

PHL271 Handout 5: Dworkin on Judicial Adjudication as Interpretation

§1 Review: Hart on Adjudication

Ronald Dworkin was the most well-known and influential critic of legal positivism (especially the brand of legal positivism defended by Hart). He argued that legal positivism generates the wrong model of *adjudication*. Whereas legal positivists take judicial adjudication to primarily consist in the application of positive law, Dworkin argued forcefully that on a right model of adjudication it is an essentially *interpretive* enterprise.

Recall: in Ch. 26 of *Leviathan*, Hobbes argues that adjudication by non-sovereign judges must *always* involve interpretation. Perhaps this should make you suspect that the interpretive aspect of Dworkin's model of adjudication isn't the major source of difficulty for legal positivism (the problems might arise instead from what Dworkin says about how judicial interpretation must operate).

Today we're going to examine Dworkin's development of his *Interpretive Model of Adjudication* in 'Law's Ambitions for Itself' (a model later extended in his book *Law's Empire*).

Recurring Questions: Which elements of the Interpretive Model are inconsistent with legal positivism? Could Dworkin's arguments persuade legal positivists to accept these elements?

Let's begin by reminding ourselves of what Hart meant by 'legal positivism':

Legal Positivism: the *Separation* and *Identification* theses are true.

Separation Thesis: there is no necessary connection between law and morality.

Identification Thesis: legal systems contain only laws whose content can be determined without appeal to moral argument—so called 'positive law'.

Hart's main opponent, when he defends legal positivism, is someone who endorses a version of Natural Law Theory:

Natural Law Theory (rough): 'there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid' (p. 186 of CL)

Today we're going to look at Ronald Dworkin's anti-positivist account of adjudication. As we'll see, Dworkin seems to qualify as a Natural Law Theorist.

Why is judicial adjudication relevant to the debate between positivists and anti-positivists? To see the answer to this question, it's worth returning to Hart's 'Problem of the Penumbra'.

Here's the problem in a nutshell: legal rules have central cases where the decision is obvious, but also 'penumbral' cases where the legal rules seem incomplete and in

need of extension (or supplementation). To deal with penumbral cases, judges must make rational decisions about how to extend the law (these decisions are part of a more general process of adjudication). Yet for these decisions to be rational (or 'intelligent'), it seems they must be guided by what the law *ought* to be; yet if this 'ought' is read as a moral 'ought', legal positivism looks to be in trouble.

[To get feel for the problem, check out Hart's 'vehicle' example on p. 37 of LM.]

Hart answers the objection by appeal to his 'Ought' Pluralism:

'Ought' Pluralism. There is both a moral and a non-moral reading of 'ought' that can be intelligibly applied to laws and legal systems.

He bolsters this appeal by insisting that the relevant standards of correctness are determined by social aims. Yet these aims could, for all his view says about them, turn out to be evil. So the necessary separation of law and morals remains intact.

Hart's answer to the Problem of the Penumbra has several features that will become salient when we discuss Dworkin.

1. He denies that the relevant social aims are part of the law—if they were part of the law, then he would have to abandon the identification thesis (since that thesis restricts the 'law' to positive law).
2. Given 1, when judges are dealing with penumbral cases, they are *creating* rather than merely *applying* the law.
3. The social aims that make a particular extension or supplementation of the existing positive law *rational* or *intelligent* are not generated by the particular aims of particular judges; they are determined instead by the community that accepts and constructs the law.
4. The social aims that determine what the law ought to be may be either moral or non-moral.

Dworkin abandons 2–4, and therefore also abandons 1.

§2 Dworkin's Interpretive Model of Adjudication

Dworkin's argument for the Interpretive Model is complicated and difficult to evaluate. His explicit opponent in 'Law's Ambitions for Itself' is a model of adjudication on which (1) the law is exhausted by positive law (i.e. the Identification Thesis is true) and (2): 'There are only judges who change the law, from time to time, in order to make it better, in their own entirely human view, or simply to repair its gaps enough to decide cases at hand.' (LM p. 109)

Notice: Hart (and likely also Hobbes) would endorse (1). But he wouldn't endorse (2): he thinks that when judges make rational changes to the law they are not guided only by 'their own entirely human view' but by general social aims.

Historical Note: the legal positivists Dworkin mentions are those whose views Hart seeks to improve upon in his article, namely the Utilitarians Bentham and Austin, as well as the American Legal Realists.

§2.1 *Metaphors and Mysteries*

Dworkin's aim is to 'rehabilitate' an idea captured by the following collection of old metaphors: "Law works itself pure." "There is a higher law, within and yet beyond positive law, toward which positive law grows." "Law has its own ambitions" (pp. 108–109)

He claims that within these metaphors lie three 'mysteries'. These mysteries all presuppose the following 'obvious fact':

Adjudication as Legislative: 'in some sense law changes through adjudication as well as explicit legislation. Judges often describe the law, that is, as different from what people had taken it to be before, and use their novel description to decide the very case in which it is announced.' (p. 109)

Here are the three 'mysteries':

1. The changes judges make to the law in adjudication are (or can be) (i) guided (ii) by the law itself.
2. Changes guided in this way are improvements ('purer law is better law').
3. These changes are not genuine changes, but discoveries of existing law.

One analogy that might help provide a grasp on these mysteries:

There are those who restore old paintings. These experts usually haven't seen the actual scenes depicted by the paintings. Yet they are still able to restore the painting. They might alter a painting (the 'changes to the law') according to relevant physical principles (the guiding elements of the law itself)—e.g. about natural illumination—and so produce a more accurate picture (the 'improvement') of the depicted scene (the 'existing law').

Dworkin raises an interesting consideration in favour of (3). He argues that (3) figures in a political justification for adjudication that changes the law (cf. p. 109).

On the face of it, for a judge (rather than a legislator) to change the law seems unfair to the litigants (and also contrary to the separation of powers between legislative and judicial branches of government).

Yet if (3) is right, then these 'changes' are not genuine changes, but instead discoveries of existing law. So in these cases judges are not creating new law, but recognizing and enforcing a hitherto obscured aspect of the existing law.

§2.2 *The Interpretive Model*

Dworkin's model of adjudication is meant to capture an idea that runs through the metaphors and mysteries canvassed in §2.1. At the core of this idea is a distinction between *positive law* and *full law* (cf. p. 111):

Positive Law: 'the law in the books, the law defined in the clear statements of statutes and past court decisions'

Full Law: 'the set of principles of political morality that taken together provide the best interpretation of the positive law'.

The complicated part of the model is Dworkin's account of interpretation. This is how he glosses the notion on p. 111:

Legal Interpretation: 'a set of principles provides the best interpretation of the positive law if it provides the best justification available for the political decisions the positive law announces. It provides the best interpretation, in other words, if it shows the positive law in the best possible light.'

Dworkin motivates and develops his account of interpretation by appeal to quite general considerations drawn from literary theory (Cf. p. 112; see also the selection from *Law's Empire* in LM).

At the most abstract level, Dworkin claims that 'interpretation seeks to show the material being interpreted as the best it can be' (p. 112).

This abstract characterisation of interpretation is meant to be a general description of interpretation that captures what is in common between rival theories of interpretation.

Dworkin uses his abstract characterisation of interpretation to extract two tests for deciding between rival interpretations:

1. FIT: a candidate interpretation must justify (at least most) existing positive law
2. JUSTIFICATORY POWER: an interpretation I_1 is better than an interpretation I_2 if it provides a superior justification for existing positive law than I_2 .

Obvious question: what does it take for the justification of positive law to be superior?

Here is what Dworkin says: 'Showing positive law in its best light means showing it as the best course of statesmanship possible.' (p. 113)

Dworkin provides an extended example—the Dronenberg case—of how his model differs from that of his positivist opponents. See pp. 114–117.

§2.3 *Why Accept the Interpretive Model?*

Dworkin's argument in 'Law's Ambitions for Itself' is quite hard to figure out. He couches his disagreement with his positivist opponents in largely political terms. The contrast between his model and his opponent's model of adjudication is portrayed as a disagreement over which political virtue should dominate (cf. pp. 119–121). His model presupposes a virtue of *political integrity* (roughly: the state must speak with one voice).

'If [the state] relies upon one set of political principles to justify its use of coercive power in one area, it must allow those principles their natural extension' (p. 119)

By contrast, Dworkin accuses the positivists of endorsing the virtue of *economic efficiency* ('conceived as the goal of satisfying the preferences of the community overall').

Dworkin sees these two virtues as essentially in conflict, and so sees the choice of model for adjudication as a political/moral decision between these two incompatible political virtues.