

10-24-2013

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Suggested Citation

Marc D. Falkoff, Dictionary Blues: Judicial Reasoning Muddied by Definition Wrangling, *Chi. Daily L. Bull.*, Oct. 24, 2013.

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Chicago Daily Law Bulletin®

Volume 159, No. 209

Dictionary blues: Judicial reasoning muddied by definition wrangling

Maybe it would be best if judges left their dictionaries on the shelf.

That's the conclusion I reached after reading an Illinois court opinion last month, in which the decision turned on the dictionary definition of a commonplace word — "presence" — whose statutory meaning was in dispute.

The construction eventually adopted by the court was reasonable enough. But by relying solely on a dictionary as authority, the court reflected a troubling trend nationwide.

Increasingly, dictionaries are used to make the resolution of cases appear to be the product of common sense and unchallengeable authority, rather than of policy decisions made by judges.

I don't have a beef with dictionaries per se. I have an unreasonable attachment to my 2,400-page Compact Oxford English Dictionary, with its onion-skin paper and tiny print, illegible without a magnifying glass. And I regularly ask my first-year students to head to the library and grab a copy of Black's Law Dictionary — so they can figure out, for example, what Lord Coleridge meant in *Regina v. Dudley and Stephens* when he curiously referred to the defendant's "animus furandi."

Enlightened, they discover it's an "intention to steal," rather than the defendant's furry household pet. (While my students are there, I invite them to look up "Regina" too, to see why she's been involved in so many lawsuits.)

But judges typically invoke dictionaries not to define a term from Latin or Law French, or even to clarify the meaning of an uncommon English word. Rather, judges turn to dictionaries to lend a patina of authority to their discussions of ordinary words, whose range of meanings would typically be self-evident to any native English speaker.

At best, such citations seem empty of significance. At worst, they disguise that a choice has been made, cloaking the judge's

decision — whether intentionally or not — in a mantle of objectivity and inevitability.

Consider in this regard *People v. Burk*, 2013 IL App (2d) 120063 (Aug. 30, 2013). Dale Burk was a passenger in a car that an officer pulled over for speeding. He and another passenger were placed in the backseat of the squad car after the officer smelled burning marijuana in their vehicle.

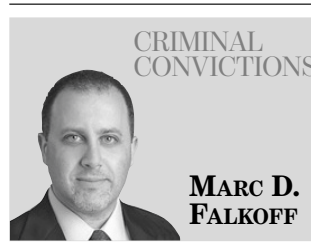
After the officer left the squad car to search their vehicle for drugs, Burk told his companion he'd hidden heroin packets in the driver's side door. Unknown to Burk, his conversation was being surreptitiously recorded by a camera in the squad car.

The officer found no drugs in their car, but after reviewing the tape recording the next day, he searched again and found the heroin. During Burk's trial for drug possession, he sought to suppress the narcotics evidence, urging that the drugs were inadmissible because they were found only as the result of a violation of the Illinois Eavesdropping Act.

The state, in turn, argued the recording was permissible under an exception to the act that allowed "recordings of utterances made by a person while in the presence of a uniformed peace officer and while an occupant of a police vehicle."

At issue in the case was the meaning of "presence." Was the defendant's conversation actually taped in the "presence" of the officer, given that he was 10 to 15 feet away and in another vehicle at the time? This is a genuinely tough question. On the one hand, the officer was obviously in the

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general vicinity of the defendant and his companion. On the other, he was also clearly out of earshot and far enough away to be unaware of their conversation.

A panel deciding such a matter might consider the privacy-protection purposes of the Eavesdropping Act and reflect on the reasons the legislature drafted this particular law enforcement exemption. To help them decide, they might consider looking at the drafting history of the statute.

The appellate court didn't go that route, instead turning to a dictionary. The panel quoted one of its definitions of "presence" and explained it would be improper to resort to legislative history where there was no indication the legislature intended anything other than the "commonly understood" meaning of the term "as reflected in the dictionary." *Id.* at ¶ 39.

But what dictionary did the panel choose to cite? And, having chosen the dictionary, which of the several definitions of "presence" did the judges select? How did they make those decisions and why?

Below are five definitions of "presence," all taken from court decisions citing different dictionaries for the conclusive definition of "presence." (It's just a sample; a Westlaw search turned up more than a dozen definitions across the country.) See if you can figure out which definition of "presence" the *Burk* court chose.

- "A situation face to face with some person or persons, in view." Funk and Wagnalls Dictionary.
- "Immediate vicinity; proximity;"

Black's Law Dictionary (8th ed.).

- "The vicinity of or the area immediately near." Webster's Third New International Dictionary.

- "Being before, beside, with or in the same place" as someone. Oxford English Dictionary.

- "Being in view or at hand." Webster's New Collegiate Dictionary.

If you selected the Oxford English Dictionary ("Being before, beside, with or in the same place as the person"), you might have concluded that an officer outside of the car and searching another car 10 to 15 feet away was not in the "presence" of the defendant.

If you opted for Webster's New Collegiate ("being in view or at hand"), you would most likely conclude that the officer was in view and therefore in the presence of the defendant during the recording.

In fact, the appellate court opted for Webster's Third New International (in "the vicinity of or the area immediately near"). Ironically, this definition doesn't seem to offer much help at all, since it merely substitutes one commonly understood term ("presence") for another ("vicinity"). But the court concluded that using this definition, the officer was plainly in the presence (or vicinity) of the defendant while the recording was made and that therefore the Eavesdropping Act had not been violated.

Was there a principled reason for choosing this particular definition from this particular dictionary? The opinion offers no clue.

Dictionaries are an important tool for accomplishing a limited range of tasks, such as determining the meaning of technical terms, foreign words, legal terms of art and historical origins and uses.

But common words need no definition. What we need when the meaning of a statutory term is contested is a judgment about how the word was intended to be understood in a particular context. Dictionaries simply don't help us answer that question.