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Blackstone, Expositor and Censor of Law Both Made and Found

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Blackstone, Expositor and Censor of Law Both Made and Found

Jessie Allen

> To the province of the *Expositor* it belongs to explain to us what, as he supposes, the Law *is*: to that of the *Censor*, to observe to us what he thinks it *ought to be*.
>
> ■ Jeremy Bentham[1]

Blackstone's great contemporary antagonist Jeremy Bentham charged the *Commentaries* with mixing up finding and making. Blackstone purports to be an "expositor" of common law as he finds it, but, says Bentham, by giving "*reasons* in behalf of it" he justifies and remakes law as he thinks it ought to be.[2] At a more substantive level, Bentham complains that Blackstone's account of judicial decision making confuses law making with law finding. According to Bentham, Blackstone costumes judicial invention as discovery, obscuring the way judges make new law while pretending to uncover legal meaning that was there all along.[3] Bentham's critique of judicial phoniness persists to this day in claims that judges are "politicians in robes" who pick the outcome they desire and rationalize it with doctrinal sophistry.[4] Such skeptical attacks are typically met with attempts to defend doctrinal interpretation as a partial or

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[1] J Bentham, *A Fragment on Government* , JH Burns and HLA Hart (ed), (London, 1776; Oxford, Oxford U Press 2010) 397.
[2] Ibid 399.
[3] J Bentham, *A Comment on the Commentaries*, JH Burns and HLA Hart (ed), (Oxford, Oxford U Press 2010) 192-206.
[4] *See eg* Linda Greenhouse, 'Law in the Raw', *New York Times*, Nov. 12, 2014; Hon. Diarmuid F. O'Scannlain, 'Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation', 101 *Va. L. Rev. Online* 31 (2015)..

occasional substantive limit on judicial policy making. I want to take a different approach. I view the judicial performance of legal interpretation described in the *Commentaries* as a kind of ritual in which Blackstone participates.

Now Bentham might respond that I have just proved his point. In the mainstream modern view, ritual is quintessentially false and irrational – empty ceremony that distracts us from reality, the polar opposite of reasoned discourse. If legal decision making is like ritual, in Bentham's eyes that just goes to show the fallaciousness of common law. After all, ritual deploys or embodies a kind of fiction, which to Bentham is anathema: "By the priest and the lawyer, in whatsoever shape fiction has been employed, it has had for its object or effect, or both, to deceive."[5]

But there is another way to think of ritual. On this account, ritual's fictional performance is not intended to deceive. Rather, as Seligman et al put it, "ritual creates a subjunctive, an 'as if' or 'could be' universe."[6] Ritual practitioners "act as if the world produced in ritual were in fact a real one. But they do so fully conscious that such a subjunctive world exists in endless tension with an alternate world of daily experience."[7] So, while practitioners of the ritual of judicial discovery act as if they are finding objectively determined outcomes, they—and we--understand and acknowledge that subjective creativity is involved in producing those results. Taken as this kind of conscious practice, ritual is more like a play than a deception or delusion. Ritual

[5] J Bentham, *Fragment on Ontology* 199, [need Burns/Hart cite], quoted in Robert A Yelle, 'Bentham's Fictions: Canon and Idolatry in the Genealogy of Law', 17 *Yale J L & Humanities* 151, 169 (2005).
[6] A B Seligman, R P Weller, M J Puett, and B Simon, *Ritual and Its Consequences: An Essay on the Limits of Sincerity* (Oxford, Oxford U press 2008) 151.
[7] Ibid 25–26.

participants' commitment to acting as if they were part of an unconflicted world is directed not to finally resolving social conflicts or pretending that those conflicts do not exist. Rather ritual is a response to real conflict and disorder that is seen as effectively endless and so must be met with the endlessly repetitive work of artful, temporary reconciliation.

Bentham saw the performance of law finding as an apologetic strategy, a way for Blackstone and the common law judges he defended to justify the status quo and frustrate progressive reform. Ritual is often associated with maintaining traditional social structures, and in the U S today Blackstone continues to be claimed today by conservative "originalists" who treat the *Commentaries* as an authoritative guide to American law at the time of the country's founding.[8] But, while ritual cannot finally resolve real social conflicts, it need not always preserve a static social reality. Later in this essay I will discuss a recent U.S. federal appeals court decision that deployed the ritual of judicial discovery to expand protection for the rights of LGBT Americans.[9]

I. BENTHAM'S CONTRADICTORY CRITIQUE

There is a curious ambiguity in Bentham's criticisms of the *Commentaries*. According to Bentham, Blackstone has taken an incoherent common law system and "decked her out . . . to advantage, from the toilette of classic erudition: enlivened her with metaphors and allusions" to create an illusion of rationality.[10] But Bentham cannot make

[8] J Allen, 'Reading Blackstone in the Twenty First Century and the Twenty First Century through Blackstone', in W Prest (ed), *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* 224-25 (Oxford, Hart Publishing 2014).

[9] *Hively v Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir 2017) (en banc).

[10] Bentham, *Fragment on Government* 413.

up his mind whether Blackstone is the perpetrator or the victim of this falsely tricked out law. Sometimes he paints Blackstone as a conscious manipulator, a dissembling common law partisan who "chuckles over the supposed defeat of the Legislature with a fond exultation which all his discretion could not persuade him to suppress."[11] But at other times, Blackstone appears to be in thrall to his own wishful fantasies of common law perfection, caught up in a "design" that is "scarce recognized perhaps by our Author: but not the less likely to have governed him."[12]

For Bentham, something either is or is not law. Judicial decisions "are themselves among the ingredients of this same common law . . . or they are nothing."[13] Treating judicial opinions as "evidence" of common law is for Bentham simply fallacious. Blackstone's famous characterization of judges as "living oracles"[14] is "an appropriate similitude," Bentham observes, because it confers a mysterious power on both the law and the judges who declare it. It makes law, just "like certain Tyrants of the earth" inaccessible to ordinary humans and "perceivable only by means of these delegates: these judicial decisions."[15] We are left to wonder, however, whether Blackstone is a false prophet or deluded victim of this mystifying tactic.

Bentham derides Blackstone's assertion that judges who overrule precedents "do not pretend to make a new law, but only to vindicate the old one from misrepresentation."[16] But it is unclear whether Bentham views this as deliberate

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[11] Ibid 411.
[12] Bentham, *Comment on the Commentaries* 195.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid, quoting William Blackstone, *Commentaries on the Laws of England*, vol 1, W. Prest and D. Lemmings ed (London 1765, Oxford, Oxford U Press 2016) 52.

hypocrisy or pathetic credulity or both. It reminds Bentham of the way religious believers rationalize sacreligious behavior. The judge who insists that by contradicting precedent he is correcting old law, rather than making new law, is like a Jew with "a Christian relish for Westphalia Hams" who called the hams "stock-fish; and with the said stock-fish (retaining always his aversion for the flesh of swine) did fill his belly."[17] Likewise, "many a good Mussulman, who abhors the very name of wine, finds means to amuse himself with *brown water*."[18] Just so, says Bentham, a judge who disagrees with some prior decision "may overthrow it at his pleasure," so long as he does not say the previous ruling made bad law. Instead, "let him call it no law, and everything is as it should be."[19]

II. COMMON LAW AND THE COMMENTARIES AS RITUAL

Bentham's ambivalent characterizations of Blackstone as at once a fraud and a fanatic recall anthropologists' struggle to make sense of ritual participants' combination of knowledge and faith. The Victorian founders of the academic discipline of anthropology regarded ritual magic as definitionally false, and their perplexed reports echo Bentham's ambiguous critique. Thus E B Tylor asserts that a ritual practitioner is 'at once dupe and cheat', and 'combines the energy of a believer with the cunning of a hypocrite'.[20] The field anthropologists of the twentieth century, viewed the double consciousness of ritual practitioners in a less judgmental but still somewhat mystified light. E E Evans-Pritchard, in his classic field study of magic among the Ndembu, notes that the subjects and witnesses of ritual healing are well aware that the witch doctor palms and plants the

[17] Ibid 201, fn e.
[18] Ibid.
[19] Ibid 201.
[20] E B Tylor, *The Origins of Culture* (London 1871, Harper ed. 1958), 134.

charcoal bits he ostensibly extracts from his patient's body, yet remain convinced of the value of the ritual.[21] Likewise, Franz Boaz observes that among the Kwakiutl of the Pacific Northwest, 'It is perfectly well known by all concerned that a great part of the shamanistic procedure is based on fraud; still it is believed in by the shaman as well as his patients and their friends' and exposures of shamanistic sleight of hand 'do not weaken the belief in the 'true' power of Shamanism'.[22] Reflecting on this apparent psychological contradiction, Michael Taussig concludes that such exposures are far from mistaken. Instead, 'the success of such ritual lies not in concealing but in revealing trickery'.[23]

If such revelations of illusion do not destroy the meaning of the ritual, it must be because no one is fooled in the first place. Of course this raises the question of how and why rituals are 'successful', but however rituals 'work', it is not a matter of fraud or self-delusion. The crucial point is that within a ritual framework acting as if something is the case is not the same thing as believing, or trying to persuade others, that one's performance is a transparent reflection of fact-based reality. Consider the rites that accompany Trobriand Islanders' annual building of storehouses for the yam harvest, described by Bronislaw Malinowski. The complex spells performed to 'anchor' and secure the yam houses are grammatically addressed to the storehouses and yams themselves. But Malinowski observed that Trobrianders 'have not the slightest doubt that

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[21] E E Evans-Pritchard, *Witchcraft, Oracles and Magic Among the Azande* (abridged ed 1976) 107.
[22] F Boaz, *Kwakiutl Ethnography*, H Codere ed, (1966) 121.
[23] M Taussig, 'Viscerality, Faith and Skepticism: Another Theory of Magic', *In Near Ruins: Cultural Theory at the End of the Century*, NB Dirks ed, (Minneapolis, MN, U Minnesota Press 1998) 221.

the magic does not act directly on the substance of the food but on the human organism'.[24] The ritual acts *as if* it renders the yams impervious to human invasion. But the villagers understand the rite's effect as restraining hunger.

Though a form of make believe, ritual has the capacity to generate 'an irreducible change in quality of experience or situation of the participants'.[25] The yamhouse ritual works to improve the security of the yam houses, not because of false beliefs in its ability to alter physical reality but because through the ritual villagers commit themselves to the inviolability of the storehouses. In this view, ritually created order is not a sham. Like theatrical performers, ritual participants partake of what Joseph Roach calls 'double consciousness, the self-reflexive interaction of identity and role'.[26] Indeed part of what separates and defines a particular social action as a performance or ritual is this doubled quality. And note that ritual work is never finished but needs to be renewed endlessly, through repeated performances according to a prescribed schedule. Ritual's presentation of a smooth, univocal reconciliation of conflict is a creative act, whose repetition is necessitated by the persistently broken and inharmonious real world. Cultures that take ritual as central "understand the world as fundamentally fractured and discontinuous, with ritual allowing us to live in it by creating temporary order."[27]

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[24] B Malinowski, *Coral Gardens and Their Magic:* Vol 1 (Bloomington, IN, Indiana U Press 1965) 128.
[25] E Schieffelin, 'On Failure and Performance: Throwing the Medium Out of the Séance', *in The Performance of Healing,* C Laderman and M Roseman ed, 59, 64 1995).
[26] J Roach, *Cities of the Dead: Circum-Atlantic Performance* (New York, Columbia U. Press, 1996) 1.
[27] A B Seligman, R P Weller, M J Puett, and B Simon, *Ritual and Its Consequences: An Essay on the Limits of Sincerity* (Oxford, Oxford U press 2008) 11.

Of course, Bentham would not be convinced by my attempt to vindicate common law's social value as a kind of ritual. From his instrumental perspective, it must be either true or false that judges find legal outcomes by applying pre-existing legal principles. Judges who act and speak as if they are being guided by preexisting doctrines are either deliberately deceiving the public or they are themselves caught up in a fantasy. Attacking Blackstone's description of judges' reliance on precedent, Bentham pounces on what he sees as an exception that swallows the rule. A judge, says Blackstone, is 'sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one'. [28] Nevertheless, a judge may diverge from precedent if the prior decisions are 'most evidently contrary to reason'.[29] But how, Bentham asks, can a judge know when a prior decision is 'contrary to reason'? The judge 'cannot go round the world and count suffrages', and so must resort to his own judgment.[30] Blackstone's rule of judicial interpretation, then, boils down to a command to follow precedent, 'unless it is most evidently contrary to what you like'. [31] As if that were not bad enough, after Blackstone gives judges a license to pick the legal outcomes they personally prefer, he proceeds 'to teach a Judge that is self-willed, by what sophistry he may varnish over his presumption', explaining that when judges diverge from an unreasonable precedent, they 'do not pretend to make a new law, but to vindicate the old one from misrepresentation'.[32] When a precedent is rejected as 'absurd or unjust, it is declared, not

[28] Ibid 196, quoting Blackstone *Commentaries*, Vol I 52.
[29] Ibid 197.
[30] Ibid 198.
[31] Ibid.
[32] Ibid 200, quoting Blackstone *Commentaries*, Vol I 52.

that such a sentence was *bad law*, but that it was *not law'*.[33] Bentham is practically apoplectic at what he regards as sheer hypocrisy: A judge is free to disregard precedent, so long as 'he does not say it was bad law: let him call it no law, and everything is as it should be'.[34]

From the ritual perspective I have been expounding, however, treating a divergence from precedent as finding the law's true meaning is not a way to hide or shirk responsibility for law making. It can be viewed instead as a creative enactment of the judge's sublimation of her own will to the direction of the law, "making, not faking" a commitment to impartial judgment.[35] The judge acts as if preexisting law determines the outcome, as 'a means of performing the way things ought to be in conscious tension with the way things are'.[36] And in the rigorous, repeated performance of that 'ought to be', the judge performs his commitment to make every effort to reason impartially. Like the Trobrianders, who act as if their harvest rituals change the nature of the yams and their storehouses to protect the harvest, we might see judges as acting as if doctrinal reasoning actually determines outcomes, all the while conscious of their performance as an imaginative creation that works, if it works, to affect their own outlook. From the ritual perspective, then, Bentham's criticism of common law as "a thing merely imaginary" misses the point.[37] As a ritual, common law is indeed a product of imagination; that is the source of its power.

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[33] Ibid.
[34] Ibid.
[35] D Conquergood, *Performance Theory* 154, quoting V Turner, *From Ritual to Theatre: The Human Seriousness of Play* 93 (1982).
[36] Seligman et al.
[37] J Bentham, *Comment on the Commentaries* 119.

III. BLACKSTONE CELEBRATES LEGAL INVENTION

But does Blackstone recognize the creative "as if" nature of the legal doctrines and procedures he describes? Or does he, as Bentham suggests, naively take them for objective reality or deceitfully attempt to conceal their artifice?

Bentham chose to focus his critique entirely on Blackstone's Introduction to the *Commentaries*, the most abstract part of the work's four volumes. Reading just that text, it is hard to tell whether Blackstone means to describe judicial decision making as a process in which judges somehow really escape their subjective limits, or a conventional practice of acting *as if* judges find rather than make law.

In other parts of the *Commentaries*, however, Blackstone comments directly on the ingenious inventions of common law's creative practitioners. Bentham probably would regard these acknowledgments of legal creativity as further demonstrations of the fundamental falsehood of the judicial performance of law finding. But it is virtually impossible to read these later sections and maintain a belief that Blackstone himself believes that common law materializes according to some transcendent master plan or that he is trying to convince his readers that legal reasoning is a simple matter of following preexisting rules.

Consider the discussion of the law of future estates, which Blackstone explains "contains some of the nicest and most abstruse learning in the English law."[38] The shift from feudal land grants in exchange for personal service to a relatively free market in real estate is not presented as the result of some shadowy common law divination or a natural evolution of social custom. Blackstone is very clear that changes in legal structures are

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[38] Blackstone Vol II 110.

the human handiwork of individual practitioners whose skill at legal artifice should inspire both respect and suspicion. For instance, Sir Orlando Bridgman and Sir Geoffery Palmer are credited with the "invention" of the doctrine of remainders.[39] And Blackstone is almost gleeful when he explains how "a method was invented" to get around the rule that only direct descendants of the original purchaser could inherit property.[40] The legal fiction of the *feudum novum* to hold *ut feudum antiquum* treats newly purchased real estate as if it has been in the purchaser's family for centuries. That way distant cousins can inherit it "because they might have been of the blood of, that is descended from, the first imaginary purchasor."[41] In other words, Blackstone presents the legal structure of hereditary descent, 'the principal object of the laws of real property in England', as based on *imaginary* history.[42]

Or take Blackstone's description of the 'common recovery', an elaborate court procedure undertaken when legal restrictions would otherwise bar a property transfer. This proceeding is so twisted that Blackstone is 'greatly apprehensive that it's form and method will not be easily understood', and he spends three full pages detailing its choreography.[43] In a nutshell, two people who want to transact a legally prohibited sale of land go to court and act out a pretend collusive lawsuit. Note that although there is no real adversity between the parties, nobody is fooled by the charade. Everyone – judges, witnesses, and the public at large – recognizes this as a performance. Indeed, the broad hyper-artificial style of this legal theater is a little

[39] Ibid 115.
[40] Ibid 149.
[41] Ibid.
[42] Ibid 200.
[43] Ibid 242.

much for Blackstone's taste: 'such awkward shifts, such subtile refinements, and such strange reasoning'! he exclaims.[44]

There is no 'mask of mystery' here.[45] It is perfectly clear that the imaginary ancestral estates and pretend collusive lawsuits Blackstone describes are the deliberate creations of real live human lawyers. Moreover, the frankly invented nature of the common law doctrines and procedures Blackstone describes gives their results a provisional quality. Formalizing the steps for legal ritual creates a road map for undoing it, a pathway that can be retraced. What's done is done, but if we know how it was done it can be undone, too. Blackstone offers a concrete example in his description of the 500-year battle of institutional wits waged between Parliament and the church to, respectively, collect and avoid taxes. Once again creative lawyers are celebrated, especially the lawyers for the churchmen, 'who, Sir Edward Coke observes, in this were to be commended, that they ever had of their counsel the best learned men that they could get'.[46]

After reading Blackstone's account of how property law doctrines were developed, his introductory text on judicial interpretation looks different. The description of judges' reliance on precedent reads less like an ontological claim about the metaphysical status of law and more like an account of a conventional practice. After all, Blackstone does not write that judges never use their own judgment in determining legal outcomes, but rather that a judge is '*sworn to determine*, not according to his own private

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[44] Ibid 244.
[45] Bentham 410.
[46] Blackstone Vol II 184.

judgment, but according to the known laws and customs of the land'.[47] Nor does he say that judges who overrule precedent do not make new law, but rather that they 'do not *pretend to* make a new law.'[48] Rather than a claim that judges do not make law, this may be an observation that even when judges do make new law, they (and we) *say,* or 'pretend' that they are correcting a mistaken view of what the law has always been. Doubtless Bentham would view this equivocal language as further evidence of Blackstone's duplicity or confusion. But one can also read these ambiguous passages as careful descriptions of a conventional practice that partakes of ritual's ambiguous, doubled nature, an account that mirrors a practice in which judges act as if making were finding, and in so doing perform the sublimation of their individual will to the direction of law.[49]

V. Ritual and Violence

But why should Blackstone promote a dicey, ambiguous ritual approach to law? After all, like Bentham, he championed Enlightenment rationality and science. The great project of the *Commentaries* is to show how traditional common law embodies modern liberal political rights. The problem that both Blackstone and Bentham face is that liberal

[47] Blackstone Vol I 52, my italics.
[48] Ibid, my italics.

[49] Blackstone himself sometimes describes common law procedures in terms that suggest ritual performance. For instance, he suggests that common recoveries may have begun as a kind of '*pia fraus*', or pious fraud. Vol II 78.

rights sometimes conflict with government's monopoly on legitimate violence. Moreover, there is a built in contradiction in a 'rule of law' system in which legality is the warrant for government force, because every vindication of individual liberty bolsters the legitimacy of government power. (This, of course, was Marx's problem with liberal legal rights as an engine of social justice.) For Bentham, there is a possible solution to this problem. As a positivist who believes on the one hand that all individual rights are the product of sovereign authority, and on the other, that the social benefits of legal outcomes can be measured objectively, Bentham can imagine a world in which law is perfectly aligned with objective good. In such a world, the sovereign would have a fully legitimate claim to monopolize violence. Of course Bentham recognizes that reality as it stands does not meet that standard. But in principle, justice can progress, just as in the field of natural science 'knowledge is rapidly advancing towards perfection'.[50] In this purely positivist legal vision, it is possible to imagine the end of the conflict between legal rights as forestalling and justifying sovereign violence.

But in Blackstone's legal framework that combines positive law with natural rights, the conflict between justice and sovereign authority cannot be finally resolved. As Bentham observes, the natural-law concept that an unjust law is not law, taken literally, would justify, perhaps even necessitate, constant rebellion, for 'if no laws then is the enforcing them an act of violence without authority'.[51] Constant rebellion is obviously incompatible with stable sovereign government, but Blackstone is unwilling to give up on the idea of rights that transcend sovereign authority. Perhaps, then, he is inclined to

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[50] Bentham, *Fragment on Government* 393.
[51] Bentham, *Comment on the Commentaries* 55.

accept what amounts to a ritual approach to legal process as a way to negotiate the inherent contradictions between natural rights and sovereign power.

Blackstone seems to accept a picture of law as endlessly developing and requiring constant work to maintain whatever benefits have been achieved. As David Lemmings observes, Blackstone's historical account of English common law strongly suggests that 'the constitution of liberty that had been so painfully constructed was not guaranteed to be a permanent fixture'.[52] Nor does he ever suggest that there would be a way to construct a legal system in which individual liberty would be sure to prevail.

In contrast Bentham seems to think that if the legal system were to adopt what he sees as the measurable standard of utility, conflicts over legal results might be finally put to rest. The question of utility can, Bentham believes, be framed in terms of 'future contingent matters of fact'.[53] Faced with an inquiry into observable fact, disputing parties will eventually come 'at least to a visible and explicit issue'.[54] And this common ground of fact may, 'when thoroughly trodden and explored, be found to lead on to reconcilement at the last'.[55] Moreover, in a legal system guided by utilitarian principles, the 'arrangement that would serve for the jurisprudence of any one country, would serve with little variation for that of any other'.[56] Any bad law would be identified because 'the utility of it would be rendered suspicious, by the difficulty of finding a place for it'.[57] Thus, '[g]overned in this manner by a principle that is recognized by all men', progress

[52] Lemmings, 'Editor's Introduction to Book I', Blackstone I xx.
[53] Bentham, *Fragment on Government* 491-92.
[54] Ibid 492.
[55] Ibid.
[56] Ibid 416.
[57] Ibid.

could be made toward a universally applicable system of law.[58] The irony here is that it is the skeptic Bentham who accepts the *potential* for ultimate utopian legal harmony, even as he criticizes Blackstone's fictional harmonious present. He excoriates Blackstone's assertion that 'everything is now as it should be' in the current English legal treatment of heresy, but Bentham apparently believes a consistent commitment to utilitarianism could make everything as it should be in every legal system in the world for all time.[59]

IV. RITUAL AND REFORM

Ultimately, Bentham's critique cast Blackstone as an enemy of progress, such an avowed, 'determined and persevering enemy' that 'the interests of reformation' are 'inseparably connected with the downfall of his works'.[60] If progress means resolving the contradiction between rights and sovereignty, then Bentham is correct that progress is impossible in the legal scheme the *Commentaries* describes. Note that Blackstone's commitment to some kind of natural rights is shared by modern constitutional democracies, like the United States, that recognize rights that cannot be undone by positive law– e g, rights of reproductive choice, or race and gender equality. So long as we also remain committed to a system that makes legality the warrant for sovereign force, the boundary between law and justice cannot be dissolved or overcome once and

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[58] Ibid.

[59] Bentham lambasts Blackstone for the *Commentaries* approval of the treatment of heresy. Bentham, *Fragment on Government* 407, quoting Blackstone Vol IV 32. Bentham acknowledges in a footnote that Blackstone's complete statement is a bit more equivocal: "Every thing is now as it should be: unless perhaps that heresy ought to be more strictly defined, and no prosecution permitted, even in the ecclesiastical court, till the tenets in question are by proper authority previously declared to be heretical.' Ibid 407 n *n.*

[60] Bentham, *Fragment on Government* 394.

for all. But within that scheme, it is possible for substantive law and legal procedures to progress in the sense that they change in ways that reflect and help construct expanded categories of rights.

Bentham's characterization of Blackstone as a jurisprudential stick in the mud persists. The American judge most likely to invoke Blackstone in recent years was the late conservative Supreme Court Justice Antonin Scalia, who advocated "originalism," that is, reading legal texts as they would have been understood by ordinary readers at the time of their enactment. In a book on legal interpretation, Justice Scalia claimed Blackstone as a jurisprudential fellow traveler, declaring him "a thoroughgoing originalist."[61] But Scalia (and his co-author Bryan Garner) must have been relying more on Blackstone's conservative reputation than a close reading of his work.

To support their characterization of Blackstone as an originalist, Scalia and Garner point to a paragraph in the *Commentaries* discussing a fourteenth-century English statute that 'forbids all ecclesiastical persons to purchase *provisions* at Rome'.[62] Blackstone notes that the law 'might seem to prohibit the buying of grain and other victual', i.e., 'provisions' in common usage, but 'when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to vacant benefices by the pope were called *provisions*, we shall see that the restraint is intended to be laid upon such provisions only'.[63] In other words, rather than banning food purchases, the law

[61] A Scalia and B A Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul, MN Thomson/West 2012) 79.
[62] Ibid 80, quoting Blackstone I, 46. Oddly, they refer to the statute which Blackstone identifies as "a law of our Edward III," as an eleventh-century statute. Ibid.
[63] Blackstone I 46.

prohibited bribing the Roman officials who made religious appointments. Scalia and Garner read this passage to indicate Blackstone's view that giving a term in a medieval statute 'an 18th-century meaning, or the 21st-century meaning, would be utterly wrong'.[64] But Blackstone never mentions a temporal gap, or rejects a change in meaning over time. What's more, in addition to the specialized meaning of appointments to religious posts, 'provisions' apparently meant supplies in the fourteenth century just as it did in later times.[65] So Blackstone's point seems not to be about original versus contemporary understandings at all, but rather that statutes should be understood in light of their context and what he calls their 'subject matter'.[66]

Blackstone never contends that a statute's purpose, or, subject matter, must be understood as limited to what the enacting legislators themselves or their contemporaries envisioned. Arguably, the passage of time and a changing social context could reveal, rather than obscure, how the law's subject matter should be understood. If new methods of bribery developed involving clerical appointments, the old law might well be found to prohibit these new forms of a 'purchase of provisions at Rome'. Nothing in the *Commentaries* rules out this type of dynamic statutory meaning.

Blackstone does seem committed, though, to the idea that new legal interpretations should be presented as corrections rather than creations of new legal rights. Recently, Blackstone was prominently cited in a federal court opinion

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[64] Scalia and Garner 80.

[65] The Oxford English Dictionary etymology of 'provision' offers both meanings with thirteenth and fourteenth century dates for the word's Anglo-Norman origins, although the first example for the specific definition "a supply of food" is dated 1555 while the first entry for the definition 'appointment to a see or benefice' is from 1387.

[66] Blackstone I 46.

reinterpreting a 50-year-old statute to protect LGBT Americans against employment discrimination.[67] In my view, that particular citation is questionable, but not because it is being used to liberalize rights. The problem is that the concurrence in which it appears explicitly rejects the performance of judicial discovery. In contrast, the majority opinion in the same case, which does not cite Blackstone, offers a textbook example of ritual law finding undertaken to expand individual rights.

In *Hively v Ivy Tech Community College of Indiana,* an adjunct professor who believed that her contract was not renewed because she is a lesbian, sued under the Civil Rights Act of 1964.[68] The Act forbids discrimination 'because of [an] individual's race, color, religion, sex or national origin'.[69] For many years, however, U S courts have interpreted the prohibition on sex discrimination to exclude sexual-orientation discrimination, and the trial judge dismissed Hively's complaint on that basis. An appellate panel affirmed the dismissal on the same ground, but the appellate court then voted to rehear the case *en banc* and reversed the panel's decision. In a remarkable about face, the majority of judges concluded that the statute forbids discrimination on the basis of sexual orientation and overruled prior case law to the contrary.[70]

According to the *Hively* majority, recent U S Supreme Court cases recognizing same-sex couples' constitutional right to marry cast new light on the meaning of the sex discrimination forbidden by the Act.[71] Among other things, reading the statute to allow sexual orientation discrimination led to the 'bizarre results' that 'a person can be married

[67] *Hively v Ivy Tech Community College*, 853 F. 3d 339 (7th Cir 2017).
[68] 853 F. 3d 339 (7th Cir 2017 en banc).
[69] 42 USC Section 2000e-2(a).
[70] *Hively*, 853 F. 3d at 340-41.
[71] Ibid 349-50.

on Saturday and then fired on Monday for just that act'.[72] The appellate court's own precedents held that 'discrimination based on sexual orientation is somehow distinct from sex discrimination', and so was not covered by the statute.[73] After taking 'a fresh look at our position in light of developments at the Supreme Court', the court rejected its previous interpretation of the statute and held that the ban on sex discrimination includes sexual-orientation discrimination.[74] Indeed, the court explained 'that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex'.[75]

Judge Richard Posner joined the majority and wrote a separate concurrence claiming Blackstone as a guiding spirit of the court's decision.[76] Posner is a well-known iconoclast, Scalia antagonist, and Blackstone fan, so besides bolstering the majority's legal reasoning, his citation may well have been aimed at reclaiming Blackstone for a more progressive jurisprudence. In this case, however, Posner's claim to Blackstone's blessing seems as dicey as Scalia's characterization of Blackstone as an originalist. The problem is not the substantive outcome or the need to overrule settle precedent to reach it. Nothing in the *Commentaries'* discussion of statutory interpretation precludes the court's expansive reinterpretation of the Act. And Blackstone's view that precedent contrary to natural rights can and should be overruled is clearly compatible with the *Hively* decision. Rather the problem is that Posner calls on Blackstone to authorize exactly the sort of explicit law making that the judicial ritual of law finding avoids.

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[72] Ibid 342.
[73] Ibid 341.
[74] Ibid 341.
[75] Ibid 351.
[76] Ibid 352-57, Posner, J, concurring.

Focusing on another example from the same page of the *Commentaries* cited by Scalia, Posner argues that Blackstone's approach to statutory interpretation supports 'a sensible deviation from the literal or original meaning of the statutory language'.[77] So far, so good, but Posner goes further. Declaring, 'We are Blackstone's heirs', he advocates acknowledging that the court's decision is 'rewriting' the anti-discrimination law to give it 'a new, a broader meaning' to 'update it to the present'.[78] Indeed, Posner urges the court to 'acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted'.[79]

As Bentham's critique points out, this sort of candid judicial lawmaking is quite contrary to Blackstone's account of judicial interpretation. Oddly, at first Posner seems to recognize the gap between this kind of overt judicial legislation and Blackstone's interpretive approach. Early in his opinion Posner names Blackstone as the definitive articulator of what he calls statutory 'interpretation by unexpressed intent'.[80] Initially Posner *opposes* that interpretive method to a more 'controversial' approach in which 'interpretation can mean giving a fresh meaning to a statement' in a statute 'that infuses the statement with vitality and significance today'.[81] Somehow by the end of Posner's opinion, however, these two different styles have been collapsed into one. The court's adoption of 'an interpretation that cannot be imputed to the framers of the statute' in order to serve the 'compelling social interest in protecting homosexuals . . . from

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[77] *Hively*, 853 F.3d at 352, Posner, J, concurring.
[78] Ibid 353-54.
[79] Ibid 357.
[80] *Hively*, 853 F. 3d at 352.
[81] *Hively* 853 F.3d at 352.

discrimination' is justified by Blackstone's allowance for 'a sensible deviation from the literal or original meaning of the statutory language'.[82]

Like Bentham, Posner has little use for doctrinal fiction. And like Bentham he realizes that 'a sensible deviation' from a statute's conventional reading can be expanded to produce virtually any interpretation a judge prefers – including one that contradicts the way a law has been understood for decades. So, from Posner's perspective, there is nothing to be gained from acting as if a judicial decision is correcting a previous misunderstanding, rather than boldly changing the law to suit the changing times. Moreover, and again like Bentham, the modernist Posner is uncomfortable with a judicial style that looks to him like duplicity. But where Bentham attacks Blackstone for advocating a false performance of judicial discovery, Posner treats the conventional law-finding performance as trivial. Discounting, rather than protesting, that performance leaves him free to claim Blackstone as an authority not only for a liberal result but for a candid law-making method.

The problem is that Blackstone apparently regarded the judicial performance of law finding as significant. Indeed, there is every reason to think that for Blackstone the performative means a court used to reach its results were as important as the substantive result. As Bentham's critique points out, Blackstone's descriptions of judicial method present the performance of judicial discovery as central to common law. For Bentham and Posner, judges' counterfactual performance of law finding is at best tediously conventional and self-aggrandizing and at worst downright deceptive. I have tried to show that engaging in a ritual of law finding is not the same thing as believing – or trying

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[82] Ibid at 355.

to convince others -- that judges actually unearth legal answers from preexisting authorities without creative intervention. But that is not the same as saying that the ritual of judicial discovery is meaningless. Posner's belief that he can just dispense with the performance of law finding is the flip side of Bentham's virulent attack. Because he shares Bentham's instrumental approach, any aspect of judicial decision making that does not actually contribute to substantive legal results is either pernicious or it is *nothing*.

Ironically, the *Hively* opinion with the greatest claim to Blackstonian inheritance never cites him. Written by Judge Diane Wood, the majority opinion is a classic example of judicial law reform enacted through a common law performance of judicial discovery. The stage is set with an express commitment to law finding:

> The question before us is not whether this court can, or should, 'amend' Title VII to add a new protected category to the familiar list of 'race, color, religion, sex or national origin.' Obviously that lies beyond our power. We must decide instead what it means to discriminate on the basis of sex.[83]

The court then proceeds to carry out its avowedly interpretive task in a way that produces a rather stunning remaking of anti-discrimination law. The key move involves a categorical reframing. Rather than distinguishing sexual orientation from gender identity, the opinion treats homosexuality as an extreme form of gender nonconformity. In this light, the lesbian plaintiff 'represents the ultimate case of failing to conform to the female stereotype', so the biased treatment she received is a kind of sex discrimination.[84] In a further irony, the opinion justifies this categorical shift with a 20-year-old Supreme Court

[83] Ibid 343.
[84] Ibid 346.

opinion written by none other than Justice Scalia.[85] There follows a discussion of the Supreme Court's recent cases recognizing same-sex couples' right to marry (in both of which Scalia dissented), after which the opinion declares that it 'would require considerable calisthenics to remove the 'sex' from 'sexual orientation', and maintain the longstanding understanding that the employment discrimination statute does not ban sexual-orientation bias.[86]

In this way, the *Hively* court performs a radical reform of employment rights as an interpretive adjustment necessary to reflect the true meaning of a statute that has been misinterpreted for decades. A dissent by Judge Sykes accuses the majority of exactly the kind of 'judge empowering' deception that Bentham charged Blackstone with promoting, a pretense of judicial interpretation undertaken 'to smuggle in the statutory amendment'.[87] But as I have argued, it seems wrong to understand the court's approach as deceptive. Who after all is it fooling? The harder question, is, What good could such a performance possibly do? Judge Posner brushes aside the majority's performance as unnecessary, and obviously the substantive results would be the same if the court adopted his (avowedly Blackstonian but actually Benthamist) approach and simply declared that expanding the statute was necessary for the good of society and in light of 'what this country has become'.[88]

To see the potential benefit of a judicial discovery ritual, it is necessary to think of judicial process as something other than an instrumental method for reaching legal

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[85] Ibid 344, citing *Oncale* v *Sundowner Offshore Servs. Inc.*, 523 US 75 (1998).
[86] Ibid 350.
[87] *Hively*, 853 F. 3d 360, Sykes, J dissenting.
[88] *Hively*, 853 F. 3d 357, Posner, J concurring.

outcomes. Only then is it possible to envision some real work that the ritual of deferring to common law might do. Performing ritual requires a temporary subordination of individual personality to the performed role. A ritual commitment to impartiality still leaves room for a failure to follow through. But acting out commitment is more than just saying something.

Conscientious formal doctrinal reasoning entails a complex, cognitively effortful series of actions that require skill, patience, attention to detail, and intellectual determination. The judge who undertakes to justify an outcome by precedent must coordinate her understanding and interpretation of the situation at hand with other judges' interpretations of previous cases and with all the preexisting legal authorities she has identified as relevant. Even if the judge reasons alone, she must consider previous judicial expressions of legal rules and principles and outcomes in other cases. In this sense at least, the ritual of doctrinal reasoning, like all ritual, "necessitate[s] an opening toward the other."[89]

In rule of law terms, then, the ritual of judicial discovery forces judges to perform the act of looking 'outside their own will for criteria of judgment'.[90] In fact, ritual in other contexts is sometimes described in terms that resonate with the rule of law ideal of sublimating individual preferences to a preexisting publically endorsed authority. Ritual, "the performance of more or less invariant sequences of formal acts and utterances not

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[89] Ibid.

[90] K J Bybee, *The Rule of Law Is Dead! Long Live the Rule of Law!*, in CG Geyh ed, What's Law Got to Do with It? 306 (2011), quoting L H Carter and T F Burke, Reason in Law 147 (7th ed 2007).

entirely encoded by the performers," is quintessentially social.[91] Seligman et al characterize ritual as a practice that 'creates and re-creates a world of social convention and authority beyond the inner will of any individual'.[92]

Like the Trobrianders who act as if their harvest rituals change the nature of the yams but understand the ritual as affecting their own appetites, we might expect judges who act as if they find outcomes in preexisting legal doctrine to see themselves as committed to impartiality and to at least attempt to fulfill that commitment. In the ritual framework, however, the state of mind of ritual participants is inconsequential. What matters is what they do. In the ritual of judicial discovery, judges turn away from their ordinary all-things-considered approach to decision making and toward preexisting formal legal texts in order to resolve conflicts. Whether those texts in fact direct or constrain the resulting legal outcomes, the ritual 'works' to generate a shared approach to a set of conflicts that cannot be ultimately resolved. Judges engaged in law finding rituals perform a repertoire of endlessly repeated behaviors that model an impartial rule of law. The judicial performers act as if their decisions are externally guided, but they, and we, "do so fully conscious that such a subjunctive world exists in endless tension with an alternate world of daily experience'.[93]

For progressive reformers, ritual's circularity and artificiality is frustrating. Bentham rails against its obvious illusions. Posner disdains its inauthentic denial of individual agency. But it seems that, like magic ritual in general, the ritual of law finding

[91] R A Rappaport, *Ritual and Religion in the Making of Humanity* (Cambridge 1999) 24.
[92] *Ritual and Its Consequences* 11.
[93] Ibid 25-26.

‘begs for and at the same time resists explanation most when appearing to be explained’.[94] Bentham and Posner’s skeptical critiques of conventional judicial reasoning are widely recognized as brilliant, yet neither seems to have made a dent in the legal cultural commitment to the performance of judicial discovery. In fact, one could see both Bentham and Posner as themselves ritual practitioners par excellence. At least, the form of their critiques is a familiar feature of ritual in other contexts. Michael Taussig observes that across multiple cultures, magic rituals incorporate a technique he calls the ‘skilled revelation of skilled concealment’.[95] Taussig retells the story of Quesalid, aka George Hunt, a Kwakiutl man who set out to unmask the tricks of his culture’s shamanic healers. As Quesalid ‘travels the land in search of truth and technique, and exposes other shamans as fakes’, he becomes known as a great shaman.[96] His exposures of shamanic sleight of hand convince the public and the shamans themselves that he ‘possesses a secret more powerful than their own’.[97] Like Quesalid, Bentham and Posner have unmasked ritual artifice. But rather than disenchantment, the unmasking seems only to have rendered the ritual more resilient and compelling.

[94] Ibid 241.
[95] Taussig, Viscerality, Faith and Skepticism 241.
[96] Ibid 232.
[97] Ibid.