

There is nothing in the statutory context or legislative history demonstrating that the Legislature intended to adopt a unique meaning of

“for hire,” in the definitions of “motor transportation business” and “urban transportation business” in RCW 82.16.010(6) and (12), especially one that was at odds with the common and consistent meaning employed in the other PUT definitions and other transportation statutes.

Moreover, the Department’s position that school buses are not operated “for hire” is even contradicted by its own regulation in effect between 1943 and 1954, which states:

*NOTE: Persons operating school buses for hire are taxable under the classification of “Service and Other Activities” of Title II (Business and Occupation Tax) at the rate of 1/2 of 1% of gross income.*

Washington State Tax Commission Rule 180 (1943/49) (emphasis added).

In 1955, the Legislature expressly expanded the statute at issue to include all persons operating vehicles “for hire.” Given that the regulation interpreting the statute for over a decade prior to this amendment expressly identified school buses as being operated “for hire,” there is no reasonable basis to conclude the Legislature intended to adopt the Department’s novel reading of the term “for hire.”

Instead, the Court should reverse the Court of Appeals’ decision and apply the definition of “for hire” that has been consistently applied in common law, set forth in ordinary dictionaries, widely used in Washington statutes and regulations, and is consistent with the statutory context.

## **II. ISSUES PRESENTED**

1. When interpreting an undefined statutory term with a familiar legal meaning, may a court adopt a reading of a legal dictionary definition that conflicts with the meaning found in common law?

2. Must courts give deference to an agency's post hoc rationale advanced for the first time in litigation, when the rationale is inconsistent with the agency's prior administration of the statute?

## **III. STATEMENT OF THE CASE**

### **A. First Student's Business**

First Student is a transportation company that provides transportation services for compensation to organizations including school districts, youth groups, summer camps, and churches. CP 30 ¶ 3; CP 30-31 ¶ 6; CP 35; CP 50. Because First Student is in the business of operating vehicles to transport passengers for compensation, it is registered as a carrier with both the Washington Utilities and Transportation Commission and the U.S. Department of Transportation. CP 31 ¶¶ 10 & 12; CP 56-57. The Department admits that First Student received compensation for transporting students as passengers. CP 26-27 (Requests for Admission Nos. 3-5). Between 1990 and 2014, First Student paid B&O taxes on its transportation services. CP 110-11.

**B. Department's Refund Denial and Trial Court Ruling.**

First Student filed refund requests with the Department, seeking refunds of overpaid B&O taxes for the tax periods between December 1, 2008 and December 31, 2014. CP 21. First Student asserted that the Department should tax it under the PUT classifications as opposed to the B&O tax classification, and that the Department's exclusion of school bus operators from the PUT classifications in WAC 458-20-180 ("Rule 180") is inconsistent with the statute. CP at 128-29. The Department denied First Student's refund request, refusing to explain how Rule 180 is consistent with the statute. CP 22. The Department also, without explanation, denied First Student's petition for reconsideration. CP 11.

First Student then timely filed the current refund action challenging the Department's determination and filed a motion for summary judgment. CP 9; CP 58. In response, the Department's attorneys asserted, for the first time, that Rule 180's school bus exclusion was consistent with the statute because the services First Student provided to school districts were not provided "for hire" because the passengers themselves did not pay for the transportation. CP 142-44.

The trial court granted summary judgment for the Department, concluding that the term "for hire" required compensation for the service to be provided on a per-passenger basis. CP 287.

**C. The Court of Appeals' Decision.**

The Court of Appeals affirmed the trial court's summary judgment order. First, it determined that the legal or technical meaning of the term "for hire" at the time the statute was drafted contemplated that the passengers must be directly responsible for any compensation paid and held that the term "for hire" is ambiguous. *First Student, Inc. v. Dep't of Revenue*, 4 Wn. App. 2d 857, 868-70, 423 P.3d 921 (2018). Second, because the Court of Appeals determined that the term is ambiguous, it held that the Department's interpretation of the term was entitled to deference and adopted the Department's position. *Id.* at 871-75.

**IV. ARGUMENT**

Companies in the business of operating vehicles to transport people or property for compensation have generally been subject to PUT since 1935. *See* Laws of 1935, ch. 180, § 36. Under the plain language of the current statutes any business operating vehicles "for hire" is taxable under either the motor or urban transportation tax classifications in RCW 82.16.010 and exempt from B&O tax. *See* RCW 82.04.310 (excluding activities subject to PUT from B&O tax).

Here, it is undisputed that First Student is in the business of operating vehicles to transport passengers for compensation. CP 27 (Requests for Admission Nos. 3-5). The Department attempts to avoid the

plain language of the statute by asserting the Legislature intended the term “for hire” in RCW 82.16.010(6) and (12) to have a novel meaning that is inconsistent with the common law usage of the term, the meaning found in ordinary dictionaries, and the Department’s administration of the statute.

**A. The Plain Language of the Statutes Imposes PUT on Companies Using Vehicles to Transport Passengers for Compensation.**

Under the current statutes, the operation of a vehicle to transport people or property “for hire” is subject to PUT as either a motor or urban transportation business. Nothing in the language of the statutes limits the scope of the motor or urban transportation business classifications based on the type of vehicle or passenger involved in the transportation, or how the company is compensated for its service.

“Motor transportation business” is defined as:

The business (except urban transportation business) of operating *any motor propelled vehicle* by which persons or property of others *are conveyed for hire* and *includes, but is not limited to*, the operation of any motor propelled vehicle as an auto transportation company (except urban transportation business), common carrier, or contract carrier as defined by RCW 81.68.010 and 81.80.010.

RCW 82.16.010(6) (emphasis added).

“Urban transportation business” is defined as:

[T]he business of operating *any vehicle* for public use *in the conveyance of persons or property for hire*, insofar as [it operates within a certain proximity to a city]. *Included*

*herein, but without limiting the scope hereof, is the business of operating passenger vehicles of every type.*

RCW 82.16.010(12) (emphasis added).

Consistent with the plain language of the statutes, the Department's interpretive rule states that a company is taxable under one of these PUT classifications, if it is in the "business of operating motor-driven vehicles, on public roads, used in transporting persons or property belonging to others, on a for-hire basis." Rule 180(5).

The Department does not dispute that the transportation services First Student provides to school districts include the operation of a vehicle to transport people. CP 27 (Requests for Admission Nos. 3-5). The Department's sole argument is that the transportation services provided to school districts are not provided "for hire."

The term "for hire" is not defined in RCW 82.16.010. When a term is not defined in a statute, the courts will look to the plain meaning of the words as they are ordinarily given. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The plain meaning of a statute requires examining words in the context in which they are found and the statutory scheme as a whole. *Id.*

The plain meaning of the term "for hire" is "available for use or service in return for payment." *Webster's Third New International*

*Dictionary* 1072 (3d ed.) (2002). The Court of Appeals agreed that this definition is consistent with the ordinary meaning of “for hire” at the time the statute was drafted, and the other uses of the term “for hire” in RCW 82.16.010. *First Student*, 4 Wn. App. 2d at 866-70. The only issue was whether there was a technical meaning of “for hire” that the Legislature employed solely for the motor and urban transportation definitions. *Id.*

**1. The motor and urban transportation PUT classifications have always been tied to the transportation of persons or property for compensation.**

When it was first enacted, the PUT tied the “motor transportation business”<sup>1</sup> tax classification exclusively to the motor carrier definitions in the statutes regulating motor transportation. *See* Laws of 1935, ch. 180, § 36. All of the motor carrier definitions referenced in the original PUT statute applied to persons providing transportation “for compensation.”<sup>2</sup> These motor carrier definitions are still referenced in the current version of the PUT statute, and the motor carrier definitions are still tied to the provision of transportation “for compensation.”<sup>3</sup>

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<sup>1</sup> The “highway transportation business” classification was renamed the “motor transportation business” classification in 1961. Laws of 1961, ch. 293, § 12(9).

<sup>2</sup> Laws of 1921, ch. 111, § 1(d) (defining “auto transportation company” as any person transporting passengers “for compensation”); Laws of 1933, ch. 166, §§ 1(f), 13 (defining “contract hauler” and “for hire carrier” as persons engaged in the business of transporting property “for compensation”); Laws of 1933, Ex. Sess., ch. 55, § 1(e) (defining “certified freight carrier” as persons engaged in the transportation of property “for compensation as a common carrier”).

<sup>3</sup> *See* RCW 82.16.010(6) (defining “motor transportation business”); RCW 81.68.010(3) (defining “auto transportation company”); RCW 81.80.010(1)-(3) (defining common and

While the definitions of “auto transportation company,” “common carrier,” and “contract carrier” were broadly defined to encompass most motor transportation provided for compensation, there were specific exclusions from these definitions. Importantly, the definition of “auto transportation company” excluded taxicabs, hotel buses, school buses, and vehicles exclusively transporting agricultural products from the point of production to a market. Laws of 1935, ch. 120, § 1(d).

The 1943 and 1949 versions of Rule 180 note that “persons operating school buses *for hire*” are taxable under the Service and Other B&O tax classification. Washington State Tax Commission Rule 180 (1943/49) (emphasis added). Thus, the school bus exclusion in Rule 180 had its origins in the definition of “auto transportation company,” which excluded school buses, not a strained reading of the term “for hire.”

In 1955, the Legislature amended the statute to include all “for hire” motor transportation companies regardless of whether they fell within the referenced definitions. Laws of 1955, ch. 389, § 28(9). Thus, the PUT statute was expressly amended to include businesses operating taxicabs, hotel buses, school buses, and agricultural vehicles that were previously not

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contract carriers).

taxable due to the express exclusions in the definition of “auto transportation company” in RCW 81.68.010.

The relevant portions of the current statute have not been amended since 1955. *Compare* Laws of 1955, ch. 389, § 28(9) *with* RCW 82.16.010(6). Thus, the current version of the statute clearly applies to all companies operating vehicles to transport people or property for compensation. As it is undisputed that First Student transports students as passengers for compensation, its services are taxable under the motor and urban transportation PUT classifications.<sup>4</sup>

**2. The term “for hire” does not depend on who pays the fare or how the company charges for transportation services.**

To avoid the plain meaning of the term “for hire,” the Department argues that when the Legislature amended the statute in 1955, the term “for hire” was limited to situations where the passengers were responsible for paying the fare. CP 143. To support this interpretation, the Department cites the definition of “for hire” from the 1951 version of *Black’s Law Dictionary*. This definition states:

***FOR HIRE OR REWARD.*** *To transport passengers for property of other persons than owner or operator of vehicle for a reward or stipend, to be paid by such passengers, or persons for whom such property is transported, to owner or operator.* Michigan Consol. Gas Co. v. Sohio Petroleum Co., 32 N.W.2d 353, 356, 321 Mich. 102.

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<sup>4</sup> Activities subject to PUT are exempt from B&O tax. RCW 82.04.310.

CP 372.

Under the Department's reading, if a third party pays for the transportation, then the service is not provided "for hire" as the passengers themselves are not responsible for paying the compensation. See CP 143. The Department's hyper-literal reading of the definition distorts its meaning and creates a distinction that is not consistent with the common legal usage of the term or the statutory context. A natural reading of the definition is that providing transportation "for hire" is dependent on receiving a reward for transporting other people or their property. In other words, a person transporting themselves or their own property is not providing transportation "for hire."

Moreover, none of the case law supporting the *Black's Law Dictionary* definition or cited by the Department in its briefs makes the distinction advanced by the Department. The *Black's Law Dictionary* definition is copied from a section of *Michigan Consolidated Gas Co. v. Sohio Petroleum Co.*, 321 Mich. 102, 32 N.W.2d 353, 355 (1948), which quotes a passage from *City of Sioux Falls v. Collins*, 43 S.D. 311, 178 N.W. 950, 951 (1920). Neither case involved the transportation of passengers.<sup>5</sup>

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<sup>5</sup> *Michigan Consolidated Gas Co.* examined whether a company using its pipeline to transport its own natural gas was transporting the gas "for hire, compensation or otherwise." 32 N.W.2d at 355. *City of Sioux Falls* involved whether a baker delivering his bakery products to customers was transporting property "for hire or reward." 178 N.W. at 951.

Therefore, neither case could have held that the term “for hire or reward” turned on whether the passengers themselves paid for the transportation. Any statements in these cases regarding the term “for hire” in the context of transporting passengers were pure dicta. In fact, no case citing *City of Sioux Falls* has ever involved the transportation of passengers. See Pet. For Review n. 10. Again, there is no distinction based on whether the passengers themselves are paying the fare. What is relevant is that the carrier is transporting someone else for compensation. As such, the case law relied on by the 1951 edition of *Black’s Law Dictionary* is completely consistent with the meaning of the term in ordinary dictionaries and the use of the term in the other PUT classifications.

**B. The Meaning of a Familiar Legal Term Is Tied to the Meaning Given To It In The Common Law.**

Under established Washington law, the meaning of well-known legal terms used in statutes is derived from the meaning that such terms have at common law. “[I]t is presumed that the legislature intended [the term] to mean what it was understood to mean at common law.” *Ralph v. State Dep’t of Nat. Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014) (citing *N.Y. Life Ins. Co. v. Jones*, 86 Wn.2d 44, 47, 541 P.2d 989 (1975)). This concept stretches back to 1916 and is closely followed by the courts. See *Irwin v. Rogers*, 91 Wash. 284, 287, 157 P. 690 (1916). This makes sense, in that a term usually

gains meaning from its usage in certain contexts and common law is the primary source of usage for many legal terms.

While legal dictionaries can be useful for quickly determining the meaning given to specific terms at common law, they should not be used blindly to supplant a well-known meaning. *See Black's Law Dictionary* at iv (6th ed. 1990)(“A Final Word of Caution” in the preface states that “a legal dictionary should only be used as a ‘starting point’ for definitions”).

Accordingly, a reading of a legal dictionary definition that is not supported by the case law applying the term should be rejected for two reasons. First, adopting such a reading would be contrary to the longstanding rule that legal terms should be given their meaning at common law. Second, it ignores the purpose of a legal dictionary, which is to capture the meaning of a term in the legal context.<sup>6</sup>

The current editor of *Black's Law Dictionary* has even stated that prior editions contained “parroted ill-phrased definitions” copied from judicial pronouncements.<sup>7</sup> Therefore, definitions pulled from prior editions,

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<sup>6</sup> PREFACE TO THE TENTH EDITION, *Black's Law Dictionary* (10th ed. 2014) (noting that preparation of an entry may involve consulting “5, 15, or perhaps 50 cases.”)

<sup>7</sup> *See* Bryan A. Garner, *Legal Lexicography*, 6 Green Bag 2d 151, 156 (2003) (discussing shortcomings in the way definitions were compiled in these editions). Garner also notes that the definition “hotel” in the sixth edition, which was pulled from a Utah Supreme Court decision, “is inaccurate, even if a state supreme court said it.” *Id.*

such as the definition of “for hire” at issue, deserve heightened scrutiny to ensure that they accurately capture the common law usage.

**C. The Common Law Meaning of “For Hire” Is Not Ambiguous.**

In this case, the Department’s arguments ignore the common law usage of “for hire.” Indeed, no holding in any case across the United States addressing the term “for hire” limits its scope based on whether the passengers themselves pay the compensation. Therefore, the common law meaning of “for hire” cannot turn on whether the passengers themselves pay for the transportation.

On the other hand, there are a number of cases holding that carriers paid by third parties to transport passengers are operating “for hire.” The case most on-point is *Surface Transportation Corp. of New York v. Reservoir Bus Lines, Inc.*, 271 A.D. 556, 67 N.Y.S.2d 135, 137 (1946). In *Surface Transportation*, the bus company argued that it was not operating “for hire” because the passengers themselves were not paying for the transportation. *Id.*

In rejecting the bus company’s argument, the court stated:

Defendant’s contention that it is *not carrying passengers for hire is baseless*. Its omnibuses are carrying passengers under contract with the landlords. Each landlord pays to defendant a monthly lump sum to furnish the service. The compensation is paid to defendant for carrying passengers. *Whether the cost of the service is borne by the landlords or by the tenants is immaterial. The fact remains that*

*defendant is receiving pay to transport passengers and is accordingly carrying passengers for hire.*

*Id.* at 139 (emphasis added).

This explicit and forceful rejection of the Department’s reading of “for hire” by the New York appellate court is in line with many other cases adopting similar holdings.<sup>8</sup> This case law, combined with the complete lack of case law supporting the Department’s position, demonstrates that there is no way that the distinction read into the *Black’s Law Dictionary* definition by the Department is consistent with the common law understanding of the term “for hire.”<sup>9</sup> Because the common law meaning of the term “for hire”

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<sup>8</sup> See, e.g., *Burnett v. Allen*, 114 Fla. 489, 154 So. 515, 518 (1934) (“The bus driver who contracts to furnish transportation and to transport school children from places at or near their residences to public free school becomes a special contractor for hire....”); *Sheffield v. Lovering*, 51 Ga. App. 353, 180 S.E. 523, 524 (1935) (“[T]he operator for hire of a school motorbus who operates along a certain route every school day in taking all school children alike to and from a certain school is a carrier of passengers in so far as such school children are concerned....”); *Short Line, Inc. v. Quinn*, 298 Mass. 360, 10 N.E.2d 112, 113 (1937) (bus operator transporting employees under a contract with a shoe manufacturer held to be “transporting passengers for hire.... It is unimportant that the hire is paid by one not a passenger.”); *Baltimore & A.R. Co. v. Lichtenberg*, 176 Md. 383, 4 A.2d 734, 737 (1939) (transporting laborers under contract with federal government was “a use of the roads of the State for hire, in carrying passengers”); *Maley v. Children’s Bus Serv., Inc.*, 203 Misc. 559, 117 N.Y.S.2d 888, 889 (Sup. Ct. 1952) (“The defendant had a written contract with the City of New York under and by the terms of which the defendant undertook and agreed to transport school children attending various schools within fixed termini.... [T]he defendant was a carrier for hire....”), *aff’d*, 282 A.D. 920, 125 N.Y.S.2d 643 (1953); *Brown v. Nat’l Motor Fleets, Inc.*, 276 Ala. 493, 164 So. 2d 489, 490 (1963) (term “operate for hire” “has a well-known and definite meaning in the jurisprudence of this country. The term means in law, in commercial usage, and in ordinary parlance, the transportation of persons or property for compensation.”); *Hunt ex rel. Gende v. Clarendon Nat’l Ins. Serv., Inc.*, 218 Wis. 2d 439, 691 N.W.2d 904, 909 (Ct. App. 2004) (“Johnson School Bus Service makes itself available to public school districts, offers to transport persons identified by the district ... and receives payment from the district for those services. Clearly, the service is for hire.”).

<sup>9</sup> Further, none of the Washington statutes and regulations that use the term “for hire”

flatly contradicts the Department’s reading of the statute, and supports First Student’s, there is no reasonable basis to conclude that the term “for hire” in RCW 82.16.010 is subject to more than one reasonable reading.

**D. The Department’s Interpretation of the Term “For Hire” Is Completely at Odds with the Statutory Context.**

The term “for hire” is used or referenced in 11 of the 16 PUT classifications in RCW 82.16.010. These classifications cover a wide variety of businesses, including many that do not involve vehicles, such as “gas distribution business,” “light and power business,” “network telephone service,” and “water distribution business.” There is nothing in the language or structure of the statute indicating that the Legislature intended a separate or distinct meaning of the term “for hire” for each type of business. *See Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 313, 884 P.2d 920 (1994) (“When the same words are used in different parts of the same statute, it is presumed that the Legislature intended that the words have the same meaning.”). Therefore, the Legislature’s use of the same term in virtually all of the PUT definitions should be read in a manner that makes sense for all of the PUT classifications.

While First Student’s reading of “for hire” is completely consistent with all of the PUT definitions, the Department’s reading creates illogical

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draws the distinction that the Department asserts.

and absurd results for all of them and, therefore, should be avoided. *See Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007) (an interpretation that produces absurd results must be avoided because it cannot be presumed that the Legislature intended absurd results).

For example, the Department's reading of the term "for hire" would exclude virtually all charter operators from the motor and urban transportation definitions. If a church or company hired a charter carrier to transport its members or employees, the passengers would not be responsible for paying the fare. As such, the charter carrier would not be providing transportation "for hire" under the Department's definition. It is hard to square excluding so many motor carriers with the statement that "urban transportation" includes "the business of operating passenger vehicles of every type." RCW 82.16.010(12).

**E. The Department's Reading Of "For Hire" Is Not Entitled Deference As It Conflicts With Its Administration of the Statute.**

Even if the term "for hire" was ambiguous, the Court of Appeals' unquestioning deference to the Department's interpretation, without any analysis as to whether it provided a reasonable resolution of the ambiguity in the statute, conflicts with this Court's decision in *Association of Washington Business v. Dep't of Revenue*, 155 Wn.2d 430, 447, 120 P.3d 430 (2005).

Interpretive rules, such as Rule 180, are only entitled to deference to the extent they provide a persuasive explanation of the statute. *Ass'n of Wash. Bus.*, 155 Wn.2d at 447 (interpretive rules “are not binding on the courts and are afforded no deference other than the power of persuasion”). Accordingly, the court cannot automatically defer to an agency interpretation merely because the language of the statute is ambiguous. The court must determine if the agency’s position advances a persuasive resolution of that ambiguity. Otherwise, the court has not met its duty to ensure that the rule accurately reflects the underlying statute. *See id.* at 448 (interpretive rules only have effect on public to the extent they accurately reflect the statutory authority).

Here, the overwhelming weight of authority supporting First Student’s position shows that the Department’s interpretation of “for hire” is not a persuasive resolution of any ambiguity in the term “for hire.”

Moreover, the Department’s interpretation is entitled to deference only to the extent it is consistent with its prior administrative practices. *See Skamania Cty. v. Columbia River Gorge Comm’n*, 144 Wn.2d 30, 43, 26 P.3d 241 (2001) (“[a]n agency’s interpretation of an ambiguous statute is not entitled to deference if the interpretation is entirely inconsistent with the agency’s prior administrative practice.”).

The reading of “for hire” advanced by the Department in this case is clearly contrary to its prior administration of the statute. In a published determination, the Department imposed PUT on a charter bus company that was providing buses to transport its customers’ employees. Det. No. 05-0288, 26 WTD 143 (2007), CP 96. The bus company was hired by railroad companies to transport their train crews between various places. *Id.* at 144, CP 97. The bus company had been reporting these activities under the Service and Other B&O tax classification, but the Department determined that these activities were subject to PUT under the motor and urban transportation classifications and assessed the bus company for unpaid PUT. *Id.* If the Department truly had a longstanding interpretation of the term “for hire” that required the passengers to pay the fare, then it should not have assessed PUT against this taxpayer as it was the employer, not the passengers, that was paying the bus company.

Additionally, the Department agreed in a prior audit that First Student’s charter services provided to organizations, such as churches, youth groups, and summer camps, are taxable as motor and urban transportation even though they were paid for by third parties on an hourly or per route basis that is indistinguishable from the services at issue here. CP 194-195.

Moreover, as noted above, between 1943 and 1954, Rule 180 even states that the school bus provision applied to “persons operating school buses *for hire*.” Washington State Tax Commission Rule 180 (1943 / 1949) (emphasis added).<sup>10</sup> Therefore, deference to the Department’s position is not appropriate in this case, even if there was some ambiguity in the term “for hire.”

## V. CONCLUSION

For the foregoing reasons, the Court of Appeals decision should be reversed and the matter should be remanded with instructions that First Student’s home-to-school services are taxable under the motor and urban PUT classifications in RCW 82.16.010(6) and (12) and exempt from B&O tax.

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<sup>10</sup> The Department’s Answer to the Petition for Review attempts to explain this away by asserting that the 1943 definition of “urban transportation” included the term “for hire.” Ans. To Pet. at 13-14. However, comparing the 1943 and 1949 versions it is clear that the note only applied to the “highway transportation business” definition, which did not contain the term “for hire.” The note only follows discussion of the term “highway transportation business,” not “urban transportation business,” and when the order of the two terms is switched in the 1949 version, the note is moved as part of the “highway transportation business” section. Indeed, it appears that the note was added to clarify that even though school buses were operated for hire, they were not subject to PUT because they were expressly excluded from the definition of “auto transportation company.”

RESPECTFULLY SUBMITTED this 3rd day of June, 2019.

LANE POWELL PC

By   
Brett S. Durbin, WSBA #35781

Attorneys for First Student, Inc.

132278.0001/7686292.1

**CERTIFICATE OF SERVICE**

I certify that on June 3, 2019, I served a copy of the foregoing SUPPLEMENTAL BRIEF OF APPELLANT/PETITIONER via electronic mail, per agreement, upon the following counsel of record:

CAMERON G. COMFORT  
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*Counsel for Respondent*

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: June 3, 2019, at Seattle, Washington.

  
Kathi Milner, Legal Assistant  
LANE POWELL PC

## APPENDICES

Appendix A - Washington State Tax Commission Rule 180 (1949)

Appendix B - Sixteenth Biennial Report of the Tax Commission of the State of Washington for the Period Ending June 30, 1956

Appendix C - Bryan A. Garner, *Legal Lexicography*, 6 Green Bag 2d 151 (2003)

# **APPENDIX A**

thereafter forwarded by water carrier, in their original form, to interstate or foreign destinations: *Provided*, That no deduction will be allowed when the point of origin and the point of delivery to such export elevator, wharf, dock, or ship side are located within the corporate limits of the same city or town.

When revenue derived from any of the foregoing sources is included within the reported "gross operating revenue," the amount thereof may be deducted in computing tax liability.

In addition to the foregoing deductions there also may be deducted from the reported "gross operating revenue" (if included therein), the following:

- (a) The amount of cash discount actually taken by the purchaser or customer.
- (b) The amount of credit losses actually sustained.
- (c) Amounts received from insurance companies in payment of losses.
- (d) Amounts received from individuals and others in payment of damages caused by them to the utility's plant or equipment.
- (e) Amounts received from individuals and others in payment for moving or altering the utility's plant or equipment when done for the benefit or convenience of such individuals or others. This does not include amounts received for extension of service lines.

(For specific rule pertaining to the classifications of "urban transportation" and "highway transportation," see Rule 180.)

Effective May 1, 1949.

## HIGHWAY TRANSPORTATION—URBAN TRANSPORTATION

### Rule 180.

The term "highway transportation business" means the business of operating any motor propelled vehicle, as an auto transportation company (except urban transportation business), common carrier or contract carrier as defined in chapter III, Laws of 1921, page 338, section 1, and chapter 184, Laws of 1935, page 884, section 2 and amendments thereto and includes the business of so operating within and between incorporated cities and towns whose corporate limits are more than five miles apart.

It includes the business of hauling for hire upon the highways any merchantable extracted material, such as logs, poles, sand, gravel, coal, etc. Such persons will be deemed to be engaged in the business of highway transportation when the Public Service Commission requires them to obtain a common carrier or contract carrier permit with respect thereto.

It does not include the hauling upon streets or highways of any earth or other substance excavated or extracted from or taken to the right of way of a publicly owned street, place, road or highway, by a person taxable under the classification of "public road construction" of Title II (Business and Occupation Tax). (See Rule 171.)

NOTE: **Persons operating school buses for hire** are taxable under the classification of "Service and Other Activities" of Title II (Business and Occupation Tax) at the rate of  $\frac{1}{2}$  of 1% of gross income.

The term "urban transportation business" means the business of operating any vehicle for public use in the conveyance of persons or property for hire, in so far as (A) operating entirely within the corporate limits of any city or

town, or within five miles of the corporate limits thereof, or (B) operating entirely within and between cities and towns whose corporate limits are not more than five miles apart or within five miles of the corporate limits of either thereof. Included herein, but without limiting the scope thereof, is the business of operating passenger vehicles of every type and also the business of operating cartage, pick-up or delivery services, including in such services the collection and distribution of property arriving from or destined to a point within or without the state, whether or not such collection or distribution be made by the person performing a local or interstate line-haul of such property;

It does not include the business of operating any vehicle for the conveyance of persons or property for hire when such operation extends more than five miles beyond the corporate limits of any city (or contiguous cities) through which it passes. Thus an operation extending from a city to a point which is more than five miles beyond its corporate limits does not constitute urban transportation, even though the route be through intermediate cities which enables the vehicle, at all times, to be within five miles of the corporate limits of some city.

### Business and Occupation Tax (Title II)

**Retailing**—Persons engaged in either of said businesses are taxable under the "Retailing" classification at the rate of  $\frac{1}{4}$  of 1% of gross retail sales of tangible personal property sold by them.

**Service and Other Business Activities**—Persons engaged in either of said businesses are taxable under the "Service and Other Activities" classification at the rate of  $\frac{1}{2}$  of 1% of gross income received from checking service, packing and crating, commissions on sales of tickets for other lines, travelers' checks and insurance, and from rental of equipment, etc.

Persons hauling in their own equipment and for their own account, property owned or sold by them, are not taxable with respect to such operation under either Title II or Title V.

### Public Utility Tax (Title V)

Persons engaged in the business of urban transportation are taxable at the rate of  $\frac{1}{2}$  of 1% of the gross operating revenue of such business.

Persons engaged in the business of highway transportation are taxable at the rate of  $1\frac{1}{2}$ % of the gross operating revenue of such business.

Persons engaged in the business of both urban and highway transportation are taxable at the rate of  $1\frac{1}{2}$ % of gross operating revenue, unless a proper segregation of such revenue is shown by the books of account of such persons.

Effective May 1, 1949.

## VESSELS INCLUDING TUGS AND BARGES, OPERATING UPON WATERS WHOLLY WITHIN THE STATE OF WASHINGTON

### Rule 181.

#### Business and Occupation Tax (Title II)

**Retailing**—Persons engaged in the business of operating such vessels and tugs are taxable under the "Retailing" classification at the rate of one-fourth

# **APPENDIX B**

purpose of storing, manufacturing, milling, or other processing or service, and thereafter forwarding the same commodity, or its equivalent, in the same or converted form under a through freight rate from point of origin to final destination which is lower than the freight rate from point of origin to the transit station plus the freight rate from the transit station to final destination.

When revenue derived from any of the foregoing sources is included within the reported "gross operating revenue," the amount thereof may be deducted in computing tax liability.

In addition to the foregoing deductions there may also be deducted from the reported "gross operating revenue" (if included therein), the following:

- (a) The amount of cash discount actually taken by the purchaser or customer.
- (b) The amount of credit losses actually sustained.
- (c) Amounts received from insurance companies in payment of losses.
- (d) Amounts received from individuals and others in payment of damages caused by them to the utility's plant or equipment.
- (e) Amounts received from individuals and others in payment for the moving or altering the utility's plant or equipment when done for the benefit or convenience of such individuals or others. This does not include amounts received for extension of service lines.

(For specific rule pertaining to the classifications of "urban transportation" and "highway transportation," see Rule 180.)

Effective May 1, 1943.

## URBAN TRANSPORTATION—HIGHWAY TRANSPORTATION

### Rule 180.

The term "urban transportation business" means

- (1) The business of operating any street railway for the conveyance of persons or property for hire mainly upon or within streets and other public places within one incorporated city, and
- (2) The business of operating any other vehicle for public use in the conveyance of persons or property for hire, mainly within the corporate limits of an incorporated city or contiguous city and within five miles of the corporate limits of either thereof.

It includes the business of operating taxicabs, city bus systems, vehicles for intracity transfer of property, pick-up and delivery service, including the collection and distribution of property arriving from or destined to a point within or without the state and whether or not such collection or distribution be made by the person performing a local or interstate line-haul of the property which is picked up or distributed.

It does not include the business of operating any vehicle for the conveyance of persons or property for hire when such operation extends more than five miles beyond the corporate limits of all cities through which or in which a part of such operation occurs, even though such operation be within five miles of the limits of some other city or cities which are not entered by the carrier.

The term "highway transportation business" means the business of operating any motor propelled vehicle as

- (1) An auto transportation company for the conveyance of persons or property for hire over any public highway in this state and between fixed termini or over a regular route, and
- (2) Any other carrier for the conveyance of property for hire over any public highway, whether over regular or irregular routes, excepting only from both (1) and (2), the business of urban transportation and the operation of school buses.

It includes the business of hauling for hire upon the highways any merchantable extracted material, such as logs, poles, sand, gravel, coal, etc. Such persons will be deemed to be engaged in the business of highway transportation when the State Department of Public Service requires them to obtain a common carrier or a contract carrier permit in respect thereto.

It does not include the hauling upon streets or highways of any earth or other substance excavated or extracted from or taken to the right of way of a publicly owned street, place, road or highway, by a person taxable under the classification of "public road construction" of Title II (Business and Occupation Tax) (See Rule 171.)

NOTE: Persons operating school buses for hire are taxable under the classification of "Service and Other Activities" of Title II (Business and Occupation Tax) at the rate of  $\frac{1}{2}$  of 1% of gross income.

### Business and Occupation Tax (Title II)

**Retailing**—Persons engaged in either of said businesses are taxable under the classification of "retailing" at the rate of  $\frac{1}{4}$  of 1% of gross retail sales of tangible personal property sold by them.

**Service and Other Business Activities**—Persons engaged in either of said businesses are taxable under the classification of "Service and Other Activities" at the rate of  $\frac{1}{2}$  of 1% of gross income received from checking service, packing and crating, commissions on sales of tickets for other lines, travelers' checks and insurance, and from rental of equipment, etc.

Persons hauling in their own equipment and for their own account, property owned or sold by them, are not taxable in respect to such operation under either Title II or Title V.

### Public Utility Tax (Title V)

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Persons engaged in the business of highway transportation are taxable at the rate of  $1\frac{1}{2}$ % of the gross operating revenue of such business.

Persons engaged in the business of both urban and highway transportation are taxable at the rate of  $1\frac{1}{2}$ % of gross operating revenue, unless a proper segregation of such revenue is shown by the books of account of such persons.

Effective May 1, 1943.

# **APPENDIX C**

# Legal Lexicography

A VIEW FROM THE FRONT LINES

*Bryan A. Garner*

THERE ARE ESSENTIALLY five big questions for the writer of a modern law dictionary – and they’re pretty much the same questions faced by lexicographers of old, from Rastell to Jacob to Bouvier to Black. They are:

- (1) To what extent should a law dictionary be a *dictionary* – as opposed to a legal encyclopedia? That is, to what extent should it merely define terms, as opposed to expansively discussing the law relating to those terms?
- (2) To what extent is a law dictionary a work of original scholarship – as opposed to a compilation of judicial definitions?
- (3) To what extent should we worry about the formalities of defining words – that is, about getting the lexicography right as well as getting the law right?
- (4) To what extent can the modern lexicographer rely on the accuracy of predecessors?
- (5) How do you find the material to include in a dictionary?

As a practicing lexicographer, I’ve had to answer those questions – and some of them I continue to answer ad hoc, from day to day and week to week. My answers largely explain why the seventh edition of *Black’s Law Dictionary*, which came out in 1999, looks so different from earlier editions. Let’s take these questions one at a time.

## I. To what extent should a dictionary contain encyclopedic information?

Early law dictionaries were essentially glossaries, with short explanations of legal terms. In the 18th century Giles Jacob was the first to combine a dictionary and an abridgment, so that he was essentially trying to expound the law according to an alphabetical arrangement. The title of later editions of his dictionary, after all, is “A Law-Dictionary: Containing the Whole Law ... .” His entry for *jointenants* (which he spelled as one word) was an essay that runs to four long columns of small type, in which he set forth all the court holdings he

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could find on joint tenancy. This discursive essay runs to 3,400 words.

When Thomas Edlyne Tomlins took over Jacob's *Law Dictionary*, his first edition of 1797 more than doubled the entry on *jointenants* to some 7,500 words. He was writing more of an encyclopedia – the kind of entry that *Corpus Juris Secundum* contains today. So it was also with most contemporaries of Jacob and Tomlins.

John Bouvier, the American, reacted against the encyclopedic nature of his predecessors' dictionaries. In 1839, in the first edition of his *Law Dictionary*, he criticized other dictionaries in this way: "It is true such works contain a great mass of information, but from the manner in which they have been compiled, they sometimes embarrassed [the reader] more than if he had not consulted them" (p. v). His own entry for *joint tenants* (spelled as two words) runs only 46 words:

JOINT TENANTS, *estates*, are two or more persons to whom are granted lands or tenements to hold in fee simple, fee tail, for life, for years, or at will. 2 Black. Com. 179. The estate which they thus hold is called an estate in joint tenancy.

The later editions of Bouvier rejected his concise approach and moved once again more toward an overdeveloped encyclopedic treatment. The 1914 edition by Francis Rawle, one of the last editions, ran to 512 words – more than ten times as long – and cited 11 case holdings, all of which look (to the modern eye) very antiquarian.

This kind of excessive growth occurred throughout Bouvier's dictionary after the first edition. I'm convinced that hypertrophy is what led Bouvier's law dictionary to become obsolete. It couldn't accurately restate the whole law in two or three volumes. The essays had already been superseded by specialist treatises and by much bigger encyclopedias. It became impossible to keep the essays up to date. So by the late 1930s, the publishers had abandoned Bouvier's dictionary as an unworkable venture.

There were other 19th-century dictionaries that appeared before and after *Black's Law Dictionary* appeared in 1891, but none as important. Henry Campbell Black was a learned lawyer with varied interests. His list of full-length treatises is extremely impressive. He wrote full-length treatises on constitutional law,<sup>1</sup> on the removal of cases from state to federal court,<sup>2</sup> on the law of judgments,<sup>3</sup> on the rescission of contracts,<sup>4</sup> on bankruptcy,<sup>5</sup> on the income tax,<sup>6</sup> on tax titles,<sup>7</sup> on mortgages and deeds of trust,<sup>8</sup> and on statutory interpretation.<sup>9</sup> He even wrote a book called *Black on Intoxicating Liquors*.<sup>10</sup> There can be little doubt that, perhaps apart from John Cowell, Black was the most erudite lawyer ever to write a dictionary. It's interesting to speculate whether he ever knew that his other books would pass into oblivion, while his law dictionary would become something of a household name.

Black's entry for *joint tenancy* ran to 153 words (citing two statutes and no cases). The

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- 1 Henry Campbell Black, *Handbook of American Constitutional Law* (1897).
  - 2 Henry Campbell Black, *Removal of Causes from State Courts to Federal Courts* (1889).
  - 3 Henry Campbell Black, *A Treatise on the Law of Judgments* (1891).
  - 4 Henry Campbell Black, *A Treatise on the Rescission of Contracts* (2d ed. 1929).
  - 5 Henry Campbell Black, *A Handbook of Bankruptcy Law* (1898).
  - 6 Henry Campbell Black, *A Treatise on the Law of Income Taxation* (1913).
  - 7 Henry Campbell Black, *A Treatise on the Law of Tax Titles* (1893).
  - 8 Henry Campbell Black, *A Treatise on the Law of Mortgages and Deeds of Trust* (1903).
  - 9 Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* (1896).
  - 10 Henry Campbell Black, *Black on Intoxicating Liquors* (1892).

entry characteristically begins with a definition and then expands modestly on it. While there's no attempt to restate the entire law, he does include a modest amount of encyclopedic information:

**JOINT TENANCY.** An estate in joint tenancy is an estate in fee-simple, fee-tail, for life, for years, or at will, arising by purchase or grant to two or more persons. Joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. The grand incident of joint tenancy is survivorship, by which the entire tenancy on the decease of any joint tenant remains to the survivor. Pub. St. Mass. 1882, p. 1292.

A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. Civil Code Cal. § 683.

In his second edition of 1910, Black wisely relegated the phrase *joint tenancy* to be a subentry under *tenancy*. This was a good move because it allowed the dictionary user to compare all the types of tenancy at a glance. Meanwhile, Black carefully gave a cross-reference under J. And he added four case citations, to courts in Kansas, Indiana, Michigan, and Pennsylvania.

When the sixth edition of *Black's Law Dictionary* appeared in 1990 – before I became involved in the project – the entry for *joint tenancy* remained pretty much as it had been in 1891, except that all the caselaw was deleted. Two new judicial definitions were added, one with a citation to a federal district court and one with a citation to the Arizona Supreme Court. These judicial definitions mostly repeat the definitions in an earlier paragraph,

using different words.

When I became editor in chief of *Black's Law Dictionary* in 1994, the prevailing view among lexicographers was that dictionaries should define – that they shouldn't attempt to be encyclopedias.<sup>11</sup> But there was a growing view that some encyclopedic information is indispensable and that there's no easy dividing line between what is definitional and what is encyclopedic. This was very much in line with Henry Campbell Black's approach. I developed a system for dividing definitions from discursive information: my colleagues and I used bullet dots to separate the two. And we came to refer, in our own in-house jargon, to "BBS" (before-the-bullet stuff) and "ABS" (after-the-bullet stuff). So the entry for *joint tenancy* reads:

*joint tenancy.* A tenancy with two or more coowners who take identical interests simultaneously by the same instrument and with the same right of possession. • A joint tenancy differs from a tenancy in common because each joint tenant has a right of survivorship to the other's share (in some states, this right must be clearly expressed in the conveyance – otherwise the tenancy will be presumed to be a tenancy in common). See UNITY (2); RIGHT OF SURVIVORSHIP. Cf. *tenancy in common*.

"The rules for creation of a joint tenancy are these: The joint tenants must get their interests at the same time. They must become entitled to possession at the same time. The interests must be physically undivided interests, and each undivided interest must be an equal fraction of the whole – e.g., a one-third undivided interest to each of three joint tenants. The joint tenants must get their interests by the same instrument – e.g., the same deed or will. The joint tenants must get the same kinds of estates – e.g., in fee simple, for life, and so on." Thomas F. Bergin & Paul G. Haskell, *Preface to Estates in Land and Future Interests* 55 (2d ed. 1984).

<sup>11</sup> See, e.g., Sidney Landau, *Dictionaries: The Art and Craft of Lexicography* 5-6 (1984); Tom McArthur, *Worlds of Reference* 104 (1986); R.R.K. Hartmann & Gregory James, *Dictionary of Lexicography* 48-50 (1998).

The bullets allowed us to provide concise, substitutable definitions and to include some encyclopedic information – or ABS – whenever our research turned up something interesting or useful. As far as I know, this use of bullets was something of an innovation in lexicography.

There's something else new about that entry. West asked me to add citations to the entries where I could. I decided to integrate a further level of encyclopedic information by briefly quoting major authorities on various words and phrases. In the entry above, it's Bergin and Haskell on future interests. In other entries we quoted Blackstone on the law of England, Buckland on Roman law, Chitty on criminal law, Dworkin on legal philosophy, Gilmore and Black on the law of admiralty, Wright on federal courts, and so on. My colleagues and I looked for the most enlightening discussions of legal terminology, preferably from an acknowledged expert in the field. If the quotation happened to be from a judicial opinion, so much the better. But I gave no preference to judicial opinions.

One commentator has questioned why the seventh edition of *Black's Law Dictionary* has more quotations from treatises than from cases. My answer is threefold. First, a scholar who has studied and written extensively in a given field of law is more likely to have a good, informed discussion of a legal term. I'd rather quote Douglas Laycock on the irreparable-injury rule (as the seventh edition does) than an intermediate court in Louisiana (as the sixth edition did). Doug Laycock knows more about this rule, and has written about it in far greater depth, than some appellate judge in Louisiana. Second, caselaw is readily available and searchable electronically, whereas the treatises so frequently quoted in the seventh edition are not so accessible. Anyone wanting to research the caselaw in a given jurisdiction can get online. Third, the chances that a reader of *Black's Law Dictionary* is actually looking for a

Louisiana precedent seems remote. Treatise-writers tend to be more expansive in their view and to discuss variations among jurisdictions: all this can be enormously helpful to a dictionary-user.

The quotations also lend a greater degree of scholarly reliability to the dictionary. Of course, the *Oxford English Dictionary* is famous for its illustrative quotations – sentences illustrating the actual use of a term through the centuries. Our quotations in *Black's Seventh* are rather different: my colleagues and I didn't just quote a sentence to show how a term is used. Instead, we quoted substantive experts precisely for their expertise, and we typically quoted two to five sentences. This is something that a specialist dictionary can do to give the entries greater historical and intellectual depth. Once again, though, to my knowledge no previous dictionary has ever systematically used quotations in quite this way.

## 2. To what extent is a law dictionary a work of original scholarship – as opposed to a compilation of judicial definitions?

There are two traditions in legal lexicography. There's the law dictionary, and there's the judicial dictionary – such as *Stroud's Judicial Dictionary* (a leading English authority since 1890) or *Words and Phrases* (a 90-volume collection of judicial pronouncements).

A judicial dictionary is both broader and narrower than a law dictionary because it collects whatever words and phrases judges have had occasion to define. It is broader in the sense that judges often, in deciding a case, are called on to define ordinary words. For example, one page of *Words and Phrases* (volume 5A) collects definitions for the terms *Boston cream pie*, *Boston Firemen's Relief Fund*, *bosun's chair*, and *botanical garden* – none of which can properly be called a legal term. At the same time, judges are seldom called on to interpret certain legal terms. For

example, one page of *Black's Seventh* has definitions for *legal realism*, *legal research*, *legal secretary*, *Legal Services Corporation*, and *legal theory*. None of these appear in *Words and Phrases*; only two of them appeared in *Black's Sixth* (*legal secretary* and *Legal Services Corporation*).

At times, *Black's Law Dictionary* has erred on the side of being a judicial dictionary. For example, the fourth edition – the only one in print from 1951 to 1979 – had an entry for *Boston cream pie*, which it defined as follows: “two layers of sponge cake with a layer of a sort of cream custard.” For that definition, the book cited an opinion from the District of Columbia Court of Municipal Appeals.

To round out *Black's Seventh*, I wanted to do three things. First, I wanted to be sure that *Black's* wouldn't be a mere judicial dictionary. I wanted to define everything that might legitimately be called a legal term – whether it was about a judicially created doctrine or a type of legal philosophy that courts would never have occasion to address directly. Second, I wanted to be sure that my colleagues and I, as lexicographers and lawyers, did our best to define terms as fully and accurately as possible – without uncritically accepting some judicial pronouncement about what a word means. Third, I didn't want to try to do what *Words and Phrases* already does so comprehensively.

I, for one, consider lexicography to be serious scholarship. Samuel Johnson and Noah Webster amply demonstrated this; so did the editors of the *Oxford English Dictionary* and of the *Century Dictionary*, as well as the 20th-century editors of the various editions of *Webster's International Dictionary* and of the *OED Supplement*. So I rejected the idea of being a mere compiler of judicial scraps, and I scrapped the idea of having nonlegal terms:

*Boston cream pie* is only one egregious example among many.

3. **To what extent should we worry about the formalities of defining words – that is, about getting the lexicography right as well as getting the law right?**

This is an interesting and a challenging question. Naturally, I wanted to get the lexicography right as well as the law.

But in legal lexicography, this proves difficult. As a result of the two phenomena already discussed – the tradition of having legal encyclopedias masquerade as law dictionaries, and the tradition of simply copying judicial definitions – most law dictionaries have been very loose in their defining. *Black's Law Dictionary*, as I inherited it, was no exception. Although Henry Campbell Black had been pretty systematic in his entries, the various contributors to the book in the third through sixth editions – most of whom were anonymous – had allowed the book to sprout all sorts of stylistic inconsistencies. Meanwhile, as far as I have been able to tell, they hadn't really been trained in lexicography.

In fact, five basic tenets of defining words seemed rarely to be followed. The tenets are:

- Make the definition substitutable for the word in context,<sup>12</sup> so that the entry begins with the definition itself – never with a phrase such as *a term meaning* or *a term referring to*.<sup>13</sup>
- Indicate every meaning of the headword in the field covered by the dictionary.<sup>14</sup>
- Don't define self-explanatory phrases that aren't legitimate lexical units (including such phrases as *living with husband*).<sup>15</sup>
- Define singular terms, not plurals, unless there's a good reason to do otherwise.

12 Sidney Landau, *Dictionaries: The Art and Craft of Lexicography* 164 (2d ed. 2001).

13 *Id.* at 163.

14 *Id.* at 187.

15 *Id.* at 187.

- Distinguish between definitions and encyclopedic information (that is, textbook descriptions).<sup>16</sup>

These are challenging commands for the lexicographer – especially the first: substitutability. *Black's Sixth* had hundreds of entries that weren't substitutable. They read, for example, after the headword: "Exists where ...,"<sup>17</sup> "Term refers to ...,"<sup>18</sup> "Term used to describe ...,"<sup>19</sup> "A Saxon term for ...,"<sup>20</sup> It had hundreds of other entries in which adjectives were defined as if they were nouns, and nouns as if they were adjectives. For example, *litigious*, an adjective, was defined as a noun: "That which is the subject of a lawsuit or action."<sup>21</sup> Henry Campbell Black wrote that in 1891, and it was carried through every edition up through the sixth in 1990. But examples like that one proliferated in the intervening years, and you'd find this sort of thing on almost every page of the sixth edition.

In fairness to those who worked on the third through the sixth editions of *Black's*, I can point to three mitigating facts. First, defining terms rigorously isn't an easy matter. Even after months of training, most of my own assistants (past and present) have tended to stumble on the principle of substitutability, and I'm sure I've stumbled occasionally as well. Second, to the extent that the compilers were following judicial pronouncements, they parroted ill-phrased definitions: they were

just following the precedent of judges who were less than adept at defining. A good example of this is the Utah Supreme Court's definition of *hotel*, a nonlegal term included in *Black's Sixth*: "a building held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation and it opens its facilities to the public as a whole rather than limited accessibility to a well-defined private group." In that example, a noun phrase turns into a clause in the latter part – and the definition itself is inaccurate, even if a state supreme court said it. As a third mitigating fact, the users of *Black's Law Dictionary* through the years seem never to have complained about one part of speech being defined as if it were another part of speech. It could be that only professional lexicographers complain about this sort of thing. Then again, it could be that users trust dictionary writers to get the definitions right.

Like the first tenet, substitutability, the other tenets are fairly routinely flouted in pre-seventh editions of *Black's*: meanings aren't clearly enumerated,<sup>22</sup> many entries aren't legitimate lexical units,<sup>23</sup> there are plural headwords and even plural definitions of singular terms,<sup>24</sup> there are entries in which verb definitions and noun definitions are run together without differentiation,<sup>25</sup> and many entries

<sup>16</sup> Id. at 187.

<sup>17</sup> See, e.g., *Black's Law Dictionary* 229, 935 (6th ed. 1990) (s.v. chain conspiracy, living separate and apart).

<sup>18</sup> See, e.g., *Black's Law Dictionary* 743, 796, 1425 (6th ed. 1990) (s.v. hybrid class action, insider trading, subject-matter jurisdiction).

<sup>19</sup> See, e.g., *Black's Law Dictionary* 1479 (6th ed. 1990) (s.v. third degree).

<sup>20</sup> See, e.g., *Black's Law Dictionary* 888 (6th ed. 1990) (s.v. lazzi).

<sup>21</sup> *Black's Law Dictionary* 934 (6th ed. 1990).

<sup>22</sup> Compare *Black's Law Dictionary* 1026 (6th ed. 1990) (defining natural in two long unnumbered sentences from which two senses emerge) with *Black's Law Dictionary* 1048 (7th ed. 1999) (defining natural in seven numbered senses in about the same amount of space).

<sup>23</sup> See, e.g., *Black's Law Dictionary* 935 (6th ed. 1990) (s.v. living with husband).

<sup>24</sup> See, e.g., *Black's Law Dictionary* 897 (6th ed. 1990) (defining legal usufruct as "usufructs established ...").

<sup>25</sup> See, e.g., *Black's Law Dictionary* 562 (6th ed. 1990) (s.v. exchange).

contain exclusively encyclopedic information without any definitions at all.<sup>26</sup>

It was a major challenge putting the seventh edition of *Black's* into a consistent format and implementing the modern rules of dictionary defining. But I never doubted whether this was the right course.

#### 4. To what extent can the modern lexicographer rely on the accuracy of predecessors?

As you might have guessed, I believe it's unwise to rely on predecessors' work. My policy has been, as much as possible, to research anew every entry in *Black's*. My colleagues and I didn't merely rely on earlier editions. Instead, within the time constraints we had, we researched every definition in every entry and generally wrote them from scratch. We wanted to rethink everything in the dictionary. We second-guessed everything.

I'll give you an interesting example of this. When I was working on the V's – a letter that grew enormously from the sixth edition to the seventh – I came upon the word *vitiligate*. There it was in *Black's Sixth*:

**vitiligate.** To litigate cavilously, vexatiously, or from merely quarrelsome motives.

Never having heard of this word, I thought it was an extraordinary discovery. Of course, I needed to verify its existence. So, as with almost every other entry, I checked the *OED*, and it wasn't there. Instead, the *OED* recorded *vitilitigate*, citing Blount's *Nomo-Lexicon* of 1670. Likewise, *Webster's Second New International Dictionary* (1933) recorded *vitilitigate*, and so did the *Century Dictionary* (1914). The meaning was the same.

Looking at many other sources confirmed that *vitiligate* was simply a typographical error in a headword. I looked in the first edition of *Black's* and found that it was correctly recorded there: *vitilitigate*, not *vitiligate*. So I wondered

when the mistake had crept into the book. It appeared in the fifth edition (1979), in the fourth (1951), in the third (1933), and even in the second (1910). And the second edition, remember, was published in Henry Campbell Black's lifetime. The typesetter had apparently dropped a syllable in 1910, and this typographical error got perpetuated in every edition of *Black's* for another 89 years. Fortunately, I couldn't find any caselaw using the bastardized form in reliance on *Black's*. We put things right in *Black's Seventh*.

My decision to second-guess old research also took another form. *Black's Law Dictionary*, like most law dictionaries, is chock full of Roman-law terms and maxims. Being an American lawyer with a typical American legal education, I didn't feel competent reviewing the Roman-law material. I had read a great deal about Roman law, and I had built a small library of English-language materials on Roman law, but still I knew that specialist reviewers would have to become involved.

So I went straight to the top of the field. I hired Professor Tony Honoré of Oxford and Professor David Walker of Glasgow to review every entry in the book. Not only did they correct a lot of the Roman-law material – from misrecorded Latin headwords to incomplete and inaccurate definitions; they also improved the treatment of English law and Scots law. There isn't a single page of *Black's Seventh* that wasn't improved by their erudition and industry.

Lawyers sometimes ask me why I put in so much additional Roman-law material. The answer is simple: Roman-law principles underlie many modern civil-law and common-law concepts. Students of legal history often come across references to Roman legal terms. I had the opportunity, with the help of Honoré and Walker, to get things right. It would have been serious malfeasance not to take advantage of

<sup>26</sup> See, e.g., *Black's Law Dictionary* 1479 (6th ed. 1990) (s.v. thin capitalization).

their suggested additions.

I should also point out my two other major consultants: Joseph F. Spaniol Jr., former clerk of the U.S. Supreme Court, and Professor Hans W. Baade of the University of Texas law faculty. Spaniol's broad knowledge of American law, especially of the federal system, was enormously helpful. And Professor Baade, who became involved at a late stage in the project, made many valuable contributions, not least of which was making our citations to Blackstone consistent.

For *Black's Eighth*, which is still several years away, I am happy to report that I've engaged Professor A.N. Yiannopoulos of Tulane Law School to review the manuscript. At the moment, *Black's* is better in covering Scots law than it is in covering Louisiana law. With Professor Yiannopoulos's help, we'll bring the text into an even better state of jurisdictional equilibrium.

Meanwhile, I've appealed to the academic community for help, and it has responded. Because I'm working with an enormously complex manuscript of 3,750 single-spaced pages, I've appealed to the best legal minds I know, at universities throughout the United States, to scrutinize 100-page batches of manuscript. When the panel of academic contributors is listed in the front matter of *Black's Eighth*, it will read like a who's who among academic lawyers. They will have helped take *Black's* to greater heights.

##### 5. How do you find the material to include in a dictionary?

One thing we tried to do in *Black's Seventh* was to improve the coverage of legal terms. You'll see this in various ways that are fairly easy to quantify. For example, the sixth edition had only 5 subentries under *interest rate* – in other words, just 5 types of interest rates; *Black's Seventh* defines 15. Likewise, from the sixth edition to the seventh, *Black's* went from 15 subentries under *bond* to 19, from 9 subentries

under *marriage* to 12, from none under *reinsurance* to 4, and from 3 under *veto* to 14.

So where did we find all this additional material? We did it partly, as lexicographers must, by examining other reference books. But the more important method was examining hornbooks and treatises that deal systematically with a given legal field. For more than 12 years, I've had a habit of reading and marking about one lawbook a month. I highlight potential headwords, and then a typist follows my work and types in all the potential headwords. Then either my assistants or I will research and draft an entry for each headword. Any good dictionary-maker must have some type of reading program for gathering new material in this way.

The shame is that I haven't found a William Chester Minor – someone to be a madman to my professor, someone locked away with nothing to do other than read and mark lawbooks, and to do it knowledgeably. For the most part, I've had to be my own madman. That's not to say, by the way, that I don't get prisoner letters. I get plenty of those at LawProse. Unfortunately, the prisoners read the name of my company as if it were "Law Pro Se." But those letters are always asking me for help, never offering it.

But back to gathering source materials for *Black's*. On the seventh edition, I did have the help of three full-time lawyers that I had trained as lexicographers, including my senior assistant editor David W. Schultz. And I now have the help of two fine lawyer-lexicographers, Tiger Jackson and Jeffrey Newman. Having a team, even a small one, is enormously useful.

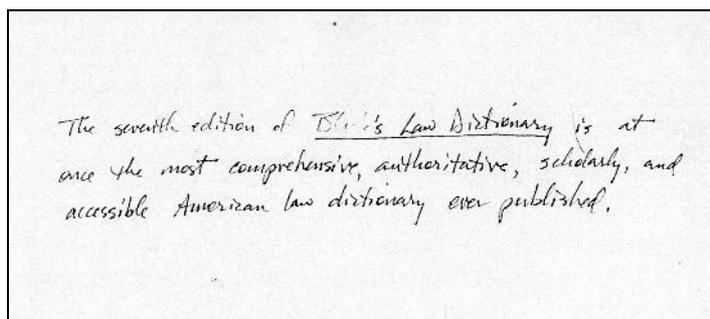
And there's another way of gathering materials a little more systematically. For the past couple of years, I've been working on specialist glossaries for West's publishing program. So far, we've produced handbooks of basic law terms, business-law terms, criminal-law terms, and family-law terms. The last is a

good example: one colleague and I spent the better part of a year reading every text we could find on family law, and we produced a glossary that has 1,500 terms not yet found in *Black's*. We had several family-law specialists review the whole text, adding terms, refining definitions, and suggesting after-the-bullet stuff (that is, encyclopedic information). Although this has been my worst-selling book, I'm convinced that producing it was well worth the effort: once we include the new material in *Black's Law Dictionary*, the big book will benefit for as long as *Black's* stays in print.

Right now I'm at work, with my in-house colleagues at LawProse and various patent and

much easier, the issues with which a modern legal lexicographer must deal are much like those that Rastell and Jacob and Bouvier and Black dealt with. My editorial decisions often depart from those of my precursors, but this is largely because of strides made in the field of lexicography.

Shortly before *Black's Seventh* was completed, my publishers at West, over dinner, asked me how I would describe the book. I still have the dinner napkin on which I wrote: "The seventh edition of *Black's Law Dictionary* is at once the most comprehensive, authoritative, scholarly, and accessible American law dictionary ever published." Whether my colleagues and I met that goal only time will tell. I've tried here to



The Dinner Napkin

copyright specialists (most notably Herbert Hammond and Beverly Ray Burlingame of Dallas), on a glossary of intellectual-property terms. We are carefully poring over every intellectual-property text we can find so that we can strengthen the coverage in this fast-growing field. It may seem like tedious work, but every time we find a term that hasn't yet been recorded in a law dictionary – and this happens daily, if not hourly – we feel genuine excitement. In our own little way, we're adding to the storehouse of human knowledge and making the law more easily accessible to anyone interested in it.

## DASHING ONE'S FRAME

Despite all the computers that make the job so

give some explanation of why that claim might actually hold.

When you write a dictionary, especially in a field as wide-ranging as law, you're battling your own fallibility. I'm constantly second-guessing my own work as well as that of my colleagues, and I've gone to

great lengths to find other knowledgeable second-guessers. Only with that kind of vigilance can you feel confident about the scholarship.

I do thank the West Group for giving me free rein to refashion the book. It continues to be a work in progress. And I would be a fool to write for the *Green Bag* and not enlist the help of any readers who are willing to lend a hand. If you ever encounter a definition that isn't quite right in some way, please let me hear from you (at lawprose.org). Meanwhile, I hope to continue my harmless drudgery for many years to come.

Toward the end of his distinguished career as editor in chief of the *OED Supplement*, my friend Robert W. Burchfield wrote that it was "discouraging to see the waves of new words lapping in behind as one dashed one's frame

against the main flood.”<sup>27</sup> Perhaps it’s a function of my age – and of the hope that I’ll be able to supplement and perfect *Black’s Law Dictionary* over the course of several editions –

but I welcome the flood of new legal terms and new legal meanings for old terms. And I imagine Henry Campbell Black felt the same way back in the 1890s.



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<sup>27</sup> Robert W. Burchfield, *Unlocking the English Language* 176 (1989).

## A Sample Entry from Black's Law Dictionary

<i>Black's Law Dictionary</i> 1st ed. (1891)	<i>Black's Law Dictionary</i> 6th ed. (1990)	<i>Black's Law Dictionary</i> 7th ed. (1999)
<p><b>JOINT TENANCY.</b> An estate in joint tenancy is an estate in fee-simple, fee-tail, for life, for years, or at will, arising by purchase or grant to two or more persons. Joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. The grand incident of joint tenancy is survivorship, by which the entire tenancy on the decease of any joint tenant remains to the survivor. Pub. St. Mass. 1882, p. 1292.</p> <p>A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. Civil Code Cal. § 683.</p>	<p><b>Joint tenancy.</b> An estate in fee-simple, fee-tail, for life, for years, or at will, arising by purchase or grant to two or more persons. Joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. The primary incident of joint tenancy is survivorship, by which the entire tenancy on the decease of any joint tenant remains to the survivors, and at length to the last survivor.</p> <p>Type of ownership of real or personal property by two or more persons in which each owns an undivided interest in the whole and attached to which is the right of survivorship. Single estate in property owned by two or more persons under one instrument or act. <i>D'Ercole v. D'Ercole</i>, D.C.Mass., 407 F.Supp. 1377, 1380. An estate held by two or more persons jointly, each having an individual interest in the whole and an equal right to its enjoyment during his or her life. In re <i>Estelle's Estate</i>, 593 P.2d 663, 665, 122 Ariz. 109.</p>	<p><b>joint tenancy.</b> A tenancy* with two or more coowners who take identical interests simultaneously by the same instrument and with the same right of possession. • A joint tenancy differs from a tenancy in common because each joint tenant has a right of survivorship to the other's share (in some states, this right must be clearly expressed in the conveyance – otherwise the tenancy will be presumed to be a tenancy in common). See <b>UNITY</b> (2); <b>RIGHT OF SURVIVORSHIP</b>. Cf. tenancy in common.</p> <p>“The rules for creation of a joint tenancy are these: The joint tenants must get their interests at the same time. They must become entitled to possession at the same time. The interests must be physically undivided interests, and each undivided interest must be an equal fraction of the whole – e.g., a one-third undivided interest to each of three joint tenants. The joint tenants must get their interests by the same instrument – e.g., the same deed or will. The joint tenants must get the same kinds of estates – e.g., in fee simple, for life, and so on.” Thomas F. Bergin @ Paul G. Haskell, Preface to <i>Estates in Land and Future Interests</i> 55 (2d ed. 1984).</p>

\* The genus tenancy having already been defined just above, in the main headword, the word may be used in defining the species joint tenancy.



**LANE POWELL PC**

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