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Ronald Dworkin's criticism of pragmatism

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Ronald Dworkin was a leading figure of contemporary philosophy of law. Indeed, countless articles and reviews have been devoted to his works,[1] and his contribution to legal literature is considered of paramount importance. As one of the most influential American legal scholars, he has received considerable attention from both the academic community and a wider audience.[2] He is the author of famous books such as *Taking Rights Seriously*,[3] *A Matter of Principle*[4] and *Law's Empire*.[5]

From the end of the 1960s, Dworkin published critical work on legal positivism as formulated by H.L.A. Hart,[6] whose student he had been. His critical reaction to positivism later developed into an autonomous theory of jurisprudence, in which he suggested that interpretation in law should be guided by the concept of "integrity". He helped to renew the debate between theories of natural law and legal positivism.

According to Dworkin, Hart's legal positivism does not properly describe existing legal practices. Indeed, unlike legal positivists, who claim that law is synonymous with a system of positive norms, Dworkin considers that law also contains "principles" that ought to be observed because they constitute a "requirement of justice, fairness or some other dimension of morality".[7] Judges should decide cases according to those principles which provide the best con-

1 See for example the collection of essays edited by Marshall Cohen containing contributions by Neil MacCormick, John Mackie, Joseph Raz and Anthony D. Woozley: Marshall Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth, 1984). See also: Scott Hershovitz, ed., *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford; New York: Oxford University Press, 2006).

2 This is what Michel Troper pointed out in his introductory remarks to a special issue of the journal *Droit et société* entitled "Ronald Dworkin", published in 1985. It should be specified that during his lifetime, Ronald Dworkin was very involved in public debate. In his works, he took a stand on issues such as affirmative action, civil disobedience, and freedom of expression. He also contributed regularly to the *New York Review of Books*, on topics such as the Vietnam War, abortion, assisted suicide, the war in Iraq and Barack Obama's healthcare reform plan, among other subjects.

3 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977).

4 Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985).

5 Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986).

6 His essay entitled *The Model of Rules I*, first published in 1967, is reprinted in: Dworkin, *Taking Rights Seriously* at 14-45. On the "Hart-Dworkin" debate, see: Genaro R. Carrio, "Professor Dworkin's Views on Legal Positivism," *Indiana Law Journal* 55 (1979): 209–46; Brian Leiter, "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence," *American Journal of Jurisprudence* 48 (2003): 17–51; Scott J. Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed," in *Ronald Dworkin*, ed. Arthur Ripstein (Cambridge; New York: Cambridge University Press, 2007), 22–55.

7 Dworkin, *Taking Rights Seriously* at 22.

structive interpretation of the community's legal practice.

In fact, Dworkin argues that interpretation should be at the heart of legal theory. Such a theory pragmatically centered on judicial interpretation and its effects on society seems a perfect fit for American common law, in which judges and their decisions play an active role in the determination of legal rules.[8] The common law tradition's commitment to pragmatist approaches inspired by the work of philosophers such as Charles Sanders Peirce, William James and John Dewey is undeniable.[9] The infusion of pragmatism into legal theory has been discussed by many authors.[10]

In this context, it is interesting to see that Dworkin's theory, which examines legal interpretation within the frame of reference of American law, shows itself to be highly critical – even hostile – toward what he calls "pragmatism". Indeed, in *Law's Empire*, Dworkin condemns the philosophical theory of pragmatism, which he considers opportunistic and which would allow, in his opinion, a form of judicial activism he denounces.[11]

In this context, we seek here to provide a critical analysis of Ronald Dworkin's views on pragmatism, insofar as he evolves in a legal culture marked by considerations that arise from pragmatist philosophy and is also himself described by some scholars as a pragmatist. How does he view pragmatism? What are the criticisms he addresses to pragmatist theories? How can we nuance those criticisms?

With the aim of examining the relevance of Dworkin's position on pragmatism, we will proceed to a brief overview of the use of the term "pragmatism" in legal literature (A), before directly exploring Dworkin's criticisms of pragmatist philosophy (B) as well as the nuances to those criticisms that we can highlight (C).

A. "Pragmatism" in Legal Literature

At the outset, in assessing Ronald Dworkin's criticism of pragmatism, we need to note that in legal literature, the term "pragmatism" is often used without restraint and causes many uncertainties. Indeed, it initially referred to the notion of ideas having a practical value (an idea is not true unless it works). The term "pragmatism" also seems to be frequently adopted to describe an analysis of law that is either "skeptical" or "instrumental". Finally, "pragmatism" also qualifies the classic philosophical movement of pragmatism first developed by Charles Sanders Peirce, and followed by other authors such as William James and John Dewey. It is this latter sense we will refer to in our evaluation of Dworkin's criticisms of pragmatism.

As we mentioned, the origins of pragmatism in philosophy can be traced back to Peirce, who outlined, at the end of the nineteenth century, a method for determining the meaning of difficult words

8 See: Étienne Picard, "Common Law," ed. Denis Alland and Stéphane Rials, *Dictionnaire de la culture juridique* (Paris: Lamy, Presses universitaires de France, 2003) at 242.

9 See: Jean-Pierre Cometti, *Qu'est-ce que le pragmatisme?* (Paris: Gallimard, 2010) at 43.

10 Thomas C. Grey asserts as follows: "The infusion of pragmatism into legal theory is not new. John Dewey made significant contributions to a pragmatist account of law, and Lon Fuller and Karl Llewellyn likewise combined the pragmatist suspicion of foundational theorizing with the pragmatist tendency to give equal stress to law's purposive or instrumental aspects as well as its historically contextual or socially situated sides. In my own view, Oliver Wendell Holmes, Jr. preceded them as the first and most important legal pragmatist." See: Thomas C. Grey, "Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory," *Southern California Law Review* 63 (1989): 1569–95 at 1571–1572.

11 See the chapter *Pragmatism and Personification* in Dworkin, *Law's Empire* at 151–175.

and abstract concepts from their practical effects, which became the famous "pragmatic maxim": "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."[12] In other words, the notion of pragmatism hereby established implies that the determination of the meaning of words and things can only be considered to have taken place when they come into contact with experience and action.[13] Peirce later renamed his theory as "pragmaticism", in order to distinguish it from William James's theory, (James had subsequently popularized the term "pragmatism").

The study of these classic pragmatist authors shows that this philosophy covers vast and diverse realities and that is marked by a strong heterogeneity in its lines of thought. For example, Peirce and James, though contemporaries, had many disagreements about the meaning and purpose of pragmatist philosophy. Later, theorists like James Dewey and Hilary Putnam developed their own visions of pragmatism, sometimes taking their distance from the original theories. Today, these dissensions among pragmatist authors make pragmatism a polymorphic school of thought.

In fact, today, the use of the term "pragmatism" has moved away from the already heterogeneous theories of its founders. There is now a multitude of interpretations for "pragmatism": the term may qualify either a comprehensive approach to law or theories of legal interpretation, truth, knowledge, judicial practice, etc. Thomas Grey writes in this vein that "much pragmatist theory […] [is] essentially banal. At its most abstract level it concludes in truisms."[14] In the same vein, according to Richard Rorty, if pragmatism was "shocking" some decades ago in the United States, it was subsequently "absorbed into American common sense".[15] In fact, pragmatist theories have now become "banal" in the sense that the label "pragmatist" could be applied at the same time to authors as different as Roberto Unger, Richard Posner and Ronald Dworkin.[16] Richard Posner also asserted that pragmatism had become "an umbrella term for various tendencies in philosophical thought."[17] Consequently, in examining Ronald Dworkin's criticism of pragmatism, one must keep in mind this plurality of perspectives on pragmatism, which cannot be confined to an artificially unified definition.

However, we cannot either conclude that total disunion exists among theories of pragmatism. Indeed, basic trends in pragmatism are present, and constitute its specificity. As mentioned by Jean-Pierre Cometti, the historical pragmatists, as well as those who followed in their footsteps, are commited to a philosophy that can be recognized in a number of theses.[18] In this regard, Cometti mentions at least three points of contact between those who are

12 Pierce, Charles S., "How to Make Our Ideas Clear," *Popular Science Monthly* 12 (1878): 286–302 at 293.

13 Claudine Tiercelin, *C.S. Peirce et le pragmatisme* (Paris: Presses universitaires de France, 1993) at 5.

14 Thomas C. Grey, "Holmes and Legal Pragmatism," *Stanford Law Review* 41 (1989): 787–870 at 814.

15 Richard Rorty, "The Banality of Pragmatism and the Poetry of Justice," *Southern California Law Review* 63 (1990): 1811–19 at 1813.

16 Ibid.

17 Richard A. Posner, "What Has Pragmatism to Offer Law," *Southern California Law Review* 63 (1989): 1653–70 at 1653.

18 Jean-Pierre Cometti, *Qu'est-ce que le pragmatisme?* (Paris: Gallimard, 2010) at 344.

said to be the architects of pragmatist philosophy.[19]

Thus, historical pragmatism would first be characterized by an *anti-essentialist* component, that is to say, the rejection of the thesis that every object has an essence, an objectively knowable reality, an intelligible higher form. In law, this anti-essentialism results in the rejection of the idea that the values expressed by law have an objective, rational, and demonstrable existence.[20]

Second, pragmatism is identifiable by an *anti-representationalist* component, a refusal to say that truth is a representation in the sense that there exist representations that show things as they "really" are. It is thus an objection to the correspondence theory of truth. Similarly, for the pragmatists, language is not a tool designed to be able to reveal the "essence" of things, since the function of language is not to represent reality. In brief, there is no "real" world that language could represent faithfully. The "reality" of an object is part of a system of beliefs.[21]

Finally, pragmatism can also be described as *anti-foundationalist*, which means that it assumes the non-existence of an absolute foundation providing an objective foundation for our beliefs, and an undisputed standard by which the truth of our proposals can be verified.[22] Thus, there is no absolute, objective, fixed, ahistorical and universal point of view that would provide the undisputed standard from which the truth of our beliefs about reality, morality or justice may be justified.[23] Reality provides no external anchor for human experience.

In sum, these theses (anti-essentialism, anti-representationalism and anti-foundationalism) are the three main elements impregnating the work of the authors considered as historical pragmatists.[24] They will help us in appraising

19 Ibid at 345. See also: Jean-Rodrigue-Élisée Eyene Mba and Irma Julienne Anque Medoux, *Richard Rorty : La fin de la métaphysique et la pragmatique de la science* (Paris: L'Harmattan, 2007) at 79 ff.

20 Véronique Champeil-Desplats, "Production et Sens Des Principes : Relecture Analytique," *Diritto E Questioni Pubbliche* 11 (2011): 39–57 at 40.

21 Eyene Mba and Anque Medoux, *Richard Rorty : La fin de la métaphysique et la pragmatique de la science* at 86 ff.

22 Luc B. Tremblay, "L'interprétation téléologique des droits constitutionnels," *Revue juridique Thémis* 29 (1995): 459–526 at 487.

23 Ibid.

24 Several authors have attempted to identify points of contact between pragmatist philosophers. For example, for Hilary Putnam, four theories form the core of pragmatism:

(1) antiskepticism: pragmatists hold that *doubt* requires justification just as much as belief [...]

(2) fallibilism: pragmatists hold that there is never a metaphysical guarantee to be had that such-and-such a belief will never need revision [...]

(3) the thesis that there is no *fundamental* dichotomy between "facts" and "values"; and (4) the thesis that, in a certain sense, practice is primary in philosophy.

See: Hilary Putnam, *Words and Life* (Cambridge, Masschusetts: Harvard University Press, 1994) at 152. In the same way, in his article *What Has Pragmatism to Offer Law*, Richard Posner presents the elements he considers as forming the core of pragmatism: "To speak in nonpragmatic terms, pragmatism has three 'essential' elements. [...] The first is a distrust of metaphysical entities ('reality', 'truth', 'nature', etc.) viewed as warrants for certitude whether in epistemology, ethics, or politics. The second is an insistence that propositions be tested by their consequences, by the difference they make – and if they make none, set aside. The third is an insistence on judging our projects, whether scientific, ethical, political, or legal, by their conformity to social or other human needs rather than to 'objective', 'impersonal' criteria. These elements in turn imply an outlook that is progressive (in the sense of forward-looking), secular, and experimental, and that is commonsensical without making a fetish of common sense – for common sense is a repository of prejudice and ignorance as well as a fount of wisdom." See: Posner, "What Has Pragmatism to Offer Law." at 1660. It is interesting to note that these elements identified by Putnam and Posner meet fairly well the criteria identified by Cometti.

Ronald Dworkin's approach to and criticism of pragmatism.

B. Ronald Dworkin's Approach to Pragmatism

This section will focus on analyzing Ronald Dworkin's approach to pragmatism. By studying his views on this theory, we will seek to identify the classical pragmatist theses he attacks in his criticisms.

However, before proceeding to the examination of Dworkin's understanding of pragmatism, one should note some difficulties inherent to the study of such an author. First, we can see that in his works, Dworkin rarely refers directly to the authors or to the theses he criticizes, which has the effect of creating a certain ambiguity around his theories. In the preface to *Law's Empire*, Dworkin even affirms that in general, he has not attempted to compare his views with those of other legal or political philosophers, or to point out how he has been influenced by their work.[25] Also, regarding Dworkin's comprehension of pragmatism itself, it is interesting to notice that he does not put forward a clear definition of the object he criticizes. Indeed, we will see that Dworkin sometimes equates pragmatism with a form of utilitarianism, even to a simple instrumentalism. Finally, we can add that the multiplicity of issues addressed in Dworkin's works renders the identification of a form of unity in his thinking arduous, as well as the identification of actual pragmatist influences on his theories.

For these reasons, Dworkin's understanding of pragmatism sometimes remains unclear. Despite the general sharpness of his argumentation, his clear style and his way of using concrete examples from the American context, this constitutes an important difficulty for our appreciation of his thoughts on pragmatism.

Thus, in Law's *Empir*e, Ronald Dworkin puts forward a theory of law as integrity, an interpretive theory that "takes rights seriously" and that allows a judge to find the "one right answer" in constitutional controversies. He writes:

> The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness. [...] According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.[26]

Here, the concept of integrity demands that the judge present the law as a coherent whole based on sound principles whenever he decides a case.

25 Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986) at ix. Some authors have examined the philosophical foundations in Dworkin's thought. See for example: Julie Allard, *Dworkin et Kant : Réflexions Sur Le Jugement* (Bruxelles: Éditions de l'Université de Bruxelles, 2001); Thom Brooks, "Between Natural Law and Legal Positivism: Dworkin and Hegel on Legal Theory," *Georgia State University Law Review* 23 (2006): 513–60; Richard Nordahl, "Rousseau in Dworkin: Judicial Rulings as Expressions of the General Will," *Legal Theory* 3 (1997): 317–46.

26 Dworkin, *Law's Empire* at 225. For a definition of law as integrity, see: Robert Justin Lipkin, "Dworkin's Constitutional Coherentism," in *Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism* (Durham (N.C.): Duke University Press, 2000), 77–117 at 91.

For Dworkin, as for the legal positivists, propositions of law may be true or false, but the theories differ in that this truth is not determined by the same criteria. Thus, for a positivist like Hans Kelsen, the truth of a proposition of law depends on the validity of the norm it describes. A proposition of law is true if the norm it describes exists, if it is valid in the legal system in question. The validity of a norm is determined by criteria that are immanent to the legal system. A norm is valid either if its content is consistent with the content of another norm, or if it was laid down in the way prescribed by a higher norm. For Dworkin, propositions of law describe principles, but the existence of the latter does not depend on their compliance with a higher norm.[27] A proposition of law is the conclusion of an activity of interpretation and justification and will be true, as we have just seen, if it arises from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.

Therefore, to this theory of law as integrity, Dworkin opposes the pragmatist theory, an approach that in his opinion infused American constitutional history. Although Dworkin does not precisely define his views of pragmatism, the criticism of this theory runs throughout his work. As we mentioned earlier, Dworkin conceives of pragmatism as a form of instrumentalism that could not possibly provide a coherent answer to the question of determining what the the law is.[28]

In *Law's* Empire, Dworkin's analysis of pragmatism unfolds in three ideas: how pragmatism envisions the "past", judicial activism, and individual rights. These are the three elements of his critique that we will explain and nuance.

As noted by Michael Sullivan, Dworkin first builds his criticism of pragmatism around the assertion that a pragmatist judge would be indifferent to past political decisions of courts and legislatures. For him, pragmatism is nothing but a subjective vision, which manipulates the concept of precedent and lacks systematization.[29] It is only concerned with the future and has no regard for the past. Dworkin writes:

> The pragmatist takes a skeptical attitude toward the assumption we are assuming is embodied in the concept of law: he denies that past political decisions in themselves provide any justification for either using or withholding the state's coercive power. He finds the necessary justification for coercion in the justice or efficiency or some other contemporary virtue of the coercive decision itself, as and when it is made by judges, and he adds that consistency with any past legislative or judicial decision does not in principle contribute to the justice or virtue of any present one. If judges are guided by this advice, he believes, then unless they make great mistakes, the coercion they direct will make the community's future brighter, liberated from the dead hand of the past and the fetish of consistency for its own sake.
>
> Of course judges will disagree about which rule, laid down in which circumstance, would in fact be best for the future without concern for the past.[30]

27 Michel Troper, "Les juges pris au sérieux ou la théorie du droit selon Dworkin," *Droit et Société* 2 (1986): 53–70 at 63.

28 Michael Sullivan, *Legal Pragmatism: Community, Rights, and Democracy* (Bloomington (Ind.): Indiana University Press, 2007) at 32.

29 Ibid.

30 Dworkin, *Law's Empire* at 151.

In other words, for Dworkin, a pragmatist judge believes that the triumph of justice or of certain policies is the only thing that matters in adjudication. Consistency with the past, except if it allows the achievement of these goals, is irrelevant.[31]

Then, according to Dworkin, this lack of consideration for the past in pragmatism originates from an activist approach to interpretation. A pragmatist judge, according to this theory, would have the opportunity to make decisions according to his own views.[32] Pragmatism supports judicial discretion in so far judges may choose to apply any method to solve a case, if this method leads to the solution they consider to be the best for the future.[33] Therefore, for Dworkin, this conception of interpretation sacrifices the principle of integrity that is at the heart of his legal theory.

Finally, Dworkin believes that the pragmatist approach denies the existence of rights, in the sense of genuine legal rights, or in other words, as Dworkin says, it does not "take them seriously".[34] He writes:

> It [pragmatism] rejects what other conceptions of law accept: that people can have distinctly legal rights as trumps over what would otherwise be the best future properly understood. According to pragmatism what we call legal rights are only the servants of the best future: they are instruments we construct for that purpose and have no independent force or ground.[35]

According to Dworkin, for the pragmatists, rights have no independent force. For him, when they acknowledge the existence of rights, this is merely strategic (*as-if* rights).[36] Recognizing rights would be to do *as if* individuals had legal rights in order to achieve societal benefits in the long term. This criticism of pragmatism is crucial for Dworkin, who, on the contrary, built his entire theory of law around the idea that individuals do have rights supported by principles that provide a justification of legal practice as a whole.

C. A Necessary Nuance of Dworkin's Criticisms on Pragmatism

Since a fairly hostile criticism of pragmatism is present in Dworkin's work, it is interesting to see how his approach to this philosophical theory can be nuanced.

However, before proceeding to such an analysis, it is important to reiterate that Dworkin's refutation of pragmatist theses suffers from several methodological shortcomings. Michael Sullivan describes as "mediocre" the version of pragmatism proffered by Dworkin,[37] and Margaret Radin claims he reduces pragmatism to a "crass instrumentalism"[38]; from our side, we are concerned about the fact that he does not put forward any indication or clear reference to the theses he criticizes, rendering his criticism of this complex philosophical theory both unsound and ambiguous.

Keeping in mind this fact that pervades Dworkin's views on pragmatism,

31 Ronald Dworkin, "Pragmatism, Right Answers, and True Banality," in *Pragmatism in Law & Society*, ed. Michael Brint and William Weaver (Boulder: Westview, 1991), 359–88 at 368.

32 Dworkin, *Law's Empire* at 152.

33 Ibid at 160.

34 Ibid.

35 Ibid.

36 Ibid at 152–153.

37 Sullivan, *Legal Pragmatism: Community, Rights, and Democracy* at 32–33.

38 Margaret Radin, "The Pragmatist and the Feminist," *Southern California Law Review* 63 (1990): 1699–1726 at 1722.

we will focus on the three previously mentioned ideas developed by the author in his presentation of the theory, that is to say, how it understands the past, judicial activism, and individual rights. We will seek to nuance Dworkin's criticism of pragmatist philosophy on those points, in light of the elements we have identified as forming the core of historical pragmatism: anti-essentialism, anti-representationalism and anti-foundationalism.

A first criticism addressed to pragmatism by Dworkin lies in the fact that according to him, this philosophy has no consideration for the past, for history or for precedents, which goes against his notion of law as integrity. From a descriptive point of view, Dworkin denies that pragmatism actually takes the past into account in adjudication. From a prescriptive point of view, Dworkin says that the past *should* be taken into account by the pragmatists. As mentioned by Steven D. Smith, these assertions by Dworkin lead to an unconvincing reasoning stipulating that since pragmatism does not take the past into consideration, and that continuity with the past must be valued, pragmatism is therefore an inadequate theory of law.[39]

However, by carefully analyzing Dworkin's propositions in conjunction with historical pragmatist theories, it is possible to nuance both Dworkin's descriptive and prescriptive assertions.

Indeed, the idea that pragmatism ignores the past, history and precedents is not only wrong, but seems to ignore all previous works by pragmatist thinkers. Indeed, as we noted earlier, Dworkin assumes that in accordance with a pragmatist approach, the determination of what is best for the future of a community has no ties with the past. He contends that the pragmatist judge settles disputes "without concern for the past", liberated from the "dead hand" of history as well as from the "fetish of consistency for its own sake".[40] These statements are misleading.

Dworkin is right when he says that pragmatists do not see maintaining consistency with past decisions as a goal in itself (coherence for itself, coherence in principles), but rather as a way to arrive at better results.[41] However, this does not mean that pragmatists would therefore never take the past or precedents into consideration.

In fact, William James asserts repeatedly in his works the "imperious" need for "consistency both with previous truth and with novel fact".[42] For James, the pragmatist is pent "between the whole body of funded truths squeezed from the past and the coercions of the world of sense about him".[43] On the question of the importance of the past, John Dewey also writes:

> The essential continuity of history is doubly guaranteed. Not only are personal desire and belief functions of habit and custom, but the objective conditions which provide the resources and tools of action, together with its limitations, obstructions and traps are precipitates of the past, perpetuating, willy-nilly, its hold and power.[44]

39 Steven D. Smith, "The Pursuit of Pragmatism," *Yale Law Journal* 100 (1990): 409–49 at 412.

40 Dworkin, *Law's Empire* at 151.

41 Richard A. Posner, "Pragmatic Adjudication," *Cardozo Law Review* 18 (1996): 1–20 at 5 ff; Sullivan, *Legal Pragmatism: Community, Rights, and Democracy* at 33 ff.

42 William James, *Pragmatism* (New York: Dover Publications, 1995) at 84 (originally published: London ; New York : Longmans Green, 1907).

43 Ibid at 90.

44 John Dewey, *The Public and Its Problems: An Essay in Political Inquiry* (University Park (Pa.):

Thus, although it is accurate for Dworkin to say that pragmatism does not value consistency as an end in itself, it is wrong for him to assume that pragmatism has "no concern for the past." If pragmatists do not follow the past and precedents mechanically, they however take them into consideration. First, because pragmatism operates from an anti-foundationalist posture, which recognizes that it is inevitable for a judge to take the past into account simply because human reasoning is structured by experience and culture. Furthermore, because it is possible for pragmatism to value the past and precedents for instrumental reasons, in the usefulness they may have for the future. For example, the knowledge of dominant jurisprudential orientations allows (to a certain extent) one to anticipate the application of norms for the future.

Furthermore, in his works, Dworkin does not provide a compelling argument to support his claim that we *must* value the past and consistency in themselves.[45] In addition to not demonstrating how he himself differs from what he calls the "sophisticated" pragmatist, who would make use of the past strategically,[46] Dworkin's theory of the chain novel (according to which judiciary interpretation is similar to the literary model) fails to present the past as having some intrinsic value.[47] Steven D. Smith writes:

> The chain novelist should maintain continuity because she is writing for *future* readers who will read the book *as a whole* and will be disappointed if the book is incoherent. Continuity with the past is desirable only to promote a future good; and if continuity ceases to serve that future good then the value of continuity will likewise disappear.[48]

In brief, in light of these considerations on Dworkin's descriptive and prescriptive assertions on the past, on history and on precedents in pragmatism, it is necessary for us to nuance his overall criticism of this philosophical theory.

A second criticism of pragmatism by Dworkin is directly related to the first, concerning how a pragmatist makes use of the past, of precedents and of history. It relates to the idea that pragmatism, in his view, grants broad discretion to the judge in making decisions, in the way he is enabled to act on his or her own opinions. Indeed, for Dworkin, judicial activism is a virulent form of pragmatism. In his opinion, it would actually be easy for a pragmatist judge to ignore constitutional text and precedents in his work of interpretation. Here, Dworkin presupposes that his theory of law as integrity does not grant any discretion to the judge and that it does not entail an activist vision of interpretation. However, following ethical cognitivism, for Dworkin, propositions of law are true, *not* if they are consistent with objective and timeless principles, but rather if they offer the "best" justification of the legal practice of the community. Evidently, it is not possible for a judge to assert that a principle consists in a better justifica-

Pennsylvania State University Press, 2012) at 129. For a similar position on the importance of history for the pragmatists see: Benjamin Nathan Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1960) at 150. Daniel Farber states that the importance of tradition among pragmatists has not only instrumental value, but is a "necessary ingredient in all human reasoning." See: Daniel A. Farber, "Legal Pragmatism and the Constitution," *Minnesota Law Review* 72 (1987): 1331–78 at 1344. .

45 On this question, see: Smith, "The Pursuit of Pragmatism" at 414 ff.

46 Ibid at 415–416.

47 Dworkin, *Law's Empire* at 228 ff.

48 Smith, "The Pursuit of Pragmatism" at 418.

tion than another principle without putting forward his own values, preferences and moral convictions. Therefore, it is difficult to understand how Dworkin's law as integrity, although described as a cognitive activity, is actually immune to the influence of the will of the judge. Dworkin fails to show how pragmatism would lead to an extension of judicial activism, while law as integrity would only consist in the interpretation of the legal practice of the community.

A final criticism raised by Dworkin towards pragmatism that we should moderate is the idea that a pragmatist approach denies the existence of rights and that consequently, the protection of fundamental rights could not be fully ensured by a pragmatist judge.

Here, we must admit that considering the anti-essentialist and anti-foundationalist components of pragmatism, it would be accurate to contend that for pragmatists, rights do not have an objective existence[49] and that they do not have any independent force. However, this position does not mean that pragmatism denies the existence of the individual rights that are recognized in our society, and would automatically refuse their judicial protection.[50] As stated by Daniel A. Farber, in pragmatist philosophy, "the question of the advisability of judicial review turns on its usefulness for promoting a flourishing democratic society".[51] The existence of judicial review in the perspective of the protection of individual rights could perfectly be combined with a pragmatist approach, but would not consist in an end in itself. Similarly, it is interesting to note that Dewey, for example, attached particular importance to the protection of rights such as freedom of expression.[52] Indeed, even if the pragmatist does not value fundamental rights in themselves, they can be linked to a wide range of pragmatist considerations.

In conclusion, we have seen that it is necessary to present several important nuances to Dworkin's criticism of pragmatism. Indeed, while maintaining the respect that is due to his understanding of the past, of judicial activism and of individual rights, we are obliged to affirm that Dworkin is sometimes misguided in his understanding of pragmatist philosophy.

49 Farber, "Legal Pragmatism and the Constitution" at 1347.

50 For an interesting refutation to the argument that utilitarianism (according to John Stuart Mill) is incompatible with the protection of fundamental rights by judicial review, see: Robin L. West, "In the Interest of the Governed: A Utilitarian Justification for Substantive Judicial Review," *Georgia Law Review* 18 (1984): 469–528.

51 Farber, "Legal Pragmatism and the Constitution" at 1348.

52 Dewey, *The Public and Its Problems: An Essay in Political Inquiry* at 166–171, 176–184, 208–209.