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## Book Review - 'The Language of Statutes' by Lawrence M. Solan

Brian Christopher Jones, *Academia Sinica*



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# THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION

by Lawrence M. Solan. Chicago: The University of Chicago Press, 2010. 304pp. Cloth \$45.00. ISBN: 9780226767963. E-book \$7.00-\$40.00. ISBN: 9780226767987.

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pp.308-312

Historically law has often been perceived as a sociological endeavor. Laws are written; bills are approved; statutes are codified; law is enforced; and judges judge. Yet within this (admittedly simplified) progression there lies an incredibly complex and interconnected web of how law itself operates. Gazing through a sociological lens, one can come to a deep understanding of law. Yet over the past few decades, the legal establishment has decided to do something quite profound: embrace psychological research about the law and research that relates to the law. And when this research is performed well, a much deeper understanding of law emerges than the previous picture taken alone could provide. Lawrence M. Solan has figured this much out, and, accordingly, *THE LANGUAGE OF STATUTES* provides a richly detailed analysis regarding the thorny business of statutory interpretation.

For all the politicians, journalists, academics and others who commonly lambaste lawmakers and judges for the state of legislation and statutory interpretation, Mr. Solan has a message for you: law, generally, works quite well. Thus is the predominant theme of this intriguing jaunt into the language of statutes and statutory interpretation in the U.S., and how psychological phenomena explain many interpretative problems. In support of his message Solan provides not just a guide to statutory interpretation, but a direction in how to govern by statute, analyzing everything from the *CHEVRON* doctrine to the role of jurors when interpreting statutes.

In large part, the book is both a tribute and a rebuke of opinionated Supreme Court Justice Antonin Scalia. Acknowledging that Scalia is the foremost sitting Supreme Court justice concerned with statutory interpretation, Solan uses Scalia's bench and marketplace literature to shed light on a number of statutory conundrums. In using a figure of Scalia's magnitude, Solan cleverly and deliberately does not trap himself, as so many other writers seem to do, as being the antithesis of the vaunted justice. Instead, using his own subtle linguistic precision, the author systematically reveals that many of Justice Scalia's theories in regard to statutory interpretation are not only contrary to the psychological processes of analyzing and interpreting law, but at times divergent from Scalia's own bench decisions.

Chapter 1 introduces a few of Solan's main practical points, such as: the fact that judges, through their very role, "cannot help but contribute to the meaning of legislation" (p.10); that drafting crisp and flexible law is [\*309] cognitively challenging; and that our current state of statutory interpretation does a "reasonably good" job of effectuating the will of the legislature. The author's viewpoints on interpretation appear to be influenced by a somewhat realist judicial mindset, which he implicitly stands by throughout the text. He tackles perhaps the most provocative interpretation issue early on, that of personal influence, unabashedly noting that "only a naïve apologist could ignore the fact that a judge's personal values contribute to their decisions" (p.4). Further accentuating this point, he states that "Judges are acutely aware of the ramifications of their decisions 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" (p.5). And, though this is important from a psychological and interpretative perspective, it is not the crux of Solin's manuscript. He spends the remainder of the book attempting to find common ground and apply best practices when interpreting statutes.

To justify why statutory interpretation is needed, the author delves into the intricacies of the federal bribery statute in Chapter 2. He describes how we conceptualize "mental models" of words or phrases that usually have quite different technical or legal definitions, and how these competing definitions drive interpreters to quarrel. But, it is not quarrelling that leads us to interpret statutes, but a desire for understanding. An interesting section describes

the “dogs that didn’t bark” phenomenon, and how, though statutory definitions may often be complex (such as the bribery statute), but most of the time they are sufficient enough to resolve disputes. Ultimately this reinforces his thesis: that most laws generally work well. Chapter 3 derides both textualism and its critics for essentially making much ado of nothing. As Solan points out, both sides seem to agree on the principle of legislative primacy, but nagging rifts remain as to best practices. In relation to ordinary and definitional meaning, it is argued that separating the two is difficult, if not entirely impossible. Our brains, even textualist brains, are trained to think both ways, and relying on ordinary meaning assumes that the legislature was clearly doing so when they wrote the statute. Yet the bigger problem is that the definition of “ordinary meaning” is not entirely settled. In presenting a number of cases analyzing the two (supposedly) diametric approaches, the author provides much criticism for those who merely abide by one dictum. Solan also analyzes the psycholinguistics behind both models, using academic literature to demonstrate that we think in both prototypical and rule-like fashion when we conceptualize and categorize words. This leaves the author to conclude that, “to the embarrassment of the American legal system . . . courts find ordinary meaning anywhere they look, and judges are not restrained in deciding where they are willing to look” (p.70).

Chapter 4 discusses legislative intent, a highly debated topic that Solan believes is used ubiquitously by both textualists and their critics. The author clarifies his position on the matter by noting that “evidentiary arguments that courts sometimes misuse legislative history may have merit and should be dealt with on a case-by-case basis. In contrast, arguments against any reference to legislative intent do not have merit and [\*310] should be rejected” (p.83). A helpful analogy Solan uses to put things in perspective is that “understanding language is very much a matter of striving to understand the intent of the speaker, just as speaking is an effort to facilitate our hearers’ efforts to understand our message” (pp.87-88). He considers statutory language and lawmaking no different; attenuating the intent of the speaker, in this case the legislature, is largely a natural human reaction. To compliment this, Bloom’s “theory of mind” approach to the acquisition of words is explained, as the author details how during development children understand new concepts by discovering joint attitudes towards objects that others have (Bloom, 2002). This tool allows them make sense of their world. Adults do this as well, as we are merely building on the concepts that we have acquired from our youth. One of the most intriguing items in the book is the graphic that Solan uses on page 101, which shows the number of times federal and state courts used the words “intend,” “intent,” and the like, close to the words Congress/Legislature. Turns out they do it quite often: 30,000+ in Federal and State Courts from 1998 to 2007, and also from 1988-1997.

In Chapter 5 the federal bribery statute is again used to demonstrate how over time a law can induce stability: while prosecutions have increased throughout the years, published appeals have continued to decline and total appeals seem to have leveled-off. Yet, while laws may become more stable over time, many factors change around them. Culture, language and those enforcing laws are constantly in motion, and even statutes that are written to incorporate such change produce problems. These changes are nearly impossible to control. The latter part of this chapter is sprinkled with a bevy of interesting analyses on other interpretative “values” that arise frequently, such as the purpose of legislation, coherence, promoting constitutional values, supporting law enforcement, and political ideology. The legislative process is also one of the values discussed. Solan reminds us that groups, especially those composed of hundreds of individuals, are often subject to error. Interestingly, many of these errors do not arise in the technical drafting of the statute, but in the facts relied upon when drafting (Keeton 1988, also see New Jersey’s “runny egg law”). In reaction to these mistakes, Courts usually defer to the outcome of the legislative process, rather than purpose, when interpreting such a statute. Here the author appears to be challenging whether this should be the case. However, unlike many other parts of the book, Solan does not explicitly affirm whether this should be the case.

The roles of the executive and legislative branches are examined in Chapter 6. Solan begins by discussing the CHEVRON doctrine (CHEVRON USA, INC. v. NATURAL RESOURCES DEFENSE COUNCIL, INC.). The 1984 decision instructs courts to defer to executive agency interpretations of their own power, thus providing agencies more freedom to carry out their functions. Many believe that the doctrine amounts to a more direct marriage between democracy and interpretation. Also, in many respects the agencies are flooded with specialist knowledge about their own fields, and the courts usually are not. Presidential Signing Statements and prosecutorial discretion are also discussed in relation to interpretation. [\*311] The former is regarded by both judges and the author to be of limited value, while the latter is deemed to play a more important role in the executive’s interpretation of statutes. But the main consideration of the chapter is whether legislatures should advise courts on how to interpret

law. Solan gently reminds his readers that “Judicial Power” of the United States is vested in the Supreme Court and its inferior courts, and *MARBURY v. MADISON* established the courts’ power to review statutes for constitutionality. Therefore, the question is not whether courts should interpret statutes, but how the courts should go about doing so. Yet it is noted that civil law countries commonly provide interpretive explanations for judges, and here Solan treads the middle ground yet again. In recognizing this, he states that “legislatures have more power to do so than they exercise,” but does not think that “the value of legislative primary is well served” by more expansive interpretative instructions (pp.180-181). The addition of rules that judges must abide by during interpretation is only likely to complicate these matters further. Perhaps, as Solan suggests, it would be “a better idea to trust judges to do their jobs with care” (p.189).

Chapter 7 deals with a somewhat neglected aspect of statutory interpretation: juror influence. Noting the rich history this is built around in the United States, Solan discusses many issues related to the matter, such as the “absurd-results rule,” the “pernicious ambiguity” of language and the “false-consensus bias.” The latter occurs when people may recognize that others disagree with them about meaning, but they usually overestimate the consensus to which people share their interpretation of language, which has significant implications for law (Solan, Rosenblatt, and Osherson, 2008). The author also notes that when juries encounter difficulty in such language, they are usually not provided the same, if any, materials that judges use when interpreting statutes. Thus, their preconceived notions of such matters, such as definitions, play a large role in their understanding of statutes. Generally, the author notes that the role of the jury has not changed all that much in two centuries, as they still play a unique and relatively significant role in statutory interpretation.

Overall, there are very few criticisms this author has for Solan’s text. However, there is one thing that continues to bother me. Solan’s academic and psychological exploration into law and the language of statutes, and indeed many of his stances throughout, are reminiscent of the arguments made by Jerome Frank in his 1931 article, which contributed to sparking the legal realism movement. This essay largely explained how judges could not escape being affected by psychological factors, as they were indeed human beings (Frank 1931). Yet the author fails to mention this influential piece of work throughout the text, which is a pity. And, while references to celebrated linguist Noam Chomsky are certainly apt to Solan’s academic endeavor (pp.39, 111), a reference to Mr. Frank at some point in the text would have been much preferred.

Nevertheless, *THE LANGUAGE OF STATUTES* is a thorough and engaging endeavor into the complex business of statutory interpretation. Throughout the text Solan not only provides much [\*312] evidence for his general thesis that laws work quite well, but he also attempts to find common ground and best practices for all those interpreting statutes. In doing this, the author employs a combination of sound legal reasoning and an exploration into human cognition and makes a substantial contribution to the literature. If there is one text that could potentially bridge the gap between textualism and its critics, this just may be it.

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