PRAGMATISM, PLURALISM AND LEGAL INTERPRETATION: POSNER'S AND RORTY'S JUSTICE WITHOUT METAPHYSICS MEETS HATE SPEECH

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INTRODUCTION

Not surprisingly, legal interpretation is in a crisis in pluralist societies with widely diverging conceptions of the good.[1] When there is sharp disagreement over fundamental values, there seems to be a complete lack of objective criteria to interpret legal texts, and particularly broadly articulated wide ranging textual provisions such as those characteristic of constitutions.[2] Accordingly, interpretation looms as hopelessly subjective, and the interpretive subject as indispensable but utterly problematic.[3] In a homogeneous society with widely shared religious, ethical, and political values, legal interpretations will count as just if they manage to reconcile

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1 In the United States, the crisis affecting legal interpretation extends both to private and public law, and has often bitterly divided the Supreme Court. *See* Michel Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism*, *in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 152 (Drucilla Cornell et al. eds., 1992) [hereinafter Rosenfeld, *Deconstruction and Legal Interpretation*].

2 This is illustrated by the United States Supreme Court's jurisprudence on the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. *Compare* Lochner v. New York, 198 U.S. 45 (1905) (holding that the Due Process Clause prohibits economic regulation of employer/employee relationship) *with* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (finding that the Due Process Clause permits such regulation); *and* Plessy v. Ferguson, 163 U.S. 537 (1896) (holding racial apartheid permissible under the Equal Protection Clause) *with* Brown v. Board of Educ., 347 U.S. 483 (1954) (concluding that racial apartheid violates the Equal Protection Clause).

3 The interpretive subject ultimately determines which particular interpretation to give a legal text, and may refer to an individual judge or a collective ideology. What is crucial for our purposes, is that in an ideologically divided polity, the interpretive subject will always seem biased, and therefore merely subjective to at least some of those affected by legal interpretations. A vivid example of profound divisions regarding the interpretive subject is provided by the bitter controversy surrounding Judge Robert Bork's nomination to the United States Supreme Court. *See* Symposium, *The Bork Nomination*, 9 CARDOZO L. REV. 1 (1987).

justice according to law with justice beyond law.[4] In a deeply divided heterogeneous society, however, seemingly irresoluble disagreements regarding justice beyond law make virtually any proposed alignment between justice according to law and justice beyond law unacceptable to a significant portion of the citizenry. Consequently, in divided polities, the search for just interpretations tends to yield just interpretation.

Pragmatism is particularly attractive in a pluralist society inasmuch as it promises to circumvent the thorny path to a just legal interpretation. Indeed, by cutting through the dichotomy between subject and object, and by rejecting the need for foundations, pragmatism is supposed to eliminate the problematization of the interpretive subject. Characterized chiefly by its orientation towards the future, its adaptability, its fluidity, and its "down to earth" quality, pragmatism purports to offer practical solutions to concrete problems. Moreover, by confining legal interpretation to the concrete and by orienting it towards practical consequences, pragmatism raises the possibility of settling questions of justice according to law without necessity to appeal to justice beyond law, or to take sides in the contest among competing conceptions of the good.

Notwithstanding its great promise, pragmatism, in large measure owing to its great success, has meant so many different things to such a large number of people as to raise as many questions as it answers. It is not clear, for instance, whether it is more accurate to speak of pragmatism or pragmatisms; whether there is any link between pragmatism in philosophy and in law; or whether pragmatism can make a palpable, concrete contribution to the solution of the crisis in legal interpretation. With this in mind, Part I of this Article examines whether it is more accurate to speak of pragmatism or of pragmatisms. Part II deals with the relationship between pragmatism in philosophy and pragmatism in law. Parts III and IV address the question of whether one can extract a common core of useful standards relevant to legal interpretation from very different versions of pragmatism by considering, respectively, the traditional scientific pragmatism of Richard Posner and the neopragmatism of

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[4] For instance,

> [j]ustice according to law is achieved when each person is treated in conformity with his or her legal entitlement. Justice [beyond] law, on the one hand, is the justice that makes it plausible to claim that a law is unjust (even if it is scrupulously applied in strict compliance with the entitlements which the law establishes).

Michel Rosenfeld, *Autopoiesis and Justice*, 13 CARDOZO L. REV. 1681, 1681 (1992) (footnote omitted).

Richard Rorty. Based on adoption of the hypothesis that one can extract a common core from different versions of pragmatism, Part V puts Posner's and Rorty's pragmatism to the test, and considers whether pragmatism affords a satisfactory practical solution to the difficult and highly divisive interpretive conflicts raised by hate speech. Finally, Part VI provides certain concluding remarks stressing the limits of pragmatism and the dangers inherent in its misuse for purposes of settling or circumventing interpretive conflicts.

I. PRAGMATISM OR PRAGMATISMS?

Pragmatism, which originated in the United States, and which counts the nineteenth-century American philosopher Charles Sanders Peirce as its first major proponent,[5] has been the dominant philosophy in the United States ever since.[6] Pragmatism has also made important inroads in Europe, where it has influenced many philosophers, most notably Jürgen Habermas.[7] Moreover, by giving pragmatism a "linguistic turn,"[8] America's most celebrated neopragmatist, Richard Rorty, has instigated a further *rapprochement* between American pragmatism and contemporary European theory, to wit, poststructuralism and deconstruction.[9]

At this point, pragmatism radiates so far over the philosophical and legal landscape as to risk becoming devoid of any determinate meaning. Indeed, if in philosophy pragmatism regroups such diverse figures as Peirce, William James, John Dewey, and Richard Rorty, in contemporary American legal theory it arguably encom-

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5 *See* Richard A. Posner, *What Has Pragmatism to Offer Law?*, *in* PRAGMATISM IN LAW AND SOCIETY 29, 30 (Michael Brint & William Weaver eds., 1991) [hereinafter Posner, *What Has Pragmatism to Offer Law?*]. Posner points out that Peirce maintained that he got the idea of pragmatism from a lawyer friend. *Id.*

6 *See* JOHN P. DIGGINS, THE PROMISE OF PRAGMATISM: MODERNISM AND THE CRISIS OF KNOWLEDGE AND AUTHORITY 3 (1994) [hereinafter DIGGINS, THE PROMISE OF PRAGMATISM].

7 For Habermas's discussion of Peirce and pragmatism, see JÜRGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 90-139 (Jeremy J. Shapiro trans., 1971) (1968). *See also* THOMAS MCCARTHY, THE CRITICAL THEORY OF JÜRGEN HABERMAS 293, 299 (1978) (discussing affinities between Habermas and Peirce); DIGGINS, THE PROMISE OF PRAGMATISM, *supra* note 6, at 476 (referring to Habermas as a "neopragmatist").

8 *See* Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, *in* PRAGMATISM IN LAW AND SOCIETY 89, 91 (Michael Brint & William Weaver eds., 1991) [hereinafter Rorty, *The Banality of Pragmatism and the Poetry of Justice*] ("[W]e new pragmatists talk about language instead of experience or mind or consciousness, as the old pragmatists did.").

9 *See* DIGGINS, THE PROMISE OF PRAGMATISM, *supra* note 6, at 3.

passes everyone but the most rigid of formalists.[10] Consistent with this overly broad sweep, pragmatism would appear to embrace any practical, result-oriented approach, as opposed to any systemic approach rooted in fundamental principles. In the words of Cornel West, the "common denominator" of pragmatism amounts to "a future-oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action."[11]

By shifting the focus from foundations to results, pragmatism invites all members of a pluralist society to turn away from their disputes concerning conceptions of the good in order to join in the common pursuit of practical results. Thus, under pragmatism, justice according to law would depend neither on particular conceptions of the good, nor on finding an Archimedean point between these conceptions, nor on systematically severing law from other normative or social endeavors. Instead, justice according to law would be measured by its practical consequences, by the actual results to which it leads.

So far, so good. However, a nagging question emerges. Assuming that different laws (or different interpretations of the same law) would lead to different practical consequences, can recourse to pragmatism determine which of the available alternatives ought to be pursued? In short, is pragmatism self-sufficient or is it merely *parasitic* on certain contestable conceptions of the good?

This last question is crucial for our purposes. This is so because if pragmatism turns out to be merely parasitic on contestable conceptions of the good, its attractiveness would be very limited. Under those circumstances, pragmatism could help us avoid normative disputes when no demonstrable practical consequences are at stake, but otherwise could do little to overcome clashes between conceptions of the good. To illustrate this point, let us suppose that a society is equally divided among those who maintain that wealth-maximization is the *summum bonum* and those who assert that society ought to pursue social solidarity above all. Let us further suppose that a judge in that society is confronted with the task of interpreting a broad, generally phrased constitutional equality provision, and that he or she knows that one plausible interpretation will actually foster wealth-maximization to the detriment of social

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10 *See* Rorty, *The Banality of Pragmatism and the Poetry of Justice*, *supra* note 8, at 89-91 (according to Rorty; Judge Richard Posner, the neoconservative leader of the "Law and Economics" school; Ronald Dworkin; and Roberto Unger, one of the leading figures in the Critical Legal Studies Movement; can all be considered to be pragmatists).

11 CORNEL WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM 5 (1989).

solidarity, while another plausible interpretation would undoubtedly lead to the opposite result. In that case, there is no question that both of the plausible interpretations would lead to palpable, empirically verifiable effects, but pragmatism would appear to offer no help to a judge having to choose between the two alternatives. Accordingly, the judge would have to fall back on contested values in order to justify either of the two available alternatives.

It is *conceivable*, though highly unlikely, that pragmatism, if properly and consistently followed, could rise above dependence on contestable conceptions of the good. What makes this particularly unlikely is the wide span of political ideologies embraced by various proponents of pragmatism, and the great divergence between old pragmatist and new pragmatist conceptions of "what works." For old pragmatists, like Peirce and Dewey, "what works" was understood in terms of scientifically grounded experience.[12] For neopragmatists like Rorty, on the other hand, "what works" is conceived in terms of a "linguistic redescription" susceptible of gaining widespread acceptance primarily on account of its aesthetic appeal.[13]

A pragmatism completely freed from the grip of contestable conceptions of the good, then, is highly unrealistic. A pragmatism entirely parasitic on such conceptions is largely uninteresting. The possibility of a pragmatism that falls between these two extremes, however, is worth investigating, and will provide the principal focus of the remainder of this Article. Such pragmatism may be termed "intermediate pragmatism" to distinguish it from a "comprehensive pragmatism" that would do away with the need to rely on contestable conceptions of the good, and from a "mere pragmatism" that is but a parasite. Unlike mere pragmatism—which amounts to a pragmatism of means—and comprehensive pragmatism—which is a pragmatism of means and ends—intermediate pragmatism purports to be a pragmatism of means and *some* ends (or at the very least, a special pragmatism of means allowing for a different perspective on ends).

The possibility of intermediate pragmatism is worth exploring in relation to concerns regarding just interpretations in a pluralistic society. Indeed, such concerns presuppose commitment to certain

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12 *See, e.g.*, CHARLES S. PEIRCE, *The Fixation of Belief*, *in* THE PHILOSOPHY OF PEIRCE: SELECTED WRITINGS 5 (Justus Buchler ed., 1956); JOHN DEWEY, LOGIC: THE THEORY OF INQUIRY 345 (1938); DIGGINS, THE PROMISE OF PRAGMATISM, *supra* note 6, at 235.

13 *See* RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 7-22 (1989) [hereinafter RORTY, CONTINGENCY, IRONY AND SOLIDARITY].

ends, most notably the promotion of social cooperation and peaceful co-existence without doing away with diversity predicated on the legitimate pursuit of competing conceptions of the good. Assuming that the latter end is not itself a product of pragmatism,[14] then intermediate pragmatism may well furnish the practical means to realize the desired end so long as it does not mandate the achievement of any inconsistent ends.[15]

The search for intermediate pragmatism is complicated by the fact that pragmatists have tended to treat the relationship between means and ends with a remarkable lack of concern.[16] One critic has even suggested that the very success of pragmatism in the United States can be explained in terms of a pervasive uncritical acceptance of a Lockean conception of ends.[17] In light of this, and in order to sharpen the contrast between means and ends, I shall explore the possibility of intermediate pragmatism on the basis of a comparison between two very different versions of pragmatism, namely Richard Posner's brand of old pragmatism and Richard Rorty's neopragmatism. Moreover, what makes a comparison between Posner, who is on the right of the American political spectrum, and Rorty, who is on its left, particularly apt for our purposes is that they both agree that pragmatism justifies extensive freedom of expression rights.[18] Actually, Posner goes so far as to assert that the scope of protection of free speech is one—and perhaps the only—legal question to which pragmatism is "directly applicable."[19]

Given the universal embrace of freedom of speech in contemporary democracies, one may object that its derivation from prag-

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[14] If it were, then we would be dealing with comprehensive pragmatism. But that would simplify rather than complicate the task, for the problem would then be reduced to the selection of adequate means. Accordingly, if intermediate pragmatism can do away with the need to pursue the quest for just interpretations, *a fortiori* so can comprehensive pragmatism.

[15] Of course, if such intermediate pragmatism turned out to be completely indifferent as between all ends, it would collapse into mere pragmatism and would prove useless inasmuch as it would be *equally* compatible with pluralistic diversity and with its destruction.

[16] Thus, for instance, "Dewey saw no troubling dualism between means and ends because he regarded ends as given." DIGGINS, THE PROMISE OF PRAGMATISM, *supra* note 6, at 242.

[17] *See* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION 10 (1955).

[18] *See* Posner, *What Has Pragmatism to Offer Law?*, *supra* note 5, at 36-37; RORTY, CONTINGENCY, IRONY AND SOLIDARITY, *supra* note 13, at 60; RICHARD RORTY, CONSEQUENCES OF PRAGMATISM 69-70 (1982) [hereinafter RORTY, CONSEQUENCES OF PRAGMATISM].

[19] *See* Posner, *What Has Pragmatism to Offer Law?*, *supra* note 5, at 36.

matism and the agreement between Posner and Rorty may ultimately be merely trivial. Therefore, to avoid reaching misleading conclusions, I shall test the respective pragmatisms of Posner and Rorty against the divisive issue of extremist or hate speech. Extremist speech, which gives rise to what Karl Popper has called "the *paradox of tolerance*,"[20] has been afforded protection in certain constitutional democracies like the United States, but banned in others.[21] Accordingly, pragmatism's production of a resolution to the paradox of tolerance, and an inquiry into whether both Posner and Rorty would agree to it, promises to shed light on the possibility and potential of intermediate pragmatism.

Before taking a closer look at Posner and Rorty, however, an important question must be addressed, namely: What links, if any, can be established between pragmatism in philosophy and pragmatism in law? Although law and philosophy constitute two distinct practices, they overlap in certain instances.[22] From this, however, it does not necessarily follow that there is any common ground between *pragmatism* in law and in philosophy. In other words, it is conceivable that legal pragmatism is reducible to a mere parasitic pragmatism. If that were the case, then the possibility of intermediate pragmatism in philosophy would be of no help in establishing plausible links between justice according to law and justice beyond law. With that in mind, let us now take a closer look at how pragmatism in law stacks up against pragmatism in philosophy.

II. PRAGMATISM IN LAW VERSUS PRAGMATISM IN PHILOSOPHY

Neither Rorty nor Posner sees any intimate relationship between philosophical pragmatism and legal pragmatism. Rorty states: "I agree with Posner that judges will probably not find pragmatist philosophers—either old or new—useful."[23] This is not to say, however, that Posner, Rorty, and other pragmatists see *no* relationship between pragmatism in philosophy and in law. According to them, pragmatist philosophy performs a useful task that facilitates the practice of legal pragmatism, but that task involves the removal of obstacles—or, to use Posner's metaphor, "clear[ing]

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20 *See* 1 K.R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 265 n.4 (5th ed. 1966). Popper suggests resolving the paradox by limiting tolerance to the tolerant. *Id.* at 266 n.4. For further discussion of the paradox, see *infra* notes 136-82 and accompanying text.

21 *See infra* note 165 and accompanying text.

22 *See* MICHEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY 135-40 (1991).

23 Rorty, *The Banality of Pragmatism and the Poetry of Justice*, *supra* note 8, at 92.

the underbrush"[24]—rather than building a philosophical framework affording backing to legal practice. According to this view, pragmatist philosophy's antifoundationalism has a liberating effect on law, by freeing the legal theorist from having to justify practical solutions to legal problems under any comprehensive theory. In the words of Thomas Grey, "[p]ragmatism is freedom from theory-guilt. . . ."[25]

The apparent liberation afforded to law by pragmatist philosophy may have at least three different meanings. First, it may mean that pragmatist philosophy frees law from the need to have any ties to philosophy or any other comprehensive theory. Second, it may mean that pragmatist philosophy makes it possible for law to pick and choose whatever it finds useful among all available philosophies, without regard for consistency or comprehensiveness. Or, third, it may mean that, while law need not derive something positive from pragmatist philosophy, legal pragmatism depends on pragmatic philosophy for purposes of keeping at bay any encroachments from foundationalism or comprehensive theory. In the first case, philosophical pragmatism would make the case that legal pragmatism has altogether no need and no use for philosophy. In the second case, legal pragmatism would emerge as a mere pragmatism that could be engrafted on any philosophy of one's choosing without concern for consistency or comprehensiveness. Finally, in the third case, philosophical pragmatism and legal pragmatism would have a mutual connection making it possible for them to combine together into some version of intermediate pragmatism.

All three of these cases have at least some plausibility. The plausibility of the first case stems, above all, from the sense that law is a practical endeavor that must aim for workable solutions that make a real difference in the empirical world. Accordingly, there ought to be a clear division of labor between philosophy and law. Thus, for instance, a philosophically grounded theory of justice may well justify holding a party to a contract to his or her original promise as he or she intended it and understood it at the time of entering into the relevant contract. However, with no practical way to verify what a person actually intended or understood some

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24 Posner, *What Has Pragmatism to Offer Law?*, *supra* note 5, at 44.

25 Thomas C. Grey, *What Good is Legal Pragmatism?*, *in* PRAGMATISM IN LAW AND SOCIETY 9, 10 (Michael Brint & William Weaver eds., 1991) [hereinafter Grey, *What Good is Legal Pragmatism?*].

time in the past,[26] a legal rule relying on past subjective intent to settle contractual disputes would be impractical and could well lead to more harm than good. In short, holding contract promisors to their actual subjective intent may constitute a compelling ethical norm, but an unworkable legal norm.

That law raises pragmatic questions which neither philosophy nor ethics can answer is hardly surprising. Actually, even certain comprehensive theories that are not reducible to pragmatism, such as Habermas's discourse theory, recognize the legitimacy of pragmatic justifications in law, but not in morals.[27] Indeed, there is nothing *logically* inconsistent about embracing Kantian morals and adopting a pragmatic approach when it comes to law.[28] Accordingly, the crucial question raised by the first of the three cases discussed above is not whether there is a split between philosophy and law, but whether, as a consequence of being unavoidably steeped in pragmatic considerations, law ultimately proves to be independent of philosophy.

Unless one adheres to an extremely reductive conception of law as being purely instrumental, and as having no role whatever in establishing any kind of ends, the answer to the last question must be in the negative. In any complex advanced legal system, law must determine at least some ends. Such determinations, moreover, cannot always be achieved by mere reference to law or to the political process resulting in the enactment of positive law. For example, whether a broadly articulated constitutional equality right should be construed to prohibit discrimination against homosexuals, or whether a generally phrased constitutional privacy right requires protecting a woman's right to an abortion, is unlikely to be cogently addressed without any reference to ethical norms or other broader philosophical concerns. Thus, unless pragmatism is made synonymous with preservation of the *status quo*, or unless particularly extreme circumstances are at hand, the consequences alone

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26 Even if a promisor is scrupulously honest, his or her recollection of what he or she intended months or years ago, when the contract now in dispute was entered into, may well be distorted or vague.

27 *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996) [hereinafter HABERMAS, BETWEEN FACTS AND NORMS]; Michel Rosenfeld, *Law as Discourse: Bridging the Gap Between Democracy and Rights*, 108 HARV. L. REV. 1163, 1177 (1995) (book review).

28 As a matter of fact, Kant advocates a prudent course of action in law and politics even if that results in postponing compliance with the dictates of morals. *See* IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, *in* KANT: POLITICAL WRITINGS 93, 118-19 (Hans Reiss ed. & H.B. Nisbet trans., 2d ed. 1991) (1970).

cannot supply a principled answer to the relevant question confronting the constitutional judge.[29] Indeed, protecting homosexual lifestyles is likely to have *certain* practical consequences, and refusal to do so *certain other* practical consequences. Because of this, a judge may not be able to arrive at a cogent resolution of the question of constitutional equality rights for homosexuals on the basis of a legal pragmatism that is completely severed from ethics or philosophy. More generally, the first of the three cases described above looms as unpersuasive. Adherence to legal pragmatism, therefore, does not, in the last analysis, justify a complete emancipation of justice according to law from justice beyond law.

The second of the three cases stems from an understanding of the liberating effect of pragmatist philosophy on law that, in effect, reverses the respective positions of philosophy and law. In a conventional foundationalist setting, philosophy can be viewed as preceding, and standing above, law. For example, one may embrace a Lockean theory of property and assess the legitimacy of laws in terms of their compatibility with the relevant precepts of Lockean theory.[30] In case of conflict, Lockean theory would unquestionably control, and inconsistent laws or interpretations of laws would have to be cast aside to make room for suitable substitutes. In the antifoundationalist setting carved out by pragmatist philosophy, by contrast, practical solutions to actual legal problems would become paramount and philosophical justifications would play a subsidiary role. Thus, the principal objective would be to find an acceptable and workable practical solution to an actual legal problem, and then resort to philosophy only to refute charges that the adopted solution is arbitrary or unethical. Putting law before philosophy, while linked to the pragmatist philosopher's skepticism,[31] is by no means an exercise in cynicism. Indeed, practical legal problems

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29 As an example of "extreme circumstances," one could imagine a situation in which a majority of the population is so inflamed against homosexuality that a mere extension of rights to homosexuals is almost inevitably guaranteed to result in a campaign of terror and violence against them. In that situation, it would seem plausible to argue that refusal to extend rights to homosexuals is morally wrong, but pragmatically justified to avoid dire consequences. It is important to note, however, that even in such an extreme situation, pragmatism itself does not, strictly speaking, require bowing to the *status quo* or giving in to the threat of violence. Indeed, it is by no means logically inconsistent for a pragmatist to argue that the practical consequences of a violent revolution are preferable to the practical consequences of continuing to condone an intolerable *status quo*.

30 This does not mean, of course, that to be a competent judge one would have to be a Lockean scholar. Rather, Lockean norms would be embedded in prevailing legal standards, and Lockean reasoning would permeate legal arguments.

31 *See* RICHARD A. POSNER, OVERCOMING LAW 6 (1995) [hereinafter POSNER, OVERCOMING LAW].

confronting a judge may be so particularized as to defy any neat classification in terms of any general philosophical conceptions. In a complex situation, there may be a widely shared intuition on how to reach a just result in a particular case. A systematic philosophical justification of such an intuition may seem hopelessly elusive, even as some plausible, albeit partial and incomplete, philosophical justification serves to dispel the suspicion that the result is merely arbitrary.

In certain other situations, there may be a clear link between a particular legal solution and philosophically grounded support for it, but two legal solutions widely believed to be just may lead to competing and perhaps even inconsistent philosophical justifications. For example, one can imagine that there is widespread consensus that equality in relation to medical benefits should be interpreted to mean equality based on need, whereas equality in relation to employment should be construed as being limited to formal equality of opportunity.[32] Equality according to need would be justified under an egalitarian but not a libertarian theory of justice, while formal equality of opportunity would be called for under a libertarian but not an egalitarian theory of justice.[33] In short, so long as law remains in the forefront and philosophy in the background, and as philosophical pragmatism frees those who seek to determine justice according to law from the need to be philosophically comprehensive or consistent, legal pragmatism can apparently flourish as a form of mere pragmatism. But the latter mere pragmatism—to which we may refer to as "mere legal pragmatism"—differs significantly from the mere pragmatism that was discussed above—which we may refer to, by way of contrast, as "mere philosophical pragmatism." Actually, mere legal pragmatism stands mere philosophical pragmatism on its head. Under mere philosophical pragmatism, pragmatism serves as a screen for some non-pragmatic ultimate end or justification. Under mere

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32 Formal equality of opportunity means that "X and Y have equal opportunity in regard to A so long as neither faces a legal or quasi-legal barrier to achieving A the other does not face." ROBERT K. FULLINWIDER, THE REVERSE DISCRIMINATION CONTROVERSY: A MORAL AND LOGICAL ANALYSIS 101 (1980) (footnote omitted).

33 To be sure, equality according to need in one area and formal equality in another could easily be made consistent by subsuming them under a suitable comprehensive theory of justice, such as utilitarianism. Thus, it is plausible that the greatest good of the greatest number would best be promoted by dispensing medical benefits according to need and employment positions through competition equally open to all. Nevertheless, there appears to be no inherent contradiction in adhering to egalitarianism regardless of utilities in the context of medical benefits and at the same time to libertarianism, even in the face of disutilities, in the realm of employment.

legal pragmatism, philosophy furnishes an attractive wrapping for a practical solution to a concrete problem that stubbornly refuses to be neatly subsumed under any comprehensive theory.

The mere legal pragmatism that emerges in the second case does not do away with philosophy in the way that legal pragmatism under the first case does. Nevertheless, mere legal pragmatism deflates and relativizes the role of philosophy; seemingly placing all ethical norms on an equal footing regardless of the conception(s) of the good which sustain(s) them; and thus reduces philosophy (in relation to justice according to law) to a parasitic role.

Subordinating philosophy to law may seem more appealing than altogether severing philosophy from law. But the question remains whether making philosophy parasitic on law can ultimately lead to a satisfactory solution to the problem of just interpretations. As we shall now see, the answer must be in the negative. This becomes obvious from consideration of situations in which there is sharp disagreement concerning the ends to be served by a particular law or legal interpretation.

Upon close examination, mere legal pragmatism only proves attractive when set against a background of widespread consensus on relevant values. Such consensus need not be philosophically comprehensive or consistent. For instance, there is nothing anomalous about a consensus based in part on libertarian ideas and in part on egalitarian ones. Moreover, so long as the consensus holds, there may be no awareness of prevailing philosophical inconsistencies and no need to fill existing theoretical gaps. In short, broad agreement on ends obviates the need to examine or justify them, and allows for concentration on means, to wit, on legal solutions that work.

Another possibility that has the effect of relegating philosophical issues to the background, is that a practical legal solution to a problem happens to be consistent with several otherwise inconsistent philosophical positions. For example, the legitimacy of freedom of expression can be predicated on different philosophical justifications. Thus, in the United States, free speech rights have been variously defended under a democratic self-government theory,[34] a marketplace of ideas theory,[35] and an individual self-ex-

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34 The foremost proponent of this theory was Alexander Meiklejohn. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948).

35 This theory, which will be discussed below, *see infra* note 140 and accompanying text, has its judicial origins in Justice Holmes's famous dissent in *Abrams v. United States*, 250 U.S. 616 (1919), and its philosophical origins in John Stuart Mill's *On Liberty*.

pression theory.[36] Each of these theories justify protecting political speech, although arguably only the latter two require protecting artistic expression[37] and only the self-expression theory may cogently extend protection to pornography.[38] Consistent with this, proponents of all three theories can set their differences aside when dealing with political speech. Under these circumstances, pragmatism merely counsels not to jeopardize the pursuit of legal objectives consonant with one's philosophy by engaging in unproductive theoretical debates that might as well be postponed.[39]

Whether complacence, confusion, or overlap is responsible for philosophy's low profile, it is not likely to last once background consensus dissolves in the face of a sharply divisive issue, such as abortion. Indeed, when dealing with an issue like abortion, the luxury of relegating theoretical concerns to a secondary plane quickly vanishes, conflict between proponents of different practical ends seems bound to erupt, and the advocates of each contending position are called upon to justify their preferences. Moreover, as the debate sharpens, it becomes increasingly necessary to develop a more consistent and comprehensive position to counter the attacks of adversaries bent on exploiting every possible inconsistency or weakness. Unless one concedes that selection among contending legal avenues is merely a matter of politics, one must reach back to find the best possible theoretical support for one's preference. In sum, when dealing with genuinely divisive issues susceptible of competing practical solutions, neither mere legal pragmatism nor mere philosophical pragmatism holds up. Accordingly, legal pragmatism can neither completely do away with philosophy nor consistently confine itself to a purely parasitic relationship to philosophy.

That leaves the third case in which legal and philosophical pragmatism combine to yield an intermediate pragmatism. In this

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36 According to this theory, the right to self-expression is essential in relation to individual autonomy and dignity. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1975).

37 *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (advancing a narrow view of the self-government theory that condones refusing to protect works of fiction).

38 The marketplace of ideas theory rejects protecting pornography on the grounds that it is unlikely to contribute anything to the discovery of the truth. *See* Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 616-17; Frederick Schauer, *Response: Pornography and the First Amendment*, 40 U. PITT. L. REV. 605, 608 n.14 (1979).

39 Unlike in the case of tacit consensus, in the latter case of philosophical overlap we are dealing with mere philosophical pragmatism rather than with mere legal pragmatism.

last case, pragmatic philosophy's liberation of legal pragmatism from the constraints of comprehensive theory does not mean liberation from all philosophy or freedom to pick and choose among all philosophies. It means, instead, freedom from all philosophies other than pragmatism on the condition of submitting to the constraints dictated by pragmatist philosophy. And if these constraints are often hard to discern, it is because they seem to be primarily negative ones. But we are getting ahead of our story. Before further exploring the possibility of intermediate pragmatism, we must take a closer look at the different versions of pragmatism advocated, respectively, by Posner and Rorty.

III. RICHARD POSNER'S BLEND OF SCIENTIFIC PRAGMATISM, LAW AND ECONOMICS, AND LIBERAL INDIVIDUALISM

A. *Posner and Intermediate Pragmatism*

Richard Posner's pragmatic jurisprudence emerges in the context of his distinguished career as a legal academic and judge. He is the preeminent exponent of the law and economics school, and is one of the leading federal judges in the United States.[40] His unique blend of unusually broad theoretical interests[41] and practical experience as a judge have led him to acknowledge the limitations of the economic approach to law,[42] and to embrace philosophical pragmatism.[43] Moreover, Posner purports to blend his philosophical pragmatism with his commitment to the economic approach to law and to liberal individualism.[44]

Posner's pragmatism is particularly interesting for our purposes in that it seems a good candidate for an intermediate pragmatism. Indeed, Posner rejects the proposition that law is autonomous,[45] and asserts that it is pragmatism that justifies the

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[40] *See* Stephen B. Presser, *A Kinder Posner: The Master of Legal Controversy Becomes More Ecumenical*, CHI. TRIB., April 23, 1995, at 2 (reviewing RICHARD A. POSNER, OVERCOMING LAW (1995)); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986) [hereinafter POSNER, ECONOMIC ANALYSIS OF LAW]; RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981).

[41] In addition to his prolific contributions in law and economics, Richard Posner has written on many diverse subjects. *See, e.g.*, POSNER, OVERCOMING LAW, *supra* note 31; RICHARD A. POSNER, SEX AND REASON (1992); RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988).

[42] *See* POSNER, OVERCOMING LAW, *supra* note 31, at 22-23.

[43] *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 454-69 (1990) [hereinafter POSNER, THE PROBLEMS OF JURISPRUDENCE].

[44] *See* POSNER, OVERCOMING LAW, *supra* note 31, at 22-29.

[45] *See* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 43, at 428-53.

economic approach to law[46] and adherence to liberal individualism.[47] Furthermore, since Posner maintains that neither the economic approach to law nor individualistic liberalism is comprehensive,[48] his pragmatism requires some, but by no means all, ends.[49]

Posner's brand of pragmatism is scientific in the tradition of Peirce and Dewey. In his own words,

> [p]ragmatism in the sense that I find congenial means looking at problems concretely, experimentally, without illusions, with full awareness of the limitations of human reason, with a sense of the "localness" of human knowledge, the difficulty of translations between cultures, the unattainability of "truth," the consequent importance of keeping diverse paths of inquiry open, the dependence of inquiry on culture and social institutions, and above all, the insistence that social thought and action be evaluated as instruments to valued human goals rather than ends in themselves. These dispositions, which are more characteristic of scientists than of lawyers (and in an important sense pragmatism is the ethics of scientific inquiry), have no political valence.[50]

On its face, Posner's pragmatism is thus antifoundationalist and anti-Cartesian, experimental and culturally relativistic, and open to a seemingly unlimited array of ultimate value preferences and conceptions of the good. Posner insists that his pragmatism is antidogmatic and skeptical without being radically or dogmatically so.[51] Posner regards pragmatism as sufficiently skeptical to foreclose the finality of any scientific insight or hypothesis, but not so thoroughly skeptical as to raise serious doubts about the existence of the outside world or the belief that some propositions are more sound than others.[52]

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46 *See* POSNER, OVERCOMING LAW, *supra* note 31, at 15-21.

47 *See id.* at 23.

48 *Id.* at 23-25.

49 What should count as means and what as ends is no simple matter, for certain ends may properly be regarded as means towards other ends. Thus, political liberalism may be regarded as a desirable political end, but consistent with the ideology of individualism, may also be regarded as a means towards the ultimate end of allowing each individual the greatest opportunity to pursue his or her own self-interest consistent with an equal opportunity for all. Whereas the dialectics between means and ends will be further explored below, *see infra* notes 53-55 and accompanying text, for now suffice it to say that liberalism can be properly conceived as a political end and law as molded through the economic approach as a practical means necessary to promote the end of maximizing the welfare of society.

50 POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 43, at 465.

51 *See* POSNER, OVERCOMING LAW, *supra* note 31, at 6.

52 *Id.*

Upon more exacting scrutiny, however, Posner's pragmatism does not prove as flexible, culturally relativistic, and antidogmatic as he believes. Specifically, while Posner's pragmatism remains open-ended regarding ultimate ends, it turns out to be much more rigid than might be expected when it comes to means. To be sure, rigidity concerning means may merely result from proper focus on practical consequences. If, regardless of which of the many possible ends is pursued, the same means are called for, then a singular set of means is consistent with a plurality of ends, and conditions are presumably propitious for intermediate pragmatism to thrive. But rigidity concerning means may also result from dogmatism concealed through a shift in focus from ends to means. In the latter case, what appears to be intermediate pragmatism turns out to be mere pragmatism in disguise. To determine where Posner's pragmatism fits in the last analysis, it is therefore necessary to examine its relation to the economic approach to law and to liberal individualism, and to its handling of the nexus between means and ends.

Because of his openness to a wide array of diverse value-preferences and goals among members of the polity, Posner seems agnostic concerning ultimate ends. Consistent with this, his economic approach to law and his liberal individualism are but means in the overall scheme of maximizing the opportunities for everyone to pursue his or her conception of the good. And, since under pragmatism particular means become justified upon proof that they afford the *best* practical path to a desired end, commitment to the economic approach to law and to liberal individualism implies that no better practical alternative has been found.

It seems anomalous that agnosticism regarding ends should go hand in hand with firmly entrenched means. Plausibly, in such a case, what on the surface appears as a progression from means to ends, is at bottom the product of a reversal between means and ends concealed by the vicissitudes of the dialectic that connects sequences of events into relationships of means to ends. In terms of that dialectic what counts as means, and what as ends, depends on the perspective from which a relevant sequence is approached. Thus, for example, from the perspective of achieving justice according to law, the economic approach to law emerges as a means towards the end of achieving just interpretations. By contrast, from the perspective that posits maximizing the welfare of society as the targeted end, achieving justice according to law emerges as a means. Accordingly, anything that is best characterized as an end

under certain relevant perspectives, and as a means under others, can at most be a relative or intermediate end. By the same token, only something that counts as an end from the standpoint of every relevant perspective can be genuinely considered as a final end.[53] Furthermore, under pragmatism, means and intermediate ends are evaluated in terms of their practical contribution toward final ends. Agnosticism concerning final ends, therefore, casts a serious doubt on any preference among means or intermediate ends.

A reversal between means and ends, on the other hand, occurs when a temporal means/end sequence is juxtaposed against a conceptual, ideologically grounded means/end relationship pursuant to which the temporally anterior event constitutes the end while the temporally posterior one amounts to the means. As an illustration, consider the following example involving a lottery to dispose of a sum of money coveted by a large number of potential recipients. An obvious interpretation would be to regard the lottery as the (temporally anterior) means to a (subsequent) fair distribution of the relevant sum of money to one of the equally deserving potential recipients. But, in the context of an ideology that seeks to portray allocations of wealth as arbitrary and uncertain, it seems quite plausible to frame the lottery as a desirable or inevitable institution, and to treat the actual distributions that it yields as a means to reinforce a sense of arbitrariness and insecurity.[54] In the latter case, moreover, by preaching indifference as to the actual distributions resulting from the lottery, one can mask the overriding objective of legitimating the lottery as an end in itself (at least in relation to the distributions that it actually yields) by concealing the relevant conceptual sequence under the more obvious and superficially appealing chronological sequence.

To assess fairly whether Posner's pragmatism ultimately rests on a reversal of means and ends, I shall first explore to what extent his combination of agnosticism regarding ends, advocacy of the economic approach to law, and embrace of liberal individualism can be cogently defended as yielding intermediate pragmatism. To this end, I should point out that agnosticism regarding ends can mean two different things depending on whether it is the consequence of dogmatic skepticism or of pragmatic skepticism. In the

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53 "Final" should be understood here as implying that the end in question cannot assume the role of a means pursuant to a shift in relevant perspective, but not as implying that it may not be legitimately substituted by another (non-intermediate) end.

54 Strictly speaking, it is the recollection of past arbitrary distributions or the projection of anticipated future ones that serves as means to cast the lottery as a desirable or inevitable institution.

first of these cases, all ends are literally equivalent. This means that they all stand on the same plane and that adoption of any one of them is no better or worse than adoption of any other, or of a scheme that makes for the peaceful coexistence of as many diverse ends as possible. In short, dogmatic skepticism renders all ends equally contingent and arbitrary, thus making pragmatism practically useless.

Under pragmatic skepticism, however, agnosticism regarding ends may take on an altogether different meaning. Indeed, pragmatism's antifoundationalism results not in the equivalence of all conceivable ends, but rather in the belief that no conception of the good could ever be definitively established as superior to its rivals. Consistent with this, the pragmatist can justify putting one end on a different plane than all the others, namely the end of maximizing equal freedom to pursue other ends. This special end thus becomes a second-order end while all other ends remain, in principle, on the same plane as first-order ends. Under pragmatic skepticism, therefore, agnosticism regarding ends should be understood as being limited to first-order ends.

In a sense, the second-order end appears as merely a means toward first-order ends, or in other words, merely an intermediate end that must be reached to preserve the widest possible choice of final ends. But because the pragmatic skeptic can give no definitive endorsement to any first-order (final) end, he or she must rely on the second-order end as the only constant objective against which the practicality of all available means must be eventually tested. Furthermore, in as much as Posner views himself as a pragmatic skeptic,[55] his agnosticism implies commitment to the second-order end. Accordingly, Posner may well prove to be an intermediate pragmatist in spite of his agnosticism. What remains to be seen, however, is whether his economic approach to law and his liberal individualism can be successfully defended as the best possible practical means toward the achievement of the predominant second-order end.

B. *Pragmatism and Posner's Law and Economics*

Even as tempered by his pragmatic skepticism, Posner's ambitions for the economic approach to law cannot be characterized as modest. In his own words:

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[55] *See supra* note 31.

> The most ambitious and probably the most influential effort in recent years to elaborate an overarching concept of justice that will both explain judicial decision making and place it on an objective basis is that of scholars working in the interdisciplinary field of 'law and economics,' as economic analysis of law is usually called.[56]

Thus, if law and economics fulfills its promise, the problem of just interpretations would largely disappear. Legal interpretation would be taken out of the hands of limited, partisan, biased, and self-interested interpretive subjects, and become entrusted to the objectively grounded and empirically testable norms and instrumentalities of economic science. In a nutshell, relying on the assumption of instrumental rationality[57] economics—in its two dimensions as a positive science that purports to explain the behavior of instrumentally rational self-interested human actors and as a prescriptive science oriented towards wealth-maximization—furnishes objective (in the sense of scientifically testable) criteria for the evaluation and interpretation of laws. Thus, for example, assuming that a particular law may be susceptible to a number of different interpretations, law and economics prescribes that the interpretation best suited to lead to wealth-maximization be adopted. Moreover, the emphasis on wealth-maximization seems pragmatically justified as consistent with agnosticism concerning first-order ends. As Posner asserts, "wealth maximization may be the most direct route to a variety of moral ends."[58] In other words, wealth maximization may be best suited to lead to maximization of equal freedom to pursue the widest possible range of first-order ends.

From the perspective of law and economics, justice according to law is bounded by instrumental rationality and the scientific pursuit of wealth-maximization. This allows for the elimination of formalistic and subjective approaches to legal interpretation. To use an example furnished by Posner, suppose a common law judge must decide whether the finder of a lost cat is entitled to a reward upon its return to an owner under the following circumstances. The owner had posted notices offering a reward for the return of the cat, but the actual finder, being unaware of such notices, did not expect any reward when he decided to bring the cat to its owner.[59] Pursuant to some formalistic conception of contract law,

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56 POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 43, at 353 (footnote omitted).

57 *See id.* at 367 (economics "assumes that human beings behave rationally . . . .").

58 *Id.* at 382.

59 POSNER, OVERCOMING LAW, *supra* note 31, at 423.

justice would not require the owner to pay the reward, for there was no conceivable "meeting of the minds" between him and the finder. Under law and economics, however, awarding the reward to the finder would be just if enforcement of a legal rule extending rewards in all similar cases would be wealth-maximizing.[60]

As law and economics becomes ever more pervasive in its scope, it raises the question of whether in the end law might not become completely subsumed under economics. If that were to occur, then justice according to law would give way to economic justice. More generally, law and politics would become increasingly peripheral in a social world factually and normatively ruled implacably by economics. In other words, in a world in which wealth-maximization is perceived as a precondition to the achievement of a plurality of ends, there is a serious danger that attention to wealth-maximizing means would overshadow the pursuit of moral ends. Accordingly, although in theory wealth-maximization would only serve as means, in practice it would force all other ends to be continuously postponed or relegated to a lesser plane.[61]

One of the most vexing issues raised by law and economics is not *whether* economics should figure in contemporary determinations of justice according to law, but rather *how much* or *how far* it should figure. It would be absurd to pretend that economics has nothing to contribute to just interpretations. But in some areas of law it is difficult to see what relevance, if any, economics might have in the search for just interpretations. For example, economics

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60 *Id.* at 423. Curiously, if the common law judge follows the prescriptions of law and economics, he or she must decide each case in terms of future consequences that may have no bearing on solving the dispute that brought the parties before the court. To return to Posner's example, there is no issue concerning wealth-maximization as between the cat owner and the finder who returned the cat. The only issue between them is one of just distribution to be determined in relation to past conduct. In terms of distributive justice, it may make a difference whether the owner or the finder ends up with the reward. From a wealth-maximization standpoint, however, the outcome of the lawsuit is indifferent, for—all other things remaining equal—overall wealth is neither increased nor decreased by a transfer of the reward from the owner to the finder. If it makes no difference, from the standpoint of distributive justice, which way the case is decided, the common law judge can both properly adjudicate the dispute at hand and further the aims of law and economics. But if distributive justice in the present case and wealth-maximization in similar future cases pull in opposite directions, then to remain true to law and economics, the common law judge would, for all practical purposes, have to abdicate the role of adjudicator to embrace that of purely future-oriented legislator.

61 *Cf.* 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 477-78 (Edwin Cannan ed., The University of Chicago Press 1976) (1904) ("By pursuing his own interest [the individual] frequently promotes that of society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good.").

seems of little or no relevance in determining whether constitutional liberty, equality, or privacy should be interpreted as justifying a woman's right to an abortion.[62] Actually, even if economics could prove that a right to abortion would be wealth-maximizing—which as Posner indicates it cannot as there is no scientifically cogent way to determine the "cost" of an abortion to the aborted fetus[63]—that would hardly seem to be an important consideration for adopting or rejecting a constitutional right to abortion.

To his credit, and true to his commitment to pragmatism, Posner has acknowledged the limits of law and economics in his more recent works.[64] But once law and economics is no longer conceived as potentially all pervasive, the question of limits becomes highly unsettling. Does a chastened law and economics still replace the interpretive subject in many, though not all, cases? Or does it merely make a partial contribution to just interpretations that must be further processed and incorporated with other partial insights by an interpretive subject? To get a better handle on these questions, it is first necessary to look closer at the nexus between economics and law; to explore whether the usefulness of the economic approach to law is confined to market situations, or whether it extends to non-market activities; and to assess the limits of normative economics as a prescriptive guide in the realm of legal relationships.

Even under the most optimistic scenario, law as a distinct practice would never completely give way to positive and normative economics. Indeed, assuming all intersubjective dealings were reducible to uninhibited, fully competitive market transactions, it would still seem impossible to sustain a functioning market society without a legal regime—albeit a limited one confined to the protection of property and contract rights.[65] Moreover, it also seems highly unlikely that applications and interpretations of laws would in each and every case boil down to a straight forward economic assessment of the unmediated demands of wealth-maximization. In other words, even in the best of law and economics worlds, it is hard to imagine that at least some legal rules would better serve the overall aim of wealth-maximization by refraining from seeking

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62 *See* Roe v. Wade, 410 U.S. 113 (1973).

63 *See* POSNER, OVERCOMING LAW, *supra* note 31, at 22.

64 *Compare* POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 40, *with* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 43, *and* POSNER, OVERCOMING LAW, *supra* note 31.

65 *Cf.* Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 625 (1983) ("A regime of contract is just another legal name for a market.").

to promote wealth-maximization in the context of each individual case.[66]

In contemporary societies, the relationship between law and economics is bound to be complex and multifaceted. With respect to efficient markets, legal regulation should be limited to the minimum required to prevent interference with uninhibited market transactions. To the extent that markets prove inefficient, however, positive legislation becomes indispensable to make up for the imperfections of existing markets. In other words, in the context of efficient markets, the law performs a *facilitative* role, whereas in inefficient markets, the law must fulfill a *regulative* role to correct market deficiencies.

In theory there should be no significant difference whether law plays a facilitative or regulative role. In either case, the legitimacy of a law or the justification of a particular legal interpretation would be subject to the same test, namely whether the consequence of the law or legal interpretation in question is to promote wealth-maximization. In practice, however, one cannot remain within the frictionless world of perfect markets in which law is merely facilitative and where outcomes are automatically wealth-maximizing. Instead, frictions are inevitable, littering the path to wealth-maximization with serious obstacles, making it necessary to appeal to regulative law, and raising for the first time significant questions concerning distributive justice.

In the imaginary world of perfect markets, everyone enjoys unlimited access to all relevant information so that freedom of contract (relying on the modest facilitative legal regime on which it depends) guarantees the proliferation of wealth-maximizing transactions among individuals with a propensity to "truck, barter, and

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[66] *See supra* note 60 and accompanying text. Moreover, this argument is analogous to that made in the context of utilitarianism, according to which overall utility may be better achieved through application of a uniform rule to a whole range of cases rather than taking each case individually and acting so as to maximize utilities in that case, or in other words, that "rule-utilitarianism" is preferable at least in certain cases, to "act-utilitarianism." For a discussion of the distinction between act-utilitarianism and rule-utilitarianism, see J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 9-12 (1973). As Posner observes, there are striking similarities between normative economic's wealth-maximization objective and that of utilitarianism. The two do not completely overlap, however, to the extent that some utility maximizing outcomes may not be wealth-maximizing. For example, if a thief enjoys a stolen object more than its rightful owner, then the theft would be utility-maximizing assuming the added pleasure experienced by the thief outweighs the added pain suffered by the owner as a consequence of the theft. Condoning such theft, however, would not be wealth-maximizing as it would discourage productivity. *See* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 43, at 357, 390-91.

exchange one thing for another."[67] If we imagine a lack of significant material disparities among contractors in such a world of perfect markets,[68] distributive justice is not likely to become a matter of concern. But once the ideal of perfect markets is left behind, distributive issues are bound to arise even if all intersubjective transactions could be subsumed under a contract paradigm. This can be illustrated by reference to the *Coase Theorem*[69] that furnishes some of the central ideas animating the economic analysis of law.[70] According to the *Coase Theorem*, in cases with zero transaction costs,[71] a wealth-maximizing or efficient outcome will be reached regardless of the legal rule selected. If there are positive transaction costs, on the other hand, not every rule is likely to be efficient, thus calling for the adoption of a preferred legal rule capable of minimizing the effects of transaction costs.[72] In either case, the choice of a relevant legal rule has palpable and significant distributive effects.

These distributive effects become clear when considering the following example.[73] Suppose a factory emits smoke that damages the laundry hung outdoors to dry by five residents who have properties adjacent to the factory. Suppose further, that if no action is taken, each resident will suffer a loss of $100, for a total of $500. To eliminate the smoke damage, two alternatives are available: the factory can buy a smokescreen for $150, or each resident can buy an electric dryer for $50. Obviously, the efficient solution is obviously to buy the smokescreen because it eliminates damages in the sum of $500 for $150 rather than for the $250 which the five dryers would cost. Now, assuming zero transaction costs, the same result would be reached regardless of whether there is a legal rule making polluters responsible for the consequences of their polluting activities or a legal rule granting factories a right to pollute, and thus placing the burden of obtaining adequate protection on those

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67 SMITH, *supra* note 61, at 17.

68 This last assumption is unnecessary from the standpoint of law and economics, in view of its single-minded pursuit of wealth-maximization. Nevertheless, it may make the perfect market construct more palatable to others, and may better approximate Adam Smith's vision of an atomistic market society where no one is powerful enough to dominate competition. *See id.* at 165, 382-83.

69 *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

70 *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 11 (1983).

71 "In general, transaction costs include the costs of identifying the parties with whom one has to bargain, the costs of getting together with them, the cost of the bargaining process itself, and the cost of enforcing any bargain reached." *Id.* at 12.

72 *Id.* at 13.

73 This example is provided by Polinsky. *See id.* at 11-13.

who are affected by the pollution. Under the first rule the factory would have to spend the $150, whereas, under the second, each resident would have to contribute $30 to buy the smokescreen. Although both rules are equally efficient, their distributive effects are clearly different. As a consequence of this, if a common law judge were confronted with the need to adjudicate a suit by the five residents against the factory, wealth-maximizing considerations would be insufficient to suggest which of the two equally efficient legal alternatives should be adopted. If justice according to law should only be concerned with the size of the economic pie, this indeterminacy would be of no concern. If it is also to deal with how the economic pie ought to be divided, however, then even in the idealized world of no transaction costs, law and economics would fail to solve a large number of legal problems.

The distributive problem is likely to be compounded in cases involving positive transaction costs, as the efficient legal options are likely to dwindle. Returning to our example, suppose it would cost $60 for each resident to get together to discuss the problem and to decide on a common course of action ($60 representing the costs of transportation and lost time). In that case, under a clean air rule, the factory would still buy the smokescreen for $150, thus producing the most efficient outcome. But under a right to pollute rule, it would cost each resident $90 to obtain the smokescreen, that would prompt each of them to act individually, and purchase a $50 dryer. Accordingly, the right to pollute rule would be less efficient than the clean air rule, thus requiring the conscientious common law judge to apply the latter rule.

Because one may tend to regard factories as more economically powerful than individuals, the more efficient clean air rule may also seem better suited to satisfy the demands of distributive justice. But by adding an additional transaction cost to our example, we can readily see how the reduction of options when it comes to adopting efficient legal rules is likely to exacerbate the tension between wealth-maximization and distributive justice. Suppose that installing the smokescreen would cost the factory an additional $120 in lost productivity as the smokescreen would require the factory to reduce somewhat its rate of production. In that case, the most efficient solution would be for each resident to purchase a dryer (thus, spending $250 rather than $270 to prevent a loss of $500), and for a common law judge to apply "a freedom to pollute" rule. But what if the factory owner is more than twenty times wealthier than each of the five residents, and if the price of the

factory products to the consumer would be only negligibly increased as a consequence of a reduction in productivity due to the smokescreen? Would it then be *fair* to impose a $50 cost on each resident to save the factory owner $270? Arguably, this places efficiency and fairness on a collision course.

Posner envisages a division of labor designed to keep efficiency issues by and large separate from issues of distribution. He stresses that distributive issues are best handled by legislatures which are well equipped to redistribute wealth through their taxing and spending powers.[74] He goes on to argue that "an efficient division of labor between the legislative and judicial branches has the legislative branch concentrate on catering to interest-group demands for wealth distribution and the judicial branch on meeting the broad-based social demand for efficient rules governing safety, property, and transactions."[75]

Given this framework, problems of distribution would be relegated to the political realm, with interest groups competing for influence over legislatures, and legislators competing to insure sufficient interest group support to optimize their chances of reelection.[76] Consistent with this, law, as opposed to politics, would consist essentially in the interpretation and application of statutes embodying politically mediated interest group deals concerning redistribution,[77] and in the elaboration of means for efficient dispute resolution in areas not covered by statutes. Within this perspective, to use Posner's own words,

> Many of the law's doctrines, procedures, and institutions can usefully be viewed as responses to the problem of transaction costs, being designed either to reduce those costs, or, if they are incorrigibly prohibitive, to bring about the allocation of resources that would exist if they were zero. The law tries to make the market work and, failing that, tries to mimic the market.[78]

Even with the division between legislative and judicial function and between politics and law suggested by Posner, the problem of distributive justice is far from being satisfactorily handled. The most persuasive pragmatic argument in favor of the marriage between the politics of wealth-redistribution and the law of wealth-maximization suggested by Posner seems to be that it is the best that we can realistically hope for, given a lack of consensus on ends

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74 *See* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 43, at 360.

75 *Id.*

76 *See id.* at 354-55.

77 *Id.* at 355.

78 POSNER, OVERCOMING LAW, *supra* note 31, at 416.

in the context of the prevailing institutional framework and current allocation of wealth in the United States.[79] But that argument appears circular in that it seems to assume the inevitability of the *status quo*, and the impracticality of any departure from it. Indeed, on the assumption that it is the most powerful interest groups who will be in the best position to influence legislatures, the combination of legislative wealth redistribution and judicial wealth-maximization would seem inevitably headed towards ever increasing disparities in wealth.[80] Posner seems mindful of the danger of giving *homo economicus* unconstrained latitude in the realms of politics and law, as he appeals to the United States Constitution to curtail the most objectionable political redistributions and to rule out the most ethically reprehensible uses of wealth-maximization in common law adjudication.[81]

Constitutional constraints may be envisioned as setting a floor above which the economics of wealth redistribution and wealth-maximization would be left alone to mold legislative and judicial outcomes. For example, a constitutional prohibition against slavery would preclude legislation imposing slavery or enforcement of a contract of self-enslavement, but beyond that would allow economics to shape legislation and adjudication in the field of labor relations. Upon further consideration, however, the above picture looms as overly mechanistic and static. Constitutional constraints embedded in a long-standing historical tradition, such as those arising under the United States Constitution, are likely to be evolving ones with a propensity to permeate through the legislative and judicial process rather than merely delimiting it through the deployment of bright-line boundaries. One need only recall the broad sweep of certain constitutional protections such as the Due Process Clause or the Equal Protection Clause of the United States Constitution[82] to realize that there is an evolving process of interpenetration between constitutional norms and other legal norms.[83]

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79 *See* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 43, at 388.

80 In this respect, it is noteworthy that there is an increasing gap between rich and poor in the United States. *See* Keith Bradsher, *America's Opportunity Gap*, N.Y. TIMES, June 4, 1995, at D4; James K. Glassman, *The Income Gap: Where's the Problem?*, WASH. POST, April 25, 1995, at A17.

81 *See* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 43, at 387-88.

82 *See* U.S. CONST. amend. XIV, § 1.

83 *Compare* Lochner v. New York, 198 U.S. 45 (1905) (holding that the Due Process Clause forbids states from limiting the number of hours that bakery employees may work) *with* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (holding that the minimum wage law is not violative of the Due Process Clause); *and* Plessy v. Ferguson, 163 U.S. 537 (1896) (concluding that racial apartheid in public accommodations is permissible under the Equal

Moreover, once it is clear that constitutional norms are quite often neither transparent nor merely external to the remainder of the realm of legal relationships, then problems of constitutional interpretation may not be neatly detachable from other problems concerning legal interpretation. In other words, if constitutional interpretation is not reducible to law and economics, neither is interpretation of any law that might be subject to constitutional challenge.

The problem posed to law and economics by the need to rely on constitutional constraints is compounded upon rejection of the adequacy of the economic approach when it comes to dealing with non-market transactions. For Posner, all human activity can be profitably understood in terms of the economic model which postulates that all social actors are rational instrumentalists.[84] There are serious questions, however, as to whether analogous cost/benefit considerations are equally likely to motivate a profit-seeking merchant and a would-be adulterer or a religious zealot. And the more non-market activities stray from the economic model, the looser becomes the grip of law and economics over the optimization of law and legal interpretation.

In the last analysis, Posner's law and economics fails the pragmatist test as it cannot secure achievement of the second-order end that emerges as the necessary correlate of agnosticism regarding first-order ends. Moreover, law and economics does not merely fall short of its intended target, but squarely proves inadequate to assume a leading role in the delimitation of pragmatically justifiable legal relationships to the extent that it cannot carve out a domain free of constitutional or other non-market reducible constraints. Furthermore, it is possible to launch an even more radical critique of law and economics from the standpoint of intermediate pragmatism. Indeed, it is by no means self-evident that law and economics provides the best practical means—or even good practical means—towards the second-order end associated with intermediate pragmatism. For example, it is certainly not obvious that wealth-maximization is more likely than utilitarianism[85] to bring us closer to the desired end. As a matter of fact, if a wealth-maximizing policy leads to greater overall unhappiness than some other policy, it is difficult to imagine why the latter policy

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Protection Clause) *with* Brown v. Board of Educ., 347 U.S. 483 (1954) (finding that mandated racial segregation in public schools is violative of the Equal Protection Clause).

84 *See* POSNER, OVERCOMING LAW, *supra* note 31, at 15-16.

85 For a statement of the principal difference between the two, see *supra* note 66.

would not be clearly preferable from a pragmatist standpoint. In short, from a pragmatist perspective, there seems to be no *ex ante* justification for embracing wealth-maximization as an intermediate end. Even if in some cases it proved optimal based on an evaluation of its consequences, that would still not justify singling out wealth-maximization for privileged status. Finally, a similar argument can be launched against privileging liberal individualism. Again, nothing inherent in liberal individualism makes it more suitable to bring about intermediate pragmatism's second-order end than, for example, participatory democracy, civic republicanism, or welfare liberalism. Also, in view that wealth-maximization is not automatically desirable, even proof that liberal individualism best promotes economic efficiency would not justify placing it above all other political alternatives.

Given its limitations when it comes to initial rights allocations or to non-market activities, the usefulness of positive economics in guiding our understanding of legal relationships is, at best, limited. Moreover, given that wealth-maximization is far from pragmatically justified, the legitimate reach of normative economics is even more limited. Because of this, Posner's pragmatism is perhaps best understood as an adjunct to his commitment to the principle of wealth-maximization rather than the other way around. From this latter perspective, wealth-maximization is not primarily a neutral engine designed to optimize choices for everyone. Instead, wealth-maximization is part of a way of life that encompasses a value-system and a conception of the good that competes with several others. What is deceiving about wealth-maximization is that it does not foreclose the pursuit of certain first-order ends, and is thus easily confused as being part and parcel of a second-order end. For example, wealth-maximization privileges individualism and competition over communitarianism and solidarity, and accordingly is much more amenable to conceptions of the good predicated on the former than on those dependent on the latter. It does not follow, however, that wealth-maximization completely precludes the pursuit of preferences based on solidarity, or that it must necessarily take sides among competing conceptions of the good rooted in individualism. Nevertheless, the essential point remains that wealth-maximization is not neutral and that the fate of other conceptions of the good are subordinated to it rather than the other way around.

Once wealth-maximization is posited as the predominant pursuit, agnosticism regarding other conceptions of the good can be

mobilized to thwart the thrust of attacks launched from ideological standpoints inimical to the law and economics ethos. Similarly, under those circumstances, constitutional constraints supply useful means to appease potential opponents of wealth-maximization by tempering its harshest tendencies. Most importantly for our purposes, pragmatism can be invoked to deflect the sting of revelations concerning wealth-maximization's limitations and contradictions. Accordingly, not only would Posner's pragmatism prove to be mere pragmatism rather than intermediate pragmatism, but also its principal usefulness would derive from its ability to deflect attention from dogmatic idealization of wealth-maximization. Consistent with this, pragmatism as a vehicle for the justification of wealth-maximization is at best merely parasitic and at worst pernicious.

The preceding analysis reveals that Posner's commitment to wealth-maximization and liberal individualism is difficult to reconcile with intermediate pragmatism. That does not, however, preclude Posner from entering into the ranks of intermediate pragmatism through his defense of freedom of speech. But before tackling that issue, it is time to examine Richard Rorty's brand of pragmatism.

IV. RICHARD RORTY'S NEOPRAGMATISM: USING THE LINGUISTIC TURN TO REINVIGORATE IRONY, LIBERALISM, AND SOLIDARITY

The philosopher Richard Rorty is the preeminent proponent of neopragmatism, a postmodern reformulation of the pragmatist project that shifts the focus from experience to language.[86] Rorty's pragmatism is shaped by his radical reinterpretation of the meaning and implications of the rejection of foundationalism. For Rorty, antifoundationalism not only requires rejection of Cartesianism and Kantian moral theory;[87] but also demands that we refrain from according science and 'the scientific method' any special deference,[88] and that we abandon viewing language as a medium of expression or of representation.[89] In other words, according to Rorty, it is not useful to regard language as referring to, or corresponding to, a reality beyond it, or as connecting a subject to an

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86 *See supra* note 8 and accompanying text.

87 *See* RORTY, CONSEQUENCES OF PRAGMATISM, *supra* note 18, at xxxvii.

88 *See id.* at 52.

89 *Id.* at 9-10.

object.[90] Rather, language is most profitably conceived in Wittgensteinian terms, as a game making possible the use of alternative vocabularies relating to one another "more like alternative tools than like bits of a jigsaw puzzle."[91] Rorty warns us, however, that language tools are in one important respect unlike other tools. For example, the tools of a craftsman are made or chosen with knowledge of the particular task for which they are intended. Language tools, by contrast, must be chosen or developed before that for which they will be used is fully known, for its very definition is dependent on the actual language tools being put into use.[92] In a nutshell, Rorty invites us to turn away from the interpretive subject and its elusive objects, and to accept that the human self makes its mark by the use of a vocabulary.[93] Moreover, choices among alternative vocabularies are supposed to be evaluated in terms of their practical consequences—that is, in terms of whether they are likely to lead to a greater and more fruitful consensus among members of the polity.

Consistent with the place of language games in Rorty's vision, justice is more likely to emerge out of the poet's imagination than out of the philosopher's search for normative coherence.[94] Thus, as Rorty emphasizes, there is a prophetic side to justice.[95] But it is an open question whether the prophetic quality of justice has anything to do with pragmatism other than that pragmatism's removal of foundations may do away with cumbersome constraints on the uses of imagination and prophecy. Arguably, there is no intrinsic connection between Rorty's prophetic strand and his pragmatism.[96] Furthermore, Rorty himself has not been consistent in his own pronouncements on the relationship between pragmatism and recourse to prophecy.[97]

On the assumption that there is no intrinsic connection between prophecy and pragmatism, the poetry of justice would belie

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90 *Id.* at 7, 10-11.

91 *Id.* at 11.

92 *Id.* at 12-13.

93 *Id.* at 7.

94 *See* Rorty, *The Banality of Pragmatism and the Poetry of Justice*, *supra* note 8.

95 *Id.* at 92-93.

96 *See* Lynn A. Baker, *"Just Do It": Pragmatism and Progressive Social Change*, *in* PRAGMATISM IN LAW & SOCIETY, *supra* note 8, at 99 (arguing that Rorty's utopianism and call for social change bears no intrinsic connection to his pragmatism).

97 *Compare* Richard Rorty, *Afterword* to Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1911, 1917 (1990) ("[I]f you had the prophecy, you could skip the pragmatism.") *with* Richard Rorty, *Feminism and Pragmatism*, 30 MICH. Q. REV. 237 (1990) (Feminist prophets "might profit from thinking with the pragmatists").

any nexus between justice according to law and justice beyond law, and would confine the former to the realm of aesthetics. Legal interpretations could only be meaningfully evaluated in terms of their appeal, and judges would have to rely on their imaginations with the hope that their opinions will be able to kindle a favorable and uplifting response. In this scenario, justice would be entirely liberated from philosophy, and the legitimacy of legal interpretations could only be measured by the lasting power of their aesthetic appeal.

There is another plausible reading of the link between pragmatism and prophecy that allows bringing Rorty's contribution closer to intermediate pragmatism. Under this alternative reading, antifoundationalist philosophy and the turn to language do not merely play a negative role, but also bestow legitimacy on certain particular positive undertakings. In other words, pragmatism not only clears away obstacles that stand in the way of prophecy, but also furnishes positive backing for certain crucial elements in the prophetic vision. With this in mind, let us now focus on the potential of Rorty's pragmatism for forging plausible links between the critical work stemming from antifoundationalism and the constructive task of the prophetic poet.

Rorty's antifoundationalism is closely connected to an inevitable existential confrontation with contingency. If we focus on the starting points of our reflection, we notice that it is contingent, that we find ourselves where we are as a consequence of chance rather than necessity.[98] Confronted with our contingency, we can either seek to escape from it, or to accept it and cope with it as best we can.[99] Those who seek to escape are likely to turn to the philosophical tradition rooted in Kant that conceives of truth as a vertical relationship between representations and what is represented.[100] To overcome the contingency of their existential predicament, they will accordingly seek to approach the latter from the vantage point of a truth anchored somewhere high above. Those willing to accept contingency, on the other hand, are likely to link up with a philosophical tradition issued from Hegel which regards truth as a horizontal process consisting in the "reinterpretation of our predecessors' reinterpretation of their predecessors' reinterpretation."[101] Unlike their Hegelian predecessors, however,

98 *See* RORTY, CONSEQUENCES OF PRAGMATISM, *supra* note 18, at 166.
99 *Id.*
100 *Id.* at 92.
101 *Id.*

those who are prepared to confront contingency do not believe that successive reinterpretations will progressively approximate any comprehensive truth, albeit an immanent one. The point of reinterpretation is not discovery or realization of any transcendent or immanent truth, but redescription in the hope of finding better suited ways to handle our contingency upon the realization that it is fruitless to attempt to escape from it.

The justification for choosing redescription as opposed to an appeal to vertical truth is pragmatic. Indeed, to be concerned with vertical truth is unproductive in a similar way as it is not helpful to become bogged down with questions about the existence or the nature of God. Just as the secularist maintains that we should not dwell upon questions beyond our capacities to resolve, so too the pragmatist insists that we should not waste our time worrying about the truth, since we are not in a position to ascertain its existence or precise nature.[102]

By refusing to look beneath or beyond language, Rorty comes close to Derrida's insistence that we regard all texts—written or unwritten—as writings referring to other writings.[103] Moreover, whereas Rorty admires Derrida—and in particular later Derrida[104]—he has certain reservations about the Derridean enterprise.[105] Without delving further into Rorty's assessment of Derrida, it suffices for our purposes to emphasize that the principal difference between the two is that Rorty is more directly concerned with practical consequences and is more squarely future oriented than is Derrida.[106] Indeed, whereas Rorty embraces the Heideggerian notion that 'language speaks man,' and acknowledges that "human beings cannot escape their historicity,"[107] he nevertheless stresses that they can "manipulate the tensions within their own epoch in order to produce the beginnings of the next epoch."[108]

Not only does Rorty have important affinities to Derrida, but his pragmatism also relies on a dialogical proceduralism reminiscent of Habermas. Indeed, for Rorty, the legitimate resolution of conflicts among competing redescriptions vying for general accept-

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102 *See id.* at xiv.

103 *See id.* at 94.

104 *See id.* at 124 n.6.

105 *See id.* at 99 (warning against Derrida's tendency to succumb to nostalgia and to engage in system building).

106 For a discussion of Derrida's theory in the context of legal interpretation, see Rosenfeld, *Deconstruction and Legal Interpretation*, *supra* note 1.

107 RORTY, CONTINGENCY, IRONY AND SOLIDARITY, *supra* note 13, at 50.

108 *Id.*

ability is by means of an undistorted dialogue.[109] Like Habermas,[110] Rorty maintains that contested alternatives be submitted to others to consider and discuss, and that the normative validity of an alternative derives from its ability to generate a consensus among all those who engage in the relevant dialogue. Significantly, however, Rorty parts company with Habermas when it comes to defining "undistorted" dialogue. In explaining what should count as "undistorted," Habermas, according to Rorty, "goes transcendental and offers principles. The pragmatist, however, must remain ethnocentrist and offer examples."[111] In other words, Rorty's version of undistorted dialogue contrasts with Habermas's Kantian dialogical procedural because the participants are aware of their contingent starting points, conscious that they cannot transcend the imprints of their own culture, and mindful of the fortuity and fragility of any consensus which they might happen to reach.[112]

The critical side of Rorty's antifoundationalism leads to the same conclusion as does Posner's: no one can prove that his or her conception of the good—or in Rorty's characterization, his or her "final vocabulary"[113]—is superior to any other. Moreover, agnosticism concerning final vocabularies calls for a split between first-order ends and the second-order end of maximizing freedom to develop, and choosing among final vocabularies.[114] Consistent with this, within the confines of an intermediate pragmatist framework, Rorty's prophetic vision seems a good candidate to complement critical antifoundationalism, and furnishes the requisite positive component needed to elaborate a coherent practical approach for dealing with the contingency, diversity, and volatility of first-order ends. It remains to be seen whether Rorty's prophetic vision can be integrated into a workable conception of intermediate pragmatism. As we will now see, however, it is clear that the positive side of Rorty's theory differs rather significantly from that of Posner.

What drives Rorty's positive contribution is the redescription of the liberal project consistent with the practical implications of

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109 *See id.* at 164-65, 173-74.

110 *See* HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 27.

111 RORTY, CONSEQUENCES OF PRAGMATISM, *supra* note 18, at 173.

112 *See id.* at 173-75.

113 *See* RORTY, CONTINGENCY, IRONY AND SOLIDARITY, *supra* note 13, at 73 ("All human beings carry about a set of words which they employ to justify their actions, their beliefs, and their lives. . . . I shall call these words a person's 'final vocabulary.'").

114 *See supra* notes 53-54 and accompanying text.

his critical analysis. The protagonist of Rorty's prophetic journey is the "liberal ironist." To be "liberal," in Rorty's redescription, is to think that "cruelty is the worst thing we do";[115] to be an "ironist" is to recognize the contingency of one's innermost beliefs and desires.[116] Accordingly, the liberal ironist seems bound by the pursuit of two distinct ends: eradicating cruelty and combatting against the forceful imposition of any final vocabulary. Moreover, both these ends appear consistent with the concept of intermediate pragmatism in that they can be plausibly integrated into a project to secure a second-order end to allow for maximization of equal opportunities to pursue first-order ends.

Rorty's prophetic agenda combines an individualistic objective with a collective one, namely self-creation with solidarity.[117] On the one hand, everyone should be given as much room as possible to use his or her imagination to devise a final vocabulary better suited to his or her needs and desires. Moreover, from a political standpoint, all that opportunity for self-creation requires, according to Rorty, is peace, wealth and the standard "bourgeois freedoms."[118] On the other hand, the collective pursuit of solidarity also involves reliance on imagination, in this case to foster an ever more broadly encompassing mutual perception as fellow sufferers who are vulnerable to humiliation.[119]

Given the predominant role Rorty envisions for imagination with respect to both the individualistic and the collective component of his prophetic conception, it is not surprising that he advocates shifting the emphasis from science and rationality to poetry, literary criticism, and utopian politics.[120] Indeed, it is the strong evocative powers of the poet and the literary critic that can foster greater awareness of, and greater sensitivity towards, the suffering and the vulnerability to humiliation of fellow humans whom we may have thus far approached as outsiders, strangers, or even outcasts. Similarly, an imaginative utopian politics may be useful to unfasten entrenched prejudices, to expose settled political institutions and practices inimical to self-creation and solidarity, and to suggest new ways of incorporating the marginalized. The pursuit of poetic imagination and the evocation of utopian politics may thus

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115 RORTY, CONTINGENCY, IRONY AND SOLIDARITY, *supra* note 13, at xv.

116 *Id.*

117 *Id.*

118 *Id.* at 84.

119 *Id.* at xvi, 91. As Rorty emphasizes, the liberal ironist "thinks that recognition of a common susceptibility to humiliation is the *only* social bond that is needed." *Id.* at 91.

120 *Id.* at 52-53.

unite to further two interrelated practical objectives: to enlarge as much as possible the space for idiosyncratic individual self-creation and to narrow as much as possible the (perceived) differences that stand as obstacles to achieving greater solidarity.[121]

The two objectives of making more room for individual idiosyncracy and of fomenting greater solidarity may well appear to be at loggerheads. Arguably, following the threads of one's idiosyncratic imagination is a rather solipsistic endeavor, whereas developing sufficient empathy towards other human beings to perceive them as fellow sufferers, on the contrary, requires a certain measure of self-abnegation and an altruistic gesture of openness towards the other. Within the confines of Rorty's prophetic vision, the tension between the individualist and the collective objective can be productively harnessed to further the agenda of the liberal ironist. From a less utopian standpoint, however, this tension raises serious questions concerning whether Rorty's positive conception can be ultimately reconciled with intermediate pragmatism. This last question is best postponed until after completion of our examination of the promise of Rorty's prophetic vision. For the moment, suffice it to note that the difficulties in the case of Rorty concern means and intermediate ends rather than final ends.

From within Rorty's own perspective, what binds individualism and solidarity closer together is not logic, but the consequences of contingency. Because of the precariousness and vulnerability of the individual who cannot ground any final vocabulary on a solid foundation, everyone is relegated to projecting into the future a plausible hope of redemption that will make up for the painful limitations inherent in his or her present predicament.[122] Rorty emphasizes that this hope is a common one. He writes that "[w]hat binds societies together are common vocabularies and common hopes. The vocabularies are, typically, parasitic on the hopes—in the sense that the principal function of the vocabularies is to tell stories about future outcomes which compensate for present sacrifices."[123] We should not infer from this passage, however, that Rorty preaches subordinating individualist aspirations to collective undertakings. Indeed, as he emphatically indicates, for the liberal ironist, "human solidarity is not a matter of sharing a common

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121 *See id.* at 192 (moral progress toward greater solidarity depends on "the ability to see more and more traditional differences (of tribe, religion, race, customs, and the like) as unimportant when compared with similarities with respect to pain and humiliation . . . .").

122 *Id.* at 86.

123 *Id.*

truth or a common goal but of sharing a common selfish hope, the hope that one's world—the little things around which one has woven into one's final vocabulary—will not be destroyed."[124] In sum, the nexus between individualism and solidarity depicted by Rorty appears to be a pragmatic one based on recognition of the inevitability of contingency. Accordingly, solidarity may be imaginatively promoted through poetic narrative, but what predisposes the individual to remain open to it is fear of being trivialized and humiliated and the desire to give free rein to his or her own idiosyncratic imagination in order to develop future hopes that might be usefully pitted against present insufficiencies.

Rorty's focus on future hopes admittedly bears a parallel to religious promises of redemption in the afterworld as compensation for the inevitability of present sacrifices.[125] Rorty's promise of redemption differs in a crucial respect, however, from its religious counterpart. Redemption in a secular society, according to Rorty, depends "on the existence of reasonably concrete, optimistic, and plausible *political* scenarios, as opposed to scenarios about redemption beyond the grave."[126] In other words, what Rorty the prophet offers is political redemption that somehow weaves together overlapping individualistic and collective concerns.[127] To be sure, how the requisite blend between individualism and solidarity is to be achieved is never clearly spelled out. Nevertheless, Rorty's prophetic vision seems quite amenable to being incorporated into a framework comprised of a second-order (primarily) collective objective allowing for the maximization of opportunities to pursue the widest possible array of (primarily) individually grounded first-order preferences.

The political means Rorty considers necessary to render his hopes for redemption in this world realistic are startlingly simple and familiar. He states:

> I think that contemporary liberal society already contains the institutions for its own improvement. . . . Indeed, my hunch is that Western social and political thought may have had the last *conceptual* revolution it needs. J.S. Mill's suggestion that governments devote themselves to optimizing the balance between leaving people's private lives alone and preventing suffering seems to me pretty much the last word.[128]

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124 *Id.* at 92.
125 *See id.* at 86.
126 *Id.*
127 *Id.* at 92-93.
128 *Id.* at 63 (footnote omitted).

Moreover, the principal difference between Rorty's postmodern liberal ideal and its Millian counterpart stems from Rorty's insistence on privileging the role of language and narrative to the exclusion of anything which may lie behind or beyond language. In Rorty's ideal liberal society, change is the result of persuasion rather than force, reform rather than revolution.[129] Also, since the best hope for liberal society is that it will foster useful redescriptions, uninhibited freedom of expression ranks among its paramount objectives.

It is true that freedom of expression already occupied a similar prominence in Mill's vision. But Mill, who unearthed the philosophical roots of the marketplace of ideas justification for freedom of speech,[130] was convinced that uninhibited discussion afforded the best possible means to discover the truth.[131] Rorty, by contrast, values discussion for its own sake, and preaches freedom of expression as the best hope to lead to more speech, instead of the use of force.[132] In short, the paramountcy of freedom of expression is doubly justified in Rorty's prophetic vision. On the one hand, it enlarges the horizon for redescription; on the other hand, it serves to channel conflicts towards resolution by means of discussion as opposed to force. It is Rorty's hope that in a liberal society that is committed to freedom of expression the poet and the innovator will prevail. And if that makes life harder for others, Rorty reassures us that we need not worry, for it will be harder "only by words, and not deeds."[133]

In the last analysis, Rorty's critical analysis and his prophetic vision can be plausibly combined to yield a seemingly coherent version of intermediate pragmatism. Moreover, since Rorty's philosophy is driven by at least one constant objective, namely the hope for more useful redescription, the intermediate pragmatism to which it apparently leads would qualify as a pragmatism of ends, at least with respect to one end. That (second-order) end is the maximization of opportunities for imaginative redescriptions, and it calls for at least one legal norm, namely affording the greatest possible protection to freedom of expression. Accordingly, in spite of their otherwise significant differences, Posner and Rorty both concur that pragmatist philosophy lends support to freedom of expres-

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129 *Id.* at 60.

130 *See supra* note 35 and accompanying text.

131 *See* JOHN STUART MILL, ON LIBERTY 15-52 (Elizabeth Rapaport ed., 1978) (1859) [hereinafter MILL, ON LIBERTY].

132 *See* RORTY, CONTINGENCY, IRONY AND SOLIDARITY, *supra* note 13, at 52.

133 *Id.* at 61.

sion.[134] It is now time to take a closer critical look at this common conclusion, by inquiring whether the pragmatist defense of freedom of expression can overcome the challenge posed by extremist and hate speech. Also, after this inquiry, we will be in a better position to answer the question raised but left open above; that is, whether Rorty's prophetic vision is ultimately unpragmatic because of its shortcomings regarding means rather than ends.[135]

V. PHILOSOPHIC PRAGMATISM, FREEDOM OF EXPRESSION, AND THE PARADOXES OF EXTREMIST AND HATE SPEECH

A. *Pragmatism and the Free Marketplace of Ideas*

There is a strong affinity between the pragmatist justifications for freedom of speech propounded respectively by United States Supreme Court Justice Oliver Wendell Holmes, Posner, Rorty, and the utilitarian justification elaborated by John Stuart Mill. Significantly, the philosophers Mill and Rorty display a much more optimistic outlook concerning the virtues of freedom of expression than do judges Holmes and Posner. Nevertheless, the views of all four converge when it comes to the question of truth in that they all reject the Kantian conception of truth as a vertical relationship.[136] Accordingly, all four of them advance a justification for freedom of expression predicated on the impossibility of complete or immutable truth.

Mill's strong defense of freedom of expression is rooted in his individualism and in his optimism concerning the possibility of social progress. Operating within a utilitarian framework, Mill embraces the general principle that society can limit the individual's freedom to promote the common good whenever an individual's *action* is not purely self-regarding—that is, when it is likely to have a direct impact on the well-being of others.[137] That general principle is largely inapplicable, however, in the context of *expression*. Indeed, in Mill's view, even an expression that is directly harmful to others should remain beyond regulation unless it amounts to an *incitement* to violence.[138] Moreover, underlying Mill's opposition to regulating harmful speech is his firm belief that free discussion is

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134 *See supra* note 18 and accompanying text.

135 *See supra* notes 121-22 and accompanying text.

136 *See supra* note 100 and accompanying text.

137 *See* MILL, ON LIBERTY, *supra* note 131, at 73-74.

138 *See id.* at 53 (opinions lose their immunity when their expression amounts to "a positive instigation to some mischievous act"). *Cf.* Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that speech that "incites" to violence rather than merely "advocating" violence is not constitutionally protected).

indispensable to the discovery of incremental truth and to social progress.[139] Thus, stripped to its utilitarian essentials, Mill's broad justification for freedom of expression boils down to the following: the long term benefits (in relation to truth and social progress) of uninhibited discussion are bound to outweigh the sum of harms attributable to non-inciting expression.

Holmes imported Mill's broad justification for freedom of expression into constitutional jurisprudence, and gave birth to the marketplace of ideas justification of speech[140] that has been influential in the United States ever since.[141] Although Holmes's *justification* of free expression is very similar to Mill's, the respective *reasons* that led the two men to embrace the same principle sharply contrast. Indeed, whereas Mill is led by optimism and belief in progress, Holmes is driven by skepticism and pessimism. In particular, Holmes is quite skeptical about the possibility of truth. In one of his letters, Holmes writes:

> When I say a thing is true I mean that I can't help believing it—and nothing more. But as I observe that the Cosmos is not always limited by my Cant Helps I don't bother about absolute truth or even inquire whether there is such a thing, but define the Truth as the system of my limitations.[142]

Consistent with this view, Holmes endorses a free marketplace of ideas on pragmatic grounds. Because most wrongly held views eventually prove false, any limitation on speech is most likely to be grounded on a false idea. Accordingly, a free marketplace of ideas is likely to reduce harm in two distinct ways: It lowers the probability that expression will be needlessly suppressed on account of falsehoods; and it encourages most of us, who are prone to stubbornly hold on to worthless or harmful ideas on the belief that they are true, to develop a healthy measure of self-doubt.[143]

What unites Mill and Holmes in spite of their differences—and what links Posner to both of them—is the belief that constraining the marketplace of ideas would do more harm than good.

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139 *See* MILL, ON LIBERTY, *supra* note 131, at 50-52. Suppressing expression that incites to violence is consistent with Mill's view that the broadest possible uninhibited discussion offers the best means towards truth and progress. Indeed, inciting speech by its very nature seems more likely to lead to violence than to more speech. *See* MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 191 (1984).

140 *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

141 *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15-16 (1982).

142 Letter from Oliver Wendell Holmes to Learned Hand (June 24, 1918) *in* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 757 (1975).

143 *See Abrams*, 250 U.S. at 630.

Posner's pragmatic rationale in favor of the marketplace of ideas actually straddles a middle course between Mill and Holmes. Like Holmes, Posner is wary of objective truth, but coming closer to Mill he is rather optimistic about the possibility of scientific progress.[144] Moreover, having had the benefit of the extensive American debate on freedom of speech since the days of Holmes, Posner adopts a broader, more encompassing view of the marketplace of ideas than his two illustrious predecessors. Unlike them, Posner is not constrained by the model of scientific discussion, and thus refuses to draw any sharp boundaries between rational and emotive expression, such as artistic expression, or symbolic action with a predominant expressive content—such as burning a draft card or flag.[145] In short, Posner maintains that any expression, whether rational or emotive, factual or fictional, that may lead to consequences in the world of facts should be protected within the framework of the marketplace of ideas.[146] Also, by emphasizing the importance of emotive expression and fiction, Posner's justification of freedom of expression displays an important affinity to that of Rorty.

Posner's endorsement of his expanded version of the marketplace of ideas is not unlimited, however. In what appears to be a departure from the Millian ideal, Posner indicates that certain restrictions on the marketplace of ideas may be warranted when the failure to impose them is likely to impose too high a cost on society.[147] In his most recent writings, Posner seems to retreat even further from an unqualified endorsement of the free marketplace of ideas. He writes: "Nothing in pragmatism teaches that the harms caused by speech should be ignored; nothing justifies the privileging of freedom of speech over other social interests."[148]

Whether Posner's apparent retreat from the Millian ideal is ultimately attributable to his pragmatism or to his commitment to wealth-maximization is a question that is best deferred until after consideration of the case of extremist and hate speech. In the meantime, suffice it to reiterate that whereas their respective reasons may differ somewhat; and whereas their respective attitudes to the relation between freedom of expression and discovery of the truth vary significantly in scope and emphasis; Holmes, Posner, and

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144 *See* Posner, *What Has Pragmatism to Offer Law?*, *supra* note 5, at 36-37.

145 *See* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 43, at 467.

146 *Id.*

147 *Id.*

148 POSNER, OVERCOMING LAW, *supra* note 31, at 396.

Rorty all strongly embrace the Millian ideal of a free marketplace of ideas because of their conviction that it comports with the practical dictates of pragmatism. Accordingly, it is time to turn to the problems raised by extremist and hate speech in order to evaluate the pragmatist justification of freedom of expression, and to be in a better position to offer a cogent critical assessment of the viability of the concept of intermediate pragmatism.

B. *Theoretical and Practical Problems Raised By Extremist and Hate Speech*

Constitutional provisions affording protection to speech and expression tend to be uniformly sweeping and indeterminate.[149] Since these free speech provisions give rise to widely diverging interpretations,[150] they squarely raise questions concerning the criteria of legitimacy in constitutional interpretation. Perhaps nowhere are these questions more acute than in the context of extremist and hate speech, in which American jurisprudence stands in sharp contrast to that of many other Western democracies.[151]

Extremist speech, as already mentioned, gives rise to what Karl Popper has called the "paradox of tolerance."[152] The paradox arises as a consequence of tolerating the intolerant. In a tolerant society, the intolerant can take advantage of the broad protection of speech to disseminate extremist views. And if these views prove persuasive to a large enough audience, the intolerant may well be in a position to ascend to power and to eradicate tolerance. Hence the quandary: to remain tolerant, must a society be consistently tolerant towards all? Or must it, to protect itself, be intolerant of the intolerant?

The paradox raised by hate speech is analogous to that triggered by extremist speech.[153] Indeed, just as a tolerant society de-

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149 *See* Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 353, 356-57 (Michel Rosenfeld ed., 1994).

150 *Id.*

151 *See, e.g.*, 3 R.S.C. ch. 46, § 319 (1985) (Canada); Public Order Act 1986, ch. 64, §§ 17-29 (United Kingdom); and International Convention on the Elimination of All Forms of Racial Discrimination G.A. Res. 2106, U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1966) (United Nations).

152 *See supra* note 20 and accompanying text. For a more extended analysis of the constitutional implications of this paradox, see Michel Rosenfeld, *Extremist Speech and The Paradox of Tolerance*, 100 HARV. L. REV. 1457 (1987) (reviewing LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986)).

153 Extremist and hate speech are distinguishable even though they often go hand in hand, such as in the case of Nazism where political totalitarianism was combined with systematic hate propaganda against Jews. It is possible, however, to embrace totalitarian

pends on the willingness to live in peace with those who do not share one's outlook and views, a free marketplace of ideas seems viable only if it affords a fair forum for the uninhibited examination and free discussion of all ideas and viewpoints. To be sure, not all ideas or viewpoints that reach the marketplace are likely to fare equally well. Undoubtedly, at any time, some ideas will be widely embraced while others will be roundly rejected. But there is a crucial difference between rejecting an idea based on an assessment—even an erroneous one—of its merits, or based on prejudice or hatred against its proponent. Thus, if hate propaganda succeeds in vilifying its target group by fomenting contempt among non-victims coupled with self-doubt and withdrawal among victims, the marketplace is in grave danger of becoming thoroughly corrupted.

At first, it seems that recourse to pragmatism affords the best means to deal with the paradoxes raised by extremist and hate speech. Indeed, no systematic solution looms as wholly satisfactory because no solution can solve numerous theoretical and practical problems posed by extremist or hate speech. For example, a complete ban would sweep much too broadly, equate hatred of the oppressor and the oppressed,[154] blur the distinction between endorsement of, and satirical reference to, reprehensible views,[155] and generate difficult line drawing problems.[156] The complete absence of any ban, on the other hand, would facilitate the imposition of oppression. Additionally, its perpetuation would encourage violence in certain circumstances, and would stand in the way of implementing a policy of equal dignity and equal respect for every

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political extremism without harboring any hatred on the basis of race, sex, ethnic origin, religion, or sexual orientation. Thus, for example, one could conceivably adhere to a radical, antidemocratic, communist vision predicated on rigid forced egalitarianism. By the same token, it is possible to reject political extremism in favor of a certain conception of democracy and yet hate, vilify, and demean the members of certain racial, ethnic, or religious groups.

154 *See, e.g.*, Anthony Skillen, *Freedom of Speech*, *in* CONTEMPORARY POLITICAL PHILOSOPHY: RADICAL STUDIES 139, 142 (Keith Graham ed., 1982) (noting the irony that the first person convicted under the British 1965 Race Relations Act, for uttering a racially derogatory expression, was black).

155 For example, in the late sixties, an American fictional television series was based on a satire meant to ridicule Archie Bunker, an unenlightened racial bigot. Significantly, however, public surveys indicated that a sizeable portion of the viewers identified with, not against, Archie Bunker. *See* WILSON KEY, SUBLIMINAL SEDUCTION 159 (1973).

156 For example, should the ban encompass advocacy but not a sympathetic depiction of an extremist position of a classroom discussion? Should the ban extend to a true statement exploited for purposes of propagating racial hatred? *Cf.* 3 R.S.C. ch. 46, § 319(3) (1985) (Canadian Criminal Code) (truth is a defense to criminal charges for propagating hatred against an identifiable group).

member of society.[157] By contrast, a pragmatic approach focusing on likely consequences might seem best suited to avoid undesirable extremes without having to be sacrificed to satisfy impractical demands of theoretical coherence.[158] Thus, for example, American legal commentators have argued that tolerance of extremist speech is justified in the United States although it may not be in Germany, because the respective historical experiences of both countries make the United States much less vulnerable than Germany to the perils of Nazism.[159]

Upon further reflection, however, the pragmatist approach to extremist and hate speech proves to be seriously deficient. Beyond requiring the obvious *caveat* that theoretical coherence does not justify accepting practical consequences contrary to those sought to be achieved, pragmatism's contribution regarding extremist and hate speech looms as largely circular. Because of the complexities inherent in the dialectic between tolerance and intolerance,[160] the practical consequences of different approaches to extremist and hate speech are likely to be varied and nuanced rather than clear-cut. Accordingly, focus on practical consequences would at best be inconclusive, and thus trigger the need to choose among different sets of similarly plausible practical consequences. To a significant degree, moreover, the practical consequences of tolerance or intolerance towards certain views may be simply unpredictable. However, it does not follow that choosing between tolerance and intolerance should no longer be considered a matter of concern. But it may well follow that the choice in question, while normatively important, does not necessarily depend on practical consequences.

To illustrate these last points, one need only consider briefly certain aspects of the dialectic between tolerance and intolerance. There is a significant asymmetry between tolerance and intolerance.[161] Intolerance implies disapproval, but tolerance, depending

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157 *See* Regina v. Keegstra, 3 S.C.R. 697 (1990) (majority opinion of the Supreme Court of Canada upholding constitutionality of statute criminalizing hate propaganda).

158 *See, e.g.*, Grey, *What Good is Legal Pragmatism?*, *supra* note 25, at 22-26 (advocating a pragmatic solution to the problem of hate speech on university campuses by borrowing from different theories that respectively buttress constitutional liberty and constitutional equality without attempting to reconcile the two).

159 *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 198-99 (1986) [hereinafter BOLLINGER, THE TOLERANT SOCIETY]; Schauer, *supra* note 149, at 365-67.

160 For a more extended examination of this dialectic, see Rosenfeld, *Extremist Speech and the Paradox of Tolerance*, *supra* note 152, at 1460-66.

161 *See id.* at 1461-67.

on the circumstances, may communicate approval or disapproval. Thus, a religious person with a profound aversion to abortion may nonetheless consistently maintain that he feels politically obligated to tolerate abortion, but cannot endorse it, and is prepared to argue against it in front of anyone who still has an open mind on the issue. On the other hand, whereas tolerance implies disagreement, it does not necessarily require disapproval. For example, a scientist may disagree with the theories of a colleague and yet recognize that this same colleague is a worthy member of the scientific community. Furthermore, there are cases where a plea for tolerance not only involves approval but also an intent to mask agreement. For example, white students who defend the right of a Ku Klux Klan member to be a featured speaker at their university in the name of tolerance may be motivated by tacit agreement with the proposed speaker's racist message.[162] Finally, tolerance bears a different connotation whether it results from a genuine act of self-restraint—such as when someone powerful refrains from taking available measures against less powerful people whose conduct he strongly disapproves—or from conditioning by more powerful outside forces. In the latter case, tolerance corresponds to what Herbert Marcuse labelled "passive toleration"[163]—such as when a benefit to a much victimized group is conditioned on the exercise of stoic self-restraint in the face of demeaning treatment by members of other groups.

The above examples make it clear that, depending on the circumstances, tolerance and intolerance are likely to have very different practical consequences. Whether tolerance is inclusionary or exclusionary depends on the relevant context, and whether a policy of inclusion or exclusion is more desirable under given circumstances seems more a matter of substantive value-preferences than one of predominantly pragmatic considerations.

That no single pragmatic course of action emerges in the context of extremist and hate speech is illustrated by the contrast between the constitutional jurisprudence of Canada and the United States. Although neither Canada nor the United States afford unqualified protection to speech,[164] the constitutional jurisprudence

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162 As noted by one commentator, the appeal to tolerance in this last case may amount to a "form of vicarious aggression." BOLLINGER, THE TOLERANT SOCIETY, *supra* note 159, at 233.

163 *See* Herbert Marcuse, *Repressive Tolerance*, *in* A CRITIQUE OF PURE TOLERANCE 81, 85 (Robert Wolff et al. eds., 1970).

164 In the case of Canada, *see, e.g.*, Regina v. Keegstra, 3 S.C.R. 697 (1990) (criminalization of hate speech held constitutional); in that of the United States, *see, e.g.*, Chaplinsky v.

of the United States has displayed much greater tolerance towards extremist and hate speech than that of Canada. Indeed, toleration of hate speech is a divisive issue on both sides of the border,[165] but in more recent times, American courts have come down on the side of toleration of hate speech,[166] and Canadian courts on the opposite side.[167] The dominant position in the United States, consistent with a marketplace of ideas approach, is that content-based regulations of speech pose a serious threat to the ideal of an "uninhibited, robust, and wide-open" debate on public issues[168] which lies at the core of the American commitment to free speech. Accordingly, extremist or hate speech that falls short of "fighting words" or of triggering an incitement to violence ought to be tolerated and fought with more speech rather than with censorship. By contrast, the position adopted by a majority on the Supreme Court in Canada is that some sacrifice in the scope of public debate is warranted in order to deal with the serious harm threatened by hate speech.[169] Stressing Canada's commitment to equality and to multiculturalism, the Supreme Court upheld the ban on hate speech because of its serious potential for humiliating and degrading those whom it targets, and for gradually prejudicing the remainder of society against members of the targeted group.[170]

Once one realizes that the United States and Canada have certain different priorities, it becomes obvious that nothing inherent in either approach makes it more pragmatic than the other. If one is

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New Hampshire, 315 U.S. 568 (1942) (finding that "fighting words" are not protected speech).

165 The Supreme Court of Canada decided *Keegstra* by a four to three majority. Meanwhile, the refusal of American courts to exclude hate speech from constitutional protection has been surrounded by an often strident and bitter polemic. *See, e.g.*, BOLLINGER, THE TOLERANT SOCIETY, *supra* note 159, at 14-15 (discussing upheaval and dissent within the American Civil Liberties Union (ACLU) pursuant to its decision to represent Neo-Nazis bent on marching in full uniform, including swastika, in a suburban area heavily populated by Jewish survivors of Nazi concentration camps); Mari J. Matsuda, *Public Response to Racist Speech: Considering The Victim's Story*, 87 MICH. L. REV. 2320 (1989) (arguing that the severe impact of hate speech on its victims justifies criminalization).

166 *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding that a statute criminalizing hate speech was unconstitutional as applied to Ku Klux Klan style cross burnings); Brandenburg v. Ohio, 395 U.S. 444 (1969) (finding that Ku Klux Klan "advocacy" of (as opposed to "incitement" to) violence against Jews and Blacks is constitutionally protected); and Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied.*, 439 U.S. 916 (1978) (concluding that a Neo-Nazi march in a Jewish neighborhood is constitutionally protected).

167 *See* Regina v. Keegstra, 3 S.C.R. 697 (1990) (upholding constitutionality of criminalization of anti-semitic hate propaganda).

168 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

169 *See Keegstra*, 3 S.C.R. at 795.

170 *Id.* at 746-48.

concerned with the gradual yet potentially devastating effect of hate speech on self-esteem and on respect for others, then the Canadian approach looms as more pragmatic than the American one. Indeed, by allowing restrictions on speech only if it poses a "clear and present danger" to society,[171] or if it amounts to an incitement to violence,[172] American constitutional jurisprudence is poorly adapted, from a practical standpoint, to deal with speech that produces humiliation instead of provoking violence, and that gradually undermines the very fabric of social cohesion instead of immediately threatening to tear it to shreds. Conversely, of course, if the object is to foster the greatest dissemination of available views, limited only by avoidance of imminent danger and violence, then the American approach clearly seems more pragmatically suited than its Canadian counterpart.

It may also be that the Canadian approach exaggerates the harms of hate speech while the American one underestimates them.[173] More generally, it seems quite plausible that there is no reliable way to predict the practical consequences of tolerating extremist and hate speech, as the number and complexity of relevant factors and as the full gamut of contextual variations may far exceed our grasp. In the latter case, pragmatism would be of little help in selecting a constitutional approach to extremist and hate speech, but that would by no means obviate the need for one. Accordingly, the choice would have to depend on conceptions of the good and value-preferences rather than on practical considerations. Consistent with this, the Canadian approach would be better suited for those with a more egalitarian and multicultural outlook, while the American approach would seem preferable for those with a libertarian bent. In sum, there is no pragmatist solution to the paradoxes of extremist and hate speech. At best, there are different pragmatist means suited to different non-pragmatist ends. At worst, the role of pragmatism is reduced to the negative task of preventing non-pragmatic designs from leading to consequences that are diametrically opposed to those which were originally intended.

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171 *See* Schenck v. United States, 249 U.S. 47 (1919).

172 *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

173 In this connection, it seems quite remarkable that in the United States, with its long history of slavery, racial segregation, and ruthless violence against African-Americans, the criminalization of Ku Klux Klan cross burnings should not survive a constitutional challenge on free speech grounds. *See id.*

C. *Critique of the Pragmatist Justification of Freedom of Expression*

The preceding observations concerning extremist and hate speech suggest that the pragmatists' trust in the Millian ideal is misplaced. As the Supreme Court of Canada has stated:

> The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under the strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.[174]

Thus, assuming that uninhibited discussion is insufficient to ward off the evils threatened by hate speech, and that hate speech can cause serious incremental harm, leaving the marketplace of ideas open to hate speech would most likely lead to more harm than good.

Rejection of the Millian ideal seems most damaging to Rorty's prophetic vision of a society devoted to persuasion and redescription. To be sure, Rorty, unlike Mill, is not concerned with advancing the cause of truth.[175] Nevertheless, in the tradition of Mill, Rorty assumes that harms perpetrated by words are less serious than those perpetrated by deeds.[176] To the extent that extremist and hate speech belie that assumption, however, persuasion and redescription may inflict harms that are comparable to those flowing from evil deeds. Indeed, it would not be surprising if a protracted verbal hate campaign proved more painful, more demeaning, and more humiliating than an occasional physical drubbing. Moreover, precisely because Rorty admonishes us that there is not much value in being overly concerned with the truth, as a logical consequence, there should be virtually no constraint against using one's creative power of imagination to generate redescriptions that are more humiliating and demeaning than uplifting.[177] Consistent with this, pragmatism can offer no assurance

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174 Regina v. Keegstra, 3 S.C.R. 744 (1990).

175 *See supra* note 102 and accompanying text.

176 *See supra* note 133 and accompanying text.

177 Rorty could argue that this pessimistic scenario is unrealistic in view of the liberal ironist's aversion to cruelty. *See supra* notes 115-16 and accompanying text. To the extent that Rorty would open the Millian marketplace of ideas to everyone, however, the self-imposed constraints of the liberal ironist would be plainly insufficient to turn away harmful rediscriptions. Thus, even if the liberal ironist is legitimated by intermediate pragmatism, the Millian marketplace of ideas need not be.

that Rorty's prophetic utopian dream of solidarity among poets will not turn into a harrowing nightmare of hate propaganda and humiliation. In short, even if Rorty's objective of making room for more useful redescription can be fully justified under pragmatism, the Millian marketplace of ideas fails the pragmatist test for qualifying as a suitable means towards that end.

On the surface, it may seem that rejection of the Millian ideal does not deal as severe a blow to the pragmatic defense of the marketplace of ideas advanced by Holmes. Holmes harbors no prophetic dreams or misplaced optimism. He resorts to the marketplace of ideas because of his distrust of the state's ability to distinguish between useful and harmful speech, and because of his distastes for the unwarranted hubris of those who stubbornly hold on to their erroneous ideas. Accordingly, even if hate speech is harmful, trusting the state to decide when speech should be protected might in the end prove worse.

Upon further consideration, however, Holmes's argument for the marketplace of ideas may be more persuasive than Rorty's, but it is hardly convincing or compelling from the standpoint of pragmatism. On the one hand, if it is much more likely that any given idea will prove false rather than true, then it is by no means obvious that a certain measure of unwarranted state suppression of views would be worse than an unimpeded flow of extremist views and hate propaganda. Moreover, it is not clear that misplaced confidence in one's most likely erroneous views will lead to more harmful consequences than constant insecurity and self-doubt. Indeed, intolerance may well be caused more often by self-doubt and insecurity than by overconfidence.[178]

On the other hand, even if we were to agree that the benefits to be gained from the unimpeded flow of all ideas (except those that provoke an imminent danger of violence) far outweighed the harms of extremist or hate speech, it still would not be obvious that the American approach to hate speech would be superior, from a *practical* standpoint, to the alternative adopted in Canada. There can be no absolute protection of the flow of ideas so long as judges are required to uphold constraints on "fighting words" and on communications that pose a "clear and present danger" because of their message. And without absolute protection, there can be no guarantee of absolute neutrality. Consequently, the unconscious, implicit, or hidden biases in an approach predicated on the Ameri-

178 *See* BOLLINGER, THE TOLERANT SOCIETY, *supra* note 159, at 86.

can model may ultimately prove more harmful than the publicly acknowledged and openly discussed restrictions adopted in an approach based on the Canadian model. In this connection, it is particularly noteworthy that, while arguably consistent on a doctrinal level, American First Amendment jurisprudence has fairly consistently resulted in suppression of extremist speech coming from the left and in toleration of hate propaganda perpetrated by the extreme right.[179] Thus, in the end, skeptical and pessimistic premises fail to afford a convincing pragmatic justification for a marketplace of ideas approach. But even if they did furnish such a justification, the American approach to hate speech would not necessarily emerge as pragmatically superior to plausible alternatives.

Inasmuch as Posner's reasons for supporting the marketplace of ideas fall somewhere between Mill's and Holmes's[180] his most recent retreat seems consistent with the conclusion reached here—namely, that neither pragmatist ends nor pragmatist means necessarily calls for approaches to free speech spanning the spectrum bounded by the respective theories of Mill and Holmes. As Posner emphasizes, the harms of hate speech impose costs that must be empirically ascertained. And it is only on the basis of those costs, and of other relevant costs and benefits, that a legitimate decision can be made on whether hate speech should be tolerated or prohibited.[181] Moreover, the "costs" and "benefits" in question may be determined in terms of a wealth maximization criterion or some

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179 *Compare* Debs v. United States, 249 U.S. 211 (1919) (Holmes, J.) (upholding the conviction of a long-time leader and presidential candidate of the Socialist Party for speech opposing World War I); Gitlow v. New York, 268 U.S. 652 (1925) (upholding the criminal conviction of a member of the Socialist Party for advocating, in general terms, the violent overthrow of the government on the grounds that such advocacy is sufficient by itself to meet the "clear and present danger" requirement.) (Justice Holmes dissented. *See id.* at 672.); Whitney v. California, 274 U.S. 357 (1927) (Justice Holmes concurred. *See id.* at 372.), *overruled by*, 395 U.S. 444 (1969) (conviction similar to that in *Gitlow* upheld); Dennis v. United States, 341 U.S. 494 (1951) (upholding criminal conviction for organizing the Communist Party and advocating the violent overthrow of the government); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961) (upholding the requirement that the Communist party register with the Attorney General and furnish membership lists based on a legislative finding that the communist movement presents a "clear and present" danger over objection on freedom of association grounds) *with* Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that Ku Klux Klan advocacy of violence against Jews and Blacks was constitutionally protected); Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied.*, 439 U.S. 916 (1978) (concluding that a march in Nazi uniforms, including swastikas and advocacy of Nazism, was protected); and R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (statute making cross burning in the manner of the Ku Klux Klan criminally punishable expression held unconstitutional).

180 *See supra* note 140 and accompanying text.

181 *See* POSNER, OVERCOMING LAW, *supra* note 31, at 396.

other substantive, normative criterion such as libertarianism or egalitarianism. In any event, consistent with Posner's own recent remarks, pragmatism itself can offer no justification for or against tolerating extremist or hate speech.

VI. Concluding Remarks: The Limits and Dangers of Pragmatism in Legal Interpretation

The last conclusion concerning hate speech can be extended to cover freedom of speech generally. Indeed, whether we tackle freedom of speech at the core, or at the margins, any cogent justification for it ultimately depends on linkage to ends that are not reducible to pragmatism. This may be less apparent at the core than at the margins, because of the availability of a large number of overlapping normative justifications. For example, at its core, free speech may be justified from democracy, truth, self-expression, equal dignity, solidarity, etc., but at the margins many, if not most, of these justifications would in all probability be unavailable. Also, where a large number of overlapping ends affords justifications to freedom of expression, there may be no practical need to focus on ends. But that should not be mistakenly interpreted to imply that ends do not matter. Thus, it may be possible sometimes to pick and choose among suitable ends, but inescapably all purportedly pragmatic justifications of free speech will ultimately prove to be parasitic on some non-pragmatic end. In short, to the extent that it makes sense to speak of pragmatist justifications of free speech, such justifications would fall under the rubric of mere pragmatism rather than under that of intermediate pragmatism.

Given the high hopes that the pragmatic justification of freedom of expression would bolster the case for intermediate pragmatism, its failure to do so calls into question whether the very notion of intermediate pragmatism is devoid of any practical consequences. To resolve this question, it is necessary to focus briefly on the distinction between critical and constructive pragmatism. Critical pragmatism refers to antifoundationalism, skepticism, and contingency, whereas constructive pragmatism designates whatever positive aims or programs may derive their justification from pragmatism. Assuming for the moment that critical pragmatism is generally unproblematic, the question boils down to whether anything remains to constructive pragmatism after the conclusion that there is no cogent purely pragmatic justification for freedom of expression.

Arguably, the only constructive prescription to which critical pragmatism leads is the necessity to embrace as a second-order end the maximization of equal freedom to pursue first-order ends. At first, it appeared that the promotion of freedom of speech could be subsumed under this second-order end. That did not prove to be the case, but is not necessarily dispositive of the question. Under further consideration, however, it becomes apparent that while critical pragmatism *does not foreclose* pursuing the above mentioned second-order end, it by no means requires it. After accepting that antifoundationalism, skepticism, and contingency lead to the conclusion that no conception of the good can be convincingly established as superior to others, the pragmatist must confront the need to determine the best practical course to follow under the circumstances. With this in mind, suppose that embracing the conception of the good shared by a majority would lead to greater peace and stability whereas adopting the second-order end would lead to greater freedom and sense of fairness. In that case, is either of the two options preferable to the other from a pragmatist standpoint? The answer is clearly no, as the first option offers the best practical means towards the (non-pragmatic) end of stability, whereas the same is true for the second option with respect to the non-pragmatic objective of greater freedom. At least when it comes to constructive pragmatism, therefore, the concept of intermediate pragmatism ultimately proves empty.

What about critical pragmatism? Can it escape the fate of being ultimately relegated to mere pragmatism? In other words, do antifoundationalism, contingency, or moderate skepticism have anything peculiarly pragmatic about them? Here again, the answer seems to be clearly in the negative. Antifoundationalism is typical of the postmetaphysical era, and even more of the postmodern era, and it counts among its many advocates the deconstructionists, for example, who are not necessarily pragmatists.[182] The same can be said of contingency, that is by no means within the exclusive preserve of the pragmatists. Indeed, the notion of contingency has been invoked and extensively used by others, such as the existentialists.[183] Finally, skepticism is hardly an invention of pragmatists,[184] and "moderate skepticism," to the extent that it is a

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182 *See* Rosenfeld, *Deconstruction and Legal Interpretation*, *supra* note 1.

183 *See, e.g.*, JEAN-PAUL SARTRE, BEING AND NOTHINGNESS: AN ESSAY ON PHENOMENOLOGICAL ONTOLOGY (Hazel E. Barnes trans., 1956) (providing an extended existentialist treatment of the notion that the individual's existence is contingent).

184 Skeptical thinking has historical roots going as far back as the pre-Socratic philosophers. *See* Richard H. Popkin, *Skepticism*, *in* 7 THE ENCYCLOPEDIA OF PHILOSOPHY 449

feature of pragmatism,[185] seems far from coherent. Specifically, once the hope of constructive pragmatism is cast aside, what is there to constrain skepticism? If the answer is "what we cannot help but believe in," it is purely circular. In that case, "moderate skepticism" either dissolves into a mere tautology: "I believe in what I believe in and I doubt what I cannot believe"; or it ends up amounting to an arbitrary refusal to ride skepticism to its logical conclusion.

Critical pragmatism thus seems as parasitic as constructive pragmatism. Nevertheless, it may still be preferable to alternatives to the extent that it is biased towards practical concerns, makes room for theoretical inconsistencies and is oriented toward the future. To determine whether that can be borne out, we must ask ourselves whether legal interpretation ultimately stands to gain or lose from adherence to critical pragmatism.

Critical pragmatism's orientation towards practical concerns can make a positive, though limited contribution, to legal interpretation. At the legislative level, it can help weed out unworkable or counter-productive legislation. This help, however, is likely to remain relatively modest, to the extent that pieces of legislation have multiple purposes, and that the practical implications of legislation are often not clear cut. Similarly, at the judicial level, critical pragmatism may help judges recognize and reject legal interpretations that are practically unworkable, or that would clearly lead to practical consequences inconsistent with what was intended. But in the great many cases in which different judicial interpretations would lead to different practical results, critical pragmatism can only play a minor role. As already mentioned, in those cases, judicial interpretation must rely on non-pragmatic normative considerations, with the consequence that critical pragmatism cannot be relied upon to furnish a just interpretation.

The much touted room for theoretical inconsistency, which philosophical critical pragmatism affords to legal pragmatism, proves in the end to be as dangerous as it is convenient. In cases in which there is a consensus concerning legal interpretation, but the theoretical reasons for agreement vary among various parties to the consensus, as already pointed out, convenience clearly outweighs any plausible danger. Indeed, because of inherent differ-

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(Paul Edwards ed., 1967). Also, among twentieth-century skeptics must be included such diverse philosophers as Albert Camus and George Santayana. *See id.* at 458.

185 *See supra* notes 51-52 and accompanying text (discussing moderate skepticism in the context of Posner's pragmatism).

ences between philosophy and law as distinct practices; and because everyone who gives his or her assent to the legal interpretation which is the subject of the relevant consensus does so because the interpretation in question is consistent with his or her own theoretical outlook; putting theoretical differences aside looms as both practical and harmless.

In cases in which there are genuine theoretical inconsistencies, however, critical pragmatism may often do more harm than good, by masking conflicts and tensions that would benefit from being tackled in the open. Thus, for example, along the lines suggested by Thomas Grey,[186] one may attempt to solve the thorny legal problem raised by hate speech by devising an approach that borrows from both libertarianism and egalitarianism without being consistent with either of the two. Accordingly, let us assume that to placate egalitarian concerns regarding the harms of hate speech, a libertarian marketplace approach is somewhat modified through criminalization of hate propaganda that falls within the definition of "fighting words."[187] From a libertarian standpoint, this solution might be dangerous in that it undermines (what the libertarian considers) "content-neutrality" and opens the door to a nearly imperceptible and gradual, but nonetheless ultimately potentially devastating, corruption of the free marketplace. From the egalitarian standpoint, on the other hand, this compromise is also dangerous, for "fighting words" hate speech may only represent the tip of the iceberg, and it may actually be less harmful than less strident alternatives which are likely to cause more profound and more permanent injuries. The compromise solution may not only conceal the relative potential for harm of different kinds of hate speech, but also, by conveying the impression that it imposes a balanced and reasoned standard, it may make it more difficult to combat the evils of hate speech than if the clash between libertarians and egalitarians were fully spelled out in the open. Finally, enthusiastic endorsement of theoretical inconsistencies would seem to make it easier for greater judicial manipulation. In other words, concerns of theoretical consistency are likely to impose some constraints

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186 *See* Grey, *What Good is Legal Pragmatism?*, *supra* note 25.

187 This solution comes close to that advocated by Grey. *See id.* at 25. Moreover, while this solution may seem consistent with the libertarian approach, it is actually not, to the extent that it only criminalizes "fighting words" that also qualify as hate speech and thus engages in content discrimination. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (criminalization of racist and gender-based "fighting words" but not other kinds, such as those based on hatred of homosexuals, held constitutionally impermissible content discrimination).

that make for greater judicial integrity than if theoretical inconsistency could be exploited to shield judicial biases. Accordingly, for all these reasons, the likely consequences of theoretical inconsistency do not appear to enhance the cause of critical pragmatism.

Critical pragmatism's orientation towards the future is linked both to its antifoundationalism and to its concern with practical consequences. Stated in conventional terms, pragmatism is designed to allow us to rid ourselves of cumbersome historical baggage and to concentrate on what works as measured by actual future consequences. On the level of common sense, this certainly sounds like a useful and practical approach, even if very banal. From a more critical theoretical perspective, however, combining pragmatism's antifoundationalism with its future orientation leads to a vexing contradiction. Consistent with this latter perspective, it is pragmatism's orientation towards the future that shapes and sustains its antifoundationalism. This is most obvious with respect to metaphysics. Indeed, in the postmetaphysical age, there is no practical future oriented use for metaphysics in the sense that metaphysics does nothing to help us solve the problems which we must confront in the course of shaping our future. Furthermore, the case of metaphysics is easy because in the postmetaphysical age most of us believe that, and behave as if, science rather than metaphysics helps solve practical problems. But from the standpoint of pragmatism, the proof of any theory or hypothesis lies in its consequences, and since the future cannot ever be known *ex ante*, strictly speaking no action could ever be pragmatically justified before, or at the time of, its occurrence without recourse to some unwarranted foundation. Consequently, the old pragmatists were foundationalists who relied on science and experience to justify their future oriented actions. Neopragmatists like Rorty, on the other hand, reject empirical science as incompatible with pragmatism's antifoundationalism, but replace it with arbitrary foundations of their own. Thus, to the extent that Rorty goes beyond claiming that use of language and redescription are inevitable facts of our past and present lives, and prophesies about future self-creation and solidarity,[188] he falls into the foundationalist trap. Indeed, without any foundations, there is no reason to believe that any particular future consequence, as opposed to any other consequence, would follow from any present use of language, or from any past or present effort at redescription. In sum, if pragmatism's antifoundationalism and its orientation towards the future are taken together

188 *See supra* note 117 and accompanying text.

and are taken seriously they logically lead to only one outcome—namely, complete paralysis. Therefore, not only does pragmatism's failure to deal with ends condemn it to a purely parasitic existence, but also, when logically interpreted, its antifoundationalism combined with its future orientation deprive it of any legitimate basis for dealing with means.

Based on the preceding analysis, pragmatism cannot solve the problem of just interpretations or eliminate the need for the interpretive subject. Whereas the intellectual journey of pragmatism has left us with useful lessons and modest gains, pragmatism offers no viable solution to the crisis concerning legal interpretation in a pluralist society. Because of the failure of the promise of pragmatism, the split between justice according to law and justice beyond law cannot be overcome through a mere rejection of foundations or through exclusive focus on means to the exclusion of ends. As a matter of fact, pragmatism's propensity to draw attention to means is not only inadequate but can also be downright harmful. Submersion or concealment of ends most often boosts the *status quo*, and thus exacerbates the obstacles encountered by those who are disfavored by prevailing institutional arrangements. On the other hand, pragmatism's antifoundationalism is so paralyzing in its logical implications that pragmatists have been prone to preach it more than to practice it. There is, however, a useful lesson to be drawn from pragmatism's attacks on foundations. Foundations are necessary and unavoidable, but in this postmodern age, they cannot be drawn from metaphysics, the enlightenment's conception of scientific reason or Kantian morals. The challenge posed by the intellectual journey of pragmatism, therefore, is to discover foundations consistent with contingency and a plurality of conceptions of the good, and, at the same time, capable of reconciling justice according to law with justice beyond law in a way that provides a satisfactory handle on the problem of legal interpretation. That is obviously a rather formidable challenge, well beyond the scope of this Article. But hopefully, the preceding discussion has contributed to "clear[ing] the underbrush"[189] and to encouraging efforts to meet the challenge in novel and creative ways.

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189 *See supra* note 24 and accompanying text.