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When Good Enough is Not Good Enough

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BOOK NOTICE

WHEN GOOD ENOUGH IS NOT GOOD ENOUGH

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THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION. By *Lawrence M. Solan*. Chicago: University of Chicago Press. 2010. Pp. x, 288. $45.

INTRODUCTION

According to conventional wisdom, the state of statutory interpretation is not strong. Its canons of construction—*noscitur a sociis*, *ejusdem generis*, *expressio unius est exclusio alterius*, *reddendo singula singulis*, and more than a few others—are a morass of Latin into which many law students and even judges have sunk. Its practitioners are unprincipled. Its doctrines are muddied. Its victims are many. In short, the system is broken—unless, of course, it is not.

In *The Language of Statutes: Laws and Their Interpretation*, Lawrence M. Solan[1] slices through the rhetoric, the fighting, and the law-review-article histrionics in an attempt to show that the system actually works pretty well. Solan admits that there are hard cases (p. 4). He even outlines how and when those hard cases are likely to arise, drawing on his expertise in cognition and linguistics (p. 4). But he argues that those hard cases are the exceptions (p. 4); to him, the easy cases are the rule (pp. 4–5).

Part of the problem, Solan writes, is that hardly anyone ever talks about those easy cases. Instead, commentators focus only on the difficult interpretive choices that reach the Supreme Court. Solan claims that this vantage point obscures the reality of the situation, which is that there is usually no dispute as to how a law will apply. Those are the easy cases. When the text of a statute reads "No vehicles allowed in the park" and the defendant has driven his pickup truck onto the Great Lawn, the rule clearly and neatly applies. The parties recognize that the statute applies. The case settles or the defendant pleads, and everyone goes home. No one writes law review articles about these cases.

Partly because the vast majority of cases are such car-in-the-park cases, Solan concludes that statutory interpretation actually works fairly well. The system, he claims, is not "a mess, full of arbitrary decisions," as many think (p. 4). We should not be "terribly worried" either that judges sometimes

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1. Don Forchelli Professor of Law, Brooklyn Law School.

have to make decisions or that judges have too little power to make such decisions when necessary (p. 4). The proper application of a statute to a particular set of facts is clear "most of the time," and people understand their obligations under the law "well enough" (p. 4). A header in Chapter One sums up his point succinctly: "Laws Work . . . Most of the Time."[2]

This Notice challenges Solan's claim that statutory interpretation is as problem-free as he suggests. Part I provides an overview of the book, noting Solan's considerable contributions toward understanding how and when problems of interpretation arise. It also addresses Solan's efforts to solve some of the mysteries of the subject, a task he approaches with an even-handedness that stands in sharp contrast to some of the alarmist diatribes published by other scholars. Part II argues that the current system of statutory interpretation still needs some serious reforms—namely, the adoption of a single set of interpretative guidelines for all judges to use—and suggests that while Solan convincingly demonstrates that things are not as dire as they seem, his tolerance for the status quo may be too high.

I. GOOD ENOUGH

Even the simplest directive can be difficult to draft, follow, and interpret. As an example, Solan offers the rule that makes it illegal to move between train cars on the New York City subway (p. 6). It has long been illegal to move between cars when a train is in motion, but it has been illegal only since 2005 to do so even when the train is stopped at a station (p. 6). The text of the rule is displayed on the rules section of the Metropolitan Transit Authority ("Transit Authority")'s website as follows: "It is a violation to . . . [m]ove between end doors of a subway car whether or not train is in motion, except in an emergency or when directed by police officer or conductor" (p. 6). As part of an effort to educate the public about the new rule, the Transit Authority printed the same text verbatim on signs in some of its train cars (p. 6). Clear enough. But even after the enactment of the new rule, the Transit Authority left up old signs in some of its cars that depicted a figure positioned between two cars with a red stripe across it, showing that this behavior was not allowed (p. 6). Accompanying the illustration were the words "Riding Between Cars Prohibited" (p. 6). In addition, another part of the Transit Authority's website, a page called "Subway Safety," said only this: "When you're inside a moving train, never ride between cars or lean against doors" (p. 7).

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2. P. 5. Solan's book is not just an argument for his position; it also serves as a primer on the modern complexities of statutory interpretation. It is an excellent general overview of the subject, exploring such intricacies as the debate over which institutions should interpret statutes, p. 160, the role of jurors in the process, p. 196, and the values besides legislative primacy that go into the calculus, p. 120. Some of the book's most illuminating insights involve how cognition and linguistics contribute to legal thought. By necessity, though, this Notice focuses on Solan's central argument: that statutory interpretation is not that problematic.

Let's say, then, that a passenger walks between cars in order to escape an unruly fellow passenger (p. 7). Our passenger does not know that the rule prohibits him from moving between cars at any time; it is his first time in New York, and the sign communicating the rule in his particular car is one of the old signs that reads "Riding Between Cars Prohibited" (p. 7). Solan breaks down the two sides of the resulting dispute (pp. 7–8). From one perspective, the law is clear; ignorance of the law is no excuse (p. 7). From another perspective, the old sign and the Transit Authority's website may give the passenger the misimpression that he is completely within his rights to move between cars at a station stop and that only *riding* between cars while the train is in motion is prohibited (p. 7). If the police officer refuses to let the passenger off with a warning and the passenger decides to fight the case, what should a judge do (p. 6)? Through this example, Solan persuasively argues that communicating even such seemingly simple rules can be less than simple.[3]

Solan's larger theme is that difficulty in statutory interpretation arises not because of poor drafting by legislatures or bad decisions by judges (though those are sometimes to blame) but because of something more fundamentally faulty about the way we think[4]:

> The basic argument of the book is that laws generally work well; when they fail to provide us with sufficient information to know our rights and obligations, it is usually (but by no means always) because of uncertainties in how well the concepts contained in a statute's words match the events that are in dispute. *That is, most problems of statutory interpretation, including most of the famous cases, are about problems of conceptualization.* (p.13; emphasis added)

The world is complicated. Statutes cannot be simultaneously flexible enough to absorb new situations and precise enough that their application is clear in all situations. Judges necessarily have to fill in the blanks in some cases. For example, in the 1892 Supreme Court case *Church of the Holy Trinity v. United States*,[5] a statute prohibited the importation of people to perform "labor" in the United States. The church nevertheless paid to import a minister from England to New York (p. 11). The legislature probably did not intend to ban the importation of that kind of "labor;" its focus was likely

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3. In Chapter Four, Solan cites a Supreme Court case that parallels the subway scenario: *United States v. Locke*, 471 U.S. 84 (2000). In *Locke*, a miner had to renew his claim to his land. *Id.* at 89. The miner asked an agent of the government when the deadline for the renewal was, and the agent misled him into thinking it was later than it actually was. *Id.* at 89–90. Because of his resulting failure to timely renew his claim, he stood to lose his mine, at least for a while. The Court held that despite the agent's misstatement, the original deadline held (but it wriggled away from the injustice and found another way to let the miner reclaim his mine). *Id.* at 91. The result in *Locke* suggests that a court might come down similarly in the subway case.

4. *See* pp. 9–10.

5. 143 U.S. 457, 458 (1892).

rather on the importation of manual labor.[6] Judges in cases like that one (and like the subway example) must decide whether to (1) enforce the dictionary meaning of the word "labor;" (2) enforce its ordinary meaning; or (3) enforce the statute in accordance with another set of values, like legislative intent, coherence in the statutory scheme, or others.[7]

In the easy cases, the law works smoothly. The easy cases are generally those whose facts form a crisp fit with the statute, such as when a longtime subway rider passes between cars while the subway is in motion and knows full well that his action is against the rules (pp. 5–6). In other words, easy cases present the types of recurrent problems that the legislators had in mind when they drafted the legislation (p. 223). Scholars concentrate instead on the more difficult cases, in which the fit is not so square. When the situation at hand gets further from the typical cases, the words become less clear because they are written specifically to address those typical cases. When such harder disputes arise, though, the courts resolve them. And when they recur, there is judicial precedent, and in that way statutory interpretation stabilizes as time continues (p. 223).

Solan illustrates the types of situations in which disputes arise by studying the federal bribery statute.[8] Under that statute, disputes arise most often over the meanings of key words, even though the statute includes its own glossary (pp. 22–23). However, different words mean different things to different people at different times. For example, under a strictly literal interpretation, the terms of the statute would apply to a government agent who pays an informant to gather information and testify about that information (p. 25). The law is written in all-or-nothing definitional terms, but humans generally think in a graded way (p. 37).

Solan also draws conclusions from the disputes that do *not* arise under the statute (pp. 30–37). The statute is long, complex, and syntactically complicated. Nonetheless, most of the time it works pretty well:

> Were we to look at all two hundred words of the bribery statute, uncover all the syntactic ambiguities, the potential garden paths that we could take with all the various conjunctive and disjunctive phrases, and everything else that *could* go wrong, we would have to conclude that very little *does* go wrong. (p. 33)

When things do go wrong, the disputes generate a disproportionately large amount of controversy in courts and in the legal academy. The sides of that debate are often broken down into two camps: textualists on one side and those who want courts to consider a larger base of information on the other. That is, at least, the common fundamental dichotomy.

Solan, in keeping with his generally nonalarmist perspective, finds common ground where others see only division. He argues that the two

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6. *Church of the Holy Trinity*, 143 U.S. at 463 ("No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain.").

7. *See* pp. 54–55.

8. Pp. 21–22; 18 U.S.C. § 201 (2006).

sides agree on "almost everything" (p. 51). Both agree that legislative primacy is the most important value in interpreting statutes; they simply disagree over how courts should go about pursuing that value. The two sides also share a "loose agreement" on what values besides deference to the legislature should aid courts in their interpretation of a statute, though they do not agree on what weight to grant each of these values (p. 224).

No matter their political inclinations, Supreme Court justices begin with the language of the statute. When the text is sufficiently clear and no other information points the Court in another direction, the Court applies the statute's language without controversy.

Furthermore, Solan quarrels with the mischaracterizations both sides cast on their opponents. He claims that textualists exaggerate the other side's willingness to abandon fair readings of the text in search of intent. Likewise, textualists do not always, as their enemies suggest, ignore context in a mechanical way (p. 51). Rather, they are against the use of particular types of context. Namely, they are against the use of legislative history as evidence of legislative intent.[9] Textualists merely want to, as Solan puts it, "reach results in disputed cases that are sensitive to a statute's purpose, and thus respectful of the primacy of the legislature, without resorting to extratextual materials that create both evidentiary and conceptual difficulties" (p. 52). Ultimately, Solan comes down on the side of those who advocate for the use of legislative history as one of a number of competing values, but his chief argument is that it does not matter much either way.

Near the end of the book, Solan considers some improvements to the interpretative system (pp. 224–30). He offers suggestions to each of the three branches of government, all of which play a role in statutory interpretation. For example, he asks that legislators give judges more information about their purposes in enacting particular laws (p. 227). He also suggests that courts err on the side of comprehensibility in giving instructions to jurors, even when doing so means sacrificing fidelity to the statutory text (and, by extension, to the legislature) by not using the legislature's exact language (pp. 225–26).

Nonetheless, Solan establishes that it is not his intent to be too critical of the current system.[10] He does not intend "radical change" (p. 226). If judges read his book, he wants mostly to "bring some level of insight and comfort to them about the difficulty of their task" (p. 226). And despite his suggestions for improvement, Solan stays true to his central thesis: that courts and

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9. Solan explains the difference between the two camps of analysis in this way:

> Ultimately, the choice is between insisting upon a standard set of methodologies, sensible enough most of the time but sure to result in errors, even on its own terms, and living with a more relaxed set of evidentiary standards, less able to constrain judicial discretion but better able to head off results that are likely at odds with what an enacting legislature intended its law to accomplish. (p. 80)

10. "The book concludes with chapter 8, where I summarize some of the major points and ask what might make the system better. . . . The tone of this chapter, however, is more positive than it is didactic." P. 15.

the other institutions involved in the interpretative process are doing an "adequate job" of interpreting statutes (p. 230). As a result of the disconnect between how lawmaking works and how our cognitive processes function, he admits, there will always be some hard cases. But there is not a lot anyone can do about it. Not me, not you, not anyone. Please, Solan seems to be saying, just don't overreact.

II. NOT GOOD ENOUGH

Solan's book is a powerful calming agent to those with a tendency to overreact. However, there is significant room between his view of the severity of the problem and the views of the more inflammatory critics of the current system. The truth is probably somewhere in between. This Notice argues that Solan understates the problems with the current system, which are considerable.

There are several objections to Solan's theory that a system that is pretty good is good enough. First, the results of the hard cases are important in and of themselves. Second, under the current system, the outcomes in some cases are unacceptably unpredictable, a defect that costs money and wastes time. Third, and most troubling of all, the current system gives judges the cover to decide close statutory interpretation cases based on their own political or personal values.

As for the first reason, it is true, as Solan writes, that there are not many hard cases (p. 4). There are at least not as many as there may seem to be and certainly not as many relative to the number of easy cases. However, it does not necessarily follow from that fact that the current system is working fine. Any system of statutory interpretation should be tested by its effectiveness in handling the very hardest cases. The easy cases handle themselves through settlement or other forms of resolution. The hard cases require something more from the judicial system.[11] The parties in those cases deserve the right result, just as the parties in the easy cases deserve the right result. Even in the prototypical example, *Church of the Holy Trinity*,[12] which is so often cited in commentaries on this subject that its use takes on a more cartoonishly academic feel with each successive citation, real people were affected by the outcome.[13] The minister's ability to immigrate hung in the balance, another minister might have had to be hired in his place, the congregation might not have been able to enjoy its ideal choice of minister, and so on. Solan does not deny this reality found in every case but neither does he give it enough weight in his analysis. Getting ninety-nine easy cases right

11. Of course, courts are by no means the only institutions that interpret statutes. Prosecutors, administrative agencies, and even ordinary citizens who wish to comply with the law commonly engage in some form of statutory interpretation. However, by necessity, this Notice constrains its argument to courts, which have the last say on a particular statute's interpretation and, in that way, influence how the other institutions go about their own interpretative processes.

12. 143 U.S. 457 (1892).

13. *See* pp. 54–55.

does not necessarily make up for the hundredth case, the hard case that the court gets wrong (or struggles to decide without incurring incredible cost).

The second reason also relates to efficiency concerns. The current system suffers from too much uncertainty. A system in which parties had greater certainty about how their cases would turn out would lower costs and decrease the number of cases that reach the court system to begin with. For example, if both sides in the New York City subway example knew that judges at all levels of appeal would strictly apply the text of the rule without considering whether it would be equitable to do so in light of the misleading information given by the Transit Authority, the parties would be less likely to gamble by going to trial.[14] The defendant would be more likely to strike some sort of deal. Similarly, if the parties knew that the judges were sure to take the misleading statements as an excuse or even just as a factor in their analysis, the case could probably be resolved quickly. Most likely, the prosecutor would not charge the passenger in the first place, or the defendant would plead to the charges.

Under the current system, it is not only unclear how the case will come out under each of the various approaches to statutory interpretation—textualism, dynamic textualism, and the like—but different judges will also apply different approaches. Implementing a single system of interpretation among all judges would increase, at least by some margin, the stability and predictability of the outcome of cases. Parties would know whether, for example, a legislative committee report would be dispositive of their case, and would proceed accordingly. Some hard cases would become easy cases. But under the current system, some judges persist in using legislative history as evidence of legislative intent while others steadfastly ignore it. Some prefer certain canons of construction while others afford them less weight than other canons, or more weight, or no weight at all. And so on.

Of course, courts and legal commentators have been groping for a cohesive, generally accepted theory of statutory interpretation for hundreds of years.[15] None has emerged. Some commentators have argued that there are many legitimate theories of statutory interpretation and that different ones should be applied in different situations.[16] Even if we did manage to agree upon such a system, it is not clear that judges would or even could implement it.[17]

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14. *See* pp. 5–12.

15. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *59 (positing different methods of statutory interpretation in eighteenth-century England); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006) (arguing for a version of legal formalism in the interpretation of statutes).

16. *E.g.*, Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. U. L. REV. 1559, 1578 (2010) ("There are too many different kinds of statutes used for too many different kinds of reasons for us to expect there to be a workable singular theory of statutory interpretation.").

17. *See* VERMEULE, *supra* note 15, at 36 ("[I]ntellects of the highest caliber have explored interpretive strategies without attending to the fact that such strategies will inevitably be used by fallible institutions.").

Moreover, no system would be perfectly predictable, and this Notice does not purport to suggest that there is a solution that would offer substantial improvement. Even if every judge decided that he would use, say, the rule of lenity *and* would give it more weight than several other canons of construction, it would be impossible to quantify—and thus impossible to standardize exactly—how much weight each judge would give it. It would be equally difficult to standardize how certain canons cut in certain cases, or, if judges decided to use legislative history as evidence of legislative intent, to decide which statements of which members of the legislature deserve credence. However, the difficulty posed in finding an alternative does not mean that the status quo is acceptable.

The third problem with the current regime casts the biggest shadow on Solan's thesis. At least in the very hardest cases, political and personal preferences seep into judicial decisions. Under the present system, judges can hide their preferences for certain outcomes behind arguments that appear to be based on the statute, and then simply claim allegiance to whatever principle of statutory interpretation that they choose (but that they might not choose if it cut the other way).[18] The potential opportunities for such manipulation are perhaps rare. But they do occur, and judges do take advantage of them.

Solan is not at all blind to this. He writes that "only a naïve apologist could ignore the fact that judges' personal values contribute to their decisions" (pp. 4–5). He cites several recent cases in which the Supreme Court's split—the five conservative justices voting one way and the four liberal justices voting the other way—could not be explained without reference to the justices' political leanings. In *Circuit City Stores, Inc. v. Adams*,[19] the Court was faced with an ambiguous labor statute. The conservative justices adopted an interpretation that benefited the employer; the liberal justices adopted one that benefitted the employee. Similarly, in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*,[20] the justices split in a similar way, with the conservative justices voting for an interpretation that favored the tobacco industry and the liberal justices voting for an interpretation that would have given the Food and Drug Administration more power to regulate the tobacco industry.

In such cases, the dispute is ostensibly over the meaning of a statute. Somehow, though, the Court predictably splits in resolving that matter. Karl Llewellyn demonstrated more than fifty years ago that each canon of construction has a countercanon that judges can use to reach their desired

18. This Notice does not take a position on the use of legislative history as a tool of statutory interpretation, but it is worth noting that legislative history introduces another variable element that can be manipulated by judges who seek to advance their personal or political interests.

19. 532 U.S. 105 (2001).

20. 529 U.S. 120 (2000).

result.[21] The current scattered system offers judges multiple mechanisms by which to reach the result they want.

Solan considers all of this, and he even offers some suggestions to help solve this particular problem. For example, he suggests that courts should be more upfront when they exercise their discretion in close cases (p. 225). He uses *Circuit City Stores* as an example, arguing that the conservative majority should have acknowledged that it exercised said discretion in favor of the employers, and the liberal justices should have done the same with regard to the employees. Doing so, Solan argues, would have added legitimacy to the process.

But that suggestion is among those that Solan states are "not designed to lead to radical change" (p. 226). This is how he summarizes the issue:

> When the resolution of a hard case engages political values, arguments adduced by particular judges tend to lead to a result consistent with their political orientation. This fact may create the impression that statutory interpretation is both indeterminate and political. With respect to these cases, especially when they reach the Supreme Court, that impression is accurate. But with respect to the wide range of cases in which a statute may apply, the impression can be significantly overstated. (p. 224)

That may be letting judges off too lightly. Perhaps even one hard case decided by a judge's political motivation is one too many. Perhaps each such case is an inexcusable scandal that deserves all the pages in all the law reviews in the world. Solan's point that judges do a better job at a harder task than many give them credit for is a valuable insight, but his argument goes too far in the other direction. He has set the bar too low.

CONCLUSION

In keeping with the theme of over- and understating, it is possible to understate this book's illuminating insights and to overstate the critiques of its main thesis. Solan approaches the thicket of statutory interpretation with a clearheadedness that evades some of his peers. His standards may be too low, but his central thesis—not to mention his many related revelations—is a valuable counterweight to the reactionary statements he confronts: the interpretation of statutes is hard, there are good reasons why it is hard, and we should generally be content with the efforts of the institutions that interpret statutes, including courts. Still, those who paint a dimmer picture of the situation have legitimate complaints about how well the current system works. These scholars are correct that the state of statutory interpretation could very well be better, but Solan offers a cogent reminder that it could also very well be worse.

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21. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).