

ESSAY

“DO JUSTICE!”: VARIATIONS OF A THRICE-TOLD TALE

*Michael Herz**

I remember once I was with [Justice Holmes]; it was a Saturday when the Court was to confer. It was before we had a motor car, and we jogged along in an old coupé. When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: “Well, sir, goodbye. Do justice!” He turned quite sharply and he said: “Come here. Come here.” I answered: “Oh, I know, I know.” He replied: “That is not my job. My job is to play the game according to the rules.”

Judge Learned Hand¹

There is a story that two of the greatest figures in our law, Justice Holmes and Judge Learned Hand, had lunch together and afterward, as Holmes began to drive off in his carriage, Hand, in a sudden onset of enthusiasm, ran after him, crying, “Do justice, sir, do justice.” Holmes stopped the carriage and reproved Hand: “That is not my job. It is my job to apply the law.”

Judge Robert Bork²

* Professor of Law, Benjamin N. Cardozo School of Law. Thanks to Larry Kramer, John McGinnis, Richard Weisberg, Chuck Yablon, and the participants in a faculty workshop at the Emory University School of Law for comments on earlier drafts, to Ray Henson, Tom Grey, Gerald Gunther, and Steve Loffredo for helpful correspondence, to Arthur Jacobson for talking through this material with me, and to Michael Jaffe (Cardozo '94) for helping track down a number of the versions of the “Do justice!” story discussed herein.

¹ Learned Hand, A Personal Confession, *in* The Spirit of Liberty 302, 306-07 (Irving Dilliard ed., 3d ed. 1960).

² Robert H. Bork, The Tempting of America 6 (1990).

Let me conclude with an old story about judges, law and justice. Learned Hand was visiting Washington and went to lunch with Justice Holmes. They walked back to the Capitol. The Court was still sitting there in the Old Senate Chamber. As they parted, Hand called, "Sir, do justice."

The old man turned on him fiercely, eyebrows bristling: "Justice? What's that? That's none of my business. Law is my business."

*Professor Abram Chayes*³

ALTHOUGH recent debates would suggest that narrative scholarship is brand new,⁴ lawyers, judges, and law professors, like all humankind, have always offered stories for illustration or support or to make a point in an indirect, and often more effective, way. Learned Hand's story about telling Justice Holmes to "do justice" is one widely-used example, offered by many writers in addition to Judge Bork and Professor Chayes. Its popularity is easy to understand. The story has a substantive message, pithily expressed, on a basic jurisprudential issue; it involves two members of the pantheon; and it crams a lot of human interest and historical flavor into a few lines.

The exchange between the two judges is part of an age-old struggle to define the relation of law and justice and to deter-

³ Abram Chayes, *How Does the Constitution Establish Justice?*, 101 Harv. L. Rev. 1026, 1041 (1988) (footnote omitted).

⁴ On the controversy over narrative scholarship, see Kathryn Abrams, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971 (1991); Jane B. Baron, *Resistance to Stories*, 67 S. Cal. L. Rev. 255 (1994); Jane B. Baron, *The Many Promises of Storytelling in Law*, 23 Rutgers L.J. 79 (1991) (book review); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 Vand. L. Rev. 665 (1993); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 Stan. L. Rev. 607 (1994); Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 Stan. L. Rev. 647 (1994); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 Stan. L. Rev. 807 (1993); Elizabeth J. Samuels, *Stories Out of School: Teaching the Case of Brown v. Voss*, 16 Cardozo L. Rev. 1445, 1446-51 (1995). See generally Symposium, *Legal Storytelling*, 87 Mich. L. Rev. 2073 (1989) (addressing questions of legal narrative and its "counterhegemonic" power).

mine to which the judge owes loyalty.⁵ Some distinction between law and justice, certainly as a descriptive matter and often as a normative one, is generally accepted. Law schools are famous for insisting on such a separation,⁶ and lawyers and nonlawyers alike easily accept the concept of an "unjust law" or a judicial decision that is "unfair" (or unjust) but "correct as a matter of law." The distinction is perhaps more often celebrated within the legal profession and more often lamented outside it.⁷

Holmes, of course, is particularly associated with what Anthony D'Amato and Arthur Jacobson label the "Separation Thesis"—the thesis that law is entirely separate and distinct from any value-system such as justice or morality.⁸ It was Holmes who famously proclaimed, "I hate justice." This sentiment is usually cited to a letter from Holmes to John Wu: "I have said to my brethren many times that I hate justice, which means that I know if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms."⁹ This strenuous

⁵ In a tribute to J. Skelly Wright, Justice William J. Brennan distinguishes the judge "who sees his role as guided by the principle that 'justice or righteousness is the source, the substance and the ultimate end of the law,' from the judge for whom the guiding principle is that 'courts do not sit to administer justice, but to administer the law.'" William J. Brennan, Jr., In Memoriam: J. Skelly Wright, 102 Harv. L. Rev. 361, 361 (1988). Justice Brennan notes that Holmes and Hand "have been associated with the latter view." *Id.* Similarly, G. Edward White distinguishes Earl Warren's natural law approach to judging from the position that "the proper decisionmaking calculus for an appellate judge should not include unarticulated notions of fairness and justice," of which Holmes' rejoinder to Hand is an example. G. Edward White, Earl Warren as Jurist, 67 Va. L. Rev. 461, 540 (1981).

⁶ For a discussion and critique of this tendency, see Symposium, The Justice Mission of American Law Schools, 40 Clev. St. L. Rev. 277 (1992). One important step toward exploring and to some extent erasing the distinction in legal education is Anthony D'Amato & Arthur J. Jacobson, *Justice and the Legal System: A Coursebook* (1992).

⁷ Thoreau aired a familiar complaint in his essay Civil Disobedience: "Law never made men a whit more just; and, by means of their respect for it, even the well-disposed are daily made the agents of injustice." Henry David Thoreau, *Civil Disobedience*, in *The Portable Thoreau* 109, 111 (Carl Bode ed., rev. ed. 1964).

⁸ D'Amato & Jacobson, *supra* note 6, at 234.

⁹ Letter from Oliver Wendell Holmes to John C.H. Wu (July 1, 1929), in *Justice Holmes to Doctor Wu: An Intimate Correspondence, 1921-1932*, at 53 (n.d.), and in *The Mind and Faith of Justice Holmes* 435 (Max Lerner ed., 1943). Similarly, Holmes is often quoted as having said that the Supreme Court is not a court of justice but a court of law. See, e.g., Eugene W. Hickok & Gary L. McDowell, *Justice vs. Law: Courts and Politics in American Society* (1993) ("I am always suspicious of an advocate who comes before the Supreme Court saying this is a court of justice; it is a court of law.") (unnumbered page); Andrew Roth & Jonathan Roth, *Devil's Advo-*

positivism is linked to the insistence on judicial restraint illustrated by Hand's story. We see the same stance in another familiar Holmes statement concerning the nature of his "job," a statement quite reminiscent of his reply to Hand:

I have been in a minority of one as to the proper administration of the Sherman Act. I hope and believe that I am not influenced by my opinion that it is a foolish law. I have little doubt that the country likes it and I always say, as you know, that if my fellow citizens want to go to Hell I will help them. It's my job.¹⁰

Happily, the existence or validity of the law/justice distinction is not my topic. Rather, it is how lawyers, judges, and commentators have used Hand's story that interests me here. I want to show how others have altered the story to make a point, enlist an ally, mock a foe, and generally create a narrative that better supports their own views on that topic.

To Hand, "Holmes was an unblemished idol on the bench."¹¹ Even discounting for the demands of the genre, Hand's two published tributes to Holmes display a boundless, even fawning, admiration.¹² Accordingly, he tells the "Do justice!" story

cates: *The Unnatural History of Lawyers* 124 (1989) (noting that Holmes made such an observation in "reprimand[ing] a youthful lawyer for his overenthusiasm"). See also *infra* note 78.

Perhaps because Hand himself quotes the "I hate justice" comment immediately before telling his own story, some have combined the two, telling a version of the "do justice" story in which Holmes tells Hand that his job is to play the game according to the rules *and* that he hates justice. See, e.g., Robert A. Ferguson, *Holmes and the Judicial Figure*, 55 U. Chi. L. Rev. 506, 544 (1988) ("The master craftsman and inspiring philosopher can also be the narrowest and most unattractive of tacticians. 'I hate justice,' he tells Learned Hand, '... That is not my job. My job is to play the game according to the rules.'").

¹⁰ Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), in 1 *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916-1935*, at 248-49 (Mark DeWolfe Howe ed., 1953) [hereinafter *Holmes-Laski Letters*].

¹¹ Gerald Gunther, *Learned Hand: The Man and the Judge* 345 (1994). See also *id.* at 403 ("Holmes was Hand's idol"); *id.* at 675 ("[I]nspiration came from his judicial idol, Oliver Wendell Holmes."). According to Felix Frankfurter, Hand "reverently called Mr. Justice Holmes 'the Master.'" Felix Frankfurter, *Learned Hand*, 75 Harv. L. Rev. 1, 1 (1961).

¹² See *Learned Hand, Mr. Justice Holmes* at 85, in *The Spirit of Liberty*, *supra* note 1, at 24; *Learned Hand, Mr. Justice Holmes*, 43 Harv. L. Rev. 857 (1930), *reprinted in The Spirit of Liberty*, *supra* note 1, at 57 [hereinafter *Hand, Mr. Justice Holmes*].

admiringly; it lies in the best-advice-I-ever-had category. Immediately after the portion set out above he says, “I have never forgotten that.”¹³ After all, Hand was (or at least perceived himself to be) thoroughly “commit[ted] . . . to the Holmesian point of view.”¹⁴ In his narrative, Hand characterizes himself as not really serious. Clearly, he knows the correction is coming—he welcomes and agrees with it and is just having a little fun by saying something both men know to be rather silly. To Hand, Holmes has something important to say about the judicial role; he himself has taken Holmes’ comment to heart and he wants his listeners to do the same.

Not everyone who retells this story, however, does so from that perspective. As the quite different versions of the story told by Bork and Chayes set out above illustrate, a difference in purpose and perspective can affect the details of the story itself. Those with less sympathy for Holmes’ position tend to adjust the factual details or to alter Holmes’ statement to cast him in a less flattering light. On the other hand, those who are relying on Holmes as an authority, making a “Famous Dead Person” argument,¹⁵ may adjust the facts or the quotation to fit their own model of the ideal judge.

I have gathered all of the versions of this oft-recounted story I could find. (Most are set out in the Appendix.) While it is not quite true that the story is never told the same way twice, the variation is impressive. In this Article, I explore the ways in which people telling the story get it wrong. Through a variety of subtle alterations to Hand’s account, the story is made to serve the recounter’s own purposes.

¹³ Hand, *supra* note 1, at 307.

¹⁴ Letter from Learned Hand to Walter Lippmann (Mar. 3, 1926), *quoted in* Gunther, *supra* note 11, at 386.

¹⁵ The term is from Michael S. Ariens, *Dutiful Justice*, 22 St. Mary’s L.J. 1019, 1020 (1991) (reviewing Sheldon M. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* (1989)). Ariens uses the term to describe the tendency to accept certain arguments merely because they are advanced by a “famous dead person.” Holmes is often the famous dead person invoked in such arguments. For an explicit example of such a use of the Holmes/Hand story, see *South Dakota v. Rufener*, 392 N.W.2d 424, 431 (S.D. 1986) (Henderson, J., dissenting) (telling the story and chiding the majority for ignoring the rules of evidence, explaining, lest anyone miss it, that “[t]he great Holmes, of course, meant that justice was to be achieved by application of objective legal rules”).

I. BACKGROUND

We cannot consider how the story has been altered without first agreeing on an original or correct version. That task is easier than one might fear. The first quotation set out above is from an oral presentation by Judge Hand at an ALI/ABA conference on Continuing Legal Education held at Arden House in December 1958. This was the winter after Hand had delivered the Holmes lectures at the Harvard Law School, a few months before the special session of the Second Circuit marking Hand's half-century on the bench. Hand was 86. The Arden House talk is included in the third (1960) edition of *The Spirit of Liberty*, Irving Dilliard's collection of Hand's incidental writings and speeches, under the title *A Personal Confession*. Hand himself chose the Arden House talk to conclude that volume.¹⁶ Though best-known through *The Spirit of Liberty*, the talk has also been reprinted elsewhere.¹⁷

While the Arden House talk is the best-known source of Hand's story, it was hardly the only occasion on which Hand recounted it. It appeared in print as early as 1926.¹⁸ Gerald Gunther, who clerked for Hand in 1953-54, recalls having heard the Judge tell it in his presence "at least a couple of times."¹⁹ No doubt the story has also travelled verbally, on separate (though overlapping) tracks than its written versions. I know of only two other accounts directly from Hand himself, however. Both are nearly identical to and closely contemporaneous with the Arden House version. First, it was one of three stories

¹⁶ Hand, *supra* note 1, at 302.

¹⁷ The speech, or the relevant portion thereof, is set out verbatim in Ruggero J. Aldisert, *The Judicial Process* 184-85 (1976); Charles P. Curtis, *Law As Large As Life: A Natural Law for Today and the Supreme Court as its Prophet* 156-60 (1959); Eva H. Hanks, Michael E. Herz & Steven S. Nemerson, *Elements of Law* 38 (1994); Justice Holmes *Ex Cathedra* 229 (Edward J. Bander ed., 1966); Harry C. Shriver, *What Gusto: Stories and Anecdotes About Justice Oliver Wendell Holmes* 10 (1970).

¹⁸ Elizabeth Shepley Sergeant, *Oliver Wendell Holmes*, *The New Republic*, Dec. 8, 1926, at 59, 63. Sergeant's essay was reprinted as *Justice Touched With Fire*, in *Mr. Justice Holmes* 183 (Felix Frankfurter ed., 1931) [hereinafter *Sergeant, Justice*], and is usually cited to that volume. Except when referring to the 1926 publication in particular, I will cite to the 1931 collection, which is more readily available than the *New Republic* of December 8, 1926.

¹⁹ Letter from Gerald Gunther to Michael Herz (June 7, 1994) (on file with the Virginia Law Review Association).

about Holmes that Hand supplied to Mark DeWolfe Howe in 1959 when the latter was working on Holmes' biography,²⁰ and second, it is set out in a 1960 letter from Hand to Professor Ray Henson.²¹

Whether Hand's account is itself historically accurate is not important for present purposes. The point is that he seems to have been quite consistent in how he told it. Indeed, the letter to Professor Henson shows that it mattered to Hand that the details and the quotation be correct, suggesting he was probably consistent in telling it. Most importantly, the Arden House talk is widely available and wholly dominates all other sources. Thus, in considering how the story has been altered in the retelling, it seems reasonable to take the Arden House version as the original.

II. THE NARRATIVE

A. *Incidental Factual Errors*

Various accounts of the Hand-Holmes exchange modify the facts. For example, although it is too little too late, Hand several times receives the promotion to the Supreme Court he was denied while still alive.²² One version identifies Holmes'

²⁰ Letter from Learned Hand to Mark DeWolfe Howe (Apr. 29, 1959) (attachment 2) (on file at Harvard Law School under Hand Papers, Box 90, File 31).

²¹ Letter from Learned Hand to Ray Henson (Jan. 11, 1960) (on file with the Virginia Law Review Association), *quoted in* Ray D. Henson, Preface to *The Law of Sales* ix (1985). Hand quotes Holmes as stating: "Young fellar, that is not my job. My job is to play the game according to the rules."

²² Those who mistakenly refer to "Justice Hand" include Michael A. Hammer, Comment, *The Constitutional, Judicial and Social Pitfalls Attendant to the Criminalization of Prenatal Maternal Substance Abuse: A Plea for Governmental Uniformity and Mercy*, 22 Seton Hall L. Rev. 1456, 1500 n.214 (1992), and George F. Will, *The Tempting of America*, Newsweek, Dec. 4, 1989, at 96. Will's error is quoted without correction in George Anastaplo, *Bork on Bork*, 84 Nw. U. L. Rev. 1142, 1154 (1990) (reviewing Bork, *supra* note 2).

One author recounting the story refers to "Judge Learned Hand of the New York Court of Appeals." Jack Harrison Pollack, *Mr. Justice, Mr. Politics*, N.Y. Times, Sept. 7, 1982, at A23. While Hand did sit on a Court of Appeals in New York, it was not, of course, the New York Court of Appeals. Like "Justice Hand," this misstatement also awards Judge Hand a judicial post that he missed during his lifetime. In 1913 Hand was the Progressive Party's candidate for Chief Judge of the New York Court of Appeals. Refusing to campaign or make any public appearances because he was a sitting judge, Hand garnered only 13% of the vote. Gunther, *supra* note 11, at 233-

interlocutor as Louis Brandeis, whom Holmes addresses as "Louie."²³ Another puts them in an automobile.²⁴ And several add the dramatic touch of having the two men part on the steps of the Supreme Court.²⁵ Indeed, Judge Joseph Bellacosa milks the Supreme Court setting for all its worth, noting that the exchange took place "on the steps of the imposing Tribunal on whose upper pediment appears the frieze message: Equal Justice Under Law."²⁶ Unfortunately, that "imposing Tribunal" was completed only after Holmes' death; Hand's story takes place outside the Capitol, where the Court sat until 1935.

Others do not alter the basic facts, but they invent additional details. While everyone agrees that the two men were going to the Court (that being a narrative necessity if Hand's admonition is to make sense),²⁷ there is disagreement as to where they were

37.

²³ Emil Poggi, Letter to the Editor, N.Y. Times, Sept. 25, 1988, §4, at 24 ("No, Louie," Holmes replied, "that is not our job. We are here to enforce the laws, not to do justice.").

²⁴ During Justice Breyer's confirmation hearings, Senator Cohen told the nominee the story, describing Hand and Holmes as "driving in an automobile past the Supreme Court." Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Comm. on the Judiciary, 103d Cong., 2d Sess. 230 (1994) [hereinafter Breyer Hearings].

²⁵ See Gary J. Aichele, Oliver Wendell Holmes, Jr.: Soldier, Scholar, Judge 140 (1989); Electronic Mail Message from Steven Loffredo to Michael Herz (Sept. 20, 1994) (on file with the Virginia Law Review Association) (describing "the two giants strolling toward the base of the Supreme Court stairs; as Holmes ascends, Hand calls after him"). Mark Tushnet's account is ambiguous in this regard; he has Holmes "leaving to go to the Supreme Court." Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 108 (1988). Senator Cohen has Holmes and Hand driving "past the Supreme Court." See Breyer Hearings, *supra* note 24, at 230.

²⁶ Joseph W. Bellacosa, Foreword, 1992 Annual Survey of New York Law, 44 Syracuse L. Rev. 1, 1 (1993).

²⁷ In one version of the story Holmes is on his way to the Court in the professional rather than the geographic sense. This takes place at a farewell dinner in Massachusetts. As Holmes was leaving the dinner, a guest reportedly said, "Now justice will be administered in Washington." Holmes replied, "Don't be too sure. I am going there to administer *the law*." Justice Holmes Ex Cathedra, *supra* note 17, at 213 (citing Butler, A Century at the Bar of the Supreme Court of the United States 50-51 (1942)) (emphasis in original). See also Peter Hay, *The Book of Legal Anecdotes* 226 (1989) (recounting an almost identical story); Wallace Mendelson, Justices Black and Frankfurter: Conflict in the Court 116 (2d ed. 1966) ("An old story has it that when Holmes departed to assume his duties on the Supreme Court he was admonished to do Justice. He responded thoughtfully that his job was merely to enforce the law."). It is possible that these really were two separate incidents, and Holmes had the good fortune to have a cooperative straight man not once, but twice. (It is even possible that Hand

coming from. In *A Personal Confession*, Hand does not tell us.²⁸ Many others, however, feel the need to do so. The most popular addition is that they had gone out to lunch together,²⁹ though some have Hand simply accompanying Holmes to work in the morning³⁰ or running into him on the street.³¹

Another sort of addition is to say when the exchange occurred. Hand does not give a date other than to say that it was "before we had a motor car."³² Some dodge the uncertainty as to the date, venturing only to say that the conversation took place "some years ago" (as of 1926),³³ "a very long time ago" (as

had heard the older story and, consciously or unconsciously, was replaying the scene.) My hunch, however, is that a game of telephone is being played here. The two stories are suspiciously alike not only in the verbal exchange, but in their narrative details: In both, someone calls out to Holmes as he is walking away, headed (though in this case more abstractly) for the Supreme Court.

²⁸ His letter to Professor Henson says that they were coming from Holmes' house. Henson, *supra* note 21, at ix.

²⁹ Bork, *supra* note 2, at 6; Chayes, *supra* note 3, at 1041; Terence Moran, *The Emperors Have No Robes*, Wash. Monthly, May 1992, at 41 (reviewing David Savage, *Turning Right: The Making of the Rehnquist Supreme Court* (1992)).

³⁰ William M. Wiecek, *Liberty Under Law: The Supreme Court in American Life* 76 (1988) ("Learned Hand once recounted an incident that occurred when he accompanied Justice Oliver Wendell Holmes, Jr., to work one morning."). See also Sergeant, Justice, *supra* note 18, at 206 (Holmes said to be "driving . . . to the Capitol one morning.")

³¹ Colin K. Kaufman, Comment, *Bringing Chaos Out of Order: Truth in Lending in the Courts*, 10 Ga. L. Rev. 937, 943 (1976).

³² Hand, *supra* note 1, at 306. A more diligent researcher than I could learn when that was. A few clues in recent biographies suggest that Holmes began riding in an automobile in the early or middle 1920s. Describing Washington in the 1920s, Liva Baker writes:

Like the rest of the country, Washington had adopted the automobile. Gas fumes and "vehicular casualties"—9,400 in 1925—deterred all but the most determined pedestrians, and parking problems—the entire Mall had become an open-air garage—dominated cocktail party small talk. Traffic congestion mounted. . . . Holmes resisted the automobile for some years and continued to take his daily drives in a hired horse and buggy, catching cabs for longer jaunts and, always, the train to Beverly Farms in summer. He finally succumbed to the "inevitable," but he never owned an automobile; he hired it by the month, complete with driver; that way, Holmes reasoned, he couldn't be sued.

Liva Baker, *The Justice From Beacon Hill: The Life and Times of Oliver Wendell Holmes* 585 (1991). In describing Holmes' routine "about 1925," Sheldon Novick writes: "The secretary would help him down the front steps when it was time for Charles Buckley, the coachman turned chauffeur, to drive him to the Court in a rented motorcar." Sheldon M. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* 354, 478 n.71 (1989).

³³ Sergeant, Justice, *supra* note 18, at 206.

of 1985),³⁴ and “many years ago” (as of 1992).³⁵ No one suggests that it took place outside of the period between 1902 and 1932, Holmes’ dates of service on the Court. But most of the possibilities within those 30 years are covered. One writer says it took place when Hand “was just beginning a celebrated judicial career of his own”³⁶ (Hand became a district judge in 1909), another that it occurred “late in [Holmes’] career”³⁷ (Holmes retired in 1932). We learn that the incident occurred “about 1915,”³⁸ and “in the 1920’s”;³⁹ that it occurred when Hand was in his sixties and Holmes in his eighties⁴⁰ (a time that, given the 31-year gap in the two mens’ ages, never existed⁴¹); that it occurred when the two were already “old friends.”⁴²

The errors (“Justice” Hand, steps of the Supreme Court, driving in an automobile, etc.) reflect carelessness more than anything else. Some are transferred from another source; others are perhaps sloppy but understandable. None is especially significant except as a testament to scholarly carelessness and a reminder that student citechecking is not perfect.

³⁴ Henson, *supra* note 21, at ix.

³⁵ Moran, *supra* note 29, at 41.

³⁶ *Id.*

³⁷ Aichele, *supra* note 25, at 140.

³⁸ Charles E. Wyzanski, *quoted in* The Work of Justice, *Time*, May 5, 1958, at 15, 17 n.*, *reprinted in* 104 Cong. Rec. 8237, 8238 n.3 (1958).

³⁹ William H. Harbaugh, *Lawyer’s Lawyer: The Life of John W. Davis* 264 (1973).

⁴⁰ Arthur S. Miller, *A Justice Who Did Justice*, *Wash. Post*, May 22, 1977, at E5 (reviewing Gerald T. Dunne, *Hugo Black and the Judicial Revolution* (1977)).

⁴¹ Hand was born in 1872, and so only turned 60 just after Holmes retired from the bench. Therefore the exchange could not have taken place when Hand was in his sixties. Holmes was born in 1841 and so was in his eighties from 1921 to 1931, a year before his retirement.

⁴² “One Saturday, old friends, Judge Learned Hand and Justice Oliver Wendell Holmes, shared a ride in a coupe.” James L. McAlister, *Comment, A Pigment of the Imagination: Looking at Affirmative Action Through Justice Scalia’s Color-Blind Rule*, 77 Marq. L. Rev. 327, 327 (1994). I concede some ambiguity in this sentence. It is possible that in referring to “old friends,” this author means two friends who were old, an interpretation supported by the statement, two sentences later, that “Hand decided to goad his older friend.” *Id.* Given that by the time Holmes and Hand were “old friends” they were also friends who were old, we need not resolve this puzzle. (It is also possible that the readership of the Marquette Law Review is just very elderly, and/or very loyal, and so appropriately addressed as “old friends” rather than, say, “dear reader.” However, the sentence’s last comma indicates that Holmes and Hand were indeed the friends in question.)

The *additions* (returning from lunch, a particular date) are more significant. They attest to the storyteller’s need to situate the narrative.⁴³ Doing so lends the tale authenticity—this really happened, here’s the spot—and, therefore, authority. Hand himself shows the same tendency. The details that the conversation occurred on a Saturday and that they rode in a horse-drawn carriage, for example, are irrelevant to the point of the story. They add to it nonetheless, just like the inventions of later narrators. Indeed, the additions arise out of the same impulse as choosing to tell the story at all, rather than just asserting “Justice Holmes favored (or, I favor) judicial restraint.”

B. *Meaningful Revisions*

The *particular* errors or additions described above are not an effort to turn the story into something it is not. Other factual modifications, in contrast, are less harmless. They result from a desire to have the story make a particular point. Those who, with Holmes, “hate justice” modify the story so as to make Holmes appear wise and thoughtful and Hand youthful and naive, or at least jocular. Those who, shall we say, “love justice” alter the facts so that Holmes becomes fierce, even monstrous, and dangerous. These changes have little or nothing to do with what the two men *say*; they are all in the style and the narrative detail.

Consider Robert Bork’s creative version:

There is a story that two of the greatest figures in our law, Justice Holmes and Judge Learned Hand, had lunch together and afterward, as Holmes began to drive off in his carriage, Hand, in a sudden onset of enthusiasm, ran after him, crying, “Do justice, sir, do justice.” Holmes stopped the carriage and

⁴³ There are occasional exceptions to the tendency to add facts, and they provide a lesson in how to tell a story. The comment discussed in the preceding footnote bucks the trend by deleting details. It begins, “One Saturday, old friends, Judge Learned Hand and Justice Oliver Wendell Holmes, shared a ride in a coupe.” *Id.* Now that is not exactly focusing in on the essential. The author continues, “At their destination, Holmes stepped down and walked away.” *Id.* The failure to identify the destination detracts from the force and the sense of the narrative. The whole point is that Holmes is on his way to the Court; it is there that he will, or will not, “do justice.”

reproved Hand: "That is not my job. It is my job to apply the law."⁴⁴

Bork goes on to quote from an opinion of his own in which "I meant something like that."⁴⁵ He wants to associate himself with Holmes. And he has a particular Holmes in mind: not the nasty, amoral believer that might makes right, but the wise voice of judicial restraint and the rule of law.

To this end, Bork decorates the story with a number of factual additions.⁴⁶ For example, he has Hand not merely call to Holmes but "r[u]n after him, crying" out his exhortation. The result is to make Hand (and thus his suggestion that Holmes "do justice") look somewhat ridiculous; his panting ignorance is contrasted with Holmes' calm, adult wisdom. Holmes does not "reply" or "respond," he "reproves," like a parent; Hand does not "say" or "urge," he "cries," like a child. Whereas Hand portrays himself as mischievous, Bork ascribes to him "a sudden onset of enthusiasm," underlined by the fact that he cries out "do justice" not once but twice. Hand is visceral, Holmes cerebral; Hand is a bit out of control, Holmes thoroughly in control.

Strikingly, Bork has Holmes drive away from Hand in the carriage. In both sources that Bork cites, as well as virtually every other telling of the story, both men get out of the carriage and Holmes walks away from Hand, who calls after him.⁴⁷ Leaving Holmes in the carriage has important consequences. First, as noted, it forces Hand to run after him in this rather silly fashion. Second, the merits of their substantive statements (and their relative judicial positions) are recapitulated in their physical relationship. Holmes is above, looking down on Hand below.

⁴⁴ Bork, *supra* note 2, at 6.

⁴⁵ *Id.*

⁴⁶ Bork cites two sources: the Sergeant piece from 1931 and Harry Shriver's collection of Holmes' quotes and stories, *What Gusto*, which in turn sets out Hand's Arden House speech. Both are inconsistent with Bork's version in every aspect I discuss in text, as well as with regard to what Holmes said, as I discuss *infra* at text accompanying notes 90-92.

⁴⁷ Judge Wyzanski seems to leave Holmes in the carriage as well, but does not have Hand run after him: "As they approached their destination, the district judge left the carriage and, waving farewell, called out, 'Do justice, sir.' Sharply he was summoned back." See *The Work of Justice*, *supra* note 38, at 17 n.* (quoting Judge Charles E. Wyzanski).

Moreover, he does not even turn; another detail present in virtually every other retelling of the story. Finally, while Bork is not completely clear, he gives the impression that Holmes is driving the carriage himself: "Holmes began to drive off"; "Holmes stopped the carriage." This both confirms that Holmes is in control—he is literally holding the reins—and enhances the impression of Holmes' competence. Not only is he America's greatest jurist, he can handle horses too. Needless to say, it is quite clear that in fact Holmes did not drive his own carriage; again, this is apparent from, if nothing else, the very sources that Bork cites.⁴⁸

In short, Bork modifies the story's details in important ways in order to be more sure of the effect. Others invoking Holmes as an authority describe his manner similarly. For example, a newspaper columnist who shares Bork's skepticism about judges who seek to "do justice" expressed his reservations about then-nominee Stephen Breyer thus: "Justice Holmes, a towering figure in our judicial history, didn't promise to make the law 'work for the people.' Holmes soberly and somberly declared that his job was simply to 'apply the law.'"⁴⁹ Similarly, Raoul Berger, quoting Wallace Mendelson, describes Holmes not as "sober and somber" but as "thoughtful": "It is said that when Holmes left the Massachusetts Court for the Supreme Court, 'he was admonished to do justice. He responded thoughtfully that

⁴⁸ Elizabeth Sergeant's version, which Bork cites, even includes a dated and awkward reference to "a highly respectable coloured coachman on the box." Sergeant, *Justice*, supra note 18, at 206.

Incidentally, Bork's version, complete with his citations, is repeated word for word, and without attribution, in *In re Funding Sys. Asset Management Corp.*, 111 B.R. 500, 502 (Bankr. W.D. Pa. 1990) (Markovitz, J.). Whereas Judge Bork includes citations but departs from his sources, Judge Markovitz is utterly true to his source but does not include a citation. Perhaps this is because the stuff we *really* like we try to pass off as our own; the stuff that is merely helpful we only adjust to fit our needs (as the freedom with which Hand's story is used, by Bork and others, shows). Cf. T. S. Eliot, *The Sacred Wood* 125 (3d ed. 1932) ("immature poets imitate; mature poets steal").

⁴⁹ Richard Grenier, Two Cheers, No More, for the Court in *Brown*, *Wash. Times*, May 25, 1994, at A17. Breyer himself, on the other hand, found *support* for his position in this story, asserting that Holmes' point was that the legal system must "work[] out for society in a way that is better for people rather than worse." Breyer Hearings, supra note 24, at 231. This peculiar interpretation is discussed infra at notes 98-102 and accompanying text.

his job was merely to enforce the law.”⁵⁰ These authors give us a Holmes who is firm without being fierce, leaving an impression of calm wisdom and patient forbearance.

Not all justice-haters portray Holmes as quite so calm. For example, in a book review in *The Washington Monthly*, Terence Moran dismisses as an “illusion” the view that legality and justice should correspond. He uses the “Do justice!” story to make his point. In his version, “The old man wheeled around, glared at his protégé, and fired back.”⁵¹ Moran portrays Holmes as somewhat fierce, but still thinking; the intensity of the response results from the benightedness of Hand’s suggestion. Indeed, a scent of betrayal hangs over Hand, the “protégé” who has erred so profoundly. William Wiecek, stressing that “a jurist betrays his responsibility and his oath when he decides according to the commands of conscience rather than law” renders Holmes less fierce, but similarly provoked.⁵² He describes Holmes as responding to Hand “with apparent agitation,”⁵³ again undercutting Hand’s substantive position.

Justice-lovers have two choices in portraying Holmes. One alternative is to suggest that Holmes didn’t really mean it. Louis Schwartz, in an article advocating judicial and lawyerly attention to justice, and to beauty as an element of justice, tries this tack, coupling it with a hint that Homer may have nodded. Describing positivism, he writes: “So great a man as Justice Oliver Wendell Holmes said, perhaps in jesting response to Judge Learned Hand’s admonition”⁵⁴ The other alternative is to undercut Holmes by portraying him as wilder and less thoughtful than the justice-haters characterize him. For example, Arthur S. Miller has him “thunder[ing] back” to Hand.⁵⁵

⁵⁰ Raoul Berger, *Government by Judiciary* 289 n.24 (1977) (quoting Mendelson, *supra* note 27, at 116). Berger and Mendelson seem to be combining Hand’s story and the farewell dinner story set out in *supra* note 27.

⁵¹ Moran, *supra* note 29, at 41.

⁵² Wiecek, *supra* note 30, at 76.

⁵³ *Id.*

⁵⁴ Louis B. Schwartz, *Justice, Expediency, and Beauty*, 136 U. Pa. L. Rev. 141, 148 (1987).

⁵⁵ Miller, *supra* note 40, at E5.

Abram Chayes offers the most striking reworking of the story along these lines.⁵⁶ For Chayes, Holmes' position is anathema. He tells the story as an example of a mistaken jurisprudence: "We know [Holmes' assertion] is not true. We know that law is inevitably concerned with justice. . . . [T]here is no way to talk about law without eventually coming to talk about justice."⁵⁷ In his account, when Hand called out "do justice," "The old man turned on him fiercely, eyebrows bristling."⁵⁸ Each word in this sentence is telling. First, Holmes has become "the old man"; an outsider, infirm, perhaps an anachronism.⁵⁹ More than that, he has lost his own name. Rightly or wrongly, that name is the most resonant and well-known in the history of the American judiciary. The switch from "Oliver Wendell Holmes" to "the old man" is a huge first step toward delegitimization. No longer the

⁵⁶ As we will see, Chayes' version is vastly removed from Hand's. Remarkably, notwithstanding his extensive alterations, Chayes does cite Hand's Arden House speech. He does so, however, only "[f]or Judge Hand's version of the story." Chayes, *supra* note 3, at 1041 n.78. Apparently Chayes was also present, he just remembers the exchange differently than did Hand. (I suspect that this formulation was a compromise between the editors of the law review, who felt obliged to find a cite for this story, and Professor Chayes, who was unwilling to change his version once the cite had been found.)

⁵⁷ *Id.* at 1041-42.

⁵⁸ *Id.* at 1041.

⁵⁹ Ironically, Hand himself captured the insult here when, in presenting Holmes' portrait to the Harvard Law School, he denied that Holmes, then 89, was old:

[W]hile we have been working along at mere terrestrial velocities, he has certainly not been growing old. Nobody can say that without flagrant disregard of the obvious, whatever be the records of our wretchedly defective means of counting time. If it be old to degenerate in will, mind, or feeling, patently he is not old. If it be old to be muffled by the body, so that a veil falls between us and our fellows, he is not old. If it be old not to understand youth, its joys, its aspirations, and its generous warmth, he is not old. If we measure youth by the power to assimilate what is new, by freshness of outlook, by sympathy, by understanding, by quickness of response, by affection, by kindness, by gentleness, by magnanimity, he is not old.

Hand, Mr. Justice Holmes, *supra* note 12, *reprinted in* Hand, *The Spirit of Liberty*, *supra* note 1, at 64-65.

The negative flavor of the "old man" is contextual. Referring to Holmes as the "old man" might also indicate his perseverance, toughness, or wisdom. See Moran, *supra* note 29, at 41 ("The old man wheeled around, glared at his protege, and fired back . . ."). Holmes described himself as "the old man" in a letter to Pollock upon his 70th birthday. Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Mar. 12, 1911), *in* 1 Holmes-Pollock Letters 178 (Mark DeWolfe Howe ed., 2d ed. 1961) ("Tell [Lady Pollock] the old man swept round the last post to the home stretch going strong.").

Yankee from Olympus, he is the Wizard of Oz revealed behind the curtain. Second, this old man does not turn *to* Hand, he turns *on* him, like an animal. As in Wiecek's account, there is a suggestion of betrayal, but now Holmes is the betrayer, suddenly "turning on" his friend. Third, Holmes' attack is "fierce," his "eyebrows bristling." Apart from the fact that if any eyebrows were bristling during this exchange they were Hand's famously exuberant ones,⁶⁰ this last touch confirms the animalistic imagery. Holmes is aggressive, angry, unreasoning. (It is probably going overboard to discover in the pair of bristling eyebrows a hint of an animal's, or the devil's, horns.) In short, Chayes flips the characteristics suggested by Bork's version; now Hand is cerebral, Holmes visceral.

More is at work here than just a desire to liven up the story, though that is part of it. Each narrator decorates the story with details that subtly support the substantive point being made. Of course, an important reason we tell stories is that they let us make points in indirect ways. Bork and Chayes purport to tell the same story, but their versions share little but the characters and the fact (invented) that they were returning from lunch. They are making different points and adjust the details accordingly. The modifications to narrative details are an indirect acknowledgement of the power of narrative. These narrators

⁶⁰ In addition to any photograph of Hand, see Lewis F. Powell, Jr., Foreword to Gunther, *supra* note 11, at xi (referring to Hand's "rugged square features and imposing eyebrows"); Gunther, *supra* note 11, at i (referring to Hand's "striking looks—he was a stocky, barrel-chested man with a square head accented by stiff, gray hair, thick bushy eyebrows, and large, piercing eyes"). Not that Holmes was a slouch in the eyebrow department. See, e.g., Baker, *supra* note 32, at 357 (referring to Holmes' "silver mustaches and unruly eyebrows"). Cf. William E. Schmidt, Gephardt Raises Eyebrows With His New Look, *N.Y. Times*, Feb. 1, 1988, at A22 (reporting that presidential candidate Richard Gephardt had taken to darkening his eyebrows for television appearances and quoting a political consultant's speculation that this may be "a case of eyebrow envy" in light of the fact that Michael Dukakis had "the most wonderful manly eyebrows of anyone who has ever run for President").

Hand's eyebrows are especially luxuriant—rising upward about as far as his face extends downward below them—in a caricature by David Levine in the *New York Review of Books* accompanying Ronald Dworkin's review of the Gunther biography. See Ronald Dworkin, *Mr. Liberty*, *N.Y. Rev. Books*, Aug. 11, 1994, at 17, 17. The editors also included a drawing of Oliver Wendell Holmes. *Id.* at 18. Direct eyebrow comparison is not possible, however, for unfortunately they chose a drawing of Oliver Wendell Holmes, Sr., not Jr. (The Autocrat of the Breakfast Table's eyebrows are pretty impressive too, but no match for Hand's.)

assert control over the factual details, which then become not just part of their narrative, but part of their argument.

C. Choice of Words

The impression this story makes results not only from the specifics of the action but from the words used to describe it. One example in particular tidily illustrates how, without changing any facts, the meaning of the story changes in the telling. Telling this story requires a verb for the protagonists' "speech acts." I discussed above how Robert Bork undermines Hand and legitimates Holmes by having the first "cry" and the second "reprove." Retelling the story as told by Judge Bork, conservative columnist George Will does not make Hand run after Holmes as Bork does. He achieves something of the same effect, however, by having Hand "exclaim."⁶¹ Michael Gerhardt and Tom Rowe also retell the story as told by Bork, but they are much less sympathetic to Bork's view of the judicial role than is George Will.⁶² In their version, Hand does not "cry" or even "exclaim"; rather, he "plead[s] with" Holmes to do justice.⁶³ The verb legitimates Hand's position in a way inconsistent not only with Bork's breathless version but with Hand's own account, in which his comment is at least partly tongue in cheek.

One popular term here is "admonish." Hand himself does not use this word, but many others do. They are revealingly divided, however, as to who is admonishing whom. The good guy always admonishes. Thus, when the justice-lovers tell the story, Hand

⁶¹ Will, *supra* note 22, at 96 (reviewing Bork, *supra* note 2).

⁶² See Michael J. Gerhardt, *Interpreting Bork*, 75 *Cornell L. Rev.* 1358 (1990) (reviewing, harshly, Bork, *supra* note 2).

⁶³ Michael J. Gerhardt & Thomas D. Rowe, Jr., *Constitutional Theory: Arguments and Perspectives* 161 (1993) (citing Bork, *supra* note 2, at 6).

"admonishes" Holmes;⁶⁴ when the justice-haters tell the story, Holmes "admonishes" Hand.⁶⁵

III. WHAT HOLMES SAID

People tell this story because of Holmes' statement about the judicial task. Both published versions from Hand himself have the same punchline: "That is not my job. My job is to play the game according to the rules."⁶⁶ Likewise, in the oldest published version, Elizabeth Shepley Sergeant's 1926 essay, Holmes says almost the same thing, though with a rather bizarre addition:

I am not here to do justice. I am here to play the game according to the rules. When I was at the bar and Lowell used to beat [me], I'd say to him: "Judge, your result may be good, but it's another game I undertook to play. I gave you a thrust in tierce and you countered with a bag of potatoes over my head."⁶⁷

⁶⁴ See Schwartz, *supra* note 54, at 148 ("Holmes said, perhaps in jesting response to Judge Learned Hand's admonition to 'do Justice': 'Young feller, that is not my job.'"). Wallace Mendelson, who himself feels the pull of both positions, reveals that ambivalence in his choice of words here. On the one hand, he has Holmes' (in this case unnamed) interlocutor "admonish" him to do justice. But this is balanced by having Holmes "respond[] thoughtfully that his job was merely to enforce the law." Mendelson, *supra* note 27, at 116.

Some narrators have Hand "enjoin" Holmes to do justice, which has a similar ring to it. See Howard T. Markey, *On Simplifying Patent Trials*, 116 F.R.D. 369, 370 n.2 (1987); Miller, *supra* note 40, at E5.

⁶⁵ See *In re George Cindrich Gen. Contracting*, 130 B.R. 20, 21 (Bankr. W.D. Pa. 1991) ("In admonishing Hand, Justice Holmes advised that it was not his duty or prerogative to do justice."); Bruce Fein, *On Reading the Constitution*, 90 Mich. L. Rev. 1225, 1228 (1992) (book review) ("Justice Holmes echoed those sentiments in admonishing Judge Learned Hand that the judicial duty is not to invoke a personal standard of justice but to play the game according to the rules."); Gerhardt, *supra* note 62, at 1392 ("Bork relates an anecdote in which Justice Oliver Wendell Holmes admonished Judge Learned Hand that Holmes's job was not to do justice . . . Bork praises Holmes for this admonition."); McAlister, *supra* note 42, at 327 ("That is not my job,' Holmes admonished."). I include Gerhardt among the justice-haters here because he is describing Bork's use of the story.

⁶⁶ Hand, *supra* note 1, at 307; Henson, *supra* note 21, at ix. In his letter to Howe, Hand quotes Holmes almost identically: "That is not my business. I am here to play the game according to the rules." Letter to Howe, *supra* note 20. On the change from "job" to "business," see *infra* notes 68-73 and accompanying text.

⁶⁷ Sergeant, *Justice*, *supra* note 18, at 206-07.

Who knows what to make of the reminiscence about Judge Lowell? Were it not written almost seven decades ago one might attribute its appearance to a problem with the word processor's cut and paste feature. In any event, Sergeant's version is essentially consistent with Hand's, varying only in the "I am here" in place of "My job is." Thus, all four "original" versions of the story—the three recorded versions from Hand himself and the oldest and only roughly contemporaneous version—have Holmes asserting that a judge is not to "do justice" but "to play the game according to the rules."

What does this mean? The comment is like a Holmes opinion: short, memorable, epigrammatic, inscrutable, and revealing much less than it purports to. Holmes' comment might be read as an insistence on judicial restraint, or as an endorsement of the separation thesis, or as a jurisprudential description of law as a set of rules. I think it is best read as a statement about the confines of the judicial role—a statement more of political science than jurisprudence. But, again, the "correct" understanding of Holmes' meaning matters less for present purposes than the way the quotation is altered to reflect one or another of these three ideas and to render Holmes' view admirable or indefensible. In a significant number of instances, Holmes' words are subtly, but importantly, altered. In what way exactly depends, once again, on whether the narrator wants to praise or trash Holmes and on the narrator's own preferred version of the judicial role.

Perhaps the most extreme liberties with Hand's version are taken by Professor Chayes, who gives Holmes' response as: "Justice? What's that? That's none of my business. *Law* is my business."⁶⁸ Chayes' article aims to establish that law is inescapably and appropriately concerned with justice. He modifies Holmes' statement of the contrary view, making "the old man" a straw man. As rescripted, Holmes asserts not merely that law and justice are unconnected, but that they are in direct opposition. Holmes does not even know what justice is; he has never heard of it. His tone is hostile and aggressive. Holmes mocks something most people (including positivists) value, whether

⁶⁸ Chayes, *supra* note 3, at 1041.

they think judges should be pursuing it directly or not. Holmes is not agnostic; he is malevolent and belligerent. He *must* be wrong.

Chayes makes one other subtle but significant change. Holmes referred to his "job"; Chayes has him refer to his "business." The two are not the same. A "business" is pursued for personal gain rather than the greater good; a "job" is a form of service. More importantly, "job" was a loaded term for Holmes. It connoted modest, practical, and nontransformative goals along with an intense concern for craft and professionalism.⁶⁹ Holmes liked to talk about his imaginary "Society of Jobbists," whose members turned their backs on reform and idealism in favor of concentrated and craftsmanlike attention to the task at hand.⁷⁰ Jobbists believed that in doing "one's job as well as one can one achieves practical altruism."⁷¹ Hand himself celebrated Holmes as a "Jobbist," developing the theme extensively in his tribute at the unveiling of Holmes' Harvard

⁶⁹ See Oliver Wendell Holmes, Speech at Bar Dinner, in *Collected Legal Papers* 244, 247 (1920). See also Thomas C. Grey, Holmes and Legal Pragmatism, 41 *Stan. L. Rev.* 787, 846-47, 859-61 (1989) (describing Holmes' "Jobbist" or "professionalistic" work ethic).

⁷⁰ See, e.g., Baker, *supra* note 32, at 96; Letter from Oliver Wendell Holmes to Harold J. Laski (Dec. 9, 1921), in 1 *Holmes-Laski Letters*, *supra* note 10, at 385; Letter from Oliver Wendell Holmes to John C. Wu (Mar. 26, 1925), in *Justice Holmes to Doctor Wu*, *supra* note 9, at 27 ("true view" of "the necessary foundation for a noble life" "was that of my imaginary society of jobbists").

⁷¹ Letter from Oliver Wendell Holmes to Lewis Einstein (July 17, 1909), in *The Holmes-Einstein Letters* 48 (James Bishop Peabody ed., 1964). See also Oliver Wendell Holmes, The Class of '61, in *Speeches* 95, 96 (1934) (telling 50th reunion of his college class that "the best service that we can do for our country [is] . . . to hammer out as compact and solid a piece of work as one can, to try to make it first rate, and to leave it unadvertised"); Oliver Wendell Holmes, Sidney Bartlett, in *The Occasional Speeches of Justice Oliver Wendell Holmes* 51, 54 (Mark DeWolfe Howe ed., 1962) ("[T]he beginning of self-sacrifice and holiness—is to do one's task with one's might."). Whether at bottom all this truly reflects the modesty and judicial humility that it, somewhat self-contradictorily, advertises may be doubted. G. Edward White says that in fact Holmes' paeans to Jobbism are "the logical culmination of his own self-confidence in being a gifted professional." G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 296 (1993).

Law School portrait.⁷² With Chayes' substitution of "business" for "job," all this disappears.⁷³

Mark Tushnet's changes are less extreme than Chayes', but in the same direction:

One day, as Justice Oliver Wendell Holmes was leaving to go to the Supreme Court, a friend said to him, "Well, off to do justice again!" Holmes is said to have replied, "Sonny, I don't do justice; I just make sure that people play by the rules."⁷⁴

By replacing "That's not my job" with "I don't do justice," Tushnet, like a clever lawyer at a deposition or on cross-examination, gets Holmes to condemn himself. Holmes' actual words leave open the possibility that justice will be done *because* judges play the game according to the rules, ensuring, to quote the Supreme Court frieze, "equal justice under law."⁷⁵ Indeed

⁷² Hand, Mr. Justice Holmes, *supra* note 12, at 62.

Of course, the Jobbists can be described unsympathetically as well. In a tribute to Judge J. Skelly Wright, Justice Brennan celebrates the fact that Skelly Wright was *not* a Jobbist:

Holmes' imaginary society of Jobbists is limited to judges who hold a tight rein on humanitarian impulse and compassionate action, stoically doing their best to discover and apply already existing rules. But judges acting on the former view [i.e., that the ultimate concern of law is justice], and Skelly Wright was one, believe that the judicial process demands a good deal more than that. . . . [A] just choice between competing alternatives has to be made to decide concrete cases.

Brennan, *supra* note 5, at 361-62. It was unnecessary for Brennan to observe to which camp he himself belonged.

⁷³ To be fair, Hand himself also substitutes "business" for "job" in one of his own accounts of the exchange. See Letter to Howe, *supra* note 20.

⁷⁴ Tushnet, *supra* note 25, at 108. Tushnet is virtually the only person to retell this story with Hand saying something other than simply the imperative "do justice." The tone of "Well, off to do justice again!" is hard to read; perhaps it is naively enthusiastic, perhaps sarcastic, perhaps self-conscious, perhaps belittling. Whatever it is, though, it is decidedly *not* a useful endorsement of justice-based judging. Tushnet goes on to attack such an approach as indeterminate and unworkable. He therefore has no stake in making Hand sound good either—quite the contrary. Thus, Tushnet tells the story in a way that undercuts both the Holmesian *and* the "do justice" positions.

Note also that Tushnet does not identify Hand. The reader does not know that the "friend" is famous, sophisticated, and supportive of Holmes' position.

⁷⁵ See *State v. Rufener*, 392 N.W.2d 424, 431 (S.D. 1986) (Henderson, J., dissenting) (interpreting Holmes to have meant that "justice was to be achieved *by* the application of objective legal rules") (emphasis added). In its more extreme (perhaps tautological) form, this view is not that justice is achieved because judges play by the rules, but that justice *consists* of playing by the rules.

both Holmes and Hand would endorse such a view of justice.⁷⁶ At the least, judges will achieve "justice as regularity" by playing according to the rules.⁷⁷ As Frederick Schauer has written, expressing a view to which Holmes would be sympathetic, "[a]n

"Justice" in this sense means legality; it is "just" for a general rule to be actually applied in all cases where, according to its content, this rule should be applied. It is "unjust" for it to be applied in one case and not in another similar case. And this seems "unjust" without regard to the value of the general rule itself, the application of which is under consideration.

Hans Kelsen, *General Theory of Law and State* 14 (1945). See also Roscoe Pound, *Justice According to Law*, 13 *Colum. L. Rev.* 696 (1913) (tracing the intersection of rules and judicial discretion in the administration of justice).

⁷⁶ Without being sidetracked on a lengthy discourse about Holmes' view of justice, I would only note that in his opinions, he tends to invoke the idea of justice where others might instead use the language of legality. What is "unjust" for Holmes is to impose requirements that cannot really qualify as law at all. Liability without notice or pursuant to changed, retroactive, invalid, or unknowable laws would be unjust; the substantive result itself is not a matter of justice or injustice as long as the proceedings are fair and, in particular, there has been no unfair surprise. See, e.g., *Atlantic Coast Line R.R. v. Burnette*, 239 U.S. 199, 200 (1915) (Holmes, J.) ("It would seem a miscarriage of justice if the plaintiff should recover upon a statute that did not govern the case, in a suit that the same act declared too late to be maintained."); *Western Union Tel. Co. v. Brown*, 234 U.S. 542, 547 (1914) (Holmes, J.) ("The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious . . ."); *Noble v. Gallardo y Seary*, 223 U.S. 65, 66 (1912) (Holmes, J.) (rejecting lower court's reliance on the doctrine of laches, since such an equitable principle was a quite recent introduction to the jurisdiction and "it would be unjust to apply [equitable] doctrines to the conduct of the parties during the many years that were not governed by any rule peculiar to chancery courts"); *Southern Ry. v. King*, 217 U.S. 524, 539 (1910) (Holmes, J., dissenting) ("It seems to me a miscarriage of justice to sustain liability under a statute which possibly, and I think probably, is unconstitutional, until the facts have been heard which the petitioner alleged and offered to prove."); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (Holmes, J.) (noting that it would be "unjust" for a country to impose liability for acts done in, and legal under the law of, another country). Similar invocations of justice are found in Holmes' opinions in *Western Union Tel. Co. v. Wilson*, 213 U.S. 52, 54 (1909); *Spreckels v. Brown*, 212 U.S. 208, 214-15 (1909); and *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905).

Holmes' catalogue of injustice is very much like Lon Fuller's catalogue of the "eight distinct routes to disaster" for a legal system; that is, the ways in which a system may fail to achieve something we can call "law" at all. See Lon L. Fuller, *The Morality of Law* 38-39 (rev. ed. 1969). Both rest on a fundamental principle that laws must be capable of being known and complied with.

As for Hand, see Kathryn Griffith, *Judge Learned Hand and the Role of the Federal Judiciary* 11 (1973) ("A common thread ran through his decisions—his deep concern for justice according to the rules as he understood them.").

⁷⁷ See John Rawls, *A Theory of Justice* 235-39 (1971).

agent who says, 'This is not my job,' is not necessarily abdicating responsibility. One form of taking responsibility consists in taking the responsibility for leaving certain responsibilities to others."⁷⁸

Professor Tushnet himself rejects this view of justice and of the judicial role.⁷⁹ Whether or not this view holds up, it is no

⁷⁸ Frederick Schauer, *Playing By the Rules* 162 (1991) (footnotes omitted). See, e.g., Mendelson, *supra* note 27, at 116-18 (interpreting the story to mean that justice results from each governmental actor's acceptance of its assigned task). Chief Justice Burger's use of the story has some of this feel, although it is awfully tentative: "Our duty . . . is not to do justice but to apply the law and hope that justice is done." *Bifulco v. United States*, 447 U.S. 381, 402 (1980) (Burger, C.J., concurring).

Here is another Holmes story, much like Hand's in many ways, that puts this thesis to the test. Three times Holmes denied stays for Sacco and Vanzetti, the last at 9:00 p.m. the night before their execution. After the second denial, he is reported to have told defense counsel: "I am convinced that these men did not get a square deal, but we cannot take the United States Government into State affairs and undermine the basic principles of the separate sovereignties of the State and Federal governments." Michael A. Musmanno, *After Twelve Years* 300 (1939). After Holmes had denied a stay, his clerk, Thomas Corcoran, ventured to ask, "But has justice been done, Sir?" According to Corcoran, Holmes replied:

Don't be foolish, boy. We practice law, not "justice." There is no such thing as objective "justice," which is a subjective matter. A man might feel justified in stealing a loaf of bread to fill his belly; the baker might think it most just for the thief's hand to be chopped off, as in Victor Hugo's *Les Miserables*. The image of justice changes with the beholder's viewpoint, prejudice or social affiliation. But for society to function, the set of rules agreed on by the body politic must be observed—the law must be carried out.

Baker, *supra* note 32, at 607-08 (quoting Thomas G. Corcoran & Philip Kopper, *Rendezvous with Democracy: The Memoirs of "Tommy the Cork"* 23-26 (unpublished manuscript in the Thomas G. Corcoran papers in the Library of Congress)). As Thomas Grey observed in drawing this passage to my attention, this is a suspiciously verbatim transcript. Nonetheless, Holmes' letters from around the time of the Sacco and Vanzetti execution do repeatedly return to this theme. While claiming that his "prejudices" lay with the condemned men, he insisted that their claim simply did not amount to a constitutional issue that would justify the federal judiciary's interference in this state prosecution. He defended himself against accusations of injustice by pointing to *legal* constraints that stood in the way of his pursuing justice. See Letter from Oliver Wendell Holmes to Harold J. Laski (Aug. 18, 1927), in 2 Holmes-Laski Letters, *supra* note 10, at 970-71; Letter from Oliver Wendell Holmes to Harold J. Laski (Aug. 24, 1927), in *id.* at 974; Letter from Oliver Wendell Holmes to Lewis Einstein (Aug. 14, 1927), in The Holmes-Einstein Letters, *supra* note 71, at 271-72. His actions in this case subjected Holmes to enormous criticism and some strain. Notwithstanding his repeated and somewhat impatient insistence that his hands were tied and that there was no basis for the issuance of a stay, this may have been the point in Holmes' professional life where the law/justice distinction was at its starkest.

⁷⁹ He makes this position clear in a well-known article with a title strikingly appropriate for the present discussion. See Mark Tushnet, *Following the Rules Laid*

longer even available under Tushnet's version (which would have been significantly milder had he had Holmes say, "I don't 'do justice'"). Here, Holmes himself asserts that he is unjust.

Tushnet's second change, from "my job is to play the game according to the rules" to "I just make sure that people play by the rules," also alters the meaning and effect of Holmes' statement. As reported by Hand, Holmes' comment seems to be about judicial restraint, emphasizing that there are limitations on the judicial role (though without revealing what those limitations are). It is the *judge* who is playing "the game," and *his* play is constrained by "the rules." On this reading, Holmes might still be read to preserve significant judicial discretion; he does not reveal what the judge's proper role is, only that it has firm boundaries and does not deputize the judge as, in Cardozo's words, "a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness."⁸⁰

As reworded by Tushnet, Holmes is instead making a comment about the nature of law, implying that it consists of a set of rules, like other games, such as chess or football. This is not Holmes the paragon of judicial restraint but Holmes the positivist. These two views of what Holmes was talking about—political science or jurisprudence—are of course connected. Our understanding of what "law" is will be reflected in our rules for judging. Furthermore, adhering to rules is in itself a form of self-restraint because it is a means of deferring to decisionmaking by others, i.e. those who made the rules. Applying rules allocates power among decisionmakers.⁸¹ As Justice Scalia in particular has emphasized, a jurisprudence of rule-following implies a norm of judicial restraint.⁸² Still, the two are not the same. Tushnet's rephrasing eliminates any ambiguity here in favor of the second viewpoint. Tushnet wants Holmes' point to be that law is only a set of rules, divorced from the pursuit of justice.⁸³

Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781 (1983).

⁸⁰ Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1925).

⁸¹ Schauer, *supra* note 78, at 161.

⁸² See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176-80 (1989).

⁸³ Stephen Diamond performs a similar reformulation of Holmes' words, though

Furthermore, as Philip Bobbitt pointed out in reviewing Tushnet's book, "[t]here is a world of difference between, on the one hand, trying conscientiously to play by the rules and, on the other hand, seeing your task as making others do so."⁸⁴ The latter implies an unempathetic haughtiness and a freedom from the rules for oneself. At best, this is the petty bureaucrat's unthinking rule fetishism; at worst it is a cynical and dictatorial abuse of authority.⁸⁵

Finally, Tushnet's insertion of the word "just"—"I don't do justice. I *just* make sure people play by the rules"—emphasizes, in a punning, sarcastic way, the gap between the ideal of justice and the reality of Holmes' jurisprudence. Tushnet means "just" in the sense of "merely"; the word play emphasizes the contrast between the two judicial goals.⁸⁶ Holmes is not "just" in the

without presenting it as an actual quotation:

[Holmes'] stance was that of a demoralized—in its nineteenth-century meaning, a state of being without moral concerns—aristocrat, simply holding every party to its agreements and to the rules, but without much confidence, or even interest, in the particular results. This demoralized perspective is central to Holmes' jurisprudence. Law is obedience to rules rather than a quest for justice.

Stephen Diamond, *Citizenship, Civilization, and Coercion: Justice Holmes on the Tax Power*, in *The Legacy of Oliver Wendell Holmes, Jr.* 115, 146 (Robert W. Gordon ed., 1992). Diamond states that "[a]ccording to Learned Hand, Holmes denied that as a judge he did justice, and admitted only to enforcing the rules." *Id.* at 283 n.115.

⁸⁴ Philip Bobbitt, *Is Law Politics?*, 41 *Stan. L. Rev.* 1233, 1301 (1989) (reviewing Tushnet, *supra* note 25).

⁸⁵ The same haughtiness comes through in a version of the story told to me by Professor Steve Loffredo of the CUNY Law School, who recalls (not with complete confidence) having heard it this way as a first-year law student of Professor Chayes. Hand calls to Holmes as the latter is ascending the Supreme Court stairs. "Holmes looks back disdainfully and replies from above, 'Justice, bah! I interpret the law.'" Electronic Mail Message from Steven Loffredo to Michael Herz, *supra* note 25. Here the sense of judicial disconnectedness is emphasized by Holmes' physical placement "above it all."

⁸⁶ To make clear that Holmes' definition of the judicial role is a modest one—indeed, to imply that it is *too* modest—many retellers invent some such adverb or phrase. See, e.g., Bellacosa, *supra* note 26, at 1 ("All we do here is apply the rules of the game!") (emphasis added); Diamond, *supra* note 83, at 283 n.115 ("Holmes denied that as a judge he did justice, and admitted *only* to enforcing the rules . . .") (emphasis added); Grenier, *supra* note 49, at A17 ("[H]is job was *simply* to 'apply the law.'") (emphasis added); Harbaugh, *supra* note 39, at 264 ("All we do is apply the rules of the game.") (emphasis added); Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 *Vand. L. Rev.* 1023, 1038 (1987) ("[T]he best that appellate judges can do is to ensure that the game is played by the rules.") (emphasis added); Mendelson, *supra* note 27, at 116 (Holmes

sense of right and moral; he is "just" a narrow rule-enforcer.⁸⁷

While the left adjusts Holmes' comment to make it appear especially harsh and blindered, the right does the opposite, modifying Holmes' statement so as to reveal, lo and behold, that Holmes was asserting the basic position of conservative jurists of the 1980s. In some cases, this is done by attributing to Holmes an additional elaborative or explanatory phrase. For example, conservative scholar and columnist Thomas Sowell of the Hoover Institution has Holmes say that his job was "to see that the game is played according to the rules, whether I like them or not."⁸⁸ Similarly, Bruce Fein has Holmes "admonishing Judge Learned Hand that the judicial duty is not to invoke a personal standard of justice but to play the game according to the rules."⁸⁹ These additions are arguably consistent with Holmes' comment, but not necessarily so. They are also somewhat anachronistic, owing at least as much to Edwin Meese as to Oliver Wendell Holmes.

Others reword the basic statement. We saw above, for example, that Robert Bork has Holmes say that his job is "to apply the law." This is a common formulation.⁹⁰ Both the sources

"responded thoughtfully that his job was *merely* to enforce the law.") (emphasis added).

⁸⁷ The pun could cut the other way, however, if playing the game according to the rules produces, or even defines, justice. On this view, the pun in Tushnet's "I just make sure" is more positive; it implies "I am just by making sure."

⁸⁸ Thomas Sowell, *Integrity Is the Issue*, *Forbes*, Oct. 28, 1991, at 90. Sowell's article is a familiar attack on the preoccupation in the judicial appointments process with where a nominee "stand[s]" on "issues." The tone, and message, is captured by the two sentences the editors set off, highlighted: "It has taken centuries of struggle by giants to establish 'a government of laws and not of men.' Today, pygmies are trying to reduce it all to a question of a judge's 'views.'" *Id.*

⁸⁹ Fein, *supra* note 65, at 1228.

⁹⁰ Those who rely on Bork as the source of the story repeat this phrase. See *In re Funding Systems*, 111 B.R. at 502; Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 *Duke L.J.* 1, 7 n.22 (1993); Gerhardt & Rowe, *supra* note 63, at 161; Grenier, *supra* note 49, at A17 (not attributing the story to Bork, but using this formulation and referring to Bork elsewhere in the article); Julius Menacker, *Legislative Withdrawal of Administrator Tenure: How Much Process is Due?*, 67 *Ed. L. Rep.* 411, 420 n.29 (July 4, 1991); Will, *supra* note 22.

But others also quote Holmes as saying that his job is to "apply the law," either without citation or with a citation to a source that gives the "play the game according to the rules" version. See Katharine L. Huth, *Garcia Revisited: The Age Discrimination in Employment Act's Application to Appointed State Court Judges*, 59

Bork cites give the quotation as "play the game according to the rules." Why would Bork find "apply the law" more congenial? The consequences of playing the game according to the rules depend on what those rules are, and Holmes does not tell us. It may be that the rules call for judges to pursue goals of justice or fairness in certain circumstances, to meliorate harsh requirements, to temper "justice" with mercy. Playing the game according to the rules might involve large interpretive freedom. In contrast, to say that judges "apply the law"—not make it, or even interpret it—emphasizes the limited range of judicial action and implies that law is simply an accumulation of rules.

Ironically, Bork's alteration is thus very much like Tushnet's. "Apply the law" and "make others play by the rules" are more like each other than either is like "play the game according to the rules."⁹¹ Tushnet and Bork both want Holmes to be endorsing the proposition that law is a relatively inflexible set of rules. However, Tushnet does so in order to bury Holmes, Bork in order to praise him. As a result, they use different reformulations: "apply the law" sounds responsible and sober; "make others play by the rules" sounds tyrannical and incomplete.

In one of the few examples of the use of this story in an opinion, Chief Justice Burger tracks Bork. In a concurrence in which he accepts the ordinary, though silly, meaning of the words of a statute, Burger emphasizes the judiciary's subordinate policy-making role and the importance of resisting the temptation simply to do "what we regard as the more sensible thing." "Our duty, to paraphrase Mr. Justice Holmes in a conversation with Judge Learned Hand, is not to do justice but *to apply the law* and hope that justice is done."⁹² The idea here is the same:

Fordham L. Rev. 403, 404 n.11 (1990); Thane Josef Messinger, A Gentle and Easy Death: From Ancient Greece to Beyond Cruzan Toward a Reasoned Legal Response to the Societal Dilemma of Euthanasia, 71 Denv. U. L. Rev. 175, 249 n.551 (1993) (citing Hand, *supra* note 1); Miller, *supra* note 40, at E5; The Work of Justice, *supra* note 38, at 17 (quoting Judge Wyzanski); Charles E. Wyzanski, Jr., Book Review, 90 Harv. L. Rev. 283, 285 (1976). See also Harbaugh, *supra* note 39, at 264 ("apply the rules of the game"); Bellacosa, *supra* note 26, at 1 (same); Justice Holmes Ex Cathedra, *supra* note 17, at 213 ("administer *the law*") (emphasis in original); Arthur Hill, Address at Memorial Service for Oliver Wendell Holmes at a Special Session of the Massachusetts Supreme Judicial Court, 298 Mass. 575, 600 (1937) (same).

⁹¹ See also Harbaugh, *supra* note 39, at 264 ("apply the rules of the game").

⁹² *Bifulco v. United States*, 447 U.S. at 401-02 (emphasis added). Burger at least is

judges are a cog (an important cog, but only a cog) in a wheel of the justice machine; for the machine to function, however, judges must do their appropriate part, which is merely law application.

A variation on Bork's variation appears in Professor Michael Gerhardt's quite scathing review of Bork's book.⁹³ Gerhardt writes: "In the book, Bork relates an anecdote in which Justice Oliver Wendell Holmes admonished Judge Learned Hand that Holmes's job was not to do justice but rather to *interpret* the law."⁹⁴ The change from "apply" to "interpret" is significant; interpretation implies a more broad-ranging and creative task than application. Three explanations for Gerhardt's misquote come to mind. One arises from the vocabulary of constitutional theory. Those in the Bork camp, favoring "judicial restraint," are "interpretivists." The second is that Gerhardt, consciously or not, wants to use the story himself, which he is retelling only incidentally. By making the choice between doing justice and *interpreting* the law, rather than between doing justice and *applying* the law, he shifts the whole debate a step toward a more active judicial role. Even the narrow position does not involve mechanical law-application, but the more creative and active task of interpretation.⁹⁵ Third, Gerhardt may just be using a more meaningful and accurate vocabulary. As suggested by the very fact that the Borkian position is "interpretivism," not

honest about paraphrasing.

⁹³ Gerhardt, *supra* note 62.

⁹⁴ *Id.* at 1392 (emphasis added).

⁹⁵ The exact difference between applying the law and interpreting the law would be hard to define precisely. However, the former is a narrower, more constrained task than the latter. See, e.g., *The Case of the Speluncean Explorers: Contemporary Proceedings*, 61 Geo. Wash. L. Rev. 1754, 1761 (1993) (mock opinion of Naomi R. Cahn) (noting that under an ethic of justice(!), as opposed to an ethic of care, "statutory *interpretation* becomes more of an exercise in statutory *application*") (emphases in original). Indeed, there is a corner of bankruptcy law that turns on exactly this distinction. Bankruptcy courts' jurisdiction is limited to issues arising under the Bankruptcy Act. Yet bankruptcy proceedings inescapably will involve some issues under other statutes as well. At some point those latter issues are sufficiently pronounced as to deprive the bankruptcy court of jurisdiction. The Second Circuit has held that withdrawal of the case from the bankruptcy court is mandatory if the bankruptcy judge must "engage in significant *interpretation*, as opposed to simple *application*, of federal laws apart from the bankruptcy statutes." *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991) (emphases added).

"applicationism," the notion that judging is simply law application cannot stand, at least in the constitutional arena.⁹⁶

With surprising frequency, then, those telling the story paraphrase Holmes' comment. As lawyers and law professors know well, the paraphrase almost always changes meaning. To play the game according to the rules is not the same as to apply the law, which is not the same as to interpret the law, which is not the same as to enforce the law, which is not the same as to see that others play the game according to the rules, which is not the same as to apply the rules of the game, and so on. In some cases, these are surely careless paraphrases that *might* matter but in context are irrelevant or at least innocent. In many others, however, the change is made so that the story works better for the story-teller's own purposes. The changes may be unconscious, but they are not insignificant.

IV. CONCLUSION

David Luban recently observed that Holmes' view of the judicial role may well be narrower than what most Americans actually want.⁹⁷ Despite the common lament that judges too often "legislate from the bench" instead of "interpreting the law," it is not at all clear that many people actually wish judges to adhere to Holmes' own description of his job: playing by the rules and helping the citizenry to Hell if it wants to go. The appeal of rule-based formalism tends to give way before that of

⁹⁶ As Ronald Dworkin has recently pointed out, Hand himself acknowledged as much:

[A]ll the notable attempts by constitutional scholars and judges to explain how [courts might exercise judicial review without second-guessing legislatures' judgment about fundamental moral principles]—from Herbert Wechsler's plea that judges develop "neutral" principles that nevertheless impose serious constraints on legislation to Robert Bork's attempt to show that *Brown* was right while all other liberal decisions of the last few decades were wrong—fail for a reason Hand saw clearly and most of his critics ignore. The great constitutional clauses set out extremely abstract moral principles that must be *interpreted* before they can be *applied*, and any interpretation will commit the interpreter to answers to fundamental questions of political morality and philosophy.

Dworkin, *supra* note 60, at 21 (emphases added).

⁹⁷ David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 *Duke L.J.* 449, 510-11 (1994).

preferred substantive results. This is one lesson of the rejection of Judge Bork's nomination to the Supreme Court; one way of describing the nomination's failure is that it resulted from Bork's endorsement of Holmes' description of his job.

Bork's stance can be contrasted with that of Justice Breyer, who dealt with the Hand/Holmes story directly. During Justice Breyer's confirmation hearings, Senator Cohen (R-Me.) told the "do justice" story, observing that Breyer had not in any of his statements promised to "do justice" and asking the nominee if that was because he agreed with Holmes.⁹⁸ Cohen's interpretation, predictably, was that Holmes had meant that courts should stay out of the legislature's way. Breyer acknowledged that that was part of what Holmes meant (never contradict a Senator during a confirmation hearing), but said that Holmes had something else in mind as well. Holmes saw "ultimately the vast object of this vast interrelated set of rules including rules that say whose job is what as working out for society in a way that is better for people rather than worse."⁹⁹ Breyer then launched into a set piece about his longstanding conviction that a judge needs both a heart and a head.

If you do not have a heart, it becomes a sterile set of rules, removed from human problems, and it will not help. If you do not have a head there is the risk that in trying to decide a particular person's problem in a case that may look fine for that person, you cause trouble for a lot of other people, making their lives yet worse.¹⁰⁰

It is extremely difficult to find any of this in "My job is to play the game according to the rules." As discussed above, one can read Holmes (and Hand) as arguing that justice is only possible through the rule of law, and so individual happiness will be enhanced if the judiciary abjures a roving commission to do good and yields to majoritarian preferences. Yet recall Holmes' other best-known description of his "job": "[I]f my fellow citizens want to go to Hell I will help them. It's my job."¹⁰¹

⁹⁸ Breyer Hearings, *supra* note 24, at 230-31.

⁹⁹ *Id.* at 231.

¹⁰⁰ *Id.*

¹⁰¹ Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), in 1 Holmes-Laski Letters, *supra* note 10, at 249.

Helping the citizenry on its way to Hell because of a foolish law hardly seems the same as ensuring that things “work[] out for society, in a way that’s better for people rather than worse.” And Breyer’s vision of the judge as social worker, dedicating himself to solving individuals’ problems, has no recognizable basis in Holmes’ reply to Hand or his thinking in general.¹⁰²

Through this strained interpretation, Justice Breyer manipulated the “Do justice!” story to make it seem to support his own substantive position and so serve his own political needs. The various retellings we have reviewed similarly turn the story to the teller’s advantage, but through direct *revision* rather than interpretation. The goal is to make the Holmes position appear either beneficent or unpalatable. This is done in two ways. One is to fiddle with the quotation itself. Subtle differences in wording matter; a good deal of the lawyer’s or law professor’s time is spent trying to understand such differences. We always want a good quote, even if we have to make it up ourselves. The second sort of revision is to the narrative details and the description of the events of the story itself.

What lessons can we draw from this exercise? I think there are a few.

¹⁰² Justice Breyer’s (mis)characterization of Holmes is a testament primarily to just how overwhelming is the pressure to put on a meaningless show during the confirmation process. Playing against type, he seized every opportunity to return to his newly discovered theme: law is to work for the people. The both-a-head-and-a-heart business is a particularly striking example of this confirmation conversion. Breyer portrays the judge as someone whose basic task is to help people with their problems. He needs both body parts not, as one might have thought, because empathy and reason are both important to judging. Cf. William J. Brennan, Jr., Reason, Passion, and “The Progress of the Law”, 10 Cardozo L. Rev. 3, 9-12 (1988) (arguing that law requires a dialogue between heart and head). Rather, he needs heart and head so that he can be empathetic both to the people before him, to whom his heart goes out, and to those who are not before him, to whom his head goes out.

Bork also offered an observation about head and heart during his hearings, and the contrast is strong. Addressing the shift in his own political views, Bork quoted Winston Churchill: “Any man who’s not a socialist before he’s 40 has no heart, and any man who is a socialist after he’s 40 has no head.” Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 437 (1987). Where Breyer came down firmly on the side of heart and empathy, Bork’s undoing was that he instead came down on the side of head and reason. See also *id.* at 854 (stating that he wanted to be on the Court because “it would be an intellectual feast just to be there and to read the briefs and discuss things with counsel and discuss things with my colleagues”).

First, with regard to lawyers and law professors: Time and again, we see subtle adjustments to help make the story more effective and appropriate for the teller's purpose. This tendency is hardly limited to lawyers, and among lawyers it is hardly limited to stories. Yet it does show (as if we needed a reminder) that one cannot trust lawyers and law professors to tell anything straight. It is therefore a caution to writers, and readers, to be alert to carelessness or bad faith. Small modifications often matter greatly.

Second, to some extent this exercise confirms a central theme of law-and-literature scholars: that the distinction between reality and its expression, between substance and form, is at least elusive and perhaps nonexistent.¹⁰³ If my discussion has shown nothing else, it has shown that in any given version of this story form and substance collaborate and merge. Some law-and-literature scholars might go further and argue that in the retelling of a story accuracy (substance) is no more important than, and perhaps indistinguishable from, how well the story is told (form).¹⁰⁴ Under this view, law is nothing but a story, one continually retold and thus remade.

Such an understanding raises the normative question whether the freedoms taken with Hand's tale should be welcomed or lamented. Thus far, the stance of this Essay has been implicitly critical of those who have altered Hand's story to fit their needs. Yet I do not wish to push that criticism too far. Whether the sort of modifications described above are troubling depends on the purposes for which a story is offered.¹⁰⁵ For example, if the "story" consists of the particular facts of a case, the outcome of

¹⁰³ For an elaboration of these themes of law and literature studies, see Richard Weisberg, *Poethics and Other Strategies of Law and Literature* 3-47 (1992).

¹⁰⁴ See *id.* at 6-10.

¹⁰⁵ For example, Professor Chayes, it seems, would be unmoved by the objection that he has told the story "wrong." In citing *The Spirit of Liberty* "for Judge Hand's version of the story," see *supra* note 56, he is implicitly acknowledging his own inaccuracy and asserting that it is less important than having an effective story. Read for all it is worth, Chayes' statement rests on an extreme historical relativism in which all accounts of past events are equally valid. I would not go so far. Nonetheless, we should not assume that "Judge Hand's version of the story" is itself precisely accurate. Hand too puts a spin on the story. In addition, he has selectively recounted this story from among all the possible stories about Holmes, or about law. This is not qualitatively different than what those who retell the story have done.

which turns on what version is accepted, then accuracy is of course critical and worth striving for even if unattainable. On the other hand, if the original "story" is the opinion in a prior, similar case, now elaborated, reinterpreted, and "retold" by later judges, what here seems careless or duplicitous might be celebrated as the genius of the common law.¹⁰⁶

This line of thought leads to an alternative jurisprudential lesson, somewhat at odds with the more obvious conclusion offered above about the need for precision, care, and good faith. To play the game according to the rules requires knowing what the rules are. Positivism in general presupposes that the law is knowable, external, and reasonably static. The variety in the retellings of this story hints that law can be none of those things. If these were not retellings of an old story, but rather lawyers' statements of the holding of a case, they would certainly pass the Rule 11 threshold. Yet how different they are. If we cannot even get a simple story right, how can we ever know the law and play the game according to the rules?

Third, with regard to Holmes: In 1971, G. Edward White wrote an article tracing Holmes' "rise and fall."¹⁰⁷ White shows how in each of six historical periods, both the strength and the nature of Holmes' varying reputation reflected the nature of the times themselves.¹⁰⁸ In the two-and-a-half decades since White's article, Holmes' reputation has continued to change. The examples of how the "Do justice!" story is used reveal something of how we might update White's article—how Holmes' current complex reputation is consistent with the tenor of our times.

Interest in Holmes has never been greater. The last few years have seen a spate of new biographies;¹⁰⁹ the University of

¹⁰⁶ See Lon Fuller, *The Law in Quest of Itself* 8-10 (1940).

¹⁰⁷ G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. Chi. L. Rev. 51 (1971).

¹⁰⁸ Specifically, White offers the following divisions: 1881-1902, Holmes as Scientist; 1903-31, Holmes as Progressive; 1932-40, Holmes as Myth (this period marking the height of the rise and the beginning of the fall); 1941-49, Demythologizing; 1950-59, Sense of Alienation; and 1960-71, Holmes and Libertarianism-Egalitarianism (a period in which Holmes' reputation reaches its nadir as he was dismissed as inhumane and too comfortable with basic inequities). *Id.* at 54-74.

¹⁰⁹ See Aichele, *supra* note 25; Baker, *supra* note 32; Novick, *supra* note 32; White, *supra* note 71.

Chicago is publishing, for the first time, a set of collected works;¹¹⁰ Judge Posner has edited a collection with the punning title *The Essential Holmes*;¹¹¹ the flow of law review articles has become a flood. We even have a new play¹¹² to add to "The Magnificent Yankee."¹¹³ All this despite the fact that we "know" Holmes was deeply flawed, both as a person and as a judge. The result is an ambivalent and somewhat paradoxical stance toward Holmes. Many individuals hold him in both awe and contempt;¹¹⁴ that ambivalence is even more prominent in his overall reputation. White was able to identify dominant, shared views of Holmes during times past. Identifying such a shared view would be much harder, if not impossible, to do today. To be sure, discerning single, dominant attitudes is always an easier task when describing the past than the present, but I also think this may be a particular sign of the times. Consider the Holmes we see just in the different versions of the "Do justice!" story: wrongheaded, wise, nasty, friendly, authoritarian, deferential, humorless, puckish, narrow, precise, disagreeable, appealing. It is perhaps appropriate to this scattered, diffuse, fractured age, and symptomatic of the overall lack of consensus in the legal academy in particular, that so many Holmeses are present simultaneously.

Finally, with regard to stories: Without entering into the firestorm over narrative scholarship, I would note that the pervasiveness of Hand's story, used by writers of every political stripe, should remind us that stories have always been, and should always be, part of argument, discussion, and exploration. No

¹¹⁰ The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes (Sheldon M. Novick ed., 1995). As of this writing, three of an anticipated five volumes have appeared.

¹¹¹ *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.* (Richard A. Posner ed., 1992).

¹¹² Rodney A. Smolla, *The Trial of Oliver Wendell Holmes*, 36 Wm. & Mary L. Rev. 173 (1994). Smolla's work might be said to be primarily about whether a judge should do justice or play by the rules. The dialogue closest to the Hand-Holmes exchange is set out in the Appendix, *infra*.

¹¹³ In fact, this half-century-old chestnut has also recently been dusted off. See Pamela Sommers, *Justice Holmes For All*, Feb. 9, 1996, at F2 (reviewing current production of the Emmet Lavery play).

¹¹⁴ For an insightful discussion of the ambivalence felt by one person, namely, Grant Gilmore, see Charles Yablon, *Grant Gilmore, Holmes, and the Anxiety of Influence*, 90 Nw. U. L. Rev. 236 (1995).

doubt there are stories and there are stories. One can endorse the occasional illustrative anecdote within traditional scholarship without accepting autobiographical or fictional narratives as stand-alone articles; there is a difference between using narrative to assist traditional scholarship and using it to replace such scholarship. Nonetheless, the power and value of a good story are inescapable. To return to the three versions of this story with which I began, neither Hand, nor Bork, nor Chayes *had* to include this story to make his point. Yet each thought that the point would be clearer and fuller if illuminated by the story.

I believe each was right. Indeed, the apparently irresistible impulse to modify the story is an implicit acknowledgement that the narrative itself, with all its attendant, apparently incidental, details, is important, rhetorically and substantively. By the same token, the unconscious ease with which those using Hand's story modify it reminds and warns us of how ready we are to find in a quotation or a story what we are looking for, like the careless scientist who adjusts the facts to fit the hypothesis. And the effectiveness of the changes reminds and warns us of how powerful a story can be.

APPENDIX

[Holmes] was to me the master craftsman certainly of our time; and he said: "I hate justice," which he didn't quite mean. What he did mean was this. I remember once I was with him; it was a Saturday when the Court was to confer. It was before we had a motor car, and we jogged along in an old coupé. When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: "Well, sir, goodbye. Do justice!" He turned quite sharply and he said: "Come here. Come here." I answered: "Oh, I know, I know." He replied: "That is not my job. My job is to play the game according to the rules."

Learned Hand, A Personal Confession, *in* The Spirit of Liberty 302, 306-07 (Irving Dilliard ed., 3d ed. 1960). This speech, or the relevant portion thereof, is set out verbatim in Eva H. Hanks, Michael E. Herz & Steven S. Nemerson, Elements of Law 38 (1994); The Oxford Dictionary of American Legal Quotations 185-86 (Fred R. Shapiro ed., 1993); Peter Hay, The Book of Legal Anecdotes 226 (1989); Ruggero J. Aldisert, The Judicial Process 263-64 (2d ed. 1996); Harry C. Shriver, What Gusto: Stories and Anecdotes About Justice Oliver Wendell Holmes 10 (1970); Justice Holmes Ex Cathedra 229 (Edward J. Bander ed., 1966); Martin Mayer, The Lawyers 520 (1966) (citing Curtis); Charles P. Curtis, Law as Large as Life: A Natural Law for Today and the Supreme Court as its Prophet 156-57 (1959).

It is quoted accurately, though only partially, in Donald Dale Jackson, Judges 331-32 (1974) (citing Mayer); Michael S. Ariens, Dutiful Justice, 22 St. Mary's L. Rev. 1019, 1023 & n.30 (1991) (citing Bander); and John Leubsdorf, Theories of Judging and Judge Disqualification, 62 N.Y.U. L. Rev. 237, 241 n.15 (1987) (citing Hand, A Personal Confession).

We were going downtown from "I" Street in a cab before he had a motor. We had a pleasant, as I remember it, chat about that decision of McKinna on the steel trust, which as you may remember was not the highest flight of judicial analysis. I made what I thought was a guarded statement to the effect that I was not sure that I understood it, to which the answer was "I didn't care a damn what he said, as long as he came out right."

But that is not what I want to give you of that day's talk. We came to the Capitol and got out: he was going to the usual 12 o'clock conference. I can see his figure retreating from me as I stood by the cab which was going to take me back uptown. He was bent but still vigorous, and by way of a parting shot that I knew would bring him round, I said: "Well, Sir, goodbye, do justice." He did turn around quite quickly for so old a man and beckoned to me, saying "Come here young fellar, come here." I came up to him saying, "I know, Sir, I know." When I got to him he said: "That is not my business. I am here to play the game according to the rules."

Letter from Learned Hand to Mark DeWolfe Howe (Apr. 29, 1959) (attachment 2) (on file at Harvard Law School under Hand Papers, Box 90, File 31).

I had gone down with him from his house to the court house,—then in the Capitol,—and the cab, for it was not a motor, was to take me back to the center of the city. I got out of the cab first and then he got out and as he was walking his way to the Capitol I said to him by way of jest: "Well, Sir, do justice." He turned around quickly, and beckoned me to come to him, which I did. He said: "Young fellar, that is not my job. My job is to play the game according to the rules."

Letter from Learned Hand to Ray Henson (Jan. 11, 1960), *quoted in* Ray D. Henson, *The Law of Sales* ix (1985) (on file with the Virginia Law Review).

When late in his career, a friend parted with Holmes on the steps of the Supreme Court, saying, "Well, Sir, Good Bye—Do justice!" Holmes replied, "that's not my job! My job is to play the game according to the rules."

Gary J. Aichele, Oliver Wendell Holmes, Jr.: Soldier, Scholar, Judge 140 (1989) (citing Elizabeth Shepley Sergeant, Justice Touched with Fire, *in* Mr. Justice Holmes 183, 206 (Felix Frankfurter ed., 1931) and Francis Biddle, Justice Holmes, Natural Law, and the Supreme Court 71 (1961)).

It is said that as Justice Holmes was leaving the banquet hall after the farewell dinner tendered him by the Boston Bar,

before he left for Washington to take his seat on the Bench of the Supreme Court of the United States, someone called out:

“Now justice will be administered in Washington.”

To this the new justice is reported to have replied:

“Don’t be too sure. I am going there to administer *the law*.”

Justice Holmes Ex Cathedra 213 (Edward J. Bander ed., 1966) (citing Butler, A Century at the Bar of the Supreme Court of the United States 50-51 (1942)). See also Peter Hay, The Book of Legal Anecdotes 226 (1989) (telling the same story, but assigning a date of December 1902, identifying the host as the Middlesex Bar Association, and quoting Holmes as saying that he was going “to administer the laws”).

An anecdotal conversation between two judicial icons tempers this notion [Aristotle’s “idealized version” of justice] with some modern realism. Judge Learned Hand is supposed to have bade a gingerly “Do justice” farewell to Justice Oliver Wendell Holmes on the steps of the imposing Tribunal on whose upper pediment appears the frieze message: Equal Justice Under Law. The Justice, it is said, exclaimed, “Justice? All we do here is apply the rules of the game!”

Joseph W. Bellacosa, Foreword, 1992 Annual Survey of New York Law, 44 Syracuse L. Rev. 1, 1 (1993) (citing William H. Harbaugh, Lawyer’s Lawyer: The Life of John W. Davis 264 (1973)).

Now and then he [Charles P. Curtis, in *Law as Large as Life*] recounts talk worth remembering, particularly a talk that Hand had with Holmes. They jogged down to the Capitol together—it was before the justice had a car, and he was bound for the Court. To tease him into a response, as they parted, Hand said: “Well, sir, goodbye. Do Justice!” The other turned sharply: “That is not my job. My job is to play the game according to the rules.”

Francis Biddle, Justice Holmes, Natural Law, and the Supreme Court 71 (1961) (citing Curtis).

There is a story that two of the greatest figures in our law, Justice Holmes and Judge Learned Hand, had lunch together and afterward, as Holmes began to drive off in his carriage, Hand, in a sudden onset of enthusiasm, ran after him, crying, "Do justice, sir, do justice." Holmes stopped the carriage and reproved Hand: "That is not my job. It is my job to apply the law." I meant something like that when I dissented from a decision that seemed to proceed from sympathy rather than law: "[W]e administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of new law."

Robert H. Bork, *The Tempting of America* 6 (1990) (quoting *Hohri v. United States*, 793 F.2d 304, 313 (D.C. Cir. 1986) (Bork, J., dissenting from denial of reh'g en banc), rev'd, 482 U.S. 64 (1987)) (footnotes omitted) (citing Sergeant and Shriver). This paragraph is quoted approvingly in Karl N. Gellert, Note, *In re Comprehensive Review Technology: Improper Analysis of Future Advances and the Priority of Security Interests Under Article 9*, 39 Wayne L. Rev. 1641, 1650 n.37 (1993). Bork's account is copied verbatim, cites and all, though without attribution, in *In re Funding Systems Asset Management Corp.*, 111 B.R. 500, 502 (Bankr. W.D. Pa. 1990).

If useful at all, the labels ["activist" and "neutralist" or "passivist"] may be more serviceable to distinguish the judge who sees his role as guided by the principle that "justice or righteousness is the source, the substance and the ultimate end of the law," from the judge for whom the guiding principle is that "courts do not sit to administer justice, but to administer the law." Such legendary names as Justice Holmes and Judge Learned Hand have been associated with the latter view.

William J. Brennan, Jr., *In Memoriam: J. Skelly Wright*, 102 Harv. L. Rev. 361, 361 (1988) (no citation).

The temptation to exceed our limited judicial role and do what we regard as the more sensible thing is great, but it takes us on a slippery slope. Our duty, to paraphrase Mr. Justice Holmes

in a conversation with Judge Learned Hand, is not to do justice but to apply the law and hope that justice is done.

Bifulco v. United States, 447 U.S. 381, 401-02 (1980) (Burger, C.J., concurring) (citing Hand, *A Personal Confession*).

Let me conclude with an old story about judges, law and justice. [Fn: For Judge Hand's version of the story, see L. Hand, *The Spirit of Liberty* 306-07 (I. Dilliard 3d ed. 1960).] Learned Hand was visiting Washington and went to lunch with Justice Holmes. They walked back to the Capitol. The Court was still sitting there in the Old Senate Chamber. As they parted, Hand called, "Sir, do justice."

The old man turned on him fiercely, eyebrows bristling: "Justice? What's that? That's none of my business. *Law* is my business." What else would we expect of the Holmes who many years earlier in *The Path of the Law* invented the "bad man theory of the law." His point then was the same: law and justice inhabit different realms.

We know that is not true. We know that law is inevitably concerned with justice.

Abram Chayes, *How Does the Constitution Establish Justice?*, 101 Harv. L. Rev. 1026, 1041 & n.78 (1988) (footnote omitted).

Senator COHEN: I was looking through [Hand's] book, "*The Spirit of Liberty*," and he was talking about his relationship with Holmes, whom you are also a great devotee of, in terms of his writings and decisions. And Holmes used to frequently say, "I hate justice." Of course, Hand would go on to say he really did not mean that, but he tried to make the point that on one occasion when they were driving in an automobile past the Supreme Court, when Holmes was going to a weekly conference, Hand tried to pique him a little bit, and he said, "Well, sir, goodbye. Do justice."

Holmes turned around and snapped at him and said, "That is not my job. My job is to play the game according to the rules."

. . . At no time did you say that you intended to do justice. I take it that your reluctance to do that was the same for Holmes as well, of not seeking to do justice in the sense of intervening into an area that was properly before that of the

Congress or the State legislature. Is that how you would interpret Holmes’ statement . . . ?

Judge BREYER: In part, yes, but I think that Holmes means more than that. I think Holmes—and it is another reason I do admire him—I think that he sees the rules from the time he wrote [*The Common Law*] up through his Supreme Court career, I think he sees all this vast set of rules as interrelated. And I suspect, although I am not positive, that he sees ultimately the vast object of this vast interrelated set of rules including rules that say whose job is what as working out for society in a way that is better for people rather than worse.

I suppose when you say “Do justice,” or you say, “No, no; I am just following the rules,” what you worry about is someone trying to decide an individual case without thinking out the effect of that decision on a lot of other cases. That is why I always think law requires both a heart and a head. If you do not have a heart, it becomes a sterile set of rules, removed from human problems, and it will not help. If you do not have a head, there is the risk that in trying to decide a particular person’s problem in a case that may look fine for that person, you cause trouble for a lot of other people, making their lives yet worse.

Nomination of Judge Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary, 103d Cong., 2d Sess. 230-31 (1994).

[For Holmes,] [l]aw is obedience to rules rather than a quest for justice. . . . According to Learned Hand, Holmes denied that as a judge he did justice, and admitted only to enforcing the rules.

Stephen Diamond, Citizenship, Civilization, and Coercion: Justice Holmes on the Tax Power, *in* *The Legacy of Oliver Wendell Holmes, Jr.* 115, 146, 283 n.115 (Robert W. Gordon ed., 1992) (citing Hand, A Personal Confession).

[Robert Bork] concur[s] with Justice Holmes that judges should not "do justice" because their job is "to apply the law."

Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 *Duke L.J.* 1, 55 n.22 (1993) (citing Bork).

As Justice Benjamin Cardozo observed, . . . [j]udges empowered to adjudicate according to their individual sense of justice might produce a benevolent despotism, but such a regime would put an end to the reign of law. Justice Holmes echoed those sentiments in admonishing Judge Learned Hand that the judicial duty is not to invoke a personal standard of justice but to play the game according to the rules.

Bruce Fein, *On Reading the Constitution*, 90 *Mich. L. Rev.* 1225, 1228 (1992) (book review) (footnote omitted) (citing Hand, *A Personal Confession*).

[Holmes] can appear to be everything from romanticist, idealist, and mystic to positivist, realist, Darwinist, skeptic, and cynic. The master craftsman and inspiring philosopher can also be the narrowest and most unattractive of tacticians. "I hate justice," he tells Learned Hand, ". . . That is not my job. My job is to play the game according to the rules." But the job and the rules are not so clear in many of Holmes' decisions. As the *Abrams* dissent demonstrates, the patrician is not above ridiculing the people whose rights he must protect.

Robert A. Ferguson, *Law and Political Culture: Holmes and the Judicial Figure*, 55 *U. Chi. L. Rev.* 506, 544 (1988) (footnote omitted) (citing Shriver).

In *The Tempting of America*, Robert Bork recounts a story in which Judge Learned Hand reportedly pleaded with Justice Oliver Wendell Holmes, "Do justice, sir, do justice," to which Holmes responded, "That is not my job. It is my job to apply the law."

Michael J. Gerhardt & Thomas D. Rowe, Jr., *Constitutional Theory: Arguments and Perspectives* 161 (1993) (citing Bork).

Bork lowers, rather than elevates, constitutional dialogue because he wants to end the dialectical process of constitutional interpretation. Bork's intolerance for, and inability to participate in, an open dialogue on the meaning of the Constitution is well illustrated through Bork's use of another story. In the book, Bork relates an anecdote in which Justice Oliver Wendell Holmes admonished Judge Learned Hand that Holmes's job was not to do justice but rather to interpret the law. Early in the book, Bork praises Holmes for this admonition

Michael Gerhardt, *Interpreting Bork*, 75 Cornell L. Rev. 1358, 1392 (1989) (reviewing Robert H. Bork, *The Tempting of America* (1990)) (citing Bork).

[W]hen I hear our new Supreme Court nominee Stephen Breyer's deeply ambiguous promise to make the law "work for the people," I'm uneasy. Justice Holmes, a towering figure in our judicial history, didn't promise to make the law "work for the people." Holmes soberly and somberly declared that his job was simply to "apply the law." A daunting enough job in itself, one would think.

Richard Grenier, *Two cheers, No More, for the Court in Brown*, Wash. Times, May 25, 1994, at A17 (no citation, but referring to Bork elsewhere in the column).

Once, in the 1920's, Hand closed a talk with Holmes by saying, with mischievous intent, "Goodbye Mr. Justice, now go and do justice!" Holmes, who was leaving, turned around and said, "What's that you said?" Hand repeated the remark. Holmes retorted: "You know better than to say a thing like that. All we do is apply the rules of the game."

William H. Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis* 264 (1973). Harbaugh gives as his source a memo to him from Ralph M. Carson, one of Davis's law partners. He uses the story to illustrate the judicial equivalent to Davis's understanding of the lawyer as a free moral agent. The use and genesis of the quote make one think that Davis himself used to tell the story. Harbaugh's account is reprinted in *Quote It II: A Dictionary of Memorable Legal Quotations* 207 (Eugene C.

Gerhart ed., 1988) and in Michael A. Hammer, Comment, *The Constitutional, Judicial and Social Pitfalls Attendant to the Criminalization of Prenatal Maternal Substance Abuse: A Plea for Governmental Uniformity and Mercy*, 22 *Seton Hall L. Rev.* 1456, 1500 n.214 (1992) (using brackets to identify the interlocutors as “[Justice] Hand” and “[Justice] Holmes”).

[A] very long time ago [Hand] and Justice Holmes had taken a horse-drawn cab from the Justice’s house to the Capitol, where the Court then sat. Judge Hand got out of the cab first and then Justice Holmes got out and started to walk to the Capitol, at which point Judge Hand “said to him by way of jest: ‘Well, Sir, do justice.’ He turned around quickly, and beckoned me to come to him, which I did. He said, ‘Young feller, that is not my job. My job is to play the game according to the rules.’”

Ray D. Henson, *The Law of Sales* ix (1985) (quoting January 11, 1960 letter from Hand to the author). The letter is set out more fully above.

[Holmes’] mind . . . was characteristic of the Puritan stock from which he came. There was nothing vague about his law. It had the hard clear-cut outline of the traditional Puritan doctrine. . . . Characteristic was his answer to a friend, who, on meeting him on his way to the court house, said: “So, you are about to do justice.” To meet the reply, “No, I am going to administer the law.”

Arthur Hill, Address at Memorial Service for Oliver Wendell Holmes at a Special Session of the Massachusetts Supreme Judicial Court, 298 *Mass.* 575, 599-600 (1937) (no citation).

Viewing judges as policymakers may be problematic because such a view is contrary to some definitions of judging. . . . See generally, E. Sergeant, *Justice Touched With Fire* . . . (Holmes states his job is only to apply the law).

Katharine L. Huth, Note, *Garcia Revisited: The Age Discrimination in Employment Act’s Application to Appointed State Court Judges*, 59 *Fordham L. Rev.* 403, 404 n.11 (1990) (citing Sergeant).

This graphic example of the . . . "do justice" philosophy [namely, a decision under the Truth in Lending Act that was best explained by the court's anger toward greedy creditors] brings to mind a story about Mr. Justice Holmes. It is reported that Learned Hand met Justice Holmes walking to the Supreme Court and urged him to "Do justice!" "That is not my job," Holmes replied. "My job is to play the game according to the rules."

Colin K. Kaufman, Comment, Bringing Chaos Out of Order: Truth in Lending in the Courts, 10 Ga. L. Rev. 937, 943 (1976) (citing Shriver).

One Saturday, old friends, Judge Learned Hand and Justice Oliver Wendell Holmes, shared a ride in a coupe. At their destination, Holmes stepped down and walked away. Hand decided to goad his older friend. Hand called out, "Well, sir, good-bye. Do justice!" Holmes stopped, turned, and summoned Hand nearer. Hand drew close. "That is not my job," Holmes admonished. "My job is to play the game according to the rules." In the area of benign racial classifications (affirmative action), the Supreme Court has . . . been more concerned with achieving some amorphous concept of justice than playing by the constitutional and statutory rules.

James L. McAlister, Comment, A Pigment of the Imagination: Looking at Affirmative Action Through Justice Scalia's Color-Blind Rule, 77 Marq. L. Rev. 327, 327 (1994) (footnote omitted) (citing Shriver).

[Addressing a trial advocacy course at St. Mary's Law School, then-Justice William Rehnquist] recounted a conversation between Learned Hand and Oliver Wendell Holmes, Jr., while Holmes was on the Supreme Court, which exemplifies Rehnquist's idea of what constitutes justice. When told by Judge Hand to "do justice," Holmes replied, "That is not my job. My job is to play the game according to the rules."

Michael T. Larkin, Casenote, 21 St. Mary's L.J. 1063, 1077 n.70 (1990) (citations omitted).

Parting from Justice Holmes, Judge Learned Hand enjoined, "Do justice." Justice Holmes responded, "That is not my job. My job is to play the game according to the rules."

Howard T. Markey, *On Simplifying Patent Trials*, 116 F.R.D. 369, 370 n.2 (1987) (citing Aldisert).

Some months ago, in a prior Opinion, we spoke of a meeting between Justice Oliver Wendell Holmes and Judge Learned Hand. At the conclusion thereof Hand pursued Justice Holmes' horse drawn buggy and cried out to Holmes to "Do justice, Sir, do justice!". In admonishing Hand, Justice Holmes advised that it was not his duty or prerogative to do justice. His duty was to apply the law.

Were we granted authority to "Do justice, Sir", then clearly this contract would be temporarily modified [to allow the debtor to reorganize]. . . . Unfortunately, we are not granted *carte blanche* to "do good and avoid evil."

In re George Cindrich General Contracting, Inc., 130 B.R. 20, 21-22 (Bankr. W.D. Pa. 1991) (Markovitz, J.) (referring to, but not citing, *In re Funding Systems Asset Management Corp.*, 111 B.R. 500, 500 (Bankr. W.D. Pa. 1990), which in turn copies, but does not cite, Bork's version).

No one would argue that the system [of appellate review] is a system of perfect justice. In the words of Justice Holmes, the best that appellate judges can do is ensure that the game is played by the rules.

Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 Vand. L. Rev. 1023, 1038 (1987) (citing Hand, *A Personal Confession*).

An old story has it that when Holmes departed to assume his duties on the Supreme Court he was admonished to do Justice. He responded thoughtfully that his job was merely to enforce the law.

Wallace Mendelson, *Justices Black and Frankfurter: Conflict in the Court* 116 (2d ed. 1966) (no citation). See also Raoul Berger, *Government By Judiciary* 289 n.24 (1977) ("It is said

that when Holmes left the Massachusetts Court for the Supreme Court, 'he was admonished to do justice. He responded thoughtfully that his job was merely to enforce the law.")(quoting Mendelson).

I recall a conversation with [Justice Black] in the 1950s, at the end of which I asked what he perceived his job to be as a member of the Supreme Court. Without hesitation, he drew himself up and replied: "To do justice." And that he did, as he saw justice. (His response differs from one attributed to Justice Oliver Wendell Holmes, who once was enjoined by Judge Learned Hand "to do justice"; Holmes, then in his 80s, thundered back to Hand (in his 60s): "Sonny, that's not my job. My job is to apply the law.")

Arthur S. Miller, *A Justice Who Did Justice*, Wash. Post, May 22, 1977, at E5 (book review) (no citation).

There's an old story in American law that David Savage's book [Turning Right: The Making of the Rehnquist Supreme Court (1992)] brings to mind. On a Saturday afternoon many years ago, Justice Oliver Wendell Holmes Jr. took a break from his work at the Supreme Court and went for lunch with his friend Judge Learned Hand, a man 30 years younger than Holmes who was just beginning a celebrated judicial career of his own. As the two men returned to the Old Senate Chamber in the Capitol Building, where the Supreme Court once sat, they took their leave, and Hand called out to Holmes, "Sir, do justice." The old man wheeled around, glared at his protege, and fired back, "That is not my job. My job, sir, is to play the game according to the rules."

Terence Moran, *The Emperors Have No Robes*, Wash. Monthly, May 1992, at 41 (book review) (no citation).

[While working as a special agent for the IRS,] I was frequently reminded of a conversation reported to have occurred between Justices Oliver Wendell Holmes and Louis D. Brandeis. "Go and do justice," Brandeis said. "No, Louie," Holmes replied, "that is not our job. We are here to enforce the laws, not to do justice."

Emil Poggi, *Unjust Tax Laws Corrupt Our Society*, Letter to the Editor, N.Y. Times, Sep. 25, 1988, § 4, at 24 (no citation).

Justice Oliver Wendell Holmes once was bidding goodbye to Judge Learned Hand of the New York Court of Appeals. "Do justice!" Judge Hand said. Justice Holmes replied: "That is not my job. My job is to play the game according to the rules."

Jack Harrison Pollack, *Mr. Justice, Mr. Politics*, N.Y. Times, Sep. 7, 1982, at A23.

[Justice should play a larger part in legal practice and judging than it currently does, and one element of justice is aesthetic: a just decision or statute is beautiful.] There is a school of jurisprudence, however, that would reject not merely beauty, but justice itself, as a criterion of decisionmaking and lawmaking. Members of this school, known as "positivists," would find both concepts repellently subjective. So great a man as Justice Oliver Wendell Holmes said, perhaps in jesting response to Judge Learned Hand's admonition to "do Justice": "Young feller, that is not my job. My job is to play the game according to the rules."

Louis B. Schwartz, *Justice, Expediency, and Beauty*, 136 U. Pa. L. Rev. 141, 147-48 (1987) (citing Henson).

A judge of the Federal bench tells of driving with Justice Holmes to the Capitol one morning some years ago, in that neat brougham drawn by a fat cob, with a highly respectable coloured coachman on the box, in which Holmes used to be recognized on the Washington streets. The Justice had got out of the carriage and was striding off, vigorous and loose-limbed, toward the dome when the younger man called out humorously: "Do justice, sir!" Holmes wheeled: "Come here, young feller!" and then, "I am not here to do justice. I am here to play the game according to the rules. When I was at the bar and Lowell used to beat, I'd say to him: 'Judge, your result may be good, but it's another game I undertook to play. I gave you a thrust in tierce and you countered with a bag of potatoes over my head.'"

Elizabeth Shepley Sergeant, *Justice Touched With Fire*, in Mr. Justice Holmes 183, 206-07 (Felix Frankfurter ed., 1931). Sergeant's essay first appeared as Oliver Wendell Holmes, *The New Republic*, Dec. 8, 1926, at 59. Her account is quoted accurately in Grover Joseph Rees III, *Albert Tate on the Judicial Function*, 61 *Tul. L. Rev.* 721, 727 n.31 (1987); Grover Rees III, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 *Ga. L. Rev.* 913, 930 n.54 (1983).

SOCRATES: Do you agree that during [your] tenure [on the Supreme Court], it was your duty to dispense justice?

HOLMES: No. I wouldn't put it that way. It was my duty to interpret and apply the Constitution and the laws of the United States.

SOCRATES: But you bore the title of "Justice." And you sat on your nation's highest court of justice. And the constitution and laws of a nation exist to allot justice, do they not?

HOLMES: You are playing your usual icy games with words, Socrates. You call the Supreme Court the highest court of justice. I might just as easily call it the highest court of law.

Rodney A. Smolla, *The Trial of Oliver Wendell Holmes*, 36 *Wm. & Mary L. Rev.* 173, 207-08 (1994).

Any Justice of the Supreme Court who decides cases on the basis of where he personally stands on issues lacks the integrity for the job.

... Holmes was quite clear about the role of a Supreme Court Justice. His job was "to see that the game is played according to the rules," he said, "whether I like them or not."

It has taken centuries of struggle by giants to establish the ideal of "a government of laws and not of men." Today, pygmies are trying to reduce it all to a question of a judge's "views."

Thomas Sowell, *Integrity is the Issue*, *Forbes*, Oct. 28, 1991, at 90 (no citation).

One day, as Justice Oliver Wendell Holmes was leaving to go to the Supreme Court, a friend said to him, "Well, off to do

justice again!" Holmes is said to have replied, "Sonny, I don't do justice; I just make sure that people play by the rules."

Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 108 (1988) (no citation) (also referring to "Holmes's quip").

A long line of respected twentieth-century judges has taken the position that the proper decisionmaking calculus for an appellate judge should not include unarticulated notions of fairness and justice. From Holmes's alleged rejoinder to Learned Hand's exhortation to "do justice" ("that is not my job")

G. Edward White, *Earl Warren as Jurist*, 67 Va. L. Rev. 461, 540 (1981) (no citation).

[T]he American judicial tradition requires that the judge must always decide according to law, and not permit his conscientious scruples to override the law. Judge Learned Hand once recounted an incident that occurred when he accompanied Justice Oliver Wendell Holmes, Jr., to work one morning. Hoping to provoke Holmes, Hand said, "Do justice." With apparent agitation, Holmes responded, "That is not my job. My job is to play the game according to the rules."

William M. Wiecek, *Liberty Under Law: The Supreme Court in American Life* 76 (1988) (no citation, but referring to Chief Justice Burger's opinion in *Bifulco v. United States* in the next sentence).

As Justice Oliver Wendell Holmes drove off after lunch with Justice [sic] Learned Hand, the latter exclaimed, "Do justice, sir, do justice." Holmes halted his carriage and reproved Hand: "That is not my job. It is my job to apply the law." That story involving two of America's finest legal minds is told by a third such, Robert Bork, in his elegant and entertaining new book, *The Tempting of America*. The story encapsulates the philosophic stance that brought down upon Bork unprecedented furies. His book is a ringing defense of what his most fanatical opponents feared: democracy.

George F. Will, *The Tempting of America*, Newsweek, Dec. 4, 1989, at 96 (citing Bork). This paragraph is quoted in full in George Anastaplo, *Bork on Bork*, 84 Nw. U.L. Rev. 1142, 1154 n.46 (1990) (reviewing Robert H. Bork, *The Tempting of America* (1990)).

From the time at least of Plato, whose greatest dialogue bears as an alternate title, “On Justice,” there has been a plausible proposal that justice should be more than a philosophical ideal, or a balance among competing virtues, but ought to be the very *measure* of the law.

Yet the proposal is not so clearly sound as to be self-evident. Otherwise, O.W. Holmes would not have answered Learned Hand’s injunction to “Do justice, Sir,” with the sharply caustic reply, “Sonny, you don’t understand my job. It is to apply the law.”

Charles E. Wyzanski, Jr., Book Review, 90 Harv. L. Rev. 283, 285 (1976) (no citation).

About 1915, Mr. Justice Holmes invited a then young U.S. district judge, Learned Hand, to accompany him as he rode toward the Capitol to sit on the Supreme Court of the U.S. As they approached their destination, the district judge left the carriage and, waving farewell, called out, “Do justice, sir.” Sharply he was summoned back, “Sonny, you don’t understand my job; it is to apply the law.”

Charles E. Wyzanski, Jr., *quoted in* *The Work of Justice*, Time, May 5, 1958, at 15, 17 n.*, *reprinted in* 104 Cong. Rec. 8237, 8238 n.3 (1958).

