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Editors' Introduction

Sanne Taekema & Rachel Herdy*

In 1878, the American philosopher Charles S. Peirce formulated the Pragmatic Maxim for making our ideas clear, but interestingly enough, since then the idea of pragmatism itself has been quite obscure. While Peirce insisted that pragmatism intended to pursue an experimental attitude in philosophy and that it implied a realist approach in metaphysics, William James argued that pragmatism (which he also dubbed 'practicalism') looks at concrete instances, facts, action, and power and that it agrees with nominalism in its appeal to particulars. In 1908, when pragmatism celebrated its 10th anniversary, Arthur O. Lovejoy identified, under the same rubric, no less than thirteen logically independent propositions. Today, more than 100 years after Peirce's death, the history of pragmatism is still confusing. Pragmatism continues to be invoked by rival philosophical projects and incorporated in the studies of philosophers of different strings – revolutionary and conservative, realist and nominalist, rationalist and deconstructionist.

Erasmus Law Review 8:1 attempts to address these conflicting views when it comes to legal theory. This volume grew out of a special workshop on Pragmatism and Legal Theory held during the 26th World Congress on Philosophy of Law and Social Philosophy (IVR) in Belo Horizonte, Brazil. Our main goal was to try to understand the mesh of complex, intertwined, and conflicting legal ideas that are frequently organised under the rubric 'legal pragmatism'.

In 'Pragmatism, Holism, and the Concept of Law', Adam Dyrda argues against some uncharitable criticisms of legal pragmatism, in which this line of thought is dismissed as anti-theoretical. The author proposes to look at Morton White's investigation of 'holistic pragmatism' in order to reconcile legal pragmatism with a type of moderate conceptual approach to legal theory. Any approach to law, argues Dyrda, presupposes some general background assumptions, and things are not different when it comes to pragmatist legal theory. Oliver Wendell Holmes, Jr. can thus be read as an example of the possibility of connecting pragmatist thinking with a modest, non-ambitious conceptual approach in legal theory.

In 'Inferentialist Pragmatism and Dworkin's "Law as Integrity"', Thiago Lopes Decat draws on the similarities between an important contemporary pragmatist philosopher, Robert Brandom, and the work of an equally important contemporary legal theorist, Ronald Dworkin. His task is a tough one, however, for Dworkin conspicuously rejected philosophical pragmatism. Decat's strategy is to differentiate a narrow from a broad sense of philosophical pragmatism. Instrumentalism is just one of the commitments of a pragmatist thinker; others should be regarded as equally important. This strategic differentiation allows Decat to argue that Dworkin's cognitivist legal position is a match for Brandom's pragmatic and historical-expressive conception of rationality.

Wouter de Been recalls the pluralistic ideas of some of the classical pragmatist thinkers, like William James and John Dewey, in order to criticise the epistemological thinking of a contemporary pragmatist philosopher and legal theorist, Susan Haack. In 'Pragmatism and Dynamics: Does Pragmatist Adjustment Goes All the Way Down?', de Been argues that Haack's epistemology fails to support three fundamental pragmatist ideas: a pluralistic notion of reality, a view of inquiry as a form of action, and a claim that the principle of continuity should adjust the relationship between means and ends. His case is illustrated by looking at recent developments in the field of economic theory.

Given the fact that the theoretical aspects that distinguish a pragmatist position in philosophy and legal theory are so contested, the views and opinions presented in the articles that follow will likely differ. As editors, we consider ourselves participants in these debates. Many of the points made by the authors of this volume are arguments in the debate, to which we look forward to respond in the near future. The contributions to this issue can therefore be seen as instances of various conversations about pragmatism's place in legal theory.

We are grateful to the contributors who accepted to take part in this ongoing discussion and to the anonymous reviewers who helped improve the arguments.

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Pragmatism, Holism, and the Concept of Law

Adam Michał Dyrda*

Abstract

When discussing O. W. Holmes's answer to the question *What constitutes the law?* Morton White underlines the fact that Holmes's inquiry didn't focus on developing the concept of law. White states: '…Holmes said little in *The Path of the Law* about the notion of legal authority, perhaps because he was interested not in what he called a "useless quintessence of all legal systems" but in "an accurate anatomy of one"'. Such ambition (or lack of ambition) is characteristic of many pragmatic enterprises in the field of jurisprudence. However, sometimes the opposition between legal pragmatism and other legal theories is built upon a reference to the notion of the 'nature' or 'essence' of law. Many legal philosophers who aim to reveal the very 'nature of law' (or 'the concept of law' as H. L. A. Hart did) try to interpret Holmes and other pragmatists as offering a competitive view to their own. I will follow White's early intuition that such a construal of the controversy is simply wrong. Afterwards I will sketch a portrait of legal pragmatism in the context of White's own inquiry and his version of 'holistic pragmatism'; thirdly, I will present in brief the main reasons for exploring the concept of law in the contemporary analytic philosophy of law. Then I will show that traditionally 'pragmatic' and 'analytic' efforts in legal theory are situated on different levels of generality and conceptuality. However, these efforts can be, at least to some extent, reordered under the aegis of holistic pragmatism.

Keywords: legal pragmatism, holistic pragmatism, O.W. Holmes, H.L.A. Hart, M.G. White

1 The Methodological Objection

One of the most important matters in science and philosophy is the way in which we formulate questions; hence, the object of inquiry is, at least to some extent, implicitly suggested in every preliminary question asked. Thus, probably one of the most important (and, equally, most commonplace) accusations against a certain legal theory is the 'methodological objection' (MO). In its general form, it is as follows:

> (MO) The discussed theory fails because it uses the wrong methodology and asks the wrong questions, which precludes the theory from reaching the right (adequate) conclusions. Without putting our questions in the right way, we cannot grasp any substantial answers, i.e. such answers that (at least) could have a claim to adequacy.[1]

It seems, then, that for researchers who use this argument against a particular theory T, the theory T fails on its own grounds because it asks the wrong questions and, thus, receives inadequate answers. However, it is important not to simply equate inadequate answers with false answers. It may well be that the explanations proposed by T are true, but nevertheless, these truths can be assessed as falling beyond the 'real interest' of the particular (legal) theory. Therefore, even true theoretical answers can be inadequate in the sense that they are answers to the 'wrong questions' (and thus irrelevant) or even that they are the answers to questions that have actually never been asked (or need not have been asked)! To say 'Sorry, but you missed the important methodological point' is to claim that the whole theoretical effort made in order to answer questions has been useless. For sure, there is nothing more frustrating for a theorist than to hear something like that!

In such circumstances, theory T may be true, but nevertheless, it would not be a theory of the right sort. To put it in another way, it would not be the theory of the thing that it pretends to be the theory of. The label is wrong; therefore, after the successful conduct of the MO, theory T is compromised.

The methodological objection is a very popular critical move and probably the one that allows individuals to undermine a theory at the very beginning, without making any deeper research about its content. On the other hand, if the basic questions are, in the eyes of a critic, put rightly, she/he has to examine a substantial part of the theory more thoroughly. However, the answers giv-

* Adjunct Professor, Department of Legal Theory, Faculty of Law, Jagiellonian University, Cracow, Poland. Contact: adam.dyrda@uj.edu.pl; http://jagiellonian.academia.edu/AdamDyrda. I'm grateful to the organizers and the participants of the workshop on legal pragmatism at the IVR World Congress in Belo Horizonte (July 2013, Brazil) for their comments and discussion over the main ideas included in the very preliminary draft of this article. I owe special thanks to two anonymous referees who pointed out at least the most clamant shortcomings of this article.

1. Generally speaking, 'adequate claims' are ontic characteristics of things that are neither too narrow (and thus lacking some element or explanation) nor too vast (where characterisation is replete with elements that are unnecessary to properly describe or explain a thing). According to that definition, MO is primarily designed against descriptive-explanatory theories. In case of normative-evaluative theories, MO can be used only partially to discredit descriptive assumptions of such theory (on the basis that these assumptions are not the assumptions of the right kind). It is however hard to imagine how MO could be applied against purely normative theories (if there are any).

en by a particular theory could not ever be conceived as irrevocable, solid, final answers. Any possibility of reaching Peirce's "Final Opinion" shall be rather conceived as an ideal, and thus, we are allowed to give only preliminary answers, which surely would not be perfectly, ideally adequate, but may appear to be practically adequate in the sense that they would stand as sufficient reasons to formulate answers, despite the awareness of their potential incompleteness. And such answers would not only be of theoretical but also of practical importance.

Let us say that a 'human' theory should aim at giving answers in the most intuitive, practical sense (attempting to reach the possible, practical optimum) – answers that could be understood and rationally discussed by different parties. As C. S. Peirce stated, the main task of any inquiry or investigation is 'the settlement of (true) opinion' about reality, though humans might fail to reach the ultimate opinion on any question 'as long as the human race should last'.[2] A 'true belief' in such a scheme is a temporary, 'calm and satisfactory state' attained when the irritation and the doubt have been removed. The more practical a belief is, the more it becomes a longer and a more comfortable stop on our way to the ultimate true opinion (that would probably never be achieved).

In the following sections, I want to deal with particular, uncharitable criticisms of legal pragmatism. On that ground, there arises a question about the method of conceptual analysis applied by legal pragmatists. Having answered this question, I can focus on the holistic pragmatism understood as a general, philosophical background for differing and *prima facie* inconsistent conceptions of law.

2 How Does the Critique Usually Go?

The first thing I would like to focus on is the way the critique of non-pragmatist thinkers against legal pragmatism usually goes. There are actually a few ways to defy legal pragmatism. The first one is to undermine its philosophical background as, in the least, inaccurate. One must be perfectly acquainted with the philosophy of pragmatism to follow that line of thought. In fact, critics are often only generally aware of what such thinkers as W. James, C. S. Peirce, G. H. Mead, J. Dewey, and others have said on the matter. Such critics use maxims and epigrams rather than arguments and do not care whether their own interpretations fulfil the so-called charity principle. That is why the history of the critique of philosophical pragmatism (and its counterparts like legal pragmatism) is a story of misinterpretations. Significantly, W. James observed a long time ago that such situations were 'nothing new'.[3] This observation remains true.

D. Lind has recently pointed out that some authors, like R. Dworkin, D. Luban, P. S. Atiyah, and B. Z. Tamanaha, attempt to undermine legal pragmatism by saying that it is 'amorphous', 'antitheoretical', and 'skeptical jurisprudence', one that 'languishes in indeterminacy, depreciates the instinctive structure of legal reasoning and decision making, and commits a host of other jurisprudential sins'.[4] Probably the most important reason for such a labeling of legal pragmatism is that it is viewed as 'result oriented or instrumental', where adherence to precedent and rules is only contingent and not based on principle, as far as making a decision is always 'instrumentally important' for a community.[5] In a similar way, R. Dworkin argues that pragmatism supports an approach to adjudication that 'holds that judges should always decide the cases before them in a forward-looking consequentialist style',[6] and thus, he 'sees pragmatism as a worrisome interpretive conception of law that sacrifices principle and integrity for whatever outcomes would seem to be "best for the future without concern for the past"'.[7] I am not going to repeat Lind's way of defending legal pragmatism against these accusations here. I will limit myself only to notice that his way of argument reinterprets the misunderstood claims of legal pragmatists like O. W. Holmes and B. Cardozo in the light of certain background philosophical assumptions. Thus, he simply shows that 'result orientation', 'instrumentalism', 'antitheoretical character', and so on are not exactly what these critics think them to be.[8] Quite a similar strategy of defence was developed by S. Haack who presented the interpretation of Holmes's position in the philosophico-historical context of its origin.[9] In such cases as these, the conclusion of the whole analysis is that the critics have simply misunderstood what is at stake with pragmatism.

Unfortunately, the approach consisting of criticising philosophical pragmatism (both as a general movement and as a theory of a particular thinker) from an expert's point of view, and subsequently falsifying claims of legal pragmatism on the basis of such a ('charitable') critique,

2. C.S. Peirce, *How to Make Our Ideas Clear?* (1878), access online: <www.marxists.org/reference/subject/philosophy/works/us/peirce.htm>.

3. W. James, *Pragmatism: A New Name for Some Old Ways of Thinking* (1907), Lecture I.

4. D. Lind, 'The Mismeasurement of Legal Pragmatism', 4 (2) *Washington University Jurisprudence Review* 213, at 213-4 (2012).

5. D. Luban, 'What's Pragmatic about Legal Pragmatism?,' 18 *Cardozo Law Review* 43 (1996).

6. R. Dworkin, *Justice in Robes* (2006), at 21.

7. Lind (2012), above n. 4, at 215; cf. R. Dworkin, *Law's Empire* (1986), at 151.

8. In one of my articles I call these critics "Momosian critics", derived from the name Momos, a Greek god of evil-spirited blame and unfair criticism (and not a 'momos' as a dumpling!). *See* A. Dyrda, 'Momosa pragmatyzm prawny: rzeczywiste granice teorii, rozsądne granice krytyki, 2 *Jurysprudencja* (special volume: 'Integracja zewnętrzna i wewnętrzna nauk prawnych, cz.1')['Internal and External Integration of Jurisprudence, part 1'] 149 (2014).

9. S. Haack, 'On Legal Pragmatism: Where Does "The Path of the Law" Lead Us?', 50 *American Journal of Jurisprudence*, 71 (2005).

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is rather rare. Usually[10] the objection takes the following direction. As indicated above (in the case of Dworkin and Luban), one says that legal pragmatism is simply wrong, as it misses the point of legal theorising, that is, a careful analysis of basic legal concepts (this is a version of the MO argument), which would eventually reveal the true 'nature' of law (a kind of 'substantial argument'). By making such statements, critics try to present substantial arguments, as well as the MO against legal pragmatism, usually without any deeper knowledge of legal pragmatism's *rationale*, namely, its philosophical foundations and its proper methodology. In the above-mentioned critiques, especially of Luban and Dworkin, the MO argument and substantial arguments are mixed together (and they are surely linked: substantial claims are strictly related to the assumed methodological theses, because, I suppose, assumed methodology circumscribes the scope of possible questions and limits, or otherwise underdetermines, a possible understanding of a theory)[11]. Lind tries to defend legal pragmatism by showing that substantial points have been misunderstood by the critics, which eventually shows that the methodological stance of these thinkers towards legal pragmatism is wrong. Such a way of defending legal pragmatism is fair but, to my mind, also too extensive and wearisome. I think that it is much easier to formulate the argument against prejudiced critics the other way around, i.e. firstly, to describe the basic methodological stance of legal pragmatism and then, secondly, to compare it with the methodology assumed by critics. Such an argument would be more beneficial and universal, since it could be used not only against certain methods of critiquing (that are based, amongst others, on substantial arguments) but against all theories that seem to reach different substantial claims by assuming (at *least prima* facie) quite different methodologies. This way of arguing is, to some extent, implicit in what S. Haack or B. Leiter has been writing recently on legal pragmatism (realism).[12] This would also allow us to show, by detailed analysis of theories compared, that a clarification of present misunderstandings can also lead to reconcile them (which were at first glance so different).

The pivotal problem is as follows: what is the meaning of conceptual analysis or concept explanation in legal pragmatism and other theories of law? Moreover, does legal pragmatism seek what all the apostles of general jurisprudence[13] try to find: the 'essence', the 'nature', and the 'concept of law'? The answer is surely negative, but critics (usually, but not always, apostles of analytical, general jurisprudence) wrongly assume that legal pragmatism attempts to answer such questions, and much of their writings (Hart's argument against legal realism is a prime example here) are devoted to showing that legal pragmatism is an inadequate theory of law just because it cannot solve definitely general, conceptual questions which would eventually trigger essentialist answers (although I think that the general 'essentialist objection'[14] against all general-jurisprudential efforts is not valid in each and every case). The situation in which legal pragmatism, notably represented by Holmes or Cardozo, is placed by uncharitable critics resembles the way in which the philosophical pragmatism of James, for instance, was criticised by G. E. Moore and B. Russell, who actually thought that James had been trying to elaborate on 'truth' as a concept (and was willing to propose a synonym for the word 'truth'), whereas, on the

10. There are also serious critics of legal pragmatism who are not subject to my argument. I think that they are 'serious' to a large extent because they accept, at least provisionally, the holistic account I present in the following section.
11. S. Perry rightly notices: 'Because jurisprudence lies within a rather unstable area of intersection between philosophy and social theory, methodological questions tend to be as controverted as substantive questions, and often two become inextricably entangled' (S. Perry 'Holmes v. Hart: The Bad Man in Legal Theory', in S. Burton (ed.), *The Path of The Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.* (2000) 158, at 160.
12. Cf. Haack (2005), above n. 9; B. Leiter, 'Legal Realism and Legal Positivism Reconsidered', 111(2) *Ethics* 278 (2001).
13. I'm thinking of the general, analytical jurisprudence in a wider sense, including not only H.L.A. Hart and his descendants, but R. Dworkin and his followers as well – i.e. the sense in which the one, abstract relation between important legal concepts is supposed be established by a theory. S. Perry uses in this context the term 'comprehensive theory of law' (Perry, above n. 11). The relation between 'essence' (understood as necessary and sufficient feature of being such-and-such, wider than essence, covering also *typical* but not necessary features of an object) and "concept" (the most general term) is a mater of persistent controversy. It is not clear what the task of general jurisprudence is. Is it the explanation of the concept of law? Or maybe it is the inquiry into the very nature or even essence of law? Hart's basic project can be understood to large extent as anti-essentialist, for Hart, in the first chapter of *The Concept of Law* does not want to provide the real definition of law in its classical form (*genus proximum* + *differentia specifica*). Such interpretation is presented for example by F. Schauer. It is not clear, however, whether Hart's position precludes from providing other, more complicated forms of real definition of law, the more that providing such a definition does not amount merely to present a semantic equivalent (and thus Dworkin's famous semantic sting argument does not apply here). So, even if we accept the 'anti-essentialist' interpretation of Hart's enterprise in the simplest meaning of that that term (cf. F. Schauer, 'Hart's Anti-Essentialism', in A. Dolcetti, L. Duarte d'Almeida & J. Edwards (eds.), *Reading H.L.A. Hart's 'The Concept of Law'* (2013), 237, there is still much place for more detailed conceptual work to be done *within* his account in generally essentialist spirit. The question asked by Hart is 'what is law?' and this is a purely metaphysical question. Whether the answer refers to the idea of law's 'essence', 'nature' or 'concept', in each case answer would at least imply some kind of metaphysical solution. Basing on that intuition, pervasive in post-Hartian general jurisprudence, J. Raz wrote: 'In as much as a general theory of law is about the nature of law it strives to elucidate law's essential features, i.e., those features which are possessed by every legal system just in virtue of its being legal, by every legislative institution in virtue of being legislative, by every practice of legal reasoning in virtue of its being a practice of legal reasoning, and so on. A claim of necessity is the nature of the enterprise' (J. Raz 'On the Nature of Law', in J. Raz (ed.), *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (2009) 91, at 92. In case of Dworkin, although he himself claims that the 'nature' of law is nothing more than 'conforming mantra, positivism's phlogiston' (R. Dworkin, *Justice in Robes* (2006), at 216), in his well known argumentation he continually refers to 'true proposition of law' and 'grounds of law', what at least conceptually presupposes that such grounds exists (and this a metaphysical thesis as well; in case of Dworkin such thesis is supported by a peculiar version of moral realism). In this sense contemporary general jurisprudence shares the basic tenets of Langdellism and *Begriffjurisprudenz*.
14. Haack (2005), above n. 9.

contrary, James 'saw himself as an inquirer into the motives of […] truth-claimers, an inquirer into the causes of beliefs, just as he saw himself as an inquirer into the sources or causes of religious feelings in the *Varieties*'.[15] The assumption that Holmes and other legal pragmatists tried to answer the same questions about law that analytic legal philosophers habitually ask has led critics like Hart or Dworkin completely astray. Just as James was not concerned with finding a synonym for 'truth', Holmes was not interested in presenting the analysis of the concept of law (the 'nature' of law, as J. Raz would put it), with all the abstract and general characteristics it was supposed to have. I think that many of the contemporary analyses of legal pragmatism,[16] including comparisons with other theories, are inquisitive enough to see what is at stake with such critics. However, this case is not new. In fact, one of the most influential thinkers who put forward that legal pragmatism is not the kind of 'conceptual theory' the critics expect it to be was M. G. White.

In the subsequent parts of the paper, I will discern the general view which encompasses the important philosophical background for pragmatism as a whole, namely, White's 'holistic pragmatism'. Then, by application of this philosophical stance to legal theory (by a quick analysis of an interesting example of O. W. Holmes's approach), I will present in a nutshell the difference between the pragmatic concept explanation and the methodology of concept analysis assumed by major figures of general (conceptual) jurisprudence. In effect, the thesis that the 'cynical' but poetical answers that Holmes and his pragmatist followers give to important jurisprudential questions are to some extent 'independent' from any metaphysical or essentialist conceptions of law (like legal positivism, law as integrity, etc.)[17] nevertheless does not mean that they are not (or could not be) eventually underdetermined by some general jurisprudential conceptions. This will show that the MO argument against legal pragmatism from the general-jurisprudence position (that sometimes reminds a 'trench warfare') is not a valid one. Unless a critic embraces strong metaphysical assumptions about law, her analysis of the concept of law would be coherent with holistically underdetermined general theory of law (like legal positivism). In other words, if a legal theorist at least remains skeptical in connection with basic metaphysical assumptions about reality, including 'the nature of law', legal pragmatism and some particular types of conceptual, general theory of law can simply coexist. In this sense, these two differing positions can be reconciled.

3 Holistic Pragmatism and Law

M. G. White indicates that 'holistic pragmatism' is the view developed in W. V. Quine's masterpiece *Two Dogmas of Empiricism*, where he wrote: 'Each man is given a scientific heritage plus a continuing barrage of sensory stimulation; and the considerations which guide him in warping his scientific heritage to fit his continuing sensory prompting are, where rational, pragmatic'.[18] Four elements are characteristic of that view:[19] (1) this view is about the behaviour of human beings and their heritage (some cultural phenomena); (2) a scientific heritage is understood as a conjunction of many beliefs rather than as one non-conjunctive belief, what eventually leads to the claim that that our beliefs (or sentences) are not tested individually but 'face the tribunal of experience' in corporate bodies ('holism');[20] (3) there is the reference to a barrage or sensory stimulation or a flux of experience ('empiricism'); and (4) there is the reference to the pragmatic warping of a scientific heritage that has to fit sensory promptings ('pragmatism'). As White writes: 'According to holistic pragmatism, scientists' warpings are carried out with concern for the elegance or simplicity of the theory they adopt and with the intention to warp the heritage conservatively',[21] thus engaging 'minimum modification' (James) or 'minimum mutilation' (W. V. Quine) of it.[22] Being as it is, the holistic pragmatism is primarily opposed to classical rationalism (the view that we can have knowledge that is not tested by experience; in its contemporary form espoused by Descartes). Moreover, in pure versions of holistic pragmatism, the dualism between 'the analytic' and 'the synthetic', to some extent accepted by some pre-pragmatist thinkers (like Hume's distinction between 'experimental thinking' and 'abstract thinking'), as well as some classical pragmatists (according to White, neither W. James nor J. Dewey fully escaped from this dichotomy), is abandoned. The theory, being a conjunction of different kinds of statements (logical, empirical), must fit the sensory promptings, and if we want to make this relation of 'fitting of belief' work, sometimes even some logical

15. M.G. White, *The Philosophy of Culture: The Scope of Holistic Pragmatism* (2002), at 22; cf. S. Pihlström, 'Morton White's Philosophy of Culture: Holistic Pragmatism and Interdisciplinary Inquiry', 21 *Human Affairs* 140 (2011), at 146.
16. Leiter (2001), above n. 12; Haack (2005), above n. 9.
17. Pragmatists' anti-essentialism expresses the thesis that the way we think about things we want to *describe* (the way we weave the web of belief) determines our conception of these things. In this sense, there is no metaphysical necessity involved in analysis (I deliberately put aside the problem of epistemic necessity). On the other hand, the broadly conceived essentialism proclaims the thesis that there is something necessary we can say about things like law, even if in result of performed analysis we get, for example, a cluster of minor concepts. If a theorist thinks that there is a solid truth-maker for 'propositions of law' (like the one established by the rule of recognition, either inclusive or exclusive), then a theorist is an essentialist and a metaphysician, at least in a broad sense.
18. W.V. Quine 'Two Dogmas of Empiricism', in W.V. Quine, *From a Logical Point of View: Nine Logico-Philosophical Essays* (1953) 20, at 46.
19. White (2002), above n. 15, at 1.
20. Cf. Pihlström (2011), above n. 15, at 141.
21. White (2002), above n. 15, at 2.
22. W. James, *Pluralism, Pragmatism and Instrumental Truth* (1907), 52, above n. 3, at 61, where James writes about 'minimum of modification' (online: <www.uky.edu/~eushe2/Pajares/jpluralism.html>); cf. Quine (1953). Arguments against this pragmatic theory of belief revision see H. Rott, 'Two Dogmas of Belief Revision', internet access <www.lucs.lu.se//spinning/categories/dynamics/Rott/Rott.pdf>.

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statements – or according to legal positivists 'analytic truths' – should be rejected. That stays in close connection with an abandoning of 'the spectator's view' in all fields of inquiry – scientific, moral, legal, and artistic, which are all equal subfields of cultural philosophy (being actually a metaphilosophical position)[23]. However, the difference between statements characteristic of each subdiscipline is not, as Quine ultimately thought, different in kind, but only, according to White, different in degree.[24]

M. G. White, inspired not only by Quine but also by J. Dewey ('epistemological gradualism') and A. Tarski ('epistemological holism'), extended the restrictive view that Quine held himself, namely, the view that 'the philosophy of science is philosophy enough'. Quine's line of argument was strictly connected with his idea of 'naturalised epistemology'. Such a remnant of logical positivism as 'rationalism', against which Quine argued in his article,[25] should be replaced by the fully fledged holistic pragmatism, according to which 'the philosophy of culture is philosophy enough'. In this view, science is only one of many cultural institutions that are interesting for philosophers (once Quine himself compared science to the Wittgenstein's language game: 'the game of science'[26]). And these institutions should be described, analysed, or explored on equal rights. According to White, 'we may distinguish different disciplines associated with various elements of culture on the basis of their different vocabularies and substantive statements, but not by saying that we use fundamentally different methods in supporting those statements'.[27] All of these disciplines – ethics, law, art, and science – are 'anchored in experience', and all of them are corrigible but cognitive enterprises, which eventually form altogether a 'holistic totality' instead of 'any compartmentalised group of distinct areas with definite boundaries'.[28] To put it in a slightly different manner, in science, morality, art, and law, we use the same empirical method requiring 'an examination of how we do and should use language'. That is not an effort characteristic of rationalists or certain significant twentieth-century thinkers (B. Russell, G. E. Moore, C. I. Lewis, R. Carnap) for decomposing concepts. White assesses the rational methods of analysis, due to the failure of the analytic-synthetic distinction and the paradox of analysis, as unfruitful. On the contrary, the holistic program is a struggle against apriorism connected with various forms of rationalism, and, for sure, holistic pragmatists appreciate the strength of their rationalistic foes. In 1877, C. S. Peirce wrote that the rationalistic, a priori method was the most intellectual and respectable of all the old methods. He also pointed out: 'its failure has been the most manifest'.[29] Holistic pragmatism elaborates against any ultimate rationalisation, or what Dewey once called 'the quest for certainty', that reminds us of the most important point: both in science par excellence and in 'soft sciences' (law, art, ethics), there are no ready-made solutions in advance of particular problems.

It is, however, important to stress that holistic pragmatism ought to be conceived as a rule (a normative stance) rather than a descriptive statement.[30] It is the method of testing our beliefs, being, in fact, a normative method of how one should philosophise (metaphilosophy), being neither analytic, a priori, necessary, nor self-evident. It is rather 'our best guess so far' that should be followed 'in a fallibilist spirit'.[31]

In the field of law, holistic pragmatism can be found in W. James's *Pragmatism,*[32] where he wrote 'given previous law and a novel case…the judge will twist them into fresh law' which – as White notices – reflects the demeanor of a scientist who 'begins with a conjunction of previous truths, encounters fresh facts, and incorporates fresh truths or revises the old'.[33] It is quite interesting that just a decade before James wrote this, O. W. Holmes had delivered his famous speech 'The Path of the Law'. This speech is a great source of immortal epigrams, either expressing his antirationalist position ('The life of the law has not been logic, it has been experience') or his, as simple as it is controversial, answer to the question: *What consitutes the law?* ('The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law').

Holmes's lecture, as we know, focused on the approach of an operative lawyer who is bound to present to a bill-paying client the best possible prediction of the judicial decision. As a heuristic position, using some kind of binoculars through which the lawyer tries to formulate a prediction of the decision (like an analyst who tries to forecast weather), Holmes presents the 'bad man's point of view', who does not care 'a straw' about rules and precedents, but simply wants to be kept out of jail (and thus he must anticipate the future judicial decree). Many objections have been raised against this conception. One of the most influential was the critique devel-

23. As H. Putnam, a disciple of M. White, recognises, the abandonment of 'the spectator's view', that Quine, Goodman, or Davidson themselves postulate, would mean nothing 'if we don't extend the pragmatic approach to the most indispensable "versions" of ourselves and our world that we possess' (H. Putnam, *The Many Faces of Realism* (1987), at 21; cf. Pihlström, above n. 15, at 141).
24. White (2002), above n. 15, at 154-5.
25. Quine (1953), above n. 18.
26. Quine wrote: '… [W]hen I cite predictions as the checkpoints of science, I do not see that as normative. I see it as defining a particular language game, in Wittgenstein's phrase: the game of science, in contrast to other good language games such as fiction and poetry. A sentence's claim to scientific status rests on what it contributes to a theory whose checkpoints are in prediction' (W.V. Quine, *Pursuit of Truth* (1990, at 20; cf. M. Murphey, *The Development of Quine's Philosophy* (2012), at 241; cf. D.G. Windblad, 'Scepticism, Science, Quine and Wittgenstein,' in R. Arrington, H-J. Glock (eds.), *Wittgenstein and Quine* 97 (1996).
27. White (2002), above n. 15, at 3.
28. Pihlström (2011), above n. 15, at 143.
29. C.S. Peirce, *The Fixation of Belief* (1877), online access: <www.peirce.org/writings/p107.html>.
30. White (2002), above n. 15, ch. XI; cf. Pihlström (2011), above n. 15, at 143.
31. Therefore, it should be possible to critically evaluate or test holistic pragmatism by use of holistic pragmatism (cf. Pihlström, above n. 15, at 143).
32. James, above n. 3, Lecture VII.
33. White (2002), above n. 15, at 126.

oped by H. L. A. Hart, who noticed that, firstly, law cannot be perceived as consisting only of predictions, and secondly, we should not always regard the lawyer's client as a bad man only. Hart's effort in a few passages in *The Concept of Law* was to show that Holmes's legal realism is wrong due to the fact that there really exists something that falls under the concept of 'legal obligation' (or, more generally, the concept of 'legality'). Hart wrote: 'that a person has a legal obligation to do something does not mean the same as saying that he will be punished if he does not perform that act';[34] or 'the statement that a rule is [legally] valid is an internal statement recognising that the rule satisfies the test for identifying what is to count as law […], and constitutes not a prophecy of but a part of the reason for the decision'.[35] These citations are only two excerpts from the long and still strong methodological objection made by Hart against different forms of legal pragmatism (realism) generally.[36] As B. Leiter recognises, Hart criticises legal pragmatists by attaching to them a label of 'conceptual rule skepticism', namely, an account according to which 'it is impossible to articulate a simple idea that the law is one thing, and a particular court's decision another'.[37]

It seems that all we have here is the popular and controversial theory of 'a bad man' here. But it would be a mistake to equate this theory, actually a very parochial (local) one, with the kind of overall philosophical view about law that Holmes held. I think that we can distinguish at least two other, but somehow interconnected, parochial theories in Holmes's thinking and also one more general conception under which, to some extent, all the three parochial theories fall together. And that general approach would have much to do with holistic pragmatism; being the methodological stance, he embraced to propose any, either local or more general, claims about law (although Holmes himself did not use the term 'pragmatism' to describe his own philosophy, and, moreover, he was quite critical of pragmatic philosophy in general, apart from some works of J. Dewey).[38]

Nowadays, it is quite clear that the 'predictive theory' is not a descriptive theory of judicial behaviour, i.e. a naturalistic theory of adjudication, just because it refers to the reasons and facts upon which an operative lawyer builds *his* prediction. The descriptive theory of adjudication rather should refer to the facts, rules, reasons, and motivations that an official actually has whilst composing a decree, which are not necessarily exhaustive and exactly the same elements that are taken into account by the predicting lawyer. The lawyer and the official have two different vantage points (the lawyer's point of view, who is trying to account for all factors relevant to present a successful prediction, may not account for all the factors that really determine judicial reasoning but only for those that are directly affecting the final opinion; on the other hand, a descriptive theory of adjudication should account for all factors that really influence judicial reasoning, even if they do not determine the final decree, and present the role they play, as well as some explanation of their irrelevance/relevance to the final decree). However, there is a strong incentive to build a complex argument by referring to certain interconnections between these two viewpoints (I suppose that is actually what B. Leiter does[39]). M.G. White notices that the crucial difference relates to the type of theoretical statements (and their justifications) that are produced by each parochial theory.[40] A lawyer simply defends his prediction by relying on descriptive premises, and thus the prediction is actually an empirical statement (or a conjunction of empirical statements); on the contrary, a judge defends his decree by assuming some legal rules that are not, or at least not exhaustively, empirical statements, and thus, his decree is not generally an empirical statement, but a normative decision, having a 'normative component'. Whether in the second case judges use normative elements (norms, rules, etc.) to create the decree, or only to justify it afterwards, it is of a minor importance, since both mechanisms fall under the overall description made by the empirical, descriptive theory of adjudication. However, the important general point is that none of those mentioned theories is conceptual and makes general claims about 'what is distinctive of any society's legal norms'.[41] They simply state what lawyers and judges do when they either make predictions or decide cases; that is all.

Holmes's pragmatic stance towards the second type of theory can be seen clearly in his works. There are both the descriptive and the normative elements (or both the descriptive and the normative theories of adjudication). On the purely descriptive level, such a theory simply states that there are no essential elements that fall under the description of how judges really think, and that is why the only possible way is to – by the use of the more modern language of Quine – analyse the actual *causal-nomological* connections between underlying situation types and actual judicial decisions (that is what B. Leiter calls 'naturalised jurisprudence'[42]). By being such a descriptive theory of adjudication, it could probably be classed as scientific and pragmatic but in a very banal sense. Fortunately, Holmes's theory of adjudication also stays in close connection with his thoroughly pragmatic

34. H.L.A. Hart, *The Concept of Law* (1994), at 82.
35. Hart (1994), above n. 34, at 105.
36. As to the relations between legal pragmatism and legal realism, I think that realism is an important but not the only possible upshot of pragmatism. In the case of Holmes's 'bad man', we can speak interchangeably about 'realism' and 'pragmatism', but there are also other less realistic elements of Holmes's pragmatic overview.
37. Leiter (2001), above n. 12, at 290.
38. I would not try to reconstruct legal pragmatism as a 'comprehensive theory of law', as some theorists, like H. Dagan, do. Dagan argues for the solid 'realist conception of law' (H. Dagan, *The Realist Conception of Law* (2007)), and S. Perry shows a few general lines of argument in Holmes's view that are able to construe a 'comprehensive theory' similar, to some extent, to the simple theory of T. Hobbes (Perry, above n. 11, at 160). In each case, I perceive these reconstructions as interesting and proposed in a much more charitable way than the one which I have referred to as an uncharitable critique.
39. Leiter (2001), above n. 12.
40. White (2002), above n. 15, at 144.
41. Leiter (2001), above n. 12, at 279.
42. *Ibid*.

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and anti-formalistic attitude towards judicial dissenting opinions and the general role of the judge in the judicial process (and this element contains both simple descriptions of causal connections and much of the elements characteristic of holistic pragmatism program). M. Tushnet calls Holmes a 'great dissenter', meaning that he was not only a great rhetorician but, more importantly, that he had dissented by having such a forward-looking style that was vindicated by history. As A. Mendenhall describes Holmes's approach: 'The language of Holmes's dissents were acrobatic. It acted and reacted and called attention to itself. The more provocative and aesthetic the language, the more likely it was for future judges and commentators to return to the dissent to reconsider Holmes's argument – the more likely that non-law might become law'.[43]

The aesthetics in judicial work, as was also clearly seen by Holmes's successor, B. Cardozo, is a great tool for helping to influence reality in connection with what J. Dewey once called 'intelligence'.[44] The main elements of judicial tasks are thus twofold: to make an *intelligent* study of law's history that will illuminate the forces that make the present law thus and so (historical element; the reference to the cultural heritage) and of 'the ends which rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether those ends are worth the price'.[45] Both these aspects together lead to the typically liberal and pragmatist conclusion that a judge, whilst deciding the case, should weigh 'considerations of social advantage' whilst paying attention to statistics and economics in particular circumstances, amongst other important social factors (facts). The philosophical background of Holmes and his pragmatist followers can be described as antidogmatic, with an aversion to absolutes and foundationalism, fascinated by contingency and process, putting great focus on different perspectives (perspectivism) and the necessity to relativise each phenomenon to the particular context of analysis and respecting the 'ordinary', common-sensual ordering of things. As such, the local considerations of Holmes, either made from the bad man's/good man's perspective or the descriptive/normative analysis of the way judges think, fall under the holistic program that aims to build an opinion by reference to a cultural/contextual heritage, contemporary beliefs, and scientific and empirical evidence, with a forward-looking perspective towards social change (the latter element is a kind of liberal-pragmatic 'normative punch').

As L. Menand writes: 'It was Holmes's genius as a philosopher to see that the law has no essential aspect'.[46] The pragmatic character of all parochial theories that justify or explain particular decisions or dissents could not then be reconciled into one general theory of law: their locality grants Holmes's theoretical 'consistent inconsistency'.[47] However, in my opinion, by differentiating certain types of Holmes's theoretical efforts, by setting certain relations between them, and by applying the charity principle, as well as by allowing for some amendments of his work, we can subscribe these efforts under the more general view, namely, the 'holistic pragmatism'. I think this is what White suggests whilst he recommends certain (and obvious) amendments of Holmes's pragmatism that 'suffers from not being explicitly holistic and from being insufficiently mindful of questions surrounding the word "meaning"'.[48] This can be more clearly seen if we compare the role that conceptual analysis plays in different types of theories, in general theories, and in parochial theories of legal pragmatists like Holmes or Cardozo.

4 What Does It Mean to Explain a Concept (of Law) in the Pragmatic Sense?

Sometimes the opposition between legal pragmatism and other legal theories is built upon a reference to the notion of the 'nature' or the 'essence' of law. 'Whether those who hold that statues, reports, and treatises themselves constitute the law have more than a trivial verbal quarrel with Holmes is a nice question. It is customary to construe the debate between legal realists and their more traditional opponents as one between rival definitions of "the same conce between competing attempts to arrive at the "essence of law"', but as White notices (and I share that contention with him), 'this is a doubtful construal of the controversy'.[49] On the other hand, it is true that some of the legal pragmatists' (realists') work was devoted to the attack on the 'conceptualism' of the past, much of which was so aggressive that it degenerated into 'childish nihilism'.[50] But there are also modest views that consciously refer to the conceptual heritage of the past, views that allow for the coexistence of theories from the 'different conceptual levels' – and these moderate views can be connected, although probably to a significant extent implicitly or tacitly, with holistic pragmatism and conceptually reordered under its aegis.

At the beginning, it is important to note that to criticise rationalism, as holistic pragmatism does, does not mean

43. Mendenhall, 'Holmes's Dissent', 12 *The Journal of Jurisprudence* 697, at 680-1 (2011).
44. Cf. J. Dewey, 'Intelligence and Power', *The New Republic*, 25th April 1934.
45. O.W. Holmes, Jr., 'The Path of the Law', 10 *Harvard Law Review* 457, at 474 (1897); cf. Haack (2005), above n. 9, at 83.
46. L. Menand, *The Metaphysical Club: A Story of Ideas in America* (2001), at 339.
47. Mendenhall (2011), above n. 43, at 683.
48. White (2002), above n. 15, at 152; cf. F. Kellogg, 'Holistic Pragmatism and Law: Morton White on Justice Oliver Wendell Holmes', 40 *Transactions of the Charles S. Peirce Society* 559, at 560 (2004). The necessity of making additional differentiations and amendments to Holmes's theory is due to the fact that it lacks, as White and Kellogg notice, 'philosophical care'.
49. M.G. White, *Social Thought in America. The Revolt against Formalism* (1976), at 62-3.
50. G. Gilmore, 'Legal Realism: Its Cause and Cure', 40 *The Yale Law Journal* 1037, at 1038 (1961).

to reject any concept analysis in its entirety. It can be seen by referring to the most important pragmatic keystone: the Pragmatic Maxim. C. S. Peirce wrote:

> It appears, then, that the rule for attaining the third grade of clearness of apprehension[51] is as follows: Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object.[52]

There are several ways of interpreting this maxim (e.g. as the method of clarifying meaning, as clarifying conception, as the actual process of practical deliberation, and so on). Here, I will limit myself to a few remarks. It seems to be quite obvious that in practical deliberation, we cannot generally avoid concept analysis, and this maxim shows only which concepts (conceptions) are of practical importance. From the vast set of concepts, we can simply cut off ones that do not bear any practical, observable effects. The maxim inevitably forces us to use some kind of scientific test as a proper device to evaluate our beliefs and in that way is connected with 'fallibilism'. All speculative and metaphysical conceptions that cannot be tested scientifically (in the vast meaning of the term 'science'), having no practical bearings, are not worth consideration. Maxim, being as general as it is, is also a simple tool for comparing concepts: two concepts that are supposed to be different, but have the same practical bearings, are actually just the same concept under two labels. The simple framework of the maxim is backed up by the conviction that concepts are labile and are subject to amendment or rejection. But there is always a basic set (or 'heritage' according to Quine and White) of concepts that serves as a starting point for the mechanism of opinion settlement, generally described by the Pragmatic Maxim. This maxim is a 'method or approach to philosophical questions focused on pragmatic consequences, not a body of philosophical doctrine'.[53] This general interpretation allows for both the Peircian understanding of the 'pragmatic' following Kantian 'pragmatische' (experimental) and the Jamesian one that focuses on *praxis* (action as opposed to theory).[54] I think it is now easy to see the parallel between Holmes's presentation of the 'prediction theory' and Peirce's general statement of the Maxim[55]: the suffering, the potential harm, or gain caused by the judicial decision, predicted by a lawyer, is all we can measure empirically. However, the simple prediction theory has never been claimed to be an exhaustive, general theory of law, and as I showed above, it is not the only theory that Holmes himself explicitly developed. On the contrary, Holmes stressed that his theory was local (or 'parochial' according to White); it focused on one, particular, legal system and did it from a very specified perspective – that of an operative lawyer. However, S. Haack persuasively suggests that Holmes's philosophy is much more sophisticated than the label 'prediction theory' implies, and she shows how *The Path of the Law* leads from a couple of cynical statements about the concept of legal obligation that actually are 'the mundane specificities of the working attorney' at the beginning of the lecture, to the end, where we can see the great 'intellectual aspirations of the legal theorist'.[56] To a large extent she is right, but she builds that argument extensively by showing some general strands in Holmes's thinking and cites many of his other works, decisions, and dissents as evidence. I think the way in which such a conclusion can be reached is much easier, as far as we focus on the meaning of conceptual analysis that was conducted by Holmes himself in connection with many, maybe not perfectly clearly distinguished but nevertheless present, theoretical points of view of law that he, at least implicitly, proposed. And in all these mini-theoretical cases, the pragmatic maxim can be in use.

Although Holmes refused to use the label 'pragmatism', he may well be called a pragmatist, simply because 'he treats rules and standards as necessarily communal and objective, and because he describes the legislative function performed by the community in determining and applying law. These notions are fundamentally Peircian'.[57] And this is characteristic not only of *The Path of the Law* but also of other major works, including *The Common Law* which 'felt the necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious' to be the communal, objective standards by which every law is determined, staying in contrast to private and subjective (Holmes called it 'moral') standards.[58] The distinction, developed in that publication, between external (objective, communal) and internal (subjective, moral) standards can be easily seen in *The Path of the Law*, where Holmes presents a strong claim concerning the separation of law and morals. It is, however, crucial not to confuse this claim with the positivist separation thesis. As Kellogg notices: 'What Holmes meant in eschewing moral language was not an ontic separation but a fallibilist insight, in effect competing principles can generally be found on both

51. Peirce's distinction between the three grades of clarity of concepts (the first grade, an unreflective grasp of the concept in everyday experience; the second grade, a definition of the concept; the third grade, the Pragmatic Maxim) reveals the difference between 'having a merely verbal understanding of a scientific concept and having a seriously knowledgeable grasp of what it involves' (S. Haack, 'The Growth of Meaning and the Limits of Formalism: in Science and Law', 29(1) *Analisis Filosofico* 5, at 11 (2009)). This method of concept clarification is especially useful in legal science, where the growth of meaning can advance rapidly in a short period of time.
52. Peirce (1878), above n. 2.
53. Haack (2005), above n. 9, at 76.
54. On different meaning of 'pragmatic' in pragmatists' works, *see*, for example, Haack (2005), above n. 9.
55. And I leave open the historical controversy over whether it was Peirce who inspired Holmes or the reverse (during their activity in the Metaphysical Club the end of the 1860s and the beginning of the 1870s).
56. Haack (2005), above n. 9, at 82.
57. Note: 'Holmes, Peirce and Legal Pragmatism', 84 (5) *The Yale Law Journal* 1123, at 1125 (1975).
58. Note (1975), above n. 57, at 1127.

sides of controversial case, and moral argument from them amounts to "hollow deduction from empty general propositions"'.[59] According to the Pragmatic Maxim, in order to be meaningful, a concept must have practical consequences that are both public and communal (due to Peirce's critique of introspection that stays in connection with his anti-Cartesianism), and Holmes's basic distinction between internal and external standards 'responds to the same philosophical impulse that led Peirce to say that all knowledge of our psychological states is derived from observation of public facts'.[60]

What is more, in addition to this parallel between the pragmatic methods of Peirce's and Holmes's views of law, there are deeply holistic roots to Holmes's thinking that can be found in the philosophy of C. Wright who taught him, according to Holmes's own words, that he 'must not say *necessary* about the universe, that we don't know whether anything is necessary or not',[61] and we can only bet on the behaviour of the universe (Holmes discussed the notion of *bet ability* being a form of predictability). Wright argues for the holistic account of a socially rooted development of perception, cognition, and language, being anti-Cartesian and pro-Darwin all at the same time. This may stand as a real historical background of Holmes's holistic thinking.[62]

The problem that triggered so much of the unfriendly critique against the 'predictive theory of law' was that Holmes speaks very loosely of meaning. In *The Path of the Law*, he concentrates on the perspective of a 'bill-paying client', who 'does not pay a lawyer to make disputable philosophical claims about general legal concepts'.[63] However, unfortunately, Holmes seems to treat 'the prediction (prophecy)' and 'the law' as synonyms. That causes a lot of confusion if one does not recognise the two features characterising Holmes's writings. First, Holmes explicitly stated his own view about 'meaning', whilst he said that the word 'law', as many other words, may be properly used in many different ways. '[A] word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used'.[64] Second, as we can see, Holmes used a very artistic language, full of cynical, sharp metaphors and epigrams (and that style remained characteristic of further pragmatists' legal writings). As I indicated earlier, the 'bad man's point of view' is only a heuristic device of an operative lawyer who does not assume any strict connection between law and morality. This is, however, only one of many ways in which one can describe law or theorise about law. Besides the bad man's point of view, we can distinguish also (1) the 'good man's point of view', from which all the possible positive effects of the decision other than fear and harm are evaluated (that perspective, however, could be included under the aegis of the 'predictive theory' by a simple but 'charitable' amendment of what Holmes originally wrote); (2) the reconstructed officials' point of view,[65] which amounts apparently to a descriptive theory of adjudication *sensu largo*,[66] i.e. 'a theory about what it is that judges really do when they decide cases' (this point of view is characteristic of efforts made by legal realists; it is different from the bad man's and the good man's points of view, because it does not fall under the aegis of the 'predictive theory', as far as no judge would predict his own decision – he would rather refer tacitly or explicitly to some legal theory to construe it[67]); and (3) the general jurisprudential point of view that aims at analysing important legal concepts; it divides into at least two types of the theory: one that allows for either a methodologically external or detached point of view (e.g. legal positivism) and the other ones that claim that it is impossible to separate moral valuations from conceptual analysis and social-phenomena description ('law as integrity', ius-naturalism).

There are two important things I want to stress in the context of this differentiation: 'conceptual gradualism' and the 'parochial-general discrimination'. First, the requirements of scientific precision rise gradually as we move from the theory of the first type (both good man's and bad man's theories, where the pragmatist razor cuts off all concepts that have no experimental bearings but, on the other hand, allows for a very labile use of certain concepts) towards the theory of the third type that focuses on deeper analysis of the concepts that are supposed to be at least temporarily settled (rigid concepts are much easier to analyse, either by logical or non-logical methods). Second, there is a substantial difference between theories that are fully fledged pragmatic enterprises such as the predictive theory (that are parochial, relativised to space and time) and more general theories that focus on the way in which a legal official performs so-called reasoning according to law or even the most general theories that fall under the aegis of 'general jurisprudence' that aim to give detailed analysis of the most general, universal legal concepts ('reasoning about law'). The most important feature of that differentiation is that the former theories must always presuppose, at least tacitly, some of the important assumptions of the latter that are both more general and usually more detailed (at this general level).

59. Kellogg (2004), above n. 48, at 565.
60. Note (1975), above n. 57, at 1132.
61. Kellog (2004), above n. 48, at 562.
62. Kellog (2004), above n. 48, at 563.
63. White (2002), above n. 15, at 137.
64. O.W. Holmes, Jr., U.S.S.C., *Towne v. Eisner* 245 (1918) 418, at 425.
65. The relation between the reconstructed officials' point of view and the apparent, institutional officials' point of view is such that the former includes the latter (but not vice versa). The latter involves primarily general, mutual officials' beliefs about the way they perceive their own institutional enterprise. In other words, the latter point of view comprises of how officials *think* about what they do (like construing a 'normative decision' and how they can justify it), but do not necessarily involve the description of what they *actually do* (which the former view includes).
66. In contrast, the apparent, institutional officials' point of view mentioned in the footnote above, being in fact a description of the shared theory of how should judge justify her decision as 'normative' or 'binding' in context of existing legal institutions, can be dubbed a 'theory of adjudication *sensu stricto*'.
67. Leiter (2001), above n. 12, at 279.

The conceptual analysis is characteristic of the broadest theories of the latter type. These theories are general, and their main task is, as in case of legal positivism, to explain the main concepts that reflect the fundamental features of societies. J. Raz once stated that 'We do not want to be slaves of words. Our aim is to understand society and its institutions',[68] and the proper tool to do that, to reveal the most important and universal features of law, is conceptual analysis. B. Leiter notices that this kind of analysis has two important features.[69] First, the analysis aims at describing law and its institutions as conceptually different from other types of social/cultural institutions. Such an idea stays in close relation to so-called Autonomy Thesis (a conceptual thesis developed in part by G. Postema[70]) and has its empirical counterpart in the Limited Domain Thesis.[71] Both those theses describe (or refer to) the criteria of legality, but the first does it on the highest, most conceptual level; the second thesis is merely an observational, factual statement. The second is the role, presumably distinctive, that law plays in practical reasoning of officials and citizens. This thesis is supposed to explain the normative, reason-giving character of law, namely, how law purports to guide anyone's conduct. Those two points, however different, are usually combined on the grounds of conceptual, general jurisprudence. Positivists think that the reason givingness of law is strictly connected with the idea that legal reasons are autonomous reasons, and non-positivists, like Dworkin, argue that the normative character of law is strictly connected with law being morally valid and thus nonautonomous. However, I am not going to describe this discussion in detail here.

Instead, I would like simply to state that in the case of legal pragmatism, neither of these two points is at stake. Legal pragmatists, with the prime example of Holmes, just do not care (in the sense: they do not primarily care) about concepts that are discussed by academics. They do not care how it happens – although they may consider such theorising as a great intellectual play – that people's behaviour is governed by reasons delivered by the law nor why and in what circumstances law has authority and whether it is autonomous or not. On the contrary, the conceptual scaffolding of legal pragmatists is a very simple one and can be reduced to the use of scientific methods, as simple as possible, to build an opinion (a holistic conjunction of beliefs) that would either help to predict a decree for a paying client or to justify a decree in certain a political and cultural context. Such efforts, however, do not supplant the need of using more general, conceptual schemes that would account for a 'comprehensive theory of law'.

Nevertheless, the relation between the most parochial predictive theory, the empirical theory of adjudication, and a general theory of law is as follows. The predictive theory must assume at least some kind of an empirical theory of adjudication, because an operative lawyer must know what rules, facts, reasons, and motivations could be applied or referred to by a judge who is composing a decree. A lawyer's concern is about 'predictions of the incidence of the public force through the instrumentality of the courts',[72] which are what a bad man pays a lawyer to make. To make such predictions, a lawyer must know much more than only the set of legal rules that the judge is likely to apply, but amongst these are quite simple concepts like the concept of the authoritative judge. As White argues, the lawyer and his client are not interested in 'useless quintessence of all legal systems', and Holmes and other legal pragmatists do not define the words 'judge', 'authority', or 'the law'; they simply 'know the judge [and respect "authority" or "the law/statute"] when they see one'. So, on this level, 'the judge' can be defined ostensively, but this also demands some deeper presupposition of the 'authority' that grants the judge the power to resolve cases.[73] Furthermore, any kind of a theory of adjudication must presuppose – and this is quite suggestively elaborated on by Leiter – 'a non-skeptical account of legality'[74] and must, to some extent, rest on some conception of a legitimate legal authority. Only in these circumstances could the court decision be 'justified', or even 'understood', as a decision of a court. It is so because no one is obligated to act with simple lawyers' prophecies or even empirical statements about the way in which judges are reasoning. All parochial theories need some more general view as their background assumptions.

What is interesting is that Holmes himself seems to agree with this notion when he claims that we still 'have too little theory than too much',[75] although he does not appear to be developing, in *The Path of the Law*, a theory of a comprehensive type. Nevertheless, it seems to be obvious that Holmes, both in this lecture and in other writings and rulings, usually introduced more general, typically pragmatist, methodological precepts of empirical sciences. The arguments presented by White, and comments given, for instance, by F. Kellogg, suggest that he would probably enthusiastically meet the amendments and clarifications made from the perspective of a unifying but interdisciplinary holistic pragmatism.[76]

White notices that Holmes fails to discuss the concept of law or the concept of legal authority at a greater length, and he thinks, like Leiter, that there must have been

68. J. Raz 'Legal Positivism and the Sources of Law', in J. Raz (ed.), *The Authority of Law* (1979) 37, at 41.
69. Leiter (2001), above n. 12.
70. G. Postema 'Law's Autonomy and Public Practical Reason', in R.P. George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (1996) 79.
71. F. Schauer, 'The Limited Domain of Law', 90 (7) *Virginia Law Review* 1909 (2004).
72. Holmes (1897), above n. 45, at 457.
73. White (2002), above n. 15, at 131.
74. Leiter (2001), above n. 12.
75. Holmes (1897), above n. 45, at 476.
76. Kellogg writes: '[I]f Holmes had lived just 25 years longer to read White's *Toward Reunion in Philosophy* (1956), especially the passage on pp. 161-2 in which White compares philosophical definition with the process of legal adjudication, he would have uttered the famous 'Good for you!' with which he welcomed an excellent argument in the Supreme Court' (Kellogg (2004), above n. 48, at 565).

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some deeper positivistic assumption about the nature of law (some kind of a Social Fact Thesis) that would enable parochial theories to work. However, S. Haack writes: 'Holmesian argument seems, as it stands, covertly to presuppose the kind of purely abstract and essentialist philosophy of law that he officially, and in my opinion – rightly – eschews'.[77] The question now is whether every general, jurisprudential theory of law must be 'essentialist' in the sense that it would reveal 'the very nature of law'? I think that we can answer this question in two different ways, but having the same effect. Firstly and more commonly, there appears a discrimination between two types of a general, conceptual analysis: ambitious and non-ambitious conceptual analysis (in different terminology: immodest and modest conceptual analysis[78]). The point is that the non-ambitious (modest) conceptual analysis strives at the most accurate translation ('paraphrasing', in Quine's words) and rational change (in light of particular, empirical evidence) of the 'folk theory' of certain things, whilst the ambitious (immodest) analysis strives to determine the way things really are. For example, Hart's conceptual analysis, being an enterprise in 'descriptive sociology', is probably best understood as a non-ambitious (modest) analysis, because it tries simply to present the way in which some constellation of basic legal concepts (it is a kind of legal-theoretical vocabulary that covers both actual and possible cases of concept application) is made true by another, more basic vocabulary, rooted in the folk theory of law. So, in its modest type, the conceptual analysis role is that, by Jackson's own words, 'of addressing the question of what to say about matters described in one set of terms *given* a story about matters described in another set of terms. Conceptual analysis is not being given a central role in determining the fundamental nature of our world; it is, rather, being given a central role in determining what to say in less fundamental terms given an account of the world stated in more fundamental terms'.[79] Modest analysis serves to 'elucidate concepts by determining how subjects classify possibilities, and [Jackson] emphasises that conceptual analysis is an hypothetical-deductive exercise'.[80] If that type of analysis, characteristic of the mainstream activity of analytical jurisprudence, means actually 'seeking the hypothesis that makes best sense of a person's responses to possible cases, taking into account all the evidence',[81] that seems at least compatible with pragmatic fallibilism and holism more generally. And, of course, in this case, searching for a conceptual 'quintessence of law' does not necessarily mean searching for a 'nature of law' in any of essentialist meanings of that term.[82] So, this general stance can be reconciled with harsh pragmatists' negative response to any 'essentialist' (and in this ambitious sense 'conceptual') theory of law. Had Holmes lived long enough he could be really interested in such a non-ambitious reading of Hart's theory. Nonetheless, he would probably be very disappointed by its further essentialist developments, to which Hart himself contributed, for example, by making reference to 'descriptive sociology' and suggesting that law is exclusively and essentially determined by special, foundational social facts.[83] Embracing a modest analytic apparatus allows to read Hart in a non-essentialist mode, however, at the expense of loosing some features of the broadly 'Hartian' theory that has been extensively discussed through the years.

Secondly, it seems to be quite certain from the whole of White's enterprise in the philosophy of culture that when he criticises Holmes for being 'too parochial' and says that his theory must presuppose the more general theory of legal authority (like the Hartian one), he does not think of such a theory as foundationalist or essentialist. He is a holistic pragmatist, so far! White reads Hart modestly, in the way described above. That would mean that the holistic pragmatism could be perceived as a background for a general theory of law, as well as for many parochial theories that tacitly presuppose that one. It would be very interesting to discuss how both general and parochial theories of law apply the holistic pragmatist's machinery and what the limits are of such an application.

5 Epilogue: Legal Pragmatism as an 'Independent Theory of Law'?

When discussing O. W. Holmes's answer to the question *What constitutes the law?*, M. G. White underlines the simple fact that Holmes's inquiry did not focus on developing the concept of law. White argues: 'Holmes said little in *The Path of the Law* about the notion of legal authority, perhaps because he was interested not in what he called a "useless quintessence of all legal systems" but in "an accurate anatomy of one"'.[84] Such ambition (or lack of ambition) is characteristic of many pragmatic enterprises in the legal field. However, many legal philosophers who aim at revealing the very 'nature of law' (or 'the concept of law' as H. L. A. Hart did) try to interpret Holmes and other pragmatists as offering a

77. Haack (2005), above n. 9, at 88.
78. F. Jackson, *From Metaphysics to Ethics* (1998); for the legal context *see* V. Rodriguez-Blanco, 'A Defence of Hart's Semantics as Non Ambitious Conceptual Analysis', 9 *Legal Theory* 99 (2003).
79. Jackson (1998), above n. 78, at 44.
80. Rodriguez-Blanco (2003), above n. 78, at 104.
81. Jackson (1998), above n. 78, at 36; cf. Rodriguez-Blanco(2003), above n. 78, at 105.
82. Actually, there is a very simple way to show that the question from *The Path of the Law*, namely, the question *What constitutes the law?* is not a general jurisprudential question. The 'the' prefix suggests the local character of it. On the contrary, Hart and Dworkin ask *What is law?* and the lack of 'the' prefix suggests the most possible general sense of their inquiry.
83. That puts the whole Hartian discourse on the 'metaphysical track'.
84. White (2002), above n. 15, at 130.

competitive view to their own. As I have (at least partially) tried to demonstrate, this is wrong and oversimplifies the problem. Holmes, and other legal pragmatists, could have held many parochial accounts of local legal concepts at the same time, being 'consistently inconsistent'. On the other hand, we can differentiate between very parochial, modestly parochial, and general theories of law. Parochial theories must be partially presupposed by some concepts of a more general provenience and thus be at least partially independent[85] from the general ones. The independence in the above-mentioned sense is not full; thus, probably it would be more proper to speak of each and every legal pragmatist effort as an 'underdetermined theory of law'. I would not use the word 'parochial' nor the word 'local' to describe the legal pragmatists' approach generally, but I think that particular divagations could be treated as tiny, 'parochial' theories built from a local perspective, but by the use of the same 'holistic machinery' (that grants their general consistency). Moreover, I think that there could be many more local perspectives than the ones legal pragmatists have yet presented. What is important is that they all tend to fall under more general methodology, namely, holistic pragmatism, and hence they can coexist conceptually with some other, more general, theories that also accept, or at least do not deny, that metaphilosophical position.

If one does not read the aims of the theoretical background accurately, she/he may use the methodological objection I introduced in the beginning incorrectly and in consequence, think that the 'premises of the theory are shaky' and thus its 'promises – overstated'.[86] We can see that there need not be any conflict between conceptual analysis of a moderate (non-ambitious) type and legal pragmatist efforts. Moreover, it seems to be quite promising to use the scaffolding of holistic pragmatism to both evaluate existing general legal theories and to explore a general theory of law that would be quite consistent and pre-suppositional for all parochial theories of law, the ones in which legal pragmatists are most interested. After all, M. White's holistic pragmatism is probably the best of all efforts to unify pragmatic philosophy.[87] It fits the metaphor of G. Papini who once compared pragmatism to a hotel where all the guests pass through the same corridor, but each works alone in his own room[88] and as such, stands as a prime candidate for the resolution of apparent confusions about legal philosophy as well.

85. The independency claim I am making here is a claim about the relation between theories that fall under different degrees of generality. It is not the claim about the rigid independency, or even autonomy, of different (at face value) cultural domains (science, law, art, ethics), because according to the metaphilosphical position of holistic pragmatism, they simply could not be separated. Parochial theories are not themselves instances (tokens) of these more general theories. Rather, as I tried to show, parochial theories in fact work *in virtue of* some background theories (e.g. general theory of 'authority'). The holistic framework is the most general on the scale.
86. Gilmore (1961), above n. 50, at 1037.
87. Kellogg (2004), above n. 48; Pihlström (2011), above n. 15.
88. 'As the young Italian pragmatist [Giovanni] Papini has well said, [pragmatism] lies in the midst of our theories, like a corridor in a hotel. Innumerable chambers open out of it. In one you may find a man writing an atheistic volume; in the next, someone on his knees praying for faith and strength; in a third a chemist investigating a body's properties. In a fourth a system of idealistic metaphysics is being excogitated; in a fifth the impossibility of metaphysic is being shown. But they all own the corridor, and all must pass through it if they want a practicable way of getting into or out of their respective rooms' (James, above n. 3, at 32; cf. S. Haack, 'The Pluralistic Universe of Law: Towards a Neo-Classical Legal Pragmatism', 21(4) *Ratio Juris* 453, at 454 (2008)).

Inferentialist Pragmatism and Dworkin's 'Law as Integrity'

Thiago Lopes Decat*

Abstract

The paper aims at justifying an interpretation of Dworkin's theory of Law as Integrity that brings it closer to philosophical pragmatism despite his rejection of legal pragmatism. In order to achieve this aim, this work employs a classification of philosophical commitments that define pragmatism in a broad and in a narrow sense and shows that legal pragmatism follows the main thinkers of pragmatism in the narrow sense in committing to instrumentalism. The attribution of a pragmatist character to Dworkin's theory of law rests on the idea that the adoption of a commitment to instrumentalism is not implicated by its adoption of other pragmatist commitments.

Keywords: pragmatism, instrumentalism, integrity

1 Introduction

The widely known and historical polysemy of the term 'pragmatism', in its philosophical theoretical use, finds a match in its use in the theory of law. Nevertheless, a conception in particular has been standing out and getting more space in discussions in the legal field, namely the one involved in the debates between Ronald Dworkin and self-titled pragmatist Richard Posner.[1] Such a conception of decisionist nature seems to claim as its remote antecedent two tenets of Oliver Wendell Holmes') philosophy of law: the rejection of abstract speculation, especially moral ones, as well as the conscious decision to refer the contents of judicial decisions to its predictable social consequences.[2] Its present-day antecedent may be found in Richard Rorty's version of pragmatism that sees anti-theoretical and anti-systematic commitments as necessary consequences of conferring primacy to practice (in the sense of social practices) and of anti-essentialist thought.[3]

In an article called 'The banality of pragmatism and the poetry of justice', Rorty predictably restates the affinity between his version of neo-pragmatism and Posner's philosophy of law.[4] However, he surprises us by also enlisting Dworkin into the ranks of the legal (neo) pragmatism, despite his explicit rejection of what he conceives as legal pragmatism.[5]

This paper intends to make a similar move bringing Dworkin closer to a non-rortyan version of contemporary *philosophical* pragmatism. The argument rests on the idea that Robert Brandom's inferencialist reading of pragmatist theoretical commitments can serve as the basis for a conception of contemporary philosophical pragmatism which is, simultaneously, anti-essentialist and based on the primacy of practical, without being for this reason anti-theoretical and anti-systematic.[6]

The reasonableness of this effort to bring them closer is justified, among other things, by the similarity between what Brandom calls historical-expressive rationality – a conception of rationality originally Hegelian but properly stripped of its metaphysical and teleological features by means of the resources of an inferencialist linguistic pragmatics – and the Dworkian demand for integrity that guides the decisions of judges as an independent ideal, according to an interpretation of legal social practices that shows them in their best light.[7] The affinity between philosophical pragmatism and a rationalist, cognitivist, theory of law such as 'Law as Integrity' might perhaps allow the extension of the expression 'legal pragmatism' even beyond its already wide and vague limits.

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1. R. Dworkin, *Justice in Robes* (2006), at 75-104; R. Posner, 'Conceptions of Legal Theory: A Reply to Ronald Dworkin', 29 *Arizona State Law Journal* 377 (1997); R. Posner, 'The Problematics of Moral and Legal Theory', 111 *Harvard Law Review* 1637 (1998).
2. O.W. Holmes, *O Direito Comum: as Origens do Direito Anglo-Americano. [The Common Law].* (1963). Translation J.L. Melo; O.W. Holmes, *The Path of Law* (1897) <http://intersci.ss.uci.edu/wiki/eBooks/BOOKS/Holmes/The%20Path%20of%20Law%20Holmes.pdf> (last visited 17 June 2013).
3. R. Rorty, 'Un Mundo sem Substâncias ou Essências'. [A World without Substances or Essences], in C. Magro and A.M. Pereira (eds.), *Pragmatismo: a Filosofia da Criação e da Mudança* (2000) 53.
4. R. Rorty, 'The Banality of Pragmatism and the Poetry of Justice', in R. Rorty (ed.), *Philosophy and Social Hope* (1999), at 93.
5. R. Dworkin, *Law's Empire* (1986), at 175.
6. R. Brandom, 'Analyzing Pragmatism: Pragmatics and Pragmatisms', in R. Brandom (ed.), *Perspectives on Pragmatism: Classical, Recent & Contemporary* (2011) 56.
7. Dworkin (1986), above n. 5.

2 Dworkin and Legal Pragmatism

The main difficulty in devising an argument that brings Dworkin's law as Integrity closer to philosophical pragmatism, and consequently in developing a sense of legal pragmatism that both fits his theory of law and is conceivable as an extension or application of philosophical pragmatism to the legal field, is Dworkin's explicit rejection of legal pragmatism.[8] Even recognising that legal pragmatism shares the merit of being an interpretive theory of law with his own conception, and therefore is superior to semantic theories of law such as legal positivism, he claims that if legal pragmatism is right, his own theory of law is wrong and *vice versa*, that they are opposite theories.[9]

The awkwardness of this situation is that, at the same time, it is easy to spot some theoretical commitments typical of philosophical pragmatism in his theory of law and hard to miss the aversion and critical stance adopted towards the instrumentalism characteristic of both legal pragmatism and classical American pragmatism.

The strategy – but in no way the arguments – adopted here is recognisably a Rortyan one: to broaden the scope of philosophical pragmatism in order to include the theoretical commitments of classical pragmatism as well as the accomplishment of other philosophers that share some of these commitments, but not necessarily all of them. It is also Rortyan the strategy of identifying Dworkin's criticism of legal pragmatism with the criticism of its crass instrumentalism. As will be seen ahead, it is this theoretical commitment to instrumentalism that characterises the distinction between pragmatism in broad and narrow sense.

One cannot agree with Rorty, however, when he claims that:

> Dworkin's polemics against legal realism appear as no more than an attempt to sound a note of Kantian moral rigorism as he continues to do exactly the sort of thing the legal realists wanted done.[10]

or when, in an attempt to make the interpretation above plausible, he claims that:

> For myself, I find it hard to discern any interesting *philosophical* differences between Unger, Dworkin and Posner; their differences strike me as entirely political, as differences about how much change and what sort of change American institutions need.[11]

Seeing Dworkin's theory of law as an attenuated or disguised form of legal realism, is to ignore the authority of past over future applications of legal concepts, central to the idea of integrity.

Also, understanding the disagreement between Dworkin and self-titled legal pragmatists not as a philosophical difference concerning what the law is – understood as social practice – but as a disagreement about political preferences, however broadly one takes the meaning of the term 'political', amounts to acknowledge a radical separation between what the law is and what the law ought to be, something *entirely* incompatible with Dworkin's criticism of legal positivism. In fact, it is the rejection of this separation what makes both Law as Integrity and legal pragmatism examples of interpretive theories of law, as opposed to legal positivism, understood as victim of the semantic sting.[12]

If the mentioned strategy works, it will be allowed to say that, although Dworkin is not a legal pragmatist in the known and time-honored sense of Holmes (2013) or Posner (2010), he is in some sense also a legal pragmatist because his theory may also be seen as an application to law of pragmatist philosophical commitments.[13]

3 Two Senses of Philosophical Pragmatism

The first step, then, is to discern the different philosophical commitments that shape pragmatism in its broader sense and in its narrower, classical American, sense.

Brandom's analytic classification of pragmatist commitments is the point of departure. He distinguishes pragmatism, narrowly thought, '[…] as a philosophical school of thought centered at evaluating beliefs by their tendency to promote success at the satisfaction of wants', whose emblematic adherents are Peirce, James, and Dewey, from pragmatism in a broader sense:

> […] a movement centered on the primacy of the practical, initiated already by Kant, whose twentieth century avatar include not only Peirce, James and Dewey, but also the early Heidegger, the latter Wittgenstein, and such figures as Quine, Sellars, Davidson, Rorty and Putnam.[14]

He considers the narrow sense of Pragmatism, and its commitment to an instrumental order of explanation of belief and truth, to be a way of working out the commitments that constitute pragmatism in a broader sense.

Pragmatism, in the broadest possible sense, means to him giving general explanatory pride of place to practices and the practical.[15] This idea unfolds, in a more determinate way, in a corresponding commitment to the explanatory priority of pragmatic theorising over semantic theorising. The idea that semantics must answer to pragmatics is a pragmatist one in a distinctive

8. Dworkin (1986), above n. 5.
9. Dworkin (1986), above n. 5, at 151-75.
10. Rorty (1999), above n. 4, at 93.
11. Rorty (1999), above n. 4, at 94.
12. Dworkin (1986), above n. 5, at 46.
13. Holmes (1897), above n. 2.
14. Brandom (2011), above n. 6, at 56.
15. Brandom (2011), above n. 6, at 58.

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sense. The meaning Brandom attaches to these terms is broad:

> […] pragmatics is the systematic or theoretical study of the *use* of linguistic expressions, and semantics is the systematic or theoretical study of the *contents* they express or convey.[16]

According to Brandom, this commitment implies, even for the philosophers that wrote before the linguistic turn, an understanding of language as a kind of doing, as a practice or activity. The primary focus on the order of linguistic explanation is on the activity of saying, as opposed to focusing on what is said, the meaning or content.

To Classical American Pragmatism, this theoretical move was also compatible with, if not required by, their resolute determination to accommodate the discoveries and contributions of Darwinian evolutionism in a naturalist philosophical conception of rational (linguistic) creatures as continuous with the rest of living nature (and even inorganic nature, as in the even more radical reconciliation sought by Peirce in his evolutionary cosmology).[17]

Brandom attributes another pragmatist commitment, derived from the previous one, to the philosophers mentioned above: 'the *point* of talking about the content expressed or the meaning possessed by linguistic expressions is to explain at least some features of their use'.[18]

This is a commitment to a methodological Pragmatism: seeing semantic theorising as answering to pragmatics by taking pragmatic theory as it's explanatory target. Taking the success of the theoretical semantic enterprise to be assessed according pragmatic criteria of adequacy allows the sorting out of genuine semantic theories from others on the basis of it explaining or not a central feature of linguistic practice.

Another pragmatist commitment derived from the explanatory primacy of the practical, another way of making semantics answer to pragmatics, is *semantic* pragmatism: '[…] the view that it is the way practitioners *use* the expressions that makes them *mean* what they do'.[19] This commitment imposes a methodological requirement on semantic theorising: when one

> […] associates with expressions some semantic relevant whatsis as its content and meaning, she undertakes an obligation to explain what it is about the use of that expression that establishes in practice the association between it and the semantically relevant whatsis.[20]

Semantic pragmatism, although related to, is different from methodological pragmatism. But the difference is subtle. The methodological pragmatist

> […] looks at the explanation of the practice of using expressions, the subject of pragmatics, in terms of the contents associated with those expressions, the subject of semantics. The semantic pragmatist looks at the explanation of the association of contents with expressions in terms of the practice of using those expressions. While those explanations may be facets of the same story, they need not be.[21]

A further way in which the primacy of the practical unfolds is the commitment to the explanatory priority of 'Knowing how' over 'knowing that' named *fundamental pragmatism* by Brandom.[22] According to it, the intelligibility of explicit theoretical beliefs depends on the existence of a background of implicit practical abilities. It is the opposite of the platonic intellectualist strategy of explaining practical abilities in terms of the grasp of some principles, some privileged bits of 'knowing that'.

Brandom points out that taking the capacity to entertain beliefs and acquire knowledge as parasitic on capacities to do things more primitive than thinking, believing, and saying, in the sense that it is not *yet* one of these, is something we find even in the older members of the brief list of philosophers mentioned earlier.[23] The fact that we can find it in the first Heidegger as well as in Dewey, for example, also supports the attribution of this commitment to philosophers on both sides of the analytic-continental gap, reinforcing the idea of a wider sense of pragmatism than the one defined by the theoretical commitments undertaken by the classical American triumvirate.

This fundamental pragmatism take its force, in part, from its ability to present itself simultaneously as a determination and clearer expression of the fundamental pragmatic insight according to which practice takes explanatory precedence.

But its force comes, in part, from its ability to solve the problem of infinite regress characteristic of the attempt to start to explain believing (a dimension of linguistic practice) in terms of explicit 'know that' instead of implicit 'know how'.

Brandom shows that the heart of the problem is also the indication of its solution: the inferential nature of beliefs. According to him

> Beliefs would be idle unless the believer could at least some times tell what followed from them (what else they committed the believer to) and what was incompatible with them.[24]

However, sorting out among beliefs which ones are compatible or incompatible with some other belief, and

16. Brandom (2011), above n. 6, at 57.
17. Brandom (2011), above n. 6, at 6.
18. Brandom (2011), above n. 6, at 58.
19. Brandom (2011), above n. 6, at 61.
20. *Ibid.*
21. Brandom (2011), above n. 6, at 63.
22. Brandom (2011), above n. 6, at 65.
23. *Ibid.*
24. Brandom (2011), above n. 6, at 66.

which ones are consequences of it, is at the same time something that can be done right or wrong and something for which a finite explicit regulation cannot be given. For if there are explicit rules to follow in correctly sorting incompatibilities and inferential consequences, these last rules could be rightly or wrongly followed, demanding a new set of explicit rules located at a superior level, and so forth.

The solution to this problem is agreeing with Wittgenstein and the other pragmatists on the inevitable bending of the shovel: '[…] distinguishing the potential beliefs that are incompatible with a given belief, and those that are its inferential consequences is a practical skill or ability: a kind of know how'.[25]

This commitment is worked out in different ways by different philosophers. Brandom's strategy involves developing a neo-Hegelian account of the expressive function of logic, which encompasses acknowledging the existence of material inferences, transitions, and incompatibility relations between propositions and between assertions which are good not in virtue of its form, but of its content.[26]

These material inferences, a kind of content related inferential license, are in turn instituted by the activity of practically assessing the linguistic performances of others, the activity of treating a transition as good or bad, of taking a move in the language game to be good or bad (not of saying that it is).

The fourth and final commitment Brandom attributes to pragmatism in the broad sense is a commitment to specifying linguistic practices in terms of some sort of normative status, to employ normative vocabulary in pragmatic theory.[27] Commitment to this normative pragmatics seems to him unavoidable, if one wants give an account of the practice of using linguistic expressions that

> I) [is] to be explained by semantics, according to methodological pragmatism; II) establish the association of linguistic expressions with semantic interpretants, according to semantic pragmatism; and III) constitute the practical know *how* against the background of which alone the capacity to know believe or think *that* can be made intelligible, according to fundamental pragmatism.[28]

This commitment was already undertaken by Kant. Brandom sees as one of the most fundamental Kantian insights the idea that what distinguishes the activities of rational beings, judgments, and actions, from the behaviour of non-rational creatures is that judgments and actions are things one is responsible for. They involve, in an essential way, the undertaking of *commitments*.[29]

According to this interpretation, Kant takes judging and acting as discursive activities, since it consists in the applications of concepts and sees concepts as rules that define to what one has committed oneself in judging and acting the way he did. These rules make possible to assess the correction of judgments and actions in terms of facts and intentions, respectively.

Hence, Brandom takes Kant's account of conceptual contents as aimed at establishing conditions of correctness to our practical performances of acting and asserting.[30] That makes him a methodological pragmatism whose account of discursive practices employs normative vocabulary.

A contemporary version of that commitment to normative pragmatics can be seen in Frege's distinction between force and content. As Brandom reads him, for the young Frege, *claiming* is associating a pragmatic assertional force with a sentence. He also takes assertional force as a kind normative assessment, since he sees asserting a sentence as taking it to be true, and truth to be a form of correctness.[31]

Something along the same lines can be said of the latter Wittgenstein on Brandom's account.[32] One of the central subjects of *Philosophical Investigations* is the existence of norms implicit in practices. That is why, for Wittgenstein as well, to take a linguistic performance to have certain meaning is committing oneself to the correctness and incorrectness of some uses of the expression.[33] To grasp a concept or intention is to commit to norms implicit in practice that define the correct use of the first and the fulfillment of the second.

Brandom sees the later Wittgenstein's version of the regress argument as qualifying him as a fundamental pragmatism, as well as a normative pragmatism.[34] His argument about the necessary end of interpretations (the name he gives to a rule to apply or follow a rule) concludes with the acknowledgement that norms explicit in the form of rules can only be understood against a background of norms implicit in practices.

While the first three commitments that define the three more specific notions of pragmatism above may be easily applied to Classical American Pragmatism, it seems that normative pragmatism cannot be reconciled with their naturalistic approach to semantic and pragmatic theorising. This apparent impossibility emerges, at first sight, from the difficulty of naturalistic theoretical enterprises in reconciling the existence of a normative dimension implicit in linguistic social practices with the idea that this same practices are in continuity with the doings of other creatures in nature. At a first glance, it may appear hard to run this normative dimension together with the notion that the difference between sapient creatures and sentient ones is a matter of degree, not of their nature. For, how would it be possible to recognise the doings of

25. *Ibid.*
26. R. Brandom, 'Semantic Inferentialism and Logical Expressivism', in R. Brandom (ed.), *Articulating Reasons: An Introduction to Inferentialism* (2003) 45.
27. Brandom (2011), above n. 6, at 68.
28. *Ibid.*
29. *Ibid.*
30. *Ibid.*
31. *Ibid.*
32. Brandom (2011), above n. 6, at 69.
33. L. Wittgenstein, *Investigações Filosóficas [Philosophical Investigations]* (1999) Translation José Carlos Bruni, at 91-92, 195-99.
34. Brandom (2011), above n. 6, at 69.

sentient creatures as normatively structured and responsive to norms?

But this is not the case. In fact, as Brandom reads the classical American pragmatist movement, this reconciliation is precisely the enterprise in which they were involved. They showed it is possible to acknowledge that the specification of social practices needed to work out the commitments to methodological, semantic, and fundamental pragmatism requires the employment of normative vocabularies – talk about commitments and about correctness and incorrectness of performance – while searching for a naturalist strategy to understand the working of normative assessments.[35]

Brandom understands classical pragmatists as pragmatists in all the senses discerned above.[36] The explanatory priority they give to habits, practical skills, and abilities qualifies them as fundamental pragmatists. Their methodological pragmatism is manifest in their taking the point of talking about what we mean or believe – namely, semantic talk about meaning and content – to be the clarification of what we do, of our habits, of our practices of solving problems, and seeking goals. They are also semantic pragmatists since they explain the meaning of utterances and the content of beliefs in terms of the roles of those utterances and beliefs play in social practices. Brandom aligns them alongside Kant, Frege, and Wittgenstein as endorsing a normative pragmatics, what in conjunction with their fundamental pragmatism implies their being also normative pragmatists.[37]

What makes it sometimes hard to see is the exclusively instrumental account they give of the norms that structure our cognitive practices. According to Brandom, classical pragmatism acknowledges only instrumental norms structuring human cognitive practices.[38] Instrumental norms, in this sense, are assessments of performances as correct or incorrect in terms of their contribution to the successful achievement of goals.

This is the kind of norms they see as implicit in discursive (conceptual) practice and, because of this, they are also the norms their semantic pragmatism treats as the ultimate source of specific semantic explicit normative assessments such as truth assessments. The result is a conception of truth in terms of usefulness and a corresponding understanding of the contents of utterances and intentional states in terms of their contribution in getting what one wants. This line of thought allows Brandom to describe Peirce, Dewey, and James as instrumental normative pragmatists.[39]

This description, however, is far from consensual among contemporary pragmatists. Some of them, like Haack and Putnam, reject Brandom and Rorty's attribution of instrumentalism to classical American pragmatism as an error of interpretation.[40] It must be acknowledged that they are right concerning Peirce. Although his pragmatic maxim is formulated in a way that, if considered apart from his other theoretical concerns, allows an instrumentalist reading, the association of Peirce's conception of truth as idealised justification with his recognition of truth as a goal of inquiry certainly ends the dispute.

Attempts to eschew attributions of instrumentalism to James and Dewey, however, are not so successful. Some specialists in the classical American pragmatism have been going to some pains to reject the attribution of instrumentalism to James and Dewey. Regarding Rorty's and Brandom's instrumentalist reading of the classical pragmatists' account of norms structuring linguistic social practices – and therefore the correction of performances – Putnam, in his response to an earlier version of Brandom's paper discussed here, says that:

> […] the fact remains that serious students of pragmatism have spent almost a century rebutting the sort of travesty of what the classical pragmatists thought that Brandom relies on, and it must not be allowed to go unrebutted now.[41]

He then argues that, since the beginning of his philosophical theorising,

> Peirce insisted that the interest that drives pure scientific inquiry is utterly different from the interests that drive ordinary practical inquiry. […] Moreover, as early as Peirce's famous 'The Fixation of Belief ', the interest that drives scientific inquiry is identified with the interest in having one's beliefs fixed by 'an external permanency', by 'nothing human'. In short, it is the aims of pure science (which are sui generis, in referring to the indefinitely long run) that Peirce has in mind here (as elsewhere), and not the wants of the agent (unless what the agent wants is truth).[42]

Concerning Peirce, these considerations are hard to reject. The arguments he raises against instrumentalist central features in James' pragmatism, however, are less convincing. The alluded fact that James speaks of 'agreement with reality' and 'correspondence' throughout his work loses much of its force when supplemented, as it were, by the consideration that this notion is in itself in need of explanation, and by the kind of explanations he provided. Putnam, himself, implicitly recognises this when he says that 'James also thinks that what

35. Brandom (2011), above n. 6, at 70.
36. *Ibid.*
37. Brandom (2011), above n. 6, at 71.
38. *Ibid.*
39. *Ibid.*
40. S. Haack, 'Pragmatism, Old and New', 1 *Contemporary Pragmatism* 3 (2004); H. Putnam, 'Comment on Robert Brandom's Paper', in J. Conant and U. Zeglen (eds.), *Hillary Putnam: Pragmatism and Realism* (2002) 59; Brandom, (2011), above n. 6, at 70-81; R. Rorty, 'Verdade sem correspondência com a Realidade' [Truth Without Correspondence to Reality], in C. Magro and A.M. Pereira (eds.), *Pragmatismo: A Filosofia da Criação e da Mudança* (2000b) 17, at 34-52.
41. Putnam (2002), above n. 40, at 59.
42. Putnam (2002), above n. 40, at 60.

kinds of contact with realities will count as "fruitful" depends on our "aesthetic and practical nature"'.[43]
Putnam's way to deflate the instrumentalist aura of these considerations is to run it together with realism-oriented quotations such as these:

> Reality is in general what truths have to take account of; and the first part of reality from this point of view is the flux of our sensations. Sensations are forced upon us, coming we know not whence. Over their nature, order and quantity we have as good as no control.[44]

But then, again, the 'cash value' of James' use of the realist vocabulary of correspondence to address the correction and validity of social practices of enquiry betrays Putnam's aim of avoiding attributions of instrumentalism to James' pragmatism. The use of criteria such as 'interests' in the selection of the sensations makes it clear:

> […] we have a certain freedom in our dealings with these elements of reality, and that in particular which [of our sensations] we attend to, note, and make emphatic in our conclusions depends on our interests; and according as we lay the emphasis here or there, quite different formulations of truth result. We read the same facts differently.[45]

This swinging back and forth, between apparent realist remarks and its instrumentalist specification, is interpreted by Putnam as proof that '[…] James rejects both the view that agreement with reality isn't required at all for truth (or isn't a meaningful notion) and the Peircean view that our convergence to certain beliefs will be forced on us "by nothing human".'[46] The neopragmatist, then, expects the rejection of Brandom's instrumentalism depiction of the norms implicit in practices, in James' Pragmatism, to follow from the conclusion above.
However, even if one considers the quotations Putnam selected as highly representative of James' position, and supportive of this last remark, she or he can still disagree with the conclusion he draws: the norms implicit structuring linguistic social practices and the correction of performances in James thought cannot be instrumental in nature. These quotations may as well support the idea that, for James, although sensory experience, broadly construed, institute certain limits to inquiry, the bits of experience that become candidates to selection are made so guided by practical and aesthetic considerations. How one cuts reality in its joints, then, would be guided by human interests, and true knowledge resulting from inquiry could only be so if, at least holistically, directed at these practical goals.

Suzan Haack, in her paper *Pragmatism, Old & New*, also intends to mitigate the instrumentalist aspects of James' pragmatism. Her conclusions, however, are much more ambiguous and nuanced than Putnam's. Haack interprets James as taking Peirce's pragmatic maxim as the center of his own version of pragmatism. However, the idea of identifying the meaning of a concept with the consequences for conduct of the affirmation or denial of the concept led them to different paths:

> […] while Peirce's philosophy matured in a logical and realist style, James's evolved in a more psychological and nominalist vein. Moreover, unlike Peirce, James thought philosophy would do well to go round Kant, rather than through him; he was more influenced by the British empiricists, and dedicated his Pragmatism to John Stuart Mill.[47]

She points out that this becomes progressively clear as the mature and realist Peirce starts to get uneasy with the encouragement the formulation of the maxim gives to completely subordinating knowing to doing. It contrasts with

> James's readiness to construe 'the consequences of a belief' in a way that includes not only the consequences of the truth of the proposition believed, but also the consequences of the person's believing it.[48]

Haack sees James' interpretation of the pragmatic maxim as influencing the subsequent development of his defense of the will to believe, with its corollary that beliefs that cannot in principle be verified or falsified – like religious ones – may be validated by its effect in one's life.[49] Although it might be the case that James insistence on the separation of his pragmatism from the will to believe – on the basis that the former concerns the policy of believing while the latter concerns the character of truth – points to his rejection of a strong instrumentalism, Haack thinks he was not able to keep them apart:

> "For if it [the pragmatic maxim] is construed as tying meaning to the pragmatic consequences of a proposition's being true, the pragmatic maxim would undermine the doctrine of the Will to Believe; while if it is construed as tying meaning to the pragmatic consequences of a proposition's being believed, the pragmatic maxim and the Will to Believe really do blur into each another".[50]

This blurring can be seen as a strong reason in favour of the attribution of instrumentalism to his philosophy, and it emerges frequently when the pragmatist addresses the concept of truth in *Pragmatism*:

43. Putnam (2002), above n. 40, at 61.
44. Putnam (2002), above n. 40, at 62.
45. Putnam (2002), above n. 40, at 63.
46. Putnam (2002), above n. 40, at 61.
47. S. Haack, 'Pragmatism, Old and New', 1 *Contemporary Pragmatism* 3 (2004), at 12.
48. *Ibid.*
49. *Ibid.*
50. Haack (2004), above n. 47, at 13.

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> Theories thus become instruments, not answers to enigmas, in which we can rest (p. 53); The practical value of true ideas is thus primarily derived from the practical importance of their objects to us (p. 203); […] ideas […] become true just in so far as they help us to get into satisfactory relation with other parts of our experience (p. 58); *The true is the name of whatever proves itself to be good in the way of belief, and good, too, for definite, assignable reasons*. Surely you must admit this, that if there were no good for life in true ideas, or if the knowledge of them were positively disadvantageous and false ideas the only useful ones, then the current notion that truth is divine and precious, and its pursuit a duty, could never have grown up or become a dogma (p. 76) [..] truth becomes a habit of certain of our ideas and beliefs in their intervals of rest from their verifying activities (p. 222); 'The true,' to put it very briefly, is only the expedient in the way of our thinking, just as 'the right' is only the expedient in the way of our behaving. Expedient in almost any fashion; and expedient in the long run and on the whole of course; for what meets expediently all the experience in sight won't necessarily meet all farther experiences equally satisfactorily.[51]

Haack considers that the only available resource for weakening the impression of strong instrumentalism emanating from James definitions of theory and of truth rests in his radical empiricism. In addition, she sees it as the result of a holistic turn in the concept of experience that accommodates both the notion of 'ideas' *as* a part of experience, and experience as a continuous, endless, self-correcting enterprise: 'Experience has ways of *boiling over*, and making us correct our present formulas'.[52] She thinks that 'The robustness of James's response crucially depends on his keeping his account firmly anchored in the long run of experience'.[53] However, James' nominalist and verificationist preference limits the success of this interpretative strategy:

> […] his success in this is at best limited. James disassociates himself from the disconnectedness of earlier empiricisms, and specifically from the idea that similars have nothing really in common, or that the causal tie is nothing but habitual conjunction; so he might, like Peirce, have appealed to the reality of kinds and laws to underpin his conception of Truth absolute. […] But his predilection for the particular leads to an insistence that pragmatists focus on concrete truths, leaving abstract Truth for "intellectualists" to worry about; and his discomfort with the notion of the verifi*able* reinforces this preference for concrete truths actually verifi*ed*.[54]

The movement of downplaying abstract truth in favour of concrete 'truths', and the neglect of the dependence of the latter on the former, in his definitions of truth, keeps James tied to a verificationist conception of truth and an instrumentalist conception of the norms structuring social, linguistic, cognitive practices.

Regarding Dewey's version of pragmatism, Putnam's efforts to avoid the attribution of instrumentalism follow a different path. Dewey's exclusive concern with 'warranted assertability' in his most explicitly pragmatist work, *Logic: The Theory of Inquiry*, makes it the point of departure. Even if a warrantedly assertable belief becomes so for being able to solve a problematical situation,

> […] it isn't the case that satisfying wants is sufficient for resolving a problematical situations – as a staunch cognitivist, Dewey is quite willing to say that *you may have the wrong wants*. Nor is it the case that resolving a problematical situation is *sufficient* for warrantedly assertability: you may not have *inquired* sufficiently well to be *warranted* in thinking the belief resolves the problematical situation even if it does.[55]

The correctness of these remarks, however, does not entitle Putnam to conclude that Dewey did not adopt an instrumentalist version of *normative pragmatism*. The opportunity of correcting one's ends in the light of a better understanding of the means to achieve them – or even the possibility of adopting directly a critical stance towards these ends – do not exclude all forms of instrumentalism.

It is important to acknowledge that the adoption of this holist turn significantly distances Dewey from a *crass* instrumentalism. The continued perfecting of ends allowed by the convergence of his contrite falibilism with his cognitivism on values makes room for Putnam remark that there are '[…] several respects in which Dewey thinks that evaluating beliefs simply in terms of their tendency to "secure some end or achieve some goal" is quite inadequate'.[56]

Nevertheless, an unequivocal instrumentalist character remains connected with Dewey's idea that inquiry, in general, consists in problem solving. Haack is especially attentive to the particularity of Dewey's instrumentalism when she stresses his concern with how thought processes experimentally determine future conduct and his aim of integrating in a holistic, anti-dualistic manner, the agent/knower beliefs about the world and his beliefs about values.[57] Although Dewey shares with Peirce the idea of inquiry as an active process that leads from doubt to settled belief, his instrumentalism can be seen in the fact that his method for settling beliefs does not revolve around being constrained by an independent reality:

> Dewey sounds less like Peirce when, after pointing out that inquiry is a kind of practice, to be judged, like other practices, by its purposive success, he con-

51. W. James, *Pragmatism* (1907), at 53, 203, 58, 76, 222.
52. James (1907), above n. 51, at 222.
53. Haack (2004), above n. 47, at 14.
54. *Ibid.*
55. Putnam (2002), above n. 40, at 61.
56. Putnam, (2002), above n. 40, at 64.
57. Haack (2004), above n. 47, at 16.

> tinues – by its purposive success rather than by some supposed standard of accuracy of reflection of its objects. The object of knowledge is not an immutable, independent reality, but is in part constituted by our cognitive interactions with it. Inquiry, discovering "provisional facts" and conjecturing possible solutions, transforms a problematic, indeterminate situation into a determinate one.[58]

And in Dewey's attempt to develop a better notion of experience than the classical empiricist one, Haack also identifies '[…] a more radical step, from the idea that experience is active in the sense of requiring intelligent manipulation, experimentation, and selection, to the idea that it somehow constitutes its objects'.[59]
Dewey understands Logic – in a broad sense that includes but is not reducible to formal logic – as the normative theory of enquiry:

> The way in which men do "think" denotes, as it is here interpreted, simply the ways in which men at a given time carry on their inquiries. […] we are able to contrast various kinds of inquiry that are in use or that have been used in respect to their economy and efficiency in reaching warranted conclusions. We know that some methods of inquiry are better than others in just the same way in which we know that some methods of surgery, farming, road-making, navigating or what-not are better than others. It does not follow in any of these cases that the "better" methods are ideally perfect, or that they are regulative or "normative" because of conformity to some absolute form. They are the methods which experience up to the present time shows to be the best methods available for achieving certain results, while abstraction of these methods does supply a (relative) norm or standard for further undertakings.[60]

In other words, Dewey describes inquiry as a normatively structured activity whose norms are produced by generalisations of some specific methods employed in the past: the ones that proved to be, in experience, the best methods for achieving certain results. Thus, he understands logic as an explicit codification of recommendations about how to inquire. These recommendations are abstracted from the procedures that proved to work in practice.
The best way to conciliate these perspectives – the instrumentalist aspects of their definitions of theory, truth, and inquiry, on one hand, and their complaints regarding crass instrumentalist interpretations of their philosophy, on the other – seems to be to attribute to James and Dewey not only the adoption of instrumentalist strategies, but also some degree of awareness that commitment to instrumentalism is only a strategy for working out the other pragmatist commitments, and so should not cloud them. That may as well be what the complaints they made about some instrumentalist interpretations of their work having pushed pragmatism too far are about.
However, this awareness is intermittent. The emphasis placed, by their critics and by the classical pragmatists themselves, on the instrumental aspect of pragmatism has eclipsed, from their critics and from themselves, the four more relevant pragmatist commitments that shape their philosophy, in Brandom's view.[61]
Since the attribution of instrumentalism to Peirce does not hold, and since Brandom's analysis of pragmatism ends in a definition of classical pragmatism consisting in the undertaking of all five pragmatist commitments above, from now on when talking about classical pragmatism Peirce should be excluded. The invention and the keeping of the name 'pragmaticism' to differentiate his thought from the thought of the rest of the pragmatists, especially their instrumentalism in matters of inquiry and truth, shows that Peirce would have no problem with this.
This is how he describes the episode that led to the creation of the neologism:

> His word 'pragmatism' has gained general recognition in a generalised sense that seems to argue power of growth and vitality. The famed psychologist, James, first took it up, seeing that his 'radical empiricism; substantially answered to the writer's definition of pragmatism, albeit with a certain difference in the point of view. Next, the admirably clear and brilliant thinker, Mr. Ferdinand C. S. Schiller, casting about for a more attractive name for the 'anthropomorphism' of his *Riddle of the Sphinx*, lit, in that most remarkable paper of his on *Axioms as Postulates*, upon the same designation 'pragmatism', which in its original sense was in generic agreement with his own doctrine, for which he has since found the more appropriate specification 'humanism', while he still retains 'pragmatism' in a somewhat wider sense. So far all went happily. But at present, the word begins to be met with occasionally in the literary journals, where it gets abused in the merciless way that words have to expect when they fall into literary clutches. Sometimes the manners of the British have effloresced in scolding at the word as ill-chosen, – ill-chosen, that is, to express some meaning that it was rather designed to exclude. So then, the writer, finding his bantling 'pragmatism' so promoted, feels that it is time to kiss his child good-by and relinquish it to its higher destiny; while to serve the precise purpose of expressing the original definition, he begs to announce the birth of the word 'pragmaticism', which is ugly enough to be safe from kidnappers.[62]

At first glance, the episode seems only to express Peirce's reaction to the abuse the word 'pragmatism' suffered because of the circulation of pragmatists theses

58. Haack (2004), above n. 47, at 17.
59. Haack (2004), above n. 47, at 18.
60. J. Dewey, *Logic: The Theory of Inquiry* (1939), at 103,104.
61. Brandom (2011), above n. 6, at 71.
62. C.S. Peirce, 'Letter to Signor Calderoni', XV *The Monist* 161 (1905), at 165.

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in the literary circles of the time. Peirce was not bothered, then, with its use by the other classical pragmatists to denote their partially different conception of the pragmatic maxim.
However, in a letter dated from the same year, Peirce already seems to think that his new world would have the effect of distinguishing his interpretation of the pragmatic maxim from that of the others pragmatists:

> In the April number of the Monist I proposed that the word 'pragmatism' should hereafter be used somewhat loosely to signify affiliation with Schiller, James, Dewey, Royce, and the rest of us, while the particular doctrine which I invented the word to denote, which is your first kind of pragmatism, should be called 'pragmaticism.' The extra syllable will indicate the narrower meaning.[63]

A year later, in a paper called *A Sketch of Logical Critics*, the scope of differentiating his thought from the instrumentalist interpretation of the pragmatic maxim he criticised in James and Schiller, seemed to have become the main reason for sustaining the world 'pragmaticism' to denote his own views:

> I have always fathered my pragmaticism (as I have called it since James and Schiller made the word [pragmatism] imply 'the will to believe,' the mutability of truth, the soundness of Zeno's refutation of motion, and pluralism generally), upon Kant, Berkeley, and Leibniz, and have rated J. S. Mill by the fatal inaccuracy of his reasoning, as decidedly inferior to his father.[64]

Putnam also shares this interpretation. Criticising the idea that '*Beliefs are true insofar as they are good tools or instruments for getting what one wants*', he says of it that it is 'Precisely the misunderstanding that Peirce feared when he changed the name of his philosophy from "pragmatism" to "pragmaticism"!'[65]
If this argument is sound, it is possible to see Peirce as rejecting the instrumentalism James and Dewey sustain. The great advantage of construing the norms implicit in practices in instrumental terms is, for them, the synthesis it allows between normative pragmatism and a Darwinian naturalism, a way to understand human practices as normative that is not mysterious, dualistic, or metaphysical, and that allows one to see them as continuous with the rest of nature.

63. C.S. Peirce, *Collected Papers,* Eds. C. Hartshorne, P. Weiss & A. Burks (1931-58), 1958, 8.205.
64. C.S. Peirce, *The Essential Peirce: Selected Philosophical Writings* (1998), at 457.
65. Putnam (2002), above n. 40, at 64.

4 Legal Pragmatism and Instrumentalism

Of the five pragmatist commitments that shape the classical pragmatist movement's philosophy, the one that was more intensely absorbed, and in some cases solely absorbed, by theoretical applications of pragmatism in the field of law was instrumentalism.
Instrumentalism is what boils behind Posner's resolute anti-theoretical claims that philosophical theory, even *pragmatist* philosophical theory, is irrelevant to legal pragmatism and legal practice.[66] Such myopic absorption also help understanding Holmes' conception of law as prophecy, and his taking the judges conceptions of social benefit as supreme hermeneutic criteria.
In his *The Path of Law*, Holmes presents a series of instrumentalist claims and slogans.[67] About law as object of inquiry, for example, he claims that '[…] the object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts'.[68] In the same spirit, he claims that 'the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law'.[69] Sometimes, the instrumentalism in Holmes' conception of law leans towards utilitarianism, when he claims that:

> judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said.[70]

Holmes also highlights in the same book, that priority should be given, in the shaping of lawyers, to the study of economy, thus anticipating more radical and utilitarian versions of legal pragmatism such as those exhibited by Posner and by the *Law and Economics* movement.[71]
There certainly are other elements on Holmes' conception of law that seem to follow from those other pragmatist theoretical commitments, shared by pragmatists in broad sense. The more relevant ones are the understanding of law not as a closed system of norms, but as a social practice, as well as the understanding of the content of law as subjected to a historical process of transformation and improvement.[72] Such features, however, play a secondary role when compared with those features following from instrumentalism.
The same thing can be said of the sketch of a pragmatist conception of law that emerges from Dewey's *My Phi-*

66. R. Posner, *Direito, Pragmatismo e Democracia [Law, Pragmatism and Democray]* (2010) Translation Teresa Dias Carneiro, at 32-3.
67. Holmes (1897), above n. 2.
68. Holmes (1897), above n. 2, at 2.
69. Holmes (1897), above n. 2, at 4.
70. Holmes (1897), above n. 2, at 9.
71. Holmes (1897), above n. 2, at 16.
72. Holmes (1897), above n. 2, at 1, 3, 11.

losophy of Law and *Logical Method and Law*.[73] Although in the first paper Dewey makes an effort to show the social – in the sense of interactional or intersubjective – origins of law, when it comes down to describing the activities of those involved in legal social practices in the second paper, instrumentalism dominates *entirely*.

After criticising the syllogistic conception of legal inquiry and discussing at some length his own proposal of legal inquiry as an instantiation of the active, experimental, and empirical process of inquiry that he calls logic – or, more precisely, the logic of discovery – characteristic of the reaching of intelligent decisions by lawyers and judges, Dewey adds to this process an instrumentalist twist. In a fragment resembling Holmes' instrumentalist theses, he claims about the logic of judicial decisions that:

> […] it must be a logic *relative to consequences rather than to antecedents*, a logic of prediction of probabilities rather than deduction of certainties. For the purposes of a logic of inquiry into probable consequences, general principles can only be tools justified by the work they do.[74]

One is right in attributing to Dewey, therefore, the idea that the real process by means of which legal decisions in general – and judicial decisions in particular – are reached is instrumental in nature. In another passage, the instrumental nature of normative legal patterns becomes even clearer:

> The 'universal' stated in the major premise is not outside of and antecedent to particular cases; neither is it a selection of something found in a variety of cases. It is an indication of a single way of treating cases for certain purposes or consequences in spite of their diversity.[75]

If the reading undertaken here is sound, it seems that Dewey, in his sparse writings on law, synthesises the conception of experience and logic typical of philosophical pragmatism in the narrow sense with an instrumentalism quite similar to the one expressed in Holmes' theses of law as prophecy and in his adoption of efficiency in bringing forth social benefits as supreme hermeneutic criteria.

Theoretical pragmatist conceptions of law can then be seen, apparently, as what happens when the orientation towards consequences that characterises the pragmatist movement is read through reductive instrumentalist lens before being applied to law.

73. J. Dewey, 'My Philosophy of Law', in J.A. Boydston (ed.), *John Dewey: The Later Works, 1925-1953* (2008) 115; J. Dewey, 'Logical Method and Law', 10 *Cornell Law Quarterly* 1914 (1925).
74. Dewey (1925), above n. 73, at 26.
75. Dewey (1925), above n. 73, at 22.

5 Dworkin's Theory of Law as a Pragmatist Interpretation of Legal Practices

However, this is a half-truth. There are others theories in the field of law that could be called pragmatist theories due to its absorption of one or more of the other pragmatist commitments, although rejecting instrumentalism. This is the case of Dworkin's Law as Integrity.[76] This specific theory of law is commited to methodological pragmatism since it takes the point of theorising about the content of law in general and of rights in particular as explaining some features of the use of legal concepts, of judicial adjudication, in short, of legal practice. This commitment is manifest, for example, when he criticises accounts of the theoretical divergence in legal practices that are affected by what he calls *semantic sting*, for not being able to encompass the typical situation of theoretical argumentation in law,

> […] when members of particular communities who share practices and traditions make and dispute claims about the best interpretation of these, when they disagree […] about what some tradition or practice actually requires in concrete circumstances.[77]

This theoretical guideline is what lies behind Dworkin's interpretive and non-reductionist conception of law according to which to interpret the law is to identify as the contents of rights those that show legal social practices in its best light, running intelligibility and justifiability together. In Dworkin's own words, the theoretical propositions his theory of law generates

> […] are constructive interpretations: they try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice. So no firm line divides jurisprudence from adjudication or any other aspect of legal practice. […] Jurisprudence is the general part of adjudication, silent prologue to any decision at law.[78]

Law as Integrity is also committed to semantic pragmatism. It rejects the legal positivist strategy of demarcating the realm of law by means of a factual test. In its place stands the acknowledgment that the only thing that can lead us in establishing the propositional content of the doctrinaire concept law – what the law requires in novel cases – is the history of previous political and judicial decisions thought of as continuous and coherent with the current legal practices of adjudication. In short, it is a theory that makes the meaning and content of the legal propositions simultaneously dependent on its historical and present use and on the view of the practition-

76. Dworkin (1986), above n. 5.
77. Dworkin (1986), above n. 5 at 46.
78. Dworkin (1986), above n. 5, at 90.

ers of what makes the practice valuable. When it comes to interpretive concepts, the genre to which legal concepts, and the very concept of law, belong, they require

> […] that people share a practice they must converge in actually treating the concept as interpretive. But that does not mean converging in the application of the concept. People can share such a concept even when they disagree dramatically about its instances. So a useful theory of an interpretive concept – a theory of justice – cannot simply report the criteria people use to identify instances or simply excavate the deep structure of what people mainly agree are instances. A useful theory of an interpretive concept must itself be an interpretation. which is very likely to he controversial, of the practice in which the concept figures.
> In my view the doctrinal concept of law functions as an interpretive concept, at least in complex political communities. We share that concept as actors in complex political practices that require us to interpret these practices in order to decide how best to continue them, and we use the doctrinal concept of law to state our conclusions.[79]

Although the role of value considerations in interpretive concepts might lead one to think its current and past use loose relevance in establishing the meaning of these concepts, and therefore might weaken the claim regarding semantic pragmatism commitments in Dworkin's theory, his explicit considerations eschews this conclusion:

> It does not follow, even from that rough account, that an interpreter can make of a practice or work of art anything he would have wanted it to be, that a citizen of courtesy who is enthralled by equality, for example, can in good faith claim that courtesy actually requires the sharing of wealth. For the history or shape of a practice or object constrains the available interpretations of it, though the character of that constraint needs careful accounting.[80]

Furthermore, Dworkin's rejection of the 'semantic sting', the counterfactual presupposition of complete homogeneity in the use of legal concepts in the field of law, made by positivist theories, does not prevent him from recognising a partial consensus in the uses that articulate the meaning of the concept of law. He distinguishes the consensual level of social legal practices converging on the concept of law from the controversial conceptions of this concept:

> Discussions about law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.[81]

The controversial conceptions of law, manifest in the partially different uses of legal concepts by the participants of social legal practices, stem from the consensual and conceptual level as they provide different answers to the three questions raised by the concept:

> First, is the supposed link between law and coercion justified at all? Is there any point to requiring public force to be used only in ways conforming to rights and responsibilities that "flow from" past political decisions? Second, if there is such a point, what is it? Third, what reading of 'flow from' – what notion of consistency with past decisions – best serves it?[82]

The commitment to semantic pragmatism is also recognisable in the central place Dworkin's interpretive conception of law gives to the historical uses of legal concepts in establishing the doctrinaire concept of law:

> It insists that the law – the rights and duties that flow from past collective decisions and for that reason license or require coercion – contains not only the narrow explicit content of these decisions but also, more broadly, the scheme of principles necessary to justify them. History matters because that scheme of principle must justify the standing as well as the content of these past decisions.[83]

Differently from the other pragmatist commitments, commitment to fundamental pragmatism does not come to the fore of Dworkin's Law as integrity. However, since there is nothing in Dworkin's theory of law that precludes commitment to fundamental pragmatism, and since this theory is not compatible with any form of platonist intellectualist order of explanation, this absence may be credited to the relative irrelevance of investigating pre-linguistic know how for achieving its theoretical goals.
The commitment to normative pragmatism, on the other hand, can be clearly seen in the pride of place Dworkin affords to the idea of norms implicit in practices. That idea is in the core of his concept of legal principle and of the distinctive rational process of simultaneously applying the law and developing the law that he calls constructive interpretation. In this sense, Law as Integrity

> […] argues that rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political

79. Dworkin (2006), above n. 1, at 11.
80. Dworkin (1986), above n. 5, at 52.
81. Dworkin (1986), above n. 5, at 93.
82. Dworkin (1986), above n. 5, at 94.
83. Dworkin (1986), above n. 5, at 227.

> morality the explicit decisions presuppose by way of justification.[84]

Besides having the clear advantage of allowing an adequate treatment of legitimacy questions concerning social legal practices and institutions, this normative pragmatist feature of his interpretive conception of law is also restated and justified in practical terms:

> If people accept that they are governed not only by explicit rules laid down in past political decisions but by whatever other standards flow from the principles these decisions assume, then the set of recognized public standards can expand and contract organically, as people become more sophisticated in sensing and exploring what these principles require in new circumstances, without the need for detailed legislation or adjudication on each possible point of conflict.[85]

It is also deserving of notice that this commitment to the existence of norms implicit in practices is one that none of the self-titled legal pragmatists undertook. They suggest a kind of skepticism about rights to the judges. It is the strategy of acting 'as if' there were rights originating from the norms explicitly codified in the forms of rules. But they see this strategy as just one more way of 'interpreting' the law and fixing its meaning *aiming at an increase in social benefit*. What follows from this is the conditional character of the strategy: it should be employed when and only when it supposedly leads to an increase in social benefit. Consequently, rights derived from rules are a considered a (sometimes) useful fiction. They do not really exist. The opposite of that conception is to recognise norms as real even when they are implicit in practices. In doing so, Law as Integrity

> […] requires our judges, so far as this is possible, to treat our present system of public standards as expressing and respecting a coherent set of principles, and, to that end, to interpret these standards to find implicit standards between and beneath the explicit ones.[86]

If this is correct, one can start to understand how the employment of Brandom's analysis of philosophical pragmatism equips one to do what this paper set out to do from the beginning: bring Dworkin closer to philosophical pragmatism. It is possible to see now that his conception of law is incompatible not with philosophical pragmatism in the broad sense as defined by the four pragmatist commitments that articulate its theories. On the contrary, Dworkin's theory of law adopts explicitly three of them and is highly compatible with the fourth. Its incompatibility regards merely the strategy adopted by the classical pragmatists for working out their commitment to normative pragmatism in the context of their Darwinian naturalist commitments, namely, instrumentalism about norms, and its legal expression. But this strategy is entirely optional. Commitment to a naturalist order of explanation is not required by pragmatism in the broad sense. In the same spirit, commitment to instrumentalism is optional even for someone committed to naturalism. Its rejection count as rejecting at most some features of pragmatism as construed in a narrow sense. It is doubtful that committing to a reductive instrumentalism about norms is inevitable even if one wants to give a naturalist account of the norms implicit in practices. Brandom's own account of the emergence of the norms implicit in our discursive practice in the first chapter of *Making it Explicit* can be read as a kind of weak naturalistic explanation of normativity.[87] Since the conception of law as integrity undertakes at least three of the four theoretical commitments that defines pragmatism in the broad sense, and since legal pragmatism, despite sharing instrumentalist commitments with classical pragmatism, undertakes no more than three of these commitments, we can draw the conclusion that Dworkin's (2007) conception of law is entitled to be understood as an application of philosophical pragmatism to the legal field, at least as much as legal pragmatism is.[88]

84. Dworkin (1986), above n. 5, at 96.
85. Dworkin (1986), above n. 5, at 188.
86. Dworkin (1986), above n. 5, at 217.
87. R. Brandom, *Making It Explicit: Reasoning, Representing and Discursive Commitment* (1998), at 3-66.
88. Dworkin (1986), above n. 5.

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Pragmatism and Dynamics: Does Pragmatist Adjustment Go All the Way Down?

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Abstract

Pragmatism has become an established academic topic focused on an accepted canon of works and a number of seminal authors. There is something ironic about this fixation of the Pragmatist tradition. An anticipation of transience and embrace of adaptability runs through many of the classic works of Pragmatism. Nevertheless, there seems to be a tendency to fixate Pragmatism and freeze it in its classic iterations, especially with respect to its philosophy of scientific inquiry. The article seeks to retrieve the dynamics and adaptability the classical Pragmatists built into their notion of scientific inquiry. It seeks to illustrate the need for such flexibility with recent developments in the field of economics. When the financial crisis struck in 2007-2008, this involved more than the insolvency of a number of large banks. The crisis, at the very least, also involved the bankruptcy of a dominant economic model. It raised questions about the rationality of markets and the widespread faith in soft-touch regulation. It cast doubt on decades of neo-classical economic dogma that counseled small government, privatisation, and free markets. Neo-classical economics did not float free from other concerns. It informed notions about the role of the state, the limits of public policy, and the scope of democratic decision-making. Indeed, faith in rational, self-correcting markets affected debates in disparate disciplines like law, political science, philosophy, ethics, and history in many non-trivial ways. Hence, the financial crisis is also a crisis of scientific research.

Keywords: pragmatism, dynamics, research methodology, financial crisis, social sciences

1 Introduction

Pragmatism has become an established academic topic focused on a widely accepted canon of classic pragmatist works and a number of undisputed seminal authors – from Charles Sanders Peirce, William James, and John Dewey to W.V.O. Quine, Wilfrid Sellars, Hilary Putnam and others. There is something ironic about this fixation of the pragmatist tradition. An expectation of transience, and an embrace of adaptability and adjustment, runs through many of the classic works of pragmatism. Yet, the canonisation of pragmatism to a certain extent amounts to a fixation of pragmatism, to a freezing of pragmatism around a set of historical characteristics. Typically, this fixation is focused on pragmatism as a philosophy of scientific inquiry. The implicit assumption seems to be that even though through time pragmatism may generate new and different insights and be put in the service of new and different projects, its notion of truth and method of inquiry will remain largely unchanged. In 1930, Legal Realist Jerome Frank warned against such an ossification of scientific method in his notorious work *Law and the Modern Mind*. Science should not become 'a new source of illusion, a new escape from change and chance, a new road to the absolute'.[1] What was needed, Frank argued, was not so much a scientific method, but a scientific 'habit of thought'. This echoed William James's shift from the notion that pragmatism amounted to a 'method of inquiry,' to the view that pragmatism was principally a guide for action, an ethic. It also tallied with John Dewey's criticism that in their quest for certainty and immutability, modern philosophers had moved from uncovering truths about the nature of the universe to unveiling truths about the nature of knowledge. 'If the conditions of the possibility of knowledge can be shown to be of an ideal and rational character,' Dewey noted: 'then, so it has been thought, the loss of an idealistic cosmology in physics can be readily borne'.[2]

To be sure, an acceptance of the revisability of all human knowledge, including knowledge about the gathering of knowledge, is almost a precondition for entry into the company of pragmatists. Yet, there is a wide range of belief with respect to the certainty and variability of scientific method among the adherents of pragmatism. Some – like Charles S. Peirce and Susan Haack – primarily stress the stability of scientific method and claim people have learned a great deal about the procedures that deliver dependable knowledge. This scientific practice and its attendant values and techniques deserve to be handled with care because it is our best hope for scientific progress.[3] While others – most notably the late Richard Rorty – stress the changeable, even capricious, nature of research methods and claim the method of science is little more than a vocabulary to talk about reality.

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1. J. Frank, *Law and the Modern Mind* (1970 (1929)), at 307.
2. J. Dewey, *The Quest for Certainty: A Study of the Relation of Knowledge and Action* (1960 (1929)), at 41-2.
3. S. Haack, *Manifesto of a Passionate Moderate: Unfashionable Essays* (1998), at 7-9.

Pragmatists like Dewey argued for the 'need to abandon traditional notions of rationality, objectivity, method and truth,' according to Rorty, and moved 'beyond method'. The history of science, in Rorty's view, illustrates 'the power of new vocabularies rather than the secret of scientific success'.[4]

Pragmatism navigates a course somewhere between these opposite poles of stability and dynamics, of scientific realism and nominalism, and it is difficult to pinpoint exactly what coordinates it should track. Haack has argued forcefully – and pertinently – against neopragmatists, like Rorty, that veer off too far to the nominalist end of the spectrum. I have argued elsewhere that these objections are cogent.[5] Yet, that does not mean that Haack's alternative, and the Peircean inspiration it draws on, plots a uniquely right trajectory for pragmatism, i.e. that Haack's species of pragmatism gets the balance between scientific realism and nominalism exactly right. Indeed, in this paper I will argue that Haack's course, in turn, strays too far to the realist end of the spectrum. This makes pragmatism look too fixed and stable and too much like another version of scientific realism. Haack's unadulterated Peircean understanding of the pragmatist conception of science creates problems with other central aspects of pragmatism. It leads to a conception of scientific method that is out of tune with pragmatist notions about holism, situatedness, and action.

But what does the pragmatist embrace of dynamics mean with respect to inquiry? If the dynamics of pragmatism with respect to research involves more than changes in topics and subject matter, then what does it entail? Does it remain limited to theoretical changes in the way phenomena are conceived and conceptualised? Does it affect heuristics and methodology? Or does it go all the way down and affect basic notions about science and the pursuit of knowledge? I will argue that there are a number of aspects to pragmatism that suggest pragmatists should expect the practice of scientific research to change and evolve more readily and more radically, than is often assumed. Notably, the embrace of epistemological pluralism, the emphasis on scientific research as a form of action, and the belief in the continuity of means and ends conspire to make for a rather more dynamic notion of scientific practice.

I will illustrate these three aspects of the pragmatist understanding of scientific inquiry by looking at recent developments in the field of economics, most notably at the slow demise of central tenets of neo-classical economic theory, which held sway in economics and public policy since at least the 1980s. When the financial crisis struck in 2007-2008, this involved more than the insolvency of a number of large banks. The crisis also involved the bankruptcy of the business practices of these banks. It raised questions about the rationality of the market, the belief in the wisdom of crowds, and the widespread faith in soft-touch regulation. It cast doubt on several decades of neo-classical economic dogma that counseled small government, privatisation, and free markets. For Alan Greenspan, Chairman of the Federal Reserve and high priest of neo-classical orthodoxy, the failure of neo-classical economics in the financial crisis evidently involved a failure of his whole *Weltanschauung*. At the hearings of House Committee on Government Oversight and Reform Greenspan was clearly taken aback by the events of 2008. When Chairman Henry Waxman put it to Greenspan: 'In other words, you found that your view of the world, your ideology, was not right. It was not working'. Greenspan answered: 'That's precisely the reason I was shocked, because I had been going for forty years or more with very considerable evidence that it was working exceptionally well'.[6]

In Greenspan's Damascene conversion in the wake of the financial crisis there was much more at stake than just the falsification of an economic theory. Neo-classical economics does not float free from other concerns. It is an economic world view that was extraordinarily successful in the last three decades and that informed notions about the role of the state, the limits of public policy and the scope of democratic decision-making. Hence, beyond the field of economics, faith in rational, self-correcting markets also affected debates in disciplines like law, political science, philosophy, ethics, and history in many non-trivial ways. Thus, the financial crisis undermined not only the confidence people had in their economic model, but also in their wider public philosophy; the regulatory models they had adopted,

4. R. Rorty, 'Method, Social Science, and Social Hope', XI:4 *Canadian Journal of Philosophy* 569, at 582 (1981).
5. W. de Been, *Legal Realism Regained: Saving Realism from Critical Acclaim* (2008).
6. This dramatic volte face of Alan Greenspan with respect to his unshakeable faith in rational markets drew a lot of attention. (He has backtracked on his confession of being mistaken, since.) By no means was Greenspan alone, however. Another remarkable turnaround was the loss of faith of one of the champions of law-and-economics and self-declared pragmatist, Richard Posner. Posner had built his career as a law-and-economics scholar on the application of rational market theory to legal questions. When this theory was punctured, Posner dramatically distanced himself from decades of economic dogma and announced his embrace of Keynesianism. In a 2009 article in *The New Republic* he claimed: 'We have learned since September that the present generation of economists has not figured out how the economy works'. As a result, the economics profession had few suggestions on how to deal with the crisis: 'Not having believed that what has happened could happen', Posner commented: 'the profession had not thought carefully about what should be done if it did happen' (R. Posner, 'How I Became a Keynesian', *The New Republic* September 2009, <www.newrepublic.com/article/how-i-became-keynesian> (Consulted 24-6-2013) at 1).

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and the new balance they had pursued between the private and the public sphere.[7]

The crisis of the dominant approach to economics of the last three decades provides a vivid illustration of the way pragmatists looked at scientific knowledge, i.e., as warranted beliefs rooted in the world of practice that could be more or less useful in dealing with reality, not as theories that necessarily reflected the true nature of the phenomenon under study. For pragmatists like Dewey and James, the world could not be neatly carved up between disinterested scientific research and the social and economic projects people engaged in. They always understood scientific research as something that emanated from the practical concerns of a particular social, cultural, and historical setting. James proposed a holistic understanding of truth. Knowledge of the world was part and parcel of the larger context within which scientific research took place: i.e., the existential setting researchers found themselves in and the practical projects they saw themselves as part of. James and Dewey would not have been surprised about the way worldly success could push to the side hesitation and doubt like it did in the run-up to the financial crisis. Even though James is often mistakenly criticised for coarsely reducing truth to what is expedient to believe, for focusing on the 'cash value of ideas', he was keenly aware that accomplishment and affluence could warp your understanding and moral stance. In a letter to H.G. Wells he wrote famously: 'The moral flabbiness born of the exclusive worship of the bitch-goddess SUCCESS. That – with the squalid cash interpretation put on the word success – is our national disease'. This article will interrogate the interconnections between science and society, including the 'squalid' ones on display in the recent financial crisis, and see to what extent the dynamics they set in motion fit with a pragmatist understanding of scientific inquiry. This interrogation will be organised around three central pragmatist themes and their consequences for scientific inquiry: (1) the irreducible pluralism of reality, (2) research as a form of action, and (3) the pragmatist notion of continuity between means and ends.

7. Indeed, several authors have pointed to the pervasive influence of free-market economics in recent decades, well beyond the confines of the discipline. In his short treatise on *What Money Can't Buy,* Michael Sandel claims that 'we drifted from *having* a market economy, to *being* a market society', which he defines as 'a way of life in which market values seep into every aspect of human endeavor' (M. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (2012), at 10-11). Indeed, Sandel believes market reasoning is so ingrained in the U.S. that even the 2008 financial crisis has not led to a loss of faith in markets. German cultural theorist Joseph Vogl claims that the providentialist eighteenth century notion of 'theodicy', of the world as an expression of divine will, has secularized into the present-day notion of 'oikodicy', of the world as the benevolent outcome of beneficent market forces. The ghost of the free-market is everywhere and giving everyone their just deserts (J. Vogl, Joseph, *Das Gespenst des Kapitals* (2010, 2011)). Robert Skidelsky claims that today 'mainstream economics is in fact an ideology – the ideology of the free market' (R. Skidelsky, 'Post-Crash Economics' *Project Syndicate*, <www.project-syndicate.org/commentary/robert-skidelsky-knocks-the-scientific-halo-off-mainstream-economists--teaching-and-research> (Consulted 24-6-2014)).

2 Situatedness and Epistemological Pluralism

In his lecture on Pragmatism Putnam claims that William James 'tries to "humanize" the notion of truth, to view it (as he views all notions) as a human instrument, and not as an idea that dropped from the sky'.[8] This introduces the first problem with a static notion of pragmatism. If people are not disinterested intelligences floating free from any worldly concerns and formulating detached hypotheses about the nature of reality but situated and involved intelligences trying to find practical answers to the going concerns of their societies, then this opens the notion of science up to pluralism, to a variety of perspectives rooted in diverse contexts, and focused on the solution of diverse problems.

Pluralism is a well-known theme in James's work, of course. In the preface to his *Talks to Teachers*, James noted that according to his pluralistic philosophy:

> …the truth is too great for any one actual mind, even though that mind be dubbed 'the Absolute,' to know the whole of it. The facts and worths of life need many cognizers to take them in. There is no point of view absolutely public and universal. Private and incommunicable perceptions always remain over, and the worst of it is that those who look for them never know *where*.[9]

This could be interpreted to mean simply that human perspectives are limited; that people can only survey their piece of the puzzle but never the whole jigsaw; that there are supplemental points of view that are not reflected even in the most comprehensive, state-of-the-art statement of the truth we can muster.

There are good reasons to assume that such an interpretation would be too modest, though. James's pluralism is more thoroughgoing than that. One of the reasons James was preoccupied with pluralism was his worry that a monistic world would lack freedom. A pluralistic world provided room for choice, freedom, chance, and novelty, whereas a monistic world was deterministic and closed. Moreover, in *A Pluralistic Universe* James contended that his finite experiences as a finite being precluded access to any absolutes, anyway:

> What boots it to tell me that the absolute way is the true way; and to exhort me, as Emerson says, to lift mine eye up to its style and manners of the sky, if the feat is impossible by definition. I am finite once and for all, and all the categories of my sympathy are knit up with the finite world *as such*, and with things that have a history.[10]

8. H. Putnam, *Pragmatism: An Open Question* (1995), at 21.
9. W. James, *Talks to Teachers on Psychology: And to Students on Some of Life's Ideals* (1905 (1899)), at V.
10. W. James, *A Pluralistic Universe* (1912), at 48.

'If we were *readers* only of the cosmic novel, things would be different: we should then share the author's point of view', James noted. However, he pointed out: 'we are not the readers but the very personages of the world-drama' and the 'tale which the absolute reader finds so perfect, we spoil for one another through our several vital identifications with the destinies of the particular personages involved'.[11]

In *A Pluralistic Universe*, moreover, James stressed the understanding of our concepts as the tools on hand to cope with our experience, not as absolutes that held sway beyond time and place. He praised Henri Bergson for 'his attempt to limit the divine right of concepts to rule our mind absolutely' and for his conception of philosophy as lying 'flat on its belly in the middle of experience, in the very thick of its sand and gravel […] never getting a peep at anything from above'.[12] In a similar vein, Dewey drew the conclusion from Darwin that the world was in perennial flux and that even such basic categories as natural species lacked a true and permanent nature. They should not be treated as permanent fixtures but only as temporary classifications of evolving organisms. '[I]n treating the forms that had been regarded as types of fixity and perfection as originating and passing away', Dewey wrote, 'the "Origins of Species" introduced a mode of thinking that in the end was bound to transform the logic of knowledge'.[13]

James's pluralism, moreover, was tied to his concerns about what we would now call ethnocentrism. Overestimation of the rightness of our own understanding and 'pronouncing on the meaninglessness of forms of existence other than our own', James considered a serious moral failure.[1415] Indeed, he warned against 'the stupidity and injustice of our opinions, so far as they deal with the significance of alien lives', and 'the falsity of our judgments, so far as they presume to decide in an absolute way on the value of other persons' conditions or ideals'.[16]

The picture Susan Haack paints of pragmatism is quite different in tone and substance from James's pluralistic notion. With respect to scientific knowledge, the humility of James is gone in Haack's work. She defends science with the temperament of a confident realist, but for the classic pragmatists like Dewey and James scientific knowledge, and our procedures for gathering it, always remained provisional and tentative. They saw scientific knowledge as makeshift explanations that helped people deal with the world around them, but they made no ontological claims about the nature of reality. Haack's account does not share this agnosticism about scientific knowledge. When it comes to defending science, she happily adopts the title of 'old-fashioned prig' as a badge of honour. For Haack science is best, whether it is pre-eminently a Western invention or not and claims it is an ideal of incalculable value to the whole of humanity.[17]

Hence, her understanding of science leaves much less room for pluralism. Indeed, she proposes the metaphor of the crossword puzzle to exemplify what scientific research is like. Haack contends that she was struck by the notion 'that the way a person's beliefs about the world support one another is rather like the intersecting entries in a crossword'. Much like scientific inquiry, according to Haack, an entry in a crossword puzzle depends on three factors: 'how well it is supported by its clue and any already-completed intersecting entries; how reasonable those intersecting entries are, independent of the support given them by the belief in question; and how much of the crossword has been completed'.[18]

Haack gets a lot of things right about pragmatism, but there is something distinctly un-pragmatic about this crossword metaphor. It suggest there is an underlying framework to reality, God's own crossword, waiting there to be uncovered and filled in by scientists and researchers using a single, commensurate vocabulary. That task is vast, and there are likely to be many disagreements about the entries different researchers suggest, – hence, pragmatists are right to hedge their bets on the truth for the time being – but at the end of time the whole crossword will be filled out, and the one true solution will be known. This is a view where truth is found, not made; where absolutes may be bracketed for the time being but are assumed in the long run; and where all knowledge can be transcribed into a single discourse. It is a view that comes close to the 'epistemologically-centred philosophy' that Richard Rorty criticised for wanting 'notions of "method" and "rationality" which signify more than good epistemic manners, notions which describe the way in which the mind is naturally fitted to learn Nature's Own Language'; or in case of Haack, notions that describe the way in which the mind is naturally fitted to fill in Nature's Own crossword puzzle.[19]

This crossword image is not simply an unfortunate metaphor that suggests an unrepresentative interpretation of Haack's ideas. On the contrary, the crossword analogy ties in with Haack's notion of scientific concepts and research terms corresponding to real categories in empirical reality, providing accurate descriptions of the furniture of the universe. Explanation and prediction, Haack states, require 'the classification of things into real kinds'.[20] '[A] vocabulary can not only be more or less convenient or more or less transparent in meaning, but also – most importantly – more or less successful at

11. James, above n. 10, at 48-9.
12. James, above n. 10, at 277.
13. J. Dewey, *The Influence of Darwin on Philosophy and Other Essays* (1997 (1910)), at 1-2.
14. W. James, *On A Certain Blindness in Human Beings* (1900), at 45.
15. For a thorough discussion of James's ethical concerns in relation to pluralism see: R. Bernstein, *The Pragmatic Turn*, Cambridge: Polity (2010), at 61-9.
16. James, above n. 14, at 4.
17. Haack, above n. 3, at 146-7.
18. Haack, above n. 3, at 85-6.
19. R. Rorty, 'Method, Social Science, and Social Hope', XI:4 *Canadian Journal of Philosophy* 569, at 573 (1981).
20. S. Haack, *Defending Science – Within Reason: Between Scientism and Cynicism* (2003), at 66.

identifying kinds of stuff, or phenomenon'.[21] Haack's focus is on the notion that there is simply one world that exists independently from us, a world that is a certain way whatever we think of it and that falls apart into natural categories independent if the way people describe the world. Hence, even though this world can be described in different languages, ultimately these descriptions must be translatable into a single language and must conform to the way the world is to allow for aggregation into a coherent, non-contradictory representation of the *one* world.

Usually pragmatists reject this as the 'myth of the given', of course, the notion that there is a given categorical structure to the world which imposes itself on the mind.[22] Whatever their differences, for the pragmatists the relation of our theories and conceptions and the empirical world was much messier. James and Dewey believed scientific questions were ultimately rooted in the practical world and continuous with the problems people faced. Different people living in different social and cultural conditions, had different angles on reality and pursued different purposes when they interacted with the world. Rorty put it succinctly when he said that Dewey saw 'vocabularies as instruments for coping with things rather than representations of their intrinsic natures'.[23] The same could be said about James. Facts were not theoretically innocent. They were creatures of the theoretical perspective. As a result, the pragmatists believed that research was always infused with the concerns of a particular time and place and always bore the hallmarks of its context of origin. It was impossible to steer clear of the perspective that informed and inspired the research. Somebody like James knew very well, Putnam notes, that when there is disagreement about scientific theories, when 'disputes break out at a fundamental level, they always cross boundaries; philosophical issues are mixed with "scientific" ones, and cultural and even metaphysical preconceptions play a role'.[24]

From a pragmatic point of view the pursuit of science looks much less like a linear progress towards ultimate truth and much more like a succession of makeshift solutions that wed previous conceptions of reality to new, incongruous, empirical data with the least amount of disturbance. 'Any idea', James noted: 'that helps us to *deal*, whether practically or intellectually, with either the reality or its belongings, that doesn't entangle our progress in frustrations, that *fits*, in fact, and adapts our life to the reality's whole setting, will agree sufficiently to meet the requirement. It will hold true of that reality' (James 2011 (1907), p. 222). The metaphor of the crossword, with its pre-given spaces to fill in and implicit assumption that all truth can be transcribed into a single vocabulary, seems far too restrictive to accommodate the kind of creativity implied in James's account. Maybe a better metaphor for the pragmatic conception of knowledge would be that of a city being fitted into a landscape. An urban development has to obey basic physical constraints and the lay of the land. Moreover, it has to conform to the basic social and physical needs of the people that live there. But over and above that, there is much room for different solutions and local variations in style. The city can be developed into different directions and can be planned in different ways. Nothing is permanent. Even its basic street plan could in theory be revised retroactively, although only at great cost. Within a number of basic constraints – the unyielding stubbornness of empirical reality – much remains plastic.[25]

If James tried to 'humanise' the notion of truth, as Putnam suggests, then the recent vicissitudes of economics reveal a discipline that is 'all too human'. The pragmatists would not have been surprised by the fact that economics fell short of being a pure science, aimed at unassailable objective knowledge about economic behaviour, and simply turned out to be, in the words of Stiglitz, 'free market capitalism's biggest cheerleader'.[26] To a certain extent, the pragmatists would have expected a symbiotic relationship between the general push and thrust of society and the research of its social scientists and policy experts. (That is not to say that they would have approved of the, almost religious, zeal with which many politicians, bankers, business people, and academics supported rational self-regulating markets in the boom years. Indeed, the success-worship that James saw as a 'national disease' at the end of the Gilded Age, he probably would have recognized as a character flaw in what Paul Krugman has termed our 'Second Gilded Age'.[27]

The lesson to be learned from pragmatism with respect to the role of economics in the financial crisis is that, instead of unflinching loyalty to our hard-won theories, we should take a more agnostic attitude towards our deeply held scientific convictions and be ready to abandon them when they no longer help us deal with reality

21. Haack, above n. 20, at 67.
22. The phrase 'myth of the given' derives from the work of Wilfrid Sellars.
23. Rorty, above n. 19, at 576.
24. Putnam, above n. 8, at 15.
25. Interestingly, Haack presents a similar metaphor when she talks about the social sciences. The social sciences need to fit with the truths uncovered by the natural sciences even if their subject matter – culturally heterogeneous social behaviour – does not allow for the same type of determinate scientific explanation. When thinking about the integration of the social and the natural sciences, Haack argues, a good model 'might be a map in which depiction of the roads, towns, etc. is superimposed on a delineation of the contours of the same territory, and integrated in virtue of the fact that the roads go around the lake and through the pass in the mountains, that the town is on, not in the river, and so on. The natural sciences draw a contour map of the biological determinants of human nature and the biological roots of human culture, on which the social sciences superimpose a road map of marriage customs in New Guinea, the failures of the Soviet economy, the rise of modern science in seventeenth-century Europe, and so on' (Haack, above n. 20, at 161). The drift of this landscape metaphor is very different, though. Haack is not trying to say that reality can be conceptualised differently, i.e. that different cities can be fitted into a given landscape – which I understand to be the pragmatic stance on research in both natural and social science, – but that the social sciences study a miscellany of changeable cultural and social phenomena that all need to obey a set of basic biological givens of human life established by the natural sciences.
26. J. Stiglitz, *Freefall: America, Free Markets, and the Sinking of the World Economy* (2010), at 238.
27. P. Krugman, *End This Depression Now!* (2013 (2012)), at 71-5.

and 'start to entangle our progress in frustrations'. The economics of efficient markets, it is good to remember, had all the hallmarks of a rigorous science. The models, Krugman points out, 'were wonderfully elegant', and demanded 'formidable math skills'. They were not only highly lucrative, turning business school professors in 'Wall Street rocket scientists, earning Wall Street paychecks', but they were also grounded in 'a great deal of statistical evidence, which at first seemed strongly supportive'.[28] In short, it involved exactly the type of science that scientific realists hold up as a model. If we imagine the insights of neo-classical economics entered in a crossword, there would be a great many mutually supporting entries with independent support. And, for a while, it all worked wonderfully well.

But then the financial crisis hit and the roof caved in on the world economy. Almost overnight, for many people, neo-classical economics and its policy recommendations changed from prestigious scientific theory into ruinous scientific delusion. The queen of the social sciences became the dismal science once more. For economics to put all its eggs in the neo-classical basket proved to be a costly error. If the efficient markets model had not been embraced as the last word on economics, but only as one of several possible ways to look at economic behavior, economics would have had a wider range of theoretical resources and conceptual tools available to deal with the collapse of the financial system, a collapse that the neo-classical model had simply ruled out as a possibility. The increasing professionalisation of economics and the drive to be rigorous and scientific had led economists to embrace increasingly sophisticated mathematics and increasingly complex models of economic behaviour. This had a marked effect. Essentially it put macroeconomics – historically concerned with diagnosing systemic, economy-wide problems – on a microeconomic footing – focused on models of rational actors efficiently pursuing their interests, models that could be translated into elegant statistical equations. 'Economists are all too often preoccupied with petty mathematical problems', Thomas Piketty remarks, an obsession that provides 'an easy way of acquiring the appearance of scientificity without having to answer the far more complex questions posed by the world we live in'.[29] Other perspectives on economics were marginalised as a result. Indeed, Keynes, or anyone who referred to Keynes, Krugman notes, 'was banned from many classrooms and professional journals'.[30]

Such a consensus on what constitutes valid economic knowledge can also turn out to be mere groupthink, of course. This seems a fair characterisation of the period leading up to the credit crisis. Alternative perspectives got no hearing and reports about growing imbalances were ignored. Hence, when central bankers claimed that no one had predicted the bubble before it broke, Stiglitz notes that in a sense they were right: 'no one *with credibility in their circle* challenged the prevailing view, but there was a tautology: no one challenging the prevailing view would be treated as credible. Sharing similar views was part of being socially and intellectually acceptable'.[31] The insights into market failures and the hazards we were facing were typically assembled by people outside of the dominant paradigm and they were marginalised. The dominant paradigm was equated with success and scientific rigor: 'The ideologues of the Right and the economists who gave them succor – supported by the financial interests who were doing very well by the deregulation movement – chose to ignore these advances in knowledge. They chose to pretend that Adam Smith and Friedrich Hayek had had the last word to say on market efficiency – perhaps updated by some fancy mathematical models corroborating the results'.[32]

When we leave aside the question whether the pragmatists would have considered neo-classical economics and its market worship a contribution to human flourishing, then the intermeshing of economics, politics, and policy leading up to the credit crisis in itself is roughly in accordance with the way pragmatism understood science as a social practice. The pragmatists thought the notion of science as a detached and disinterested search for certain, and objective truth was hopelessly misguided and believed science should be seen as a human endeavor aimed at attaining human ends; as a tool in the service of human projects. Hence, while it worked, belief in neo-classical economics could be said to have been warranted. Yet, when neo-classical analyses no longer fit with events and no longer produced the consequences anticipated, pragmatists certainly would have thought this should have repercussions for the way economics was organised and economists conducted their research (which it did in fact for the one self-declared pragmatist law-and-economics scholar, Richard Posner.)

Unfortunately, this is not how all economists see their own discipline. Many do not treat their economics paradigm as a tool that could be more or less useful, like Dewey and James suggested, but as an established body of objective, scientific knowledge, some outliers, and unexplained phenomena notwithstanding. (Rare exceptions like 'an occasional world-economy-destroying crisis' Krugman pointed out wryly.[33] These different attitudes towards scientific theory seem to play out in current debates among economists. Many of the arguments in economics, Krugman notes, are now about 'pragmatism versus quasi-religious certainty'.[34] Krugman is not talking about classical, philosophical pragmatism here, to be sure, but his meaning is very much in the spirit of Dewey and James, nonetheless. Pragmatic economists who try to come up with unorthodox solutions for the current crisis, wherever they can find them, are pitted against economists who are waging religious war in the

28. Krugman, above n. 27, at 98-9.
29. T. Piketty, *Capital in the Twenty-First Century* (2014 (2013)), at 32.
30. Krugman, above n. 27, at 102.
31. Stiglitz, above n. 26, at 253.
32. Stiglitz, above n. 26, at 273-4.
33. Krugman, above n. 27, at 100.
34. Krugman, above n. 27, at 104.

name of the 'One True Faith' of efficient markets, no matter how discredited.

The catastrophic failure of economics in turn has led to calls to change the discipline. As Stiglitz notes, if you want to succeed in reforming the economy, you 'may have to begin by reforming economics'.[35] Dick Thaler has called the assumption of rationality in question, fundamental for efficient market theory. The new field of behavioural economics, associated with name of Thaler, starts out from the assumption that people in fact are often quite irrational in their decision-making. It is an approach that does not allow for the precise modelling that has become stock-in-trade in economics. This precision is illusory at any rate, Thaler contends, because 'human nature is a mess'. The choice between efficient market economics and behavioural economics, he notes, is 'a choice between being precisely wrong or vaguely right'.[36] Robert Skidelsky, in turn, suggests taking the study of macroeconomics out of the business school 'to protect macroeconomics from the encroachment of the methods and habits of mind of microeconomics' and 'mitigate the departmental concentration of maths-driven economics'. In graduate schools macroeconomics should be taught as a joint degree, Skidelsky believes, teamed up with disciplines like history, philosophy, sociology, politics, international relations, biology, or anthropology, to train macroeconomists 'whose main value to society will lie as much in their philosophical and political literacy as in their mathematical efficiency'. Economics, Skidelsky believes, should abandon the drive 'for uniting the whole of theory under the umbrella of rational expectations' and acknowledge that 'different knowledge assumptions are appropriate for different kinds of activity'.[37]

It remains to be seen whether economics departments will engage in this type of restructuring. So far, the main drive to change economics as an academic discipline has come from students. Already in 2000, economics students at the University of Paris started what has become the Post-Autistic Economics Movement with a petition against the dominance of the neoclassical approach in the economics curriculum. In their petition they complained: 'We no longer want to have this autistic science imposed on us'. Economics, they believed, had become an 'autistic science' with the instruction of neo-classical economics as if it were 'THE economic truth': 'We do not accept this dogmatism. We want a pluralism of approaches, adapted to the complexity of the objects and to the uncertainty surrounding most big questions in economics'.[38] This protest spread across the world and led to an open letter from economics students from seventeen countries calling on economics departments to reform their curriculum.

The call for reform picked up again after the 2008 financial crisis. At the University of Manchester, students founded the Post-Crash Economics Society as a response to the dearth of change in the economics curriculum after the 2008 crash. Their initiative led to similar revolts at economics departments across the UK. Five years after, the crash the students at the lamented the 'monoculture in public and academic economics' and argued for a broadening of the curriculum:

> A situation in which the vast majority of professional economists, economic commentators, politicians and academics have studied only one economic paradigm is unacceptable as we struggle to manage [an] economic crisis and achieve sustainable prosperity. As a result our society has no organized ability to critically question the foundations, assumptions and practices of the economic status quo.[39]

Even though reforms have so far been modest, the financial crisis and the Great Recession that followed it have called into question the intellectual premises on which economics is based in the academic world, the way research agendas are set, and the way educational programs have weeded out heterodox perspectives. From a pragmatic perspective such a willful evasion of the capriciousness of social reality and such a glaring failure to employ alternative perspectives to get to grips with it is certainly not in accordance with the ethic they wanted to instill in scientists. It is not clear what Haack would make of the evident failures of economics in the years that followed the credit crisis. Her conception of pragmatism as a methodological position, however, clearly vitiates against pluralism and agnosticism about the truth of scientific knowledge.

3 Action

A second reason pragmatism is at odds with a notion of scientific method that remains stable and unchanging is the centrality of action. Scientific research, according to the pragmatists, did not involve passive registration of a pre-given order in reality but required active intervention and manipulation of the world. John Dewey, famously, criticised the 'spectator theory' of knowledge. In *The Quest for Certainty* – tellingly subtitled *A Study of the Relation of Knowledge and Action* – he wrote that many of the classic problems of epistemology follow from this conception of the passive spectator involved in detached observation:

35. Stiglitz, above n. 26, at 238.
36. J. Fox, *The Myth of the Rational Market: A History of Risk, Reward, and Delusion on Wall Street* (2009), at 298.
37. R. Skidelsky, *Keynes: The Return of the Master* (2010 (2009)), at 189-90.
38. Post-Autistic Economics Network, 'A Brief History of the Post-Autistic Economics Movement', <www.paecon.net/HistoryPAE.htm> (Last visited 10 July 2014).
39. Post-Crash Economics Society, 'Economics, Education and Unlearning: Economics Education at the University of Manchester', <www.post-crasheconomics.com/economics-education-and-unlearning/> (Last visited 13 July 2014).

> They spring from the assumption that the true and valid object of knowledge is that which has being prior to and independent of the operations of knowing. They spring from the doctrine that knowledge is a grasp or beholding of reality without anything being done to modify its antecedent state – the doctrine which is the source of the separation of knowledge from practical activity. If we see that knowing is not the act of the outside spectator but of a participator inside the natural and social scene, then the true object of knowledge resides in the consequences of directed action.[40]

This is a conception of knowledge that is pregnant with potentialities. Indeed, Dewey observes that one could even say '"there are as many kinds of valid knowledge as there are conclusions wherein distinctive operations have been employed to solve the problems set by antecedently experienced situations'. Since these experienced situations and the operations dealing with them 'never exactly repeat one another', they 'do not determine exactly the same consequences'. To be sure, it is only when the operations fall into 'certain kinds or types', i.e., only when we act in an organised, premeditated manner, that they fall within the ambit of science.[41]

For pragmatists science is continuous with our efforts as a species to shape and control our environment, in other words. As an organised and disciplined form of acting on the world, science is only a subset of a much more nebulous cluster of practical human interactions with the living environment. When you see science this way, when you see it as part of a larger and fluid continuum of activity, it becomes difficult to demarcate and define with any precision. Hence, when the pragmatists discuss inquiry, they do not provide us with a protocol, a set of rules, or a detailed plan of action, rather they describe a process and a mindset. 'For Peirce and Dewey', Putnam notes: 'inquiry is cooperative human interaction with an environment; and both aspects, the active intervention, the active manipulation of the environment, and the cooperation with other human beings, are vital'.[42] This lists all the key elements in the pragmatist conception of science. Inquiry is empirical and experimental – the 'active intervention' and 'active manipulation' part – and it is theory driven, i.e., guided by open and reasoned debate in the research community about what theories and hypotheses are most warranted – the 'cooperative human interaction' part. It is not so much a theory, as a description of a process or practice. In the words of Hilary Putnam: 'Peirce and James and Dewey would have said that democratically conducted inquiry is to be trusted; not because it is infallible, but because the way in which we will find out where and how our procedures need to be revised is through the process of inquiry itself'.[43] James Conant makes a similar observation with respect to the James's understanding of pragmatism. 'James is not offering any arguments which will logically compel us to assent to a particular thesis', Conant notes: 'He proposes pragmatism not as a theory (something that might be true or false), but as a guide for action (something which might or might not serve us well in "our conduct of the business of living")'.[44]

It is important to keep in mind, here, that for the pragmatist 'action' was genuinely open-ended and creative. For them truth in a very real sense was not found, but made. This aspect perhaps comes out most clearly in the work of James. 'The truth of an idea is not a stagnant property inherent in it', James asserted, 'Truth *happens* to an idea. It *becomes* true, is *made* true by events. Its verity *is* in fact an event, a process: the process namely of its verifying itself, its veri-*fication*. Its validity is the process of its valid-*ation*'.[45] Obviously, this was a process that involved researchers not as passive witnesses of a given order, but as creative actors.

This voluntaristic conception of scientific research comes out clearly in James' critique of social Darwinism and its deterministic bearings. In reaction to the work of his highly influential contemporary Herbert Spencer who emphasised a static notion of the fitness of human beings to their environment, James stressed the adaptability and creativity of human beings. For Spencer the 'fit' were naturally adapted to the unchangeable and static circumstances of life and the 'unfit' inevitably went under. Social science, Spencer argued, could uncover these eternal laws of nature. James could not disagree more:

> The knower is an actor, and coefficient of the truth on one side, whilst on the other he registers the truth which he helps to create. Mental interests, hypotheses, postulates, so far as they are bases for human action – action which to a great extent transforms the world – help to make the truth which they declare. In other words, there belongs to mind, from its birth upward, a spontaneity, a vote. It is in the game, and not a mere looker-on; and its judgments of the *should-be*, its ideals, cannot be peeled off from the body of the cogitandum as if they were excrescenses, or meant, at most, survival.[46]

According to Conant, this notion that knowers are actors who make the truth, should be taken quite literally. For James, Conant argues, there were beliefs 'that have the peculiar characteristic that, by virtue of one's having adopted them, they become true'. With this James did not mean that in the sense that you adopt a truth and then discover it is actually true, 'but in the sense that, in the course of allowing the conduct of one's

40. Dewey, above n. 2, at 196.
41. Dewey, above n. 2, at 197.
42. Putnam, above n. 8, at 70.
43. Putnam, above n. 8, at 74-5.
44. J. Conant, 'The James/Royce Dispute and the Development of James's "Solution"', in R.A. Putnam (ed.), *The Cambridge Companion to William James* (1997), 186, at 200.
45. W. James, 'Pragmatism's Conception of Truth', in J.R. Shook (ed.), *The Essential William James* (2011 (1907)), at 217.
46. W. James, *Remarks on Spencer's Definition of Mind as Correspondence* (1878).

life to be informed by them, one actually brings into being (or at least contributes to bringing into being) the very conditions which make them true'.[47] Indeed, Conant argues that James also thought of pragmatism in these terms. For James, Conant argues, a pragmatist 'is – not just someone who affirms a particular thesis after a chain of argument has convinced him of the truth but rather – a kind of person one *becomes* through a particular way of life'. This is a conception of pragmatism, Conant argues, that 'is bound to exhibit in its results a certain degree of agent-relativity'.[48]

This might seem a rather idiosyncratic notion of truth, but it ties in with quite familiar processes in the social sciences and legal and political theory. Social theorists have long grappled with the problem of reflexivity, of course, with the problem that theories describing social behaviour affect the social behaviour described. It is also a notion of truth that Haack has no truck with. The pragmatist notion of 'action' is not a central concept in Haack's theory, but she is fairly critical of this notion of reflexivity in social science. For Haack, this is a form of 'self-aggrandisement', a misplaced belief that the social scientist's theories about social institutions affect the way these institutions function. Fortunately, she claims, 'it isn't true, and sociologists aren't really quite so powerful as some of them like to think they are'. After all, Haack states, it is clear that '[S]ocial scientists no more brought child abuse or schizophrenia or homosexuality into existence by their intellectual activities than biologists brought anthrax into existence by theirs'.[49]

As a rhetorical flourish these examples might work. However, as instances of supposed reflexivity – 'supposed' because you have to wonder whether any contemporary sociologist is actually suggesting that child abuse, schizophrenia, and homosexuality are reflexively constructed phenomena – they are fairly weak and over the top. Social scientists did not bring about homosexuality, but they certainly may have had an influence on the attitudes towards homosexuality, and other minority groups. Nor did social scientists call forth schizophrenia, but you only have to read up on the history of mental illness to realise that there are considerable shifts in the classification and diagnosis of mental illnesses. 'Female hysteria' was perceived to be a widespread problem in the nineteenth century, but has disappeared as a diagnosis in our time. 'Neurasthenia' a kind of nervous exhaustion allegedly caused by the fast pace of modern society was once a common ailment in the United States. Indeed, William James coined the phrase 'Americanitis' for it. Clearly these pathologies are more than simply objective physiological states. And for those who believe we have outgrown such unfounded diagnoses: Who will tell whether Attention Deficit Hyperactivity Disorder (ADHD) will still be recognised as a genuine problem in the twenty-second century? Economics did not create trade or the marketplace, but it may very well have affected the way people perceive their role in the market place and the way they think they should behave when they enter the market place.

If we go back to the example of neo-classical economics, one could certainly raise the question whether the notion that economic agents are modelled as rational and self-interested individuals, suggests to people that rational pursuit of their self-interest is appropriate behaviour for the marketplace. The descriptive model then becomes a guideline for behaviour and creates its own corroboration. In this respect, Jospeh Vogl is quite right to claim in a recent interview that 'Economics tries to understand a world that it has itself created'.[50] Rationality, self-interest, and greed are timeless and universal aspects of human behaviour, no doubt. Nevertheless, in recent decades the basic assumptions of neo-classical economics about the rationality of economic agents and the efficiency of the market developed into something more than mere descriptions of human behaviour and scientific hypotheses to be tested. These assumptions became part of a drive to privatise public services, to liberalise markets, to de-regulate, to introduce market incentives in regulatory regimes, and to fall back on the power of social and economic domains to regulate themselves. These tied in with a big historic narrative of the road *out* of serfdom, the story of the fall of communism, the end of ideology, and the victory of democracy and free-market capitalism. Indeed, the vocabulary of the market has entered into the very language of many public institutions and organisations, who now talk of delivering products, managing processes, serving clients, and achieving targets.

Michael Sandel has described in vivid detail how widely the values of the market have spread in contemporary societies. He contends that 'what is striking is how potent this image has become – not only in academia but also in everyday life. To a remarkable degree, the last few decades have witnessed the remaking of social relations in the image of market relations'.[51] In his book, Sandel provides a wide variety of examples to illustrate the extent to which market notions now pervade our everyday life, from commercials in the classroom to the hiring professional queue standers for public hearings. For him the financial crisis and the greed it exposed only illustrates the larger story: i.e., the propagation of market-oriented thinking into all corners of society. This, according to Sandel is 'one of the most significant developments of our time'.[52]

Korean economist Ha-Joon Chang, in turn, has drawn attention to the way the ethic of the free market tends to crowd out non-selfish, altruistic behaviour. 'Assume the

47. Conant, above n. 44, at 205-6.
48. Conant, above n. 44, at 206.
49. Haack, above n. 20, at 163.
50. Interview with Joseph Vogl in: *The European*, 'The Spectre of Capital: Capital and Money Are Profane Gods', <www.theeuropean-magazine.com/371-vogl-joseph/370-the-spectre-of-capital> (last visited on the 5th of June 2015).
51. M.J. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (2012), at 51.
52. Sandel, above n. 51,at 7.

worst about people', he asserts: 'and you get the worst'.[53] Yet, even with this crowding-out process, self-interest can only explain human behaviour to a degree. A great deal of human behaviour remains unselfish and is driven by other motives. Hence, management regimes that appeal only to people's self-interest lead to suboptimal performance.

Stiglitz has also noted that economics theory is a kind of self-fulfilling prophecy, i.e., that people who study economics start conforming to its basic tenets:

> Most of us would not like to think that we conform to the view of man that underlies prevailing economic models, which is of a calculating, rational, self-serving, and self-interested individual. There is no room for human empathy, public spiritedness, or altruism. One interesting aspect of economics is that the model provides a better description of economists than it does of others, and the longer students study economics, the more like the model they become.[54]

The model of economic man may be a poor approximation of actual human behaviour, but for people engaged in economic activity it functions as a prescriptive model and tells them what would be rational for them to do in that context.

It would be grossly unfair to associate William James with this process without some strong qualifications. When he talked about people 'making the truth which they declare' he did not mean that they should create a world of selfish scoundrels, by acting on the assumption that everybody was a selfish scoundrel and adopting the lifestyle. He was not arguing for a race to the bottom, a vicious circle where people conformed to the basest expectations they had of their fellow citizens. Rather, he was arguing for a virtuous circle, where through sheer will people lived according to their highest aspirations and helped create a world where those aspirations became operative principles and true.

If one takes the notion of 'action' seriously, that lies at the heart of pragmatism, and the way it is bound up with freedom, novelty, and creativity, it becomes hard to fit it into the type of quantitative empirical social science that reached a high point in neo-classical economics. Economics is interested in routine behaviour, not creative action. It is interested in the standard, the regular, the predictable, in causal patterns. James suggests, however, that this does not capture what is most interesting about human beings. What is more, he contends that this is not how researchers should conduct themselves in scientific inquiry. Scientific research is also pre-eminently a domain of creative action that cannot be reduced to simply following the right procedures and routines.

53. H-J. Chang, *23 Things They Don't Tell You About Capitalism* (2010), at 41.
54. Stiglitz, above n. 26, at 249.

4 Continuity of Means and Ends

A final problem for a static notion of scientific method is the pragmatist claim that there is a continuity between means and ends. In practice, pragmatists suggest, it is impossible to separate the end being pursued from the means through which people are trying to pursue it. According to Dewey, we do not start with some clear idea of an end and then decide on the best means to bring it about. Rather, we only realise what end we are striving for, when we start forming notions about how to achieve progress in that direction:

> The connection of means-consequences is never one of bare succession in time, such that the element that is means is past and gone when the end is instituted. An active process is strung out temporarily, but there is a deposit at each stage and point entering cumulatively and constitutively into the outcome. A genuine instrumentality *for* is always an organ *of* an end. It confers continued efficacy upon the object in which it is embodied.[55]

If you make action central to your conception of research, then this continuity of means-ends, or means-consequences, is also relevant to the conception of that practice of course. Dewey clearly shared James's notion of science as a form of creative action. He very much approved of the 'alteration in the "seat of authority"', that James advocated 'looking forward instead of backward, looking to what the world and life might become instead to what they have been'.[56]

Nevertheless, the continuity of means and ends was mainly a theme in the work of John Dewey. There is no explicit counterpart to that tenet in the work of William James, but Putnam rightly points out that 'One of the chief characteristics of James's philosophy is its *holism*'. Indeed, Putnam claims 'there is an obvious if implicit rejection of many familiar dualisms: fact, value, and theory are all seen by James as interpenetrating and interdependent'.[57] Obviously, this interpenetration raises all kinds of questions about scientific method. If we reverse 'the seat of authority' in research, as the pragmatists suggested, i.e., if we look forward and actively try to learn from premeditated manipulations of reality, then a change in the ends we pursue will have repercussions for the way we adjust reality and the way we conduct our research. Vice versa, the methods we have ready at hand, the kinds of procedures available to us to act on the world, will shape our notion of what ends we can pursue. In a pragmatist perspective, scientific research weds these different elements, the availability of certain instruments, techniques or sets of raw infor-

55. J. Dewey, *Experience and Nature* (1997 (1925)), at 298.
56. Dewey, above n. 2, at 284-5.
57. H. Putnam, 'James's Theory of Truth', in R.A. Putnam (ed.), *The Cambridge Companion to William James* (1997), 166, at 7.

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mation can help to shape what 'ends' we can try to achieve. While the hazy notions of what ends we want to pursue will suggest ways to develop our instruments, hone our techniques, and provide directions for the collection of data.

Again with respect to the continuity between means and ends, Haack's account of pragmatism seems to diverge in tone and substance from the ideas of James and Dewey. To be sure, the continuity between means and ends does not figure prominently in Haack's discussion of pragmatism. However, some parts of Haack's analysis seem difficult to square with a continuity between means and ends. As we saw earlier, the notion of situatedness is not central to Haack's account of pragmatism. Haack, rather, recommends the notion of the disinterested inquirer standing aloof from the concerns and projects of his, or her, social and cultural setting. Indeed, she seems to prefer people to get involved with inquiry without any form of prior engagement with the object of study altogether, 'because it's their job' or 'because they have to write a dissertation on *something*'.[58] This ideal of the lone outsider-observer is difficult to square with the idea of the situated researcher engaging with the going projects of his, or her, day and applying existing tools and instruments – including the existing conceptual apparatus – into new territory. Moreover, the idea that scientific knowledge is progressing towards Peirce's 'Final Opinion' throws a different light on the issue of the continuity between means and ends. The concepts, the vocabularies, and the way the data are conceived may change through time, and these conceptual tools may be symbiotically connected to the scientific theories under consideration, but that does not necessarily mean pluralism and incommensurability for Haack. If these changes are part of the progress towards the Final Opinion, then they should just be seen as a form of progress and refinement. Peirce, Haack argues, 'sees the growth of meaning as contributing to the progress of science'. According to Peirce, Haack states, 'devising concepts and developing vocabularies, that match up adequately to real "generals", i.e., to real kinds of stuff, is an important element of that enterprise'.[59] This recasting of pragmatic notions of pluralism and conceptual change as simply a form of scientific progress does not do justice to the work of Dewey and James, however.

There is also a dimension of the continuity between means and ends in the recent dominance of the efficient markets model. Perhaps it is no surprise that the rise of sophisticated mathematical modelling in economics coincided with the ready availability of computers. Complicated statistical equations, that would have taken a great deal of time and skill to do manually, can be run through a computer relatively easily. Data sets that used to be stored on punched cards or magnetic tapes can now be called up with the click of a button. Good data sets used to be hard to come by, now they are ubiquitous. It is a lot easier to be an economic 'rocket scientist', when the computer does a lot of the work for you.

These ubiquitous data, in turn, were not conceived immaculately. Data are collected for a purpose. They are engendered with theoretical notions and practical applications in mind. They measure such phenomena as performance, value, output, usage, choice, cost and quantify measurable aspects of human behaviour. Data only provide a partial representation of the social world, of course. They highlight certain aspects of social and economic life and push others into the background. In a way they are creatures of the theoretical paradigm they feed into, they co-evolve with the theories they provide empirical input for. With such interpenetration everything is continuous; to a certain extent data, theories, methods, and policy objectives stand or fall together. This does not mean they form a hermetic, self-referential, and un-falsifiable conglomeration. Indeed, neoclassical economics was thoroughly disproven (even if many politicians and high profile economists do not recognize that fact). But it does mean that when theories run into trouble, these troubles also affect methods and the framing of data.

How the available data and the existing body of theory hang together and interpenetrate was illustrated vividly by Richard Posner recently. Posner explained he had read John Maynard Keynes' classic work *The General Theory* (1936), to see what it had to say about the financial crisis. He soon found out that it was a work that was difficult to understand. It is a book from a different age, Posner claimed, based on a different conception of economics: 'it […] bristles with unfamiliar terms, such as "unit-good" (an hour's employment of ordinary labor), and references to unfamiliar economic institutions, such as a "sinking fund" (a fund in which money is accumulated to pay off a debt)'.[60] These difficulties have turned *The General Theory* in an unread classic, an inaccessible treatise that demands a great deal of effort to make sense of.

This suggests that the reason economic theory is obstinate and resistant to change is in part institutional. Economists work in an intellectual environment in which certain understandings of economic behaviour are dominant, understandings that affect the way data are conceptualised and collected. This creates an in-built inertia, a bias against change in the discipline. Hence, contrary to what the pragmatists might have expected, not dominant interests in society or a longing for familiarity are obstacles to social change, but the very research community that is supposed to analyze social developments and infer possible consequences. It should come as no surprise, then, that scholars are among the most reluctant to change. The economist Richard Thaler has warned that there will be no reconsideration of intellectual positions. With respect to the effects of the financial crisis on the economics discipline, he stated: 'What is

58. Haack, above n. 20, at 170.
59. S. Haack, 'The Meaning of Pragmatism: The Ethics of Terminology and the Language of Philosophy', 28:3 *Teorema* 9, at 15 (2009).
60. R. Posner, 'How I Became a Keynesian', *The New Republic* (September 2009), <www.newrepublic.com/article/how-i-became-keynesian> (Last visited 24 June 2013).

the old line – that science progresses funeral by funeral? Nobody changes their mind. What will happen is that the economists [in their thirties and forties] are pretty open to these ideas. They don't think it is very controversial. That's where economics will be in ten years'.[61]

5 Conclusion

The pragmatist theory of knowledge is often taken to be the most significant part of pragmatism and is often described as a fairly static theoretical doctrine containing a number of familiar premises. This paper has called into question this static notion of pragmatist epistemology. For the pragmatists the theory of knowledge was not a timeless set of instructions, but an ethic, a posture, a loose guide for how scientists should conduct themselves.

There are a number of reasons for this role-centered outlook on epistemology. Pragmatism understands scientific enquiry as a situated endeavour, as a practice that is part of the going projects of society. This casts scientific inquiry as an instrument in the service of a wide variety of interests reflecting the irreducible social and cultural pluralism of the world. This pluralism vitiates against an unchangeable method of science. Moreover, the pragmatists saw scientific inquiry as a form of creative action. For them science is not backward, but forward looking. Science is not about registering what has been, but about employing your intelligence to actively manipulate the world and bring about the results predicted. This exercise is fundamentally unpredictable and creative and will betray a certain degree of agent relativity. Finally, the pragmatists believed there was a continuity of means and ends, between research methods and research findings. This makes research contingent on the going approaches available and the theoretical and epistemological context in which the research takes place. These will differ according to time and place.

61. J. Cassidy, 'Interview with Richard Thaler', <www.newyorker.com/online/blogs/johncassidy/2010/01/interview-with-richard-thaler.htm> (Last visited 3 April 2014).

doi: 10.5553/ELR.000037 - ELR August 2015 | No. 1