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Understanding Scalia and making his philosophy easier to understand

Justice Antonin G. Scalia died Feb. 13, 2016, at the age of 79. Following his death, much was written to celebrate his impact. Some of the most endearing were the tributes written by his own law clerks. See, as one good example, a piece by New York-based Kirkland & Ellis LLP attorney and former Scalia clerk Danielle Sassoon — "Tribute: A mentor and a Mensch — Remembering Justice Scalia," on SCOTUSblog.

I've encountered so many law students, non-law students, lawyers and non-lawyers who seem to have neatly formed an opinion about Scalia's judicial philosophy. Oftentimes the opinions are on the extremes — either "Justice Scalia always gets it wrong," or "Justice Scalia is always right."

Whenever I am asked my views on Scalia's views (usually by family or friends as of late), I tell the true story of two cases — two cases diametrically opposed to one another; two cases that I do not believe can be reconciled — and two cases which, when pitted against one another, help illustrate what some might call competing judicial philosophies.

I share this story now, and, at its conclusion, please ask yourself which case appeals more to your judicial compass. Both cases involve the old (and now mostly legislatively solved) question of whether a killer can inherit property from his victim.

The first case is one we read in law school: *Riggs v. Palmer*, 115 NY 906 (Ct. App. 1899).

"At the date of the will, and, subsequently, to the death of the testator, Elmer lived with him as a member of his family and at his death was 16 years old. He knew of the provisions made in his favor in the will, and, that he might prevent his grandfather from revoking such provisions, which he had manifested some intention to do, and to obtain the speedy enjoyment and immediate possession of his property, he willfully murdered him by poisoning him. He now claims the property, and the sole question for our determination is, can he have it? The defendants say that the testator is dead; that his will was made in due form and has been admitted to probate, and that, therefore, it must have effect according to the letter of the law." *Riggs*, 115 NY at 508-509.

At the outset of its decision, the *Riggs* court acknowledged that under the letter of the law, the slayer inherits. "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*, 115 NY at 509.

But upon further reflection, the *Riggs* court ruled otherwise because it felt that the legislators could never have intended for the slayer to take under the will.

"The purpose of those statutes was to enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes legally expressed; and in considering and giving effect to them this purpose must be kept in view. "It was the intention of the lawmakers that the donees in a will should have the property given to them. But 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.

"If such a case had been present to their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it." *Riggs*, 115 NY at 509.

Now for the second case — the one we did not necessarily read in law school. Basically the same question presented in *Riggs* came before the Illinois Supreme Court some 15 years later in *Wall v. Pfanschmidt*, 265 Ill. 180 (1914). Only in this case there was no will; rather, the victim died intestate at the hands of a slayer in line to recover.

The *Wall* court reviewed the various cases reaching the issue, and in particular reviewed the *Riggs* case and its reasoning. The *Wall* court rejected *Riggs* and concluded that the statutes require the slayer to inherit. " ... [W]here the intestate law casts the estate of a deceased person upon designated persons this is absolute and peremptory, and no rule of public policy can take it from the persons designated by statute and give it to others, even for the reason that the designated person killed the intestate without a violation of the statute." Wall, 265 Ill. at 189-90.

Directly confronting *Riggs*' reasoning, our Supreme Court then stated: "The question as to what the framers of the statute would have done had it been in their minds that a case like the one here under consideration would arise is not the point in dispute. The inquiry is as to what, in fact, they did enact, possibly without anticipating the existence of such facts. This should be determined, not by conjecture as to their meaning, but by the construction of the language used." *Wall*, 265 Ill. at 190.

After I tell the story of *Riggs* and *Wall*, I ask the listener: "Which case is correctly decided?"

Are you a *Riggs* thinker — who examines the statute and, if it does not answer the question, then you divine what the legislators would have done had the controversy been before them? The *Riggs* camp has no qualms bestowing great power upon the court to fashion remedies in an arena thought to be controlled by the legislature.

Or are you instead a *Wall* follower, who is content with the language of the statute and would permit it to be enforced as written — knowing that the legislature always has the power to amend if there be injustice?

Your party tends to distrust judicial power, avoids infringing on legislative pronouncements (unless they be unconstitutional) and has confidence that the legislative process will fix any injustice it may have caused.

Scalia was unapologetically a *Wall* judge — just like the members of our state's own high court in 1914.

THE PROCEDURAL THICKET

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