Carlin Soos
University of California, Los Angeles

Extended Abstract
Out of the Ordinary: Common Use Arguments in Legislative Classification

Introduction

The common-law doctrine of *stare decisis* tasks the courts with comparing, sorting, and regulating new cases based on established standards of legality, a lineage of thought that seeks continuity between past and future rulings (Scalia 1997, 7). Regardless of this strong desire for stability and consistency, the frustrating reality is that ambiguity is often written—intentionally or accidentally—into legislation, contracts, and policy, questionable phrasing that can severely hinder a court's ability to determine how new cases relate to previous findings. As the text of a legal document provides the normalized naming around which future cases are considered, statutory interpretation is needed to "determine an instrument's meaning" (Baude and Sachs 2017, 1086) when subjects deviate too far from or challenge previously defined regulatory categories. This interpretation ensures that a statue is "not only internally consistent, but also compatible with previously enacted laws" (Scalia, 16).

Different modalities, discourses, and theories can influence and guide judicial interpretation. Here, I will be focusing on the legal canons of "ordinary meaning," "plain meaning," and "common use," flexible interpretive devices frequently evoked by scholars and judges to clarify ambiguous terminology and manage legislative classifications. Although each is unique and distinct, I argue that appeals to the plain, ordinary, and common can be unified under a singular knowledge organization (KO) theory motivated by a desire for atheoretical meaning and rooted in three unifying characteristics: obfuscation, hegemonic appeal, and autopoietic validation. Each of these attributes provides extremely valuable epistemic opportunities, yet their effective combination creates a mechanism that most readily substantiates, rather than dismantels, oppressive norms.

A Note on Terminology

Ordinary meaning and common use hold very similar legal connotations and are frequently used in tandem (see, for example, HHS 2020a and 2020b). Plain meaning and ordinary meaning are sometimes used interchangeably but have more divergent functions: whereas ordinary meaning is intended to address undefined statutory terms, plain meaning directs the court to enforce a statute "according to its terms" (Hobbs 2011, 328). My decision to group the three concepts together is not intended to erase

their important distinctions. Rather, I seek to highlight their shared focus on atheoretical

meaning, their often similar applications, and the potential consequences of their use.

The precedent of "common usage" in knowledge organization (KO) standards, such as the Anglo-American Cataloging Rules, and in classification theory more broadly (Svenonius 2009, 88-89) is of notable importance to this discussion. Unfortunately, I have not yet identified similarly direct KO references for the other two concepts. My choice to unite the three as a singular classificatory theory is therefore rooted in their usage in the domain of U.S law, not knowledge organization. That being said, I do believe there are broader applications for an ordinary meaning classification theory, which I intend to address in future work.

Methodology

Hjørland and Albrechtsen have explained that the "domain-analytic paradigm in information science (IS) states that the best way to understand information in IS is to study the knowledge-domains as thought or discourse communities, which are parts of society's division of labor" (1995, 400-401). Tennis (2003) emphasizes that this particular definition positions a domain as a type of discourse community, a distinction which makes the two analogous rather than synonymous.

Given the interplay between discourses and domains, Smiraglia states that "[discourse] analysis is an important tool for domain analysis for the richness of context it can reveal in the blending of conceptual and social constructs within and among domains" (2015, 15). Recognizing this valuable methodological relationship, I build upon KO tradition (ibid, 20) and make use of a complementary pairing of domain and discourse analyses, turning primarily to legal theory, legislation, and court opinions to understand how ordinary meaning, plain meaning, and common use function as classificatory devices. Both the legal discourse surrounding these concepts and their judicial applications will be considered.

Ordinary Meaning in Statutory Interpretation

Solan and Gales (2016) identify three techniques most commonly used by judges and legal scholars seeking ordinary meaning: linguistic intuitions, dictionary definitions, and reference to linguistic corpora.

Linguistic Intuitions

The most common way of determining ordinary meaning relies "upon one's knowledge of the language as a native speaker" (ibid, 254). This intuitive process results from observed information patterns, personal experiences, and learned behaviors, a functioning I view similarly to the cognitive theory of perceptual categories (APA n.d.). In both phenomena, a more reactionary form of classification occurs based on acquired

associations, a relationality that allows an individual to create connections and establish groupings of similar kinds. Central to intuition is a dependence upon pattern formation and the establishment of particular "standards of similarity" (Quine 1969, 123), both of

which provide information on what something is and how it relates to other things.

Justice Potter Stewart epitomized intuitive interpretation in his commentary on *Jacobellis v. Ohio*, the 1964 Supreme Court case that grappled with the boundary between "obscenity" and constitutionally protected freedom of expression. When prompted to define "hardcore pornography" and, ultimately, state whether the film central to the case fit that description, Stewart famously replied, "I know it when I see it, and the motion picture involved in this case is not that" (LII n.d.). This claim—that he will "know it when [he] sees it"—speaks to the way linguistic intuition and tacit knowledge (Polanyi 1966) can lead us to meaning without providing the language to articulate our reasoning. We simply know it, intuitively, to be true.

The fact that Stewart's phrase has found popular usage beyond the Court speaks to a common and persistent reliance on linguistic intuition in daily life. Regardless of its frequent usage, Solan and Gales note two fundamental limitations to this epistemic method: confirmation bias and unobserved variation. Just as the nature of linguistic intuition results in a reactionary sense of what is ordinary, there is a similarly reactionary rejection of alternatives. While this intuitive response can be handy, it can be dangerous in circumstances where a deep consideration of all possibilities is needed. (For example, in a high-stakes Supreme Court case.)

Dictionary Definitions

When seeking ordinary meaning beyond our own intuition, turning to a dictionary might seem like the most obvious answer, a belief substantiated by the Supreme Court's increasing reliance on "dictionary definitions in determining the ordinary meanings of statutory terms" (Hobbs 2011 238-239). The Court's affection for dictionaries, however, has a long history, as exemplified by *Nix v. Hedden*. In this 1893 case, the Court had to decide if tomatoes should be regulated as fruits or vegetables within the Tariff Act of 1883. Over the course of this trial, the only real "evidence" brought forth by either side were the definitions of various fruits and vegetables as provided by Webster's Dictionary, Worcester's Dictionary, and the Imperial Dictionary. By the time both sides concluded their arguments, the definitions of tomato, pea, eggplant, cucumber, squash, pepper, potato, turnip, parsnip, cauliflower, cabbage, carrot, and bean had been read into the Court's record.

Ultimately, the Court's justices determined that neither party proved the terms fruit and vegetable held any special meaning in "common speech" or the Act itself. Lacking any legislative specification, and with "no evidence that the words […] have acquired any special meaning in trade or commerce," Justice Horace Gray stated that the words "must receive their ordinary meaning" (Gray 1892, 305-306).

Dictionaries might seem like the least problematic sources for obtaining views of the ordinary, plain, and common, but fundamental misunderstandings about how dictionaries are actually compiled can severely compromise the legitimacy of this interpretive method. For example, judges often select a particular definition based on its ranked

placement in an entry, believing that "definitions are presented in order from the most to the least common usage" (Stewart 2018, 1498). While perhaps a reasonable assumption, this is not always the case, and this misconception can introduce major issues if definition order is the linchpin upon which a case rests.

Linguistic Corpora

The final technique proposed by Solan and Gales is corpus linguistics, a newer interpretive methodology that relies on robust word databases to determine linguistic meaning (Ehrett 2019, 50). By collecting as many documented uses of a particular term as possible, those championing the linguistic corpora seek to identify trends in how actual people use actual words to actually communicate.

In a way, corpus linguistics recognizes how temporal and spatial influences affect meaning—or, as Drabinski puts it, that "systems of categorization and naming are inextricable from the historical contingencies of their own production" (Drabinski 2013, 102). However, very much *unlike* Drabinski's ultimate determination that these contextual influences mean that "there can be no 'correct' categorical or linguistic structures, only those that discursively emerge and circulate in a particular context," scholars and judges who use the corpus to interpret legislation seem to argue that you *can*, at least in part, claim that some meanings are more legitimate than others. This "correctness" is typically linked with frequency of use (Ehrett, 54).

Ordinary Meaning as a Classificatory Theory

In 2020, the U.S. Department of Health and Human Services (HHS) rescinded anti-discrimination protections for transgender patients under Section 1557 of the Affordable Care Act, citing a return to the "ordinary meaning" of the word "sex" (HHS 2020a, 3). After a standardized review process, the HHS rejected the inclusion of gender identity under protections "on the basis of sex" and reverted to the "plain meaning" of the phrase (HHS 2020b, 12-13). Melodie Fox has previously described the classificatory power of legal discourse to produce "determinations of sex differentiation that hold civil and even violent consequences in the lived experience of those impacted by its rulings" (2016, 688), a warning fully substantiate by the HHS's recent action.

Executive action has since annulled these changes, but this HHS case study perfectly demonstrates how appeals to the ordinary, plain, and common can be used for nefarious purposes. Additionally, the use of "sex" as a legilsative category illustrates the three main characteristics around which ordinary meaning, common use, and plain meaning operate: obfuscation, hegemonic appeal, and autopoietic validation.

Obfuscation

Rather than explicitly stating the true values, beliefs, and criteria behind a particular classificatory action, ordinary meaning obscures its user's true influences and motivations. Claims that the HHS will enforce Section 1557 by returning to the "ordinary meaning of the word 'sex' in the statute" (HHS 2020a, 3) says very little about the actual

factors used to reach their conclusion. What actions were taken? Whose ordinary meaning is being presented? What are the alternatives? Assumptions can surely be made, but the primary role of statutory interpretation is to clarify vague language, not kick the ambiguous can down the road.

Hegemonic Appeal

Simply put, basing "correctness" on frequency of use will almost always privilege socially dominant paradigms, ontologies, and values. As minority communities are, well, in the minority, I am preemptively concerned that correlating frequency with correctness will help maintain, rather than dismantle, oppressive hierarchies. Critical KO literature on user warrants might prove beneficial to understanding this particular topic.

Autopoietic Validation

When frequency of use becomes the marker of correctness, the very act of using something common, plain, or ordinary validates its status as such. That is, since using something innately adds to its frequency of use, each new application strengthens the claim that it is, in fact, common. This has the simultaneous effect of raising the likelihood that the same meaning will find future application. By selecting and supporting a particular meaning, these choices reproduce their own validity in a highly efficient fashion.

Conclusion

Over two decades of KO scholars have refuted the belief that any method of classification can be atheoretical (Hjørland 2016), neutral (Olson 2001), or objective (Drabinski 2013), offering a critical bibliography well positioned to discuss and understand the dangers of the ordinary. Depending on one's perspective, "there are many ways to read a legal text, each with its own claim to authority" (Baude and Sachs 2017, 1082). Still, none of these readings, nor the legal categories they support, can be viewed as wholly atheoretical or detached from external influence.

As suggested in the three cases discussed above, the ordinary, common, and plain have found widespread use in a variety of cases, resulting in a variety of consequences. This flexibility surely makes for an incredibly effective interpretive device, but its support for hegemonic viewpoints, obfuscation of underlying logics, and autopoietic validation raises critical concerns. Instead of removing "special interests," as is implied

by the concepts, the canons of common use, plain meaning, and ordinary meaning simply neutralize and support hegemonic values, repackaging them as atheoretical reflections of "what is." Consequently, legislative categories resulting from these meanings are difficult to refute. How do you challenge a defense that essentially boils down to, "That's just the way things are"?

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