

## Pragmatism and the Question of Legal Precedent: Should Past Decisions be Used in Adjudication?

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### Introduction

This essay examines the contemporary debate on the question of legal precedent using pragmatist views, and proposes an innovative take on the conditions in which past decisions should, and should not be used in adjudication. By using the L'Aquila earthquake trial in Italy (2012) as a case study, I take the debate on legal precedent and the role of past decisions in adjudication out of the traditional conventions of the legal realm, and examine it from a philosophical perspective. Whilst being a predominantly philosophical piece, the essay also seeks to remain highly relevant to the realities of the legal discipline, and will draw upon the contributions of academics highly specialised in the legal field.

Firstly the objections of Ronald Dworkin to the pragmatic position will be outlined, and his argument that the past is 'valuable for its own sake'<sup>1</sup> will be critically examined. I will discuss Dworkin's argument, expose its weaknesses and thus undermine his position on the value of the past. Though Dworkin is able to provide us with some convincing reasons for *why we should* value the past, and this enables us to explain some of the controversy surrounding the L'Aquila trial, his argument is not sufficient to justify that the past is valuable for its own sake. The argument will then turn to the pragmatist position of Oliver Wendell Holmes which places a critical emphasis upon the synthesis of law as being both situated, and instrumental in character.<sup>2</sup> The different stages of the argument will explore why continuity with the past can, and often is valuable for the pragmatist, but crucially how a departure from precedent can be both validated, and beneficial for the progression of socially desirable ends. I will seek to emphasise the importance of instrumentalism in determining the value of using past decisions in adjudication, but will remain sensitive to the value of the past by maintaining that law is always *situated*. Throughout the argument the L'Aquila case will be used to illustrate the sophisticated nature of the pragmatist argument, by conveying that though there are certainly cases in which a departure from precedent can indeed be valuable, there are significant dangers that such a departure can have in terms of future consequences. Removing the centrality of legal statutes, traditions and precedents from legal adjudication challenges the very foundations of 'conventional'<sup>3</sup> theories of law. However this is what this essay will seek to do, where through exploring the question of legal precedent through a pragmatist perspective I will ultimately seek to illustrate the conditions in which past decisions should, and should not be used in adjudication.

### The Importance of the Debate and its Relevance to the L'Aquila Earthquake Trial (2012)

This debate is one which might in isolation seem abstract. However when examined in relation to a contemporary problem facing society, I believe the significance of its implications become

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<sup>1</sup> Steven D Smith, "The Pursuit of Pragmatism," *The Yale Law Journal*, Vol. 100, No. 2 (1990): p. 414

<sup>2</sup> Thomas C Grey, "Holmes and Legal Pragmatism," *Stanford Law Review*, Vol. 41, No. 4 (1989): p. 806

<sup>3</sup> Stanley Fish, "Still Wrong after All These Years", *Law and Philosophy*, Vol. 6, No.3 (1987): p. 401

truly illuminated. It seems that it is only when a legal decision is made that we deem to be 'unjust,' that we really begin to question the way in which such decisions are made. Of this process of legal decision making, an imperative part is the use of past decisions, where their importance is taken as almost *a priori* in conventional theories of law.<sup>4</sup> In the pragmatist spirit I seek to inquire as to whether, and if so, *why* past decisions should be seen as a valuable source, not counting them as valuable for their own sake. The controversial and somewhat confusing decision of the L'Aquila earthquake trial (2012) represents a case which has compelled me to question the decision making process in adjudication, and the question of legal precedent will be highly relevant to the analysis.

On 6th April 2009 a 6.3 magnitude earthquake hit L'Aquila, Italy and killed over 300 people.<sup>5</sup> The legal case which followed made a highly controversial decision; six Italian seismologists and one government official were charged, and then convicted for multiple counts of manslaughter.<sup>6</sup> The charges document states that following a meeting before the earthquake, these members of the National Commission for Forecasting and Predicting Great Risks went on to provide 'incomplete, imprecise and contradictory information' to an unnerved public.<sup>7</sup> Therefore the technical charge was for 'carrying out a superficial analysis of seismic risk, and proving false reassurances to the public'.<sup>8</sup> However the outcry from the scientific community, and much of the international public has been that the Italian scientists essentially face unjust charges of 'failing to predict the earthquake'.<sup>9</sup> It has had the consequence of sending shockwaves around the hazard prevention community, with hazard and risk scientists having already faced alienation in Italy following these convictions.<sup>10</sup> The decision in this case will have implications for seismologists in particular, but also scientists in general across the world. There is a concern that the duty of scientists to take part in public debate may be compromised 'for fear of conviction,'<sup>11</sup> and the chairman of Italy's 'Serious Risks Commission' has already resigned.<sup>12</sup> The decision has caused uncertainty and instability, and is likely to change the way scientists warn the public about risks, a severe impact on their accountability. This case has been chosen because there is arguably no historical precedent of this form of legal decision. The most similar case identified involves the failure of Taiwanese meteorologists to predict the landfall of a deadly typhoon in 1960; they were charged with the

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<sup>4</sup> Fish, op. cit., p. 401

<sup>5</sup> Stephen Hall, "Scientists on trial: At fault?" *Nature - International Weekly Journal of Science*, 14/09/2011. Accessed on 15/11/2012 at: <http://www.nature.com/news/2011/110914/full/477264a.html>

<sup>6</sup> Hall, op. cit.

<sup>7</sup> *Ibid*

<sup>8</sup> Erik Klemetti, "The Verdict of the L'Aquila Earthquake Trial Sends the Wrong Message," *Wired Science Blogs*, 22/10/2012. Accessed on 15/11/2012 at: <http://www.wired.com/wiredscience/2012/10/the-verdict-of-the-laquila-earthquake-trial-sends-the-wrong-message/>

<sup>9</sup> Hall, op. cit.

<sup>10</sup> Bill McGuire, "L'Aquila quake scientists: creating scapegoats will cost even more lives," *The Guardian*, 23/10/2012. Accessed on 15/11/2012 at: <http://www.guardian.co.uk/science/2012/oct/23/laquila-quake-scientists-scapegoats?INTCMP=SRCH>

<sup>11</sup> Nicola Nosengo, "L'Aquila verdict row grows," *Nature - International Weekly Journal of Science*, 30/10/2012. Accessed on 02/12/20120 at: <http://www.nature.com/news/l-aquila-verdict-row-grows-1.11683>

<sup>12</sup> BBC News. "Italy disaster head Luciano Maiani resigns over L'Aquila," *BBC News*, 23/10/2012. Accessed on 03/12/2012 at: <http://www.bbc.co.uk/news/world-europe-20039769>

'dereliction of duty', however *were later released*.<sup>13</sup> Though difficult to generalise, an example which I believe reflects the general socially accepted precedent is where Michael Fish in the UK 'failed to predict' the storm of 1987.<sup>14</sup> Though he certainly faced derision from the public there was no risk of him being convicted for crimes.<sup>15</sup> The conviction of the Italian scientists for manslaughter then certainly represents a departure from historical precedent, and this is largely reflected by the overwhelming reaction by the scientific community and the international media. The level of accountability of the scientists assumed in this case has not been present to this extent in past examples, and this is largely what has caused the ensuing uncertainty. Critical to why this case is so relevant for this debate is this sharp departure from precedent, and for the essay it will be assumed that the case does indeed represent this.

The case will therefore be used as a framework to debate the value of, and reasons for using past decisions in adjudication. There is a significant divergence between 'pragmatism' and 'its enemies' within this debate. The pragmatic position rejects that the past should be seen as valuable 'for its own sake,'<sup>16</sup> and argues that no question of *obligation* towards the legal tradition should be involved in the decision of adjudication.<sup>17</sup> Continuity with the past for the pragmatist is no categorical imperative unless it is instrumental in meeting future needs.<sup>18</sup> However, the pragmatic approach is often accused of being inconsistent towards precedent, history and legal texts and therefore leading to unprincipled legal decisions.<sup>19</sup> In order to illustrate what I believe are great virtues in the pragmatist position, it is first necessary to provide an analysis of the objections it faces.

### Ronald Dworkin's Objections to Pragmatism, and an Analysis of the Dworkinian Position on the Value of the Past

At the forefront of the accusations against pragmatism is its best known nemesis,<sup>20</sup> American philosopher and scholar of constitutional law, Ronald Dworkin. Pragmatism is situated in opposition to Dworkin's theory of 'law as integrity', of which an essential component is *consistency* with the precedent.<sup>21</sup> For Dworkin the chief obligation for a judge is to test his interpretation of a decision by asking whether it could form part of a coherent theory justifying a network as a whole.<sup>22</sup> Consistency with past decisions is therefore critical for Dworkin, and his objections to pragmatism are rooted in what he perceives as a neglecting of the value of the past. Dworkin's reasoning for the value of the past will be explored, however crucially what I wish to illustrate is that he fails to provide a valid reason for accepting that the past is valuable

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<sup>13</sup> Lizzy Davies, "Jailing of Italian seismologists leaves scientific community in shock," *The Guardian*, 23/10/2012. Accessed on 15/11/2012 at: <http://www.guardian.co.uk/world/2012/oct/23/jailing-italian-seismologists-scientific-community>

<sup>14</sup> Davies, op. cit.

<sup>15</sup> Davies, op. cit.

<sup>16</sup> Michael Sullivan and Daniel Solove, "Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism", *The Yale Law Journal*, 687 (2003): p. 695

<sup>17</sup> Richard A Posner, *Overcoming Law* (US: President and Fellows, 1997): p. 12

<sup>18</sup> Grey, op. cit., p. 807

<sup>19</sup> Daniel A Farber, "Legal Pragmatism and the Constitution", *Minnesota Law Review*, Vol. 72 (1987): p. 1343

<sup>20</sup> Sullivan and Solove, op. cit., p. 694

<sup>21</sup> Fish, op. cit., p. 402

<sup>22</sup> Fish, op. cit., p. 401

for its own sake.

Dworkin's central objection to pragmatism is that as a theory of law 'it stands alone in denying that judicial decisions have any obligation to maintain continuity with the past.'<sup>23</sup> Pragmatism therefore is deemed disrespectful of the past in general, and precedent in particular.<sup>24</sup> Dworkin's reasons for respecting the past will be discussed in detail, but generally he places a high value upon precedent, and respect towards past legislation. Dworkin therefore understands pragmatism to be a 'rogue' and 'activist' jurisprudence which gives judges a free hand to make, rather than interpret law.<sup>25</sup> In its most 'virulent' form, pragmatism for Dworkin becomes judicial activism. Activism involves a judge simply ignoring all prior legal, historical and cultural decisions in order to impose his own view of what justice demands.<sup>26</sup> The decision in the L'Aquila trial *could* be conceptualised in this way, where the verdict was certainly seen by the scientific and international communities to have ignored all such prior decisions, and was accused of setting a new and 'dangerous precedent'.<sup>27</sup> However it is important to note here that though the objections to the decision can be applied for the same reasons as Dworkin objects to pragmatism, this does not deem the decision as one which a pragmatist would endorse. To examine these objections of Dworkin, it is useful to understand that they come in the form of a descriptive, and a normative claim about the pragmatist position on the past. His descriptive criticism claims that the pragmatist judge is guided by making 'whatever decisions seem to them, best for the community's future', regardless of 'any form of consistency with the past as valuable for its own sake'.<sup>28</sup> And his normative claim asserts that 'judges *should* maintain continuity with the past'.<sup>29</sup> With these objections in mind I will begin my analysis with examining *why* Dworkin argues that the past is valuable.

In determining Dworkin's *reasons for valuing the past* it is required that I address his normative claim: that judges *should* maintain continuity with the past, at least in some cases.<sup>30</sup> Dworkin's most convincing argument for the value of the past lies within its importance for the community,<sup>31</sup> and this seems especially relevant in reference to the L'Aquila case. Dworkin argues that we should strive for law which is both legitimate, and morally authoritative for the *community*. In order to achieve this we must regard the law as the 'expression of a single, coherent set of principles.'<sup>32</sup> In the case of L'Aquila there seems to be a definitive lack of coherence, and the 'unclear'<sup>33</sup> nature of the verdict appears to serve conflicting principles and

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<sup>23</sup> Smith, op. cit., p. 414

<sup>24</sup> Sullivan and Solove, op. cit., p. 694

<sup>25</sup> Robert Westmoreland, "Dworkin and Legal Pragmatism", *Oxford Journal of Legal Studies*, Vol, 11. No. 2 (1991): p. 174

<sup>26</sup> Farber, op. cit., p. 1433

<sup>27</sup> Richard Walters: Oxford University Department of Earth Sciences. Quoted by Josephine McKenna, Rome, and Nick Collins in "L'Aquila earthquake scientists sentenced to six years in jail", *The Telegraph*, 22/10/2012. Accessed on 02/12/2012 at: <http://www.telegraph.co.uk/news/worldnews/europe/italy/9626075/LAquila-earthquake-scientists-sentenced-to-six-years-in-jail.html>

<sup>28</sup> Smith, op. cit., p. 412

<sup>29</sup> *Ibid*, p. 412

<sup>30</sup> *Ibid*, p. 412

<sup>31</sup> Smith, op. cit., p. 418

<sup>32</sup> *Ibid*, p. 418

<sup>33</sup> Nosengo, op. cit.

interests within the community. Where the use of past decisions is often valuable for building continuity, in this case a departure from precedent has severed this, and the legitimacy of the law has also been undermined. Therefore no 'community of principle' has been achieved, and the authority of the law has certainly suffered. In trying to balance the interests of the scientists charged, and the families of the victims, it seems as if *maintaining* precedent within the verdict would have been better for achieving a community of principle than making such a significant departure from it. There has been a damaging of the moral authority of law, and the decision does seem somewhat 'unprincipled'; it is therefore suggested that the value of the past should have been more carefully considered in this case. Therefore Dworkin's normative claim that judges 'should maintain continuity with the past', is, at least in some cases, valid. However though it can clearly be shown *why* Dworkin values the past, what this does not do is validate the claim that the past is useful for its own sake. '*In some cases*' is critical here, where in the L'Aquila case it can be identified that consistency with the past in the decision of the verdict would have been preferable, however this should not lead to the conclusion that this is applicable to all cases. Dworkin should not be seen as correct in saying that we have an obligation to maintain continuity with the past simply because a decision not based on precedent has had a negative impact. The analysis will now turn to the weaknesses in Dworkin's argument, which lie particularly within his descriptive claim.

Dworkin's descriptive claim of legal pragmatism is that 'pragmatism as a theory of law holds that legal officials, in particular judges, do and should make whatever decisions seem to them best for the community's future, not counting any form of consistency with the past as valuable *'for its own sake'*.<sup>34</sup> This is where we can begin to see that the pragmatists actually share Dworkin's *normative* position, but it is his descriptive claim which they find problematic.<sup>35</sup> The pragmatist agrees that judges *should* maintain continuity with the past *in some cases*. Indeed sometimes the pragmatist cannot help it, and additionally the past can be instrumentally useful for promoting good in the future.<sup>36</sup> However critically neither of these uses of the past by the pragmatist deem it useful for *'its own sake,'* and therefore this is where Dworkin's claim is problematic. Farber argues that the pragmatist philosophers were in fact keenly sensitive to the importance of tradition as a value in reasoning.<sup>37</sup> This will be discussed in detail with an exploration of the pragmatist position, however what is critical is that the pragmatist does not always favor continuity with the past, especially when such continuity is avoidable and serves no present or future interest.<sup>38</sup> This position for Dworkin suggests a deep interpretative failure of the pragmatists, where he believes that judges are responsible to both justice, and legal history.<sup>39</sup> He argues that law *is* interpretative, and uses his 'chain novel' analogy to illustrate this.<sup>40</sup> The chain novel analogy likens a judge to a writer involved in novel in which each successive chapter has a different author. Each author must write her chapter as well as she can, but the novel requires that new decisions fit in with the earlier ones,<sup>41</sup> and therefore she must be respectful of what previous authors have written in previous chapters and must

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<sup>34</sup> Smith, op. cit., p. 412

<sup>35</sup> *Ibid*, p. 412

<sup>36</sup> *Ibid*, p. 412

<sup>37</sup> Farber, op. cit., p. 1344

<sup>38</sup> Smith, op. cit., p. 413

<sup>39</sup> Westmoreland, op. cit., p. 177

<sup>40</sup> Posner, op. cit., p. 11

<sup>41</sup> *Ibid*, p. 11

*maintain continuity* in plot and characterization.<sup>42</sup> However his chain novel analogy is heavily criticised and seems to fail for two reasons.<sup>43</sup> Firstly the very relevance of the chain novel analogy is dubious, whereby there is an assumption that because ‘unity’ is a critical criterion in novel writing, this evaluative criterion can be transferred to law.<sup>44</sup> This assumption is flawed however where no reason is provided to support that this kind of unity would be desirable in law.<sup>45</sup> Secondly Smith notes that if the analogy is intended to argue that judges should maintain continuity with the past ‘for its own sake,’ then the argument fails.<sup>46</sup> Even within the analogy it is not shown that there is any *real obligation* for the author to respect the past for its own sake. Continuity with previous chapters is presumably only desirable to promote future good, and therefore *if continuity ceases to serve that future good, then the value of continuity will disappear*.<sup>47</sup> This runs parallel to the argument of the pragmatists, who use exactly this instrumentally orientated argument in relation to the law.

Therefore Dworkin fails to provide us with a valid reason for respecting the past as valuable for its own sake. This forms the beginning of my argument regarding the L’Aquila case, where the decision best for the *community’s* future in this case would arguably have had made better use of past decisions and maintained continuity with the precedent. The ideas of Dworkin have been useful here in understanding that the damaging of the authority of law and the loss of a ‘community of principle’ could have been avoided by a more careful consideration of the value of precedent. This recognises the value of the past, but is not to say that Dworkin is correct in maintaining that the past is valuable ‘for its own sake’. Therefore my argument is not aligned with Dworkin where neither in this, or any other case should the judge be obligated to the past for this reason. This links directly to what Holmes proposed in his ‘Path of Law’ (1897),<sup>48</sup> and I will now turn to the pragmatist argument which provides a better, more convincing and more flexible explanation for the value of the past.

### **Holmes’ Pragmatic Position on the Value of Using Past Decisions in Adjudication**

Oliver Wendell Holmes is described as the figure standing as the ‘pragmatic interlocutor for law’;<sup>49</sup> his ‘Path of Law’ (1897) ‘scorched the field’<sup>50</sup> with criticism of Classical Legal Theory (CLT), indicating disdain for its appeal to formal abstract concepts and its reasoning by logical deduction.<sup>51</sup> Holmes’ association with pragmatism stems from his friendships with Charles Sanders Peirce and William James, and from his admiration for John Dewey; he is often counted by intellectual historians as an adherent founder of the movement.<sup>52</sup> Holmes’ central

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<sup>42</sup> Smith, op. cit., p. 417

<sup>43</sup> *Ibid*, p. 417

<sup>44</sup> *Ibid*, p. 417

<sup>45</sup> *Ibid*, p. 417

<sup>46</sup> *Ibid*, p. 417

<sup>47</sup> *Ibid*, p. 417

<sup>48</sup> Justin Desautels-Stein, “At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis,” *bePress Legal Series* 565, Paper. 1988 (2007): p. 16. Accessed 15/10/2012 at: [http://works.bepress.com/justin\\_desautels\\_stein/1/](http://works.bepress.com/justin_desautels_stein/1/)

<sup>49</sup> Desautels-Stein, op. cit., p. 16

<sup>50</sup> *Ibid*, p. 16

<sup>51</sup> *Ibid*, p. 16

<sup>52</sup> Grey, op. cit., p. 788

objection to CLT was the characterisation of the law as a body of formal concepts, where he understood the law to be an evolving *experience*.<sup>53</sup> This is well summarised by his thesis that 'the life of the law has not been logic, but experience'.<sup>54</sup> Holmes had simultaneously a great respect for the 'embodiment of a nations' development' into law, but also the felt necessities of the time,<sup>55</sup> where 'continuity with the past is only a necessity and *not* a *duty*'.<sup>56</sup> Therefore this provides the link with the criticisms of Dworkin, where Holmes statement suggests that continuity with the past can be necessary, but is not an obligation, or valuable for 'its own sake'.<sup>57</sup> Through an exploration into Holmes' argument it should become clear how he would have viewed the L'Aquila decision. This will involve looking at the complexities for why the pragmatists do value the past, but also at their argument that there are often valid reasons for making a departure from it. In order to fully understand the pragmatist position it is critical to have a constant appreciation of Holmes' synthesis of law as being both situated, and instrumental in character.<sup>58</sup> Interestingly here parallels with Dewey can be identified, who in his 'philosophy of law' he argued that the *source* of law was custom, but that its *end criterion* was the extent to which it produced desirable practical consequences.<sup>59</sup> This distinctly pragmatic concept will remain critical to the argument. It will now be discussed *why* Holmes believed the past was so important to use, but then reinforces that this still does not deem it a duty.

The value of the past for the pragmatists is heavily grounded in Holmes' argument that past decisions *should* inform our present ones in legal adjudication because of the *situated* nature of law. The function of law has developed through institutions, practices and beliefs which in turn have constructed our culture, values and language.<sup>60</sup> Without these we would have been unable to build any 'working system of practice,' which certainly could not have been constructed from the bare ground of human nature alone.<sup>61</sup> Therefore it must be considered what values these have for the present and the future. Farber notes that in some cases tradition would have been the '*essential foundation* for intellectual and social progress'; consistency with the past for Homes is 'as much a necessity as a virtue'.<sup>62</sup> Therefore certainly in some cases the pragmatist would endorse past decisions being used in adjudication, especially when these values are still relevant. However what *is* critical for the argument is that there comes a point at which some of these customary beliefs and practices cease to have *intelligent* value within inquiry, and are merely 'survivals from more primitive times'.<sup>63</sup> Therefore despite in some, and often many cases being highly valuable in adjudication, our beliefs and practices should certainly not be immunized from scrutiny and revision.<sup>64</sup> This links to the classical pragmatists in the idea that we should strive to make our inquiry more

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<sup>53</sup> Desautels-Stein, op. cit., p. 16

<sup>54</sup> Farber, op. cit., p. 1377

<sup>55</sup> *Ibid*, p. 1377

<sup>56</sup> Smith, op. cit., p. 414

<sup>57</sup> *Ibid*, p. 414

<sup>58</sup> Grey, op. cit., p. 806

<sup>59</sup> *Ibid*, p. 806

<sup>60</sup> Grey, op. cit., p. 807

<sup>61</sup> *Ibid*, p. 807

<sup>62</sup> Farber, op. cit., p. 1345

<sup>63</sup> Grey, op. cit., p. 807

<sup>64</sup> *Ibid*, p. 807

intelligent. What is critical here is that within a legal framework this concept of intelligent inquiry must be a long term objective. In the short term an abrupt departure from precedent can lead to negative consequences, which would be contradictory to the best future consequences that pragmatism seeks to achieve. Here this short run, long run framework can be used to examine the L'Aquila case. It is plausible to suggest that the decision of convicting the Italian scientists may have been made with the aim to set a precedent of better informed communication in the future, by making scientists accountable for more than purely hazard assessment. The potential long term 'consequence' here could be seen as simply saving more lives in the future. However, this increased accountability of the scientific advisor was not one which was rooted in the *values of the past*, or even present institutions, practices and beliefs in Italy. Therefore it appears unfair to rule them as guilty of accountability by a value which current habits do not display. Though in the *long run* the judiciary may have 'every reason' to make our desires of the role of the scientific advisor 'more intelligent', in the short term this was an inappropriate decision from a pragmatic viewpoint, where its results were largely negative. In this case the past is not valued 'for its own sake', but because law is situated, and in this case the situated nature of the past is useful for instrumental purposes. In other cases though it must be considered that legal pragmatism may indeed depart from the past exactly for such instrumental purposes. Remembering that continuity with the past is 'no categorical imperative',<sup>65</sup> the pragmatist will maintain that if it can be sufficiently validated, a departure from past decisions can lead to beneficial reform in the future.

It has been established then that the Holmesian position does not 'neglect' the past as the pragmatist is often accused of doing. However it has also been expressed that the pragmatist also often places a high value on making a **departure** from precedent in legal adjudication. It is important for the argument to explore how such a departure can be validated, and will consider moral and ethical aspects to abandoning the past, and more importantly the critical concept of instrumentalism. Firstly regarding the moral aspect of the argument we can look back to accusations towards pragmatism, where Dworkin insists that judges have a 'duty' to secure consistency with the past.<sup>66</sup> Richard Posner, contemporary thinker and 'steward of pragmatism' in the law,<sup>67</sup> objects to this by arguing that securing consistency with the past should not be seen as any moral or 'ethical duty.'<sup>68</sup> Rather, legal pragmatism is forward looking, and if there are good reasons to break with the past for instrumental reasons in the present or the future then the judge *should not hesitate to do so*.<sup>69</sup> The decision making process is guided by the choice that will produce the best results,<sup>70</sup> and therefore it would be counterproductive to maintain consistency with the precedent if this were to impact negatively on these results. Therefore like Holmes, Posner recognises that the relation between the past, and the present and the future may be a very important one, however there is no moral reason for there to be a felt duty of continuity.<sup>71</sup> What is critical is that in order to validate his departure from the precedent, the pragmatist does not look to 'transcendental' sources of

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<sup>65</sup> Grey, op. cit., p. 807

<sup>66</sup> Richard Posner, "Pragmatic Adjudication", in *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture*, Ed. Morris Dickstein (London: Duke University Press, 1998): p. 237

<sup>67</sup> Sullivan and Solove, op. cit., p. 688

<sup>68</sup> Sullivan and Solove, op. cit., p. 694

<sup>69</sup> Posner, op. cit., in *Overcoming Law* p. 11

<sup>70</sup> Posner, op. cit., in *The Revival of Pragmatism* p. 241

<sup>71</sup> Posner, op. cit., in *The Revival of Pragmatism* p. 247



moral principle, he does not have confidence in such a form of secure foundation.<sup>72</sup> In 'Overcoming Law'<sup>73</sup> Posner emphasises that *all* a pragmatic jurisprudence really connotes is a rejection of such permanent principles.<sup>74</sup> Though there might be pragmatic reasons for judges to consider themselves morally bound to follow precedent,<sup>75</sup> pragmatism is ultimately value neutral.<sup>76</sup> This goes back to James who argues that 'pragmatism stands for no particular results and has no dogmas.'<sup>77</sup> Therefore in the case of L'Aquila though I would argue that Posner would have been most likely to in fact maintain continuity with the precedent, this would not have been for any moral reason. It would have been due to the fact that continuity in this case is a social value.<sup>78</sup> The pragmatist judge would have realised that in this case the departure from the precedent was too abrupt, and this actually had bad social results on balance.<sup>79</sup> Posner identifies this as a 'tradeoff' between substantive justice, and the maintenance of the certainty and predictability of the law.<sup>80</sup> In the case of L'Aquila the predictability of the law has certainly been compromised; defense lawyer Marcello Melandri is insightful in his analogy that 'this trial is like an earthquake, nothing about it is predictable.'<sup>81</sup> Thus the judiciary in L'Aquila should have seen that precedent was a source of potentially valuable information about the *best result*, and by obliterating this it has alienated people that depend on it.<sup>82</sup> Therefore use of past decisions should not be made in adjudication for moral reasons, unless it will benefit the future. Even then this would be for instrumental, and not moral reasons and therefore these motives for a validation of a departure should not be confused.

This is intrinsically linked to instrumentalism, where the argument will seek to maintain that continuity with the past is only really useful, when it is *instrumentally* valuable. Posner argues that the pragmatist judge will only be concerned with securing consistency with the past *if* this aids the production of better future results,<sup>83</sup> and instrumentalism therefore is beginning to emerge as the condition under which the past is valuable. Holmes argued that historical inquiry should aim towards reform,<sup>84</sup> and that the main point of historical research, and therefore the value of the past should be to facilitate the instrumental value of law for the future. Holmes gives the example that if there is no better reason to follow a rule than for the fact that it was 'laid down in the time of Henry VI,<sup>85</sup> then this is not sufficient, and law should be established

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<sup>72</sup> Posner, op. cit., in *The Revival of Pragmatism* p. 243

<sup>73</sup> Posner, op. cit., in *Overcoming Law* p. 12

<sup>74</sup> Sullivan and Solove, op. cit., p. 689

<sup>75</sup> Posner, op. cit., in *Overcoming Law* p. 12

<sup>76</sup> Sullivan and Solove, op. cit., p. 696

<sup>77</sup> *Ibid*, p. 696

<sup>78</sup> Sullivan and Solove, op. cit., p. 694

<sup>79</sup> Posner, op. cit., in *The Revival of Pragmatism* p. 238

<sup>80</sup> *Ibid*, p. 238

<sup>81</sup> Marcello Melandri in a statement given to BBC Newsnight, Full Video Report, *BBC Online*, 16/09/2011. Accessed at: <http://news.bbc.co.uk/1/hi/programmes/newsnight/9593123.stm> on 03/12/2012

<sup>82</sup> Posner, op. cit., in *The Revival of Pragmatism* p. 238

<sup>83</sup> Posner, op. cit., in *The Revival of Pragmatism* p. 237

<sup>84</sup> Grey, op. cit., p. 807

<sup>85</sup> Desautels-Stein, op. cit., p. 16

upon accurately measured social desires, rather than simply tradition.<sup>86</sup> Therefore in some cases if social desires tend towards something which departs from tradition, the changing desires and needs of the community take precedent over tradition.<sup>87</sup> The pragmatist will thus only expect the judge to maintain continuity with the past if, and only if it has instrumental value. Law is treated as a functional instrument meant to meet present and future human needs.<sup>88</sup> However critically the pragmatist judge would only make such a departure when the decision was certainly one which tended towards 'accurately measured'<sup>89</sup> social desires, not in a situation when this was unsure. It seems likely that Holmes would have been incredibly reluctant to make a decision similar to that of the L'Aquila verdict. Where in the case of L'Aquila there was *little clear idea* of what the best decision would have been for the community. Holmes would have seen that an overruling of past decisions in this case would have only had the effect of sacrificing certainty and stability.<sup>90</sup> This does seem to be exactly what has happened, and can be reflected by the resignation of the chairman of Italy's serious risks commission.<sup>91</sup> Holmes would have opposed the conjectured decision of L'Aquila, for the very reason that from the beginning it was unclear whether this would have been the best decision for the future.

At this point it is crucial to bring the argument full circle and emphasise that even if legal adjudication takes a departure from precedent, the law does not cease to be situated. *Continuity* with the past in legal adjudication is only valuable if it has an instrumental purpose, but because of the situated nature of law the past is still valuable, even if we depart from it. It must be recognised that even if our decisions depart from past decisions, they are not 'ahistorical,' they have emerged from experience, not some a priori source.<sup>92</sup> Therefore even by going against precedent, if this is done through inquiry which deems some past decision as insufficient to meet present and future need, this indicates that law is *still* situated by virtue of that inquiry. Therefore we cannot simply 'wipe the slate clean' to permit the creation of a new order.<sup>93</sup> We can however use historical inquiry to justify our setting of a new precedent which tends to social desires and communal needs. In the case of L'Aquila historical inquiry does not seem to have been conducted sufficiently, and the law fails to be situated where we are unable to trace why the decision has been made. Therefore the sentencing of those charged does not represent a pragmatic decision. Holmes would have urged the judiciary in this case to have considered more closely the historical roots of the end which they sought to achieve, and also realised that the verdict did not reflect the general social desire either. This synthesis of the situated and instrumental aspects of law is what I believe provides the most convincing support for the pragmatist position, where even when a departure from precedent is made, though it can be easily overlooked, the past is still critically valuable for the pragmatist.

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<sup>86</sup> Grey, op. cit., p. 811

<sup>87</sup> *Ibid*, p. 811

<sup>88</sup> *Ibid*, p. 811

<sup>89</sup> *Ibid*, p. 811

<sup>90</sup> Posner, op. cit., in *The Revival of Pragmatism* p. 241

<sup>91</sup> BBC News. "Italy disaster head Luciano Maiani resigns over L'Aquila", *BBC News*, 23/10/2012. Accessed at: on 03/12/2012 at: <http://www.bbc.co.uk/news/world-europe-20039769>

<sup>92</sup> Sullivan and Solove, op. cit., p. 705

<sup>93</sup> *Ibid*, p. 705

## Reflections on the L'Aquila Trial Verdict and Final Conclusions

The framework of the L'Aquila earthquake trial has provided us with a way of understanding the important differences in how Dworkin, and Holmes value the past. I have argued that the verdict of the trial would have been criticised from the perspectives of both Dworkin and Holmes, but it is at this point that their reasons diverge. Dworkin would criticise the decision simply upon the basis that it was not consistent with the precedent. However Dworkin's argument that continuity with the past is valuable for its own sake is not sufficient to justify a criticism of the verdict, as good reasons have been identified for why we can, and should depart from it in some cases. It is my understanding that Holmes would have criticised the decision, as Dworkin would, for not maintaining consistency with the past. Though Holmes notes that a judge has no obligation or duty to the past, he also outlines extremely convincing reasons for *why the past can be so important*. An exploration into the L'Aquila case study has revealed it to be a representation of the dangers that can be associated with making an acute departure from precedent. I have therefore argued that the L'Aquila case represents a condition in which past decisions should have been used more carefully in adjudication. The conviction of those charged in association with the L'Aquila earthquake has achieved significantly negative consequences, where the predictability of the law has been undermined, and uncertainty has been created within the scientific community. It seems that there would have been great instrumental value in making use of past decisions in the L'Aquila verdict, as these consequences could then potentially have been avoided. Thus on many occasions the pragmatist will indeed adhere to the precedent and make use of past decisions in adjudication in order to avoid such consequences.

The pragmatic position is not therefore insensitive to the past, as it is so often accused of being. On the contrary, even the forward looking *instrumentalism* central to the pragmatic position is still heavily facilitated by the past due to the fundamentally *situated* nature of law. The pragmatist finds enormous value in the past, but crucially, will only maintain *continuity* with it in conditions when this will have instrumental value. Arguments have been given to sufficiently justify the assertion that the past is not useful 'in itself'. Ultimately, when it can be validated, a departure from precedent which tends towards accurately measured social desires can be imperative for meeting future human need.<sup>94</sup> I believe that this illustrates the innovative appeal of pragmatism, where in the spirit of inquiry it will seek to use law as a functional tool towards social reform. Thus in some cases a departure from the past can, and should be made in order to progress with socially desirable ends.

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