

Announcements

A Note about our schedule:

Today: Dworkin, tutorial,
& test questions on Blackboard

Monday, February 4: Review class (please bring
questions)

Wednesday, February 6: In-class test & no tutorial

Ronald Dworkin
(1931-)



“Law’s Ambitions for Itself”
(1985)

Outline

- 1. Overview of Dworkin's Project
- 2. Three Mysteries of a Non-Positivist Account
- 3. The Solution: An Interpretive Model of Adjudication
- 4. Applying the Model: *Dronenburg v. Zech*
- 5. Returning to the Three Mysteries
- 6. Responding to Dworkin's Critics
- 7. Dworkin v. Hart

1. Overview of Dworkin's Project

- 1. Dworkin's Opponents
 - Positivists, legal realists, and conservatives
- 2. Dworkin's Goals
 - Non-positivist account of law
 - A theory of adjudication
 - A progressive theory

2. Three Mysteries of a Non-Positivist Account

- 1. “Law works itself pure.”
- 2. “There is a higher law, within and yet beyond positive law, toward which positive law grows.”
- 3. “Law has its own ambitions.”

3. The Solution: An Interpretive Model of Adjudication

- Dworkin's definition of law:
 - Positive law (the law on the books) versus
 - Full law (positive law + principles of political morality that best justify the positive law)
- The role of the judge:
 - To interpret the positive law in accordance with the principles of political morality that best justify the positive law

3. The Solution: An Interpretive Model of Adjudication

- Two dimensions of interpretation:
 - 1. Dimension of fit: The interpretation of a rule has to fit with the language of that rule and must accord with other judicial decisions on point.
 - 2. Dimension of justification: The interpretation must justify the rule.
- Law as Integrity

4. Applying the Model: *Dronenburg v. Zech*

- Facts:
 - Dronenburg discharged from the military for having sex with another man in the barracks.
- Issue:
 - Does the constitutional right to privacy extend to cover homosexual acts in the barracks?
- Prior constitutional decisions:
 - Covered other aspects of privacy (contraception; interracial marriage; abortion) but not homosexual acts. No explicit right.

4. Applying the Model: *Dronenburg v. Zech*

- Two possible ways of interpreting the right to privacy, under dimension of *fit*:
 - Narrow interpretation
 - Harm principle interpretation
- Dimension of *justification*
- Result: According to Dworkin, homosexual acts are protected by the right to privacy

5. Returning to the Three Mysteries

- Has Dworkin solved each of the three mysteries of a non-positivist theory of law?
 - Law works itself pure.
 - There is a higher law toward which the actual law grows.
 - Law has its own ambitions.

6. Responding to Dworkin's Critics

- Has Dworkin adequately responded to his opponents?
 1. The only law we have is the law on the books (positive law).
 2. If judges rely on anything beyond the positive law, they “make” law.
 3. It is illegitimate for judges to “make” law.

7. Dworkin v. Hart

Dworkin and Hart provides different answers to the following two questions:

- 1. What is law?
- 2. What is adjudication?