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### Wagging, Not Barking: Statutory Definitions

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# WAGGING, NOT BARKING: STATUTORY DEFINITIONS

JEANNE FRAZIER PRICE\*

## ABSTRACT

Legislative text is distinguished by the frequency with which it specifies the meaning of the words it employs. More than 25,000 terms are defined in the United States Code alone. In few other contexts is there a perceived need to so carefully and repeatedly clarify meaning. This Article examines the roles played by definitions in a reader's understanding and application of a legislative text; it demonstrates that the effects of defining are not as straightforward as we might assume. The discussion is framed by the distinction between legislation as a communication vehicle and as an instrument of governance. In some cases, definition serves predominantly a communicative purpose; it clarifies the speaker's intent. But at other times the legislative definition empowers; it serves a performative function, investing groups of individuals or instances with rights or obligations. The Article suggests that a better understanding of the effect of definition on a reader's interaction with a text, coupled with an appreciation of the different roles served by definition, will enable legislators to draft more useful definitions and enable interpreters to better apply those definitions.

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## I. INTRODUCTION

More than 25,000 definitions nestle quietly within the fifty-one titles of the United States Code.<sup>1</sup> The variety of those definitions defies expectations. The meanings of nouns, verbs, adjectives, adverbs and even prepositional phrases are described, sometimes by lengthy and nearly impossibly complicated texts and at other times by one- or two-word synonyms.<sup>2</sup> Single words are defined, as are compound words and simple and complex phrases.<sup>3</sup>

Although practitioners and academics routinely interact with statutory definitions, there has been little discussion of the functions served by those definitions or of their utility.<sup>4</sup> We seem to accept the existence and even the

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<sup>1</sup> Definitions in the United States Code were counted over a seventeen month period, beginning in April 2011 and ending in August 2012. Any word or phrase defined in a U.S. Code section titled “definitions” was counted, as well as definitions of terms that appeared outside of explicitly designated definition sections. Terms are usually defined using the verbs “means,” “is,” and “includes.” Since many words and phrases are defined (differently) multiple times throughout the U.S. Code (e.g., child, commerce, employee, person, sale, state), the number of unique terms defined in the Code is significantly smaller.

<sup>2</sup> Nouns as varied as “citizen” (43 U.S.C.A. § 177 (West 2012)), “dam” (25 U.S.C.A. § 3802 (West 2012)), “drug” (15 U.S.C.A. § 55 (West 2012)), “facility” (14 U.S.C.A. § 690 (West 2012)), “hostilities” (10 U.S.C.A. § 948a (West 2012)), “insider” (11 U.S.C.A. § 101 (West 2012)), “maquiladora” (6 U.S.C.A. § 1401 (West 2012)), “propeller” (18 U.S.C.A. § 31 (West 2012)), “put,” (7 U.S.C.A. § 2 (West 2012)), and “vessel” (17 U.S.C.A. § 1301 (West 2012)) are defined in the U.S. Code. Verbs defined in the Code include “buy” (15 U.S.C.A. § 78c (West 2012)), “debar” (10 U.S.C.A. § 2393 (West 2012)), “intimidate” (18 U.S.C.A. § 248 (West 2012)), and “subscribe” (17 U.S.C.A. § 111 (West 2012)). Other Code sections define adjectives (e.g., “eligible” in 5 U.S.C.A. § 4701 (West 2012), “credentialed” in 6 U.S.C.A. § 311 (West 2012), and “available” in 17 U.S.C.A. § 119 (West 2012)), adverbs (e.g., “publicly” in 17 U.S.C.A. § 101 (West 2012)), and prepositional phrases (e.g., “below the mean high water line” in 19 U.S.C.A. § 1773b (West 2012) and “without regard to waste” in 25 U.S.C.A. § 2201 (West 2012)).

<sup>3</sup> Among the more colorful phrases defined in the U.S. Code are “simplified acquisitions threshold definitions” (6 U.S.C.A. § 423 (West 2012)), “emergency situation involving a biological or chemical weapon of mass destruction” (15 U.S.C.A. § 382 (West 2012)), and “grave breach of common Article 3” (18 U.S.C.A. § 2441 (West 2012)).

<sup>4</sup> For all their ubiquity, statutory definitions remain relatively unexamined by legal scholarship. Legislative drafting manuals pay relatively short shrift to the statutory definition. E.g., M. DOUGLASS BELLIS, *STATUTORY STRUCTURE AND LEGISLATIVE DRAFTING CONVENTIONS: A PRIMER FOR JUDGES* (2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/draftcon.pdf/\\$file/draftcon.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/draftcon.pdf/$file/draftcon.pdf); REED DICKERSON, *LEGISLATIVE DRAFTING* (1954); REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* (2d ed. 1986) [hereinafter DICKERSON, *FUNDAMENTALS*]; TOBIAS A. DORSEY, *LEGISLATIVE*

necessity of statutory definition with little introspection; we have not closely examined the consequences, either expected or unintended, of definitions and their impact, conscious or not, on a reader's understanding of a text.

Too many commentators have written on the “messiness”<sup>5</sup> of legislation, its “monstrous” complexity,<sup>6</sup> and its lack of “meaningful transparency.”<sup>7</sup> To what extent do definitions mitigate that complexity and incomprehensibility, or do statutory definitions in fact contribute to it? Given the length and specificity of many statutory definitions, it is easy to assume that the meanings of those defined terms are well-settled—at least in that statutory context<sup>8</sup>. But the frequency of litigation around the application of legislative definitions belies that assumption. Within the last few years alone, the United States Supreme Court has on many occasions considered the scope and application of terms seemingly well defined by federal statute.<sup>9</sup> Lower courts even more frequently wrestle with the meaning and application of legislative definitions.<sup>10</sup>

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DRAFTER'S DESKBOOK: A PRACTICAL GUIDE (2006); LAWRENCE E. FILSON & SANDRA L. STROCKOFF, *THE LEGISLATIVE DRAFTER'S DESK REFERENCE* (2d ed. 2008); DONALD HIRSCH, *DRAFTING FEDERAL LAW* (2d ed. 1989); and WILLIAM P. STATSKY, *LEGISLATIVE ANALYSIS AND DRAFTING* (2d ed. 1984). These and similar manuals may suggest the location of definitions within bills, particular methods of definition, or even specific verbiage to be employed in legislative definitions, but they do little to add to an understanding of the purposes and functions—let alone the utility—of statutory definitions.

<sup>5</sup> See generally *Editors' Note on "Legisprudence,"* 89 B.U. L. REV. 423 (2009).

<sup>6</sup> Robert Pear, *If Only Laws were like Sausages*, N.Y. TIMES, Dec. 5, 2010, at WK3, available at [http://www.nytimes.com/2010/12/05/weekinreview/05pear.html?\\_r=1&ref=todayspaper](http://www.nytimes.com/2010/12/05/weekinreview/05pear.html?_r=1&ref=todayspaper).

<sup>7</sup> See generally Jane S. Schacter, *Digitally Democratizing Congress? Technology and Political Accountability*, 89 B. U. L. REV. 641 (2009).

<sup>8</sup> “Detailed definitions give the impression that legal language is entirely accurate and without ambiguity. This is not the case.” HEIKKI E. S. MATTILA, *COMPARATIVE LEGAL LINGUISTICS 70* (Christopher Goddard trans., 2006).

<sup>9</sup> See, e.g., *United States v. Stevens*, 130 S. Ct. 1577 (2010), in which the Court considered the definition of “depiction of animal cruelty” set forth in 18 U.S.C.A. § 48(c)(1) (West 2012); *Astrue v. Capato*, 132 S. Ct. 2021 (2012), in which the “sparse” definition of “child” set forth in section 416(e) of the Social Security Act (42 U.S.C.A. § 416(e) (West 2012)) is discussed; *Johnson v. United States*, 130 S. Ct. 1265 (2010), in which the meaning of the term “physical force,” as used in the definition of “violent felony” in 18 U.S.C.A. § 924(e)(1) (West 2012), is debated; *Milavetz, Gallop & Milavetz v. United States*, 130 S. Ct. 1324 (2010), which held that attorneys may indeed be “debt relief agencies” as defined in 11 U.S.C.A. § 101(12A) (West 2012); *Kawashima v. Holder*, 132 S.Ct. 1166 (2012), where the Court looked at the definition of “aggravated felony” set forth in 26 U.S.C.A. § 7206 (West 2012); *Samantar v. Yousef*, 130 S. Ct. 2278 (2011), a case which turned on whether an individual could be included within the definition of “foreign state” set forth in 28 U.S.C.A. § 1603 (West 2012); *McNeil v. United States*, 131 S. Ct. 2218 (2011), in which the meaning of the term “serious drug offense,” as defined in 18 U.S.C.A. § 924(e)(2)(A)(ii) (West 2012) rests upon the tense of the verbs used in the definition; and *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010), which again considers the meaning of the term “aggravated felony,” this time in an immigration context and as defined in 8 U.S.C.A. 1101 § (a)(43)(B) (West 2012).

<sup>10</sup> Recent lower court decisions involving the interpretation of definitions set forth in the U.S. Code include *United States v. Am. Soc’y of Composers, Authors & Publishers*, 627 F.3d 64 (2d Cir. 2010) (definitions of “performance” and “publicity” in the Copy Right Act, 17

In his book, *The Language of Statutes*, Lawrence Solan focuses on “the dogs that do not bark—the aspects of lawmaking that appear to present very little problem and that, therefore, make it possible for us to govern ourselves more or less successfully in a complex legal system based on finely articulated rules.”<sup>11</sup> One of Solan’s chapters is titled “Definitions, Ordinary Meaning, and Respect for the Legislature.” Solan’s focus in that chapter is on the meaning—ordinary or not—of words in a statutory text.

My focus is narrower. This Article explores the role that definitions incorporated into a statute play in our understanding and application of the text. I suggest that this role is a much more substantive and important one than we acknowledge. Although statutory definitions may not bark—they do not bring attention to themselves—they often act as the tail that wags the dog. They are important thresholds to our understanding of and the success of legislation. Statutory definitions are not normative (another reason that they do not bark). Instead, they confer the authority

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U.S.C. § 101 (2006); *Sprint Commc’n v. Ntelos Tel. Inc.*, No. 5:11cv00082, 2012 WL 3065437 (W.D. Va. July 26, 2012) (definition of “claim” in the Bankruptcy Code, 11 U.S.C. § 101(5) (2006)); *Sec. Investor Pro. Corp. v. Jacqueline Green Rollover Account*, No. 12 Civ. 1039(DLC), 2012 WL 3042986 (S.D.N.Y. July 25, 2012) (definition of “customer” under the Securities Investor Protections Act of 1970, 15 U.S.C. § 78111(2) (2006)), *McCorkle v. Bank of Am. Corp.*, 688 F.3d 164 (4th Cir. 2012) (definition of “normal retirement age” under the Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. § 1002(24) (West 2012)); and *Alamo v ABC Fin. Serv., Inc.*, No. 09 5686, 2011 WL 221766 (E.D. Pa. Jan. 20, 2011) (definition of “debt collector” under the Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692a(6) (West 2012)).

*Arista Records v. LaunchMedia*, 578 F.3d 148 (2d Cir. 2009) illustrates some of the ironies inherent in courts’ efforts to clarify the meaning of a definition. 17 U.S.C.A. § 114 (West 2012) defines an “interactive service,” in part, as “one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.” In its struggle to determine whether the services offered by LaunchMedia qualified as interactive ones, the Second Circuit felt compelled to consult *Merriam-Webster’s Collegiate Dictionary* to ascertain the meaning of both “specially” and “created.” Although the court ultimately found the dictionary to be of little use, the court’s willingness to parse the meaning of a definition by, as a first resort, referring to dictionary definitions of the words used in the statutory definition says something about the utility of definitions in general.

Finally, deserving special mention is the 2011 case of the inebriated cowboys. Two individuals, while intoxicated, rode, respectively, a mule and a horse in downtown Austin, Texas. See John Kelso, Commentary, *Vodka and Cranberry on a Mule Shows Just How Much Austin has Changed*, AUSTIN AM. STATESMAN, June 13, 2011, available at <http://www.statesman.com/news/local/vodka-and-cranberry-on-a-mule-shows-just> 1184146.html. One of the two was arrested and charged with driving while intoxicated. The charges were subsequently dropped. The state statute contemplates the use of a motor vehicle in cases involving a charge of driving while intoxicated (TEX. PENAL CODE ANN. § 49.04 (West 2011)); the Texas definition of motor vehicle, however, hardly eliminates vehicles of the four-legged variety. “‘Motor vehicle’ means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks.” TEX. PENAL CODE ANN. §§ 49.01 (3) and 32.34 (2) (West 2011).

<sup>11</sup> LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* 13 (2010).

and establish a structure that allows the statute's normative provisions to have effect; they inform and instruct as to how a particular outcome might be achieved or avoided.

If statutory definitions do in fact serve important legislative functions and affect the balance of power between legislators and interpreters, we ought to know more about them. Examining the statutory definition in depth may lead to more nuanced and mindful drafting of definitions and to better informed interpretations. By understanding what definitions accomplish—or purport to accomplish—and how they affect cognition, we may be in a better position to determine when definitions are appropriately included in legislation and how best to formulate those definitional texts. We may also find that defining terms—or defining terms in particular ways—may not always serve clarity, consistency, or comprehensibility; in some situations, no definition may be the better plan.

The Article explores four facets of statutory definition: (i) the type of word or phrase defined; (ii) the technique by which the term is defined; (iii) the purpose of definition; and (iv) the effects of definition. The Article concludes by making some suggestions about the drafting of statutory definitions generally and about some particular considerations that legislators and drafters might keep in mind as they decide whether terms used in statutes warrant definition. Particular definition techniques may serve some purposes better than others. Moreover, if interpreters of legislation better understand how definitions function within a statutory scheme, they, in turn, may be better equipped to construe them in a way that furthers the statutory purpose.

Framing this discussion of statutory definition is the distinction between legislation—and its component definitions—as instruments of governance and as communication vehicles.<sup>12</sup> Since J. L. Austin first described the role played by what he termed “performative utterances” or “speech acts,” their relevance and application to law have been clear, albeit not always well or consistently articulated.<sup>13</sup> Thinking

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<sup>12</sup> Yon Malley characterizes a statute as “an act of language and an act of law.” Yon Malley, *The Language of Legislation*, 16 LANGUAGE IN SOC'Y, 25, 28 (2010). And, Reed Dickerson, in advising legislative drafters, points out that too often they fail to realize that “a legal instrument is both (1) a crystallization and declaration of rights, privileges, duties, and legal relationships and (2) a communication.” DICKERSON, FUNDAMENTALS, *supra* note 4, at 25.

<sup>13</sup> J. L. Austin described a particular type of speech that (i) does not “‘describe’ or ‘report’ or constata anything at all”; (ii) is not true or false; and (iii) “is, or is a part of, the doing of an action, which . . . would not *normally* be described as saying something.” He went on to provide four examples of this type of speech: (i) “I do,” in a marriage ceremony; (ii) “I name this ship the Queen Elizabeth;” (iii) “I give and bequeath my watch to my brother;” and (iv) “I bet you sixpence it will rain tomorrow.” “In these examples it seems clear that to utter the sentence (in, of course, the appropriate circumstances) is not to describe my doing of what I should be said in so uttering to be doing or to state that I am doing it: it is to do it.” J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 5-6 (1962). Austin coined the term “performative sentence” to represent these kinds of speech.

In applying the concept of performative sentences or speech acts, as John Searle characterized them (JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969)), Yon Maley suggests that all legislation in fact serves the performative function: “When the legislature enacts a statute, it is performing speech acts in the classic, performative Austinian sense.” Maley, *supra* note 12, at 27. Monica Cowart looks at consent through a speech act analysis; she finds that speech act theory “offers a systematic approach for uncovering the

about statutory definitions as having both communicative functions and governance—or speech act—functions should allow us to see that sometimes the communicative function is the more important and is more closely related to the definition's purpose. In other cases, it is the role played by the definition as a speech act—i.e., an instrument of governance—that motivates its inclusion. To the extent that we can determine *why* a definition is incorporated in a statute—and what purposes it serves—we can draft better definitions that further the interests of communication and / or governance.

## II. TYPES OF TERMS DEFINED

Terms defined in statutes could be categorized in any number of ways. Terms that are discipline-specific might be compared to those that are used in everyday language; definitions of physical objects and recognized phenomena that occur in the world might be contrasted with definitions that relate to abstractions or characteristics. The soul of definition relates to meaning; whether or not a definition is necessary or advisable depends on the audience's understanding—or lack of understanding—of the term *absent* the definition. But the legislative audience is not homogenous. Legislation effects consequences; it “carries meaning”<sup>14</sup> independent of any one individual's understanding of the meaning of its terms. How and whether terms are defined in statutory text ought to relate in some way to the meaning—if any— of the term outside of the statute.

Terms defined by statute might be roughly grouped as follows:

- A. Terms that in ordinary use have many—sometimes inconsistent or contradictory—meanings
  - 1. Ordinary, frequently used words and phrases
  - 2. Ambiguous terms
- B. Terms that have almost no meaning absent definition
  - 1. Terms that have some (but very little) sense in context
  - 2. Terms having no sense
- C. Terms associated with well-established and either ordinary or discipline-specific meaning
  - 1. Common words and phrases
  - 2. Descriptive phrases
  - 3. Terms of art and technical terms

It is easy to intuit that terms falling within categories A and B might, at least absent a context, require definition. Less obvious is a decision to define terms that fall within category C. Yet all of these types of words and phrases are defined

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complex relationship between uttering words and what one does by uttering them.” Monica Cowart, *Understanding Acts of Consent: Using Speech Act Theory to Help Resolve Moral Dilemmas and Legal Disputes*, 23 LAW & PHILOSOPHY 495, 496-97 (2004).

<sup>14</sup> Timothy Endicott, *Linguistic Indeterminacy*, 16 OXFORD J. OF LEGAL STUD. 667, 683 (1996) (quoting FREDERICK SCHAUER, PLAYING BY THE RULES 207 (1991)). Endicott discusses at some length Schauer's notion of “semantic autonomy” and the suggestion that symbols (and Schauer includes in that term individual words and phrases) can “carry meaning independent of the communicative goals on particular occasions of the users of those symbols.” While Schauer argues that speakers of a common language can understand one another even if they have “nothing in common but their language,” Endicott suggests that there no such language speakers who share a language and yet nothing else. *Id.* at 684.

repeatedly and inconsistently (in fact, often contradictorily) throughout the U.S. Code.

### *A. Ordinary Terms with Many Meanings*

Terms defined in the United State Code include commonly used words whose meaning ordinarily depends on context and the expertise of the communicants. “Available,” “bank,” “child,” “delivery,” “educator,” “function,” “livestock,” “machine,” “operator,” “records,” “repair,” “security,” “value,” and “vessel,” are all words that signify different things to different people in different circumstances, and all are terms defined on multiple occasions in the United States Code.<sup>15</sup> Sometimes those definitions clarify what sense of the word is intended, and place limits on the term’s application for purposes of the statute. For example, the definition of “traffic” in Title 18’s prohibition of trafficking in stolen goods sets forth activities that qualify as trafficking and imposes the requirement that those activities be undertaken for “commercial advantage or private gain” in order to fall within the definition’s scope.<sup>16</sup> But other definitions of familiar but context-dependent terms

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<sup>15</sup> “Available” is defined in 17 U.S.C.A. § 119 (West 2012) and 47 U.S.C.A. § 339 (West 2012); “bank” is defined in 7 U.S.C.A. § 27 (West 2012), 12 U.S.C.A. §§ 36, 202, 461, 635t, 1422, 1841, 2214a, 2282, 5002 (West 2012), 15 U.S.C.A. §§ 77c, 78c, 80a-2, 80b-2 (West 2012), 18 U.S.C.A. § 2113 (West 2012), 22 U.S.C.A. §§ 262r-6, 2185 (West 2012), and 26 U.S.C.A. §§ 408, 581, 585 (West 2012); “child” is defined in 5 U.S.C.A. §§ 5569, 8101, 8341, 8345, 8441, 8467 (West 2012), 8 U.S.C.A. § 1101 (West 2012), 12 U.S.C.A. § 1707 (West 2012), 15 U.S.C.A. § 6501 (West 2012), 18 U.S.C.A. §§ 1111, 1169, 1204, 3509 (West 2012), 20 U.S.C.A. §§ 7011, 7801 (West 2012), 22 U.S.C.A. § 4044 (West 2012), 25 U.S.C.A. § 3202 (West 2012), 26 U.S.C.A. §§ 151, 152 (West 2012), 28 U.S.C.A. §§ 376, 1738A, 1738B (West 2012), 29 U.S.C.A. § 1169 (West 2012), 30 U.S.C.A. § 902 (West 2012), 38 U.S.C.A. §§ 101, 1831, 1901, 1965 (West 2012), 42 U.S.C.A. §§ 290ff-4, 416, 675, 1382c, 1396a, 1396r-1a, 1397jj, 3030s, 3796b, 3796aa-8, 5011, 5106g, 5119c, 5792, 13791, 13882 (West 2012), and 50 U.S.C.A. § 2002 (West 2012); “delivery” is defined in 21 U.S.C.A. § 802 (West 2012) and 44 U.S.C.A. § 3601 (West 2012); “educator” is defined in 25 U.S.C.A. § 2012 (West 2012); “function” is defined in 22 U.S.C.A. § 6502 (West 2012), 29 U.S.C.A. § 2918a (West 2012), and 42 U.S.C.A. § 12651, 12651d (West 2012); “livestock” is defined in 7 U.S.C.A. §§ 182, 1471, 1472, 1523, 1635a, 8302 (West 2012), 16 U.S.C.A. § 3801 (West 2012), and 18 U.S.C.A. § 2311 (West 2012); “machine” is defined in 17 U.S.C.A. § 101 (West 2012); “operator” is defined in 16 U.S.C.A. § 973 (West 2012), 29 U.S.C.A. § 2882 (West 2012), 30 U.S.C.A. §§ 802, 1702 (West 2012), 33 U.S.C.A. § 1901 (West 2012), 42 U.S.C.A. §§ 2014, 6991 (West 2012), and 49 U.S.C.A. § 30501 (West 2012); “records” are defined in 10 U.S.C.A. § 2313 (West 2012), 12 U.S.C.A. § 5390 (West 2012), 15 U.S.C.A. §§ 78c, 78x (West 2012), 41 U.S.C.A. § 254d (West 2012), and 44 U.S.C.A. § 3301 (West 2012); “repair” is defined in 42 U.S.C.A. § 300j-21 (West 2012) and 49 U.S.C.A. § 32702 (West 2012); “security” is defined in 7 U.S.C.A. § 1a (West 2012), 15 U.S.C.A. §§ 77b, 78c, 781ll, 80a-2, 80b-2 (West 2012), 16 U.S.C.A. § 796 (West 2012), 18 U.S.C.A. § 513 (West 2012), and 26 U.S.C.A. §§ 165, 475, 1042, 1236, 6323 (West 2012); “value” is defined in 11 U.S.C.A. §§ 522, 548 (West 2012), 12 U.S.C.A. 5390 (West 2012), 18 U.S.C.A. §§ 641, 2311 (West 2012), 22 U.S.C.A. §§ 2321h, 2403, 2794 (West 2012), 26 U.S.C.A. §§ 382, 851, 856, 4462 (West 2012), and 50 U.S.C.A. § 415 (West 2012); and “vessel” is defined in 10 U.S.C.A. § 7291 (West 2012), 16 U.S.C.A. § 973 (West 2012), 18 U.S.C.A. § 2311 (West 2012), 22 U.S.C.A. § 456 (West 2012), 33 U.S.C.A. §§ 902, 1321, 1502, 1601, 2701 (West 2012), 42 U.S.C.A. § 9601 (West 2012), 46 U.S.C.A. § 53701 (West 2012), and 49 U.S.C.A. §§ 13102, 80301 (West 2012).

<sup>16</sup> 18 U.S.C.A. § 2320 (West 2012).



impose unexpected restrictions on the scope of word meaning. In the context of Title 42, in sections that address the safety of public water systems, the word “repair” means “with respect to a drinking water cooler, to take such corrective action as is necessary to ensure that water cooler is lead-free.”<sup>17</sup>

Ambiguous terms similarly call for definition. These terms do not necessarily occur in ordinary usage; they may or may not be descriptive; and their application could extend to a variety of referents. “Architectural work,” “financial entity,” “foreign proceeding,” “Indian custodian,” “powers of self-government,” and “small business case”<sup>18</sup>—each of which is defined in the U.S. Code— could each be associated with any number of objects; although many of those referents might have some relationship to one other, they are often fundamentally different things. For example, “architectural work” might refer to buildings, plans of buildings, sculpture, or models. But its definition in the U. S. Code restricts that term’s meaning to “the *design* of a building”<sup>19</sup> [emphasis added]; the definition notes that the *design* may be embodied in different media. Similarly, entities as diverse in purpose and function as banks, accounting firms, collection agencies, tax preparers, ratings agencies, and securities exchanges might all be collected within the scope of “financial entity.” Per the U.S. Code, that term includes individuals and entities engaged in particular types of activities, as well as anyone “predominantly engaged in activities that are in the business of banking or financial in nature.”<sup>20</sup>

If a term suggests multiple meanings, it has no unique referent or group of referents in the real world.<sup>21</sup> Terms with multiple meanings may be abstractions—like “right of possession,” “traffic,” or “asset”<sup>22</sup>—a that represent concepts familiar

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<sup>17</sup> 42 U.S.C.A. § 300j-21(West 2012).

<sup>18</sup> “Architectural work” is defined in 17 U.S.C.A. § 101 (West 2012); “financial entity” is defined in 15 U.S.C.A. § 78c-3 (West 2012); “foreign proceeding” is defined in 11 U.S.C.A. § 101 (West 2012); “Indian custodian” is defined in 25 U.S.C.A. § 1903 (West 2012); “powers of self-government” is defined in 25 U.S.C.A. § 1301 (West 2012); and “small business case” is defined in 11 U.S.C.A. § 101 (West 2012).

<sup>19</sup> Per 17 U.S.C.A. § 101 (West 2012), “architectural work” refers to “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.”

<sup>20</sup> 15 U.S.C.A. § 78c-3 (West 2012): “For the purposes of this subsection, the term ‘financial entity’ means—(i) a swap dealer; (ii) a security-based swap dealer; (iii) a major swap participant; (iv) a major security-based swap participant; (v) a commodity pool as defined in section 1a(10) of Title 7; (vi) a private fund as defined in section 80b-2(a) of this title; (vii) an employee benefit plan as defined in paragraphs (3) and (32) of section 1002 of Title 29; (viii) a person predominantly engaged in activities that are in the business of banking or financial in nature, as defined in section 1843(k) of Title 12.”

<sup>21</sup> Rebecca Kukla, *Cognitive Models and Representation*, 43 THE BRIT. J. FOR THE PHIL. OF SCI. 219, 221 (1992). “According to the covariance theory, representations get their meaning by actually covarying with the things or states they represent in the real world.” *Id.* If the group of things with which a word “covaries” is not homogenous, the word has multiple meanings. *Id.*

<sup>22</sup> “Right of possession” is defined in 25 U.S.C.A. § 3001 (West 2012); “traffic” is defined in 17 U.S.C.A. § 1101 (West 2012) and 18 U.S.C.A. §§ 1028, 1029, 2318, 2319A, 2320 (West

to us in an almost infinite variety of applications and contexts. The job of the definition is to help us select which of the many possibilities applies. Other terms with multiple meanings may function as symbols, collecting under one caption many iterations of a type of thing, a grouping of somehow “like” things. Words and phrases such as “state,” “member bank,” and “foreign proceeding”<sup>23</sup> represent, in shorthand form, a collection of entities and events that can somehow be included within a single term’s compass. If law is a “system of signs,”<sup>24</sup> definitions of these place-filling terms serve to point to a group of objects too numerous to otherwise name.

Finally, many terms of multiple meaning function as descriptors, representing groups of real world referents that share well-recognized characteristics. “Child,” “employee,” “forest product,” and “academic facilities”<sup>25</sup> might each relate to many referents, but those terms describe members of a group that somehow resemble one another. These indexical and descriptive terms may acquire meaning by “co-varying with things in the real world,”<sup>26</sup> but those things may still vary greatly among themselves. What it is that brings them together in the context of the statute—what matters for the statute’s purposes—is often what the definition highlights.

### B. Terms Having No Meaning

The second category of defined terms includes those that, standing alone, are meaningless. Some of these terms—like “near elderly person,” “excessive amount,”

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2012); and “asset” is defined in 20 U.S.C.A. § 1087vv (West 2012), 25 U.S.C.A. §§ 677a, 26 U.S.C.A. 341, 806 (West 2012), and 28 U.S.C.A. § 3301 (West 2012).

<sup>23</sup> “State” is probably one of the most frequently defined words in the U.S. Code. It often includes each of the fifty states, the District of Columbia, Puerto Rico, and other territories or possessions of the United States (e.g., 1 U.S.C.A. § 5707a, 6 U.S.C.A. § 1111 (West 2012), 7 U.S.C.A. § 1932 (West 2012), 10 U.S.C.A. § 2192 (West 2012), 12 U.S.C.A. § 95 (West 2012)). But it may also include Indian tribes and tribal organizations (42 U.S.C.A. § 629a (West 2012)). Sometimes it refers to the State of California alone (16 U.S.C.A. §§ 460vvv, 539o, 1300l-6, 1300m, 1300n-1 (West 2012)), and sometimes it expressly excludes Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, the Marshall Islands, and Palau (8 U.S.C.A. § 1522 (West 2012) and 42 U.S.C.A. §§ 3030s-1, 9835, 9872, 11841 (West 2012)). “Member bank” is defined in 18 U.S.C.A. §§ 656, 1005 (West 2012); “foreign proceeding” is defined in 11 U.S.C.A. § 101 (West 2012).

<sup>24</sup> DENNIS R. KLINCK, *THE WORD OF THE LAW* 50 (1992) (citing Roberta Kvelson, who characterizes law as “a sign system paralleling language”).

<sup>25</sup> “Child” and “employee” are both defined repeatedly in the U.S. Code: examples of definitions of child are in 1 U.S.C.A. § 8 (West 2012), 5 U.S.C.A. §§ 5569, 8101, 8345, 8441, 8467 (West 2012). See also *supra* note 15. “Employee” is defined in, among other sections, 2 U.S.C.A. § 60e-1d, 2 U.S.C.A. §§ 130b, 1341, 1432, 1602 (West 2012), 4 U.S.C.A. § 401 (West 2012), and 5 U.S.C.A. §§ 2105, 3581, 4101, 4301, 4501, 4701, 5102, 5361, 5504, 5518, 5520a (West 2012). The term “forest product(s)” is defined in 25 U.S.C.A. § 3103 (West 2012) and 46 U.S.C.A. § 40102 (West 2012). “Academic facilities” is referenced in 25 U.S.C.A. § 1813(f)(2) (West 2012); that section states that the term has the meaning provided in 20 U.S.C.A. § 1132e-1 (West 2012). Unfortunately, 20 U.S.C.A. § 1132e-1 (West 1980) was omitted from the U.S. Code in 1986 when Chapter 28 of Title 20 was reorganized.

<sup>26</sup> Kukla, *supra* note 21.

“useful article,” “incidental property” or “new hybrid product”<sup>27</sup>—may make some sense in particular contexts; otherwise, these are rudderless terms, signifying nothing. Other terms are nearly nonsensical; “unresolved area of noncompliance,” “identifying activity level,” “qualified GO zone,” and “master netting agreement,”<sup>28</sup> are almost laughable. But, once defined by statute, these terms (in contrast to words of ordinary usage, which acquire and shed shades of meaning as easily and often as their contexts change) come to “carry their meaning like pieces of freight.”<sup>29</sup> They are less likely to bend and sway to the winds of context.

For most of these sense-less terms, absent definition, there is no class of objects or events that correspond to the term, and nothing that can be associated with, or identified as belonging to, a class described by the term. We would be hard pressed to pick out of a crowd all of the “reliance parties” or all of the “near elderly persons.”

### C. *Terms with Well-Established Meanings*

There is no shortage of definitions in the U.S. Code of terms whose meanings are well-established and uncontroversial. Words and phrases like “motion pictures,” “emergency,” and “margarine,”<sup>30</sup> are well and similarly understood by most speakers. Although we may not agree that particular situations could or should be characterized as emergencies, we share a common appreciation of the prototypical case of emergency, and we accept what it is about an event that makes it an emergency. We generally disagree only at the fringes of meaning. Similarly, while there are different types and formats of motion pictures, we all know what is meant when we go to a motion picture or talk about making a motion picture. A term like

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<sup>27</sup> “Near elderly person” is defined in 25 U.S.C.A. §§ 4103, 1437a (West 2012); “excessive amount” is defined in 26 U.S.C.A. §§ 6675, 6676 (West 2012); “useful article” is defined in 17 U.S.C.A. §§ 101, 102, 1301 (West 2012); “incidental property” is defined in 11 U.S.C.A. § 101 (West 2012); and “new hybrid product” is defined in 15 U.S.C.A. § 78o (West 2012).

<sup>28</sup> “Unresolved area of noncompliance” is defined in 42 U.S.C.A. § 9832 (West 2012); “identifying activity level” is defined in 15 U.S.C.A. § 78m (West 2012); “qualified GO zone” is defined in 26 U.S.C.A. § 1400N (West 2012); and “master netting agreement” is defined in 11 U.S.C.A. § 101 (West 2012).

<sup>29</sup> James Boyd White, *Thinking About Our Language*, 96 YALE L.J. 1960, 1973 (1986). Whether it is ever possible to precisely enumerate meaning through definition or description has been questioned. White has written at length about language and meaning in the context of law. For him, “words are not discrete and definable entities, as much as our talk about them (especially when we are thinking conceptually) seems to assume. They do not carry their meanings like pieces of freight, which the competent reader can pick up perfectly, nor are they reducible to ideas that can be regarded as having some existence beyond or behind language.” *Id.* But, definitions attempt to invest words with meaning and, so, to cause them to become laden with a particular implication. While that may not be appropriate for commonly understood terms, it makes much more sense for definitions of otherwise nonsensical terms.

<sup>30</sup> “Motion pictures” is defined in 17 U.S.C.A. § 101 (West 2012); “emergency” is defined in 7 U.S.C.A. § 1736f-1 (West 2012), 8 U.S.C.A. § 1187 (West 2012), 15 U.S.C.A. § 781 (West 2012), 16 U.S.C.A. § 2206 (West 2012), and 42 U.S.C.A. §§ 5122, 5196, 8622 (West 2012); and “margarine” is defined in 15 U.S.C.A. § 55 (West 2012).

“teaching skills,”<sup>31</sup> also defined in the U.S. Code, similarly communicates something that we all understand, but that we rarely have the need to precisely describe or quantify.

Defining a well-understood word or phrase risks fixing its meaning in unintended ways. Normal evolutions in word meaning are frustrated by definition. A definition that might once have reliably reflected a well-accepted meaning comes to represent a class of objects that does not correspond to a contemporary understanding of the term. So, while we all understand what is meant when we talk about a motion picture, defining it as an “audiovisual work consisting of a series of related images which, when shown in succession, impart an impression of motion . . .”<sup>32</sup> may trigger questions about the term’s application as technologies evolve.

Descriptive phrases may also be relatively well understood, even absent definition. “Burial site,” “open dump,” “heir by killing,” “family violence,” “drug-related criminal activity,” “housing area,” and “foreign government”<sup>33</sup> all encompass a variety of instances, yet most of us would easily be able to identify a particular instance as a member of that category of things. Even with respect to a term as charged as “weapons of mass destruction,”<sup>34</sup> while there may be uncertainty in application at the edge of meaning, prototypical members of that class of objects are easily named. Many of these descriptive phrases correspond to real world objects or events that we recognize as being appropriately classified within the scope of the phrase.

Terms of art and technical terms are also associated with well-accepted meanings by expert audiences, yet these phrases as well are often statutorily defined. In some cases, these terms correspond to physical substances (“coal”), scientifically recognized phenomena (“fetal alcohol syndrome” or “pneumoconiosis”), or standards (“coordinated universal time”).<sup>35</sup> In other cases, events or iterations that fall within a term’s scope are characterized by particular attributes or functions, characteristics that are familiar to actors within a particular discipline (“securities self-regulatory organization”<sup>36</sup>).

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<sup>31</sup> “Teaching skills” is defined in 20 U.S.C.A. §§ 1021, 9812 (West 2012).

<sup>32</sup> 17 U.S.C.A. § 101 (West 2012).

<sup>33</sup> “Burial site” is defined in 25 U.S.C.A. § 3001 (West 2012); “open dump” is defined in 25 U.S.C.A. § 3902 (West 2012); “heir by killing” is defined in 25 U.S.C.A. § 2206 (West 2012); “family violence” is defined in 25 U.S.C.A. § 3202 (West 2012); “drug-related criminal activity” is defined in 25 U.S.C.A. § 4103 (West 2012); “housing area” is defined in 25 U.S.C.A. § 4221 (West 2012); and “foreign government” is defined in 5 U.S.C.A. § 7342 (West 2012).

<sup>34</sup> “Weapon of mass destruction” is defined in 18 U.S.C.A. § 2332a(c)(2) (West 2012) and 50 U.S.C.A. § 2902 (West 2012).

<sup>35</sup> “Coal” is defined in 26 U.S.C.A. §§ 48A, 48B (West 2012) and 42 U.S.C.A. §§ 8302, 8374 (West 2012); “fetal alcohol syndrome” is defined in 25 U.S.C.A. § 1603 (West 2012); “pneumoconiosis” is defined in 30 U.S.C.A. § 902 (West 2012); and “coordinated universal time” is defined in 15 U.S.C.A. § 261 (West 2012).

<sup>36</sup> 11 U.S.C.A. § 101 (West 2012).

## III. METHODS OF DEFINITION

Techniques employed to define terms in the U.S. Code are almost as varied as the terms themselves. Consider “livestock,” a word that most of us are familiar with and that is prototypically associated with cattle, sheep, goats, and similar animals raised on a ranch or farm for commercial purposes. Sometimes the word is defined by simply listing types of animals that fall within the term’s scope. That list may be exhaustive (“[t]he term ‘livestock’ means cattle, swine, and lambs”<sup>37</sup>) or merely suggestive (“[t]he term ‘livestock’ includes, but is not limited to, cattle, sheep, swine, goats, and poultry”<sup>38</sup>). Those definitions comport with our general understanding of what is implied when the word ‘livestock’ is used.

Other definitions take a relatively common word—like “livestock”—and either expand or limit its ordinary meaning in extraordinary ways. Other sections of the U.S. Code establish meanings of “livestock” that include elk, reindeer, bison, horses, deer, and “fish used for food,” so long as instances of those animals meet two additional conditions imposed by the definition.<sup>39</sup> Other definitions of “livestock” include dead animals (of particular species)<sup>40</sup> and the carcasses of particular types of animals, thereby expanding the word’s scope beyond any ordinary understanding.<sup>41</sup>

Sometimes, to define is to describe; still other definitions of “livestock” list salient characteristics of instances included within the term’s meaning. In other sections of the Code, “livestock” consists of “all farm-raised animals”<sup>42</sup> and “all animals raised on farms.”<sup>43</sup> Those definitions clearly encompass prototypical instances of livestock (e.g., cattle and sheep), and include outlying instances as well (e.g., horses and even dogs and cats raised, for whatever purposes, on a farm).

Still other definitions establish conditions that must be met in order for the definition to apply. One definition of “livestock” focuses on domestic animals, but insists that they be raised for “home use, consumption, or profit.”<sup>44</sup>

A. *Descriptive vs. Prescriptive Definitions*

Whatever mechanics are employed to define a term, the definitions that result are, in approach, either descriptive or prescriptive.<sup>45</sup> Descriptive definitions, not

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<sup>37</sup> 7 U.S.C.A. § 1635a (West 2012).

<sup>38</sup> 7 U.S.C.A. § 1523 (West 2012).

<sup>39</sup> 7 U.S.C.A. § 1471 (West 2012).

<sup>40</sup> 7 U.S.C.A. § 182 (West 2012): “The term ‘livestock’ means cattle, sheep, swine, horses, mules, or goats—whether live or dead.”

<sup>41</sup> 18 U.S.C.A. § 2311 (West 2012): “‘Livestock’ means any domestic animals raised for home use, consumption, or profit, such as horses, pigs, llamas, goats, fowl, sheep, buffalo, and cattle, or the carcasses thereof.”

<sup>42</sup> 7 U.S.C.A. § 8302 (West 2012).

<sup>43</sup> 16 U.S.C.A. § 3801 (West 2012).

<sup>44</sup> 18 U.S.C.A. § 2311 (West 2012).

<sup>45</sup> Published in 1961, *Webster’s Third Unabridged Dictionary* took an approach to definitions that differed greatly from its predecessors. Dwight MacDonald, *The String Untuned*, N. YORKER, at 177, Mar. 10, 1962 (reviewing WEBSTER’S NEW INTERNATIONAL DICTIONARY (UNABRIDGED) (3d ed. 1961)). Whereas the highly regarded Second Edition

surprisingly, describe the meaning of a term. And, that description usually reflects or depends upon the actual use of a word or phrase, although the definition itself may enlarge or contract ordinary usage. Descriptive definitions paint a picture of the term. According to its U.S. Code definition, a “swimming pool or spa” is “any outdoor or indoor structure intended for swimming or recreational bathing, including in-ground and above-ground structures, and includes hot-tubs, spas, portable spas and non-portable wading pools.”<sup>46</sup> The definition describes what it is about swimming pools that distinguishes them, without specifying in detail any required attributes.

Descriptive definitions may be nominal in that they provide examples or synonyms of the word defined, or denotative or extensional as they list components or sub-classes of the defined term. The word “production” is defined nominally in Title 19 as “growing, mining, harvesting, fishing, raising, trapping, hunting, manufacturing, processing, assembling, or disassembling a good.”<sup>47</sup> And, both “nuclear science”<sup>48</sup> and “weapons of mass destruction”<sup>49</sup> are defined extensionally by listing subsets of instances included within the broader defined term.

Descriptive definitions often depict either a cluster of attributes of what is defined or typical uses of the term. Instances falling within the descriptive definition’s scope resemble one another because they share some, but often fewer than all, enumerated characteristics. “Literary works,” as defined in the U.S. Code, “are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.”<sup>50</sup> That definition could encompass radically different objects and instances—a love letter, a cartoon and its caption, a taxonomy, an interview, a mathematical equation—but each of those instances share some characteristics—they all fall within the common understanding of a “work,” and they all use characters of some sort to express something.

Descriptive definitions, then, create “fuzzy” categories<sup>51</sup> of word meaning. They may depend on the existence of a prototypical member of the category created by the

defined words in a classical way, i.e., prescriptively, by articulating the appropriate or correct meaning and use of a word, *Webster’s Third* defined words descriptively, by illustrating word meaning by its use (correct or incorrect). *Id.*

<sup>46</sup> 15 U.S.C.A. § 8002 (West 2012).

<sup>47</sup> “Production” is so defined on three occasions in Title 19: 19 U.S.C.A. §§ 3332, 3805, 4033 (West 2012).

<sup>48</sup> 42 U.S.C.A. § 16532 (West 2012): nuclear science “includes . . . (1) nuclear science; (2) nuclear engineering; (3) nuclear chemistry; (4) radio chemistry; and (5) health physics.”

<sup>49</sup> 50 U.S.C.A. § 2902 (West 2012): weapons of mass destruction are defined as any “chemical, biological, and nuclear weapons, and chemical, biological, and nuclear materials used in the manufacture of such weapons.”

<sup>50</sup> 17 U.S.C.A. § 101 (West 2012).

<sup>51</sup> “Fuzzy” categories are those not defined by necessary and sufficient conditions. Instead, fuzzy categories may relate to prototypical category members. The closer an instance resembles the prototype, the more central it is to the category. With fuzzy categories, unlike classical ones defined by necessary and sufficient conditions, an outlying instance’s inclusion in the category is not certain. See GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS*:

term; the certainty with which instances are either included or excluded from the term's scope depends on the closeness of their resemblance to the prototypical instance. The boundaries of the definition are not rigidly established.

Prescriptive definitions, on the other hand, dictate the appropriate use of a term (at least as determined by the definition's author), one that may or may not correspond to actual use, and one that is more definite and emphatic in its application. Prescriptive definitions often enumerate at least one condition—a universal—to which all instances of the defined term must conform. For purposes of federal personnel management, an employee is “an individual employed in or under a federal agency.”<sup>52</sup> Although this definition does not provide much assistance in helping us determine what it means to be employed generally, we know that for purposes of the statute employment by a federal agency is required in order to satisfy the definition.

Prescriptive definitions may consist of a set of conditions, compliance with each one of which is necessary to fall within the definition's scope and beyond which there are no other requirements. Instances are either clearly in or out of the prescriptive definition's boundaries.

While “swimming pool or spa” is defined descriptively in the U.S. Code, the definition of a “public pool or spa” is a prescriptive one. The term “public pool and spa” is defined to mean:

a swimming pool or spa that is:

(A) open to the public generally, whether for a fee or free of charge;

(B) open exclusively to—

(i) members of an organization and their guests;

(ii) residents of a multi-unit apartment building, apartment complex, residential real estate development, or other multi-family residential area (other than a municipality, township, or other local government jurisdiction); or

(iii) patrons of a hotel or other public accommodations facility;

or

(C) operated by the Federal Government (or by a concessionaire on behalf of the Federal Government) for the benefit of members of the Armed Forces and their dependents or employees of any department or agency and their dependents.<sup>53</sup>

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WHAT CATEGORIES REVEAL ABOUT THE MIND 39-46 (1986). Membership in fuzzy categories is “graded, rather than all or none.” Teresa M. Alexander & James T. Enns, *Age Changes in the Boundaries of Fuzzy Categories*, 59 CHILD DEV. 1372, 1372 (1988). In talking about word meaning, Michael Green notes: “it may be impossible to come up with a set of conditions, each member of which is necessary and the totality of which is sufficient, for a thing falling under a term. Instead, meanings may consist of clusters of conditions, not all of which are necessary and no specific set of which is sufficient. The applicability of the word may simply be the result of the satisfaction of a sufficiently large number of conditions within the cluster.” Michael Steven Green, *Dworkin's Fallacy, or What the Philosophy of Language Can't Teach Us About the Law*, 89 VA. L. REV. 1897, 1901 (2003).

<sup>52</sup> 5 U.S.C.A. §§ 4701, 5102, 5520a (West 2012).

<sup>53</sup> 15 U.S.C.A. § 8003 (West 2012).

If a particular swimming pool fails to meet one of the three conditions for being public, it simply is not a public pool, at least as defined by the U.S. Code.

Another section of the U.S. Code prescribes the meaning of “appliance lamp.”<sup>54</sup> If the lamp has a voltage higher than the maximum specified in the definition, if the lamp is sold in other than retail settings, or if the designations on the lamp packaging do not meet the conditions set forth in the statutory definition, the lamp fails to qualify for, and become subject to or benefit from, whatever statutory provisions apply to appliance lamps.

Prescriptive definitions may be connotative or intensional. They may assign meaning to a term by designating a broader class and then establishing features that distinguish members of the defined term. So, a statutorily defined “qualified joint venture” is one whose only members are a husband and wife who both “materially participate” in the business of the joint venture and who elect to be governed by a particular statute.<sup>55</sup> The universal or essential characteristic of all qualified joint ventures is that their only members are spouses who actively engage in the business.

Descriptive and prescriptive definitions are distinguished by their approach to word meaning. The descriptive definition recognizes uncertainty, incompleteness and the impossibility of fashioning a precise definition that will cover all—even unforeseen—instances. The prescriptive definition assumes that: (i) meaning can be assigned, (ii) meaning can be precise; (iii) there are essential characteristics of the instances that fall within the meaning of any term; and (iv) meaning can be articulated by a statement of required conditions or attributes. The prescriptive definition precludes doubt; any instance that lacks an element required by a prescriptive definition is excluded.

#### *B. Correlation Between Types of Terms Defined and Definitional Techniques*

In trying to predict what techniques of definition might be best suited for different types of terms defined, we might expect that words and phrases in our first category (terms with many meanings) would be defined descriptively, and that words and phrases falling within our second category (terms with no stand-alone meaning) would be defined prescriptively. In the first instance, ordinary terms that have many distinct meanings, the definition must limit meaning by indicating which of the several senses of the term applies in the statutory context. So, for many ambiguous terms, we see statutory definitions that focus meaning, not so much by enumerating essential characteristics, but by either indicating the intended usage of the term or by listing typical referents of the term.

For example, a word like “security” has multiple meanings. When used in the sense of an instrument that documents ownership or a right to payment, the word is usually defined in statutes by reference to a list of qualifying objects. In a

<sup>54</sup> Per its definition in 42 U.S.C.A. § 6291(29)(T) (West 2012):

“appliance lamp” means any lamp that—

- (i) is specifically designed to operate in a household appliance, has a maximum wattage of 40 watts, and is sold at retail, including an oven lamp, refrigerator lamp, and vacuum cleaner lamp; and
- (ii) is designated and marketed for the intended application, with—
  - (I) the designation on the lamp packaging; and
  - (II) Marketing materials that identify the lamp as being for appliance use.

<sup>55</sup> 26 U.S.C.A. § 761 (West 2012).



bankruptcy context, the term “security” “includes” notes, stocks, treasury stocks, bonds, debentures, collateral trust certificates, and transferable shares, as well as any “other claim or interest commonly known as ‘security,’” but emphatically does not include “currency, check, draft, bill of exchange, or bank letter of credit,” or several other enumerated “non-securities.”<sup>56</sup> The list of referents is not exhaustive, yet it conveys a sense of what is and is not included within the term’s scope. In a very different context, Indian tribes’ “powers of self-government” include, in Title 25 of the U.S. Code, “all governmental powers” possessed by the tribe and its constituent authorities and agencies; that definition goes on to make it clear that Indian tribes possess the “inherent power . . . hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.”<sup>57</sup> That definition *describes* what is included within the term, and, in so doing, acknowledges and confirms a substantive right that is associated with the term.

In each of the foregoing examples, the descriptive definition does what it ought to; it clarifies what sense of the term is intended without contradicting ordinary understanding.

But sometimes the statutory definition of a commonly used and understood word is a prescriptive one. When this happens, a condition is imposed on meaning that may disconnect the common understanding of the term from its defined meaning. The definition of “small business debtor” in the Bankruptcy Code is long and involved, but any debtor included within the term’s coverage must have no more than \$2,343,300 in debt.<sup>58</sup> There is something that is absolutely essential to being a small business debtor, at least as that term is defined in the Bankruptcy Code (and that essential attribute is probably *not* a characteristic that comports with our everyday usage or ordinary understanding of the term—in fact, the definition may in some ways contradict an ordinary understanding of the term). And, although a “foreign proceeding,” as defined in that same section of the Bankruptcy Code, “means a collective judicial or administrative proceeding in a foreign county, including an interim proceeding,” that process must be undertaken “under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.”<sup>59</sup> In resolving the ambiguity inherent in the phrase, the statutory definition imposes a requirement—absent from the term’s ordinary meaning—to which all instances of the term must adhere.

Just as words and phrases having many meanings sometimes beg for definition in a statutory context, so do terms that have no meaning. Since there is no actual usage of these terms, the legislature must stipulate meaning. We would expect prescriptive definitions to be the norm in these cases.

The term “near elderly person” is defined on two occasions in the U.S. Code. In one case, persons at least fifty-five years old but less than sixty-two qualify, and are deemed to be “near elderly;” some titles later, the near elderly have gotten younger—anyone at least fifty years of age, but not yet sixty-two, is a near elderly

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<sup>56</sup> 11 U.S.C.A. § 101 (West 2012).

<sup>57</sup> 25 U.S.C.A. § 1301 (West 2012).

<sup>58</sup> 11 U.S.C.A. § 101(51d) (West 2012).

<sup>59</sup> 11 U.S.C.A. § 101(23) (West 2012).

person.<sup>60</sup> Membership in the near elderly category can, in both instances, be objectively determined without any reference to what it means to be elderly in a substantive sense.

Prescriptive, denotative definitions should be appropriate for phrases that are composed of modifiers attached to familiar and meaningful words. Phrases like *excessive* amount, *exclusive* processor, *covered* permanent improvement, and *innocent* purchaser distinguish a subset of a larger collection of instances by focusing on particular attributes or characteristics. So, in order to qualify as a “covered permanent improvement” under 25 U.S.C. § 2206, an addition must satisfy two necessary and sufficient conditions: it must be both part of a decedent’s estate and attached to “a parcel of trust of restricted land that is also, in whole or in part, included in the estate of a decedent.”<sup>61</sup> If either of those two conditions is not present with respect to the improvement, its status as a “covered” permanent improvement fails.

Other definitions of nonsensical terms do not convey the same sense of certainty; they are descriptive and open to interpretation; accordingly, it is more difficult to objectively determine what instances are included. There is no anchor of common usage or shared understanding to tether the term to either the real world or familiar concepts. So, “incidental property” includes property “commonly conveyed with . . . a debtor’s principal residence . . . .”<sup>62</sup> And, for purposes of federal securities laws, an “exclusive processor” is a type of securities information processor or self-regulatory organization that undertakes a wide variety of activities “on an exclusive basis.”<sup>63</sup> Without a foundation of ordinary meaning, a descriptive definition cannot specify one sense among many or expand or contract ordinary meaning. In assigning meaning to terms like “incidental property” and “exclusive processor,” descriptive definitions relate fuzzy modifiers to equally fuzzy nouns.<sup>64</sup>

For terms of many meanings, descriptive definitions can quickly and efficiently indicate which sense of the word or phrase applies. And for terms with no meaning, prescriptive definitions establish meaning. For commonly used terms with well-accepted meanings, the utility of any definition is debatable. Looking at examples of these definitions, we see that they sometimes expand or limit ordinary meaning in unexpected ways.

Purportedly descriptive definitions of common, well-understood terms may muddy the waters more than clarify them. What might first appear to be a perfectly harmless descriptive definition, one that seemingly clarifies the meaning of a term by indicating what is and is not included, may actually change meaning, either incorporating instances that would not ordinarily fall within the term’s scope, or limiting the term to exclude items ordinarily covered. So, an “employee,” as defined

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<sup>60</sup> Per 25 U.S.C.A. § 4103 (West 2012), “the term ‘near-elderly person’ means a person who is at least 55 years of age and less than 62 years of age.” On the other hand, according to 42 U.S.C.A. § 1437 (West 2012), “[t]he term ‘near-elderly person’ means a person who is at least 50 years of age but below the age of 62.”

<sup>61</sup> 25 U.S.C.A. § 2206 (West 2012).

<sup>62</sup> 11 U.S.C.A. § 101 (West 2012).

<sup>63</sup> 15 U.S.C.A. § 78c (West 2012).

<sup>64</sup> MANUEL ATIENZA & JUAN MANERO, A THEORY OF LEGAL SENTENCES 64 (1998): definitions do nothing more than “relate words to [other] words.”

in 2 U.S.C. § 1602, “means any individual who is an officer, employee, partner, director, or proprietor;” the definition goes on to explicitly exclude from its scope independent contractors and volunteers.<sup>65</sup> Although the definition seems, at first glance, reasonable enough, we might wonder whether owners and directors would normally be thought of as being employees of a business. In fact, the wording of the definition itself implicitly acknowledges that officers, directors, partners, and proprietors are usually not “employees.” Another definition of “employee” in the U.S. Code expands its meaning to include applicants for employment and former employees,<sup>66</sup> bringing within the term’s compass individuals who, in most cases, are very clearly not “employed.”

If some definitions in the U.S. Code vest meaning in “employee” in a way that expands its coverage outside of ordinary meaning, other definitions limit the word’s scope. The definition of “employee” in section 4301 of Title 5 is one that, first, describes the term by including all individuals “employed in or under an agency” within its coverage, and, then, goes on to exclude eight classes of people who would otherwise fall within the definition.<sup>67</sup> The definition is descriptive initially, but then it becomes somehow the opposite, listing types of referents explicitly removed from the initial description of the term’s meaning. The result is a sort of hybrid definition that assigns meaning by creating a collection of objects and then specifically excluding particular members of that collection.

“Food” is defined repeatedly in the U.S. Code.<sup>68</sup> Nearly all of those definitions somehow expand or contract the common understanding of the term. Consider “food” as a cluster of instances, some of which are closer to prototypical instances of food (e.g., a hamburger or an apple) than others. Most of the U.S. Code definitions of food explicitly either include or exclude outlying instances of food from the scope of the defined term. So, on one occasion within Title 15 of the U.S. Code, unusual instances are encompassed in the ambit of “food”: “[t]he term ‘food’ means (1) articles used for food and drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.”<sup>69</sup> If asked whether chewing gum or something like MSG qualified as “food,” most of us would not have an immediate reaction one way or the other; we would have to think about it. But neither of those items would come to mind when someone mentions food.

Another definition of “food” within the U.S. Code, this time in Title 7, explicitly excludes from the definition’s scope hot foods “ready for immediate consumption.”<sup>70</sup> While that definition takes away with one hand, removing from its coverage items that we would routinely and without hesitation identify as food and that probably lie close to the prototypical instance of “food,” the definition adds with the other hand,

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<sup>65</sup> 2 U.S.C.A. § 1602 (West 2012).

<sup>66</sup> 3 U.S.C.A. § 401 (West 2012): “The term ‘employee’ includes an applicant for employment and a former employee.”

<sup>67</sup> 5 U.S.C.A. § 4301 (West 2012).

<sup>68</sup> See, e.g., 7 U.S.C.A. § 2012 (West 2012), 15 U.S.C.A. §§ 55, 2052 (West 2012), and 21 U.S.C.A. § 321 (West 2012).

<sup>69</sup> 15 U.S.C.A. § 55 (West 2012).

<sup>70</sup> 7 U.S.C.A. § 2012 (k) (West 2012).

including within its scope “seeds . . . for use in gardens to produce food for personal consumption.”<sup>71</sup>

Definitions of commonly used and understood terms, whether couched in descriptive or prescriptive language, have a prescriptive effect. By including instances that a common understanding of the term would not encompass, or by removing instances that we would normally associate with a word or phrase, definitions of well-understood words and phrases inevitably change meaning.

#### IV. PURPOSES OF DEFINITION

The statutory definition may—intentionally or not—narrow the lens of meaning or expand it; the best definitions may simply and succinctly restate meaning in a way that suggests to the reader a particular sense out of many possible ones. But definition inevitably—sometimes subtly, sometimes radically—changes meaning even as it tries to accurately reflect it. If a single word “invites” meaning, rather than fixes it,<sup>72</sup> then more words may either bewitch a reader, offering too rich a combination of implications, or starve him, taking away the staples of meaning on which he normally depends. The more we talk about meaning, the more we change it. So, why define? What legislative ends are achieved by the statutory definition? And, are those ends furthered by particular types or techniques of definition?

##### A. Creating a Model

If law structures and orders a community,<sup>73</sup> an arrangement of legislation like the U.S. Code might represent a model for the organization and operation of the community that it governs. In imposing order on a diverse, complicated, and messy reality and, at the same time, anticipating how things will change, statutes are often framed in what Judge Posner has called “a highly specific language.”<sup>74</sup> That highly specialized language establishes standards to which the governed are expected to conform. To textually establish a structure for governance, Manuel Atienza, Ruiz Manero, and others have suggested that two vehicles are required: “norms of conduct and definitions or conceptual rules.”<sup>75</sup> Definitions, “allow the identification of

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<sup>71</sup> *Id.*

<sup>72</sup> Michael Johnson, *Language and Cognition in Products Liability*, in *LANGUAGE IN THE JUDICIAL PROCESS* (Judith N. Levi & Anne Graffam Walker, eds., 1990). In discussing how individual words trigger individual comprehension, Johnson notes that “words do not *have* meanings, they *invite* them.”

<sup>73</sup> DEBORAH CAO, *TRANSLATING LAW* 13 (2007). “Law exists as a set of prescriptions having the form of imperatives, defining and enforcing the arrangements, relationships, procedures, and patterns of behavior that are to be followed in a society.” *Id.*

<sup>74</sup> See KLINCK, *supra* note 24, at 90 (quoting Richard Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1365 (1986)). Posner was actually referring to the language of the U.S. Constitution. *Id.*

<sup>75</sup> See ATIENZA & MANERO, *supra* note 64, at 63: “[Carlos] Alchourron and [Eugenio] Bulygin hold that a legal order can be constructed satisfactorily with only two categories of sentences, namely, norms of conduct and definitions or conceptual rules.” *Id.* Atienza and Manero note that Alchourron and Bulygin “characterize power-conferring rules as definitions.” *Id.*

norms by elucidating the sense in which expressions are used.”<sup>76</sup> Falling within a statutory definition results in becoming subject to normative rules.

The interpretation of text is in many ways private; but legislation can be successful and legitimate only to the extent that meaning is public and shared.<sup>77</sup> Legislation assumes that the governed can both understand the import of statutory text<sup>78</sup> and appropriately conform its behavior to that text. If the “use of language assumes a competence in the audience that the utterance does not convey,”<sup>79</sup> we can appreciate why definitions have come to be the rule, rather than the exception, in legislation. In a perfect world, definitions could establish that competence among the audience and fill the gap between the specialized language used by those who govern and the ordinary language employed by the governed.

Technical language employs specialized vocabularies; unfamiliar terms are used and familiar words are used in unusual ways.<sup>80</sup> In the absence of definition, legislators either assume that meaning is shared among readers or are intentionally ambiguous or vague, preferring to leave to courts and other interpreters the hard work of determining the precise application of a statutory term.<sup>81</sup>

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<sup>76</sup> *Id.* at 62, again referring to the work of Alchourron and Bulygin: “they characterize definitions as sentences that do not express norms (although they may have normative consequences), but rather allow us to identify norms by elucidating the sense in which certain expressions are used.”

<sup>77</sup> See DICKERSON, *FUNDAMENTALS*, *supra* note 4, at 25. In characterizing legal instruments (including statutes, ordinances, regulations, and wills) as communication vehicles, Dickerson notes: “To be effective . . . such an instrument must carry the same meaning to those who execute it as the draftsman.” Vlad Perju cites Habermas in echoing the notion that meaning must be somehow shared among the drafter of laws and those who are governed by those laws: “the only legitimate laws are those whose addressees can see themselves as the laws’ rational authors.” Vlad Perju, *A Comment on “Legisprudence,”* 89 B. U. L. REV. 427 (2009).

<sup>78</sup> MATTILA, *COMPARATIVE LEGAL LINGUISTICS*, *supra* note 8, at 34: “the correct understanding of a message often presupposes that the recipient has sufficient prior knowledge of the matter in question.”

<sup>79</sup> See White, *supra* note 29, at 1973 (“Any use of language assumes a competence in the audience that the utterance itself does not confer.”).

<sup>80</sup> See Mary Jane Morrison, *Excursions Into the Nature of Legal Language*, 37 CLEV. ST. L. REV. 271, 314 (1989), who suggests that there are:

three types of technical terms: (1) terms that never have had ordinary uses because they are not from ordinary language at all and instead are from theories (physics’ “quark”); (2) terms that were once connected to ordinary words at least marginally by using one among many of the meanings of the ordinary word but today function in theories that undergird the other uses . . . ; and (3) terms that have uses in the discipline that are fixed to one among the many uses of the ordinary word, i.e., that are fixed on one out of the many meanings of the ordinary language word . . . .

<sup>81</sup> Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947) (“Statutes as well as constitutional provisions at times embody purposeful ambiguity or are expressed with a generality for future unfolding.”).

By assigning a name to an object or abstraction, the legislature instructs its audience that the defined term—functioning almost as a sign<sup>82</sup>—stands for what the definition either describes or dictates. The legitimacy of the definition, or the degree to which the audience accepts what the legislature says, may have something to do with both the type of term defined and the techniques used to define it.

By defining terms, statutes create categories into which behaviors, entities, individuals, and actions—both present and future—are somehow made to fit.<sup>83</sup> Rules enumerated in legislation apply only to the extent that the associated definitions are somehow satisfied. With respect to prescriptive definitions, the conditions set forth in the definition must be met and, with respect to descriptive ones, the instance to which the normative provisions apply must somehow sufficiently resemble the prototypical category member. If the entirety of the U.S. Code is in some sense a model of the real world, then definitions serve as building blocks in constructing that model.

### B. Controlling the Future

When it defines, the legislature requires that words used in the statute be understood in particular ways. When terms are defined prescriptively, the power of the reader to interpret the word or phrase is even more severely restricted. To define is to limit,<sup>84</sup> and by setting forth the meaning of a term, legislative drafters may set limits beyond which interpreters cannot venture.

Legislation enacted in 2010 established a complex regulatory structure designed to administer health care benefits and insurance. Venturing into uncharted waters, Congress incorporated more than four-hundred definitions into the text of the Patient Protection and Affordable Care Act.<sup>85</sup> Among those definitions is one for “qualified health plan,” which sets forth terms and conditions that any health plan wishing to be treated as such is required to meet.<sup>86</sup> The definition is prescriptive; if any one of its

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<sup>82</sup> See Monroe Beardsley, *Categories*, 8 REV. METAPHYSICS. 3, 23 (1954) (“To interpret a sign is not to respond to it or to describe actual or probably responses: it is to say that a certain response would be good, in terms of a specific standard, if the sign occurred.”).

<sup>83</sup> *Id.* at 3 (“A category is at least a way of dividing up the world . . . [i]t is always . . . an anticipation of experience as well, since it provides a pair of pigeonholes that future experience is to be put into.”).

<sup>84</sup> David Melinkoff notes that the language of lawyers is often and expectedly imprecise: “Many of the words that lawyers traditionally use never have had any definite meaning.” DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 301 (1963). Once defined, the term cannot be interpreted to mean something that lies outside the scope of the definition: “by precisely establishing the meaning of the terms used in legislative language, definitions fulfill the function of reducing the ‘semantic power’ of judges and legal doctrine.” ATIENZA & MANERO, *supra* note 64, at 73.

<sup>85</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>86</sup> 42 U.S.C.A. § 18021 (West 2012):

The term “qualified health plan” means a health plan that—

(A) has in effect a certification (which may include a seal or other indication of approval) that such plan meets the criteria for certification described in section 18031(c) of this title issued or recognized by each Exchange through which such plan is offered;

conditions is not satisfied, the health plan is not entitled to whatever benefits are available to qualified health plans. When the legislation was drafted, Congress was less than omniscient with respect to the future landscape of federally mandated health insurance.<sup>87</sup> But, by establishing that only those health plans in compliance with specific and detailed conditions would qualify for certain treatment, Congress sought to ensure that at least certain aspects of the health care regime comported with legislative expectations. Interpreters would theoretically be powerless to designate other instances of health plans falling outside statutory parameters as “qualified health plans.”

Even definitions with descriptive features allow legislatures to exercise some control over readers, and to erect boundaries outside of which interpretation ought not to stray. So, “motor vehicles,” defined in sections 30B and 30D of the Internal Revenue Code, are vehicles that are “manufactured primarily for use on public streets, roads, and highways (not including a vehicle operated exclusively on a rail or rails) and which [have] at least 4 wheels.”<sup>88</sup> At least for purposes of the Internal Revenue Code, a motorcycle can never be classified as a motor vehicle. Other descriptive definitions explicitly exclude instances from the definition’s scope. An “existing major fuel-burning installation” is, according to the statutory definition, one that is (unsurprisingly) not a new major fuel-burning installation; the definition goes on to exclude from the definition of “existing major fuel-burning installation” two categories of installations that would otherwise qualify.<sup>89</sup> Again, under no

(B) provides the essential health benefits package described in section 18022(a) of this title; and

(C) is offered by a health insurance issuer that—

(i) is licensed and in good standing to offer health insurance coverage in each State in which such issuer offers health insurance coverage under this chapter;

(ii) agrees to offer at least one qualified health plan in the silver level and at least one plan in the gold level in each such Exchange;

(iii) agrees to charge the same premium rate for each qualified health plan of the issuer without regard to whether the plan is offered through an Exchange or whether the plan is offered directly from the issuer or through an agent; and

(iv) complies with the developed by the Secretary under section 18031(d) of this title and such other requirements as an applicable Exchange may establish.

<sup>87</sup> Congress, in fact, had to predict—and order—the future. See CAO, *supra* note 73, at 122: “legislative language must anticipate a world that does not exist at the time of expression and must be prepared for an infinity of possibilities.”

<sup>88</sup> 26 U.S.C.A. §§ 30B, 30D (West 2012).

<sup>89</sup> 42 U.S.C.A. § 8302(12) (West 2012):

(A) The term . . . “existing major fuel-burning installation” means any installation which is not a new major fuel-burning installation.

(B) Such term does not include a major fuel-burning installation for the extraction of mineral resources located-

(i) on or above the Continental Shelf of the United States, or

(ii) on wetlands areas adjacent to the Continental Shelf of the United States, where coal storage is not practicable or would produce adverse effects on environmental quality.

(foreseeable) circumstances could interpretation of the statute confer “major fuel-burning installation” status on those two types of facilities.<sup>90</sup>

Like any category into which some events and objects must fall and others be excluded, a definition ranks and relates the experiences and events to which it may apply in comparison to each other. As items are either included or excluded from a category, they are deemed either similar or distinct. Absent definition, categories established by statutory text still exist, but their boundaries are more likely to expand and contract in reaction to both developments in the area and unforeseen applications of the statutory text. Definitions impede—if not completely forestall—normal evolutions in word meaning, at least in a statutory context. If, in ordinary discourse and usage, the meaning of a word is always a work in progress,<sup>91</sup> then the role of the definition is to finish the job. From the perspective of a legislative drafter who wishes to ensure a particular understanding of statutory text—a and limit the alternatives available to interpreters—“the deader the better,”<sup>92</sup> at least with respect to word meaning. The choice of definitional techniques—whether descriptive or prescriptive, connotative or denotative—may signal the extent to which drafters—intentionally or not—have effectively either closed the meaning of the term, admitting no unexpected interlopers, or left meaning open, acknowledging the impossibility of anticipating all circumstances.

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<sup>90</sup> Frederick Schauer, in a 1988 article, looks at formalism, and, as he characterizes it, defends it:

Formalism is the way in which rules achieve their “ruleness” precisely by doing what is supposed to be the failing of formalism: screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account. Moreover, it appears that this screening off takes place largely through the force of the language in which the rules are written. Thus the tasks performed by rules are tasks for which the primary tool is the specific linguistic formulation of a rule.

Frederick Schauer, *Formalism*, 97 YALE L. J. 509, 510 (1988). In that article, Schauer frames formalism in the context of a denial of choice. *See generally id.* Definitions certainly do not foreclose all judgments by the interpreter, but, whether they are performative or communicative, they do direct the interpreter toward a particular reading of a term and, in some cases, eliminate potential constructions of the word.

<sup>91</sup> Ernest Von Glaserfeld, *Cognition, Construction of Knowledge, and Teaching*, 80 SYNTHESIS 121, 134 (1989) (“To be considered proficient in a given language requires two things among others: to have available a large enough vocabulary, and to have constructed and sufficiently accommodated and adapted the meanings associated with the words of that vocabulary so that no conceptual discrepancies become apparent in ordinary linguistic interactions.”).

<sup>92</sup> Particular terms of art come to be relied on (maybe too frequently) by lawyers because they believe those words’ meaning to be well-settled. David Melinkoff suggests that it is fear that causes lawyers to stick with particular expressions, a misplaced belief that certain phrases and articulations are certain in their application and impact: “It is precise now. We are safe with it now. Leave us alone. Don’t change. Here we stay till death or disbarment.” MELLINKOFF, *supra* note 84, at 295. With respect to peculiar and archaic legal expressions, lawyers may find (unjustified) comfort in their use, assuming that their meanings are well-established. “The fact that [words] are archaic is a recommendation . . . The deader the better; that means they can’t move around. ‘Archaic’ is taken as another way of saying that these words haven’t changed since Coke, and anything that old must be good. Not so. Many words that old have simply been bad longer.” *Id.* at 304.



Definition may also allow drafters to close loopholes and prevent “willful misinterpretation.”<sup>93</sup> By making clear that particular instances fall outside of the statutory definition,<sup>94</sup> drafters recognize that the text of the definition itself might admit instances not intended to be included, and that interpreters might successfully pervert statutory language to accomplish outcomes contrary to the legislative purpose. By explicitly removing those instances from the definition’s compass, drafters try to ensure the intended interpretation.<sup>95</sup>

Schauer distinguishes between the “long-term mobility of language [and] its short-term plasticity.”<sup>96</sup> The fact of definition addresses the mobility of word meaning over time, while the choice of definitional techniques signals, at least to some extent, the willingness or reluctance of the legislature to live with at least some malleability in the definition’s application.

### C. *Being Precise and Increasing Certainty*

If definitions control future interpretations of the statute, they may also clarify current application of the statute and promote predictability. To the extent that the meaning of terms used in statutes is expressed precisely, those individuals governed by a statute may be better able to comply with its dictates and conform behavior to the standards enumerated. Precisely defining terms used in statutes might narrow the margin of uncertainty in application,<sup>97</sup> and reduce the number of hard cases.<sup>98</sup>

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<sup>93</sup> In 1914, a report, prepared by a Special Committee of Congress and submitted to the American Bar Association, considered the creation of an official legislative drafting service. In proposing a manual for legislative drafters, the Committee noted that legislative language “should not only be capable of being clearly understood, but should be incapable of willful misinterpretation.” SPECIAL COMM. ON LEGISLATIVE DRAFTING, REPORT OF THE SPECIAL COMMITTEE ON LEGISLATIVE DRAFTING 5 (1914) (presented at the meeting of the American Bar Association, in Washington, D.C., on October 20-22, 1914)

<sup>94</sup> See, for example, 15 U.S.C.A. § 15g (West 2012), which makes clear that neither proprietorships nor partnerships are included within the definition of “natural person.” The definition of “dealer” in 26 U.S.C.A. § 5845 (West 2012) both excludes particular types of businesses that might otherwise fall within the definition’s scope, and brings outlying instances into the definition: “The term ‘dealer’ means any person, not a manufacturer or importer, engaged in the business of selling, renting, leasing, or loaning firearms and shall include pawnbrokers who accept firearms as collateral for loans.”

<sup>95</sup> See ATIENZA & MANERO, *supra* note 64, at 73 (“[D]efinitions fulfil [sic] the function of reducing the ‘semantic power’ of judges and legal doctrine.”).

<sup>96</sup> See Schauer, *supra* note 90, at 524.

<sup>97</sup> DICKERSON, *supra* note 4, at 40, 145. Dickerson notes that some terms have “wide margins of uncertainty”, and others relatively “narrow ones.” He suggests that definitions can “resolve uncertainties in the cloudy areas surrounding vague terms.”

<sup>98</sup> Scott Soames, *Interpreting Legal Texts: What is and What is Not, Special About the Law* (2007) (paper presented at an International Conference on Law, Language, and Interpretation at the University of Akureyri, Iceland, April 1-2, 2007), *available at* [http://www-bcf.usc.edu/~soames/sep\\_pub/Interpreting\\_Legal\\_Texts.pdf](http://www-bcf.usc.edu/~soames/sep_pub/Interpreting_Legal_Texts.pdf). Soames describes “semantically hard cases” as those in which “the meanings of the relevant legal texts, plus all nonlegal and nonmoral facts, fail to determine [the] (legally correct) outcome.” Definitions that serve primarily communicative functions, in focusing the interpreter’s attention on a particular meaning, might cause some cases to become at least less semantically difficult. *Id.*

Sometimes, precisely establishing the limits of a term's scope makes perfect sense. The word "child" is defined repeatedly in the U.S. Code.<sup>99</sup> Depending on the context in which it appears, "child" may or may not include individuals who are more than eighteen years of age, who can support themselves, who are married, who are not related by blood to a parent, who are not yet born, or who have died.<sup>100</sup> Each particular statutory definition of the word narrows the lens of meaning in the context of what it is about a child that is important in the statutory context.

But for every precisely worded definition that clarifies a term's application, another equally precisely defined term complicates an understanding of what instances are covered by the term's reach. The definition of "food" in 7 U.S.C. § 2012 is a long and complicated one; it excludes all "hot foods" except those that fall within any of six clauses. The structure of the definition is such that it, first, incorporates an ordinary understanding of "food," and then, (i) excludes certain categories of what we would think of as food (i.e., hot food); (ii) enumerates exceptions to those excluded categories (thereby bringing more instances of "food" into the fold); and, finally, (iii) adds new categories of normally non-food items (like equipment used to procure food) to the definition's scope.<sup>101</sup> In a definition that is more than six hundred words long, clarity and comprehension may have been sacrificed in an effort to be precise.

"Consumer product" is defined in Title 42 of the U.S. Code in the context of energy conservation programs.<sup>102</sup> In section 6291, "consumer product" is associated with a definition that, first, excludes an item that we would ordinarily think of as a consumer product (automobile); second, limits the term's compass to objects that consume energy or, in a small number of cases, water (thereby eliminating large classes of objects that we ordinarily understand to be consumer products); and, third, eliminates the requirement that the particular object is actually used by a consumer. In the case of "food" and "consumer product," it is hard to see how precision in definition increases clarity. The definitions may, indeed, serve certainty, but at significant cost in terms of understandability.

If the intent behind definition is to reduce, if not eliminate, indeterminacy and vagueness, it is an effort whose success is undermined by everyday language use. The more precise the definition of a common or ordinary term, the more baggage accompanies it throughout its statutory life. But that baggage—cumbersome and unwieldy—is very different from the cloud of meaning that customarily surrounds a word or phrase used in ordinary discourse.

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<sup>99</sup> In Title 5 alone, "child" is defined seven times. 5 U.S.C.A. §§ 8101, 8341, 8345, 8424, 8441, 8467 (West 2012).

<sup>100</sup> See, for example, 5 U.S.C.A. §§ 8341 and 8441 (West 2012) ("child" includes unmarried dependent children between eighteen and twenty-two years of age who are students); 5 U.S.C.A. § 8101 (West 2012) ("child" includes stepchildren and posthumous children and children over the age of eighteen who are incapable of self-support but does not include married children); and 5 U.S.C.A. § 8342 (West 2012) ("child" includes a natural and adopted child, but does not include a stepchild.).

<sup>101</sup> See 7 U.S.C.A. § 2012 (West 2012). This may be one of those definitions that "strips language of its sociological and normative complexity, . . ." and substitutes something equally, if not more, complicated, but far less rich. CHRISTOPHER HUTTON, *LANGUAGE, MEANING AND THE LAW* 101 (2009).

<sup>102</sup> 42 U.S.C.A. § 6291 (West 2012).

*D. Promoting Readability and Efficiency in Drafting*

Most legislative drafting manuals justify the use of definitions by suggesting that including definitions in the text of a statute results in an economy of expression and improvements in readability. The rationale is that by assigning a name to a complex set of conditions or attributes, drafters are able to state statutory provisions more succinctly and clearly.<sup>103</sup> And, as a result, the statutory message is more easily received and understood. Moreover, use of the definition ensures – at least in theory – that terms are used consistently throughout what may be a lengthy text.

If legislation is expressed in a technical language,<sup>104</sup> its vocabulary is likely to consist of terms of art that either have no meaning in ordinary English or have several different meanings. Those terms of art are often shorthand expressions of complicated concepts whose application is confined to a particular discipline; “one of the primary utility features of a technical language is that it enables those of us who speak it to say more in a more comprehensible, thorough and exact way, using less time and fewer words than . . . ordinary English.”<sup>105</sup> The logic of defined terms is evident in some of the especially convoluted and apparently meaningless terms defined in the U.S. Code. Phrases like “Rita GO Zone,” “Wilma GO Zone,” “Price-Anderson Incident,” and “means-tested Federal benefit program” stand in the place of textual descriptions of what those terms represent.<sup>106</sup> Assigning a name to all of the instances or phenomena subsumed in the definition allows the statute’s normative provisions to be more efficiently articulated and ensures that there are no discrepancies or contradictions among the statute’s possibly many references to the phenomenon or group of objects.

While the legislature may very well intend that those otherwise meaningless terms be understood consistently across a statute, it is more of a stretch to suggest that legislators who define common terms intend a similarly consistent interpretation. A reader wonders if legislators remember the definitions of common terms set forth in one part of a statute as they draft other sections that occur much later in the text.

Literature suggests that “lexical chunks”—content rich phrases or groupings of words—are more easily learned and better incorporated into a cognitive model, at least by children, than individual words.<sup>107</sup> Perhaps frequently repeated terms that refer back to a statutory definition will trigger responses that are appropriate, as gauged by the normative provisions of statutory text.

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<sup>103</sup> “[D]efinitions can reduce complexity by allowing the bill’s key operating provisions to be stated simply, even when the concepts they involve are extremely complicated.” LAWRENCE E. FILSON & SANDRA L. STROKOFF, *LEGISLATIVE DRAFTER’S DESK REFERENCE* 129 (2008).

<sup>104</sup> CAO, *supra* note 73, at 54.

<sup>105</sup> Morrison, *supra* note 80, at 306.

<sup>106</sup> “Rita GO Zone” and “Wilma GO Zone” are defined in 26 U.S.C.A. § 1400M (West 2012). “WMD” is defined in 50 U.S.C.A. § 2902 (West 2012). “Price-Anderson incident” is defined in 42 U.S.C.A. § 17373 (West 2012). A “means-tested Federal benefit program” is defined in 20 U.S.C.A. § 1059e (West 2012).

<sup>107</sup> See Ben Zimmer, *Chunking*, N.Y. TIMES MAGAZINE, Sept. 16, 2010, at MM30, available at <http://www.nytimes.com/2010/09/19/magazine/19FOB-OnLanguage-Zimmer.html>.

### E. Leveling the Playing Field

Some definitions succinctly, and without elaboration, clarify the ways in which words or phrases are used in statutes. These statements, far from assigning a definitive meaning to a particular word or phrase, instead, put drafters and readers alike on notice, and create a context in which the statute can be situated. They are almost not definitions in a classic sense, yet they are designated as such by statute. So, in the context of Head Start programs, “health” is defined as follows:

the term “health,” when used to refer to services or care provided to enrolled children, their parents, or their siblings, shall be interpreted to refer to both physical and mental health.<sup>108</sup>

The definition evidences the intent of the legislation that—at least with respect to either mental or physical health—there should be no question about the scope of the term as used in the statute. Similarly, the definitions section of the Copyright Act includes this short definition (if we can call it that) of “device, machine or process:” “A ‘device’, ‘machine’, or ‘process’ is one now known or later developed.”<sup>109</sup>

To the extent that the sense of a term is quickly and simply clarified, we expect readers to share at least some of the same responses to the word or phrase. With compatible, albeit inexact, understandings of meaning created by quasi-definition, there is at least a context established so that individual comprehension can take place on the same plane.<sup>110</sup> The definition sets forth ground rules—easy to remember and articulate—that apply throughout a reading of the statute. The definition establishes a shared cognitive space that ensures that drafters and readers share some assumptions and understandings, inexact though they may be.<sup>111</sup>

If definitions sometimes efficiently clarify by inclusion, they may equally well exclude certain possible interpretations. The definition of “database” in the Federal Agency Data Mining Reporting Act does not tell us what it necessarily is; the definition only informs us as to what it is not: “[t]he term ‘database’ does not include telephone directories, news reporting, information publicly available to any member of the public without payment of a fee, or databases of judicial and administrative opinions or other legal research sources.”<sup>112</sup> In 5 U.S.C. § 8342, “child” is deemed to include natural or adopted children, but not stepchildren. And, in 5 U.S.C. § 8421, the only definition of “service” is a statement to the effect that “the term ‘service’ does not include military service.” If a term is capable of

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<sup>108</sup> 42 U.S.C.A. § 9852c (West 2012).

<sup>109</sup> 17 U.S.C.A. § 101 (West 2012).

<sup>110</sup> “[T]o understand what someone has said or written means no less but also no more than to have built up a conceptual structure that, in the given context, appears to be *compatible* with the structure the speaker had in mind . . . .” See Von Glaserfeld, *supra* note 91, at 134.

<sup>111</sup> Communication is successful when the parties understand each other in a way that meets each of their expectations. And whether that happens depends upon the extent to which each participant’s interpretation of the words used in the text matches the other’s. “Each of us is a circle of experiences and meaning that occasionally, through language, meet or overlap with others, at least at the edges.” White, *supra* note 29, at 1974. If definitions can ensure that the individual understandings overlap, at least with respect to the intended meaning of a particular term, then they will have served their purpose.

<sup>112</sup> 42 U.S.C.A. § 2000ee-3 (West 2012).

attracting different meanings, one purpose of definition is to ensure that the appropriate sense is the one attached to the word in the statute.

## V. FUNCTIONS AND EFFECTS OF DEFINITION

The inclusion of so many definitions is one of many ways in which legislative texts differ from ordinary ones. Legislative vocabulary, grammar, and syntax are all unusual, at least when compared to texts and communication that most of us encounter in our non-law lives.<sup>113</sup> Whether the nature of law requires such a distinctive (and convoluted) style is a familiar debate.<sup>114</sup> But if there are reasons for legislative speech to differ from ordinary language, those reasons likely have something to do with the role that law—and, by implication, legislation—plays in our lives.

### A. *Talking and Doing—Acts of Language and Law*

Characterizing law, as others have done, as a “normative discourse”<sup>115</sup> highlights what it is about law—and the language in which it is expressed—that makes it different from other texts and other language. Law is normative—it has effects. Law invests individuals with rights and obligations that they would not otherwise have; it prescribes behaviors and it dictates how particular states of affairs are to be treated by a community. But law is also a discourse, almost a conversation (albeit largely a one-sided one)—it is a communication that describes how a community operates and what it values; its import changes as its audience interacts with it and applies it.

If law—writ large—is a normative discourse, then so is legislation. It is an agent that both informs a community and effects norms.<sup>116</sup> Legislation communicates, and, as it does so, it changes the status, privileges, rights, and obligations of those to whom it is addressed.

Statutory definitions even more emphatically illustrate the two levels on which legal language operates. On the one hand, statutory definitions tell us what terms mean in particular contexts; they are meant to clarify the message conveyed by the legislature in the statute’s normative clauses. The legislative speaker intends to deliver information that will be recognized, understood, and appropriately acted

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<sup>113</sup> The unnecessary complexity of legislative language is not a new phenomenon. David Mellinkoff notes that Thomas Jefferson recognized the problem and was determined not to perpetuate it. “With his draft of a bill on criminal law, Jefferson wrote. . . . ‘In it’s style I have aimed at accuracy, brevity and simplicity . . . . The same matter if couched in the modern statutory language, with all it’s tautologies, redundancies and circumlocutions would have spread itself over many pages, and been unintelligible to those whom it most concerns.’” MELLINKOFF, *supra* note 84, at 252-253; *see also* Maley, *supra* note 12, at 25 (“[Legislation] is commonly agreed to be a complex, intricate, even bizarre style of language.”).

<sup>114</sup> *See* ALFRED PHILLIPS, *LAWYERS’ LANGUAGE: HOW AND WHY LEGAL LANGUAGE IS DIFFERENT* 30 (2003), where he describes the language of lawyers as “not only alien but also alienating”; *see also* MELLINKOFF, *supra* note 84; and Peter Tiersma, *Some Myths About Legal Language*, 2 *L., CULTURE & HUMAN.* 29 (2006).

<sup>115</sup> *See* Francis Jay Mootz, III, *Interpretation, in* *LAW AND THE HUMANITIES: AN INTRODUCTION* 347 (Austin Sarat, Matt Anderson & Catherine O. Frank eds., 2010) (citing BRIAN BIX, *LAW, LANGUAGE AND LEGAL DETERMINACY* 181 (1993)).

<sup>116</sup> DICKERSON, *supra* note 4, at 25 (“ [A] legal instrument is both (1) a crystallization and declaration of rights, privileges, duties, and legal relationships and (2) a communication.”).

upon by the legislative audience;<sup>117</sup> the definition is included so that the meaning of the normative text is better understood.

Section 254b of Title 42 of the U.S. Code deals with health centers eligible to receive federal aid. Among the grants that may be awarded pursuant to that section are those to centers that provide services to certain agricultural workers. Section 254b includes the following definition of agriculture:

The term “agriculture” means farming in all its branches, including—

- (i) cultivation and tillage of the soil
- (ii) the production, cultivation, growing, and harvesting of any commodity grown on, in, or as an adjunct to or part of a commodity grown in or on the land; and
- (iii) any practice (including preparation and processing for market and delivery to storage or to market or to carriers for transportation to market) performed by a farmer or on a farm incident to or in conjunction with an activity described in clause (ii).<sup>118</sup>

Apart from the paragraph in which it is defined, the word “agriculture” appears but twice in section 254b (a section that is quite lengthy—more than 8500 words in all). It appears once as part of the definition of “migratory agricultural worker” and again within the definition of “seasonal agricultural worker.”<sup>119</sup> The word “agricultural,” however, occurs repeatedly in section 254b as it modifies both worker(s) and chemicals on a number of occasions. The statutory definition of agriculture is broad and inclusive; it makes clear that many activities related to transportation of farming products are included within its scope. The definitions of migratory and seasonal agricultural workers are similarly made a part of the statute, not for the purpose of changing the status or rights of those individuals, but, instead, in order to describe the type of health center eligible for federal funds. The definition communicates what types of activities are intended to be included within the statute’s compass.

On the other hand, legislative definitions can also empower;<sup>120</sup> they may confer a particular status on individuals, entities, or situations, and invest those agents and states of affairs with obligations, benefits, privileges, and rights. For example, certain small and green energy producers, including “eligible solar, wind, waste or geothermal facilities,” are exempt, pursuant to section 824a-3 of Title 16, from some

<sup>117</sup> Communication studies literature suggests that, in any cooperative communication, the speaker must intend to convey information that is relevant in the context and the other party must recognize that intention. See Prashant Parikh, *Communication, Meaning, and Interpretation*, 23 LINGUISTICS & PHILOSOPHY 185, 190 (2000).

<sup>118</sup> 42 U.S.C.A. § 254b (West 2012).

<sup>119</sup> Per 42 U.S.C.A. § 254b (West 2012), “‘migratory agricultural worker’ means an individual whose principal employment is in agriculture, who has been so employed within the last 24 months, and who establishes for the purposes of such employment a temporary abode.” And, the term “‘seasonal agricultural worker’ means an individual whose principal employment is in agriculture on a seasonal basis and who is not a migratory agricultural worker.”

<sup>120</sup> Disagreeing with Alchourron’s and Bulygin’s characterization of definitions as “power-conferring rules,” Atienza and Manero suggest that the role they play is more ambiguous. See ATIENZA & MANERO, *supra* note 64, at 62-63.

federal energy regulations. An “eligible solar, wind, waste or geothermal facility” is defined to mean—

a facility which produces electric energy solely by the use, as a primary energy source, of solar energy, wind energy, waste resources or geothermal resources; but only if—

(i) either of the following is submitted to the Commission not later than December 31, 1994:

(I) an application for certification of the facility as a qualifying small power production facility; or

(II) notice that the facility meets the requirements for qualification; and

(ii) construction of such facility commences not later than December 31, 1999, or, if not, reasonable diligence is exercised toward the completion of such facility taking into account all factors relevant to construction of the facility.<sup>121</sup>

By falling—or purposefully moving—within the confines of the term’s definition, a facility gains regulatory freedoms unavailable to non-qualifying plants. This definition does much more than communicate; it entitles certain facilities to regulatory advantages set forth in the statute’s normative provisions. By being—or becoming—the defined term, the facilities’ entitlements and attributes are changed.

When definitions function in this way—when they create a status that brings with it entitlements or sanctions—they serve a performative function; they are, in fact, speech acts.<sup>122</sup> These definitions still communicate, but their performative function is equally, if not more, important.

Distinguishing between what legal texts say and what they do<sup>123</sup> relates to a broader discussion among linguists and philosophers that focuses on the difference between “uttering words and what one does by uttering them.”<sup>124</sup> The idea that certain types of speech or text have immediate and important effects is most frequently associated with the work of J. L. Austin and John Searle.<sup>125</sup>

<sup>121</sup> 16 U.S.C.A. § 796(17)(E) (West 2012).

<sup>122</sup> In fact, some have suggested that legislation is, in itself a speech act: “[w]hen the legislature enacts a statute, it is performing speech acts in the classic, performative, Austinian sense.” Maley, *supra* note 12, at 27.

<sup>123</sup> Sometimes, in a legal context, the distinction is between the meaning of the words used in a law and the “content” of the law itself. See Soames, *supra* note 98, at 12-15, where he discusses *Smith v. United States*, a case involving the meaning of the phrase “a use of a firearm.” See also KEPA KORTA & JOHN PERRY, HOW TO SAY THINGS WITH WORDS; JOHN SEARLE’S PHILOSOPHY OF LANGUAGE: FORCE, MEANING, AND THE MIND 169 (Savas L. Tsohatzidis ed., 2007).

<sup>124</sup> Cowart, *supra* note 13, at 496-97.

<sup>125</sup> Searle’s notion of speech acts is actually very broad. He claims that the study of speech acts in language is in fact the study of the meaning of sentences. “Since every meaningful sentence in virtue of its meaning can be used to perform a particular speech act . . . , and since every possible speech act can in principle be given an exact formulation in a sentence . . . , the study of the meaning of sentences and the study of speech acts are not two independent studies but one study from two different points of view.” JOHN SEARLE, SPEECH ACTS: AN

Speech or text that in effect constitutes action obviously plays an important role in law. While some writers suggest that all legislation effectively functions as a speech act, with component parts individually serving performative functions as well,<sup>126</sup> my focus is necessarily on the statutory definition and its role in both the communicative and performative behavior of legislation.

Legislation is both “an act of language and an act of law;”<sup>127</sup> it is a communicative event and a performative act; it informs and it empowers.<sup>128</sup> Statutory definitions similarly serve these two functions; in few other contexts is such a premium put on either the meaning of terms or the conditions to be satisfied in order to fall within the scope of a term’s import. While definitions may serve both communicative and performative functions in legislative text, they do not do so in equal measure. At times, the communicative purpose of the statutory definition overwhelms any possible performative function, while, in other instances, the performative function dominates.

By looking closely at the context in which statutory definitions appear and their functions, we might learn to draft better definitions and we might more consistently, or at least mindfully, interpret those definitions. Particular definitional techniques may be more appropriate for either the communicative or performative function. Moreover, particular definition techniques may actually work against communication or empowerment, and, in turn, should be avoided in particular contexts, depending on the role served by the definition. The effectiveness and legitimacy of a definition may depend on both the purposes served—or sought to be served—by the definition and its particular expression. To understand how definitions might better serve these two distinct functions we ought to examine, on the one hand, what it is that makes communication successful, and, on the other, what it is about speech acts that make them work.

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ESSAY IN THE PHILOSOPHY OF LANGUAGE 18 (1969). The type of speech acts that this paper emphasizes, however, are illocutionary acts:

[w]e thus detach the notions of referring and predicating from the notions of complete speech acts as asserting, commanding, etc. . . . Austin baptized these complete speech acts with the name “illocutionary acts”. . . . [s]ome of the English verbs denoting illocutionary acts are “state,” “describe,” “assert,” “warn,” “remark,” “comment,” “command,” “order,” “request,” “criticize,” “apologize,” “censure,” “approve,” “welcome,” “promise,” “object,” “demand,” and “argue.”

*Id.* at 23.

<sup>126</sup> See Maley, *supra* note 12, at 27; see also CAO, *supra* note 73, at 21 (“A statute is a master speech act with each provision constituting individual speech acts.”).

<sup>127</sup> Maley, *supra* note 12, at 27.

<sup>128</sup> For characterizations of law as a communication, see DICKERSON, *supra* note 4, at 25 (“That a legal instrument is a communication is seen most clearly in statutes, ordinances, and regulations, and such dispositive instruments as wills.”), and Mootz, *supra* note 115, at 349 (“legal texts are communicative events”). By contrast, see ATIENZA & MANERO, *supra* note 64, at xii (“legal orders also contain other kinds of sentences—power-conferring rules—which make it possible to introduce, modify, or derogate mandatory norms, and, in general, to bring about normative change”), and Maley, *supra* note 12, at 29 (“the central role of legislation . . . is . . . the creation by means of correctly enacted speech acts, of rights and duties.”).



### B. *Communicating Successfully*

If we want to draft statutory definitions that successfully communicate, we ought to think about what it is that makes any communication productive and what conditions foster effective communication. Understanding the conditions necessary for felicitous communication should help us determine, in the first place, whether statutory definitions are as necessary as their current numbers in the United States Code suggest, and, second, whether the methods we employ when we define terms in statutes support good communication. Moreover, if we explore the characteristics of successful communication, we may find ways to assess the utility of those statutory definitions that play a predominantly communicative role.

Ordinary communication doesn't require that the participants define their terms. We assume, until we are proven wrong, that "what we intend to communicate is in fact comprehended by the message recipient and that what we comprehend as the recipient is in fact what the sender intended to communicate."<sup>129</sup> We assume that the sense of words used in a communication is shared—even if inexactly—between speaker and audience.

In the case of words and phrases having many meanings, the context of ordinary conversation or text is usually enough to allow disambiguation among multiple meanings. Context enables the audience to select a meaning that makes sense given the goals of the discourse.<sup>130</sup> Similarly, for words and phrases of well-established meaning, successful communication does not require that we specify the boundaries of meaning or that we flesh out all of the contours of a term's sense.<sup>131</sup> Close enough is good enough. In most discourse, it makes little difference if the participants share an exactly identical understanding of a term's meaning: "understanding' is a matter of fit, rather than match."<sup>132</sup>

Words whose meanings are vague or ill-defined are often used in conversation or text.<sup>133</sup> As a term is used, its meaning—at least in that context—is clarified. From time to time, completely new words and phrases enter our vocabulary. Those terms may acquire meaning by context or by description. Most commonly, though, words acquire meaning by use. If invented terms strike a chord within a community and come to be frequently used by speakers, they may become part of everyday speech; their signification no longer requires any explanation.

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<sup>129</sup> Johnson, *supra* note 72, at 299.

<sup>130</sup> *Id.* at 293 ("the meaning a language user attaches to a word or larger linguistic unit is in significant part a function of the context in which it is embedded"); Von Glaserfeld, *supra* note 91, at 131-32 ("The physical signals that travel from one communicator to another . . . do not actually carry or contain what we think of as 'meaning.' Instead, they should be considered instructions to select particular meanings from a list . . .").

<sup>131</sup> Glanville L. Williams, *Language and the Law—II*, 61 THE L. QUARTERLY REV., 179, 191 (1945), reprinted in LAW AND LANGUAGE 125 (Frederick Schauer ed., 1993) ("[T]he words we use, though they have a central core of meaning that is relatively fixed, are of doubtful application to a considerable number of marginal cases. . . . the ordinary man is not usually troubled with these perplexities.").

<sup>132</sup> Von Glaserfeld, *supra* note 91, at 134.

<sup>133</sup> See JOHN R. TAYLOR, LINGUISTIC CATEGORIZATION: PROTOTYPES IN LINGUISTIC THEORY 56 (2d ed. 1995) (quoting R. W. Langacker, "no two speakers share precisely the same linguistic system.").

But what is it that so distinguishes legislation from ordinary discourse that we are prone to define so many terms of all different types?

Underlying nearly all discussions of language and communication is the idea of community. Our language is built by its speakers,<sup>134</sup> meanings of terms change over time as communicants refine their use of particular terms to reflect changes in the environment. James Boyd White suggests that a community is “defined by its language”;<sup>135</sup> those who successfully communicate constitute the community.

The community that engages in legislative discourse is not an easy one to identify; there may, in fact, be several audiences who receive statutory communications. Those audiences (judges, lawyers, regulators, the public) interpret legislation for different purposes. Even within a group, members are far from homogenous. Individuals from each audience interact differently with, and relate differently to, legislative text. They bring to the text vastly different levels of expertise.

Due process considerations certainly require that generally applicable statutes should have a meaning that is clear “enough” to those to whom it applies.<sup>136</sup> When the consequences of misunderstanding are great, it makes sense to provide at least some clarification of what the legislative speaker intends when a particular term is used. So, in prohibiting the making of animal crush videos, section 48 of Title 18 of the U.S. Code defines an animal crush video.<sup>137</sup> That term may have acquired a fairly well-understood sense among a specialized community of animal rights activists and filmmakers, but to the larger community of individuals subject to federal law, its implications are less than clear. Similarly, a phrase like “earned income,” used in the Internal Revenue Code,<sup>138</sup> is a descriptive one, but it is a term that has a special meaning to tax practitioners and accountants. Definition of the term both allows the general public to understand what the term means in a federal tax context, and ensures that tax experts share a common frame of reference.

Context’s role in clarifying meaning is obvious: context allows disambiguation; it limits the referents of a term; and it enables participants in a communication to feel confident that a sincere and felicitous exchange is taking place. The syntactic and semantic environment in which a term occurs is but one aspect of context. The shared knowledge and experience of speakers who use a term inform any exchange.

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<sup>134</sup> SOLAN, *supra* note 11, at 52, (quoting John Manning: “Even the strictest modern textualists properly emphasize that language is a social construct.”); White, *supra* note 29, at 1962 (“[L]anguage itself is socially constructed.”).

<sup>135</sup> White, *supra* note 29, at 1962.

<sup>136</sup> MATTILA, *supra* note 8, at 36: “[L]egal protection requires that texts intended in the first place for use by lawyers should be easily understandable by every citizen.”); Maley, *supra* note 12, at 35 (quoting H. W. R. Wade) (“[I]t may be said that it is more important for a rule of law to be certain that it is for it to be just.”).

<sup>137</sup> 18 U.S.C.A. § 48 (West 2012) (“In this section the term ‘animal crush video’ means any photograph, motion-picture film, video or digital recording, or electronic image that—(1) depicts actual conduct in which 1 or more living non-human mammals, birds, reptiles, or amphibians is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury (as defined in section 1365 and including conduct that, if committed against a person and in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242); and (2) is obscene.”).

<sup>138</sup> 26 U.S.C.A. § 911(d)(2)(A) (West 2012).

Marmor refers to a “rich contextual knowledge” that “gives meaning beyond words,”<sup>139</sup> and Schauer suggests that “the members of a community possess shared understandings that enable them to talk to all other members of the community.”<sup>140</sup>

In a legislative context, we share some understanding of the text, but probably far less than a uniform one. Hart, who wrote at length on legal language, its meaning, and effects, argued that all legal language must be read and interpreted in the context of an existing system of laws “against the background of which legal language obtains its meaningfulness . . . .”<sup>141</sup> In reading individual pieces of legislation, some of us, more than others, recognize that context and its implications. But with respect to ordinary terms used in more or less their common sense in legislation, the community context—i.e., the habits and understandings shared by the larger community—probably exerts more influence on a layman’s understanding of a statutory term than the law-related context. For example, we may share a similar, though not identical, understanding of the meaning of words and phrases like food, homeless person, and motor vehicle.<sup>142</sup> Our understanding of those terms depends less on the law-related context in which they appear in legislation than on community conventions. We may differ among ourselves at the margins of application of those terms; definitions that clarify what peripheral referents might be either incorporated in or excluded from the term’s ordinary meaning serve a valid communicative purpose.

“Motor vehicle” is defined on several occasions in the U.S. Code.<sup>143</sup> The Internal Revenue Code specifies that motor vehicles must have four wheels.<sup>144</sup> At least for tax purposes, motorcycles are not motor vehicles. Title 18, on the other hand, which

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<sup>139</sup> Marmor, *supra* note 98, at 2 (“[S]peakers’ ability to convey communicative content that goes beyond what they say typically depends on two main factors: a relatively rich contextual background that is common knowledge between the conversational parties, and certain norms that apply to the conversational interaction.”); Schauer, *supra* note, 90, at 526-27 (“Members of the community of English speakers . . . possess shared understandings that enable them to talk to all other members of the community.”).

<sup>140</sup> Schauer, *supra* note 90, at 526-27 (“Members of the community of English speakers . . . possess shared understandings that enable them to talk to all other members of the community”); Cowart, *supra* note 13, at 508 (“The participants in the conversation must be communicating within a similar linguistic framework and be capable of adequately performing the duties of speaker/hearer.”); see also Andrea Bianchi, *Textual Interpretation and (International) Law Reading: The Myth of (In)determinacy and the Genealogy of Meaning*, in MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOR OF DETLEV VAGTS 51 (P. Bekker et al, eds., 2010) (“Only within a community is communication possible.”).

<sup>141</sup> CAO, *supra* note 73, at 15.

<sup>142</sup> All of these terms are defined in the U.S. Code, some on several occasions. For definitions of “food,” see *supra* note 68. “Homeless person” is defined in 42 U.S.C.A. § 11302 (West 2012). For definitions of “motor vehicle,” see *infra* note 143.

<sup>143</sup> See, e.g., 12 U.S.C.A. § 5519 (West 2012); 15 U.S.C.A. §§ 2821, 6781 (West 2012); 18 U.S.C.A. §§ 31, 47, 2311 (West 2012); 23 U.S.C.A. §§ 154, 157, 405 (West 2012); 26 U.S.C.A. §§ 30, 30B, 30D, 179A, 6323 (West 2012); 40 U.S.C.A. §§ 102, 17101, 17501 (West 2012); 42 U.S.C.A. §§ 7550 (West 2012); 49 U.S.C.A. §§ 13102, 14301, 30102, 30301, 31301, 32101, 33112 (West 2012).

<sup>144</sup> See 26 U.S.C.A. §§ 30B, 30D (West 2012).

covers crimes and criminal procedure, explicitly includes motorcycles within one of its definitions of a motor vehicle,<sup>145</sup> and a second definition of motor vehicle in Title 18 is so broad that motorcycles clearly fall within its scope.<sup>146</sup> At least so long as these definitions do not contradict an ordinary understanding of the phrase or incorporate within the term's scope something unfamiliar, these three definitions—different as they are—successfully communicate what the legislative context cannot. Ordinarily we understand a speaker “on the [basis] of *what it would make sense* for the speaker to communicate in the circumstances.”<sup>147</sup> As there is no back-and-forth among legislative speaker and audience that can establish a shared understanding, the statutory definition allows the speaker to clarify the scope of a term's meaning and ensure that its audience understands the intended message.

A second component of context involves the individual's “internal context”<sup>148</sup> - the sum of a person's life experiences and knowledge, reflected in his or her individual use of language, that determine the associations triggered by particular terms.<sup>149</sup> One person's private meaning will never completely match another's, but, in most communicative contexts, it makes little difference. And, in many legislative contexts as well, the fact that the contours of individual meaning fail to match exactly is of no import.

The person who said that a “community is defined by its language,” also suggested that “all of our languages are different; none are identical,” and that “language has an ineradicably individual character.”<sup>150</sup> Legislation, on the other hand, is essentially public in nature. While statutory definitions cannot be expected to resolve discrepancies among private meaning (nor would we want them to), what those definitions might do is establish a shared mental space, in which lawmakers and those subject to laws are consistently informed of the ground rules for interpretation and application. By so announcing intention and meaning to the world at large, the statutory definition may also reduce the gap between the expert's understanding of a term and the layperson's.

The Securities Exchange Act of 1934 includes definitions for both “broker” and “dealer,”<sup>151</sup> words that connote a variety of referents in ordinary speech and whose

<sup>145</sup> 18 U.S.C.A. § 47 (West 2012) (“The term ‘motor vehicle’ includes an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle designed for running on land.”).

<sup>146</sup> 18 U.S.C.A. § 31 (West 2012) (“The term ‘motor vehicle’ means every description of carriage or other contrivance propelled or drawn by mechanical power and used for commercial purposes on the highways in the transportation of passengers, passengers and property, or property or cargo.”).

<sup>147</sup> See Marmor, *supra* note 98, at 6.

<sup>148</sup> Bianchi, *supra* note 140, at 41.

<sup>149</sup> Johnson, *supra* note 72, at 296 (“[T]he message to be comprehended (of which context is an inextricable part) stimulates, triggers, or otherwise engages something that is already a part of the message receiver—that is, the comprehender's knowledge.”).

<sup>150</sup> White, *supra* note 29, at 1962, 1974.

<sup>151</sup> 15 U.S.C.A. § 78c (West 2012). (“(4) The term ‘broker’ means any person engaged in the business of effecting transactions in securities for the account of others. . . . (5) The term ‘dealer’ means any person engaged in the business of buying and selling securities for such person's own account through a broker or otherwise.”).

meanings may often overlap. Apart from provisions that speak exclusively to banks, both definitions are concise and clear (although not precise or detailed). And, the two definitions together clearly distinguish the meaning of one term from that of the other. Both definitions serve a performative function as well as a communicative one, as qualifying as either a broker or dealer brings with it certain obligations and privileges. From a communication perspective, the two definitions work well; each succinctly sets forth what it is that distinguishes the work of, respectively, a broker or a dealer, and establishes the ground rules for an elaborate regulatory structure that governs the activities of those agents.

In most communicative contexts, we assume that participants in a dialogue are cooperating and that they share at least some common goals,<sup>152</sup> whether those involve a sincere exchange of information, the cementing of a relationship, the encouragement of changes in behavior or taking of action, or some other mutually desired outcome. As the ends sought by communicants diverge, the quality of communication suffers. We cannot assume that the legislative speaker and its audience are cooperative; they may each envision very different outcomes from legislation.<sup>153</sup> To the extent that Congress and the governed share a common understanding and appreciation of the policies furthered by statute, the legislative communication is more likely to be successful,<sup>154</sup> and the meanings of terms used in legislation more apt to be similarly understood. Our courtrooms and boardrooms, however, are filled with individuals whose goal is, in fact, to circumvent legislative norms and policy. If explicitly disambiguating or otherwise clarifying the meanings of terms used in legislation might impede the willful evasion of the statute, then incorporating definitions into the statutory text might be worthwhile.<sup>155</sup>

The Internal Revenue Code allows deductions—i.e., privileges—for interest paid in connection with “property held for investment.”<sup>156</sup> Deductions are good for

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<sup>152</sup> See Sidoka Gizir & Hasan Simsek, *Communication in an Academic Context*, 50 HIGHER EDUCATION 197, 209 (2005). Studying the communication patterns in an academic institution, the authors found a lack of common goals was one factor that caused a deterioration in communication.

<sup>153</sup> Marmor, *supra* note 98, at 19, 24. Marmor characterizes legislation as a “non-cooperative form of communication” and a “different kind of conversation.”

<sup>154</sup> See SOLAN, *supra* note 11, at 5-12. Solan notes that most laws work well because they conform to our expectations of what is appropriate. “Most of the time . . . the rules work so well that the possibility of concocting unusual situations in which they do not provide unequivocal answers goes unnoticed. That is generally true of laws that codify social norms. It is less true of laws that attempt to regulate behavior in ways that are counterintuitive or in ways in which people would rather not conform.” *Id.* at 11.

<sup>155</sup> See Maley, *supra* note 12, at 36 (quoting an 1891 English case) (“[I]t is not enough to attain a degree of precision which a person reading in good faith can understand, but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it. ([1891] 1 Queen’s Bench 149, 167 per Stephen J.)”).

<sup>156</sup> 26 U.S.C.A. § 163 (West 2012) (“The term ‘property held for investment’ shall include—(i) any property which produces income of a type described in section 469(e)(1), and (ii) any interest held by a taxpayer in an activity involving the conduct of a trade or business—(I) which is not a passive activity, and (II) with respect to which the taxpayer does not materially participate.”).

taxpayers; we would expect arguments for the inclusion of all sorts of property interests within the scope of that phrase. Defining “property held for investment” to explicitly exclude interests in passive undertakings (defined in yet another section of the Internal Revenue Code<sup>157</sup>) efficiently eliminates one possible misreading (at least as Congress intended it) of the statute.

Willful misinterpretation of speech or text implies a less than successful communication. A communication is productive when the response of one participant to another’s speech is appropriate and expected. When responses are unanticipated, either what was intended to be communicated was misunderstood or the parties to the communication did not share similar objectives in communicating. To the extent that there is a response or reaction to a communication, the success or failure of the speech can be assessed. But legislative communication may provoke little immediate reaction or feedback. If the goal of the statutory message is to influence behavior (as it usually is), the impact of the legislative text is not immediately measurable. Indicia of communicative success or failure in the legislative context may be a long time in coming. As the effects of legislation play out, legislators may see a need to tighten statutory language, close loopholes, or clarify the statute’s application. Defining or redefining the meaning of terms may allow the legislature to do just that.<sup>158</sup>

From a communication perspective, definitions might be usefully included in legislative text in order to enrich context, establish a shared frame of reference, and overcome, at least to some extent, the lack of immediate feedback normally associated with communicative exchanges. With those interests in mind, how might statutory definitions best be drafted in order to fill whatever gaps exist in legislative communication?

The context of ordinary speech allows immediate disambiguation of words having more than one distinctive meaning. And, little, if any, clarification is ordinarily required in legislation to disambiguate among radically different meanings of a term. The context, even in legislation, will make it clear whether we are talking about financial institutions or riverbeds when we refer to banks. What legislative context can rarely accomplish, though, is refinement of meaning with respect to an often-used term. The statutory definition *can* clarify what we mean when we use a term like “child,” by indicating whether the focus is on the attribute of age, the relationship to a parent figure, the characteristic of dependence on others for financial or physical well-being, or some combination of all of the foregoing.<sup>159</sup> A

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<sup>157</sup> 26 U.S.C.A. § 469 (West 2012).

<sup>158</sup> Robert Cooter & Tom Ginsburg, *Leximetrics: Why the Same Laws are No longer in Some Countries than Others* 24 (June 2003) (University of Illinois Law & Economics Research Paper No. LE03-012), available at SSRN: <http://ssrn.com/abstract=456520>. Cooter and Ginsburg examine the length and specificity of legislation across jurisdictions and across languages. One of the questions left open in their paper goes to the specificity of legislation over time. Cooter and Ginsburg wonder whether legislative amendments always add specificity to statutes or whether there are times when the legislature, in a delegatory mood, decides to give greater discretionary authority to administrative agencies, and amend the statute so that is less specific.

<sup>159</sup> For example, some definitions of “child” focus only on the age of the individual (see, e.g., 15 § U.S.C.A. 6501 (West 2012): “The term ‘child’ means an individual under the age of 13”); others highlight the nature of the relationship between the child and the parent (see, e.g., 12 U.S.C.A. § 1707 (West 2012): “The term ‘child’ means, with respect to a mortgagor under

definition that directs the reader's attention to what it is about child-ishness that matters in the context of the statute's message should allow the legislative audience to appreciate the import and intention behind normative provisions that include the term "child."

Similarly, definitions that quickly establish that particular fringe instances of terms are meant to be either included in or excluded from the terms' scope also work to establish a context. The definition of "human organ" in section 274e of Title 42 of the U.S. Code raises any number of problems from other perspectives, but at least it makes clear that the term encompasses fetal organs:

The term "human organ" means the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation.<sup>160</sup>

Sometimes, a definition quickly and simply clarifies meaning, without at all encumbering it. For example, one section of the U.S. Code defines "ocean energy" to include current, wave, and tidal energy, and to exclude thermal energy.<sup>161</sup>

A definition that "presupposes, rather than displaces"<sup>162</sup> ordinary meaning and clarifies the scope of the term's application works to enrich the message and ensure that the communicants are interacting on a level field of play. On the other hand, definitions that do nothing more than restate the ordinary meaning of a term serve little purpose, and may even detract from the communicative function served by the statute.<sup>163</sup>

such section, a son, stepson, daughter, or stepdaughter of such mortgagor"); and still others depend on the absence of financial independence (see, e.g., 5 U.S.C.A. § 8441(4) (West 2012): the term 'child' means . . . (b) such unmarried dependent child regardless of age who is incapable of self-support because of mental or physical disability incurred before age 18").

<sup>160</sup> 42 U.S.C.A. § 274e (West 2012). Whether we usually understand bones and skin, and parts of organs to be included within the phrase "human organs" is one question. But more troubling is the fact that this definition of human organ sits just three sections away from another definition of "organ," also falling within the part of Title 42 named "organ transplants" that explicitly excludes corneas and eyes from the compass of the word. According to section 274b of Title 42, "the term 'organ' means the human kidney, liver, heart, lung, pancreas, and any other human organ (other than corneas and eyes) specified by the Secretary by regulation and for purposes of section 274a of this title, such term includes bone marrow." Section 274e was first enacted in 1984, and the references to fetal organs added by amendment in 1988. Section 274b was also enacted in 1984, and amended in 1988, but those 1988 amendments made no changes to the definition of organ. Whether these differences in definition are purposeful or not, there is little that can be said for having two explicitly different definitions of two very similar terms in the same part of the same chapter.

<sup>161</sup> 42 U.S.C.A. § 17282 (West 2012).

<sup>162</sup> See CAO, *supra* note 73, at 107, and her description of non-exhaustive definitions: "non-exhaustive definitions presuppose rather than displace the meaning that a defined term would bear in ordinary usage."

<sup>163</sup> FILSON & STROKOFF, *supra* note 4, at 129: "a definition should never recite the obvious . . . it would be unnecessary and might create doubts about the meaning of other familiar words."

Definitions of common and well-understood terms may interfere with our engagement with a text. As presumably competent language users, we are usually able to understand common words and phrases without reference to glossaries. Each of our individual uses of language relates to our own experience; our language use and word choice reflect that categorization of experience. Our conceptual categories are in a constant state of flux as each of us reacts to new situations and experiences, and incorporates those stimuli and events into our individual cognitive systems.<sup>164</sup> Cognition—and the language use that results from it—is an “adaptive function”;<sup>165</sup> it is above all not passive, but, rather is an “active accomplishment”;<sup>166</sup> and it involves assimilation and accommodation.<sup>167</sup> But all of these processes are both gradual and internal and unique to the individual. Incorporating a definition into a text creates static; the reader is instructed as to how a word or phrase should be interpreted. The reader must somehow fit that explicit meaning into his or her own understanding of the term. The greater the discrepancy between the term’s statutory definition and the reader’s existing understanding, the more substantial the readjustment required of the reader.

Defining the word “person” to include corporations, partnerships, associations, and other entities, as so many statutory definitions do,<sup>168</sup> raises obvious opportunities for misunderstandings. But, for those who interact frequently with legislative text, that kind of definition may be less problematic. That particular audience has come to understand “person” to include, in a legislative context, a wide range of inhuman entities.<sup>169</sup> But when a definition runs very far afield from both an ordinary understanding of a word and a specialized meaning, credulity is strained and our understanding of the statute’s normative provisions can be significantly impaired. Chapter 39 of Title 22 (Foreign Relations and Intercourse) of the U.S. Code deals with arms exports control. The definitional section of the subchapter addressing missiles and missile equipment defines “person” as follows:

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<sup>164</sup> White, *supra* note 29, at 1979, 1980: “our categories and terms are perpetually losing and acquiring meaning . . . they mean differently to different people and in different texts.” In this passage, White was discussing the “literary use of language” and suggesting that “law is naturally literary.”

<sup>165</sup> Von Glaserfeld, *supra* note 91, at 125.

<sup>166</sup> Laboratory of Comparative Human Cognition, *Cognition as a Residual Category in Anthropology*, 7 ANNUAL REV. IN ANTHROPOLOGY 51, 53 (1978).

<sup>167</sup> Von Glaserfeld, *supra* note 91, at 136: “Knowledge is never acquired passively, because novelty cannot be handled except through assimilation to a cognitive structure the experiencing subject already has. Indeed, the subject does not perceive an experience as novel until it generates a perturbation relative to some unexpected result. Only at that point the experience may lead to an accommodation and thus to a novel conceptual structure that re-establishes a relative equilibrium.”

<sup>168</sup> See, e.g., 2 U.S.C.A. § 431 (West 2012), 5 U.S.C.A. § 551 (West 2012), 7 U.S.C.A. § 15b (2012), and 18 U.S.C.A. § 224 (West 2012).

<sup>169</sup> But while we might expect the term “person” to include corporations, partnerships, and the like in a business context (e.g., securities, bankruptcy, banking), we would probably be surprised to learn that, even in a criminal context, it could include entities as well. See the definitions section of the Racketeer Influenced and Corrupt Organizations Act, codified at 18 U.S.C.A. § 1961 (West 2012): “(3) ‘person’ includes any individual or entity capable of holding a legal or beneficial interest in property.”



(A) the term “person” means a natural person as well as a corporation, business association, partnership, society, trust, any other nongovernmental entity, organization, or group, and any governmental entity operating as a business enterprise, and any successor of any such entity; and

(B) in the case of countries with non-market economies (excluding former members of the Warsaw Pact), the term “person” means—

(i) all activities of that government relating to the development or production of any missile equipment or technology; and

(ii) all activities of that government affecting the development or production of electronics, space systems or equipment, and military aircraft.<sup>170</sup>

Throughout the six sections that comprise that subchapter, every reference to “person” brings within its scope this strange assortment of individuals, entities, and, most curiously, activities. This is a very different definition of “person” than that which simply includes businesses and professional organizations. That definition is relatively simple, as it includes within its scope just about any formally organized group. The definition of “person” in the foreign relations context, by contrast, is next to impossible to encapsulate. Almost constant reference to the definition would be required to understand the normative provisions in which the definition applies. More likely, the definition, in all its complexity, will simply be ignored. Even among an audience with particular expertise, it is hard to see any merit in defining such a common term so differently from its ordinary meaning. Anyone reading the text of the legislation—layperson and expert alike—would be hard pressed to incorporate such a peculiar meaning into the statute’s content.

The job of the statutory definition is to establish a public meaning for a term. Private meanings and individual connotations associated with a term must somehow coalesce, or give way to a public one that is easily accepted by a variety of readers. To the extent that any statutory definition of an ordinarily used term strays far from its common or established meaning, the definition will require a greater readjustment and realignment of private meaning categories; that realignment will make acceptance of the statutory definition more difficult. Ideally, statutory definitions should parallel ordinary meaning, while clarifying the scope of that meaning in questionable or hard cases.<sup>171</sup>

<sup>170</sup> 22 U.S.C.A. § 2797c (West 2012).

<sup>171</sup> Soames, *supra* note 98, at 1. Soames distinguishes between “genuinely” and “semantically” hard cases:

I will call a legal case genuinely hard *iff* its (legally correct) outcome is not determined by all nonlegal and nonmoral facts plus the linguistically-based content of the relevant legal texts—including everything asserted and conveyed therein. These cases divide into three types: (i) those in which the texts say too little to produce any result, (ii) those in which the texts are inconsistent, and thus generate contradictory results, and (iii) those in which the texts yield a single result, which is, paradoxically, legally incorrect. In a genuinely hard case, a correct outcome can be reached only by an innovative judicial decision—which, effectively, creates new law. In contrast, a case is semantically hard *iff* the meanings of the relevant legal texts, plus all nonlegal and nonmoral facts, fail to determine its (legally correct) outcome. The distinction between semantically, and genuinely, hard cases turns on the distinction between the semantic contents of legal texts and their complete, linguistically-based contents.

The point is hardly a new one. Hirsch and Filson, both writing on legislative drafting, mention the “drag” of a word’s ordinary meaning.<sup>172</sup> Dickerson conjures the specter of accepted use with which the definition must contend: “Like ghosts returning to a haunted house, established connotations return to haunt the user who attempts to banish them.”<sup>173</sup> Dickerson goes on to suggest that it is next to impossible for a drafter to cause his reader to cancel the engrained emotion of a word for another.<sup>174</sup> As early as 1929, an article in the *Harvard Law Review*, playing off Holmes’ characterization of words,<sup>175</sup> noted that “words are certainly not crystals, but they are after all not portmanteaus . . . We can not quite put anything we like into them.”<sup>176</sup>

Many legislative drafting texts describe efficiencies realized when defined terms stand for complicated concepts. Investing terms with complex meanings that they then carry with them throughout a particular statutory provision might indeed simplify a text and avoid inconsistencies.<sup>177</sup> But, as tempting as it might be to invest, through definition, ordinary terms with significance that they might not otherwise enjoy, the costs, in terms of burdens placed on the understandability of a term, may well outweigh the benefits.

Definitions such as that of “food” in 7 U.S.C. § 2012<sup>178</sup> plague the reader. That definition, which applies to all twenty-six sections within its chapter, specifically excludes items within the ordinary meaning of the term (e.g., hot foods) and includes others not usually associated with the term (e.g., chewing gum and seeds). Likewise, definitions of “employee” that include applicants and former employees are equally likely to be either ignored or forgotten as a reader interacts with the statute’s substantive provisions.<sup>179</sup> If remembered, the definition does nothing to make the statute more understandable; instead, the reader must always remind herself that the no-longer- and not-ever-employed are covered by the statute. In any event, the legitimacy of the statute is undermined.<sup>180</sup>

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*Id.*

<sup>172</sup> FILSON & STROKOFF, *supra* note 4, at 136 (“the drag of its original meaning”), and HIRSCH, *supra* note 4, at 30 (“the drag of a word’s normal meaning”).

<sup>173</sup> DICKERSON, FUNDAMENTALS, *supra* note 4, at 143.

<sup>174</sup> *Id.* at 143 (quoting RICHARD ROBINSON, DEFINITION 7 (1950)).

<sup>175</sup> “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

<sup>176</sup> Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 866 (1930)

<sup>177</sup> FILSON & STROKOFF, *supra* note 4, at 129: a definition “promotes internal consistency, . . . avoids clutter, . . . promotes readability and drafting economy,” and DORSEY, *supra* note 4, at 221: “a definition saves you from stating a complicated concept over and over; it allows you to package the concept in a simple term and use that term repeatedly.”

<sup>178</sup> *See supra* note 101.

<sup>179</sup> *See supra* notes 25 and 66.

<sup>180</sup> Kristen Hickman & Claire A. Hill, *Concepts, Categories and Compliance in the Regulatory State*, 94 MINN. L. REV. 1151, 1182: “Regulated parties are most likely to perceive the law as legitimate when acts or conditions that seem to be similar in all salient respects yield the same legal consequences, and will be more skeptical of laws whose seemingly

On the other hand, creating a term out of whole cloth and investing it with meaning may make sense in terms of both drafting efficiency and understandability. A wholly new term created solely to fit the purposes of the statute brings with it no baggage<sup>181</sup>—no existing cognitive categories to be muddled.

Legislative drafters might recognize as well the impossibility of complete and exhaustive definition.<sup>182</sup> From a communications perspective, an exhaustive definition is seldom required; meaning need only be made clear enough for the purpose at hand. A definition is “the substitution for the symbol to be defined by a symbol or symbols that can be better understood.”<sup>183</sup> Understandability, though, is different from certainty in application. The words used in the definition—either alone or together—may clarify a term’s meaning without necessarily imparting any more certainty in application than the defined term itself. While a descriptive definition can clarify, disambiguate, and explicitly either exclude or include marginal cases, it *cannot* solidify meaning, altogether eliminate fringe meanings or close the periphery of a term’s scope.<sup>184</sup> Even when a term is defined by necessary and sufficient conditions, the expression of the conditions themselves has prototypical and fringe applications. Definitions that purport to be exhaustive, either by enumerating a set of necessary and sufficient conditions or by listing qualifying instances, rarely close the door on meaning.<sup>185</sup>

Though legislators may wish to encourage particular behaviors among a statute’s audience, they cannot completely anticipate either the audience’s reactions or the

ordinary terms encompass an odd assemblage of dissimilar items that do not so obviously warrant the same treatment.”

<sup>181</sup> See FILSON & STROKOFF, *supra* note 4, at 133 which refers to the advisability of sometimes not defining words that “carry with them too much baggage.”

<sup>182</sup> See Vijay Bhatia, *Cognitive Structuring in Legislative Provisions*, in LANGUAGE AND THE LAW 137 (John Gibbons ed., 1994). Bhatia remarks upon the tendencies of legislative draftsmen to “attempt to define their model world of obligations and rights, permissions and prohibitions as precisely, clearly and unambiguously as linguistic resources permit. Another factor which further complicates their task is that they deal with a universe of human behavior, which is unrestricted in the sense that it is impossible to predict exactly what may happen within it.”

<sup>183</sup> See Glanville Williams, *Language and the Law—IV*, 61 THE L. QUARTERLY REV., 384, 386 (1945), reprinted in LAW AND LANGUAGE 145 (Frederick Schauer ed., 1993) (referring to the definition of definition formulated by C. K. Ogden and I.A. Richards in THE MEANING OF MEANING (1928)—“definition is the substitution for the symbol to be defined of a symbol or symbols that can be better understood.”).

<sup>184</sup> See Williams, *supra* note 183, at 138. Glanville distinguishes between fringe and multiple meanings and suggests that definition may resolve problems associated with multiple meanings, it is unlikely to provide any certainty with respect to fringe meaning.

<sup>185</sup> See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), where the court addressed the definition of “material support or resources” set forth in 18 U.S.C. § 2339A(b)(1). See also, *McNeill v. United States*, 131 S. Ct. 2218 (2011), where the definition of “serious drug offense” in 18 U.S.C. 924(e)(2)(A)(ii) is discussed and the Court considers the use of present, as opposed to past tense, in the statement of the definition. Finally, see Justice Sotomayor’s dissent in *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433 (2010), where she notes that a literal reading of a statute’s definition of “railroad” (in 49 U.S.C. § 10102(6)(A)) would “render a truck a railroad.”

environment that will affect the statute's application. Definitions that serve primarily communicative functions should not be so closed, or so rigidly construct boundaries around the scope of a term that the definitions work to foreclose unexpected applications of the statute's normative provisions. In his 1988 article on formalism, Schauer discusses constraints on application and interpretation that follow from particular linguistic choices in law.<sup>186</sup> In his discussion of *Lochner v. New York*,<sup>187</sup> Schauer suggests that Justice Peckham's refusal to recognize "the political, moral, social and economic choices"<sup>188</sup> at stake in the decision rests on Peckham's understanding of the meaning of a single term—liberty:

What strikes us clearly as a political or social or moral or economic choice is described in *Lochner* as definitionally incorporated within the *meaning* of a broad term. Thus, choice is masked by the language of linguistic inexorability.<sup>189</sup>

Schauer moves from linguistic to definitional inexorability. Referring not necessarily to definitions incorporated into the text of statutes, but to word meaning more generally (e.g., the undefinable "property"), Schauer states, "a decisionmaker who knows or should know that . . . a choice is open, but treats the choice as no more available than the choice to treat a pelican as other than a bird, is charged with formalism for treating as definitionally inexorable that which involves nondefinitional, substantive choices."<sup>190</sup>

From a *communications* perspective, we want to avoid definitional inexorability; we do not want the definition's text to inappropriately foreclose choices that should otherwise exist in the application of a statute's normative provisions. To cause a definition that serves a primarily communicative function to wag the dog, so to speak, elevates it to a significance that overshadows the statute's norms and may frustrate the statute's policies.

The meanings of words and phrases we employ in successful communications are no more static and inert than the experiences they describe. Definitively closing the meaning of a term in a legislative communication that endures over some period of time may in fact impair the effectiveness of both the communication and the statute itself.

From a communications perspective, we want definitions to fill the gap occasioned by the absence of a rich context and shared experience and expertise. We want everyone on the same page, using words and phrases in a similar (though probably not identical) manner. To the extent that a definition gets us to that point by either clarifying what is or is not included or encouraging us to focus on what is

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<sup>186</sup> Schauer, *supra* note 90, at 510: "Formalism is the way in which rules achieve their 'ruleness' precisely by doing what is supposed to be the failing of formalism: screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account. Moreover, it appears that this screening off takes place largely through the force of the language in which rules are written. Thus the tasks performed by rules are tasks for which the primary tool is the specific linguistic formulation of a rule."

<sup>187</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>188</sup> Schauer, *supra* note 90, at 511.

<sup>189</sup> *Id.* at 512.

<sup>190</sup> *Id.* at 512-13.

important about a thing or event (rather than rigidly constraining meaning), a statutory definition can be useful.

### C. *Making Speech Acts Work*

In ordinary conversation or text, rarely do words alone effect substantive change. But sometimes, as we interact with others, we consent to something or make a promise. That consent or promise may be manifested in language, a gesture, or even silence—depending on the context and the participants in the exchange—but the effect of promising or consenting is, in the one case, to obligate and, in the other, to authorize. That particular speech or gesture, or lack of same, has an effect—it changes the relationship among the parties and invests one with either a responsibility or a privilege.

Other language used in particular settings and rites implicate a set of rules and conventions that, when applied to actors, objects, or states of affairs, brings about a change in status. A baseball umpire calls a runner out; a minister pronounces a couple husband and wife; a priest absolves a penitent of sins; a dignitary christens a vessel—all of these utterances have real and concrete effects. The success—or failure—of speech in effecting change depends on the authority of the speaker, the context in which the speech occurs, and the utterance itself. The heckler's shouts from the stands calling the runner safe have as little effect as my attempts to marry a couple or absolve a confessor of sins.

Speech or text that has the "character of action"<sup>191</sup> is a topic well discussed among philosophers and linguists. J. L. Austin and John Searle have written often and at length on "performative utterances"—declarations that change the status, entitlements, or obligations of the speaker or the audience.<sup>192</sup> While a speech act certainly serves a communicative function, what distinguishes it, and ultimately overwhelms its communicative role, is its transformative impact on an existing state of affairs or on the participants in the speech.

Language used in law-related contexts often effects substantive change: it can impose sanctions, invest an individual with entitlements or impairments, and cause an event to have concrete and predictable consequences. H. L. Hart noted that "sentences of legal language differ in meaning, import, and effect (or all three) depending on who utters them, where, and when."<sup>193</sup> Legislative text, enacted in conformity with proper procedures and law, is vested with an authority and impact that allows it to be enforced. If legislation communicates, so does it perform; it sanctions some behaviors and rewards others.

If all statutory definitions serve a communicative purpose, some serve performative functions as well; in many of those cases, it is the definition's role as a speech act that allows the statute's normative provisions to accomplish the legislative goal. The effect of naming by definition, and the resulting assignment of rights and obligations to named entities, may well overshadow any communicative purpose served by the definition. As statutory definitions create categories of

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<sup>191</sup> Barry Smith, *Towards a History of Speech Act Theory*, in *SPEECH ACTS, MEANINGS, AND INTENTIONS: CRITICAL APPROACHES TO THE PHILOSOPHY OF JOHN R. SEARLE* 29 (A. Burkhardt ed., 1990).

<sup>192</sup> See *supra* note 13.

<sup>193</sup> Morrison, *supra* note 80, at 293 (quoting H. L. Hart, *Definition and Theory in Jurisprudence*, 70 L. QUARTERLY REV. 37, 43, 44 (1954)).

instances to which the statute's normative provisions apply or as they deem particular types of behavior to warrant certain treatment, definitions invest those instances and behaviors with rights and obligations that they would not otherwise have. The definitions solidify a status that brings with it entitlements.<sup>194</sup>

Atienza, echoing Hart, suggests that all legal authority consists of two kinds of rules - those that create sanctions, obligations or benefits (i.e., normative rules) and those that confer power.<sup>195</sup> From one perspective, the statutory definition—at least when its role is predominantly performative—is all about power. Legislation can, through definition, cause words to represent whatever its drafters decree; there is a certain “freedom of stipulation,”<sup>196</sup> and a power exerted by legislators through definition. While definitions rarely mandate behavior, impose obligations, or bestow privileges, they do serve as guideposts that indicate how those benefits might be obtained or how those obligations avoided. By conforming to a definition's terms, the governed may benefit or otherwise gain advantage. Or, falling within the scope of a definition may result in sanctions. The definition may, in fact, provide a means to either obtain or avoid certain ends.<sup>197</sup>

Chapter 1 of Title 7 of the U.S. Code governs commodity exchanges; parts of that chapter exempt some commodities from regulation. But even transactions in exempt commodities may be subject to other provisions of Chapter 1 unless one or more of the participants in the transaction qualifies as an “eligible commercial entity.”<sup>198</sup> Being named and qualifying as an “eligible commercial entity” brings

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<sup>194</sup> See *id.* at 296, describing the meaning of a term (in this case, H. L. Hart's “limited company”) as set forth in rules of law: “They [the rules of law] lay down the criteria for something counting as a company by laying down, in a sense, the proper modes of speaking; in so laying down the criteria, they effectuate a categorization.”

<sup>195</sup> ATIENZA & MANERO, *supra* note 64, at 44.

<sup>196</sup> DICKERSON, FUNDAMENTALS, *supra* note 4, at 140-44.

<sup>197</sup> ATIENZA & MANERO, *supra* note 64, at 59: “If state of affairs X obtains and Z performs action Y, then institutional result (or normative change) R is produced”; see also Hickman & Hill, *supra* note 180, at 1156 (“law often emphasizes certainty and encourages planning by providing detailed roadmaps of necessary and sufficient conditions for achieving particular legal consequences”).

<sup>198</sup> 7 U.S.C.A. § 1a(17) (West 2012):

The term “eligible commercial entity” means, with respect to an agreement, contract or transaction in a commodity—

(A) an eligible contract participant described in clause (i), (ii), (v), (vii), (viii), or (ix) of paragraph (12)(A) that, in connection with its business—a

- (i) has a demonstrable ability, directly or through separate contractual arrangements, to make or take delivery of the underlying commodity;
- (ii) incurs risks, in addition to price risk, related to the commodity; or
- (iii) is a dealer that regularly provides risk management or hedging services to, or engages in market-making activities with, the foregoing entities involving transactions to purchase or sell the commodity or derivative agreements, contracts, or transactions in the commodity;

(B) an eligible contract participant, other than a natural person or an instrumentality, department, or agency of a State or local governmental entity, that—

with its advantages set forth in the statute. There is no such thing as an eligible commercial entity apart from the statute; the definition reifies something that otherwise would not exist. It is only by means of a definition that identifies, and, in fact, creates, such a creature that the statute's normative provisions can be applied. And it is only by means of qualifying as such a thing pursuant to the statutory definition that a commodity trader may remove itself from the requirements of federal regulation.

In a criminal context, an individual who takes actions that fall within the definition of a "forest trespass"<sup>199</sup> is subject to penalties. The definition names and identifies a set of activities and behaviors; the statute's normative provisions establish the consequences triggered upon the attachment of the definition to a state of affairs.

Terms that are statutorily defined and that function as speech acts run the gamut from words and phrases with many meanings to terms whose common meaning is well-accepted and to purely invented and otherwise nonsensical terms.

The meaning of the word "dealer" depends on context; we can imagine dealers of arms, cars, cards, and drugs, and also recognize specialized uses of the word in the context of securities, commodities, and other commercial transactions. In the United States Code, the word "dealer," standing alone, is defined at least sixteen times in contexts as varied as agriculture, securities, crimes, tax, accounting, and transportation.<sup>200</sup> With respect to some of those definitions, being named as a

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(i) regularly enters into transactions to purchase or sell the commodity or derivative agreements, contracts, or transactions in the commodity; and

(ii) either—

(I) in the case of a collective investment vehicle whose participants include persons other than—a

(aa) qualified eligible persons, as defined in Commission rule 4.7(a);

(bb) accredited investors, as defined in Regulation D of the Securities and Exchange Commission under the Securities Act of 1933, with total assets of \$2,000,000; or

(cc) qualified purchasers, as defined in section 2(a)(51)(A) of the Investment Company Act of 1940;

in each case as in effect on December 21, 2000, has, or is one of a group of vehicles under common control or management having in the aggregate, \$1,000,000,000 in total assets; or

(II) in the case of other persons, has, or is one of a group of persons under common control or management having in the aggregate, \$100,000,000 in total assets; or

(C) such other persons as the Commission shall determine appropriate and shall designate by rule, regulation, or order.

<sup>199</sup> 25 U.S.C.A. § 3103 (West 2012).

<sup>200</sup> 7 U.S.C.A. § 701 (West 2012); 7 U.S.C.A. § 499a (West 2012); 15 U.S.C.A. § 77b (West 2012); 15 U.S.C.A. § 78c (West 2012); 15 U.S.C.A. § 1231 (West 2012); 15 U.S.C.A. § 7220 (West 2012); 18 U.S.C.A. § 841 (West 2012); 18 U.S.C.A. § 921 (West 2012); 26 U.S.C.A. § 901 (West 2012); 26 U.S.C.A. § 5121 (West 2012); 26 U.S.C.A. § 5845 (West 2012); 26 U.S.C.A. § 6412 (West 2012); 42 U.S.C.A. § 7550 (West 2012); 49 U.S.C.A. §

dealer—whether it be of livestock, securities, weapons, distilled spirits, or motor vehicles—brings with it obligations or benefits. Those who fall within the definition of dealer may be required to register with designated federal authorities,<sup>201</sup> they may be prohibited from undertaking activities that non-dealers are free to engage in;<sup>202</sup> they may be exempt from obligations that attach to others;<sup>203</sup> or they may benefit from privileges accorded only to their class.<sup>204</sup>

The forms and styles of those performative “dealer” definitions are as varied as the attributes that distinguish instances falling within the definition’s scope. Some definitions establish a set of conditions, each one of which must be satisfied in order for an iteration to be deemed a dealer. The Sarbanes Oxley definition of dealer is closely related to the Securities Exchange Act definition of dealer, but is more restrictive as it attaches two additional conditions to the Securities Exchange Act definition.<sup>205</sup> To qualify as a dealer under Sarbanes Oxley, an entity must satisfy three conditions: it must meet the Securities Exchange Act definition of dealer (17 U.S.C. § 78c(a)(5)); it must be required to file financial statements under other provisions of Sarbanes Oxley; and those financial statements must be required, by other statutory provisions, to be certified by an accountant.

Becoming a dealer under Sarbanes Oxley brings with it an obligation; becoming a dealer effects a change, not only in the dealer’s own behavior, but in the behavior or obligations of those that interact with it.<sup>206</sup> The Sarbanes Oxley definition of dealer is rigid; if only one of the three conditions set forth in the definition fails, the instance avoids obligations assigned to qualifying dealers.

By way of contrast, the definition of dealer set forth in Title 18 is much more open. Nevertheless, those who fall within its porous borders may become subject to licensing requirements and are prohibited from engaging in activities permissible for non-dealers:

The term “dealer” means

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30102 (West 2012); 49 U.S.C.A. § 32304 (West 2012); and 49 U.S.C.A. § 32908 (West 2012).

<sup>201</sup> 7 U.S.C.A. §§ 203, 701 (West 2012).

<sup>202</sup> 15 U.S.C.A. §§ 77b, 78c (West 2012).

<sup>203</sup> 26 U.S.C.A. § 5121 (West 2012).

<sup>204</sup> 26 U.S.C.A. § 6412 (West 2012).

<sup>205</sup> 15 U.S.C.A. § 7220 (West 2012). “The term ‘dealer’ means a dealer (as such term is defined in section 78c(a)(5) of this title) that is required to file a balance sheet, income statement, or other financial statement under section 78q(e)(1)(A) of this title, where such balance sheet, income statement, or financial statement is required to be certified by a registered public accounting firm.”

<sup>206</sup> Some Sarbanes Oxley provisions impose obligations on the dealers themselves (e.g., the “accounting support fee” referenced in 15 U.S.C.A. § 7219(h) (West 2012)). Other sections speak to potential burdens, not on dealers themselves, but on accounting firms that certify or otherwise review the financial condition of dealers (e.g., 15 U.S.C.A. § 7214 (West 2012) which provides that the Public Accounting Oversight Board may conduct inspections of public accounting firms that audit brokers and dealers (as defined in Sarbanes Oxley/Dodd Frank)).



- (A) any person engaged in the business of selling firearms at wholesale or retail,
- (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or
- (C) any person who is a pawnbroker.<sup>207</sup>

Both these definitions of dealer—the one set forth in Sarbanes Oxley and the other in Title 18—are associated with normative provisions that, rather than conferring benefits, impose obligations on instances that fall within the definition's scope. In one case, the definition's boundaries are more or less certain, while the other describes a category that is fuzzy in outline.

If ambiguous terms like “dealer” can be statutorily defined to serve speech act purposes, then so can commonly used words with established meanings. “Employee” is defined repeatedly in the U.S. Code; in Title 5 alone, the word is defined more than thirty times.<sup>208</sup> Qualifying as an employee often brings with it statutorily enumerated benefits; in other cases, obligations are imposed on those individuals deemed to be employees. In section 4301 of Title 15, “employee” is defined for the purposes of determining those individuals entitled to receive performance evaluations.<sup>209</sup> That definition of employee begins by broadly including all persons employed by federal agencies; it then excludes eight categories of federal agency employees. Only those employees falling within the section 4301 definition (i.e., all federal employees other than those specifically excluded) are evaluated in accordance with section 4302 of Title 15 and afforded notice and other protections in the event of an evaluation that reflects unacceptable performance.

Chapter 5 of Title 3 also bestows labor rights on particular federal employees.<sup>210</sup> Here, it is the group of individuals employed by the offices of the president and by the residences of the president and vice-president who are entitled to protection against discrimination, family and medical leaves, and other rights vested by statute in other groups of employees. The definitional scheme set forth in Chapter 5 is a convoluted one: first, “employee” is defined to include applicants for employment and former employees; then, “employing office” is deemed to refer to the offices of the president and the residences of the president and vice-president; and, finally, “covered employee” is defined as any employee of an employing office.<sup>211</sup> While “covered employees” are those to whom the rights attach, qualification as an employee is a threshold to “covered employee” status. In the context of Chapter 5, a common word—employee—is expanded quite beyond its ordinary sense (to include both applicants and former employees), and then a narrower term—“covered employee”—is defined by specifying the identity of the employer. By virtue of the definition of employee, persons not ordinarily encompassed by the term (i.e.,

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<sup>207</sup> 18 U.S.C.A. § 921 (West 2012).

<sup>208</sup> See, e.g., 5 U.S.C.A. §§ 2105, 3323, 3581, 4301, 4501, 4701, 5102, 5361, 5504, 5520a, 5521, 5541, 5561, 5570, 5581, 5595, 5597, 5701, 5721, 5921, 6101, 6301, 6331, 6381, 7103, 7322, 7342, 7501, 7511, 7541, 8101, 8311, 8331, 8701, 8901, 9001, 9801, 9902 (West 2012).

<sup>209</sup> 15 U.S.C.A. § 4301 (West 2012).

<sup>210</sup> 3 U.S.C.A. § 401 et seq. (West 2012).

<sup>211</sup> 3 U.S.C.A. § 401 (West 2012).

applicants and former employees) share rights conferred on more traditional employees.

In the case of “employee,” none of the definitions in the U.S. Code articulate what it means to be employed; some variation of the verb “employ” is always used to describe the characteristics of an employee. Instead, the definitions refine the idea of employment by including or excluding particular types of individuals; consequently, an individual’s rights and obligations depend on whether he or she falls within or outside of other categories enumerated in the definition. In the two definitions of employee discussed above, the default is that “employees” benefit from the rights conferred by the statute. It is only if the particular instance of employee falls within one of the exceptions to the definition that the rights are not conferred.

“Family fishermen” are similarly entitled to benefits under the Bankruptcy Code.<sup>212</sup> By contrast to definitions of “employee”—where a large group of individuals is, by default, included and then that group reduced—the definition of “family fisherman” is one that sets forth conditions that all instances must satisfy.<sup>213</sup> No one is a family fisherman unless each and every condition relating to ownership and income set forth in the statute is met.

For terms wholly invented by statute, we would expect that their definitions, at least insofar as they serve speech act functions, would be articulated by necessary and sufficient conditions. Since we have no frame of reference for these invented terms, how would we otherwise be able to determine what instances are entitled to obligations conferred by statute or subject to sanctions imposed? Because we have no experience in the use of these terms, we’re not able to attach meaning to them.<sup>214</sup> If rights or sanctions are to be imposed on instances of those terms, the definition should assign a fairly certain meaning that would enable interpreters to consistently and reasonably determine what instances are included within the term’s scope.

In many cases, a statute defines a number of terms all related to one another and all pieces in a puzzle that, when assembled, reveals a regulatory structure. Those defined terms, which usually serve performative functions, are often composed of modifiers upon modifiers attached to other defined terms. The Internal Revenue Code is full of otherwise meaningless terms (like “adjusted gross income,” “modified adjusted gross income,” “qualified appreciated stock,” “3-year property,” “5-year property,” “amortizable section 197 intangible,” “de minimis fringe,” “eligible individual,” “covered executive,” “highly compensated participant,” “qualified contaminated site,” “eligible long-term care premiums,” “permitted insurance,” “and qualifying child”) that, upon definition, support and implement the Code’s normative provisions.<sup>215</sup> Once an event or individual qualifies under the

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<sup>212</sup> 11 U.S.C.A. §§ 1201-1208, 1221-1231 (West 2012).

<sup>213</sup> 11 U.S.C.A. § 101 (West 2012).

<sup>214</sup> White, *supra* note 29, at 1982 n.30: “grammar is what we use when we do not have enough experience of a language to make it our own.” Perhaps definitions, in turn, are what we turn to when experience and use do not inform our understanding.

<sup>215</sup> See 26 U.S.C.A. § 62 (West 2012) (adjusted gross income), 26 U.S.C.A. § 24(b)(1) (West 2012) (modified adjusted gross income), 26 U.S.C.A. § 170 (West 2012) (qualified appreciated stock), 26 U.S.C.A. § 168 (West 2012) (three-year and five-year property), 26 U.S.C.A. § 197 (West 2012) (amortizable section 197 intangible), 26 U.S.C.A. § 132 (West 2012) (de minimis fringe), 26 U.S.C.A. § 25B (West 2012) (eligible individual), 26 U.S.C.A.

definition, its tax treatment is (theoretically) settled. Usually, these terms are defined by necessary and sufficient conditions. So, to be treated as “qualified medical expenses,” amounts must (i) be spent on medical care (as defined in the Code); (ii) be paid on behalf of certain family members; and (iii) not be reimbursed.<sup>216</sup> The fact that unfamiliar and otherwise meaningless terms are used to establish a status that brings with it entitlements or sanctions is likely a good thing. At least the foreignness of the term ought to put the reader on notice that something unusual is afoot.

Taxonomies relate categories of things to each other by identifying characteristics that distinguish—or define—members of each category. Once an individual is assigned to a category within a taxonomy, we know its attributes and behaviors. As individuals or activities fall or fit within statutory definitions that serve performative functions, we know their entitlements and obligations. What a thing is will determine the statute’s treatment of it. For these kinds of performative definitions, what can we do as drafters and interpreters to ensure that those definitions work as we expect them to? If we can identify characteristics of successful speech acts and somehow incorporate those into legislative text, statutory definitions might better perform their speech act roles.

Even if we wouldn’t know what to call it, we recognize a speech act when we see it (if we are observers) or experience it (if we are agents involved in it). We accept that something is happening that changes the status quo. An individual is found to be guilty by a jury and sentenced by a judge. That speech is performed in a particular setting with rules and conventions by individuals vested with particular authority. The individual upon whom the speech operates may not accept the truth of what triggers the speech (much like a baseball player may not agree that the pitch was a strike), but there is no evading the consequences of the speech.

Statutory definitions are parts of legislation enacted by authorized individuals and then formally published in accordance with applicable rules. Together, the authority of the speaker and the circumstances in which the speech occurs are sufficient to make the legislative speech act possible. Whether that speech is effective, though, depends on the intention and understandings of the parties. In order for the speech’s performative functions to be fulfilled, the speaker and its audience must both understand that a particular speech has a recognized effect and agree to be bound by whatever it is that the speech implies.<sup>217</sup>

In a statutory context, we want to ensure that the interpreters and those to whom the statute applies are alerted to the performative nature of the definition. A reader ought to recognize that by qualifying under the definition, consequences follow. And, on each occasion that the defined term appears in the statute’s text, interpreters

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§ 125 (West 2012 ) (highly compensated participant), 26 U.S.C.A. § 198 (West 2012) (qualified contaminated site), 26 U.S.C.A. § 213 (West 2012) (eligible long-term care premiums), and 26 U.S.C.A. § 220 (West 2012) (permitted insurance).

<sup>216</sup> 26 U.S.C.A. § 223(d)(2) (West 2012).

<sup>217</sup> See AUSTIN, *supra* note 13, at 15. In enumerating the conditions that must be satisfied in order for a speech act to be successful, Austin notes that the parties must be sincere in their speech: “Where, as often, the procedure is designed for use by persons having certain thoughts or feelings, or for the inauguration of certain consequential conduct on the part of any participant, then a person participating in and so invoking the procedure must in fact have those thoughts or feelings, and the participants must intend to so conduct themselves.”

ought to be reminded of the importance of that defined term. Causing words of ordinary meaning to serve speech act functions does nothing to highlight the special role that they play in the statutory scheme. Better to define words and phrases with little or no meaning if the fact of inclusion within or exclusion from the definition triggers significant consequences.

Speech acts involve almost ritualized behaviors and language. In order to invest a group of entities or states of affairs—a grouping that is otherwise not a familiar or natural one—with attributes, perhaps a wholly new and invented term best serves to highlight both the newness and uniqueness of the group created by statute. So, in a regulatory regime which sanctions or rewards particular behaviors and where there is no ordinary term to describe a group of qualifying instances, a wholly invented term that is otherwise as close as possible to meaningless may be appropriate. This type of group of instances would not exist apart from statute; to label this newly created group by a word or phrase that does convey meaning and evoke connotations may detract from the ritualistic character of the use of the term, and, in fact, interfere with the term's function within the context of the statute.

If certain types of employees are entitled to rights not shared by all employees, why not, instead of defining the term "employee" in a way that contradicts its ordinary meaning, define a new term like "entitled employee"? Interpreters are put on notice that every time that term appears in the statute, it designates a group that is distinguished and treated in a particular way.

Most speech acts are simple and to the point. Statements like, "I now pronounce you man and wife," "The jury finds the defendant not guilty," and "I baptize this child," are clear in their import and impact. Definitions that are equally direct and succinct are certainly easy to understand. If falling within the definition's scope brings with it privileges or obligations, whatever it is that determines the definition's application ought to be clearly stated (even if the application itself is not always certain).

Too complex definitions invite technical avoidance and insincere compliance. Speech acts are most effective when the participants recognize the speech's effect and agree on the intentions motivating the speech. Drafting a definition that is long, complicated, and full of exceptions facilitates purposeful misinterpretation of the statute and frustrates the statute's purpose.

Just as some communications are infelicitous, so do some speech acts result in unanticipated and unintended consequences.<sup>218</sup> What we characterize as a loophole in a highly regulated area is often simply an opportunity for either (i) willful avoidance of a too precise set of conditions that define a groups of instances on which obligations are imposed, or (ii) insincere compliance with a rule that failed to

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<sup>218</sup> Austin's argument is that performative utterances are neither true nor false; instead, as he puts it, they can be "unhappy" and they can fail. *Id.* at 14: "Besides the uttering of the words of the so-called performative, a good many other things have as a general rule to be right and to go right if we are to be said to have happily brought off our action. What these are we may hope to discover by looking at and classifying types of cases in which something goes wrong and the act—marrying, betting, christening or whatnot—is therefore at least to some extent a failure: the utterance is, then, we may say, not indeed false but in general unhappy."

take into account all of its consequences.<sup>219</sup> The ability of actors to intentionally move in and out of the confines of definitions depends not so much on the interpretation of the definitional text, but, rather, on the tailoring of behavior by the statute's audience to fall within or be excluded from the statute's scope. In some cases, a shifting of behaviors is exactly what the statute encourages and, in fact, fulfills its purpose;<sup>220</sup> in others, though, purposefully avoiding the scope of a too precisely worded definition frustrates the policies of the statute. An overly precise definition informs bad actors by delineating means to avoid compliance.<sup>221</sup> A definition stated in terms of a prototype that either identifies an exemplar or simply states what characteristic it is that distinguishes the category may better clarify what types of instances are to be included in the definition and be less likely to provide instructions for willful misbehavior.

Finally, definitions that are too complicated fail to identify what it is that distinguishes, from all other things, those instances that fit within the category created by the definition. Performative speech is effective only to the extent that it occurs in a consistent context and involves actors and activities that are in some way similar. If a definition fails to articulate what its instances have in common, its effects, when the statute's normative provisions are applied to those instances, may make little sense.

To suggest that speech act definitions should clearly identify what characteristic distinguishes the group of instances falling within the scope of a definition is very different from a commitment to precision in definitions. The United States Code is replete with definitions fulfilling performative roles that set forth long and complex litanies of conditions that must be satisfied in order for an instance to fall within a definition's scope. The definition of eligible contract participant in Title 7 (Agriculture) is more than one thousand words long.<sup>222</sup> It sets forth fourteen different types of individuals and entities that may qualify, under a variety of circumstances unique to each particular type, as an eligible contract participant. While that definition elaborates the scope of its application in purportedly precise text, the extent of the definition's coverage is by no means clear or certain. Nowhere in those one thousand words does one get a sense of what characterizes or what should distinguish an eligible contract participant from all others. Instead, for more than one of its fourteen types of qualifying individuals and entities, the definition provides what Hickman and Hill might describe as a road map,<sup>223</sup> a set of detailed instructions that guide potentially qualifying instances toward a desired result, whether that goal is to be deemed an eligible contract participant or not. Instances could, depending on their interests, move within or without the scope of the

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<sup>219</sup> See, e.g., the description of the "SUV loophole" in Lawrence Zelenak, *The Loophole That Would Not Die: A Case Study in the Difficulty of Greening the Internal Revenue Code*, 15 LEWIS & CLARK L. REV. 469, 470-71 (2011).

<sup>220</sup> See, e.g., *supra* note 121, the definition of "eligible solar, wind, waste or geothermal facility" in 16 U.S.C.A. § 796(17)(E) (West 2012).

<sup>221</sup> Hickman & Hill, *supra* note 180, at 1197.

<sup>222</sup> 7 U.S.C.A. § 1a (18) (West 2012).

<sup>223</sup> Hickman & Hill, *supra* note 180, at 1187.

definition. It is this type of performative definition that could lead to what Hickman and Hill characterize as spirit violative behavior.<sup>224</sup>

Precision and clarity are different statutory goals. In a speech act context, when objects, individuals, or states of affairs are invested with privileges or burdened with obligations, when becoming a defined thing brings with it rights or sanctions, we ought to know what it is about the thing that causes it to warrant such treatment. Rather than a long and complex litany of conditions that must be the case in order to qualify as a defined terms, better to simply and succinctly state what it is that makes qualifying instances special.<sup>225</sup> Speech act definitions confer power on those who benefit from being included within the scope of the definition and on those who enforce sanctions or obligations on qualifying instances. Definitions create categories, and the treatment of category members must somehow be justified; why this particular group of instances—and not others—warrant one approach—and others another—ought to be relatively straight-forward and understandable, both to those to whom the statutory definition applies and those who are called upon to interpret it.

Too precisely articulating a definition impairs its ability to be applied sensibly in states of affairs unanticipated at the time of the legislation's enactment. In a perfect world, we would expect definitions that are "crisp enough to apply and . . . flexible enough to deal with new situations."<sup>226</sup> Dickerson suggests that, where needed, definitions should "put sharp edges"<sup>227</sup> around the boundaries of a term. "Sharp edges" may not always be the answer—too rigid an outline complicates application in unforeseen circumstances, prevents normal maturation of meaning as context changes, and weighs down a text, making it nearly unintelligible and lessening its import. But surely the statutory definition ought to "sharply"—i.e., clearly and succinctly—indicate what it is, given the policies and purposes behind the statute's normative provisions, that should characterize those privileged or obligated instances.

## VI. CONCLUSION

When the temptation to define strikes, resistance should follow. Defining without a valid and well-identified purpose risks complicating the statute and creating the potential for unforeseen questions unrelated to the statute's purpose.

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<sup>224</sup> *Id.*

<sup>225</sup> Or, as Hickman and Hill suggest, it may in some cases be appropriate to formulate "goal-derived categories:"

The categories law uses are generally specified concretely at fairly low levels of abstraction. Law is, after all, trying to guide action. . . . [T]he concrete specification takes the form of prototype-centered categories or categories with necessary and sufficient conditions. Both types of categories open the door to spirit-violative behavior. Law therefore needs a way to reach what these lower level categories miss, to realize fully the categories' purposes. Goal-derived categories are law's solution: they represent a recourse to the higher-level abstraction that could not by itself be the law but that, as a complement to more concrete prohibitions, fills in the gaps.

*Id.* at 1198.

<sup>226</sup> SOLAN, *supra* note 11, at 13.

<sup>227</sup> DICKERSON, *supra* note 4, at 91-92.

The legislative drafter should carefully consider what the definition is intended to accomplish and how best to further those purposes.

If the statute is part of a complex scheme designed to order a sphere of activity, where individuals—depending on their attributes and actions—are entitled to be treated in particular ways, then assigning a name to those groups of actors might be useful. If the drafter wants to ensure that particular instances are certainly and forever entitled to particular treatment, no matter how the interpreter chooses to read the text, then a definition can clarify an instance's status. For purposes of modeling behaviors, a performative definition may fit the bill—if an instance falls or purposefully comes within the scope of a definition, the named thing is treated appropriately.

The drafter may see no other way to make her meaning and communication plain other than by definition. She may be unsure whether a particular term will be understood by her audience as she intends it to be. Or she may wish to forestall anticipated misinterpretation. A definition can provide information and direction on how a particular term is to be understood.

In relegating particular instances to a specified treatment, the definition functions as a performative. In clarifying the sense of words in text, the definition's predominant role is to enable successful communication. In either case, the benefits of precisely defining a word or phrase that is already easily associated with a well-accepted meaning are dubious. Articulating definitions of well-understood and unambiguous terms may in fact be detrimental to both communicative and performative goals. If the definition is performative in nature—if qualifying under it invests an individual or activity with rights or obligations—the point is to put the audience on notice. Defining words already having well-established meaning and then asking them to perform speech act functions demands too much of them. And, the audience may be frustrated as it is expected to invest common terms of ordinary meaning with special powers.

If, on the other hand, the purpose of the definition is to strengthen or clarify a legislative communication, defining a well-understood word risks not only unintentionally changing its meaning, but fixing it in time. If the drafter intends a word of ordinary meaning to have that ordinary meaning in the statute, why define it at all?<sup>228</sup> Why diminish the nuances and complexities of meaning? If the drafters wish to change a word's ordinary meaning through definition, to either expand or restrict its compass, it may be better to use an invented or descriptive term instead.

Definition may be advisable, however, to clarify the intended meaning of ambiguous<sup>229</sup> or unsettled terms or to establish groups of individuals or activities entitled to particular treatment. No matter what purposes it serves, however, the definition ought to be simple and succinct in its statement. Long and convoluted

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<sup>228</sup> Any time there is a discussion of a term's meaning, that meaning inevitably is changed. Beardsley, *supra* note 82, at 5: "as soon as we talk about ordinary language we are changing it. To point out an ambiguity in a term, or to call attention to different functions of a syntactical device, is to force users of the language to be conscious of a distinction hitherto not sharply made, and hence to force them to make new decisions in using the language."

<sup>229</sup> Of course, sometimes Congress prefers ambiguity and purposefully chooses not to clarify a term's meaning. See Elizabeth Garrett, *Preferences, Law, and Default Rules*, 122 HARV. L. REV. 2104, 2116 n.28 (2009) (review of EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION (2008)).

definitions seldom promote clarity or certainty, and they surely make a legislative text more difficult to read, as repeated reference to the definition's details is required throughout the reading of the statute.

No matter what she seeks to accomplish in defining a term, the legislative drafter would do well to realize that definition is a process that is always incomplete. Word meaning inevitably changes and unforeseen situations occur that are not addressed by definitions purportedly covering all circumstances. Better to take into account the indeterminacy of word meaning in drafting a definition than to attempt to completely and finally memorialize the meaning of a term.

Regardless of the goal, the drafter ought not to confuse clarity, certainty, and precision. The last does not always lead to the first or the second. While the definition ought to be clear in its import—the reader should be able to understand what instances are generally covered or what sense of the word is intended—it need not be absolutely certain. The definition may leave open the question of whether some outliers are encompassed within it. Or, it may, with certainty, include or exclude particularly hard cases. But it need not do so by precisely and interminably enumerating all of the characteristics of every qualifying or disqualified instance. To try to do so would be both expensive, from a drafting perspective, and futile.<sup>230</sup>

Once a decision to define has been made, the drafter should consider whether the most important function served by the definition is a communicative or performative one.

If the definition's function is to improve the understandability of the legislative text—if it is primarily a tool to ensure a successful communication between the legislature and its audience—then the definition needs simply to replace what is lost as a result of the sparse legislative context. The communicative definition ought to enrich context by quickly disambiguating among competing senses, establishing a shared frame of reference, and getting drafters and audience alike on the same page.

From a communication point of view, we want to avoid “definitional inexorability.”<sup>231</sup> The definition ought not to fixedly settle meaning; it ought to simply clarify the legislative intention. The drafter need not, by definition, diminish the richness of meaning. Rather, for terms of many meanings, we want to quickly identify what sense of the word is intended. The communicative definition can also make clear that particular outlying instances are either included or excluded. A list of included instances, accompanied by a catch-all phrase that draws into the definition's scope similar instances, works well to replace what context and interaction otherwise supply. Once the appropriate meaning is identified, the drafter ought to stop there. The more that is said in the definition, the more baggage<sup>232</sup> it carries, purposefully or not. If particular features of a defined term are especially important in the legislative context, the definition should highlight those aspects as a way of focusing the interpreter's attention on those characteristics. If the drafter recognizes that the term might be reasonably read to include unintended cases, language that quickly eliminates those misinterpretations ought to be included. But if the intended sense of the term is an especially narrow or broad one, the drafter might consider appending an adjective to the term, and, then, defining that modified term, to indicate the change in meaning.

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<sup>230</sup> Cooter & Ginsburg, *supra* note 158.

<sup>231</sup> Schauer, *supra* note 90, at 512-13.

<sup>232</sup> FILSON & STROKOFF, *supra* note 181.



For definitions that serve performative functions, the stakes are somehow higher; we may actually seek inexorability.<sup>233</sup> Once an instance meets the definition's criteria, it becomes something to which entitlements or sanctions attach; the definition is in fact the tail that wags the dog. And, it may not be enough to merely identify a particular sense of a term or include or exclude marginal cases.

Legislation that regulates a particular sphere of activity often includes definitions that distinguish one group of actors or objects from others,<sup>234</sup> depending on which definition applies, a particular treatment follows. The relationship among defined terms informs a reader and may guide behavior in a way that furthers the statute's policies. In drafting definitions that serve performative functions, legislators might consider who it is that has the power to cause an instance to either come within a definition's scope or be excluded from it. In encouraging particular behavior, some statutes include definitions that allow instances to move within or outside of the definition's scope by acts of will. These definitions serve as road maps, showing the way to consumers to help them achieve a particular result. These types of performative definitions are likely best expressed as a series of conditions that can be satisfied by changes in behavior or actions. If the conditions are met, a particular outcome is ensured.

If, on the other hand, the legislature has determined that an individual or instance having particular characteristics, regardless of intention, merits a certain statutory treatment, then the performative definition might simply state clearly and concisely what it is that is essential—i.e., what one characteristic is emblematic of the types of things that warrant a particular treatment.

Imposing a performative function on any term is to make that term something other than what it ordinarily is. That argues against investing ordinary or frequently used terms with performative powers. It requires a stretch of the intellect to define a term like "child" so that it serves a speech act function; but asking a term like 'unaccompanied alien child'<sup>235</sup> (as strange as it may sound) to bring together a group of children who are entitled to certain benefits seems far more reasonable.

The tail-wagging and non-barking dog goes a long way toward highlighting our approach to and understanding of statutory definitions. On the one hand, definitions do not bark particularly loudly—they do not draw attention to themselves, and, consequently, we haven't carefully examined the roles they play in a reader's understanding of a statutory text. On the other hand, it is sometimes the definition that determines how and to whom the rights, privileges, and sanctions described in the statute apply. Drafters and interpreters alike might benefit from paying more attention to the dog that does not bark and to the tail that sometimes wags so that terms are more appropriately defined, that definitions function as intended, and that

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<sup>233</sup> We may, in fact want to "box" both the governed and the interpreters "into a corner." See Bhatia, *supra* note 182, at 137-38 (quoting Caldwell).

<sup>234</sup> In a federal securities context, there are brokers and dealers, but there are also "persons associated with a broker or dealer," "registered brokers or dealers," "municipal securities dealers" and "municipal securities brokers," "persons associated with a municipal securities dealer," "government securities dealers" and "government securities brokers," "persons associated with a government securities broker or government securities dealer," "municipal advisors," and "persons associated with a municipal advisor or associated person of an advisor." See 15 U.S.C.A. §§ 77b, 78c, 78o-4 (West 2012).

<sup>235</sup> 6 U.S.C.A. § 279 (West 2012).

the legislative audience's expectations with respect to terms used in a text are respected.

