CORPUS LINGUISTICS AND VICO'S LAMENT: AGAINST VIVISECTIONAL JURISPRUDENCE

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I. THE LURE OF CORPUS LINGUISTICS

The "new textualist" approach to legal interpretation, most closely identified with the late Justice Scalia, argues that the meaning of a legal text is the ordinary meaning attributed to the words by an average competent speaker at the time of their enactment as a statute. Under this view, textual meaning is an empirical fact established by how language was actually used at a particular point in history. But what manner of investigation is appropriate to uncover this empirical reality? Too often, judges appear to draw on their vague intuitions about ordinary meaning, usually under the cover of citing to malleable and contradictory dictionary definitions. This poses a serious problem because a primary justification for new textualist methods is the ability to discern legal meaning in an objective manner that rises above a particular judge's subjective desires.

Some legal theorists have recently turned to corpus analysis, claiming that this tool developed by professional linguists provides the empirical methodology capable of identifying the ordinary meaning of words used in a legal text by rigorously examining how the words were used at a given point in the past. Linguists study the rules governing the use of natural language. By creating massive electronic databases of all manner of texts—thereby building a "corpora," or sample "body," to explore—linguists provide data that can be investigated to determine how language is used by members of a community. Legal scholars argue that corpus analysis, although not foolproof, will often identify the ordinary meaning of words and phrases as they were used when the legal

text was adopted, thus providing an objective means to specify legal meaning under the new textualist approach. Boiled to its essence, proponents claim that corpus analysis of terms used in a legal text provides an empirical demonstration of the ordinary meaning of that text.

The lure of corpus analysis for legal theorists is the most recent in a long history of similar Siren calls. We are seduced by the promise of a methodology that claims to apply the law to a specific case in a manner that permits observers to monitor and assess whether that application of the law is objectively correct. But this allure inevitably founders on the rocks, leaving us unfulfilled, disappointed, and searching for the next promising suitor to lead us to a method for determining objectively correct answers.

What is the source of our desire to identify an objectively correct meaning? In the modern democratic era, we have assumed that the rule of law depends on the existence of a fundamental distinction between *lawmaking* and *law enforcement*. On one hand, the law is the will of the people communicated through their representatives and constrained only by constitutional norms. On the other hand, the executive branch enforces the law, subject only to judicial review that is constrained by deference to the policy choices made exclusively by the legislature. Simply put, under this traditional view, rule of law values are achieved when the law is first democratically promulgated, and then later faithfully applied. My thesis is that this proposition in not only *too simply* put, it is fundamentally *incorrect*.

It has long been a truism that "we are all realists now." In its conservative manifestation, realism abandoned the hope for formal deductive methods of decision making and sought to align law with social science and empirical methods. In this sense, the turn to corpus analysis is certainly part of the broad tradition of realism. However, the legal system has never come close to internalizing the most radical implications of the realist critique of legal practice. In its most important and profound iteration, the realists questioned the foundational theoretical premise of modern law that there is a sharp distinction between creating law and applying law. Contemporary theorists pay a steep cost for refusing to attend to this lesson. Legal scholars turning to corpus analysis are again engaging in the fool's errand of establishing methods that do not depend on the exercise of judgment to achieve justice. They cannot save themselves from returning to this fruitless quest because they refuse to acknowledge the fundamental reality that legal meaning can be known only in its application in the present, and never as a brute empirical fact of language patterns that can be uncovered scientifically by interpreters in the present. Unfortunately, successive failures to devise a methodology that can render judging objective just harden the resolve of contemporary scholars rather than suggest that they abandon the effort.

In this essay I argue against the deep impulse that motivates the contemporary turn to corpus linguistics precisely because this enticing "new" method reinscribes the profoundly misguided theoretical premise of modern law that

there are ontological and epistemological distinctions between the law and its application to a specific case. In his oration at the commencement of the 1708 term at the University of Naples, Giambattista, Vico lamented the abandonment of rhetorical understanding and the misguided embrace of Cartesian analysis as the model of genuine knowledge. The past three centuries have borne witness to this slavish adherence to a focus on objective and empirical inquiry, neglecting the unavoidable role of rhetorical persuasion in legal meaning. My essay proceeds in the spirit of Vico's great oration. I urge that, at long last, we should return to a conception of legal meaning as rhetorical knowledge.

II.   THE SIGNIFICANCE OF ORDINARY MEANING

I begin by stepping back and posing a basic question. It is commonplace that lawyers, judges, and legal scholars begin with a commitment to the ordinary meaning of legal texts. Corpus linguistics is appealing precisely because it promises to provide empirical evidence of the ordinary meaning of language as used in discourse at a given point in time. But this begs the question: Why is ordinary meaning the foundational premise of legal interpretation?

Historically, the law was unwritten, hidden, and mysterious. To claim to know the law was an affront to the Gods and the demands of ineffable justice. For the common man to lay claim to understanding the law was pure hubris. This has now changed. Our contemporary commitment to adhere to the ordinary meaning of legal texts is a manifestation of the strong modern impulse to uphold democratic governance. We now firmly believe that the law is *from* the people, *for* the people, and deeply *part of* the people. We reject the comfort of having a powerful priest, standing with his back to us and chanting magic words in a foreign language, serve as the fount of justice. We aspire to justice that is a sacrament brought forth in the people's language, worked out in the people's language, and expressed to the people in the people's language.

We adhere to ordinary meaning, then, as part of our commitment to *democratic dialogue*. Democratic dialogue is complex and non-linear; it requires judgment and humility. It is critical that we not permit the commitment to ordinary meaning—a vital part of our jurisprudence—to be twisted into a commitment to a narrow methodologism. This goal is best achieved by recognizing that the commitment to ordinary meaning is really the commitment to the use of natural language—as opposed to a wholly technical or specialized language—to resolve legal questions.

Consider two friends engaged in a discussion about how to handle an important dilemma that has arisen in their lives. Would we ever claim that this use of natural language and its reliance on ordinary meaning can be the source of objectivity and determinacy? Of course not. Would we ever fear that this use of natural language and its ordinary meaning is an invitation to irrationalism and incoherence? Of course not. In this case, the ordinary meaning of their deliberation is the product of a pragmatic, dialogic engagement that draws upon an

open-textured set of topics. Our commitment to ordinary meaning in the legal system is a commitment to working within the realm of natural language and rejecting the Cartesian ideals of determinant and objective analysis.

Ironically, successive efforts to cabin ordinary meaning with methodological rigor tends to reduce law to a more specialized language that avoids the openness of natural language and the imprecision of ordinary meaning. Instead of working through legal questions in a living, natural language, proponents of objectivity pursue a goal that is metaphorically captured by the television show, *The Walking Dead*. The meaning of words is frozen in time, but they continue to stumble forward in a zombie-like existence in the present. There is nothing "ordinary" or "natural" about this situation. It is positively horrifying!

III. AGAINST VIVISECTIONAL JURISPRUDENCE

Corpus linguistics is premised on the idea that we can perform a scientific operation to discern an objective reality about past language use, much like animal researchers who cut into the bodies of living animals to understand the meaning of life. In one case, the corpus is subject to data analytics and qualitative assessment; in the other case, the "body" is literally presented for dissectional analysis. Vivisection is a ghastly exercise. As a monkey struggles in constraints, its brain is probed and stimulated to discover how the body works. It may well be the case that we learn something important from this scientific approach. Indeed, we may gain vitally important knowledge that assists us in formulating diagnostic protocols and treatments. But this is not to say that we are experiencing the subject in an ordinary manner. Indeed, this is an *extraordinary* intrusion and reduction of the subject that is viewed by many as immoral. The living organism is distressed and ignored. Vivisection is a highly unusual and specialized effort designed to achieve very focused and limited objectives. And these limited objectives must be weighed against the very obvious and substantial costs.

It is not overly dramatic to ask the supporters of corpus analysis whether judges should consider themselves lab scientists who engage in the vivisection of natural language in a quest to identify objective meaning. What training would judges have to undergo to gain access to this knowledge? One does not quickly read a few manuals and then enter the lab with a scalpel. Judicial vivisection, if done properly, would require years of training. Linguists are specifically trained for corpus analysis, and we should leave it to the professionals to conduct these academic inquiries rather than re-purpose practically oriented judges working within natural language to become vivisectionist scientists.

My claim is not radical. I am merely pleading that we should authorize judges to exercise judgment about the ordinary meaning of the law as it is applied to present questions. The motivation to use corpus analysis comes from the commitment to defend ordinary meaning, but it quickly veers off into the vivisectional aspirations of modern scientists. Judges should embrace the ordi-

nary meaning of natural language used in legal texts and should reject the vivi-sectionist urge to master meaning by subjecting it to methodological impera-tives. Ordinary meaning is not data to be drawn from a body that is strapped to a table; instead, it is the language in which the legislature must act and the lan-guage in which judges must apply the laws. It is the language of democratic governance rather than the language of scientific certainty.

As Vico argued long ago, we must give Cartesian methodologism its due, but also recognize its limitations. We must embrace the radical innovation that our commitment to use natural language and ordinary meaning to identify prob-lems and appropriate solutions commits us to an integrated rhetorical and her-meneutical practice. Judging always poses a question of how the historically unfolding meaning of the text has significance for the case at hand. There is no object, frozen in the past, that is retrieved, sedated, and subjected to disinterest-ed dissection. There is only the present case in which we are called to exercise judgment.

IV. A REPLY TO CRITICS

My thesis will certainly generate criticisms. Most significantly, critics might ask what harm can come from a modest embrace of corpus linguistics if it is a tool that is used wisely and with discretion? Is there really a danger in learning more about how relevant language in a legal text is used in ordinary discourse? The question, these critics would emphasize, is not whether corpus linguistics can fully determine the results in all cases, but whether it can occa-sionally be of some assistance to lawyers and judges.

In some cases, it very well might be helpful to permit expert testimony in the form of a corpus analysis of legal language. The issue is not whether corpus analysis might productively be employed as a tool of interpretation in select cases, but whether it should be celebrated as *the* methodology for determining ordinary meaning. As with other efforts to subject judgment to a method, the problem with corpus analysis is that there is far too much leeway in choosing how to wield the tool. Just as judges may search for friendly dictionary defini-tions to support their analysis of ordinary meaning, corpus analysis is subject to multiple factors and inputs. Advocates might construct competing corpora for a case, investigators may take different approaches to qualitative analysis of the analytical results, and opposed judgments can be drawn from the data. There are simply too many variables even within the scope of corpus analysis to ex-pect definitive results.

Although corpus analysis is just now entering legal practice, these infirmi-ties are quickly becoming evident. A self-described group of "Scholars of Cor-pus Linguistics" filed an amicus brief in the 2019 Supreme Court case of *Rimi-ni Street v. Oracle* arguing that a statute had a clear meaning. It should come as no surprise that a brief rejecting this analysis was filed by a group who desig-nated themselves as "Scholars of Linguistics." It should be even less surprising

that Justice Kavanaugh authored an opinion for a unanimous court that cited neither brief and used a variety of ordinary tools of statutory interpretation to resolve the case. It is far from clear that corpus analysis will provide definitive guidance to judges and lawyers seeking to articulate legal meaning. This does not discredit corpus analysis as developed by professional linguists; instead, it cautions judges against assuming that they can easily adapt this analytic tool to their obligation to judge cases under the law.

As a fallback position, critics might concede that corpus linguistics does not provide definitive answers about the ordinary meaning of statutes, but still insist that applying this method constrains judges by virtue of the technical requirements of conducting a corpus analysis. Under this more pragmatic view, a single determinant meaning of statutory language may not always be discernable, but if judges act "as if" such meaning exists and adhere to corpus analysis, it will secure rule of law values. Unfortunately, this posture would provide scant constraint against judicial activism. As a general matter, adoption of a highly technical approach to legal rules generally favors elites who can employ sophisticated legal teams to manipulate the game from within the technical field. Karl Llewellyn employed this wisdom in Article Two of the Uniform Commercial Code by using natural language to state general rules, and then reinforcing the purpose of the rules through the Official Comments. Supporters of his approach would argue that Article Two's simply stated obligation of "good faith" has proved more predictable and effective than detailed, confusing, and highly technical regulations by state and federal governments. Discerning good faith in the facts before the court is an inquiry undertaken in ordinary, natural language about the values we hold dear in the realm of commercial behavior. Acting "as if" there is a linguistic method that narrows the scope of inquiry has the negative effect of interfering with the task at hand of rendering judgment.

More important, it is likely that in many cases corpus analysis will not just be unable to specify a determinant meaning of legal language, it will positively result in a finding that there is no definitive original meaning of the relevant words or phrases. As with most methodologies, the proponents may find themselves hoist with their own petard in ways that unsettlingly reveal the inadequacies of the method. Proponents suggest that this underscores the ideologically neutral character of the methodology, but it also underscores the significant limitations of the method even if supported only by the "as if" justification.

CONCLUSION: AGAINST VIVISECTION

The proponents of corpus analysis begin with a commitment to ordinary meaning but fail to recognize the degree to which their sophisticated inquiry abandons ordinary discourse in natural language. Judicial discourse, particularly at the level of Supreme Court opinions, is highly complex, technical, and (ostensibly) rigorous and objective. Average citizens do not read opinions and discuss them in their own terms. Why do adherents of corpus analysis believe that a linguistic method can assist in understanding ordinary meaning, when

meaning at this level is anything but ordinary? Corpus analysis promises only to increase the trend toward technical argumentation designed to foreclose lines of inquiry in the interest of objectivity and determinant meaning.

We should read state trial court memoranda and oral arguments from motion day in state court if we want to understand the commitment to ordinary meaning. Legal discourse at this level is not a lapse from ordinary meaning but instead preserves ordinary meaning in the legal system in the face of the judicial discourse of elites at the highest levels. Rather than emboldening the elites, shouldn't we recognize that their deviation from ordinary meaning with an approach that seeks objectivity and invites techniques such as corpus linguistics is a deviation from their critical roles in a democracy? The oft-stated commitment to ordinary meaning is profound; it should not be overcome by the insinuation of scientific methods that are abrasive to how ordinary meaning is explicated in genuine dialogue.

I do not ascribe ill motives to those promoting corpus linguistics. Judges, lawyers, and academics are working in good faith toward the honorable goal of reducing the cognitive and volitional burdens on legal actors who must exercise judgment. What a relief to have a scientific inquiry that renders judgment objective! "If only justice could be secured by an algorithm, we could ensure justice," one hears in the justification of corpus analysis. Indeed, it is a comforting story. But justice is secured through the vagaries of ordinary language, and it is within ordinary language that we must struggle against judicial biases and limitations to implement the people's law.

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