Mischief and Snap Removal

Author : Howard M. Wasserman

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Samuel L. Bray, *The Mischief Rule*, 109 **Geo. L.J.** ___ (forthcoming 2021), available at SSRN.

Civil Procedure may mark 1Ls' first encounter with statutes and judicial interpretation and elaboration of statutory text. Some of the provisions in the canon are barebones to the point of meaningless without judicial elaboration— "short and plain statement of the claim" or a corporation's "principal place of business" have no obvious meaning. Other statutes and rules are more substantial and allow for deeper textual parsing. Either way, statutory analysis remains an essential component of the study of courts law.

Samuel Bray's *The Mischief Rule* reconsiders one rule of statutory interpretation that "instructs an interpreter to consider the problem to which the statute was addressed, and also the way in which the statute is a remedy for that problem." The mischief rule asks what evil or danger a statute intended to cure and how it remedies that evil or danger. While the rule dates to Elizabethan times, it is misunderstood by defenders and critics. Bray resituates the rule as a tool for all interpretive methodologies.

The conventional narrative places the mischief rule within four key historical jurisprudential moments. The first is *Heydon's Case*, a 1584 decision of the Court of the Exchequer; the second is Blackstone's *Commentaries on the Laws of England*; the third is Hart & Sacks *The Legal Process*; and the fourth is Justice Scalia's rejection in his book *Reading Law* and his opinion for the Court in *Oncale v. Sundowner Offshore Services*. But Bray argues that each moment misunderstands the rule. *Heydon's Case* is not a "manifesto" for purposivism, but a guide to not reading statutes in a vacuum. Blackstone did not fully separate mischief from other interpretive considerations. Hart and Sacks conflate the mischief rule with purposivism. And working from that same conflation, Scalia rejects the mischief rule because he rejects purposivism. The result is that courts and scholars "slide" between mischief and purpose, using them interchangeably.

But there is "daylight" between the concepts. Mischief or evil operates prior and external to the enactment of the statute—mischief is the social problem and the deficiencies in existing law that allow the social problem to persist. Bray frames it as a logical progression: "Because of *a*, the action *b*, so that *c*." The mischief is *a*, the social problem for which existing law is deficient and to which the statute responds; the legislative action is *b*, the statutory response to the mischief; the legislature's purpose or goal going forward is *c*. Whether one believes the third step should matter (the point on which Scalia departs from Hart and Sacks), the mischief represents a distinct concept and a distinct step.

So conceptualized, the mischief rule performs two textual functions. First, it provides a rational stopping point in defining the scope of a statutory term. Considering mischief could prompt a narrower interpretation or a broader interpretation; either way, it guides the interpreter, focuses her attention, and allows her to express an intuition about the statute. Thus, a slug or squirrel is not an "animal" on the railroad tracks for which a train must stop, where the mischief is valuable farm animals such as cows being killed and derailing trains. Second, it allows courts to adopt modestly broader interpretations to thwart "clever evasions" of the text that perpetuate the mischief. Thus, "cattle" includes sheep, to prevent ranchers from grazing livestock other than cows on Indian land without tribal consent.

Bray's rehabilitation of the mischief rule offers scholars and judges a solution to a current civil procedure problem—forum defendants and "snap removal." The forum-defendant rule prohibits removal of diversity actions from state to federal court where one of the defendants is a citizen of the forum state. Diversity jurisdiction alleviates the mischief of local bias (or anti-local prejudice) in state court by offering the non-local party a structurally insulated forum.

Congress recognized, however, that this mischief is not implicated where a non-forum plaintiff chooses to sue in the forum defendant's home turf; removal in such case is unnecessary to further diversity's purposes.

But the text precludes removal only where the forum defendant has been "properly joined and served." That language targets a different mischief—cases in which the real target of the lawsuit is a non-forum defendant (who needs the federal forum) and the plaintiff includes a forum defendant against which it does not intend to proceed. A plaintiff can frustrate the non-forum defendant's right to remove by including a forum defendant with no intention to even serve, keeping him in the case to prevent the non-forum defendant from removing. The "properly joined and served" language allows removal where the plaintiff never serves the forum defendant.

While protecting non-forum defendants from plaintiff gamesmanship, however, the text has enabled a clever evasion—the defendants, including forum defendants, snapping the case into federal court before the forum defendant can be served. Many district courts have allowed this practice despite its obvious inconsistency with the purposes of diversity jurisdiction and its obvious departure from congressional intent to proscribe removal by forum defendants. Other courts reject snap removal, but by express resort to legislative purpose and the absurdity canon to ignore or override plain statutory text. The Third Circuit even allowed removal where the sole defendant was from the forum, because the text was plain and the result not absurd.

Bray's conception of the mischief rule suggests a way out. Congress included the "properly joined and served" language in response to the mischief of plaintiffs including forum defendants for show. In Bray's logical progression: Because plaintiffs include unserved forum defendants for show (*a*), Congress limited the bar on removal to forum defendants properly joined and served (*b*), so that plaintiffs cannot frustrate non-forum defendants' right to remove (*c*). But that mischief is not implicated where the plaintiff obviously intends to proceed against the forum defendant but has not had an opportunity to serve and has time remaining to do so.

Applying the mischief rule, a court might interpret "properly . . . served" to mean served prior to expiration of the time permitted for service by the forum rules; this reading precludes removal before the time for serving the forum defendant has lapsed. By modestly broadening "properly" to account for the entire service period, the statute focuses on the mischief of a plaintiff naming a forum defendant for show with no intent to serve, while preventing the creative evasion. This interpretation broadens the statute to preclude removal when time remains to properly serve the forum defendant, even if service has not yet been effected, while allowing removal once service time lapses and it is no longer legally possible to properly serve the forum defendant.

Arthur Hellman and his co-authors propose allowing plaintiffs to serve forum defendants post-removal and for post-removal service to provide a basis for remand. But they argue that this resolution requires congressional action, because statutory purpose and policy goals are insufficient to overcome plain language. This new mischief rule does not involve a similar overriding of text. Rather, the mischief informs the text and colors the court's broader interpretation of the word "properly." Courts focus existing text on the evil Congress had in mind—frustrating non-forum-defendant removal by naming a forum defendant without intention to proceed). The mischief-focused interpretation permits removal when that evil is implicated, while excluding from the text and prohibiting removal in the different case that does not implicate that evil (when the plaintiff has not had a full opportunity to serve the forum defendant).

Bray does not have civil procedure in mind in his article. He focuses on statutes and cases involving discriminatory state taxes on railroads, fish as a tangible object that cannot be destroyed, and the meaning of sex under Title VII. But his paper offers a key to resolving an ongoing civil procedure conundrum.

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