

PHIL420
Philosophy of Law
Distance Delivery
Lecture Eight

Legal Realism

Legal Formalism

- Probably a straw man
- Ties to legal positivism
- Legal rules
 - Usually clear
 - Direct courts
 - “Applying the law”
- Law as a logical system
- Law as objective and impartial
- Hard cases

Riggs v. Palmer

- **Facts of the case**
- **What is the law?**
- **Judge Earl**
 - It is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer.

Riggs v. Palmer

- it never could have been *their* intention that a donee who murdered the testator to make the will operative should have any benefit under it
- It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter
- all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.

Riggs v. Palmer

- **Judge Gray**
 - The statutes of this state have prescribed various ways in which a will may be altered or revoked; but the very provision, defining the modes of alteration and revocation, implies a prohibition of alteration or revocation in any other way
 - to concede appellants' views would involve the imposition of an additional punishment or penalty upon the respondent

Bush v. Gore

- **Facts of the case**
- **Bush's argument – Equal Protection**
- **Gore's argument**
 - "intent of the voter"
 - Most elections would be unconstitutional
- **Remedy?**
- **Make up of the Court**
 - Rehnquist, O'Connor, Scalia, Thomas, Kennedy
 - Stevens, Breyer, Souter, Ginsburg

How do cases get decided?

- Language of legal texts
- Precedent
- Language of legal opinions
- What really happens?
 - Ambiguity of language in legal texts
 - Ambiguity of precedent
 - Judicial power
 - Rhetoric of legal opinions
- Exception or the rule

Legal Realism

- Legal formalism is a myth
- Cases like above are typical
- Language is inherently ambiguous
- Precedent is inherently ambiguous
- Judges have no choice but to exercise power
 - Nothing in the past determines the outcome
 - Judges' moral and political views
 - Judging as an "art"
- Law as prophesy