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Books Reviewed

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BOOKS REVIEWED

Repressive Tolerance, by Herbert Marcuse, in
A CRITIQUE OF PURE TOLERANCE. By R. P. Wolff, B. Moore, Jr., and H. Marcuse. Boston: Beacon Press, 1965. Pp. 117. $2.45.

Almost everyone knows already that Herbert Marcuse has been adopted as prophet-in-residence for the newest and most radical movements of the left. It is also too late to be first in pointing out the weaknesses in his unliberal position. But Marcuse's writings still serve to focus attention on the confrontation of recent liberalism and the new movements, and that is a matter of pressing concern.

Where tolerance of radicalism is exhausted by the efforts of blacks to attain dignity in our society, Marcuse is best not read at all. But for anyone who is still only puzzled rather than enraged when the new radicals are as virulent in attacking liberalism as in their criticism of fascism, the essay *Repressive Tolerance* provides a more articulate and qualified account than is generally available in the public media or, for that matter, at most demonstrations and rallies. I shall first try to sketch out that account.

In what follows, "the new movements" is simply a noun phrase, dangerous and abstract, for referring to a kind of spirit or recurring attitude in current radical development on the left. "Recent liberalism" is an equally dangerous way of referring to a strain of thought recognizable in the United States during the period from the thirties to the midfifties.

I

The choice between the liberating and repressive, the human and inhuman, is not a matter of preference but a rational demand. If the identification of policies and actions under these headings is outside the province of "the sciences," it is not beyond the talents of a mature and educated man. To deny to the community the right to make this choice in a corporate way is to misconstrue the function of democracy. To insist that the community must allow the wheat and the tares to grow together is to put off indefinitely the harvest itself which is the only thing that makes the policy worthwhile.

In fact, no existing society enjoys "pure" or "universal" tolerance. There are a selective application of the laws and a highly effective system of pressures that protect the status quo and inhibit significant change. A democracy like the United States cannot have "universal" tolerance so long as external threats require it to have a large military organization, and internal economic policy requires, or at least supports, social inequities. But no government should even try to have a "pure" tolerance when the forces of repression constitute a clear and present danger. And the whole "post-fascist period is one of clear and

present danger." (p. 109) This means "intolerance against the right and tolerance of the left." (p. 109) Such intolerance requires "withdrawal of tolerance from repressive movements *before* they can become active." (p. 110) For the "liberation of the Damned of the Earth presupposes suppression not only of their old but also of their new masters." (p. 110)

The unwillingness to accept this conclusion has been fostered by a false tolerance that characterizes our present society. Although the framers of liberal theory and its present practitioners personally hold and publicly pay speech-service to the most noble and humane goals, they actually, even if unwittingly, serve a false individualism that prevents society from working corporately for these goals and inhibits any activity the citizens might be able to accomplish on their own. If a government must restrict itself to providing a "free" atmosphere where the goals of individual citizens receive maximum protection, allowing any goal to be espoused and worked for that does not upset the stability of the society, the result will be the reinforcement of the status quo: not a maximizing of different values but a minimizing of change.

A striking symptom of false tolerance is the image the news media adopt to appear informative and fair. In fact, however, devoting side-by-side equal space to alternate proposals on key issues often results in the impression that mere taste separates them rather than in a real education of the public. Treating racist proposals in unemotional terms is not fairness so much as a kind of discoloration of the facts. (pp. 94-99) The result is that the most reactionary policies and attitudes are put on a par with the most progressive ones, and the forces that work to liberate man are reduced to the level of those that repress man. (p. 107) The same false tolerance infects our educational ideals and practice. (pp. 112-14)

It is not enough to say that we do better than others. The choice facing us is not which actual society we prefer to live with but what kind of society we intend to create. The impediment to our making that choice correctly is not the specious attractiveness of repressive policies but the illusion of a liberal democracy. In fact our society is a repressive one, though perhaps not completely or unregenerately so. (Marcuse has no illusions about dictatorships, whether communist or not.) But the process of educating our society about its present faults and its future possibilities, if it is not institutionalized by the community itself, becomes the responsibility of minorities who must then resort in varying degrees to forms of dissent.

There cannot be any right of resistance to the point of subversion "for any group or individual against a constitutional government sustained by a majority of the population." (p. 116) But there are oppressed minorities in our society where

> . . . as everywhere the law and order protect the established hierarchy; it is nonsensical to invoke the absolute authority of this law and this order against those who suffer from it and struggle against it—not for personal advantages and revenge, but for their share of humanity. There is no other judge over them than the constituted authorities, the police, and their own conscience. If they use violence, they do not start a new chain of violence but try to break

> an established one. Since they will be punished, they know the risk, and when they are willing to take it, no third person, and least of all the educator and the intellectual, has the right to preach them abstention. (p. 117)

To put it crudely, the image of liberal tolerance is a dangerous self-deception, actually promoting our society's repression of minorities and blocking progressive policies. As a realist, one admits that force and intolerance are facts of life in modern society. The intolerance espoused is simply a claim to a piece of the action. (We might dub the position "participatory intolerance.")

II

Is Marcuse's philosophy a new totalitarianism or perhaps a call to anarchy? One asks that question, of course, because of the threat of the more virulent form of antiestablishment action that is reported to be gaining support in our country today. Just because of the emotions behind the question, it is not easy to answer.

It is to Marcuse's credit that he has not written off the radical movements of the young as the noisy waste product of an affluent and permissive society. Even those who cannot believe that the future lies with radicalism must face the question whether the radical movements constitute the only place in our present society where the future can find any voice at all. Despite the fact of regular elections as a channel for change, the actual change of political and social attitudes is both slow and minimal. Where the full extent of possible change is realized and/or where the social and political situation remains fairly stable, this process may work as a testing and selective mechanism. But the great and noisy battle between the parties tends to obscure the influence of a natural inertia that resists creative and imaginative policies. The citizen's right to vote for elected representatives diverts attention from the facts of power in our or any other society.

There is an obvious paradox in the radicals' condemnation of a repressive management of the society at the same time that they seek a government that would establish policies requiring official intolerance. There is confusion in the way they justify their cause. Sometimes the argument is that these policies are good and their opposites immoral, so that the opinion of the majority, or other minorities, is irrelevant. At other times, the argument is that the majority is actually for these policies, though they have been "disenfranchised" by technicalities or brute force. Often enough, the argument is that the majority would be for these policies if they were properly educated and informed.

Paradox and confusion, however, are not the exclusive property of the radicals. Many liberals have staked their hopes on a society where the individual is allowed to pursue selfish ends and yet, by proper adjustment and encouragement, the management will be able to shape the results towards the realization of worthy and altruistic goals. Others persist in believing that extending the rights and privileges of freedom to those who do not yet possess them is the natural and obvious trend in our society's present attitudes. At their most sympathetic, such people can only make excuses for young radicals who, in a burning desire to see perfection achieved, have forgotten or ignored how much has been done, how

difficult the task, how heroic the efforts and how (realistically) great the results. I believe even the most sympathetic have missed the point.

The most striking feature common to confrontations between radicals and liberals—as, for example, at student demonstrations at Berkeley and Columbia—is the priority liberals seem to accord to rules and procedures over issues. Many members of the establishment are truly hurt that radicals should show ingratitude towards those who "defend" them on the basis that they have a right to be wrong. What is at stake, however, is not whether a minority can speak against the majority even when it is wrong but whether it can act against the majority when it is right.

Such confrontations, I believe, are signs of real crisis in the development of democratic forms. Were it a matter of implementing definite policies and protecting a clear tradition, there would be difficulties enough. The challenge is to articulate the tradition anew, to think out and work out these problems at a new level. On the intellectual side of this endeavor, we have to face again a number of troublesome dualisms: thought and action, fact and value, individual and community. Our present techniques, theoretical and procedural, for coping with such problems are working parts of our culture. They were made from the best materials available, but they have been forced out of shape by the pressures of our development. One cannot simply pull them out or the whole thing will come to a stop; and one cannot leave them going as they are or the whole thing will soon shake itself to pieces.

Marcuse has recognized the importance of reexamination of these dualisms but, to my mind, he has not advanced our thinking on them. To put it metaphorically, his solution is that we go back to the nineteenth century and start over again, though this reactionary streak tends to go unnoticed because of the selective reading given the essay by the new movements. Neither they nor the liberals have anything to gain by allowing themselves to be led on that unprofitable journey.

The most common misreading of Marcuse's proposals comes from ignoring an explicit statement at the beginning of the essay that he is proposing an ideal: a truly liberating tolerance is not to be expected from any power or authority or government presently existing so that the point of his writing is only the opening of "mental space." (pp. 81-2) No one should deny that we can use some mental space, but anyone who has tried to teach *The Republic* knows the ambiguities involved in working with "the ideal." Is the model proposed something we want to see concretely established and for which we should now be working, or is it rather an abstraction that is helpful in judging the actual political structures and policies that we are working for? Marcuse's radical reputation comes from taking the first line of interpretation, but I suspect that, where he is not guilty of equivocation, Marcuse himself takes the second line.

At any rate, it is crucial to his whole project that the distinction between the repressive and the liberating is the kind of distinction all but the immature and the irremedially ignorant can and will agree upon. The "ideal" society is one in which the wise rule, and Marcuse holds that what makes Mill's theory democratic, as opposed to Plato, is that Mill thinks that sufficient wisdom is

attainable by a larger number of people. (p. 106) Whether or not this is faithful to Mill, there is here an appeal to education that is as attractive and fallacious now as it was in Plato's day. A society would indeed be ideal where the only authority were wisdom and the only force education.

One can underestimate the importance of education — the whole arena for exchange of information, parts of which are the schools and the public media. Truth is no tyrant, and knowledge does set us free. But that does not mean that the political structure of a society can be its educational system. One has only to ask what is to be done with the failures to be on the track of uncovering the horrors of such a state. However important one may find the need for an educated elite — and they are an even more dangerous elite if they constitute the majority — second-class citizenship is no more an asset to a society for being based on "natural" classes. Aristotle thought he had justified slavery on similar lines.

To the extent that Marcuse's special brand of intolerance depends upon this educational elitism, it deserves all the criticism it has received. Perhaps those who support Marcuse are temporarily blinded by the glaring inconsistency of a position that justifies resistance on the part of the oppressed and yet accords power only to those who are properly educated. Again one might refer to *The Republic* and recall how few people in reading Plato are self-conscious about identifying easily and only with the highest of his three orders in society.

To leave the matter here, however, is to miss Marcuse's most important insight. The tyranny of the majority that Mill decried is crude and obvious in comparison to subtle forms that can use tolerance itself as an instrument for repressing change. The media of communication, the system of education, and the most revered procedures for legitimate redress of grievances and expression of dissent all work together to create a situation where nearly anyone can speak but only a few are allowed to make themselves heard. Consequently, forces of opposition and dissent can be effectively undercut by "letting them have their say." A direct opposition to minorities always runs the risk of conferring upon them status and identity within the community. With the appearance but not the spirit of an open society, however, minorities can be rendered powerless or branded irresponsible. Perhaps an appreciation of Marcuse's point comes only with having felt, somehow, the weight of resistance in a fairly liberal institution or with participation in a "way-out" movement in our society. At the very least, however, one ought to be able to resist the identification of political establishment with political life that automatically places the greater part of discontent in our present society beyond the pale. Marcuse is no anarchist. In fact, his writings presuppose the vocation of man as a political animal, not the politician of our current usage but someone committed to the life of the *polis*. He complains about our present situation where the practice of politics has furthered the process of alienation, cutting man off from that life where alone he can "find himself." (pp. 114-15) For Marcuse and for most radicals, the attack upon the present political establishment fulfills a political obligation. From their standpoint, it is the entangling alliance between recent liberalism and present bureaucracy, rather than a taste for fascism in the new

movements, that accounts for fragmentation on the left. Unfortunately, there seems to be some truth on both sides.

Nevertheless, when it comes to methods, Marcuse does not advocate a violent revolution. His public remarks about the student demonstrations at Columbia make it clear that he is not always in agreement with any particular group as to whether its oppression is real or the nature of its response justifiable. What he envisions is an ever-increasing number of perhaps isolated cases of illegal resistance (where justified) and legal dissent and protest (where possible), leading to a general change of attitude in the society. If I read him correctly, Marcuse does not even want a violent or subversive revolution. He sees these various cases of "taking stands," more or less vigorously and more or less illegally, as bringing about an education of the majority.

Here again, Marcuse is articulating the position of most radical movements in the United States. Despite the talk of revolution, only a small percentage of the new movements is really thinking of revolution. What they have in mind is bringing about a rapid change of attitude; they do not expect it to be easy, but they do not think it will require civil war. Hopefully they are right, for a change of mind is needed and a civil war is not. But there still remains the question of how to be effective in achieving the one without causing the other.

III

Marcuse claims that every political advance has been born of social revolution. (pp. 107-8) This is imprecise. While radicalism is the necessary condition, the only progress in social revolution is accomplished by the adoption of the program by the majority. There is the practical difficulty, in a time of crisis and tension, of sustaining a movement of opposition without creating an opposition that is unfavorable to the ultimate achievement of progressive goals without violence.

Resort to extraordinary forms of protest and dissent must win a suitable response from the majority in a relatively short period of time or find itself faced with the embarrassing choice of losing face which may mean political extinction or opting for escalation. Such dissent runs a risk very similar to "limited military action" in the solution of political problems. If such protest serves to harden the reactionary tendencies in a society, it will have forced the situation which only its "ultimate weapon" of insurrection can meet.

> A climate of war creates its own horizons, its own justification and method. Subjected to such an atmosphere for a long period of time, men come to accept it as normal and self-evident; they create a logic that suits their state of soul . . . .
>
> In such an atmosphere, men gradually come to accept a totally different version of human life . . . . Such men live in the dreamworld of the schizoid or the adolescent . . . The stranger becomes the enemy; the enemy is everywhere . . . . And almost inevitably, as the complexities of human relationships merge into the single image of the enemy, a complementary image of

> ourselves arises. We become the beleaguered defenders of all that is good and noble in life . . .[1]

These words of Daniel Berrigan were written about our involvement in a foreign war, but they apply as well to civil conflict.

To maintain that the future lies with subversive revolution is to go the way of the past. It can sometimes be true that the ways of the present are worse than the ways of the past, but as I read him, Marcuse does not think we have reached this unfortunate stage. What is misleading about the limited revolution he advocates, then, is that to be anything other than an ideal, it would require either a receptive public, intolerant management rather than leadership, or a subtle appreciation on the part of radical leaders for the actual limits of tolerance within the society. The last alternative is not so unthinkable as the reactionary account of radicalism maintains, and there is real hope that a broadly based and politically experienced group will eventually emerge from within the new movements. That cannot happen, however, unless the society can retain its tolerance and resist the reaction pattern that has preceded violent revolution and/or fascist take-over in Western countries in the last half century. The tendency towards dangerous polarization is too obvious in our country to be ignored. The responsibility for preventing that tendency from running its disastrous course falls again on the proponents of liberal democracy.

Obviously enough, exposing the inadequacies of Marcuse's position will not suffice as a program for the future. Liberalism must free itself from the righteous refusal to consider the possibility of self-deception. A repugnance towards the unruly, the out-of-order, the impetuous and the impatient can mask a very cultured prejudice. A "high-principled" insistence upon discussion, balance, and going about things in the proper way can be a hypocritical way of avoiding or preventing action. The social and political conditions where injustice is most common are usually the result of forces that are not under liberal control. When the insistence upon liberal procedures comes after the fact, it leads, at its worst, to rationalization and, at its best, to a defense of the status quo.

In a closed society, for example in some religious or ideologically based institutions, questions of obedience can come to dominate all the activity of the members. Obedience serves the very important purpose of providing unity and is, therefore, relevant to every decision and to the exercise of any other virtue. When such a society goes stale and its structure hardens, obedience can actually take the place of all other virtues. It becomes the ultimate, universal, and sole test of whether something is to be done or whether someone is acting within the community. In a free society, tolerance bears a large part of the weight for preserving unity: we tolerate one another, despite differences and faults, for the alternative is to become enemies, citizens of different and separate societies. One may want to put off admitting it, but a free society can also go stale. When that happens, however paradoxical this may seem, appeals to the need for tolerance can become means of control rather than expressions of a living unity.

A democracy cannot justify putting procedures ahead of issues. If we seem

[1] DANIEL BERRIGAN, S.J., THEY CALL US DEAD MEN 166 (New York, 1966).

to be backed into that corner, it is only for having lost sight of the fact that tolerance is one of those issues. One cause of this oversight is a misunderstanding of tolerance that is shared by many liberals. "The telos of tolerance is truth," says Marcuse (p. 90), for he thinks that tolerance is directed to ideas. But tolerance is rightly directed only towards people, and its end is the development and preservation of community. Where tolerance is directed towards truth, its justification is the prevalence of ignorance — an important enough problem, of course, but still no reason for telling anyone who is right that he should not act. Where tolerance is ordered to community, there is a common point of reference by which to judge the actions of both rulers and ruled: the common good. One need not claim that it is easy to determine the common good in particular cases. It is enough that the decision about who is right should not be automatic.

This new — or perhaps very old — way of looking at tolerance does not eliminate the conflict between liberals and radicals. But it prevents liberals from using appeals to the need for tolerance to justify the suppression of dissent. It challenges radicals to take a stand on whether we are to have a free society now or only after the enemy has been eliminated. From its standpoint, Marcuse's espousal of intolerance is dangerous and reactionary, while his analysis of liberal self-deception is challenging and relevant.

JOHN BOLER

LEGAL FICTIONS. By Lon L. Fuller. Palo Alto: Stanford University Press, 1967. Pp. xiii, 142. $4.50.

This new book by Fuller consists of three articles which were originally published in the *Illinois Law Review* in 1930 and 1931. They are now republished in a slightly altered form. The main reason given by Fuller for disinterring these essays more than a third of a century after they were written is that fictions represent the pathology of the law. The diseases which call for their use, though they may have diminished during the last thirty years, have not entirely disappeared. This argument seems to be convincing. Though many may wish to see the fiction relegated to the rubbish heap, it is another matter to assert that its disappearance is already an accomplished fact. The reading of even recent decisions in the United States convinces one that references to constructive frauds, implied contracts, the presumed acceptance of gifts, and similar notions still abound. We are dealing with a living institution, not a corpse.

This work like others by the same author is written in an easy, freewheeling style. One feels the presence of a kindly, urbane, and self-confessedly romantic writer conducting us on something of a fireside tour. Analysis and system are uncongenial to him. He is most worth attending to when he speaks, so to say, of the neighborhood he knows best — the vagaries and intricacies of the American judicial process.

The result is a certain unevenness both within and between the different essays. Much the best of these is the second, which discusses the motives for adopting legal fictions. Here Fuller discusses (pages 56 ff.) the motives for dressing up new law as if it were a variety of the old. Of these he distinguishes four: conservatism of policy, emotional conservatism, the conservatism of convenience, and intellectual conservatism. The first is the desire to conceal a new policy, especially when it involves a usurpation of legislative power. The second is perhaps better described by the author elsewhere as the motive of persuasion. The lawyer who enunciates the fiction attempts to commend it to his audience by showing that the new policy is only a variety of the old. The third motive is to save trouble by adopting a form of shorthand — what the author elsewhere calls an abbreviatory fiction. The fourth reason for adopting what Fuller happily calls "exploratory fictions" is that the judge is feeling his way. He is striking out on a new path, but is for the moment unable to see where it leads. Or several judges, unable to agree on the real reason for the new departure, are at least in accord as to the fictitious reason. This exposition of the different motives for adopting legal fictions in the second essay, which I have supplemented to some extent from other parts of the book, seems both cogent and sensitive.

The first essay is less successful, though it too contains some suggestive paragraphs. In it Fuller discusses the definition of a legal fiction. After an initial description of a fiction as a statement made by a lawyer or judge which he knows to be false, he proceeds to a definition by which a fiction is either "(1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility." (p. 9) This curious bifurcated definition has little to commend it, since there certainly can be fictions which do more harm than good, and it is arguable that all do so. Much happier is the suggestion that fictions arise from the "strained use of old linguistic material." (p. 22) This makes the most substantial of Fuller's points in defense of at least certain fictions, namely that to eradicate them would inhibit the natural growth of language.

In the third essay Fuller asks whether the fiction is an indispensable instrument of human thinking. His answer on the whole is that it is, unless we are prepared to adopt a language in which each term stands for or represents something in the external world. Others have maintained the same thesis; Fuller's version is strongly marked by the popular science and philosophy of the 30's.

The puzzles which Fuller is concerned to solve and dispel seem to me to fall into four categories, which I deal with not necessarily in the order of their importance. The first, which he discusses in his 1967 introduction, is concerned with what he calls "comprehensive system," which might perhaps be better termed "comprehensive classification." The lawyer is faced with the following sort of dilemma. A marriage must apparently be either valid or invalid. There is nothing in between. If therefore we are confronted with a union to which it is desired to attribute some but withhold other legal effects there seems no way of fitting it into the accepted classification. Similarly in physics, Fuller asserts, there is a difficulty in classifying bodies which have some characteristics of waves and some of corpuscles. But this, strangely enough, is not in his view the case in

chemistry or politics. To the reviewer it seems that the difficulties confronted by the lawyer and physicist in this respect are not very different from those confronted by the chemist who is in doubt whether to classify some substance as a liquid or a gas, or by the student of politics who is uncertain whether a certain state is a democracy or a dictatorship. In every study, whatever classifications are adopted, there are likely to be borderline cases. To the lawyer the problem is less troublesome because the hybrid legal consequences are subject to his control, whatever classification is adopted, while the physical phenomena fall wholly or largely outside the control of the scientist. The statement that a marriage both is and is not valid does not necessarily involve either a contradiction or a fiction. It is not a contradiction once the validity is stated to be a restricted one. Nor is it a fiction since the statement that a given union is to have certain of the normal legal effects of a marriage but not others does not assert any fact but merely prescribes certain consequences.

A second source of puzzlement is the use of words which do not have a direct physical counterpart in the external world. If such words are said to refer to fictitious entities, then fictitious entities include, to adapt one of Bentham's lists, such notions as "motion, rest, quality, obligation, right, power, condition, certainty, etc." This topic is the particular theme of the third essay. Fuller's treatment is based largely on the work of Vaihinger, which appeared in 1911, though the nucleus was written as early as 1876. Fuller does not here take account of Bentham's theory of fictions, in which the same difficulties were met rather more clearly than in Vaihinger's work, and about a century before him. Nor does he discuss Vaihinger's contemporary, Russell, and the series of philosophers who have subsequently investigated the problem of logical constructions, nor the rather different and more recent analysis of Hart. This part of Fuller's argument is not really essential to his thesis, nor is it consistent with his main definition to call these notions fictions. Thus, to assert, for instance, that a person has a right (however obscure the expression may be) is not necessarily to make a false statement, but to make one the truth or falsity of which depends upon the prevailing rules and the facts of the case.

A third difficulty of Fuller's concerns the notion of truth. There are some rather loose statements about this, for example where he says "the truth of any given statement is only a question of its adequacy," and again, "the truth of the statement is, then, a question of degree." (p. 10) On the other hand he rejects (p. 21) the theory of the juristic truth of fictions. Through this rather confusing series of comments on the notion of truth there emerges, nevertheless, a proposition which is itself true and important. The truth of a proposition depends on its meaning and force. Thus if it is said that "an illegitimate child and its father are unrelated," before we can say whether the statement is true or not, we must first decide not merely whether what is being asserted is a natural or a legal relationship, but whether the person asserting it is making a statement of fact, natural or juristic, or is prescribing a rule to be followed. If the statement is found in a civil code, for example, it is neither true nor false, but merely means that an illegitimate child is to be treated in law as unrelated to its father. So understood the statement is not fictitious because it does not assert a fact but

prescribes what is to be done. Whether the notions true and false can meaningfully be predicated of the statement depends on the intention with which and the context in which it is made.

But the main puzzlement with which Fuller attempts to deal is that generated by the use of legal fictions to persuade. Fuller's discussion of this appears in various places, particularly at pp. 24, 53 ff. Whatever may have been the position in the past, the main areas in which this persuasive use of fiction is still current appear to be the following.

A) The first is when it is desired to escape from authority (pp. 51 ff. where Fuller speaks of reconciling a legal result with some express or assumed premise). Courts and writers who are faced with an authoritative text such as a statute, which seems to bar the way to a new development, may open the door by using a term found in the statute or text in a fictitious sense. Thus where the statute speaks of "fraud," the court or writer may speak of a "constructive fraud." There is a modern example in the case of *In Re Fox's Will,* 9 N.Y.2d 400, 174 N.E.2d 499 (1961). The reason for such fictitious extensions is that courts cannot overrule statutes. On the other hand if one looks at the situation in pure case law areas there is probably now some contrast with the situation as it existed when Fuller was originally writing. The rules of precedent are looser and it is very unlikely that a court would nowadays use the terminology which Fuller adopts at pp. 67-8, where he is discussing the problem of a child trespasser allured onto the occupier's land and injured by some contraption on that land. A court which wished to relax the rule barring child trespassers from recovery would hardly say nowadays that the child was "deemed to have been invited" onto the land. The court would either openly change the rule, or openly decide that it should not.

Indeed the defenders of fiction are here in something of a dilemma. If a judge has a limited, interstitial legislative power, then recourse to fiction is unnecessary. If, on the other hand, he has not, the recourse to fiction is unjustifiable. Bentham's criticism that judges who assume legislative power and conceal their assumption by a fiction are lacking in candor seems no less justified now than when it was first made. All that is necessary, in order to meet it, is that judges should openly assume a limited power to apply both statutes and common law principles by analogy.

To bring this out, an analysis of a typical sentence embodying a fiction is perhaps necessary. Take a sentence of the form "in this case there is a constructive fraud." This seems to imply at least the following: 1) there has been no actual fraud in this case; 2) but the situation is to be treated legally as if there had actually been fraud; 3) the situation is in some unspecified way similar to that in which an actual fraud has occurred; 4) this similarity provides a reason for applying the same rule as in a case of actual fraud. The word "constructive," though in one sense a "mark of shame," is also a salutary warning of the fact that the word "fraud" is not being used in its ordinary or literal sense.

If this analysis is correct, then a judge or writer who makes use of a typical persuasive fiction commits himself to a course of analogical reasoning. Ought he not to explain why he thinks the analogy appropriate and why in his opinion it

justifies the application of the same rule as in the standard nonfictional case?

B) This is an appropriate point to revert to Fuller's tentative exploratory fictions. He says "a judge may adopt a fiction, not simply to avoid discommoding current notions, or for the purpose of concealing from himself or others the fact that he is legislating, but merely because he does not know how else to state and explain the new principle he is applying." Is this argument, and the desire to avoid cramping the natural growth of language, sufficient to justify Fuller's view (pp. 21-2) that a wholesale rejection of fictions is both impossible, and, if it were possible, inadvisable? Undoubtedly, the argument is appealing. Very often when a new development first begins, judges have neither the time nor the experience to view it in all its possible ramifications. A series of cases, a period of years will be needed before a mature and authoritative formulation of the reasons for and limits of the new development becomes possible. But one reviewer at least was not convinced that even this limited apology for fictions can be sustained. To revert to the example of constructive fraud: is not the appropriate course for the court hesitant to say something like this, "We are satisfied that this case sufficiently resembles a case of fraud for it properly to be brought under the same rule. That is all that is necessary for the decision of this case"? A court which does this may be accused of not giving an adequate reason for its decision. But if it says that that case is one of constructive fraud, it does not give an adequate reason either. The suggested nonfictitious way of putting the matter has this advantage, that it focuses the attention of the court on the existence of a supposed similarity to the standard case and perhaps exposes the question whether, if it is impossible to say even roughly in what that similarity consists, the extension of the rule to the new situation is indeed justified.

I have passed over many good things in this book. One of them is Fuller's account of how fictions die through the transition of language from living meaning to metaphor. Another is the distinction between assertive and assumptive fictions. (pp. 36-7) If in the end the book's central argument fails to convince its grace, charm, and felicity cannot but provoke thought and entertain.

A. M. Honoré

The Logic of Choice. An Investigation of the Concepts of Rule and Rationality. By Gidon Gottlieb. New York: Macmillan, 1967. Pp. 188. $5.95.

The Logic of Choice is about reasoning with rules. One reasons with rules, in the sense Gottlieb intends, when one relies on rules to guide his reason. A central feature of reasoning with rules is choice. Rules find application to actual sets of events in circumstances requiring that a choice or decision be made. But a rule does not apply itself to a state of affairs. Whether a rule applies depends on whether there is a suitable correspondence between the *protasis* of the rule and the state of affairs in question. Whether the correspondence is suitable

depends partly on our choice of suitability criteria and partly on our choice concerning the most apt description of that state of affairs. In the background are a variety of competing purposes in terms of which the inclination to make any choice at all is to be explained. Of course, choices with respect to these purposes must also be made. The function of rules is to guide the mental processes involved in making these various choices.

The aim of *The Logic of Choice* is to examine the logic of rule-guided choices and to show that the reasoning involved may be rational without being either analytic or scientific. The importance of this undertaking is reflected in the numerous but unsuccessful attempts to show that rule-guided reasoning is really but a species of deductive or inductive reasoning. Inability to effect the desired reduction has occasioned doubts about the rationality of fields in which rule-guided reasoning predominates. The skepticism has been especially persistent in the case of legal reasoning, and Gottlieb focuses on this domain to exhibit his model for rule-guided reasoning. Owing to this focus, several chapters (like the one on precedent) are devoted to topics peculiar to the law. For this reason, the book is perhaps of special interest to those troubled about legal reasoning.

Gottlieb's model for rule-guided reasoning is unstructured and by his own admission of "rambling form." (p. 32) It defies any simple summary; so for the most part my remarks remain at a fairly general level. For a rule to function to guide choice it must satisfy certain structural requirements by indicating (i) the circumstances in which it applies, (ii) what is to be concluded, (iii) the type of inference contemplated, and (iv) that the statement is indeed designed to function as a rule or inference-warrant. (p. 38) Of special importance is item (i), for rules presuppose a context of application and a certain relationship to that context. Indeed, the first test of the relationality of a decision is the *correspondence* between all *relevant* facts and the *protasis* of the applicable. (p. 46) Unfortunately, the notions of "relevant fact" and "applicable rule" are deeply interwoven.

This interplay between rule and fact undoubtedly is a central concern to those who are skeptical about the rationality of rule-guided deliberation. What Gottlieb calls a model for this sort of reasoning is, I think, best understood as an attempt to isolate and examine the disparate elements of this interplay. Thus, Chapter IV is mainly an examination of various standards in terms of which facts are made relevant to some rule-guided deliberation. The "applicable rule" is one of those standards; moral rules and principles, and social and economic considerations, provide others. Chapter VII concerns the interpretation of rules, a matter of considerable importance if one is rationally to judge that there is a suitable correspondence between rule and fact. The problems of interpretation lead to the discussion in Chapter VIII of the role of purpose in the application of rules. Again, whether the purposes underlying a rule are furthered or thwarted by a particular application depends to a large extent on the facts (under *some* description) to which that rule is applied. Finally, even in the chapter on precedent the central issue is the relation between the material facts of a case and its *ratio decidendi*.

Discussion of the various elements of this interplay between fact and rule

almost invariably proceeds through a perusal of fragments taken from recent philosophic writings. (There are nearly 250 footnotes, and quoted material comprises over a quarter of the text.) Frequently, the quotations appear to take the place of argument. For example, von Wright is quoted for the observation that, linguistically, rules are a very varied bunch, cutting across several grammatical types of sentences. From this Gottlieb concludes that "it is the use and not the form or look of the sentence or expression which indicates whether it is a rule-statement." (p. 35) This does not square well with the internal structural characteristics which Gottlieb claims rules must have, but the pertinent point here is that the conclusion is not argued for. In a book in which the notion of a rule occupies such a prominent position, argument on this point seems in order. There is a surprising lack of argument throughout *The Logic of Choice,* and at least sometimes this lack seems to be the result of excessive reliance on the conclusions of others.

More often, the lack of argument is owing to the absence of any need for argument. For example, to support the thesis that a mechanical interpretation of an ostensibly applicable rule can lead to a misconception of the facts and hence to an irrational decision, Gottlieb cites Puffendorf's famous case of the surgeon who performed an operation in the street and was prosecuted under a statute prohibiting public bloodletting. (p. 45) Gottlieb's insistence that there is here only a marginal correspondence between the *protasis* of the rule applied and the facts to which it was applied is well taken. More generally, his insistence is well founded that the fact and rule selections, proper rule interpretation, correct identification and weighing of relevant and possibly conflicting purposes, and so forth, are all essential elements of acceptable rule-guided reasoning. What is puzzling about *The Logic of Choice* is the implicit assumption that persons troubled about such reasoning need be reminded of these elements and of their intricate interdependencies. I return to this point in my concluding remarks.

I do not mean to suggest that *The Logic of Choice* is devoid of observations of importance or insight. Some of Gottlieb's discussion of meaning offers a refreshing contrast to much that legal scholars have said on the topic. For example, he observes that the operative part of a rule may be inordinately vague owing to the occurrence of a certain word. The usual response to problems of vagueness is that a decision concerning the meaning of the word is called for. Gottlieb's response is that what is called for is a decision about the meaning of the word-in-the-rule, which is really a decision whether to apply the rule or not. (p. 48) Part of the importance of this observation is that it tends to discourage acceptance of the view that in interpreting a vague rule one is really bringing to light some darkly hidden meaning.

Unfortunately, Gottlieb abuses the observation in several ways. First, he ignores part of its significance by continuing to distinguish between the "ordinary" and the "legal" meaning of words even in cases where, in light of his remarks, the distinction embodies an important confusion. A more serious abuse comes later in his discussion of interpretation. He is led to maintain that the problem of interpreting a rule is not to discover the meaning of words, but to determine "whether the inference drawn in accordance with the rule is authorized

or required by such a rule." (p. 101) Interpretation, he says, involves not discovering something in the rule, but finding guidance for its application. The obvious problem here is that the search for guidance and an answer to whether a particular inference *is* "in accordance with the rule" depends to a considerable extent on the meaning of the rule and the words comprising it. Not all talk about the meaning of words is misguided.

These remarks about meaning and interpretation, in conjunction with the "purposeful choice" element of any rule application, account for Gottlieb's view that rules "necessarily delegate the authority to interpret them." (p. 114) He argues that reference to this fact provides the basis for distinguishing between "rules" and "commands" or "orders." Unlike the concept of rule, the concept of command does not presuppose the delegation of the authority to interpret a command in light of certain underlying purposes. This characteristic of commands is a dubious basis for the distinction. Orders frequently require interpretation involving references to purpose. It is true that the addressee of an order is rarely in a position effectively to call those purposes into question, but that is because of the position he occupies. What Gottlieb probably means to argue is that the addressee is not free to disobey the order on grounds that its underlying purpose is objectionable. But this is not to say that the addressee of a command or order is not free to interpret by making reference to this purpose.

Gottlieb's treatment of rule-guided reasoning encompasses an enormous range of problems to which no brief review can do justice. There is, for example, an interesting discussion of conflicting doctrines of constitutional interpretation and of the relation between this conflict and the "separation of powers" doctrine. Chapter IX is a brief discussion of the relation between law and morality, and Chapter VI is an examination of various views of precedent from which Gottlieb constructs four criteria designed to constrain judicial lawmaking. These, however, are matters peripheral to Gottlieb's main interest.

As previously indicated, the central aim is to present a model for rule-guided reasoning which shows how such reasoning can be rational without being either analytic (deductive) or scientific (inductive). Gottlieb's final description of the model is that it indicates the relationship between the disparate elements of rule-guided deliberation and establishes the necessity of attending to various presuppositions, implications, and consequences if such reasoning is to be rational. (p. 171) But after reading *The Logic of Choice* one is likely to lament that among the various elements (and associated conflicting theories) tension remains despite the model proposed. Because of this there is a temptation to regard the book as a manual of reminders, offering no solution to the problems prompting the investigation.

Before acceding to this temptation, it is important to consider what, according to Gottlieb, a solution to these problems would look like. He maintains that "the soundness of arguments in rule-guided fields can be ascertained by the extent to which they do not disregard these necessary features" (i.e., the elements to which his model directs our attention). (p. 171) Assuming completeness with respect to these "necessary elements," this remark suggests why Gottlieb supposes that his model constitutes an alternative to analytic and scientific methods, and hence pro-

vides an answer to skeptical concerns about the rationality of rule-guided deliberation.

Gottlieb has indicated that reasoning with rules is essentially a matter of making choices in which considerations of value and purpose loom large. (p. 64) His central contention is that such choices are rational if they are the result of deliberation in which the elements of his model have been taken into account. Of course, deliberation of this sort does not insure any particular result; rational men may attend to these elements and make rational but conflicting choices. But unanimity of choice is not a test of the rationality of rule-guided reasoning. Indeed, Gottlieb suggests, the infusion of conflicting values and purposes, so central to reasoning with rules, indicates that any such requirement is itself irrational.

I think the skeptic may well remain puzzled by *The Logic of Choice*. Presumably, deductive reasoning is a rule-guided enterprise, and alternative deductive systems reflect the need for choice and attention to purpose. Pragmatic considerations, sometimes of the sort that Gottlieb's model incorporates, determine this choice, but the system chosen assures one of rational results only if it is not possible to derive contradictions in it. Gottlieb acknowledges this as a requirement of rationality, (p. 172) but attention to the various elements of his model plainly does not insure satisfaction of this requirement. Hence it remains unclear just what *The Logic of Choice* has achieved.

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REGULAE IURIS. By Peter Stein. Edinburgh: Edinburgh University Press, and Chicago: Aldine Publishing Company, 1966. Pp. 206. $5.95.

Peter Stein, now Regius Professor of Civil Law at the University of Cambridge, examines in this book what Justinian's *Digest* called "the rules of law," their forerunners in Roman jurisprudence, and their descendants in European legal writing. The time covered thus runs from the early Roman Republic to the nineteenth century, with unity provided by focus on what went under the name of "rules of law" or "maxims." As is inevitable in such a vertical slice of history, the environmental context of each period's approach to the rules cannot be fully examined, and such contextual study is consciously sacrificed for the sake of the perspective provided by looking at the same topic over twenty centuries.

In early Rome, *ius* was what was orally recognized by the pontiffs as right in a particular case; *lex* was the formal, authoritative declaration of *ius* as a rule to the public. (p. 4, p. 13) By the second century B.C. *lex* was differently viewed; it was seen as an expression of the will of the people, capable of reforming the existing law and making new law. (p. 21) The function of declaring the existing law became the work of an emergent class of men, the jurists, who published *responsa* to the questions submitted to them on the application of custom, *lex*,

or the new edictal law being developed by the praetors; these men, while capable of occasional generalizations, confined themselves to particular decisions. (pp. 27-32) Systematization of Roman private law began in the first century B.C. under the inspiration of Aristotle. The pioneer was Q. Mucius Scaevola, who divided the law into classes (*genera*) and drew from existing law a number of generalizations of the sort, "An act is considered to be done by force if a person does it after having been prohibited from doing it." Q. Mucius's term for this kind of proposition, *definitio,* became the word for juristic propositions explaining a term or an institution, and his approach was followed by Servius Sulpicius (d. 43). These jurists conceived of their work as descriptive, as the declaration of existing law. (p. 48)

Regula, the Latin translation of the Greek *kanon,* originally meant "measure" or standard; as used by grammarians, it came to mean "a rule," as in "the rule to be followed in using the ablative case." The lawyers took over the grammarians' usage. (p. 63) M. Antistius Labeo (d. 10 A.D.) probably introduced the term to describe normative propositions of law. (p. 66) A different view was taken by the Sabinian school, which held that "the law (*ius*) should not be taken from the rule, but the rule should be made out of the law." (*Digest* 50.17.1) The distinction between description and norm was not, however, emphasized. (p. 73)

In the second century A.D., a number of works were written entitled *Regulae.* These provided working rules of thumb for particular classes of cases and were probably intended to be used by subordinate officials in the imperial bureaucracy charged with issuing the emperor's decisions on legal matters brought to him; these manuals, devoid of arguments or authorities, offered "a short-cut to the official view of the law." (p. 81) Third-century *Regulae* tended to be somewhat fuller in citations and discussion and meant to meet the "minimum needs of the ordinary legal practitioner" as well as the demands of the chancery bureaucrat. (p. 89)

The classical jurists regarded a *regula* as an established generalization applicable in a concrete area of law, e.g., the rule that if A builds on B's land, what he builds becomes B's. Their rules can be compared to the *ratio decidendi* in Anglo-American case law. (p. 103) A *regula* was subject to development by the jurists so that similar cases would be governed by the same reason, although sometimes the hardened formula of a rule defied rationalization. (p. 99) In the late classical period *regulae* came to be applied to maxims not closely related to a specific area of law, such as the maxim, "Ignorance of the law harms anyone, but ignorance of fact does not harm." Such rules were catch phrases for use in legal argument. (p. 105) In the postclassical period, Constantine used *regula* to describe what was laid down in imperial constitutions, and rule now meant "imperial enactment." Even the rules stated by the old jurists were to be accepted because the emperor had approved the author stating them. (pp. 110-11)

Against this background of six centuries, the *Digest*'s collection of rules, *De diversis regulis iuris antiqui,* was made. It was prepared as an authoritative statement by the emperor of "rules" chiefly in the sense of maxims and contained 211 fragments. Some propositions were confined to particular areas of law, e.g., "No

one can die partly testate and partly intestate." Others covered all areas of litigation, e.g., "What is declared by judgment is taken as the truth." Others were of a generality that was moral or philosophical although the proposition was meant for legal usage, e.g., "In all things fairness should be considered," "No one ought to be enriched to the detriment of another," "The greater includes the less." Justinian's commissioners making this compilation cut classical rules from their contexts, often broadened them, and often sought epigrammatic brevity (pp. 117-23) The probable use intended for the rules was to provide presumptions which would be urged by advocates in arguments. (p. 123)

Twelfth-century glossators on Justinian sought to abstract and generalize the decisions in the Roman legal texts, extending the term *regula* to any brief rule of law found in the *Digest.* (p. 131) For Bulgarus, writing sometime between 1123 and 1141, a *regula* was reached by induction from a number of regularly recurring instances. (p. 135) In the next generation Johannes Bassianus observed, "Where there is the same principle, there are also the same laws," and *regula* seems to be conceived of by him as a normative force. (pp. 141-42) The Gloss on the Digest of Accursius, which became the *Glossa ordinaria,* recognized specifically the normative force of a rule. (p. 146)

Explicit discussion of *regulae* by the canonists began in 1191 with Bernard of Pavia. (p. 144) The *Decretals* of Gregory IX provided eleven "rules of law," a mixture of *Digest* rules and moral maxims. The great canonical contribution to the literature of rules was the Sext, where Boniface VIII gave 88 rules—some taken verbatim from the title on rules of the *Digest,* others made more pungent, others derived from other parts of the *Digest* or formed by combining *Digest* rules, and still others taken from medieval brocards. The commentary on this collection by Dinus Mugellanus "acted as a kind of codification of the theory of legal rules for the commentators of the fourteenth and fifteenth centuries." (p. 153) The Sext had a great popularity in England, and its statement of the rules outlived the Reformation. As Stein at p. 155 quotes Maitland, "When in any century from the thirteenth to the nineteeth century, an English lawyer indulges in a Latin maxim, he is generally, though of this he may be profoundly ignorant, quoting from the Sext." Such adages, for example, as "No one is obliged to the impossible" and "No injury or fraud is committed against one who knows and consents," come from the Sext.

The use of the rules of the *Digest* was a subject of debate for European humanists. Jean Coras (1513-1572) claimed that they constituted "the rules of universal law" and were the necessary starting points of any rational system. On the other hand, Rabelais mockingly had Justice Bridlegoose defend his decision of cases by throwing the dice; the justice said that in obscure cases he used small dice rather than large, following the rule "In obscure matters we follow what is least," *Digest* 50.17.9, "canonized" in Sext 5.12.30, and that he gave judgment to the party who first had the best possible throw, according to the rule, "Who is first in time is more powerful in law," Sext 5.12.5. Jacques Cujas (1522-1590) objected that law was not an exact science with necessary conclusions and observed that arguments from *regulae* were thrown off with little effort. Jacques Godefroy (Gothofredus) (1587-1652) found the *Digest* title helpful because it

was the authoritative text, but also remarked, "In practice it is more helpful to use a case decided in limited terms than to heap up a multitude of general rules." (pp. 113-20)

After Gothofredus the theory of law was treated by natural lawyers who preferred to cite what "natural reason" dictated rather than the Roman texts. Still they sometimes found natural law to coincide with the rules elaborated in commentaries on the *Digest* title. Collections of rules of law taken from the Roman tradition continued to be published even in the nineteenth century, with practicing lawyers as their intended audience. (p. 179)

Stein's book offers not only a good amount of legal history, but matter for jurisprudential reflection. Does the connection which law has to language, concretely illustrated here by the grammarians' part in forming the notion of a rule, suggest that legal generalizations are to be most effectively studied by linguistic inquiries? Is the tendency, so marked in all the self-conscious writers on the rules, to value generalization as the sign of reason, a linguistic, logical, or ethical impulse? Does the perennial question of whether the rules are descriptions of practice or prescriptions for conduct reflect the perennial imprecision of lawyers or the impossibility of separating "fact" and "value"? *Regulae iuris* does not try to answer these questions but it does enhance one's awareness of their historical dimensions.

Stein's book does, perhaps, provide sufficient material from which to form an answer to one question to which his book naturally leads, "Were any of the functions served by the rules of law of much human value?" From his account it appears that the rules in their detailed form have served the principal purpose of providing summary directions for bureaucrats; in their broad forms as maxims they have offered aid to lawyers in argument. In both forms they have furnished stimulus to academicians reflecting on the nature of law. Stein makes no evaluation of these functions, but his stating them invites one to assess their role in human affairs.

As to the use of fairly specific rules of law by bureaucrats, some suggestive contemporary evidence is furnished by the use of the *Codex iuris canonici,* which is a manual of detailed prescriptions intended to provide short, simple, clear instructions to Church officials. Such a manual seems to promote a depersonalized treatment of human beings. The officials are encouraged by the very existence of the book not to look for reasons for application of the law or to weigh the effect of its application upon the human beings before them. I find it hard to believe that the second-century compilations for imperial officials were of any greater benefit to mankind.

As to the use of maxims by lawyers, I recall the hilarity with which we learned in law school of the venerable list of equity maxims, "Equity loves equality," "Equity does nothing by halves," "Equity considers done what ought to be done," "Equality is equity." These tags have stayed in my mind because of their epigrammatic quality, but I have never used them, and I have known no one who took them seriously. They are suitable for the trial of Justice Bridlegoose, but scarcely serviceable to win a case. It is easy to imagine such maxims or their equivalents in the *Digest* or Sext adorning legal arguments in other centuries and

being taken as evidence of the learning of the advocates using them; it is hard to imagine that they have ever been decisive for skilled lawyers or judges.

As for providing material for academicians, teachers from Gaius to Blackstone have been attracted by the idea of propositions by means of which classifications and deductions may be made. I fear that I have the bias of the common-law lawyer who believes that the teachers of Roman law and the commentators upon it spent too much time in inspection of the Roman system as system and not enough effort in ascertaining how the system actually worked. To the substantial extent that the notion of "rules of law" encouraged systematization in the air it seems to me that they were unfortunate.

No doubt the mind has to generalize to do law at all; no doubt the first generalizations, the *definitiones* of Q. Mucius Scaevola, have a place of honor in the history of legal thought as representing a stage where generalization becomes conscious and articulated. No doubt when Roman law studies revived in Western Europe, the discovery of generalizations in the law provided impetus to the search for rationality in the law. Still, reading Stein's book, one is uncertain that the benefits of the rules of law outweighed their influence in making the study of law a study of classifications rather than a study of the processes by which persons interact.

My criticisms of the rules of law represent, of course, the anachronistic application of contemporary values to other periods of time, and it may be urged that no other approach to generalization was "possible" in the law of those periods. But in judging legal institutions of another time or country one necessarily asks if these institutions seem rational and humane by the standard one takes for rationality and humanity.

The deficiencies of the rules of law are, at all events, not the fault of Stein, who records with admirable impartiality their uses and their critics. One could have hoped that he might have broadened his study to investigate instances where "rules of law" were actually applied in administration, argument, or decision; it is not necessarily true that all that can be learned of the rules of law is found by looking at what learned men called rules of law in their treatises. Stein follows the classical tradition of discussion of the rules in looking at the formal references to them and not at the cases where the Anglo-American tradition would tell one to look to see what the rules "really meant." To the extent cases are not available, as for some periods of time is more or less true, the Anglo-American approach would yield only a cautious agnosticism as to what the rules "really" were. But Stein deliberately opts for an approach whereby he can report what the writers, at least, said the rules were.

Undertaking this task as a reporter, Stein has provided a comprehensive compendium of opinions on the rules of law. His careful and exacting analysis of texts, his balanced and sensible suggestions as to motives, his range of learning about the law all compel admiration. A reader, such as I, who has always wondered what the rules of law were meant to be, must be in his debt for his thorough and succinct account of what the authorities said they were.

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