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Elmer's Rule: A Jurisprudential Dialogue,
by Anthony D'Amato*, 60 Iowa Law Review 1129-1146 (1974-1975)

Abstract: Cardozo wrote of *Riggs v. Palmer* that this case that two analytical paths pointed in different directions and the judges selected the path that seemed better to lead to "justice". Dworkin has claimed that the case demonstrates the triumph of certain "principles" over what are called "rules of law". Taylor has argued that there was no "law" at all about murderers inheriting from testators before the actual decision in *Riggs*, and that consequently the decision itself was the only "law" that affected Elmer. All of these suggest that the decision in *Riggs* was largely unpredictable and therefore must have come as something of a surprise. But the notions of surprise and unpredictability raise a far more basic issue: what business does a court have in surprising anyone? Shouldn't a court fulfill people's expectations of the law? Shouldn't a court behave as predictably as it possibly can?

Tags: Jurisprudence, rules of law, Elmer's rule, *Riggs v. Palmer*, positivism, judicial decisions, predictive theory of law, principles of rule

[pg1129]** A case that has continued to fascinate students of jurisprudence is *Riggs v. Palmer*, [FN1] an 1889 New York decision holding that Elmer E. Palmer, who was convicted of the second-degree murder of his grandfather, could not then inherit the estate under the terms of his grandfather's will. [FN2] Justice Cardozo wrote of this case that two analytical paths pointed in different directions and the judges selected the path that seemed better to lead to "justice". [FN3] Ronald Dworkin has claimed that the case demonstrates the triumph of certain "principles" over what are called "rules of law". [FN4] This illustrates, to Dworkin, a fundamental deficiency in the school of jurisprudence known as positivism, a school which, since it emphasizes the concept of law as a set of rules, does not quite know how to handle "principles". [FN5] More recently, Richard Taylor has argued that there was no "law" at all about murderers inheriting from testators before the actual decision in *Riggs*, and that consequently the decision itself was the only "law" that affected Elmer. [FN6]

All of these approaches, but especially Taylor's, suggest that the decision in *Riggs* was largely unpredictable and therefore must have come as something of a surprise to Elmer and his attorney. Of course, looking at this case today, we are not particularly concerned with whether or not Elmer or his attorney was surprised by the result. But the notions of surprise and unpredictability raise a far more basic issue: what business does a court have in surprising anyone? Shouldn't a court fulfill people's expectations of the law? Shouldn't a court behave as predictably as it possibly can? More basic even than these questions is the question of just what we mean when we refer to "law". Of course, that question is as enormous as it is basic, but I would suggest that we do have at least a minimal conception of law that most people would not challenge. Minimally, law is a means for affecting the behavior (modifying it, channeling it, or changing it) of the people to whom the law is addressed. If law did not at least fulfill such a function, we would hardly call it "law" or be interested in it.

[pg1130] But if law means something that affects behavior, can we say that the law *prior* to the decision in *Riggs* could have affected Elmer's behavior? If we can in fact so conclude, then to some extent the law either did not or should not have come as a surprise to Elmer: in dealing with his case, the courts were simply ratifying in a reasonably predictable manner a norm (or a "rule" or "principle") that existed in some sense before Elmer put the poison in his grandfather's food. To the same extent, we would not be as troubled by the apparent discretion or "legislative

function" attributed to the New York court by various writers of jurisprudence. And we would also reinforce our own conception about the proper rule of a court—that in adjudicating *past* behavior, a court should apply norms that were in existence at the time of that past behavior. For if a court does *not* do this, it would be acting prospectively—as a legislator—in making rules. But the prospective action would apply retrospectively—to the losing party in the case. This would strike against our notions of fairness and undermine our belief in the viability of the definition of "law" suggested above. If a court is to be "fair" and to proceed according to "justice", it should not invent rules and then apply them retroactively to litigants. Although even positivists such as H.L.A. Hart have recognized that courts in dealing with "penumbral" questions can be said to act at times like legislatures and we should recognize this fact, [FN7] I would contend that the more we "recognize" it the more we are conceding to courts the license to act unfairly and unjustly. To be sure, if courts really do act as Hart claims, we must acknowledge that reality. But let us not do so in haste. Perhaps a closer look at what courts do would dissolve many apparent instances of "judicial legislation" and reveal instead a more subtle and fairer process of adjudication.

In this Article I would like to apply the foregoing observations in taking a closer look at the *Riggs* case. Instead of analyzing the case conventionally, I shall invent a dialogue [FN8] between Elmer and his attorney. The dialogue will attempt to indicate what notice, if any, Elmer might have received had he gone into the question of the "law" prior to his decision to murder his grandfather. Of course, the dialogue is constructed with all the benefits of hindsight, including especially the ultimate decision by the New York courts. The lawyer, like the dialogue itself, is purely fictitious. While the attorney's observations may appear to be unrealistic, I do not feel that his perceptions imply that Elmer was fortunate enough to happen upon a clairvoyant counselor in his search for legal advice. By taking the following dramatic license, I hope to present in the clearest way I can what Elmer and a reasonably perceptive attorney might have concluded had they seriously examined the *Riggs v. Palmer* issue before the New York courts decided the case. Any final judgment as to the plausibility of the following dialogue is naturally left to the reader.

[pg1131] SCENE ONE: *Office of an Attorney in Upstate New York, February, 1882.*

ATTORNEY: Have a seat, Elmer. What's on your mind these days? Miss Fetch says you have a question to ask me.

ELMER: That's right, I do. I want to know whether an heir under a will would still get the property even if he killed the testator.

ATTORNEY: I didn't know you knew all those legal terms, like "testator" and "heir". Have you been looking up Blackstone or Kent?

ELMER: As a matter of fact, I did take out the Blackstone book from the library. But it wasn't any help on this issue.

ATTORNEY: Well, I'm glad you're so interested in the law. But I'm a bit surprised about the question you asked. What made you think of it?

ELMER: Well ...

ATTORNEY: I can imagine you would come up with lots of questions after reading some of Blackstone. But a question that doesn't even exist in Blackstone is another matter. Was there actually something in Blackstone's book that made you come up with this particular question?

ELMER: No. I read about it in a dime novel the other day.

ATTORNEY: And you rushed out to look up the law?

ELMER: That's right.

ATTORNEY: Are you sure you don't know anyone who's planning to murder his rich old uncle?

ELMER: Oh, no sir.

ATTORNEY: Do you know anyone who has any notions of murder in mind?

ELMER: No, I don't.

ATTORNEY: Now don't get me wrong in my asking this, Elmer, but just out of curiosity, your grandfather has quite a bit of money, and you'd be the only logical beneficiary.

ELMER: I don't see what that has to do with it.

ATTORNEY: Nothing, my boy, nothing at all. You just set my mind thinking. Would you know, by the way, whether you are the beneficiary under your grandfather's will?

ELMER: Isn't that something you would know?

ATTORNEY: No, as a matter of fact. Your grandfather used another lawyer in town. But I know he has a will, all right.

ELMER: Well, I think I'm mentioned in his will. But I can't be sure. Anyway, my question has nothing to do with me.

ATTORNEY: I know that, Elmer, and I'm glad of it. I suppose it would be natural for a beneficiary under a will sometimes to wonder when the testator is going to die, or whether he might change the will before he dies. But I'm sure that those thoughts are not at all what prompts your question.

[pg1132] ELMER: Not at all. But I would like to know the law on the point.

ATTORNEY: I can't give you an answer offhand. But I'll do some research on it, just out of curiosity. Here are a couple of books you might look into, too. You can come back in about a week and we'll discuss it at that time.

ELMER: Thanks. I'll see what the books say. Maybe there's a rule in one of them that covers the point.

ATTORNEY: I tend to doubt it, since there was no rule in Blackstone. But we'll see. Meanwhile, I want you to know one thing.

ELMER: Yes?

ATTORNEY: Murder, as you know, is the most heinous crime of all. Anyone who murders anyone else deserves to be hanged. I wouldn't hesitate to turn over any information I have about any murderer to the police, even if it's information about someone who is a client of mine.

ELMER: A client?

ATTORNEY: A client whom I know committed a murder—so long as I didn't get the information in confidence from the client himself after the fact as part of my job in representing him. Even then, I wouldn't know whether to represent him, but I don't suppose I could turn him into the police. But if someone is my client and I find out that he committed a murder, the fact that he is my client won't stop me from calling the police.

ELMER: I think I understand. But why are you tell me this?

ATTORNEY: I just want you to know, Elmer, about how I view my responsibility as a lawyer. The very fact that you came in here and asked me a question about murderers and testators is a fact that I have to regard as a piece of evidence. Oh, it probably will never be useful in any regard. But just suppose, Elmer, that your grandfather dies an unnatural death. In such a situation, the fact that you asked me the question about a murderer inheriting under a will would tend to throw a tiny bit of suspicion your way—

ELMER: But ...

ATTORNEY:—even if you were perfectly innocent! You see, now that you've asked me the question in a connection that has absolutely nothing to do with any action that you yourself are contemplating, I would not regard it as confidential information under an attorney-client privilege if subsequently there is an investigation of any possible unnatural death of your grandfather.

ELMER: I see.

ATTORNEY: All right, then. Come in next week and we'll discuss your interesting question.

ELMER: [in an old-fashioned "aside" to the audience] Drat! I shouldn't have asked him. I should have done the research by myself. But how? I don't know how to do the research. I had to ask an attorney. Oh, well, now that I've asked him, I might as well go through with the investigation. Whatever damage has been done can't be undone. I'll see him next week and get his opinion.

In one sense, nothing has happened so far. Elmer has simply asked a question of his attorney. But in another sense something important has been suggested about the meaning of "law". We have seen that the attorney himself is part of the legal system in more than just the technical sense that he is an "officer of the court." The attorney represents Elmer's first contact with the legal process that is beginning to take shape around Elmer's question. As Elmer himself has discovered by failing to find the question even mentioned in Blackstone or Kent, the two most consulted works of the time, "Can a beneficiary inherit if he murders the testator?" is not an inquiry to which the legal system provided an easy answer. But the legal system, through the attorney himself, has started to respond. Even though the attorney has only said so far that he doesn't know the answer to the question, in fact he has begun to reveal that answer by the very attitude that he has taken toward Elmer's question. His attitude, Elmer has discovered, is markedly negative. The attorney will research it as an "interesting" question, but he has made it clear that he would be repelled if this question had any practical significance to Elmer.

Thus, if Elmer were a very discerning chap, he might have said to himself that the lawyer's negative attitude is a good indication that the legal system as a whole will also have a negative attitude toward such a question, for the lawyer is part of the legal system. But Elmer is not even looking for a "hint" in these quarters. Instead, he is only upset that he has aroused the suspicions of an unsympathetic attorney.

Elmer, as we shall see in more detail, is basically a "positivist." In other words, he believes that the legal system is simply a set of rules. Either there is a specific rule to answer his question, or there is no special rule. In the latter case Elmer would conclude that the other rules in the system would continue to apply and the beneficiary would collect under the will. Since he views law as a neutral collection of rules, Elmer naturally does not feel that the attorney he is consulting has anything to do with the content of law. The attorney is simply, to Elmer's mind, a research assistant.

SCENE TWO: *The same, a week later.*

ATTORNEY: Come in, Elmer. I've had a chance to research that question of yours now. I've turned up some interesting information.

ELMER: Is there any law on the subject?

ATTORNEY: Well, that's a large question. Let's break it down. What do you mean by "law"? Or, what's one of the things you mean by that term?

ELMER: A statute?

ATTORNEY: Fine, we'll start with that. I've done the research and the fact is that there is no New York statute that deals with the subject of a beneficiary taking if he murdered the testator. There are lots of statutes, of course, that deal with taking under wills, but there is none on the

particular question [pg1134] you raise. In addition, there are no relevant federal statutes.

ELMER: How about other states? Or don't they count?

ATTORNEY: In fact, I've not been able to come up with any legislation of any other state on this matter, and I suspect that if I looked at the legislation of other countries I wouldn't find anything either. Of course, statutes in other states or countries would not be binding in New York, but it is interesting that your question never seems to have occurred to any legislative body in all recorded history.

ELMER: How about cases?

ATTORNEY: Very good, Elmer. I can see that you've learned something from the books I've given you. You are telling me that "law" means to you not only the rules found in statutes but also the rules found in judicial decisions. Is that right?

ELMER: Yes. From my point of view, I suppose that rules that are passed by the legislature and rules that are passed by judges are the same—I mean they have the same effect.

ATTORNEY: That's right, they do. A court will apply "precedent" just as it will apply a statute. So I did some research on precedents.

ELMER: And ...?

ATTORNEY: There is no case in the books involving the murder of a testator by the beneficiary.

ELMER: None at all?

ATTORNEY: That's right, to be precise about the matter. But you see, Elmer, an attorney's job can't end by just looking up the question of whether there was exactly the same case ever decided previously. There may be what we call an analogous case. A case where somewhat the same issue has come up in a different setting.

ELMER: I don't know what that might be.

ATTORNEY: Well, I'll tell you. I found a case that was decided in North Carolina that involved a wife's right to dower. [FN9] She had been convicted of being an accessory before the fact to the murder of her husband. In other words, she was involved in the murder of her husband, and yet she was claiming a share of his estate.

ELMER: That sounds pretty close to the question I asked you.

ATTORNEY: I thought so too.

ELMER: What was the ruling?

ATTORNEY: The court held that the wife was entitled to dower.

ELMER: And that's the only case on the books?

[pg1135] ATTORNEY: Right. The only case tends to suggest that a murderer can inherit anyway.

ELMER: That just about answers my question, then.

ATTORNEY: Not so fast. There are several things we have to consider. In the first place, as I told you, it was a North Carolina case, not a New York case.

ELMER: Does that mean it has no effect in New York State?

ATTORNEY: No, not exactly. As a matter of fact, I suspect that the New York courts would want to follow the only precedent in point even if it is a decision in another state. Judges, you might know, have some feeling that the law should be consistent, and so that would feel a pressure to reach the same result as North Carolina. But they are not *bound* to do so.

ELMER: Not bound, you mean, like they would be if it were a New York decision?

ATTORNEY: Exactly. And even if it were a New York case, a later court can always reverse the former precedent. But such instances of overruling a precedent are very rare.

ELMER: So what you're saying is that a New York court probably would follow North Carolina case?

ATTORNEY: Yes. At least, judges in this state would take the North Carolina case into account as an important factor. But now let's look at a second issue. Just how close is a case of dowry to a case involving a will?

ELMER: It's exactly the same thing.

ATTORNEY: But a will isn't a dowry.

ELMER: I mean, the principle is the same.

ATTORNEY: You're right that we have to look to the principle. But what is the principle?

ELMER: The principles inheriting an estate from someone you've killed.

ATTORNEY: Well, Elmer, that's *one* principle. But let's analyze it a different way. Suppose we have a testator who announces to the beneficiary that he is going to *change* his will, and the beneficiary fears that the change may be quite adverse to the beneficiary. [FN10] If the beneficiary hurries up and murders the testator before the testator can change the will, then he will have profited enormously by the murder. But look at the dowry situation. There the husband

can't change the way the estate will devolve.

ELMER: But the wife gets the estate sooner by murdering her husband.

ATTORNEY: Very true. But that's true for the will situation as well. Indeed, the murderer in both cases gets the property sooner than he would have if the owner died a natural death. So that is a point of similarity. But I've been talking about a point of difference.

[pg1136] ELMER: Suppose the husband divorced the wife? Wouldn't the wife lose her dowry interest?

ATTORNEY: Excellent question, Elmer. No, I think the situation would still be different. A beneficiary under a will has no claim whatsoever to the estate except the claim that the will provides to him. If the will is changed and the beneficiary disinherited, he has no claim (so long as the will is proper and so forth). But the wife has a dowry interest when she is lawfully married. Therefore, any divorce proceeding would have to take place in light of this dowry interest. The wife might not agree to a divorce, or she might get a much more favorable property settlement as part of the divorce than she would have received if there were no dowry.

ELMER: So the cases then are different?

ATTORNEY: Yes. Or at least I should say, a judge could find a difference between a will case and a dowry case if he wanted to.

ELMER: What might make him want to?

ATTORNEY: Well, we'll have to go into that. I have some other business to attend to now, but we can talk if you come back later this afternoon. But let me say this much. The case for the murderer taking under the will is pretty strong on its face. There is no statute anywhere that says he can't. The only case on a slightly different point suggests that he can. And in addition to that, there are numerous statutes regulating how a will is to be construed. These statutes, as well as judicial precedent, instruct a judge to apply the terms of the will as written, and not to attempt to change them. You know, if courts were to make exceptions in wills that are not specified in the wills themselves, the amount of litigation in the probate area would quadruple at the very least. More and more wills would be contested, and all kinds of exceptions would be claimed. People who make out wills would not be able to predict what exceptions a court might write in. The whole idea of a will would be eroded. That's why the statutes are so clear on the point. Estate law is one branch of the law that adheres extremely closely to the written word. If the testator himself does not make an exception cutting off any beneficiary who murders him, the courts have no statutory authority to write such an exception into a will. So, let me leave the situation with you for the moment as saying that it looks like a pretty iron-clad case for the murderer taking under the will, at least as far as the law on the books is concerned.

COMMENTARY

Under positivist theory, "law" is a set of rules or norms or commands. [FN11] In New York

in 1882, there was no such rule regarding murderers taking under a will. Therefore, a positivist would have to conclude that the rules pertaining to wills [pg1137] must be applied as written, and a murderer must take. But our attorney is starting to suggest to Elmer that a different conception of "law" may be more accurate. The attorney has started to talk in terms of predicting what a court will do. Elmer might have wished that a court would simply apply "the law" which, to Elmer, consists of the rules on the books. But the attorney has begun to suggest that a court might not act in such a robot-like manner.

Elmer might not like the way this matter is proceeding. But he certainly has an interest in predicting what a court will actually do. A pure positivist might not have such an interest. The positivist might simply want to know what the "rule" is, and simultaneously concede that for one reason or another a particular court might not act as it "should". If the court acts contrary to the "rule", the positivist might conclude that the court was acting illegally, or as a matter of "discretion", or like a "legislature". Such concessions on the part of a positivist might not seem to him to be important to his "theory". But to Elmer they would be important, because at bottom Elmer is interested in predicting what the court will do and not in vindicating a jurisprudential approach to the meaning of law. Elmer is a real person asking a real question that has real consequences for him, and therefore, following Wittgenstein, [FN12] we can say that the meaning of "law" as revealed to Elmer is likely to accord with the usage of the term in ordinary language. Abstract definitions of "law" formulated by philosophers interested in the term for "its own sake" (whatever that means) are of little if any significance to Elmer.

SCENE THREE: *Same, later that afternoon.*

ELMER: Well, sir, I've done some thinking about what you've said and I'm convinced that the answer to my question is that the murderer would take under the will. I think it's clear as a matter of the law. And there's probably good reasons for it too.

ATTORNEY: Good reasons? Yes. I think there are some good reasons. But I'm glad you brought up the matter of reasons. A mere rule itself is a fragile thing if there aren't good reasons to back it up. So we really should look at the reasons favoring the outcome that you suggest and see if they are convincing.

ELMER: Well, I know one reason—the reason you suggested: a court which writes exceptions into wills ruins the idea of wills.

ATTORNEY: That certainly is one reason. But let's take another. Why should a murderer get *rewarded* for his crime by being allowed to inherit the estate?

ELMER: I don't know. But isn't it something outside the law to say whether someone gets rewarded or not? I mean, shouldn't the judges just apply the law, and not look at the effects of their decisions?

ATTORNEY: That certainly is an approach, and a thoughtful one. But I think [pg1138] judges won't ignore the effects of what they do. Why should they? Justice isn't "blind" in that sense. A judge is part of the real world.

ELMER: Yes, but a judge is also someone who applies the law.

ATTORNEY: Elmer, "the law" isn't just the statutes and the cases, as I'm trying to point out to you. Certainly the law is partly that, in fact mainly that. But it can be a bit more, too. It can involve the reasons behind the law. It can involve deep-seated principles that we all share. It can involve looking at the effects of decisions. It can involve "justice". All these things are the things a judge should "apply".

ELMER: But all that looks pretty vague to me.

ATTORNEY: Well, the question you ask hasn't come up yet, so what do you expect? Surely you don't expect the law to provide answers in the books to questions that haven't yet come up! So we have to proceed in what you call a vague fashion, since there isn't a better alternative. But let's get down to brass tacks. There is a second answer to my question about a murderer rewarded for what he has done.

ELMER: I can't think of it.

ATTORNEY: It's simply this. The United States Constitution and the Constitution of the State of New York provide certain procedures and safeguards for a person accused of a crime. A person may be declared guilty only after he has been given the right to a jury trial, the right to confront witnesses, and after the case has been proved against him beyond a reasonable doubt. When all that happens and a person is declared guilty, he cannot be punished beyond the punishment prescribed by the law. A person convicted of a felony for which the maximum penalty is 10 years in prison cannot be sentenced by a judge to 20 years in prison, for example.

ELMER: What does this have to do with my question?

ATTORNEY: Simply this. We assume that you have a murderer who has been *convicted* of murder. Whatever his punishment is, it is that which has been prescribed by the criminal law. Now a person can argue that no other court or official can *add* to that punishment. Any additional punishment would be something that exceeds the punishment prescribed by the criminal law. Moreover, any additional punishment *from a different court* will be imposed upon the murderer without his having had the benefit of a right to jury trial, proof beyond a reasonable doubt, and so forth. Thus, in a basic constitutional sense, to take a murderer's inheritance away from him would constitute an additional penalty imposed upon him solely because of his crime, and that additional penalty would not have been imposed according to the constitutional safeguards to which the murderer was entitled. [FN13]

[pg1139] ELMER: So it would be *illegal* for a court to deny the murderer his inheritance?

ATTORNEY: I didn't say that. I'm only giving you an argument, a reason behind the law, a reason perhaps that was in the minds of the judges in North Carolina in the dowry case.

ELMER: But surely a court can't act contrary to the Constitution.

ATTORNEY: That's right. But remember, a court *interprets* the Constitution. If it doesn't think it is acting contrary to the Constitution nothing I can tell you in this office is going to change that fact. Besides, a court might get around the problem of additional punishment.

ELMER: How?

ATTORNEY: By saying that the murderer isn't being deprived of his property, because the property hasn't been "vested" in him. If the property isn't vested in him, the court isn't taking it away.

ELMER: That sounds fishy.

ATTORNEY: It is, in a way. What the court would be saying is that the property isn't the murderer's until the court itself has construed the will. If part of the court's construction of the will is to read in an exception for murderers, then the exception has been read in before the property got to the murderer. So the court would be taking nothing away from him.

ELMER: That's not only fishy. Surely the court would be taking away from the murderer something that would otherwise be his.

ATTORNEY: Not quite. It would be "his" if he weren't a murderer! But, I agree, this line of argument is pretty suspicious. I only want to point out to you that a court would be *capable* of coming up with it just in order to refute the "additional penalty" argument that I gave you. So we have to conclude that the additional penalty point is only an argument, not a conclusive thing by any means.

ELMER: Well, can I ask if there are any more reasons in favor of allowing the murderer to take under the will?

ATTORNEY: I've thought of a third one, though it's not likely that a court would pay much attention to it if it comes up in argument. But let me give you a possible situation. Suppose the testator has an estate worth a million and five dollars. He draws up a will dividing his estate into two parts absolutely: a million dollars goes to his son, and five dollars for a tiny organization called Citizens for the Restoration of British Sovereignty in America. Then his son murders him. Suppose the court were to decide that the son cannot inherit the million dollars because he murdered the testator. Should the million then be paid over to the other beneficiary? You see, the estate has to go *somewhere*. It can't revert back to the state because any such rule would encourage the judiciary, which is part of the state, to find such reversions. There are laws that require that the estate go to the beneficiaries. So who would the court be benefitting by disinheriting the murderer?

[pg1140] ELMER: You mean, in any will at all there will be a question of who gets the money if the murderer doesn't get it?

ATTORNEY: Exactly. Giving the money to the other persons in the will might be worse than

giving it to the murderer. Of course, it's not really a question of worse or better, but of the intent of the testator. Suppose a court says that it cannot imagine that the testator, if he was aware of the problem, would have intended to give the money to a murderer? All right, but then what would have been his intent? To make my preceding example stronger, suppose his son has several children, but the father instead of providing directly for the grandchildren in the will gave the estate outright to the son. Then the son murders the father. Suppose in addition that the son is going to be hanged for murder and will thus die shortly. If the court takes the money away from the son and instead gives it to the Citizens for the Restoration of British Sovereignty, the court in fact will be depriving the grandchildren of the estate. Surely the testator would not have wanted such a result. We can suppose that even if he knew about the murder, he would still have wanted his grandchildren to inherit at least part of the estate and not be left penniless after their father is hanged.

ELMER: Will the courts always construe a will according to the intent of the the testator?

ATTORNEY: Well, they construe wills as written, but the written words are taken to indicate the testator's exact intent. When the words are ambiguous, courts may look to other evidences of the testator's intent. Now, in your murderer question, there is no ambiguity whatsoever in the will, and hence there is no cause at all for a court to look for other indications of the testator's intent. Even if a court did want to look beyond the will for evidence of intent an argument would be possible, along the lines I've suggested, that the testator might have intended that the person who murdered him take the estate anyway, especially if the facts are as strong as the ones I've suggested in my fanciful example.

ELMER: As long as these speculations seem to have something to do with the law, I might as well mention a couple of ideas I've had since our last conversation.

ATTORNEY: Such as?

ELMER: Well, you said that a murderer might act so that the testator doesn't have a chance to change the will. But suppose the testator would have changed the will to give *more* of the estate to the person who murdered him. You know, a change in a will can act to a person's benefit as well as to his harm. We can't just assume that the murderer gets an advantage by killing the testator.

ATTORNEY: Very good. What else?

ELMER: Suppose the testator *wants* the beneficiary to murder him? Suppose he's told the beneficiary that he's looking for some way to die but doesn't believe in suicide or is afraid to commit suicide. Or, he might be in great pain [pg1 141] and ask the beneficiary to put him out of his pain.

ATTORNEY: Also very good. Elmer, you've been doing a powerful lot of thinking about all this.

ELMER: It looks like you have too.

ATTORNEY: Yes, it's an interesting problem and I've put more time in it than I should have, just because it interests me. But you've never taken any interest in the law before. Why this great interest on your part?

ELMER: Nothing in particular. It's just that your ideas have led me to think about it.

ATTORNEY: Well, your ideas do have some merit. A court shouldn't simply assume that the murder is committed so that an adverse change in the will can be prevented. And sometimes, though this one seems far-fetched, the testator might want to be murdered. Of course, that would still be murder, but I take it your real point is that if the testator wanted to be murdered he would still have intended that the murderer take under the will.

ELMER: Yes.

ATTORNEY: So what do you think?

ELMER: Well, as I said at the beginning, I think the case is more solid than ever. There's no statute or case saying a murderer should be read out of his victim's will. And as I count them, there are at least five reasons, some of course a lot stronger than others, which support allowing a murderer to collect under the will. I agree that you have shown that each of the reasons is not itself conclusive on the court—it can wiggle out of any one of them by some idea or other like the one you call "vesting". But taken together they should be conclusive. Don't you agree?

ATTORNEY: No.

ELMER: *What?*

ATTORNEY: Just as I said.

ELMER: Why?

ATTORNEY: Let's look at the reasons on the other side. Now, some of them we've already considered. There's the one about the murder acting to prevent the will from being changed. You're right, that won't always necessarily be the situation, but a court will probably think that the murderer felt he had good reason to commit the crime. If the murderer thought he would benefit from the testator's living a bit longer and changing the will, then the murderer would not act.

ELMER: But the murderer might not know what the testator would do.

ATTORNEY: I'll grant you that. Yet, you see, there is something to the argument concerning change, and it does to an extent distinguish the North Carolina case. Also, the "vesting" point I mentioned is a possible argument on the other side. In addition, there is something to the notion of the court's assumption that the testator would not have intended to have the murderer like under the will had the testator thought about the problem, though there [pg1142] too a lot of

difficulty attaches to a court's taking such a position and rewriting a will to accord to what it thinks the testator would have wanted.

ELMER: The policy against rewriting wills makes all of those arguments weak.

ATTORNEY: Maybe so, but there are better arguments against the opposite result, arguments which in my opinion—well, I won't give you my final verdict until we've looked at the arguments.

ELMER: O.K. What can they be?

ATTORNEY: First of all, let's look at the effect of a decision allowing a murderer to take under a will. The public will be put on notice that one way to get an estate would be to murder the testator. Lots of crazy people might be encouraged to do so.

ELMER: But—

ATTORNEY: I know, you're going to say that it would make no sense for someone to commit murder if he wants to enjoy the property he receives. But remember, life insurance contracts typically have a provision that disallows suicide, because people have been known to commit suicide so that their families will inherit the life insurance proceeds. The courts might simply not want to be a party to any decision that would encourage such a fundamentally immoral act as murder.

ELMER: I was going to say, what business is it of a court to make that judgment in the first place?

ATTORNEY: Well, if you're saying a legislature should deal with the question, I agree. It would be better if a legislature did so. But a legislature might not get around to doing it, and meanwhile a court is faced with a decision to make. The court can't reach a "bad" result simply by thinking that the legislature will come along later and correct it. A court is under some pressure to come up with good results irrespective of what the legislature will do.

ELMER: All right, maybe the result isn't desirable. But on what law can the court base the decision you seem to be predicting?

ATTORNEY: Not any "law" in the sense of rules in statutes or cases. But let's look at some other sorts of "law". For instance, there are various principles in the law that have been repeated in many cases and approved by many writers. You can find them in Blackstone and Kent, among other places. In particular, it's often been said that "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." [FN14]

ELMER: But are those statements rules of law?

ATTORNEY: No, they are maxims, or standards, or principles, or whatever you want to call

them. Sometimes they apply and sometimes they don't, which is a rather frustrating feature that they have. For example, they don't apply to the rule in property known as adverse possession, where a person gains the [pg1143] property of another by virtue of his own wrongful trespass exercised openly for a period of years! Or take the case of an employee who breaks his contract to take a higher-paying job. He might have to pay damages to his first employer, but he can keep his new salary, and therefore the law allows him to profit by his own breach of contract. [FN15]

ELMER: So sometimes they are rules and sometimes they aren't. Just what do you think a court will do?

ATTORNEY: Well, Elmer, after all this thinking and research, it comes down in my mind to a kind of intuitive feeling. I predict, on the basis of what I know about courts and judges and the legal system, that a court simply will not want to be a party to a murderer's scheme to collect under a will. It's as simple as that. The judiciary will not want to be involved in that kind of enterprise. A court faced with the question would probably hold that the murderer cannot take. The court will perceive its decision to be in accordance with "justice". That might not mean precisely that the right party will receive the funds (recall my Citizens for British Sovereignty example), but it will help guarantee that criminals get what most people would probably say is coming to them. In other words, the court simply might not want to think of itself as any sort of an instrument enabling a murderer to profit from his crime.

ELMER: That is very vague.

ATTORNEY: I know. That's why I've mentioned other arguments, like listing some principles that have been used in many other cases. You can view these as make-weights if you want to, or you might view them as suggestive of the same general result. The maxim that a person should not be allowed to profit by his own wrongdoing is perhaps another way of stating that the courts will not allow themselves to be instrumental in a person's scheme to profit from his own wrong. Of course, sometimes courts do exactly that, as in the case of adverse possession, or perhaps in the North Carolina case concerning dower. But although courts sometimes do it, I don't think they want to, and I do think that they will try to avoid it whenever they can. Thus, I would conclude that there is considerably more of a chance than not that a court would not allow the murder to take under the will.

ELMER: So you think the court would probably act contrary to the law?

ATTORNEY: Not at all, Elmer. It might be acting contrary to some rules, and it might not be able to cite a statutory rule in its favor. But the law is something more than those rules. In fact, the law, as I've tried to suggest to you, is really a prediction of what courts will decide. If you want to have my prediction right now at this moment, I would have to say that there's a better chance than not that a court will hold against the murderer.

ELMER: This is your intuition?

ATTORNEY: Yes, in a way. It's the same intuition I had when I first heard [pg1144] your question. All the research we've done in between hasn't really changed my opinion.

ELMER: Well, thank you very much for your opinion. I can't see how you you could reach that result in the light of all the statutes and cases and other considerations that we talked about. Your idea of law is too vague for me. I guess I just don't think of law that way.

ATTORNEY: You're entitled to your opinion. I just hope that in your lifetime and mine no court will ever be faced with this particular question. As much as I'd like to know whether my idea of the law is right or not, I hope your question is never answered by any court.

—The End—

POSTSCRIPT

The murder is committed off-stage, after the performance, by Elmer. A following drama, *People v. Palmer*, is a straightforward criminal trial ending in a conviction of second-degree murder. After that there is a new courtroom drama taking place in Probate Court entitled *Riggs v. Palmer*, where Elmer is stripped of his rights under the will and the estate passes instead to his aunts.

CONCLUSION

If Elmer was, as I have hypothethized, a pure positivist, the decision by the probate court must have come as a complete surprise to him. I have tried to show by means of a fictitious dialogue that a lawyer could have predicted the result in advance. Of course, no prediction served to stop the original Elmer Palmer. But something like it might have deterred other nameless would-be murderers before 1889; the idea of killing a testator in order to take under a will was at least conceivable for centuries before that time. There is no way we will ever know whether any such deterrent was operative, but if the lawyer's intuitive reactions are any persuasive indication, in a very real sense "the law" could have so operated in this peculiar situation.

I hope that the dialogue concerning "Elmer's Rule" has helped to clarify the notion of law as a prediction of official behavior. Justice Holmes was apparently the first to write that "law" is a prophecy of what courts will do, [FN16] but this seminal idea became distorted in the later writings of the "American realist school" into an equation of "law" with the actual decisions of officials. [FN17] A great deal now remains to be sorted out about the predictive theory of law. But one thing seems clear. If "law" is to mean something that can affect (change, modify) human behavior, then it must operate at the time that a person has a choice to make concerning [pg1145] his own plans or activities. If it only operates after the fact—i.e., when an official finally is called in to make some judgment about the person's completed act— then it can hardly be called "law". A *prediction* of official behavior, however, does operate in the present. It comes into play when a person such as Elmer, is contemplating whether to do or refrain from doing something. A lawyer is not needed to make the prediction, although the more one knows about law the better the prediction will be. Elmer himself could have reached some conclusions regarding the New York courts' most probable course of action. The real Elmer may in fact have looked up the law in Blackstone and proceeded to commit the crime, secure in his own mind that he would receive

the estate even if convicted of murder.

If Elmer did do so, then he fell into the positivist trap of equating the law with "rules" on the books. To be sure, a rule is usually a good predictor of official behavior. But it doesn't always work, particularly in "hard" cases. There may be a gap between the result called for by the rule and the result that will be reached by the court. Part of this gap might indeed be filled by what Dworkin has argued are "principles"—standards that act somewhat like rules but not exactly like them, as witness the adverse-possession exception to the principle that a man should not profit from his own wrong. [FN18] Perhaps a little more of the gap might be filled by notions of justice or fairness which we are only dimly beginning to understand. [FN19] Even more of the gap might be accounted for by something analogous to Chomsky's deep-structure transformation rules of grammar, [FN20] a possibility which provides a rich field awaiting legal research. The idea of law as a set of rules, a concept that once seemed so scientific in the writings of Kelsen [FN21] and even [pg1146] Hart, [FN22] now only seems to account for the part of the iceberg above the waterline. *Riggs v. Palmer* is one of the important sign-posts toward a scientific jurisprudence that takes leave of the obvious and starts to examine what may lie below the surface.

FOOTNOTES

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**Numbers beginning with pg1129 etc. refer to the paging in the original paper.

[FN1]. 115 N.Y. 506, 22 N.E. 188 (1889).

[FN2]. *Id.* at 514-15, 22 N.E. at 191.

[FN3]. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 41 (1921).

[FN4]. Dworkin, *The Model of Rules*, 35 U.CHI.L.REV. 14, 23-24, 29-30 (1967) [[hereinafter cited as Dworkin].

[FN5]. *Id.* at 22.

[FN6]. Taylor, *Law and Morality*, 43 N.Y.U.L.REV. 611, 626 (1968).

[FN7]. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV.L.REV. 593, 629 (1958).

[FN8]. For a similar dialogue, see Hart, *The Power of Congress to Limit the Jurisdiction of*

Federal Courts: An Exercise in Dialectic, 66 HARV.L.REV. 1362 (1953).

[FN9]. *Owens v. Owens*, 100 N.C. 240, 6 S.E. 794 (1888). I have taken a slight dramatic license. *Owens* in fact arose after Elmer poisoned his grandfather, but before the decision in *Riggs v. Palmer*, which discussed and rejected "the doctrine of that case." 115 N.Y. at 514, 22 N.E. at 190-91.

[FN10]. Such a situation is the main ingredient in a superb detective novel by Agatha Christie. See A. CHRISTIE, *HERCULE POIROT'S CHRISTMAS* (1938).

[FN11]. See generally H. HART, *THE CONCEPT OF LAW* (1961); H. KELSEN, *PURE THEORY OF LAW* (1967).

[FN12]. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (1968). See also Hunter, *Wittgenstein on Meaning and Use*, in *ESSAYS ON WITTGENSTEIN* 374 (E. Klemke ed. 1971).

[FN13]. See *De Veau v. Braisted*, 363 U.S. 144, 158-60 (1960); *Trop v. Dulles*, 356 U.S. 86, 96-97 (1958). See generally Gathings, *Loss of Citizenship and Civil Rights for Conviction of Crime*, 43 AM.POL.SCI.REV. 1228 (1949); *Developments in the Law—Equal Protection*, 82 HARV.L.REV. 1065 (1969).

[FN14]. 115 N.Y. at 511, 22 N.E. at 190.

[FN15]. These examples are Dworkin's, *supra* note 4, at 25-26.

[FN16]. Holmes, *The Path of the Law*, 10 HARV.L.REV. 457, 458 (1897).

[FN17]. See, e.g., K. LLEWELLYN, *THE BRAMBLE BUSH* 90-91 (1951); Frank, *What Courts Do In Fact*, 26 ILL.L.REV. 645, 657 (1932); Frank, *Are Judges Human?*, 80 U.PA.L.REV. 233, 236-37 (1931).

[FN18]. Dworkin distinguishes "rules" (which require a certain result if the facts fall within the rule) from "principles" (which are a matter of "weight" and which should be taken "into account" but which do not point unequivocally to a specific result). Dworkin, *supra* note 4, at 25-29. But although this distinction is valuable in many cases, it is hard to apply in those instances where a "rule" does not clearly apply to a fact situation. Here a rule may only apply in its penumbra, *cf.* Hart, *supra* note 7, at 607-12, 628-29, and in such a case the "rule" may take on aspects of what Dworkin calls a "principle." When the "rule" is derived from a case decision, a court may even look to the principle of the rule (as we have seen in the discussion between Elmer and the Attorney concerning the distinguishing principle of the North Carolina dower decision). Finally, principles are sometimes enacted as rules. Contrary to the Attorney's guess in the text, the Napoleonic code did have provisions against the taking of property by inheritance or will from a benefactor whom the heir has murdered. See 115 N.Y. at 513, 22 N.E. at 190. How are such "code" provisions to be balanced against statutory "rules" in Dworkin's sense? As Dworkin has recognized, his essay opens many new and difficult questions even as it achieves its primary goal of showing the inadequacies of positivist theory. See Dworkin, *supra* note 4, at 45-46.

[FN19]. *See generally* J. RAWLS:, A THEORY OF JUSTICE (1971). Rawls' book is a 'classic' in the special sense that it should have appeared a century or two ago. Its recent publication attests the retarded state of moral philosophy. "We can send a man to the moon," but we have hardly begun to improve upon the rudimentary theories of justice of Plato and Aristotle.

[FN20]. *See id.*, at 47. *See generally* N. CHOMSKY, LANGUAGE AND MIND (1968); N. CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX (1965).

[FN21]. *See* KELSEN, *supra* note 11, at 106-07. *See also* J. RAZ, THE CONCEPT OF A LEGAL SYSTEM 93-167 (1970).

[FN22]. *See* HART, *supra* note 11, at 77-96.