Inferentialist Pragmatism and Dworkin's 'Law as Integrity'

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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

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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.

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

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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 pragma-

tism 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*:

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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.

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 fallibilism 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

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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.

in the literary circles of the time. Peirce was not both-ered, 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 instru-mentalist 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 mutabili-ty of truth, the soundness of Zeno's refutation of motion, and pluralism generally), upon Kant, Berke-ley, 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 synthe-sis it allows between normative pragmatism and a Dar-winian naturalism, a way to understand human practices as normative that is not mysterious, dualistic, or meta-physical, and that allows one to see them as continuous with the rest of nature.

4 Legal Pragmatism and Instrumentalism

Of the five pragmatist commitments that shape the clas-sical 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 absorp-tion 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 instrumen-tality 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 utilitari-an 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' concep-tion of law that seem to follow from those other pragma-tist theoretical commitments, shared by pragmatists in broad sense. The more relevant ones are the under-standing of law not as a closed system of norms, but as a social practice, as well as the understanding of the con-tent of law as subjected to a historical process of trans-formation and improvement.[72] Such features, however, play a secondary role when compared with those fea-tures 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-*

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.

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.

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-

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.

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]

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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.