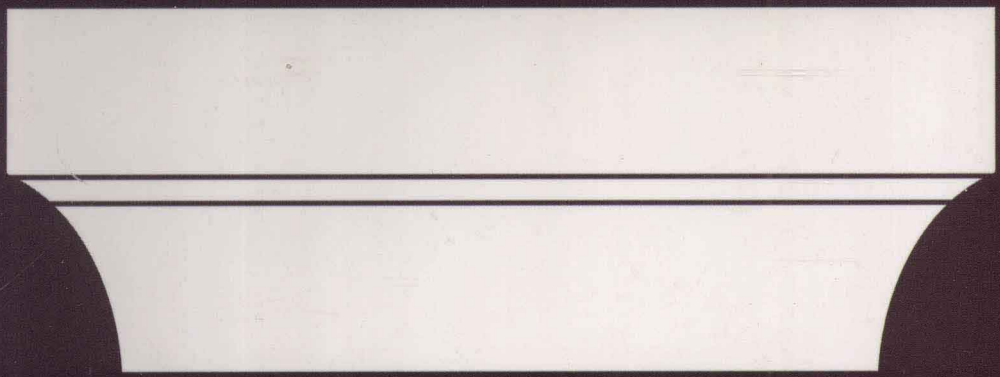

THE LANGUAGE OF STATUTES

LAWS AND THEIR INTERPRETATION

LAWRENCE M. SOLAN

The Language of Statutes

Laws and Their Interpretation

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LAWRENCE M. SOLAN

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Contents

CHAPTER ONE

Laws and Judges

This book is about the relationship between lawmakers and judges. More specifically, it is about how judges judge disputes about laws. In cases involving the common law, judges determine how well the facts of a dispute fit into the earlier body of decisions and attempt to reach the best outcome in the new case, which then becomes part of the tradition for the next judge to consider. Depending on which court in the judicial hierarchy makes the decision, the decision not only is advisory but also has official legal status as binding precedent under the doctrine of *stare decisis*.

But now, much of the law is made not by judges but by legislatures. Laws governing crime and punishment, trademarks, patents, copyright, securities, corporations, taxation, environmental regulation, antitrust, the sale of goods, and insurance are all enacted through legislation. When a legislature passes a law in a particular domain, common-law judges must give the statute priority over their own values and defer to the legislative judgment. At times, the legislature delegates to agencies the authority to write rules to implement the statute. These too have the force of law. For the most part, courts are also obliged to subordinate their own judgment to those of the rule makers.

Common-law judges are also charged with interpreting statutes, which they have done for centuries.[1] Some believe that judges, so accustomed to having the last word in common-law cases, have not been willing to adjust

to the role of taking a back seat to the legislature. Instead, judges attempt to legislate beyond their authority by imposing their own glosses and values on statutes that should simply be applied as the legislature wrote them. The most prominent such critic is Supreme Court Justice Antonin Scalia. In his book *A Matter of Interpretation,* he remarks: "But though I have no quarrel with the common law and its process, I do question whether the attitude of the common-law judge—the mind-set that asks, 'What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?'—is appropriate for most of the work that I do, and much of the work that state judges do. We live in an age of legislation, and most new law is statutory law."[2]

Justice Scalia is by no means alone in his concern. For example, Adrian Vermeule suggests that judges should eschew virtually all interpretive principles. They should instead, he claims, apply laws by their plain language when possible and defer to administrative agencies (including prosecutors) when there is some uncertainty about a statute's meaning.[3] Because judges bent on finding the intent of the legislature have no reliable methodologies that will ensure that they have accomplished their goal successfully, the argument goes, the system would be better off if judges applied rules mechanically and let the experts take over when decisions must be made.[4]

Others, in sharp contrast, believe that the common-law tradition provides a special opportunity for judges to continue to do justice, even though so much of the law is statutory. Guido Calabresi takes this position in his book *A Common Law for the Age of Statutes*, whose title states his thesis. Calabresi asks: "What, then, is the common law function to be exercised by courts today? *It is no more and no less than the critical task of deciding when a retentionist or revisionist bias is appropriately applied to an existing common law or statutory rule.* It is the judgmental function . . . of deciding when a rule has become sufficiently out of phase with the whole legal framework so that, whatever its age, it can only stand if a current majoritarian or legislative body reaffirms it."[5] This position argues that because legislatures move slowly—or not at all—it is only by some reasonable sharing of power between the two branches of government that any reasonable legal system can sustain itself without irreparably compromising the goal of doing justice. William Eskridge, in his important book *Dynamic Statutory Interpretation*, also focuses on the need for courts to recognize doctrinal development notwithstanding laws enacted pursu-

ant to a constitutionally mandated process, which, at least in principle, is intended to give the laws primacy over the value systems of individual judges.[6]

Whether one believes that judges should wield more power or less power in the age of statutes, there can be no doubt that judges actually do continue to sound like common-law judges even when they are interpreting laws. Although they purport to defer to legislative judgment, they indeed make their own judgments about which pieces of the legislative history and other social facts surrounding the enactment of a law tell us what the legislature *really* had in mind; they adhere to the common-law principles of precedent, so that an earlier interpretation of a statute—even a demonstrably bad interpretation—continues to have binding effect on future cases; they create all kinds of "canons of construction," ranging from assumptions about the resolution of grammatical ambiguity to the rule of lenity, which calls for ambiguities in criminal statutes to be resolved in favor of the defendant; and they impose on legislators "plain statement rules," through which they warn lawmakers to draft disfavored provisions in an especially "clear" manner if they expect courts to enforce them. Even when the legislature reacts to a court decision by changing the law to override the judges, courts often continue to refer to their own precedents, construing the new law narrowly, as if the legislature were an inconvenience whose effect on the decision making of judges should be minimized to the extent possible.[7]

When the language of the law leaves uncertainty, and it predictably does leave uncertainty, then discretion is unavoidable, whether we like it or not. For those concerned with there being a crisp rule of law conveyed in language that we can understand and comply with, this is unfortunate, since these interpretive gaps permit argument on both sides of an issue that is consistent with some legitimate understanding of the language, on the one hand, and with at least some set of values sufficient to justify the interpretation, on the other. No wonder the personal values of the individual judge seep in to the statutory analysis.

Judges exercise even more judicial power when the language of a law appears sufficiently at odds with a reasonable application in a particular situation that it seems only fair to construe the law as not applying. As Judge Richard Posner observes, no one would arrest a prosecutor for possession of child pornography when her only reason for having it is to use it as evidence against a pornographer.[8] Judges and scholars disagree about how

far such judicial power may be taken. Some would limit it to the erasure of absurd results, while others would go a little further in an effort to enforce the statute's intent even when the literal application is not so bad as to be absurd. Ostensible errors in the language used by the legislature opens the door to judicial interpretation.

Despite all this judicial activity in the realm of statutory law, as the argument of this book unfolds I hope to show that laws work fairly well. Most of the time most people understand their obligations well enough, and most of the time the law's application is clear. Hard cases arise because of a gap between our ability to write crisp yet appropriately flexible laws and the design of our cognitive and linguistic faculties. That gap is small enough to permit some to fall prey to the illusion that it is even smaller than it actually is. But it does exist, and as we will see, beginning in chapter 2, most of the time it manifests itself in linguistically predictable circumstances.

Yet it would be a mistake to make too much of this gap. If one focuses only on the highly contested cases decided by the U.S. Supreme Court, one might sensibly infer that legal interpretation is a mess, full of arbitrary decisions. But if one focuses on all the times that a law applies without even generating a dispute, and on the times that it is clear enough to resolve a dispute without much difficulty, then the hard cases become just that: difficult situations embedded in a system of order that appears to be working fairly well. I argue in this book that this is what happens, and thus I am neither terribly worried about the fact that judges must actually make decisions some of the time or about their seemingly having too little power to do so. As long as judges constrain themselves by staying within the range of reasonable interpretations that the language of the statute affords or, in unusual situations, by articulating a good reason for not doing so (such as a legislative error or an obviously anomalous result), legislators really will be given primacy over judges in forming and applying statutory law.

And judges typically do so. Judges of all political stripes repeatedly articulate legislative primacy as an overarching value in the decision-making process. They often disagree about what evidence of the legislative will is legitimate and useful, and they weigh differently other values, such as fair notice, coherence, adherence to constitutional norms, and stability. All this disagreement, however, comes within a fairly narrow range of discourse in which it is a relatively straightforward matter to identify the many simple cases and to apply laws without controversy. As for the hard cases, only a naïve apologist could ignore the fact that judges' per-

sonal values contribute to their decisions. It can be no accident that the five conservative Supreme Court justices, in recent cases, construed an ambiguous labor statute in favor of the employer[9] and a regulatory statute in favor of the tobacco industry and against regulation,[10] whereas the four more liberal justices did just the opposite. In both of these cases, the dueling justices evoked the intent of the legislature to justify their opposing positions.

Judges are acutely aware of the ramifications of their decisions[11] and cannot help but steer the legal system in a direction they believe to be the best course when more than one outcome is licensed by a statute whose application is not sufficiently clear in a particular case. How much one is troubled by this observation should depend upon the extent to which judges are constrained and the relative frequency of straightforward cases to ones in which political judgment is permitted to masquerade as close legal analysis. I maintain that because language works quite well as a vehicle for conveying rules, and because judges indeed take seriously the concept of legislative primacy as a value, the residue of unrestrained political judgment is well within tolerable limits. Because my argument depends upon the salience of legislative primacy as a value, much of this book is devoted to developing that concept and defending its legitimacy. For now, though, let us turn to some easy cases.

Laws Work . . . Most of the Time

In our everyday lives, we can generally tell in advance what we are required to do, what we are permitted to do, and what benefits we have from the obligations of others. Consider the person who commutes to work from New Jersey to New York by train. A host of laws regulate his commute. Passengers are not permitted to get on or off a moving train,[12] they must pay the fare,[13] and they are not allowed to walk on the tracks.[14] Passengers must also obey the criminal law and refrain from violence toward the train crew, and they must heed the signs that say it is prohibited to pull the emergency stop cord without a good reason. We barely notice such rules. They conform to our own norms of conduct, so for the most part we would act in accordance with them even if they were not articulated.

This may not be so for everyone, however. Some people might be thrill-seekers who would get pleasure out of walking on the railroad tracks with a train close by. Others might be antisocial enough to enjoy pulling the

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emergency stop cord for no legitimate reason. The rules are written to proscribe conduct that violates ordinary social norms but in which some people would engage if they were not told that they cannot do so. Compliance with these norms would be expected even if there were no laws making it illegal to violate them. Their clear articulation serves to legitimize legal sanctions against violators.

Laws do not always work that well, however. Let us say that the commute also includes a ride on the New York City subway. It has long been illegal to ride between cars on the subway. Since 2005, it has also been illegal to move between cars, even when the train is stopped. The Transit Authority Web page has the following listed under its Rules of Conduct: "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."[15] Arrests for riding or moving between cars jumped from about 700 in 2005 to 3,600 the next year, and to more than 17,000 in 2007, reflecting a crackdown and the fact that most riders did not know about the new rule and were caught off guard when they behaved as they always had.[16]

Riders made aware of the new rule complained. There is a long tradition in New York of moving between cars to evade loud passengers, unwanted entertainment, broken air conditioners, and foul odors. New Yorkers are also often in a hurry and move between cars so they are closer to the appropriate exit in their destination station.

Yet the rule has a purpose: to impede those who wish to engage in crimes on the subway system. A newspaper article quotes a Transit Bureau police chief: "We've tried to really hammer down on moving between cars. A lot of bad guys move between cars, really, prowling for victims."[17] The rule also addresses safety concerns. Deaths and injuries have occurred by virtue of passengers riding between cars, sometimes resulting in lawsuits against the Transit Authority.

Small signs are posted on the end doors of subway cars. The signs have a cartoon-like picture of a person riding between cars with a diagonal red stripe through him to indicate that his conduct is prohibited. Until the new rule was put in place, they bore the words, "Riding Between Cars Prohibited."[18]

Subsequently, the Transit Authority replaced these signs with ones that state the rule verbatim, but even several years after the rule was changed, some of the cars continued to have the sign pictured on the next page Moreover, the Web page entitled Subway Safety has only the following

FIGURE 1.1. Photo by Shannon Stapleton/The New York Times/Redux. Reproduced with permission.

warning: "When you're inside a moving train, never ride between cars or lean against doors. When you are standing, always hold on."[19] It does not mention the new rule.

How should the law apply to a passenger who, without knowledge of the rule, walks from one car to another to avoid heat, noise, or smells while the train is stopped at a station? On the one hand, the rule is clear, and the passenger has violated the rule. It generally should not matter that he does not know the rule, since ignorance of the law is no excuse for disobedience unless the legislature has made such knowledge a prerequisite for conviction.[20] On the other hand, the sign might give a misimpression as to what is really prohibited, and the Transit Authority's Web page contains conflicting information, depending on whether one reads the safety tips or the rules themselves.

The best result would be, I believe, for the police to explain the law and to let the passenger go. He meant no harm and will not move between cars again. Thus, the police themselves act as the first line of statutory interpreters. If they conclude that the purpose of the law is not being served by an arrest, they can simply not make the arrest and avoid the need for a decision about the legality of their actions. When police, prosecutors, or, for that matter, plaintiffs' lawyers refrain from bringing legal cases that raise

difficult questions about the proper application of a law, they permit the system to treat laws that are unclear at the margins as though they were clear. We will see in chapter 6 that, for example, federal prosecutors bring very few criminal copyright cases, and the ones they bring are for clear, egregious violations of the Copyright Act. The result is that whatever uncertainty in meaning the copyright laws contain becomes irrelevant in the criminal context, since prosecutors do not raise such issues. They would rather devote the resources needed to try to expand judicial interpretation of the copyright laws elsewhere.

Let us say, however, that the passenger is arrested and charged with moving between cars. He decides to fight the case because he regards himself as a law-abiding citizen and he is angry about the entire incident.[21] The problem is that the government has enacted a law but has communicated its substance to the public in a way that misleads them into thinking that the law is narrower than it really was written to be. As one group of scholars has put it, the information that legislators wish to convey in a statute must be compressed into a signal and later expanded by the recipient into an understanding of that information. In this case, the signal containing the compressed information could not be expanded by the recipient to reveal the information that the legislators wished to convey.[22]

This sometimes happens in actual cases. For example, the Internal Revenue Service assists taxpayers in meeting their obligations, but having received misinformation from an IRS agent is no excuse for not paying one's taxes, both in full and on time.[23] Similarly, in chapter 5 I discuss *United States v. Locke,* a case in which the government had misled a miner about the deadline for renewing his claim to federal land.[24] The Supreme Court held that a deadline is a deadline no matter who said what but still found a clever way to do justice and get Mr. Locke back his mine.

In a more recent case, the Court was far less generous with a convicted felon attempting to appeal a trial court's denial of his petition for *habeas corpus* relief. In *Bowles v. Russell,* decided in 2007, a prisoner convicted of murder had applied to the federal courts for *habeas corpus* relief, claiming that his constitutional rights had been violated at his trial, which had occurred in the state courts of Ohio.[25] His application was denied, and he failed to appeal. Sometime later, he applied to reopen the period under which he could appeal the denial of his application under a statute that permits the courts, under certain circumstances, to reopen the time to appeal for a period of fourteen days.[26] A judge granted his application but, for some unknown reason, gave him seventeen days to do so. Bowles

did appeal within that seventeen-day period, ordered by the judge, but he did not do so until the sixteenth day, outside the fourteen-day statutory period. The question facing the Supreme Court was whether the judge's order—seemingly made in error—could trump the statute, whose deadline was clear and absolute.

The case resulted in a five-to-four decision against Bowles. Writing for the majority, Justice Clarence Thomas held that the statute granting judges the right to extend the period to appeal by fourteen days is jurisdictional in nature. That means that the judge who made the error cannot confer jurisdiction upon the appellate court to hear the appeal of the denial of the *habeas corpus* application, regardless of whether this creates an unfair result to this particular individual. In dissent, Justice David Souter made the following remark: "The District Court told petitioner Keith Bowles that his notice of appeal was due on February 27, 2004. He filed a notice of appeal on February 26, only to be told that he was too late because his deadline had actually been February 24. It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch. I respectfully dissent."[27] Obviously, not everyone agrees that such rulings are "intolerable" for a judicial system, including five of the justices. Yet Justice Souter asks the right question. Given a law that appears to be quite specific, are there values that might override fidelity to the language of a statute when the law's substance was miscommunicated?

Our subway story, while in some sense a novelty, illustrates the same core problem in the interpretation of statutes raised in *Locke* and *Bowles:* the legislature intends to convey a message imposing an obligation on members of society, but somehow that message does not come through. What is unusual about these stories is that one branch of government enacted a clear statute, but another later muddied the waters by issuing a conflicting statement. In the ordinary case, the statute itself fails to communicate adequately just what is expected. Most often this happens because the statute uses words that were chosen with a particular set of scenarios in mind, and a disputed event comes within the scope of a word's meaning but does not fit the scenarios that led to the statute's enactment; or something happens that fits the scenario but does not come within the scope of the word's meaning; or it comes within the word's meaning in one sense but not another.

These problems most often result not from sloppy drafting or bad judging but from a partial cognitive mismatch between our ability to regulate

ourselves with precision through detailed laws whose language we take seriously and the architecture of our linguistic and conceptual faculties. We flexibly absorb new situations into categories that we have already formed. In the realm of law, however, those new situations might not have been intended to come within the law. By the same token, a new event might seem not to fit a legal category when, from a perspective of justice, it should.

These observations are by no means new. Aristotle observed the problem in the *Nicomachean Ethics:*

> [E]very law is laid down in general terms, while there are matters about which it is impossible to speak correctly in general terms. Where it is necessary to speak in general terms but impossible to do so correctly, the legislator lays down that which holds good for the majority of cases, being quite aware that it does not hold good for all. The law, indeed, is none the less correctly laid down because of this defect; for the defect lies not in the law, nor in the lawgiver, but in the nature of the subject matter, being necessarily involved in the very conditions of human action.[28]

Aristotle recognized that because of this "defect" in "the nature of the subject matter" decision makers might have to make adjustments in applying the law to avoid anomalous results, a recognition that seemed obvious enough to him. He explained: "When, therefore, the law lays down a general rule, but a particular case occurs which is an exception to this rule, it is right, where the legislator fails and is in error through speaking without qualification, to make good this deficiency, just as the lawgiver himself would do if he were present, and as he would have provided in the law itself if the case had occurred to him."[29] Judges cannot help but contribute to the meaning of legislation. Aristotle had no problem with the concept, which is a matter of considerable discomfort to contemporary thinkers concerned about judges usurping the legislative role.

Also controversial, this time among psychologists and philosophers, is the extent to which the problems lie in the nature of the thing, as Aristotle saw it, or in the nature of the mind. Both must be in play.[30] We do not say that a window is a type of ball at least in part because windows are not balls. Thus, the nature of things plays a role in how we conceptualize the world. But when we have trouble deciding whether having a gun in the trunk of the car should count as "carrying" the gun to the site of a drug crime, at least part of the decision appears to lie, not in some independent

essence of *carrying* that can be discovered through, say, scientific research, but rather in some aspects of how we fit situations into the categories that we have formed.[31] That psychology, and the role it plays in statutory interpretation, are the subject of much of chapters 3 and 4.

Given that the core problem in the interpretation of laws has been recognized since antiquity, it is no wonder that the scholarly literature and law school casebooks are full of discussion of old cases. In the realm of statutory interpretation, the classic one is *Church of the Holy Trinity v. United States,* an 1892 case that continues to receive significant attention in the literature and that is discussed in chapter 3 of this book.[32] The question was whether the church had violated a law prohibiting the importation of people performing a service or labor of any kind when it paid to bring a minister to New York from England. The case raises the same problem as whether the defendant in the previous paragraph was carrying a firearm and, for that matter, the same problem that Aristotle observed.

When such things happen, judges must decide whether to enforce the law's plain meaning (when the language is unequivocal) or its ordinary meaning (when there is more than one interpretation, but one of them seems more typical than the others) or to enforce it according to some other set of values, such as the purpose of the statute, evidence of what the enacting legislature had in mind, coherence with other laws, consistency with earlier decisions of other courts, the need for evolution so that the law remains responsive, and so on.

I develop those arguments and the debates over which should be given priority in chapters 3 through 5. In thinking about them, it is important to keep in mind the examples contained in the beginning of the subway story. These are the rules that we understand without controversy, such as not pulling the emergency cord unless there is an emergency. The clear rules, too, can generate hard cases when, for instance, a passenger concludes that some sort of physical discomfort constitutes an emergency, but the train crew does not, or it becomes necessary to walk across the tracks to avert harm. Most of the time, however, the rules work so well that the possibility of concocting unusual situations in which they do not provide unequivocal answers goes unnoticed. That is generally true of laws that codify social norms. It is less true of laws that attempt to regulate behavior in ways that are counterintuitive or in ways to which people would rather not conform. Such situations sometimes create a game of cat and mouse, where the legislature attempts to set standards and the regulated attempt to comply with the letter of the law but to thwart its intent by engaging

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