Ambiguity and Misunderstanding in the Law

Sanford Schane [*]

"The law is a profession of words." [1] By means of words contracts are created, statutes are enacted, and constitutions come into existence. Yet, in spite of all good intentions, the meanings of the words found in documents are not always clear and unequivocal. They may be capable of being understood in more ways than one, they may be doubtful or uncertain, and they may lend themselves to various interpretations by different individuals. When differences in understanding are irresolvable, the parties having an interest in what is meant may end up in litigation and ask the court to come up with its interpretation. In the eyes of the law, when this kind of situation arises, the contract or the legislative act contains "ambiguity ".

Paradoxically enough, the word *ambiguity* itself has more than one interpretation. One of the senses, what I call the general meaning, has to do with how language is used by speakers or writers and understood by listeners or readers. Ambiguity occurs where there is lack of clarity or when there is uncertainty about the application of a term. It is this sense of *ambiguity* that generally is meant within the law. The other sense, the restricted meaning, is concerned with certain lexical and grammatical properties that are part of the very fabric of language, irrespective of anyone's usage or understanding. A word may have multiple definitions or a group of words may partake of more than one grammatical parsing. Linguists and grammarians have extensively investigated these features of language.

I shall analyze three court cases claimed to contain "ambiguity" or "ambiguous words". [2] The claims are appropriate for the general meaning of these terms. Otherwise, the three cases of so-called "ambiguity" turn out to be quite different. One of them exemplifies the restricted meaning of *ambiguity*, whereas the other two present problems of *reference* and of *vagueness*. I shall discuss these differences of misunderstanding and show that they played a role in how the cases were decided.

I. Three cases with so-called "ambiguity"

The first case, *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*,[3] gets embroiled in the definition of a chicken. Buyer, a Swiss company, has ordered

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[*] Research Professor of Linguistics, University of California, San Diego. B.A. Wayne State University; M.A. University of Michigan; Ph.D. Massachusetts Institute of Technology. Liberal Arts Fellow, Harvard Law School.

[1] This is the opening sentence in David Mellinkoff's monumental work, *The Language of the Law,* Little, Brown & Co., Boston: 1963.

[2] Frigaliment Importing Co. v. B.N.S. International Sales Corp.; Raffles v. Wichelhaus; Interstate Commerce Commission v. Kroblin.

[3] 190 F.Supp.116 (S.D.N.Y. (1960).

frozen eviscerated chickens from a New York wholesaler of poultry. The order called for chickens of two sizes: 1 ½ - 2 pounds, and 2 ½ - 3 pounds. When the shipment arrives in Europe, Buyer discovers that the larger birds are all stewing chickens. Expecting broilers and fryers, Buyer cries "foul" and brings suit against Seller for breach of contract.

The issue before the court becomes: "what is chicken?" [4] The plaintiff buyer contends that "'chicken' means a young chicken, suitable for broiling and frying."[5] The defendant insists that a chicken is "any bird of the genus that meets contract specifications on weight and quality, including what it calls 'stewing chicken'."[6] Judge Friendly, who heard the case, concedes that both meanings are possible. Consequently, he declares that "the word 'chicken' standing alone is **ambiguous** " (emphasis added),[7] and he decides to look to the contract to see whether it offers any aid for the interpretation of this word.

The second case, *Raffles v. Wichelhaus,*[8] is notoriously known to law students. The bizarre events of this English case took place in 1864, before there were telegraphs, telephones, or e-mail. The buyer purchased bales of cotton that were to be sent from Bombay, India to Liverpool, England on a ship called the "Peerless". At the time of the making of the contract it was unbeknown to the parties that there were two different ships by the name of "Peerless". One of them was to leave Bombay in October, the other in December. The buyer expected the goods to be on the October ship, whereas the seller planned to place them on the December vessel; neither of them was aware of the other's intent. When the October Peerless arrived in England, naturally there were no bales of cotton on it for the buyer. When the December Peerless sailed in to port with the shipment, the buyer refused acceptance. Seller then brought suit against Buyer.

Counsel in support of the defendant buyer's plea noted that "there is nothing on the face of the contract to shew [sic] that any particular ship called the 'Peerless' was meant; but the moment it appears that two ships called the 'Peerless' were about to sail from Bombay there is a latent **ambiguity** (emphasis added)...." [9]

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[4] Frigaliment. The legal issue, of course, is whether the seller supplied the buyer with the goods that the buyer had ordered.

[5] Frigaliment.

[6] Frigaliment

[7] Frigaliment

[8] 2 Hurl. & C. 906, 159 Eng. rep. 375 (Ex.1864).

[9] Raffles

The third case, *Interstate Commerce Commission v. Allen E. Kroblin, Inc.*,[10] once again deals with eviscerated chickens. This time we find the ICC against farmers in a heated dispute over whether dressed and eviscerated chickens are manufactured products. One of the roles of the ICC is to certify trucking companies engaged in interstate commerce, and most goods that are transported between states must be carried by these certificated or regulated carriers. However, there is an exemption for certain agricultural commodities, such as fruits and vegetables, fish, ordinary livestock, and agricultural commodities that are not manufactured products. [11] Thanks to this exemption, farmers are able to use less costly uncertificated conveyances for moving agricultural goods from state to state.

The ICC claims that dressed and eviscerated poultry is a manufactured product, whereas the Department of Agriculture maintains that it is an agricultural commodity. The Court notes that "all parties are agreed that the words 'agricultural commodities' and 'manufactured products thereof' used in the agricultural exemption are **ambiguous words"** [emphasis added]. [12]

Here then are three cases claimed to contain ambiguous words. But exactly what is meant by "ambiguity"?

II. Two definitions of "ambiguity"

The term *ambiguity* has more than one interpretation: a highly general sense that pertains to language use, and a more restricted meaning that deals with some fundamental properties about language itself.

For the general sense, let us look at the following definitions found under the entries "ambiguity" and "ambiguous" within the legal reference work, *Words and Phrases*.[13]

> The words "ambiguous" and "ambiguity" are often used to denote simple lack of clarity in language.[14]
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> "Ambiguous" means doubtful and uncertain.[15]

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[10] 113 F.Supp. 599 (N.D.Iowa, E.D. 1953)

[11] Section 203(b)(6)

[12] ICC

[13] Words and Phrases, Vol. 3, Westfield Publ., St. Paul, Minn., 1953.

[14] Universal C.I.T. Credit Corp. v. Daniel, 243 S.W. 2d 154, 157, 150 Tex.513. (Words and Phrases (p. 440):

[15] Osterholm v. Boston and Montana Consol. Copper and Silver Mining Co., 107 P.499, 502, 40 Mont.508 (Words and Phrases, p. 440)

> The word "ambiguous" means capable of being understood in more senses than one; obscure in meaning through indefiniteness of expression; having a double meaning; doubtful and uncertain; meaning unascertainable within the four corners of the instrument; open to construction; reasonably susceptible to different constructions; uncertain because of susceptible of more than one meaning; and synonyms are "doubtful", "equivocal", "indefinite", "indeterminate", "indistinct", "uncertain", and "unsettled". [16]

It is the general usage of the word *ambiguity* that is common to the three cases. There is a contract for the sale of chickens but it is *unclear* what kinds of chickens are called for; there are two boats with the same name but it is *indeterminate* as to which one was to carry bales of cotton; and there are deplumed and eviscerated chickens to be transported but it is *uncertain* whether they are to be classified as manufactured products. The general meaning that is attributed to the term *ambiguity* has to do with language use—with what has been said and with how it is understood. Lawyers and legislatures (as well as ordinary citizens) ideally should use language that is clear, certain, unequivocal, and to the point, and but when it is unclear, uncertain, doubtful, or equivocal, then language is considered to be "ambiguous".

Opposed to this general view of ambiguity is a more restricted meaning. It is this restricted sense that typically finds expression in grammatical treatises and in the field of linguistics. Linguistics, as a discipline, studies the properties of human language. One of the truly fascinating aspects of language is the potential for ambiguity. We find two principal types: lexical ambiguity, and syntactic or structural ambiguity.

Lexical ambiguity potentially occurs whenever a word has more than one objective or dictionary meaning. The ambiguity is potential because it is only in certain contexts that more than one of the meanings may be possible. For example, the word *bank* can refer to a financial institution or to the edge of a river or stream. The sentence "I'll meet you at the bank at three o'clock", written or uttered in isolation, is ambiguous between the two meanings. Yet, most of the time we are unaware of any ambiguity, and in fact, we find none because other linguistic features from elsewhere in the discourse, or even nonlinguistic clues, render only one of the readings as possible. Thus, if I had said, "I'll meet you at the bank at three o'clock because I have to go there to cash a check," the meaning to be attributed to the word *bank* is quite unambiguous. Or if we had planned to go fishing, and later on you see me walking to my car with a fishing pole over my shoulder, and I say to you, "I'll meet you at the bank at three o'clock," you probably would infer that our rendez-vous is to take place at the river bank. But when there are neither linguistic nor situational features to help out, the ambiguity could be very real.

Syntactic ambiguity is the other common type. It has to do with grammatical structure. Words occur in a particular order and grammatical relationships are established

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[16] Simpkin's v. Business Men's Assur. Co. of America, 215 S.W. 2d 1, 3, 31 Tenn. App. 306. (Words and Phrases, p. 440)

by those orderings. There is the potential for syntactic ambiguity whenever a given order of words may allow for more than one grammatical relationship. This kind of ambiguity often involves, what linguists refer to, as *scope of modification*. Notice the scope of the word *skinny* in the sentence: "The skinny general's daughter was the belle of the ball." Who is skinny? The general or his daughter? The adjective *skinny* potentially can modify either noun. Structural ambiguity frequently results also due to the placement of a prepositional phrase. Consider the sentence: "John asked Bill to leave on Wednesday." Did John do the asking on Wednesday, or was Bill to leave on that day? Here the scope of the adverbial modifier *on Wednesday* can be either the main clause or else the contained infinitival clause. But if the prepositional phrase were to be moved to the front of the sentence, there would be no ambiguity: "On Wednesday, John asked Bill to leave." Here the scope of the adverbial modifier can be only the main clause (i.e. modifying John's asking). Similarly, for the sentence: "The general's skinny daughter was the belle of the ball", the placement of the adjective *skinny* before the second noun makes it refer unambiguously to the daughter. [17]

The law by no means has entirely overlooked the restricted sense of "ambiguity." Here is yet another definition from *Words and Phrases*.

> "Ambiguity" can exist in a written document only in those cases where language is susceptible of more than one meaning.[18]

The author of this quote specifically talks about *language in itself*. A document is not ambiguous merely because it is unclear or doubtful, but rather within the language of the document there is something that creates more than one meaning. Moreover, this particular definition allows for both lexical and syntactic ambiguity. Language is like a coin with two faces—lexicon and grammar, and both of these essential features can be sources of ambiguity. [19]

I stated that when it is claimed for the three cases that they contain "ambiguous words", it is the general sense of "ambiguity" that is common to them. When does the

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[17] In *California v. Brown,* 107 S.ct.837 (1987), the United States Supreme Court had to consider whether a jury instruction in a capital case violated the defendant's right to have the jury view his situation with compassion or sympathy. The jury instruction stated: "You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." The issue was whether the adjective *mere* modified only the word *sentiment* or all of the words in the series. Depending on the scope of the adjective, there would be a crucial distinction between *sympathy* and *mere sympathy*. For a thorough discussion of the syntactic ambiguity of this case, see Lawrence M. Solan, *The Language of Judges*, University of Chicago Press, Chicago, 1993:55-61.

[18] Hardy and Hardy, Cal. App, 135 P. 2d, 615, 619. (Words and Phrases, p. 438). This quote contains a potential lexical ambiguity. Does the word *cases* mean "instances" or "legal suits"? Given the overall context, it is the former meaning that is most probably intended.

[19] A less common type of ambiguity (for the spoken language only) is *homonymic ambiguity*, which involves words that are pronounced the same but are spelled differently. E.g. "Harry kept tripping over the garden hoes [hose]." Puns are frequently of this type.

restricted meaning apply? And what other kinds of "misunderstanding" do we need to recognize?

III. Types of misunderstanding in the three cases

The case of *Frigaliment* is a prime example of lexical ambiguity, where a word has more than one objective meaning. [20] A good comprehensive dictionary of English will list (among others) both meanings of *chicken* that are relevant to this case. For example, Webster's 3rd, among its definitions, has the following two:

> *1.a. the common domestic fowl (Gallus gallus);*
> *b. the flesh, esp. of the young of such fowl used as food.*[21]

As a handy way of distinguishing between the two meanings, Judge Friendly refers to a 'broad' sense (i.e. any member of the genus *Gallus gallus*) and a 'narrow' sense (i.e. a young one of this genus). What is interesting about this particular type of lexical ambiguity is that there is an inclusion relationship—that is, entities that satisfy membership in the narrow sense also constitute membership in the broad sense.[22] Most cases of lexical ambiguity are not of this type. Recall the two senses of *bank* (illustrated previously), where the two meanings are quite distinct and may have few if any properties in common. The fact that there is this kind of inclusion for the word *chicken* has importance for how the case would get decided. [23]

The case of *Raffles* deals with two vessels having the same name. Now at first blush it may seem that the name *Peerless* is potentially ambiguous in a way analogous to the ambiguity of the word *chicken*: We have two different boats with the same name in

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[20] In most situations, though, there would be no ambiguity in the meaning of "chicken" as the context would make it clear which meaning was intended. For example, if I said "Harry breeds and raises chickens," you would doubtless understand the reference to be to the entire species. On the other hand, if I were to ask you to go to the market to buy chicken to grill on the outdoor barbecue, I clearly desire a broiler or a fryer (which is what you would probably find anyway as stewing hens have become a rare commodity in most American supermarkets).

[21] Webster's, 3rd ed., (1964:387). Some of the other definitions of *chicken* include: 2. the young of any of various esp. gallinaceous birds whose young run about soon after hatching; 3. *slang*: a young person, esp. a woman. 4. coward, sissy.

[22] Other examples of set inclusion are the words *dog* (the species/male only) and *gay* (homosexual/male homosexual); also proper names that have become common nouns often have this relationship, where the proper name then becomes a subset or an included member (e.g. *kleenex* (tissue/a specific brand); as well as *jello, band-aid, xerox, hoover* (British).

[23] Another case of lexical ambiguity that is very similar to *Frigaliment* is *Shrum v. Zeltwanger* (559 P.2d. 1384; 1977 Wyo.). The contract specified 134 head of *Cows*. Buyer understood *cows* to mean female bovine that had produced calves, which is the narrow meaning, whereas Seller meant any female bovine including heifers (young females that have never calved), which is the broad meaning. Both definitions occur in dictionaries, and here too there is an inclusion relationship of the narrow meaning within the broad one.

the one case, and two different definitions of the same word in the other. Yet, linguistically, *Peerless* and *chicken* are quite different, most obviously because of their grammatical classifications. Although both are nouns, the former is a proper noun and the latter is a common noun. For this reason, it is more natural to refer to *Peerless* as a name, but to *chicken* as a word (as I have done throughout this paragraph).[24]

The philosopher, John Stuart Mill, sought to explain the difference between proper names and common nouns, claiming that proper names are *denotative*, whereas common nouns are *connotative*.[25] Proper names denote or point to the individuals or entities having that name, but they do not designate or imply any particular qualities or attributes of those entities. According to Mill, the purpose of a proper name is to enable us to talk about someone or something without relating anything specific about him, her, or it. On the other hand, a common noun like *chicken*, besides denoting an infinitesimal number of individuals, connotes specific properties of an entity belonging to that class, such as a domesticated fowl, used for food, a source of eggs, flightless, having feathers, etc., etc. Whereas a proper name connotes nothing and therefore has no particular signification, other than it is a name, a common noun has meanings and it is these meanings that dictionaries try to capture with their definitions.[26]

One need only consult a dictionary of English to determine that the word *chicken* does indeed have the two senses that were under dispute in the *Frigaliment* case. The potential ambiguity is precisely what Judge Friendly discovered when he consulted his dictionary. But the protagonists in *Raffles* could have no such luck. Who would ever think to look up the name *Peerless*? But one might object that this example is unfair. What about less obscure names? To be sure there are many dictionaries and other kinds of reference works that do include proper names. For example, one of those references

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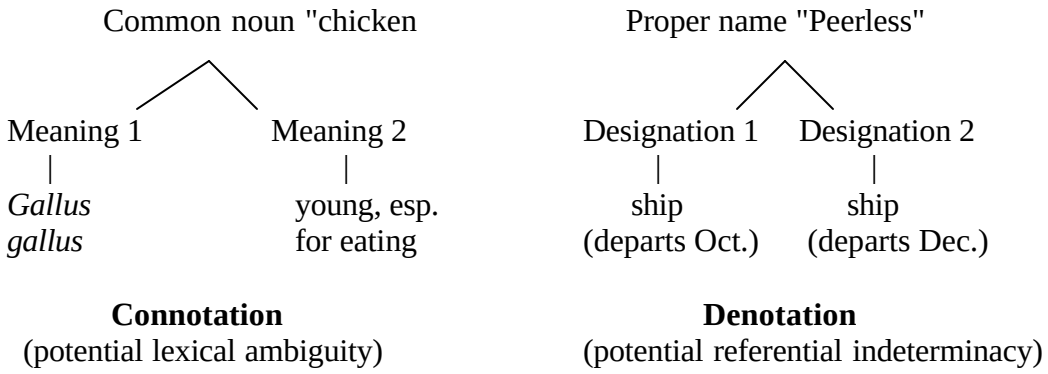
[24] *Huhn*, the German word for "chicken", is not a word of English, but for English speakers *Huhn* could very well be a name for someone or something. Moreover, common nouns can be translated from one language to another, but proper nouns (aside from spelling variations) tend to be the same from language to language, with the exception of certain fixed correspondences, such as Spanish *Julio* and English *Julius.* Yet, even here, it is unlikely that in an English-language newspaper *Julio Iglesias* would ever be referred to as *Julius Iglesias* (or even worse *Julius Church*).

[25] John Stuart Mill, A *System of Logic*, 8th ed., Longmans, London, 1961: I, Ch. II..

[26] Mill's view on proper and common nouns was refuted by the Danish linguist, Otto Jespersen, (*The Philosophy of Grammar,* W.W. Norton and Co, New York, 1965:64-71). Jespersen notes that proper names often become common nouns and in the process may lose their orthographic capitalization (recall the examples of *xerox, jello, kleenex*, etc. of note 22). Conversely, common nouns can be turned into proper ones (e.g. *the Mall, the White House, the Capitol*, all of which are in Washington, D.C.). Moreover, certain proper nouns do take on connotations associated with properties attributed to the original referent of the name, and when so used they are accompanied often by an article or other modifier (e.g. Baja California has become *the Riviera* of North America; Sadam Hussein is *another Hilter*.) In spite of Jespersen's valid observations, Mill's distinction between denotation and connotation serves our purpose well enough and is sufficient for explaining the crucial difference between the name *Peerless* and a word like *chicken*. Peter Tiersma (*Legal Language,* University of Chicago Press, Chicago, 1999:120-121*)*, in discussing some of the features of legal language, treats this difference in much the same terms. Tiersma speaks of *reference* and *sense*: A proper noun has reference to one or more entities, whereas a common noun has one or more senses or meanings.

might state that *Paris* is a city located in the north central region of France and that it is the capital and largest city of that country. A good gazetteer would also note that in Texas there is a much smaller city with the same name. These characterizations are not definitions in the strict sense of the word, but rather they represent an attempt to situate the various Parises geographically or politically. The descriptions serve as verbal pointers indicating the location of these places. Is the name *Paris* then potentially ambiguous? Not according to the restricted sense of the word "ambiguity", where a word is lexically ambiguous if there is more than one meaning. The name *Paris*, when designating more than one entity with that name, may present a problem of reference so that one may not be entirely sure to which city the name refers, but it is not a word exemplifying multiple meanings. When an uncertainty of reference arises, as it did in the *Raffles* case, the uncertainty engendered is distinct from that of lexical ambiguity. Rather the misunderstanding is due to **referential indeterminacy**. [27]

The following schema depicts the various characteristics attributed to the two classes of nouns.



Let us now turn to the case involving the ICC, where the issue is whether dressed and eviscerated chickens are manufactured products. The Department of Agriculture suggested that, for the purpose of the agricultural exemption, a definition of *manufacture* that had been approved in a separate case involving fruit growers was appropriate here for determining whether a commodity is or is not a "manufactured product". [28]

> "Manufacture," as well defined by the Century Dictionary, is 'the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery'; also 'anything made for use from raw or prepared materials.'" [29]

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[27] The term *referential ambiguity* would be appropriate for this concept so long as it is not confused with *lexical ambiguity*.

[28] American Fruit Growers, Inc., v. Brogdex Co., 1931, 283 U.S. 1, 51 S. Ct. 328, 75 L.Ed. 801.

[29] The definition is found on page 11 of 283 U.S. and on page 330 of 51 S.Ct.

It is the contention of the Department of Agricultural that dressed poultry is not a manufactured product according to this definition. The Interstate Commerce Commission, accepting the same definition, is just as adamant in its claim that dressed poultry is a manufactured product. Is the word *manufacture* (or *manufactured*) ambiguous? Clearly, there are *not* two distinct objective meanings of the word *manufacture*, one that accords precisely with the ICC position and the other with that of the farmers. Nor is there any dictionary that is ever likely to have anything to say about dressed poultry within its definitions of *manufacture.* How is it possible then for each side vehemently to maintain its position vis-à-vis a definition that both sides find acceptable?

The misunderstanding arises not in the definition itself but in its applicability to the classification of particular items. For the class of "manufactured products", it is indisputable that my computer and the desk it sits on belong to this category, and that a live chicken and a head of lettuce do not. The chicken and lettuce are located at the negative end of the scale *unmanufactured/manufactured*, and the computer and desk are at the positive end. But in between these two clear end points there is an intermediate gray area, where there may no longer be complete certainty and where vagueness enters, and here entities will be classified differently by different individuals. As an exercise, consider the following list of items, all of which involve dead chickens in some form or other. At what point does one of these entities become a manufactured product? Where do you, the reader, make the divide between "agricultural commodity" and "manufactured product"?

> a) a whole chicken with its feathers still on and with head, feet, and innards intact; b) a whole chicken that is plucked but still retaining head, feet, and innards; c) a whole chicken plucked (dressed) and eviscerated, but with head and feet; d) a whole fresh chicken dressed, eviscerated, and without head or feet; e) same as d) but frozen; f) a whole chicken cut into pieces, packaged and wrapped in cellophane (as sold in the typical supermarket); g) a dozen raw chicken wings, packaged and wrapped in cellophane; h) a dozen precooked hot wings (with a spicy sauce) packaged as a frozen TV dinner.

In the debate over whether dressed and eviscerated poultry are to be classified as manufactured products, the ICC and the Department of Agriculture have undoubtedly drawn their lines at different places along the scale.[30]

The problem of categorization has fascinated philosophers, psychologists, linguists, and even jurists. But the classical view that all members of a category have a set of common properties is no longer tenable.[31] Rather there are prototypes, which means

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[30] One is reminded of former president Clinton's infamous statement: "I never had a sexual relationship with that woman." Which of the following physical acts would constitute "having a sexual relationship"?: *kissing on the lips, French kissing, touching the genitals, fondling the genitals to orgasm, oral sex, sexual intercourse*. Clinton's notion of a sexual relationship placed the requisite act to the far right of the scale. So was he lying?

that some entities are better exemplars of a category than others.[32] For example, wrens and robins are prototypical "birds", but chickens and penguins, being of larger size, flightless, and nonarboreal, are poorer representatives of this category. On the other hand, bats, although they may be small and excellent flyers, are nonetheless excluded from the category "birds" because of biological and anatomical characteristics. By the same token, computers and desks are prototypical "manufactured products", but loose cut diamonds and packaged chicken wings are inferior examples, if at all, whereas pebbles, flowers, and live chickens are clearly outside of the category.

Let us see how the notion of prototype is applicable to the *ICC* case. We have a category ("manufactured product") and we want to decide whether, according to the definition of the category, certain entities ("dressed and eviscerated chickens") are members. Now the entities in question are by no means prototypical. Consequently, either they are nonprototypical but nonetheless still members of the category (which is the position maintained by the ICC), or else they are entirely outside of the category (which is the stance taken by the agricultural people). The misunderstanding in the *ICC* case is not due to any kind of lexical ambiguity, but rather it has to do with **vagueness of categorization.**

To summarize, though the three cases have words or terms that are open to more than one interpretation, they illustrate "ambiguity" only in the rather general sense that where there is more than one interpretation, ipso facto there will be a certain indefiniteness or lack of clarity. On closer scrutiny, the nature of the misunderstanding is by no means of the same type: In *Frigaliment*, the equivocal meaning of the word "chicken" is attributed to lexical ambiguity; in *Raffles*, the uncertainty of the application of the name "Peerless" results from referential indeterminacy; and in *ICC*, the indecisiveness concerning the assignment of items to the class of "manufactured products" occurs because of vagueness of categorization. Although the three cases differ in regard to the nature of the misunderstanding, nonetheless there is still a common structure underlying them. They all deal with the relation of language to some real-world situation. At issue for each case is how or whether the definition or reference of a term applies to specific entities. Does the word "chickens", appearing in a contract for the sale of poultry, include stewing fowl or not? Does the name "Peerless", designating a ship sailing with goods from Bombay to Liverpool, refer to a vessel departing in October or to a different one leaving in December? Does the expression "manufactured products", as used in an act governing the transportation of goods by certificated carriers, apply to dressed and eviscerated poultry? How did the courts answer these questions?

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[31] For an overview of the history and problems of categorization, see George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal about the Mind*, University of Chicago Press, Chicago, 1987.

[32] For prototype theory, see Eleanor Rosch, Principles of Categorization, in Rosch and Lloyd, eds. *Cognition and Categorization*, Lawrence Erlbaum Associates, Hillsdale, N.J., 1978:27-48.

IV. Analysis of the three cases

Frigaliment Importing Co. v. B.N.S. International Sales Corp.

Treatises discussing contract law frequently make reference to two opposing theories: the *objective theory* of contracts and the *subjective theory*.[33] The objective theory takes the position that the words used in an agreement by themselves are sufficient for interpreting the contract, and the court need not and should not inquire into the subjective intentions of the parties — that is, the way they intended to use those words. Arthur L. Corbin, although not an advocate of the objective theory, summarized it beautifully in an article attacking this position: "Contracting parties must be made to know that it is their written words that constitute their contract, not their intentions that they try to express in the words. They, not the court, have chosen the words; and they, not the court, have made the contract. Its legal operation must be in accordance with the meaning that the words convey to the court, not the meaning that they intend to convey."[34] A strict adherence to this position leads to adoption of, what has been called, the *plain meaning rule.* Where a writing appears to be complete (i.e. an integration) and not ambiguous on its surface, the court must interpret the words with their ordinary meaning and must not resort to any extrinsic evidence for ascertaining the intent of one or both parties. But there is an exception. Extrinsic evidence or parol evidence will be admissible when the contract itself is unclear or ambiguous and the court is unable to arrive at an interpretation entirely from the language within the "four corners" of the document. The extrinsic evidence serves not to alter the contract but to assist the judge in interpreting it. The subjective theory of contract, on the other hand, requires that there be a *meeting of the minds*— that without an agreement of intention, properly expressed, a contract has not been created. Judges adhering to this doctrine have no qualms about admitting extrinsic evidence in order to ascertain each party's intent, even where the parties thought that they had created a final expression of their agreement. In any case, regardless of the theory to which one subscribes, it happens that the parties to a contract, when drawing it up, may think that they have reached agreement, and only subsequently do they learn that each has a different interpretation of some crucial term. It is this discrepancy in belief, known in contract law as *misunderstanding,* that brings the two disputants to court.[35]

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[33] Arthur L. Corbin, *Corbin on Contracts*, One Volume Edition, West Publishing Co., 1952:156-7.

[34] Arthur L. Corbin, The Interpretation of Words and the Parol Evidence Rule, *Cornell Law Quarterly*, 1965, 50:161. In this article Corbin analyzes the *Frigaliment* case, for which he justifies the introduction of extrinsic evidence.

[35] Peter M. Tiersma, A Message in a Bottle: Text, Autonomy, and Statutory Interpretation, *Tulane Law Review*, 76:2, 431-82 discusses when judges should be *textualists*, adhering strictly to the written word, and when it is appropriate for them to be *intentionalists*, concerned with determining the intent of the writer(s) of the words. Tiersma contends that textualism is most suited for those writings that should be autonomous—that is, that should not rely on extrinsic information for their interpretation (e.g. statutes intended for the public).

When the seller ships stewing fowl to the buyer in the *Frigaliment* case, there ensues a major misunderstanding: The plaintiff intends for the term "chickens" to refer to birds no larger than broilers or fryers, whereas the defendant believes that the term "chickens" includes as well stewing fowl. Judge Friendly begins his discussion of the case with a comment about the objective theory: "Assuming that both parties were acting in good faith, the case nicely illustrates Holmes' remark 'that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties' having *meant* the same thing but on their having *said* the same thing.'" [36] Judge Friendly continues: "Since the word "chicken" standing alone is ambiguous, I turn first to see whether the contract itself offers any aid to its interpretation."[37] The contract stated that the New York firm would sell to the Swiss corporation:

> "US Fresh Frozen Chicken, Grade A, Government Inspected, Eviscerated
> 2 ½ – 3 lbs. and 1 ½ – 2 lbs. each
> all chicken individually wrapped in cryovac, packed in secured fiber cartons or wooden boxes suitable for export
> 75,000 lbs. 2 ½ - 3 lbs.....@$33.00
> 25,000 lbs. 1 ½ - 2 lbs.....@$36.50
> per 100 lbs. FAS New York
> scheduled May 10, 1957 pursuant to instructions from Penson & Co., New York."[38]

After having examined the "four corners" of the contract, Judge Friendly could find nothing within the written lines indicating that the larger-size birds were to be broilers and fryers but not stewing chickens. Extrinsic evidence was then admissible.

The extrinsic evidence begins with an interesting linguistic quirk. The plaintiff asserts that preliminary communications were all in German, a language known by both parties. The plaintiff claims to have used intentionally within its German correspondence the English word "chicken" because of its understanding that the English word meant young chicken and it was for that reason that the plaintiff had eschewed the German word "Huhn", which includes both stewing chickens ("Suppenhuhn") and broilers ("Brathuhn).[39]

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[36] Frigaliment. The quote from Holmes is from The Path of the Law, *Collected Legal Papers*, p. 178.

[37] Frigaliment. There were actually two separate contracts, differing only with respect to the amount of each kind of chicken and its price. The nature of the dispute and the legal issues remain the same however.

[38] Frigaliment

[39] The defendant pointed out that the plaintiff attempted to sell some of the larger birds as "poulets" (was this in French-speaking Switzerland?) and that only when customers started complaining did the plaintiff come forth with his claim that "chicken" meant "young chicken". The court did not attach much credence to this interpretation by the defendant.

The plaintiff called forth three witnesses in support of its claim that there was an established trade usage that favored its interpretation of "chicken". One of the witnesses, a resident buyer in New York for a chain of Swiss cooperatives, testified that for him "chicken" meant a broiler, but he admitted that in his own dealings he was careful to specify "broiler" when that was what he wanted. The other two witnesses were more consistent and stated that, within the trade, "chicken" did not include stewing chicken.

The defendant claimed to be new to the chicken business and at the time of making the contract was unaware of any particular trade usage. Nonetheless, it had no difficulty in finding witnesses in support of its interpretation. One of them, an operator of a chicken eviscerating plant in New Jersey, testified that "chicken is everything except a goose, a duck, and a turkey. Everything is a chicken, but then you have to say, you have to specify which category you want or that you are talking about." [40] A second witness for the defendant maintained that in the trade "chicken" encompassed all classifications. The defendant's third witness held that he would consider a chicken to be anything categorized as "chicken" within the regulations of the Department of Agriculture, whose classification includes fowl along with broilers and fryers.

Finally, the defendant argued that broilers and fryers were not available at the cheaper price charged for the larger birds and that the plaintiff should have been aware of market conditions and known that it would not be receiving younger birds at that price.

After considering all this extrinsic evidence, what did Judge Friendly conclude? The plaintiff's claim for the narrow sense of "chicken" certainly corresponded with one of the objective meanings found in dictionaries and there was even some support from trade usage, but one arrives at similar observations in regard to the broad meaning of "chicken" as claimed by the defendant. Hence, both positions are more or less equally tenable. But since the plaintiff was the one who brought suit, it had the burden of showing that, in the contract, "chicken" was to be interpreted with a clear preference for the narrow meaning as opposed to the broad one. Having failed to do so, the plaintiff did not prevail.

Previously, I noted that there is an inclusion relationship between the narrow meaning of "chicken" and the broad one. That is, anything that is a member of the class of broilers or fryers is also a member of the class of chickens (*Gallus gallus*). The same inclusion relationship holds, of course, for the members of the class of stewing fowl. Thus, although stewing chickens were sent to the plaintiff, it did not receive geese, ducks, or turkeys instead of chickens (in the broad sense). To that extent, the terms of the contract were satisfied. I believe that the inclusion relationship is an important element in the decision of this case. Consider the following hypothetical example where the inclusion relationship does not hold. Suppose that one of the objective meanings of "chicken" is "a certain kind of child's toy animal resembling a mother hen" and that the plaintiff had ordered the toy animals but instead had received frozen eviscerated stewing hens. I doubt whether such a case would ever be decided in the same way as *Frigaliment.* The court probably would have found that there was no valid agreement.

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[40] Frigaliment

Raffles v. Wichelhaus

If the decision in *Frigaliment* is a good example of the operation of the objective theory of contracts, then *Raffles* will serve as a prime example of the subjective theory. The conclusion reached in *Raffles* is that there was no *meeting of the minds*—that is, "no consensus ad idem, and therefore no binding contract".[41] Hence, each party could walk away from the contract and anyone who had suffered damages had to eat the loss.

The contract stipulated:

> "that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton..., to arrive ex 'Peerless' from Bombay;...and that the defendants would pay the plaintiff for the same at a certain rate, to wit, 17 ¼ d. per pound, within a certain time then agreed upon after the arrival of the said goods in England."[42]

Now why did the plaintiff not prevail? After all, the proper goods did arrive in England from Bombay on a ship called the Peerless, exactly as the contract had specified, and the plaintiff was prepared to deliver the merchandise. Why, then, had the defendants refused to accept the goods or to pay for them? In their plea, the defendants averred that a ship called "Peerless" had left Bombay in October and they were ready and willing to accept the merchandise when that ship arrived in England. Instead, the goods arrived on a different ship, coincidentally bearing the same name, that left in December. The plaintiff retorted that it had always intended to ship the goods on this other "Peerless" and so it had acted in good faith. The testimony revealed that each party had a different "Peerless" in mind, and moreover, each claimed to be unaware of the other's intention. As one of the judges hearing the case observed, "the moment it appears that two ships called 'Peerless' were about to sail from Bombay there is a latent ambiguity, and parol evidence may be given for the purpose of shewing [sic] that the defendant meant one 'Peerless,' and the plaintiff another."[43]

Courts sometimes make a distinction between *latent ambiguity* and *patent ambiguity*. The latter applies when words in an agreement have more than one objective meaning. The term "chicken", as it occurs in the *Frigaliment* contract, is an excellent example of patent ambiguity. In latent ambiguity, on the other hand, the term in question is not ambiguous on the face of the document, but the so-called "ambiguity" arises because of the particular facts of the situation. In *Raffles*, the fact that there were two ships called "Peerless" could not be ascertained from a perusal of the words in the contract but became known only when two different ships with the same name had left India and arrived in England on substantially different dates.

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[41] Raffles

[42] Raffles

[43] Raffles

Yet the distinction between patent and latent ambiguity does not by itself account for the different outcome in the two cases. Why, in *Frigaliment*, was the plaintiff forced to accept goods (i.e. stewing fowl) that he claimed not to have ordered, but in *Raffles*, the contract was dissolved so that neither plaintiff nor defendant ultimately prevailed? I believe the answer lies in the nature of the parol evidence that was available for each of the cases. In *Frigaliment*, both sides referred to earlier negotiations and brought forth witnesses in support of their respective interpretations. The plaintiff's evidence turned out to be weaker, and since he was the one that had brought suit he had the obligation of convincing the court of the validity of his interpretation of "chicken". Because the plaintiff had failed to do so, it was the defendant's meaning that was imputed to the contract. In *Raffles*, the only parol evidence that came forth was that there were different vessels, equally obscure, named "Peerless", departing from India on different dates. Moreover, the parties to the contract were unaware of this fact, they had not intended the same ship, and neither knew of the other's intention. At the trial there was no testimony from witnesses or any other evidence for suggesting that more weight should be given to one of the interpretations over the other. The only logical conclusion is that there was a gross misunderstanding. The court had no choice but to declare that there was no "meeting of the minds" and, therefore, no agreement had ever existed.

It is significant that the referential indeterminacy in the *Raffles* case involves reference to two entities equally obscure. Had one of the ships been well known and the other not, the interpretation would surely have been in favor of the well-known vessel. Suppose I am selling raffle tickets for a voyage on the QE2. It just so happens that I own a motor boat that I have named QE2, but you are unaware of its existence.You win the raffle expecting a voyage on the ocean liner bearing that name, but I inform you that you have won a trip on my motor boat. The court would in all likelihood embrace your interpretation of the QE2 or, even more likely, conclude that I have acted fraudulently. [44]

Interstate Commerce Commission v. Allen E. Kroblin, Inc.

Is a dressed eviscerated chicken a "manufactured product"? This question came before the federal district court in Iowa. [45] The ICC was of the opinion that dressed chickens are manufactured products and must be transported by certificated trucks, whose licensing is under its jurisdiction. The Department of Agriculture and farm groups, on the other hand, maintained that dressed poultry is to be classified as an agricultural commodity (and not a manufactured product) and therefore can be transported by

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[44] Note the following hypothetical scenario from the *Restatement*, where the Peerless facts have been altered: "A knows that B means Peerless No. 2 and B does not know that there are two ships named Peerless. There is a contract for the sale of the goods from Peerless No. 2, and it is immaterial whether B has reason to know that A means Peerless No. 1. If A makes the contract with the undisclosed intention of not performing it, it is voidable by B for misrepresentation...." *Restatement of the Law of Contracts* 2d , §20, illustration 3, American Law Institute Publishers, St. Paul, Minn., 1981.

[45] 113 F.Supp. 599 (N.D.Iowa, E.D. 1953)

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uncertificated carriers, because an act of Congress had exempted agricultural commodities from the requirement of ICC certification. The relevant part of the Act, Section 203(b) (6), exempts:

> ". . . motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (**not including manufactured products thereof**) [emphasis added], if such motor vehicles are not used in carrying any other property, or passengers, for compensation." [46]

Previous to the lawsuit, the ICC had set up its own commission to find an answer to the question. A group of scientists stated that "chickens and turkey, New York dressed, drawn, eviscerated, cut up, or frozen [are] unmanufactured agricultural commodities.... [But] such treatments as smoking, cooking, and canning...are said to cause the fowl to become a manufactured product." [47] The issue is not whether an agricultural commodity has been subjected to some type of processing, but "whether, as the result of processing, such 'agricultural commodity' has been so changed that a new and distinctive commodity or article is produced." [48] The Commissioner concurred with much of the report and concluded: 'The dressing and cutting into pieces of a chicken or a turkey does not result in the production of a distinctive article having any new characteristics or uses. It is still an agricultural commodity. Surely the Thanksgiving turkey which the farmer's wife so carefully stuffs and places in the oven is not a manufactured product." [49] Yet, it is amazing that in spite of this conclusion, the Commission reversed the recommendation of its own report. It is this reversal which brought the case to court.

The Court laments the fact that the terms "agricultural commodities" and "manufactured products" were never defined in the Act. Although the word "manufactured" certainly has dictionary meanings and has been defined also in other court cases, each party nonetheless contends that those definitions accord with its interpretation. The Court takes the view that any attempt to deduce the meaning of "manufactured products" from general definitions is a futile endeavor that can only lead one into a "semantic wilderness". [50] From a linguistic point of view the semantic enigma

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[46] ICC

[47] ICC

[48] ICC

[49] ICC. There was an interesting linguistic observation made by the Commissioner: "Chickens, ducks, geese, and guineas alive and after having been killed are still known by the same names." On the other hand, in English, we have different names for some of the larger animals and the meat derived from them—e.g. *cow/beef, sheep/mutton, pig/pork* (where the name for the food item was borrowed from Norman French). Interestingly enough, the meat products resulting from the slaughter of these animals, such as steaks or chops, were not within the agricultural exemption and were never part of this dispute. But then a steak hardly resembles the animal from which it comes in the same way that a drumstick does.

[50] ICC

arises from *vagueness of categorization.* It is by no means obvious where one should place entities labeled as "dressed eviscerated poultry" along the bipolar scale of *unmanufactured/manufactured*. The Department of Agriculture veers toward the left end of this scale, whereas the ICC steers toward the right. The Court seems situated somewhere in the middle, not knowing in which direction to turn, and so it must consider extrinsic evidence.

The Court first looks for an administrative interpretation under the guise that a particular agency ought to have expertise in its field of specialization. The Department of Agriculture asserts that Congress has made it the expert in all things pertaining to agriculture and, therefore, it is the one that knows how poultry is to be classified. The ICC counters this assertion by claiming that because it is responsible for enforcing regulations pertaining to interstate trucking, its administrative interpretation of the provisions of Section 203(b)(6) should be given greater weight. The Court's hope of finding an acceptable administrative interpretation leads only to another standstill.

The Court then turns to a different extrinsic aid—the legislative history. What was the intent of the legislature in enacting the various statutes? The parties were agreed that the purpose of the Act was to benefit the farmers. By using uncertificated trucks the farmers are able to transport their goods more rapidly and at a much lower cost. Rapid transport and lowered cost also benefit consumers. Throughout the years a number of amendments had been proposed to restrict certain provisions of the Act, and each time Congress either rejected the amendments or else liberalized even further some of the provisions. After scrutinizing the legislative history, the Court reached the decision that it was the "intent on the part of Congress that the words 'manufactured products' ... are not to be given the restricted meaning contended for by the Interstate Commerce Commission herein." [51]

Let us summarize for each of the three cases the type of linguistic misunderstanding that arose and its impact on how a case was decided. In *Frigaliment*, we find "lexical ambiguity". There are two objective meanings of the word *chicken*, and each side presents extrinsic evidence in support of its definition. The plaintiff, because it is the party bringing suit, has the burden of convincing the Court that its interpretation is the preferred one. Unable to do so, it loses the case. In *Raffles,* we are faced with "referential indeterminacy". There are two ships named *Peerless*, a fact not known by either party to the contract. The only extrinsic evidence forthcoming is the acknowledgment of this fact and the recognition that each party had a different ship in mind and was unaware of the other's intention. Faced with this indeterminacy, the Court has no choice but to declare that it finds no "meeting of the minds" and consequently there is no valid contract. In *ICC*, we encounter "vagueness in categorization". The ICC claims that dressed eviscerated poultry is a manufactured product, whereas the Department of Agriculture maintains that it is uniquely an agricultural commodity. Each side insists further that any definition of *manufactured* supports its interpretation of how dressed poultry should be classified. To resolve the dilemma, as extrinsic evidence the

[51] ICC

Court looks to the legislative history of the Act. Congress, in creating an agricultural exemption from certificated trucking, intended to give farmers maximum leeway in finding convenient and inexpensive modes of transport for agricultural commodities. Respecting the intent of the legislature, the Court affirms that dressed eviscerated poultry is *not* a manufactured product.

V. Conclusion

We have examined three cases containing "ambiguous words" or "ambiguity". I stated that these terms were appropriate for the general sense of *ambiguity*—where the language employed in a document is uncertain, unclear, or doubtful. This general sense emphasizes the language user's perspective. It is this view also that lies behind the objective theory of contracts, which contends that the words used in a contract uniquely represent the intentions of the drafters, and therefore, in its interpretation of the document the court must look exclusively to the words and it should not inquire into what the drafters thought they meant. Such a view puts the responsibility for a correct formulation squarely on the creator of a document. But is the language user always at fault? There are features inherent to language that can contribute to misunderstanding, such as the multiple meanings or references of words and expressions. Speakers may not know all the nuances, and even if they do, they may believe that some of these are not at all applicable to their legal situation and so they do not feel compelled to specify which meaning or reference is intended.

In *Frigaliment*, the buyer of chickens believed that it was common knowledge that only broilers and fryers were suitable for a family meal, and it may never have occurred to him to have to inform the seller that old chickens would not do. Conversely, the seller had the obligation of providing chickens at a certain price and weight and he probably believed that the contract specification for the larger ones could be satisfied only by supplying older birds (since younger ones were not available at the contract price), and hence there was no need to indicate that the larger birds were not going to be broilers or fryers. What I am suggesting is that even though both parties were probably acquainted with both meanings of "chicken", nonetheless their perceptions of the external context were such as to render in their minds only one of the meanings as likely, so that neither party was cognizant of a potential ambiguity. If this series of events is what occurred, does this scenario suggest that *Frigaliment* was decided wrongly? In fact, the *Restatement* proposes a conclusion for *Frigaliment* similar to that of *Raffles*—that is, there was no "meeting of the minds" and hence no contract.[52] This conclusion would be valid if the only extrinsic evidence in *Frigaliment* was the two meanings of the word "chicken". But because there was also evidence concerning prior negotiations and trade usage, I believe it was for that reason that the case was decided in favor of one of the litigants.

[52] *Restatement of the Law of Contracts* 2d, §201, Illustration 4, American Law Institute Publishers, St. Paul, Minn., 1981.

I have suggested that *Frigaliment* illustrates the inadvertent failure to recognize the two meanings of a word. *Raffles* presents an analogous failure in regard to the reference of a name. Recall the view of the philosopher, John Stuart Mill, that proper nouns serve to denote or point to specific entities. Frequently, though, more than one person or thing bears the same name. Suppose, for example, that you and I have a friend, John Smith, and he is the only acquaintance of ours with that first name. Then it is perfectly normal for me to begin a conversation by saying that I saw John yesterday. However, if John Smith and John Jones are our friends, it would not be appropriate (with no other context for reference) for me to say that I saw John yesterday. I would need to specify, either by adding a last name or by supplying additional information, to which John I was referring. Now let us apply this protocol for the use of proper names to *Raffles*. If both parties knew that there were two different ships named "Peeless", we would expect them to have stipulated either October Peerless or December Peerless. The contract stated simply that the goods were to leave India on a ship called "Peerless". One is led to assume, then, that each party was aware of only one ship bearing this name and, moreover, believed that the other party had to have the same ship in mind. Later, only after two ships with the same name arrived on substantially different dates in England, did it come to light that the parties were not referring to the same vessel. Certainly, at the time of making the agreement, the parties cannot be expected to know all of the ships named "Peerless". Their mistake was undoubtedly inadvertent.

Recognizing lexical ambiguity or referential indeterminacy is relatively straight-forward once one is aware of the different meanings of a word or expression or of the various entities designated by a name. Vagueness of categorization, however, is more problematic. A dictionary or a legislative definition of a category may not be precise enough for determining whether a particular item is supposed to belong to the classification. Moreover, if one is dealing with an ordinance or an administrative act it is helpful to know the purpose of the ordinance or act (as was necessary in the ICC case). Consider the well-known legal example of a hypothetical ordinance that prohibits "vehicles in the park". [53] Assuming that the intent of the statute is to allow people to stroll casually in the park and for children to play safely there, it should be fairly evident that trucks, automobiles, and motorcycles are prohibited from entry and that the ordinance does not bar little kids on tricycles or mothers pushing baby carriages. But what about skateboards, rollerblades, bicycles, or scooters with motors? Do any of these items belong to the class of prohibited "vehicles"? Peter Tiersma has proposed a twofold solution to this problem—one that comprises both lists and definitions. [54] In relation to our hypothetical ordinance, the legislature could provide a list of specific prohibited items, particularly where there are disparate types (e.g. trucks, rollerblades), as well as some general definitions where applicable (e.g. any kind of motorized vehicle). But even

[53] See H.L.A. Hart, *The Concept of Law*, 128-29 (2nd ed., 1944).

[54] Tiersma discusses this two-pronged approach in relation to a California statute regulating the sale and use of assault weapons. Elsewhere in the article he discusses the utility of a preamble by the legislature in which it gives its reasons for promulgating the statute and its intentions on how the statute is to be interpreted. Peter M. Tiersma, A Message in a Bottle: Text, Autonomy, and Statutory Interpretation, *Tulane Law Review*, 76:2, 462-71.

this approach may not completely accommodate all situations. Might it be permissible for younger kids to ride bicycles and to use skateboards, but not teenagers or adults? Although a combination of lists and definitions would reasonably account for a majority of the entities to be classified, there could be some residual items whose classification remains uncertain. One might still need to inquire into the intention of the legislature vis-à-vis the purpose of the ordinance (e.g. in a public park, do teenagers on skateboards interfere or endanger children and strollers?).

In *ICC*, the Court noted that the legislature had failed to provide definitions for the two crucial terms mentioned in the Act: "agricultural commodity" and "manufactured product thereof". Nor had the legislature provided a list of the kinds of processing (e.g. dressing, eviscerating, cutting into parts) that convert poultry from an agricultural commodity into a manufactured product. [55] Without definitions or lists to go by, all that the Court could do was to look to the legislative history of the Act in an attempt to decipher the intentions of the lawmakers.

Parties to an agreement should endeavor to use language that is clear, unequivocal, and expresses to the best of their abilities their intentions. Still, no matter how much care has gone into the creation of a document, at times, there will be misunderstanding later about how the terms are to be interpreted. Misunderstanding does not arise simply from improper usage. Built into the very structure of language are ambiguity and vagueness. Unless one is particularly sensitive to these nuances or has been trained to perceive them, they may go unnoticed. The fact that linguists are serving as expert witnesses in disputes having to do with lexical and syntactic ambiguity and with issues about reference and categorization indicates that these subtleties of language are not always so obvious to litigants or to judges and juries. Expert testimony frequently is necessary in order to convince the court of the presence of ambiguity or vagueness. The purpose of the testimony may be to enable a plaintiff to argue for an interpretation that is not so apparent, or to permit the parties to bring in extrinsic evidence to show their intentions.

Because the drafters of a document cannot necessarily anticipate all the subtleties of language and all the vagaries of usage or know all the referents of a proper name, is it reasonable to hold them always responsible for their choice of language? When misunderstanding arises, is it justifiable, as advocated by a strict version of the objective theory, for courts to resolve issues by a rigid adherence to the "four corners" doctrine or to the "plain meaning" rule? A subjective theory of contracts is more gracious in its treatment of misunderstanding. It does not hold the parties entirely responsible for how the court must ultimately interpret their words. It allows for an exploration of the intricacies of language, without requiring the creators of documents to be fully aware of all possible meanings, nuances, or references. It is more forgiving of inadvertent

[55] The scientists, in the report commissioned by the ICC, did provide a list of types of processes relevant for classifying poultry as either "unmanufactured agricultural commodities" or "manufactured products". See the text at note 47.

mistakes. Courts would be wise to embrace some version of the subjective theory and thereby be free at all times to inquire into the intentions of the contracting parties. [56]

[56] For a defense of the liberal use of extrinsic evidence by judges for determining intent, see Arthur L. Corbin, The Interpretation of Words and the Parol Evidence Rule, *Cornell Law Quarterly*, 1965, 50:161.