The Jurisprudence of Radical Change: Herbert Marcuse's "Great Refusal" vs. Political Due Process

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THE JURISPRUDENCE OF RADICAL CHANGE: HERBERT MARCUSE'S "GREAT REFUSAL" VS. POLITICAL DUE PROCESS*

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"I maintain that there are issues where . . . there is no 'other side' . . . ."  
—Herbert Marcuse

"All silencing of discussion is an assumption of infallibility."  
—John Stuart Mill

IF FOR AMERICANS the past decade is historically recorded as the Revolutionary Sixties, no small credit will be due to the now famous neo-Hegelian philosopher, Herbert Marcuse. If that same decade gains the paradoxical reputation as the era in which Americans enacted and violated more laws than in any other decade in their history, a measure of the credit—or blame—belongs to Professor Marcuse. Marcuse's influence on the student racial movement and the academic world

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1 Herbert Marcuse, now in his seventies, moved from his Berlin birthplace to Freiburg, where in 1922 he completed his formal studies of philosophy and aesthetics and received his doctorate. After serving as Heidegger's assistant, he joined the Frankfurt Institute of Social Research, where Fromm, Horkheimer, and others were developing a neo-Marxist and Freudian critique of modern capitalism. Marcuse came to the United States in 1932 and worked in various research institutes until 1941, at which time he began a nine-year interlude with the Office of Strategic Services and the Department of State. In 1954 he began teaching politics and philosophy at Brandeis; presently he is a professor of philosophy at the University of California at San Diego.
is undeniable. His major book has gone into seven printings in five years. He has been explained, praised, and denounced in popular journals both liberal and conservative, intellectual and business. Though hardly a "household word" himself, Marcuse and his theories have been invoked even to illumine the allegedly darker aspects of the present Administration's attitude toward the media. For a

2 See, e.g., THE CRITICAL SPIRIT: ESSAYS IN HONOR OF HERBERT MARCUSE (K. Wolff & B. Moore eds. 1967 [hereinafter Wolff & Moore]. However, for a view, sub silentio, different from that expressed in the text, regarding his influence on the radical student movement, see THE POLITICS OF PROTEST (J. Skolnick ed. 1969), which does not mention him in nearly fifty pages on "Student Protest."

His influence in the academic world appears to be rather uneven, depending on the political orientation of a given college or department, the age of its instructors, the number of "activists" on campus, and other variables. That he should have any noticeable influence at all strikes me as somewhat puzzling, for he has written only one significant work, i.e., ONE-DIMENSIONAL MAN (1964) [hereinafter ONE-DIMENSIONAL MAN]; and the weaknesses of his arguments lay him open to devastating critique. See, e.g., Howe, HERBERT MARCUSE or MILOVAN DJILAS?, HARPER'S, July 1969, at 4; Vivas, Herbert Marcuse: 'Philosopher en titre of the New Nihilists, 6 INTER-COLLEGIATE REV. 51 (1969). His influence may be due to the fact that it is easier to quote him than to understand him, and that apparently few of his devotees have taken the time to read his critics.

3 ONE-DIMENSIONAL MAN.

4 Callahan, Resistance and Technology, 87 COMMONWEAL 377 (1967).


6 Peretz, HERBERT MARCUSE: BEYOND TECHNOLOGICAL REASON, 57 YALE REV. 518 (1968). This is the best article I have seen which is largely sympathetic.


8 Greenfield, Spiro Agnew: Heresy in High

9 time student revolutionaries on the Continent revered him as the Second Person of a new Trinity of radicalism. Nevertheless, it is fair to assert that outside certain very narrow circles, his name is unknown and his influence, if felt, is unrecognized. Perhaps he is nowhere more unknown than in the world of law, since the work of lawyers as a class is ordinarily quite different from that of the political theorist. Yet, because Marcuse has influenced a generation of nascent political activists and social theorists to adopt an outlook at odds with traditional notions of law, the values law protects, and the procedures requisite for civilized change, those who inhabit the legal world should scrutinize his ideas closely. Ideas do have consequences.

The sections that follow will sketch Marcuse's thought as drawn from his works that bear on this theme, in particular ONE-DIMENSIONAL MAN, his critique of modern industrial society; An Essay on Liberation, dealing with techniques of achieving radical change; and Repressive Tolerance, an essay from A CRITIQUE OF PURE TOLERANCE. Through copious citations Marcuse


9 One-Dimensional Philosopher, TIME, Mar. 22, 1968, at 38 [hereinafter One-Dimensional Philosopher]. See also Howe, supra note 2.

10 I have suggested elsewhere that lawyers as a class, emerging from the British empirical tradition, are ill-equipped intellectually to cope with movements whose elan resembles that of a continental ideology. See Stanmeyer, THE NEW LEFT AND THE OLD LAW, 55 A.B.A.J. 319 (1969).

11 A comprehensive bibliography of Marcuse's works up to April 1, 1967, appears in Wolff & Moore, at 427-33.

12 H. MARCUSE, AN ESSAY ON LIBERATION (1969) [hereinafter LIBERATION].

13 MARCUSE, Repressive Tolerance, in A CRITIQUE
will speak for himself whenever possible. Although in any summary some nuances are necessarily lost, the exposition will be as accurate as possible. It should be understood at the outset that I find the arguments of Burke and Mills and their tradition far more convincing than Marcuse’s and that a vast gulf lies between them. I will offer some criticisms of Marcuse from the perspective of that tradition, for not even a radical critic should be immune from critical commentary.

Part I deals with Marcuse’s general position on (a) the repressive technological society, (b) “liberation” through “negation” and “the Great Refusal,” and (c) the need for “repressive tolerance.” Part II offers an appreciation in (a) demonstrating the value of negative thinking and in (b) some criticisms of his method. Finally, Part III ponders the need for “rules of the game” in political decision-making and contrasts this kind of “due process” with Marcuse’s recommendation of violence. The conclusion contains some comments on bridging that vast gulf between the evolutionary and the revolutionary.

The Repressive Technological Society

Central to Marcuse’s thinking is the view that contemporary technological society—generally the West and specifically the United States—is both totalitarian and irrational. For “totalitarian” means not only a terroristic political coordination of society, but also a non-terroristic economic-technical coordination wherein vested interests manipulate human needs and “thus preclude[s] the emergence of an effective opposition against the whole.”14 Moreover, “this society is irrational as a whole.”15 Its productivity destroys free development of human faculties and fulfillment of human needs; its peace is maintained by the constant threat of war. People suffer under “aggressive business practices which turn ever more spaces of protective nature into a medium of commercial fulfillment and fun” and thus both “offend beauty” and “repress biological necessities.”16 The individual in the affluent society bends under “strains and stresses . . . grounded in the normal functioning of this society . . . rather than in its disturbances and diseases.”17 This society is sick.18

The need for possessing, consuming, handling, and constantly renewing the gadgets, devices, instruments, engines, offered to and imposed upon the people, for using these wares even at the danger of one’s own destruction, has become a “biological” need.19

“The established universe of discourse is

14 One-Dimensional Man 3.
15 Id. at ix.
17 Id. at 249.
18 As a tentative definition of “sick society” we can say that a society is sick when its basic institutions and relations, its structure, are such that they do not permit the use of the available material and intellectual resources for the optimal development and satisfaction of individuals needs.
19 Liberation 11.
that of an unfree world”;20 one experiences a “radical falsity [in] the established forms of life.”21 By apparently providing for man’s every want, society has deadened his critical faculties: “the increasing comforts of life and the ubiquitous power of the productive apparatus keep man enslaved to the prevailing state of affairs.”22 We inhabit a society which is both totally administered and overdeveloped, which creates artificial waste in order to maintain specious affluence, which fosters “positive thinking” not through terror but by overwhelming, anonymous power and efficiency.23 In flattening opposition, in absorbing the Other, the media as well engage in maintaining the “one-dimensional” society: they stifle the mind’s quest for alternatives and help make liberty itself an instrument of domination. “Free election of masters does not abolish the masters or the slaves.”24

Many of these value-laden sociological judgments have been suggested before.25

H. MARCUSE, REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY xii (1960) [hereinafter REASON AND REVOLUTION].

21 Id. at xiii.

22 Id. at xiv. Cf. ONE-DIMENSIONAL MAN 8, noting the “flattening out of the contrast (or conflict) between the given and the possible, between the satisfied and the unsatisfied needs.”

23 ONE-DIMENSIONAL MAN 226. “Positive thinking” has a technical meaning. It has overtones of philosophical positivism, which Marcuse strongly opposes and forcefully criticizes. See id. at 144-69. He sees it as basically a philosophical movement “which undertook to subordinate reason to the authority of established fact.” REASON AND REVOLUTION xv. This attitude leads to an uncritical acceptance of the status quo and a blindness to the possibilities of alternatives. See also NEGATIONs 134-58.

24 ONE-DIMENSIONAL MAN 7. The “absorption of the negative by the ‘positive’” is discussed at 226 et seq.

Other commentators have gleaned essentially the same message. Martin Peretz, supra note 6, summarizes as follows:

Business and labor, advertiser and consumer, each has a stake in the perpetuation of the present. How pointless then, the old philosophic gambits of is and ought, of being and becoming! What Marcuse finds so striking and so compromising are the equivalent implications of other intellectual disciplines. Sociology studies the conditions securing consensus; psychology probes for refined techniques of inducing adjustment; economics purports to be neutral engineering; the arts are smugly devoid of ennobling aspiration. . . . [T]he guilt of the intellectuals [consists of] envisioning no alternatives to the present. . . .

Id. at 522. And he adds that poverty amidst plenty, elaborately preserved formal liberties carefully emptied of substance, an ethic of work undermining the free leisure momentum of automation, an economy of waste and obsolescence, the recurrence of wars and of military interventions, these are not for him [Marcuse] blemishes on the facade of the system gradually to be eliminated with time; they are of the system’s essence and in keeping with its logic.

Id. at 523.

See also Cohen, The Norman Vincent Peale of the Left, ATLANTIC, June 1969, at 108; Howe, supra note 2; Vivas, supra note 2. The flippant titles given to some popular articles on Marcuse should not be allowed to obscure the seriousness with which he writes and his devotees follow him. For a serious appraisal, see Stern, The Metaphysics of Rebellion, 6 RAMPARTS 55 (1967).

25 Marcuse himself acknowledges his debt to C. Wright Mills, Vance Packard, William H. Whyte, and Fred J. Cook. ONE-DIMENSIONAL MAN 17. He adds a theoretical analysis. His merger of Hegel with popularized sociology has been noted in Stillman, Marcuse, HORIZON, Summer 1969, at 26. After naming the forementioned writers: “Marcuse is the reverse of a popularizer—one who makes abstruse thinking accessible to the masses. Marcuse takes popular doctrine and cloaks it in ideology and dense prose.” Id. at 31. Despite this jibe, this article is the best serious piece that I have seen in the popular press which
Marcuse's originality lies partly in his attempt to cast them into a mold drawn from Hegel, Marx and Freud; and largely in his candid appraisal of what must be done about them. The latter point bears directly on an area of inquiry where jurisprudence and social philosophy overlap: the role of law in organizing a humane society.

Implicit through Marcuse's diagnosis of society is a view of law. For him, law is an instrument of the hyper-stable society itself, a means of preserving the status quo and cloaking its resistance to change in the garb of legitimacy. In this view he departs little from Marx, whose remark about bourgeois jurisprudence expressed the doctrine that all subsequent revolutionaries marching under his banner have preached. Though not in overall outlook, Marcuse has moved away from Marx in significant details, both in his unhesitant admission that no longer is a single "class," the bourgeoisie, at fault—he substitutes the technological organization as a whole, in which the workers acquiesce as well—and in his conviction that radical new beginnings must occur equally in such hitherto politically irrelevant fields as linguistics and general culture. Marcuse sees little that is truly liberating in the present role of law in our lives (and here too he may be influenced by the Marxian postulate that ultimately, after the purgative period of proletarian dictatorship, the State and its laws will "wither away"); indeed, he would probably regard law and "liberation" as antithetical. It is hardly strange, therefore, that he recommends actions which depart from the law-imposed norms. To see why such departure is a means to liberation, one must understand the premise: liberation, the goal of social life, means the fulfillment of individual desires and potentiality as autonomously articulated. However, law helps impose that crushing cultural uniformity which inhibits autonomous choice; thus law contributes to the withering of freedom.

At the very outset of One-Dimensional Man Marcuse suggests a startling notion of freedom: "The rights and liberties which were such vital factors in the origins and earlier stages of industrial society yield to a higher stage of this society: they are losing their traditional rationale and content." Freedom of thought, speech and conscience were "essentially critical ideas, designed to replace an obsolescent material and intellectual culture by a more produc-

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shows the philosophical, historical and even theological influences on Marcuse.


27 But don't wrangle with us so long as you apply, to our intended abolition of bourgeois property, the standard of your bourgeois notions of freedom, culture, law, etc. Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will, whose essential character and direction are determined by the economic conditions of existence of your class.


29 Id. at 67-73. See also Repressive Tolerance at 81. The entire essay is an exhortation to depart from traditional norms, especially of freedom of speech.

30 One-Dimensional Man 1.
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tive and rational one.” But now that they are institutionalized, they have lost their critical thrust. It follows that to achieve “a radical transvaluation of values” the present forms of freedom must be negated; in fact, the only way to achieve true liberation from the false consciousness that so permeates our society is “total rejection of the existing society, of its entire value system.” The popular majority’s opinion is generated by the dominant interests in the status quo; consequently “the general will is always wrong”; and “if democracy means self-government of free people, with justice for all, then the realization of democracy would presuppose abolition of the existing pseudo-democracy.” The opposition that must arise cannot share the same premises of this system or be willing to work for piecemeal reform, for then it too would finally be co-opted and absorbed into the one-dimensional society; rather, what is needed is “an opposition which is directed, not against a particular form of government or against particular conditions within society, but against a given social system as a whole . . .” He develops the preconditions for this opposition in An Essay on Liberation.

“The Great Refusal”: Liberation Through Negation

In discussing “the present meaning of Liberalism,” George H. Sabine states that “a crucial characteristic and perhaps the most important characteristic of a liberal government is the negative quality of not being totalitarian,” and that its goal is “first and foremost . . . to regularize public reflection and discussion, and the weighing of contrary claims to the end of evolving a workable policy.” This is done, he asserts, by institutions which promote a maximum of opportunity for human wisdom, which “consists less in certainty than in a built-in corrigibility.” And when Mill inquires what accounts for the fact that most people hold rational opinions and exhibit rational conduct, he answers that “it is owing to a quality of the human mind

31 The problem of the fossilization of revolutionary fervor once it becomes “established” may be more a fact of human psychology than an attribute of an idea, such as freedom. The secularization of the Christian Church, once Emperor Constantine made it the Roman Empire’s official religion, is perhaps one historical example. Milovan Dijas has observed the same phenomenon infecting the communist movement. M. DJILAS, THE NEW CLASS 152 (Praeger ed. 1964).
32 LIBERATION 6. “Such a practice involves a break with the familiar, the routine ways of seeing, hearing, feeling, understanding things . . .” Id. “To the degree to which the rebellion is directed against a functioning, prosperous, ‘democratic’ society, it is a moral rebellion, against the hypocritical, aggressive values and goals . . . of this society. . . .” Id. at 62.
33 Id. at 58. He describes “today’s rebels” who have “libertarian aspirations” which “appear as the negation of the traditional culture. . . .” Id. at 46. Earlier, he describes with the fervor of the advocate, the “struggle . . . waged for essentially new ways and forms of life: negation of the entire Establishment, its morality, culture. . . .” Id. at 25.
34 Id. at 65. The general will is wrong because “it objectively counteracts the possible transformation of society into more humane ways of life.”
35 Id.
that as a moral being, [a man's] errors are corrigible.\(^\text{40}\)

It is precisely these two features which Marcuse vehemently denies exist in modern society; for it is totalitarian—and thus it is no longer corrigible.\(^\text{41}\) Therefore non-parliamentary means must be utilized; in sum, these comprise the Great Refusal.\(^\text{42}\) He teaches that the resistance must take place in life style, in language, in action; that to create “a realm of freedom which is not that of the present . . . necessitates an historical break with the past and present.”\(^\text{43}\) He believes that a rational organization of the technical and technological forces of advanced capitalism and socialism “would terminate poverty and scarcity within a very foreseeable future,”\(^\text{44}\) but only if the rebellion takes root in the very nature of the individual man and a qualitative change occurs in the needs—in the “infrastructure,” as it were—of social man himself. Such a “biological” transformation can come about “only through a political practice of methodical disengagement from and refusal of the Establishment,” and with a touch of the prophet condemning Sodom and Gomorrah, he adds that those who join in the Refusal “[must] reject the rules of the game that is rigged against them, the ancient strategy of patience and persuasion, the reliance on the Good Will in the Establishment, its false and immoral comforts, its cruel affluence.”\(^\text{45}\) Though “radical political practice involves a cultural subversion”\(^\text{46}\)—by redefining words like “obscene” to mean the hypocrisies of the present society, by turning morality against the Establishment—it “is affirmative in that it envisages a new culture which fulfills the humanistic promises betrayed by the old culture.”\(^\text{47}\) Since the populace has an almost organic adaptation to this terrible but profitably functioning society, they “cannot reject the system of domination without rejecting themselves.”\(^\text{48}\) Thus, “we would have to conclude that liberation would mean subversion against the will and against the prevailing interests of the great majority of the people.”\(^\text{49}\) Marcuse envisions a new type of man: controlling his own destiny, leisured, freed of injustice through “human relationships no longer mediated by the market, no longer based on competitive exploitation or terror.”\(^\text{50}\)


\(^{41}\) "The democratic process . . . is discredited to such an extent that no part of it can be extracted which is not contaminated. Moreover, using this process would divert energy to snail-paced movements." Liberation 63.

\(^{42}\) Liberation ix; One-Dimensional Man xiv & 257; Reason and Revolution xi.

\(^{43}\) Liberation viii. Query: The law having been made in the past, and preserving past values and modes of conduct in the present, does this position mandate rejection of the legal order, not for any “dishonest” purpose but for purposes of breaking the historical continuity and thus symbolically placing oneself over-and-against (gegenstand) the established order?

\(^{44}\) One-Dimensional Man 4. But this can occur only through “collective ownership, collective control and planning of the means of production and distribution.” Liberation 87. I return to the problem of central planning at note 96 infra.

\(^{45}\) Liberation.

\(^{46}\) Id. at 10.

\(^{47}\) Id.

\(^{48}\) Id. at 17.

\(^{49}\) Id.

\(^{50}\) Id. at 27, 46.

But the construction of such a society presupposes a type of man with a different sensitivity as well as consciousness: men who would speak a different language, have different gestures, follow different impulses;
Marcuse recognizes, as do many of his followers, the educational value of physical action as a means of creating a new attitude; the beginning of radical change in consciousness, he says, is a period of enlightenment prior to material change, "a period of education . . . which turns into praxis: demonstration, confrontation, rebellion."  

Marcuse has raised a problem in the legal system which is rarely touched in law schools: the relation between underlying values and express standards, between one's private understanding of his role in society and that society's public understanding of itself. However stated, the polarities suggest a tension that law alone cannot quite resolve. Although law needs public acceptance and a measure of individual commitment to insure compliance, it cannot effectively command a general commitment. It can, in a word, command certain acts—but not a willingness to perform those acts. Commitment to certain processes of resolving disputes, allocating resources, making decisions, insuring that change brings progress, and withal, maintaining a living dialogue between governing and governed—popular commitment to, or at least acquiescence in, the legal institutions of society is essential for their effective functioning.  

This society has taken its institutions for granted. They have worked tolerably well, quite well compared to other systems attempted in other societies. Until the last decade, the winds of revolutionary change that might shake domestic institutions not firmly anchored in popular acceptance did not blow across our country, so that whatever gaps separated underlying mores, morals, worldview or ideology on the one hand, and social arrangements, public laws, and official practice on the other were hardly noticed. Since everyone shared—or seemed to share—the same underlying values, a public consensus on means generally (as well as on a wide range of ends), everyone took those values for granted. The deep differences were largely over method or degree within the system; as Marcuse would say, a matter of quantity and not quality. Marcuse popularized—among a certain constituency—the truth that the relationship between legal system and underlying values is one of interdependence. Since they support one another, a person can attack one by attacking the other. Accordingly, the "historical break

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51 Id. at 53. Cf. Repressive Tolerance at 101.
52 See C. HYNEMAN & C. GILBERT, POPULAR GOVERNMENT IN AMERICA 287 (1968): "Rules that limit the behavior of an aggressive society cannot be made effective by display of governmental authority alone; there must be voluntary adherence to the rules [as well]."
53 See C. FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 149 (1963):
The more generally the existing foundation of the social order is accepted, as was the case in the United States until recently and in Europe during the nineteenth century, the more law can be treated as if it were only a compromise of existing interests—the reason being that the deeper foundations, the "fundamental agreements," are not questioned.
with the past and present" becomes both a self-induced alienation from popular mores and habits and a similar isolation from the influence of accepted legal processes. It is thus a rooting out of the implicit commitment to social rules that carries on in human psychology even after explicit commitment has been permitted to atrophy. When one “refuses” involvement with “the System,” he engages in a kind of reverse-rehabilitation process, the goal now being to leave the “square” world psychologically—a world, incidentally, which takes the norm to be the “law-abiding” and which structures such myriad social relations through law, both criminal and civil, that a shortcut to self-alienation from that world is to clash with its laws. Attack the legal system—whether through ridicule, purposeless violation, or pressure on authorities to abdicate—and one strikes at the values and attitudes it reinforces. Or one may reverse the direction of his sortie and use Marcuse’s “cultural subversion”—symbolic acts, a life-style that ridicules inherited social arrangements, the “new morality” or linguistic perversion—as a rear guard assault on the legal system, of which the traditional norms and values are spirit and life. Marcuse notes the relation:

Even the most totalitarian technocratic-political administration depends, for its functioning, on what is usually called the “moral fiber”: . . . A society depends on the relatively stable and calculable sanity of the people. . . . Moreover, a society also demands to a considerable extent, belief in one’s beliefs (which is part of the required sanity); belief in the operative value of society’s values.55

The original Marxist theory expected the working class to be driven to a growing consciousness of their alienation and the oppressive purpose of bourgeois law and values; this awareness would presage revolution. Capitalism’s resilience, however, blunted the proletariat’s revolutionary fervor; thus, Marcuse suggests that history has handed the torch of negative thinking to ghetto dwellers and the student population, who have “the common ground [of] the total rejection of the existing society, of its entire value system.”56 In a style repportorial but with a tone hortatory, Marcuse in effect calls upon both groups to reject the political process because liberal-parliamentary democracy is a sham; the politicians are irrelevant; the courts do nothing to mitigate popular distrust; the system not only takes too long but it is also so discredited that its every part is contaminated.57 As the rejection is of the down, and only then, he says, will the “political climate . . . prevail” for new forms of struggle. 56 Id. at 58. As staging ground for the student movement, the university receives general demands for educational reform which are, Marcuse says, “only the immediate expression of wide and more fundamental aims.” Id. at 59.

57 Id. at 63. The condemnation is elaborate and forceful. It is instructive to juxtapose the ideas about the legal system, the courts in particular, and the need for “radical reform” offered by legal scholar and practicing attorney John Frank who, unlike Professor Marcuse, has had vast experience with the topic of his critique. See J. FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM (1969), which moves far beyond the thundering generalities in the passage just cited, to point out precisely what is wrong and to offer specific recommendations. Cf. John P. Frank—Radical Judicial Reform Symposium, 47 Texas L. Rev. 965 (1969). The gap between the mountaintop of theory and the marketplace of practice is made greater by Marcuse’s unfortunate habit of anath-

55 Liberation 83-84. When these values break
social system as a whole, it is impossible not to breach legality, for all enforceable laws only serve the status quo, and "those who refuse such service are *eo ipso* outside the realm of law even before they come into actual conflict with the law." By using Law and Order as a counter-revolutionary force, the system of corporate capitalism presses the radical opposition into direct action and uncivil disobedience. Indoctrinated and self-perpetuating, the majority are open to changes within, but not beyond, the institutionalized social system; the radical must either surrender to the power of the status quo or violate the law and order of the status quo.50

Marcuse is aware of the objection that to set oneself up as judge of a legally constituted society in place of the official representatives and the majority of the people is to opt for a self-appointed elite. He notes further that between democracy and dictatorship—even "benevolent" dictatorship—democracy is certainly preferable. He insists, however, that such a democracy does not exist; rather, we have a network of pressure groups, "machines," vested interests which control democratic institutions.60 To exchange these ruling

ematizing the unknown. Compare the field of business, note 94 infra.

58 LIBERATION 67.

59 Id. at 69-70.

60 Robert Paul Wolff, colleague of Marcuse, argues the failure of pluralism in Beyond Tolerance, another essay in *A Critique of Pure Tolerance*, *supra* note 13, at 36. For a more profound appraisal of the need for pluralism, see R. NISBET, COMMUNITY AND POWER 265-69, 283-84 (1962). Of this book, Adolf Berle comments that pages 140 to 180 "ought to be required reading for those currently attracted by the think-

minorities for an elite "would only mean replacement of the present ruling elite by another . . . [which] may not be less qualified and less threatening than the prevailing one."601 The positive, codified right of existing society clashes with the negative, unwritten human right of transcendence—a standoff, he implies. And the standoff is not broken by criticizing the radical for violence when "violence is built into the very structure of this society."602 Especially when one ponders the horror of our foreign policy, he contends, "the traditional distinction between legitimate and illegitimate violence becomes questionable."603 "Law and Order" are indeed necessary, but in the present situation "law and order become something to be established as *against* the established law and order: the existing society has become illegitimate, unlawful: it has invalidated its own law."604

"Repressive Tolerance" and the Great Refusal

In *A Critique of Pure Tolerance*, Professor Marcuse contributed an essay entitled "Repressive Tolerance," which is


61 LIBERATION 70.

62 Id. at 75. "[A]s the accumulated aggressiveness which drives the business of life in *all* branches of corporate capitalism, as the legal aggression on the highways, and as the *national aggression* abroad. . . ." Id. at 75-76 (emphasis added). The use of analogy to presume a point to be proved is discussed in the text accompanying notes 101-07 infra.

63 Id. at 76.

64 Id. at 78. Thus, by a different route Marcuse has arrived at the same conclusion as Marx. *See* note 28 *supra*. 
generally viewed as the epitome of his thinking about the Great Refusal, as well as a frontal attack on the tradition of Burke and Mill regarding the method of change in a free society.

Marcuse advances the paradoxical observation that “what is proclaimed and practiced as tolerance today, is in many of its most effective manifestations serving the cause of repression.” Because of the basically oppressive character of the status quo, tolerance is extended to conditions and modes of behavior which should not be tolerated because they impede liberation. Worse still, “within a repressive society, even progressive movements [i.e., movements of radical negation] threaten to turn into their opposite to the degree to which they accept the rules of the game.” Tolerance is of two kinds: passive toleration of entrenched and established attitudes and ideas (even if their damaging effect is evident), and active or official tolerance of the Right as well as of the Left. The second form, “pure tolerance,” is non-partisan, but its neutrality “actually protects the already established machinery of discrimination.” The goal of struggle is to create a society wherein “man is no longer enslaved by institutions which vitiate self-determination from the beginning,” for “freedom” does not yet exist; it “is still to be created.” The standard, the effectuation of liberation, therefore, “cannot be indiscriminate and equal with respect to the contents of expression. . . . [I]t cannot protect false words and wrong deeds which demonstrate that they contradict and counteract the possibilities of liberation.” The rationale of free speech and assembly was that men were individuals who could come to reasonable positions on their own, but since this supposition for universal toleration no longer obtains—men are now manipulated and indoctrinated—the indiscriminate guaranty of political rights actually turns out to be repressive. Thus tolerance itself is questionable. Dominating through technology, this society can condescend to permit the

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65 Repressive Tolerance at 83.
66 Id. at 83-84.
To take a most controversial case: the exercise of political rights (such as voting, letter-writing to the press, to Senators, etc., protest-demonstrations with a priori renunciation of counter-violence) in a society of total administration serves to strengthen this administration by testifying to the existence of democratic liberties which, in reality, have changed their content and lost their effectiveness. In such a case, freedom (of opinion, of assembly, of speech) becomes an instrument for absolving servitude. Id.
67 Id. at 85.
68 Id. at 87.
69 Id. at 88, 90-91. Marcuse states: “The antagonistic structure of society rigs the rules of the game. Those who stand against the established system are a priori at a disadvantage, which is not removed by the toleration of their ideas, speeches, and newspapers.” Id. at 92 (emphasis added).

Unless this is an objection against having rules at all, it should be apparent that this burden falls equally on every party or person who would change the status quo—including even those who would change the status quo in San Diego by imposing mandatory retirement on professors who are beyond retirement age but continue to teach. That Marcuse benefits by society's rules of the game against self-help “repressive tolerance” exercised by a populace resentful of his revolutionary message is suggested indirectly in Legion vs. Marcuse, 207 THE NATION 421 (1968); Gold, Mao, Marx et Marcuse! Saturday Evening Post, Oct. 19, 1968, at 56. The irony of escaping repression through the protection of the “repressive society’s” legal forms is lost on him.
appearance of freedom to opposition movements, because the overwhelming majority, secure in the increasing satisfaction of needs, militates against qualitative social change and sees to it that the radicals do not really change anything. Consequently, it allows all points of view: Left and Right, white and Negro, crusaders for armament and for disarmament. Throughout the babble of competing voices "the people" are supposed to decide; yet the unspoken condition precedent to the success of democratic argument is that they have access to authentic information and are capable of autonomous thought. In our present era, however, "the democratic argument for abstract tolerance tends to be invalidated by the invalidation of the democratic process itself."\textsuperscript{71} The apparent objectivity of the media fosters, in a totalitarian democracy, a mental attitude which obliterates distinctions between true and false, between information and indoctrination. In order to break out of the established universe of meaning, this deceptive impartiality must be abandoned, the prevailing indoctrination offset, and the trend reversed: the people "would have to get information slanted in the opposite direction."\textsuperscript{72} To

\textsuperscript{70} Repressive Tolerance at 94.
\textsuperscript{71} Id. at 95.
\textsuperscript{72} Id. at 99. He asserts that such a recommendation does not amount to espousal of a dictatorship; for despite its limitations and distortions, democratic tolerance is always more humane than the institutionalized intolerance of a dictatorship. But he states there is a third alternative other than dictatorship and our present democracy: to change this society to make it truly democratic. He does not discuss prior twentieth-century experiments in "slanting" information in the direction a ruling elite thinks best for the people, nor does he explain how his proposal would differ

open up the ways by which a subversive majority could develop "may require apparently undemocratic means," which "would include the withdrawal of toleration of speech and assembly from groups and movements which promote aggressive policies, armament, chauvinism, discrimination on the grounds of race and religion, or which oppose the extension of public services, social security, medical care, etc.," and "may necessitate new and rigid restrictions on teachings and practices in the educational institutions. . . ."\textsuperscript{73}

This position, he continues, entails re-examining the traditional distinction between violent and nonviolent action, for in terms of its historical function there is a difference between revolutionary and reactionary violence. The natural question—Who makes the judgment between the two kinds of violence and by what standards?—can have only one logical answer: everyone who has learned to think rationally and autonomously—a number, in an indoctrinated society, that would be quite small and not necessarily the people's elected representatives. The historical record reveals that violence from below, by the oppressed masses, leads to progress in civilization, and that one can anticipate whether a violent "movement would serve the revamping of the old order or the emergence of the new."\textsuperscript{74}

Liberating tolerance, then, would mean intolerance against movements from the Right, and toleration of movements from

\textsuperscript{71} Id. at 100.
\textsuperscript{74} Id. at 108-09.
the Left. As to [its] scope: it would extend to the stage of action as well as of discussion and propaganda, of deed as well as of word. The traditional criterion of clear and present danger seems no longer adequate where the whole society is... in a period of clear and present danger.7

Our whole society being in extreme danger, an extreme suspension of the rights of free speech and assembly is justified: tolerance should be withdrawn before the deed, at the stage of communication in word or art form. The deterioration of democracy has proceeded so far that false consciousness has become the general consciousness; the only remedy is "withdrawal of tolerance from regressive movements before they can become active; intolerance even toward thought, opinion, and word," for "I maintain that there are issues where either there is no 'other side' in any more than a formalistic sense, or where 'the other side' is demonstrably 'regressive' and impedes possible improvement of the human condition."76

An Evaluation: The Power of Negative Thinking

John Stuart Mill observed sagely that "it is the fashion... to disparage negative logic—that which points out weaknesses in theory or errors in practice, without establishing positive truths.77 Marcuse's thought is "negative," in the metaphysical sense:78 in both epistemological theory and political practice one moves to truth by grasping, in the first instance, the falsity of the given. The Hegelian dialectic, with its many levels of application and subtlety, is not the customary method of thought in the English-speaking West, but it has guided Marcuse to some conclusions that deserve a hearing; his many-sided analysis may well prompt agreement on individual points without acceptance of the entirety. Such an acceptance may well be impossible for a person operating out of the tradition of Burke and Mill, simply because of the gulf separating the "spiritual universe" of British empiricism from that of Continental ideology. Or it may be, as this paper will argue, because of Marcuse's insufficient familiarity with important societal institutions, such as law and business, and the disturbing implications of his recommendations about means to achieve his ends.79

75 Id. at 109. The reference is to Schenck v. United States, 249 U.S. 47, 52 (1919), wherein Mr. Justice Holmes enunciated the classic test of free speech hindrance:
The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.
It is a question of proximity and degree."

76 Repressive Tolerance at 110, 120. The latter appears in a Postscript to the essay, written in 1968.

77 J. MILL, supra note 40, at 64.
78 See note 21 supra.
79 To those who take issue with Marcuse there is a convenient rejoinder. See One-Dimensional Philosopher at 40, wherein the author states that "[t]o most criticisms, Marcuse smilingly answers that his intellectual opponents are simply one-dimensional prisoners of the system." Marcuse's method of answering in advance the objection that his ideas are utopian appears as follows:
"The unrealistic sound of these propositions is indicative, not of their utopian character, but of the strength of the forces which prevent their realization." ONE-DIMENSIONAL MAN 4.
The weakness of this kind of rebuttal is that it smacks of the ad hominem attack and presumes what must be proved—that the "system" "im-
No quarrel need ensue, however, if one begins by adverting to some affirmative aspects of Marcuse's negative thinking. As a theoretician whose thought process is geared to transcendence, he has little patience with philosophical positivism, which, he believes, artificially narrows one's perspective to the “is” while excluding the “ought”—the alternative—which is beyond the grasp of empirical method or expression in “operational terms” but is nonetheless real. Emphatic that if any style of thought is “one-dimensional,” this is, Marcuse argues that one of positivism's contemporary offspring, analytic philosophy, trivializes philosophy and cosmic problems by a nit-picking method that refuses to attend to anything but simple, everyday sentences and situations. His particular insight is to focus on the connection between philosophical positivism and societal resistance-to-change. He believes positivism's flattening out of the world of meaning and alternatives in thought is the philosophical counterpart of a similar emasculation rampant in people's psychology, politics, and social relations. They accept the given as the right. They surrender to a self-validating system. Thus they lose the power—even in thought—to stand outside it and challenge it in terms of alternatives. They demean themselves by acquiescing to the positivist truncation of the philosopher's witness, which is to stand over-and-against the irrational while subjecting it to the scrutiny of reason.80 One can sense Marcuse's horror at the positivist renunciation of theory as he recoils from "Bishop Butler's pronouncement which adorns G.E. Moore's Principia Ethica: 'Everything is what it is, and not another thing?'”81—even as Hegel would be horrified—or as he notes that neopositivism sets up a comfortable "reservation" for certain modes of thought, thereby insulating "the normal universe of discourse from being seriously disturbed by unfitting ideas".82

The neo-positivist critique still directs its main effort against metaphysical notions, and it is motivated by a notion of exactness which is either that of formal logic or empirical description. Whether exactness is sought in the analytic purity of logic and mathematics, or in conformity with ordinary language—on both poles of contemporary philosophy is the same rejection or devaluation of those elements of thought and speech which transcend the accepted system of validation...83 and are set aside—segregated?—as "poetic" or "metaphysical."

Admittedly, Marcuse is far from the first to question the adequacy of posi-

80 The positivist "analysis abstracts from the negative, from that which is alien and antagonistic and cannot be understood in terms of the established usage. . . . In barring access to this realm [of knowledge beyond common sense and formal logic], positivist philosophy sets up a self-sufficient world of its own, closed and well protected against the ingressing of disturbing external factors." ONE-DIMENSIONAL MAN 182.
81 Id. at 184.
82 Id.
83 Id.
tivism. Nor is he original in his concern about the dehumanization of man in the technological society. But he has shown originality in combining an attack on the general philosophical underpinnings of a society with a prophet's wrath at its practical excesses. Moreover, as any prophet, his mission is essentially normative rather than descriptive. He arrived on the scene at a time when many students and young intellectuals have become disenchanted with logical positivism pushed to—shall we say?—its logical conclusion, either in sterile analysis of words and simple sentences in the classroom or in the piecemeal reform of societal institutions that leaves them in essence as they were. He offered a normative critique quite heady compared to the intellectual pablum they feel has heretofore been their diet. Students for a Democratic Society and other radical protest groups are essentially normative: they stand outside the accepted scheme of things in order to criticize it, to distinguish clearly the is from the ought, and to assert that the latter is both knowable and attainable. By pounding his many theses of dissent on the university door, Marcuse resembles Luther striking at the “established” system, which in his day bound theological thought and religious practice; or an intellectual Moses leading his people across a spiritual desert where they must create “new forms” of social life as the price for redemption of the class they represent—the “disinherited of the earth”—in the promised land, which for Marcuse will be the unpressive, technologically abundant, classless society. To avoid stagnation, every society needs its prophets.

Lawyers especially owe a certain debt to a prophet like Marcuse. Busy tending the machinery of society, we often fail to ask where the machine is going; complacent in that successful daily conflict-resolution which Marcuse so roundly condemns, we rarely consider the ethical implications of the system as a whole. Skilled at utilizing the democratic process, we scarcely consider the need for commitment, values, and underlying consensus. We write elaborate scholarly briefs on narrow points within the legal system; but few of us have bothered to compose a brief that would prove the value of the system itself to the dissenter. If “political due process” is the soul of Western legal thought, Marcuse’s student followers, under his tutelage, have drawn up an indictment with its chief count the accusation that the system is a Frankenstein. In effect, they say, “Prove that it needs a soul—and has one.”

84 From quite a different perspective, Professor Lon L. Fuller attacked positivism in jurisprudence. See L. FULLER, THE LAW IN QUEST OF ITSELF (1940). The argument that ensued is traced, with citations from contemporary positivist jurists, in Fuller, A Reply to Critics, in The Morality of Law 187-242 (rev. ed. 1969).

85 See note 25 supra. This theme is so commonplace today that citation is hardly necessary. Nevertheless, at least passing reference is owed to a Continental philosopher whose “feel” for the human condition is extraordinarily sensitive. See G. MARCEL, MAN AGAINST MASS SOCIETY (1962).

86 See Stillman, supra note 25.

87 For interesting comments about Marcuse and Continental student protest groups, see Cranston, Neocommunism and the Students’ Revolts, 1

Studies in Comparative Communism, July-October 1968, at 40. This is an interdisciplinary journal published quarterly by the School of Politics and International Relations, University of Southern California.
An Evaluation: The Limits of Negative Thought

Before an examination of the indictment itself, a discussion of how it is reached is in order. A careful reading of Marcuse's analysis raises grave doubts about its adequacy. These doubts cluster around four main themes: first, his lack of experience with the processes he so confidently condemns; second, the rhetorical device of redefining words to "prove" an otherwise controverted point; third, his utopianism; and fourth, the facile transfer of Hegelian dialectic from the conceptual domain of thought to the real world of society.

The pervasive question is whether Marcuse carries the burden of proof. We must ask whether he has proved beyond a reasonable doubt the guilt of the political-legal system so that the verdict of the death penalty should indeed be rendered. In order to comprehend how crucial this evidentiary question is, we must clearly understand, at the outset, what the issue is and where the burden of proof lies. As to the former question, at stake is not a given objectional practice in American society—say de facto segregation, conformity pressures on middle management, pollution, or any other specific evil; if such specifics were at stake one could neutralize their probative impact by recitation of other particulars which are positive, beneficial and good—the widespread private philanthropy in this country, open-ended upward mobility, religious and economic freedom, even the "bourgeois" comforts of central heating. Such a litany of social virtue is as irrelevant as any litany of social vice. The goal of the new sensitivity and new consciousness, Marcuse explains, "implies rejection of those policies of reconstruction, no matter how revolutionary, which are bound to perpetuate... the pattern of the unfree societies and their needs." He means that any reform which would ameliorate or remove many of the contemporary social evils is not the goal, for such reform would only impede true progress toward a different system by making this one more tolerable. The prisoner at the bar, he contends, has no redeeming features and simply cannot be rehabilitated. Further, the transformation must be total. Not socializing the means of production, not changing national priorities, not reconciling the races—not any single radical improvement is enough. Although useful, these are merely piecemeal. They leave the essentials intact. For Marcuse, there must be a substantial change in the entire social-economic-political-legal-aesthetic-biological-philosophical life of this society.

Precisely because of the pristine, uncompromising absoluteness of the Marcusian prescription, the burden of proof question becomes crucial. Since his diagnosis is so pessimistic, it is natural to inquire how deeply the physician has examined, what tests he has conducted, what verification rules out contrary hypotheses, what is the recommended surgery's price, and what are its chances for

88 Populated in W. Whyte, The Organization Man (1956), acknowledged by Marcuse in One-Dimensional Man xvii.
89 Liberation 86.
90 Id. chs. 1-2; see also Political Preface to H. Marcuse, Eros and Civilization (1966).
success. Indeed, so total will be the operation’s shock to the system, it is fair to ask whether the physician or his colleagues of the same school can point to any prior successes.

Lack of Experience

However the inquiry be framed, an essential element must be the depth of Marcuse’s experience of living in this society. And here the evidence seems particularly weak. Although he occasionally introduces some concrete examples, these are afterthoughts illustrating points already presumed “proved.” The evidence consists largely of a lavish sprinkling of quotations from French and German writers dealing theoretically with the problems of modern man, but only a few who philosophize about concrete experience here. On a general level Marcuse is familiar with numerous abstractions—“economic relations,” “social system,” “alienation,”—but on the practical level of specifics he reveals that his witness is based on hearsay and second-hand information, for he cannot discuss subsidiary institutions with any degree of familiarity. Thus, if the topic is economics, he has predictable aversion to the “private interests” and “corporate capitalism” which prey upon the public; and he asserts confidentially that central planning would unlock the potentials of the technological society that the capitalists have inhibited, resulting in rapid abolition of poverty. Such denunciations would carry more weight if their author could draw upon his own experience with a company’s inner workings, had empathized with the problems of labor and management, had felt the tensions within the industrial enterprise, and had dealt with the resistance to authoritarian direction-from-the-top that human beings display in the face of all theories that society can be run like an army. But Marcuse’s life and vocation lay elsewhere, in the academy, not the corporation; grappling with Hegelian dialectic, not profit-margin or labor-management relations.

Despite this absence of personal experience with production problems, Marcuse should be esteemed no less as a thinker; but it is fair, if one adopts that critical, negative sense of looking for the “alternative” to the “given,” to ask that the expert witness have some expertise upon which to base those confident prophecies he so cavalierly gives the reader. That Marcuse is a hostile witness to the present system of production and distribution goes without saying; but that he should be accepted without challenge as an expert witness becomes especially questionable when we turn to the other side of the allegation, the

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91 One-Dimensional Man 226-27. The lesson to be drawn from these examples—riding in a new car, walking in a national park, riding in a subway—is ambiguous. These experiences are open to other interpretations and are not the same in each person. Marcuse’s attempt to use trivia to “prove” important points is dissected brilliantly by Vivas, supra note 2, at 65. For a more favorable approach, see Peretz, supra note 6. Howe, supra note 2, at 86, observes of Marcuse’s fact-consciousness: “Marcuse’s work is striking for its utter absence of factual material; he seems proud of his freedom from the restraints of the empirical. . . . As a result of this abstractedness, Marcuse soon evokes a solipsistic universe in which he communes exclusively with his own self-confirming categories.”

92 Liberation 76.

93 One-Dimensional Man 251.
assertion that a centrally planned society could do the job much better. Again, he has no experience to back up this assertion. Discounting the question—never answered—how such a “planned” society would differ from the “administered” society he criticizes—recent experience demonstrates that the most extreme efforts to “plan” a nation’s economy have failed.


[A] planned economy depends more on the proper discharge of the top-management function and makes infinitely greater demands on its top management than any other form of economic organization we know. We might say that a planned economy rests on the proposition that management can be selected so as to be perfect and infallible. Such supreme confidence in human perfectibility may be forgiven people who, like most advocates of a “planned economy,” have never seen a management in action and have little idea how imperfectly and how fallibly it operates.

(Emphasis added.)


[T]he Soviet economy, with its bureaucratic methods and irrational price structure, is wasteful of its resources. Capital is ill-applied and badly utilized.

Id. at 958.

[T]he use of economic resources through investment has become progressively less efficient; or in other words, there has been a decline in the growth of output obtained from each ruble of investment . . . the central planners still exercise virtually all of the command functions . . . and it is precisely this inflexible and topheavy rule that reinforces the inherent wastes. . . .

Id. at 961. See also E. Lyons, Workers’ Paradise Lost ch. 11 (1967); and the long series by Shub, Russia Turns Back the Clock, The Washington Post, June 18 & 19, 1969, at A-1, col. 1.

These failures are on record.96 The inferences drawn from that record may be rebuttable and some political theorists might devise a scheme wherein the command economy would somehow avoid bogging down in bureaucracy, waste, and political intrigue. However, Marcuse does not attempt the task. This omission can only raise grave doubts about his understanding of the workings of the political economy.

A similar misapprehension is visible in his offhand remarks about law. As a Marxist, Marcuse’s presupposition is akin to Marx’s, that law is at root a sham, a disguised method of covering an apparatus of repression with a veneer of legitimacy.

97 For brief but incisive commentaries on some legal implications in the Marxist analysis, see E. Bodenheimer, Jurisprudence 79-81 (1967); Friedrich, supra note 53, at 143-53.
Whether one focuses on the exploits of Perry Mason or the encounters of real-life police and ghetto residents, such a view is understandable. But prosecutor and policeman operate only within a narrow range of the law. If one believes that the legal system is “repressive” because some laws or law-enforcers limit autonomous freedom, he should, by the same token, admit that the system is “liberative” because other laws and law-related forms protect autonomous freedom and foster opportunity to live the humane life. Thus, tort law protects the dignity of personality; contract law provides a kind of “language of trade” whereby persons can voluntarily commit themselves to certain costly engagements with the confidence of secured return—and, in the process, create an overflow of value for others to share; corporation law creates new forms of property management which engenders a multiplication of wealth shared by millions as users of inexpensive products, recipients of dividends, and earners of wages. Civil courts resolve conflict peacefully; administrative agencies attempt to harmonize collective interests with an eye, at least, toward the public interest; legislatures on every level from the local town council to the United States Congress struggle with the task of managing a turbulent and rapidly-changing society through the peaceful mechanism of law. The power of the State itself is limited by the Constitution with such crucial notions as “due process of law” and “freedom of speech,” a limitation which is no small achievement in an era which witnessed the Gestapo, the K.G.B., and the Red Guards. The goal is to liberate the individual for life, liberty and the pursuit of happiness. The web of institutions which we all take for granted is so largely dependent upon law for structure, harmonization, and protection, that none of us could fulfill his own needs for a week—whether food, clothing, shelter or education, association, religion or self-government—without continual reliance upon the life-support system, i.e., the environment of law. The legal system attempts to be even-handed, and thus extends its assistance to its critics, such as Professor Marcuse: it will enforce his contract to teach, protect his person, and see to it that the royalties on his books are paid. It secures his freedom to travel and to speak. It protects him against powerful persons who may resent his success or object to his point of view—a protection the legal system of his homeland was too

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[There is a] demand of the economic order for certainty, uniformity, and stability in the administration of justice, without which any high degree of economic development is impossible. . . . [In societies without a web of reasonable laws] one cannot with safety do anything involving large expenditure of labor or money or extending over a long period of time. With increasing complexity of affairs the bad economic effects of lack of rule and uniformity in the administration of justice are more acute. The progress of civilization increases this complexity and demands law, that is, system and order and rule in the administration of justice so that men may act assuredly with reference to the future.
Id. at 17-18.

99 W. LIPPMANN, THE GOOD SOCIETY (1943):

“...The whole of it, all property, and everything which we include in the general name of private enterprise, is the product of a legal development and can exist only by virtue of the law.” Id. at 273. This book is not an argument for laissez faire.
weak to accord him in the 1930's. Marcuse's distaste for the laws which impede radical transformation of the system is understandable; nonetheless, the suggestion even as an inference, that the legal system is, as a whole, repressive of human personality bespeaks an unfamiliarity with the realities of law and its role in our lives.\(^{100}\)

**Rhetorical Legerdemain**

A rhetorical device which enables quick transit from assertion of the evils of the present social order to assertion of the essential evil of that order itself, and relatively, to the insistence that the order must be completely changed in a "qualitative" way is Marcuse's unique use of analogy and word-redefinition. He is quite willing to attribute to words which are crucial for his analysis—such as "impoverishment," "enslavement," "domination," "violence," "aggression"—an expansive meaning their original, common and everyday use does not import. Thus, in a passage generally critical of automation he speaks of a "kind of masterly enslavement . . . not essentially different from that of the typist, the bank teller, the high-pressure salesman . . . and the television announcer."\(^{102}\) In a description of Western technological society, he says "[t]he instruments of productivity and progress, organized into a totalitarian system, determine not only the actual but also the possible utilizations . . . domination functions as administration . . . [when] the administered life becomes the good life of the whole [we have] the pure form of domination."\(^{103}\) *An Essay on Liberation* states that "violence is built into the very structure of this society: as the accumulated aggressiveness which drives the business of life in all branches of corporate capital-

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\(^{100}\) See note 57 supra.

\(^{101}\) For instance, in *One-Dimensional Man*, Marcuse admits that he changes the meaning of words, although he attempts to put the onus of redefinition on others:

One must insist on the inner connection between the Marxian concepts of exploitation and impoverishment in spite of later redefinitions, in which impoverishment either becomes a cultural aspect, or relative to such an extent that it applies also to the suburban home with automobile, television, etc. "Impoverishment" connotes the *absolute need and necessity* of subverting *intolerable* conditions of existence, and such absolute need appears in the beginnings of all revolution against the basic social institutions.

**One-Dimensional Man** 26.

Though this device is commonplace throughout the books under consideration, space here permits inspection of only a few key instances. Thus, "impoverishment" normally means "reduced to poverty" and connotes physical deprivation, absence of material necessities, etc. "Enslavement" suggests physical domination under which a person is treated like a chattel and even in its secondary meaning, at stating a general relationship of oneway compulsion—"He was a slave to that drug"—strongly implies lack of volition, debasing treatment, helplessness, harm to the "slave." Similarly, "totalitarian" in modern times is a descriptive term for dictatorial governments which through unrestrained power attempt to control every significant facet of their subjects' lives, against their will, utilizing raw police-military force to insure compliance. Again, "violence" is commonly associated with rough or random physical force in action; "aggression" with the purposeful and unjust offensive attack on another individual or nation. These definitions are based on the Random House American College Dictionary (Random House ed. 1962); however, that they substantially comport with contemporary usage can be demonstrated by appealing to the reader's personal experience with the language.

\(^{102}\) *One-Dimensional Man* 25.

\(^{103}\) *Id.* at 225.
ism, as the legal aggression on the highways, and as the national aggression abroad. . . .” 104

Marcuse’s method is, generally, to take a word which primarily describes concrete, almost palpable, relationships, instances of which one could watch happening before his own eyes—the impoverished beggar lying in a Skid Row gutter, the lynch mob violently seizing its prey—and transfer it, the relationships it summarizes, and their connotations to abstract relations which thereby assume much of the same immediacy and reality possessed by the concrete analogue. The pejorative nuances associated with the concrete action or relation also carry over to the abstract. At root, the method appears to be argument from analogy, a technique as old as literature itself, but one fraught with occasions for fallacy. The writer can assume the very point to be proved: that because some characteristics in the well-known concrete example recur—or seem to recur—in the abstract analogue, all characteristics so recur, and the interrelationships also are replicated, as, finally, are the moral judgments evoked. Thus the slave-owner “dominated” his slaves, and the technological society “dominates” its subjects. The ambitious businessman is as “aggressive” as the drivers on our highways, and so also the Vietnam foreign policy. The moral judgment anyone would pass upon slavery or a war of aggression is, by the simple transfer of the word, wrenched out of its appropriate context and levelled at a pattern or activity where, without the surreptitious insertion by analogy, it would require far more proof than the writer adduces. “Such arguments introduce assumptions in a metaphorical guise,” one commentator on logic has noted, “in which they are not readily detected or easily criticized. In place of analysis they attempt to identify their position with some familiar symbol which will evoke a predictable, emotional response in the reader.” 105 Marcuse’s method enables him to knock down convenient straw-men without stating the distinctions in the concepts he is merging. And so “administration” becomes “domination,” which turns into “enslavement,” which at last emerges as “totalitarian.” And somewhere along this winding road, some members of the party have disappeared and some have joined the troupe: for instance, the fact of the consent of the people to the basic institutions of society, possibly implicit in the relatively non-pejorative word “administration,” has disappeared, to be replaced by the innuendo of popular helplessness in the face of the “totalitarian” Leviathan. The enslavement of a bygone era, with its cat-o’-nine-tails and chains for enforcement, with its endless hours of unrewarded human toil, Marcuse discerns covertly present in the media, behind the apparatus of technology and within the forms of social experience. Un-

104 LIBERATION 75-76.

105 See Davis, Logic and Logical Fallacies, in Contexts for Composition 96 (S. Clayes & D. Spencer eds. 1965). The reader may wonder at the many meanings of the word “aggression”: how is centralized “aggression,” if such it be, in a war akin to discrete and individualized driving habits on a highway? And what does the latter have to do with evaluating a society, since one could probably find as many careful, or even hyper-cautious drivers, as truly “aggressive” ones? See also Nutting, Newspeak 1970, 56 A.B.A.J. 131 (1970).
under Marcuse's alchemy, words undergo a Doctor Jekyll-Mr. Hyde transformation.

Now it is quite true that he does not rely merely on metaphorical devices to make his case; and that our society does manifest numerous structural evils along with a shallow materialism that deserves his evangelical critique. But in his eagerness to move from the particular to the universal, the rhetorical condemnation goes beyond the evidence and assumes a meaning to words and an application of them to given realities which is the whole issue to be proved. Effective as the discourse may be on the speaker's rostrum, one cannot prove this society "totalitarian" simply by calling it such, and then adding a few arguable examples of repression. The logical task of proving a democracy to be "totalitarian" is really quite complex.\footnote{If one would show that the United States is "totalitarian" he must show that it is "like" Nazi Germany or Stalinist Russia, since these are the two modern and familiar examples from which the word draws its meaning. Such a demonstration entails convincing the reader (a) that the relationships in this society are identical to, parallel, or are (at least) "like"—another analogy—those in Germany and Russia of that era, and (b) that there are no significant differences which could spoil the resemblance between them. See \textit{W. Fearsnide \\& W. Holther, Fallacy: The Counterfeit of Argument} 22-27 (1961). Such an enterprise entails a standard of comparison and exclusion as well as articulation of how one judges the weight to be given to comparative factors.

In the example at hand, in Germany and Russia these factors, among others, must certainly be significant: (a) elitist control through a single "party"; (b) secret police comprising a "state within a state" and unrestrained by constitutional inhibitions or court supervision; (c) intense, one-sided propaganda; (d) systematic violent eradication of real or potential adversaries of the regime; (e) absence of legal forms to distribute and transmit power through predictable and generally accepted structures; (f) an implicit command-theory of government that likens the leadership's role to the general staff of an army; (g) a psychology of suspicion that assumes that anyone who fails to show outward enthusiasm for the regime's every policy is therefore disloyal; (h) deterioration of the laws to the level of arbitrary edicts; (i) breakdown of subsidiary institutions (trade unions, church groups, business associations) to the point that they are absorbed by and become an arm of the State itself; (j) general mismanagement of the economy which can be cured only by a war psychology that can unite the people against a common outside enemy; (k) the emergence in the leadership of a single, all-consuming goal: to stay in power at all costs (at the price of other, more traditional governmental goals, subsumed in the phrase, "to serve the people"); (l) the public "purging" of scapegoats on trumped-up charges to instill popular loyalty and turn popular discontent at a visible target on whom all wrongs can be blamed; (m) censorship and book-burning as part of a general campaign to discredit the heroes and practices of the memorable past and substitute a future-orientation in popular aspirations as a distraction from the ideas and comforts of the remembered past and from the sufferings of the present; (n) pervading all the foregoing a ruthless thoroughness and wanton denial of the classic forms of "due process of law." See generally \textit{R. Conquest, The Great Terror: Stalin's Purge of the Thirties} (1968); \textit{W. Shirer, The Rise and Fall of the Third Reich} 268-76, 937-94 (1960). Awareness of many of the foregoing in Germany moved Churchill to observe that "conditions in Germany bore no resemblance to those of a civilized state." \textit{1 W. Churchill, The Second World War} 91 (1948). A chief cause of such barbarism is the total breakdown of the Rule of Law.

These are some of the major characteristics of totalitarianism. Surely if the contemporary society is "totalitarian" it would exhibit most of these qualities, especially those associated with arbitrary power by a lawless elite group directly controlling the State for its own purposes. Marc-
it can only be called utopian. This is not the simplistic stricture that his alternative itself is "no place," does not exist, and so does not deserve our efforts; for neither did any improvement of the human condition when first conceived. Rather, the objection is threefold. First, the goal is so vague that one cannot know where Marcuse is leading him; yet, in an age so vitally concerned with "truth in packaging" and consumer protection, the buyer should have more to inspect than glittering generalities about the performance of the product labeled "total transformation of society." Second, the price is unclear. The student purchasers of the new society are told only that the price will be high and the installments continuous;\(^{108}\) moreover, delivery is not guaranteed. If delivery is made, no warranty promises that the product will perform as advertised; in fact, earlier models attempted in this century did more harm to their users than good. Since the designer is in no position to stand behind the product, the consumers must be content to let the losses fall on themselves and the rest of society if the product does prove a failure. Third, (dispensing with the parallel to consumer protection) Marcuse erects an abstract ideal and then judges concrete realities against it; when these present realities are found wanting, he does not inquire whether the infinite gap between ideal and reality is due to the present's imperfection or the future's impossibility. Yet the method is essentially unfair, for the actual can never compete with the possible and always stands condemned by comparison. Although the utopian ideal, if specified, can attract, it should not be the sole standard of judgment. Marcuse goes the prophets of old one better: they judged an evil society against norms their listeners themselves knew they could emulate if they tried; Marcuse judges against norms only the angels would recognize.

The Unwarranted Leap from Epistemology to Polity

Marcuse assumes that conceptual relations and the process of arriving at a "higher" truth have their exact counter-
parts in the political world. Thus, if thought is a process of “negating” the given, social progress is a process of negating the present social order. If thought progresses through “contradiction,” so then must those who want social progress stand against, oppose, “contradict” the present order. If thought moves necessarily to “higher” stages and somehow subsumes in a comprehensive synthesis what truths lay on the “lower” levels, so social change—if “radical,” i.e., contradictory enough—will necessarily lead to a “higher” or better society. The fallacy is to confuse Hegelian metaphysics with political realities. Since the two orders of existence really are different, their “laws” too will be different. Whatever the mind’s process in struggling toward truth, experience shows that most social progress has come through cooperation, itself perhaps a kind of harmonization-of-opposites, but still by no means the total clash implied by Marcuse. Moreover, the more one “descends” to the practical world of politics and economics, the more he finds many alternatives, all standing over-and-against the given to a certain extent, and yet all somewhat realizable. The relations are not a matter of formal logic, with formal all-or-nothing inclusions and exclusions, but ones of practical compromise. Further, the assumption that the “alternative” will necessarily be “better” in the social order because it is “higher” in the conceptual order is not borne out by experience. Certainly Nazi Germany “radically negated” the Weimar Republic that preceded it, but it was not a “higher stage of history.” Retrogression, stagnation, and gradual forward progress—all hard to analogize to the process of thinking—are social realities. So-
ciety is living, turbulent; its dynamisms are not readily conceptualized by a metaphysics of progress-by-negation. One is compelled to wonder whether Marcuse is subject to the same critique he leveled at the positivists: Is he a prisoner of his own method?

**Political Due Process and the Rules of the Game**

The cryptic phrase, “the rules of the game,” suggests what more elegantly may be called “political due process.” Its central notion is the conviction that the process of making public policy decisions is more important than the given content of any one particular decision itself, so much more important, indeed, that on balance a polity will be better off even if it should make the wrong decision the right way than should it make the “right” decision the wrong way. Behind such a paradox lie some judgments about man and the nature of society which, inferentially, Marcuse rejects. First, political due process is flavored with a Humean skepticism: for Mill, no one is infallible about politics and economics; thus it is dangerous to close off debate and freeze the current doctrine or approach into permanent ac-

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109 See Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173 (1956): “In other words, because the democratic method of settling conflict keeps open the avenue of change so that wrongs may be righted peacefully, the citizens of a democracy have a greater stake in this method of settlement than in any particular outcome of any particular conflict.” *Id.* at 191. Despite the application the cited article makes of this principle, as a principle it should hardly be controversial.
ceptance. Not only is it quite possible that some weakness in the policy has not been considered, but it is practically certain that changed conditions in the future will necessitate modification—and such change will be highly difficult if not impossible if the spokesmen for potential changes are silenced or if the channels of effecting change—the decision-making processes themselves—are closed. This skepticism about certainty is not shared by Marcuse, for whom the “radical alternative” is the only “other” and is so clearly better that anyone who opts for change within the status quo lacks either good faith or good sense, or has forfeited his right to a voice in the making of policy because technological domination has warped his judgment.

Another judgment underpinning the rules of the game: since no one is infallible and yet decisions must be reached, it follows that in political affairs only an approximation of perfection can be attempted. In other words, each decision must be open-ended—subject to emendation—because human judgment is such that no “totally right” or “eternally correct” position can be taken. Consequently, the possibility of correcting a given policy-decision must always be built into that decision itself. Thus, the democratic policy-maker is, as it were, always “distracted”: he keeps one eye on the task at hand, the issue presently being fought, but he must keep the other on the method of accomplishing that task, on the rules of the fight. Besides the positive value in such a dual concern—the chance of winning the vote tomorrow that he loses today—it also avoids a crucial negative result, i.e., the substitution of naked force for agreed-on standardized methods. For when a given result is sought above all else, above even the methods of realizing that result, the classic ends/means problem of social ethics becomes acute: partisans on all sides of the issue are forced to act as if the end justified the means—if only to survive.

However, if procedure be held in higher esteem than the immediate, substantive result, it provides a common ground among contesting factions, a basis of cooperation when future power-shifts modify the roles of the currently victorious and vanquished, and a subtle facesaving device for the loser, who can convince his followers that he did all he could under the circumstances, i.e., under the rules. A political leader’s constituency, or his rivals within the ranks who abide by rule-imposed restraints, will be much less demanding of instant success than those who use power as their only norm, and will impose on the leader fewer pressures in a given case, thus giving him time to maneuver through peaceful channels. Moreover, by limiting what the victors can do to the vanquished by reprisals—both being under the rules—defeat does not mean destruction for any party. This is no trivial feat, considering the sham that is lawmaking in the total dictatorship, where the substantive goal of keeping power is infinitely more important to the elitist power-holders than

110 J. MILL, ON LIBERTY, supra note 40, at 25: “All silencing of discussion is an assumption of infallibility.”
111 See the comment of George Sabine at note 37 and accompanying text supra.
any “mere” procedure and where, consequently, dissidents dare not criticize for fear they will be deemed a threat to that overriding goal’s continual realization by the infallible leadership. By disarming one’s adversary (and oneself)—permitting only nonviolent means of effecting substantive results—the commitment to procedural due process in politics minimizes reliance on force and violence by redirecting conflict into calmer channels. It thus achieves a “substantive result” far more profound and far-reaching than any particular measure: the civilizing of the contestants themselves. Whatever the real weaknesses of some of our present political procedures, to enshrine immediate result over long-range process as all-important is retrogressive. It enfeebles a civilized system at its very heart and purpose: its ability to correct mistakes nonviolently. Nevertheless, Marcuse reverses the commitment to the integrity of the general procedure and insists that substantive results are all-important.

Other Benefits of Political Due Process

Process is impersonal. Substantive “results” are usually personal: they are blamed on or credited to individual persons, and individual political leaders identify, in their people’s minds and often in their own, with the results. Commitment to procedure over substance helps remind those who share the commitment that the Maximum Leader is not everything; it helps remove “personality” somewhat from the enterprise of governing, both by subjecting the governor himself to rules even he must obey, and by providing continuity and permanence to a society which would otherwise be stamped by the personality of the Leader and even chronicle its past in terms of “his” era, e.g., in Russia, the “Stalin era.” Then too, it enables those who went before to contribute their own wisdom to the settling of affairs in the present, at least to the extent that the forefathers established the procedure which binds the descendants and thus structures the manner in which the latter will approach their problems. Among many that could be adduced, the separation of powers and the method of constitutional amendment are two outstanding examples of the Founding Fathers’ participation in our current governance in the United States.\textsuperscript{112}

Reverence for the rules of the game makes change take longer. Sheer power can effect changes by shortcut means that “get the job done” no matter who is trampled. It is true, of course, that undue concern for the form of action, as the common-law pleading demonstrated before modern reforms, can be an obstacle to attaining the just substantive result that the forms were originally devised to facili-

\textsuperscript{112} I do not suggest that a procedure is good just because it is old; but the reverse may be true, that it is old just because it is good and has survived the tests of time. One could hardly fault Holmes for observing that it is “revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV,” Holmes, \textit{The Path of the Law}, reprinted in \textit{INTRODUCTION TO LAW} 50, 62 (1965), though there is great difference between a rule of law from medieval England and a method of self-governance from Federalist times. The modest purpose of the paragraph accompanying this note is merely to suggest a few ways that procedural due process helps decision-makers to get a better perspective of the immediate task at hand, by helping them somewhat transcend both personal ambitions and historical myopia induced by the immediacy of their specific problem, goal or crusade.
tate. But as long as there are openings for justified change, as long as the channels do at least reach the sea, then our impatience for instant upheaval—because our side happens to have the power or the image to carry all before it—is misplaced. The orderly, step-by-step procedures retain their importance: they admonish us that in many instances government cannot entirely right the wrongs it denounces, that old practices have an inertia of their own, that people cannot be “put in their place” as one would arrange the papers on his desk, that in the nature of things changes may be rapid but improvements come slowly, however hurried the improvers.  

“The errors and defects of old establishments are visible and palpable,” wrote Edmund Burke in 1790; “it calls for little ability to point them out; and where absolute power is given, it requires but a word wholly to abolish the vice and the establishment together.” To the objection that reform which preserves what is good in the old order, while injecting needed changes in what is evil, is too slow and might take up many years, Burke answered:

Without question it might; and it ought: It is one of the excellencies of a method in which time is amongst the assistants, that its operation is slow, and in some cases almost imperceptible. . . . Political arrangement, as it is a work for social ends, is to be only wrought by social means. There mind must conspire with mind. Time is required to produce that union of minds which alone can produce all the good we aim at. Our patience will achieve more than our force.

Finally, adherence to the rules of the game reminds the players of the kind of enterprise they are embarked on: the self-governance of free men. If society is to resemble a Spartan army, conceivably orders can issue from the top to settle things, though the average infantryman will be unhappy and the intermediate officers will grumble. But if society as a whole is to be attuned to its members’ needs, it must provide opportunity for them to express those needs. This mandates freedom of speech: dialogue among the members and, as Adolf Berle has observed, dialogue between the members and the power-holder. In today’s society this multifaceted dialogue is at times slow and often inconclusive; a number of reforms are necessary. But frequent delay is no reason to exchange a glacier, if such it be, for a steamroller.

**The Jurisprudence of Rule-Refusal**

Marcuse teaches his followers to refuse to play the game by the rules, contending that any cooperation with the political system is wrong. Behind such an uncompromising position lie two philosophical premises. Marcuse never articulates them specifically; rather they are implicit throughout his writing on the method of achieving radical social change in a demo-

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113 Of course, even the most socialist of nations will not satisfy Marcuse because it has not undergone the “qualitative” “transvaluation” he envisions.

114 E. Burke, Reflections on the Revolution in France 238 (Regnery ed. 1962).

115 Id. at 239.

116 A. Berle, supra note 60, at 115-42.
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cratic society. First, a political movement will be “tainted” even by procedural cooperation with a society it would substantively change; second, substantive goals and procedural means are so intertwined that one’s adherence to certain means will foreclose, perforce, the possibility of achieving some necessary results. I believe he is mistaken on the first premise, but may well be correct on the second. The questions deserve examination.

To ask whether the movement will be tainted by operating within the forms of democratic procedure is not to ask whether it will succeed—for that is the second question. Although the concern about purity may befit a religious movement as a matter of principle, it may not be appropriate for a political movement. It will not assist in achieving the designated goal. Still, avoidance of contamination through cooperation may be used as a defense mechanism to insulate the neophyte from having his faith shaken by outside contact. It helps maintain his sense of isolation (and often, resentment at isolation). Without living, experiential contact with that political system which he feels oppresses him—except possibly in the dimension of police law-enforcement—he can conjure up various visions of abuses, plots, schemes that the Powers—“They”—are planning, while remaining secure in his negative faith that “the channels are closed,” that no means within the system can effect change. Since the follower of Marcuse wants to believe that American legal and political processes do not work, he does not want to encounter them working.

One of the great threats to the Marcusean faith is that the communicant will discover that many of the world’s ills stem not from some abstract entity called “the System” but from individual misunderstandings and pure human “cussedness.” Indiscriminate contact with the outside world would reveal to him the twin facts that any system can be oppressive if it is abused, and that many persons in this system are using its viable procedures to improve it. The concern about “taint” is, in some contexts, insurance against second-thoughts; it is also an effective protection against encountering the actual complexity of social life and political decision-making. The person who “refuses his service” to the status quo and so defines himself as “outside the realm of law” even before some actual conflict with legal mechanisms is hardly likely to exercise the patience needed in using legal forms to accomplish social goals. Even, for example, in such relatively simple decision-making forums as a zoning board hearing or a school board budget briefing, the demands on a partisan are great; to learn the facts, to prepare a case, to study the statute, to consult with others, to attend the hearing itself, to argue his point, and other chores of a good advocate, all “take too long.” The self-defined “outlaw” prefers to disguise his inexpertise by declaring the legal forms inadequate, and “taint” those who use them. His ignorance and impatience have locked him into his own narrow a priori outlook. Yet, a mere glance at recent history, toward which he is often as disdainful as he is toward political due process, would serve to remind him how unnecessary is this self-imposed isolation: the history of the Socialist movement in both Europe and the United States elo-
quentely attests to the possibility of accepting the democratic legal framework while "keeping the Faith" in one's substantive goals.

Secondly, a Marcusean radical cannot cooperate with democratic forms because they impede attainment of his substantive goal. Insistence on set procedures, such as affording the opposition an opportunity to speak; voting on a given matter only when a constitutional quorum is present; obeying written laws until they are changed by test-case court ruling or legislative action; insisting that decisions (whether judicial or legislative) be made only after notice, hearing, and opportunity to rebut; insures a kind of balancing process whereby extreme views are usually tempered, what was of value in the past is separated from the dross and preserved for the future, and proponents of overturning long-standing practice are forced to scrutinize their plans carefully and to justify them in detail. In terms of accomplishing revolution, it may be that the "rules of the game" are "rigged"—though the term is unfairly pejorative—in favor of the status quo, for they establish an apparatus wherein persuasion, not violence, is (supposed) to be the basic means toward achieving power. Persuasion requires that the speaker frame a convincing case, state it to his constituency, and abide by their decision on its merits. The rules also require that he listen to their "feedback," field their questions, handle their criticisms, and accord to competitors the same respect he demands for himself. Finally, if he would succeed, he must strike a responsive chord in his audience either in terms of their interests or their idealism. Although the system rarely works as well as this summary model would suggest, it does at least force both candidate and elector to articulate and to justify (often imperfectly it is true) their desires. Reasons clash with opposing reasons, and because few advocates so dominate the debate that everyone follows, some minds are changed but some adhere to their original views. And since most men have something they would like to preserve and are wary of trading a known present good for an unknown future good—which they fear might also be evil—it becomes, as a practical matter, impossible for a revolutionary operating within a parliamentary structure to persuade a majority to follow his lead. Finally, the revolutionary seeks a total change, and, consistently, demands not only total power to accomplish his end, but also total freedom from the procedural limitations imposed upon that power by the parliamentary system. The abuse of power being a hallmark of the twentieth century, men are uneasy in the face of such demands and, unless stirred by some impending or recent cataclysm, a majority is almost certain to choose a more "moderate" program. The procedures provide men with an opportunity to achieve change without revolution—in some measure, the best of both worlds. Thus, Marcuse correctly asserts that when these procedural

117 The fact that the democratic process provides for the redress of grievances and for legal and lawful changes does not alter the illegality inherent in an opposition to an institutionalized democracy which halts the process of change at the stage where it would destroy the existing system.

LIBERATION 66.

118 E. BURKE, supra note 114, at 238-45.
JURISPRUDENCE OF RADICAL CHANGE

structures, which encourage a non-revolutionary result, are wedded to technological affluence, the general populace simply does not “see” the need for total upheaval. By making evolution possible, the procedure deepens their disinterest in revolution. The result is success for a candidate or movement which in comparison to the radical-revolutionary is “conservative,” though the new program may be quite “radical” compared to its own predecessor.\textsuperscript{119} At root, then, Marcuse’s complaint about the “rules of the game” is an admission that to play the game means to lose it. He does not consider the possibility that the loss may be due not to bad rules but to bad coaching.

The Assumption of Infallibility

In rejecting the “rules of the game,” Marcuse implicitly rejects the reasons for them. He states, in effect, that the “alternative” which is “wholly other” is so important to achieve—now—that the process of changing society gradually through open debate is irrelevant. His view of what is wrong with society and what must be done to correct it is the only right one;\textsuperscript{120} his view is in itself so cogent that if it were not for the oppressive atmosphere of the totally-administered society it would easily command acceptance. But in the present context, the game being rigged against the radical analysis and prescription, the people cannot really decide what is best for them. On the assumption that “the game” is rigged, the procedural protections sketched above are to be jettisoned in return for an activist censorship board which will protect people from whatever is “repressive,” including words that promote warfare instead of welfare, and even thought that inhibits “liberation”—all as defined by the Marcusean elite itself. At the core of this extreme skepticism about the possibility of free speech in modern society is both Marcuse’s puzzlement that people do not seem to see the world as he does and the assumption that therefore they must be bereft of all critical faculties. Thus, he ignores popular concern about the role of the media,\textsuperscript{121} dismisses the in-

\textsuperscript{119} Not “truly” radical, of course, for those who would “reject society as a whole.” The kinds of “progress in civilization” Marcuse approves are stated in \textit{Repressive Tolerance} at 107-08: “The English civil wars, the French Revolution, the Chinese and the Cuban Revolutions. . . .” Pretermitting the question whether these four instances are truly analogous, it should be noted that the verdict on the latter two is still to be rendered, and in the judgment of some scholars the price of “progress” has been terribly high. \textit{Id.} at 40. It is easy to rhapsodize about a revolution one has not lived through.

\textsuperscript{120} In an article generally sympathetic to much of Marcuse’s analysis (though opposed to his solution), one writer compared his approach to the dogmatic righteousness in the historical Church: “The price of tolerance for the right and the true is intolerance for the wrong and the false. (Catholics have heard this before: ‘error has no rights.’)” Callahan, \textit{supra} note 4, at 380. This is the best popular article I have seen on the question of political due process in Marcuse.

\textsuperscript{121} Expressed at least as early as the publication of \textit{W. Lippmann, The Public Philosophy} 99
fluence of the radical press, and overlooks the widespread political ferment that so distinguished the 1960's. Eyes riveted on the rocks ahead—"the whole . . . period is one of clear and present danger"—he does not notice that the Ship of State is veering onto a different course. For Marcuse, the end—"liberation"—does justify the means—repression of opinion which dissents from his own. The supposition, infallibility of his radical analysis, is unstated but nevertheless necessary to the argument; and the wisdom of those who will decide who is nonprogressive, when and how to "withdraw tolerance" from them, and what opinions may be tolerated is taken for granted. Finally, that the debate will deteriorate to violence as final arbiter is assured; since "repressive tolerance" cannot occur in a society given to procedural due process, so the silencing of wrong, i.e., non-liberating, opinions cannot occur without destroying the structures that encourage the marketplace of ideas, and these structures are, in the final analysis, the same rules of the game that inhibit violence. Marcuse does not flinch from the logical conclusion.

"Liberating Violence"

For Marcuse, the ethical judgment on the use of violence is based on factors other than the violence itself, i.e., on who does it and what is the result.

In terms of historical function, there is a difference between revolutionary and reactionary violence, between violence practiced by the oppressed and by the oppressors. In terms of ethics, both forms of violence are inhuman and evil—but since when is history made in accordance with ethical standards? To start applying them at the point where the oppressed rebel against the oppressors, the have-nots against the haves is serving the cause of actual violence by weakening the protest against it.123

Since violence is a feature of all existing regimes—"even in the advanced centers of civilization, violence actually prevails"—and since law in today's society is institutionalized violence, while it may be prudent for the powerless to refrain from violence in the face of the powerful, it is hardly ethically necessary; nonviolence "is a necessity rather than a virtue."124 Thus Marcuse disdains the Gandhi-King type of non-violent resistance movement.125 Granted Marcuse's premises, his position is logical enough; and as a tactician he does show some feel for current political realities. While admitting that the time is not ripe for upheaval, he states that "resistance at particular occasions, boycott, nonparticipation at the local and small-group level may perhaps prepare the ground."126 The ease

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122 Repressive Tolerance at 109.
123 Id. at 108.
124 Id. at 102.
125 British scholar Maurice Cranston makes this explicit judgment. See Cranston, supra note 87. Along with Marcuse's writings he cites his lecture promoting the "demystification of violence" at the London Conference on the Dialectics of Liberation in 1967. Id. at 47.
126 Repressive Tolerance at 101. In Liberation, he approves the stages of "enlightenment prior to material change—a period of education . . . which
with which Marcuse recommends that his youthful followers justify violent means with the rightful ends they pursue is consistent with his premises. But the life of society is not merely logic. When one contrasts the violence of the modern revolutionary with the so-called “violence” Marcuse attributes to society under the rule of law, he wonders, once again, whether we have an instance of misplaced analogy, of Marcuse’s personal lack of experience with law as a nonviolent means of conflict-resolution, or perhaps, simply a lack of adequate reflection on the relation between creativity and violence.

Power is ethically neutral: it can be good or evil, applied in good or evil ways, for good or evil ends. For power to be creative or liberative, it must be applied rationally; yet violence is irrational. Creativity follows and uses natural patterns, as the composer of a symphony works within the necessities of harmony, as the poet obeys the commands of rhythm and rhyme. But violence is random; it shatters natural patterns. It is the axe swung into the composer’s piano, the ink smeared over a poet’s manuscript, the grenade tossed into a shop in Saigon or Tel Aviv. Creativity is a thousand years of culture accumulating at Dresden or Monte Cassino; violence is a night bombing-raid that sweeps it all away, leaving only pock-marked earth, smoking rubble, and crippled children with tears in their eyes. In itself, violence cannot create, for it is power used irrationally. But indirectly, the selective, rational application of certain kinds of power can be a creative force. The surgeon’s scalpel, the parent’s measured discipline of his child, court orders carefully drawn to achieve a specific result—these and hundreds of other examples demonstrate that the threat or actual use of measured force for a rightful purpose and (especially with regard to law) within prescribed clearly understood rules of general application is ubiquitous in human affairs and is essential for a rational society.

But there is an infinite difference between the measured force the law brings to bear and the indiscriminate violence of the revolutionary. The law deals with individuals, struggling to maintain reason, and making careful distinctions—e.g., among accident, negligence, intentional tort, strict liability; between murder and the degrees of manslaughter; between substantial and incidental contract violations, and in some jurisdictions even between comparative degrees of negligence. The revolutionary, as prosecutor, judge and executioner—of a predetermined, indiscriminate sentence against a whole class of people—has no time to make rational distinctions. How can a Molotov cocktail hurled at a draft board or a bomb planted in a New York skyscraper avoid the innocent and harm only the guilty? When a judge signs an injunction prohibiting socially damaging conduct, he specifies clearly, in detail and at great length, after a fair hearing to determine facts, what cannot be done; when a revolutionary would “enjoin” his less enlightened brethren from conduct not approved by him, he sets up barricades or throws rocks. Just how close to barbarism men are, when they fail to distinguish between rational force and
random violence, when they begin to rhapsodize about "creative violence" or "violence as the midwife of a new society," has been strikingly illustrated in the conduct of the famous dictators of our troubled era. But Marcuse neither adverts to these theoretical distinctions nor seems to remember the historical examples. In his concern to bring about a better world even if the price be violence, Marcuse is a man of great hope; yet "there is often a monstrous incongruity between the hopes, however noble and tender, and the actions which follow them. It is as if ivied maidens and garlanded youths were to herald the four horsemen of the apocalypse."129

Conclusion

The foregoing pages have described two different spiritual universes. I fear the gap between them is unbridgeable. Building that bridge would be only an academic exercise if Marcuse were just another academic. But he has had hundreds of readers and thousands of followers, doubtless among them some of the best intellects the present generation can boast, most of them quite enthusiastic about their vague goal of "liberation" and a good many quite committed—or at least resigned—to the "necessity" of violence to achieve it. Thus, they challenge those who would defend the tradition of reasonableness in human affairs to defend it by reasons which will convince the doubters. Those who accept the tradition of reason must demonstrate the harm that will befall society should it follow Marcuse's prescriptions, and must prove the continued viability of the tradition of Burke and Mill, and not the Jacobins; of Locke and the Federalists, and not the Encyclopedists; of America's historical experience, and not Hegel's historical abstractions. The violence already pervading this society and decried by Marcuse attests both to the failure, in some measure, of the tradition of free debate and to the continued widespread presence of the arbitrary in human affairs. Such an ill can be cured gradually, but not by the alternate kind of violence Marcuse urges. As the American Civil Liberties Union has aptly observed:

To abandon the democratic process in the interests of "good causes" is to risk the destruction of freedom not just for the present but for the future, not just for our social order but for any future social order as well. Freedom, the world has learned to its sorrow, is a fragile plant that must be protected and cultivated.130

128 See W. Shirer, supra note 106, especially sections on the "Roehm Purge" and the concentration camps; R. Conquest, supra note 106. As for Lenin, see D. Shub, Lenin 156-57 (1953), describing the execution of fifteen hundred political prisoners by his Secret Police Chief, Dzerzhinsky, who "misunderstood" Lenin's orders.