

10/01

legal realism-

- roots in pragmatism
- Florence Kelley- advocate/ legal strategist, put together briefs for SC
- SC Justice Louis Brandeis
 - Brandeis brief- why it is dangerous for women to work for more than 10 hours a day
- progressive reform and legal change
- bramble bush- llewellyn
 - attempted to draft a code of rules that made things more sensible
- looks for pragmatic outcome
 - what will results be- in public interest
- characteristics and method
- social science/real world arguments
- Perez v. Sharp
 - Cali SC 1948
 - 4-3 ruling
 - Justice Roger Traynor
 - Spanish woman trying to marry a black man
 - Perez wins
 - law prohibiting blacks and whites from marrying is struck down in Cali
 - law is invalidated because its based on prejudice- social issue
 - uses scientific evidence
 - demolishes California justifications one by one with factual argument
- Perry v. Schwarzenegger
 - 2010
 - prop 8
 - trying to get state to issue marriage licenses to them
 - it has become a constitutional amendment to the Cali constitution so go to federal court
 - Perry won
 - because of social reasons unlike Goodridge which won because of aspirational-ism
 - judge vaughn walker argues against everything cali had to say- "evidence shows"
 - BELOW IS JUST FYI

- supporters of prop 8 were unhappy
- 9th circuit sends back to state
- ultimately, back at 9th circuit and it says we don't have jurisdiction then goes to US SC and cali is no longer interested in defending it
- Atkins v. Virginia 2002
 - morality of executing a mentally retarded person
 - abduction, robbery, murder
 - Atkins wins
 - evolving standards of decency
 - looking at why we execute people- to act as a deterrence to people who purposely murder, to act as an example for future murderers
 - can't do that with mentally retarded people because they won't understand it
 - not practical- won't work
 - even if you exempt mentally retarded people from execution- won't affect the mentally capable people
 - practicality- m.r defendants may be less capable of defending themselves
 - advantages-
 - can be used to improve society
 - care about the way the outcome will affect people
 - current/ practical/prevalent trends in society
 - concrete/ straightforward
 - disadvantages
 - what is good or bad for society, who decides
 - can disregard what the law is
 - too much flexibility
 - room for bias
 - disregards the framers
 - focuses on social sciences- social science is not definitive
 - inconsistent
 - outcome not clear/ dependent on quality of argument made for it

10/3

the adversarial system

group session- pick attorney or judge in the mock lawsuit- check due dates

purposes of the courts

- finding justice
- 3rd party resolves disputes

- interpreting law- definitive, quality; **legitimacy**
- conflict resolution
- social ordering
- lawmaking

players- The Triad

neutral arbiter

plaintiff's attorney -----> defendant's attorney

2 out of 3 will win always- outsider can appeal or reject the legitimacy

Jerome Frank- problems of adversarial system

- fight theory vs. ...theory
- problems: unnatural form, framing to the advantage of one side or the other, memory may be vague/less than definitive, attorneys skill makes a difference- make untruthful witnesses look truthful and vice/versa,
- now attorneys don't look for the truth- they look to win
- nobody looks for the truth
- a lot of technicalities can go wrong

The nature of legal disputes

- disputes as a process of filtration and translation
- practical example

***adversarial system can be good, but it won't resolve all issues ***

Translation and Filtration

Injury Occurs

- every lawsuit starts with an injury or anticipated injury