

Cambridge University Press

978-0-521-60375-1 - Freedom of Speech

Edited by Ellen Frankel Paul, Fred D. Miller and Jeffrey Paul

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## EQUALITY AND EXPRESSION: THE RADICAL PARADOX

BY ANDREW ALTMAN

### I. INTRODUCTION

The modern liberal state arose as part of a rebellion against the entrenched hierarchies of rank, power, and privilege that had characterized the feudal order of European society. Under that order, a person's prospects in life were determined almost entirely by his status at birth. The individual lacked the liberty to change his social and economic ranking and was rendered dependent on the will of those in higher-ranking positions. It was against this inclusive, closed, and ascriptive system of inequality and dependence that the proponents of the liberal state fought.

An important element of the new liberal state was strong legal protection for property rights and the economic liberty that accompanied such rights. Locke had argued that property rights were natural rights, which governments had an obligation to respect and protect. Property rights were grounded in the fact that "every man has a property in his own person" so that "the labor of his body and work of his own hands are . . . properly his."<sup>1</sup> Moreover, as Locke saw it, the invention and use of money meant that mankind had agreed to "an inequality of private possessions," which was bound to occur as "different degrees of industry were apt to give men possessions in different proportions."<sup>2</sup>

Kant contributed to the development of liberalism by formulating an account of citizenship within the liberal state. He argued that a citizen rightfully possesses three attributes: "lawful *freedom* to obey no law other than that to which he has given his consent . . . civil *equality* in recognising no-one among the people as superior to himself . . . and civil *independence* which allows him to owe his existence and sustenance not to the arbitrary will of anyone else among the people, but purely to his own rights and powers."<sup>3</sup> In fact, all three features involve different elements of the

\* For valuable comments and suggestions on this essay, I am indebted to Ellen Frankel Paul, Jeffrey Paul, and Daniel Jacobson.

<sup>1</sup> John Locke, *The Second Treatise of Government* (1690; reprint, Indianapolis, IN: Bobbs-Merrill, 1952), 17.

<sup>2</sup> *Ibid.*, 28–29.

<sup>3</sup> Immanuel Kant, *The Metaphysics of Morals*, 1797, in Hans Reiss, ed., *Kant: Political Writings* (New York: Cambridge University Press, 1991), 139. Kant goes on to distinguish "active" citizens, who have a right to vote and exercise political influence from "passive" citizens, who possess "the freedom and equality of all men as *human beings*" but lack political rights. The latter group includes women, minors, and wage laborers (139–40).

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equality of liberal citizens: equal freedom under the law, equal political rights, and equal autonomy from the will of others.

However, radical critics of liberalism have long argued that there is an irresolvable conflict between the liberties protected by the liberal state and the equal citizenship it claims to provide, and that liberal thought and practice inevitably favor liberty over equality in the conflict. The locus classicus of this argument is Marx's "On the Jewish Question" (1843). Marx contended that the situation of the Jew, who was then still deprived of political rights in many liberal states, illustrated the dominance of economic power over the principles of political and civil equality: "The contradiction existing between the practical political power of the Jew and his political rights is the contradiction between politics and financial power generally." Politics had become the "serf" of financial power.<sup>4</sup> In other words, the liberal state allowed even Jews to turn economic advantage into political control. The supposedly "free, equal, and independent" Christian citizens were, in reality, dependent subjects of those who, in theory, were not even full citizens. Thus, the liberal revolution did not bring about "human emancipation."<sup>5</sup> For that, another turn of the revolutionary wheel of history would be necessary.

Marx's critique of the liberal state has survived in updated form among radical thinkers until the present day. Such thinkers contend that liberal economic freedoms create inequalities of power that make a mockery of the idea that citizens enjoy political and civil equality under the law. Moreover, in recent years there has surfaced a new and complementary form of the charge that the liberal state cannot redeem the promise of equality.

The new charge issued by radical critics is aimed at the liberal system of free expression, and the heart of the accusation is that the system unduly obstructs efforts to eliminate oppressive inequalities rooted in sex and race. Just as it has long been said that the market and liberal protections of private property generate concentrations of wealth that subvert political equality, it is now claimed that the liberal state's strong protection of expressive liberty creates indefensible obstacles to the pursuit of racial and sexual equality.

In this essay, my aim is to examine the radical critique of the liberal system of free expression. The essay proceeds as follows. In Sections II and III, I outline the principal elements of a liberal system of expression and defend the account against some skeptical arguments. Section IV then describes the position on free expression taken by one of the most influential radical thinkers of the 1960s, Herbert Marcuse. I show that Marcuse decisively rejected a liberal system of expression and that his rejection was entirely consistent with his underlying social theory, which

<sup>4</sup> Karl Marx, "On the Jewish Question," 1843, in Lawrence H. Simon, ed., *Karl Marx: Selected Writings* (Indianapolis, IN: Hackett, 1994), 23.

<sup>5</sup> *Ibid.*, 21.

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posited the existence of oppressive economic and social inequalities. In Sections V and VI, I discuss the views of contemporary radicals and show that, despite making theoretical claims similar to those of Marcuse, their treatment of expressive liberty is strikingly different from his. While Marcuse advocated drastic inroads on free expression, the proposals of contemporary radicals are far more modest and generally compatible with a liberal system of expression. In Section VII, I argue that, paradoxically, liberal arguments about free expression must carry considerable weight for the contemporary radical position on speech to be coherent.<sup>6</sup>

## II. FREE EXPRESSION: INSTITUTIONAL VARIATIONS

It is imperative to recognize from the outset that the abstract ideal of a system of free expression can be translated into institutional practice in a variety of ways. It is “institutional fetishism,” to borrow Roberto Unger’s term, to think that there is just one natural, necessary, or correct way in which the abstract ideal can receive institutional embodiment.<sup>7</sup> Unger makes the case against institutional fetishism in connection with the ideals of the market and democracy. Yet, a parallel case can be convincingly made with respect to the liberal ideal of a system of free expression. Indeed, it makes sense to think of the different possible embodiments of such an ideal as tied to alternative institutional forms of democracy. Different systems of free expression constitute, in part, different forms of democracy.

It is true that there is much more to a particular form of democracy than its specific rules regarding expressive liberty. These rules do not dictate whether a democracy has a parliamentary system or a presidential one, a system of proportional representation or a district-based, “first-past-the-post” one. Nor do the rules dictate whether a democracy operates with judicial review of legislative and executive action or without such judicial power.

However, expressive activities occur within a framework that is broader than simply the rules that are explicitly and exclusively concerned with expression. The broader framework helps to shape the kind of system of expression a society has. This framework does not merely include the law of libel, the legal rules governing the production and distribution of pornography, the law concerning racist or anti-Semitic speech, and more

<sup>6</sup> I will use the terms ‘expression’ and ‘speech’ interchangeably. They refer to communicative activity in general, i.e., activity having the following features: its primary intent is to convey a certain semantic content; its secondary intent is to achieve the primary intent by getting others to recognize the primary intent; and the primary and secondary intent can be reliably achieved because there is a conventionally accepted set of rules linking certain sorts of verbal or nonverbal behavior to specific semantic contents. This account is a variation on Paul Grice, “Meaning,” in Paul Grice, *Studies in the Way of Words* (Cambridge, MA: Harvard University Press, 1989), 220–21. Also see Peter Meijes Tiersma, “Nonverbal Communication and the Freedom of ‘Speech’,” *Wisconsin Law Review* (1993): 1525–89.

<sup>7</sup> Roberto Mangabeira Unger, *Democracy Realized: The Progressive Alternative* (London: Verso, 1998), 25.

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generally, the abstract doctrinal principles concerning the authority of government to restrict expression on account of its propositional or emotive content. The framework also includes the nature of the political party and electoral systems, the power of courts, the rules regarding private property, the nature of the mass media, and much else that shapes the ways in which persons and groups engage in communicative activities.

Accordingly, liberal systems of free expression vary in their rules regarding expression and in the broader social, legal, and political framework in which they operate. That having been said, the abstract ideal of a liberal system is not wholly malleable. There are certain paradigmatic features, and when some system departs in significant measure from these features, there must be reasons that are not only strong but also of a characteristically liberal sort to justify the departures. Otherwise, the system's claims to be a liberal one will be weak or implausible.

United States Supreme Court Justice William J. Brennan described one of the central features of a liberal system: "debate on public issues should be uninhibited, robust, and wide-open."<sup>8</sup> In fact, this robust debate consists of a number of interconnected elements: there is a broad array of political views, which are voiced in a way that is readily accessible by a typical member of the public; disagreement and discussion over the validity of political programs, proposals, and policies take place in the open, without fear of suppression by government or illegitimate coercion by private parties; criticism of existing or alleged power structures can proceed without fear of rights-violating retaliation; and association for expressive purposes can occur without similar fears.

These aspects of robust public debate require certain institutional arrangements, or are at least fostered by such arrangements, under conditions of modern social and political life. For example, in the absence of a system of relatively strong property rights, liberals find it impossible to see how adequate public debate can exist. The assertion of an inextricable connection between property and political freedom was one of the main contentions of the major figures of modern liberalism.<sup>9</sup>

The twentieth century saw considerable debate within the liberal camp over the proper scope, strength, and grounds of rights to property. One of the key points of contention was whether liberal socialism was a viable institutional arrangement.<sup>10</sup> Notwithstanding these disputes, all current liberals would agree with Cass Sunstein's claim that liberal democracy

<sup>8</sup> *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>9</sup> Accordingly, Benjamin Constant wrote, "Arbitrary power over property is soon followed by arbitrary power over people." Biancamaria Fontana, ed. and trans., *Benjamin Constant: Political Writings* (Cambridge: Cambridge University Press, 1988), 263.

<sup>10</sup> Among the major contributions to the debate were L. T. Hobhouse, *Liberalism*, 1911 (New York: Oxford University Press, 1964); John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); and Friedrich A. Hayek, *Law, Legislation, and Liberty*, vol 2: *The Mirage of Social Justice* (Chicago, IL: University of Chicago Press, 1978). Hobhouse and Rawls argued for the potential viability of liberal socialism, while Hayek and Nozick rejected such arguments.

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“requires constitutional protections of many individual rights, including . . . the right to private property, for people cannot be independent citizens if their holdings are subject to unlimited government readjustment.”<sup>11</sup> Moreover, it is clear that liberal principles require a market economy and flatly rule out any form of state socialism as unjust in principle and incompatible with free speech in practice.

Although robust debate on public issues is central to a liberal system of expression, the system must also protect forms of communicative activity that are neither political nor public. Much communication does not concern questions of law or policy, and even some expression that does implicate such questions occurs in settings reasonably regarded as private. Thus, much religious, scientific, and artistic expression is not intended or understood as contributing to debate on public issues, and communication among friends, family members, and fellow worshippers is typically outside the realm of public discussion. A liberal system will carve out a broad zone of communicative freedom for such private forms of expression.

Many thinkers take the principle of ‘content neutrality’ to capture one of the key guiding thoughts behind a liberal system of expression. In rough terms, the principle prohibits restrictions on speech based on its propositional or emotive content. However, the principle has been widely misunderstood. As legal scholar James Weinstein points out, the principle cannot be reasonably formulated as “a blanket rule against content discrimination.”<sup>12</sup> There are too many kinds of noncontroversial content-based restrictions on expression, from libel laws and securities regulations to copyright and antitrust rules, for a general prohibition or even a strong presumption against content restriction to be plausible. Weinstein’s more reasonable alternative is a principle against the content-based restriction of those forms of communication that help to constitute “the public discourse by which we govern ourselves and through which we build our culture.”<sup>13</sup>

However, it is important to realize that even Weinstein’s formulation of the principle of content neutrality cannot by itself capture all, or even most, of the key elements of a liberal system of expression. There is also a broad realm of private discourse that must be free from regulation, regardless of its content. Clearly, this realm does not include threats of violence or of other rights violations, but it must include the private expression of racist, sexist, or heterosexist attitudes. Moreover, even the principle of content neutrality must operate within the context of a regime of private property, multiparty politics, and the other institutions that make possible the robust public debate central to Justice Brennan’s

<sup>11</sup> Cass Sunstein, *Designing Democracy: What Constitutions Do* (New York: Oxford University Press, 2001), 7.

<sup>12</sup> James Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine* (Boulder, CO: Westview Press, 1999), 49.

<sup>13</sup> *Ibid.*, 44.

understanding of free speech. In the absence of such institutions, a liberal system of expression could not exist.

### III. SKEPTICAL CHALLENGES

Skeptics of the liberal view, including some radical critics, will argue that ‘robustness’, ‘wide ranging’, ‘broad zone’, and similar liberal terms are largely metaphorical and emotive in content. These skeptics will claim that the terms are little more than emotionally positive labels that liberals—or anyone else for that matter—affix to the systems of which they approve. If the skeptics are right, then I have not described a distinctively liberal system of expression but have simply constructed a set of empty conceptual boxes into which virtually any ideological position can pack its favored institutions.

Accordingly, Stanley Fish contends that “abstract concepts like free speech do not have a ‘natural’ content but are filled with whatever content and direction one can manage to put into them. ‘Free speech’ is just the name we give to verbal behavior that serves substantive agendas we wish to advance. . . . Free speech, in short, is not an independent value but a political prize.”<sup>14</sup> Competing ideological factions struggle over the power to decide what verbal behavior “merits” this emotionally charged term, and “there’s no such thing as free speech” because any conception of free speech will presuppose some particular set of political values.

Fish contradicts his claim that the concept of free speech has no natural content in the very next sentence of the passage from which I have cited: he asserts that the concept refers to verbal behavior. The reference to such behavior surely gives the concept some natural semantic content. In fact, a more sensible reading of the concept’s content would explicate it much more broadly, in terms of communicative activity.<sup>15</sup> However, if we set this point aside and treat the claim about the absence of natural content as hyperbole, it is possible to make sense of Fish’s understanding of the idea of free speech.

Fish is disaggregating the term ‘free speech’ into distinct descriptive and emotive elements. The descriptive element simply refers to verbal behavior or communicative activity more generally. The emotive element is the attitude of approval that the speaker, based on her political values, is expressing toward the protection of a certain sort of communicative activity from punishment by society.<sup>16</sup>

<sup>14</sup> Stanley Fish, *There’s No Such Thing As Free Speech, and It’s a Good Thing, Too* (New York: Oxford University Press, 1994), 102.

<sup>15</sup> See note 6 above.

<sup>16</sup> On an alternative reading, the noncognitive component in Fish’s analysis is prescriptive rather than emotive, i.e., it involves some kind of imperative of the form “Let everyone do X,” rather than the mere expression of the speaker’s favorable attitude toward X. I am grateful to Daniel Jacobson for this suggestion. The criticisms I make of the emotivist version of Fish apply, *mutatis mutandis*, to the prescriptivist version.



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On Fish's account, any set of rules regulating expression can count as a system of free speech: the speaker's own political values and preferences determine what rules count as such, and the political preferences of speakers run the gamut. Certainly, the range extends well beyond the particular preferences of liberals.

The kind of emotivist analysis that I am attributing to Fish has its precedents in twentieth century metaethics and has been subject to a wide range of criticisms.<sup>17</sup> The problem on which I intend to focus in criticizing Fish will show that there is much more descriptive content to the concept of free speech than Fish acknowledges. This criticism is not, by itself, inconsistent with an emotivist analysis that permits a fixed descriptive content. However, the criticism is inconsistent with Fish's analysis, because his account leaves the concept of free speech devoid of almost all fixed descriptive meaning.

My criticism stems from the idea that there is a kind of "folk political philosophy" whose propositions help to fix the meaning of the concept of free speech.<sup>18</sup> These propositions are platitudinous: "Totalitarian systems are incompatible with free speech," "Government suppression of dissenting political views typically violates free speech," "Whether a given instance of suppressing expression is compatible with free speech depends in part on the circumstances," "Banning works of art because the majority finds them offensive is a violation of free speech," "Private violence against nonviolent forms of religious worship violates free speech," "Multiparty political systems are essential to a system of free speech," "Tolerance of conflicting opinions is essential to a system of free speech," "Multiple, independent sources of news and information are essential to a system of free speech," and so on.

Philosopher Michael Smith has defended an account of conceptual analysis according to which "the aim of an analysis is to give us knowledge of all and only the platitudes surrounding our use of [a] concept."<sup>19</sup> I regard this account as presenting an oversimplified view of the connection between conceptual meanings and platitudes. It ignores the fact that concepts have an internal structure and a place within a wider network of concepts. Thus, some platitudes are more central to the meaning of a given concept than others, and the meaning of a concept is, in part, a function of its various links to other concepts that share its semantic field. Moreover, the platitudes surrounding our use of a given concept can to some extent change.<sup>20</sup> Nonetheless, it would be unclear how one could pick out any subject to talk about—free speech, water, tigers, or whatever—

<sup>17</sup> For an overview of twentieth century metaethics, including the debates over emotivism, see Stephen Darwall, Allan Gibbard, and Peter Railton, "Toward *Fin de siècle* Ethics: Some Trends," *Philosophical Review* 101, no. 1 (1992): 115–89.

<sup>18</sup> I am adapting the approach found in Frank Jackson, *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Oxford: Oxford University Press, 1998), 31–55.

<sup>19</sup> Michael Smith, *The Moral Problem* (Oxford: Blackwell, 1994), 44. Also see p. 33.

<sup>20</sup> Jackson seems to avoid some of the problems with Smith's account. See Jackson, *From Metaphysics to Ethics*, 38.

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unless the platitudes surrounding the subject played a significant role in defining the meaning of the corresponding concept.

Fish would be quick to point out that the platitudes of the folk political philosophy of free speech are suspiciously liberal, and liberal they are indeed. We should not be surprised: the concept of free speech was, after all, constructed by modern liberal thinkers. Fish can contest the extent to which, or the way in which, a liberal system values free speech; he can argue for some alternative to a liberal system of free expression. However, if he rejects all or most of our liberal commonplaces, he is not talking about free speech from a different political viewpoint but is simply changing the subject.

Fish is unquestionably right in thinking that speakers use 'free speech' in a way that expresses an attitude of approval toward certain policies and conditions, such as constitutional protection for competing political parties or economic arrangements that will provide multiple and independent sources of news and information. However, the approval is linked in a specific way to the descriptive content of the concept: speakers think that there are justificatory reasons for favoring those policies. If someone rejects those policies, then he is not operating with a nonliberal conception of free speech but is, rather, opposing the policies implicit in the very idea of free speech.

I do not claim that Fish is himself such an opponent. In fact, I doubt that he is because there is no reason to think that he would reject the liberal commonplaces, despite his initial pejorative reference to some of them as "First Amendment pieties."<sup>21</sup> Rather, he is asserting one of the liberal platitudes as an unqualified generalization and elevating it to a privileged position above all of the others, namely, the platitude that whether a given instance of speech suppression violates free speech depends on the circumstances. Fish's formulation is this: "The question of whether or not to regulate will always be a local one, and we cannot rely either on abstractions that are empty of content or filled with the content of some partisan agenda to generate a 'principled' answer."<sup>22</sup> The sound approach is "to consider in every case what is at stake and what are the risks and gains of alternative courses of action."<sup>23</sup>

Fish's approach may seem to throw out all of the other liberal platitudes and to claim that particular circumstances are all that count in determining whether an instance of speech is an exercise of expressive freedom. However, in the end he winds up accepting the other liberal platitudes, even though he does not think that they can generate acontextual answers to questions about particular issues of speech regulation: "First Amendment formulas . . . still serve a function that is not at all negligible: they slow down outcomes in an area in which fear of over-

<sup>21</sup> Fish, *There's No Such Thing*, 110.

<sup>22</sup> *Ibid.*, 111.

<sup>23</sup> *Ibid.*



hasty outcomes is justified by a long record of abuses.”<sup>24</sup> Fish’s initially dismissive talk of “First Amendment pieties” has thus become a more respectful reference to “First Amendment formulas.”

In any case, it seems dubious for Fish to elevate above all other free speech platitudes the one that concerns the circumstances of speech. The other platitudes are at least as important because no account of the circumstances of speech can ignore the considerations to which the other platitudes make reference, such as the existence of a multiparty system or a totalitarian one, the toleration of religious difference or private violence against dissenting creeds, the control by government of the media or multiple and independent sources of information, and so on. Nor is there any reason to think that the relevant particular circumstances are so variable that all presumptive generalizations about free speech are to be rejected in favor of the unqualified generalization that issues of free speech are “always local.”

I do think that Fish is right to this extent: the free speech platitudes do not dictate in any simple way the answers to many of the free speech issues that confront liberal societies. I include among these issues the ones on which contemporary radicals focus: pornography regulation, sexual harassment rules, and restrictions on hate speech. Moreover, I agree with Fish that considerations of historical and social context ought to carry weight in dealing with these issues. None of these points is inconsistent with recognizing that the concept of free speech has a robust descriptive content or affirming that a liberal system of expression ought to be endorsed. Fish’s efforts to show that the concept is inherently devoid of descriptive content fail. However, even if we can fix at least some of the content of the concept by reference to liberal platitudes, the question still remains whether a liberal system of expression ought to be endorsed.

#### IV. MARCUSE AND THE REJECTION OF LIBERALISM

In the 1960s one of the most influential voices on the left was Herbert Marcuse (1898–1979), and he explicitly rejected a liberal system of expression in favor of what he regarded as an equality-promoting alternative. Marcuse did not defend his alternative as a permanent fixture. Rather, he believed that a liberal system could not be justified at this historical juncture because it tolerated forms of expression whose content blocked progress toward peace, equality, and effective freedom for all. The progress of history required the systematic suppression of certain ideas now so that a liberal system of free expression could be instituted at a later stage of social development.

For the advancement of freedom, peace, and equality, Marcuse advocated what he called a system of “liberating tolerance.” In his writings, he describes what he has in mind in only the sketchiest of terms, but these

<sup>24</sup> *Ibid.*, 113.

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terms—together with the justification he offers for liberating tolerance—make it clear that he is advocating a radical alternative to a liberal system. Liberating tolerance would employ “apparently undemocratic means,” including “the withdrawal of toleration of speech and assembly from groups and movements which promote aggressive policies, armament, chauvinism, discrimination on grounds of race and religion, or which oppose the extension of public services, social security, medical care, etc.”<sup>25</sup>

In order to achieve a free and democratic society, “tolerance cannot be indiscriminate and equal with respect to the contents of expression.”<sup>26</sup> The reason resides in the very framework of liberal capitalist society: “The antagonistic structure of society rigs the rules of the game. Those who stand against the system are a priori at a disadvantage, which is not removed by toleration of their ideas, speeches, and newspapers.”<sup>27</sup> To achieve true equality requires “liberating tolerance [which] would mean intolerance against movements from the Right, and toleration of movements from the Left.”<sup>28</sup> The result “would amount to an upheaval” and involve the “cancellation of the liberal creed of free and equal discussion.”<sup>29</sup>

Marcuse is clear that liberating tolerance would involve sweeping restrictions on expressive liberty, and his account of the nature of post-World War II liberal society is meant to support such restrictions:

The whole post-fascist period is one of clear and present danger. Consequently, true pacification requires the withdrawal of tolerance before the deed, at the stage of communication in word, print, and picture. Such extreme suspension of the right of free speech and free assembly is indeed justified only if the whole of society is in extreme danger. I maintain that our society is in such an emergency situation, and that it has become the normal state of affairs.<sup>30</sup>

In the foregoing passage, Marcuse is turning what had been a standard liberal rule of free expression into the basis for a repressive system. The rule was formulated by U.S. Supreme Court Justice Oliver Wendell Holmes, namely, the “clear and present danger” test. For much of the twentieth century, jurists saw this test as highly protective of expression. Holmes had written, in *Schenck v. United States* (1919), that government could restrict speech in a way that is consistent with the First Amendment only

<sup>25</sup> Herbert Marcuse, “Repressive Tolerance,” in Robert Paul Wolff, Barrington Moore Jr., and Herbert Marcuse, *A Critique of Pure Tolerance* (Boston, MA: Beacon, 1965), 100.

<sup>26</sup> *Ibid.*, 88.

<sup>27</sup> *Ibid.*, 92n.

<sup>28</sup> *Ibid.*, 109.

<sup>29</sup> *Ibid.*, 101 and 106.

<sup>30</sup> *Ibid.*, 109–10.