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Rules, Tricks and Emancipation

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By Jessie Allen

> [T]rickster . . . needs at least a relationship to other powers, to people and institutions and traditions that can manage the odd double attitude of both insisting that their boundaries be respected and recognizing that in the long run their liveliness depends on having those boundaries regularly disturbed.
>
> -- Lewis Hyde[1]

> But still, the way in which rules operate eludes us.
>
> ■ Frederick Schauer[2]

What is the line between dynamic legal interpretation and deceptive overreach? Between following legal rules even when they lead to outcomes the rule makers never would have imagined and willfully ignoring the rules' original meaning? Between applying legal rules in creative new ways and twisting rules to produce distorted results? Faithful rule following and tricky rule evasion are generally seen as opposites. But in legal practice the line between them can be gossamer thin – porous. I want to consider these apparently opposite approaches as both legitimate aspects of legal rule interpretation, and to suggest that playing tricks with rules may be not only allowed, but required by the institution we call "rule of law,"

Rules and tricks are often thought of as two completely different kinds of things. Rules are associated with order and control; with predictability -- knowing in advance how something will turn out.[3] Tricks are deceptive and transgressive, built to surprise us and confound our expectations in ways that can be entertaining or devastating. But sometimes rules can be tricky.

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[1] TRICKSTER MAKES THIS WORLD: MISCHIEF, MYTH AND ART 13 (1998).

[2] PLAYING BY THE RULES 112 (1991)

[3] Though even conventional analyses stress that following rules is an irrational decision making method if a well-informed all-things-considered analysis dictates a different approach and there is no punishment for violating a rule to the contrary. *See* Frederick Schauer, *Rules, Rationality, and the Significance of Standpoint*, 35 QUEENS L. J. 305 (2009).

Because rules generalize some prohibition or prescription without regard to context, their application to particular situations can be problematic. In some situations a rule may operate to produce unexpected results, results that seem to be far from what the rule makers expected or the interests the rule has been understood to promote.[4] This is usually framed as a shortcoming of legal rules.[5] And theories of legal interpretation usually include some discussion of when and how decision makers should reject or adjust these sorts of anomalous results.[6]

I want to propose that this apparently problematic aspect of rule following is crucial to the value of rules as a lawmaking tool, and to the cultural, moral, political system in which power is channeled and constrained by law. I suggest that we think of cases in which following a legal rule leads to absurd results, or results contrary to a law's presumptive purpose, as a kind of trick played by the law on the lawmakers, or the culmination of a trick that lawmakers play on themselves. Such tricks are not a perversion of law. They are the instantiation of legal rules' capacity to constrain the rule makers – something that we expect and in fact demand from a society that claims to be governed by the rule of law. Moreover, this tricky capacity is the source of legal rules' creativity, their ability to contribute to, rather than stymie, social change. In particular, legal tricks sometimes produce emancipatory results.

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[4] Rules and the purposes they are understood to serve are sometimes contrasted using metaphors of transparency and opacity. *See* George Taylor, *Legal Interpretation: The Window of the Text as Transparent, Opaque or Translucent*, 10 NEVADA L. J. 700-718 (2010).

[5] *See, e.g.,* Cass R. Sunstein, *Problems with Rules*, 83 CAL L. REV. 953, 992 (1995) ("If strictly followed, the rule will often produce arbitrariness and errors in particular cases.")

[6] *See, e.g.*, WILLIAM BLACKSTONE, I BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 60-62 (1765-1769), (explaining that "where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them," and citing the seventeenth century jurists Puffendorf and Grotius for the need to consider context in statutory interpretation for what Grotius called, "the correction of that, wherein the law (by reason of its universality) is deficient.") See also H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

The emancipatory tricks legal rules play call to mind the archetypal trickster characters that have been identified in many different cultural contexts.[7] Though not exactly culture heroes, tricksters are not just villains or idiosyncratic mischief makers. They are culture builders. Tricksters may be mischievous opportunists, but somehow their mischief often produces culture-expanding, liberating effects. Unlike heroes whose accomplishments are achieved through acts of physical courage and power (Hercules, Agamemnon), or through reason and wisdom (Apollo, Solomon), tricksters exert their transformative influence through guile, foolishness and deception. In particular, tricksters, like, Hermes, Legba, Coyote, or Odysseus, are associated with crafty verbal gamesmanship.

Trickster statements at first seem patently false, but on second thought they reveal a larger truth that appears when conventional assumptions and categories are called into question.[8] For instance, Lewis Hyde relates the typical trickster antics of the Hindu god Krishna, who as a child is warned by his mother not to steal the household butter and then proceeds to do just that as soon she leaves the house. When his mother returns and confronts him with his disobedience, Krishna denies it, saying, "I didn't steal the butter, Ma. How could I steal it? Doesn't everything in the house belong to us?"[9] As Hyde observes, a trickster's falsehoods do not "merely contradict the truth" in a way that is "still part of a game whose rules have preceded him." Rather, "The problem is to make a 'lie' that cancels the opposition and so holds the possibility of new worlds.

[7] *See*, LEWIS HYDE, TRICKSTER MAKES THIS WORLD: MISCHIEF, MYTH AND ART 13 (1998); PAUL RADIN, THE TRICKSTER: A STUDY IN AMERICAN INDIAN MYTHOLOGY (1972); RALPH ELLISON, CHANGE THE JOKE AND SLIP THE YOKE, SHADOW AND ACT (1964).
[8] HYDE, *supra* note 7, at 72.
[9] *Id.* at 71.

. . . that muddies the line between the true and the false."[10] By showing us that there is more than one way to see things, trickster "reveals the plenitude of this world."[11]

Legal argument is full of the categorical fluidity and questioning of assumptions typical of trickster's approach. And like trickster's antics, this fluidity and questioning is often denigrated as dishonest, especially when it leads to results that upend the status quo. The assumption is that following legal rules is a straightforward and sincere practice, the opposite of twisting or manipulating the rules. I want to argue, instead, that following legal rules can sometimes allow, or even demand, trickster's revelatory creativity.

Rules, Generality and Rule of Law

Perhaps paradoxically, absurdity is a feature, not a flaw, of rule bound legal decision making. While legal culture prizes persuasive, logical reasoning, and requires legal decision makers to give reasons for their rulings, law also has a special relationship with rules that act to curtail the role of reason in legal results. Any rule of law system includes general rules made in advance of the specific claims and situations to which the rules are applied.[12] Because rules involve generalizing some specific characteristic to trigger a given response regardless of context, following the rules inevitably produces some irrational, even absurd results. As Frederick Schauer observes, the fact that following the rules sometimes produces absurd outcomes is "but the extreme manifestation of a central feature of the idea of a rule."[13]

Schauer calls this characteristic of rules "entrenched generalization" and notes that it makes rules necessarily both over- and under-inclusive.[14] So, for example, a law against dogs in

[10] *Id.* at 70.
[11] *Id.* at 290.
[12] Brian Tamanaha, *The History and Elements of the Rule of Law*, SINGAPORE JOURNAL OF LEGAL STUDIES, Dec 2012: 232-247, available at <https://search.informit.com.au/documentSummary;dn=224175833222280;res=IELHSS> ISSN: 0218-2173.
[13] FREDERICK SCHAUER, PLAYING BY THE RULES 215 (Clarendon/Oxford, New York 1991).
[14] *Id.* 47-50.

restaurants likely aims to minimize disruption, noise, and interactions that many customers would find unpleasant, unsanitary or frightening. Not all situations involving dogs in restaurants would fit that description, but the legal rule "no dogs allowed" bans them all. The rule replaces case by case judgment about whether a dog is disruptive or dangerous with what is generally an easily discernible fact: it is a dog. Once dogness is established, the decision is made – at least if the rule is being followed. The law excludes "the entire universe of dogs, bad and good, annoying and helpful, troublesome and obedient."[15] Likewise, the rule bans dogs in situations that the law makers almost certainly did not intend to cover, and that few people would think of when they saw a sign declaring "no dogs allowed" on a restaurant door, for instance, bomb-sniffing dogs, or dogs searching for survivors of an earthquake.

Of course, just because we recognize a rule and give it some weight in considering what to do does not mean that the rule must always be followed. We can decide that there are other principles and objectives – safety from bombs, surviving an earthquake – that are more important in some circumstances than following the rule against dogs. Or we might say that a given situation is just too far outside the ordinary understanding of the rule's meaning and purpose to count as a violation of the rule, even when on reflection it does seem to involve a dog in a restaurant -- say, a taxidermist who brings along a box containing a stuffed dead dog and stows it under his restaurant table while he dines. Rules can have exceptions. But (and this is Schauer's main point), if every time the rule produces a result that seems counter to its accepted purposes a new exception can be made on the spot so that the rule does not apply, then the rule disappears. The point of a rule is that it replaces these sorts of value judgments. If a legal rule applies only

[15] *Id* at 47.

when following the rule produces a result congruent with the rule's accepted purposes, then the rule loses its power *as a rule*.[16]

Emancipatory Legal Tricks

So far, nothing about the over- and under-inclusiveness of rules looks particularly tricky, although the notion of allowing absurd results to stand might carry a whiff of ludic. To develop the rule-trick connection further, then, let me turn to some examples. I will discuss several situations in which applying a preexisting legal rule to a particular case produces results that seem tricky – that is, results that are in some way perverse, absurd, or apparently contrary to the rule's generally recognized purpose, at least as it was understood at the time the rule came into being. I will start with a very old emancipatory trick involving medieval social structures and common law property rules. The historical distance makes it easier to see the trickiness. Then I will offer some more modern examples.

Turning Villeins into Freemen

In feudal Britain there was a class of peasant farmers, called villeins, who lived on and worked the land owned by the lords of the manors. Villeins were basically slaves of the lord they served, or, more accurately, appurtenances to the land the lord owned. When it came to that key legal boundary drawn between subjects and objects, between persons capable of ownership and things that could be owned as property, villeins were on the property side.[17] Nevertheless, according to both Coke and Blackstone, the lord who owned the land to which a villein was

[16] As Schauer puts it, "a rule that is inapplicable in every case of internal failure is in an important way not a rule at all." *Id.* at 117.

[17] Indeed, the two classes of villeins – villeins regardant and villeins in gross -- correspond to the two types of additional property rights and duties associated with the use of some real property (for instance the right to use a neighbor's driveway), and either belong to the specific landholder (in gross) or run with the land (appurtenant).

attached had the power to manumit him, enfranchising him as a freeman.[18] It seems, however, that this legal power could sometimes enfranchise villeins a lord did not intend to free.

"Manumission is properly when the lord makes a deed to his villain to enfranchise him," says Coke, that is, a formal property transfer by the lord effectively gives the villein to himself, transforming him from the lord's property to his own person.[19] There is already something rather eerie about this transformative procedure, but nothing particularly perverse or deceptive. There were, however, "also many implied manumissions."[20] This is where the trick comes in.

Implicit real estate transfers can sometimes occur when, without formally or explicitly communicating an intention to do something, the property owner acts as if he has made a transfer. You might, for instance, implicitly grant your neighbor the right to use your driveway if you stand by and allow them to use it openly year in and year out.[21]

In the law of villeinage, according to Blackstone, the rule apparently was that an implied manumission occurred when the lord acted as if "dealing with his villein on the footing of a freeman."[22] Some acts that satisfy this rule seem quite unsurprising, for instance, granting land to the villein as an inheritable estate, known as a "freehold," which in medieval social structures could only be held by freemen. As Blackstone puts it, such a grant to a villein amounted to "vesting an ownership in him entirely inconsistent with his former state of bondage."[23] After all, in feudal society it was taken for granted that one's relationship to land constructed and reflected one's status, as one's "real estate." So, it is hard to imagine that any lord of the manor would find himself tripped up by that application of the rule.

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[18] WILLIAM BLACKSTONE, II BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 94 (1765-1769),
[19] EDWARD COKE, AN ABRIDGMENT CONTAINING THE SUBSTANCE OF COKE UPON LITTLETON , WILLIAM HAWKINS (ED.) 217 (8TH EDITION) (1822) .
[20] *Id.*
[21] The name for this form of property transfer is a prescriptive easement.
[22] BLACKSTONE, *supra* note 18.
[23] *Id.*

But sometimes the rule of implicit manumission produced really tricky results. In particular, if a lord sued his villein in court, this freed him! Blackstone explains that under the law of villeinage, a lord could seize everything his villein possessed, and so get hold of property that exceeded the value of any money damages he could hope to recover with a lawsuit. By suing his villein, then, the lord was acting as if he did not have this power. So, Blackstone says, it was "presumed that by bringing his action [the lord] meant to set his villein on the same footing with himself," thereby effecting an implied manumission.[24] It is hard to see this "presumption" of a grant of personhood as a sincere interpretation of what the lord meant to accomplish. Nor does it seem likely that ordinary people at the time would have understood the lord's legal attack as a grant of personhood. Thus, if implied manumission is understood as an informal shortcut to freeing a villein, this application of the rule seems quite counter to that purpose. Instead it's an absurd result that looks rather like a legal trick played on a lord who abuses or fails to recognize his own power. The remarkable legal capacity to turn property into a person backfires when the lord launches a reckless legal action. It turns his transformative legal power into a kind of legal Midas touch. But notice that this tricky result is also, following Schauer's view, the most truly rule bound, for a rule only really has consequential force when it directs us to do something contrary to what our otherwise all-things-considered choice would be.

It also seems worth noting that the particular act that triggers enfranchisement is bringing the villein to court, that is, to the place where law ritually and routinely enacts status changes that draw and redraw lines between rightless things and rights bearing persons. Courts strip criminally convicted defendants of their ordinary rights of personhood and generate new legal

[24] *Id*. at 94-95; Coke, *supra* note 19, at 218.

persons in the shape of corporations. It's as though the lord's lawsuit inadvertently triggers the transformative power of formal court process.

Blackstone is fairly gleeful at this legal "gotcha" moment. He sees it as an emancipatory trap sprung by his beloved common law "which is always ready to catch at any thing in favour of liberty."[25] Maybe. Or maybe it is just the sort of individually liberating result that preserves systemic hierarchy. After all, the power to manumit is part of what marks the status difference between lords and villeins. If lords start treating villeins like free citizens – even by launching hostile legal actions against them – that tends to muddy the social boundaries. Rather than allow this murky middle ground, the rule of implied manumission automatically moves any villein being treated like a free man into the free man category, aligning legal status and social behavior to maintain the existing class structure.

Dred Scott

The idea of a master's unwitting action freeing his slave should sound familiar to students of United States legal history. In a notorious nineteenth-century U.S. Supreme Court case, *Dred Scott*, an African American man who had been a slave, claimed that when his master took him to a state where slavery was outlawed, he was emancipated, and so as a citizen of a free state, was entitled to the rights and protections granted by the U.S. Constitution, notably the right to sue his ex-master for battery in federal court.[26] The Court rejected his claim.

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[25] BLACKSTONE, *supra* note 18, at 94. This arcane bit of legal history may seem oddly familiar to fans of the popular Harry Potter series of children's books by J.K. Rowling. In Rowling's fictional world of wizards, there exists a permanent underclass of indentured servants, known as "house elves." Just as villeins could be implicitly emancipated by granting them property appropriate to freemen, house elves (who normally dress in sacks) gain their freedom if their master gives them an item of ordinary clothing. At the end of the second book in the series, Harry Potter uses this implicit emancipatory power to free Dobby, a house elf who has befriended him. Harry tricks Dobby's master, the evil Lucius Malfoy, into tossing a filthy sock at the house elf. When Dobby catches it – he becomes a free man. J.K. ROWLING, HARRY POTTER AND THE CHAMBER OF SECRETS 337-338.

[26] Dred Scott v. Sandford, 60 US 393 (1857). Note that Dred Scott was one of many such suits brought by slaves taken to free states, many of whom won their legal claims of freedom. *See, e.g.*, Commonwealth v. Thomas Aves, 18 Pick. 193 (Mass 1836).

Writing for the majority, Justice Taney explains that no such enfranchisement is possible because the free citizenship guaranteed by the U.S. Constitution was not meant to be available to African Americans. Although no constitutional text expressly excludes African Americans, Scott can "claim none of the rights and privileges which it provides and secures to citizens of the U.S.," because African Americans "are not included, and were not intended to be included, under the word 'citizens' in the Constitution."[27] The opinion offers examples of colonial laws subordinating African Americans as evidence of the "degraded condition of this unhappy race" at the time the constitution was ratified.[28] These laws are said to convey "the fixed opinions concerning that race, upon which the statesmen of that day spoke and acted," including the Constitution's framers. In other words, if the people who wrote and ratified the Constitution didn't understand African Americans to be citizens of the country it constituted, then they were not, and could not be, citizens. Period.

The coup de grace is an argument that may seem laughable. The gist is that the slaveholding and slavery-sympathizing founders couldn't have meant to adopt a constitution that recognized African Americans as persons, because then treating them like property would be wrong. Quoting the Declaration of Independence, Taney points out that if African Americans are among the men "created equal" and possessed of "unalienable rights" of liberty, then the slaveholding practices of the Declaration's signers were "utterly and flagrantly inconsistent with the principles they asserted."[29] That would mean the framers were hypocrites. And that is just not possible! The framers were "great men . . . high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting."[30]

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[27] *Id*. at 404.
[28] *Id*. at
[29] *Id*. at 410.
[30] *Id*.

I used to see this as a ridiculous attempt to rescue the reputation of the American founders by declaring them consistently racist. But the absurdity of this argument may be a smokescreen. Focusing on the Constitution's original meaning is a way for the justices in the Court's majority to avoid acknowledging, possibly even to themselves, that the words of the Constitution demand an emancipatory reading. And that such a reading, in the teeth of social conventions and the accepted views of the constitution's enactors, is a truer embodiment of a rule of law than a reading that is guided by those conventions and views. By refusing to read the available Constitutional text to make African Americans rights-bearing legal persons, the judges are not just reinscribing old racist attitudes, they are blocking the emancipatory potential of the text with racial boundaries that are still current, although by no means universal, in their own present day society. The opinion justifies a contemporaneous racist interpretation as the necessary consequence of the supposedly racist context in which a 100-year-old text became law. In so doing, the court shuts down the very thing that gives legal rules the power to go beyond the moral horizon of the society that creates them – the tricky capacity to mean things their enactors did not mean. To be sure, the capacity the Court rejects is a kind of *irrationality* – a product of the fact that rule makers cannot predict in advance all the ways their rules will work. But that irrationality is at the core of the rule of law idea. It is exactly because the rule makers cannot foresee all the situations in which the rule will be invoked and all the ways it will be applied that the rule makers themselves become subject to the rule.

Nor, in this view, is it necessary that the interpreting judges' motives be pure and disinterested. What matters is how the judge acts. Once again the trickster archetype provides a model. Trickster is notoriously selfish and driven by desire. And it is exactly this appetitive

selfishness that drives trickster to find previously unseen ways the rules will allow, or even require, him to get what he wants. In so doing, he makes the society around him more open.

Hively

Questions about legal rules' power to generate results that the rule makers never envisioned and accusations of playing legal tricks came up recently in a series of U.S. federal appellate cases applying a 50-year-old civil rights law. Title VII of the 1964 Civil Rights Act forbids employment discrimination because of a person's "race, color, religion, sex or national origin."[31] For many years, it was 'hornbook law' that Title VII's ban on discrimination "because of . . . sex" offered no protection against discrimination on the basis of sexual orientation. The U.S. Supreme Court has never addressed the issue, but the intermediate appellate courts were univocal in rejecting Title VII sexual orientation claims.[32] Recently, however, that unanimity has shattered. Three different courts of appeals have reexamined the issue, and all three produced split decisions, including two majority *en banc* opinions holding that Title VII's proscription on sex discrimination does indeed outlaw sexual orientation discrimination after all.[33]

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[31] 42 USC 2000e-2.

[32] *See e.g.*, Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006); Medina v. Income Support Div., New Mexico, 413 F.3d 1131, 1135 (10th Cir. 2005); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Hammer v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701 (7th Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 751–52 (4th Cir. 1996); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979); *but see* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002).

[33] Zarda v. Altitude Express Inc., 883 F.3d 100 (2d Cir. 2018) (en banc) (finding that "sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination" and actionable under Title VII); Hively v. Ivy Tech. Comm. College, 853 F. 3d 339 (7th Cir. 2017) (en banc) (concluding that "sexual orientation is a form of sex discrimination" and allowing a Title VII claim to go forward); and Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017) (holding over a dissent that sexual orientation discrimination is not covered by Title VII). In April of 2019**,** the U.S. Supreme Court decided to hear the appeal of *Zarda* in conjunction with the appeal of *Bostock v. Clayton County, Georgia* (723 Fed. Appx. 964 (Mem. 11th Cir 2018), *reh. denied*, 894 F.3d 1335 (11th Cir. 2018).

The intermediate appellate courts' reassessments took place against a background of Supreme Court decisions finding constitutional protections for LGBT Americans in other contexts[34] and an opinion from the Equal Employment Opportunity Commission that Title VII prohibits sexual orientation discrimination.[35] The appellate courts were clear, however, that none of those factors *required* them to reconsider their longstanding view. Like *Dred Scott* and the implied manumission of medieval villeins, these cases arise from the potential of legal rules to transform society, and enfranchise subordinated social groups, in ways that were unthinkable to the rules' creators. And like these earlier examples, the employment discrimination cases raise the question whether unleashing previously unrecognized emancipatory power carries out or betrays the rule of law. Is it a trick played by self-serving judges that usurps the legislative role, or is it a trick that fulfills the lawmakers' commitment to be bound by laws that transcend their individual intentions?

I will focus here on one of the cases, the Seventh Circuit's *en banc* decision, in *Hively v. Ivy Tech Community College*, the first holding by a federal court of appeals that Title VII protects LGBT employees from discrimination based on their sexual orientation.[36] The Court issued three main opinions. The Hively majority holds that Title VII covers sexual orientation discrimination. The court makes no attempt to hide its sharp break with its own unequivocal precedent, and divergence from the position taken by other circuit courts. The EEOC's position that that the statute does prohibit sexual orientation discrimination, along with the last decade's Supreme Court cases expanding LGBT constitutional rights, are the avowed catalysts for

[34] *See, e.g.*, Obergefell v. Hodges, 135 S.Ct. 2584 (2015) (holding that the U.S. Constitution's due process clause guarantees a right of marriage to same sex couples).
[35] Although the Trump Administration does not take this position, the EEOC has not as of this writing published a contrary opinion.
[36] 853 F.3d 339 (7th Cir. 2017) (en banc).

revisiting the employment discrimination question, but the Court does not contend that those developments made the statutory reexamination mandatory. Moreover, the majority notes that "Congress has frequently considered amending Title VII to add the words 'sexual orientation'" and has never done so.[37] Nevertheless, the court rejects the notion that revisiting this issue amounts to a judicial effort to "'amend' Title VII to add a new protected category." [38]

Instead, the majority frames its task as "a pure question of statutory interpretation": deciding "what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex." [39] Two different doctrinal approaches are offered, casting sexual orientation discrimination as a form of sex stereotyping and associational discrimination – both of which have previously been recognized as violating Title VII. But the gist of the decision is not really a new doctrinal analysis. The Court finds that sexual orientation is *obviously* within the statute's coverage because of "the common sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discrimination on the basis of sex."[40]

Predictably, the *Hively* dissenters see the new interpretation of discrimination "because of sex" as unfaithful to both the statutory text and the court's proper judicial role. In their view, the decision to "upend settled precedent" is contrary to "the foundational assumptions of the rule of law."[41] They accuse the majority of engaging in a deceptive attempt to "smuggle in . . . statutory amendment under cover of an aggressive reading of loosely related Supreme Court precedents."[42]

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[37] *Id.* at 344.
[38] *Id.* at 343.
[39] *Id.*
[40] *Id.* at 351.
[41] *Id.* at 373.
[42] *Id.* at 360.

There is something decidedly trickster-like about the majority opinion. The majority manages to "upend settled precedent" by questioning a longstanding underlying assumption, namely, that sexual-orientation discrimination and sex-discrimination are two completely different things. Once that assumption is exploded, the legal rule's result flips. Just as Krishna could not be guilty of stealing butter that actually belonged to him, Title VII's ban on sex discrimination prohibits sexual orientation discrimination because it is "actually impossible to discriminate on the basis of sexual orientation without discrimination on the basis of sex."[43] This is a move right out of the trickster playbook. But as I have been arguing, legal tricks are sometimes played in the service of the rule of law not against it. The trick *Hively* pulls off has the kind of rule of law integrity embodied in the medieval law of implicit manumission and rejected in *Dred Scott*. This legal trick liberates rights-bearing legal subjects using legal rules whose emancipatory power was at least partially hidden when the rules were adopted.

The trick is accomplished with a realignment of legal boundaries. Before *Hively*, sexual orientation was securely outside the bounds of laws forbidding sex discrimination. The majority dissolves that line, and then redraws it to sweep sexual orientation within the anti-discrimination statute's coverage. Moreover, the issue in *Hively* concerns the legal treatment of a group of individuals themselves figured as border-crossers, blurring the heteronormative line between masculinity and femininity. Ultimately, the opinion draws a new line between employers' legal discretion and illegal discrimination. *Hively* thus disrupts existing legal and gender boundaries and in so doing rearranges both social structure – classic Trickster behavior. As Lewis Hyde observes, boundary creation and boundary crossing are related to one another.[44]

[43] *Id.* at 351.
[44] Hyde, *supra* note 1, at 7.

In this post-realist age, it is impossible to endorse Blackstone's optimistic view of law as somehow always tending to expand liberty and human rights. But when an anti-discrimination statute whose ordinary meaning today plausibly provides protection against a form of discrimination that many, if not most, Americans (and American judges) profess to abhor, there is a strong argument to be made against rejecting that protection because it creates a new order unimagined by the law's creators. Even if it is true that when the law was enacted 50 years ago most Americans would have found its application to sexual orientation laughable or repugnant, denying the law's apparent meaning today seems unjustified.

A concurrence by Judge Posner argues that the majority should have taken a less tricky, more straightforward approach. Rather than claim to correct a mistaken interpretation of the law, Posner thinks the court should acknowledge that it is infusing an old statute with new meaning. Posner no doubt views his approach as more realistic. It is certainly more direct. But this avowedly sincere description of judicial legislation is not necessarily more true to the actual perspective of the judges in the majority, or to the rule of law.

As Posner says, no one really thinks that the 1964 legislators who enacted Title VII intended to outlaw employment discrimination against LGBT Americans. But that doesn't mean that reading the statute in this way 50 years later has nothing to do with the law's original meaning. Think of the majority's decision as a trickster truth. Whatever the rule might have meant to most of the reading public at the time it was enacted, its "public meaning" now at least plausibly, and probably more definitely, includes sexual orientation. As the *Hively* majority points out, it has long been accepted that punishing a woman for failing to conform to feminine stereotypes is a form of sex discrimination that violates Title VII. And what is a more basic feminine stereotype, after all, than women's sexual attraction to men? Indeed, only in a

heteronormative society could one see sexual attraction to men as naturally, rather than stereotypically, feminine. Once we have seen this aspect of the rule, there is no going back to the old meaning. Once the old heteronormative assumption has been undermined, seeing the rule as prohibiting sexual orientation is probably more true to our understanding of its meaning than a reading of the text to rule out sexual orientation discrimination: "How could I steal the butter, Ma? Doesn't everything in the house belong to us?"

It is true that, upon considering the point about gender stereotypes, our sense of the rule's meaning changes. In that sense Posner is correct that we as interpreters are changing the rule's meaning. But our experience is not of imposing a meaning that was previously non-existent, but rather of seeing something, discovering something that was there all along and hidden from many, if not all, previous interpreters and from the rule's enactors. This is a trick, in the sense that the emerging meaning is not discovered the way one might discover gold in the ground, but created through our interaction with the text. But it seems equally, if not more, true that this new meaning was always "there" in the statute's text. Moreover the rule makers should have recognized that rules can produce these sorts of unpredictable interpretations, that by legislating they became the authors of tricks to be played on them by future generations. As Justice Holmes observed, in an opinion quoted by Posner in his concurrence, creators of constitutive legal texts should "realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."

What makes *Dred Scott* such a terrible opinion is its passing off a racist legal interpretation as the necessary product of a racist past, as if that view were no longer widespread but simply frozen into anachronistic legal structures that the Court is powerless to change. It pretends that judges can ratify a dehumanizing reading of a legal rule and avoid all responsibility

for the consequences. Its praise for the framers is a sleight of hand, a bait and switch. While readers are chuckling over how ridiculous it is for the Court to try to protect the historical reputations of the individual constitutional law makers by reading the rules they made as consistently racist, they may fail to notice that the court saddles the constitutional framers with the blame for its own racist interpretation. Hiding the liberating potential of the legal text and denying the Court's complicity in a dehumanizing outcome is the real deception.

Despite the *Hively* dissenters' protests to the contrary, it is not the attitudes of the 1964 enactors of Title VII that prevent those judges from seeing that the statute covers sexual orientation discrimination. As they finally acknowledge, it is their own view that to most fluent English speakers "then and *now*," a ban on treating employees unfairly based on gender stereotypes "does not fairly include the concept of sexual orientation."[45] Even assuming that were true, the real question is *why* that would be a common reading. Once the Trickster majority points out that sexual attraction to men is a stereotype of what it means to be a woman, a rule that bans discrimination on the basis of sexual stereotypes surely looks like a rule against sexual orientation discrimination, and refusing to apply the rule that way looks like a choice to diverge from the rule in order to preserve old social boundaries that put homosexual workers outside the protection of employment discrimination law.

Tillikum

The implied manumission of villeins sued by lords, Dred Scott's claim to the federal court's diversity jurisdiction, and Hively's efforts to sue her employer under Title VII all involve the personifying effects of legal action. In each case the judges' decision hinges on whether it is plausible and reasonable, or absurd and impossible, to see the individual before them as someone

[45] Hively 853 F.3d 339, at 363 (en banc) (Sykes, J., dissenting) (italics mine).

entitled to make or defend a claim in court, someone who belongs there as a rights-bearing legal subject. I want to close by discussing another such personifying claim, one that will likely strike many a "fluent speaker of the English language" as tricky in the extreme. A few years ago, in a federal court in California, the company Sea World was sued by a group of orca whales.[46] The whales-- Tilikum, Katina, Corky, Kasatka, and Ulyses-- filed suit with the animal rights group PETA (People for the Ethical Treatment of Animals) acting as their "next friend," a legal procedure used when a plaintiff lacks the capacity to make decisions and direct legal counsel; for instance, an infant or a mentally disabled adult. The whales, all performers at Sea World water parks, claimed that they were being held against their will in violation of the Thirteenth Amendment of the U.S. Constitution, which outlaws slavery. [47]

The whales' alleged situation did bear uncanny parallels with the institution that the Reconstruction Congress outlawed with the Thirteenth Amendment. Plaintiffs "were born free and lived in their natural environment until they were captured and torn from their families."[48] In captivity, the orcas were "deprived of liberty, forced to live in grotesquely unnatural conditions and perform tricks."[49] Some were forced to breed, and separated from their children. Their situation caused the whales "extreme physiological and mental stress and suffering," while their captors "reaped millions of dollars in profits from their slavery and involuntary servitude."[50] It would be hard to find factual allegations more clearly within the Thirteenth Amendment's coverage. The problem, of course was that the plaintiffs were whales.

[46] Tilikum v. Sea World, 842 F. Supp. 2d 1259 (S.D. Cal. 2012).
[47] *Id.*
[48] *Id.* at 1261.
[49] *Id.*
[50] *Id.*

The right to sue in U.S. Courts is not limited to human individuals. Corporations are rights-bearing legal persons.[51] But whales have thus far not been made parties in U.S. Courts.[52] The federal judges hearing Tilikum's constitutional claim were not about to start. The trial judge explained that based on "plain and ordinary meaning, historical context, and judicial interpretations" the "only reasonable interpretation of the Thirteenth Amendment" was that it protects only humans, and the court of appeals affirmed. According to the courts, the "slavery" that the Thirteenth Amendment extinguishes is a strictly human institution. The Amendment doesn't say "human slavery," but it doesn't need to, just as, for instance, a restaurant sign banning dogs will be understood to bar only live dogs.

The trouble is that in both cases, as in *Hively*, once the alternative possibility has been raised and really considered, it takes some kind of twist, some kind of turning away from or slipping out from under the issue to avoid the rule's application. One can never again see the legal rule as definitely excluding the problem case to which it now seems to apply. Of course, in some instances it makes sense to reject applications of legal rules that appear absurd, or contrary to the purpose for which the rule was created. Many judicial opinions are built around rationalizing this kind of exception. But as Schauer points out, it is important to recognize that such 'common sense' results are the *opposite* of rule-bound decision making.[53] It can be perfectly legitimate to choose *not* to follow a rule when other considerations are paramount. Let the bomb-sniffing dog into the restaurant, for God's sake! There may be reasons for excluding

[51] Notably, the U.S. Supreme Court held in Citizens United that corporations are guaranteed rights of free expression under the First Amendment.

[52] Compare the medieval practice of putting animals on trial. Paul Schiff Berman, *Rats, Pigs and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects,* 69 NYU L. REV. 288 (1994).

[53] As Schauer puts it, "A rule that "is not applicable in those cases in which the justification *for that rule* is inapplicable . . . . is in an important way not a rule at all." Schauer, *supra* note 2, at 117.

non-human animals from Thirteenth Amendment protection.[54] But such exceptions are not required by the rule. And just as courts may reasonably and legitimately decide to reject absurd or socially harmful applications of a legal rule, they may fairly choose to double down on a rule's apparently unlooked for absurd result. To go with it. To allow the Thirteenth Amendment and Title VII of the Civil Rights Act to do their personifying work.

The dismissal of the whales' complaint was not required by the Thirteenth Amendment any more than the *Hively* dissent's protest was about being true to the original meaning of the term "sex" in Title VII. Like the decision in *Dred Scott*, both are rather the product of still current doubts about the ramifications of treating the plaintiffs as entitled to protection, of moving a group across the line of full legal personhood. Reading a ban on slavery to apply only to humans and a prohibition on sex stereotyping to exempt the stereotype that women are sexually attracted to men only makes sense as driven by a decision to preserve existing social boundaries that would be threatened if law's personifying power were allowed to flow to non-human animals and non-heterosexual humans.

Conclusion

The *Hively* majority declined to play the trick of hiding a contemporary discriminatory exclusion behind a discriminatory original meaning, opting instead for the emancipatory trick of giving a general rule an unexpected meaning hidden from its enactors. As a liberal believer in law's necessary connection to justice, Blackstone saw such tricks as part of the very nature of law itself, of its readiness "to catch at any thing in favour of liberty."[55] In today's realist age, that

[54] For instance, that they are in incapable of fulfilling legal duties presumed to go along with personhood. *But see* Will Kymlicka and Sue Donaldson, *Animals and the Frontiers of Citizenship*, 34 OXFORD J. L. STUDIES 201-219 (2014) (proposing political rights for domesticated animals, including cattle and dogs, who they point out are the most dutiful and law abiding of creatures).
[55] II BLACKSTONE, *supra* note 18, at 94.

looks like a formalistic fantasy. Whatever faith one might have in liberal systems of legal rights, no one seriously claims they are a one-way ratchet for freedom. But that doesn't mean that the kind of opportunity Blackstone sees is non-existent.

We often struggle to come up with pragmatic descriptions of the rule of law. Since laws are necessarily dreamed up and applied by human beings, it can be hard to explain what makes a society governed by a rule of law different, let alone better, than one governed by thoughtful all-things-considered policy decisions. I am trying to suggest that a partial answer lies in the way legal rules can be read to produce results that are miles away from what the rule makers envisioned. It is easy to portray such interpretations as tricky in a shady, disreputable sense. But in my view, these legal tricks are not a defect in a legal system, they are part of the design. Following the rules tricks us into going places we would not go if we could see in advance where they would lead. That is one reason rules are so useful for a rule of law.

Those on top of social hierarches rarely give up that privileged position knowingly. The capacity of rules to fool people into commitments they would otherwise not make is therefore a mechanism that helps realize the claim that a rule of law can produce a more just society. It is rules' trickiness that sets in motion forces rule makers cannot contain, that at once generates and unearths the unrecognized meaning that was there all along, and "reveals the plenitude" of the legal world.