Marie-Andrée Plante & Anaïs Voy-Gillis

School for Advanced Studies in the Social Sciences
(Université Paris Ouest Nanterre, Ecole des Hautes Études
en Sciences Sociales (EHESS) and Ecole Normale Supérieure (ENS)

Is Ronald Dworkin a pragmatist?

17/2014
Political Dialogues

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

Through his writings, Dworkin helped to renew the debate between theories of natural law and legal positivism. From the end of the 1960s, he 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". According to Dworkin, Hart's legal positivism as set out in *The Concept of Law*[7] does not properly describe

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

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

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

4 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).

5 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.

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 H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford, New York: Clarendon Press, Oxford University Press, 1994).

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".[8] Judges should decide cases according to those principles which provide the best constructive interpretation of the community's legal practice. In fact, Dworkin argues that interpretation should be at the heart of legal theory. In his article "Pragmatism, Right Answers, and True Banality," he claims that we should set aside "grand debates" about whether law is only power, illusion or constraint, and focus rather on examining how decisions should *actually* be taken by judges.[9]

Thus, 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.[10] 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.[11] The infusion of pragmatism into legal theory has been discussed by many authors.[12]

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.[13]

Yet, for many authors, Dworkin displays a major contradiction here. Indeed, by the way he places judicial interpretation at the centre of his theory,[14] Dwor-

8 Dworkin R., *Taking Rights Seriously*, 22.

9 Ronald Dworkin, "Pragmatism, Right Answers, and True Banality," in Pragmatism in Law & Society, ed. Michael Brint and William Weaver (Boulder: Westview, 1991), 359–88, 360.

10 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.

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

12 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, 1571–1572.

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

14 Margaret Radin affirms, about Dworkin and his work: "Pragmatism is reflected in his commitment to the ubiquity of interpretation, and his concomitant commitment to finding meaning in assembling concrete events (institutional coherence and fit), rather than to measuring correspondence with abstract truth or justice." See: Margaret Radin, "The Pragmatist and the Feminist," *Southern California Law Review* 63 (1990): 1699–1726 at 1722. Several other authors seem to detect pragmatist elements in Dworkin's theses. See: Richard A. Posner, "What Has Pragmatism to Offer Law," *Southern California Law Review* 63 (1989): 1653–70 at 1654; Richard Rorty, "The Banality of Pragmatism and the Poetry of Justice," *Southern California Law Review* 63 (1990): 1811–19 at 1811–1813. This is also the opinion of Robert J. Lipkin who writes that in matters of constitutional law, Ronald Dworkin's theory cannot explain "constitutional revolutions" (that is to say, radical shifts in constitutional meaning or law) without being reinterpreted in the light of pragmatist theory. 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, 91.

kin would be demonstrating an obvious commitment to a pragmatist approach to law. His theory would display many pragmatist elements that would lead one to qualify Dworkin himself as a pragmatist.

Accordingly, despite Dworkin's apparent hostility to pragmatism, we seek here to provide a critical analysis of the claim that the theory of interpretation of Ronald Dworkin is in line with the tradition of pragmatist philosophy. We will attempt to determine if some aspects of his works can be shown to display pragmatist elements. Can Ronald Dworkin be called a pragmatist? Does he, perhaps unwittingly, contribute to a philosophy in line with the theories of Peirce, James and Dewey?

In the aim of examining how Ronald Dworkin's theory of interpretation could be compatible with pragmatism, we will first identify specific pragmatist influences in Dworkin's theory (A). We will try to demonstrate that by giving a central place to interpretation in his legal theory, Dworkin sometimes follows a pragmatist approach.

Second, we will attempt to establish that the compatibility of Dworkin's theses with pragmatism is nonetheless limited (B). Indeed, this apparent compatibility would seem to be due rather to a broad use of the term "pragmatism" than to a real commitment to pragmatist theses. We will seek to prove that if Dworkin's thought sometimes follows a pragmatist approach, he cannot himself be described as a pragmatist, in the classical sense employed by pragmatist philosophy.

A. Pragmatist Influences in Ronald Dworkin's Theory

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 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."[15] 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.[16] 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.

However, we cannot conclude that total disunion exists among theories of pragmatism. Indeed, basic trends in pragmatism are present, and constitute

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

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

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.[17] In this regard, Cometti mentions at least three points of contact between those who are said to be the architects of pragmatist philosophy.[18]

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.[19]

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.[20]

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.[21] 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.[22] Reality provides no external anchor for human experience.

For many scholars, Ronald Dworkin demonstrates an obvious commitment to a pragmatist approach to law, characterized by these theses (anti-essentialism, anti-representationalism and anti-foundationalism), considered as the three main elements impregnating the work of historical pragmatists.[23] Michel Troper

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

18 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.

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

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

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

22 Ibid.

23 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 dif-

suggested that one reason for Dworkin's great success lies in the fact that he promotes a philosophy of law which can be "useful", to the extent that it adequately describes the type of justifications to which judges often resort in their legal practice.[24] His theory would thus show several pragmatist influences that could lead one to describe him as a pragmatist.

The points of contact of Dworkin's work with pragmatism will be presented in two ways. First, Dworkin can be considered a pragmatist in his global approach to law (1). Second, his theory of interpretation also demonstrates pragmatist elements in that he defends some theses that possess anti-essentialist and anti-representationalist attributes, attributes that, as we said, characterize historical pragmatism (2).

1. Pragmatist Influences in Ronald Dworkin's Global Approach to Law

As regards Dworkin's global approach to law, a pragmatist influence first shows in his works through the simple fact that he puts the issue of judicial interpretation at the heart of his theory. Indeed, this theory focuses on the instrumental aspects of law and the real effects of judicial interpretation on society. It thus reveals a pragmatist dimension, in the context of a comprehensive theory of judicial practice.

The centrality of the notion of "principles" in Dworkin's theses also indicates a pragmatist influence (and a legal realist one) in his approach to law. Indeed, in his conception of law as integrity, Dworkin clearly shows how, in their practice, judges use principles in adjudication, principles they must balance, weigh, prioritize, and essentially, treat pragmatically. The possibility of a neutral judicial decision, purged of any moral considerations, is also ruled out. To E.W. Thomas, this technical use of principles refers to a form of practical reasoning in law where actors are "supremely conscious that the law or legal process is a social institution and that their reasoning must be ultimately directed by the functional objective of serving society's needs and expectations."[25] Principles become subservient to the functional objective of law.[26] Thomas believes that the use of principles ensures the cohesion of the legal system and continuity in reasoning. Principles also provide "the mechanism by which accumulated wisdom and experience of the past is brought forward to be utilised and, if necessary, also updated".[27] Therefore, Ronald Dworkin's use of the notion of principles could be considered as being compatible with a pragmatist approach to law.

2. Pragmatist Influences in Ronald Dworkin's Theory of Interpretation

Second, Ronald Dworkin's theory of interpretation shows some anti-essential-

ference 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.

24 Michel Troper, "Présentation," *Droit et Société* 1 (1985): 29–33, 32.

25 E. W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge: Cambridge University Press, 2005), 338.

26 Ibid, 346.

27 Ibid, 345.

ist and anti-representationalist components, which are present in classical pragmatist philosophy, and which might contribute to a qualification of his work as pragmatist. Indeed, for Dworkin, the meaning of a concept is not an internal or objective property, accessible by direct and immediate intuition. For him, interpreting does not therefore signify finding the "true meaning" of words. His theory does not assume that words designate essences. In fact, Dworkin explicitly rejects any metaphysical significance of his thesis.[28] This position could be considered as a point of contact with pragmatist philosophy.

Also, according to Dworkin, it is unnecessary to conduct an ontological discussion on the objectivity of values in order to adequately describe the judicial decision-making process. He refuses any external approach to addressing moral issues. For Dworkin, the only valid point of view for any discussion with cognitive claims is the internal point of view. It is best to consider moral issues from the point of view of the actors of the legal system. In *Law's Empire*, Dworkin conjectures that as a judge, Hercules would not agree to use a redundant work like "objective" in order to "decorate" his judgments, which have the same meaning for him even without the use of such a word.[29] As recalled by Michael S. Moore:

> *Dworkin applies a like 'ban on imports' to notions of validity, objectivity, independence from convention, and even truth, meaning and reality, holding that it is wrong to assume that the propositions central to any public enterprise must be judged by the standards of science. Rather, we should 'proceed more empirically', by ascertaining what counts as a good reason within each such enterprise and judging the objectivity of its practice accordingly.*[30]

Indeed, Dworkin refuses to make a distinction between legal theory as a study of general concepts and modes of reasoning employed by legal actors, and law itself. The science of law is not different from its object. For example, for Dworkin, "jurisprudence" refers to both legal theory and to the judges' reasoning itself.[31] There is in Dworkin's work an idea of a continuity between knowledge and action, which can be considered pragmatist. For him, practice feeds action. Therefore, it is impossible to discuss law without also discussing the experience of law.

To sum up, it is true that some aspects of Dworkin's theory may be impregnated with pragmatist elements, particularly with respect to his global approach to law and to his theory of interpretation. However, we will see that it is necessary to nuance such a statement, since Ronald Dworkin's work as a whole cannot be described as pragmatist.

B. A Limited Compatibility of Ronald Dworkin's Theory with Classical Pragmatism

We have seen that some of Dworkin's theses showed pragmatist elements, but is that enough to qualify him as a pragmatist? We do not think so. Indeed, although Dworkin's theory is consistent

28 Dworkin, "Pragmatism, Right Answers, and True Banality", 366.

29 Dworkin, *Law's Empire*, 267.

30 Michael S. Moore, "Metaphysics, Epistemology and Legal Theory," *Southern California Law Review* 60 (1986): 453–506, 499.

31 Michel Troper, "Les juges pris au sérieux ou la théorie du droit selon Dworkin," *Droit et Société* 2 (1986): 53–70, 56.

with some of the characteristic elements of classical pragmatism, and although he occasionally adopts a pragmatic approach, Dworkin's work can in no way be globally described as pragmatist. This characterization is due rather to a broad, loose use of the word "pragmatism", which is used today to refer to so many diverse realities that it suffers a form of distortion and has become almost banal.[32]

Our point of view is justified by two arguments. We will demonstrate first that Dworkin is essentialist in his definition of "law", which is fundamentally anti-pragmatist (1), and second, that his denial of judicial discretion is inconsistent with a pragmatist approach (2).

1. Ronald Dworkin's Definition of Law

First, the fact that compatibility between Dworkin's theory and classical pragmatist philosophy is impossible is demonstrated in his definition of "law". Indeed, as mentioned earlier, for Dworkin, law is not just a system of positive norms. It also contains "principles" of a moral nature that meet requirements of justice and fairness. These principles materially constitute law, even when no textual source in a given legal system sets them out explicitly.[33] Thus, although those principles are not necessarily universal, objective or accessible to human reason for Dworkin, the mere fact that he acknowledges their existence demonstrates a certain essentialism, since it means that individuals have rights emanating from some moral and social order preexisting to positive legal systems. This "horizon of justice" created by the existence of principles is incompatible with pragmatist thought, as the law here seems to escape any kind of temporality.

2. Ronald Dworkin and Judicial Discretion

Second, it would be difficult to qualify Dworkin as a pragmatist because of the way he denies the existence of judicial discretion. Indeed, for Dworkin, there is always *one right answer* in law. Discretionary power of the judge does not exist. If a judge certainly has a form of interpretative freedom, he does not however have complete discretionary power, since he remains bound by principles. In other words, concerning what Dworkin labels "hard cases", a judge must base his decisions on something other than the rules *stricto sensu.* He must ground them in principles based on a conception of political morality. These principles are binding for the judge.

This point of view on judicial discretion differs from a pragmatist position in the sense that Dworkin claims that in all cases, if interpretation is not to be found in the "real meaning" of words, it does correspond to a form of logic and not to the sole will of the judge, who (in Dworkin's view) has his hands tied. Dworkin explains the constraints faced by the judge in adjudication through his analogy of the chain novel[34] and by his general idea of law as integrity. Law as integrity states that the law must speak with one voice, so judges must base their decisions on coherent principles about justice, fairness and procedural due process that best justify the legal practice of

32 See: Rorty, "The Banality of Pragmatism and the Poetry of Justice."

33 Véronique Champeil-Desplats, "Production et sens des principes : relecture analytique," *Diritto e questioni pubbliche* 11 (2011): 39–57, 43.

34 According to which judiciary interpretation is similar to the literary model. See: Dworkin, *Law's Empire* at 228 ff.

the community. However, for the pragmatists, such a knowledge on the part of the judge of the moral principles that best justify the legal practice of the community is unthinkable.

Dworkin's approach is also anti-pragmatist in that he presents in his works the ideal model of a mythical judge named "Hercules", an omniscient judge who can decide hard cases by his sole reason. From the rules, the history and the values of a community, this judge is able to extract the principles that will determine the right decision in a given case, from the point of view both of positive law and of morality.[35] In *Taking Rights Seriously*, Dworkin describes Hercules as "a lawyer of superhuman skill, learning, patience, and acumen",[36] and in *Law's Empire*, as "an imaginary judge of superhuman intellectual power and patience who accepts law as integrity".[37] Thus, he considers the judge as an actor *external* to the legal system, omniscient, while a pragmatist certainly would consider any judge as an *internal* actor, who fully participates in the system.

In short, the major discrepancies that arise between Dworkin's theory and pragmatist philosophy, regarding both the author's definition of law and his denial of judicial discretion, can only lead us to refute any claim that Dworkin could be globally described as a pragmatist.

In conclusion, as we have mentioned earlier, if it can indeed be said that some of Dworkin's theses include elements that relate to classical pragmatist philosophy, it is important to highlight that the author is not fundamentally a pragmatist. In fact, his theories are opposed on many levels to what constitutes the core of pragmatist thought, as developed by James, Peirce and Dewey.

Indeed, it seems that what has allowed some scholars to situate Ronald Dworkin among the pragmatists is not so much an interpretation of the ideas he defends, but rather a broad view of what can be understood as "pragmatism". As Richard Rorty recalls,[38] the word "pragmatism" has become banal by being used to classify different thoughts and antagonistic realities. It now has an extensive and multifaceted definition. This line of thinking, since it is extremely diverse, seems nowadays to lose some of its original usefulness, becoming instead a kind of drawer where one stuffs elements that fit into no other classification.

Ronald Dworkin therefore remains one of these unclassifiable scholars, by dint of striving to avoid being categorized as an author belonging to any particular school of thought. Therefore, to classify him among pragmatists is to have little consideration for his desire to stand out, but it also means disregarding his views and those of classical pragmatist authors. Despite this, it is important to emphasize that it is possible to recognize in Dworkin's works the central pragmatist idea that it is unrealistic to conceive court decisions as being completely neutral and not taking sides in moral or political controversies: this affinity, however, is not enough for us to be able to qualify Dworkin as a pragmatist.

35 See ch. 4 in: Dworkin, *Taking Rights Seriously*, 81–130.

36 Ibid, 104-105.

37 Dworkin, *Law's Empire*, 239.

38 Rorty, "The Banality of Pragmatism and the Poetry of Justice."